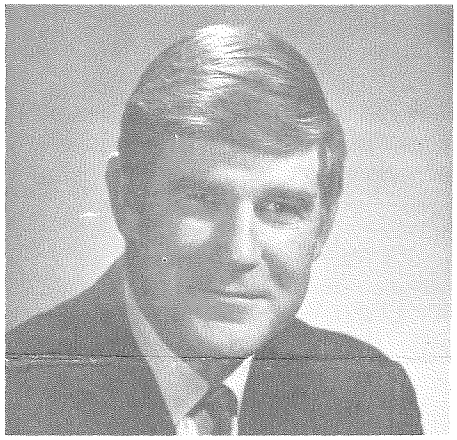
DECEMBER 1970

ALERT

CRIMINAL DIVISION

FROM THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF MAINE.



MESSAGE FROM THE ATTORNEY GENERAL JAMES S. ERWIN

In the lead article of the first two issues of ALERT, there have appeared several citations of court cases as authority for principles of law discussed within the article. They appear in the form 121 A 2d 256 and 251 F 2d 94 for example. These citations are abbreviated references to sets of law books in which are reported the decisions of courts throughout the country. Since ALERT is limited by its size to conveying only basic principles of law and stating only brief summaries of cases, the law enforcement officer who seeks further details must consult the actual reported decisions.

Realizing that the citations of these decisions may prove confusing to someone unfamiliar with them, this office has asked the law librarians in the three main law libraries in the State to assist any law enforcement officer so interested.

Therefore, any law enforcement officer who is interested in pursuing a particular case or area of the law beyond its coverage in ALERT should visit one of these libraries and ask for one of the following people: Miss Edith Hary at the Law Library in the State House in Augusta; Mr. Donald Garbrecht at the University of Maine Law Library, 68 High Street in Portland; or Mrs. Ann Rich at the Cleaves Law Library, 142 Federal Street in Portland. They have agreed to provide you with any assistance you may need in the use of their respective libraries.

There are also law libraries in the courthouses of each county available for the law enforcement officer's use. However, the officer will be left pretty much to his own resources in these libraries as there is no full time law librarian present at these libraries.

Every law enforcement officer is encouraged to research any area of the law touching upon his daily duties that is unclear or incomplete in his mind. Also, as a reminder, the Criminal Division is always available to help any law enforcement officer in this respect. Our telephone number is 289-2146.

James S. Erwin

JAMES S. ERWIN
Attorney General

PRE-TRIAL IDENTIFICATION AND LINEUPS

Pretrial criminal identification procedures, and particularly the lineup, have long been accepted law enforcement techniques. These procedures are necessary to help identify persons implicated in crimes and also to clear from suspicion those who are innocent. Until very recently, there has been little legal authority on the rights and duties of both suspects and law enforcement officers with regard to pre-trial identification procedures. In 1967, however, the Supreme Court of the United States handed down three major decisions governing this area of the law. The three decisions were *U.S. v. Wade*, 388 U.S. 219 (1967), *Gilbert v. California*, 388 U.S. 263 (1967) and *Stovall v. Denno*, 388 U.S. 293 (1967). It would be worthwhile to commit the names Wade, Gilbert and Stovall to memory, because any discussion of the law in this area is sure to center around them. This article will attempt to set out guidelines for the law enforcement officer in light of these cases and others which have been decided even more recently.

REQUIREMENT OF PRESENCE OF COUNSEL

In the *Wade* and *Gilbert* decisions, the Supreme Court decided that a pretrial confrontation of a suspect of a crime with witnesses or victims of the crime was a critical stage in the legal proceedings against the suspect. As such, the court ruled that a suspect has a right to the presence of a lawyer at the confrontation if he so desires. Furthermore, if the suspect is unable to afford his own lawyer, he is entitled to have one appointed for him by the court. This ruling is an extension of the right of every accused person to have the assistance of counsel for his defense at all critical stages of his criminal prosecution, a right guaranteed by the Sixth Amendment to the Constitution.

Basis of Court's Decision

The Supreme Court's reasoning in these cases was based (1) on the inherent unreliability of eyewitness identifications and (2) on the possibility of detrimental suggestions made to witnesses either by police officers themselves or through unfair procedures at confrontation. It was felt that the presence of counsel for the suspect at the confrontation with witnesses would prevent possible misconduct on the part of the police or others. Also, the attorney would have first-hand knowledge of what actually took place at the identification proceedings and could thereby conduct an intelligent cross-examination of witnesses at the actual trial and bring out any improprieties which might have occurred.

