TITLE D2 SUBSTANTIVE OFFENSES

Chapter 21 Offenses of General Applicability

Section 1. Conspiracy

1. A person is guilty of conspiracy if, with the intent that conduct be performed which, in fact, would constitute a crime or crimes, he agrees with one or more others to engage in or cause the performance of such conduct.

2. If a person knows that one with whom he agrees has agreed or will agree with a third person to effect the same objective, he shall be deemed to have agreed with the third person, whether or not he knows the identity of the third person.

3. A person who conspires to commit more than one crime is guilty of only one conspiracy if the crimes are the object of the same agreement or continuous conspiratorial relationship.

4. No person may be convicted of conspiracy to commit a crime unless it is alleged and proved that he, or one with whom he conspired, took a substantial step toward commission of the crime. A substantial step is any conduct which, under the circumstances in which it occurs, is strongly corroborative of the firmness of the actor's intent to complete commission of the crime; provided that speech alone may not constitute a substantial step.

5. Accomplice liability for offenses committed in furtherance of the conspiracy is to be determined by the provisions of section _____ of chapter _____.

6. For the purpose of determining the period of limitations under section 8 of chapter 11.

A. A conspiracy shall be deemed to continue until the criminal conduct which is its object is performed, or the agreement that it be performed is frustrated or is abandoned by the defendant and by those with whom he conspired. For purposes of this subsection, the object of the conspiracy included escape from the scene of the crime, distribution of the fruits of the crime, and measures, other than silence, for concealing the commission of the crime or the identity of its perpetrators.

B. If a person abandons the agreement, the conspiracy terminates as to him only when: (i) he informs a law enforcement officer of the existence of the conspiracy and of his participation therein; or (ii) he advises those with whom he conspired of his abandonment. The defendant shall prove his conduct under (ii) by a preponderance of the evidence.

7. It is no defense to prosecution under this section that the person with whom the defendant is alleged to have conspired has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, or is immune from or otherwise not subject to prosecution.

8. It is a defense to prosecution under this section that, had the objective of the conspiracy been achieved, the defendant would have been immune from liability under the law defining the offense, or as an accomplice under section _____ of chapter _____.

9. Conspiracy is an offense classified as one grade less serious than the classification of the most serious crime which is its object, except that a conspiracy to commit a class D crime is a class D crime.

Approved 1-5-73. With amendments to subsection 4 to clarify (1) that whether conduct constitutes a substantial step is to be determined under all the circumstances; and (2) that speech cannot, by itself, constitute a substantial step.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 22 Offenses Against the Person

Section 3. Promoting Criminal Homicide

1. A person is guilty of promoting criminal homicide, a class A Crime, if, acting alone or with one or more other persons in the commission of, or an attempt to commit, or immediate flight after committing, or attempting to commit [any class A crime, or escape] he or another participant causes the death of a person and such death is a natural and probable consequence of such commission, attempt or flight.

2. It is an affirmative defense to prosecution under this section that the defendant:

A. did not commit the homicidal act or in any way solicit, command, induce, procure, counsel or aid the commission thereof; and

B. was not armed with a firearm, destructive device, dangerous weapon, or other weapon which under the circumstances indicated a readiness to inflict serious bodily injury; and

C. reasonably believed that no other participant was armed with such a weapon; and

D. reasonably believed that no other participant intended to engage in conduct likely to result in death or serious bodily injury.

Approved 1-5-73. With insertion of last 15 words in subsection 1.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 22 Offenses Against the Person

Section 6. Causing or Aiding Suicide

A person is guilty of causing or aiding suicide if he intentionally aids or solicits another to commit suicide, and the other commits or attempts suicide. Causing or aiding suicide is a class D crime.

Approved 1-5-73.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 22 Offenses Against the Person

Section 7. Assault

A person is guilty of assault, a class D crime, if he intentionally, knowingly, or recklessly causes bodily injury or offensive physical contact to another.

Approved 1-5-73.

Commission 50

January 8, 1973

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 22 Offenses Against the Person

Section 8. Aggravated Assault

A person is guilty of aggravated assault, a class B crime, if he intentionally, knowingly, or recklessly causes:

1. serious bodily injury to another; or

2. bodily injury to another by means of a deadly weapon; or

3. bodily injury to another under circumstances manifesting extreme indifference to the value of human life.

Approved 1-5-73.

Commission 51

January 8, 1973

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 22 Offenses Against the Person

Section 9. Criminal Threatening

A person is guilty of criminal threatening, a class D crime, if he intentionally or knowingly places another person in fear of imminent bodily injury.

Approved 1-5-73.

