State of Maine

May 1, 1974 29C-20
June 5, 1974 meeting

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 29C Forgery and Related Offenses

Section 8 Negotiating a Worthless Instrument

1. A person is guilty of negotiating a worthless instrument if he intentionally issues or negotiates a negotiable instrument knowing that it will not be honored by the maker or drawee.

2. It shall be presumed that the person issuing or negotiating the instrument knew that it would not be honored upon proof that:

A. the drawer had no account with the drawee at the time the instrument was negotiated; or

B. payment was refused by the drawee for lack of funds upon presentation within a reasonable time after negotiation or issue, as determined according to Title 11, section 3-503, and the drawer failed to make good within 5 days after actual receipt of a notice of dishonor, as defined in Title 11, section 3-508.

3. As used in this section, the following definitions apply:

A. "Issue" has the meaning provided in Title 11, section 3-102(1)(a);

B. "Negotiable instrument" has the meaning provided in Title 11, section 3-104;

C. "Negotiation" and its varients have the meaning provided in Title 11, section 3-202.

4. Negotiating a worthless instrument is a class D crime.

Comment

Source: This section is patterned on the Hawaii Penal Code, 1973, section 857.

Current Maine Law: Title 17 contains two sections on this subject;

> §1605: Any person individually or as an officer of a corporation or member of a partnership or firm who, with intent to defraud, makes or draws, or utters or delivers, any check, draft or order in the name of the individual or in the name of any corporation or partnership or under any name whatsoever for the payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft or order in full upon its presentation, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 11 months, or by both.
>
> §1606: As against the maker or drawer thereof, or as against the person signing a check, draft or order for, or in behalf of a corporation or partnerhsip, or against a person signing a corporation, firm or business name by him, the making, drawing, uttering or delivery of a check, draft or order, payment of which is refused by the drawee for lack of sufficient funds, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank or other depository, provided such maker or drawer shall not have paid the drawee or holder thereof the amount due thereon, together with all costs and protest fees, within 5 days after receiving notice that such check, draft or order has not been paid by the drawee.

The Draft: This section punishes passing bad checks or other worthless negotiable paper. The definitions are taken from the UCC provisions in Title 11. It is not necessary that any property be obtained in return.

TITLE D1 GENERAL PRINCIPLES

Chapter 11 Preliminary

Section 13 Presumptions

When this Code establishes a presumption with respect to any fact which is an element of a crime, it has the following consequences:

1. When there is sufficient evidence of the facts which give rise to the presumption to go to the jury, the issue of the existence of the presumed fact must be submitted to the jury, unless the court is satisfied that the evidence as a whole clearly negatives the presumed fact; and

2. When the issue of the existence of the presumed fact is submitted to the jury, the court shall charge that while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.

Comment

Source: This section is taken from the New Hampshire Criminal Code, section 626:7 and Title 17, section 1632 of the Maine statutes.

Current Maine Law: Title 17, section 1632 provides the same rules as this draft, but is restricted to crimes relating to credit cards. The Supreme Judicial Court has indicated, moreover, that "there is no constitutional objection to a statute making one fact presumptive or prima facie evidence of another." State v. Larrabee, 156 Maine 115, 119 (1960).

The Draft: Since several presumptions are created by the Code, it is necessary to describe the function of a presumption. Subsection 1 states the general principle that a presumption means that proof of the basic fact is normally enough to get to the jury on the question of the existence of the presumed fact. The problem of rebutting the presumption is dealt with in the last part of this subsection which states that the court must rule, as a matter of law, against the existence of the presumed fact when the total posture of the case clearly indicates the non-existence of the presumed fact. Unless the court finds the case to go so strongly against the presumed fact, the issue must go to the jury. In subsection 2, the troublesome question of what the jury is to be told about a presumption is answered. The subsection requires a restatement of the reasonable doubt rule and an instruction that proof of the basic fact may be taken as satisfying the requirement of proof beyond a reasonable doubt as far as the presumed fact is concerned.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 29G Fraud (Approved as amended 4-11-74, from page 29G-1)

Section 1 Deceptive Business Practices

1. A person is guilty of deceptive business practices if, in the course of engaging in a business, occupation, or profession, he intentionally

A. uses or possesses with the intent to use, a false weight or measure, or any other device which is adjusted or calibrated to falsely determine or measure any quality or quantity; or

B. sells, offers or exposes for sale, or delivers less than the represented quantity of any commodity or service;or

C. takes more than the represented quantity of any commodity or service when as buyer he furnished the weight or measure; or

D. sells, offers, or exposes for sale any commodity which is adulterated or mislabelled; or

E. sells, offers or exposes for sale a motor vehicle on which the speedometer or odometer has in fact been turned back, adjusted or replaced so as to understate its actual mileage, without disclosing the understatement; or

F. sells, offers or exposes for sale a motor vehicle on which the manufacturer's serial number has in fact been altered, removed or obscured; or

G. makes or causes to be made a false or misleading statement in any advertisement addressed to the public or to a substantial number of persons, in connection with the promotion of his business, occupation or profession or to increase the consumption of specified property or service; or

H. offers property or service, in any manner including advertising or other means of communication, as part of a scheme or plan with the intent not to sell or provide the advertised property or services (i) at all, or (ii) at the price or of the quality offered, or (iii) in a quantity sufficient to meet the reasonably expected public demand unless the advertisement or communication states the approximate quantity available; or

I. conducts, sponsors, organizes or promotes a publicly exhibited sports contest with the knowledge that he or another person has tampered with any person, animal or thing that is part of the contest, with the intent to prevent the contest from being conducted in accordance with the rules and usages purporting to govern it or with the knowledge that any sports official or sports participant has accepted or agreed to accept any benefit from another person upon an agreement or understanding that he will thereby be influenced not to give his best efforts or that he will perform his duties improperly.

2. It is a defense to a prosecution under subsection 1G and subsection 1H that a television or radio broadcasting station, or a publisher or printer of a newspaper, magazine or other form of printed material, which broadcasts, publishes or prints a false, misleading advertisement did so without knowledge of the advertiser's intent.

3. As used in this section:

A. "adulterated" means varying from the standard of composition or quality prescribed for the substance by statute or by lawfully promulgated administrative regulation, or if none, as set by established commercial usage;

B. "mislabeled" means having a label varying from the standard of truth and disclosure in labeling prescribed by statute or lawfully promulgated administrative regulation, or if none, as set by established commercial usage.

4. Deceptive business practices is a class D crime.

Section 2. Defrauding a Creditor (Approved as amended 4-11-74, from page 29G-4.)

1. A person is guilty of defrauding a creditor if

A. he destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest, as defined in section 1-201(37) of Title 11, with the intent to hinder enforcement of that interest; or

B. knowing that proceedings have been or are about to be instituted for the appointment of an administrator, he

(1) destroys, removes, conceals, encumbers, transfers or otherwise deals with any property with a purpose to defeat or obstruct the claim of any creditor; or

(2) presents in writing to any creditor or to an assignee for the benefit of creditors, any false statement relating to the debtor's estate, knowing that a material part of such statement is false.

2. As used in this section "assignee for benefit of creditors means a receiver, trustee in bankruptcy, or any other person entitled to administer property for the benefit of creditors.

3. Defrauding a creditor is a class D crime.

Section 3. Misuse of Entrusted Property (Approved with amended title, 4-11-74; from page 29G-5.)

1. A person is guilty of misapplication of property if he deals with property that has been entrusted to him as a ficuciary, or property of the government or of a financial institution, in a manner which he knows is a violation of his duty and which involves a substantial risk of loss to the owner or to a person for whose benefit the property was entrusted.

2. As used in this section

A. "fiduciary" includes any person carrying on fiduciary functions on behalf of an organization which is a fiduciary;

B. "financial institution" and "government" have the meanings provided in subsection 4 of section 8 of chapter 25.

3. Misapplication of property is a class D crime.

Section 4. Private Bribery (Approved as amended 4-11-74, from page 29G-6.)

