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## An Act To Amend Statutory Post-conviction Review

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

**Sec. 1. 15 MRSA §2121, sub-§1**, as amended by PL 1995, c. 286, §2, is further amended to read:

**1. Criminal judgment.** "Criminal judgment" means a judgment of conviction of a crime, the orders of adjudication and disposition in a juvenile case and a judgment of not criminally responsible by reason of mental disease or defect ~~insanity~~.

**Sec. 2. 15 MRSA §2121, sub-§1-A**, as amended by PL 2003, c. 29, §1, is further amended to read:

**1-A. Assigned justice or judge.** "Assigned justice or judge" means the Justice or Active Retired Justice of the Supreme Judicial Court, the Justice or Active Retired Justice of the Superior Court or the judge authorized to sit in the Superior Court on post-conviction review cases who is assigned the post-conviction review proceeding when a special assignment has been made. It means any justice, active retired justice or authorized judge attending to the regular criminal calendar when the post-conviction review proceeding is assigned to the regular criminal calendar.

**Sec. 3. 15 MRSA §2121, sub-§2**, as amended by PL 1997, c. 464, §1, is further amended to read:

**2. Post-sentencing proceeding.** "Post-sentencing proceeding" means a court proceeding or administrative action occurring during the course of and pursuant to the operation of a sentence that affects whether there is incarceration or its length, including revocation of parole, failure to grant parole, an error of law in the computation of a sentence including administrative calculations of deductions relative to time detained pursuant to Title 17-A, section 1253, subsection 2 and default in payment of a fine or restitution. It does not include the following Title 17-A, Part 3 court proceedings: revocation of probation, revocation of intensive supervision, revocation of supervised release for sex offenders or revocation of administrative release. It does not include administrativethe following administrative actions: calculations of good time and meritorious good time credits pursuant to Title 17-A, section 1253, subsections 3, 3-B, 4, 5 and 7 or similar deductions under Title 17-A, section 1253, subsections 8, 9 and 10; disciplinary proceedings resulting in a withdrawal of good-time credits or similar deductions, revocation of probation, under Title 17-A, section 1253, subsections 6, 8, 9 and 10; cancellation of furlough or other rehabilitative programs authorized under Title 30-A, sections 1556, 1605 and 1606 or Title 34-A, section 3035; cancellation of a supervised community confinement or aftercare status of a juvenile or proceedings before the Appellate Division of the Supreme Judicial Court program granted pursuant to Title 34-A, section 3036-A; cancellation of a community confinement monitoring program granted pursuant to Title 30-A, section 1659-A; or cancellation of placement on community reintegration status granted pursuant to Title 34-A, section 3810 or 4112.

**Sec. 4. 15 MRSA §2122**, as amended by PL 1997, c. 399, §1, is further amended to read:

**§ 2122.Purpose**

This chapter provides a comprehensive and, except for direct appeals from a criminal judgment, the exclusive method of review of those criminal judgments and of post-sentencing proceedings occurring during the course of sentences. It is a remedy for illegal restraint and other impediments specified in section 2124 that have occurred directly or indirectly as a result of an illegal criminal judgment or post-sentencing proceeding. It replaces the remedies available pursuant to post-conviction habeas corpus, to the extent that review of a criminal conviction or proceedings ~~are~~were reviewable, the remedies available pursuant to common law habeas corpus, including habeas corpus as recognized in Title 14, sections 5501 and 5509 to 5546, coram nobis, audita querela, writ of error, declaratory judgment and any other previous common law or statutory method of review, except appeal of a judgment of conviction or juvenile adjudication and remedies that are incidental to proceedings in the trial court. The substantive extent of the remedy of post-conviction review is defined in this chapter and not defined in the remedies that it replaces; provided that this chapter provides and is construed to provide relief for those persons required to use this chapter as required by the Constitution of Maine, Article ~~H~~I, Section 10.

**Sec. 5. 15 MRSA §2123, sub-§2**, as amended by PL 1983, c. 816, Pt. B, §4, is further amended to read:

**2. Venue.** Venue ~~shall~~must be in the county in which the criminal judgment was entered. Venue may be transferred by the assigned justice or judge at ~~his~~that assigned justice or judge's discretion.

**Sec. 6. 15 MRSA §2123-A** is enacted to read:

**§ 2123-A. Method of review for administrative actions not included in the definition of "post-sentencing proceeding"**

Remedial relief from administrative actions occurring during the course of and pursuant to the operation of a sentence that affects whether there is incarceration or its length that are not included in the definition of "post-sentencing proceeding" in section 2121, subsection 2 is exclusively provided by Title 5, chapter 375, subchapter 7.