Commission 24

December 1, 1972
Sent to Commission
January 26, 1973

TITLE D1 GENERAL PROVISIONS

Chapter 11 Preliminary

Section 1. Title: Effective Date: Severability

1. Title 17 of the Revised Statutes Annotated shall be known, and may be cited as the Maine Criminal Code.

2. This Code shall become effective January 1, 1976, and it shall apply only to offenses committed subsequent to its effective date. Prosecution for offenses committed prior to the effective date shall be governed by the prior law which is continued in effect for that purpose as if this Code were not in force; provided, however, that in any such prosecution the court may, with the consent of the defendant, impose sentence under the provisions of the Code. For purposes of this section, an offense was committed subsequent to the effective date if all of the elements of the offense occurred on or after that date; an offense was not committed subsequent to the effective date if any element thereof occurred prior to that date.

3. If any provision or clause of this Code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Code which can be given effect without the invalid provision or application, and to this end the provisions of this Code are declared to be severable.

Approved 1-18-73.

TITLE D1 GENERAL PROVISIONS

Chapter 11 Preliminary

Section 2. All Crimes Defined by Statute: Civil Actions

1. No conduct constitutes a crime unless it is prohibited by this Code, or by any statute or private act outside this Code, including any rule or regulation authorized by and lawfully adopted under a statute.

2. This Code does not bar, suspend, or otherwise affect any right or liability for damages, penalty, forfeiture or other remedy authorized by law to be recovered or enforced in a civil action, regardless of whether the conduct involved in such civil action constitutes an offense defined in this Code.

Approved 1-18-73.

TITLE D1 GENERAL PROVISIONS

Chapter 11 Preliminary

Section 3. Classification of Crimes: Civil Violations

1. A crime is conduct which is prohibited by this Code, or by any statute or private act outside this Code, including any rule or regulation authorized by and lawfully adopted under a statute, provided that the penalty for violation of such a statute, rule or regulation includes a term of imprisonment. A civil violation is conduct which is prohibited by any statute, private act, or ordinance outside this Code, including any rule or regulation authorized by and lawfully adopted under such a statute, act or ordinance which provides as a penalty for engaging in such conduct a fine, forfeiture, penalty or other sanction that does not include a term of imprisonment. Civil violations are enforceable by the Attorney General, his representative or any other appropriate public official, in a civil action to recover the amount of the penalty or to secure the forfeiture.

2. Crimes are classified as class A, B, C, or D crimes by this Code or by a statute outside of the Code which defines a crime.

Approved 1-18-73.

Commission 27

January 19, 1973

TITLE D1 GENERAL PROVISIONS

Chapter 11 Preliminary

Section 4. Proof: Affirmative Defenses

1. No person may be convicted of a crime unless each element of the crime is proved beyond a reasonable doubt. "Element of the crime" means: (a) the forbidden conduct; (b) the attendant circumstances specified in the definition and classification of the crime; (c) the required culpability; (d) any required result. The existence of jurisdiction must also be proved beyond a reasonable doubt. Venue may be proved by a preponderance of the evidence. The court shall decide both jurisdiction and venue.

2. Subsection 1 does not require negating a defense

A. by allegation in the indictment or information, or

B. by proof at trial, unless the issue is in the case as a result of evidence admitted at the trial which is sufficient to raise a reasonable doubt on the issue.

3. Subsection 1 does not apply to any defense which the statute explicitly designates as an "affirmative defense." Defenses so designated must be proved by the defendant by a preponderance of the evidence.

Approved 1-18-73 as amended in subsection 1 to require proof beyond a reasonable doubt of jurisdiction, and to have the jurisdiction and venue questions decided by the court.

TITLE D1 GENERAL PROVISIONS

Chapter 11 Preliminary

Section 5. Application to Crimes Outside the Code

The provisions of this Title are applicable to crimes defined outside this Code, unless the context of the statute clearly requires otherwise.

Approved 1-18-73.

TITLE D1 GENERAL PROVISIONS

Chapter 11 Preliminary

Section 6. Impeachment by Evidence of Conviction of Crime

1. For the purpose of attaching the credibility of a witness testifying in a criminal trial, evidence that he has been convicted of a crime is admissible only if the crime involved acts of deceit, fraud, cheating, stealing or other acts reflecting adversely on his honesty and integrity, unless the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. In making such a determination, account shall be taken of the amount of time that has elapsed since the conviction and the legitimate interest of the witness in maintaining privacy concerning his past.

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. Upon the request of the state, the defendant shall furnish a list of prospective witnesses, but need not indicate whether he himself intends to testify.

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.

Tabled 1-18-73.

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.

Approved 1-18-73.

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 aggravated murder or 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 or class B crime must be commenced within six years after it is committed;

B. a prosecution for a class C or class D crime must be commenced within two years 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 six months after the dismissal, or during the next session of the grand jury, whichever occurs later, even though the period of limitations has expired at the time of such dismissal or will expire within such period of time.

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 returned, 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.

Approved 1-18-73 with amendments (1) to subsection 2 so as to have class A and B crimes governed by a six year period and class C and D crimes subject to a two year period; and (2) to subsection 4 to have the applicable period be the longer of either six months or the next grand jury session.

