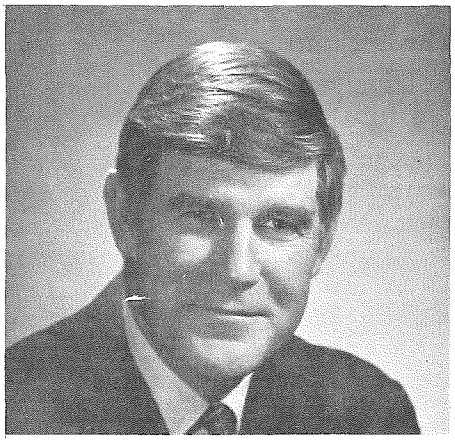
JUNE 1971

ALERT

CRIMINAL DIVISION

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



MESSAGE FROM THE ATTORNEY GENERAL JAMES S. ERWIN

Over the past seven or eight months since the first issue of the ALERT Bulletin, we have received requests daily from law enforcement personnel, asking to be added to our mailing list. Because of this, the total number of people receiving ALERT has increased from an initial 1585 to a total of over 2000.

Our contract for printing the ALERT only provides for a limited number of copies of each issue, and we are quickly drawing close to that limit.

I would therefore ask that the names of all those who are no longer involved in law enforcement activities be forwarded to this office to the attention of the Law Enforcement Education Section so that names can be deleted from the mailing list. Thank you in advance for your cooperation in this effort.

James S. Erwin

JAMES S. ERWIN
Attorney General

MIRANDA II

In the May 1971 issue of ALERT, it was stated that the great issues of *Miranda* could be said to revolve around the meaning of four words — "custody," "interrogation", "warning", and "waiver". "Custody" and its meaning for the law enforcement officer were discussed in detail in that issue. In this issue, attention will be directed toward the remaining great issues plus a number of miscellaneous considerations relating to the *Miranda* decision and its impact on law enforcement.

INTERROGATION

Once it has been determined whether or not a suspect is in custody for *Miranda* purposes, the question arises as to whether or not he is being subjected to interrogation. Interrogation is usually thought of as the questioning of an individual suspected of a crime with the intent of eliciting incriminating statements from him. However, there are several situations in which a person converses with or relates information to law enforcement officers which are not considered to be "interrogation" for *Miranda* purposes and thus do not require the warnings.

Volunteered Statements

The most obvious of these situations is the volunteered statement — the statement which is *not* made in response to questioning by a law enforcement officer. In the *Miranda* opinion, the Court stated that "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." 384 U.S. at 478

Volunteered statements commonly occur when a person simply walks up to a police officer or into a police station and makes damaging admissions. *People v. Hines*, 425 P 2d 557 (California Supreme Court, 1967). They occur most frequently, however, after a person has been taken into custody and may occur before, during, or after interrogation so long as they are clearly volunteered. *Dick v. U.S.*, 395 F. 2d 89 (9th Circuit Court of Appeals, 1968).

Volunteered statements may occur during interrogation when the suspect makes a damaging admission that is not responsive to the officer's question. For example, an officer asked defendant where the key to his car was so the car could be moved off the street and put in storage. Defendant replied that the car had been stolen. The Court held that the statement to the effect that the car was stolen was not responsive to the inquiry about the key and was completely voluntary. *Paison v. U.S.*, 387 F 2d 944 (10th Circuit Court of Appeals, 1968).

Furthermore, the police have no duty to interrupt a volunteered statement in order to warn a suspect of his rights. The *Miranda* decision specifically states that "There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make." (384 U.S. at 478)

Threshold and Clarifying Questions

Because most volunteered admissions are not very detailed, an officer may try to clarify exactly what is being said. Courts have held that a statement is volunteered even if some questions are asked by police, as long as the questions are neutral, intended to clarify, and are not designed to expand the scope of the statement the person wants to make. *People v. Sunday*, 79 Cal. Rptr. 752 (California Court of Appeals, 1969).

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An example of this is a case where a man walked into a police station and said "I done it. Arrest me. Arrest me." The officer asked him what he did and the man said he killed his wife. Then the officer asked him how, and he replied, "With an axe, that's all I had." The Court held that this was "threshold questioning" and was permitted by *Miranda*. *People v. Savage*, 242 N.E. 2d 446 (Illinois Court of Appeals, 1968).

