TO: Criminal Law Advisory Commission Members & Consultants

FROM: Stephen Diamond, Assistant Attorney General

Enclosed are the legislative documents amending sections of the Criminal Code which have been printed to date. I am sending these to you in anticipation of the possibility that the Judiciary Committee may want the Commission's input.

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Assistant Attorney General

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TO: Criminal Law Advisory Commission Members and Consultants

FROM: Stephen L. Diamond

RE: Meeting of April 21, 1977

The meeting of April 21, 1977 has been set for 10:00 A.M. in the Auditorium of the Portland Public Safety Building. The agenda is set out below. It is my hope that this will be the final meeting in which amendments to the Commission's bill (L.D. 306) will be discussed. I should like to be in a position to give to the Judiciary Committee all of the amendments approved by the Commission subsequent to the submission of the original bill.

AGENDA

1. Problem of applicability of §4-A to municipal ordinances. I expect one or more representatives of the Maine Municipal Association to address this issue.

2. Conversion amendments (attached).

3. Homicide amendments prepared by the Office of the Attorney General. (I shall mail these out if they are completed in time. Otherwise, they will be distributed at the meeting.)

4. Pending L.D.'s.

17-A M.R.S.A. §6, sub-§§2 and 3, as enacted by PL 1975, c. 740, §16-A, are repealed.

17-A M.R.S.A. §151, sub-§9, last sentence, as enacted by PL 1975, c. 740, §35, is repealed.

17-A M.R.S.A. §152, sub-§4, last sentence, as enacted by PL 1975, c. 740, §36, is repealed.

17-A M.R.S.A. §1152, sub-§1, as last amended by PL 1975, c. 740, §107, is further amended to read:

1. Every natural person and organization convicted of a crime shall be sentenced in accordance with the provisions of this Part. ~~except that the sentence authorized for a crime defined outside the code, and not classified as a Class A, Class B, Class C, Class D or Class E crime shall remain in effect.~~

17-A M.R.S.A. §1252, sub-§2-A, as enacted by PL 1975, c. 740, §117, is repealed.

17-A M.R.S.A. §1301, sub-§1, ¶A-1, as enacted by PL 1975, c. 740, §122, is amended to read:

A-1. ~~$1000~~ $2500 for a Class C crime.

17-A M.R.S.A. §1301, sub-§1, ¶B, as enacted by PL 1975, c. 499, §1, is amended to read:

B. ~~$500~~ $1000 for a Class D crime.

17-A M.R.S.A. §1301, sub-§1, ¶C, as enacted by PL 1975, c.499, §1, is amended to read:

C. ~~$250~~ $500 for a Class E crime.

17-A M.R.S.A. §1301, sub-§4, is enacted to read:

4. Whenever a statute makes the possession of a particular item, whether animate or inanimate, a criminal offense, the statute may expressly provide that the fine shall depend upon the quantity of the item possessed by the defendant. Such statute shall not be subject to the maximum limits placed on fines by subsections 1 and 3 of this section.

17-A M.R.S.A. §15, sub-§1, ¶A, sub-¶(2), as enacted by P.L. 1975, c. 740, §22, is amended to read:

(2) Any Class A, Class B or Class C crime~~;~~ or a violation of section 357 or of section 703, or an attempt to violate section 401; and

COMMENT: This amendment would authorize law enforcement officers to make warrantless arrests, based upon probable cause, for the offenses of theft of services, forgery, and attempted burglary. Forgery is a Class D crime, theft of services is usually a Class E crime, and attempted burglary is usually a Class D crime. Accordingly, present law allows warrantless arrests only if the offense is committed in the officer's presence (see 17-A M.R.S.A. §15).

Theft of services and forgery pose special enforcement problems for a number of reasons. First, they are generally committed outside the presence of an officer. Second, the offenders are frequently from other states, and thus are unknown to both the police and the victim. Third, at least in the case of forgery, the violator is likely to utilize a false identity. As a result, the requirement that the officer secure a warrant to make the arrest will often be an exercise in futility, insofar as the perpetrator will have already left the State. In addition, unless he has volunteered the information, the police may not have his name and address.

It should be noted that with respect to forgery the problem is a direct result of the enactment of the Criminal Code. Under prior law, forgery was a felony for which law enforcement officers could make warrantless arrests

based on probable cause. Pursuant to the Code, the offense is punishable by less than one year unless the face value of the check exceeds $5000. Such cases rarely, if ever, arise in Maine

With respect to attempted burglary, the amendment is directed at the following situation, which occurs with some frequency. A witness notifies the police that an attempted burglary is in progress. The police arrive promptly, and the witness identifies the culprits, who have been unable to complete the break and are ~~there~~ thus walking away from the scene. Under present law, the police could not make an arrest, whereas the proposed amendment would give them this authority.

Finally, there is considerable precedent for permitting warrantless arrests based on probable cause for "misdemeanors." For example, section 1113 allows such arrests for all drug offenses, many of which are Class D, while section 3521 of Title 17 contains similar authorization for shoplifting. In short, the Legislature has shown a willingness to liberalize the common law rules of arrests when necessitated by special circumstances.

17-A M.R.S.A. §59, sub-§2, ¶B, as enacted by P.L. 1975, c. 499, §1, is repealed and the following enacted in place thereof:

B. Evidence of mental disease or defect, as defined in section 58, subsection 2, shall not be admissible in the guilt or innocence phase of the trial for the purpose of establishing the defense of a lack of criminal responsibility, as defined in section 58, subsection 1. Such evidence shall be admissible for that purpose only in the 2nd phase following a verdict of guilty.

COMMENT: The intent of this amendment is to make it clear that evidence of mental disease or defect is inadmissible in the first phase of a bifurcated trial only when it is introduced for the purpose of establishing the insanity defense. Such evidence would be admissible for other purposes, such as to raise a reasonable doubt as to the existence of a culpable state of mind.

17-A M.R.S.A. §59, sub-§3, ~~first sentence,~~ as enacted by 1975 Laws, c.499, §1, is amended to read:

3. The issue of insanity shall be tried before the same jury as tried the issue of guilt. Alternate jurors who were present during the first phase of the trial but who did not participate in the deliberations and verdict thereof may be substituted for jurors who did participate. The defendant may, however, elect to have the issue of insanity tried by the court without a jury.

EXPLANATION

As presently worded, if a juror who participated in the first phase verdict becomes indisposed, it may be impossible to substitute one of the alternates who sat during the first trial, thereby causing a mistrial. Insanity defenses are typically raised in a week-long homocide trials.

Question re 17-A M.R.S.A. §61(2)

The above provision imposes criminal liability on an agent of an organization if he recklessly omits to perform an act required by a criminal statute. A question arises when the criminal statute, which imposes the duty on the organization, specifies a mental state higher than recklessness.

Section 5332 of Title 36 exemplifies this problem. That statute renders criminally liable any person who willfully fails to pay taxes or file a return. Accordingly, under that provision, the organization would be guilty for a willful failure, whereas under §61(2), the agent of the organization would be guilty for a reckless omission. There would appear to be a similar discrepancy in the mental states required for a human being in his private capacity and in his capacity as the agent of an organization.

17-A M.R.S.A. §152, sub-§4, as last amended by 1975 Laws, c.740, §36, is renumbered sub-§5.

17-A M.R.S.A. §152, sub-§4, is enacted to read:

4. An indictment, information or complaint, or count thereof, charging the commission of a crime under chapters 9 through 45 of this title or a crime outside this code shall be deemed to charge the commission of the attempt to commit that crime and shall not be deemed duplicitous thereby.

EXPLANATION

It seems increasingly likely, after State v. McNamara, 345 A.2d 509 (OUI, attempted OUI under same statute), and State v. O'Farrell, 355 A.2d 396 (arson, "4th degree arson") that the Law Court ~~would~~ will decide that attempt is not a lesser included offense of a completed crime because of the specific intent ("to complete the commission of the crime") necessary in attempt. §152(1). The proposed amendment does not purport to make attempt a lesser-included offense, but does state that a charge of a completed crime will also charge an attempt.

17-A M.R.S.A. §153, sub-§1, as enacted by P.L. 1975, C. 499, §1, is amended to read:

1. A person is guilty of solicitation if he commands or attempts to induce another person to commit criminal homicide in the first or 2nd degree or a particular Class A or Class B crime, whether as principal or accomplice, with the intent to cause the imminent commission of the crime, and under circumstances which the actor knows make it very likely that the crime will take place.

Comment: Although subsection 4 of section 153 contains a penalty for solicitation to commit criminal homicide in the first or 2nd degree, these crimes are not included in the definition of the offense in subsection 1. Presumably, this omission was inadvertent.

On a related matter, the Commission may wish to examine section 153 to determine whether the definition of the crime is too narrow. One question stems from the imminent commission requirement. For example, if A offers B money to kill C when the latter comes to Maine in two weeks, there might not be a crime if B should refuse the offer.

Another question arises from the limitation of the offense to Class A and B crimes. Under section 57(3)(A), a person is guilty as an accomplice if he solicits any crime, and the crime is committed. By contrast, he is not guilty if he unsuccessfully solicits a C, D, or E offense. Thus, if A offers B money to steal property (the value of which does not exceed $5,000) and give it to A, the criminal liability of A depends upon B's honesty. It is debatable whether this distinction is philosophically justifiable.

17-A M.R.S.A. §204, sub-§2, as enacted by P.L. 1975, c. 499, §1, is amended to read:

2. Criminal homicide in the 4th degree is a Class ~~B~~ A crime, provided that it is a defense which reduces it to a Class C crime if it occurs as the result of the reckless operation of a motor vehicle.

OR

17-A M.R.S.A. §202, as amended by P.L. 1975, c. 740, §40, is repealed and the following enacted in place thereof:

1. A person is guilty of criminal homicide in the 2nd degree if:

A. He causes the death of another intending to cause such death, or knowing that death will almost certainly result from his conduct; or

B. He recklessly causes the death of another under circumstances manifesting extreme indifference to the value of human life; or

C. He intentionally or knowingly causes another to commit suicide by the use of force, duress or deception.

2. The sentence for criminal homicide in the 2nd degree shall be as authorized in chapter 51.

COMMENT: The above amendments represent possible approaches to the problem raised by Justice Glassman in his letter to the Commission. That letter expressed the opinion that there is "an irrational disparity in the sentencing standards for certain types of criminal homicide."

When viewed in terms of the actual time served, the disparity is even greater than suggested by Justice

Glassman. A person convicted of criminal homicide in the 2nd degree must serve a minimum term of 16 years. By contrast, a person who receives the maximum sentence for criminal homicide in the 4th degree may well serve no more than 6 years and 8 months, after allowance is made for good time.