Commission 37

January 19, 1973
Sent to Commission
January 26, 1973

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 21 Offenses of General Applicability

Section 2. Attempt

1. A person is guilty of criminal attempt if, acting with the kind of culpability required for the commission of a crime, and with the intent to complete the commission of the crime, he engages in conduct which, in fact, constitutes a substantial step toward its commission. A substantial step is any conduct which goes beyond mere preparation and is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime.

2. It is no defense to a prosecution under this section that it was impossible to commit the crime which the defendant attempted, provided that it would have been committed had the factual and legal attendant circumstances specified in the definition of the crime been as the defendant believed them to be.

3. A person who engages in conduct intending to aid another to commit a crime is guilty of criminal attempt if the conduct would establish his complicity under section ____ of chapter ____ were the crime committed by the other person, even if the other person is not guilty of committing or attempting the crime.

4. Criminal attempt is an offense classified as one grade less serious than the classification of the offense attempted, except that an attempt to commit a class D crime is a class D crime, and and an attempt to commit aggravated murder or murder is a class A crime.

Approved 1-18-73.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 21 Offenses of General Applicability

Section 3. Solicitation

1. A person is guilty of solicitation if he commands or attempts to induce another person to commit a particular class A or class B crime, whether as principal or accomplice, with the intent to cause the imminent commission of the crime, and under circumstances which the actor knows make it very likely that the crime will take place.

2. It is a defense to prosecution under this section that, if the criminal object were achieved, the defendant would not be guilty of a crime under the law defining the offense or as an accomplice under section ____ of chapter ____.

3. It is no defense to a prosecution under this section that the person solicited could not be guilty of the offense because of lack of responsibility of culpability, or other incapacity or defense.

4. Solicitation is an offense classified as one grade less serious than the classification of the crime solicited, except that solicitation to commit aggravated murder or murder is a class A crime.

Approved 1-18-73 with amendments to §1 deleting word "request" and rewording of last 14 words. In §4, rewording of last 9 words.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 21 Offenses of General Applicability

Section 4. Facilitation

1. A person is guilty of facilitation if he knowingly provides substantial assistance to a person intending to commit a class A or class B crime, and that person, in fact, commits the crime contemplated, or a like or related class A or class B crime, employing the assistance so provided. The ready lawful availability from others of the goods or services provided by the defendant is a factor to be considered in determining whether or not his assistance was substantial. This section does not apply to a person who is either expressly or by implication made not accountable by the statute defining the crime facilitated or related statutes.

2. It is no defense to a prosecution under this section that the person whose conduct the defendant facilitated has not been prosecuted for or convicted of any offense based upon the conduct in question, or has been convicted of a different offense or class or degree of offense, or has an immunity to prosecution or conviction or has been acquitted.

3. Facilitation of a class A crime is a class B crime. All other facilitation is a class D crime.

Deleted 1-18-73.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 21 Offenses of General Applicability

Section 5. General Provisions Regarding Chapter 21

1. It shall not be an offense to conspire to commit, or to attempt, solicit, or facilitate any offense set forth in this chapter.

2. There is an affirmative defense of renunciation in the following circumstances:

A. In a prosecution for attempt under section 2, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant avoided the commission of the crime attempted by abandoning his criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof.

B. In a prosecution for solicitation under section 3, or for conspiracy under section 1, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited or of the crime or crimes contemplated by the conspiracy, as the case may be.

C. A renunciation is not "voluntary and complete" within the meaning of this section if it is motivated in whole or in part by (i) a belief that a circumstance exists which increases the probability of detection or apprehension of the defendant or another participant in the criminal operation, or which makes more difficult the consummation of the crime, or (ii) a decision to postpone the criminal conduct until another time or to substitute another victim or another but similar objective.

Approved 1-18-73 with deletion of subsection dealing with Facilitation.

STATE OF MAINE

COMMISSION TO PREPARE A REVISION OF THE CRIMINAL LAWS

MATERIAL ACTED ON BY COMMISSION AS OF JANUARY 23, 1973

CONTENTS

I. APPROVED

TITLE D3 THE SENTENCING SYSTEM

Chapter 31 GENERAL SENTENCING PROVISIONS

Chapter 34 COMMITMENTS TO THE DEPARTMENT OF MENTAL HEALTH AND CORRECTIONS

TITLE D3 THE SENTENCING SYSTEM

Chapter 36 Release from Institutions and Community Supervision

Section 1. Persons Eligible for Release: Criteria

1. Except in those cases in which the Department is required to release convicted persons from institutions pursuant to section 7 of chapter 34, all eligibility for release from an institution is governed by this section.

2. All persons committed to the Department pursuant to chapter 34 are eligible at any time for release from an institution in which they may have been placed, except that in the case of a person convicted of aggravated murder or murder, release shall not take place prior to the expiration of the minimum term specified in a sentence of commitment which requires that such minimum be served in a penal institution.

