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December 6, 1973

Edith Hary, Law Librarian
Maine State Law Library
State House
Augusta, Maine 04330

RE: CRIMINAL LAW REVISION COMMISSION

Dear Edith:

I am enclosing herewith Informal Decision No. 575 and No. C-498 of the American Bar Association, Standing Committee on Professional Ethics.

I understand that you will reproduce these decisions and send them to each member of the Commission, as well as to Sanford Fox.

Very truly yours,

BERMAN, BERMAN & SIMMONS, P.A.

Jack H. Simmons

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AMERICAN BAR ASSOCIATION

American Bar Center

STANDING COMMITTEE ON PROFESSIONAL ETHICS

Re: Informal Decision No. C-498 3/23/62
Advising Opposing Witness of Legal Rights

You propound the following question: Would a civilian defense counsel in a United States Army General Court Martial proceeding, in defending his client against a criminal charge, be authorized to advise witness for the prosecution, who was either a part or a collateral actor in the alleged criminal offense, that if he desired, he could refuse to testify against defense counsel's client on the ground that the testimony of the witness may tend to incriminate him.

The question falls within the purview of Canons 5 and 15.

> Canon 5. "It is the duty of the lawyer to undertake the defense of a person accused of a crime, regardless of his personal opinion as to the guilt of the accused * * *. Having undertaken such defense, the lawyer is bound by all fair and honorable means to present every defense that the law of the land permits, to the end that no person be deprived of life or liberty, but by due process of law. * * * ."
>
> Canon 15. "The lawyer owes 'entire devotion to the interests of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. * * * ."

Canon 15 also admonishes against the "false claim, * * *, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause."

Article 21 of the 1951 Uniform Code of Military Justice is similar to the Fifth Amendment of the United States Constitution which extends to a citizen the privilege of electing to refuse to testify on the ground that the answer may tend to incriminate him.

Defense counsel should present by fair and honorable means every defense the "law of the land" permits to the end that no person be deprived of life or liberty except by due process in order that the client be afforded the benefit of every remedy and defense authorized by the law of the land. Canons 5 and 15.

Nowhere is such admonition nullified by any requirement that the defense lawyer must refrain from advising a witness for the prosecution that the answers sought may incriminate him; nor does the law of the land forbid such an admonition addressed to the prosecuting witness by defense counsel. Therefore, such an admonition by defense counsel to the prosecuting witness cannot constitute a basis of "any manner of fraud or chicane." Canon 15.

We, therefore, hold that defense counsel would be acting within the permitted sphere of ethics in the conduct of a criminal proceeding should he see fit to admonish a witness for the prosecution that his testimony sought to be elicited may tend to incriminate him.

American Bar Center

STANDING COMMITTEE ON PROFESSIONAL ETHICS

Re: Informal Decision No. 575 11/1/62
Defense Attorney Warning Prosecution Witness

You refer to this Committee's opinion C-498 which relates to the subject of advising an opposing witness of his legal rights.

You refer to the statement on page 474 of May 1962, A.B.A. Journal, as it relates to such opinion, that "Defense ~~council~~ counsel in a criminal proceeding may properly warn a witness for the prosecution that his testimony may tend to incriminate him and that he need not testify." I enclose a copy of opinion C-498 in order that you may be cognizant of our Committee's reasoning in reaching its conclusion.

You propound certain questions which our Committee deems to be within the purview of opinion C-498, covered by its reasoning. Those questions and the Committee's answers are as follows:

> (1) Does the defense attorney in a criminal proceeding who undertakes to warn a witness for the prosecution that his testimony may tend to incriminate him and that he need not testify, in fact or in law, thereby put himself in the position of giving advice to such witness concerning his legal rights so as to establish any type of attorney-client relationship between the defense attorney and the prosecution witness?

The Committee's answer is "No." The balance of your query (1), relating to the advisability of withdrawal of the defense attorney because of having given such warning to an opposing witness, our Committee also answers in the negative.