It should be pointed out that the Maine Criminal Code differs from the recent codifications in its approach to this subject. Both the Model Penal Code (§710.2) and the proposed Federal Criminal Code (§1601) include in their definitions of murder the causing of death "under circumstances manifesting extreme indifference to the value of human life." Although the Hawaii statute is similar to Maine's, the commentary acknowledges that manslaughter may be characterized by a "cruel, wicked, and depraved indifference." To deal with these cases, Hawaii relies on a statute which doubles the maximum penalty if the court finds the defendant to be either a "persistent offender," a "professional criminal," a "dangerous person," or a "multiple offender." Hawaii Penal Code, §706-662.

17-A M.R.S.A. §210, sub-§2, as enacted by P.L. 1975, c. 499, §1 is repealed and replaced as follows:

2. Violation of subsection 1, paragraph A is a Class D crime. Violation of subsection 1, paragraph B is a Class C crime.

EXPLANATION: Most of the threats that are not bomb threats do indeed put people in fear but are in fact just "mouthing off." In fact, the most typical threat is "to kill." The penalty is simply too high. When a weapon is used, but the threat is not imminent (see criminal threatening, §209), the crime will be re-raised to Class C. Threats to witnesses are of a different nature. See suggested changes to §§454 and 754.

17-A M.R.S.A. §454, as enacted by P.L. 1975, c. 499, §1, is repealed and the following enacted in place thereof:

§454 Tampering with witness in informant

1. A person is guilty of tampering with witness or informant if, believing that an official proceeding as defined in section 451, subsection 5, paragraph A, or an official criminal investigation, is pending or will be instituted:

A. He induces or otherwise causes, or attempts to induce or cause a witness or informant

(1) to testify or inform falsely; or

(2) to withhold, beyond the scope of any privilege which the witness or informant may have, any testimony, information or evidence; or

(3) to absent himself from any proceeding or investigation; or

B. He solicits, accepts or agrees to accept any benefit in consideration of his doing any of the things specified in subsection 1, paragraph A.

2. Violation of subsection 1, paragraph A is a Class C crime if it is committed by means of force, violence, or intimidation, or by the offering or giving of any benefit. Violation of subsection 1, paragraph A, is otherwise a Class D crime. Violation of subsection 1, paragraph B is a Class C crime.

17-A M.R.S.A. §754, as enacted by P.L. 1975, c. 499, §1, is repealed and the following enacted in place thereof:

§754 Obstructing criminal prosecution

1. A person is guilty of obstructing criminal prosecution, if:

A. He uses force, violence or intimidation, or he promises, offers, or gives any benefit to another, with the intent to induce the other

(1) to refrain from from initiating a criminal prosecution or juvenile proceeding; or

(2) to refrain from continuing with a criminal prosecution or juvenile proceeding which he has initiated; or

B. He solicits, accepts or agrees to accept any benefit in consideration of his doing any of the things specified in subsection 1, paragraph A, subparagraphs (1) or (2).

2. Obstructing criminal prosecution is a Class C crime.

COMMENT: The redraft of §454 is designed to accomplish the following:

1. To make it clear that the prohibition applies when the person is successful in inducing or causing one of the specified results;

2. To broaden subparagraph (3) so that it covers the situation in which the witness or informant has not been summoned by legal process; and

3. To make the penalty class depend entirely upon the means used (i.e., force, violence, intimidation, or the giving or receiving of a benefit), rather than to differentiate among the specified results.

The redraft of §754 parallels that of §454, except that there is no crime in the absence of one of the specified means. In addition, it extends the prohibition to the person who gives or offers the benefit.

Finally, if the redraft of §754 is accepted, the drug treatment exception will have to be reenacted, although it may be preferable to move it to Title 22 or Title 32.

17-A M.R.S.A. §252, sub-§2, ¶E, as enacted by P.L. 1975, c. 499, §1, is amended to read:

E. The other person is in official custody as a probationer or a parolee, or is detained in a hospital, prison or other institution, and the actor has supervisory or disciplinary authority over such other person~~,~~; or

17-A M.R.S.A. §253, sub-§2, ¶F, is enacted to read:

F. The other person does not expressly or impliedly acquiesce in such sexual intercourse or sexual act.

17-A M.R.S.A. §253, sub-§5, 2nd sentence, as enacted by P.L. 1975, c. 499, §1, is amended to read:

Violation of subsection 2, paragraphs B ~~or~~, D or F is a Class C crime.

COMMENT: A recent series of cases in Aroostook County involved the commission of sexual acts by a "physicians's assistant" (there is some doubt that the individual was actually certified under 32 M.R.S.A. §3270-A) against female patients whom he was examining. Given the unique circumstances of a physical examination, the acts were apparently committed without the acquiescence of the patients, but also without the use of force or threats. Accordingly, the behavior did not constitute gross sexual misconduct. In light of the present wording of §251(1)(D), the conduct also did not fall within the scope of unlawful sexual contact. The purpose of these amendments is to bring the above described behavior within the ambit

of §253 as a Class C crime.

(It should be noted that these amendments do not address the situation in which a physician induces a patient to engage in sexual activity through a misrepresentation that the activity will have some therapeutic value. The Commission may wish to decide whether the Code should deal with that type of problem.)

RE: §302(1)(C)(1) and (2) (Criminal Restraint)

The above section is extremely vague. Read literally, it makes it a crime when a person, knowing he has no legal right to do so, intentionally entices a child under the age of 14 or an incompetent person. It is by no means clear what conduct is included within this prohibition.

It may be that the phrase in subparagraph 3, "from the custody of his parent, guardian or other lawful custodian. . .," was intended to apply to subparagraphs 1 and 2. If that were the case, it is not accomplished in the present wording of §302(1)(C), since the subparagraphs are written in the disjunctive.

17-A M.R.S.A. §351, second sentence, as enacted by 1975 Laws, c.499, §1 is amended to read:

§351 ....

An accusation of theft may be proved by evidence that it was committed in any manner that would be theft under this chapter, notwithstanding the specification of a different manner in the information or indictment~~,~~. The factfinder shall at the request of either party consider all manners of theft which the evidence reasonably supports and need not specify a particular manner in its verdict or finding unless the manner would affect the sentencing class. The court shall have the power ~~subject only to the power of the court~~ to ensure a fair trial by granting a continuance or other appropriate relief if the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

EXPLANATION

The theft consolidation provision at present does not make clear whether an election by the state is required if the evidence shows two or more modes of theft. The purpose of consolidation is frustrated if an election is required: the factfinder might well acquit though it may have wished to convict on the unelected mode of theft. Even assuming that retrial were possible on the

unelected mode (an unlikely assumption under §14), the second factfinder might disagree with the first.

The key operative words are "which the evidence reasonably supports." Because of the proposed changes to §361(2) (Presumptions), the factfinder usually will not be given more than one option in the fairly typical situation in which the primary proof is that defendant was in possession of recently stolen goods.

17-A M.R.S.A. §361, sub-§2, as last amended by 1975 Laws, c.740, §58 is further amended by adding a new sentence thereto at the end:

The above presumptions shall apply to violations of sections 356 and 359 only if the evidence will not suppport a conviction for another section of this chapter, chapter 27 or section 401, in the course of which a theft or robbery took place, or if there is evidence of a violation of section 356 or 359 which is independent of and additional to the evidence that the defendant was in exclusive possession of property recently taken under the circumstances described above.

EXPLANATION

The above amendment is the necessary corrollary to ~~theft~~ that of §351. The consolidation of theft is an important device to prevent fatal varianc in the prosecution of essentially similar conduct. However, the consolidation of "primary" thieves (those who obtained the property from the owner) with "secondary" thieves (those who obtained the property from

the primary thief or later or after the property had been lost) creates procedural problems, particularly with the presumptions arising from possession of recently stolen goods. The "single" presumption that the possessor is guilty of theft is actually a presumption that he is both the primary and the secondary thief — an impossibility. While this creates no great problem in the obtaining-receiving area since sentencing is the same, when the primary theft occurred in the course of a robbery or a burglary, the factfinder is given no guidance as to whether the inference should allow him to find robbery, burglary plus theft (by obtaining) or only receiving.

The proposed amendment would create a preference in favor of primary thieves (including burglars and robbers). The factfinder should only consider secondary theft if (1) there is insufficient evidence of a primary theft or (2) there is evidence generated (beyond that of the presumption itself) of secondary theft. In the latter case, the factfinder will be allowed to consider both possibilities. Receiving would act as a full defense to burglary and a partial defense to robbery (the defendant still being able to be convicted of theft). For the sake of consistency, the same rules would be applied to a charge of theft without burglary or robbery: thus, if the prosecutor does not expect evidence that the defendant committed secondary theft, he should charge primary theft. However, the defendant will not gain an acquittal by convincing the factfinder that he was only a secondary thief.

17-A M.RS.A. §352, sub-§5, ¶E, as last amended by 1975 Laws, C.740, §54, is further amended by adding a new sentence at the end as follows:

Prosecution may be brought in any venue in which one of the thefts which has been aggregated was committed.

17-A M.R.S.A. §805, sub-§1-B, as added by 1975 Laws, c.740, §87 is amended by adding a new sentence at the end as follows:

Prosecution for an aggregated aggravated criminal mischief may be brought in any venue in which one of the criminal mischiefs which has been aggregated was committed.

17-A M.R.S.A. §354, sub-§2, ¶B, as enacted by P.L. 1975, c. 499, §1, is repealed and the following enacted in place thereof:

B. Fails to correct an impression which is false which he does not believe to be true, and which

(1) he had previously created or reinforced; or

(2) he knows to be influencing another whose property is involved and to whom he stands in a fiduciary or confidential relationship;

COMMENT: The present version of this paragraph establishes two ways in which deception may occur, but is ambiguous as to the exact elements which constitute each of the ways. A literal reading of the provision suggests that in every case there must be a failure to correct a false impression created or reinforced by the deceiver but that, when a fiduciary is involved, there is no requirement that the deceiver not believe the impression to be true.

The above redraft is predicated on the idea that the real intent of this statute was, or should have been, to eliminate, in instances of fiduciary or confidential relationships, the requirement that the person had created or reinforced the impression. The redraft would thus subject the fiduciary to criminal responsibility for an intentional omission. Unlike the present statute, it would not impose liability for a failure to correct an erroneous impression, created by the fiduciary, but which the fiduciary did not believe to be false. Cf. Model Penal Code §223.3 (c)

RE: 17-A M.R.S.A. §355(2)(B) (Theft by Extortion)

The problem with the above provision is that it appears to encompass many forms of conduct not traditionally considered criminal. For example, it would seem to include a "threat" by a disgruntled consumer, with an honestly felt grievance, to report a merchant to an appropriate government body unless restitution were forthcoming. It might even extend to a threat to initiate litigation, assuming the litigation might substantially harm the other person's financial condition, reputation, etc. In short, the wording of the crime includes threats to invoke commonly accepted remedies to satisfy legitimate claims.

(It may be that the reach of this section is limited by the definition of "property of another" in §352(4) as an "interest which the actor is not privileged to infringe." If such were the intent behind that definition, it remains unclear as to what threats, if any, would be excluded from the extortion statute, especially since the limitation appears to relate only to the nature of the property, and not to the means used to acquire it.)