3. The State Parole Board shall determine, pursuant to the procedures set forth in section 3, whether a person who is eligible for release shall be released as follows:

A. In the case of persons whose maximum sentence is more than one year, ~~but not more than three years~~, the determination shall be made at the end of the first year and ~~at the end of the~~ second ~~year~~; annually thereafter;

B. In the case of a person whose maximum sentence is more than three years, the determination shall be made at the end of the first year, and annually thereafter.

C. In the case of any person confined in an institution as a result of a revocation decision authorized by section 7, the determination shall be made one year from the time he entered the institution as a result of such a decision, and annually thereafter.

D. The Department may, by regulation, provide for determinations for release to be made at additional times, such as upon the recommendation of the person in charge of the institution in which the convicted person is confined.

4. The State Parole Board shall grant a release to a person whose case is before it for determination according to the schedule set forth in this section unless:

A. there is an undue risk that the person would commit another crime during the period of community supervision; or

B. his continued correctional treatment in an institution would substantially enhance his capacity to lead a law-abiding life when released at a later date; or

C. his release at that time would seriously diminish the gravity of his crime.

COMMENT

Source: The first two subsections follow from the provisions on sentencing which give the Department discretion to incarcerate or release, except when a person has been sentenced for aggravated murder or murder, and the sentence requires that a minimum period be served in an institution. Subsection 3 follows as a procedural constraint on the Department's discretion granted in the sentencing laws. Subsection 4 is based on the Illinois Unified Code of Corrections §1003-3-5 (c).

Current Maine Law: MSA Title 34 §1672 provides that persons at the Maine State Prison and the Women's Correctional Center are eligible for a hearing before the parole board at the expiration of their minimum termless "good time" (7 days per month, plus two more days for selected prisoners), if they have been sentenced under a minimum-maximum sentence. Prisoners at these institutions who have been convicted of certain sex offenses are eligible at the expiration of one half of their sentences, less deductions for good time. Convicted murderers are eligible at the expiration of 15 years, less good time. A recently (1966) enacted amendment to section 1672 provides further that when a person has been sentenced to a minimum term of 15 years or more, he is eligible to come to the board at the expiration of 15 years less the good time deductions.

Prisoners at the Men's Correctional Center and the Women's Correctional Center are eligible for a hearing when it appears to the superintendent that they have reformed (section 1673 and 1674).

The above statutes serve to define the period of a sentence when the parole board may not release a prisoner. Following that period, the board may, pursuant to section 1671, release the inmate. It has often been repeated that release by the board "is not a matter of right but one of grace and privilege." Hartley v. State, 249 A.2d 38, 40 (Me. 1969). There are no statutory provisions to control the board's exercise of discretion in making the release decision. It has been noted by the Supreme Judicial Court, however, that: "The purpose of releasing an inmate of a penal institution to parole is to give him an opportunity to make good on the outside. The release to parole is a discretionary matter with the Board in the light of the inmate's conduct while confined and the considered probability of his complying, out of confinement, with the conditions of parole fixed by the Board." Collins v. State, 161 Me. 445, 451 (1965).

The Draft: Subsections one and two serve to affirm that the provisions of this chapter are consistent with the provisions governing sentences.

Subsection 3 provides for a periodic review of eligible prisoners by the parole board, while giving discretion to review the release question more often if the Department chooses to provide for more frequent reviews. The statute, therefore, establishes only the minimum frequency with which a prisoner must be reviewed by the Board.

Subsection 4 undertakes to set out the most significant factors in the release decision. While the board has broad discretion to determine the presence or absence of these factors, it is an appropriate legislative decision to declare that eligible persons must be released if no good is to be achieved by their continued imprisonment. In this sense, subsection four is a declaration of the need for continued imprisonment.

January 2, 1973
Sent to Commission
January 26, 1973.

TITLE D3 THE SENTENCING SYSTEM

Chapter 36. Release from Institutions and Community Supervision

Section 2. Preparation for Release Determination

1. Within 60 days of when a person becomes eligible for release under section 1, he shall be requested by the Parole Board to prepare a plan setting forth the manner of life he intends to lead if released, including such specific information as where and with whom he will reside and what occupation or employment he will follow, together with such other information as he considers relevant to the criteria set forth in subsection 4 of section 1, a copy of which shall be furnished him at the time the request for a plan is made.

2. In the course of preparing such a release plan, the person may request that he be temporarily released from the institution for a period of up to seven days in order to make contacts for employment, to secure a residence, or to acquire other information or advice necessary for the plan. Such a request shall be forwarded to the Bureau of Corrections via the person in charge of the institution from which the request eminates, together with the recommendation of such person in charge concerning whether it should be granted. The Bureau may, in its discretion, grant or deny the request. Whether the request is granted or denied, the Bureau shall render such aid as it considers to be reasonable to the person preparing the plan.

TITLE D3 THE SENTENCING SYSTEM

Chapter 36. Release from Institutions and Community Supervision

Section 3. Release Hearings

1. The Board of Parole shall meet at such times and places as are necessary to make the determinations required by this chapter.

