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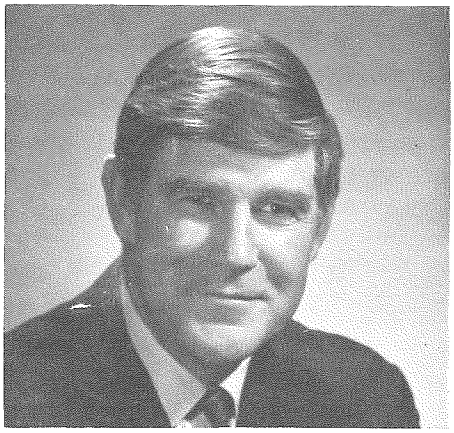
ALERT

CRIMINAL DIVISION

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



MESSAGE FROM THE ATTORNEY GENERAL JAMES S. ERWIN

One of the bills being considered by the State Legislature which is of interest to the law enforcement community is legislative document 1271. This bill proposes the establishment of a full-service central criminal laboratory, administered by the Maine State Police. The services of this laboratory would be available free of cost to all state, local and county law enforcement agencies in Maine for the processing of physical evidence of crimes. This new laboratory would eliminate the current need for sending certain types of physical evidence out of state for examination, a procedure which involves expense as well as crucial delay time in major investigations.

The proposed bill provides for the construction of a new modern fully equipped building with space for administrative, photographic, ballistics, chemical and toxicological facilities plus complete facilities for the State's Chief Medical Examiner. Also included in the proposal is a provision for hiring highly qualified professional personnel to operate the laboratory.

The program as proposed would take approximately two years to implement and would bring the processing of physical evidence in Maine up to the demanding requirements of the criminal justice system.

James S. Erwin

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Attorney General

EVIDENCE FOR THE LAW ENFORCEMENT OFFICER

In the main article of the March 1971 ALERT, it was stated that knowledge of the rules of evidence was essential to the proper presentation of testimony in court by a law enforcement officer. Although the officer obviously does not need as complete a grasp of these rules as an attorney or judge, he can benefit from a basic knowledge of the rules of evidence in his investigation and preparation of cases as well as in actually testifying in court. This article will attempt to convey this basic knowledge and tailor it to the needs of the law enforcement officer performing his daily duties. The information should be considered in conjunction with that in both the February 1971 ALERT on *Criminal Investigation* and the March 1971 issue on *The Law Enforcement Officer in Court.*

The law enforcement officer needs a basic knowledge of the rules of evidence because one of his most important functions is to ultimately bring offenders before the court to be dealt with as justice requires. In order to do this, he must be prepared to present his facts to the judge or jury in a manner acceptable under the law. Furthermore, a knowledge of the rules under which evidence is presented in court will affect the manner in which the officer investigates a crime and gathers evidence. If he knows what will and will not be allowed in court, he can concentrate his time and efforts accordingly and not waste time gathering useless information.

The rules of evidence involve many technicalities and at first may seem to frustrate the purposes of a prosecutor or law enforcement officer as a witness. Facts essential to the conviction of an offender may not be established simply because the evidence by which the prosecution proposed to prove them did not meet the required standards. However, a careful study of the rules of evidence and an attempt to understand their purposes will reveal the reason for their existence. That reason is to make sure that judgments which involve the life and liberty of the individual, on one hand, and the peace and security of the State, on the other, shall be based, so far as humanly possible, only upon evidence really worthy of being believed and acted upon in such important matters. Looking at the rules in this light, one will observe that there are usually good, logical reasons for the admissibility or non-admissibility of evidence under the various circumstances covered by the rules.

Basic Definition of Evidence

The term "evidence" is defined as something which tends to prove or disprove a matter in question, or to influence the belief respecting it. It involves all the means by which any alleged matter of fact, the truth of which is submitted to a finder of fact is established or disproved. The word "testimony" is often confused with the word "evidence". They are not the same thing. "Testimony" consists simply of the oral statements of a witness, while the term "evidence" has a much broader meaning which includes testimony, among other things.