Since modern extortion statutes tend to be broadly drafted, other states have had to deal with this problem. For example, §708-834(4) of the Hawaii Penal Code establishes an affirmative defense to limit the scope of the crime.

> (4) It is an affirmative defense to a prosecution for theft by extortion, as defined by paragraphs (e), (f), (g), and (i) of section 708-800(8), that the property or services obtained by threat of accusation, penal charge, exposure, lawsuit, or other invocation of action by a public servant was believed by the defendant to be due him as restitution or indemnification for harm done, or as compensation for property obtained or lawful services performed, in circumstances to which the threat relates.

The commentary to §708-834(4) explains the rationale behind the affirmative defense:

> Subsection (4) is intended to cover the situation where an aggrieved person attempts to seek an informal solution by threatening legal action unless restitution, indemnification, or compensation is made. The most significant instance of this device is the waiver of prosecution commonly offered by insurance companies in exchange for the return of valuable merchandise. The rationale here is that it is hardly fair to penalize someone for trying to recover his own goods (or the value thereof), nor could the penal law realistically expect to suppress such natural inclinations.

For similar reasons, either 17-A M.R.S.A. §355(2)(B) should be drafted more narrowly, or the Code should restrict its applicability through the creation of a defense or an affirmative defense. The present version of the statute criminalizes virtually every threatened course of action which would substantially harm the other person.

17-A M.R.S.A. §362, sub-§3, ¶B, as last amended by 1975 Laws, c.740, §59 is further amended to read:

B. The actor has been twice before convicted of any combination of the following offenses: Theft or violation of sections 703 or 708 or attempts thereof.

17-A M.R.S.A. §703, sub-§2, as last amended by 1975 Laws, c.740, §78 is further amended to read:

2. Violation of this section is a Class C crime if the actor has been twice before convicted of any combination of the following offenses: Violation of this section, theft or violation of section 708 or attempts thereof. Forgery is otherwise a Class D crime.

17-A M.R.S.A. §708, sub-§4, as last amended by 1975 Laws, c.740, §79 is further amended to read:

4. Violation of this section is a Class C crime if the actor has been twice before convicted of any combination of the following offenses: Violation of this section, theft or violation of section 703 or attempts thereof. Negotiating a worthless instrument is otherwise a Class D crime.

EXPLANATION

These three sections interrelate and provide for an enhanced penalty for two prior convictions of any of them. A conviction of attempt to do any of the three crimes should obviously be included.

17-A M.R.S.A. §401, sub-§1, as enacted by 1975 Laws, c.499, §1, is amended as follows:

1. A person is guilty of burglary if he enters or surreptitiously remains in a ~~dwelling-place, or other building,~~ structure ~~or place of business~~, knowing that he is not licensed or privileged to do so, with the intent to commit a crime therein.

17-A M.R.S.A. §401, sub-§2, ¶B, as enacted by 1975 Laws, c.499, §1 is amended to read:

B. A Class B crime if the defendant intentionally or recklessly inflicted or attempted to inflict bodily injury on anyone during the commission of the burglary, or an attempt to commit such burglary, or in immediate flight after such commission or attempt or if the defendant was armed with a deadly weapon other than a firearm, or knew that an accomplice was so armed; or if the violation was against a structure which is a dwelling place;

17-A M.R.S.A. §401, sub-§3, as last amended by 1975 Laws, c.740. §60, is further amended as follows:

3. A person may be convicted both of burglary and of the crime which he committed or attempted to commit after entering or remaining in the ~~dwelling place, other building,~~ structure ~~or place~~

~~of business~~, but sentencing for both crimes shall be governed by chapter 47, section 1155.

17-A M.R.S.A. §2, sub-§10, as enacted by 1975 Laws, c.499, §1 is amended to read:

10. "Dwelling place" ~~means~~ means ~~any building or~~ a structure~~, vehicle, boat or other place~~ which is adapted for overnight accomodation of persons, or sections of any ~~place~~ structure similarly adapted. A dwelling place does not include garages or other structures, whether adjacent or attached to the dwelling place, which are used solely for the storage of property or structures formerly used as dwelling places which are uninhabitable. It is immaterial whether a person is actually present.

17-A M.R.S.A. §2, as last amended by 1975 Laws, c.740, §11, is further amended by adding thereto a new sub-§24.

24. "Structure" means a building or other place designed to provide protection for persons or property against weather or intrusion, but does not include vehicles and other conveyances whose primary purpose is transportation of persons or property unless such vehicle or conveyance, or a section thereof, is also a dwelling place.

17-A M.R.S.A. §801, sub-§4, as enacted by 1975 Laws, C.499, §1, is repealed.

17-A M.R.S.A. §801, sub-§5, as enacted by 1975 Laws, c.499. §1, is renumbered sub-§4.

EXPLANATION

The above several amendments are designed to overcome a particular problem under the burglary statute having to do with lesser (or greater?) included offenses. As presently worded there are "dwelling places" and "other buildings, structures." Failure to prove that a particular building (e.g. a shed behind a house, an attached garage, or a place with bedding which was not used for some time) was a "dwelling place" would not allow conviction for Class C burglary in a building. This problem is the same as under prior arson law (1st degree: "dwelling house"; 2nd degree: "all buildings other than those included in first degree arson").

The problem is more complex, however, because the present definition (§2(10)) of "dwelling place" includes places (vehicles, boats, etc.) which are not buildings or structures. Thus, it would be possible to commit the greater crime (burglary into a dwelling place) without necessarily committing the lesser (burglary in a building, structure or place of business).

These amendments are designed to include all objects of burglary under the definition of "structure"; to make clear that all "dwelling places" are "structures"; and to allow conviction for the lesser crime if there is in sufficient proof that a particular structure is a dwelling place, but is a structure otherwise the object of burglary. As in the

case of lesser included offenses (or degrees) generally, the evidence will have to warrant a conviction to allow consideration of the lesser degree by the jury.

17-A M.R.S.A. §501, sub-§4, as enacted by P.L. 1975, c. 740, §65, is repealed.

COMMENT: Section 501(4) provides that a law enforcement officer or a justice of the peace may forbid any person to violate the disorderly conduct statute. In addition to being totally unnecessary, the provision has led some to draw the erroneous conclusion that a warning from a law enforcement officer is an element of disorderly conduct.

The original purpose of section 501(4) was apparently to replace the malicious vexation law. The enactment of section 506-A ("Harassment") accomplished that objective in a far more satisfactory fashion.

17-A M.R.S.A. §556, sub-§1, as last repealed and replaced by P.L. 1975, c. 740, §72 is amended to read:

1. A person is guilty of incest if, being at least 18 years of age, he has sexual intercourse with another person as to whom he knows he is related within the ~~2nd~~ first degree of consanguinity.

COMMENT: There is presently a conflict between the incest statute (17-A M.R.S.A. §556) and the marriage prohibition statute (19 M.R.S.A. §31). For example, marriage is permitted between first cousins, whereas sexual intercourse between the same parties is criminal. Conversely, there are many categories of individuals who may lawfully have sexual relationships, but who may not marry. Although the above amendment would narrow considerably the crime of ~~incest~~ incest, there appears to be no simple way to resolve the conflict, unless the Commission feels it appropriate to amend the marriage prohibition statute.

17-A M.R.S.A. §753, sub-§3, is enacted to read:

3. As used in subsection 1 of this section, "crime" includes juvenile offense. The sentencing class for hindering the apprehension of a juvenile shall be determined in the same manner as if the juvenile were a person 18 years of age or over; provided that if the offense committed by the juvenile would not have been a crime if committed by a person 18 years of age or over, hindering apprehension is a Class E crime.

COMMENT: The present version of §753 is arguably inapplicable when an adult hinders the apprehension of a suspected juvenile offender. The above amendment would remedy that problem and would indicate the appropriate penalties.

17-A M.R.S.A. §57, sub-§6, as enacted by P.L. 1975, c. 499, §1, is amended to read:

6. An accomplice may be convicted on proof of the commission of the crime and of his complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or is not subject to prosecution as a result of immaturity, or has an immunity to prosecution or conviction, or has been acquitted.

17-A M.R.S.A. §151, sub-§7, as enacted by P.L. 1975, c. 499, §1, is amended to read:

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

17-A M.R.S.A. §153, sub-§3, as enacted by P.L. 1975, c. 499, §1, is amended to read:

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

COMMENT: These amendments are intended to ensure that an individual will be liable under the above statutes when the principal, co-conspirator, or person solicited is a juvenile.

17-A M.R.S.A. §755, sub-§3, as last amended by 1975 Laws, c.740, §82, is further amended by striking the second sentence thereof.

17-A M.R.S.A. §757, sub-§2, as last amended by 1975 Laws, c. 740, §85, is further amended as follows:

2. As used in this section "official custody" has the same meaning as in section 755~~, provided that solely for purposes of subsection 1, paragraph A, it does include the custody of all persons under age of 18~~. As used in this section, "contraband" has the same meaning as in section 756.

EXPLANATION

The intent is to govern the substantive crime of escape by juveniles by §755 and to apply the provisions of §§753, 754, 756 and 757 when the person escaping (or committing other juvenile offenses) is a juvenile.

15 M.R.S.A. §2719, sub-§1, as last amended by 1975 Laws, c.538, §12 is further amended to read as follows:

1. ~~Absence without leave.~~ Escape If a child committed to a center ~~absents himself or herself without or attempts to do so~~ commits a violation of section 755 of Title 17-A or an attempt thereof, he or she may be committed to the center ~~under a new commitment following adjudication of the absence without~~

~~leave by the juvenile court having territorial jurisdiction where the center is located. Under this subsection "absence without leave" is a juvenile offense. Commitment ordered by the juvenile court following adjudication under this subsection shall~~ be for a fixed term of 6 months to run concurrently with the term of ~~the original~~ any other commitment and subject to the discharge provisions of section 2718.

EXPLANATION

The foregoing changes to sections 753, 755, 756 and 757 necessitate changing this section from a definition of an exclusively juvenile offense to a provision governing sentencing when the juvenile offense consists of violation of §755 (escape). Note that section 755 will now cover juvenile escapes from pre-trial detention pursuant to 15 M.R.S.A. §2608, an offense that is presently nowhere covered. The Juvenile Law Commission has no objection to the above changes. It will study the question whether the present sentencing provision (which is unchanged in this draft) should be modified and let us know in time for the November or December meeting.

17-A M.R.S.A. §756, sub-§2, as last amended by 1975 Laws, c.740, §84, is further amended as follows:

2. As used in this section, "contraband" means a dangerous weapon, or any tool or other thing that may be used to facilitate a violation of section 755, or any other thing which a statute or regulation expressly prohibits persons confined in official custody ~~is prohibited by statute or regulation~~ from making or possessing.