> (2) If the defense attorney's primary motivation in so advising the prosecution witness is the desire to encourage or to persuade the prosecution witness to not testify against the accused, isn't this a violation of at least the spirit of Canons 15, 22 and 39 of the Illinois State and American Bar Associations' Canons of Professional Ethics? If not, is it violative of the letter or spirit of any of the Canons of Professional Ethics?

Our Committee's answer is, "No," as to both of the questions propounded under (2).

> (3) If the defense attorney's secondary motivation in so advising the prosecution witness be to encourage or to persuade the prosecution witness to not testify against the accused, but his primary motivation be that, as an officer of the court, of insuring or attempting to insure that the prosecution witness' basic rights are afforded him, or at least

that he understands what those basic rights are, then shouldn't such warning:

(a) If made after commencement of the trial, whether done in or out out of open court, be either primarily or exclusively within the province of the trial judge;

The Committee's answer to (3) (a) is, "No."

(b) or if made before commencement of the trial, be either primarily or exclusively within the province of the prosecuting attorney as part of his responsibilities delineated in Canon 5 of the Canons of Professional Ethics of the Illinois State and American Bar Associations? If not, would not the defense attorney before volunteering such advice be ethically required to ascertain if the prosecution witness has requested that such advice be given, or to ascertain if the prosecution witness desires to consult another attorney of his own choosing from whom to obtain such advice?

Our Committee's answer to both questions propounded under (3)(b) is, "No." Concerning the subject matter of the second question, our Committee is of the further opinion that the procedure suggested, while appropriate, would not be necessary.

(4) Under what circumstances may the defense attorney suggest to a prosecution witness that the witness consult another attorney for advice concerning the witness right not to testify or not to incriminate himself?

The Committee feels that this question is answered by its opinion C-498 as well as herein.

(5) Does Informal Opinion 498 mean that the defense attorney may, in situations where proper to do so, warn a prosecution witness that he need not testify at all in the criminal action, or does it mean that the witness may properly be warned only that he need not testify as to those matters which may tend to incriminate him? The former would not seem to be the law.

Opinion C-498 is to the effect only, that in situations where proper to do so, the defense lawyer may warn a witness for the prosecution that his testimony sought to be elicited may tend to incriminate him.

STATE OF MAINE
SUPERIOR COURT
PORTLAND, MAINE 04111

HARRY P. GLASSMAN
JUSTICE

September 29, 1976

Peter Ballou, Esquire, Chairman
Criminal Law Revision Commission
142 Federal Street
Portland, Maine 04111

Dear Mr. Ballou:

I would like to call the attention of the Criminal Law Revision Commission to what is in my opinion an irrational disparity in the sentencing standards for certain types of criminal homicide. Under § 202(1)(A) a person is guilty of Second Degree Criminal Homicide if he causes death "knowing that death will almost certainly result from his conduct . . ." Under § 204(1)(A) a person is guilty of Fourth Degree Criminal Homicide if he recklessly causes the death of another. Recklessly is defined in the Code as a conscious disregard of a substantial and unjustifiable risk. § 10(3)(A). The practical difference between causing death by an action which the offender is aware will almost certainly result in death and causing death by an action which is a conscious disregard of a substantial and unjustifiable risk that death will result is almost non-existent. To me the difference is merely semantic, and I doubt that this subtle distinction can ever be meaningful to a jury. The distinction does have significant impact on a defendant, since a conviction of Second Degree results in a minimum period of incarceration of 20 years while a conviction of Fourth Degree results in a maximum period of incarceration of 10 years. I submit that 10 years of a person's life should not be in jeopardy as a result of a semantic distinction which a jury is unlikely to understand.

I am also concerned by a comparison of Criminal Homicide in the Fourth Degree and Aggravated Assault, as defined by § 208(1)(C). In both instances, that is, recklessly causing death and aggravated assault as defined in the provision cited above, the conduct of the defendant may be exactly the same. The distinction is that in one case the conduct has resulted in death whereas in the other the conduct has resulted only in bodily injury. In my mind, and I believe in

the mind of the general public, the difference in result is extremely significant; yet, both Fourth Degree Criminal Homicide and Aggravated Assault are Class B crimes.