1. A person is guilty of private bribery if

A. he offers, gives or agrees to give any benefit to:

(i) an employee or agent with the intention to influence his conduct adversely to the interest of the employer or principal of the agent or employee; or

(ii) a hiring agent or an official or employee in charge of employment upon agreement or understanding that a particular person, including the actor, shall be hired, retained in employment or discharged or suspended from employment; or

(iii) a fiduciary with the intent to influence him to act contrary to his fiduciary duty; or

(iv) a sports participant with the intent to influence him not to give his best efforts in a sports contest; or

(v) a sports official with the intent to influence him to perform his duties improperly; or

(vi) to a person in a position of trust and confidence in his relationship to a third person, with the intention that the trust or confidence will be used to influence the third person to become a customer of the actor, or as compensation for the past use of such influence.

B. he knowingly solicits, accepts or agrees to accept any benefit, the giving of which would be criminal under subsection 1A.

State of Maine

May 1, 1974 29G-713
May 8, 1974 meeting

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 29G Fraud

Section 5 Misuse of Credit Identification

1. A person is guilty of misuse of credit identification if, in order to obtain property or services, he intentionally or knowingly:

A. presents or uses a credit card which is stolen, forged or cancelled; or

B. presents a credit or billing number which he is not authorized to use.

2. It is an affirmative defense to prosecution under this section that the defendant believed in good faith that he had a right to present or use the card or number.

3. Misuse of credit identification is a class D crime.

Comment

Source: This section is a modification of chapter 266, section 24 of the Proposed Criminal Code of Massachusetts.

Current Maine Law: Title 17, §1621 prohibits unauthorized use of credit devices to obtain telephone service. Sections 1624-1634 define several crimes relating to credit cards, including forgery, theft and illicit use of credit cards.

The Draft: This section is more narrow than present coverage in sections 1624-1634 since other chapters such as Theft and Forgery will include credit cards.

Section 6. Use of Slugs

1. A person is guilty of use of slugs if:

A. with intent to defraud, he inserts or deposits a slug in a coin box, turnstile, vending machine or other mechanical or electronic device or receptacle; or

B. he makes, possesses or disposes of a slug with intent to enable a person to insert or deposit it in a coin box, turnstile, vending machine or other mechanical or electronic device or receptacle.

2. As used in this section, "slug" means an object or article which, by virtue of its size, shape or other quality, is capable of being inserted or deposited as an improper substitute for a genuine coin, bill, pass, key or token in a coin box, turnstile, vending machine or other mechanical or electronic device or receptacle which is designed to automatically offer, provide, assist in providing or permit the acquisition of some property or services in return for the insertion or deposit of a genuine coin, bill, pass, key or token.

3. Use of slugs is a class D crime.

Comment

Source: This section is taken from chapter 266, section 25 of the Proposed Criminal Code of Massachusetts.

Current Maine Law: There does not appear to be any specific statute on this subject. Title 17, §1601 does, however, prohibit use of a "false token" with intent to defraud as a means of obtaining property.

The Draft: This section does not require that any property be obtained by use of the slug. It is designed to cover every mechanical means for providing services or property by use of some coin or similar object, including cigarette machines, turnstyles, and public telephones. Although Title 8, §442 mentions the legitimate use of slugs in a pin ball machine, this section would not penalize such conduct since there is here required an intent to defraud.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 26 Burglary and Criminal Trespass

Section 3 Possession of Burglar's Tools

1. A person is guilty of possession of burglar's tools if he possesses or makes any tool, implement, instrument or other article which is adapted, designed or commonly used for advancing or facilitating offenses involving unlawful entry into property or offenses involving forcible breaking of safes or other containers or depositories of property, including but not limited to a master key designed to fit more than one vehicle, with intent to use such tool, implement, instrument or other article to commit a criminal offense.

2. Possession of burglar's tools is a class D crime.

Comment

Source: This section is a modification of chapter 266, section 12 of the Proposed Criminal Code of Massachusetts.

Current Maine Law: Title 17, section 1813 now provides for forfeiture of "all burglars' tools or implements prepared or designed for burglary." There is no criminal penalty attached to the possession of these tools.

The Draft: This section is designed to be complementary to the law dealing with attempts. It reaches those who possess with the intent to use the thing in order to commit a crime.

Section 4. Trespass by Motor Vehicle

1. A person is guilty of trespass by motor vehicle if, knowing that he is not licensed or privileged to do so, he intentionally or knowingly permits a motor vehicle belonging to him or subject to his control to enter or remain in or on the property of another.

2. Trespass by motor vehicle is a class D crime.

Owner presumed responsible

24 hr

exclude claims for injury

Comment

Source: This section is taken from chapter 266, section 15 of the Proposed Criminal Code of Massachusetts.

Current Maine Law: Section 2251 of Title 17 reads:

> "No person shall put or place, cause to be put or placed . . . any . . . old automobiles . . . Any person who violates this section shall be punished by a fine of not more than $100."

The Draft: This section is designed to deal with a number of problems. One is the matter of abandoning motor vehicles on the property of other persons. A lesser problem is parking of cars on such property. The draft requires that the person operating the vehicle know that he has no right to put it where he does. The presumption in subsection 2 is based on the realistic expectation that registered owners drive their cars, and that if, in a given instance, someone else was at the wheel, the owner is the one best suited to indicate this to be so.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 29D Offenses Against Public Administration

Section 5 Escape (Approved as amended 5-8-74, page 29D-13)

1. A person is guilty of escape if, without official permission, he intentionally leaves official custody, or intentionally fails to return to official custody following temporary leave granted for a specific purpose or a limited period.

2. In the case of escape from arrest, it is a defense that the arresting officer acted unlawfully in making the arrest. In all other cases, it is no defense that grounds existed for release from custody that could have been raised in a legal proceeding.

3. As used in this section, "official custody" means arrest, custody in, or on the way to or from a jail, police station, house of correction, or any institution or facility under the control of the Bureau of Corrections, or under contract with the Bureau for the housing of persons sentenced to imprisonment, the custody of any official of the Bureau, or any custody pursuant to court order. It does not include custody of person under 18 years of age unless such person has been administratively transferred to custody in the men's or women's correctional center, or the custody is as a result of a finding of probable cause made under the authority of section 2611(3) of Title 15 or is in regard to

offenses over which juvenile courts have no jurisdiction, as provided in section 2552 of Title 15. A person on a parole or probation status is not, for that reason alone, in "official custody" for purposes of this section.

4. Escape is a class B crime if it is committed by force against a person, threat of such force, or while the defendant is armed with a dangerous weapon. Otherwise it is a class C crime.

Section 6. Aiding Escape (Approved as amended 5-8-74, page 29D-20)

1. A person is guilty of aiding escape if, with the intent to aid any person to violate section 5,

A. he conveys or attempts to convey to such person, any contraband; or

B. he furnishes plans, information, or other assistance to such person; or

C. being a person whose official duties include maintaining persons in official custody, as defined in subsection 3 of section 5, he permits such violation, or an attempt at such violation.

2. [illegible]

2. As used in this section, and in section 7, "contraband" means a dangerous weapon, any tool or other thing that may be used to facilitate a violation of section 5, or any other thing which a person confined in official custody is prohibited by statute or regulation from making or possessing.

3. Aiding escape is a class C crime, unless the contraband involved in a violation of subsection 1A includes a dangerous weapon, in which case it is a class B crime.

4. A person may not be indicted or charged in an information with both a violation of this section and as an accomplice to a violation of section 5.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 26 Burglary and Criminal Trespass

Section 3 Possession of Burglar's Tools (Approved as amended 5-8-74, page 26-3)

1. A person is guilty of possession of burglar's tools if he possesses or makes any tool, implement, instrument or other article which is adapted, designed or commonly used for advancing or facilitating offenses involving unlawful entry into property or offenses involving forcible breaking of safes or other containers or depositories of property, including but not limited to a master key designed to fit more than one lock, with intent to use such tool, implement, instrument or other article to commit any such criminal offense.

2. Possession of burglar's tools is a class D crime.

Section 4. Trespass by Motor Vehicle (Approved as amended 5-8-74, page 26-4)

1. A person is guilty of trespass by motor vehicle if, knowing that he has no right to do so, he intentionally or knowingly permits a motor vehicle belonging to him or subject to his control to enter or remain in or on

A. the residential property of another; or

B. the non-residential property of another for a continuous period in excess of 24 hours.

2. It shall be presumed that the defendant was the person who permitted the vehicle to enter or remain on the property if it is proved that he was the registered owner of such vehicle.