2. The person whose release is being considered shall be given the opportunity to appear personally at a hearing before the Board, to present his plan and to examine, a reasonable time prior to the time his case will be determined, the material being considered by the Board pursuant to subsection 3, subject to the restrictions of subsection 3C.

3. The Department shall cause to be furnished to the Board of Parole:

A. a report by the institutional staff, relating to the person's adjustment to authority, and including any staff recommendations as to the release determination;

B. all official reports of his prior delinquency or criminal record, including reports and records of earlier probation and parole or community supervision experiences, if any;

C. a copy of any presentence evaluation or presentence investigation report which was submitted to the court which sentenced the offender. Confidential sources of information in such reports

may be excluded by the Board prior to its disclosure.

D. Reports of any physical and mental examinations;

E. any other relevant information as may be available.

4. The Board shall render its decision within a reasonable time after the hearing and shall state the basis therefor, both in the records of the Board and in written notice to the person in whose case it has acted. In its decision, the Board shall either set the person's release date or inform him of the date when the Board will next consider his case.

COMMENT

Source: Portions of this section are derived from the proposed Massachusetts Criminal Code chapter 264 §28, the Illinois Unified Code of Corrections §§1003-3-4 and 1003-3-5, and the Committee Print of the proposed federal code §3-12F3(c),(d).

Current Maine Law: There are no similar requirements now in the Maine statutes.

The Draft: This section further implements the policy of insuring that all relevant information is before the Board, and the policy of inmate participation in the parole decision. A significant sort of participation is provided by making available to the prisoner all of the material which the Board will be considering, subject to a continuation of the restriction on disclosing sources of confidential information contained in the presentence report as is imposed by Rule 32(c)(2) of the Maine Rules of Criminal Procedure.

TITLE D3 THE SENTENCING SYSTEM

Chapter 36. Release from Institutions and Community Supervision

Section 4. Conditions of Release

1. If the Board of Parole decides to release a person, it shall require as a condition of the release that he refrain from engaging in criminal conduct. The Board may also require that he conform to any of the following conditions:

A. support his dependents;

B. devote himself to an approved employment or occupation and to notify his parole officer of any change therein;

C. remain within fixed geographic limits unless granted written permission to leave such limits;

D. report, as directed, upon his release to his parole officer at such intervals as may be required, answer all reasonable inquiries by the parole officer, and permit the officer to visit him at reasonable times at his home or elsewhere;

E. reside at any fixed place and notify his parole officer of any change in his address;

F. attend or reside in a facility established for the instruction, recreation, treatment or residence of persons released from institutions, on probation, or otherwise under community supervision of the Department;

G. refrain from possessing a firearm or other dangerous weapon;

H. make restitution as provided in chapter 32, section 3, subsection 2G;

I. refrain from associating with persons known to him to be engaged in criminal activities or, without permission of his parole officer, with persons known to him to have been convicted of a crime;

J. to undergo available medical or psychiatric treatment as provided in chapter 32, section 3, subsection 2C. Failure to comply with this condition shall be considered only as a violation of a condition of release, and shall not, in itself, authorize involuntary treatment or hospitalization;

K. refrain from drug abuse and excessive use of alcohol;

L. comply with any other condition or conditions deemed by the Board to be reasonably related to the rehabilitation of the person or the public safety.

2. Before being released, the person shall be provided with a written statement of the conditions of his release, and shall sign a statement agreeing to such conditions.

3. Upon written notice to the person under supervision, the Board may modify the conditions of release.

COMMENT

Source: A similar listing of conditions which may be attached to the release are found in virtually all the extant and proposed recodifications.

Current Maine Law: The law now permits the Parole Board to make parole subject to "special conditions", Still v. State 256 A.2d 670 (Me. 1969), but it nowhere undertakes to describe what the possible conditions might be. It appears also that the Parole Board may modify the conditions of parole so long as this does not serve to increase the sentence. Still v. State, supra at p. 673.

The Draft: This section undertakes to identify the conditions which have a high potential contribution to the integration of the prisoner into a law-abiding life. The Board is also empowered to impose other conditions not specified, but which it considers to be reasonably related to the same end.

Although the circumstances under which the prisoner agrees to the conditions hardly amount to a meeting of the minds as would be required under contract law to create a binding obligation, the agreement here may serve the purpose of prisoner participation, especially after he has submitted his plan and discussed it with the Board.

TITLE D3 THE SENTENCING SYSTEM

Chapter 36. Release from Institutions and Community Supervision

Section 5. Period of Community Supervision

1. In any case in which the sentence contains a minimum term, the period of community supervision may not be terminated prior to the expiration of such term. It may be terminated by the Department at any time following the expiration of such minimum.

2. When there is no minimum term contained in a sentence, the period of community supervision may be terminated by the Department at any time.

3. Unless sooner terminated, the period of community supervision automatically terminates upon the expiration of the maximum period specified in the sentence. Whenever the Department terminates the period of community supervision, such termination shall have the effect of satisfying the maximum term specified in the sentence.

