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Testimony of Rep. David Sinclair presenting

**LD 1780, An Act to Secure Under Authority of a Subpoena Pretrial Statements from
a Witness Other than the Defendant in a Criminal Proceeding**
Before the Joint Standing Committee on Judiciary

Senator Carney, Representative Kuhn and distinguished colleagues of the Joint Standing Committee on Judiciary, good morning. My name is David Sinclair, and I am honored to represent House District 50, which is the City of Bath. I appreciate the opportunity to present this Commission bill, **LD 1780, An Act to Secure Under Authority of a Subpoena Pretrial Statements from a Witness Other than the Defendant in a Criminal Proceeding**.

This legislation is modeled after a New Mexico rule of criminal procedure, and similar measures are in place in Alabama and Louisiana. One of the fundamental precepts of fairness and due process in a criminal proceeding is that the accused person knows what they are accused of, who's making the accusation, and what any other witnesses to the underlying events may have observed at the time. Hearing these statements and observations in each witness's own words, rather than solely through the recollections of an officer in an incident report, provides clarity to both prosecution and defense and can help to avoid surprise to either party during that witness's later trial testimony. The availability of precise witness statements may help to change the number of cases eventually brought to trial, and to improve likelihood of a just and proper outcome, whether it be conviction or acquittal, of those cases that do go to trial.

Thank you for your time and consideration — I am happy to answer any questions committee members may have, but I believe we also have representatives here from PDS so you may wish to hold questions for them.

Respectfully,

A handwritten signature in black ink, appearing to read "David A. Sinclair".

David A. Sinclair
State Representative, House District 50

from Rep. Sanclaire
LD 1780

Proposed Amendment to LD 1780, An Act to Secure Under Authority of a Subpoena Pretrial Statements from a Witness Other than the Defendant in a Criminal Proceeding

Amend the bill in Sec. 1. 15 MRSA §1322 as follows (changes shaded):

Sec. 1. 15 MRSA §1322 is amended to read:

§1322. Witnesses other than defendant

1. Request for statement. Except in case types described in paragraph 1-A of this section, Any person, other than the defendant, with information relevant to the proceeding shall give a statement upon request of the defendant. The defendant may obtain the statement of the person by serving a written notice of statement upon the person whose statement is sought and upon the prosecution no later than 14 days before the date scheduled for the statement.

1-A. Excluded Case Types. This section shall not apply to proceedings involving domestic violence crimes under Title 17-A, sections 207-A, 208-D, 208-E, 208-F, 209-A, 210-A, 210-B, 210-C and 211-A; incest crimes under Title 17-A, section 556; sex trafficking crimes under Title 17-A, sections 852 and 853; sexual assault crimes under Title 17-A, chapter 11; sexual exploitation of minors crimes under Title 17-A, chapter 12; violations of protection from harassment orders issued under Title 5, chapter 337-A; violations of protective orders in crimes between family members under Title 15, section 321; violations of protection from abuse orders under Title 19-A, chapter 103; violations of a condition of release under Title 15, section 1092, where the victim is a family or household member, as defined by Title 19-A, section 4102(6), or a dating partner, as defined by Title 19-A, section 4102(4); or any other underlying crime that includes facts that would support the charging of any of these crimes.

2. Notice of statement. The notice of statement under this section must state the time and place for the taking of the statement along with a description of the information sought in the statement or any materials to be examined. The defendant issuing the notice shall make reasonable efforts to confer with the person whose statement is requested in good faith regarding scheduling of a statement before serving a notice of statement. The notice of statement must describe the method by which the statement must be recorded, which may be by audio recording, audiovisual recording or stenographic means. A statement may be taken in person, by telephone or by remote electronic means.

3. Process. A notice of statement under this section, and the taking of the statement, are governed by the following procedures:

A. A subpoena must be served with the notice of statement to secure the presence of the person and any materials to be examined during the statement. A copy of the subpoena and the notice of statement must be sent to the prosecution and filed with the court;

B. Notwithstanding anything to the contrary in subsection 1 or 2, if a defendant is charged with a crime under Title 17-A, chapter 9 and the victim of that crime is a family or household member as defined by Title 19-A, section 4102, subsection 6 and it is the victim's statement that is sought, then the subpoena and notice of statement must be served upon the District Attorney's office handling that prosecution and not directly upon the victim. The State shall provide the notice and subpoena to the victim;

(1) A notice under this paragraph must be served upon the District Attorney's office no later than 45 days before the date scheduled for the statement.

(2) The State shall provide certification to the defendant and the court that the notice and subpoena were provided to the victim no later than 14 days before the date scheduled for the statement.

(3) Statements taken from victims of crimes of domestic violence must be taken through hybrid means unless the counsel for the defendant can provide a safe and secure location for a statement to be taken in person.

(4) If the State cannot locate the named victim to provide notice and subpoena required under this section, the court shall consider that failure as a failure to appear by a witness under paragraph D.

For the purposes of this paragraph, "hybrid means" means the use of telephone, Internet or other remote audio and video communication technologies to conduct hearings or other judicial proceedings at which one or more, but not all, attorneys, parties and witnesses participate without being present in the same physical location as the court.

C. After the statement is taken, the defendant shall file a confirmation that the statement was taken;

D. If a person who has been served a notice of statement and a subpoena fails to appear or provide the requested information or materials, the defendant may file a motion requesting the court to issue an order barring that person from appearing as a witness in the case on any topic described in the notice of statement; and

E. At any time during the taking of the statement, a person may terminate the statement if the examination is being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass or oppress the person. The defendant may file a motion to have the court order a person to resume the statement. The defendant bears the burden of proving to the court by a preponderance of the evidence that the examination was not being conducted in such a manner as to unreasonably annoy, embarrass or oppress the person. If the statement has been terminated, the statement may be resumed thereafter only upon an order of the court in which the action is pending.

4. Remedy. The following remedies are available under this section.

A. A court that receives a request under subsection 3, paragraph D for an order barring a person from appearing as a witness shall schedule a hearing to determine:

(1) Whether the potential witness was served the notice of statement and subpoena; and

(2) Whether the potential witness appeared as required by the notice of statement.

B. If the court finds by clear and convincing evidence that a properly served person did not appear, the court shall issue an order barring that potential witness from any future testimony in the pending matter.

C. If a person terminates a statement under subsection 3, paragraph E, the defendant may move to have the person barred from appearing as a witness. The court shall schedule a hearing on the motion to determine if the statement was being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass or oppress the person. If a court finds by clear and convincing evidence that the statement was not being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass or oppress the person, the court shall issue an order barring that person from appearing as a witness in the pending matter.

D. Any person who is barred from appearing as a witness under paragraph B or C may not appear as a witness in any future criminal proceedings involving the same alleged conduct.

5. No contact order. This section and the procedure under this section may not be construed to modify an order of a court prohibiting contact between a defendant and a named person in that order.

SUMMARY

The bill allows a defendant to request that any person with information relevant to the proceeding give a statement upon being served a written notice of statement no later than 14 days before the date scheduled for the statement to be taken. This amendment excludes from a defendant's ability to request information all persons in cases involving crimes of domestic violence, incest, sex trafficking, sexual assault and sexual exploitation of minors, violations of protection orders, violations of conditions of release, or crimes whose underlying facts include evidence of these crimes.