CLASSIFICATION OF EVIDENCE

The broad term "evidence" may, for purposes of clarity, be divided into three categories as follows: direct evidence, circumstantial evidence, and real evidence. Direct evidence refers to matters introduced in court

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through the oral statements of witnesses on the stand testifying to what they know of their own personal knowledge of the facts in issue — that is, the facts to be proved or disproved. Their knowledge, with few exceptions, will have to come to them though the exercise of their own senses — sight, hearing, smell, touch or taste. A simple example will illustrate:

> A witness on the stand in a homicide trial says: "I saw the defendant point a pistol at the deceased. I saw him pull the trigger. The gun went off with a loud crack and the deceased fell to the floor."

All the facts to which the witness testified were within his immediate experience. His testimony was direct evidence of how the deceased died and who killed him.

Circumstantial evidence (sometimes called indirect evidence) on the other hand, refers to evidence which, while not directly tending to prove a fact in issue, raises a strong inference or suggestion as to that fact. Where a crime is committed by stealth, usually the only way it can be proved against the defendant is by circumstantial evidence. If a man breaks into a house, ordinarily no-one sees him and there can be no direct evidence that he committed the act. However, if he is caught with the stolen goods, was seen in the neighborhood, and has bits of glass from a broken window on his clothing, these are circumstances which raise a strong inference that he committed the act in question. Circumstantial evidence generally must be added to other evidence in order to prove the fact in issue; but a large number of pieces of circumstantial evidence can convict a defendant of the crime with which he is charged even if no-one actually saw him commit the offense.

The final category is real evidence. Real evidence is made up of things — objects of one kind or another associated with the offense. When items are identified and associated with an offense, they themselves constitute proof of facts which bear upon the matters in issue. For example, a shoe identified as belonging to the defendant is shown to match a footprint found at the scene of the offense. The shoe is introduced into evidence; it is real evidence tending to show that the defendant was at the place where the crime was committed. Other examples of real evidence would be a knife, a gun, a key, human hairs, fingerprints, photographs, documents, soil, paint chips, etc.

All of the above types of evidence are useful and admissible in the presentation of a case to the court. Direct evidence from mature, careful witnesses is highly desirable, but crimes are often committed in stealth, out of the sight and hearing of others. Hence, circumstantial and real evidence may be the only forms of proof available to the prosecutor. This should not discourage prosecution. Circumstantial and real evidence may be more accurate and compelling than the direct testimony of a witness whose power of observation may be diminished and rendered inaccurate in the shock and excitement of seeing a crime committed before him.

RULES OF EVIDENCE

Evidence which can properly be admitted in court to prove a fact in issue is said to be admissible evidence. The rules of evidence are rules or principles developed over the years by courts and by legislative bodies governing the introduction and admissibility of evidence.

It is worthwhile at this point to mention that there are certain rules under which evidence is excluded for reasons having nothing to do with the tendency of the evidence to prove facts in issue, but having to do with the manner in which the evidence was obtained. For example, if a murder weapon was found and seized in the defendant's room during the course of an illegal search, it is excluded from evidence not because its admission into evidence would not tend to prove defendant's guilt but because it was illegally seized, and evidence which is illegally seized is not admissible over objection on that ground. This is commonly known as the "exclusionary rule."

Under the rules usually spoken of as the rules of evidence, however, evidence is considered inadmissible not because of the way in which it has been obtained but because it does not have sufficient value for proving a fact in issue. It may lack this value because it is inherently untrustworthy (such as much hearsay evidence and opinions of non-experts) or because it is not relevant or material to the proof of the fact in issue. The following discussion will attempt to briefly discuss the workings of these rules.

Relevancy and Materiality

Each criminal offense is made up of several distinct elements, each of which must be proved before the defendant can be found guilty of committing the crime. The proof required from the State, then, is proof of facts which show the existence of each such element. Only such facts may be proved as bear upon whether or not these elements, or any of them, existed.