I do not undertake to suggest whether these inappropriate classifications should be changed by raising the penalty of Criminal Homicide in the Fourth Degree or making some other type of change such as re-examining the entire classification of crimes against the person. My purpose in writing is merely to bring this matter to the attention of the Commission in order that it may bring its collective wisdom to bear on what I perceive as a very serious problem.

Respectfully yours,

Harry P. Glassman

HPG:pn

cc: Richard Cohen, Esquire
John Beliveau, Esquire
Ralph Lancaster, Esquire
Gerald Petruccelli, Esquire
Caroline Glassman, Esquire
David Cox, Esquire

September 30, 1976

Joseph Jabar, Esq., Chairman
The Commission to Revise the Juvenile Statutes
in Maine
Androscoggin County Courthouse
2 Turner Street
Auburn, Maine 04210

Dear Joe:

Pursuant to our phone conversation the other day I am writing to inform you that the Criminal Law Advisory Commission has been organized. The Commission wishes to maintain contact with the Juvenile Commission, the Criminal Rules Committee and all other organizations which are particularly concerned with any changes in the Criminal Code or in other criminal laws.

We would appreciate any suggestions that you have which may bear on both the juvenile laws and the criminal laws. Similarly, we would like to be able to contact you regarding problems, if any, which may arise under the Juvenile Commission's proposed revision.

We will look forward to cooperating with you.

Very truly yours,

PETER G. BALLOU
CHAIRMAN
Criminal Law Advisory Commission

cc: Richard Cohen
Secretary-Treasurer
Criminal Law Advisory Commission

CRIMINAL LAW ADVISORY COMMISSION MEETING
Friday, November 12, 1976
Department of Public Safety
Portland, Maine

I. RULES AND COMMENTARY PROPOSED BY CIVIL RULES COMMITTEE

After a discussion concerning whether or not the District Court should have jurisdiction over civil violations no consensus was reached by the Committee and the question was tabled until a later date.

II. CRIMINAL STATUTES OUTSIDE THE CODE

Stephen L. Diamond advised the Committee that he planned to apply the conversion idea to two different areas outside the Code in order to determine what problems it might create. He specifically mentioned the problems concerning the conflicting views of the various agencies and the extent of conversion. This plan met with the Committee's approval and it was decided to defer the conversion question until the December meeting at which time a specific decision would be reached.

III. DISCUSSION OF PROBLEMS RE AMENDMENTS

No consensus was reached by the Committee concerning the problems created by the confusing definition of deadly or dangerous weapon in the amendments contained on pages 1, 2, and 4. It was agreed that Stephen L. Diamond would draft new amendments for consideration and this matter was tabled for future discussion.

The motion was made and seconded to adopt amendments 17-A M.R.S.A. §208, sub-§1, ¶B, 17-A M.R.S.A. §362, sub-§2, ¶C and 17-A M.R.S.A. §401, sub-§2, ¶B contained on page 3. The Committee voted unanimously in favor of this motion.

Concerning the amendment to 17-A M.R.S.A. §1252, sub-§4 on page 4, the Committee decided that §208(1)(B) would be excluded from the operation of §1252. It was further decided that the application of §1252 to anything else would depend on the definition of deadly weapon.

The question of whether or not sub-section 5 of §1252 should be repealed was tabled by the Committee. Motion was made to defer consideration of sub-section 5 until one of the last meetings held by the Committee. This motion was seconded and all voted unanimously in its favor. Richard S. Cohen further stated that this question would be discussed at the Prosecutors Seminar in Portland scheduled for December 5-8, 1976.

TO: Criminal Law Advisory Commission Members & Consultants

FROM: Peter G. Ballou and Stephen L. Diamond

RE: Meeting of November 12, 1976

Enclosed please find the following materials:

1. Rules and commentary proposed by the Civil Rules Committee with respect to the enforcement of civil violations. (These include Proposed Rules 80H and 80I of both the Maine Rules of Civil Procedure and the District Court Civil Rules); and

2. Package of amendments and problems dealing with specific sections of the Code.

In addition to any items brought up by the members or consultants, we anticipate that the meeting will cover the following subjects:

1. Any outstanding organizational matters;

2. The enforcement of civil violations, including the proposed rules and a recommendation by Justice Glassman that exclusive jurisdiction over civil violations be vested in the District Court;

3. Further discussion of how to deal with the criminal statutes outside the Code; and

4. The amendments and problems in the enclosed package.

As you will undoubtedly realize, the enclosed package is of considerable length, primarily because this is the first session on the Code since early this year. We do not expect that the Commission will be able to consider all of the items at the November meeting. Furthermore, future agendas should contain substantially less material.