**Sec. 7. 15 MRSA §2124**, as amended by PL 2001, c. 354, §3 and PL 2003, c. 689, Pt. B, §7, is further amended to read:

**§ 2124.Jurisdictional prerequisites of restraint or impediment**

An action for post-conviction review of a criminal judgment of this State or of a post-sentencing proceeding following the criminal judgment may be brought if the person seeking relief demonstrates that the challenged criminal judgment or post-sentencing proceeding is causing a present restraint or other specified impediment as described in subsections 1 to 3:

**1. Present restraint or impediment by criminal judgment being challenged.**

Present restraint or impediment as a direct result of the challenged criminal judgment:

A. ~~Incarceration pursuant to the sentence imposed as a result of~~ by the challenged criminal judgment which is challenged;

B. ~~Other restraint, including probation, parole, or other conditional release or a juvenile disposition other than incarceration or probation, imposed as a result of the sentence for~~ by the challenged criminal judgment which is challenged;

C. ~~A sentence of unconditional~~ Unconditional discharge resulting from a ~~imposed by the challenged criminal judgment, for a period of 2 years following the date of sentence;~~

C-1. Incarceration imposed by the challenged criminal judgment that is wholly satisfied at the time of sentence imposition due to detention time credits earned under Title 17-A, section 1253, subsection 2;

D. ~~Incarceration, other restraint or an impediment specified in paragraphs A, and B and C which that~~ is to be served in the future, although the convicted or adjudicated person is not in execution of the sentence either because of release on bail pending appeal of the criminal judgment or because another sentence must be served first; or

E. ~~A fine imposed by the challenged criminal judgment which that~~ has not been paid and in a case when a person has not inexcusably violated Title 17-A, section 1303-B or inexcusably defaulted in payment of any portion. A fine includes any imposed monetary fees, surcharges and assessments, however designated;

F. ~~Restitution imposed by the challenged criminal judgment that has not been paid and in a case when a person has not inexcusably violated Title 17-A, section 1328-A or inexcusably defaulted in payment of any portion. Any challenge as to the amount of restitution ordered is further limited by Title 17-A, section 1330-A; or~~

G. Any other juvenile disposition imposed by the challenged criminal judgment;

**1-A. Present or future restraint by commitment to the Commissioner of Health and Human Services.** ~~Present restraint or impediment as a direct result of commitment to the custody of the Commissioner of Health and Human Services pursuant to section 103 imposed as a result of being found not criminally responsible by reason of mental disease or defect, insanity that is challenged; or future restraint or impediment as a result of such an order of commitment that is challenged when a sentence involving imprisonment is or will be served first.~~

A claim for postconviction review is not allowed under this subsection relative to any court proceeding or administrative action that affects release or discharge pursuant to section 104-A;

**2. Post-sentencing proceeding.** ~~Incarceration or increased incarceration imposed pursuant to a post-sentencing proceeding following a criminal judgment, although the criminal judgment itself is not challenged; or~~

**3. Present indirect impediment.** Present restraint or impediment resulting indirectly from the challenged criminal judgment of this State:

A. Incarceration pursuant to a sentence imposed in this State, in another state or in a Federal Court pursuant to a sentence for a subsequent criminal judgment for a crime punishable by incarceration for a year or more, if the length of the incarceration being is greater than it would otherwise have been in the absence of the challenged criminal judgment of this State. The prior criminal judgment which that is challenged must be for a crime punishable by incarceration for a year or more. This requirement is not satisfied by a showing only that the court imposing the present sentence was aware of the challenged criminal judgment or if it appears from the length or seriousness of the person's total criminal record that the challenged criminal judgment, taking into account its seriousness and date, could have little or no effect on the length of incarceration under the subsequent sentence; or

~~B. A pending trial or incarceration pursuant to a sentence following a criminal judgment in this State, in another state or in a Federal Court for a crime, the degree of which or the potential penalty of which is increased as a result of the challenged criminal judgment of this State. This requirement is not satisfied unless:~~

~~(1) The subsequent crime, as enhanced, is, in the case of a crime in this State, punishable by incarceration of one year or more or, in the case of a crime in another jurisdiction, is a felony or an infamous crime; and~~

~~(2) If a sentence for the subsequent crime has been imposed, the length of that sentence actually exceeds the amount of incarceration which could have been imposed for the subsequent crime had its potential penalty not been enhanced by the challenged criminal judgment; or~~

~~C. A pending trial or any of the restraints or impediments specified in subsection 1 following a criminal judgment in this State, another state or in a Federal Court for a crime for which proof of the criminal judgment of this State that is challenged constitutes an element of the subsequent crime :~~

D. Incarceration pursuant to a sentence imposed in this State, in another state or in a Federal Court for a crime for which proof of the criminal judgment of this State that is challenged is an element of, or must constitutionally be treated as an element of, the new crime. This requirement is not satisfied unless the new crime is, in the case of a crime in this State, punishable by incarceration of one year or more or, in the case of a crime in another jurisdiction, a felony or an infamous crime.