EXPLANATION

Two purposes: (1) to make clear that dangerous weapons are absolutely forbidden, regardless of their potential for use in an escape; (2) to exclude from the definition items, e.g.,drugs, which are contraband for all persons whether in custody or not and which are covered elsewhere.

17-A M.R.S.A. §1105, sub-§1, as last amended by 1975 Laws, c.740, §102, is further amended as follows:

1. A person is guilty of aggravated trafficking or furnishing scheduled drugs if he trafficks with or furnishes to a child, in fact, under 16 or to a person in official custody a scheduled drug in violation of sections 1103,1104, or 1106. As used in

this section "official custody" has the same meaning as in section 755.

17-A M.R.S.A. §1107-A is enacted to read as follows:

§1107-A Unlawful possession of scheduled drugs by persons in official custody

1. A person in official custody is guilty of unlawful possession of a scheduled drug if he intentionally or knowingly possesses a useable amount of what he knows or believes to be a scheduled drug, and which is, in fact, a scheduled drug, unless the conduct which constitutes such possession is expressly authorized by Title 22.

2. As used in this section "official custody" has the same meaning as in section 755, subsection 3, except that it shall exclude arrest and any period prior to initial custody in one of the places or institutions named therein.

3. Violation of this section is:

A. A Class C crime if the drug is a schedule W or X drug; or

B. A Class D crime of the drug is a schedule Y or Z drug.

EXPLANATION

The furnishing, use or possession of scheduled drugs, including marijuana, obviously creates more serious problems in a jail than on the street. The intent of these two amendments is to generally raise by one class the trafficking, furnishing or possession of drugs in detention or penal settings. The exclusion for arrest and any "pre-booking" custody reflects the fact that the problem does not arise until the person is actually incarcerated.

RE: Resisting Arrest

The need for a resisting arrest statute has been asserted by Judge John Benoit. The Judge believes that the awareness of some defendants that such a statute no longer exists encourages then to refuse to accompany arresting officers. This refusal creates problems for officials confronted with defendants who have a substantial size advantage. It is the Judge's contention that the enactment of a resisting arrest section would deter potentially dangerous conduct not covered by the "assault on an officer" or "escape" prohibitions.

17-A M.R.S.A. §802, sub-§1, ¶A, as enacted by P.L. 1975, c. 499, §1, is repealed and the following enacted in place thereof:

A. With the intent to damage or destroy the property of another; or

17-A M.R.S.A. §802, sub-§2, last sentence, as enacted by P.L. 1975, c. 499, §1, is amended to read:

In a prosecution under subsection 1, ~~paragraph A,~~ "property of another" has the same meaning as in section 352, subsection 4.

COMMENT: The first of these amendments would redefine the offense so as to prohibit the intentional destruction of the property of another, regardless of where it is found. The present wording of paragraph A applies only if the fire is started, caused, or maintained on the property of another. The second amendment merely makes a technical change.

The Commission may also wish to consider whether the crime of arson is defined too broadly. Given a literal interpretation, it punishes the destruction of any property, no matter how insignificant the value. It may be that §12 (De minimis infractions) takes care of the problem. Cf. Proposed Federal Code (5.1) §4101; Model Penal Code §220.1.

PROBLEM:

Should "transporting" or "storing" explosives in violation of the "regulations" be a Class C crime, as is provided under 17-A M.R.S.A. §1001 (1)(B)? Or should "transporting" or "keeping" explosives in violation of the regulations carry a $20-$100 fine, as is provided in 25 M.R.S.A. §2441?

25 M.R.S.A. §2441 contains the grant of authority to promulgate regulations, as well as the $20-$100 fine. 17-A M.R.S.A. §1001 (2)(B) incorporates those regulations. Thus, there are two rather drastically different penalties for violation of the same regulations.

17-A M.R.S.A. §1106, sub-§3, as enacted by P.L. 1975, c. 499, §1 is repealed.

17-A M.R.S.A. §1107-A, is enacted to read:

§1107-A Unlawful possession of marijuana.

1. A person is guilty of unlawful possession of marijuana if he intentionally or knowingly possesses a quantity of marijuana which, in fact, exceeds 1 1/2 ounces, unless the conduct is authorized by Title 22.

2. Unlawful possession of marijuana is a Class E crime.

COMMENT: These amendments were suggested by District Attorney Mike Povich. They stem from the belief that the presumption utilized by the Code makes the likelihood of a conviction for furnishing extremely difficult to predict and may result in inconsistent verdicts bases on similar sets of facts. Under present law, neither the State nor the individual knows with any certainty the consequences of possession of more than 1 1/2 ounces of marijuana. By contrast, the use of the 1 1/2 ounces as a clear line of demarcation between a criminal offense and a civil violation introduces far greater predictability into the law.

17-A M.R.S.A. §1201, sub-§1, preceding the colon, as last amended by 1975 Laws, c.740, §109, is amended to read:

1. A person who has been convicted of any crime may be sentenced to ~~a suspended term of imprisonment with~~ probation or to an unconditional discharge, unless:

17-A M.R.S.A. §1201, sub-§2, as enacted by 1975 Laws, c.499, §1, is amended to read:

2. A convicted person who is eligible for sentence under this chapter, as provided in subsection 1, shall be sentenced to probation if he is in need of the supervision, guidance, assistance or direction that probation can provide. If a person is [redacted] Sentenced to probation, a suspended definite term of imprisonment may be imposed or the case may be continued for sentencing until such time as probation may be revoked. If there is no ~~such~~ need for probation, and no proper purpose would be served by imposing any condition or supervision on his release, he shall be sentenced to an unconditional discharge. A sentence of unconditional discharge is for all purposes a final judgment of conviction.

17-A M.R.S.A. §1206, sub-§5, second sentence, as enacted by 1975 Laws, c. 499, §1 is amended to read:

In such case, the court shall sentence the person to a term of imprisonment if the case was continued for sentence or shall impose the sentence of imprisonment that was suspended when probation was granted.

17-A M.R.S.A. §1206, sub-§6, as enacted by 1975 Laws, c.499, §1 is amended to read:

6. If the person on probation is convicted of a new crime during the period of probation, the court may sentence him for such crime, revoke probation and sentence the person to a term of imprisonment if the case was continued for sentence or impose the sentence of imprisonment that was suspended when probation was granted, subject to chapter 47, section 1155.

EXPLANATION

Several judges prefer the system of allowing the convicting court to "continue for sentencing" until probation is revoked, as was provided in repealed 34 M.R.S.A. §1631(1). It allows the court to make a sentence determination based on the defendant's statu at the time he is about to be imprisoned.

Note. If above amendments are adopted, should also amend § 1152 (2).

17-A M.R.S.A. §1204, sub-§3, as enacted by 1975 Laws, c.499, §1 is amended to read:

3. The convicted peson shall be given an opportunity to address the court on the conditions which are proposed to be attached and shall after sentence be given a written statement setting forth the particular conditions on which he is released on probation~~, and he shall then be given an opportunity to address the court on these conditions if he so requests at the time~~.

ALTERNATIVE

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

EXPLANATION

The requirement that the sentence and the written conditions be prepared before sentencing has caused delays in some courts. The amendment allows the court to address the defendant orally and to furnish him or her the written conditions subsequently.

The alternative takes account of the fact that Rule 32(a) already allows comment by the defendant regarding sentencing.

17-A M.R.S.A. §1253, sub-§2, as enacted by 1975 Laws, c.499, §1, is amended by striking therefrom the second sentence.

34 M.R.S.A. §3, as last amended by 1975 Laws, c.771, section 378, is further amended by adding thereto at the end the following paragraph:

> The department shall have the same authority ~~such~~ regarding local lock-ups.

EXPLANATION

The authority (to inspect, etc.) simply belongs in Title 34 rather than here, since it has nothing to do with credit for time served.

Sentencing Problems

1. There is a conflict between sections 1253(3) and (4) of Title 17-A and section 952 of Title 34 with respect to the good time deductions for persons incarcerated in county jails.

2. A question has been raised as to whether a person imprisoned both as part of the initial sentence and as a result of a failure to pay a fine is to serve those terms concurrently or consecutively. (See §§1151 and 1304)

3. Various sections refer to persons in the custody of the Department of Mental Health and Corrections. Since county jail inmates are not in the department's custody, appropriate language changes are necessary.

AN ACT TO ALLOW THE STATE TO APPEAL AFTER TRIAL IN CRIMINAL CASES WHENEVER PRINCIPLES OF JEOPARDY PERMIT

Sec. 1. 15 M.R.S.A. §2115-A, sub-§1, second sentence, as enacted by 1968 Laws, c.547, §1, is amended to read:

Such appeal shall be taken within ~~10~~ 20 days after such order, decision or judgment has been entered, and in any case before the defendant has been placed in jeopardy under established rules of law.

Sec. 2. 15 M.R.S.A. §2115-A, sub-§2, as enacted by 1968 Laws, §1, is amended to read:

2. Appeal after trial or mistrial. An appeal may be taken by the State in criminal cases, with the written approval of the Attorney General, from the Superior Court or District Court to the law court from any dismissal of an indictment, information or complaint or count thereof or judgment, decision or order which terminates the prosecution in favor of the accused, except that no appeal shall lie where the double jeopardy provisions of the United States Constitution or the Constitution of the State of Maine prohibit further prosecution, and from any decision, ruling or order of the court when the defendant appeals from the judgment. Such appeal shall be taken within 20

days after such dismissal, judgment, decision or order has been entered or, when the defendant appeals from the judgment, within 20 days after the notice of appeal of the defendant is filed.

STATEMENT OF PURPOSE

Two 1975 U.S. Supreme Court decisions, U.S. v. Wilson and U.S. v. Jenkins , made clear that the government could appeal unfavorable orders, decisions or judgments entered after verdict under the federal appeals statute, 18 U.S.C. §3731. The intent of this amendment is, like the federal statute, to allow appeals by the State whenever principles of jeopardy permit.

The expansion of the appeal period from 10 to 20 days is intended to prevent occasional problems which have arisen in obtaining written approval of the Attorney General within the shorter period.

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but shall not be limited to a dismissal of an indictment, information or complaint or count thereof and a judgment or other decision or order terminating the prosecution in favor of the accused. Such appeal shall be taken within 20 days after such dismissal, judgment, decision or order has been entered or, when the defendant appeals from the judgment, within 20 days after the notice of appeal of the defendant is filed.

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The expansion of the appeal period from 10 to 20 days is intended to prevent occasional problems which have arisen in obtaining the written approval of the Attorney General within the shorter period.

14 M.R.S.A. §5544, 2nd ¶, as amended by P.L. 1973, c. 788, §60, is further amended to read:

Any arresting officer may either take any person under arrest for a ~~misdemeanor~~ Class D or Class E crime, before a bail commissioner, who shall inquire into the charge and pertinent circumstances and admit him to bail if proper, or without fee may take the personal recognizance of any person for his appearance on a ~~misdemeanor~~ charge. of a Class D or Class E crime.