4. Upon the termination of the period of supervision, the Department shall furnish the person a certificate of discharge which shall include a statement that the sentence has been satisfied.

COMMENT

Source: Virtually all of the recodifications have a provision describing the parole period and how it is terminated.

Current Maine Law: Discharge from parole is presently controlled by Title 34, sections 1677 and 1678 which provide that:

> Any parolee who faithfully performs all the conditions of parole and completes his sentence is entitled to a certificate of discharge to be issued by the warden or superintendent of the institution to which he was committed. 1677
>
> Whenever it appears to the Board that a person on parole is no longer in need of supervision, it may order the superintendent or warden of the institution from which he was released to issue him a certificate of discharge, except that in the case of persons serving a life sentence who may not be discharged from parole in less than 10 years after release on parole. 1678

The Draft: This section brings together other parts of the sentencing system which relate to the length of sentence and the effect of a Department decision to terminate supervision on the unexpired part of a sentence. Although the responsibility for issuing certificates of discharge is placed in the Department, this can be delegated to persons in charge of institutions, as is the present law.

TITLE D3 THE SENTENCING SYSTEM

Chapter 36. Release from Institutions and Community Supervision

Section 6. Preliminary Hearing on Violation of Conditions of Release

1. If a parole officer has probable cause to believe that a person under his supervision has violated a condition of his release, he may issue a notice to such person to appear before the District Supervisor for a preliminary hearing to determine whether such probable cause in fact exists. If the alleged violation constitutes the commission of a new crime, the parole officer may communicate the basis for his belief that there is probable cause that the person under supervision has committed a crime to any law enforcement officer who may, in his discretion, thereupon arrest such person. The parole officer shall forthwith provide the arrested person with a written notice of a preliminary hearing before the District Supervisor to determine whether there is probable cause to believe that he has committed the new crime.

2. The preliminary hearing shall be held within forty eight hours if a person under supervision has been arrested, and as soon as practicable if he has not. It shall be held as near to the place where the violation is alleged to have taken place as is reasonable under the circumstances. The summons and written notice provided for in subsection 1 shall name the place and time of the preliminary

hearing, state the conduct alleged to constitute the violation, and inform the person of his rights under this section. In no case shall there be a waiver of the right to a preliminary hearing.

3. At the preliminary hearing the person alleged to have violated a condition of his release has the right to confront and cross-examine persons who have information to give against him, to present evidence on his own behalf, and to remain silent. If the District Supervisor determines on the basis of the evidence before him that there is not probable cause to believe that a condition of release has been violated, he shall terminate the proceedings and order the person under supervision forthwith released from any detention he may then be in. In such a case, no further proceedings to revoke the release may be brought. If he determines that there is such probable cause, he shall prepare a written statement summarizing the evidence that was brought before him, and particularly describing that which supports the belief that there is probable cause. The person under supervision shall be provided a copy of this statement. At the outset of the preliminary hearing, the District Supervisor shall inform the person of his rights under this section and of the provisions of section 7. Such person may waive, at the preliminary hearing, his right to confront and cross-examine witnesses against him, his right to present evidence in his own behalf, and his right to remain silent. No other rights may then be waived.

COMMENT

Source: The provisions of this section follow the rules laid down in M rrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972).

Current Maine Law: 34 MRSA 1675, as amended by Maine Statutes 1966 C. 460; 1967 c. 391 §33; 1969 c. 326 §§2,3; 1971 c. 172 §13; provides arrest and detention powers, statutory privileges at a parole revocation hearing and specific and general sentencing powers.

Rights of Parolee: Parole is traditionally "not a right of a prisoner, but accrues through legislative grace and can be withheld or withdrawn by the Legislature at will." Mottram v State, 232 A.2d 809 (Me.1967) citing State v Fazzano, 96 R.I. 472, 194 A.2d 680 (1963). Cf. Libby v State, 211 A.2d 586 at 587 (1965). The parolee is deemed to remain under the custody of the warden of the prison from which he was released on parole. He is also under the immediate supervision of the Parole Board and subject to their rules and regulations as well as to the conditions of parole imposed by them. Mottram at 818. "The rights of a parolee are such as our lawmakers intended to establish within the rehabilitation process and [the] problem is not one of constitutional requirement but statutory interpretation." Id at 814. Thus, Mottram, followed by Stubbs v State, 281 A.2d 134 (Me. 1971), holds that a parolee has no constitutional right to a parole revocation hearing. Mottram uses the Fazzano rationale, supra, and finds that a parolee also has "no property right in the enjoyment of his liberty on parole" and thus "parole revocation is not affected by the due process clause." Mottram at 815. Mottram does find that a statutory privilege is granted by 34 MRSA 1675 to the extent that he "is entitled to appear and be heard" at the hearing.

Because the statute is silent as to presentation of formal charges, an opportunity to present witnesses or be represented by counsel at the hearing, the parolee is not entitled to such "privileges." For further rationale see Mottram at 815-816.

