TITLE D1 GENERAL PROVISIONS

Chapter 11 Preliminary

Section 6. Impeachment by Evidence of Conviction of Crime

1. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime, except on a plea of nolo contendere, is admissible/but only if:

A. under the law under which he was convicted, the crime was punishable by death or imprisonment in excess of one year, and;

B. the crime involved acts of deceit, fraud, cheating, stealing, or other acts reflecting adversely on his honesty and integrity; and

C. the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.

2. Evidence of a conviction is not admissible under this section if:

A. the conviction has been the subject of a pardon, annulment, or other equivalent procedure, and

B. the procedure under which the same was granted or issued required a substantial showing of rehabilitation or was based on innocence.

3. Evidence of an adjudication as a juvenile delinquent is not admissible under this section.

4. The conviction admissible under this section may be shown by cross-examination of the witness sought

to be impeached, or by documentary evidence of the conviction. Such documentary evidence is presumed to be of the conviction of the witness if the names of the witness and of the person to whom the evidence of conviction refers are identical.

5. Upon the request of the defendant, the state shall furnish him such evidence of prior conviction of witnesses or prospective witnesses as is in its possession, custody, or control, or shall make reasonable efforts to obtain any such evidence.

6. The trial of issues arising under this section relating to the admissibility, for impeachment, of evidence of prior convictions shall be determined by the court and shall be conducted out of the hearing of the jury.

COMMENT

Source: This section is based largely on current Maine law and Rule 609 of the Proposed Rules of Evidence for the U.S. District Courts and Magistrates, 1971 Revised Draft.

Current Maine Law: Title 16 §56 now provides:

> No person is incompetent to testify in any court or legal proceeding in consequence of having been convicted of an offense, but conviction of a felony, any larceny or any other crime involving moral turpitude may be shown to affect his credibility.

A witness, including the accused, when he takes the stand, may either be cross-examined as to whether he has been convicted of an offense described in the statute, State v. Trask, 155 Me. 24 (1959), or the state may elect to introduce the record of conviction upon completion of the

witness's testimony. State v. Herlihy, 102 Me. 310 (1906). The latter case also holds that a conviction had upon a plea of nolo contendere is equally admissible with convictions resulting from guilty pleas or guilty verdicts. Furthermore, it makes no difference that the conviction sought to be proved was obtained in another state. State v. Toppi, 275 A.2d 805 (Me. 1971). When an out-of-state conviction is offered, the court may take judicial notice of the foreign law in order to determine if the penalty for the offense qualifies under the Maine statute. State v. Toppi, supra, although the court may require counsel to obtain the pertinent law books. Id.

In the Toppi opinion it was observed:

> It is to be noted the word "may" is used in the statute. It is unnecessary to reach the question whether or not the statute vests discretion in the Presiding Justice as to whether convictions may be shown in a particular case or to limit the type of convictions which may be presented beyond the limitations found in our statute.

In a footnote to this observation, Justice Pomeroy cited several cases from other states which impose limitations on the use of prior convictions for impeachment purposes that are not found in the Maine statute. The most lengthy quotation in this footnote, from Gordon v. United States, 127 U.S. App. D.C. 343, 383 F.2d 936 (1967), is:

> In considering how the District Court is to exercise the discretionary power we granted, we must look to the legitimate purpose of impeachment which is, of course, not to show that the accused who takes the stand is a "bad" person but rather to show background facts which bear directly on whether jurors ought to believe him rather than other and

> conflicting witnesses. In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or not direct bearing on honesty and veracity. A "ruleof thumb" thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not; traffic violations, however serious, are in the same category. The nearness or remoteness of the prior conviction is also a factor of no small importance. Even one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the ground of remoteness.

Whether a juvenile record may be used for impeachment in a criminal trial has not been decided by Maine law, although in Trask, supra, such a record was apparently the subject of the dispute at the trial: but after a bench conference following an effort to impeach with such a record, the state did not press the question and the record did not get in. The opinion in the case offers no view either way.

On the matter of the defendant's ability to obtain evidence of prior conviction of the state's witnesses, the court in Troppi, supra noted: "We feel in the particular circumstances, i.e., (1) that the witness had lived in many places, (2) the Defendants were indigent and (3) the witness was known by the State to be its principal witness, the State should have been ordered to make the necessary investigation on behalf of the

Defendants." 275 A.2d at 812, n.6. In that case the defendants had made pretrial request for the assistance of the state in obtaining the criminal record of the state's witness, namely, by the state requesting the record from the FBI. The Supreme Court upheld the denial of this assistance on the ground that Rule 16, Maine Rules of Criminal Procedure, under which the request was made, authorized only discovery of those things "within the possession, custody or control of the State."

The decision in Toppi also noted that the party seeking to impeach the witness should "be prepared to present the appropriate court record [and]... should also be prepared to establish that the identity of the witness is the same as the person to whom the court record refers." Cited at this point in the opinion is State v. Mottram, 155 Me. 394, 156 A.2d 383 (1959).

The Draft: This section continues some of the policies of present law, and changes same others.

Importantly, it continues the general rule that any witness, including the accused, may be impeached by evidence of prior convictions. It also continues the policy of placing restrictions on the offenses which may serve as the basis for this impeachment. The draft picks up Justice Pomeroy's favorable citation to the Gordon discussion concerning what sorts of crimes support the inference that the offender is not a reliable witness. This is, however, subject to the further limitation, derived from the Federal evidence rules, that the

offense must be a serious one, i.e., punishable by death or imprisonment for more than one year. Finally, the draft vests in the trial judge a power which he probably has without this authority, to weigh the probative value against the possible prejudice that might arise from admitting the impeaching conviction.

The draft reverses the ruling in Herlihy by denying the use of convictions based on a nolo plea for impeachment. In doing so, the rationale for a similar provision in the Federal draft provides the basis. The two drafts resolve the conflict between two policies: one encourages the resort to nolo pleas in order to diminish the number of cases which must go to trial; the other encourages the use of all relevant evidence within a trial that bears on the credibility of a witness. The resolution is in favor of the former policy, largely because the relevance of prior convictions to credibility is often tenuous in any event, and further, because the administration of justice suffers when cases needlessly go to trial.

Subsection 4 also changes present Maine law by no longer requiring that, in addition to the identity of the name, there be proof of the identity of the person, as between the witness and the person to whom the evidence of prior conviction refers. The statement in Toppi requiring the proof of identity of persons relied on the Mottram case where the issue was not a matter of impeachment, but rather the proof of prior offenses in order to enhance the penalty. In the latter circumstances

there is a constitutionally based rule that requires that the prior offenses be the subject of an indictment and proved by the state beyond a reasonable doubt. These strict requirements are not at all necessary when only impeachment is at issue, and given the trial judge's discretion to keep the evidence out if the probative value is weak, the rule about identity of persons is similarly unnecessary.