3. Trespass by motor vehicle is a class D crime.

STATE OF MAINE

Commission to Prepare a Revision of the Criminal Laws

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May 29, 1974

TO: Commission and Consultants

FROM: Sanford J. Fox

The next meeting of the Commission is scheduled for June 5, 1974. The agenda for this meeting is as follows:

1. Chapter 29H, Unlawful Gambling, §§1-7 (dated May 2, 1974)

2. Chapter 22, §§11, 12 (dated May 1, 1974)

3. Chapter 29C, §8 (dated May 1, 1974)

4. Chapter 12, §§9, 10, 11, dealing with competence to stand trial, the insanity defense, and procedures for determing insanity (enc.)

5. The three most important chapters of An Alternative Sentencing System; Chapters 1A, 2A, and 3A (enclosed). These chapters are designed to operate on provisions defining offenses which themselves will have to be modified in regard to their classification subsections. An example will help to clarify this.

Chapter 26, section 1, defines the crime of burglary. Subsection 4 contains classification criteria. To fit in with the Alternative Sentencing System, this subsection would be modified as follows:

4. A person convicted of burglary is:

A. in sentencing class B if

(i) he was armed with a firearm; or

(ii) he knew than an accomplice was armed with a firearm; or

(iii) he has twice within the preceeding two years been convicted of burglary.

According to section 3 of the enclosed Chapter 1A this person MUST be imprisoned for a definite period fixed by the court at not less than five years not more than ten years. Please note also that the aim of section 6 of the same chapter is to REQUIRE that previous convictions be charged and proved. It remains open for the Commission to change this to any other sentencing class, in which case the judge's choice of imprisonment period would be different (see the rest of section 3, chapter 1A), and to modify the content of (i) to (iii) by having the sentencing class take account of other aggravating or mitigating factors. The basic policy represented by this redraft, however, is that recognition of the major aggravating and mitigating circumstances is properly a legislative function. That is, it is for the legislature to say that, regardless of anything else, any person who commits burglary with a gun in his hand must be imprisoned; regardless of anything else, any person who persistently breaks into other people's houses (two times, three times . . .) must be imprisoned. The new subsection 4 could also be written to embody a legislative decision that, regardless of anything else, a burglar who is not yet 18 years old shall NOT be imprisoned, or should be imprisoned for no more than 30 days, etc. In regard to burglary, therefore, the alternative system is to leave the judge discretion about the term of imprisonment, but not about whether there should be imprisonment. In regard to other crimes, it is possible to grant the judge discretion to take into account factors not specified in the legislation so that he can decide the imprisonment or no imprisonment issue; but the expectation is that this will be an exception in the new sentencing system, and then would be done only with the most minor sorts of crimes.

The prosecutor's discretion is similarly circumscribed and transferred to the legislature - this time in regard to previous convictions. The policy of the new sentencing system is that previous convictions are of such importance that they must be brought forward and not left to be ignored by the exercise of discretion in the plea bargaining process. The prosecutor retains discretion to charge a lesser offense, Criminal Trespass in the Burglary situation, for example.

Although the proposal is that the judge fix a definite number of years, there has not yet been drafted the parts of the sentencing system which relate to how much of that period must be served. There are several alternatives: (1) all of it, less good time deductions. There is no parole or early release under this alternative. Furloughs and work release could continue. (2) Mandatory

release upon completion of one-third, one-half, two-thirds, etc. of the sentence, less good time deductions. (3) Discretionary release under the present parole set-up, with eligibility fixed at one-third, one-half, etc. of the sentence. The reason why these provisions have not been drafted is a matter of first obtaining the Commission's approval for a new sentencing system of this sort. I am prepared at this point, however, to disclose that I would recommend (1) as the policy to be adopted. There are several reasons: (a) the judge is going to fix the sentence with an eye to how much will be served in any event, so that under any alternative he is going to have a large share of the decision, with corrections authorities, on how much time will be spent in prison; (b) the first alternative has the advantage of making the whole of the sentencing decision far more visible, both to the public and to the offender, than do the other alternatives. Responsibility for the sentencing of criminals rests squarely with the legislature and the judge. The offender knows from the outset, far more clearly than under the other alternatives, just when he will get out. He is under no pressure to join programs merely for the sake of establishing a record for his parole hearing. Concededly, this means that the programs in the institutions will have to sell themselves to the inmates; but pressure of program administrators of this kind is probably a very good thing; (c) order and control of inmate populations does not significantly depend on apprehensions about establishing a record for the parole board. The furlough program is far more effective as a motivation toward conformity with institutional rules and regulations. If the good time rate is increased as recommended by the Corrections Task Force, as I think it should be, there would be an added motivation to conform. It appears to be the case that the parole board releases virtually everyone who is elibible at the prison so that the scrutiny of the board is of minor significance in aiding administrative control; and (d) the first alternative serves to transfer what is now correctional discretion to the legislature, as was done in regard to judicial and prosecutorial discretion.

State of Maine

May 28, 1974 1A-1
June 10, 1974 meeting

AN ALTERNATIVE SENTENCING SYSTEM

Chapter 1A General Sentencing Provisions

Section 1 Purposes

The general purposes of this Title are:

1. To prevent crime through the deterrent effect of sentences the restraint of convicted persons when required in the interest of public security, and the development of convicted persons' abilities to avoid further criminality;

2. To minimize correctional experiences which serve to promote further criminality;

3. To give fair warning of the nature of the sentences that may be imposed upon the conviction of crime;

4. To eliminate inequalities in sentences that are unrelated to legitimate public goals;

5. To redefine discretionary authority regarding sentencing and correctional decision making; and

6. To provide sentences which reflect the gravity of offenses

Section 2. Authorized Sentences

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

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

A. Unconditional discharge, conditional discharge, or probation, as authorized by sections 3 and 4;

B. To a period of imprisonment, as authorized by section 3;

C. To pay a fine, as authorized by Chapter ___. Subjec to the limitations of chapter ___, section ___, such a fine may be imposed in addition to probation, as a condition of a conditional discharge, or in addition to a sentence of imprisonment authorized by section 3.

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

A. Unconditional discharge, conditional discharge, or probation, as authorized by sections 3 and 4. These may be imposed in addition to the sanction authorized by section 5 and a fine authorized by chapter ___.

B. The sanction authorized by section 5.

C. A fine authorized by chapter ___.

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

Section 3. Sentences for Each Sentencing Class

1. The court shall sentence a convicted person according to whether

A. Such person is in sentencing class A, B, C, D, E, F or G; and

B. In the case of an organization, whether the special sanction provided in section 5 applies.

2. If the convicted person is a natural person, the following sentences are required for each sentencing class:

A. For class A, the court must sentence to imprisonment for either

(1) a maximum term of life and a minimum which does not exceed twenty-five years; or

(2) a maximum term which does not exceed 50 years and a minimum term which does not exceed twenty-five years or one half of the maximum, whichever is less.

B. For class B, the court must sentence to imprisonment for a fixed period which it sets at not less than five years nor more than ten years;

C. For class C, the court must sentence to imprisonment for a fixed period which it sets at not less than one year but which is less than five years.

D. For class D, the court must sentence to imprisonment for eleven months.

E. For class E, the court must sentence to imprisonment for sixty days.

F. For class F, the court must sentence to imprisonment for thirty days.

G. For class G, the court must sentence either to unconditional release, conditional release, or probation, pursuant to the provisions of section 4.

3. If the convicted person is an organization, the court must sentence it to pay a fine pursuant to chapter ___ and impose the sanction in section 5 if the requirements of subsection 1 of section 5 are satisfied, regardless of the sentencing class otherwise applicable.

4. If the convicted person is a natural person and is in sentencing class B, C, D, E, F, or G, the court may, pursuant to chapter ___, sentence such person to pay a fine in addition to the sentence required by subsection 2.

Section 4. Class G Sentences: Discharges and Probation

1. A convicted natural person in sentencing class G shall be sentenced, pursuant to the provisions of this section, to either unconditional discharge, conditional discharge, or probation.

2. A person shall be sentenced to probation if the court is of the opinion that the supervision and guidance which can be provided by the probation service will make it more likely that the convicted person will refrain from further criminality. Probation is further governed by the provisions of chapter 2A.

