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STATE OF MAINE

LEGISLATIVE RESEARCH COMMITTEE

REPORT ON

APPEALS BY THE STATE ON QUESTIONS OF LAW

WITNESS IMMUNITY AND PERJURY STATUTES

FOR THE PURPOSE OF

COMBATING ORGANIZED CRIME

to

SECOND SPECIAL SESSION

of the

ONE HUNDRED AND THIRD LEGISLATURE

JANUARY, 1968

Legislative Research Committee
Publication 103-15

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LETTER OF TRANSMITTAL

January, 1968

To the Members of the Second Special Session of the 103rd Legislature:

I have the honor to transmit herewith a report on the urgency of legislation to combat organized crime in Maine.

This report, designated as Committee Publication 103-15, deals with three specific areas of criminal proceedings, namely, appeals by the State on questions of law, witness immunity and the requirements of proof in perjury cases and contains the findings and recommendations of the Legislative Research Committee of the 103rd Legislature.

The Committee sincerely hopes that the information contained herein will prove of benefit to the members of the Legislature and the people of the State of Maine.

Respectfully submitted,

HORACE A. HILDRETH, JR., Chairman
Legislative Research Committee

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The Legislative Research Committee, upon its own motion, voted to hold a public hearing on November 9, 1967, in connection with organized crime activities in Maine. The Attorney General, James S. Erwin, appeared at this hearing stating a most urgent need for legislation in the following areas in their approximate order of importance:

State's right of appeal on matters of law

The need for uniformity of ruling in the District and Superior Courts gives rise to the necessity of a state right of appeal on matters of law except when it is in conflict with double jeopardy.

General Witness Immunity Statute

Immunity is granted under certain safeguards to witnesses rendering direct assistance by relating knowledge of a crime. Thirty-seven states presently have such a statute.

Perjury or treason

Present requirements of proof by two witnesses in cases of perjury or treason is cumbersome and can just as easily be accomplished by requiring that such cases be proved to a jury beyond a reasonable doubt.

Machine gun law

There is a definite need for law prohibiting the use of machine guns within the State which is relatively unrestricted at present.

Permissive wiretapping

Wiretapping is a well recognized device for invading the conspiracy of silence of organized crime and the Legislature was urged to take a second look at the possibility of its use with proper safeguards through the courts.

Conclusion

After screening the Attorney General's recommendations of November 9, 1967, the Legislative Research Committee prepared legislation with accompanying reports in three specific areas, namely: 1. Appeals by the State on Questions of Law; 2. Witness Immunity Act; and 3. Proof of Perjury.

Appeals By the State on Questions of Law

The great majority of jurisdictions in the United States, 39 states plus the federal courts and the District of Columbia, allow the State some sort of an appeal in criminal cases. Different jurisdictions permit different degrees of appeal and it is impossible to make a generalization as to what the majority of jurisdictions think on a given question under this general heading.

That there is awareness of a great need for such legislation in the State of Maine cannot be denied. In the November 26, 1967 edition of the Portland Sunday Telegram, Chief Justice Williamson said that the State's right to appeal is bound to come in the State of Maine. He not only said that this change will take place but he also intimated that it would be a good change. He said "an error by a District or Superior Court Judge made in the course of a busy trial may end the prosecution. Some day the State will have a limited right of appeal on issues of law; not of fact." Chief Justice Williamson continued to say "of course an appeal by the State must be carefully controlled to protect the just rights of the individual." Our proposed legislation would do both these things; namely, give the State a greater chance to have the law decided correctly and protect the defendant.

The Chief Justice also said that "gains from such a right of appeal by the State might well be two-fold: the accused would not escape conviction through error in the trial court; and the principles of criminal law governing future cases would be developed in the appeal cases."

We agree with Chief Justice Williamson and emphasize that giving the State the right to appeal does not in any way make the individual's position less favorable; rather, it insures that our legal system will have better laws in that important questions of law

will be decided at a high level.