The distinction between the terms relevancy and materiality is difficult to define. The simple test which the officer should apply in evaluating evidence as to relevancy and materiality is to ask himself whether or not the evidence tends to directly prove any of the necessary elements of the crime and whether the fact which it tends to prove or support is directly charged.

For example, the fact that a subject is skilled in the use of explosives may be both relevant and material elements of proof in a case charging him with burglary wherein a safe was expertly blown open. The fact that the subject had been convicted of a prior burglary is irrelevant and immaterial to the proof of burglary now charged.

Hearsay

One of the most important of the rules of evidence is the so-called hearsay rule. The basic idea of the rule is that a witness may testify only to matters of which he has personal knowledge, and not to matters of which he was informed by another. *The rule makes inadmissible any testimony by a witness of an out of court statement made by another person being offered to prove the truth of the matter stated.*

It is worthy of note here that the rule, even apart from its exceptions, does not forbid the introduction of every statement made out of court by a person not testifying. The phrase "offered to prove the truth of the matter stated" operates so as *not* to exclude a statement unless it is (1) expressly or in effect a statement of fact, and (2) offered to prove the truth of the statement contained in it. Therefore, if the statement was offered not to prove the truth of the

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words said but merely to show that the words were said or to prove a particular circumstance such as the state of mind of the person, or for some other reason, it is admissible.

The basic hearsay rule is easily illustrated:

> A witness in response to a question states: "I didn't see who fired the gun, but John Jones was there and he told me that Frank Smith fired it."

Assuming that the reason for the testimony in the example was to prove the fact that Frank Smith fired the gun, this statement would not be admitted in court for the consideration of the judge or jury.

The purpose underlying the hearsay rule is clear. Human experience has demonstrated that there is great possibility of error in such circumstances. Evidence passed from one person to another is not worthy of great credit as a general rule. In the example, all that the witness knows is what John Jones told him. Jones was not before a court at the time he told the witness who fired the shot; he was not under oath; and most important, he was not subject to cross-examination. It would be manifestly unfair to Frank Smith to allow Jones' statement to come before the court or jury at Smith's trial for homicide. It is these reasons — the likelihood of error, the lack of credibility, and the essential unfairness involved — that brought into being the hearsay rule.

Exceptions to the Hearsay Rule

There are many exceptions to the hearsay rule — more than can be covered within the scope of this article. However, a few of these exceptions are of particular interest to the law enforcement officer and will be discussed briefly here.

1. Admissions and Confessions

Under this exception to the hearsay rule, a person to whom a confession or admission is made may testify to what the defendant said, and such testimony will be allowed by the court as bearing upon the facts in issue.

A confession is a complete statement by the defendant in which he expressly admits his guilt of the crime charged or of facts revealing all the elements of an offense. An admission, on the other hand, is a statement of fact by the defendant tending, alone or in connection with other facts, to show the existence of one or more, but not all, of the elements of the offense for which he is being tried.

It should be noted here that in most instances, before an admission tending to prove guilt or a confession made *to the police* can be admitted as an exception to the hearsay rule, the standards announced in *Miranda v. Arizona,* 384 U.S. 436 (U.S. Supreme Court, 1966) must be shown to have been met. These standards, of course, relate to the warnings which must be given to a suspect by the police whenever there is a custodial interrogation. Because of the involved nature of this topic, a future issue of ALERT will be devoted to the Miranda case and its implications.

2. Dying Declarations

At a homicide trial, it is proper to introduce testimony of words used by the victim of the homicide prior to his death relative to the facts of the offense and the identity of his slayer. However, at the time the statements are made, the victim must know or honestly believe he is about to die and he must, in fact, die.