3. A person shall be sentenced to conditional discharge if the court is of the opinion that probation is unnecessary but that it will be more likely that he will refrain from further criminality if he conducts himself according to conditions determined by the court. The court may impose any of the conditions set forth in subsection ___ of section ___ in chapter ___. A failure to perform a condition shall be treated as a violation of probation.

4. A person shall be sentenced to an unconditional discharge if the court is of the opinion that neither probation nor conditional discharge is required. A sentence of unconditional discharge is, however, for all purposes a final judgment of conviction.

5. A convicted organization may, in addition to a fine and the sanction in section 5, be sentenced to a conditional discharge or probation if the requirements of subsections 2 and 3 are met, regardless of the sentencing class otherwise applicable.

Section 5. Sanctions for Organizations

1. The sanctions authorized by this section shall be imposed if an organization is convicted

A. of any crime which resulted in a pecuniary benefit to the organization exceeding $10,000; or

B. of any crime which resulted in a pecuniary benefit to the organization exceeding $1,000 if, within the five year period immediately preceeding the conviction, the organization had been convicted of a crime, the elements of which required there to have been fraud or pecuniary benefit to it. Such prior conviction shall be alleged and proved pursuant to section 6.

2. If the provisions of subsection 1 are satisfied:

A. the court shall sentence the organization to give appropriate publicity to the conviction by notice to the class or classes of persons, or the sector of the public interested in or affected by the conviction, by advertising in designated areas or by designated media, or otherwise as the court may direct. Failure to do so by the responsible employee or agent of the organization shall be punishable as contempt of court; and

B. the court shall include in the sentence an order that the director, trustee or managerial agent who committed the crime on behalf of the organization shall, in addition to any sentence which has been or may be imposed on him as a result of prosecution against him personally for such crime, be disqualified from holding office in the same or other organization for a period to be fixed by the court at not less than six months nor more than five years; and

C. the court shall determine whether restitution by individual suit against the organization to persons in the class which the statute was designed to protect who suffered injury by reason of the crime would be impractical, by reason of the multiplicity of small claims, or other circumstances. If the court determines that individual suits would be impractical, it may, prior to imposition of sentence, direct the Attorney General, a County Attorney, or any other attorney specially designated by the court, to institute supplementary proceedings to determine, collect and distribute damages to such persons. The court in which proceedings authorized by this subsection are commenced may order the state to make available to the attorney appointed to institute such proceedings, all documents and investigative reports as are in its possession or control, and grand jury minutes as are relevant to the proceedings.

Section 6. Previous Convictions

1. It shall be the duty of the Attorney General and the County Attorneys to make diligent inquiry to determine whether any person whom they prosecute has previously been convicted of a crime, in this state or in any other jurisdiction. If, from such inquiry, it appears that such person has been so convicted,

A. the evidence of such conviction shall be presented to the grand jury for inclusion, as a separate count, in any indictment which it may return against the person; or

B. allegation of such previous convictions shall be included in the information.

2. If the person is prosecuted by information, allegation of any such previous convictions shall be included therein. That part of the indictment alleging previous convictions may be waived in the same manner as the indictment alleging commission of the offense then being prosecuted. The statement by the court required by Rule 7(b) of the Maine Rules of Criminal Procedure shall include notice that prior convictions are alleged, and the consequences of such convictions being proved. The defendant may waive indictment as to either or both the prior convictions and the crime then being prosecuted.

3. At the time of the arraignment, if the indictment contains no allegation of previous convictions, the attorney representing the state shall certify to the court that subsection 1 has been complied with. He shall not reveal, however, whether his inquiry disclosed no prior convictions, or the grand jury failed to include any previous convictions. If the information contains no allegatic of previous convictions, he shall certify to the court that diliger inquiry revealed that there are no such convictions.

4. At his arraignment, the defendant shall be informed by the court that if he is found guilty after trial of the offense then charged, or pleads guilty to such offense, he shall then be called on to agree or disagree that he has been previously convicte as alleged in the indictment or information, and that if he disagrees, the issue shall be tried by jury, or by the court should he waive a jury trial on this issue.

5. In any trial before a jury on an indictment or information alleging previous convictions, the jury shall not be informed of such allegation prior to returning a verdict on the crime then being prosecuted. Nothing in this section shall, however, be taken as altering the law otherwise governing the admissibility of criminal convictions.

6. Upon the return of a guilty verdict, the convicted person shall be called upon, out of the presence of the jury, if any, to agree or disagree to any allegations concerning previous convictions. If he agrees, the judgment of the court shall include that he has been so previously convicted. If he disagress, the issue shall be tried, by the court or by jury, as he elects. The same jury as tried the allegations of the crime of which he stands convicted, shall try the issue of previous convictions unless the court determines that the interests of justice require empaneling another jury. If the court or the jury finds beyond a reasonable doubt that the person has been convicted previously as alleged, the judgment of the court shall so record. If the court or jury does not so find, the judgment shall record that he has not been previously convicted. Any judgment that includes previous convictions shall name the crime or crimes of which the person has been convicted.

Section 7. Certain Imprisonment Sentences Deemed Tentative

1. When a person has been sentenced to a term of imprisonment for an offense other than aggravated murder, the sentence shall be deemed tentative, to the extent provided in this section.

2. If, as a result of examination and classification by the Department of Mental Health and Corrections of a person under an imprisonment sentence, or as a result of the Department's subsequent evaluation of such person's progress toward a non-criminal way of life, the Department is satisfied that the sentence of the court may have been based upon a misapprehension as to the history character, or physical or mental condition of the offender, or as to the amount of time that would be necessary to provide for protection of the public from such offender, the Department may file in the sentencing court a petition to resentence the offender. The petition shall set forth the information as to the offender that is deemed to warrant his resentence and may include a recommendation as to the sentence that should be imposed.

3. The court may, in its discretion, dismiss a petition filed under subsection 2 without a hearing if it deems the information set forth insufficient to warrant reconsideration of the sentence. If the court finds the petition warrants such reconsideration, it shall cause a copy of the petition to be served on the offender and on the prosecuting attorney, both of whom shall have the right to be heard on the issue. The offender shall have the right to be represented by counsel, and if he cannot afford counsel, the court shall appoint counsel.

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

5. For all purposes other than this section, a sentence of imprisonment has the same finality when it is first imposed that it would have if this section were not in force. Nothing in this section shall alter the remedies provided by law for appealing a sentence, or for vacating or correcting an illegal sentence. As used in this section, "court" means the judge who imposed the original sentence, unless he is disabled or otherwise unavailable.

Section 8. Multiple Sentences

1. When multiple sentences of imprisonment are imposed on a person at the same time or, except as provided in subsection 2, when such a sentence is imposed on a person who is already subject to an undischarged term of imprisonment, the sentences shall run concurrently. When multiple fines are imposed on a person or an organization, the court may, in its discretion, sentence the person or organization to pay the cumulated amount or the highest single fine.

2. When a sentence of imprisonment is imposed

A. for violation of chapter ___, section ___, it shall run consecutively to the sentence being served at the time of the escape;

B. on a person in sentencing class B, C, or D who is at the time of sentencing serving a term of imprisonment, the court may in its discretion order the sentence to be consecutive.

Section 9. Consideration of Other Crimes

1. If the convicted person consents, the court may, in its discretion, take into account in determining sentence, any other crimes committed by such person for which he has not been convicted provided that if there is such consent, the prosecuting attorney shall be notified and afforded an opportunity to be heard. If, following any such hearing, or waiver thereof by the prosecuting attorney, the court takes into account such other crimes as are disclosed by the convicted person, the record shall so state and the sentence imposed shall bar the prosecution or conviction in this state of the person so sentenced. If the court does not take such other crimes into account, the convicted person's disclosure of them, in whole or in part, and any evidence derived directly or indirectly from such disclosure, shall not be admissible against him in any court. Before taking into account any such disclosed crimes the court must be satisfied that the convicted person engaged in the conduct constituting such crimes.

2. Sentences imposed under this section are subject to the provisions of section 8. Upon the imposition of sentence under this section, the clerk of the court imposing sentence shall notify in writing the clerk of the court in which there are pending any of the crimes taken into account, and the clerk of the court in which they are pending shall cause the record of such pending cases to show that they were the subject of proceedings under this sectio The record of the case in which sentence is imposed shall reflect all action taken under this section.