TITLE D1 GENERAL PROVISIONS

Chapter 11 Preliminary

Section 7. Territorial Applicability

1. Except as otherwise provided in this section, a person may be convicted under the laws of this state for any offense committed by his own conduct or by the conduct of another for which he is legally accountable only if:

A. either the conduct which is an element of the offense or the result which is such an element occurs within this state; or

B. conduct occuring outside this state constitutes an attempt to commit an offense under the laws of this state and the intent is that the offense take place within this state; or

C. conduct occurring outside this state would constitute a criminal conspiracy under the laws of this state, and an overt act in furtherance of the conspiracy occurs within this state, and the object of the conspiracy is that an offense take place within this state; or

D. conduct occurring within this state would constitute complicity in the commission of, or an attempt, solicitation or conspiracy to commit an offense in another jurisdiction which is also an offense under the law of this state; or

E. the offense consists of the omission to perform a duty imposed on a person by the law of this state, regardless of where that person is when the omission occurs; or

F. the offense is based on a statute of this state

which expressly prohibits conduct outside the state, when the actor knows or should know that his conduct affects an interest of the state protected by that statute; or

G. jurisdiction is otherwise provided by law.

2. Subsection 1A does not apply if:

A. causing a particular result or danger of causing that result is an element and the result occurs or is designed or likely to occur only in another jurisdiction where the conduct charged would not constitute an offense; or

B. causing a particular result is an element of an offense and the result is caused by conduct occurring outside the state which would not constitute an offense if the result had occurred there.

3. When the offense is homicide, a person may be convicted under the laws of this state if either the death of the victim or the bodily impact causing death occurred within the state. If the body of a homicide victim is found within this state, it is presumed that such death or impact occurred within the state.

4. As used in this section, "state" means the land and water, and the air space above such land and water, with respect to which the state of Maine has legislative jurisdiction.

COMMENT

Source: This section is derived from the Massachusetts Criminal Code chapter 263 §5, and the N.H. Criminal Code §625:4.

Current Maine Law: There is no similar comprehensive statute dealing with territorial jurisdiction over criminal acts. Serveral of the principles contained in this section have,

however, been recognized in decisions of the Supreme Judicial Court, and by statute.

Maine follows the common law rule that "the statutes of a state have no extra-territorial force, nor do its courts have any jurisdiction of offenses committed in other states or foreign countries." State v. Stephens, 118 Me. 237, 238 (1919). Where, however, a theft is committed outside Maine, there is jurisdiction to try the thief who brings his loot into the state. Younie v. State, 281 A.2d 446 (Me. 1971) (opinion by Wernick, J., adopting the rule in State v. Underwood, 49 Me. 181 (1858)).

Similarly, where a person has been entrusted with goods in Maine, and subsequently converts them, it makes no difference that the conversion takes place out of the state and Maine courts have jurisdiction to try him for the embezzlement. State v. Haskell, 33 Me. 130 (1851). If a person becomes a conspirator while outside the state, with the object of committing a crime within Maine, he may be extradited to Maine and tried in Maine for the conspiracy. State v. Trocchio, 121 Me. 368 (1922). It also appears to be the rule that it is no defense to a conspiracy indictment that the objective of the conspiracy was conduct in another state where that conduct may be legal. See State v. Pooler, 141 Me. 274, 43 A.2d 353 (1945).

In regard to homicide offenses, Title 15 §2 provides:

> If a mortal wound or other violence or injury is inflicted or poison administered on the high seas or without the State, whereby death ensues within the State, such offense may be tried in the county where the death ensues. If such act is done within and death ensues without the State, the offense may be tried in the county where the act was done, as if death had there ensued.

The Draft: This section makes no change in existing law, save reversal of the conflict of laws rule discussed in the Pooler case. It establishes at the outset that there is a need to find a jurisdictional basis in this section, or none exists. Subsection 1A sets forth the rule that if one of the elements of the offense occurs in Maine, there is jurisdiction to prosecute.

Subsections 1B and 1C generalize from the Trocchio case and provide jurisdiction over all out of state inchoate crimes that are designed to produce criminal results in Maine. Subsection 1D establishes that jurisdiction is not defeated by virtue of an intent to consumate the crime in another state, provided that the result would also be criminal under Maine law.

Subsection 1E is designed to deal with such situations as failure to support dependents where the person on whom the duty to render support is out of the state.

Subsection 1F is useful in dealing with problems of pollution where the conduct which results in the pollution arises out of state.

Subsection 2 provides for recognition of differences among the states in regard to what conduct constitutes a crime, and limits jurisdiction in cases where the out of state elements are innocent under the law where they occur, or are designed to take place. This is contrary to the Pooler result.

Subsection 3 exercises jurisdiction in homicide cases that is found in current law. It also provides a presumption for solving the case of a body found within the

state but as to which the authorities cannot establish either the place of death or of the fatal wounding.

The last subsection makes clear that the legislature intends to exercise all the jurisdiction it has, pursuant to the principles set forth in this section.

TITLE D1 GENERAL PROVISIONS

Chapter 11 Preliminary

Section 8. Statute of Limitations

1. It is a defense that prosecution was commenced after the expiration of the applicable period of limitations provided in this section; provided, however, that a prosecution for murder may be commenced at any time.

2. Prosecutions for offenses other than murder are subject to the following periods of limitations:

A. a prosecution for a class A crime must be commenced within six years after it is committed;

B. a prosecution for a class B crime must be commenced within three years after it is committed;

C. a prosecution for a class C crime must be commenced within one year after it is committed;

D. a prosecution for a class D crime must be commenced within six months after it is committed.

3. The periods of limitations shall not run:

A. during any time when the accused is absent from the state, but in no event shall this provision extend the period of limitation otherwise applicable by more than five years; or

B. during any time when a prosecution against the accused for the same offense based on the same conduct is pending in this state.

4. If a timely complaint or indictment is dismissed for any error, defect, insufficiency or irregularity, a

new prosecution for the same offense based on the same conduct may be commenced within three months after the dismissal even though the period of limitations has expired at the time of such dismissal or will expire within such three months.

5. If the period of limitation has expired, a prosecution may nevertheless be commenced for:

A. any offense based upon breach of fiduciary obligation, within one year after discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party, and who is himself not a party to the offense, whichever occurs first; or

B. any offense based upon official misconduct by a public servant, at any time when such person is in public office or employment or within two years thereafter.

C. This subsection shall in no event extend the limitation period otherwise applicable by more than five years.

6. For purposes of this section:

A. an offense is committed when every element thereof has occurred, or if the offense consists of a continuing course of conduct, at the time when the course of conduct or the defendant's complicity therein is terminated; and

B. a prosecution is commenced when a complaint is made or an indictment is filed, whichever first occurs.

7. The defense established by this section shall not bar a conviction of an offense included in the offense charged,

notwithstanding that the period of limitation has expired for the included offense, if as to the offense charged the period of limitation has not expired or there is no such period, and there is evidence which would sustain a conviction for the offense charged.

COMMENT

Source: This section is based on the Massachusetts Criminal Code chapter 263 §8.

Current Maine Law: Title 15 §452 provides:

> When no other limitation is provided, no indictment shall be found and no complaint and warrant shall be issued for any offense, except treason, murder, arson or manslaughter, after 6 years from the commission thereof; but any time, during which the offender is not usually and publicly resident in the State, shall not be a part of said 6 years.

A related provision is in Article I, §6 of the Maine Constitution which guarantees the right to a "speedy" trial. This right does not exist, however, until a person is actually charged with an offense. State v. Harriman, 259 A.2d 752 (Me. 1969).