Again, the principle underlying this exception to the hearsay rule is fairly simple. While, as noted above, statements made by one other than the witness cannot ordinarily be introduced into evidence as tending to prove a fact not known to the witness because the person making the statement was not under oath nor subject to cross-examination, yet it is reasonable to believe that a man who knows himself to be facing imminent death will speak only the truth.

If a dying declaration is made to a law enforcement officer, he should make careful notes describing the events surrounding the making of the statement in order to be able to show, later in court, that the wounded person did entertain the belief that he was going to die.

3. Res Gestae

This Latin phrase means, literally, "things done" and it refers to declarations or statements made at the time of an offense or so close thereto as to be almost automatically or impulsively said. Such statements are considered to be an integral part of the entire criminal transaction. They are deemed to be trustworthy for the very reason of their unintended, reflexive nature. The principal is illustrated as follows:

> During a scuffle on a sidewalk, an unidentified bystander is heard to exclaim "Look out, he's got a gun!" The defendant, who runs away, is apprehended some time later. He is searched, but no gun is found upon him. At the trial of the defendant for the assault, a witness testifies that he was near the place where the assault occurred — although not close enough to see if the defendant had a gun — and heard the unidentified bystander utter the words quoted above.

Under the res gestae rule, the evidence of what the bystander said, under the circumstances, would be admissible on the question whether or not the defendant was armed as he committed the assault.

Courts are strict in the allowance of evidence under the res gestae exception. Only when the utterance intended to be used as evidence is clearly shown to be a part of the entire scene surrounding the crime will it be allowed to be repeated in the trial as evidence of the fact to which it pertains.

The Opinion Rule

As a general rule, witnesses are not allowed to testify to their opinions or conclusions but must only state facts within their knowledge relevant to the issue in question. It is the function of the jury, or the judge (in a non-jury case), to draw conclusions from the pertinent facts placed in evidence. For example, the witness will not be allowed to state "He was driving recklessly," because "recklessly" is an opinion or conclusion. It is for the jury to decide from the witness' description of the details of his observations whether or not the driving was reckless. The basis for the rule is that the opinion of the witness is not necessary because once the jury has the facts, they can draw their own conclusions.

There are certain well-recognized exceptions to the opinion rule. One of these is the "qualified expert" exception. Under this exception, the court will receive opinion testimony from persons having particular skill and knowledge in a particular area. For example, an officer, highly experienced in traffic accident investi-

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gation might testify as to skid marks and be allowed to give an opinion as to how fast a car was going. The basis for this exception is that the jury, even with all the pertinent facts before it, does not have sufficient knowledge or expertise in a particular area to formulate a rationally based conclusion. In order for a witness to be allowed to give expert opinion testimony, his qualifications as an expert must be proven to the satisfaction of the court.

Another exception to the opinion rule allows opinion evidence as to certain matters of common observation which would be almost impossible to describe except in the form of an opinion. For example, a witness would be allowed to state his impression of another's manner or appearance such as that the latter was nervous or excited or spoke angrily. Some other matters about which a witness may state an opinion are sobriety, mental condition, speed, size, distance, age, identity, etc. In many cases, the witness must also state facts which form the basis of the opinion. Also, the witness can testify only as to his own impression and not what impression someone else might have gotten from the same facts.

Best Evidence Rule

The best evidence rule requires that in order to prove any fact in issue, the best evidence, or that evidence which affords the greatest certainty of the fact, is required to be produced in court. This rule refers most frequently to offers of oral evidence to prove the contents of a writing, where the writing itself ought to be produced. For example, if a witness attempted to testify to the contents of a kidnapper's ransom letter, this testimony would be inadmissible without the document itself being produced. However, where the document itself is proved unavailable, lost, or destroyed, the court may then allow other evidence, usually oral, to prove the document's contents

The basis of this rule is that the exact words of a writing are often very important (especially legal documents) and a slight variation in wording may mean a great difference in the interpretation of the document. Moreover, there are substantial risks of error and inaccuracy in translating the exact terms of a document either through oral testimony from memory or through a handwritten or typewritten copy.

