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MANUAL ON APPEALS BY THE STATE IN BOTH CRIMINAL AND JUVENILE CODE CASES

Charles K. Leadbetter
Assistant Attorney General
Criminal Division

December 1995

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PART I - PROLOGUE

This manual has been prepared in an effort to provide to each Maine prosecutor a how-to book respecting appeals to a Maine appellate court by the State in both criminal cases and Maine Juvenile Code cases. It addresses the controlling statutory substantive law, statutory procedural law, applicable court rules and relevant case law. It provides the forms to be utilized by each draftsman integral to initiating and pursuing an appeal. It offers guidance as to the necessary review process to be undertaken by any attorney for the State prior to seeking approval of the Attorney General to initiate an appeal. It explains how to initiate a request for approval. It addresses specific problem-areas relative to State's appeals such as time limitations, the need for diligent prosecution and adequacy of the appellate record. It explains the ongoing role of the Attorney General as to all appeals which have received initial approval. Finally, this manual speaks to the process to be utilized by any attorney for the State wishing to obtain relief - not from a Maine appellate court - but rather from the United States Supreme Court.

PART II - APPEALS TO THE LAW COURT BY THE STATE IN CRIMINAL CASES PURSUANT TO 15 M.R.S.A. § 2115-A AND M.R. CRIM. P. 37B

A. Introduction.

The prosecution possesses no inherent entitlement to seek appellate review in a criminal case. The right of the State to take an appeal, to the extent it exists at all (including time constraints, manner and conditions for its taking), is as provided exclusively by the legislature.[1] As applicable here, the controlling statute is that of section 2115-A of Title 15[2] and section 2115-A's implementing rule of criminal procedure found in M.R. Crim. P. 37B.[3] State v. Doucette, 544 A.2d 1290, 1291 (Me. 1988) As discussed more fully below, present section 2115-A accords to the State a limited right of appeal conditioned upon the approval of the Attorney General and diligent prosecution both prior to the commencement of a trial or retrial and after a trial, but not during the trial itself.[4] Any appeal sanctioned by section 2115-A is always to the Maine Supreme Judicial Court,

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[1]Neither the common law nor the Maine or Federal constitutions recognize any such right of the prosecution. See generally, 2 Cluchey & Seitzinger, Maine Criminal Practice, §§ 37.2 at VII-49 thru VII-53 and 37B.1 at VII-92 thru VII-94 (1992).

[2]Note that independent of 15 M.R.S.A. § 2115-A, the legislature has accorded to the State the ability to seek appellate review in the context of a criminal proceeding in certain other circumstances - i.e., review of an adverse final judgment in an extradition proceeding under 15 M.R.S.A. § 210-A; review of post-conviction bail under 15 M.R.S.A. § 1051(6); and appeal from an adverse final judgment in a post-conviction review proceeding under 15 M.R.S.A. § 2131(2).

[3]See "APPENDIX NO. 1" for the current versions of both 15 M.R.S.A. § 2115-A and M.R. Crim. P. 37B.

[4]State v. Hood, 482 A.2d 1268 (Me. 1984).

sitting as the Law Court, even when the appeal involves a District Court criminal matter.

B. Time for taking the appeal.

Under subsection 4 of section 2115-A any appeal authorized by section 2115-A

> "... must be taken within 20 days after the entry of the order or such further time as may be granted by the court pursuant to a rule of court... ."

An order is entered within the meaning of this statutory provision when it is entered in the criminal docket.[5] The implementing rule of criminal procedure in M.R. Crim. P. 37B mandates in (a) thereof that appeals authorized by section 2115-A "shall be subject to the same procedure as that for other appeals, except as provided by ... [Rule 37B itself]."[6] As a consequence of 37B(a), the substance of

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[5] State v. Hood, 428 A.2d 1268, 1269 n.2 (Me. 1984); M.R. Crim. P. 37(c).

[6] M.R. Crim. P. 37B(a) reads as follows:

> (a) **Procedure.** Appeals by the state, when authorized by statute, shall be subject to the same procedure as that for other appeals, except as provided by this rule.

M.R. Crim. P. 37(c)[7] becomes determinative as to the permissible enlargement of the statutory 20-day appeal period.[8] Pursuant to Rule 37(c),

> ... upon a showing of excusable neglect, the court may, before or after the time has expired, with or without motion and notice, extend the time for filing the notice of appeal otherwise allowed for a period not to exceed 30 days from the expiration of the original time prescribed [20 days]... .[9]

The standard of "excusable neglect" has been interpreted by the Law Court very strictly. State v. Williams, 510 A.2d 537 (Me. 1986).[10] It will be found

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[7]See "APPENDIX NO. 2" for a photocopy of the current version of M.R. Crim. P. 37(c).

[8]Note that the rule of criminal procedure which addresses enlargements generally - namely, M.R. Crim. P. 45(b) - by its own terms has no application to enlargements involving Rule 37. Rule 45(b) reads as follows:

> (b) **Enlargement.** When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period, permit the act to be done if the failure to act was the result of excusable neglect: but the court may not extend the time for taking any action under Rules 29, 33, 34, 35, 36, 36B, 37, 40, 76(c), 76(d), and 88(a), except to the extent and under the conditions stated in them.
> (emphasis supplied)

[9]Note that a trial court's refusal to take action on an enlargement request "is in itself the equivalent of a denial." See James v. Witham, 573 A.2d 793, 794 (Me. 1990) (in the context of M.R. Civ. P. 76D).

[10]Note that Williams itself suggests that whether applied in a civil or criminal context the meaning of "excusable neglect" remains the same.

ordinarily only under circumstances where, without actual fault on the part of the party charged to act, such party is not informed of the entry of the adverse order, ruling or decision in time to file a timely appeal. See generally, State v. One 1977 Blue Ford Pick-up Truck, 457 A.2d 1226, 1229, 1230 (Me. 1982). Other than in the context of such blameless "failure to learn," only in extraordinary cases "where injustice would otherwise result" will excusable neglect be found. Id.; see also Casco Bay Island Transit Dist. v. Public Utilities Comm'n, 528 A.2d 448, 451 (Me. 1987); Begin v. Jerry's Sunoco, Inc., 435 A.2d 1079, 1082 (Me. 1981).[11] Such extraordinary cases involve "genuine emergency conditions such as death, sickness [and] undue delay in the mail."[12] State v. Williams, 510 A.2d 537, 539 (Me. 1986).

From all the above it is evident that any appeal taken by the prosecution under section 2115-A and M.R. Crim. P. 37B must be commenced within 20 days after the adverse order, ruling or decision is entered in the criminal docket, except that this 20-day period can be enlarged by a trial court to include up to 30 additional days (for a maximum total period of 50 days) in the rare instance

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[11]But see Wellman v. State, 588 A.2d 1178, 1180-1183 (Me. 1991) (in the context of State's untimely response in a post-conviction review matter under M.R. Crim. P. 71 prior to its amendment effective February 15, 1993).

[12]For further guidance as to what does not constitute excusable neglect, see also, James v. Witham, 573 A.2d 793 (Me. 1990); Caron v. City of Auburn, 567 A.2d 66, 67 (Me. 1989); Casco Bay Island Transit Dist. v. PUC, 528 A.2d 448, 450-451 (Me. 1987); Lane v. Williams, 521 A.2d 706 (Me. 1987); Eaton v. Laflamme, 501 A.2d 428 (Me. 1985); State v. Weinstein, 457 A.2d 320 (Me. 1982); and Reynolds v. Hooper, 407 A.2d 312 (Me. 1979).

where "excusable neglect" exists. It is critically important to the appeal that a proper notice of appeal be timely filed, since compliance with 15 M.R.S.A. § 2115-A(4) and 37B is both mandatory and jurisdictional for purposes of appeal. See, e.g., Petition of Thomas, 434 A.2d 503, 506 (Me. 1981) & State v. Mower, 254 A.2d 604 (Me. 1969) [15 M.R.S.A. § 2115; M.R. Crim. P. 37(c)]; State v. Fernald, 381 A.2d 212, 285 (Me. 1978); State v. Kelley, 376 A.2d 840, 843-44 (Me. 1977) [15 M.R.S.A. § 2115-A; M.R. Crim. P. 37B]; see also State v. Baker, 390 A.2d 1086, 1088 (Me. 1978).[13]

C. Tolling of the appeal period.

M.R. Crim. P. 37B expressly provides for the tolling of the appeal period in one circumstance - namely, in the event a trial court grants a motion to suppress evidence and fails to make findings of fact and conclusions of law either

[13]Because the time requirements are jurisdictional, the Law Court has the power, even on judicial notice alone, to review the correctness of a trial court's finding of "excusable neglect." See State v. Fernald, 381 A.2d 282, 284 n.3 (Me. 1978); see also, State v. Woodward, 383 A.2d 661 (Me. 1978) (notice of appeal signed only by non-resident attorney). Further, in this regard, note "that the parties cannot stipulate to the existence of excusable neglect, since to allow them to do so would in effect permit the parties to extend the time for appeal by agreement and thereby confer jurisdiction upon the Law Court." Young v. Sturdy Furniture Co., 441 A.2d 320, 322 (Me. 1982).

on the record or in writing as required by M.R. Crim. P. 41A(d).[14] Specifically paragraph (e) of Rule 37B provides as follows:

> **(e) Tolling of Appeal Period.** If the state files a motion for findings of fact and conclusions of law pursuant to Rule 41A(d), the appeal period shall be tolled during the pendency of the motion. If the motion is granted, the appeal period shall begin to run once either written findings and conclusions are entered on the criminal docket or a notation reflecting that findings and conclusions have been made is entered on the criminal docket.

The explanation provided by the advisory committee to the addition of (e) to Rule 37B, reads, in relevant part, as follows:

> Rule 37B(e) is added to provide for tolling of the period for taking an appeal by the state when the state has moved for findings of fact and conclusions of law pursuant to Rule 41A(d). Practice has shown that when the state has moved for findings pursuant to Rule 41A(d), those findings are often not entered before the expiration of the 20-day period for the filing of the state's notice of appeal. The requested findings of fact and conclusions of law are often important to the determination by the Attorney General required by Rule

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[14]M.R. Crim. P. 41A(d) reads as follows:

> (d) **Order.** If the motion [to suppress evidence] is granted, the court shall enter an order limiting the admissibility of the evidence according to law. If the motion is granted or denied, the court shall make findings of fact and conclusions of law either on the record or in writing.
>
> If the court fails to make such findings and conclusions, a party may file a motion seeking compliance with the requirement. If the motion is granted and if the findings and conclusions are oral, the clerk shall mail a copy of the docket sheet containing the relevant docket entry and note the mailing on the criminal docket. (emphasis supplied)

> 37B(b). If no findings are made within the 20-day period, the Attorney General is forced to decide, without the benefit of the findings, whether to approve an appeal. The new rule provides for a tolling of the appeal period upon the filing by the state of a motion for findings of fact and conclusions of law.

M.R. Crim. P. 37B(e) advisory committee's note to 1989 amend., Me. Rptr., 551-562 A.2 CXVI-CXVII.[15]

Independent of 37B(e) there apparently exists nothing which serves to toll the appeal period. In this regard, in those cases in which the trial court has continuing jurisdiction (something other than a final judgment), it may be highly desirable (even necessary as a practical matter) for the prosecutor to move for reconsideration in an effort to obviate the need for an appeal. A motion to reconsider is, of course, proper under Maine's criminal procedure. See e.g., State

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[15]Independent of the Attorney General's need for such findings and conclusions, the existence of them as well as their adequacy is of critical importance in the ultimate appeal to the Law Court. As the appellant confronted with an adverse ruling on a motion to suppress, the burden falls to the State to ensure an adequate appellate record for purposes of appellate review. State v. Kneeland, 552 A.2d 4, 5 (Me. 1988) As a consequence

> [e]ven though the obligation of the court under Rule 41A to provide findings of fact and conclusions of law is "absolute rather than conditional," ... [citations omitted], as the only party responsible for an adequate record, the ... [State] has the burden to request the court to make findings if none are made or to expand on inadequate findings [i.e., take all procedural steps within its power to obtain from the court adequate findings] in order for the record to be meaningful for appellate review. [cite omitted]

Id. at 6. (emphasis supplied)

v. Hayford, 412 A.2d 987, 990 (Me. 1980). However, the filing of a motion for reconsideration does not apparently serve to toll the 20-day period for the filing of the notice of appeal. See generally, 2 Cluchey & Seitzinger, Maine Criminal Practice, § 37B.3 at VII-102 (1992). As a consequence, in those cases in which a motion for reconsideration is desirable, it should be filed and action thereon sought from the trial court on an expedited basis. At the same time the appeal request should be initiated so that in the event the reconsideration motion is denied or not acted upon in a timely manner, the state's appeal (if approved by the Attorney General) will be filed within the controlling time period.

D. Notice of appeal is to be accompanied by written approval of the Attorney General. Pursuant to both 15 M.R.S.A. § 2115-A(5)[16] and M.R. Crim. P. 37B(b),[17] the notice of appeal must be accompanied by the written approval of the

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[16] 15 M.R.S.A. § 2115-A(5) reads as follows:

> 5. **Approval of Attorney General.** In any appeal taken pursuant to subsections 1, 2, 2-A or 2-B, the written approval of the Attorney General is required; provided that if the attorney for the State filing the notice of appeal states in the notice that the Attorney General has orally stated that the approval will be granted, the written approval may be filed at a later date.

[17] M.R. Crim. P. 37B(b) reads as follows:

> (b) **Approval of Attorney General.** The notice of appeal shall be accompanied by a written approval of the Attorney General of the State of Maine, which shall become part of the record; provided that if the attorney for the state filing the notice of appeal states in the notice that the Attorney General has orally stated that the approval will be granted, the written approval may be filed at a later

Attorney General; provided that if the attorney for the State filing the notice of appeal states in the notice "that the Attorney General has orally stated that the [written] approval will be granted," the Attorney General's written approval may be filed at a later date. Note with respect to this mandatory written approval that neither subsection 5 of section 2115-A nor paragraph (b) of Rule 37B set a specific time requirement for its submission. The Law Court, however, has expressed its belief that such written approval "should be filed promptly after the notice of appeal is filed." State v. Chase, 439 A.2d 526, 527 n.1 (Me. 1982)

E. Appeal is to be diligently prosecuted.

Under subsection 4 of section 2115-A, any appeal taken pursuant to subsection 1 (pretrial appeal), subsection 2 (post-trial from adverse decision of trial court), subsection 2-A (post-trial from adverse decision of the Superior Court sitting as an intermediate appellate court), or subsection 2-B (appeal from denial by District or Superior Court of a state-initiated motion for correction or reduction of a sentence brought under Rule 35(a) or (c) "shall be diligently prosecuted." In section 2115-A's implementing rule (37B), paragraph (c) expressly provides as follows:

> **(c) Dismissal of Appeal.** The Law Court shall, on motion, order the dismissal of an appeal brought pursuant to this rule if it finds that such appeal has not been diligently prosecuted.

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date. The clerk shall note the filing of such approval, together with the date of filing, in the criminal docket.

As pointed out in 2 Cluchey & Seitzinger, Maine Criminal Practice, § 37B.3 at VII-101, n.46 (1992)

> [t]he legislative debate preceding the enactment of 15 M.R.S.A. § 2115-A anticipated that the Law Court would deal severely with unnecessary delays in the pursuit of pretrial appeals by the state. Speaking of the bill's requirement that the appeal be diligently prosecuted, Senator Richardson said, "There can be no delay, and if there were a delay, our Law Court would not permit it." Legislative record of the 2d Special Session of the 103rd Legislature 373 (1968). See also State v. Fernald, 381 A.2d 282, 286 n.6 (Me. 1978). ...

The net result of the unique[18] burden imposed upon the State to prosecute its appeals diligently is to necessitate (at a minimum) absolute compliance with all time limits imposed.[19] See State v. Sproul, 544 A.2d 743, 747-748 (Me. 1988) (appeal dismissed because state's brief was untimely filed and no timely request for further extension had been filed). Indeed, given the nature of the sanction for noncompliance it is advisable that prosecutors seek no extensions of time absent compelling circumstances. In this regard, no extension of any time limit should be sought by a prosecutor without prior approval of the Attorney General.

F. Form of Attorney General's written approval. The form of the written approval of the Attorney General mandated by 15 M.R.S.A. § 2115-A and M.R. Crim. P. 37B(b) is as follows:

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[18]No similar burden is imposed upon a defendant as to the exercise of any statutory appeal right (see 15 M.R.S.A. §§ 2111, 2114 and 2115).

[19]It additionally goes without saying the "diligent prosecution" precludes the State from "manipulating the device of appeal purposely to delay, abuse, or harm the defendant." State v. Fernald, 381 A.2d 282, 286 n.6 (Me. 1978).

1. Written approval actually accompanying the notice of appeal

The form of the Attorney General's written approval accompanying the notice of appeal is as follows:

STATE OF MAINE

_______, ss

_____COURT
[SITTING AT___]*
CRIMINAL ACTION
DOCKET NO. CR-

STATE OF MAINE)
)
v.)
)
___________________,)
Defendant

APPROVAL OF ATTORNEY GENERAL FOR APPEAL BY STATE PURSUANT TO 15 M.R.S.A. § 2115-A(5) AND M.R. CRIM. P. 37B(b)

I, _____________, Attorney General for the State of Maine, do hereby approve the taking of an appeal by the State to the Supreme Judicial Court, sitting as the Law Court, from [description of the adverse order, ruling or decision and the date of its entry on the criminal docket].