Stubbs elaborates on Mottram by holding that revocation of parole without notice and hearing does not violate due process. The hearing itself is administrative and not judicial because the Parole Board is not given certain "judicial" powers and furthermore, the Board should be guided by its own administrative investigation rather than by evidence to be produced at a judicial type hearing.

Parole Warrant and Arrest: A probation-parole officer has the authority under the statute to arrest and detain a parolee in jail for a period which "shall not extend beyond the next business day of the office of the director." Parolees so detained "shall have no right of action against such probation-parole officer or any other persons because of such arrest and detention." Upon alleged violation of the law or parole condition, "the director may issue a warrant for his arrest."

Because of the parolee's custodial status on parole, a parole warrant issued for his arrest for a parole violation is not be be judged by the same standards as an arrest warrant under 15 MRSA 704 and Rule 4 of Maine Criminal Rules of Procedure for the arrest of a person charged with a crime. In Stubbs, failure of the arresting officer to produce or have in his possession the parole warrant did not disturb the validity of the arrest. Compare State v Phinney, 42 Me. 384 (19), distinguished in Stubbs.

The statute does not require the parole warrant to be under seal. The warrant only serves to hold the parolee for a revocation hearing. Mottram, supra. Under the statute, any law enforcement officer, including the probation parole officer, may arrest a parolee on a parole warrant. Collins v State, 161 Me. 445, 213 A.2d 835 (1965), held that the Legislature intended to give such officer discretion to arrest, but that turning over a parolee arrested on a parole warrant to a municipality which has an assault warrant outstanding did not constitute a waiver by the state of its right to retain and resume custody of the parolee. If the municipal police had made the initial arrest, the parole warrant would have served as a detainer, to be executed when primary custody was relinquished by such municipal authorities.

Sentence: When a parole warrant issues, the statute provides for the interruption of the running of parolee's original sentence and upon a finding by the Parole Board of cause to revoke parole, parole shall be revoked. The parolee forfeits deductions earned for good behavior while on parole and is remanded to the institution from which he was paroled to serve the unexpired portion of his sentence. The Parole Board also determines when he may again become eligible for parole. Hartley v State, 249 A2d 38 (Me. 1969) held that nonexecution of a parole warrant against a parolee who was taken into custody on other charges did not terminate his first sentence, and did not nullify the consecutive scheme of 34 MRSA §1676. That statute provides: "Any parolee who commits an offense while on parole who is sentenced to the State Prison shall serve the 2nd sentence beginning on the date of termination of the first sentence, unless the first sentence is otherwise terminated by the Board." Cf. Lewis v Robbins, 150 Me. 121, 104 A2d 838 (1954).

Kuhn v State, 254 A2d 591 (Me. 1969) held that this statute also applied to Reformatory parolees when read with the section of 34 MRSA 1675 which provides: "When a parolee from the Reformatory of Men violates the law and is sentenced by the court to the Maine State Prison, any length of time set by the Board to be served of the unexpired portion of his sentence may be served at the Maine State Prison."

The Draft: Morrissey requires that there be a preliminary hearing of an alleged parole violation before a case is presented to the Board. The opinion for the Court by Chief Justice Burger would permit the parole officer to arrest the parolee, although this would be permitted under the concurring opinion of Justice Douglas only if there were a new crime committed. In conformity with the policy of non-arrest adopted in regard to probation violations, this section does not permit the parole officer to make arrests, but rather requires him to invoke the aid of a law enforcement officer. If the parole violation is not a new crime, there is no authority to arrest at all, and the case must proceed with a written notice to the parolee to appear at the preliminary hearing.

The preliminary hearing is held by the District Supervisor, since Morrissey prohibits the probable cause determination to be made by the parole officer first cognizant of the violation.

At the preliminary hearing, this section goes further than Morrissey in giving an unqualified right to confront persons who have adverse information, and in specifying that the parolee has the right to remain silent.

The provisions of subsections 2 and 3 regarding waiver of rights amount to a policy of permitting the parolee to admit to the violation, but of requiring nonetheless that the person conducting the hearing prepare a written statement describing the evidence that constitutes the basis for probable cause.

TITLE D3 THE SENTENCING SYSTEM

Chapter 36. Release from Institutions and Community Supervision

Section 7. Parole Board Hearing on Violation of Condition of Release

1. If, as a result of proceedings under section 6, the District Supervisor finds probable cause, he shall transmit the record of the case to the Board of Parole which shall schedule a hearing on the alleged violation within thirty da s from the time of the District Supervisor's decision. The person on release shall be notified in writing of the time and place of the hearing, of the violation he is alleged to have committed, and of the nature of the evidence against him. The notice shall also inform such person of his right to be present at the hearing, to confront and cross-examine witnesses against him, to present evidence on his own behalf, to remain silent, and to be represented by counsel of his choice, or if he cannot afford counsel, that counsel will be appointed for him.