Rule 42 of the Maine Rules of Criminal Procedure governs the prosecution for criminal contempt and has built in notice provisions which assure a prompt enforcement.

The Draft: This section works several changes in present Maine law and serves to provide rules in circumstances that are not now covered by the law.

The central change proposed here is to provide varying periods of limitations which depend on the seriousness

of the offense involved. To do otherwise would be inconsistant with the effort being made by the Commission to grade offenses carefully on the basis of their seriousness. To keep manslaughter subject to the same limitations rule as murder for example, would tend to blur the distinction between the two which the substantive offenses subcommittee is carefully in the process of constructing.

Murder is kept as the only offense subject to no period of limitations. Treason has been excluded on the expectation that the substantive offenses subcommittee will find that it is not necessary to provide an offense of treason against the state of Maine. Arson has also been excluded from the "no limitations rule" on the basis of the difference in seriousness between arson and murder.

TITLE D1 GENERAL PROVISIONS

Chapter 12 Criminal Liability

Section 1. Basis for Liability

1. A person commits a crime only if he engages in voluntary conduct, including a voluntary act, or the voluntary omission to perform an act of which he is physically capable.

2. A person who omits to perform an act does not commit a crime unless he has a legal duty to perform the act.

3. Possession is a voluntary act if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

COMMENT

Source: This section is based on the New Hampshire Criminal Code §626.1.

Current Maine Law: There does not appear to be either statute or judicial decision on this subject.

The Draft: This section states the common law requirements which relate to the need for voluntary action as the basis for criminal liability. See LaFave and Scott, Criminal Law 174-191 (1972).

STATE OF MAINE

Commission to Prepare a Revision of the Criminal Laws

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October 20, 1972

From: Sanford J. Fox

To: Subcommittee on Sentencing; the Commission; Consultants

October 26th will be the last meeting of this subcommittee prior to the meeting of the full Commission on December 1st. It would be well, therefore, if our meeting next week could reach some consensus on all of the sentencing drafts which will be considered on December 1st. For this reason, I am enclosing everything that has been reviewed thus far, including redrafts of some sections, particularly those dealing with commitments to the Department of Mental Health and Corrections. (chapter 34). New material also enclosed includes chapter 35, Fines and the first two sections of Chapter 32, Probation and Unconditional Discharge. I will try to have the remainder of chapter 32 for distribution on October 26th.

I know that I am violating one of my own rules by proposing a marathon session for next Thursday. But it is worth trying in order to present the Commission with as comprehensive a view of the sentencing structure as possible Perhaps with a working session following a relaxing dinner, we can get through everything. (I will stay overnight if that would be useful).

OCT 24 1972

TITLE D3 THE SENTENCING SYSTEM

Chapter 31 General Sentencing Provisions

Section 1. Purposes

The general purposes of the provisions of this Title are:

1. To prevent crime;

2. To safeguard offenders and the public from correctional experiences which serve to promote further criminality;

3. To give fair warning of the nature of the sentences that may be imposed on the conviction of an offense;

4. To encourage differentiation among offenders with a view to a just individualization of sentences; and

5. To promote the development of correctional programs which serve to reintegrate the offender into his community.

Chapter 31 General Sentencing Provisions

Section 2. Authorized Sentences

1. Every person and organization convicted of a crime shall be sentenced in accordance with the provisions of this Title.

2. Every natural person convicted of a crime shall be sentenced to one of the following:

A. Probation or unconditional discharge as authorized by Chapter 32;

B. A special sentence as authorized by Chapter 33;

C. To the custody of the Department of Mental Health and Corrections as authorized by Chapter 34; or

D. A fine as authorized by Chapter 35. Such a fine may be imposed in addition to probation or to a sentence authorized by Chapter 33 or 34.

3. Every organization convicted of a crime shall be sentenced to one of the following:

A. Probation or unconditional discharge as authorized by Chapter 32; or

B. The sanction authorized by section 3. Such sanction may be imposed in addition to probation.

C. A fine authorized by Chapter 35. Such fine may be imposed in addition to probation.

4. The provisions of this Chapter shall not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office or impose any other civil penalty. An appropriate order exercising such authority may be included as part of the judgment of conviction.

TITLE D3 THE SENTENCING SYSTEM

Chapter 31 General Sentencing Provisions

Section 3. Sanctions for Organizations

A. If an organization is convicted of a crime, the court may, in addition to or in lieu of imposing other authorized penalties, sentence it to give appropriate publicity to the conviction by notice to the class or classes of persons or sector of the public interested in or affected by the conviction, by advertising in designated areas or by designated media, or otherwise as the court may direct. Failure to do so may be punishable as contempt of court.

B. If a director, trustee or managerial agent of an organization is convicted of a class A or class B crime committed in its behalf, the court may include in the sentence an order disqualifying him from holding office in the same or other organizations for a period not exceeding five years, if it finds the scope or nature of his illegal actions makes it dangerous or inadvisable for such office to be entrusted to him.

C. The court may direct the Attorney General, a County Attorney, or any other attorney specially designated by the court, to institute supplementary proceedings in the case in which the organization was convicted of the crime to determine, collect and distribute damages to persons in the class which the statute was designed to protect who suffered injuries by reason of the crime, if the court finds that the multiplicity of small claims or other circumstances make restitution by individual suit impractical. Such supplementary proceedings shall be pursuant to rules adopted by the Supreme Judicial Court for this purpose.

TITLE D3 THE SENTENCING SYSTEM

Chapter 31 General Sentencing Provisions

Section 4. Sentence in Excess of One Year Deemed Tentative

A. When a person has been sentenced to the custody of the Department of Mental Health and Corrections for a maximum term in excess of one year, the sentence shall be deemed tentative, to the extent provided in this section, for a period of one year follwoing imposition of the sentence.

B. If, as a result of examination and classification by the Department of Mental Health and Corrections of a person under sentence for a maximum term in excess of one year, the Department is satisfied that the sentence of the court may have been based upon a misapprehension as to the history, character, or physical or mental condition of the offender, the Department, during the period specified in subsection A., may file in the sentencing court a petition to resentence the offender. The petition shall set forth the information as to the offender that is deemed to warrant his resentence and may include a recommendation as to the sentence that should be imposed.

C. The court may dismiss a petition filed under subsection F. without a hearing if it deems the information set forth insufficient to warrant reconsideration of the sentence. If the court finds the petition warrants such reconsideration, it shall cause a copy of the petition to be served on the offender and on the county attorney, both of whom shall have the right to be heard on the issue. The offender shall have the right to be represented by counsel, and if he cannot afford counsel, the court shall appoint counsel.

D. If the court grants a petition filed under subsection B., it shall resentence the offender and may impose any sentence not exceeding the original sentence that was imposed. The period of his being in the custody of the Department of Mental Health and Corrections prior to resentence shall be applied in satisfaction of the revised sentence.

E. For all purposes other than this section, a sentence to the custody of the Department of Mental Health and Corrections has the same finality when it is imposed that it would have if this section were not in force. Nothing in this section shall alter the remedies provided by law for appealing a sentence, or for vacating or correcting an illegal sentence.