I give this written approval pursuant to 15 M.R.S.A. § 2115-A(5) and M.R. Crim. P. 37B(b).

Dated at Augusta, Maine, this __ day of ____, 199_.

____
Attorney General
State of Maine

*INCLUDE ONLY IF APPEAL INVOLVES THE DISTRICT COURT.

2. Written approval by Attorney General filed at a later date.

a. Written approval by Attorney General when Attorney General earlier orally authorized that appeal

The form of the Attorney General's written approval filed subsequent to the filing of the notice of appeal when Attorney General earlier orally authorized that appeal is as follows:

STATE OF MAINE

_______, ss

_____COURT
[SITTING AT___]*
CRIMINAL ACTION
DOCKET NO. CR-

STATE OF MAINE	)	APPROVAL OF ATTORNEY GENERAL
	)	FOR APPEAL BY STATE PURSUANT
v.	)	TO 15 M.R.S.A. § 2115-A(5) AND
	)	M.R. CRIM. P. 37B(b)
________________,	)	
Defendant		

I, ____________, Attorney General for the State of Maine, do hereby approve the taking of an appeal by the State to the Supreme Judicial Court, sitting as the Law Court, from [description of the adverse order, ruling or decision and the date of its entry on the criminal docket].

This written approval is given pursuant to 15 M.R.S.A. § 2115-A(5) and M.R. Crim. P. 37B(b). Prior to the filing of the State's notice of appeal in the above-captioned case (a copy of which is attached hereto and made a part hereof), I orally stated that this written approval would be granted.

Dated at Augusta, Maine, this __ day of ___, 199_.

____
Attorney General
State of Maine

* INCLUDE ONLY IF APPEAL INVOLVES THE DISTRICT COURT.

b. Written approval by Attorney General when Deputy Attorney General, acting in the Attorney General's stead, earlier orally authorized that appeal[20]

The form of the Attorney General's written approval filed subsequent to the filing of the notice of appeal when Deputy Attorney General, acting in the Attorney General's stead, earlier orally authorized that appeal, is as follows:

STATE OF MAINE

_______, ss

_____COURT
[SITTING AT___]*
CRIMINAL ACTION
DOCKET NO. CR-

STATE OF MAINE	)	APPROVAL OF ATTORNEY GENERAL
	)	FOR APPEAL BY STATE PURSUANT
v.	)	TO 15 M.R.S.A. § 2115-A(5) AND
	)	M.R. CRIM. P. 37B(b)
________________,	)	
Defendant		

I, ____________, Attorney General for the State of Maine, do hereby approve the taking of an appeal by the State to the Supreme Judicial Court, sitting as the Law Court, from [description of the adverse order, ruling or decision and the date of its entry on the criminal docket].

This written approval is given pursuant to 15 M.R.S.A. § 2115-A(5) and M.R. Crim .P. 37B(b). Prior to the filing of the State's notice of appeal in the above-captioned case (a copy of which is attached hereto and made a part hereof), ________, Deputy Attorney General for the State of Maine, acting in my stead because I was at that time unavailable as authorized by 5 M.R.S.A. § 196, orally stated that this written approval would be granted. A photocopy of the written authorization mandated by section 196 is attached hereto and made a part hereof.

Dated at Augusta, Maine, this __ day of ___, 199_.

____
Attorney General
State of Maine

*INCLUDE ONLY IF APPEAL INVOLVES THE DISTRICT COURT.

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[20]See page 21 of this manual.

3. Written approval when someone other than the Attorney General must act in his stead.

In the event that the Attorney General himself "is unavailable to act upon the ... [appeal request] or has determined that it would be legally or ethically improper for him to do so" (within the meaning of section 196 of Title 5)[21] a deputy attorney general who has been given the necessary written authority by the Attorney General to act in his stead will act upon the approval request. The form of the written approval under these circumstances is as follows:

[21]5 M.R.S.A. § 196 provides, in relevant part, as follows:

> Notwithstanding any other provision of law, whenever the written approval of the Attorney General is required by statute or court rule and the Attorney General either is unavailable to act upon the matter or has determined that it would be legally or ethically improper for him to do so, the required approval may be given by a deputy attorney general specifically authorized in writing by the Attorney General to act on his behalf in these situations.

a. Written approval of Deputy Attorney General initially accompanying the written notice of appeal.

The form of the Deputy Attorney General's written approval accompanying the notice of appeal is as follows:

STATE OF MAINE

_______, ss

_____COURT
[SITTING AT___]*
CRIMINAL ACTION
DOCKET NO. CR-

STATE OF MAINE	)	APPROVAL OF DEPUTY ATTORNEY
	)	GENERAL FOR APPEAL BY STATE
v.	)	PURSUANT TO 15 M.R.S.A.
	)	§ 2115-A(5), M.R. CRIM.
_____________,	)	P. 37B(b) AND 5 M.R.S.A. § 196
Defendant	)	

I, ____________, Deputy Attorney General for the State of Maine, do hereby approve the taking of an appeal by the State to the Supreme Judicial Court, sitting as the Law Court, from [description of the adverse order, ruling or decision and the date of its entry in the criminal docket].

This written approval is given pursuant to 15 M.R.S.A. § 2115-A(5), M.R. Crim. P. 37B(b). Further, as authorized by 5 M.R.S.A. § 196, I am giving the required written approval in the stead of _________, Attorney General for the State of Maine, [because of the Attorney General's unavailability to act upon this matter / because the Attorney General has determined that it would be legally/ethically improper for him to act upon this matter]. A photocopy of the written authorization mandated by section 196 is attached hereto and made a part hereof.

Dated at Augusta, Maine, this ___ day of ___, 199_.

____
Deputy Attorney General

*INCLUDE ONLY IF APPEAL INVOLVES THE DISTRICT COURT.

b. <u>Written approval of Deputy Attorney General filed at a later date.</u>

The form of the Deputy Attorney General's written approval filed subsequent to the filing of the notice of appeal when Deputy Attorney General earlier authorized that appeal, is as follows:

STATE OF MAINE

__________, ss

__________ COURT
[SITTING AT __________*]
CRIMINAL ACTION
DOCKET NO. CR-

STATE OF MAINE	)	APPROVAL OF DEPUTY ATTORNEY
	)	GENERAL FOR APPEAL BY STATE
v.	)	PURSUANT TO 15 M.R.S.A.
	)	§ 2115-A(5), M.R. CRIM.
_____________,	)	P. 37B(b) AND 5 M.R.S.A. § 196
Defendant	)	

I, ________________, Deputy Attorney General for the State of Maine, do hereby approve the taking of an appeal by the State to the Supreme Judicial Court, sitting as the Law Court, from <u>[description of the adverse order, ruling or decision and the date of its entry in the criminal docket].</u>

This written approval is given pursuant to 15 M.R.S.A. § 2115-A(5) and M.R. Crim. P. 37B(b). Prior to the filing of the State's notice of appeal in the above-entitled case (a copy of which is attached hereto and made a part hereof) as authorized by 5 M.R.S.A. § 196, I gave the required oral approval because _______, Attorney General for the State of Maine, <u>[was then unavailable to act upon this matter / had determined that it would be legally/ethically improper for him to act upon this matter]. [Because he is unavailable to act upon this matter at the present time as well / Because he has determined that it would be legally/ethically improper for him to act upon this matter]</u> I am giving the required written approval in his stead. A photocopy of the written authorization mandated by section 196 is attached hereto and made a part hereof.

Dated at Augusta, Maine, this __ day of _____, 199_.

____
Deputy Attorney General

*INCLUDE ONLY IF APPEAL INVOLVES THE DISTRICT COURT.

G. Form of notice of appeal.

The form of the prosecutor's written notice of appeal is as follows:

1. Notice of appeal accompanied by written approval.
   a. pretrial order

STATE OF MAINE

_______, ss.

______COURT
[SITTING AT ____]*
CRIMINAL ACTION
DOCKET NO.

STATE OF MAINE)
)
v.)
)
_______________,)
Defendant)

NOTICE OF APPEAL PURSUANT TO 15 M.R.S.A. § 2115-A AND M.R. CRIM. P. 37B

1. ___________, the Defendant in the above-described criminal case, has not yet been placed in jeopardy within the contemplation of 15 M.R.S.A. § 2115-A(4).

2. [Describe the challenged pretrial order(s) from which the State is appealing and the date of the entry of the adverse order(s) on the criminal docket. Physically attach a copy of the challenged pretrial order(s) and make it/them a part of this notice.]

3. The pretrial order(s) identified in numbered paragraph 2 above has/have a reasonable likelihood of [causing serious impairment to / termination of the prosecution] within the contemplation of 15 M.R.S.A. § 2115-A(1).

4. This notice of appeal is accompanied by the Attorney General's written approval as required by 15 M.R.S.A. § 2115-A(5) and M.R. Crim. P. 37B(b).

WHEREFORE, the State of Maine, whose address is _____ _______________________ hereby appeals to the Supreme Judicial Court, sitting as the Law Court, from the pretrial order(s) identified in numbered paragraph 2 above pursuant to 15 M.R.S.A. § 2115-A and M.R. Crim. P. 37B.

Dated: ______, 199_.

____
[Attorney for the State]
[Title]

*INCLUDE ONLY IF APPEAL INVOLVES THE DISTRICT COURT.

b. Adverse post-trial order of the trial court.

STATE OF MAINE

_______, ss.

______COURT
[SITTING AT ____]*
CRIMINAL ACTION
DOCKET NO. CR-_____

STATE OF MAINE)
)
v.)
)
__________________,)
Defendant)

NOTICE OF APPEAL PURSUANT TO 15 M.R.S.A. § 2115-A AND M.R. CRIM. P. 37B

1. [Describe the challenged post-verdict order(s) requiring a new trial or resulting in termination of the prosecution in favor of the defendant (e.g., M..R. Crim. P. 29, 33, 34) from which the State is appealing and the date of the entry of the adverse order(s) on the criminal docket. Physically attach a copy of the challenged post-verdict order(s) and make it/them a part of the notice.]

2. The post-verdict order(s) identified in numbered paragraph 1 above can be appealed without violating the double jeopardy provisions of the Constitution of the United States and the Constitution of Maine as contemplated by 15 M.R.S.A. § 2115-A(2).

3. This notice of appeal is accompanied by the Attorney General's written approval as required by 15 M.R.S.A. § 2115-A(5) and M.R. Crim. P. 37B(b).

WHEREFORE, the State of Maine, whose address is ______ ____________________ hereby appeals to the Supreme Judicial Court, sitting as the Law Court, from the order(s) identified in numbered paragraph 2 above pursuant to 15 M.R.S.A. § 2115-A and M.R. Crim. P. 37B.

Dated: ______, 199_

____
[Attorney for the State]
[Title]

*INCLUDE ONLY IF APPEAL INVOLVES THE DISTRICT COURT.

c. Adverse decision of the Superior Court sitting as an intermediate appellate court relative to District Court criminal cases

STATE OF MAINE

_______, ss.

SUPERIOR COURT
CRIMINAL ACTION
DOCKET NO. CR-_____

STATE OF MAINE	)	
	)	NOTICE OF APPEAL PURSUANT
v.	)	TO 15 M.R.S.A. § 2115-A AND
	)	M.R. CRIM. P. 37B
_______________,	)	
Defendant	)	

1. [Describe the challenged decision vacating the underlying criminal judgment in whole or in part and the date of its entry on the criminal docket. Physically attach a copy of the challenged decision and make it a part of this notice.]

2. This decision identified in numbered paragraph 1 above is appealable under 15 M.R.S.A. § 2115-A(2-A).

3. This notice of appeal is accompanied by the Attorney General's written approval as required by 15 M.R.S.A. § 2115-A(5) and M.R. Crim. P. 37B(b).

WHEREFORE, the State of Maine, whose address is ______ ____________________ hereby appeals to the Supreme Judicial Court, sitting as the Law Court, from the decision identified in numbered paragraph 1 above pursuant to 15 M.R.S.A. § 2115-A and M.R. Crim. P. 37B.

Dated: _______, 199_.

____
[Attorney for the State]
[Title]

d. <u>Denial by District or Superior Court of State-initiated motion for correction or reduction of a sentence brought under Rule 35(a) or (c)</u>

STATE OF MAINE

___________, ss

___________COURT
[SITTING AT _______]*
CRIMINAL ACTION
DOCKET NO. CR-_____

STATE OF MAINE)
)
v.)
)
_______________,)
Defendant)

NOTICE OF APPEAL PURSUANT TO 15 M.R.S.A. § 2115-A AND M.R. CRIM. P. 37B

1. [Describe the challenged Rule 35 order from which the State is appealing and the date of the entry of the adverse order on the criminal docket. Physically attach a copy of the challenged order and make it a part of the notice.]

2. The order identified in numbered paragraph 1 above denied a State-initiated Rule 35 motion as contemplated by 15 M.R.S.A. § 2115-A(2-B).

3. This notice of appeal is accompanied by the Attorney General's written approval as required by 15 M.R.S.A. § 2115-A(5) and M.R. Crim. P. 37B(b).

WHEREFORE, the State of Maine, whose address is ________________ ___________________________________, hereby appeals to the Supreme Judicial Court, sitting as the Law Court, from the order identified in numbered paragraph 2 above pursuant to 15 M.R.S.A. § 2115-A and M.R. Crim. P. 37B.

Dated: ______________, 19_____

____
[Attorney for the State]
[Title]

*INCLUDE ONLY IF APPEAL INVOLVES THE DISTRICT COURT

2. Notice of appeal filed without written approval.

The notice of appeal is the same as that found in (G)(1)(a), (b), (c) or (d) except that the final numbered paragraph - namely, numbered paragraph 4 as to (G)(1)(a) and numbered paragraph 3 as to (G)(1)(b), (c) and (d) - should be replaced with the following language as appropriate:

a. Oral approval given by Attorney General

_____________, the Attorney General of the State of Maine, has orally stated that his written approval, as required by 15 M.R.S.A. § 2115-A(5) and M.R. Crim. P. 37B(b), will be granted; such written approval will be filed at a later date.

b. Oral approval given by Deputy Attorney General acting in the stead of the Attorney General

_____________, Deputy Attorney General for the State of Maine, acting in the stead of _________________, Attorney General for the State of Maine, as authorized by 5 M.R.S.A. § 196, has orally stated that the written approval required by 15 M.R.S.A. § 2115-A(5) and M.R. Crim. P. 37B(b), will be granted; such written approval will be filed at a later date.

H. Preliminary review process to be used by prosecutor prior to initiating a request for Attorney General approval.

1. Appeals prior to the commencement of trial or retrial.

Subsection 1 of section 2115-A authorizes a limited right of appeal "prior to trial." Subsection 4 of section 2115-A specifies that "an appeal taken pursuant to subsection 1 shall also be taken before the defendant has been placed in

jeopardy."[22] The net result of subsections 1 and 4 is that once a defendant has been placed in jeopardy the State is foreclosed from bringing an appeal until the actual termination of the trial. State v. Hood, 482 A.2d 1268 (Me. 1984). "This means that both the challenged order and the notice of appeal must be filed before the empaneling and swearing of the jury or the swearing of the first witness in a jury-waived case." 2 Cluchey & Seitzinger, Maine Criminal Practice, § 37B.2 at VII-97 and 37B.3 at VII-100 (1992) (citations omitted) In the event that the defendant has gone through a prior trial, subsection 4 does not serve to bar an appeal prior to a retrial. "The jeopardy referred to in subsection 4 is that which would arise upon a subsequent trial or retrial rather than the jeopardy that might have attached at an earlier trial." State v. Pierce, 459 A.2d 148, 151 (Me. 1983)

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[22]The Maine Law Court has described the purpose underlying the jeopardy provision of subsection 4 thusly:

> The purpose underlying ... [this] jeopardy provision is to require the State to appeal a pretrial order before jeopardy attaches even though twenty days have not elapsed after the entry of the order appealed from. In other words, subsection 4 prevents the State from interrupting a trial by appealing a pretrial order after jeopardy has attached even though twenty days have not passed since entry of the order.

State v. Pierce, 459 A.2d 148, 151 (Me. 1983).

Independent of the requirement that the appeal be brought "prior to trial," the State's ability to appeal is strictly limited. Section 1 of section 2115-A[23] permits the state to appeal from an order of the court prior to trial that

- "suppresses any evidence, including but not limited to, physical or identification evidence or evidence of a confession or admission;"
- "prevents the prosecution from obtaining evidence;"[24]
- "dismiss[es] ... an indictment, information or complaint;" or
- "either under the particular circumstances of the case or generally for the type of order in question, has a reasonable likelihood of causing

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[23]15 M.R.S.A. § 2115-A(1) reads as follows:

> 1. **Appeals prior to trial.** An appeal may be taken by the State in criminal cases on questions of law from the District Court and from the Superior Court to the law court: from an order of the Court prior to trial which suppresses any evidence, including, but not limited to, physical or identification evidence or evidence of a confession or admission; from an order which prevents the prosecution from obtaining evidence; from a pretrial dismissal of an indictment, information or complaint; or from any other order of the court prior to trial which, either under the particular circumstances of the case or generally for the type of order in question, has a reasonable likelihood of causing either serious impairment to or termination of the prosecution.

[24]This second category of appealable pretrial order "would encompass a denial of a request for discovery by the state and would appear to include the denial of an application for a search warrant." 2 Cluchey & Seitzinger, Maine Criminal Practice, § 37B.2 at VII-96 (1992) (citations omitted)

either serious impairment to or termination of the prosecution."