There is ample evidence for this position by looking at the number of states which allow the state at least some right to appeal. We can say without qualification that only the states of Delaware, Georgia, Louisiana, Minnesota, New Hampshire, Rhode Island, South Carolina, Texas, Virginia, West Virginia and Maine allow no appeal. We do not propose that giving the state the right to appeal should be done in contravention of an individual's right to be protected against double jeopardy which is safeguarded in our State Constitution. Under the proposed statute, once jeopardy has attached the State can no longer appeal except where the defendant is himself appealing the conviction or where the appeal will not affect the acquittal.

The President's Task Force Report on The Courts 1967 report, also takes the position that the state's right to appeal is a necessary tool in the successful prosecution of ever increasing crime. The Report says, pages 47, 48, that:

> "all jurisdiction should enact statutes permitting the prosecution to appeal pre-trial orders supressing statements or seized evidence; granting the prosecution a more general right to appeal from adverse pre-trial rulings on pleadings and motions also merits careful consideration."

This statement assumes that the state has a limited right to appeal and a more extensive right should be given close consideration. In the State of Maine we do not even have a limited right to appeal hence we should move to the first position and then study going beyond.

The President's Report also points out the fact that giving the state the right to appeal is going to be most beneficial in fighting organized crime.

> "The importance of permitting the Government to appeal from pre-trial supression orders is most evident in prosecutions involving professional criminal enterprises. Successful prosecutions in these cases often depend upon whether seized evidence, such as gambling equipment or stolen property, can be introduced at trial. If a pre-trial order supressing such evidence is not appealable, an erroneous decision by a trial judge may result in the inability of the prosecution to obtain a conviction in a case where law enforcement interests are particularly strong and in the waste of months or years of extensive investigation."

We maintain that the proposed statute would help fight organized crime. It would also help to protect the individual in that the issues decided at his trial could be decided correctly more often than not. The law on a given issue would be more settled and uniform throughout the State.

Other points which must be considered in favor of the state's right to appeal are as follows: Such legislation would (1) protect society more effectively in that both the rights of the state and the public would be considered as well as the rights of the criminal, (2) give all concerned a fair and impartial trial, the defendant as well as the state, (3) insure the development of the criminal law, in a proper way, (4) increase just and correct precedents, (5) help curtail the demoralizing effect on prosecutors and law enforcement officers under the present situtation, (6) appeals are now allowed by the state in civil cases, (7) safeguards are built into the proposed legislation to protect the accused.

Also, rules and regulations could be set up by the Supreme Judicial Court as to conditions and procedures to be followed. The costs could be paid by the state so there would be no undue hardship on defendants. The statute would have no retroactive effect.

It appears that Maine simply has not given this question proper consideration in the past. If it had, perhaps we would today have some sort of legislation on the books in line with the majority of states. We do maintain, however, that the legislation which we propose does give the state a limited right to appeal. The rights of an accused would be protected as much as they are under the present law. The only change would be that the state would have a better chance to have important questions of law decided by an appellate court. This would benefit the individual as well as the state.

Witness Immunity

The desire and need for the passage of a Witness Immunity Statute is illustrated by several sources.

In February of 1967, the President's Commission on Law Enforcement and Administration of Justice reported such immunity laws are essential to the combating of organized crime and the proper administration of justice and recommended:

"A general witness immunity statute should be enacted at Federal and State

levels, providing immunity sufficiently broad to assume compulsion of testimony. Immunity should be granted only with the prior approval of the jurisdiction's chief prosecuting officer. Efforts to coordinate Federal, State and local immunity grants should be made to prevent interference with concurrent investigations." (See exhibit 1.)

The President's Commission recognizes that such statutes are constitutionally permissible because a witness by being granted immunity is not being compelled to testify against himself as is his constitutional right under the Fifth Amendment. Similarly such a statute would not violate Maine's Constitution Article I, section 6, for the same reason.

The Federal Government has seen the need for such legislation by enacting some sixteen (16) such statutes which are particular in scope in that they are for particular agencies or commissions and aid in the criminal investigations of those bodies. (See Exhibit 2.)

Other states have enacted such legislation. While copies of statutes from thirty-seven (37) have been obtained, there are probably an additional half dozen states which have such statutes. Of the thirty-seven, there are both "general" and "specific" statutes.