Under consideration

1

17-A M.R.S.A. §2, sub-§3-A, as enacted by P.L. 1975, c. 499, §1, is repealed.

17-A M.R.S.A. §2, sub-§9, as enacted by P.L. 1975, c. 499, §1 is repealed and the following enacted in place thereof:

9. "Deadly weapon" or dangerous weapon" means any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is in fact used or is intended or threatened to be used by the actor, is capable of producing death or serious bodily injury. "Armed with a deadly weapon" or armed with a dangerous weapon" means in actual possession of, regardless of whether the possession is visible or concealed, any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in its ordinary use, is capable of producing death or serious bodily injury. If the actor intentionally presents, in a covered or open manner, a thing as a deadly weapon, it shall be presumed that the thing was a deadly weapon.

COMMENT: As presently worded, the definition of deadly or dangerous weapon relies upon the manner in which the object is actually used or intended to be used. That definition creates problems for at least three crimes--theft, burglary and robbery--in which the sentencing class is raised if the actor is "armed." Since "armed" does

not require proof of use or intended use, the definition is impossible to apply to statutes which use that term. Accordingly, the amendment establishes a different standard for armed with a deadly or dangerous weapon, which looks to the ordinary use of the object.

APPROVED

17-A M.R.S.A. §208, sub-§1, ¶B, as enacted by P.L. 1975, c. 499, §1, is amended to read:

B. Bodily injury to another by means of a ~~deadly~~ dangerous weapon; or

17-A M.R.S.A. §362, sub-§2, ¶C, as enacted by P.L. 1975, c. 499, §1, is amended to read:

C. The actor is armed with a ~~deadly~~ dangerous weapon at the time of the offense.

17-A M.R.S.A. §401, sub-§2, ¶B, as enacted by P.L. 1975, c. 499, §1

B. A Class B crime if the defendant intentionally or recklessly inflicted or attempted to inflict bodily injury on anyone during the commission of the burglary, or an attempt to commit such burglary, or in immediate flight after such commission or attempt or if the defendant was armed with a ~~deadly~~ dangerous weapon other than a firearm, or knew that an accomplice was so armed; or if the violation was against a dwelling place;

COMMENT: These are technical amendments whose sole purpose is to make the terminology of the Code more consistent. Since "dangerous weapon" and "deadly weapon" are synonomous concepts, there is no reason why different sections should use different terms. These amendments will avoid confusion and will eliminate certain unnecessary pleading problems.

TABLED

17-A M.R.S.A. §1252, sub-§4, as enacted by P.L. 1975, c. 499, §1, is amended by adding at the end the following sentence:

This subsection shall not apply when the use of a dangerous weapon is an element of the crime.

OR

This subsection shall not apply to a violation or an attempted violation of section 208, subsection 1, paragraph B of this Title.

COMMENT: The application of §1252(4) to a violation or attempted violation of §208(1)(B) would result in a double escalation of the sentencing class based on the same conduct, namely, the use of a dangerous weapon. Section 208(1)(B) already enhances assault from a Class D to a Class B crime because of the use of a weapon. It seems unlikely that the Legislature intended to further enhance it to a Class A crime through the application of §1252(4).

TABLED

17-A M.R.S.A. §15, sub-§1, ¶A, sub-¶(2), as enacted by P.L. 1975, c. 740, §22, is amended to read:

(2) Any Class A, Class B or Class C crime~~;~~ or a violation of section 357 or of section 703, or an attempt to violate section 401; and

COMMENT: This amendment would authorize law enforcement officers to make warrantless arrests, based upon probable cause, for the offenses of theft of services, forgery, and attempted burglary. Forgery is a Class D crime, theft of services is usually a Class E crime, and attempted burglary is usually a Class D crime. Accordingly, present law allows warrantless arrests only if the offense is committed in the officer's presence (see 17-A M.R.S.A. §15).

Theft of services and forgery pose special enforcement problems for a number of reasons. First, they are generally committed outside the presence of an officer. Second, the offenders are frequently from other states, and thus are unknown to both the police and the victim. Third, at least in the case of forgery, the violator is likely to utilize a false identity. As a result, the requirement that the officer secure a warrant to make the arrest will often be an exercise in futility, insofar as the perpetrator will have already left the State. In addition, unless he has volunteered the information, the police may not have his name and address.

It should be noted that with respect to forgery the problem is a direct result of the enactment of the Criminal Code. Under prior law, forgery was a felony for which law enforcement officers could make warrantless arrests

TABLED

based on probable cause. Pursuant to the Code, the offense is punishable by less than one year unless the face value of the check exceeds $5000. Such cases rarely, if ever, arise in Maine

With respect to attempted burglary, the amendment is directed at the following situation, which occurs with some frequency. A witness notifies the police that an attempted burglary is in progress. The police arrive promptly, and the witness identifies the culprits, who have been unable to complete the break and are ~~there~~ thus walking away from the scene. Under present law, the police could not make an arrest, whereas the proposed amendment would give them this authority.

Finally, there is considerable precedent for permitting warrantless arrests based on probable cause for "misdemeanors." For example, section 1113 allows such arrests for all drug offenses, many of which are Class D, while section 3521 of Title 17 contains similar authorization for shoplifting. In short, the Legislature has shown a willingness to liberalize the common law rules of arrests when necessitated by special circumstances.

PENDING

7

17-A M.R.S.A. §59, sub-§2, ¶B, as enacted by P.L. 1975, c. 499, §1, is repealed and the following enacted in place thereof:

B. Evidence of mental disease or defect, as defined in section 58, subsection 2, shall not be admissible in the guilt or innocence phase of the trial for the purpose of establishing the defense of a lack of criminal responsibility, as defined in section 58, subsection 1. Such evidence shall be admissible for that purpose only in the 2nd phase following a verdict of guilty.

COMMENT: The intent of this amendment is to make it clear that evidence of mental disease or defect is inadmissible in the first phase of a bifurcated trial only when it is introduced for the purpose of establishing the insanity defense. Such evidence would be admissible for other purposes, such as to raise a reasonable doubt as to the existence of a culpable state of mind.

APPROVED

17-A M.R.S.A. §59, sub-§3, ~~first sentence,~~ as enacted by 1975 Laws, c.499, §1, is amended to read:

3. The issue of insanity shall be tried before the same jury as tried the issue of guilt. Alternate jurors who were present during the first phase of the trial but who did not participate in the deliberations and verdict thereof may be substituted for jurors who did participate. The defendant may, however, elect to have the issue of insanity tried by the court without a jury.

EXPLANATION

As presently worded, if a juror who participated in the first phase verdict becomes indisposed, it may be impossible to substitute one of the alternates who sat during the first trial, thereby causing a mistrial. Insanity defenses are typically raised in a week-long homocide trials.

Question re 17-A M.R.S.A. §61(2)

The above provision imposes criminal liability on an agent of an organization if he recklessly omits to perform an act required by a criminal statute. A question arises when the criminal statute, which imposes the duty on the organization, specifies a mental state higher than recklessness.

Section 5332 of Title 36 exemplifies this problem. That statute renders criminally liable any person who willfully fails to pay taxes or file a return. Accordingly, under that provision, the organization would be guilty for a willful failure, whereas under §61(2), the agent of the organization would be guilty for a reckless omission. There would appear to be a similar discrepancy in the mental states required for a human being in his private capacity and in his capacity as the agent of an organization.

17-A M.R.S.A. §152, sub-§4, as last amended by 1975 Laws, c.740, §36, is renumbered sub-§5.

17-A M.R.S.A. §152, sub-§4, is enacted to read:

4. An indictment, information or complaint, or count thereof, charging the commission of a crime under chapters 9 through 45 of this title or a crime outside this code shall be deemed to charge the commission of the attempt to commit that crime and shall not be deemed duplicitous thereby.

EXPLANATION

It seems increasingly likely, after State v. McNamara, 345 A.2d 509 (OUI, attempted OUI under same statute), and State v. O'Farrell, 355 A.2d 396 (arson, "4th degree arson") that the Law Court ~~would~~ will decide that attempt is not a lesser included offense of a completed crime because of the specific intent ("to complete the commission of the crime") necessary in attempt. §152(1). The proposed amendment does not purport to make attempt a lesser-included offense, but does state that a charge of a completed crime will also charge an attempt.

17-A M.R.S.A. §153, sub-§1, as enacted by P.L. 1975, C. 499, §1, is amended to read:

1. A person is guilty of solicitation if he commands or attempts to induce another person to commit criminal homicide in the first or 2nd degree or a particular Class A or Class B crime, whether as principal or accomplice, with the intent to cause the imminent commission of the crime, and under circumstances which the actor knows make it very likely that the crime will take place.

Comment: Although subsection 4 of section 153 contains a penalty for solicitation to commit criminal homicide in the first or 2nd degree, these crimes are not included in the definition of the offense in subsection 1. Presumably, this omission was inadvertent.

On a related matter, the Commission may wish to examine section 153 to determine whether the definition of the crime is too narrow. One question stems from the imminent commission requirement. For example, if A offers B money to kill C when the latter comes to Maine in two weeks, there might not be a crime if B should refuse the offer.

Another question arises from the limitation of the offense to Class A and B crimes. Under section 57(3)(A), a person is guilty as an accomplice if he solicits any crime, and the crime is committed. By contrast, he is not guilty if he unsuccessfully solicits a C, D, or E offense. Thus, if A offers B money to steal property (the value of which does not exceed $5,000) and give it to A, the criminal liability of A depends upon B's honesty. It is debatable whether this distinction is philosophically justifiable.

17-A M.R.S.A. §204, sub-§2, as enacted by P.L. 1975, c. 499, §1, is amended to read:

2. Criminal homicide in the 4th degree is a Class ~~B~~ A crime, provided that it is a defense which reduces it to a Class C crime if it occurs as the result of the reckless operation of a motor vehicle.

OR

17-A M.R.S.A. §202, as amended by P.L. 1975, c. 740, §40, is repealed and the following enacted in place thereof:

1. A person is guilty of criminal homicide in the 2nd degree if:

A. He causes the death of another intending to cause such death, or knowing that death will almost certainly result from his conduct; or

B. He recklessly causes the death of another under circumstances manifesting extreme indifference to the value of human life; or

C. He intentionally or knowingly causes another to commit suicide by the use of force, duress or deception.

2. The sentence for criminal homicide in the 2nd degree shall be as authorized in chapter 51.

COMMENT: The above amendments represent possible approaches to the problem raised by Justice Glassman in his letter to the Commission. That letter expressed the opinion that there is "an irrational disparity in the sentencing standards for certain types of criminal homicide."

When viewed in terms of the actual time served, the disparity is even greater than suggested by Justice

Glassman. A person convicted of criminal homicide in the 2nd degree must serve a minimum term of 16 years. By contrast, a person who receives the maximum sentence for criminal homicide in the 4th degree may well serve no more than 6 years and 8 months, after allowance is made for good time.