(emphasis supplied)[25]

The Maine Law Court has construed subsection 1 as requiring that each of the specifically enumerated categories of appealable orders - namely, suppression of evidence, preventing the state from obtaining evidence and dismissal of a charging instrument - in fact result in "serious impairment to or a termination of the prosecution" to be cognizable in a pretrial appeal. State v. Drown, 447 A.2d 466 (Me. 1982);[26] see generally, 2 Cluchey & Seitzinger, Maine Criminal Practice, § 37B.2 at VII-96 (1992)

Preliminary to initiating a request for the Attorney General's approval, and as soon as possible after receiving the lower court's "pretrial order,"[27] ensure that, under all the circumstances, such order "has produced a significant setback to the State's attempt to bring the accused to justice." State v. Hickey, 459 A.2d 573, 578

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[25]Note that these section 1 criteria, in addition to limiting the right of the State to take a pretrial appeal, simultaneously circumscribe the jurisdiction of the Law Court to entertain a pretrial appeal by the State. State v. Doucette, 544 A.2d 1290, 1291-1292 (Me. 1988).

[26]Drown was decided by the Law Court in the context of an indictment dismissed by the Superior Court on the ground that it was not sufficiently specific as to the date of the alleged crimes charged in multiple counts. The Law Court's analysis underlying its ultimate dismissal of the appeal as improvidently granted by the Attorney General is so important to an understanding of how the Law Court construes the phrase "serious impairment to a termination of the prosecution" that the entire opinion is reproduced in "APPENDIX NO. 3."

[27]See generally, State v. Baker, 390 A.2d 1086 (Me. 1978) for guidance as to what action by a trial court is necessary to create a proper pretrial order. See also State v. Silva, 509 A.2d 659, 660 n.1 (Me. 1986); 2 Cluchey & Seitzinger, Maine Criminal Practice, 37B.2 at VII-98 (1992)

(Me. 1983) (quoting State v. Drown, 447 A.2d 466, 470-471 (Me. 1982)) Or stated slightly differently, prior to seeking approval for an appeal, examine the matter to ensure that "a reasonable likelihood exists that the State will be handicapped in trying the defendant." State v. Patterson, 651 A.2d 362, 365-366 (Me. 1994) (quoting State v. Doucette, 544 A.2d 1290, 1292 (Me. 1988) (quoting State v. Drown, 447 A.2d 466, 471 (Me. 1982)) If the adverse pretrial order involves a motion in limine, make sure that the State's appeal is not premature. See Id. at 366. Normally a ruling on a motion in limine does not become final until the time of trial. Id. (citing State v. Pinkham, 586 A.2d 730, 731 (Me. 1991)) However, under circumstances where the record makes clear that the ruling is not subject to future change, the State's appeal is not premature. Id. (citing State v. Shellhammer, 542 A.2d 780, 782 n.1 (Me. 1988))

In making your pre-request assessment, consult the available Maine case law for the category of order you seek to appeal. More specifically in this regard consult the following:

SUPPRESSION OF EVIDENCE CATEGORY

See, e.g., State v. Lemieux, 662 A.2d 211 (Me. 1995) (appeal from District Court order suppressing OUI evidence on the ground that the officer was acting without lawful authority under 29 M.R.S.A. § 2501 to conduct a vehicle stop); State v. Patterson, 651 A.2d 362 (Me. 1994) (appeal from Superior Court order on defendant's motion in limine suppressing statements of defendant before and after polygraph test on ground that evidence would be prejudicial); State v.

Haskell, 645 A.2d 619 (Me. 1994) (appeal from District Court order suppressing OUI evidence, obtained as a result of a traffic stop made at night that was pretextual); State v. Hill, 606 A.2d 793 (Me. 1992) (appeal from District Court order suppressing OUI evidence obtained as a result of investigatory stop of automobile on the ground that the basis for the officer's articulable and reasonable suspicion for the stop had dissipated prior to his request for the defendant's license and registration and thus prior to the officer's initial observations of OUI); State v. Powell, 591 A.2d 1306 (Me. 1991) (appeal from a District Court order suppressing OUI evidence on the ground that an automobile turning around as much as 4/10 of a mile, or 700 yards, before a roadblock, and 500 yards before the first traffic cones and signs warning of the upcoming roadblock, does not constitute articulable and reasonable suspicion of OUI or other criminal activity to justify an investigatory stop); State v. Pinkham, 586 A.2d 730 (Me. 1991) (appeal from a District Court order suppressing defendant's refusal to take an approved blood-alcohol breath test on the ground that the defendant already had taken an unapproved "ALERT" pre-screening test so that the defendant had no statutory obligation to take a "second" breath test); State v. Edwards, 575 A.2d 321 (Me. 1990) (appeal from order of Superior Court suppressing physical evidence obtained pursuant to a search warrant on ground of inadequate probable cause in affidavit);[28] State v. Andrei, 574 A.2d 295 (Me. 1990) (appeal from order of

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[28] See also State v. Perrigo, 640 A.2d 1074 (Me. 1994); State v. Diamond, 628 A.2d 1032 (Me. 1993); State v. Ward, 624 A.2d 485 (Me. 1993); State v. Haley, 571 A.2d 831 (Me. 1990); State v. Morse, 563 A.2d 1107 (Me. 1989); State v. Wing, 559 A.2d 783

Superior Court suppressing defendant's diary provided to police by husband on ground that admitting that diary into evidence would violate her Fourth and Fifth Amendment rights); State v. Horton, 561 A.2d 488 (Me. 1989) (appeal from order of Superior Court suppressing statements made by attorney defendant during an inquiry by Board of Overseers of the Bar on ground that their use would violate constitutional guarantees against compelled self-incrimination); State v. Hewes, 558 A.2d 696 (Me. 1989) (appeal from order of Superior Court suppressing out-of-court statements of defendant on ground of Miranda violation);[29] State v. Palmisano, 553 A.2d 1262 (Me. 1989) (appeal from order of District Court suppressing physical evidence obtained by warrantless search of defendant's automobile at police station on ground that no exigent circumstance existed); State v. Kneeland, 552 A.2d 4 (Me. 1988)[30] (appeal from order of District Court suppressing evidence gathered at an investigatory stop of defendant's automobile on ground that no articulable suspicion existed);[31] State v. Poole, 551 A.2d 108 (Me. 1988) (appeal from an order of Superior Court suppressing OUI

(Me. 1989); State v. Lutz, 553 A.2d 657 (Me. 1989); State v. Cloutier, 544 A.2d 1277 (Me. 1988); State v. Henderson, 532 A.2d 1013 (Me. 1987); State v. Bridges, 513 A.2d 1365 (Me. 1986); State v. Knowlton, 489 A.2d 529 (Me. 1985).

[29]See also State v. Lavoie, 562 A.2d 146 (Me. 1989); State v. Bridges, 518 A.2d 1365 (Me. 1986); State v. Gordon, 509 A.2d 1160 (Me. 1986).

[30]Note that the Law Court affirmed the trial court's decision because the State failed to present an adequate record for appeal. Id. at 6.

[31]See also State v. Hatch, 614 A.2d 1299 (Me. 1992); State v. Pinkham, 565 A.2d 318 (Me. 1989); State v. Daigle, 539 A.2d 206 (Me. 1988) (mem.); State v. Fogg, 539 A.2d 205 (Me. 1988) (mem.).

evidence obtained after investigatory stop of automobile on ground that out-of-court conversation with truck driver, who informed officer that defendant's car was weaving all over the road, relied upon by officer for articulable suspicion, was inadmissible as hearsay); State v. Dana, 548 A.2d 1390 (Me. 1988) (mem.) (appeal from an order of Superior Court suppressing results of breath test as a sanction for failure of police officer to appear as a witness at the time of hearing); State v. Silva, 509 A.2d 659 (Me. 1986) (appeal from an order of Superior Court suppressing marihuana obtained behind defendant's home on ground that officer's intrusion to seize marihuana violated defendant's Fourth Amendment rights because patch was within curtilage); State v. Baker, 502 A.2d 489 (Me. 1985) (appeal from Superior Court order suppressing results of blood test taken shortly after fatal auto accident over objection of the defendant on ground that test was unconstitutional search under Schmerber v. California, 384 U.S. 757 (1966)); State v. Thornton, 453 A.2d 489 (Me. 1982)[32] (appeal from order of Superior Court suppressing physical evidence obtained by warrant search of defendant's property on ground of illegal prior warrantless search providing probable cause in affidavit).

DISMISSAL OF INDICTMENT, INFORMATION OR COMPLAINT CATEGORY

See, e.g., State v. Chambers, 648 A.2d 681 (Me. 1994) (appeal from a District Court order dismissing a complaint for a violation of a tribal (Passamaquoddy)

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[32]State ultimately prevailed only after obtaining relief from the United States Supreme Court. Oliver v. United States [Maine v. Thornton], 466 U.S. 170 (1984).

hunting ordinance on ground of lack of jurisdiction in state court); State v. Cyr, 588 A.2d 753 (Me. 1991) (appeal from a Superior Court order dismissing an arson indictment, after conviction, because of a 5-year prejudicial pre-indictment delay); State v. Brown, 571 A.2d 816 (Me. 1990) (appeal from order of Superior Court dismissing possession-by-a-felon charge (Count II of indictment) on ground that 15 M.R.S.A. § 393(1) was not a reasonable exercise of State's constitutional police power to the extent it embraced convictions for "nonviolent" felonies); State v. Enggass, 571 A.2d 823 (Me. 1990) (appeal from order of District Court dismissing criminal complaint charging OUI on ground that defendant's arrest was without probable cause); State v. Mitchell, 511 A.2d 1068 (Me. 1986) (appeal from order of District Court dismissing criminal complaint charging operating after suspension in violation of 29 M.R.S.A. § 2184 on ground that suspension was based on a civil OUI adjudication); State v. Stevens, 510 A.2d 1070 (Me. 1986) (appeal from order of Superior Court dismissing indictment that charged female defendant with rape of thirteen year-old boy on ground that 17-A M.R.S.A. § 252(1)(A) did not encompass males as victims of rape); State v. Chase, 505 A.2d 791 (Me. 1986)[33] (appeal from order of Superior Court dismissing indictment as a result of State's refusal to disclose the identity of confidential informant after having been ordered to do so

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[33]Earlier, the State had attempted to appeal the order requiring disclosure while merely being under threat of a sanction for noncompliance (presumably dismissal of the indictment). The Law court dismissed the appeal as premature because the State had suffered "no harm." State v. Chase, 501 A.2d 806 (Me. 1985).

by court under M.R. Evid. 509(c)(2));[34] State v. Bowring, 490 A.2d 667 (Me. 1985) (appeal from an order of District Court dismissing two criminal cases as sanction for failure of district attorney or representative of the summonsing police department to be present at arraignment of both criminal defendants); State v. Lemar, 483 A.2d 702 (Me. 1984) (appeal from an order of Superior Court dismissing with prejudice criminal complaint for prosecutorial error during trial - namely, comment by prosecutor on defendant's right to remain silent);[35] State v. Young, 476 A.2d 186 (Me. 1984) (appeal from an order of Superior Court dismissing indictment against defendant for Class B theft without acquiescence of prosecutor); State v. Pierce, 459 A.2d 148 (Me. 1983) (appeal from order of Superior Court dismissing indictment on ground that retrial following declaration of mistrial would violate defendant's guarantee against double jeopardy);[36] State v. Drown, 447 A.2d 446 (Me. 1982) (appeal from order of Superior Court dismissing indictment on ground that it was not sufficiently specific as to dates of alleged

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[34]See also State v. Chase, 439 A.2d 526 (Me. 1982).

[35]Note that the trial court, following the State's opening argument, granted the Defendant's motion for a mistrial based upon this Fifth Amendment violation "and then, in addition, on its own motion, ordered that the case be dismissed with prejudice" as a sanction. Id. at 703. This chronology raised the question as to whether the State's appeal was properly "pretrial" within the contemplation of subsection 1 of section 2115-A. The Maine Law court held that it was, finding the case sufficiently analogous to that of State v. Pierce, 459 A.2d 148 (Me. 1983). Id. at 703 n.1.

[36]See also State v. Farrington, 511 A.2d 440 (Me. 1986); State v. Friel, 500 A.2d 631 (Me. 1985).

crimes charged in multiple counts);[37] State v. Dowling, 453 A.2d 496 (Me. 1982) (appeal from order of Superior Court dismissing indictments as a sanction for noncompliance by State with court order to obtain out-of-state medical records of a key prosecution witness); State v. Wells, 443 A.2d 60 (Me. 1982)[38] (appeal from order of Superior Court dismissing indictment on ground that earlier dismissal by District Court of criminal complaint based on identical charge precluded subsequent prosecution by way of indictment).

GENERAL CATEGORY "UNDER THE PARTICULAR CIRCUMSTANCES OF THE CASE OR GENERALLY FOR THE TYPE OF ORDER IN QUESTION, HAS A REASONABLE LIKELIHOOD OF CAUSING EITHER SERIOUS IMPAIRMENT TO OR TERMINATION OF THE PROSECUTION"

See, e.g., State v. Doucette, 544 A.2d 1290 (Me. 1988)[39] (appeal from Superior Court's in limine evidentiary ruling that prior inconsistent statements made by

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[37]Unlike in the earlier case of State v. Carter , 447 A.2d 37, 38 n.2 (Me. 1982), the Law Court did not simply criticize the State for seeking to appeal rather than utilizing alternative means. In Drown that Court found that the approval of the Attorney General was improvidently granted.

[38]The Law Court ultimately affirmed the judgment because it found that the State had failed to exercise its appeal right following the District Court's dismissal (with prejudice) of the criminal complaint for unnecessary delay and instead had improperly attempted to bypass the District Court altogether by presenting the case to the Grand Jury. Id. at 64.

[39]The Law Court ultimately dismissed the State's appeal, finding it had jurisdiction to entertain the appeal but determining that the Attorney General had improvidently granted the appeal since the evidentiary question raised could readily have been answered by study of the existing law. An interlocutory appeal that involves a question with an answer readily available from research is improvident and becomes even more obviously so when, as here, the answer is plainly adverse to the appellant." Id. at 1294.

key prosecution witness admissible solely for purpose of impeachment since not admissible under rules of evidence as nonhearsay); State v. Shellhammer, 540 A.2d 780 (Me. 1988) (appeal from District Court's in limine ruling excluding driver's admissions on day of trial of OUI charge on ground that 29 M.R.S.A. § 1312 (8-A), in abrogating the corpus delicti rule on proof of operation by a defendant, was an unconstitutional intrusion on the judicial power to establish rules of evidence in violation of art. III, § 2); State v. Hickey, 459 A.2d 573 (Me. 1983) (appeal from Superior Court's order granting defendant's motion to compel State to elect between proceeding against defendant on charge of intentional murder or depraved indifference murder).[40]

As a final point, preliminary to initiating a request for the Attorney General's approval, give thought to whether, even if statutorily the State is entitled to appeal, under the circumstances an appeal would be in the best interests of the State. Or stated slightly differently, prior to seeking approval for an appeal, examine the matter to determine whether resorting to an appeal is a wise course of action. One critical consideration should be the potential consequences of an adverse decision by the Law Court, not only relative to the case at bar, but upon other pending and future cases as well. Another consideration is the State's inability to limit the scope of review once it appeals. Notwithstanding the issue(s) approved by the Attorney General, the scope of the Law Court's review

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[40]The Law Court expressly found the State's appeal to be proper since the Justice's order in essence required the State to determine, at its subsequent peril, on which theory the jury might base conviction. Id. at 578.

cannot be limited by the Attorney General - the appeal bringing before the Law Court "the entire Superior Court record and presents any questions properly preserved below." State v. Marquis, 525 A.2d 1041, 1042 (Me. 1987) A related consideration is a potential cross-appeal by a defendant. See generally, 2 Cluchey & Seitzinger, Maine Criminal Practice, § 37B.2 at VII-98 thru VII-99 (1992). A final critical consideration is financial. Any appeal contemplated must be evaluated in light of the anticipated financial costs likely to be incurred against any expected benefits. Financial costs are not simply those to be absorbed by the prosecuting office. They also include the costs to be incurred by the Judicial Department, including reasonable counsel fees and costs for the defense of a state-initiated appeal in the event counsel is court-appointed.[41]

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[41] 15 M.R.S.A. § 2115-A(8) expressly provides that "[t]he Law Court shall allow reasonable counsel fees and costs for the defense of appeals under ... [section 2115-A]." Rule 37B(d) also mandates that "[w]hen an appeal is taken by the state, the Law Court shall allow the defendant reasonable counsel fees and costs for defense of the appeal." In the event counsel is privately retained, then the prosecuting office will be ordered by the Court to pay what it believes reflects a fair and reasonable fee based on the market rates in order not to deplete the resources of the defense.