**Sec. 8. 15 MRSA §2125**, as amended by PL 1981, c. 238, §2, is further amended to read:

### **§ 2125. Ground for relief**

A person who satisfies the prerequisites of section 2124 may show that the challenged criminal judgment or sentence is unlawful or unlawfully imposed, or that the impediment resulting from the challenged post-sentencing ~~procedure~~proceeding is unlawful, as a result of any error or ground for relief, whether or not of record, unless the error is harmless or unless relief is unavailable for a reason provided in section 2126 or 2128.

**Sec. 9. 15 MRSA §2128**, as amended by PL 1997, c. 399, §§3 and 4 and affected by §5, is further amended to read:

**§ 2128. Waiver of grounds for relief**

A person under restraint or impediment specified in section 2124 shall demonstrate that any ground of relief ishas not unavailable on the basis of waiver as described in subsections 1 to 5been waived. The bases of waiver are as follows.

**1. Errors claimable on direct appeal.** Errors at the trial ~~which~~that have been or could have been raised on a direct appeal, whether or not such an appeal was taken, may not be raised in an action for post-conviction review under this chapter; ~~provided, except~~ that if the failure of the convicted or adjudicated person to take an appeal or to raise certain issues on appeal is excusable and the errors not appealed may result in reversal of the criminal judgment, the court may order that an appeal be taken as provided in section 2130.

**2. ~~Errors claimable in federal habeas corpus.~~** ~~The assertion of a right under the Constitution of the United States shall not be held waived by its nonassertion at trial or on appeal if the assertion of the right would be held not waived in a federal habeas corpus proceeding brought by the convicted or adjudicated person, pursuant to the United States Code, Title 28, sections 2241 to 2254.~~

**3. Waiver of grounds not raised in prior post-conviction review action.** All grounds for relief from a criminal judgment or from a post-sentencing proceeding ~~shall~~must be raised in a single post-conviction review action and any grounds not so raised are waived unless the ~~State or Federal Constitution of Maine or the Constitution of the United States~~ otherwise ~~require~~requires or unless the court determines that the ground could not reasonably have been raised in an earlier action.

**4. Prior challenges.** A person who has previously challenged a criminal judgment or a post-sentencing proceeding under former Title 14, sections 5502 to 5508 or its predecessors ~~shall~~may not challenge the criminal judgment or post-sentencing proceeding by post-conviction review unless the court determines that a ground claimed in the action for post-conviction review could not reasonably have been raised in the earlier action.

**5. ~~Filing deadline for direct impediment.~~** ~~A one-year period of limitation applies to initiating a petition for post-conviction review seeking relief from a criminal judgment under section 2124, subsection 1 or 1-A. The limitation period runs from the latest of the following:~~

- A. ~~The date of final disposition of the direct appeal from the underlying criminal judgment or the expiration of the time for seeking the appeal;~~
- B. ~~The date on which the constitutional right, state or federal, asserted was initially recognized by the Law Court or the Supreme Court of the United States, if the right has been newly recognized by that highest court and made retroactively applicable to cases on collateral review; or~~
- C. ~~The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.~~

~~The time during which a properly filed petition for writ of certiorari to the Supreme Court of the United States with respect to the same criminal judgment is pending is not counted toward any period of limitation under this subsection.~~

~~**6. Filing deadline for indirect impediment.** A one-year period of limitation applies to initiating a petition for post-conviction review seeking relief from a criminal judgment under section 2124, subsection 3. The limitation period runs from the date of imposition of a sentence for the new crime resulting in the indirect impediment.~~

**Sec. 10. 15 MRSA §2128-A** is enacted to read:

**§ 2128-A. Exceptions to waiver**

The assertion of a right under the Constitution of the United States may not be held waived by its nonassertion at trial or on appeal if the assertion of the right would be held not waived in a federal habeas corpus proceeding brought by the convicted or adjudicated person pursuant to 28 United States Code, Sections 2241 to 2254.

**Sec. 11. 15 MRSA §2128-B** is enacted to read:

**§ 2128-B. Time for filing**

The following filing deadlines apply.