Waiver of Right to Counsel

Although a suspect does not have the right to refuse to participate in a lineup or other confrontation with witnesses, he may waive his right to the presence of counsel. Before the suspect can intelligently and understandingly waive his right to presence of counsel, he should be clearly advised of his rights. The following suggested Warning and Waiver form should effectively satisfy the standards of the United States Supreme Court:

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Name Address
Age Place
Date Time

WARNING

Before appearing at any confrontation with any witnesses, or lineup being conducted by (Name of Police Department) in relation to (Description of offense), you must understand your legal rights.

The results of the confrontation or lineup can and will be used against you in the event that formal charges are filed against you.

You have the right to the presence and advice of an attorney of your choice at any such confrontation or lineup.

If you cannot afford an attorney and you want one, an attorney will be appointed for you at no expense, before any confrontation or lineup is held.

WAIVER

I have been advised of my right to the advice of an attorney and to have an attorney present at any confrontation with witnesses or lineup, and that if I cannot afford a lawyer, one will be appointed for me before any such confrontation or lineup occurs. I understand these rights.

I do not want a lawyer and I understand and know what I am doing.

No promises have been made to me and no pressures of any kind have been used against me.

Signature of Suspect

CERTIFICATION

I, (Name of Officer), hereby certify that I read the above warning to (Name of suspect) on (Date), that he indicated that he understood his rights, and signed the WAIVER form in my presence.

Signature of Officer

Witness

Substitute Counsel

If a suspect requests the advice and presence of his own lawyer and his lawyer is not immediately available, a substitute lawyer may sometimes be called for the purpose of the confrontation or lineup. *Zamora v. Guam*, 394 F 2d 815 (9th Circuit Court of Appeals 1968). However, this would be justified only when emergency circumstances risk the loss of identification evidence.

Effect of Improper Lineup in Court

In order to enforce the right to presence of counsel at a witness confrontation or lineup, the United States Supreme Court has established certain rules for the admission of identification evidence in court. If the confrontation or lineup was improper, i.e. no presence of counsel and no valid waiver, then the prosecution at the subsequent trial may not offer the evidence of the lineup identification as part of its case. Furthermore, the prosecution is even limited as to the admissibility of an in-court identification when there has been an improper lineup. The in-court identification may be excluded on objection unless the prosecution can prove, clearly and convincingly, that the witness had a basis for that identification independent of the illegal confrontation or lineup.

Accordingly, every law enforcement agency should develop and observe a set of standard operating procedures relating to the identification process through witness-suspect confrontations or lineups so that exclusion of courtroom identification evidence will be reduced to the minimum. For this purpose, suggested guidelines follow.

CHECK-LIST FOR LINEUP IDENTIFICATION

The following guidelines may be helpful in conducting a lineup identification after the suspect or subject has been advised of his right to counsel and counsel has been retained or waived.

1. No lineup identification should be made without discussing the legal advisability of it with the County Attorney or the Attorney General's Criminal Division.

2. Insofar as possible, all persons in the lineup should be of the same general weight, height, age, racial and physical characteristics, including dress.

3. Should any body movement, gesture, or verbal statement be necessary, this should also be done uniformly, and any such movement, gesture, or statement should be done one time only by each person in the lineup and repeated only at the express request of the observing witness or victim.

4. A photograph of the lineup should be taken and developed as soon as possible. A copy of such photograph should be made available immediately to the suspect's counsel.

5. The names of all persons participating in the lineup should be recorded and preserved together with the names of the officers conducting the lineup.

6. The suspect's waiver of his right to counsel and voluntary participation in the lineup should be recorded and the fact of presence of counsel should also be recorded if that is the case.

7. The witness or victim attending the lineup should be advised of the purpose for which it is being conducted, but the officer should not suggest that the suspect is one of those in the lineup or even that the suspect is in police custody.

8. All witnesses who are to view the lineup should be prevented from seeing the suspect in custody and in particular in handcuffs, or in any manner that would indicate to the witness the identity of the suspect in question.