3. Before imposing sentence, the court shall inform the convicted person of the provisions of this section.

AN ALTERNATIVE SENTENCING SYSTEM

Chapter 2A Probation and Conditional Discharge

Section 1 Period of Probation: Modification and Discharge

1. A person may be placed on probation for a period fixed by the court not to exceed two years. The court shall require that a person sentenced to conditional discharge perform the conditions during a period fixed by it not to exceed two years.

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

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

Section 2. Conditions of Probation or Conditional Discharge

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

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

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

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

C. to undergo, as an out-patient, available medical or psychiatric treatment, or to enter and remain, as a voluntary patient, in a specified institution when required for that purpose. Failure to comply with this condition shall be considered only as a violation of probation and shall not, in itself, authorize involuntary treatment or hospitalization.

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

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

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

G. to make restitution, in whole or in part, according to the resources of the convicted person, to the victim or victims of his crime, or to the county where the offense is prosecuted where the identity of the victim or victims cannot be ascertained. As used in this subsection, "restitution" includes the money equivalent of property taken from the victim, or property destroyed or otherwise broken or harmed, and out-of-pocket losses attributable to the crime, such as medical expenses or loss of earnings.

H. to remain within the jurisdiction of the court unless permission to leave temporarily is granted in writing by the probation officer, and to notify the court or the probation officer of any change in his address or his employment;

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

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

K. to pay a fine as authorized by chapter 35.

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

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

Section 3. Probation Revocation

1. At any time before the discharge of the person on probation or the termination of the period of probation, if the probation officer has probable cause to believe that there has been a violation of a condition of probation, the officer may apply to any court for a summons ordering the person to appear before the court for a hearing on the violation. The application for summons shall include a statement of the facts and conduct allegedly constituting the violation of probation. The person on probation shall be furnished a copy of the application by the probation officer.

2. Upon the receipt of the application provided for in subsection 1, the court may, in its discretion:

A. issue the summons and order a hearing on the allegations, or deny the application and order the person on probation released forthwith if he has been arrested on the allegations; or

B. if it is not the court which imposed the probation sentence, transfer the proceedings to such court which shall then proceed pursuant to this section.

C. If a hearing is ordered, the person on probation shall be notified, and the court, including the court to which the proceedings may have been transferred, may issue a warrant for his arrest and order him committed, with or without bail, pending the hearing.

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

4. When the alleged violation constitutes a crime:

A. If the court hearing the violation is a District Court, it may

1. accept a plea of guilty or nolo contendere to such crime, provided all the requirements for accepting such pleas are complied with; or

2. if it has jurisdiction to try such crime, revoke probation if it finds by a preponderance of the evidence that the person on probation committed the crime, or it may order him tried for such crime; or

3. order the allegation of such new crime to be brought before the Superior Court, if it does not have jurisdiction to try such crime.

B. If the court hearing the violation is a Superior Court, it may

1. accept a plea of guilty or nolo contendere to crime, provided all the requirements for accepting such pleas are complied with; or

2. revoke probation if it finds by a preponderance of the evidence that the person on probation committed the crime; o

3. order the person tried for such crime.

5. If the alleged violation does not constitute a crime and the court finds that the person has inexcusably failed to comply with a requirement imposed as a condition of probation, it may revoke probation. In such case, the person shall be in sentencing class F and shall be sentenced as required by section 3 of chapter 1A. If the court does not revoke probation, upon any subsequent violation of probation which does not constitute a crime, the perso shall be in sentencing class E and shall be sentenced as required by section 3 of chapter 1A.

6. If the person on probation is convicted of a new crime during the period of probation, the court shall sentence him for such crime and his probation shall be automatically terminated.

AN ALTERNATIVE SENTENCING SYSTEM

Chapter 3A Sentences of Imprisonment

Section 1 Presentence Evaluations

In the case of a person in sentencing class A, the court shall commit him to the custody of the Department for purposes of such evaluation as is relevant to sentence. No later than 120 days from such commitment, the Department shall return the convicted person to the court, along with the report of its evaluation and a recommended sentence. In the case of sentencing classes B, C and D, the court may commit for such an evaluation.

Section 2. Authority of the Department of Mental Health and Corrections.

1. Upon receiving a person sentenced to imprisonment, the Department shall place the person in a classification program, the aim of which is to determine which institution and program available to the Department is most likely to insure the lawful conduct of such person upon his release from the custody of the Department.

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

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

B. a written statement from the Department to such person stating the classification decision that has been made, notifying him of his right to appeal under subsection 2C, and setting forth the reasons why he is being placed in a particular program; and

C. an appeal of the classification decision to the Commissioner of the Department. Such appeals shall be decided within 60 days from the time they are taken.

3. Upon completion of the classification process, the Department shall place a person sentenced to imprisonment in either a state correctional institution or in a county jail.

Section 3. Calculation of Period of Commitment

1. The sentence of any person sentenced to imprisonment shall commence to run on the date on which such person is received into the custody of the Department.

2. When a person sentenced to imprisonment has been committed for presentence evaluation pursuant to section 1, or has previously been detained to await trial, in any state or county instiuttion, or local lock-up, for the conduct for which such sentence is imposed, such periods of evaluation and detention shall be deducted from the minimum term of such sentence if the person is in sentencing class A, or from the term fixed by the court in the case of al

other sentencing classes. The Department shall have the same authority regarding such local lock-ups as is provided regarding county jails by chapter 34, section 3. The attorney representing the state shall furnish the court, at the time of sentence, a statement showing the length of any such detention, and the statement shall be attached to the official records of the commitment.

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

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

AN ALTERNATIVE SENTENCING SYSTEM

Chapter 4A Fines

Section 1 Amounts Authorized

1. A natural person who is in sentencing class C, D, E, F or G may be sentenced to pay a fine, subject to the provisions of section 2, which shall not exceed:

A. $5,000 for sentencing class C;

B. $1,000 for sentencing class D;

C. $500 for sentencing classes E and F;

D. $100 for sentencing class G; and

E. regardless of the sentencing class, any higher amount which does not exceed twice the pecuniary gain derived from the crime by the defendant.

2. If the defendant convicted of a crime is an organization, the maximum allowable fine which such a defendant may be sentenced to pay shall be:

A. $50,000 for a class A crime;

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

C. $10,000 for a class C or class D crime; and

D. any higher amount which does not exceed twice the pecuniary gain derived from the crime by the convicted organization.

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

Section 2. Criteria for Imposing Fines

No convicted person shall be sentenced to pay a fine unless the court determines that he is or will be able to pay the fine. In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the offender and the nature of the burden that its payment will impose. No person shall be sentenced to imprisonment solely for the reason that he will not be able to pay a fine.

Section 3. Time and Method of Payment of Fines

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

2. If a convicted person sentenced to pay a fine is also sentenced to a conditional discharge or placed on probation, the court may make the payment of the fine a condition. In such cases, the court may order that the fine be paid to the probation officer.

Section 4. Default in Payment of Fines

1. When a convicted person sentenced to pay a fine defaults in the payment thereof or of any installment, the court, upon the motion of the official to whom the money is payable, as provided in section 3, or upon its own motion, may require him to show cause why he should not be imprisoned for non-payment and may issue a summons or a warrant of arrest for his appearance. Unless such person shows that his default was not attributable to a wilful refusal to obey the order of the court or to a failure on his part to make a good faith effort to obtain the funds required for the payment, the court shall find that his default was unexcused and may order him imprisoned until the fine or a

specified part thereof is paid. The term of commitment for such unexcused non-payment of the fine shall be specified in the order of commitment and shall not exceed one day for each five dollars of the fine or six months, whichever is the shorter. When a fine is imposed on an organization, it is the duty of the person or persons authorized to make disbursements from the assets of the organization to pay it from such assets, and failure so to do is punishable under this section. A person committed for non-payment of a fine shall be given credit towards its payment for each day that he is imprisoned at the rate specified in the order of commitment. He shall also be given credit for each day that he has been detained as a result of an arrest warrant issued pursuant to this section.

2. If it appears that the default in the payment of a fine is excusable, the court may make an order allowing the offender additional time for payment, reducing the amount thereof or of each installment, or revoking the fine or the unpaid portion thereof in whole or in part.

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

Section 5. Revocation of Fines

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

2. If, in any judicial proceeding following conviction a court issues a final judgment invalidating the conviction, such judgment may include an order that any or all of a fine which the convicted person paid pursuant to the sentence for such conviction be returned to him.