It should be pointed out that the Maine Criminal Code differs from the recent codifications in its approach to this subject. Both the Model Penal Code (§710.2) and the proposed Federal Criminal Code (§1601) include in their definitions of murder the causing of death "under circumstances manifesting extreme indifference to the value of human life." Although the Hawaii statute is similar to Maine's, the commentary acknowledges that manslaughter may be characterized by a "cruel, wicked, and depraved indifference." To deal with these cases, Hawaii relies on a statute which doubles the maximum penalty if the court finds the defendant to be either a "persistent offender," a "professional criminal," a "dangerous person," or a "multiple offender." Hawaii Penal Code, §706-662.

17-A M.R.S.A. §210, sub-§2, as enacted by P.L. 1975, c. 499, §1 is repealed and replaced as follows:

2. Violation of subsection 1, paragraph A is a Class D crime. Violation of subsection 1, paragraph B is a Class C crime.

EXPLANATION: Most of the threats that are not bomb threats do indeed put people in fear but are in fact just "mouthing off." In fact, the most typical threat is "to kill." The penalty is simply too high. When a weapon is used, but the threat is not imminent (see criminal threatening, §209), the crime will be re-raised to Class C. Threats to witnesses are of a different nature. See suggested changes to §§454 and 754.

17-A M.R.S.A. §454, as enacted by P.L. 1975, c. 499, §1, is repealed and the following enacted in place thereof:

§454 Tampering with witness in informant

1. A person is guilty of tampering with witness or informant if, believing that an official proceeding as defined in section 451, subsection 5, paragraph A, or an official criminal investigation, is pending or will be instituted:

A. He induces or otherwise causes, or attempts to induce or cause a witness or informant

(1) to testify or inform falsely; or

(2) to withhold, beyond the scope of any privilege which the witness or informant may have, any testimony, information or evidence; or

(3) to absent himself from any proceeding or investigation; or

B. He solicits, accepts or agrees to accept any benefit in consideration of his doing any of the things specified in subsection 1, paragraph A.

2. Violation of subsection 1, paragraph A is a Class C crime if it is committed by means of force, violence, or intimidation, or by the offering or giving of any benefit. Violation of subsection 1, paragraph A, is otherwise a Class D crime. Violation of subsection 1, paragraph B is a Class C crime.

17-A M.R.S.A. §754, as enacted by P.L. 1975, c. 499, §1, is repealed and the following enacted in place thereof:

§754 Obstructing criminal prosecution

1. A person is guilty of obstructing criminal prosecution, if:

A. He uses force, violence or intimidation, or he promises, offers, or gives any benefit to another, with the intent to induce the other

(1) to refrain from from initiating a criminal prosecution or juvenile proceeding; or

(2) to refrain from continuing with a criminal prosecution or juvenile proceeding which he has initiated; or

B. He solicits, accepts or agrees to accept any benefit in consideration of his doing any of the things specified in subsection 1, paragraph A, subparagraphs (1) or (2).

2. Obstructing criminal prosecution is a Class C crime.

COMMENT: The redraft of §454 is designed to accomplish the following:

1. To make it clear that the prohibition applies when the person is successful in inducing or causing one of the specified results;

2. To broaden subparagraph (3) so that it covers the situation in which the witness or informant has not been summoned by legal process; and

3. To make the penalty class depend entirely upon the means used (i.e., force, violence, intimidation, or the giving or receiving of a benefit), rather than to differentiate among the specified results.

The redraft of §754 parallels that of §454, except that there is no crime in the absence of one of the specified means. In addition, it extends the prohibition to the person who gives or offers the benefit.

Finally, if the redraft of §754 is accepted, the drug treatment exception will have to be reenacted, although it may be preferable to move it to Title 22 or Title 32.

17-A M.R.S.A. §252, sub-§2, ¶E, as enacted by P.L. 1975, c. 499, §1, is amended to read:

E. The other person is in official custody as a probationer or a parolee, or is detained in a hospital, prison or other institution, and the actor has supervisory or disciplinary authority over such other person~~,~~; or

17-A M.R.S.A. §253, sub-§2, ¶F, is enacted to read:

F. The other person does not expressly or impliedly acquiesce in such sexual intercourse or sexual act.

17-A M.R.S.A. §253, sub-§5, 2nd sentence, as enacted by P.L. 1975, c. 499, §1, is amended to read:

Violation of subsection 2, paragraphs B ~~or~~, D or F is a Class C crime.

COMMENT: A recent series of cases in Aroostook County involved the commission of sexual acts by a "physicians's assistant" (there is some doubt that the individual was actually certified under 32 M.R.S.A. §3270-A) against female patients whom he was examining. Given the unique circumstances of a physical examination, the acts were apparently committed without the acquiescence of the patients, but also without the use of force or threats. Accordingly, the behavior did not constitute gross sexual misconduct. In light of the present wording of §251(1)(D), the conduct also did not fall within the scope of unlawful sexual contact. The purpose of these amendments is to bring the above described behavior within the ambit

of §253 as a Class C crime.

(It should be noted that these amendments do not address the situation in which a physician induces a patient to engage in sexual activity through a misrepresentation that the activity will have some therapeutic value. The Commission may wish to decide whether the Code should deal with that type of problem.)

RE: §302(1)(C)(1) and (2) (Criminal Restraint)

The above section is extremely vague. Read literally, it makes it a crime when a person, knowing he has no legal right to do so, intentionally entices a child under the age of 14 or an incompetent person. It is by no means clear what conduct is included within this prohibition.

It may be that the phrase in subparagraph 3, "from the custody of his parent, guardian or other lawful custodian. . .," was intended to apply to subparagraphs 1 and 2. If that were the case, it is not accomplished in the present wording of §302(1)(C), since the subparagraphs are written in the disjunctive.

17-A M.R.S.A. §351, second sentence, as enacted by 1975 Laws, c.499, §1 is amended to read:

§351 ....

An accusation of theft may be proved by evidence that it was committed in any manner that would be theft under this chapter, notwithstanding the specification of a different manner in the information or indictment~~,~~. The factfinder shall at the request of either party consider all manners of theft which the evidence reasonably supports and need not specify a particular manner in its verdict or finding unless the manner would affect the sentencing class. The court shall have the power ~~subject only to the power of the court~~ to ensure a fair trial by granting a continuance or other appropriate relief if the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

EXPLANATION

The theft consolidation provision at present does not make clear whether an election by the state is required if the evidence shows two or more modes of theft. The purpose of consolidation is frustrated if an election is required: the factfinder might well acquit though it may have wished to convict on the unelected mode of theft. Even assuming that retrial were possible on the

unelected mode (an unlikely assumption under §14), the second factfinder might disagree with the first.

The key operative words are "which the evidence reasonably supports." Because of the proposed changes to §361(2) (Presumptions), the factfinder usually will not be given more than one option in the fairly typical situation in which the primary proof is that defendant was in possession of recently stolen goods.

17-A M.R.S.A. §361, sub-§2, as last amended by 1975 Laws, c.740, §58 is further amended by adding a new sentence thereto at the end:

The above presumptions shall apply to violations of sections 356 and 359 only if the evidence will not suppport a conviction for another section of this chapter, chapter 27 or section 401, in the course of which a theft or robbery took place, or if there is evidence of a violation of section 356 or 359 which is independent of and additional to the evidence that the defendant was in exclusive possession of property recently taken under the circumstances described above.

EXPLANATION

The above amendment is the necessary corrollary to ~~theft~~ that of §351. The consolidation of theft is an important device to prevent fatal variance in the prosecution of essentially similar conduct. However, the consolidation of "primary" thieves (those who obtained the property from the owner) with "secondary" thieves (those who obtained the property from

the primary thief or later or after the property had been lost) creates procedural problems, particularly with the presumptions arising from possession of recently stolen goods. The "single" presumption that the possessor is guilty of theft is actually a presumption that he is both the primary and the secondary thief — an impossibility. While this creates no great problem in the obtaining-receiving area since sentencing is the same, when the primary theft occurred in the course of a robbery or a burglary, the factfinder is given no guidance as to whether the inference should allow him to find robbery, burglary plus theft (by obtaining) or only receiving.

The proposed amendment would create a preference in favor of primary thieves (including burglars and robbers). The factfinder should only consider secondary theft if (1) there is insufficient evidence of a primary theft or (2) there is evidence generated (beyond that of the presumption itself) of secondary theft. In the latter case, the factfinder will be allowed to consider both possibilities. Receiving would act as a full defense to burglary and a partial defense to robbery (the defendant still being able to be convicted of theft). For the sake of consistency, the same rules would be applied to a charge of theft without burglary or robbery: thus, if the prosecutor does not expect evidence that the defendant committed secondary theft, he should charge primary theft. However, the defendant will not gain an acquittal by convincing the factfinder that he was only a secondary thief.

17-A M.RS.A. §352, sub-§5, ¶E, as last amended by 1975 Laws, C.740, §54, is further amended by adding a new sentence at the end as follows:

Prosecution may be brought in any venue in which one of the thefts which has been aggregated was committed.

17-A M.R.S.A. §805, sub-§1-B, as added by 1975 Laws, c.740, §87 is amended by adding a new sentence at the end as follows:

Prosecution for an aggregated aggravated criminal mischief may be brought in any venue in which one of the criminal mischiefs which has been aggregated was committed.

17-A M.R.S.A. §354, sub-§2, ¶B, as enacted by P.L. 1975, c. 499, §1, is repealed and the following enacted in place thereof:

B. Fails to correct an impression which is false which he does not believe to be true, and which

(1) he had previously created or reinforced; or

(2) he knows to be influencing another whose property is involved and to whom he stands in a fiduciary or confidential relationship;

COMMENT: The present version of this paragraph establishes two ways in which deception may occur, but is ambiguous as to the exact elements which constitute each of the ways. A literal reading of the provision suggests that in every case there must be a failure to correct a false impression created or reinforced by the deceiver but that, when a fiduciary is involved, there is no requirement that the deceiver not believe the impression to be true.

The above redraft is predicated on the idea that the real intent of this statute was, or should have been, to eliminate, in instances of fiduciary or confidential relationships, the requirement that the person had created or reinforced the impression. The redraft would thus subject the fiduciary to criminal responsibility for an intentional omission. Unlike the present statute, it would not impose liability for a failure to correct an erroneous impression, created by the fiduciary, but which the fiduciary did not believe to be false. Cf. Model Penal Code §223.3 (c)

RE: 17-A M.R.S.A. §355(2)(B) (Theft by Extortion)

The problem with the above provision is that it appears to encompass many forms of conduct not traditionally considered criminal. For example, it would seem to include a "threat" by a disgruntled consumer, with an honestly felt grievance, to report a merchant to an appropriate government body unless restitution were forthcoming. It might even extend to a threat to initiate litigation, assuming the litigation might substantially harm the other person's financial condition, reputation, etc. In short, the wording of the crime includes threats to invoke commonly accepted remedies to satisfy legitimate claims.