Corpus Delicti Rule

The Latin term corpus delicti means literally "body of the crime." The corpus delicti rule states that in order to convict one of a crime, the State must prove that a crime was actually committed and that someone was criminally responsible for it.

The rule often comes into play when someone confesses to a crime. No matter how complete or incriminating that confession is, it will not be admissible in court unless the State has furnished proof that the particular crime was actually committed by someone. The State does not have to prove the corpus delicti beyond a reasonable doubt but must produce some evidence, outside of the defendant's admission or confession, to show commission of the crime. Some evidence has been defined as such independent credible evidence as will create a really substantial belief that the crime charged had actually been committed by someone. *State v. Wardwell,* 183 A. 2d 896 (Supreme Judicial Court of Maine, 1962). The following example illustrates the operation of this rule.

In an appeal from a conviction for operating a motor vehicle while under the influence, the defendant attacked the admission of a statement made by him that he was driving the vehicle when it overturned, on the ground that the State had failed to prove corpus delicti. The court found that the following facts were sufficient to establish the corpus delicti:

1. A motor vehicle overturned while being operated upon the highway.
2. The vehicle had been in defendant's control a half-hour earlier some miles away.
3. The defendant was at the place where the overturning occurred immediately thereafter.
4. Defendant had suffered a recent injury.
5. Defendant assumed responsibility for notifying the police.
6. Earlier on the day in question, defendant had been seen drinking in a beer parlor.
7. Defendant had been warned not to drive the truck because he had been drinking too much.

State v. Hoffses, 85 A. 2d 919 (Supreme Judicial Court of Maine, 1952).

It must be remembered, however, that when a case finally reaches the jury, there must be such extrinsic corroborative evidence of the corpus delicti as will, when taken in connection with the confession or admission, establish in the minds of the jury beyond a reasonable doubt that the crime charged was committed and that the defendant committed it.

Summary

The rules of evidence are designed to ensure that the decisions made by courts in the criminal area are based only upon evidence sufficiently trustworthy and credible to be acted upon in such vital matters. The law enforcement officer is responsible for bringing offenders against the law before the courts and presenting evidence relating to the offenses. In the areas of both criminal investigation and testifying in court, the officer needs a basic grasp of the rules of evidence so that he knows what evidence will be admissible in court and generally understands the terms and procedures relating to the proof of facts at a trial.

By preserving and producing evidence which complies with these rules, the officer helps to further the efficient administration of justice.

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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.

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.

Miranda; Impeachment

Defendant had been found guilty of selling narcotics. On appeal, he claimed that a certain statement made by him to the police could not be used to impeach his credibility on cross-examination. This statement had been given without defendant being advised of his rights to counsel and to remain silent under *Miranda v. Arizona,* 384 U.S. 436.

The court held that defendant's statement, even though inadmissible against defendant in the prosecution's case in chief because of lack of Miranda warnings, may be used for impeachment purposes to attack defendant's credibility, if the statement otherwise satisfied legal standards of trustworthiness.

Harris v. New York, 91 S. Ct. 643 (U.S. Supreme Court, February 1971).

Equal Protection; Indigents J

Petitioner, an indigent, was convicted of traffic offenses and fined a total of $425. Texas law provides only for fines for such offenses but requires that persons unable to pay must be incarcerated for a sufficient time to satisfy their fines, at the rate of $5 per day. Petitioner was incarcerated and his habeas corpus petition was denied by the state courts.

The U.S. Supreme Court held that it is a denial of equal protection to limit punishment to payment of a fine for those who are able to pay it but to convert the fine to imprisonment for those who are unable to pay it.

Tate v. Short, 91 S. Ct. 668 (U.S. Supreme Court, March 1971).