Routine Questions and Booking Procedures

In the discussion of "custody", in the May 1971 ALERT, the fact that the questioning of an individual was brief and routine was usually indicative of a lack of custody. In addition to this, it has been held by some courts that such questioning is not "interrogation" within the meaning of *Miranda* even if the suspect is in custody.

Routine questions asked during the booking of suspects by the booking officer have usually been held to be non-interrogative in nature. *Toohey v. U.S.*, 404 F 2d 907 (9th Circuit Court of Appeals, 1968). However, this is not a hard and fast rule, and since the suspect is in a police station, probably involuntarily, it is safer to give the *Miranda* warnings in this situation.

The rationale that brief routine questions are not interrogative extends to cases beyond the booking procedure. The courts seem to read *Miranda* as directed toward situations where police authoritatively demand answers from persons in custody. *State v. Travis*, 441 P 2d 597 (Oregon Supreme Court, 1968) Under this approach, the simple, run-of-the-mill question does not constitute interrogation. Other reasons for holding the routine question to be non-interrogative are the usual lack of focus and intent to incriminate on the part of the officer asking the question.

Spontaneous or Emergency Questions

When questions are asked by law enforcement officers spontaneously, impulsively, or in response to emergency circumstances, they are usually held to be non-interrogative. An example of this is a case where a jailer and a guard were called to a cell area where they found one prisoner near death from strangling. While tending to the injured person, they asked the defendant, who was also a prisoner, questions about what happened and received incriminating replies. The Court upheld this questioning not as a deliberate effort to elicit damaging evidence but rather as general on-the-scene questioning by an astonished jailer. *People v. Morse*, 452 P. 2d 607 (California Supreme Court, 1969)

Similarly, where the interest of the police is justifiable self-protection, they may ask if the suspect is armed or where his weapon is. *Ballew v. State* 441 S.W. 2d 543 (Arkansas Supreme Court, 1969).

Confrontation of Suspects with Facts and Evidence

Generally speaking, it is proper for a law enforcement officer to confront a suspect with the evidence against him or with the other facts of a case. Often times, after such a confrontation, a suspect may confess to a crime or make damaging admissions. The question under *Miranda* is whether these statements made by the suspect are volunteered statements or the product of a form of "silent interrogation".

Courts have decided the issue both ways depending on the circumstances of individual cases. Where there is no verbal interrogation and the suspect is merely confronted with evidence, an accomplice, scientific reports, etc., courts have held that damaging admissions made after the confrontation were not the products of interrogation. *People v. Doss*, 256 N.E. 2d 753; (Illinois Supreme Court, 1970); *State v. Burnett*, 429 S.W. 2d 239 (Missouri Supreme Court, 1968). However, where, along with a confrontation, there is subtle coercion, prior to interrogation conducted without warnings, or a deliberate effort on the part of police to break down defendant's refusal to talk, courts have expressed disapproval and have held resulting statements inadmissible in court. *State v. Mills*, 170 S.E. 2d 189 (North Carolina Court of Appeals, 1969); *State v. LaFernier*, 155 N.W. 2d 93 (Wisconsin Supreme Court, 1967).

Statements in Response to Statements by Others

Closely related to statements volunteered after confrontation with evidence are statements volunteered in response to comments (not questions) by law enforcement officers. Since there is usually no intent to elicit incriminating information by officers in this situation, such statements are usually held not to be the product of interrogation, *U.S. v. Pellegrini*, 309 F. Supp 250 (U.S. District Court, Southern District of N.Y., 1970).

Is it Interrogation by Law Enforcement Officers

The warning requirements of *Miranda* apply only to custodial interrogations conducted by *law enforcement officers*. Therefore, damaging admissions made by a suspect in response to interrogation by private citizens will be admissible in court despite a lack of warnings. *Yates v. U.S.*, 384 F 2d. 586 (5th Circuit Court of Appeals, 1967). However, it is universally held that law enforcement officers are forbidden from using private citizens as their agents in order to escape the *Miranda* rule. *Commonwealth v. Bordner*, 247 A 2d 612 (Pennsylvania Supreme Court, 1968).

WARNING

The Necessary Warnings

The warnings, which must be given whenever a person is in custody or deprived of his freedom of action in any significant way for questioning, appear in the May 1971 issue of ALERT and also on the card enclosed in the mailing of this issue. This card is designed to be carried on the person of the law enforcement officer and to be used when the situation requires that the warnings be given. It satisfies in all respects the requirements set out in the *Miranda* decision and the officer is urged to use it in order to avoid mistakes and omissions.