TITLE D3 THE SENTENCING SYSTEM

Chapter 31 General Sentencing Provisions

Section 5. Multiple Sentences

A. When multiple sentences, to the custody of the Department of Mental Health and Corrections are imposed on a person at the same time or when such a sentence is imposed on a person who is already subject to an undischarged term of custody or imprisonment, the sentences shall run concurrently, or, subject to the provisions of this section, consecutively, as determined by the court. When multiple fines are imposed, the court may, subject to the provisions of this section, sentence the person to pay the cumulated amount or the highest single fine. Sentences shall run concurrently and fines shall not be cumulated unless otherwise specified by the court.

B. The court shall not impose consecutive custody terms or cumulative fines unless, having regard to the nature and circumstances of the offense, and the history and character of the defendant, it is of the opinion that such a sentence is required because of the exceptional features of the case, for reasons which the court shall set forth in detail.

C. The aggregate maximum of consecutive custody sentences to which a defendant may be subject shall not exceed the maximum term authorized for the most serious offense involved, and the cumulated amount of fines shall not exceed that authorized for the most serious offense involved, except that a defendant being sentenced for two or more Class C or D crimes may be subject to an aggregate maximum of imprisonment and fines not exceeding that authorized for a Class B crime if each Class C or D crime was committed as part of a different course of conduct or each involved a substantially different criminal objective. The minimum term, if any, shall constitute the aggregate of all minimum terms, but shall not exceed one-third of the aggregate maximum term or ten years, whichever is less.

D. A defendant may not be sentenced to consecutive terms or cumulative fines for more than one offense when:

1. One offense is an included offense of the other;

2. One offense consists only of a conspiracy, attempt, solicitation or other form of preparation to commit, or facilitation of, the other; or

3. The offenses differ only in that one is defined to prohibit a designated kind of conduct generally, and the other to prohibit a specific instance of such conduct; or

4. Inconsistent findings of fact are required to establish the commission of the offenses.

E. The limitations provided in this section shall apply not only when a defendant is sentenced at one time for multiple offenses, but also when a defendant is sentenced at different times for multiple offenses all of which were committed prior to the imposition of any sentence for any of them. Sentences imposed by any court, including federal courts and courts of other states, shall be counted in applying these limitations.

October 13, 1972
October 26, 1972 meeting

TITLE D3 THE SENTENCING SYSTEM

Chapter 34 Commitments to the Department of Mental Health and Corrections

Section 1. Commitments for Murder

1. A person who has been convicted of a crime may be sentenced to the custody of the Department of Mental Health and Corrections pursuant to the provisions of this chapter.

2. In the case of a person convicted of murder, the court shall commit him to the Department and

A. set a maximum term for the commitment of life or any term of years not to exceed forty years, and may

B. set a minimum term not to exceed ten years or one half of the maximum term of years set by the court, whichever is less, and may

C. order that the minimum term be served in a penal institution under the control of the Department, with the specific institution to be determined by the Department.

COMMENT

Source: This section is new.

Current Maine Law: Title 17 § 2651 now requires that persons convicted of murder be sentenced to imprisonment for life. Eligibility for parole occurs, however, after approximately 11 years.

The Draft: This section changes present law in several respects. Life imprisonment is still possible, but it is not mandatory. A specific term of years may be ordered by the court so long as the term does not exceed forty years. Some limit is required in this regard in order to insure that terms of 100 or more years are not possible. The court is also empowered, but not required, to set a minimum term. In the absence of a minimum term, this chapter will permit the Department to place the offender outside of an institution at any time that he is in custody. This section differs from the rest of this chapter in providing the court with authority to order that the offender be put in a penal institution.

TITLE D3 THE SENTENCING SYSTEM

Chapter 34 Commitments to the Department of Mental Health and Corrections

Section 2. Commitments for Crimes Other Than Murder

1. In the case of a person convicted of a crime other than murder, the court may commit to the Department of Mental Health and Corrections for a maximum term as provided for in this section and in section 3, and for a minimum term if the conviction is for one of the following crimes: manslaughter, rape, robbery, arson, or kidnapping.

2. Subject to the provisions of section 3, the court shall set the maximum term for the commitment as follows:

A. In the case of a class A crime, the court shall set a maximum period not to exceed thirty years;

B. In the case of a class B crime, the court shall set a maximum period not to exceed ten years;

C. In the case of a class C crime, the court shall set a maximum period not to exceed five years;

D. In the case of a class D crime, the court shall set a maximum period not to exceed one year.

3. If the court sentences a person convicted of one of the crimes listed in subsection 1 to a minimum term, such minimum may be set at any term of years not to exceed one half of the maximum set under subsection2. The court shall have authority to reduce any minimum term upon application by the Department made at any time, upon notice to the county attorney.

4. The sentence of commitment made under this section or section 3 shall not include any provision concerning where the convicted person is to serve the period of commitment, and the further disposition of such persons shall be governed by the provisions of section 7.

COMMENT

This section has been revised so as to clarify the role of the restrictions in section 3; to provide minimum terms for designated crimes; and toexpress the limitation on sentences requiring imprisonment.

TITLE D3 THE SENTENCING SYSTEM

Chapter 34 Commitments to the Department of Mental Health and Corrections

Section 3. Upper-Range Commitments

1. If a convicted person is committed to the Department of Mental Health and Corrections pursuant to section 2, the maximum term shall not be set at more than twenty years for a class A crime, seven years for a class D crime, three years for a class C crime, or six months for a class D crime unless, having regard to the nature and circumstances of the crime, and the history and character of the defendant, the court is of the opinion that a term in excess of these limits is required for the protection of the public from further criminal conduct of the convicted person.

2. The court shall not imposed an upper-range commitment under this section unless there has been a pre-sentence investigation pursuant to Rule 32(c) of the Maine Rules of Criminal Procedure.

3. If a person is committed to the Department under this authority of this section, the court shall set forth for the record its detailed reasons for doing so.

COMMENT

This section has been revised to clarify its relationship to section 2.

TITLE D3 THE SENTENCING SYSTEM

Chapter 34 Commitments to the Department of Mental Health and Corrections

Section 4. Transmittal of Statements to the Department of Mental Health and Corrections

After sentence has been imposed under section two or section three, the judge, the person representing the state, the attorney representing the convicted person, and any law enforcement agency which investigated the case or participated in the prosecution, may file with the clerk for transmittal to the Department, a brief statement of their views respecting the person convicted and of the crime. Upon request, any such statement shall be made available to any of the above named persons or agencies.

TITLE D3 THE SENTENCING SYSTEM

Chapter 34 Commitments to the Department of Mental Health and Corrections

Section 5. Calculation of Period of Commitment

1. The sentence of any person committed to the custody of the Department of Mental Health and Corrections shall commence to run on the date ~~on~~ which such person is received into the custody of the Department.

2. When a person sentenced to the custody of the Department has previously been detained to await trial, in any state or local institution for the conduct for which such sentence is imposed, such period of detention shall be deducted from the minimum term of such sentence, if any, or from the maximum term of such sentence. The officer having custody of the offender shall furnish the court, at the time of sentence, a statement showing the length of any such detention, and the statement shall be attached to the official records of the commitment.