By way of reminder, the meeting is scheduled for Friday, November 12, at 10:00 a.m. in the Auditorium of the Public Safety Building in Portland. Please feel free to contact either of us if you have any questions.

rh

TO: Criminal Law Advisory Commission Members & Consultants

FROM: Peter G. Ballou and Stephen L. Diamond

RE: Meeting of November 12, 1976

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rh

(d) No Judgment Without Hearing; Appearance by Defendant. No judgment, other than a dismissal for want of prosecution, shall be entered in an action for support or custody except after hearing, which may be ex parte if the defendant does not appear. Even though the defendant does not file an answer, he may, upon entering a written appearance, be heard on issues of custody, the amount of support, and counsel fees.

(e) Counterclaim. No counterclaim shall be permitted in any action under this rule, except a counterclaim for divorce, annulment, separate support, or custody. Failure of the defendant to file a counterclaim permitted by this subdivision shall not bar a subsequent action therefor.

(f) Discovery. Depositions and interrogatories may be taken on issues of support and counsel fees as in other actions, but on issues of custody shall be taken only by order for good cause shown.

(g) Motions after Judgment. Proceedings for modification or enforcement of the judgment in actions for support or custody shall be on motion in the manner provided in Rule 80(j) of these rules.

(h) Proceedings in Forma Pauperis. Application for leave to proceed in forma pauperis may be made as provided in Rule 80(ℓ) of these rules."

7. Rule 80H of the Maine Rules of Civil Procedure is hereby added to read as follows:

"Rule 80H. Civil Violations

(a) Applicability. Except as otherwise provided in this rule, these rules shall apply to proceedings, other than traffic infraction proceedings, arising under a statute which expressly designates conduct as a civil violation pursuant to 17-A M.R.S.A. §4(3).

(b) Commencement of Proceeding. A proceeding under this rule is commenced by delivering to the defendant personally a copy of a citation completed in the manner prescribed by subdivision (c). Such citation may be:

(1) filled out and delivered to defendant by any officer authorized to enforce a statute of this state defining a civil violation who has probable cause to believe that a civil violation has been committed; or

(2) filled out by the clerk upon complaint made to him, when he is satisfied from his examination of the complainant and any witnesses produced that defendant has committed a civil violation under the law of this state, and transmitted by the clerk to any officer authorized to enforce a statute of this state defining a civil violation for delivery to defendant.

The officer delivering the citation shall not take the defendant into custody, except as temporary detention is authorized by 17-A M.R.S.A. §17. As soon as practicable after delivery to defendant, the officer shall cause the original of the citation to be filed with the court. All proceedings shall be brought in the name of the State of Maine.

(c) Content of Citation and Complaint. The citation shall contain the name of the defendant; the time and place of the alleged violation; a brief description of the violation; the time, place and date the defendant is to appear in court; (which shall in no case be less than three (3) days from the date of service unless the defendant agrees to a shorter period of time) and the signature of the officer issuing the citation. The citation shall serve as a complaint, and no other summons, complaint or pleading shall be required of the state, but motions for appropriate amendment of the complaint shall be freely granted.

(d) Pleadings of Defendant.

(1) Oral. The defendant shall appear at the time and place specified, either personally or by counsel, and shall answer to the complaint orally.

(2) No Joinder. Proceedings pursuant to this rule shall not be joined with any actions other than another proceeding pursuant to this rule, nor shall a defendant file any counterclaim.

(3) Answer. An answer which admits a civil violation shall not be admissible as an admission in any civil or criminal proceeding arising out of the same set of facts.

(e) Venue. A civil violation proceeding shall be brought in the county in which the violation is alleged to have been committed.