9. All efforts should be made to prevent a witness from viewing any photographs of the suspect prior to the lineup.

10. If more than one person is called to view a lineup, the persons having already viewed it should not be allowed to converse with other witnesses or victims prior to their viewing the lineup. It is good practice to keep witnesses who have viewed the lineup in a room other than that in which witnesses who have not yet viewed the lineup are kept.

11. Should there be more than one witness, only one witness at a time should be present in the room where the lineup is being conducted.

12. The officer in charge of the lineup should not engage in unnecessary conversation with witnesses nor permit un-needed persons in the lineup room. A suggested group of people would be the witness, the officer conducting the lineup, the prosecuting attorney, the defense attorney, and possibly an investigator.

13. The officer in charge should make complete notes of everything which takes place at the lineup and then make an official report of all the proceedings to be filed in his department's permanent records. A copy should be made available to the defense attorney.

14. Each witness, as he appears in the room where the lineup is being conducted, should be handed a form for use in the identification. The form should be signed by the witness, the defense counsel, and the law enforcement officer conducting the lineup. A suggested identification form follows:

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ALERT

The matter contained in this bulletin is information for the criminal law community only. If there is any question as to the subject matter contained herein, the cases cited should be consulted. Nothing contained herein shall be considered as an Official Attorney General's opinion unless otherwise indicated.

Any change in personnel, or change in address of present personnel should be reported to this office immediately.

James S. Erwin — Attorney General
Richard S. Cohen — Chief, Criminal Division
John N. Ferdico — Editor

This bulletin is funded by a grant from the Maine Law Enforcement Planning and Assistance Agency.

WITNESS LINEUP IDENTIFICATION FORM

The positions of the persons in the lineup will be numbered left to right, beginning with 1 on your left.

A. If you have previously seen one or more of the persons in the lineup, place an X in the appropriate square (or squares) corresponding to the number of the person in the lineup.

B. Then sign your name and fill in the date.

C. When completed, hand this sheet to the officer.

1 2 3 4 5 6 7
( ) ( ) ( ) ( ) ( ) ( ) ( )

.....
Signature of Witness

.....
Date and Time

.....
Signature of Law Enforcement Officer

.....
Signature of Attorney for Suspect

15. A copy of this Identification Form should be given to the Defense Attorney at the completion of the viewing of the lineup by each individual witness.

The Lawyer's Role

If the suspect has chosen to have an attorney present at the lineup proceedings, he should be given every opportunity to observe all the proceedings, to take notes, and to tape record the identification process in whole or part. If the attorney has any suggestions which might improve the fairness of the proceedings, the officer in charge may follow them if they are reasonable and practicable. However, the attorney should not control the proceedings in any way.

POSSIBLE EXCEPTIONS TO THE WADE RULE

The *Wade* and *Gilbert* decisions have caused much controversy and have spawned many conflicting opinions from the courts. Some lower court decisions have limited Wade to its particular facts. Others have created various exceptions to the broad holding implicit in *Wade* and its companion cases. A brief attempt to indicate some of these trends follows.

A. The Pre-Indictment Exception

The *Wade* and *Gilbert* cases both were concerned with identification proceedings which took place after the defendant had already been indicted and provided with counsel. Some courts have thus restricted the right of presence of counsel only to lineups and confrontations occurring after the formal filing of charges. *People v. Palmer,* 244 NE 2d 173 (Illinois 1969). However, other courts have reasoned that since the purpose of counsel's presence is to avert prejudice and assure meaningful cross examination of witnesses at trial on the issue of identification, it should make no difference whether the lineup occurs before or after the formal filing of criminal charges. *Palmer v. State,* 249 A. 2d 482 (Maryland 1969), *Rivers v. U.S.,* 400 F. 2d 935 (5th Circuit Court of Appeals, 1968). A California court has even suggested that the need for counsel is greater at a pre-indictment than at a post-indictment lineup.

> "The factors which make a police lineup a 'critical stage' in the proceedings are present in pre-indictment as well as post indictment lineups. The reasons given by the court for the importance of counsel's presence at the lineup apply whether the confrontation occurs before or after indictment. In some cases these factors may be more important before indictment; a suspect who has not been charged may be less likely to be on the alert for procedural unfairness and less willing to cast suspicion upon himself by objecting to police procedures". *People v. Fowler,* 76 Cal Rptr 1 (California 1969).

B. The Field Identification Exception

The field or "on the spot" identification is one in which the suspect is arrested or apprehended at or near the scene of the crime and is immediately brought before victims or witnesses by a police officer for the purposes of identification. Some courts have held that this type of confrontation is permissible without the presence of counsel.