State of Maine

May 2, 1974 29H-1
June 5, 1974 meeting

TITLE D2 SUBSTANTIVE OFFENSES

Sent to Commission
May 29, 1974.

Chapter 29H Unlawful Gambling

Section 1 Inapplicability to Beano and Bingo

The provisions of this chapter do not apply to:

1. beano or bingo games operated by authority of a license procured under the provisions of chapter ___; or

2. games of chance where the amount gambled at any one time is 25 cents or under and where conducted on the grounds of and during the annual fair of any nonprofit agricultural society eligible for the state stipend under Title 7, section 62, or where conducted by any bona fide charitable, educational, fraternal, patriotic or religious organization. Any person or organization desiring to conduct such games of chance shall be required to obtain a license therefor as provided in chapter ___.

Comment

This section is designed to leave intact the policy regarding operation of beano and bingo games and 25 cent games of chance enacted by the legislature in 1973. The chapter referred to will incorporate, with language amendments to conform to the Code, the provisions of what is now Chapter 13 of Title 17.

Section 2. Definitions

As used in this chapter, the following definitions apply:

1. "Advance gambling activity." A person "advances gambling activity" if, acting other than as a player or a member of the player's family residing with a player in cases in which the gambling takes place in their residence, he engages in conduct that materially aids any form of gambling activity. Conduct of this nature includes, but is not limited to, bookmaking, conduct directed toward the creation or establishment of the particular game, contest, scheme, device, or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment, or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operations. A person also advances gambling activity if, having substantial proprietary control or other authoritative control over premises being used with his knowledge for purposes of gambling activity, he permits that activity to occur or continue, or makes no effort to prevent its occurence or continuation.

2. "Bookmaking" means advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events.

3. "Contest of chance" means any contest, game, gaming scheme, or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.

4. "Gambling." A person engages in gambling if he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome. Gambling does not include bona fide business transactions valid under the law of contracts, including but not limited to contracts for the purchase or sale at a future date of securities or commodities, and agreements to compensate for loss caused by the happening of chance, including but not limited to contracts of indemnity or guaranty and life, health, or accident insurance.

5. "Gambling device" means any device, machine, paraphernalie, or equipment that is used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons or gambling by a person involving the

playing of a machine. However, lottery tickets and other items used in the playing phases of lottery schemes are not gambling devices within this definition.

6. "Lottery" means an unlawful gambling scheme in which:

(a) The players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other medium, one or more of which chances are to be designated the winning ones; and

(b) The winning chances are to be determined by a drawing or by some other method based on an element of chance; and

(c) The holders of the winning chances are to receive something of value.

7. "Mutuel" means a form of lottery in which the winning chances or plays are not determined upon the basis of a drawing or other act on the part of persons conducting or connected with the scheme, but upon the basis of the outcome or outcomes of a future contingent event or events otherwise unrelated to the particular scheme.

8. "Player" means a person over the age of majority who engages in social gambling solely as a contestant or bettor on equal terms with the other participants therein without receiving or becoming entitled to receive something of value or any profit therefrom other than his personal gambling winnings. "Social

gambling" is gambling, or a contest of chance, in which the only participants are players and from which no person or organization receives or becomes entitled to receive something of value or any profit whatsoever, directly or indirectly, other than as a player, from any source, fee, remuneration connected with said gambling, or such activity as arrangement or facilitation of the game, or permitting the use of premises, or selling or supplying for profit refreshments, food, drink service, or entertainment to participants, players, or spectators. A person who engages in "bookmaking" ad defined in subsection 2 is not a "player."

9. "Profit from gambling activity." A person "profits from gambling activity" if, other than as a player, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity.

10. "Something of value" means any money or property, any token, object, or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property, or of any interest therein, or involving extension of a service, entertainment, or a privilege of playing at a game or scheme without charge.

11. "Unlawful" means not expressly authorized by statute.

Comment

Source: Most of the definitions in this section are taken from the Hawaii Penal Code 1973, section 1220.

Current Maine Law: Since this section proposes definitions for a new means of defining criminal gambling, there are no comparable definitions in the present law.

The Draft: The definitions provided here make it possible to define the substantive offenses in the chapter more succinctly. A major policy embodied in these definitions, and the offenses which follow, is that it will not be criminal to be a participant in social gambling. The definition of "player" is designed to facilitate this narrow exception to the gambling prohibitions.

The definitions also permit offenses to be defined so as to make large scale professional gambling activity a more serious offense than is illegal gambling at a lower level.

Section 3. Aggravated Unlawful Gambling

1. A person is guilty of aggravated unlawful gambling if he intentionally or knowingly advances or profits from unlawful gambling activity by:

A. engaging in bookmaking to the extent that he receives or accepts in any twenty-four hour period more than five bets totaling more than $500; or

B. receiving in connection with a lottery, or mutuel scheme or enterprise, money or written records from a person other than a player whose chances or plays are represented by such money or records; or

C. receiving in connection with a lottery, mutuel, or other gambling scheme or enterprise, more than $500 in any twenty-four hour period play in the scheme or enterprise.

2. Aggravated gambling is a class B crime.

Comment

Source: This section is taken from the Hawaii Penal Code, section 1221.

Current Maine Law: The basic gambling crimes in Title 17 are:

> §1801: Whoever engages or participates in pool selling, bookmaking and numbers game, or aids or abets the same by his presence unless the same is authorized by law, or whoever, owning or controlling any place of business wherein such activities or any part thereof are taking place, knowingly permits the same, shall be punished by a fine of not more than $2,000 and by imprisonment for not more than 2 years.
>
> §1802: Whoever keeps or assists in keeping a gambling house or tenement or other place occupied, used, kept or resorted to use as a common gambling house, or for the purpose of gambling for money or other property, or is kept, used or occupied for promoting a lottery or for the sale of lottery tickets, or for prompting the game known as policy lottery or policy, or for buying or selling of pools or registering of bets upon any race, game, contest, act or event, or is found gambling or present at an establishment as described in this section, or permits any person to gamble in any way in any tenement or other place under his care or control, shall be punished by a fine of not more than $100 or by imprisonment for not more than 4 months. The municipal officers, constables and police officers of towns and cities and the assessors of plantations are required promptly to enforce the laws against gambling rooms and to make complaint against any person in their respective municipalities when there is probable cause to believe such person to be guilty of a violation of this section. The District Court shall have original jurisdiction, concurrent with the Superior Court, in all prosecutions for violations of this section.

§1803: Whoever gambles, or bets on any person gambling, shall be punished by a fine of not less than $1 nor more than $20, to be recovered by complaint or indictment to the use of the prosecutor.

This section shall not apply to games of chance where the amount gambled at any one time is 25 cents or under and where conducted on the grounds of and during the annual fair of any nonprofit agricultural society eligible for the state stipend under Title 7, section 62 or where conducted by any bona fide charitable, educational, fraternal, patriotic or religious organization.

Any person, association or corporation desiring to conduct such games of chance shall be required to obtain a linense therefor as provided in Title 17, chapter 13.

§1805: Whoever, upon any railroad train or in any railroad car or upon any steamboat, gambles or bets upon any person gambling shall be punished by a fine of not less than $100 or by imprisonment for not less than 3 months.

In addition, chapter 81 of Title 17 prohibits various forms of lotteries.

The Draft: This section defines a gambling offense that is characterized by its professional and profit-making features. The definitions of "advancing gambling activity" and "profiting from gambling activity" set forth in section 2 are key elements of the offense.

Section 4. Unlawful Gambling

1. A person is guilty of unlawful gambling if he intentionally or knowingly advances or profits from gambling activity.

2. Unlawful gambling is a class D crime.

Comment

Source: This section is taken from the Hawaii Penal Code, section 122.

Current Maine Law: See the statutes set forth in the Comment to section 3.

The Draft: This section defines an offense which is made up of intentionally or knowingly doing any of the things included in the definitions in subsections 1 and 9 of section 2.

Section 5. Possession of Gambling Records

1. A person is guilty of possession of gambling records if, other than as a player, he knowingly possesses any writing, paper, instrument or article, which is being used or is intended by him to be used in the operation of unlawful gambling activity, as defined in this chapter.