2. Appeals after trial from an adverse decision of the trial court.

Subsection 2 of section 2115-A authorizes a limited right of appeal to the State post-trial.[42] It permits the State to appeal after the termination of a trial only when

(1) the trier of fact has returned a verdict of guilty;

(2) post-verdict the court enters an order granting a motion for new trial (M.R. Crim. P. 33), granting a motion in arrest of judgment (M.R. Crim. P. 34), granting a dismissal or granting other orders necessitating a new trial or resulting in termination of the prosecution in favor of the accused (e.g., granting a motion for judgment of acquittal under M.R. Crim. P. 29 or 33); and

(3) the appeal is not barred by double jeopardy.[43]

Preliminary to initiating a request for the Attorney General's approval, and as soon as possible after receiving the trial court's post-conviction adverse ruling granting a motion for a new trial or arrest of judgment, or order of dismissal or

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[42] 15 M.R.S.A. § 2115-A(2) reads as follows:

> 2. **Appeals after trial.** An appeal may be taken by the State from the Superior Court or the District Court to the Law Court after trial and after a finding of guilty by a jury or the court from the granting of a motion for a new trial, from arrest of judgment, from dismissal or from other orders requiring a new trial or resulting in termination of the prosecution in favor of the accused, when an appeal of the order would be permitted by the double jeopardy provisions of the Constitution of the United States and the Constitution of Maine.

[43] See generally, 2 Cluchey & Seitzinger, Maine Criminal Practice, § 37B.4 (1992).

other order "requiring a new trial or resulting in termination of the prosecution in favor of the accused," examine the matter to ensure both that such appeal "would be permitted by the double jeopardy provisions of the Constitution of the United States and the Constitution of Maine" and that an appeal would be in the best interests of the State.[44] In making your assessment, consult the available Maine case law. More specifically in this regard, see, e.g., State v. Spooner, No. 7436 (Me. Oct. 19, 1995) (appeal from Superior Court's granting of the defendant's motion for new trial (treated by Law Court as entry of a judgment of acquittal), entered after, and notwithstanding, return of jury verdicts of guilty on the ground that testimony of complaining juvenile witness was so unreliable that a jury acting rationally could not avoid having a reasonable doubt as to defendant's guilt); State v. Preston, 521 A.2d 305 (Me. 1987) (appeal from Superior Court's granting of defendant's motion for a new trial based on newly discovered evidence of person's boasting that he had committed crimes in question); State v. Howes, 432 A.2d 419 (Me. 1981) (appeal from Superior Court's granting of the defendant's motion for judgment of acquittal, entered after, and notwithstanding, return of jury verdict of guilty on the ground that the evidence was insufficient to convict).[45]

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[44]See again this manual at pages 39-40.

[45]See also State v. Tait, 483 A.2d 745 (Me. 1984); State v. Harrington, 440 A.2d 1078 (Me. 1982).

3. Appeals from an adverse decision of the Superior Court sitting as an intermediate appellate court relating to District Court criminal cases.

Subsection 2-A of section 2115-A[46] allows the State to take an appeal to the Law Court from the vacation of an underlying criminal judgment in whole or in part by the Superior Court sitting as an intermediate appellate court relative to District Court criminal cases appealed by an aggrieved defendant.[47]

Preliminary to initiating a request for the Attorney General's approval, and as soon as possible after receiving the Superior Court's decision, examine the matter to ensure that the decision is adverse - i.e., the underlying criminal judgment has been vacated, at least in part - and that an appeal would be in the best interests of the State.[48] In making your assessment, consult the available Maine case law. More specifically in this regard, see, e.g., State v. Ellis, 651 A.2d 830 (Me. 1994)

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[46]15 M.R.S.A. § 2115-A(2-A) reads as follows:

> 2-A. **Appeals from an adverse decision of the Superior Court sitting as an appellate court relative to District Court criminal cases.** If an appeal to the Superior Court by an aggrieved defendant from a judgment of the District Court results in the vacating of the underlying criminal judgment in whole or in part, an appeal may be taken by the State from the adverse decision of the Superior Court to the Law Court.

[47]Unlike the State, a District Court criminal defendant must first pursue his or her post-conviction appeal before the Superior Court rather than the Maine Law Court, under 15 M.R.S.A. §§ 2111 and 2114 and M.R. Crim. P. 36. If unsuccessful before that intermediate appellate court, a defendant may then pursue an appeal before the Law Court under 15 M.R.S.A. § 2115 and M.R. Crim. P. 37.

[48]See again this manual at pages 39-40.

(appeal from an intermediate appellate court's reversal of District Court's finding of guilt as to OUI on ground of evidence insufficiency); State v. Dean, 645 A.2d 634 (Me. 1994) (appeal from an intermediate appellate court's reversal of the District Court's denial of the defendant's suppression motion and vacating the District Court's judgment entered on the defendant's conditional plea to OUI, on the ground of absence of articulable and reasonable suspicion of criminal activity to justify the investigatory vehicle stop); State v. D'Angelo, 605 A.2d 68 (Me. 1992) (appeal from an intermediate appellate court's reversing the District Court's denial of the defendant's suppression motion and vacating the District Court's judgment entered on the defendant's conditional guilty plea for OUI, on the ground that an automobile pulling into a residential driveway about 75 yards before a police roadblock did not constitute articulable and reasonable suspicion for an investigatory stop of the vehicle); State v. Violette, 576 A.2d 1359 (Me. 1990) (appeal from intermediate appellate court's vacating of more severe sentence imposed by District Court after a successful appeal and reconviction on ground that new sentence violated due process).

I. Appeal after trial by a defendant from a criminal judgment; State may obtain review without having to cross-appeal.

Subsection 3 of section 2115-A addresses the post-trial situation in which a defendant, aggrieved by a judgment of conviction, initiates an appeal. Subsection 3 reads as follows:

> **3. When defendant appeals.** When the defendant appeals from a judgment of conviction, it is not necessary

> for the State to appeal. It may argue that error in the proceedings at trial in fact supports the judgment. The State may also establish that error harmful to it was committed prior to the trial or in the trial resulting in the conviction from which the defendant has appealed, which error should be corrected in the event that the law court reverses on a claim of error by the defendant and remands the case for a new trial. If the case is so reversed and remanded, the law court shall also order correction of the error established by the State.

Because subsection 3 speaks to appeals initiated by a defendant "from a judgment of conviction" and alludes to the Maine Law Court, it is clear that the subsection is speaking only to appeals to the Law Court initiated by a defendant under 15 M.R.S.A. § 2115.[49] Under section 2115 a defendant's appeal may be either generated directly from a Superior Court judgment of conviction (the Superior Court being the trial court) or instead indirectly following a partially or wholly unsuccessful appeal from the District Court to the Superior Court sitting as an

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[49] 15 M.R.S.A. § 2115 reads as follows:

> In any criminal proceeding in the Superior Court, any defendant aggrieved by a judgment of conviction, ruling or order may appeal to the Supreme Judicial Court, sitting as the Law Court. The time for taking the appeal and the manner and any conditions for the taking of the appeal shall be as the Supreme Judicial Court provides by rule.
>
> In an appeal from a judgment imposing a sentence of imprisonment for life, if 3 judges concur, the judgment shall be reversed and may be remanded for a new trial. In all other criminal cases, the judgment shall be affirmed, unless a majority of the justices sitting and qualified to act in the case concur in its reversal.

intermediate appellate court under 15 M.R.S.A. § 2111 and 2114.[50] Once such an appeal is filed, by operation of subsection 3 of section 2115-A, the State is not required to initiate a cross-appeal as long as it seeks from the Law Court the correction of pretrial and/or trial error harmful to it committed by the trial court (District Court or Superior Court as the case may be).[51]

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[50]15 M.R.S.A. § 2111 and 2114 provide as follows:

> **§ 2111. Time to appeal**
>
> In any criminal proceeding in the District Court, any defendant aggrieved by a judgment of conviction or order may appeal to the Superior Court in the county where the offense, on which the judgment of conviction or order was rendered, is alleged to have been committed. Venue may be transferred by the Chief Justice of the Superior Court at his discretion. The time for taking the appeal and the manner and any conditions for the taking of the appeal shall be as the Supreme Judicial Court provides by rule.
>
> . . . .
>
> **§ 2114. Defendant shall make election of jury trial**
>
> In all Class D and E criminal proceedings, the defendant may waive his right to jury trial and elect to be tried in the District Court, as provided by rule of the Supreme Judicial Court. An appeal to the Superior Court following trial and conviction in the District Court shall be only on questions of law. (emphasis supplied)

[51]In the event that a defendant's Law Court appeal is from a partially successful appeal from the District Court to the Superior Court, note that the State must cross-appeal as required by subsection 2-A of section 2115-A if it is seeking relief from that adverse part of the Superior Court appellate decision rather than relief from pretrial and/or trial error harmful to it committed in the District Court.

The State is free to challenge any pretrial[52] court determination that constitutes harmful error without having to cross-appeal and any error harmful to it committed during the trial itself. The State's allegations of harmful pretrial and/or trial error when the defendant has appealed are potentially cognizable by the Law Court irrespective of whether the Defendant's appeal is ultimately sustained or denied.However, it is of the utmost importance that if the State anticipates that the defendant's appeal may be sustained and a new trial ordered, that it raise any pretrial and/or trial error harmful to it so that the error can be corrected for retrial purposes.

Although as explained above the State is free to challenge harmful pretrial and trial error when the defendant has appealed without the State having to cross-appeal, such is not the case with post-trial error. Because subsection 3 of section 2115-A refers to "error in the proceedings at trial" or "prior to trial" and is wholly silent as to errors occurring after the trial, in order for the State to raise post-trial error it must utilize subsection 2 (or 2-A or 2-B, if applicable) of section

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[52]15 M.R.S.A. § 2115-A(3) was amended by P.L. 1991, ch. 223 to specifically add harmful error committed prior to trial. Before the enactment of this amendment, subsection 3 had spoken only in terms of error committed "at trial" or "in the trial." As the "STATEMENT OF FACT" to the legislative document relative to P.L. 1991, ch. 223 - namely, L.D. 1508 (115th Legis. 1991) - makes clear:

> Since the defendant is free to raise harmful pretrial error in the defendant's appeal to the Law Court, it is appropriate to allow the State the same opportunity to challenge any harmful pretrial court orders, including those that could have been appealed by the State prior to trial under Title 15, section 2115-A, subsection 1.

2115-A rather than subsection 3. As a consequence, when the State alleges a post-trial error it must file a notice of appeal, even if the defendant is also taking an appeal. State v. Parsons, 626 A.2d 348, 349, 351-352 (Me. 1993) (State required to file notice of appeal where State's assertion of error concerned granting post-trial motion for judgment of acquittal notwithstanding the defendant's appeal).[53]

J. Appeal from denial by District or Superior Court of a State-initiated motion for correction or reduction of a sentence brought under Rule 35(a) or (c)

Subsection 2-B of section 2115-A, enacted by P.L. 1995, ch. 7, § 1, effective September 29, 1995, authorizes an appeal by the State to the Law Court from the denial, in whole or in part, by a judge or justice of a motion for correction or reduction of a sentence brought by the attorney for the State under M.R. Crim. P. 35(a) or (c).[54] Subsection 2-B reads as follows:

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[53]Although not mentioned by the Law Court in Parsons, reliance by the State upon Parsons' appeal from his judgments of conviction on multiple counts of gross sexual misconduct in order to seek to attack the trial court's erroneous granting of a judgment of acquittal following the jury's guilty verdict on a separate count of gross sexual misconduct from which Parsons did not seek to appeal, appears wholly inappropriate for a different reason. The defendant's appeal under 15 M.R.S.A. § 2115 is not taken relative to the count to which the State seeks to have the verdict reinstated. Under subsection 3 of 2115-A errors that the State is free to challenge must relate to the criminal judgment(s) actually appealed from by the defendant.

[54]M.R. Crim. P. 35(a) and (c) read as follows:

RULE 35. CORRECTION OR REDUCTION OF SENTENCE

(a) **Correction of Sentence.** On motion of the defendant or the attorney for the state, or on the court's own motion,

> 2-B. **Appeal from the denial of a Rule 35 motion.** If a motion for correction or reduction of a sentence brought by the attorney for the State under Rule 35 of the Maine Rules of Criminal Procedure is denied in whole or in part, an appeal may be taken by the State from the adverse order of the trial court to the Law Court.

The "Statement of Fact" to L.D. 549 (117th Legis. 1995) explains this appeal thusly:

> Under current state criminal procedure, the State is accorded the right to bring, on its own, a motion to correct an illegal sentence or a sentence imposed in an illegal manner, or to seek reduction of a sentence on the ground that the original sentence was influenced by a mistake of fact that existed at the time of the sentencing.
>
> No statutory authority exists under current state law to allow the State to appeal in the event its motion for correction or reduction of a sentence is denied. This bill creates that needed statutory authority.

> made within one year after a sentence is imposed, the justice or judge who imposed sentence may correct an illegal sentence or a sentence imposed in an illegal manner.
>
> . . . .
>
> (c) **Reduction of Sentence After Commencement of Execution.**
>
> (1) *Timing of Motion.* On motion of the defendant <u>or the attorney for the state</u>, or on the court's own motion, made within one year after a sentence is imposed and before the execution of the sentence is completed, the justice or judge who imposed sentence may reduce that incompleted sentence.
>
> (2) *Ground of Motion.* The ground of the motion shall be that the original sentence was influenced by a mistake of fact which existed at the time of sentencing. (emphasis supplied)

Preliminary to initiating a request for the Attorney General's approval,[55] and as soon as possible after the order of denial by the District Court or Superior Court is made known to you, examine the matter to ensure that the denial of the state-initiated Rule 35 motion in whole or in part is actually adverse to the State and that an appeal would be in the best interests of the State.[56]

K. Adequacy of record on appeal.

As the appellant, the burden falls entirely on the State to ensure an adequate appellate record for purposes of appellate review. State v. Kneeland, 552 A.2d 4, 5 (Me. 1988) (citing State v. Marshall, 451 A.2d 633, 635 (Me. 1982)) In an appeal pursued by the State under subsections 1, 2, 2-A or 2-B of section 2115-A, to this burden is added the requirement of diligent prosecution. The net effect is to require that the attorney for the State take all reasonable measures to ensure timely and adequate preparation of the record on appeal to the Law Court in any appeal initiated under section 2115-A, including a complete and accurate clerk's record (District Court and/or Superior Court), the needed transcript(s) of the proceeding(s) in District or Superior Court or a proper substitute if unavailable, and in the appropriate case, the preparation of a record on an agreed statement. Failure on the part of the attorney for the State to do so will likely result in the

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[55]Of course, both the time requirements having application to appeals taken under subsections 1, 2 and 2-A of section 2115-A, including the requirement that the appeal "must be diligently prosecuted," and the approval of the Attorney General-requirement, have application to an appeal taken under subsection 2-B of section 2115-A. See "APPENDIX NO. 1" for the current version of 15 M.R.S.A. § 2115-A.

[56]See again this manual at pages 39-40.

dismissal of the appeal rather than some lesser sanction. Particularly in pretrial appeals the State must seek to ensure that the trial court complies with any special responsibility imposed upon it such as adequate findings of fact relative to fact-based orders.[57]

L. All pending appeals are subject to dismissal at the direction of the Attorney General.

All appeals taken by the State pursuant to subsection 1 (pretrial appeal), subsection 2 (post-trial from adverse decision of trial court), subsection 2-A (post-trial from adverse decision of the Superior Court sitting as an intermediate appellate court), or subsection 2-B (appeal from denial by District or Superior Court of a state-initiated motion for correction or reduction of a sentence brought under Rule 35(a) or (c)) of section 2115-A are subject to voluntary dismissal as authorized by M.R. Crim. P. 37(e)(1). That provision reads as follows:

> **(1) Voluntary Dismissal.** A defendant may dismiss his or her appeal by filing a written dismissal signed by the defendant, and the state may dismiss its appeal by filing a written dismissal signed by the attorney for the state; provided that, after the appeal is argued to the Law Court, it may be dismissed only with leave of the Law Court. (emphasis supplied)

However, no prosecutor shall file a written dismissal without prior approval of the Attorney General. Further, any appeal which is allowed by the Attorney General is subject to dismissal by the attorney for the State at the direction of the Attorney General at any point in the appeal process. The reason for such

[57]See again footnote number 14 of this manual at page 13.

"ultimate control" resting with the Attorney General is to ensure, to the extent foreseeable, not only that a given appeal is in fact in compliance with the applicable statutory standard, but additionally that pursuit of the appeal continues to be in the best interests of the State.[58]

[58]See again this manual at pages 39-40.

PART III - APPEALS BY THE STATE IN JUVENILE CODE CASES PURSUANT EITHER TO 15 M.R.S.A. §§ 3402(3), 3403, 3405 AND M.R. CRIM. P. 36B THROUGH 36D [APPEALS TO SUPERIOR COURT] OR 15 M.R.S.A. § 3407(1) AND M.R. CRIM. P. 37B [APPEALS TO LAW COURT]

A. Introduction

In the context of the Maine Juvenile Code the controlling law respecting the right of the State to take an appeal, to the extent it exists at all, is as provided by sections 3402, 3403 and 3405 of Title 15 and the implementing rules of criminal procedure found in M.R. Crim. P. 36B through 36D as to an appeal from the juvenile court[59] to the Superior Court and as provided by section 3407 of Title 15 and the implementing rule of criminal procedure found in M.R. Crim. P. 37B as to the appeal from the juvenile court or intermediate appellate court (Superior Court) to the Maine Law Court.[60] As discussed more fully below section 3402 accords to the State an unfettered right to appeal to the Superior Court sitting as an appellate court from the failure of a juvenile court to order a bind-over, while section 3407 accords to the State a limited right of appeal to the Maine Law Court conditioned upon the approval of the Attorney General and diligent prosecution from the reversal of a juvenile court's adjudication by the Superior Court acting

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[59]"Juvenile court" means the District Court exercising the jurisdiction conferred by section 3101. (15 M.R.S.A. § 3003(15))

[60]See "APPENDIX NO. 4" for substance of the current versions of 15 M.R.S.A. §§ 3402, 3403, 3405 and 3407 and M.R. Crim. P. 36B through 36D.

as an intermediate appellate court or from an adverse decision or order of the juvenile court.[61]

B. Appeal by the State to the Superior Court from the failure of the juvenile court to order a bind-over.

The appeal provided to the State by the legislature relative to the refusal of a juvenile court to order a bind-over is wholly unique. By virtue of 15 M.R.S.A. § 3402(3)[62] and M.R. Crim. P. 36B(a)[63] the State is given, in this one

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[61]Note that 15 M.R.S.A. § 3401 expressly addresses the juvenile appellate structure and the goals of the structure in the Maine Juvenile Code. Section 3401 reads as follows:

> § 3401. **Appeals structure and goals**
>
> 1. **Structure.** Except as otherwise provided, appeals from the juvenile court shall be to the Superior Court and appeals from the Superior Court shall be to the Law Court.
>
> 2. **Goals of juvenile appellate structure.** The goals of the juvenile appellate structure are:
>
> A. To correct errors in the application and interpretation of law;
>
> B. To insure substantial uniformity of treatment to persons in like situations; and
>
> C. To provide for review of juvenile court decisions so that the legislatively defined purposes of the juvenile justice system as a whole are realized.