2. At the outset of the hearing, the Board shall determine whether the person on release is or wishes to be represented by counsel, and shall appoint counsel if required. It shall inform the person of the rights specified in subsection 1, and provide him the opportunity to admit or deny the violation charged against him. If the violation is admitted, the Board shall proceed as provided

in subsection 3. If the violation is denied, the Board shall proceed to hear the evidence which is alleged to establish the violation, and the evidence denying it, and provide each side the opportunity to comment on the evidence. The Board shall then decide whether the violation has been established by a preponderance of the evidence. If it finds that the violation has not been so established, it shall dismiss the proceedings and order the person released from any restraints that have been imposed as a result of the allegations of a violation. In such case, no further proceeding to revoke the release may be brought that is based on the same conduct. If it finds that there was a violation, it shall proceed as provided in subsection 3.

3. Upon the admission or finding that there has been a violation of a condition of release, the Board shall provide the person found to have committed the violation the opportunity to explain or otherwise comment upon the violation.

A. The Board may then order the release revoked and the person confined in an institution if it is satisfied that:

(1) the person has failed, without a satisfactory excuse, to comply with a requirement imposed as a condition of his release; and

(2) the violation involves:

(a) the commission of another crime; or

(b) behavior indicating a substantial risk that he will commit another crime; or

(c) behavior indicating that the person is apparently unwilling or unable to comply with all of the conditions of his release.

B. If the Board does not make an order under subsection 3A, it may order that:

(1) the person receive a reprimand and warning from the Board; or

(2) the supervision and reporting be intensified; or

(3) the person be required to conform to one or more additional conditions of release, including living in a named community residential facility; or

(4) a combination of the above three alternatives.

4. If a person on supervision is confined in an institution pursuant to an order made under subsection 3A, the period of time during which he was under community supervision shall be credited against his sentence.

COMMENT

Source: This section is based on the requirements of Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972). It also incorporates portions of section 3-12F6 of Senate 1, 93d Congress, 1st Session.

Current Maine Law: See comment to section 6.

The Draft: This section governs the proceedings before the Parole Board after there has been a preliminary finding of probable cause.

Subsection 1 repeats the procedural rights and the requirement of notice. The hearing must also be held within thirty days from the time of the decision on probable cause.

Although the Court in Morrissey reserved the question of whether there was a right to counsel, this section adopts the views expressed by Justices Brennan and Douglas and provides the person on release with such a right.

If the violation has been admitted, or found on the evidence, there must be an opportunity to explain it. The Board then has several options. Subsection 3A undertakes to identify the conditions which justify returning a person to an institution, and if those conditions are present, the Board may take this action. If, however, the conditions are not found, or the Board chooses not to place the person in an institution, subsection 3B sets forth alternative action the Board may take.

When a person is placed in an institution under this section, his sentence is reduced by the period of time which he has spent in the community, staying out of trouble.

TITLE D3 THE SENTENCING SYSTEM

Chapter 36. Release from Institutions and Community Supervision

Section 8. Finality of Decisions

1. No decision which is authorized by this chapter to be made by the Board of Parole, or by the Department, on a discretionary basis shall be subject to review in any court of the state.

2. Any denial of procedural rights granted by this chapter or failure to comply with any of the mandatory requirements of this chapter shall be reviewable by a justice of the Superior Court.

COMMENT

Source: This section is a modification of chapter 264, section 37 of the proposed Massachusetts Criminal Code.

Current Maine Law: "The grant, revocation and reinstatement of parole are the exclusive jurisdiction of the Parole Board subject to such procedural restrictions within which [the] Legislature circumscribed the Board's powers." Mottram v State 232 A2d 809, 814 (Me. 1967). Post conviction habeus corpus is the proper remedy to test the legality of a parolee's imprisonment due to alleged revocation of parole without a hearing. Mottram at 818. While affirming this holding, Stubbs further states that a finding of parole violation is not reviewable by habeus corpus. See 14 MRSA 5501. "Courts have no power to determine the penological system; this is within the exclusive jurisdiction of the Legislature." Stubbs at 136. And a finding of fact that cause exists for revoking parole is not subject to review either through appeal or under 14 MRSA 5501. Stubbs, at 136 n.1. Besides statutory interpretation, another reason judicial review might not be available is based on the parolee's custodial status; it could be said that the Parole Board does not adjudicate legal rights. Yet, rights are adjudicated when an additional sentence is imposed under 34 MRSA 1676 for a violation on parole.

The Parole Board is not one of the state agencies covered by the Administrative Code 5 MRSA 2301 - 2451.

The Draft: This section commits discretionary decisions to the unreviewable authority of the Board or the Department of Mental Health and Corrections. But since there are procedural rights which must be accorded to persons on release pursuant to this chapter, there must be recourse to the courts for claims that these rights have been denied. Similarly, when it is alleged that officials have failed to do something which is required of them by law, such as reviewing cases of institutionalized persons periodically, the courts must be kept open to hear the claim.

No comprehensive definition is attempted of what is "discretionary" and what is "mandatory" since close cases between the two are likely to depend on particular circumstances, so that the decision is best left to the process of judicial review.