2. Possession of gambling records is a class D crime.

Comment

Source: This is a severely restricted version of a possession offense defined in the Hawaii Penal Code, sections 1223 and 1224.

Current Maine Law: Title 17, section 2301 punishes the possession of lottery material with the intent to sell or dispose of it. The possession of betting slips is not a violation of Title 17, section 1811 which prohibits possession of specified gambling devices. State v. Ferris, 284 A.2d 288 (Me. 1971).

The Draft: This section is designed to be part of the effort to control illegal gambling by defining an offense against persons who knowingly participate in the gambling by keeping its records.

Section 6. Possession of Gambling Devices

1. A person is guilty of possession of gambling devices if he manufactures, sells, transports, places, possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody, or use of any gambling device, knowing it is to be used in the advancement of unlawful gambling activity, as defined in this chapter.

2. Possession of gambling devices is a class D crime.

Comment

Source: This section is taken from the Hawaii Penal Code section 1225.

Current Maine Law: Title 17, section 1811 provides:

> §1811: No person shall have in his actual or constructive possession any punch board, seal card, slot gambling machine or other implements, apparatus or materials of any form of gambling, and no person shall solicit, obtain or offer to obtain orders for the sale or delivery of any punsh board, seal card, slot gambling machine or other implements, apparatus or material of gambling. Any person violating this section shall be punished by a fine of not more than $100 or by imprisonment for not more t than 4 months. The municipal officers, constables and police officers of towns and cities, the assessors of plantations and licensed private detectives are required promptly to enforce this section and to make complaint against any person in their respective municipalities where there is probably cause to believe such person to be guilty of a violation of this section. The District Court shall have original jurisdiction, concurrent with the Superior Court, in all prosecutions for violation of this section.

This section does not prohibit possession of betting slips. State v. Ferris, 284 A.2d 288 (Me. 1971).

The Draft: This section is similar to section 5 in that it is designed to reach activity that is necessarily supportive to illegal gambling. The requirement that the actor know that the thing he possesses will be put to illegal use serves to confine the impact of the prohibition.

Section 7. Out of State Gambling

In any prosecution under this chapter it is not a defense that the gambling activity, including the drawing of a lottery, which is involved in the illegal conduct takes place outside this State and is not in violation of the laws of the jurisdiction in which the lottery or other activity takes place.

Comment

Source: This section is a modification of the Hawaii Penal Code section 1228.

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

The Draft: The aim of this section is to insure that the legality of out of state gambling activity does not prevent the operation of the prohibitions in this chapter.

State of Maine

May 21, 1974 12-8
June 5, 1974 meeting
Sent to Commission May 29, 1974.

Chapter 12 Criminal Liability

Section 9 Mental Ability to Stand Trial

1. A motion for trial continuance may be filed by the defendant or by the prosecuting attorney alleging that the defendant's competency to stand trial is impaired by mental disability; that is, that the defendant lacks sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, ~~and~~/or that he lacks sufficient understanding of the proceedings against him, or both.

2. Upon the filing of such a motion, or upon the court's independent determination that there is a question regarding the defendant's competency to stand trial, the court shall conduct a hearing. If, at the hearing, the court determines that there is sufficient reason to believe that further examination of the defendant by licensed psychiatrists or psychologists is necessary to determine the defendant's trial competency and his prognosis for greater competency, the court may adjourn the hearing for this purpose for a period of no more than three weeks.

3. The court shall determine, at the hearing if adjournment is unnecessary, or at a subsequent hearing no more than three weeks after the initial hearing if adjournment was necessary;

A. whether the defendant is incompetent to stand trial because of mental disability and, if so,

B. whether there is substantial probability that the defendant will become competent to stand trial within six months.

C. If the court finds that psychotherapy is required to remedy the defendant's disability, the court shall determine whether an adequate individual plan for the defendant's treatment has been presented by the prosecuting attorney. An adequate plan ~~will~~ most specify the program and facilities available for treatment of the defendant and the prior treatment experiences with comparably disabled persons upon which is based the claim of a substantial probability that the defendant will become competent to stand trial within six months.

4. If the court makes affirmative determinations under subsections 3A and 3B, the court shall grant a trial continuance of no more than three months. If the defendant requires psychotherapy to remedy his disability but is unable to afford such treatment from his own resources, the court shall order that the state provide psychotherapy services to the defendant on an out-patient basis unless it is clearly necessary that treatment be provided on an in-patient basis to make him competent. If in-patient treatment is clearly necessary, the court may order the defendant confined for psychotherapy in an appropriate state facility.

5. No more than three months following the grant of the trial continuance authorized by subsection 4, the court shall conduct a hearing to determine

A. whether the defendant remains incompetent to stand trial because of mental disability and, if so,

B. whether, on the basis of the defendant's progress toward remedying his disability, there is a substantial probability that the defendant will become competent to stand trial within three months.

C. If the court makes affirmative determinations under subsections 5A and 5B, the court may grant a further trial continuance for no more than three months. The court may order, or continue its previous order, that the defendant be confined for psychotherapy in an appropriate state facility as provided in subsection 4.

6. A motion for trial continuance shall not be granted solely because tranquilizing drugs or other medications have been or are being administered to the defendant under medical direction, unless the court finds that there is substantial probability that the defendant will not require the drugs or medication to be competent for trial within the appropriate time limit prescribed by subsection 3 or 5.

7. If, under the procedures set out in subsections 3 or 5, the court determines that a defendant is incompetent to stand trial because of mental disability but that there is no substantial probability that such incompetency will be remedied within the appropriate time limit, or that such incompetency has not been remedied within the time prescribed by subsection 5, the court shall grant no trial continuance on the ground of the defendant's incompetency. If the prosecuting attorney indicates an intention to bring the defendant to trial, the court shall determine at a pretrial hearing whether fundamental fairness to the defendant requires that special trial or pretrial procedures be used in order to redress his disabilities. The court may prescribe any or all of the special pretrial and trial procedures set out below, or such other procedures as it deems necessary:

A. Prior to trial, the court shall review all the evidence that the prosecution intends to offer at trial and shall order pretrial disclosure of evidence that would materially assist the defendant in overcoming the disabilities under which he labors. Disclosure of evidence that may endanger the lives of witnesses, or in any way promote substantial injustice, shall not be ordered;

B. On motion for directed verdict, either before or after jury deliberation, the court shall demand from the prosecution a higher burden of proof than would obtain in an ordinary criminal prosecution, and the court shall insist on extensive

corroboration of the prosecution's case with respect to issues on which the defendant is likely to be prevented by his disability from effective rebuttal;

C. If the trial is before a jury, the court shall instruct the jury that in weighing the evidence against the defendant it should take into account, in the defendant's favor, the disabilities under which he went to trial. If trial is before the judge sitting alone, he shall take account of those disabilities.

8. Any conviction shall be set aside if evidence that was not available for trial because of the defendant's incompetence subsequently becomes available and might have led at trial to a reasonable doubt regarding the defendant's guilt.

Section 10. Mental Abnormality

1. An accused is not criminally responsible if, at the time of the criminal conduct, as a result of mental disease or defect, he either lacked substantial capacity to conform his conduct to the requirements of the law, or lacked substantial capacity to appreciate the wrongfulness of his conduct.

2. As used in this section "mental disease or defect" means any abnormal condition of the mind, regardless of its medical label, which substantially affects mental or emotional processes and substantially impairs the processes and capacity of a person to control his actions.

3. The defendant shall have the burden of proving, by a preponderance of the evidence, that he lacks criminal responsibility as described in subsection 1.

Comment

Source: This section is based on the opinion of the Court of Appeals for the District of Columbia Circuit in United States v. Brawner, 471 F.2d 969 (D.C. Circ. 1972).

Current Maine Law: The present rule concerning insanity in criminal cases is in section 102 of Title 15:

> An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect. The terms "mental disease" or "mental defect" do not include an abnormality manifested only by repeated criminal conduct or excessive use of drugs or alcohol.

The burden of proof is on the defendant. State v. Collins, 297 A.2d 620 (Me. 1972).