TITLE D3 THE SENTENCING SYSTEM

Chapter 34 Commitments to the Department of Mental Health and Corrections

Section 6. Authority of the Department of Mental Health and Corrections

1. Upon receiving a person committed to its custody under section two or section three, the Department shall place the person in a classification program the aim of which is to determine which institution or program available to the Department is most likely to insure the lawful conduct of such person upon his release from the custody of the Department.

2. The Department shall, by regulation, provide for the classification process to include:

A. An opportunity for the person being classified to communicate, orally or in writing, concerning the program he is to be placed in; and

B. A written statement from the Department to such person stating the classification decision that has been made, and setting forth the reasons why he is being placed in a particular program.

3. Upon completion of the classification process, the Department may place a person committed to its custody as follows:

A. In a state institution, pursuant to the provisions of Chapter 37; or

B. In a county jail, pursuant to the provisions of Chapter 38; or

C. In a parole program pursuant to the provisions of Chapter 36.

4. Transfers from one program to another shall be made pursuant to the provisions of Chapter 39.

TITLE D3 THE SENTENCING SYSTEM

Chapter 34 Commitments to the Department of Mental Health and Corrections

Section 7. Release from Imprisonment; Community Supervision

1. The Department of Mental Health and Corrections shall, in its discretion exercised pursuant to the provisions of Chapter 36, release persons convicted of murder and sentenced to imprisonment either

A. at the expiration of the minimum term specified in the sentence; or

B. if there is a maximum term of years specified in the sentence, at any time prior to five years earlier than the expiration of such maximum term of years; or

C. if the maximum period specified in the sentence is life, then at any time following expiration of the minimum term, or at any time if no minimum term is included in the sentence.

2. Upon the release from imprisonment of any person pursuant to subsection1, the Department shall maintain him under its supervision in the community for a period not to exceed five years. At any time during such five year period if the Department determines that the protection of the public no longer requires further supervision, it may terminate such supervision, in which event the maximum period of commitment specified in the sentence shall be deemed to have expired.

3. A person convicted of any crime other than murder who has been committed to the custody fo the Department, and placed thereupon by the Department in a state or county penal institution, shall be released from such institution and be subject to supervision by the Department and remain in the custody of the Department as follows:

A. If the maximum period of commitment set in the sentence is nine years or less, the period of community supervision shall be one-third of such maximum, so that in no event shall the release be delayed beyond the expiration of two-thirds of the maximum;

B. If the maximum period of commitment set in the sentence is more than nine years but less than fifteen years, the period of community supervision shall be three years, so that in no event shall the release be delayed beyond three years prior to the expiration of the maximum;

C. If the maximum period of commitment set in the sentence is fifteen years or more, the period of community supervision shall be five years, so that in no event shall the release be delayed beyond five years prior to the expiration of the maximum.

D. At any time during the period of community supervision provided for in this subsection, the Department may terminate its supervision and custody if it determines that the protection of the public no longer requires further supervision and custody, in which event the maximum period of commitment specified in the sentence shall be deemed to have expired; provided, however, that no such termination shall be made prior to the expiration of any minimum period of commitment included in the sentence.

4. A person convicted of any crime other than murder who has been committed to the custody of the Department, and made subject thereupon by the Department to supervision in the community, may subsequently be placed in a penal institution pursuant to the provisions of chapter 36. In such cases the Department may release such a person from the institution prior to the expiration of the maximum period set in the sentence and supervise him in the community until expiration of the maximum period.

5. As used in this section, "thereupon" means upon the completion of the classification process provided for in section 6.

TITLE D3 THE SENTENCING SYSTEM

Chapter 35 Fines

Section 1. Amounts Authorized

1. A person who has been convicted of a crime may be sentenced to pay a fine, subject to the provisions of section 2, which shall not exceed:

A. $20,000 for a class A crime;

B. $10,000 for a class B crime;

C. $1,000 for a Class C crime;

D. $500 for a class D crime; and

E. any higher amount which does not exceed the pecuniary gain derived from the crime by the defendant.

2. As used in this section, "pecuniary gain" means the amount of money or the value of property derived by the defendant from the commission of the crime, less the amount of money or the value of property returned to the victim of the crime or seized by or surrendered to lawful authority prior to the time sentence is imposed. When the court imposes a fine based on the amount of gain, the court shall make a finding as to the defendant's gain from the crime. If the record does not contain sufficient evidence to support a finding, the court may conduct, in connection with its imposition of sentence, a hearing on this issue.

3. If the defendant convicted of a crime is an organization, the maximum allowable fine which such a defendant may be sentenced to pay, pursuant to subsection 1, shall be doubled.

COMMENT

Source: This section is based on the Massachusetts Criminal Code, chapter 264 section 15.

Current Maine Law: Article I, section 9 of the Maine constitution prohibits the imposition of "excessive fines." There is little clear guidance to what this means, however, since the only reported case interpreting this prohibition declared: "In determining the question whether . . . or not a fine imposed is excessive, regard must be had to the purpose of the enactment, and to the importance and magnitude of the public interest sought by it to be protected." State v. Lubee, 93 Me. 418, 421 (1899).

There is no general statutory provision governing the amount of fines authorized by law. Each criminal offense defined in the statutes carries its own fine penalty. Chapter 303 of Title 15 deals with the subject of fines, but is restricted mostly to the recovery of fines and their payment to the appropriate government official.

The Draft: This section follows the general policy of having the criminal code grade offenses by imposing differing penalties on offenses of differing seriousness. The limits provided are maxima, so that a sentence may include a fine anywhere below the specified limit. Criteria for imposing fines are in section 2.

TITLE D3 THE SENTENCING SYSTEM

Chapter 35 Fines

Section 2. Criteria for Imposing Fines

1. No convicted person shall be sentenced to pay a fine unless the court finds that he is or will be able to pay the fine. In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the offender and the nature of the burden that its payment will impose. [redacted]

2. A person sentenced to the custody of the Department of Mental Health and Corrections, pursuant to chapter 34, shall not be sentenced to pay a fine in addition unless he has derived or has attempted to derive pecuniary gain from the crime, or the court is of the opinion that such a fine will promote the public safety through its deterrent effect or the rehabilitation of the convicted person.

3. The court shall not sentence a convicted person only to pay a fine, unless having regard to the nature and circumstances of the crime and to the history and character of the offender, it is of the opinion that the fine alone suffices for protection of the public.

COMMENT

Source: This section is based on the Massachusetts Criminal Code chapter 264 section 16.

Current Maine Law: There are no criteria in the present law for imposing fines, although it is likely that the consideration that goes into deciding on a sentence to pay a fine utilizes some of the criteria set forth here.

The Draft: The provisions governing fines must be viewed in the context of the code policy of having every crime punishable by commitment to the Department of Mental Health and Corrections. There will be no crimes punishable only by a fine. It is, of course, possible that the circumstances of any particular case will lead the court to withhold the commitment alternative and to invoke only the fine that is authorized. Subsection three requires that this be done only where the court is satisfied that the fine penalty alone suffices to protect the public.