(f) Discovery. Discovery shall be had only by agreement of the parties or by order of the court on motion for good cause shown.

(g) Pre-trial Procedure. Rule 16 shall not apply to civil violation proceedings.

(h) Standard of Proof. Adjudication of a civil violation shall be by a preponderance of the evidence.

(i) Enforcement of Judgments. Judgments in civil violation proceedings shall be enforced as in other civil actions.

(j) Appeal. A party entitled to appeal may do so as in other civil actions, except that the appeal shall be within five days after judgment."

8. Rule 80I of the Maine Rules of Civil Procedure is hereby added to read as follows:

"Rule 80I. Search Warrants for Schedule Z Drugs

A warrant may be issued under this rule to search for and seize any schedule Z drug which is declared to be contraband and subject to seizure by 17-A M.R.S.A. §1114. Rule 41(a)(c)(d)(e)(f) and (g) of the Maine Rules of Criminal Procedure shall govern the issuance and execution of any warrant authorized by this rule."

9. Rule 81(b) of the Maine Rules of Civil Procedure is amended by striking therefrom the following:

"(3) Proceedings to compel support of a wife or a minor child or children;"

and by renumbering paragraphs (4)-(7) as paragraphs (3)-(6).

(b) Removal. Rule 73(b) of these rules applies to actions brought under this rule.

(c) Proceedings in Forma Pauperis. Rule 80(ℓ) of these rules applies to proceedings under this rule."

18. Rule 80H of the Maine District Court Civil Rules is added to read as follows:

"Rule 80H. Civil Violations

(a) Applicability. Except as otherwise provided in this rule, these rules shall apply to proceedings, other than traffic infraction proceedings, arising under a statute which expressly designates conduct as a civil violation pursuant to 17-A M.R.S.A. §4(3).

(b) Rule 80H(b)(c)(d)(f)(g)(h)(i) and (j) of the Maine Rules of Civil Procedure shall govern in the District Court.

(c) Venue. A civil violation proceeding shall be brought in the division in which the violation is alleged to have been committed."

19. Rule 80I of the Maine District Court Civil Rules is added to read as follows:

"Rule 80I. Search Warrants for Schedule Z Drugs

(a) Except as otherwise provided in this rule, Rule 80I of the Maine Rules of Civil Procedure governs the procedure in the District Court.

(b) In a proceeding under a statute which makes the possession of a schedule Z drug a civil violation a District Court Judge may, with the consent of both parties, entertain a motion to suppress evidence prior to trial. If a question concerning the admissibility of evidence has not been determined by motion to suppress prior to trial, upon appropriate objection, it shall be determined by the District Court Judge at the time of trial."

RULE 80H

Advisory Committee's Note

November , 1976

This rule is adopted to implement the provisions of the new Maine Criminal Code, 17-A M.R.S.A. §§4(3), 17(1), that certain conduct is to be deemed a "civil violation", the sanctions for which are enforceable in a civil action brought by the appropriate public official and commenced by service of a citation. Its provisions are made applicable in the District Court by the simultaneous adoption of D.C.C.R. 80H. In so far as possible, the rule tracks D.C.C.R. 80F, which provides for comparable proceedings under the Uniform Traffic Ticket and Complaint. Certain conforming changes have been made in D.C.C.R. 80F by simultaneous amendment.

The rule applies only to civil violations that have been expressly designated as such in the statute creating them. See 17-A M.R.S.A. §4(3). An amendment to the rule will be necessary if the provisions of 17-A M.R.S.A. §4-A(4), declaring prohibited conduct for which imprisonment is not the penalty to be a civil violation, take effect as provided in 17-A M.R.S.A. §4-A(B) on October 1, 1977, without further legislative change. Further, the rule is not intended to preclude the commencement by the Attorney General of an ordinary civil action to enforce a civil penalty, or for other relief, where authorized by law.

Rule 80H(a) ties the scope of the rule to the statutory definition of "civil violation" and makes clear that the rule does not apply to traffic infractions. Such proceedings will continue to be brought in District Court under D.C.C.R. 80F. A separate rule is needed for traffic infractions because of differences in terminology and the fact that there is no Superior Court jurisdiction of them.