Those statutes which are considered "general" are such because they permit inquiry into all offenses. Others which are "specific" related to particular crimes and/or particular bodies possessing investigating powers. Maine has in fact a "specific" immunity section in 10 M. R. S. A. section 1103 where immunity can be granted in restraint of trade investigations. (See Exhibit 3.) This statute is fine as far as it goes, but is very restricted in application.

A well written witness immunity statute will provide a penalty for the person who commits perjury when testifying within the privilege granted by the immunity statute.

Historically, it was the policy of the English Courts to encourage disclosure by a witness by granting immunity or the promising of immunity. Such immunity was felt to be good for the realm and the health of the King. (See Exhibit 4.)

Today the primary concern in enacting such a statute should be likewise for the peace and security of the state. By being general in scope it would permit application into all criminal matters whereas a "specific" statute would inhibit those investigations not clearly named.

In 1952, the National Conference of Commissioners on Uniform State Laws passed what is known as the Model State Witness Immunity Act. (See Exhibit 5) Its wording is general in scope and is substantiated by an analysis of every word and phrase. This Act was, according to the Conference, developed to counter certain advantages taken by criminals when the privilege against self-incrimination which, as all know, has posed a difficult and continuing problem for law enforcement authorities.

The need for such legislation at this time is expressed in Articles which have appeared recently in Life, and the Saturday Evening Post magazines. (Life September 1, 1967, p. 15 and September 8, 1967, p. 91 and Post, November 18, 1967, p. 27). Likewise the wisdom of such forward planning was commented on favorably by an editorial in the November 26 issue of the Portland Sunday Telegram.

Immunity legislation is the most widely adopted expedient for neutralizing the privilege against self-incrimination. Without such legislation there is little hope of obtaining vital evidence in the many cases where the sole possessors of the evidence are themselves criminally implicated. Because sound immunity legislation is vital to law enforcement generally and to the prosecution of organized crime (both intra and interstate) in particular, most states have such legislation, and this state should undertake the essential step of enacting an immunity statute.

Proof of Perjury

With regard to perjury, statistics gathered by the President's Crime Commission (Task Report: Organized Crime, Page 88) show that only 52.7 per cent of the defendants in perjury cases were found guilty from 1956 through 1965, and in all other criminal cases 78.7 per cent of the defendants were found guilty. The Report continues and relates that "it seems apparent that virtually every organized crime investigation and prosecution is characterized by false testimony."

There is no apparent reason for the distinction between perjury and other crimes with regard to proofs; but because of the common law "two witness" rule and its corollary, the direct evidence rule, at present more proof is required to convict than is required with other crimes.

AN ACT Relating to Appeals by State on Questions of Law in Criminal Cases.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. R.S., T. 15, §2115-A, additional. Title 15 of the Revised Statutes is amended by adding a new section 2115-A, to read as follows:

§2115-A. Appeals by State on questions of law

1. Appeals prior to trial. An appeal may be taken by the State in criminal cases on questions of law, with the written approval of the Attorney General, from the several District Courts and from the Superior Court to the law court from a decision, order or judgment of the court (1) suppressing evidence prior to trial, (2) allowing a motion to dismiss or quash an indictment, complaint or informations, (3) quashing an arrest or search warrant, (4) suppressing a confession or admission. Such appeal shall be taken within 10 days after such order, decision or judgment has been entered, and in any case before the defendant has been placed in jeopardy under established rules of law. The appeal shall be diligently prosecuted.

2. Appeals after trial. An appeal may be taken by the State in criminal cases, with the written approval of the Attorney General, from the several District Courts and from the Superior Court to the law court from a decision, order or judgment of the court (1) acquitting the defendant where a question of law has been decided adversely to the State during the trial; but in such case the appeal shall not subject the defendant to further prosecution, nor shall the judgment of acquittal be reversed, but the law court shall nevertheless decide the question of law presented, (2) convicting the defendant where a question of law has been decided adversely to the State and the defendant appeals from the judgment.