The purpose of subsection one is to minimize the number of times that there are defaults in the payment of fines. The same subsection requires that if a person is found to be unable to pay a fine that might be required, he shall not, for that reason, be committed. Where an unconditional discharge is not in order, the court can place the offender on probation.

Subsection two sets out the criteria of economic gain as

the primary consideration governing the use of fines in addition to commitment to the Department.

TITLE D3 THE SENTENCING SYSTEM

Chapter 35 Fines

Section 3. Time and Method of Payment of Fines

1. If a convicted person is sentenced to pay a fine, the court may grant permission for the payment to be made within a specified period of time or in specified installments. If no such permission is embodied in the sentence, the fine shall be payable forthwith.

2. If a convicted person sentenced to pay a fine is also placed on probation, the court may make the payment of the fine a condition of probation. In such cases, the court may order that the fine be paid to the probation officer, to be transmitted by the probation officer as the court may direct, pursuant to this section.

3. In cases involving desertion, non-support or illegitimacy, the court may order the fine paid over to the spouse of the convicted person or to the city, town, corporation, society or person actually supporting the spouse, child or children, or to the state treasurer for the use of department of welfare to the extent that it has actually supported the spouse, child or children. In all other cases, the fine shall be paid into the treasury of the county where the offense is prosecuted, for the use of such county.

4. The convicted person shall be informed of the form and recipient of payment at the time of sentencing. If such person defaults in the payment, the designated recipient shall take appropriate action for its collection.

5. The costs and expenses of the prosecution of offenses shall be paid by the county where the offenses are prosecuted, unless otherwise specially provided. Any law enforcement officer required in the performance of his duties in the connection with the administration of criminal justice to incur expenses for or incidental to interstate travel which are payable by a county pursuant to this subsection, shall be entitled to draw on the treasurer of such county in advance on account of such expenses in an amount set forth in a written estimate thereof bearing endorsement of approval thereof by a Justice of the Superior Court. Such officer shall be held accountable to said county for such advance.

COMMENT

Source: This section contains features from the Massachusetts Criminal Code, chapter 264 section 17 and Title 15 section 1902 of the Maine laws.

Current Maine Law: There is no present provision for installment payments of fines or for fines to be paid to anyone but the treasury of the county where the offense is prosecuted.

The provisions of subsection 5 are taken from Title 15 section 1902.

The Draft: The section provides some of the details and mechanics for the payment of fines. Importantly, it provides statutory authority for the court to order fines to be paid in a manner that fit the resources and abilities of individual persons. Present law is changed by providing additional authority, in subsection 3, for the fine to be paid other than to the county where the prosecution occurred.

TITLE D3 THE SENTENCING SYSTEM

Chapter 35 Fines

Section 4. Default in Payment of Fines

1. When a convicted person sentenced to pay a fine defaults in the payment thereof or of any installment, the court, upon the motion of the official or person to whom the money is payable, as provided in section 3, or upon its own motion, may require him to show cause why he should not be sentenced to be committed to the Department of Mental Health and Corrections for non-payment and may issue a summons or a warrant of arrest for his appearance. Unless such person shows that his default was not attributable to a willful refusal to obery the order of the court or to a failure on his part to make a good faith effort to obtain the funds required for the payment, the court shall find that his default was unexcused and may order him committed to the Department until the fine or a specified part thereof is paid. The term of the commitment for such unexcused non-payment of the fine shall be specified in the order of commitment and shall not exceed one day for each five dollars of the fine or six months, whichever is the shorter. When a fine is imposed on an organization, it is the duty of the person or persons authorized to make disbursements from the assets of the organization to pay it from such assets and failure so to do may be punishable under this section. A person committed for non-payment of a fine shall be given credit towards its payment for each day that he is in the custody of the Department, at the rate specified in the order of commitment.

2. If it appears that the default in the payment of a fine is excusable, the court may make an order allowing the offender additional time for payment, reducing the amount therof or of each installment, or revoking the fine or the unpaid portion thereof in whole or in part, or may impose such sentence of commitment to the custody of the Department as is authorized in subsection 1.

3. Upon any default in the payment of a fine or any installment thereof, execution may be levied, and such other measures may be taken for the collection of the fine or the unpaid balance thereof as are authorized for the collection of an unpaid civil judgment entered against a person. The levy of execution for the collection of a fine shall not discharge a person committed to the custody of the Departmentfor non-payment of the fine until such time as the amount of the fine has been collected.

COMMENT

Source: This section is patterned on the Massachusetts Criminal Code chapter 264 §18.

Current Maine Law: Title 15 §1904 now provides:

> Except when otherwise provided, any convict sentenced to pay a fine or costs or both and committed or confined for default thereof and for no other cause shall be given a credit of $5 on such fine or costs or both for each day during which he shall be confined and shall be discharged at such time as the said credits or such credits as have been given and money paid in addition thereto shall equal the amount of the fine or costs or both, but no convict shall serve more than 11 months to discharge his liability under any single fine or costs or both, and in all cases no further action shall be taken to enforce payment of said fine or costs or both.

The validity of this part of the Maine laws is seriously in doubt by virtue of the decisions of the Supreme Court of the United States in Tate v. Short, 401 U.S. 395 (1971) and Williams v. Illinois, 399 U.S. 235 (1970) In these cases the Court ruled that an indigent person could not be imrisoned solely because he could not raise the funds necessary to pay a fine, and that the period of incarceration for non-payment could not exceed that which was otherwise authorized by the legislature for commissio of the offense.

The Draft: This section authorizes a commitment to the Department of Mental Health and Corrections under two sets of circumstances. One is where the failure to pay the fine is found to be without excuse. The

second is where, although the court finds that the default is excusable, the convicted person would escape punishment altogether unless he were ordered to the custody of the Department. This latter situation may arise where the person may not be able to raise or earn the money needed to meet his obligations under the original fine-sentence. This is, to be sure, an instance of committing a poor person where a wealthy one would remain free; but it does not violate the rule in the Tate case since there, the statute violated provided for only a fine, so that imprisonment was altogether impossible for a non-indigent defendant. In this regard, Justice Brennan wrote for the Court:

> Since Texas has legislated a 'fines only' policy for traffic sentences, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine. Imprisonment in such a case is not imposed to further any penal objective of the State....We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so. Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case.

The last situation referred to by Justice Brennan is provided for in this draft; it has not, as yet, been ruled on by the Court.

TITLE D3 THE SENTENCING SYSTEM

Chapter 35 Fines

Section 5. Revocation of Fines

A convicted person who has been sentenced to pay a fine and has not inexcusably defaulted in payment thereof, may at any time, petition the court which sentenced him for a revocation of the fine or of any unpaid portion thereof. If the court finds that the circumstances which warranted the imposition of the fine have changed, or that it would otherwise be unjust to require payment, the court may revoke the fine or the unpaid portion thereof in whole or in part, or modify the time and method of payment.

COMMENT

Source: This section is taken from the Massachusetts Criminal Code chapter 264 § 19.

Current Maine Law: There is no provision like this in the present law.

The Draft: This section is designed to inject a degree of flexibility into the system for collecting fines. When a person "in good standing" regarding the payment of his fine, he may seek to have the fine reduced or revoked entirely, and the court is authorized to grant such a request if it finds circumstances which warrant such a change.