Rule 80H(b) provides that the action is commenced upon service of a citation on the defendant by personal delivery to him. Cf. Rule 3. This is important for purposes such as tolling the statute of limitations. The citation, which is to be in the form provided in subdivision (c), may be prepared either by a law enforcement officer who has probable cause or, upon complaint, by the clerk if he is satisfied that defendant has committed a violation. (This standard, borrowed from D.C.Cr.R. 4(a), is essentially a probable cause standard.) The latter method is based on 4 M.R.S.A. §171-A, providing for issuance of such civil process upon complaint. The citation is to be served either by the preparing officer or by an officer to whom the clerk has transmitted it for service. In either event, the defendant is not to be taken into custody except as permitted in 17-A M.R.S.A. §17 for a brief period necessary to ascertain his identity. After service, the officer is required to file the original of the citation with the court.

Rule 80H(c) provides that the citation shall contain the elements required by 17-A M.R.S.A. §17(1). Cf. Rule 80F(c). It is the intent of the rule that, pending adoption of a new form, the Uniform Traffic Ticket and Complaint, with appropriate deletions, may be used as process for any civil violation. The rule expressly states that the citation, whatever its form, is to serve as the state's complaint for pleading purposes in the civil action that is to follow.

Rule 80H(d) is identical to D.C.C.R. 80F(d), with elimination of references and terminology peculiar to traffic infraction proceedings. Note that, as in the traffic infraction rule, an answer admitting a violation is not admissible as an admission in other proceedings. The purpose is to encourage such answers in the interests of cutting down the number of trials. Cf. M.R.Ev. 410.

Rule 80H(e) limits venue to the county in which the violation is alleged to have been committed. Cf. D.C.C.R. 80F(e).

Rules 80H(f), (h), (i), are identical to D.C.C.R. 80F(f), (h), (i). Rule 80H(g) is necessary in the Superior Court. Like the limitation on discovery, it recognizes the basic simplicity of the issues in such proceedings and is intended to promote speed and economy in court.

Rule 80H(j) is identical to D.C.C.R. 80F(j) as amended. The intent of the rule is to take no position on the question of the state's right to appeal a civil violation, which is argu-

ably left ambiguous by 17-A M.R.S.A. §§4(3), 17(1). The rule omits the provision found in D.C.C.R. 80F(j) prior to its amendment that required an appellant to deposit with the court the amount of the judgment as a condition for a stay. This provision was deemed unduly onerous on defendants who might have a legitimate ground of appeal and basically inappropriate as a condition on appeal in a civil action. See Rule 62(e).

RULE 80I

Advisory Committee's Note

November , 1976

This rule is intended to implement 17-A M.R.S.A. §1114, a section of the new Maine Criminal Code providing that a Schedule Z drug under the Code, possession of which is a civil violation, may be seized as contraband. At present, marijuana is the only drug in that category. See 22 M.R.S.A. 2383. The rule is necessary, because M.R.Cr.P. 41(b)(3), which would otherwise permit issuance of a search warrant for such purposes, does not apply in noncriminal proceedings. See M.R.Cr.P. 1. Rule 80I merely authorizes issuance of a search warrant in such circumstances. The provisions of M.R.Cr.P. 41 govern details of issuance and execution.

The provisions of the rule are made applicable in the District Court by the simultaneous adoption of D.C.C.R. 80I.

D.C.C.R. 80H

Advisory Committee's Note

November , 1976

This rule is adopted simultaneously with the adoption of M.R.C.P. 80H to implement the provisions of the new Maine Criminal Code, 17-A M.R.S.A. 664(3), 17(1), that certain conduct is to be deemed a "civil violation", the sanctions for which are enforceable in a civil action brought by the appropriate public official and commenced by service of a citation. The rule simply incorporates M.R.C.P. 80H, except for subdivision (c), which places venue in the division where the offense was committed, consistent with the functioning of the District Court. See, generally, Advisory Committee's Note to M.R.C.P. 80H. The rule does not preclude removal of an action under it to the Superior Court in accordance with D.C.C.R. 73(b).