The Draft: This section proposes abandoning the so-called Durham rule in favor of the test recently adopted by the court which originated the Durham rule. For those who have the time to canvas the entire rationale of the Brawner decision, copies are enclosed. Although abolition of the insanity defense has been informally discussed at an earlier meeting, research and reflection suggest that it would likely be an unconstitutional rule, in that the rule of an insanity defense seems to be so integral a part of the criminal process that a person may not be convicted without invoking its benefits. At least two courts have indicated that the constitution forbids doing away with the defense. Sinclair v. State, 132 So. 581, 583 (Miss. 1931) (concurring opinion of Ethridge, J.); State v. Strasburg, 110 P. 1020 (Wash. 1910).

Section 11. Procedure Upon Plea of Not Guilty Coupled with Plea of Not Guilty by Reason of Insanity

1. When the defendant enters a plea of not guilty together with a plea of not guilty by reason of insanity, he shall also elect whether the trial shall be in two stages as provided for in this section, or a unitary trial in which both the issues of guilt and of insanity are submitted simultaneously to the jury. At the defendant's election, the jury shall be informed that the two pleas have been made and that the trial will be in two stages .

2. If a two stage trial is elected by the defendant, there shall be a separation of the issue of guilt from the issue of insanity in the following manner:

A. The issue of guilt shall be tried first and the issue of insanity tried only if the jury returns a verdict of guilty. If the jury returns a verdict of not guilty, the proceedings shall terminate.

B. Evidence of mental disease or defect, as defined in section 10, shall not be admissible in the guilt or innocence phase of the trial, but shall only be admissible in the second phase following a verdict of guilty.

3. The issue of insanity shall be tried before the same jury as tried the issue of guilt.

4. If the jury in the first phase returns a guilty verdict, the trial shall proceed to the second phase. The defendant and the state may rely upon evidence admitted during the first phase or they may recall witnesses. Any evidence relevant to the defendant's responsibility, or lack thereof, under section 10, is admissable. The order of proof shall reflect that the defendant has the burden of establishing his lack of responsibility. The jury shall return a verdict that the defendant is responsible, or not guilty by reason of mental disease or defect excluding responsibility. If the defendant is found responsible, the court shall sentence him according to law.

5. This section shall not apply to cases tried before the court without a jury.

Comment

Source: This section is patterned on the Wisconsin Criminal Procedure Code, section 971.175.

Current Maine Law: The present Maine practice is to try the issues of guilty and insanity simultaneously.

The Draft: The draft represents a third choice in addition to leaving trial of the insanity issue as it presently is, and abolishing the defense of insanity. The approach of the draft is to simplify the problem of trying the guilt issue by excluding evidence of insanity until after the defendant has been found tentatively guilty. What authority there is on the constitutionality of doing this is in conflict. Wisconsin has upheld a similar provision against constitutional attack. State v. Hebard, 50 Wis. 2d 408 (1970); State v. Anderson, 51 Wis. 2d 557 (1970);

Gibson v. State, 55 Wis. 2d 110 (1971). Arizona, on the other hand, struck down a two trial statute which, however, did not include an election by the defendant. State v. Shaw, 106 Ariz. 103 (1970). In some respects, the issue appears to be whether there is a due process right to a diminished responsibility defense. The last answer to this from the Supreme Court was negative. Fisher v. United States, 328 U.S. 463 (1946).

The advantages to the defendant of the procedures under this section are that he may have the opportunity to make an insanity defense without thereby making the implied admission to the jury that he committed the act charged against him. As subsection 2B is phrased, the defendant is not precluded, in the guilt phase, from entering evidence of accident, intoxication, or anything else that might raise a reasonable doubt concerning the mens rea element of the crime, save evidence of mental disease or defect; and, of course, the jury will continue to be instructed that it must find the mens rea beyond a reasonable doubt in order to find guilt. In this regard, strong disagreement is expressed here with the statement in Shaw that: "If an individual is insane he would not be able to intend an act, nor would he be able to premeditate or have malice aforethought." 106 Ariz. at 109. The reaction of the Supreme Court of Wisconsin to this seems persuasive. In speaking of this quote from Shaw, the Wisconsin court noted:

> Applied to the case now before us, this would have us state as a matter of law that the defendant, if found insane . . . did not and could not intend to kill the five persons he did kill. He aimed the gun at least five times, each time at the head of one of the five. He pulled the trigger at least five times. He did not miss. The bullets hit their mark and five persons lay dead. The Arizona conclusion is that their deaths cannot be found to have been intentionally caused. We do not share the conclusion, much less its certainty. For, as we see it, a court finding of legal insanity is not a finding of inability to intend; it is rather a finding that under the applicable standard or test, the defendant is excused from criminal responsibility for his acts. 50 Wis. at 419-30.

This view is in conformity with the opinion of Judge Bazelon in Brawner where he identifies the jury's function in these cases as the determination of whether the defendant "cannot justly be held responsible for his act." 471 F.2d at 1032. Judge Bazelon would have the jury instructed in those terms. The majority in Brawner discusses and rejects this alternative at p. 986.

It is proposed that this section be tied in with the existing provisions of Title 15, sections 103 and 104.

Chapter 29D Offenses Against Public Administration

accepted

Section 7 Trafficking in Prison Contraband

1. A person is guilty of trafficking in prison contraband if:

A. he intentionally conveys contraband to any person in official custody; or

B. being a person in official custody, he intentionally makes, obtains or possesses contraband.

2. As used in this section "official custody" has the same meaning as in section 5, provided that solely for purposes of subsection 1A of this section, it does include the custody of all persons under the age of 18.

3. A person guilty of trafficking in prison contraband is in sentencing class F if he has previously been convicted of a violation of section 5, 6 or this section, or was, at the time of the offense, a person in custody. All other persons guilty of trafficking in prison contraband are in sentencing class G.

STATE OF MAINE

Commission to Prepare a Revision of the Criminal Laws

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June 26, 1974

TO: Commission and Consultants

FROM: Sanford J. Fox

Part of the process of clearing up loose ends in our work includes a review of Title 17 to identify parts which do not have direct counterparts anywhere in our present draft. The purpose of this memorandum is to recommend the disposition of those sections in Title 17.

There are four different things which can be done with them, and I have therefore made four lists. One is a list of those parts of Title 17 to which I am referring which I would recommend be repealed and not continued as criminal prohibitions. The second is a list of those sections which I would recommend continuing in the criminal code, rewritten, however, to conform with our format. The third list is of those sections which I think should be continued in the law but elsewhere, not in the criminal code. The fourth list contains those sections about which I have been unable to decide on location within the first three lists; that is, I do not know whether they should be repealed, continued or transferred.

I would appreciate your recommendations by telephone or letter as to all of this, and if there is any time available at the August 15th meeting, we can discuss any part of this.

I. REPEAL

§52. Concealing the death of an infant
§401. Blacklisting
§551. Boxing
§604. Immunity for certain informers
§651-654. Bucket shops
§701-703. Budget planning
§801. Champerty
§1351-1354. Dueling
§1510. Rewards for certain informers
§1661-1706. Commercial frauds
§1751-1754. Maritime frauds
§2201-2207. Libel and slander
Chapter 91 (§§2701-2855) Nuisances

II. CONTINUED

§501,502. Bombs
§2252. Sawdust on the highway
§2253. Out of state waste matter
§2261-71. Litter control
§2321-2326. Machine guns.
§2901-2905. Obscenity.
§3101-3104. Abuse of office.
§3501. Shoplifting.
§3901-3902. Unprotected wells
§3951. Abandoned containers
§3952. Knives
§3957. Failure to report gunshot wounds
§3962. Inteference of radio waves.

III. TRANSFERS

§1301A-1316 Model White Cane Law
§1609A. Motor Vehicle Sales
§2002-2004. Intoxication
§2302. Injunctions against a lottery
§2303. Lottery payments declared void
§3964. Settlements or releases from injured persons

IV. UP IN THE AIR

§§330-346, 1803, 1815, 2306. The Games of Chance law enacted by Chapter 735 of the 1974 First Special Session. (We do have Chapter 29H, Unlawful Gambling)

§2401. Tampering of a railroad car
§2402. Removing packing from railroad journal boxes
§2504. Spiked boots in public places
§2951. Refusal to aid an officer
§2955. Refusal to obey a justice of the peace
§3201-3282. Activities on holy days
§3451-3464. Adulterated food
§3475. Inhaling toxic vapors
§3601-3606. Strikes against railroads and utilities
§3966. Animals in food stores
§3956. Use of electric fences.

I should add that everything else in Title 17 is covered in our draft and should therefore be repealed.