One rationale given for this position is that an "on the spot" confrontation is merely part of the investigatory aspect of the proceedings, not the accusatory, and thus is not a critical stage requiring counsel. *State v. Satterfield* 247 A 2d 144 (New Jersey 1968).

> "It is hard to believe the Court meant to prevent an officer from making such a routine, uncontrived inquiry and to require that the victim and the bystanders be carted off to a police station, held on the spot until counsel could be provided, or dismissed until a lineup attended by counsel could be arranged at some later time." *U.S. v. Davis,* 399 F. 2d 918 (2nd Circuit Court of Appeals 1968).

Another argument for excluding "on the spot" confrontations from the requirement of presence of counsel is that such a confrontation is very likely to result in an accurate identification and will thus promote fairness by assuring reliability. *Commonwealth v. Bumpus,* 238 NE 2d 343 (Massachusetts 1968), *Russell v. U.S.,* 408 F. 2d 1280 (District of Columbia Circuit Court of Appeals 1969).

Again, however, there are other courts that take directly contrary positions. One line of thought is that the distinction between investigatory and accusatory stages of proceedings is not even a relevant consideration in identification cases. "The crucial inquiry is not whether defendant had been placed under arrest or whether suspicion had focused on him, but whether his right to a fair trial was in jeopardy." *People v. Martin,* 78 Cal. Rptr. 552 (California 1969).

Furthermore, although the advantage to police investigation of "on the spot" identifications is recognized, there are courts that feel "on the spot" confrontations are inherently suggestive of guilt and the convenience does not justify the sacrifice of the individual's right to meaningful cross examination and a fair trial on the crucial issue of identification. *U.S. v. Wade,* 388 U.S. 218 (1967), *Rivers v. U.S.,* 400 F. 2d (5th Circuit Court of Appeals 1968).

Viewpoint of the Maine Supreme Court

The Supreme Judicial Court of Maine has dealt with the right to counsel in pre-trial identifications in a more general manner in the case of *State v. Butler,* 256 A. 2d 588 (1969). Rather than set out formalistic rules, the court looked at the totality of the circumstances in the case to determine whether the pre-trial identification of the suspect occurred at a critical stage in the proceedings against him.

Immediately after a robbery, the victim identified the suspect from a showing of 12 photographs at the police station. On the victim's suggestion that he would like to observe the suspect in the flesh, the police directed the victim to a place where they knew the suspect would be five days later. The victim confirmed the identification of the suspect at that time by viewing him in a room with one other man in it.

The court decided from these circumstances that this identification did

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not occur at a critical stage of the prosecution.

1. The case was in its investigatory stage and the suspect had not been accused.

2. Suspect's freedom of action had not been curtailed in any way related to the robbery.

3. The confrontation was instigated, not by police, but by the victim.

4. No warrant for arrest was sought until after the confirmed identification by the victim.

Suggested Procedures for Law Enforcement Officers

Unfortunately, *Butler,* and the other cases interpreting *Wade* and *Gilbert,* do not provide many helpful guidelines for the law enforcement officer in the area of pre-trial identification. Hopefully the United States Supreme Court will hand down a decision in the near future which will help to clarify matters in this area. Until such a decision is reached, however, the following procedures, based on cases decided to date, are suggested.

1. Any pre-trial confrontation between suspect and witness, intentionally arranged by the police, and where the suspect's freedom of action is restrained, will more than likely be treated as a "critical stage" of the proceedings by a court. This means that the suspect has a right to the presence of counsel and the police should advise the suspect of his rights and follow the procedure outlined in the *Checklist for Lineup Identification.*

2. If it is impossible or totally impracticable to follow these procedures, the situation will be controlled by the case of *Stovall v. Denno,* 388 U.S. 293 (U.S. Supreme Court 1967). In that case, the court used a "totality of the circumstances" test to determine whether the conduct of the confrontation was "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny a suspect due process of law. The law enforcement officer must use his discretion in applying this test because it would be impossible to document and discuss here all the various circumstances that could possibly arise. However, some guidance can be obtained again from the *Checklist for Lineup Identification.* For those law enforcement officials interested in further assistance in this area, the case of *U.S. v. O'Connor,* 282 F. Supp. 963 (U.S. District Court, District of Columbia 1968) provides a helpful discussion.