Search and Seizure L

State Troopers in West Virginia were advised that rental trucks were being used to transport stolen goods in the northern area of the state. Subsequently, an officer patrolling this area stopped a rental truck for a routine check for registration, drivers license and rental papers. Noticing that the truck was heavily loaded, the officer asked the defendant what he was carrying. The defendant claimed that the truck was empty. The officer requested permission to look inside but was twice refused. He threatened to get a search warrant, but the defendant finally consented. The search revealed a cargo of stolen cigarettes. On appeal, defendant claimed that consent to search had been coerced. However, the court did not consider that argument because the trooper had probable cause and under the circumstances, he could search without a warrant. Probable cause was provided by the officer's knowledge that rental trucks were being used in the area to transport stolen goods combined with defendant's obvious lie. The court said that the lawfulness of the search was not dependent upon the trooper's having probable cause to believe the cargo consisted specifically of stolen cigarettes. It was enough that he had probable cause to believe that the truck was carrying stolen goods of some sort or contraband.

The exigent circumstances for a search without a warrant were provided by the movable nature of the vehicle and the nature of the area. The northern panhandle of West Virginia is a strip of land about ten miles wide and a vehicle could be driven to Ohio or Pennsylvania in minutes.

U.S. v. Gomori, U.S. Court of Appeals, 4th Circuit, January, 1971.

Meaningful Appeal J

Defendant was convicted of assault and battery with intent to kill and he appealed. His original trial proceedings had not been recorded and his counsel on appeal was not the same as his counsel for trial. The Pennsylvania Supreme Court granted a new trial on the basis that defendant had been deprived of a meaningful appeal. The court said that while a transcript per se is not an absolute due process necessity, there must at least be an equivalent "picture" of what transpired below. Here, the defendant had no "adequate alternative" available to preserve trial errors.

Commonwealth v. Anderson, 272 A. 2d 877 (Supreme Court of Pennsylvania, January 1971).

Search and Seizure L

While on patrol in a high crime area, an officer noticed defendant walking down the street carrying a portable television set. The officer questioned the defendant, who stated that he was going to sell the set to a friend. The officer then seized the set, instructing the defendant to tell his friend to pick it up at the police headquarters. Later the same day, there was a report that a burglary in which a television set bearing the same serial number as the one defendant was carrying had been stolen. Defendant was arrested and convicted for receiving stolen property.

Defendant's contention, on appeal, was that there was no probable cause to seize the set. The court agreed with the defendant and noted that suspicion does not constitute probable cause. At the time of the seizure, the officer had no report of a burglary nor was there an offense being committed in his presence. Hence the seizure was unlawful.

Dougherty v. U.S. (District of Columbia Court of Appeals, January 1971).

Lineup

Defendant participated in a lineup as part of the investigation of a robbery of a store. His lawyer for a previous robbery case was invited but did not attend. However, a legal aid lawyer was present at the lineup for the general purpose of representing those defendants who were unrepresented for the purposes of that lineup. Defendant was identified, convicted, and appealed, claiming that the legal aid lawyer was not representing him for purposes of the lineup.

The court upheld the conviction despite the fact that substitute counsel had attended 14 lineups on the night in question; he could not remember at the pre-trial hearing or trial itself what had happened at defendant's lineup; and his notes, which were admitted into evidence, contained contradictory evidence and did not indicate whether an identification had been made. The court went on to say that even if substitute counsel's performance was ineffective, the error was harmless, as the other evidence against defendant was quite strong and the identification at trial was independently supported. *U.S. v. Randolph* (District of Columbia Court of Appeals, December 1970).

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"Fruit of the Poisonous Tree" J P

Police had illegally arrested defendant and searched his apartment on charges unrelated to a bank robbery. When police went next door to ask a neighbor if she would care for defendant's pets, the neighbor volunteered information that connected defendant with the bank robbery. Police conducted a second search of the apartment and found evidence to connect defendant with the bank robbery. Defendant was convicted of bank robbery and contended on appeal that this was an illegal search and seizure.