17. D.C.C.R. 80I

Advisory Committee's Note

November , 1976

This rule is adopted simultaneously with the adoption of M.R.C.P. 80I to implement 17-A M.R.S.A. §1114, a section of the new Maine Criminal Code providing that a Schedule Z drug under the Code, possession of which is a civil violation, may be seized as contraband. The rule simply incorporates M.R.C.P. 80I, except for the provision in subdivision (b), taken for conformity from D.C.C.R. 41(b), for pre-trial hearing on a motion to suppress. See, generally, Advisory Committee's Note to M.R.C.P. 80I.

STATE OF MAINE
SUPERIOR COURT
PORTLAND, MAINE 04111

HARRY P. GLASSMAN
JUSTICE

October 19, 1976

Gene Carter, Chairman
Civil Rules Advisory Committee
Rudman, Rudman & Carter
84 Harlow Street
Bangor, Maine 04401

Dear Mr. Carter:

Although I know it may be too late to present my comments to the Civil Rules Advisory Committee, I would like to submit to you for forwarding to the Supreme Judicial Court my views concerning proposed Rule 80H of the Maine Rules of Civil Procedure dealing with civil violations. The promulgation of such a rule creates the impression that a prosecutor has the election of bringing a civil violation proceeding either in the District Court or in the Superior Court. It is my view that all civil violations should be prosecuted in the District Court with no right of removal to the Superior Court and with a right of appeal to the Superior Court on questions of law only.

I recognize that there are several problems associated with the procedure which I would like to see adopted, it is those problems to which I would like to address myself:

1. The most obvious difficulty is that the procedure I have suggested would result in no jury trial in civil violations, which might be considered a violation of Article I, Section 20 of the Maine Constitution. This is a problem which the Law Court is ultimately going to be compelled to face in connection with traffic infractions and the statutory small claims procedure, and while the Court may be unwilling to resolve this constitutional problem through the device of rule-making, by adopting the proposed rule it is, in effect, guaranteeing the right of jury trial in civil violations and thus resolving the issue in favor of the jury trial right. My point is that if the Court promulgates any rule, it is, in effect, through the rule-making power, making a decision on this question which has not yet been presented in litigation and so long as it is doing so I would hope that the Court would consider resolving the issue against the jury trial right for civil violations.

2. The more obvious problem is the question of trial jurisdiction. Both the statutory small claims procedure and the traffic infraction statute make clear that the exclusive trial jurisdiction is in either the Small Claims Court or the District Court respectively. The new Criminal Code is ambiguous with regard to the trial jurisdiction of civil violations. Section 4(3) of the new Criminal Code, which defines civil violations, does not purport to establish the court in which such civil proceedings should be tried. Section 9(3) of the new Code provides: "The District Courts shall have jurisdiction to try civil violations, Class D and E crimes . . . ." While this section does not establish the District Court as having exclusive trial jurisdiction of civil violations, it could be so interpreted, since Class D and E crimes,also referred to in the same Code section, have by statute an established procedure for appeal or transfer to the Superior Court. 15 M.R.S.A. § 2111 et seq. No similar statutory procedure exists for civil violations. Because of this ambiguity, the Court through its rule-making power must resolve the question of trial jurisdiction, and since it must do so, it would appear to me that the resolution should be that which places the least burden on the administration of justice, i.e. exclusive trial jurisdiction in the District Court. This would make the procedure for civil violations the same as that for traffic infractions. I have already orally communicated to Peter Ballou, Chairman of the Criminal Law Revision Commission, my view that the Commission should recommend an amendment to Section 9 of the Code to expressly make trial jurisdiction in the District Court exclusive. Until the Commission and the Legislature act on this proposal, I would hope that the Supreme Judicial Court would not burden the Superior Court with the trial of civil violations if it can be avoided.

I would appreciate your forwarding a copy of this letter to the Supreme Judicial Court along with your proposed Promulgation Order so that the Court might at least be aware of my views prior to acting upon the Committee's proposals.

Very truly yours,

Harry P. Glassman

HPG:pn

cc: L. Kinvin Wroth, Esquire