3. Manner. An appeal by the State, taken pursuant to this section, shall be taken in the manner and upon such conditions as the Supreme Judicial Court may by rule provide.

4. Fees and costs. The Supreme Judicial Court shall allow reasonable counsel fees and costs for the defense of appeals under this section.

Sec. 2. Appropriation. There is appropriated from the General Fund the sum of $2,000 for the fiscal year ending June 30, 1968 and the sum of $5,000 for the fiscal year ending June 30, 1969 to the Supreme Judicial Court, to be expended in carrying out the objectives of this Act. The breakdown shall be as follows:

SUPREME JUDICIAL COURT

	1967-68	1968-69
All Other	$2,000	$5,000

Sec. 3. Effective date. This Act shall apply to any case pending upon the effective date of this Act.

AN ACT Creating the State Witness Immunity Act.

Be it enacted by the People of the State of Maine, as follows:

R. S., T. 15, §1314-A, additional. Title 15 of the Revised Statutes is amended by adding a new section 1314-A, to read as follows:

§1314-A. Compelling evidence in criminal proceedings; immunity

In any criminal proceeding before a court or grand jury, if a person refuses to answer questions or produce evidence of any kind on the ground that he may be incriminated thereby, and if the prosecuting attorney, in writing, and with the written approval of the Attorney General, requests the court to order that person to answer the questions or produce the evidence, and the court after notice to the witness and hearing shall so order, unless it finds to do so would be clearly contrary to the public interest, that person shall comply with the order. After complying, and if, but for this section, he would have had the right to withhold the answers given or the evidence produced by him, that person shall not be prosecuted or subjected to penalty or fortfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence. Failure to answer questions or produce evidence as ordered by the court following notice and hearing shall constitute contempt of court. He may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order.

AN ACT Relating to Proof of Perjury.

Be it enacted by the People of the State of Maine, as follows:

R. S., T. 17, §3001, amended. Section 3001 of Title 17 of the Revised Statutes is amended by adding at the end, a new sentence, as follows:

In the trial of any complaint, information or indictment charging any offense under this section, the guilt of the accused shall be proved in the same manner as any other offense.

EXHIBIT 1

"The Challenge of Crime in a Free Society" a report by the President's Commission on Law Enforcement and Administration of Justice.

Immunity

A grand jury subpoena can compel the attendance of a witness and the production of books and records, but the grand jury has no power to compel a witness to testify or to inspect private books and records if their owner demurs. However, it is constitutionally permissible under proper conditions to displace a witness's privilege against self-incrimination with a grant of immunity from criminal prosecution. On the Federal level immunity is available only in prosecutions under specific statutes, such as those dealing with narcotics, antitrust, and Communications Act violations. Some States follow a similar pattern, while others have enacted general immunity statutes permitting the prosecution to grant immunity in any criminal case.

Immunity provisions are particularly necessary to secure testimony in cases of official corruption, and the special need for the power to grant immunity in organized crime cases is discussed in chapter 7.

One serious danger, in the light of court decisions with respect to the application of immunity given by one jurisdiction to prosecutions in other jurisdictions, is that the grant of immunity to a witness in one proceeding will interfere with investigations elsewhere. Since facilities for communication between elements of the Federal Government are better developed than those at State and local levels, the problem is greater in State courts and grand jury investigations. The creation of inter-agency communication procedures where none now exist and the improvement of existing procedures are most important if grants of immunity are to be intelligently made. The Attorney General or other chief law enforcement officer must be in a position to ascertain whether other investigations are pending if he is to have the perspective necessary for him to choose which investigation is most important to the overall administration of justice.

Filing with the court a notice of the grant of immunity would reduce the possibility of abuse of authority by prosecutors as well as the danger of hidden immunization for corrupt purposes.

The Commission recommends:

A general witness immunity statute should be enacted at Federal and State levels, providing immunity sufficiently broad to assure compulsion of testimony. Immunity should be granted only with the prior approval of the jurisdiction's chief prosecuting officer. Efforts to coordinate Federal, State, and local immunity grants should be made to prevent interference with concurrent investigations.