The court quoted the case of *Wong Sun v. U.S.* (1963) 371 U.S. 471:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made had been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint,' "

Here the primary illegality was the original arrest of defendant and the search of his apartment. Clearly, the police would not have obtained the neighbor's statement had it not been for that arrest. However, it cannot be said that the neighbor's statement was the result of the police's "exploitation" of that arrest. No attempt was made by police to gain any information from the neighbor; the statement was gratuitously volunteered. It was sufficiently an act of free will to purge the primary taint of the unlawful arrest.

U.S. v. Williams (9th Circuit Court of Appeals, December 1970).

Pleading J P

Petitioner had originally been charged in state court with first degree murder. He bargained with the prosecutor and agreed to plead guilty to second degree murder if the prosecutor would recommend to the court a sentence for a term of years rather than life imprisonment. On the day of trial, the prosecutor failed to make the recommendation and petitioner was sentenced to life imprisonment.

Petitioner immediately sought to withdraw the guilty plea but the trial judge refused the motion, saying that he would not have accepted a recommendation for less than a life sentence even if it had been made.

On habeas corpus, petitioner alleged that his guilty pleas was involuntary because the prosecutor failed to keep his promise. The court held that a guilty plea, if induced by promises which deprive it of the character of a voluntary act, is void. It found it difficult to perceive of a more effective influence on a decision whether or not to plead guilty to a criminal offense than an agreement with a prosecutor relative to his recommendation of sentence. Furthermore, it did not matter that the promise would not have been effective with the court. The question is whether it influenced the petitioner in his decision to plead guilty. *White v. Gaffney* (10th Circuit Court of Appeals, December 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.

Habeas Corpus J

Petitioner had been convicted of rape in 1964. He brought a writ of post-conviction habeas corpus in Superior Court which was denied. He then appealed, claiming that the major reason for his pleading guilty to the 1964 charge had been the existence of a 1957 rape conviction which was declared invalid in 1968. Petitioner operated on the basis that this 1957 conviction could have been used to impeach his testimony if he pleaded not guilty in the 1964 rape prosecution and took the stand as a witness. Also, the 1957 conviction might have had an effect on the sentence he might receive in the 1964 prosecution. Therefore, he claimed the 1964 conviction should be set aside because it resulted from a plea of guilty based on error, in that he was unaware that his 1957 conviction was voidable.

The Supreme Judicial Court of Maine rejected the petition saying that the Superior Court record showed that the plea of guilty in the 1964 rape prosecution was voluntary and was motivated by petitioner's recognition of his guilt and his hope for lenient sentence and not by the existence of the previous conviction. Furthermore, the court said that a voluntary plea of guilty, intelligently made in the light of then applicable law, does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.

Northup v. State, 272 A. 2d 747 (Supreme Judicial Court of Maine, January 1971).

Jury Instructions; Self Defense J P

Defendant was convicted of manslaughter and appealed. The evidence introduced at trial showed that defendant had a dispute over property with the decedent and that defendant pursued decedent from place to place before producing an encounter with him. Then defendant challenged decedent to physical combat and when decedent produced a weapon, as defendant had anticipated he would, defendant killed decedent.

During the trial, the court gave conflicting jury instructions that defendant must carry the burden of proving he acted in self-defense by a fair preponderance of the evidence and that if upon the whole evidence the jury entertained a reasonable doubt as to whether the homicide was excusable, the jury should acquit.

The Supreme Judicial Court held that giving these instructions was error. However, it was not prejudicial error because there was insufficient evidence to sustain the court's submission of the issue of self-defense to the jury. The Court said:

> "The law of self-defense is designed to afford protection to one who is beset by an aggressor and confronted by a necessity not of his own making. It must not be so perverted as to justify a homicide which occurs in the course of a dispute provoked by the defendant at a time when he knows or ought reasonably to know that the encounter will result in mortal combat."

State v. Millett, 273 A. 2d 504 (Supreme Judicial Court of Maine, February, 1971).