[62]15 M.R.S.A. § 3402(3) reads as follows:

> The State may appeal from the juvenile court to the Superior Court for the failure of the juvenile court to

circumstance,[64] access to the Superior Court sitting as an appellate court.[65] Such an appeal is not conditioned upon the approval of the Attorney General. Thus, 15 M.R.S.A. § 2115-A has no application to this particular State's appeal.

Under subsection 5 of section 3402 any appeal authorized by section 3402 -- including, of course, a state's appeal from a juvenile court's failure to order a bind-over --

> must be taken within 5 days of the entry of an order of disposition or other appealed order or such further time as the Supreme Judicial Court may provide pursuant to a rule of court.

An order is entered within the meaning of this statutory provision when it is entered in the juvenile docket. The implementing rule of criminal procedure in M.R. Crim. P. 36B provides in (c) thereof that

> [a]n appeal may be taken within 5 days after entry of an order of disposition or other appealed order. Upon a showing of excusable neglect, the court may, before or after the time has expired, with or without motion and notice, extend the time for filing the notice of appeal otherwise allowed for a period

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order a bind-over.

[63]M.R. Crim. P. 36B(a), in critical part, reads:

> An appeal may be taken by the state from the failure of a juvenile court to order a bind-over.

[64]Stated slightly differently, the State may appeal from the juvenile court to the Superior Court "only the refusal of the juvenile court to bind over a juvenile." (COMMENTARY - 1979 to 15 M.R.S.A. § 3401 at page 685 (1983))

[65]Note that the scope of review of the Superior Court in this circumstance is as reflected in 15 M.R.S.A. § 3405(1) and the implementing rule of criminal procedure in M.R. Crim. P. 36B(b).

> not to exceed 15 days from the expiration of the original time prescribed by this paragraph. (emphasis supplied)

Rule 36B thus contemplates that an appeal taken by the prosecution under section 3402 must be commenced[66] within 5 days after the adverse order is entered in the juvenile docket, except that this 5-day period can be enlarged by the juvenile court to include up to 15 additional days (for a maximum total period of 20 days) in the rare circumstance where "excusable neglect"[67] exists.[68]

Turning away from the time constraints relative to initiating such an appeal, one final point must be made. If the State suffers an adverse decision by the Superior Court sitting as the appellate court, no further appeal to the Maine Law Court is authorized.[69] Paragraph A of subsection 2 of section 3407 expressly dictates what matters may be appealed by the State from the intermediate appellate court (Superior Court) to the Law Court. Subsection (A) provides in critical part that

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[66]An appeal is commenced by filing a notice of appeal with the clerk of the District Court. (M.R. Crim. P. 36B(a))

[67]See again pages 10-11 of this manual for an explanation of the standard of "excusable neglect" as interpreted by the Law Court.

[68]Note that neither Rule 36B nor section 3402 provides for the tolling of the appeal period under any circumstances.

[69]In this regard the State is in the same position as the juvenile aggrieved by a dispositional order of the juvenile court. "The Superior Court's conclusion that the Juvenile Court did not abuse its discretion is final." State v. Flint H., 544 A.2d 739, 741 (Me. 1988) (citing State v. Roy E.S., 440 A.2d 1025, 1027 (Me. 1982)); State v. Joey F., 438 A.2d 1273, 1274 (Me. 1982).

> [d]ecisions of the Superior Court on appeal from the Juvenile Court, as to matters described in section 3402, subsection 1, paragraph A only, may be appealed to the Law Court by... [the State]. (emphasis supplied)

15 M.R.S.A. § 3402(1)(A) addresses only an adjudication. Hence the Superior Court's decision relative to the failure of a juvenile court to order a bind-over is final.[70] (See also COMMENTARY - 1979 to 15 M.R.S.A. § 3407 at pages 694-695 (1983))

C. Appeal by the State to the Law Court from the reversal of a juvenile court's adjudication by the Superior Court.

Paragraph A of subsection 2 of section 3407 authorizes a limited right of appeal by the State, as a party aggrieved, to the Law Court from an adverse decision of the Superior Court sitting as an appellate court.[71] It permits the State to appeal only the reversal of a juvenile court's adjudication of guilt by the

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[70]Note that, unlike the State, a juvenile is accorded the right to appeal an adverse decision of the Superior Court relative to bind-over, but only after having been tried, convicted and sentenced as an adult in Superior Court. See 15 M.R.S.A. § 3407(2)(b).

[71]15 M.R.S.A. § 3407(2)(A) reads as follows:

> 2. **Appeals from the Superior Court.**
>
> A. Decisions of the Superior Court on appeal from the Juvenile Court, as to matters described in section 3402, subsection 1, paragraph A only, may be appealed to the Law Court by an aggrieved party. An appeal by the State under this paragraph shall be subject to section 2115-A, subsections 5 and 8.

Superior Court.[72] State v. Michael Z., 427 A.2d 476 (Me. 1981); see also State v. Danny A., 536 A.2d 1136 (Me. 1988) (mem.) Further, such an appeal by the State is made subject to both subsections 5[73] and 8[74] of section 2115-A by the same paragraph A and to the implementing rule of criminal procedure found in M.R. Crim. P. 37B by paragraph C.[75] As a consequence of the application of 15 M.R.S.A. § 2115-A(5) and 37B, this limited right of appeal to the Law Court is conditioned upon the approval of the Attorney General, diligent prosecution and all the other

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[72]Note that a juvenile is subject to this same limitation. State v. Joey F., 438 A.2d 1273, 1274 (Me. 1982).

[73]15 M.R.S.A. § 2115-A(5) reads as follows:

> 5. **Approval of Attorney General.** In any appeal taken pursuant to subsection 1, 2 or 2-A, the written approval of the Attorney General shall be required; provided that if the attorney for he State filing the notice of appeal states in the notice that the Attorney General has orally stated that the approval will be granted, the written approval may be filed at a later date.

[74]15 M.R.S.A. § 2115-A(8) reads as follows:

> **Fees and Costs.** The Law Court shall allow reasonable counsel fees and costs for the defense of appeals under this section.

[75]15 M.R.S.A. § 3407(2)(C) reads as follows:

> C. Appeals pursuant to this subsection shall be taken in the same manner as appeals following a judgment of conviction of an adult in Superior Court, except as otherwise provided by rule promulgated by the Supreme Judicial Court.

No special rule has been promulgated by the Supreme Judicial Court relative to this type of appeal. Thus Rule 37B controls.

factors earlier addressed in PART II of this manual relative to state criminal appeals, including the 20-day time period within which such an appeal must be initiated[76] and the necessary consideration as to whether initiating an appeal would be in the best interests of the State.[77]

D. Appeal by the State to the Law Court from an adverse decision, ruling or order of the juvenile court.

Subsection 1 of section 3407 authorizes a limited right of appeal by the State to the Law Court from an adverse decision, ruling or order of the juvenile court "to the same extent and in the same manner as in criminal cases under section 2115-A."[78] Or stated slightly differently, subsection 1 of section 3407 accords to the state a limited right of appeal conditioned upon the approval of the Attorney General and diligent prosecution both prior to the commencement of an adjudicatory hearing or rehearing and thereafter, but not during the adjudicatory hearing itself.[79] Matters subject to appeal are essentially the same as

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[76]See again PART II of this manual at pages 9-12.

[77]See again PART II of this manual at pages 39-40.

[78]15 M.R.S.A. § 3407(1) reads as follows:

> 1. **Appeals from the juvenile court by the State.** The State may appeal from a decision or order of the juvenile court to the Law Court to the same extent and in the same manner as in criminal cases under section 2115-A.

[79]Note that if an appeal is initiated to the Law Court by a juvenile under 15 M.R.S.A. § 3407(2)(A) for failure of the Superior Court to reverse a juvenile court's adjudication of guilt, subsection 3 of section 2115-A would appear to have potential application. (See again Part II of this manual at pages 44-48)

those properly appealable in criminal cases under section 2115-A. (See generally COMMENTARY - 1979 to 15 M.R.S.A. § 3407 at page 694 (1983)); see again PART II of this manual at pages 28-42, 44-49) This includes an appeal from the denial of a State-initiated motion for correction or reduction of a disposition brought under Rule 35(a) or (c).[80] The time within which such an appeal must be initiated by filing a proper notice of appeal in the juvenile court, and the tolling of the appeal period are, of course, the same as in criminal cases under section 2115-A. (See again PART II of this manual at pages 9-15) Also as in criminal cases, any contemplated appeal must be assessed as to whether it would be in the best interests of the State. (See again Part II of this manual at pages 39-40)

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[80]Correction or reduction of an order of disposition in a juvenile case appears to be made subject to M.R. Crim. P. 35(a) or (c) by operation of 15 M.R.S.A. § 3309. Section 3309 provides as follows:

> To the extent not inconsistent with or inapplicable to Part 6, procedure in juvenile proceedings must be in accordance with the Maine Rules of Criminal Procedure. The Supreme Judicial Court may promulgate rules for juvenile proceedings as provided under Title 4, section 8.

E. Form of Attorney General's written approval. The form of the written approval of the Attorney General mandated by 15 M.R.S.A. §§ 2115-A, 3407 and M.R. Crim. P. 37B(b) is as follows:

1. Written approval actually accompanying the notice of appeal

The form of the Attorney General's written approval accompanying the notice of appeal is as follows:

STATE OF MAINE

_______________, ss

DISTRICT COURT
SITTING AT___
JUVENILE ACTION
DOCKET NO. JV-___

STATE OF MAINE	)	APPROVAL OF ATTORNEY GENERAL FOR APPEAL BY STATE PURSUANT TO 15 M.R.S.A. §§ 2115-A, 3407 (1) AND M.R. CRIM. P. 37B
	)	
v.	)	
	)	
_______________________,	)	
Juvenile (DOB)	)	

I, ______________, Attorney General for the State of Maine, do hereby approve the taking of an appeal by the State to the Supreme Judicial Court, sitting as the Law Court, from [description of the adverse order, ruling or decision and the date of its entry on the juvenile docket].

I give this written approval pursuant to 15 M.R.S.A. §§ 2115-A(5), 3407(1) and M.R. Crim. P. 37B(b).

Dated at Augusta, Maine, this __ day of ____, 199_.

____
Attorney General
State of Maine

2. Written approval by Attorney General filed at a later date.

   a. Written approval by Attorney General when Attorney General earlier orally authorized that appeal

The form of the Attorney General's written approval filed subsequent to the filing of the notice of appeal when Attorney General earlier orally authorized that appeal is as follows:

STATE OF MAINE

______________, ss	DISTRICT COURT SITTING AT___ JUVENILE ACTION DOCKET NO. JV-____

STATE OF MAINE v. ______________________, Juvenile (DOB)	)))))))	APPROVAL OF ATTORNEY GENERAL FOR APPEAL BY STATE PURSUANT TO 15 M.R.S.A. §§ 2115-A(5), 3407(1) AND M.R. CRIM. P. 37B(b)

I, ____________, Attorney General for the State of Maine, do hereby approve the taking of an appeal by the State to the Supreme Judicial Court, sitting as the Law Court, from [description of the adverse order, ruling or decision and the date of its entry on the juvenile docket].

This written approval is given pursuant to 15 M.R.S.A. §§ 2115-A(5), 3407(1) and M.R. Crim. P. 37B(b). Prior to the filing of the State's notice of appeal in the above-captioned case (a copy of which is attached hereto and made a part hereof), I orally stated that this written approval would be granted.

Dated at Augusta, Maine, this __ day of ___, 199_.

____
Attorney General
State of Maine

b. Written approval by Attorney General when Deputy Attorney General, acting in the Attorney General's stead, earlier orally authorized that appeal[81]

The form of the Attorney General's written approval filed subsequent to the filing of the notice of appeal when Deputy Attorney General, acting in the Attorney General's stead, earlier orally authorized that appeal, is as follows:

STATE OF MAINE

_______________, ss

DISTRICT COURT
SITTING AT___
JUVENILE ACTION
DOCKET NO. JV-___

STATE OF MAINE	)	APPROVAL OF ATTORNEY GENERAL FOR APPEAL BY STATE PURSUANT TO 15 M.R.S.A. §§ 2115-A(5), 3407(1) AND M.R. CRIM. P. 37B(b)
	)	
v.	)	
	)	
	)	
____________________,	)	
Juvenile (DOB)	)	

I, ____________, Attorney General for the State of Maine, do hereby approve the taking of an appeal by the State to the Supreme Judicial Court, sitting as the Law Court, from [description of the adverse order, ruling or decision and the date of its entry on the juvenile docket].

This written approval is given pursuant to 15 M.R.S.A. §§ 2115-A(5), 3407(1) and M.R. Crim .P. 37B(b). Prior to the filing of the State's notice of appeal in the above-captioned case (a copy of which is attached hereto and made a part hereof) _______________ Deputy Attorney General for the State of Maine, acting in my stead because I was at that time unavailable as authorized by 5 M.R.S.A. § 196, orally stated that this written approval would be granted. A photocopy of the written authorization mandated by section 196 is attached hereto and made a part hereof.

Dated at Augusta, Maine, this ___ day of ___, 199_.

____
Attorney General
State of Maine

---

[81]See page 64 of this manual.

3. Written approval when someone other than the Attorney General must act in his stead.

In the event that the Attorney General himself "is unavailable to act upon the ... [appeal request] or has determined that it would be legally or ethically improper for him to do so" (within the meaning of section 196 of Title 5)[82] a deputy attorney general who has been given the necessary written authority by the Attorney General to act in his stead will act upon the approval request. The form of the written approval under these circumstances is as follows:

---

[82] 5 M.R.S.A. § 196 provides, in relevant part, as follows:

> Notwithstanding any other provision of law, whenever the written approval of the Attorney General is required by statute or court rule and the Attorney General either is unavailable to act upon the matter or has determined that it would be legally or ethically improper for him to do so, the required approval may be given by a deputy attorney general specifically authorized in writing by the Attorney General to act on his behalf in these situations.

a. Written approval of Deputy Attorney General initially accompanying the written notice of appeal.

The form of the Deputy Attorney General's written approval accompanying the notice of appeal is as follows:

STATE OF MAINE

_______________, ss

DISTRICT COURT
SITTING AT___
CRIMINAL ACTION
DOCKET NO. JV-___

STATE OF MAINE))) v.))) _______________,) Juvenile (DOB))	APPROVAL OF DEPUTY ATTORNEY GENERAL FOR APPEAL BY STATE PURSUANT TO 15 M.R.S.A. §§ 2115-A(5), 3407(l), M.R. CRIM. P. 37B(b) AND 5 M.R.S.A. § 196

I, ___________, Deputy Attorney General for the State of Maine, do hereby approve the taking of an appeal by the State to the Supreme Judicial Court, sitting as the Law Court, from [description of the adverse order, ruling or decision and the date of its entry in the juvenile docket].

This written approval is given pursuant to 15 M.R.S.A. §§ 2115-A(5), 3407(l) and M.R. Crim. P. 37B(b). Further, as authorized by 5 M.R.S.A. § 196, I am giving the required written approval in the stead of _________, Attorney General for the State of Maine, [because of the Attorney General's unavailability to act upon this matter / because the Attorney General has determined that it would be legally/ethically improper for him to act upon this matter]. A photocopy of the written authorization mandated by section 196 is attached hereto and made a part hereof.

Dated at Augusta, Maine, this ___ day of ___, 199_.

____
Deputy Attorney General

b. Written approval of Deputy Attorney General filed at a later date.

The form of the Deputy Attorney General's written approval filed subsequent to the filing of the notice of appeal when Deputy Attorney General earlier authorized that appeal, is as follows:

STATE OF MAINE

________________, ss

DISTRICT COURT
SITTING AT____
CRIMINAL ACTION
DOCKET NO. JV-____

STATE OF MAINE	)	APPROVAL OF DEPUTY ATTORNEY GENERAL FOR APPEAL BY STATE PURSUANT TO 15 M.R.S.A. §§ 2115-A(5), 3407(l), M.R. CRIM. P. 37B(b) AND 5 M.R.S.A. § 196
	)	
	)	
v.	)	
	)	
	)	
____________________,	)	
Juvenile (DOB)	)	

I, __________________, Deputy Attorney General for the State of Maine, do hereby approve the taking of an appeal by the State to the Supreme Judicial Court, sitting as the Law Court, from [description of the adverse order, ruling or decision and the date of its entry in the juvenile docket].