**1. Filing deadline for direct impediment.** A one-year period of limitation applies to initiating a petition for post-conviction review seeking relief from a criminal judgment under section 2124, subsection 1 or 1-A. The limitation period runs from the latest of the following:

- A. The date of final disposition of the direct appeal from the underlying criminal judgment or the expiration of the time for seeking the appeal;
- B. The date on which the constitutional right, state or federal, asserted was initially recognized by the Law Court or the Supreme Court of the United States if the right has been newly recognized by that highest court and made retroactively applicable to cases on collateral review; or
- C. The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

~~The time during which a properly filed petition for writ of certiorari to the Supreme Court of the United States with respect to the same criminal judgment is pending is not counted toward any period of limitation under this subsection.~~

**2. Filing deadline for post-sentencing proceedings.** A one-year period of limitation applies to initiating a petition for post-conviction review seeking relief from a post-sentencing proceeding under section 2124, subsection 2. The limitation period runs from the later of the following:

A. The date of filing of the final judgment in the court proceeding occurring during the course of and pursuant to the operation of the underlying sentence that results in incarceration or increased incarceration; or

B. The date of the final administrative action occurring during the course of and pursuant to the operation of the underlying sentence that results in incarceration or increased incarceration.

**3. Filing deadline for indirect impediment.** A one-year period of limitation applies to initiating a petition for post-conviction review seeking relief from a criminal judgment under section 2124, subsection 3. The limitation period runs from the date of imposition of a sentence for the new crime resulting in the indirect impediment.

**Sec. 12. 15 MRSA §2129, sub-§4,** as repealed and replaced by PL 1981, c. 238, §5, is amended to read:

**4. Bail pending disposition of petition.** Pending final disposition, the assigned justice or judge may order the release of the petitioner on bail at such time and under such circumstances and conditions as the Supreme Judicial Court ~~shall provide~~ by rule provide.

**Sec. 13. 15 MRSA §2138, sub-§12,** as enacted by PL 2001, c. 469, §1, is amended to read:

**12. Exhaustion.** A person who has taken a direct appeal from the judgment of conviction is not precluded from utilizing the remedy of this chapter while the appeal is pending, provided that as long as the resolution of the motion is automatically stayed pending final disposition of the direct appeal unless the Supreme Judicial Court, sitting as the Law Court, on motion otherwise directs.

A person who has initiated a collateral attack upon the judgment of conviction under chapter 305-A is not precluded from utilizing the remedy of this chapter while that post-conviction review proceeding is pending, provided that as long as resolution of the motion is automatically stayed pending final disposition of the post-conviction review proceeding unless the assigned justice or judge in the post-conviction review proceeding otherwise directs.

**Sec. 14. Application.** If the date of the filing of the final judgment in the court proceeding or administrative action under the Maine Revised Statutes, Title 15, section 2124, subsection 2 occurred prior to the effective date of this Act, the one-year limitation period under Title 15, section 2128-B, subsection 3 runs from the effective date of this Act.

## SUMMARY

This bill is proposed by the Criminal Law Advisory Commission pursuant to the Maine Revised Statutes, Title 17-A, chapter 55 and makes a number of changes to post-conviction review.

1. It replaces the outdated phrase “mental disease or defect” with the word “insanity” to be consistent with Title 15, section 103, Title 17-A, sections 39 and 40 and the Maine Rules of Criminal Procedure, Rule 11(a) and Rule 11A(h).

2. It expands the term “assigned justice” to also include “judge” to more accurately reflect to whom a post-conviction case may be assigned.

3. It makes a significant change regarding remedial relief for errors in calculations of good time, meritorious good time and similar deductions pursuant to Title 17-A, section 1253. Remedial relief relative to such administrative actions by the custodian is no longer obtainable by way of post-conviction review. Remedial relief, if any, must now be obtained by way of available administrative remedies pursuant to the Maine Administrative Procedure Act. Current administrative remedies provide for an adequate hearing process and for review of final custodian action pursuant to the Maine Rules of Civil Procedure, Rule 80B or Rule 80C, making access to post-conviction review relief unnecessary and duplicative.

4. It makes clear that remedial relief for errors in calculations of deductions relative to time detained pursuant to Title 17-A, section 1253, subsection 2 remains governed by post-conviction review. Unlike the calculations for deductions for good time and similar types of deductions, the custodian does not make the calculations but instead relies upon a statement from either the transporter of the prisoner or the attorney for the State.

5. In addition to the current unavailability of post-conviction review relative to a revocation of probation proceeding, it clarifies that such is also the case with respect to court proceedings involving the revocation of intensive supervision, supervised release for sex offenders and administrative release. Each such court proceeding is provided in the Maine Criminal Code with a statutorily created hearing process and appellate review, making access to post-conviction relief unnecessary and duplicative.