Timing and Manner of Giving Warnings

Miranda warnings must be given in a clear, unhurried manner — in such a way that the individual would feel free to claim his rights without fear. The warnings should not be given in a careless, indifferent, and superficial manner.

When warnings are given to an illiterate or subnormal person, they must be given in language which he can comprehend and on which he can knowingly act. This may involve taking extra pains to explain and interpret the warnings. The crucial test is whether the words used by the officer, in view of the age, intelligence,

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and demeanor of the individual being interrogated, convey a clear understanding of all his rights. *Anderson v. State*, 253 A. 2d 387 (Maryland Court of Special Appeals, 1969).

The warnings must be given at the very beginning of interrogation, but they need not be repeated as the questioning moves from one crime to another or after a short break in the questioning. *State v. Davidson*, 451 P 2d 481 (Supreme Court of Oregon, 1969).

Does The Suspect Require Warnings

The Suspect Who Knows His Rights

The *Miranda* opinion made it very clear that law enforcement officers are not to assume that any suspect knows his rights.

> "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, a prior contact with authorities, can never be more than speculation; a warning is a clear-cut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." (384 U.S. 436, 468-69).

The Non-Indigent Suspect

If a suspect is known to have a lawyer or to be financially able to afford one, it is not necessary that he be given the warning that a lawyer will be appointed for him in case of indigency. He must be given all the other warnings however.

As a practical matter for the law enforcement officer, it is not always easy to determine a person's financial status and "the expedient of giving a warning is too simple and the rights involved too important to engage in *ex post facto* inquiries into financial ability when there is any doubt at all on that score." (384 U.S. 436, 473 N. 43)

The Suspect With an Attorney Present

The *Miranda* opinion seems to say that the warnings are not required to be given to a person who has an attorney present with him.

> "The presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion." (384 U.S. at 466)

However, again, as a practical matter, it is a wiser and safer policy for the law enforcement officer to warn the suspect anyway. He may later claim that his lawyer was incompetent or that he had not actually been officially retained.

WAIVER

A waiver is a voluntary and intentional relinquishment of a known right. The determination of whether or not a suspect has fully and effectively waived his rights for purposes of *Miranda* presents many problems for the law enforcement officer. The only clear-cut rule is that waiver cannot be inferred from silence. As stated by the Supreme Court in *Miranda*, "a valid waiver will not be presumed simply from the silence of the accused after warnings are given. . . ." 384 U.S. at 475. This rule has been followed closely by the lower courts. *Moore v. U.S.*, 401 F. 2d 533 (9th Circuit Court of Appeals, 1968). Outside of this, however, there are few concrete guidelines for the law enforcement officer to help him determine whether or not he has obtained a valid waiver from a suspect and can begin questioning him.

The safest procedure for the law enforcement officer is, after the *Miranda* warnings have been given, first to ask the suspect if he understands the rights that have been explained to him. Then the officer should ask the suspect if he wishes to talk without first consulting a lawyer or having a lawyer present during questioning. (See the enclosed card for guidance in asking these questions). If the officer receives an affirmative answer to both questions, he should carefully note the exact language in which the answer was given in order to preserve it for possible future use in court. He may then proceed with the interrogation of the suspect.

If possible, the officer should always try to obtain a written waiver of rights from the suspect before questioning. A written waiver is almost always held to be sufficient if the suspect is literate and there is no evidence of police overbearance. *Menendez v. U.S.*, 393 F 2d 312 (5th Circuit Court of Appeals, 1968). The following form is suggested for this purpose:

Waiver of Rights

I have had my rights explained to me and I understand what my rights are.

I am willing to answer questions and make a statement.

I do not want a lawyer at this time.

I understand and know what I am doing.

No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed

Time Date

Witness

Witness

If a written statement is obtained as a result of questioning, it should also be signed by the suspect and witnesses. The statement should indicate the place, date, and time the statement was commenced and the place, date, and time the statement was signed by the suspect.

As a further substantiation of the validity of the waiver, it is suggested that the law enforcement officer ask the suspect to sign the following form after a written statement is obtained:

Reaffirmance of Waiver

The entire statement I have just made and signed consisting of ____pages was made by me after I carefully considered the rights I was giving up in making the statement.

At no time while I was making the statement did I decide to or indicate any desire to reclaim any of those rights.