This written approval is given pursuant to 15 M.R.S.A. §§ 2115-A(5), 3407(l) and M.R. Crim. P. 37B(b). Prior to the filing of the State's notice of appeal in the above-entitled case (a copy of which is attached hereto and made a part hereof) as authorized by 5 M.R.S.A. § 196, I gave the required oral approval because ___________, Attorney General for the State of Maine, [was then unavailable to act upon this matter / had determined that it would be legally/ethically improper for him to act upon this matter]. [Because he is unavailable to act upon this matter at the present time as well / Because he has determined that it would be legally/ethically improper for him to act upon this matter] I am giving the required written approval in his stead. A photocopy of the written authorization mandated by section 196 is attached hereto and made a part hereof.

Dated at Augusta, Maine, this __ day of _____, 199_.

____
Deputy Attorney General

F. Form of notice of appeal.

The form of the prosecutor's written notice of appeal is as follows:

1. Notice of appeal accompanied by written approval

a. pretrial order

STATE OF MAINE

________________, ss.

DISTRICT COURT
SITTING AT ____
CRIMINAL ACTION
DOCKET NO. JV-_____

STATE OF MAINE)
)
v.)
)
_________________________,)
Juvenile (DOB))

NOTICE OF APPEAL PURSUANT TO 15 M.R.S.A. §§ 2115-A, 3407(1), AND M.R. CRIM. P. 37B

1. ___________, the Defendant in the above-described criminal case, has not yet been placed in jeopardy within the contemplation of 15 M.R.S.A. § 2115-A(4).

2. [Describe the challenged pretrial order(s) from which the State is appealing and the date of the entry of the adverse order(s) on the juvenile docket. Physically attach a copy of the challenged pretrial order(s) and make it/them a part of this notice.]

3. The pretrial order(s) identified in numbered paragraph 2 above has/have a reasonable likelihood of [causing serious impairment to / termination of the prosecution] within the contemplation of 15 M.R.S.A. § 2115-A(1).

4. This notice of appeal is accompanied by the Attorney General's written approval as required by 15 M.R.S.A. § 2115-A(5), 3407(1) and M.R. Crim. P. 37B(b).

WHEREFORE, the State of Maine, whose address is _________________ ________________________ hereby appeals to the Supreme Judicial Court, sitting as the Law Court, from the pretrial order(s) identified in numbered paragraph 2 above pursuant to 15 M.R.S.A. § 2115-A, 3407(1) and M.R. Crim. P. 37B.

Dated: ______, 199_.

____
[Attorney for the State]
[Title]

b. Adverse post-verdict order of the juvenile court.

STATE OF MAINE

_______________, ss.

DISTRICT COURT
SITTING AT ____
CRIMINAL ACTION
DOCKET NO. JV-____

STATE OF MAINE)
)
v.)
)
______________________)
Juvenile (DOB))

NOTICE OF APPEAL PURSUANT
TO 15 M.R.S.A. §§ 2115-A,
3407(1), AND M.R. CRIM. P. 37B

1. [Describe the challenged post-verdict order(s) requiring a new trial or resulting in termination of the prosecution in favor of the juvenile (e.g., M.R. Crim. P. 29, 33, 34) from which the State is appealing and the date of the entry of the adverse order(s) on the juvenile docket. Physically attach a copy of the challenged post-verdict order(s) and make it/them a part of the notice.]

2. The post-verdict order(s) identified in numbered paragraph 1 above can be appealed without violating the double jeopardy provisions of the Constitution of the United States and the Constitution of Maine as contemplated by 15 M.R.S.A. § 2115-A(2).

3. This notice of appeal is accompanied by the Attorney General's written approval as required by 15 M.R.S.A. § 2115-A(5), 3407(1) and M.R. Crim. P. 37B(b).

WHEREFORE, the State of Maine, whose address is _________________ ___________________ hereby appeals to the Supreme Judicial Court, sitting as the Law Court, from the order(s) identified in numbered paragraph 1 above pursuant to 15 M.R.S.A. § 2115-A, 3407(1) and M.R. Crim. P. 37B.

Dated: ______, 199_

____
[Attorney for the State]
[Title]

c. Denial by District Court of State-initiated motion for correction or reduction of a disposition brought under Rule 35(a) or (c)

STATE OF MAINE

_______________________, ss

DISTRICT COURT
SITTING AT _________
JUVENILE ACTION
DOCKET NO. JV-______

STATE OF MAINE)
)
v.)
)
_________________,)
Juvenile (DOB))

NOTICE OF APPEAL PURSUANT TO 15 M.R.S.A. § 2115-A, 3407(1) AND M.R. CRIM. P. 37B

1. [Describe the challenged Rule 35 order from which the State is appealing and the date of the entry of the adverse order on the juvenile docket. Physically attach a copy of the challenged order and make it a part of the notice.]

2. The order identified in numbered paragraph 1 above denied a State-initiated Rule 35 motion as contemplated by 15 M.R.S.A. § 2115-A(2-B).

3. This notice of appeal is accompanied by the Attorney General's written approval as required by 15 M.R.S.A. § 2115-A(5), 3407(1) and M.R. Crim. P. 37B(b).

WHEREFORE, the State of Maine, whose address is _________________ ____________________________, hereby appeals to the Supreme Judicial Court, sitting as the Law Court, from the order identified in numbered paragraph 2 above pursuant to 15 M.R.S.A. § 2115-A, 3407(1) and M.R. Crim. P. 37B.

Dated: ____________

____
[Attorney for the State]
[Title]

d. Reversal of a juvenile court's adjudication by the Superior Court

STATE OF MAINE

________________, ss.

SUPERIOR COURT
CRIMINAL ACTION
DOCKET NO. CR-____

STATE OF MAINE)
)
v.)
)
)
______________________)
Juvenile (DOB))

NOTICE OF APPEAL PURSUANT TO 15 M.R.S.A. §§ 2115-A, 3407(2)(A), AND M.R. CRIM. P. 37B

1. [Describe the challenged decision vacating the underlying adjudication and the date of its entry on the juvenile docket. Physically attach a copy of the challenged decision and make it a part of this notice.]

2. This decision identified in numbered paragraph 1 above is appealable under 15 M.R.S.A. § 3407(2)(A)).

3. This notice of appeal is accompanied by the Attorney General's written approval as required by 15 M.R.S.A. §§ 2115-A(5), 3407(2)(A) and M.R. Crim. P. 37B(b).

WHEREFORE, the State of Maine, whose address is ________________ ____________________ hereby appeals to the Supreme Judicial Court, sitting as the Law Court, from the decision identified in numbered paragraph 1 above pursuant to 15 M.R.S.A. §§ 2115-A, 3407(2)(A) and M.R. Crim. P. 37B.

Dated: _______, 199_.

____
[Attorney for the State]
[Title]

2. Notice of appeal filed without written approval.

The notice of appeal is the same as that found in (F)(1)(a), (b), (c) or (d) except that the final numbered paragraph - namely, numbered paragraph 4 as to (F)(1)(a) and numbered paragraph 3 as to (F)(1)(b),(c) or (d) - should be replaced with the following language as appropriate:

a. Oral approval given by Attorney General.

__________________, the Attorney General of the State of Maine, has orally stated that his written approval, as required by 15 M.R.S.A. §§ 2115-A(5), 3407 and M.R. Crim. P. 37B(b), will be granted; such written approval will be filed at a later date.

b. Oral approval given by Deputy Attorney General acting in the stead of the Attorney General.

______________, Deputy Attorney General for the State of Maine, acting in the stead of __________________, Attorney General for the State of Maine, as authorized by 5 M.R.S.A. § 196, has orally stated that the written approval required by 15 M.R.S.A. §§ 2115-A(5), 3407 and M.R. Crim. P. 37B(b), will be granted; such written approval will be filed at a later date.

PART IV - INITIATING A REQUEST FOR APPROVAL AND PREPARATION OF THE PROPER FORMS

If, in light of PART II or PART III above, you determine that the lower court's decision, ruling or order should be appealed, as early as possible telephone Charlie Leadbetter (626-8511) or Wayne Moss (626-8505) or write (Office of the Attorney General, Criminal Division, 6 State House Station, Augusta, Maine 04333-0006) explaining the matter. Be prepared to follow up such initial contact with the submission of documents, transcripts or other materials necessary for a determination by the Attorney General as to whether an appeal should be allowed. Each request is personally analyzed and approved or disapproved by the Attorney General unless the Attorney General "is unavailable to act upon the ... [approval request] or has determined that it would be legally or ethically improper for him to do so" (within the meaning of section 196 of Title 5).

In order to expedite the approval process, once it becomes clear that the Attorney General or, when appropriate, his designee will approve the taking of an appeal, you will be notified of that fact by phone and you will be asked to prepare the notice and approval forms appropriate for your specific appeal. (See again PART II of this manual at pages 17-28 and PART III of this manual at pages 61-71)

PART V - SEEKING RELIEF FROM THE UNITED STATES SUPREME COURT

Review of First Circuit decisions and decisions of Maine courts of last resort by the United States Supreme Court is today essentially by way of petitioning for a writ of certiorari given the 1988 curtailment of mandatory jurisdiction. No form of relief (petition or otherwise) may be sought from the United States Supreme Court by any attorney for the State without the express approval of the Attorney General or, when unavailable within the contemplation of section 196 of Title 5, the Attorney General's designee.

A request for approval should be initiated in the same manner as described in PART IV of this manual at page 72.

APPENDIX NO. 1

(1) 15 M.R.S.A. § 2115-A; and,

(2) M.R. CRIM. P. 37B

[see again page 8, footnote 3 of text]

15 M.R.S.A. § 2115-A. Appeals by the State.

1. **Appeals prior to trial.** An appeal may be taken by the State in criminal cases on questions of law from the District Court and from the Superior court to the law court: From an order of the court prior to trial which suppresses any evidence, including, but not limited to, physical or identification evidence or evidence of a confession or admission; from an order which prevents the prosecution from obtaining evidence; from a pretrial dismissal of an indictment, information or complaint; or from any other order of the court prior to trial which, either under the particular circumstances of the case or generally for the type of order in question, has a reasonable likelihood of causing either serious impairment to or termination of the prosecution.

2. **Appeals after trial.** An appeal may be taken by the State from the Superior Court or the District Court to the law court after trial and after a finding of guilty by a jury or the court from the granting of a motion for a new trial, from arrest of judgment, from dismissal or from other orders requiring a new trial or resulting in termination of the prosecution in favor of the accused, when an appeal of the order would be permitted by the double jeopardy provisions of the Constitution of the United States and the Constitution of Maine.

2-A. **Appeals from an adverse decision of the Superior Court sitting as an appellate court relative to District Court criminal cases.** If an appeal to the Superior Court by an aggrieved defendant from a judgment of the District Court results in the vacating of the underlying criminal judgment in whole or in part, an appeal may be taken by the State from the adverse decision of the Superior Court to the Law Court.

2-B. **Appeal from the denial of a Rule 35 motion.** If a motion for correction or reduction of a sentence brought by the attorney for the State under Rule 35 of the Maine Rules of Criminal Procedure is denied in whole or in part, an appeal may be taken by the State from the adverse order of the trial court to the Law Court.

3. **When defendant appeals.** When the defendant appeals from a judgment of conviction, it is not necessary for the State to appeal. It may argue that error in the proceedings at trial in fact supports the judgment. The State may also establish that error harmful to it was committed prior to the trial or in the trial resulting in the conviction from which the defendant has appealed, which error should be corrected in the event that the law court reverses on a claim of error by the defendant and remands the case for a new trial. If the case is so reversed and remanded, the law court shall also order correction of the error established by the State.

4. **Time.** An appeal taken pursuant to subsection l, 2, 2-A or 2-B must be taken within 20 days after the entry of the order or such further time as may be granted by the court pursuant to a rule of court, and an appeal taken pursuant to subsection l must also be taken before the defendant has been placed in jeopardy. An appeal taken pursuant to this subsection must be deligently prosecuted.

5. **Approval of Attorney General.** In any appeal taken pursuant to subsection l, 2, 2-A or 2-B, the written approval of the Attorney General is required; provided that if the attorney for the State filing the notice of appeal states in the notice that the Attorney General has orally stated that the approval will be granted, the written approval may be filed at a later date.

6. **Liberal construction.** The provisions of this section shall be liberally construed to effectuate its purposes.

7. **Rules.** The Surpeme Judicial Court may provide for implementation of this section by rule.

8. **Fees and Costs.** The Law Court shall allow reasonable counsel fees and costs for the defense of appeals under this section.

9. **Appeals to Federal Court; fees and costs.** The Law Court shall allow reasonable attorneys fees for court appointed counsel when the State appeals a judgment to any Federal Court or to the United States Supreme Court on certiorari. Any fees allowed pursuant to this subsection shall be paid out of the accounts of the Judicial Department.

RULE 37B. APPEALS BY THE STATE

(a) **Procedure.** Appeals by the state, when authorized by statute, shall be subject to the same procedure as that for other appeals, except as provided by this rule.

(b) **Approval of Attorney General.** The notice of appeal shall be accompanied by a written approval of the Attorney General of the State of Maine, which shall become part of the record; provided that if the attorney for the state filing the notice of appeal states in the notice that the Attorney General has orally stated that the approval will be granted, the written approval may be filed at a later date. The clerk shall note the filing of such approval, together with the date of filing, in the criminal docket.

(c) **Dismissal of Appeal.** The Law Court shall, on motion, order the dismissal of an appeal brought pursuant to this rule if it finds that such appeal has not been diligently prosecuted.

(d) **Counsel Fees on Appeal by the State.** When an appeal is taken by the state, the Law Court shall allow the defendant reasonable counsel fees and costs for defense of the appeal.

(e) **Tolling of Appeal Period.** If the state files a motion for findings of fact and conclusions of law pursuant to Rule 41A(d), the appeal period shall be tolled during the pendency of the motion. If the motion is granted, the appeal period shall begin to run once either written findings and conclusions are entered on the criminal docket or a notation reflecting that findings and conclusions have been made is entered on the criminal docket.

APPENDIX NO. 2

M.R. CRIM. P. 37(c)

[see again page 10, footnote 7 of text]

RULE 37. APPEAL TO THE LAW COURT; ACTION BY THE SUPERIOR COURT

. . . .

(c) **Time for Taking Appeal.** The time within which an appeal may be taken shall be 20 days after entry of the judgment or order appealed from. If a timely motion in arrest of judgment, for judgment of acquittal after verdict, for a new trial on any ground other than newly discovered evidence, or for either a new trial based on the ground of newly discovered evidence or for correction or reduction of sentence under Rule 35(a) or 35(c) made within 20 ays after entry of judgment has been made, an appeal may be taken within 20 days after entry of the order denying the motion. An appeal from judgment, whenever taken, preserves for review any claim of error in any of the orders specified in the preceding sentence, even if entered on a motion filed after the notice of appeal. The filing of a motion for any such order does not waive or otherwise render ineffective a previously filed notice of appeal from the same judgment if timely filed, and time periods for taking any further steps to secure review of the judgment appealed from shall be measured from the date of the entry of such an order on a timely motion. An appeal shall not be dismissed because it is designated as being taken from such an order, but shall be treated as an appeal from the judgment.

A judgment or order is entered within the meaning of this paragraph when it is entered in the criminal docket. A notice of appeal filed after verdict or finding of guilty but before entry of judgment shall be treated as filed on the day of entry of judgment.

Except when prohibited by statute, upon a showing of excusable neglect, the court may, before or after the time has expired, with or without motion and notice, extend the time for filing the notice of appeal otherwise allowed for a period not to exceed 30 days from the expiration of the original time prescribed by this paragraph.

When a court after trial imposes sentence on a defendant, the defendant shall be advised of the right to appeal. If a defendant not represented by counsel requests, the court shall cause a notice of appeal to be prepared and filed on behalf of the defendant forthwith.

. . . .

APPENDIX 3

State v. Drown, 447 A.2d 466 (Me. 1982)

[see again page 31, footnote 26 of text]

loss of personal services and consortium arising out of this incident.

As part of his charge to the jury, the presiding justice instructed that if the possessor or owner of land should anticipate harm to his invitees from any condition or activity whose danger was known or obvious to those invitees, the possessor or owner has the duty to warn the invitees or take corrective action to protect the invitees from the known or obvious condition. The presiding justice further explained to the jury that if they found that water was on the step at the hospital and that this water created a dangerous condition, the jury must determine whether the Plaintiffs further proved that the dangerous condition existed for an amount of time sufficient to enable the hospital, using reasonable prudence, to discover the dangerous condition and to take corrective action.

After the presiding justice finished these instructions, and before the jury retired, the Plaintiffs requested that the presiding justice additionally instruct the jury that if they found that the likelihood or possibility of water on the stairs created a dangerous condition, and that the Defendant failed to discover and remedy that condition despite a reasonable opportunity to do so, the Defendant had breached its duty to the Plaintiffs. The Plaintiffs requested still another instruction that the Defendant had a duty to warn the Plaintiffs about any alleged water on the stairs if the jury found that this water could create a dangerous condition that the Defendant knew or should have known about. The presiding justice declined to give these instructions.

On appeal the Plaintiffs stress their claim that the hospital failed in its duty to warn Mrs. Murray of the water which allegedly was on the stair where she slipped, and they assert that the presiding justice's arrangement of his duty of care instruction and his failure to give the requested "curative" instruction prevented the jury from giving due consideration to this claim.