3. It is fairly well settled that when there are emergency circumstances, e.g. a witness believed to be dying, a relaxation of the right to counsel rule and the suggestibility rule may be allowed when necessary to prevent the loss of vital evidence. A recent Maine case, *Trask v. State,* 247 A. 2d 114 (1968) presents an example of this type of situation. Defendant, who was being held in jail on a charge of robbery from a store, was presented to a hospitalized victim of a separate assault and robbery offense which was being investigated. There was some question as to whether defendant had retained a lawyer on the store robbery charge, but in any event, no lawyer was contacted for the identification proceeding in the separate assault and robbery crime. Defendant was transported to the hospital by a deputy sheriff. The victim, with no preliminary statements or questioning by anyone, clearly identified the defendant as his assailant. Defendant claims that he should have been represented by a lawyer at this pre-trial confrontation with the victim.

The Maine Supreme Judicial Court decided that a claimed violation of constitutional rights in the conduct of a confrontation with a witness depends on the totality of the circumstances surrounding it. In this case, there were no circumstances conducive to a mistaken identification because: (1) No preliminary statements were made to the victim; (2) The victim's words of identification were spontaneous and certain; (3) The defendant said nothing in the presence of the victim; (4) The case was merely in the investigatory stage; (5) The critically injured victim (thought to be dying) was about to be moved to a distant hospital. Under these conditions, the fact that a lawyer was not present did not void the identification. *Trask v. State,* 247 A. 2d 114 (Maine 1968), *Trask v. Robbins,* 421 F 2d 773 (1st Circuit Court of Appeals 1970).

Photographic Confrontations and the Right to Counsel

An often used and accepted method of police investigation is the showing of mug shots or photographs to witnesses to aid in identifying or eliminating suspects. The Supreme Court, in the case of *Simmons v. U.S.,* 390 U.S. 377 (1968), has approved of this procedure subject to the same standards of fairness set out in *Stovall v. Denno.* Each case must be decided on the total circumstances surrounding it and the identification evidence will be excluded in court "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Several courts have held that a suspect has no right to have counsel present when the victim or witness examines police photos of possible suspects. *People v. Adair,* 82 Cal. Rptr. 460 (California 1969), *U.S. v. Collins,* 416 F. 2d 696 (4th Circuit Court of Appeals 1969).

The following guidelines, based on the *Simmons* case, are suggested for photographic identifications.

1. More than one photograph should be shown to a witness. In the Simmons case, six photographs were shown to several witnesses, and the Supreme Court suggested that even more than six would be preferable.

2. The people appearing in the photographs should be of the same general age, racial and physical characteristics.

3. No group of photographs should be arranged in such a way that the photograph of a single person re-occurs or is in any way emphasized.

4. Witnesses should be handled in a manner similar to that suggested in the *Checklist for Lineup Identification* (above).

5. If there are several witnesses, the Supreme Court suggests that only some of them be shown the photographs, in order to obtain an initial identification. Then the suspect could later be displayed to the remaining witnesses at a more reliable lineup in which counsel for the suspect is present.

6. After the photographs have been shown to the witnesses, they should be numbered and preserved as evidence.

It must be remembered that these guidelines are only suggested and that different circumstances may require different identification procedures. The key factor to keep in mind is that the totality of the circumstances surrounding the identification must not be so overly suggestive as to cause a substantial likelihood of irreparable misidentification.

Summary

In light of the conflict and confusion among courts in interpreting the *Wade, Gilbert* and *Stovall* decisions, the wisest course for the law enforcement officer about to conduct a

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witness-suspect confrontation is to warn the suspect of his right to counsel whenever possible. If it is not possible, the officer should take pains to see that the confrontation is conducted in an unsuggestive manner so as to avoid an irreparable mistaken identification.

NOTE

In the discussion of the "plain view" doctrine in the November, 1970, issue of ALERT, it was stated that the shining of a flashlight by a law enforcement officer into a car at night was not a search if the officer had a legal right to be in the position he was in at the time and his observation thus would not have constituted a search had it occurred in the daytime. There has been some question as to whether this doctrine is valid in Maine. Since the question has not been decided by a Maine court, the following cases in other jurisdictions are cited as authority for the principle.