October 20, 1972
December 15, 1972 meeting

TITLE D3 THE SENTENCING SYSTEM

Chapter 32 Probation and Unconditional Discharge

Section 1. Eligibility for Probation and Unconditional Discharge

1. A person who has been convicted of any crime, except murder, may be sentenced to probation or unconditional discharge, unless the court finds that

A. there is undue risk that during the period of probation the convicted person would commit another crime; or

B. the convicted person is in need of correctional treatment that can be provided most effectively by commitment to the Department of Mental Health and Corrections; or

C. such a sentence would depreciate the seriousness of the crime for which he was convicted.

2. A convicted person who is eligible for sentence under this chapter, as provided in subsection 1, shall be sentenced to probation if he is in need of the supervision, guidance, assistance or direction that probation can provide. If there is no such need, he shall be sentenced to an unconditional discharge.

COMMENT

Source: Parts of this section are taken from the Massachusetts Criminal Code chapter 264 § 20(b) and the Federal Criminal Code §3101(2).

Current Maine Law: There is no statute of general applicability similar to this in the present law. Murder, treated separately in this section, is now subject to a mandatory life imprisonment sentence under Title 17 §2651.

The Draft: This section serves to set up a system of priorities to govern the sentencing decision. Consistent with the provisions of draft chapter 34 §1, persons convicted of murder are excluded from consideration for probation or unconditional discharge. Subsection one of this section similarly excludes from this chapter those persons who

would present a threat of further crime if sentenced to probation or unconditional discharge; who are in need of the programs available to the Department of Mental Health and Corrections; or whose offense is too serious for sentence under this chapter.

Among those eligible, subsection 2 says that probation should be used if it appears that the convicted person would be helped thereby. Absent such a need, an unconditional discharge is warranted.

TITLE D3 THE SENTENCING SYSTEM

Chapter 32 Probation and Conditional Discharge

Section 2. Period of Probation; Modification and Discharge

1. A person convicted of a class A or class B crime may be placed on probation for a period not to exceed three years; for a class C crime, for a period not to exceed two years; and for a class D crime, for a period not to exceed one year.

2. During the period of probation specified in the sentence made pursuant to subsection 1, and upon application of a person on probation, his probation officer, or upon its own motion, the court may, after a hearing upon notice to the probation officer and the person on probation, modify the requirements imposed, add further requirements authorized by section 3, or relieve the person on probation of any requirement that, in its opinion, imposes an unreasonable burden on him.

3. On application of the probation officer, or of the person on probation, or on its own motion, the court may terminate a period of probation and discharge the convicted person at any time earlier than that provided in the sentence made pursuant to subsection 1 if warranted by the conduct of such person. Such termination and discharge shall serve to relieve the person on probation of any obligations imposed by the sentence of probation.

COMMENT

Source: This section is based on the Massachusetts Criminal Code chapter 264 § 22, and the Federal Criminal Code §3102.

Current Maine Law: Title 34 §1632 places a two year limit on all orders of probation, regardless of the offense for which the conviction was had. Section 1634 of Title 34 provides:

> A person on probation may be discharged by the court which placed him on probation.
>
> 1. Probationer no longer needs supervision. When it appears to the Division of Probation and Parole that a probationer is no longer in need of supervision, the division may so report to the court, or to a justice of the court in vacation

which may order the probationer returned. After hearing, the court or justice may terminate his probation and allow him to go without day.

2. Has fulfilled conditions. When it appears to the court that a probationer under its jurisdiction has fulfilled the conditions of his probation, it shall terminate his probation and allow him to go without day.

The Draft: The only significant change proposed by this section in the present Maine law relates to the periods of probation. Subsection 1, consistent with the policy of grading offenses, provides for differing maximum periods of probation, depending on the class of crime for which there was a conviction. The Massachusetts and Federal drafts propose to have six and five year maximum periods respectively for the most serious offenses. These periods have been rejected in this draft on the view that if probation is to be a successful experience at all, it will be clear that such is the case in a shorter period of time.

The flexibility for modifying the conditions of probation, and for an early release of persons from the constraints of those conditions, now in present law, are continued in this draft.

TITLE D3 THE SENTENCING SYSTEM

Chapter 32 Probation and Unconditional Discharge

Section 3. Conditions of Probation

1. If the court imposes a sentence of probation, it shall attach such conditions, as authorized by this section, as it deems to be reasonable and appropriate to assist the convicted person to lead a law-abiding life.

2. As a condition of probation, the court in its sentence may require the convicted person:

A. to support his dependents and to meet his family responsibilities;

B. to devote himself to an approved employment or occupation;

C. to undergo available medical or psychiatric treatment and to enter and remain in a specified institution when required for that purpose;

D. to pursue a prescribed secular course of study or vocational training;

E. to refrain from criminal conduct or from frequenting unlawful places or consorting with specified persons;

F. to refrain from possessing any firearm or other dangerous weapon;

G. to pay a fine authorized by chapter 35;

H. to make restitution of the fruits of his crime or to make reparation in an amount he can afford to pay, for the loss or damage caused thereby;

I. to remain within the jurisdiction of the court and to notify the court or the probation officer of any change in his address or his employment;

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J. to refrain from excessive use of alcohol and drug abuse;

K. to report as directed to the court or the probation officer, to answer all reasonable inquiries by the probation officer and to permit the officer to visit him at reasonable times at his home or elsewhere;

L. to satisfy any other conditions reasonably related to the rehabilitation of the convicted person or the public safety or security.

3. The convicted person shall be given a written statement explicitly setting forth the conditions on which he is released on probation, and he shall then be given an opportunity to address the court on these conditions if he so requests at the time.

COMMENT

Source: Similar provisions are in the Massachusetts Criminal Code chapter 264 § 21 and the Federal Criminal Code §3103. Both are derived from the Model Penal Code §301.1

Current Maine Law: Title 34 §1632 provides that ... "The court shall determine the conditions of the probation and shall give the probationer a written statement containing the conditions of his probation." There is no statute which spells out what these conditions are or might be in any individual case.

The Draft: This section provides legislative guidelines for the setting of probation conditions. It does not interfere with the discretion of the sentencing court in setting conditions which it deems proper in individual cases.

TITLE D3 THE SENTENCING SYSTEM

Chapter 32 Probation and Unconditional Discharge

Section 4. Procedures on Probation Violation

1. At any time before the discharge of the person on probation or the termination of the period of probation, a probation officer

A. may arrest the person on probation, if he has probable cause to believe that such person has committed another crime, whether or not there has been a trial and conviction for such other crime; or

B. may issue a summons ordering the person to appear before the court for a hearing on the violation of probation, if the probation officer has probable cause to believe that there has been a violation of a condition of probation that is not the commission of a crime.

2. Following arrest or summons, as provided in subsection 1, the probation officer shall forthwith file a report in the court alleging the facts and conduct constituting the violation of probation. The person on probation shall be furnished a copy of the report.

3. Upon the receipt of the report provided for in subsection 2, the court shall, in its discretion, order a hearing on the allegations, or dismiss the report and order the person on probation released forthwith if he has been arrested on the allegations. If a hearing is ordered, the person on probation shall be notified, and the court may issue a warrant for his arrest.