[1] An error in a jury instruction or in a refusal to give a requested instruction is reversible error only if it results in prejudice. *See Towle v. Aube*, Me., 310 A.2d 259, 266 (1973). Here our review of possible prejudice to the Plaintiffs' case is hampered by the Plaintiffs' failure to include in the record on their appeal counsel's closing arguments at trial. Without the benefit of counsel's final argument we cannot be certain that the issue of the Defendant's duty to warn was presented at trial.

[2-4] The jury instruction, as given, correctly states the law as to the duty of care owed by a landowner to his invitee as set forth in *Isaacson v. Husson College*, Me., 297 A.2d 98, 104-05 (1972). *See also Restatement (Second) of Torts*, Comment f to § 343A (1965). The presiding justice's refusal to give an "additional" or "curative" instruction was not an abuse of his discretion. *See Towle v. Aube, supra; Desmond v. Wilson*, 143 Me. 262, 269, 60 A.2d 782, 786 (1948); R. Field, V. McKusick & K. Wroth, *Maine Civil Practice* § 51.2 (1970 and Supp. 1981).

The entry is:

Appeal denied.

Judgment affirmed.

All concurring.

STATE of Maine

v.

Kenneth DROWN, Sr.

Supreme Judicial Court of Maine.

Argued June 16, 1982.

Decided July 12, 1982.

State appealed from pretrial order of the Superior Court, Kennebec County, dismissing an indictment on the ground that it was not sufficiently specific as to the date

of the alleged crimes. The Supreme Judicial Court, McKusick, C. J., held that State's appeal from order dismissing original indictment was improvident where, from aught that appeared in record, State could have readily avoided any impairment of prosecution by obtaining amended indictment.

Ordered accordingly.

1. Criminal Law ⇐1024(2)

Where State could have readily avoided any impairment of prosecution by obtaining amended indictment, State's appeal from order dismissing original indictment was improvident. 15 M.R.S.A. §§ 2115–A, 2115–A, subd. 1.

2. Indictment and Information ⇐87(7)

Generally, indictment will withstand pretrial motion for dismissal if its time allegation is introduced by preposition "on or about."

3. Rape ⇐13

Time was not element of statutory rape sought to be charged, except as necessary to establish that victim was underage at time it was committed. 17–A M.R.S.A. § 252.

4. Indictment and Information ⇐176

If imprecision in alleged statutory rape victim's memory of dates of offenses resulted in variance between indictment and proof, such variance would not be fatal in absence of prejudice to defendant. 17–A M.R.S.A. § 252.

5. Indictment and Information ⇐87(2)

In alleging time of offense, indictment need only be sufficiently specific that it enables defendant to prepare his defense and protects him against further jeopardy for same offense.

6. Criminal Law ⇐1024(2)

Under circumstances in which State had readily available to it means of avoiding consequences of dismissal of indictment, law court is not compelled by statute authorizing State to appeal certain pretrial orders in a criminal case to hear and decide State's appeal from dismissal. 15 M.R.S.A. § 2115–A, subd. 1.

7. Criminal Law ⇐1024(1, 2)

Under statute permitting State appeals from certain pretrial orders in criminal cases, it is not every suppression of evidence or every dismissal of an indictment that automatically must be reviewed by law court whenever requested by prosecutor with Attorney General's approval. 15 M.R.S.A. § 2115–A, subds. 1, 5.

8. Criminal Law ⇐1024(1)

Attorney General, in deciding whether to approve appeal by State from pretrial order in criminal case pursuant to statute, and law court on such appeal must consider whether under all circumstances lower court's ruling has produced significant setback to State's attempt to bring accused to justice. 15 M.R.S.A. § 2115–A, subds. 1, 5.

9. Criminal Law ⇐1024(1)

Under statute authorizing State to appeal certain pretrial orders in criminal case, if law court, even when it approaches with liberal or sympathetic view mandated by the legislature, cannot find any reasonable likelihood that State will be handicapped in trying defendant, court must declare State's appeal to be improvident. 15 M.R.S.A. § 2115–A, subd. 1.

10. Criminal Law ⇐1024(1)

Law court will decide for itself whether State's appeal of pretrial order in criminal case meets statutory standard, even though appeal has previously received Attorney General's approval. 15 M.R.S.A. § 2115–A, subds. 1, 5.

11. Criminal Law ⇐1023½

Requirement of jurisprudence is that party in order to bring appeal must have suffered legal detriment as result of order of tribunal below.

12. Constitutional Law ⇐69

Role of judicial branch in framework of government is to decide actual cases and controversies, and not to render advisory opinions except under those restricted circumstances in which they are permitted under state Constitution. M.R.S.A.Const. Art. 6, § 3.

13. Appeal and Error ⇐151(1)

Civil appellate court will not entertain appeal unless result below has direct and substantial adverse effect upon appellant. 14 M.R.S.A. § 1851; 35 M.R.S.A. § 303; 4 M.R.S.A. § 401 (Repealed).

14. Appeal and Error ⇐151(4)

Fact that appellant is agency of State does not immunize it from requirement that it establish that it is aggrieved by decision below. 14 M.R.S.A. § 1851; 35 M.R.S.A. § 303; 4 M.R.S.A. § 401 (Repealed).

David W. Crook, Dist. Atty., Alan Kelley, Deputy Dist. Atty. (orally), John Alsop, Asst. Dist. Atty., Augusta, for plaintiff.

Nale & Nale, Richard C. Nale (orally), Waterville, for defendant.

Before McKUSICK, C. J., NICHOLS, CARTER, VIOLETTE and WATHEN, JJ., and DUFRESNE, A. R. J.

McKUSICK, Chief Justice.

[1] One count of the indictment charging defendant Kenneth Drown, Sr., with statutory rape[1] alleged that the crime occurred "[b]etween the first day of January, 1980, and the thirty-first day of December, 1980," that is, at some time during the calendar year 1980; and another count of statutory rape alleged the crime had again occurred "[b]etween the first day of January, 1981, and the thirtieth day of November, 1981," that is, at some time during the first eleven months of 1981. Four other counts of the indictment charged gross sexual misconduct[2] and unlawful sexual contact,[3] alleged also to have occurred on some otherwise unspecified dates within those 12-month and 11-month periods.[4] The Superi-

1. 17–A M.R.S.A. § 252 (Supp.1981).

2. 17–A M.R.S.A. § 253 (Supp.1981).

3. 17–A M.R.S.A. § 255 (Supp.1981).

4. In full, the indictment read:

Indictment for Violation
17–A of M.R.S.A. section 252
Rape (A)

Count 1 THE GRAND JURY CHARGES: Between the first day of January, 1981, and the thirtieth day of November, 1981, at Oakland, in the County of Kennebec and State of Maine, Kenneth Drown, Sr. did engage in sexual intercourse with one [victim's name], a female who had not in fact attained her 14th birthday, to wit, the said [victim] being of the age of 12 years, and the said [victim] not being his spouse.

Title 17–A, Section 253
Gross Sexual Misconduct (A)

Count 2 And your Grand Jurors aforesaid, upon their oath aforesaid, do further present that between the first day of January, 1981, and the thirtieth day of November, 1981, at Oakland, in the County of Kennebec and State of Maine, Kenneth Drown, Sr. did engage in a sexual act with a female child, to wit, one [victim's name], the said [victim] not having, in fact, attained her 14th birthday, to wit, the said [victim] being of the age of 12 years, and the said [victim] not being his spouse.

Title 17–A, Section 255
Unlawful Sexual Contact (C)

Count 3 And your Grand Jurors aforesaid, upon their oath aforesaid, do further present that between the first day of January, 1981, and the thirtieth day of November, 1981, at Oakland, in the County of Kennebec and State of Maine, Kenneth Drown, Sr. did intentionally subject one [victim's name], the said [victim] not being his spouse, to an unlawful sexual contact, and the said [victim] had not, in fact, attained her 14th birthday and the said Kenneth Drown, Sr. being at least 3 years older, to wit, 35 years.

Indictment for Violation
17–A of M.R.S.A. section 252
Rape (A)

Count 4 THE GRAND JURY CHARGES: Between the first day of January, 1980, and the thirty-first day of December, 1980, at Oakland, in the County of Kennebec and State of Maine, Kenneth Drown, Sr. did engage in sexual intercourse with one [victim's name], a female who had not, in fact, attained her 14th birthday, to wit, the said [victim] being of the age of 11 years, and the said [victim] not being his spouse.

Title 17–A, Section 253
Gross Sexual Misconduct (A)

Count 5 And your Grand Jurors aforesaid, upon their oath aforesaid, do further present that between the first day of January, 1980, and the thirty-first day of December, 1980, at Oakland, in the County of Kennebec and State of Maine, Kenneth Drown, Sr. did engage in a sexual act with a female child, to wit, one [victim's name], the said [victim] not having, in fact, attained her 14th birthday, to wit, the said [victim] being of the age of 11 years and the said [victim] not being his spouse.

or Court (Kennebec County) dismissed the indictment on the ground that it was not sufficiently specific as to the dates of the alleged crimes. With the Attorney General's approval, the State has appealed pursuant to 15 M.R.S.A. § 2115–A(1) (1980 & Supp.1981), which authorizes the State to appeal certain pretrial orders in a criminal case. We do not reach the merits of the State's appeal. We must first consider whether the Law Court is required by section 2115–A to entertain this appeal. From aught that appears in this record, the State could have readily avoided any impairment of the prosecution by obtaining an amended indictment.[5] In such circumstances, the State's appeal from the Superior Court order dismissing the original indictment is improvident.

In moving to dismiss the indictment, defendant argued that it was so vague as to the times of the offense that he could not adequately prepare his defense and that he would not be protected against double jeopardy. In responding at the hearing on that motion, the State asserted that Drown had molested his victim, said to be his stepdaughter, once or twice a week over the combined 23-month period referred to in the indictment. More specific pleading would require an enormous number of counts in the indictment, and further, said the State's attorney, the young victim might be unable in her testimony to be more specific as to the dates of the crimes than that they took place weekly in that period. However, the State has not, either below or on appeal, contradicted the facial intendment of each count of the indictment to charge only a single criminal act, not a succession of acts through the year 1980 and the first eleven months of 1981. The State also acknowledges, as it must, that at trial, in order to convict defendant on any count, it will be required to prove at least one identified instance of criminal conduct of the type charged in that count.

[2–5] At the outset, we would do well to identify the simple alternative to appeal that was apparently open to the State as a means of preventing the frustration of the prosecution of defendant. As a general proposition, an indictment will withstand a pretrial motion for dismissal if its time allegation is introduced by the preposition "on or about." *See* Forms 4–11, M.R.Crim.P. Here, it appears that all that the State needed to do to avoid the issue it seeks to have decided on this appeal was to amend the indictment to substitute, in count 1 for example, a time allegation of "on or about June 15, 1981," or such other single date during the year 1981 as appeared best supported by the victim's grand jury testimony.[6] Time is not an element of the offense sought here to be charged, except as necessary to establish that the victim was underage at the time it was committed. *See, e.g., State v. Hathorne*, Me., 387 A.2d 9 (1978); *State v. Miller*, Me., 253 A.2d 58 (1969). At trial the victim's memory of dates may indeed prove to be imprecise; but if that imprecision results in a variance between the indictment and the proof, such a variance will not be fatal in the absence of prejudice to defendant. *See State v. Carmichael*, Me., 444 A.2d 45 (1982); *State v.*

Title 17–A, Section 255
Unlawful Sexual Contact (C)
Count 6 And your Grand Jurors aforesaid, upon their oath aforesaid, do further present that between the first day of January, 1980, and the thirty-first day of December, 1980, at Oakland, in the County of Kennebec and State of Maine, Kenneth Drown, Sr. did intentionally subject one [victim's name], the said [victim] not being his spouse, to an unlawful sexual contact, and the said [victim] had not, in fact, attained her 14th birthday and the said Kenneth Drown, Sr. being at least 3 years older, to wit, 34 years.

5. *See State v. Hathorne*, Me., 387 A.2d 9, 11–13 (1978), on the question whether the State would be required to resubmit the indictment to the grand jury.

6. If the State wished the indictment to reflect the State's claim that Drown molested his victim repeatedly over a period of twenty-three months, the indictment could have been redrawn to charge those multiple offenses in multiple counts using the "on or about" time allegation in each. Such a recast indictment would have resisted dismissal, although as we have cautioned in *State v. Gray*, Me., 407 A.2d 19, 20 n.1 (1979), the State should be prepared to prove each crime that it charges.

Terrio, Me., 442 A.2d 537 (1982). In alleging the time of the offense, the indictment need only be sufficiently specific that it enables defendant to prepare his defense and protects him against further jeopardy for the same offense. *State v. Charette*, 159 Me. 124, 127, 188 A.2d 898, 900 (1963).

Even if the State could have obtained the revised indictment only by returning to the grand jury, *see* n. 5 above, that retracing of steps, though perhaps a nuisance, certainly involved much less delay and expense than an appeal. In the case at bar we take judicial notice that the grand jury that issued the indictment on January 5, 1982, is even now still sitting; thus, it might prove unnecessary even to recall the young victim to testify again before the grand jury.

[6] Under circumstances where the State had readily available to it a means of avoiding the consequences of the Superior Court's dismissal of an indictment, is the Law Court nonetheless compelled by 15 M.R.S.A. § 2115–A(1) to hear and decide the State's appeal from that dismissal? We conclude that it is not; that such an appeal does not promote the salutary purpose for which the legislature has authorized pretrial appeals by the State and that it runs directly counter to principles of appellate review that both the legislature and this court have long recognized.

[7–10] Our conclusion derives, in the first instance, from the legislative language itself. *See Central Maine Power Co. v. Public Utilities Commission*, Me., 405 A.2d 153, 159 (1979), *cert. denied*, 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980). Section 2115–A(1) permits State appeals from "an order of the court prior to trial which suppresses any evidence . . .; from a pretrial dismissal of an indictment, information or complaint; or from any *other* order of the court prior to trial which . . . has a reasonable likelihood of causing either serious impairment to or termination of the prosecution."[7] (Emphasis added) Plainly it is not every suppression of evidence or every dismissal of an indictment that automatically must be reviewed by the Law Court whenever requested by the prosecutor with the Attorney General's approval. Such a construction would be a wooden parsing of the statutory language and would disregard the legislature's emphasis upon the purposes[8] intended to be served by permitting pretrial appeals by the State: namely, that the State should have a way of obtaining a correction through appeal of any pretrial decision that "has a reasonable likelihood of causing either serious impairment to or termination of the prosecution." In each case, the Attorney General, in deciding whether to approve an appeal by the State,[9] and this court, if the attempted appeal gets this far, must consider whether under all the circumstances the lower

7. 15 M.R.S.A. § 2115–A(1) provides in full:

> **Appeals prior to trial.** An appeal may be taken by the State in criminal cases on questions of law from the District Court and from the Superior Court to the law court: From an order of the court prior to trial which suppresses any evidence, including, but not limited to, physical or identification evidence or evidence of a confession or admission; from an order which prevents the prosecution from obtaining evidence; from a pretrial dismissal of an indictment, information or complaint; or from any other order of the court prior to trial which, either under the particular circumstances of the case or generally for the type of order in question, has a reasonable likelihood of causing either serious impairment to or termination of the prosecution.

Those portions of section 2115–A that deal with appeals after trial are not before us in this case. Thus, we are not here concerned with the limits on post-trial appeals by the State that were the subject of *State v. Howes*, Me., 432 A.2d 419 (1981).

8. Subsection (6) of 15 M.R.S.A. § 2115–A requires that:

> The provisions of this section shall be liberally construed to effectuate its purposes.

9. 15 M.R.S.A. § 2115–A(5) provides:

> **Approval of Attorney General.** In any appeal taken pursuant to subsections 1 or 2, the written approval of the Attorney General shall be required; provided that if the attorney for the State filing the notice of appeal states in the notice that the Attorney General has orally stated that the approval will be granted, the written approval may be filed at a later date.

court's ruling has produced a significant setback to the State's attempt to bring the accused to justice. If this court, even when it approaches that threshold question with the liberal or sympathetic view mandated by the legislature, cannot find any reasonable likelihood that the State will be handicapped in trying the defendant, we must declare the State's appeal to be improvident. This court will decide for itself whether the appeal meets the statutory standard, even though the appeal has previously received the Attorney General's approval. *Cf. State v. Placzek*, Me., 380 A.2d 1010, 1012 (1977) (lower court's certification, even with agreement of both the State and the defendant, that question of law on report is "of sufficient importance or doubt," not conclusive on Law Court).