EXHIBIT 2

From: 72 Yale Law Journal

Appendix A: Federal Witness Immunity Acts

Automatic acts

1. 49 Stat. 1499 (1936), 7 U.S.C. § 15 (1958) (Commodity Exchange Act).
2. 42 Stat. 168 (1921), 7 USC. § 222 (1958) (Packers and Stockyards Act).
3. 46 Stat. 536 (1930), 7 U.S.C. § 499m(f) (1958) (Perishable Agricultural Commodities Act).
4. 32 Stat. 904 (1903), 34 Stat. 798 (1906), 15 U.S.C. §§ 32, 33 (1958) (antitrust laws).
5. 38 Stat. 722 (1914), 15 U.S.C. § 49 (1958) (Federal Trade Commission Act).
6. 42 Stat. 853 (1922), 15 U.S.C. § 155(c) (1958) (China Trade Act).
7. 46 Stat. 699 (1930), 19 U.S.C. § 1333(c) (1958) (Tariff Commission).
8. 68A Stat. 586 (1954), 26 U.S.C. § 4874 (1958) (cotton futures tax).
9. 68A Stat. 793 (1954), 26 U.S.C. § 7493 (1958) (cotton futures tax).
10. 49 Stat. 977 (1935), 27 U.S.C. § 202(c) (1958) (Federal Alcohol Administration).
11. 52 Stat. 1065 (1938), 29 U.S.C. § 209 (1958) (Fair Labor Standards Act).
12. 73 Stat. 539 (1959), U.S.C.A. § 521(b) (1962 Supp.) (Labor-Management Relations Disclosure Act).
13. 39 Stat. 737 (1916), 46 U.S.C. § 827 (1958) (Shipping Act).
14. 48 Stat. 1096 (1934), 47 U.S.C. § 409(1) (1958) (Communications Act).
15. 32 Stat. 848 (1903), 49 U.S.C. § 43 (1958) (Elkins Act).
16. 27 Stat. 443 (1893), 32 Stat. 904 (1903), 34 Stat. 798 (1906), 49 U.S.C. §§ 46 - 48 (1958) (Interstate Commerce Act).
17. 49 Stat. 548 (1935), 49 U.S.C. § 305(d) (1958) (Motor Carriers Act).
18. 54 Stat. 946 (1940), 49 U.S.C. § 916(a) (1958) (Water Carriers Act).
19. 56 Stat. 297 (1942), 49 U.S.C. § 1017(a) (1958) (Freight Forwarders Act).

Claim acts - subpoena and oath not required

1. 64 Stat. 882 (1950), 12 U.S.C. § 1920(d) (1958) (Federal Deposit Insurance Corporation).
2. 48 Stat. 86 (1933), 15 U.S.C. § 77v(c) (1958) (Securities Act).
3. 48 Stat. 899 (1934), 15 U.S.C. § 78u(d) (1958) (Securities Exchange Act).
4. 49 Stat. 831 (1935), 15 U.S.C. § 79r(e) (1958) (Public Utilities Holding Company Act).
5. 54 Stat. 842 (1940), 15 U.S.C. § 80a - 41(d) (1958) (Investment Companies Act).
6. 54 Stat. 853 (1940), 15 U.S.C. § 80b - 9(d) (1958) (Investment Advisors Act).
7. 52 Stat. 838 (1928), 15 U.S.C. § 717m(h) (1958) (Federal Power Commission regulation of natural gas).
8. 49 Stat. 856 (1920), 16 U.S.C. § 825f(g) (1958) (Federal Power Commission regulation of public utilities).
9. 49 Stat. 449 (1935), 26 U.S.C. § 161(3) (1958) (National Labor Relations Board).
10. 49 Stat. 624 (1935), 42 U.S.C. § 405 (f) (1958) (Social Security Act).
11. 52 Stat. 1107 (1938), 45 U.S.C. § 362(c) (1958) (Railroad Unemployment Insurance Act).
12. 49 Stat. 1991 (1936), 46 U.S.C. § 1124(c) (1958) (Merchant Marine Act).
13. 72 Stat. 792 (1958), 49 U.S.C. § 1484(i) (1958) (Aviation Act).
14. 56 Stat. 185 (1942), 50 U.S.C. App. § 643a (1958) (war contractors investigations).
15. 54 Stat. 676 (1940), 50 U.S.C. App. § 1152(a)(4) (1958) (national defense contracts investigations).
16. 64 Stat. 816 (1950), 50 U.S.C. App. § 2155(b) (1958) (Defense Production Act).