4. If a hearing is held, the person on probation shall be afforded the opportunity to confront and cross-examine witnesses against him, to present evidence on his own behalf, and to be represented by counsel. If he cannot afford counsel, the court shall appoint counsel for him.

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5. After hearing, if the court finds that there is probable cause to believe that the person on probation has committed the crime alleged in the probation officer's report, it may order such person committed without bail pending a trial on the charge of having committed such a crime by the court having jurisdiction thereof, and the time of such commitment shall be credited as time served for the original crime if the person is not later convicted of such other crime. If the court finds that the person has otherwise inexcusably failed to comply with a requirement imposed as a condition of probation, it may revoke probation and impose any sentence that might have been imposed originally for the crime of which he was convicted. If the court finds that there is probable cause to believe that the person on probation has committed another crime, and it has jurisdiction over such crime, it may accept a plea of guilty or nolo contendere provided all of the requirements for accepting such pleas are complied with. In such case, the court may proceed to sentence for the newly committed crime, and revoke probation and impose any sentence that might have been imposed originally, subject to the provisions of chapter 31, §5.

6. Whenever a probationer is charged with violation of probation under this section, the running of the period of probation shall be interrupted from the date of the arrest or summons and shall remain interrupted until the date of the hearing or the date the court dismisses the report. In the event that the court does not revoke the probation after hearing, the probationer shall be credited with the time lost by the interruption of the running of his probation period.

7. As used in subsection 2, "court" means any Superior Court or District Court as the Division of Probation and Parole shall, in its discretion, choose. If the court is not the court which

imposed the probation sentence allegedly violated, it may order the proceedings transferred to such court or, if it chooses to entertain the proceedings, it shall request from the clerk of the court in which the probationer was sentenced attested copies of the sentence of the court and any other documents in the case. Upon receipt of such request, it shall be the duty of the clerk to send forthwith the requested attested copies.

COMMENT

Source: This section is partly new, partly based on Maine Revised Statutes Title 34 §§1632 and 1633, and the Massachusetts Criminal Code chapter 264 §§ 23 and 24.

Current Maine Law: Pertinent parts of Title 34 §§1632 and 1633 are as follows:

> 1632. A probation-parole officer has the same authority with respect to the probationer as if he were surety upon the recognizance of the probationer. Each probation-parole officer has authority to arrest and charge a probationer with violation of probation and take him into his custody in any place he may be found, to detain the probationer in any jail for a reasonable time in order to obtain an order from the court, or justice of the court in vacation, returning the probationer to court as provided in section 1633. In the event the court refuses to issue an order returning the probationer as provided under section 1633, the court shall issue an order directing the immediate release of the probationer from arrest and detention. A probationer so arrested and detained shall have no right of action against the probation-parole officer or any other persons because of such arrest and detention. Any action required under sections 1633 and 1634 may be taken by any probation-parole officer.

1633. When the Division of Probation and Parole charges a probationer with violation of a condition of his probation the division shall forthwith report the alleged violation to the court, or to a justice of the court in vacation, which may order the probationer returned. After hearing, the court or justice may revoke the probation and impose sentence if the case has been continued for sentence or may order the probationer to serve the original sentence where its execution has been suspended or may order the probation continued if it appears just to do so.

The Division of Probation and Parole may in its discretion report the alleged violation to any Superior Court or District Court as applicable. When such court deems it to be convenient in the administration of justice to entertain a petition for violation of probation, such court shall request from the clerk of the court in which the probationer was sentenced attested copies of the sentence of the court and any other documents in the case. Upon receipt of such request, it shall be the duty of the clerk to send forthwith the requested attested copies. The court may, after hearing, revoke or continue probation just as if it were the court that originally imposed sentence. The clerk shall thereupon forward to the clerk of the court that originally imposed sentence an attested copy of the petition for revocation and order pursuant thereto.

Whenever a probationer is charged by the division with violation of probation under this section, the running of the probation period shall be interrupted from the date of such charge and shall remain interrupted until the probationer is returned to the court. In the event of the withdrawal of the charge by the division or in the event that the court at the hearing on the alleged violation finds that the probationer did not violate the conditions of his probation, he shall be credited with the time lost by the interruption of the running of his probation period.

Further guidance as to the present law can be found in several reported decisions. It has been held, for example, that the statutory scheme for revoking probation contemplates that notice of the alleged violation be given, and that a person on probation cannot be compelled to defend against a charge of probation violation that was not alleged.

State v. Russon, 260 A.2d 140 (1969). The Supreme Judicial Court has also indicated that the court hearing must be fair and impartial, and a decision reached "in the exercise of a sound judicial discretion from the evidence before it" ... and not as "the result of whim or caprice." Dow v. State, 275 A.2d 815 (Me. 1971.) When sentence is made and suspended at the time probation is ordered, the court has held that there is no constitutional right to counsel at a subsequent hearing to revoke probation. Skidgell v. State 264 A.2d 8 (Me. 1970), although the court has twice repeated that it would be a wholesome policy for counsel to be appointed for indigent persons in these proceedings. Skidgell v. State, 264 A.2d 8 (Me. 1970); State v. Allen, 235 A.2d 529 (Me. 1967.)

The Draft: This section would change several aspects of the presently controlling law relating to revocation of probation. In subsection 1, the authority of the probation officer to arrest is restricted to those instances where the alleged violation involves the commission of another crime. Additional authority to cause the probationer to be arrested resides in the court to whom the probation officer makes his charges of violation. The purpose of the arrest is primarily to insure that the probationer appears at the hearing which the court may order, and in many cases it may not be necessary for the probationer to be taken into custody to insure this. In any event, when no new crime is involved, it should be a judicial decision that the probationer be held in custody.

Subsection 2 follows the present policy of reporting the alleged violation to the court and notifying the probationer of the charges.

Subsection 3 leaves to the court the precise manner of notifying the probationer that a hearing has been ordered, and the nature of the charges that will be heard.

Subsection 4 details the minimum essentials of the hearing. It accepts the dictum that the assignment of counsel is a "wholesome" practice, although in the context of there being no provisions in this draft title for suspended sentences to order into execution, Mempa v. Rhay, 389 U.S. 128 (1967) would seem to require a due process type hearing. There also needs to be taken into account the recent decision in Morrissey v. Brewer 92 S.Ct. 2593 (1972) in which the Court held that in parole revocation proceedings, due process requirements were:

"(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the reasons for revoking parole. We emphasize there is no thought to equate this second state of parole revocation [the first is a preliminary hearing by someone other than the parole officer reporting the violation - SJF] to a criminal prosecution in any sense; it is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial."

The opinion goes on to note: "We do not reach or decide tne question whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent." At this point the opinion cites the Model Penal Code provision giving a right to "advise with his own legal counsel." Justice Douglas,

dissenting in part, and Justice Brennan, concurring in the result, both indicated that counsel should be an essential feature of the proceedings.

Importantly, Chief Justice Burger based his opinion for the Court on the view that: "It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." The same is true of any analysis of probation revocation, leading to the proposal made here that the practice of assigning counsel be confirmed by legislation.