Marshall v. U.S., 422 F. 2d 185 (5th Circuit Court of Appeals, 1970);

Dorsey v. U.S., 370 F. 2d 928 (District of Columbia Circuit Court of Appeals, 1967);

U.S. v. Callahan, 256 F. Supp. 739 (U.S. District Court, District of Minnesota 4th Division);

State v. Bowman, 245 N.E. 2d 380 (Ohio, 1969);

People v. Superior Court of Santa Clara County, 84 Cal. Rptr 81 (California, 1970).

IMPORTANT RECENT DECISIONS

Note: Cases that are considered especially important to a particular branch of the law enforcement team will be designated by the following code: J - Judge, P - Prosecutor, L - Law Enforcement Officer.

Search and Seizure L

The court upheld a warrantless search of a car for marijuana. The search was begun on a public highway, before the suspects were arrested, and concluded in town after a key was made to fit the car's trunk. Probable cause to search the car was provided by an unbroken chain of suspicious circumstances.

1. Defendants had met with 3 other "hippie type" people.
2. The time was late at night.
3. The area was a notorious drug-smuggling zone.
4. Ridiculous and contradictory explanations were given by defendants for their movements in the area late at night.
5. Surveillance set up by police observed defendant's car leaving area and returning significantly lower in the back.
6. The car was a rental, especially attractive to smugglers.

The court added that, *viewing the situation from the position of the police officers*, the time and circumstances did not permit them to obtain a warrant. They did not know how the situation would develop. The early hour of the morning might have prevented them from obtaining the warrant. Furthermore, they waited until the car was in motion along the highway before they stopped and searched it. *Sherman v. U.S.*, (9th Circuit Court of Appeals, August 1970).

Search and Seizure L

Given the right to search an automobile under *Chambers*, the California Court of Appeals sees no reason why the police should not be able to search a purse left in the car. After several days of surveillance, police arrested the defendant and three others on warrants alleging narcotics violations, and seized two automobiles in which the arrested persons were riding. Due to a crowd at the scene of the arrest, the police took the arrested individuals to another location. The defendant left her purse in the car they were driving when arrested. A search of the purse revealed a quantity of narcotics. The court held that the *Chambers* rule which permits warrantless searches of automobiles because of their mobility if the police have probable cause to believe that they contain contraband and other seizable items, extends to the warrantless search of a car which has been immobilized by the arrest of its occupants. Given the right to search the automobile, the court reasoned that police could search the purse defendant left in it. *Bethune v. Superior Court*, California Court of Appeals, September 1970.

Miranda L

Defendant school students were convicted of assault with intent to rape as a result of an incident in the girls dormitory after a power blackout. They had confessed both to school officials and to a police officer and claim their confessions are inadmissible under the Escobedo and Miranda rulings.

The court found that the school officials had conducted the inquiry in a manner customary to any institution investigating a disruptive incident; no coercion or undue influence was involved; no evidence indicated that the inquiry focused on any particular individual nor that it was accusatory in nature. Thus the students were not entitled to Miranda warnings.

The court also found that the police officer had conducted the investigation properly; each student questioned was advised of his rights under Miranda; no-one was arrested or taken off campus; a counselor of the school was present at the investigation for the students' protection; there was no evidence of undue influence or other irregularity; and the students waived their rights and signed written confessions. *State v. Largo*, (Utah Supreme Court, August, 1970).

Identification-Lineups L J

Putting two 200 pound "Anglo" policemen in a lineup with two Mexican brothers suspected of a taxicab robbery, who weighed 110-130 pounds and were three to four inches shorter than the officers, violated the fundamental fairness test of *Stovall v. Denno*. But, the court found that no substantial prejudice to the defendant. The totality of the circumstances surrounding the occurrence gave the cab driver ample opportunity to observe his assailant and provided an adequate independent basis for in-court identification. *People v. Costillo*, Illinois Appellate Court, October 1970.

Search and Seizure L

A 3 by 5 envelope may not be a dangerous weapon, but when found concealed in the small of a suspicious

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traffic offender's back, it merits further examination. Therefore, police officers who were, up to that point, conducting a simple frisk for weapons incident to arresting the defendant for being unable to produce his license and registration, were justified in opening the envelope and examining its contents, which proved to be heroin. The defendant "backing away" from the officers coupled with the location of the envelope, justified their examination of the contents to determine if criminal activity was involved. *Holloman v. People*, Illinois Supreme Court, October 1970.