(It may be that the reach of this section is limited by the definition of "property of another" in §352(4) as an "interest which the actor is not privileged to infringe." If such were the intent behind that definition, it remains unclear as to what threats, if any, would be excluded from the extortion statute, especially since the limitation appears to relate only to the nature of the property, and not to the means used to acquire it.)

Since modern extortion statutes tend to be broadly drafted, other states have had to deal with this problem. For example, §708-834(4) of the Hawaii Penal Code establishes an affirmative defense to limit the scope of the crime.

> (4) It is an affirmative defense to a prosecution for theft by extortion, as defined by paragraphs (e), (f), (g), and (i) of section 708-800(8), that the property or services obtained by threat of accusation, penal charge, exposure, lawsuit, or other invocation of action by a public servant was believed by the defendant to be due him as restitution or indemnification for harm done, or as compensation for property obtained or lawful services performed, in circumstances to which the threat relates.

The commentary to §708-834(4) explains the rationale behind the affirmative defense:

> Subsection (4) is intended to cover the situation where an aggrieved person attempts to seek an informal solution by threatening legal action unless restitution, indemnification, or compensation is made. The most significant instance of this device is the waiver of prosecution commonly offered by insurance companies in exchange for the return of valuable merchandise. The rationale here is that it is hardly fair to penalize someone for trying to recover his own goods (or the value thereof), nor could the penal law realistically expect to suppress such natural inclinations.

For similar reasons, either 17-A M.R.S.A. §355(2)(B) should be drafted more narrowly, or the Code should restrict its applicability through the creation of a defense or an affirmative defense. The present version of the statute criminalizes virtually every threatened course of action which would substantially harm the other person.

17-A M.R.S.A. §362, sub-§3, ¶B, as last amended by 1975 Laws, c.740, §59 is further amended to read:

B. The actor has been twice before convicted of any combination of the following offenses: Theft or violation of sections 703 or 708 or attempts thereof.

17-A M.R.S.A. §703, sub-§2, as last amended by 1975 Laws, c.740, §78 is further amended to read:

2. Violation of this section is a Class C crime if the actor has been twice before convicted of any combination of the following offenses: Violation of this section, theft or violation of section 708 or attempts thereof. Forgery is otherwise a Class D crime.

17-A M.R.S.A. §708, sub-§4, as last amended by 1975 Laws, c.740, §79 is further amended to read:

4. Violation of this section is a Class C crime if the actor has been twice before convicted of any combination of the following offenses: Violation of this section, theft or violation of section 703 or attempts thereof. Negotiating a worthless instrument is otherwise a Class D crime.

EXPLANATION

These three sections interrelate and provide for an enhanced penalty for two prior convictions of any of them. A conviction of attempt to do any of the three crimes should obviously be included.

17-A M.R.S.A. §401, sub-§1, as enacted by 1975 Laws, c.499, §1, is amended as follows:

1. A person is guilty of burglary if he enters or surreptitiously remains in a ~~dwelling-place, or other building,~~ structure ~~or place of business~~, knowing that he is not licensed or privileged to do so, with the intent to commit a crime therein.

17-A M.R.S.A. §401, sub-§2, ¶B, as enacted by 1975 Laws, c.499, §1 is amended to read:

B. A Class B crime if the defendant intentionally or recklessly inflicted or attempted to inflict bodily injury on anyone during the commission of the burglary, or an attempt to commit such burglary, or in immediate flight after such commission or attempt or if the defendant was armed with a deadly weapon other than a firearm, or knew that an accomplice was so armed; or if the violation was against a structure which is a dwelling place;

17-A M.R.S.A. §401, sub-§3, as last amended by 1975 Laws, c.740. §60, is further amended as follows:

3. A person may be convicted both of burglary and of the crime which he committed or attempted to commit after entering or remaining in the ~~dwelling place, other building,~~ structure ~~or place~~

~~of business~~, but sentencing for both crimes shall be governed by chapter 47, section 1155.

17-A M.R.S.A. §2, sub-§10, as enacted by 1975 Laws, c.499, §1 is amended to read:

10. "Dwelling place" means ~~any building or~~ a structure~~, vehicle, boat or other place~~ which is adapted for overnight accomodation of persons, or sections of any ~~place~~ structure similarly adapted. A dwelling place does not include garages or other structures, whether adjacent or attached to the dwelling place, which are used solely for the storage of property or structures formerly used as dwelling places which are uninhabitable. It is immaterial whether a person is actually present.

17-A M.R.S.A. §2, as last amended by 1975 Laws, c.740, §11, is further amended by adding thereto a new sub-§24.

24. "Structure" means a building or other place designed to provide protection for persons or property against weather or intrusion, but does not include vehicles and other conveyances whose primary purpose is transportation of persons or property unless such vehicle or conveyance, or a section thereof, is also a dwelling place.

17-A M.R.S.A. §801, sub-§4, as enacted by 1975 Laws, C.499, §1, is repealed.

17-A M.R.S.A. §801, sub-§5, as enacted by 1975 Laws, c.499. §1, is renumbered sub-§4.

EXPLANATION

The above several amendments are designed to overcome a particular problem under the burglary statute having to do with lesser (or greater?) included offenses. As presently worded there are "dwelling places" and "other buildings, structures." Failure to prove that a particular building (e.g. a shed behind a house, an attached garage, or a place with bedding which was not used for some time) was a "dwelling place" would not allow conviction for Class C burglary in a building. This problem is the same as under prior arson law (1st degree: "dwelling house"; 2nd degree: "all buildings other than those included in first degree arson").

The problem is more complex, however, because the present definition (§2(10)) of "dwelling place" includes places (vehicles, boats, etc.) which are not buildings or structures. Thus, it would be possible to commit the greater crime (burglary into a dwelling place) without necessarily committing the lesser (burglary in a building, structure or place of business).

These amendments are designed to include all objects of burglary under the definition of "structure"; to make clear that all "dwelling places" are "structures"; and to allow conviction for the lesser crime if there is in sufficient proof that a particular structure is a dwelling place, but is a structure otherwise the object of burglary. As in the

case of lesser included offenses (or degrees) generally, the evidence will have to warrant a conviction to allow consideration of the lesser degree by the jury.

17-A M.R.S.A. §501, sub-§4, as enacted by P.L. 1975, c. 740, §65, is repealed.

COMMENT: Section 501(4) provides that a law enforcement officer or a justice of the peace may forbid any person to violate the disorderly conduct statute. In addition to being totally unnecessary, the provision has led some to draw the erroneous conclusion that a warning from a law enforcement officer is an element of disorderly conduct.

The original purpose of section 501(4) was apparently to replace the malicious vexation law. The enactment of section 506-A ("Harassment") accomplished that objective in a far more satisfactory fashion.

17-A M.R.S.A. §556, sub-§1, as last repealed and replaced by P.L. 1975, c. 740, §72 is amended to read:

1. A person is guilty of incest if, being at least 18 years of age, he has sexual intercourse with another person as to whom he knows he is related within the ~~2nd~~ first degree of consanguinity.

COMMENT: There is presently a conflict between the incest statute (17-A M.R.S.A. §556) and the marriage prohibition statute (19 M.R.S.A. §31). For example, marriage is permitted between first cousins, whereas sexual intercourse between the same parties is criminal. Conversely, there are many categories of individuals who may lawfully have sexual relationships, but who may not marry. Although the above amendment would narrow considerably the crime of ~~incest~~ incest, there appears to be no simple way to resolve the conflict, unless the Commission feels it appropriate to amend the marriage prohibition statute.

17-A M.R.S.A. §753, sub-§3, is enacted to read:

3. As used in subsection 1 of this section, "crime" includes juvenile offense. The sentencing class for hindering the apprehension of a juvenile shall be determined in the same manner as if the juvenile were a person 18 years of age or over; provided that if the offense committed by the juvenile would not have been a crime if committed by a person 18 years of age or over, hindering apprehension is a Class E crime.

COMMENT: The present version of §753 is arguably inapplicable when an adult hinders the apprehension of a suspected juvenile offender. The above amendment would remedy that problem and would indicate the appropriate penalties.

17-A M.R.S.A. §57, sub-§6, as enacted by P.L. 1975, c. 499, §1, is amended to read:

6. An accomplice may be convicted on proof of the commission of the crime and of his complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or is not subject to prosecution as a result of immaturity, or has an immunity to prosecution or conviction, or has been acquitted.

17-A M.R.S.A. §151, sub-§7, as enacted by P.L. 1975, c. 499, §1, is amended to read:

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

17-A M.R.S.A. §153, sub-§3, as enacted by P.L. 1975, c. 499, §1, is amended to read:

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

COMMENT: These amendments are intended to ensure that an individual will be liable under the above statutes when the principal, co-conspirator, or person solicited is a juvenile.

17-A M.R.S.A. §755, sub-§3, as last amended by 1975 Laws, c.740, §82, is further amended by striking the second sentence thereof.

17-A M.R.S.A. §757, sub-§2, as last amended by 1975 Laws, c. 740, §85, is further amended as follows:

2. As used in this section "official custody" has the same meaning as in section 755~~, provided that solely for purposes of subsection 1, paragraph A, it does include the custody of all persons under age of 18~~. As used in this section, "contraband" has the same meaning as in section 756.

EXPLANATION

The intent is to govern the substantive crime of escape by juveniles by §755 and to apply the provisions of §§753, 754, 756 and 757 when the person escaping (or committing other juvenile offenses) is a juvenile.

15 M.R.S.A. §2719, sub-§1, as last amended by 1975 Laws, c.538, §12 is further amended to read as follows:

1. ~~Absence without leave.~~ Escape If a child committed to a center ~~absents himself or herself without or attempts to do so~~ commits a violation of section 755 of Title 17-A or an attempt thereof, he or she ~~shall~~ may be committed to the center ~~under a new commitment following adjudication of the absence without~~

~~leave by the juvenile court having territorial jurisdiction where the center is located. Under this subsection "absence without leave" is a juvenile offense. Commitment ordered by the juvenile court following adjudication under this subsection shall be~~ for a fixed term of 6 months to run concurrently with the term of ~~the original~~ any other commitment and subject to the discharge provisions of section 2718.

EXPLANATION

The foregoing changes to sections 753, 755, 756 and 757 necessitate changing this section from a definition of an exclusively juvenile offense to a provision governing sentencing when the juvenile offense consists of violation of §755 (escape). Note that section 755 will now cover juvenile escapes from pre-trial detention pursuant to 15 M.R.S.A. §2608, an offense that is presently nowhere covered. The Juvenile Law Commission has no objection to the above changes. It will study the question whether the present sentencing provision (which is unchanged in this draft) should be modified and let us know in time for the November or December meeting.

17-A M.R.S.A. §756, sub-§2, as last amended by 1975 Laws, c.740, §84, is further amended as follows:

2. As used in this section, "contraband" means a dangerous weapon, or any tool or other thing that may be used to facilitate a violation of section 755, or any other thing which a statute or regulation expressly prohibits persons confined in official custody ~~is prohibited by statute or regulation~~ from making or possessing.