Claim acts - subpoena and oath required

1. 18 U.S.C.A. § 835(b) (1962 Supp.) (Interstate Commerce Commission investigations relating to explosives).

EXHIBIT 3

Existing Maine Law.

§ 1103. Immunity of witnesses from prosecution

If any person shall give testimony or evidence required of him in any court of this State or any federal court, with respect to contracts, combinations or conspiracies in restraint of trade or commerce or to monopolize or attempt to monopolize any part of the trade or commerce of this State, he shall not thereafter be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning such contracts, combinations or conspiracies about which he may testify or produce evidence, and no testimony or evidence produced shall be received against him upon any criminal action, investigation or proceeding instituted under the laws of this State. No person so testifying or producing evidence shall be exempt from prosecution or punishment for perjury committed in so testifying.

1961, c. 280

EXHIBIT 4

From: 21 American Jurisprudence 2nd

C. Immunity Resulting From Being Compelled To Testify; Agreements Not To Prosecute

§ 146. Generally; Historical background.

It seems to have been the policy of the English courts from the earliest period to encourage accomplices to become witnesses for the Crown, by holding out to them the hope of pardon on a free and full disclosure of their guilt and that of their associates in crime, and the first method of attaining this result was by what was known as "the practice of approvement." The course in pursuing this old form was for the culprit, indicted for treason or felony, to confess the truth of the charge and, on being sworn to reveal all the treasons or felonies within his knowledge, to enter before a coroner his appeal against all his partners in crime who were within the realm. The criminal thus confessing was called the "approver," or, in Latin, "probator," and the person implicated was styled the "appellee." By this confession and appeal the approver put it in the discretion of the court either to give judgment and award execution against him or to respite him until the conviction of his partners in guilt. If it was deemed advisable to admit him as an approver, and then if, upon being sworn, he made a full and true disclosure and also convicted the appellee, either by his oath or on wager of battle, the King, ex merito justitiae, pardoned him "as to his life." This practice, with its conditions that the appellee could claim a trial by battle and that grace to the approver should be dependent on his conviction of his associate in crime, was plainly at variance with modern sentiments and habits, and consequently it passed out of use.[12] Yet since the purpose it served was of value to judicial administration, it was inevitable that some equivalent should take its place, and the English practice on such occasions seems to have assumed, long since, a settled form. Under the modern practice there are pardons grantable as of common right, without any exercise of the King's discretion, as where a statute creating an offense or enacting penalties for its future punishment holds out a promise of immunity to accomplices to aid in the conviction of their associates. When accomplices do so voluntarily, they have a right absolutely to a pardon. The same is also true when, by the King's proclamation, they are promised immunity on discovering their associates and are the means of convicting them. Except in these cases, however, accomplices, though admitted to testify according to the usual phrase as "King's evidence," have no absolute claim or legal right to a pardon.[13] They have an equitable claim to pardon if, on the trial, a full and fair disclosure of the joint guilt of one of them and his associates is made. They cannot plead it in bar of an indictment for the offense, but they may use it to put off the trial in order to give time to apply for a pardon.[14] If the accomplice acts in bad faith or fails to testify fully and fairly, he may still be prosecuted as if he had never been admitted as a witness.[15]

EXHIBIT 5

Model State Witness Immunity Act

Passed by the National Conference of Commissioners

on Uniform State Laws in 1952.

In any criminal proceeding before a court or grand jury, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the prosecuting attorney, in writing, and with the approval of the Attorney General, requests the court to order that person to answer the question or produce the evidence, the court after notice to the witness and hearing shall so order, unless it finds to do so would be clearly contrary to the public interests, and that person shall comply with the order. After complying, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence. He may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce evidence, in accordance with the order.