Courtroom Procedures

Defendant, convicted of murder, was charged with an in-prison narcotics violation. Defendant contends that it was error to require him to appear continuously before the jury while handcuffed, even while testifying.

The Court held:

Accused's right to the appearance of innocence before the jury, in certain instances, must bow to the competing rights of participants in the courtroom and society at large. The court, however, laid down certain guidelines which a trial judge must follow when visible security measures are taken. 1.) The trial judge must state for the record, out of the presence of the jury, reasons for taking these security precautions. 2.) The trial judge must also give defendant's counsel the opportunity to comment and attempt to persuade him differently. The reasons given by the Circuit Court for the above procedures is to provide a record when special security measures are taken in order that a reviewing court may determine if there was an abuse of discretion on the part of the trial judge. *Samuel v. U.S.*, (4th Circuit Court of Appeals, September, 1970).

Cruel and Unusual Punishment J

Defendant contends that a 15 year mandatory maximum prison sentence for a narcotics possession recidivist, without the possibility of probation or parole, violates the 8th Amendment prohibition against cruel or unusual punishment. The court did not reach this constitutional issue for other reasons, but added that it certainly did not foreclose consideration of the Eighth Amendment issue when presented in a proper case. *People v. Clark*, (California Supreme Court, August, 1970).

Obscenity

The court said that a prior adversary hearing is necessary to determine obscenity even in the case of peep show films. The number of people deprived of an allegedly obscene film by its seizure is a controlling consideration in these cases and the court felt that a sufficient number of customers may view a peep show even though only one at a time. Any seized films are to be returned to their owners, but the owner must supply a single copy for evidentiary use in the obscenity determination hearing. *Platt Amusement Arcade Inc. v. Joyce*, (U.S. District Court, Western Pennsylvania, August, 1970).

Assistance of Counsel J

The defendant was convicted of rape and did not appeal within the statutory 30 day period. He now claims his privately retained counsel's failure to advise him of his rights to appeal deprived him of "effective assistance of counsel". The court finds that the above facts can constitute ineffective assistance of counsel in violation of the Sixth Amendment. *Goodwin v. Cardwell*, 6th Circuit Court of Appeals, October 1970.

MAINE COURT DECISIONS

Note: Cases that are considered especially important to a particular branch of the law enforcement team will be designated by the following code: J - Judge, P - Prosecutor, L - Law Enforcement Officer.

Plain View Doctrine

The three defendants were arrested in Somerset, Mass. for trespass. The arresting officer, while waiting for assistance, observed clothing, wrapped in cellophane, lying in plain view on the rear seat of the car. The car was removed to the police station parking lot. The arresting officer then received information that clothing, similar to that which he had seen, had been stolen in Maine. He obtained a search warrant, which later proved defective, and removed and impounded the stolen property.

The court allowed the admission of the clothing in evidence. The officer did not need a valid search warrant because the clothing was in plain view and he had reasonable grounds to believe the articles had been stolen in Maine before he seized them. "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *State v. Mosher*, Docket No. 640 (November 1970).

Admissibility of Evidence P J

Defendant was convicted of assault with a dangerous weapon with intent to kill and slay. The facts were that he had gotten into an argument with the victim while on a visit to a girl at a college campus. He then drove his car at the victim and struck him with it. The main question before the court was whether defendant had the required intent to kill or slay.

1. The prosecution, to show intent, offered evidence of defendant's nearly striking two pedestrians with his car a short time after the incident in question. At this second incident, defendant was alleged to have said "Do you want to be number two?" The court said that "[w]here the intent of a party forms a part of the matter in issue, evidence of other similar acts, not in issue, may be introduced, provided they tend to establish the intent of the party in doing the acts in question."

2. To attack defendant's credibility as a witness, the prosecution, on cross examination of defendant, introduced the fact that defendant was married at the time of the incident in question. The State Supreme Court held this evidence inadmissible. The defendant, by taking the stand, merely opens up the issue of his reputation for truth and veracity and does not put his general character in issue. The evidence offered tended to show that defendant, although married, was running around with other women. This had no relevancy to the offense charged and could only be prejudicial to defendant before a jury. *State v. Wyman*, Docket No. 645 (November 1970).

Comments directed toward the improvement of this bulletin are welcome. Please contact the Law Enforcement Education Section, Criminal Division, Department of the Attorney General, State House, Augusta, Maine.