[11-14] Our construction of section 2115-A(1) is reinforced by two deeply ingrained principles of appellate review, each of which involves important public policy considerations. First, there is in our jurisprudence a general requirement that a party in order to bring an appeal must have suffered a legal detriment as a result of the order of the tribunal below. That requirement furthers judicial economy by allowing the appellate court to avoid dissipating its limited resources in hearing and deciding unnecessary cases. Furthermore, the role of the judicial branch in the framework of government is to decide actual cases and controversies, and not to render advisory opinions except under those restricted circumstances in which they are permitted under article VI, section 3 of the Maine Constitution. Many examples can be cited of this pervasive principle of appellate review. A criminal defendant is by statute permitted to appeal a judgment, ruling, or order of the Superior Court only if he is aggrieved thereby, *see* 15 M.R.S.A. § 2115 (1980); and the logic of the popular goose-and-gander rule suggests that in order to appeal under section 2115-A the State should also be required to show aggrievement, in the sense that the State really needs relief if it is to avoid "serious impairment to or termination of the prosecution." On the civil side also, an appellate court will not entertain an appeal unless the result below has a direct and substantial adverse effect upon the appellant. *See Jamison v. Shepard*, Me., 270 A.2d 861, 862-63 (1970). Typically, civil appeal statutes expressly extend the right to appeal only to an aggrieved party. *See, e.g.*, 14 M.R.S.A. § 1851 (1980) (civil appeals from Superior Court); 4 M.R.S.A. § 401 (1979) (appeals from probate courts to Superior Court under former statute). However, even where the appeal statute contains no express aggrievement requirement, the Law Court has read the statute as importing one. *See, e.g., Eastern Maine Electric Cooperative v. Maine Yankee Atomic Power Co.*, Me., 225 A.2d 414, 415 (1967), construing 35 M.R.S.A. § 303 (governing appeals from the Public Utilities Commission) prior to the 1975 amendment explicitly limiting an appeal to a person "who is adversely affected by the final decision of the commission." The fact that the appellant is an agency of the State of Maine does not immunize it from the requirement that it establish that it is aggrieved by the decision below. *See In the Matter of Pittston Oil Refinery*, Me., 375 A.2d 530 (1977) (Department of Marine Resources and two other State agencies); *Nichols v. City of Rockland*, Me., 324 A.2d 295 (1974) (State Parole Board).

Second, the strong public policy against piecemeal appellate review also supports our construction of section 2115-A(1). *See State v. Bassford*, Me., 440 A.2d 1059, 1061 (1982). Although in form any dismissal of an indictment or other charging instrument is a final judgment, in practical effect a dismissal that is ordered merely because of a readily correctible defect in the charging instrument is only an interlocutory step in the process of bringing the accused to trial. When the dismissal of a particular indictment means only that the State must get an amendment of the indictment, the dismissal does not in actuality constitute any final termination of the defendant's "prosecution" in the broad sense of that statutory term. In both civil and criminal cases, interlocutory review is disfavored for strong public policy reasons; review of a judgment

that is not final, whether in form or reality, impedes the progress of litigation and places additional demands upon scarce appellate resources. *See, e.g., Toussaint v. Perreault*, Me., 388 A.2d 918 (1978) (report under M.R.Civ.P. 72(c) dismissed as improvident); *cf. State v. Placzek, supra* (improvident report under M.R.Crim.P. 37A(a) decided only for judicial economy). The public policy considerations disfavoring interlocutory appeals are particularly insistent in criminal cases. The defendant has a constitutional right to a speedy trial, *see* Me. Const. art. I, § 6; and obviously, the members of the public, including both the victims of crime and taxpayers, have a great interest in bringing persons accused of crime to justice promptly and efficiently. Appeals taken by the State from pretrial orders inevitably delay the commencement of trial and add to the public cost. Even though in this case the Law Court has heard the State's appeal on an expedited basis, well over two months have still elapsed since the indictment was dismissed. If the appeal had been handled on a normal schedule, it would not have been heard until five months after the dismissal. The appeal has also caused unnecessary consumption of public resources, on the part of the Law Court and also of counsel for the State and for defendant, both of whom are compensated out of the public treasury. Because of such delay and expense, it is important that the State's appeal not be entertained in the absence of "serious impairment to or termination of the prosecution." Such is the plain mandate of section 2115–A(1).

When properly used, section 2115–A serves a beneficent purpose in permitting Law Court review of preliminary questions of law in situations where a criminal prosecution is threatened by a lower court ruling prior to trial. The legislature never intended, however, that section 2115–A(1) should permit the State to get an answer to a question of criminal pleading where the State is able to replead to avoid any legal problem without in any way hampering the prosecution. We have recently warned of the folly of the State's needlessly persisting in defending a charging instrument of questionable validity. *See State v. MacKerron*, Me., 446 A.2d 420, 422 (1982). *See also State v. Carter*, Me., 444 A.2d 37, 38 n.2 (1982) (omission from complaint of word "intoxicating" in "operating under the influence of intoxicating liquor" charge). In circumstances where the prosecution can promptly and easily go forward without impairment through amendment of the indictment,[10] a State's appeal from a dismissal of the original indictment is improvident.

In the present case this court recognizes that there may be some possibility that the State after the passage of time will not be able to obtain from the grand jury a new indictment avoiding the dispute that resulted in dismissal of the original indictment. For example, essential testimony of the young victim may have become currently unavailable and the grand jury may be unwilling to reindict on the basis alone of its memory of her testimony given before them in January. Since we here for the first time delineate the circumstances in which a State's appeal may be dismissed as improvident, we will retain this appeal on our docket for whatever further action may be appropriate after the State has diligently sought a new indictment from the grand jury.

The entry is:

This appeal is retained on the docket of the Law Court; the State is ordered to report on or before September 1, 1982, on its efforts to obtain a new indictment and the results of those efforts.

All concurring.

10. In future cases, if any uncertainty exists whether an amendment of the charging instrument can be obtained, the State can preserve its appeal rights by filing a notice of appeal within the prescribed time and thereafter withdrawing it if successful in getting the amendment.

APPENDIX NO. 4

(1) 15 M.R.S.A. § 3402;

(2) 15 M.R.S.A. § 3403;

(3) 15 M.R.S.A. § 3405;

(4) 15 M.R.S.A. § 3407; AND

(5) M.R. CRIM. P. 36B THRU 36D

[see again page 52, footnote 57 of text]

15 M.R.S.A. § 3402. Appeals to Superior Court.

1. **Matters for appeal.** Appeals of the following matters may be taken from the juvenile court to the Superior Court by a party specified in subsection 2:

    A. An adjudication, provided that no appeal shall be taken until after an order of disposition;

    B. An order of disposition, or of any subsequent order modifying disposition, for an abuse of discretion;

    C. A bind-over order; and

    D. A detention order or any refusal to alter an order for changed circumstances entered pursuant to section 3203-A, subsection 5, for abuse of discretion, provided that the appeal shall be handled expeditiously.

2. **Who may appeal.** An appeal may be taken by the following parties:

    A. The juvenile; or

    B. The juvenile's parents, guardian or legal custodian on behalf of the juvenile, if the juvenile is not emancipated and the juvenile does not wish to appeal.

3. <u>**Appeals by the State.**The State may appeal from the juvenile court to the Superior Court for the failure of the juvenile court to order a bind-over.</u>

4. **Stays and releases.** On an appeal pursuant to subsection 1, paragraphs A through C, the Superior Court shall consider a stay of execution and release pending the appeal.

5. **Time for appeals.** An appeal from the juvenile court to the Superior Court must be taken within 5 days of the entry of an order of disposition or other appealed order or such further time as the Supreme Judicial Court may provide pursuant to a rule of court.

[emphasis supplied]

15 M.R.S.A. § 3403. Rules for appeals.

Procedure for appeals from the juvenile court to the Superior Court, including provision for a record, subject to section 3405, shall be as provided by rule promulgated by the Supreme Judicial Court.

15 M.R.S.A. § 3405. Scope of review on appeal; record.

1. **Scope of review.** Review on all appeals from juvenile court to Superior Court shall be for errors of law or abuses of discretion. The Superior Court may affirm, reverse or modify any order of the Juvenile Court or remand for further proceedings. The Superior Court shall enter a new order of disposition if it finds that the Juvenile Court's disposition was an abuse of discretion.

2. **Record on appeals.** In appeals taken pursuant to section 3402, subsection 1, paragraphs A, B and C, review shall be on the basis of the record of the proceedings in juvenile court. In the interest of justice, the Superior Court may order that the record shall consist of:

   A. The untranscribed sound recording of the proceedings; or

   B. An agreed or settled statement of facts with the consent of the parties.

3. **Record on appeals of detention orders.** In appeals taken pursuant to section 3402, subsection 1, paragraph D, the court shall order a review by the most expeditious of the following methods that is consistent with the interests of justice:

   A. The untranscribed sound recording of the detention hearing;

B. Evidence presented to the Superior Court, provided the scope of review shall be as specified in subsection 1;

C. A transcribed record; or

D. A record consisting of a statement of facts as described in subsection 2, paragraph B.

15 M.R.S.A. § 3407. Appeals to the Law Court.

1. **Appeals from the juvenile court by the State.** The State may appeal from a decision or order of the juvenile court to the Law Court to the same extent and in the same manner as in criminal cases under section 2115-A.

2. **Appeals from the Superior Court.**

A. Decisions of the Superior Court on appeal from the Juvenile Court, as to matters described in section 3402, subsection 1, paragraph A only, may be appealed to the Law Court by an aggrieved party. An appeal by the State under this paragraph shall be subject to section 2115-A, subsections 5 and 8.

B. Decisions of the Superior Court on an appeal from the juvenile court of a bind-over order pursuant to section 3402, subsection 1, paragraph C, may only be reviewed pursuant to an appeal of a judgment of conviction in Superior Court following bind-over.

C. Appeals pursuant to this subsection shall be taken in the same manner as appeals following a judgment of conviction of an adult in Superior Court, except as otherwise provided by rule promulgated by the Supreme Judicial Court.

[emphasis supplied]

shall be served on appellee's counsel within 20 days after the filing of the notice of appeal. Appellee's counsel may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the District Court for settlement and approval and, as settled and approved, shall be included in the record on appeal.

(2) *Transcript Unnecessary.* When the questions presented by an appeal can be determined without an examination of a transcript of proceedings in the court below, the parties may prepare and sign a statement showing how the questions arose and were decided and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the Superior Court. The statement shall include a concise statement of the points to be relied on by the appellant. It shall be submitted to the District Court within 30 days after the filing of the notice of appeal. If the statement conforms to the truth and is sufficiently complete, the District Court shall approve it for inclusion in the record on appeal.

(f) Failure to Comply With Rule. If either party fails to comply with this rule, a justice of the Superior Court may impose such sanctions as the justice deems appropriate, including dismissal of an appeal and refusal to permit one or both parties to make oral argument.

RULE 36B. APPEAL TO THE SUPERIOR COURT IN JUVENILE CASES

(a) Appeal to the Superior Court. An appeal may be taken by a juvenile or a juvenile's parents, guardian, or legal custodian as provided in 14 M.S.R.A. § 3402(2)(B), from an adjudication, an order of disposition or modification thereof, a bind-over order, a detention order, or refusal to modify a detention order, to the Superior Court in the county in which the offense was committed.

An appeal may be taken by the state from the failure of a juvenile court to order a bind-over.

An appeal is taken by filing a notice of appeal with the clerk of the District Court. The appellant shall file with the notice of appeal an order for those portions of the transcript the appellant intends to include in the record on appeal. The clerk of the District Court shall transmit date-stamped copies of the notice of appeal and transcript order to the Electronic Recording Division of the District Court, the clerk of the Superior Court, and the appellee. The clerk of the District Court shall also transmit a certified copy of the docket entries to the clerk of the Superior Court. If the appellant orders less than the entire transcript of proceedings, the appellee shall have 10 days in which to order additional portions of the transcript.

In the event that the appellant intends to move the Superior Court to consider the appeal on the basis of the untranscribed recording or on an agreed or settled statement of facts the appellant shall so indicate in the notice of appeal and forthwith file such a motion in the Superior Court.

(b) Scope of Review. Review by the Superior Court shall be for error of law or abuse of discretion, as determined from the record on appeal.

The Superior Court may affirm, reverse, or modify any order of the juvenile court, may enter a new order of disposition, or may remand for further proceedings in the juvenile court.

Pending appeal of an adjudication, an order of disposition, or a bind-over order, the Superior Court may order a stay of execution and release pending appeal.

(c) Time for Taking Appeal. An appeal may be taken within 5 days after entry of an order of disposition or other appealed order. Upon a showing of excusable neglect, the court may, before or after the time has expired, with or without motion and notice, extend the time for filing the notice of appeal otherwise allowed for a period not to exceed 15 days from the expiration of the original time prescribed by this paragraph.

(d) Stay Pending Appeal. An appeal of a detention order shall not stay proceedings in the juvenile court. Pending an appeal from an adjudication, an order of disposition, or a bind-over order, the juvenile court may order a stay of execution and release pending appeal.

RULE 36C. RECORD ON APPEAL IN JUVENILE CASES

(a) Contents of Record. The record on appeal shall consist of the juvenile court clerk's record and either the transcript of proceedings in the juvenile court or, by order of the Superior Court, the untranscribed sound recording or a statement in lieu of transcript prepared pursuant to Rule 36A(e).

(b) Contents of Juvenile Court Clerk's Record. The juvenile court clerk's record shall include a copy of the docket entries and the originals of the petition, the order of disposition or other order appealed from, all motions and actions thereon, any findings of fact, all documentary exhibits, and a list of all retained exhibits.

Documentary exhibits include papers, maps, photographs, diagrams, and other similar materials. If a documentary exhibit can be easily and inexpensively reproduced, a copy thereof shall be retained by the clerk of the juvenile court. If a documentary exhibit is of unusual bulk or weight, it shall be retained by the clerk of the juvenile court, except upon order of the Superior Court.

Exhibits which consist of tangible objects, such as weapons or articles of clothing, shall be retained by the clerk of the juvenile court, except upon order of the Superior Court.

(c) Filing of Juvenile Court Clerk's Record. The clerk of the District Court shall file the juvenile court clerk's record with the clerk of the Superior Court within 21 days of the filing of the notice of appeal and furnish copies to the parties. It shall be the appellant's responsibility to ensure that these time limits are met and to provide the clerk such assistance as is necessary in preparing the record for filing in the Superior Court. Upon a showing of good cause the Superior Court may increase or decrease the time allowed for filing the record.

(d) Filing of Transcript. The Electronic Recording Division of the District Court shall file the transcript of proceedings with the clerk of the Superior Court and furnish copies to the parties within 40 days of the filing of the notice of appeal. If the Electronic Recording Division anticipates that it will be unable to meet the 40–day time limit, it shall file an application with the Superior Court requesting additional time at least five days before the expiration of the 40–day time limit. The Superior Court shall have discretion to grant reasonable enlargements of time. Notwithstanding this or any other provision of these rules, the party requesting the transcript shall exercise due diligence to assure its timely filing.

(e) Motion to Dispense With Transcript. The appellant may move pursuant to 15 M.R.S.A. § 3405(2) to substitute the untranscribed sound recording or an agreed or settled statement of facts for the transcript of the proceedings in the juvenile court. In the event the Superior Court, in the interest of justice, orders such substitution, the clerk of the Superior Court shall transmit copies of the order to the clerk of the District Court and to the Electronic Recording Division. A statement in lieu of transcript shall be prepared pursuant to Rule 36A(e) and shall be approved by the juvenile court. A statement shall be filed with the clerk of the Superior Court within the time provided for the filing of a transcript. An untranscribed sound recording shall be provided to the clerk of the Superior Court forthwith.

(f) Failure to Comply With Rule. If either party fails to comply with this rule, a justice of the Superior Court may impose such sanctions as the justice deems appropriate, including dismissal of an appeal and refusal to permit one of both parties to present oral argument.

RULE 36D. BRIEFS AND ORAL ARGUMENT IN THE SUPERIOR COURT

(a) Notice by Clerk of the Superior Court. Upon docketing the record on appeal, the clerk of the Superior Court shall send forthwith to each counsel of record a written notice showing the dates on which the appellant's and the appellee's briefs are due to be filed and the date on which the case will be in order for oral argument.

(b) Time for Filing Briefs. The appellant's brief shall be filed within 30 days after the date on which the clerk of the Superior Court mails notice of the docketing of the record on appeal. The appellee's brief shall be filed within 30 days after service of the brief of the appellant; and the appellant may file a reply brief within 14 days after service of the brief of the appellee. Upon a showing of good cause, the Superior Court may increase or decrease the time limits specified in this subdivision.

If an appellant fails to comply with this subdivision, the Superior Court may dismiss the appeal for want of prosecution. If an appellee fails to comply, the appellee will not be heard at oral argument except by permission of the Superior Court.

(c) Scheduling of Oral Argument. All appeals shall be in order for oral argument 20 days after the date on which appellee's brief is due or is filed, whichever is earlier. The clerk of the Superior Court shall schedule oral argument for the first appropriate date after the appeal is in order for hearing, and shall notify each counsel of record of the time and place at which oral argument will be heard. The parties may, by agreement, waive argument and submit the matter for decision on the record and the briefs.

(d) Failure to Comply With Rule. If either party fails to comply with this rule, a justice of the Superior Court may impose such sanctions as the justice deems appropriate, including dismissal of an appeal and refusal to permit one or both parties to present oral argument.

[Amended effective February 15, 1995.]

RULE 37. APPEAL TO THE LAW COURT; ACTION BY THE SUPERIOR COURT

(a) How Taken. Whenever a judgment, order or ruling of the Superior Court is by law reviewable by the Law Court, such review shall be by appeal.

An appeal shall be taken by filing a notice of appeal with the clerk of the Superior Court.

(b) Notice of Appeal. The notice of appeal shall conform to Form 10 of the Appendix of Superior Court Forms. It shall include a supplemental transcript order, adding portions to or deleting portions from the standard reporter's transcript as provided in Rule 39(b). It shall be signed by the appellant or the appellant's attorney or by the clerk of the Superior Court if the notice is prepared by the clerk. The clerk of the Superior Court shall mail a date-stamped copy of the notice of appeal to the court reporter and to the attorney for the appellee and note the mailing in the criminal docket.