6. It clarifies what other administrative actions must be addressed by way of the available administrative remedies rather than by way of post-conviction review.

7. It eliminates the outdated reference to proceedings before the Appellate Division of the Supreme Judicial Court.

8. It replaces the word “are” with the word “were” in Title 15, section 2122 in the context of the remedies formerly available pursuant to former statutory post-conviction habeas corpus. The word “were” was incorrectly changed to “are” by Public Law 1997, chapter 399, section 1.

9. For the purpose of notice, it adds *audita querela* to the list of common law remedies that were abolished in Maine with the advent of the post-conviction review statute. The Maine Law Court recently held in State v. Blakesley, 2010 ME 19, ¶ 23, 989 A.2d 746, 751-52 that, assuming without deciding whether *audita querela* was potentially available in criminal matters before the advent of the post-conviction statute, *audita querela* was abolished by that statute.

10. It amends Title 15, section 2123, subsection 2 to be gender-neutral.

11. It enacts Title 15, section 2123-A to clarify that administrative actions excluded from the definition of “post-sentencing proceeding” in Title 15, section 2121, subsection 2 are subject to review in the manner provided by the Maine Administrative Procedure Act, which is the exclusive method of review of those actions, replacing any previous common law or statutory method of review.

12. It amends Title 15, section 2124 to: make nonsubstantive changes to the present restraint or impediments provisions to enhance readability and clarity; delete the current time limitation in subsection

1, paragraph C relating to an unconditional discharge, which the time limitations pursuant to Title 15, section 2128-B now control; add in subsection 1 a new paragraph C-1 to reflect the holding in State v. Trott, 2004 ME 15, 841A. 789; remove a reference to paragraph C in subsection 1, paragraph D because paragraph D is not relevant to paragraph C; in subsection 1, paragraph E relating to a fine, add 2 limitations as to a fine that has not been paid constituting an impediment for purposes of subsection 1, namely, an inexcusable violation by the person of the mandate of Title 17-A, section 1303-B and an inexcusable failure by the person to pay the fine imposed or any outstanding portion; clarify that the term “fine” also includes any imposed monetary fees, surcharges and assessments, however designated; add in subsection 1 a new paragraph F that includes restitution, a sentencing alternative that was enacted by Public Law 1977, chapter 455, but was omitted from subsection 1 when it was enacted by Public Law 1979, chapter 701, section 15; provide for 2 limitations as to restitution that has not been paid constituting an impediment for purposes of subsection 1, namely, an inexcusable violation by the person of the mandate of Title 17-A, section 1328-A and an inexcusable failure by the person to pay the restitution imposed or any outstanding portion; limit any challenge made as to the amount of restitution ordered by applying Title 17-A, section 1330-A; for purposes of clarity, strike the reference to “a juvenile disposition other than incarceration or probation” and add a new paragraph that includes any other juvenile disposition imposed by the challenged criminal judgment not earlier covered in the preceding paragraphs; strike the indirect impediments addressed in subsection 3, paragraphs B and C because the former distinction drawn between facts that elevate the class or degree or increase the potential penalty but are not technically elements of the new crime in paragraph B and actual elements of the new crime that serve to accomplish the same result in paragraph C is no longer valid in light of Apprendi v. New Jersey, 530 U.S. 466 (2000) and its progeny; and create a new indirect impediment that combines 2 former provisions and specifies that the new requirement is not satisfied unless the crime is a felony or an infamous crime and the sentence alternative of incarceration has been imposed, and so does not authorize a defendant to initiate a post-conviction challenge pretrial. In Apprendi the United States Supreme Court held that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Id. at 490. The Court also stated that “facts that expose a defendant to a punishment greater than otherwise legally prescribed [are] by definition ‘elements’ of a separate legal offense.” Id. at 483 n. 10. Apprendi applies as well to nonjury trials.

13. It amends Title 15, section 2128 to address only the waiver of grounds for relief found in subsections 1, 3 and 4. Subsection 2, which addresses certain errors not waived, was stricken from section 2128 and its provisions are now located in the newly enacted Title 15, section 2128-A. Subsections 5 and 6 were stricken from section 2128. The provisions of subsections 5 and 6 address the wholly different subject matter of filing deadlines and their provisions are now located in the newly enacted Title 15, section 2128-B.

14. It responds to the Law Court's holding in Chasse v. State, 2008 ME 28, ¶ 1, 942 A.2d 689 that no filing deadline exists by establishing a one-year filing deadline for post-sentencing proceedings.

15. In order to ensure fairness, it provides a grace period of the same length as the new one-year filing deadline for post-sentencing proceedings.