EXPLANATION

Two purposes: (1) to make clear that dangerous weapons are absolutely forbidden, regardless of their potential for use in an escape; (2) to exclude from the definition items, e.g.,drugs, which are contraband for all persons whether in custody or not and which are covered elsewhere.

17-A M.R.S.A. §1105, sub-§1, as last amended by 1975 Laws, c.740, §102, is further amended as follows:

1. A person is guilty of aggravated trafficking or furnishing scheduled drugs if he trafficks with or furnishes to a child, in fact, under 16 or to a person in official custody a scheduled drug in violation of sections 1103,1104, or 1106. As used in

this section "official custody" has the same meaning as in section 755.

17-A M.R.S.A. §1107-A is enacted to read as follows:

§1107-A Unlawful possession of scheduled drugs by persons in official custody

1. A person in official custody is guilty of unlawful possession of a scheduled drug if he intentionally or knowingly possesses a useable amount of what he knows or believes to be a scheduled drug, and which is, in fact, a scheduled drug, unless the conduct which constitutes such possession is expressly authorized by Title 22.

2. As used in this section "official custody" has the same meaning as in section 755, subsection 3, except that it shall exclude arrest and any period prior to initial custody in one of the places or institutions named therein.

3. Violation of this section is:

A. A Class C crime if the drug is a schedule W or X drug; or

B. A Class D crime of the drug is a schedule Y or Z drug.

EXPLANATION

The furnishing, use or possession of scheduled drugs, including marijuana, obviously creates more serious problems in a jail than on the street. The intent of these two amendments is to generally raise by one class the trafficking, furnishing or possession of drugs in detention or penal settings. The exclusion for arrest and any "pre-booking" custody reflects the fact that the problem does not arise until the person is actually incarcerated.

RE: Resisting Arrest

The need for a resisting arrest statute has been asserted by Judge John Benoit. The Judge believes that the awareness of some defendants that such a statute no longer exists encourages then to refuse to accompany arresting officers. This refusal creates problems for officials confronted with defendants who have a substantial size advantage. It is the Judge's contention that the enactment of a resisting arrest section would deter potentially dangerous conduct not covered by the "assault on an officer" or "escape" prohibitions.

17-A M.R.S.A. §802, sub-§1, ¶A, as enacted by P.L. 1975, c. 499, §1, is repealed and the following enacted in place thereof:

A. With the intent to damage or destroy the property of another; or

17-A M.R.S.A. §802, sub-§2, last sentence, as enacted by P.L. 1975, c. 499, §1, is amended to read:

In a prosecution under subsection 1, ~~paragraph A,~~ "property of another" has the same meaning as in section 352, subsection 4.

COMMENT: The first of these amendments would redefine the offense so as to prohibit the intentional destruction of the property of another, regardless of where it is found. The present wording of paragraph A applies only if the fire is started, caused, or maintained on the property of another. The second amendment merely makes a technical change.

The Commission may also wish to consider whether the crime of arson is defined too broadly. Given a literal interpretation, it punishes the destruction of any property, no matter how insignificant the value. It may be that §12 (De minimis infractions) takes care of the problem. Cf. Proposed Federal Code (5.1) §4101; Model Penal Code §220.1.

PROBLEM:

Should "transporting" or "storing" explosives in violation of the "regulations" be a Class C crime, as is provided under 17-A M.R.S.A. §1001 (1)(B)? Or should "transporting" or "keeping" explosives in violation of the regulations carry a $20-$100 fine, as is provided in 25 M.R.S.A. §2441?

25 M.R.S.A. §2441 contains the grant of authority to promulgate regulations, as well as the $20-$100 fine. 17-A M.R.S.A. §1001 (2)(B) incorporates those regulations. Thus, there are two rather drastically different penalties for violation of the same regulations.

17-A M.R.S.A. §1106, sub-§3, as enacted by P.L. 1975, c. 499, §1 is repealed.

17-A M.R.S.A. §1107-A, is enacted to read:

§1107-A Unlawful possession of marijuana.

1. A person is guilty of unlawful possession of marijuana if he intentionally or knowingly possesses a quantity of marijuana which, in fact, exceeds 1 1/2 ounces, unless the conduct is authorized by Title 22.

2. Unlawful possession of marijuana is a Class E crime.

COMMENT: These amendments were suggested by District Attorney Mike Povich. They stem from the belief that the presumption utilized by the Code makes the likelihood of a conviction for furnishing extremely difficult to predict and may result in inconsistent verdicts bases on similar sets of facts. Under present law, neither the State nor the individual knows with any certainty the consequences of possession of more than 1 1/2 ounces of marijuana. By contrast, the use of the 1 1/2 ounces as a clear line of demarcation between a criminal offense and a civil violation introduces far greater predictability into the law.

17-A M.R.S.A. §1201, sub-§1, preceding the colon, as last amended by 1975 Laws, c.740, §109, is amended to read:

1. A person who has been convicted of any crime may be sentenced to ~~a suspended term of imprisonment with~~ probation or to an unconditional discharge, unless:

17-A M.R.S.A. §1201, sub-§2, as enacted by 1975 Laws, c.499, §1, is amended to read:

2. A convicted person who is eligible for sentence under this chapter, as provided in subsection 1, shall be sentenced to probation if he is in need of the supervision, guidance, assistance or direction that probation can provide. If a person is [redacted] sentenced to probation, a suspended definite term of imprisonment may be imposed or the case may be continued for sentencing until such time as probation may be revoked. If there is no ~~such~~ need for probation, and no proper purpose would be served by imposing any condition or supervision on his release, he shall be sentenced to an unconditional discharge. A sentence of unconditional discharge is for all purposes a final judgment of conviction.

17-A M.R.S.A. §1206, sub-§5, second sentence, as enacted by 1975 Laws, c. 499, §1 is amended to read:

In such case, the court shall sentence the person to a term of imprisonment if the case was continued for sentence or shall impose the sentence of imprisonment that was suspended when probation was granted.

17-A M.R.S.A. §1206, sub-§6, as enacted by 1975 Laws, c.499, §1 is amended to read:

6. If the person on probation is convicted of a new crime during the period of probation, the court may sentence him for such crime, revoke probation and sentence the person to a [redacted] term of imprisonment if the case was continued for sentence or impose the sentence of imprisonment that was suspended when probation was granted, subject to chapter 47, section 1155.

EXPLANATION

Several judges prefer the system of allowing the convicting court to "continue for sentencing" until probation is revoked, [redacted] as was provided [redacted] in repealed 34 M.R.S.A. §1631(1). It allows the court to make a sentence determination based on the defendant's statu at the time he is about to be imprisoned.

Note. If above amendments are adopted, should also amend § 1152 (2).

17-A M.R.S.A. §1204, sub-§3, as enacted by 1975 Laws, c.499, §1 is amended to read:

3. The convicted peson shall be given an opportunity to address the court on the conditions which are proposed to be attached and shall after sentence be given a written statement setting forth the particular conditions on which he is released on probation~~, and he shall then be given an opportunity to address the court on these conditions if he so requests at the time~~.

ALTERNATIVE

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

EXPLANATION

The requirement that the sentence and the written conditions be prepared before sentencing has caused delays in some courts. The amendment allows the court to address the defendant orally and to furnish him or her the written conditions subsequently.

The alternative takes account of the fact that Rule 32(a) already allows comment by the defendant regarding sentencing.

17-A M.R.S.A. §1253, sub-§2, as enacted by 1975 Laws, c.499, §1, is amended by striking therefrom the second sentence.

34 M.R.S.A. §3, as last amended by 1975 Laws, c.771, section 378, is further amended by adding thereto at the end the following paragraph:

> The department shall have the same authority ~~such~~ regarding local lock-ups.

EXPLANATION

The authority (to inspect, etc.) simply belongs in Title 34 rather than here, since it has nothing to do with credit for time served.

Sentencing Problems

1. There is a conflict between sections 1253(3) and (4) of Title 17-A and section 952 of Title 34 with respect to the good time deductions for persons incarcerated in county jails.

2. A question has been raised as to whether a person imprisoned both as part of the initial sentence and as a result of a failure to pay a fine is to serve those terms concurrently or consecutively. (See §§1151 and 1304)

3. Various sections refer to persons in the custody of the Department of Mental Health and Corrections. Since county jail inmates are not in the department's custody, appropriate language changes are necessary.

AN ACT TO ALLOW THE STATE TO APPEAL AFTER TRIAL IN CRIMINAL CASES WHENEVER PRINCIPLES OF JEOPARDY PERMIT

Sec. 1. 15 M.R.S.A. §2115-A, sub-§1, second sentence, as enacted by 1968 Laws, c.547, §1, is amended to read:

Such appeal shall be taken within ~~10~~ 20 days after such order, decision or judgment has been entered, and in any case before the defendant has been placed in jeopardy under established rules of law.

Sec. 2. 15 M.R.S.A. §2115-A, sub-§2, as enacted by 1968 Laws, §1, is amended to read:

2. Appeal after trial or mistrial. An appeal may be taken by the State in criminal cases, with the written approval of the Attorney General, from the Superior Court or District Court to the law court from any dismissal of an indictment, information or complaint or count thereof or judgment, decision or order which terminates the prosecution in favor of the accused, except that no appeal shall lie where the double jeopardy provisions of the United States Constitution or the Constitution of the State of Maine prohibit further prosecution, and from any decision, ruling or order of the court when the defendant appeals from the judgment. Such appeal shall be taken within 20

days after such dismissal, judgment, decision or order has been entered or, when the defendant appeals from the judgment, within 20 days after the notice of appeal of the defendant is filed.

STATEMENT OF PURPOSE

Two 1975 U.S. Supreme Court decisions, U.S. v. Wilson and U.S. v. Jenkins , made clear that the government could appeal unfavorable orders, decisions or judgments entered after verdict under the federal appeals statute, 18 U.S.C. §3731. The intent of this amendment is, like the federal statute, to allow appeals by the State whenever principles of jeopardy permit.

The expansion of the appeal period from 10 to 20 days is intended to prevent occasional problems which have arisen in obtaining written approval of the Attorney General within the shorter period.

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but shall not be limited to a dismissal of an indictment, information or complaint or count thereof and a judgment or other decision or order terminating the prosecution in favor of the accused. Such appeal shall be taken within 20 days after such dismissal, judgment, decision or order has been entered or, when the defendant appeals from the judgment, within 20 days after the notice of appeal of the defendant is filed.

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14 M.R.S.A. §5544, 2nd ¶, as amended by P.L. 1973, c. 788, §60, is further amended to read:

Any arresting officer may either take any person under arrest for a ~~misdemeanor~~ Class D or Class E crime, before a bail commissioner, who shall inquire into the charge and pertinent circumstances and admit him to bail if proper, or without fee may take the personal recognizance of any person for his appearance on a ~~misdemeanor~~ charge. of a Class D or Class E crime.