Signed

Time Date

Witness

Witness

(Continued on page 4)

In practical application, it is not always possible for the law enforcement officer to obtain written waivers or clear-cut oral waivers. Suspects may express themselves through an infinite variety of words and actions, some of which may be held by a court to be a valid waiver of rights and some not. Often suspects will be indecisive and never quite get to the point of either claiming or waiving rights. This presents a difficult problem for the law enforcement officer. The following discussion will attempt to meet this problem and will consider various situations involving waiver that have arisen and how they have been treated by courts.

Words and Actions Constituting Waiver

When it is clear that a defendant has been fully informed of his rights, any reasonable verbal acknowledgment of understanding and willingness to speak is usually acceptable as a waiver of rights. Examples of valid waivers are cases where, after warnings, a suspect said "I might as well tell you about it", *U.S. v. Gogkin*, 398 F 2d 483 (3rd Circuit Court of Appeals, 1968); "I'll tell you" *State v. Kreinens*, 245 A 2d 313 (New Jersey Supreme Court, 1968); or "I don't want counsel" *State v. Lipker*, 241 N.E. 2d 171 (Ohio Court of Appeals, 1968). Courts have also approved nonverbal waivers such as nods and shrugs. *Mullaney v. State* 246 A 2d 291 (Maryland Court of Appeals, 1968). After receiving a waiver in any of these forms, the law enforcement officer may begin questioning the suspect.

It often happens that a suspect will indicate that he understands his rights and then simply begin to make a statement without any other verbal or non-verbal indication of willingness to waive his rights and speak. Most courts have held that once the suspect has been informed of his rights and indicates that he understands those rights, his choosing to speak and not requesting a lawyer is sufficient evidence that he knows of his rights and chooses not to exercise them. *People v. Johnson*, 450 P 2d 865 (California Supreme Court, 1969). *U.S. v. Osterburg*, 423 F 2d 704 (9th Circuit Court of Appeals, 1970). However, this rule is probably valid only if the statement of the suspect follows closely after he indicates his understanding of the warnings. *Billings v. People*, 466 P. 2d 474 (Colorado Supreme Court, 1970)

A suspect who says that he will talk to a lawyer at some time in the future but will answer questions presently without a lawyer has waived his right to counsel. *Thompson v. State*, 235 So. 2d 354 (District Court of Appeal of Florida, 1970). Also, a request to see someone other than a lawyer is not considered to be an assertion of rights under *Miranda*, although a denial of such a request may have some bearing on the voluntariness of the statements. *State v. Franklin*, 241 A. 2d 219 (Rhode Island Supreme Court, 1968). Similarly, a request for counsel made by a suspect to a friend or relative does not have the effect of a request made upon the police even if the police are aware that such a request was made. *People v. Smith* 246 N.E. 2d 689 (Appellate Court of Illinois, 1969).

Refusal to Sign Written Statements or Waivers

The fact that a suspect refuses to sign either a written waiver or a written statement has generally been held not to affect the validity of the suspect's waiver with respect to the admissibility of oral statements he has made. *Cummings v. U.S.*, 398 F 2d 377 (8th Circuit Court of Appeals, 1968). *Pettyjohn v. U.S.* 419 F 2d 651 (District of Columbia Circuit Court of Appeals, 1969). This assumes of course that a valid oral waiver has been obtained.

However, where a suspect indicates, after giving a valid written or oral waiver, that he does not want any notes taken, this may indicate that the suspect erroneously believes that his oral statements cannot be used against him in court. In this case, the law enforcement officer should tell him that oral statements can be used against him in court. Otherwise, a court might hold the waiver invalid. *Frazier v. U.S.*, 419 F 2d 1161 (District of Columbia Circuit Court of Appeals, 1969)

Multiple Interrogations

In the *Miranda* opinion, the Court said:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of incustody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." 384 U.S. at 473-74.

The quoted language indicates clearly that once a suspect indicates either his desire to remain silent or his desire for an attorney, all questions must stop at least until the suspect confers with an attorney. Despite this seeming clarity, under certain circumstances, some courts have allowed second attempts to question after a suspect has claimed his rights. *U.S. v. Brady*, 421 F. 2d 681 (2nd Circuit Court of Appeals, 1970). The rationales for these holdings have varied with the different fact situations of each case. Other courts have just as vehemently rejected this approach, adhering closely to the guidelines of *Miranda*. *People v. Fioritti*, 441 P. 2d 625 (Supreme Court of California, 1968).

The safest procedure for the law enforcement officer is to cease questioning entirely when the suspect either expresses a desire to remain silent or to have an attorney after he is given warnings. However, if the suspect himself initiates a second conversation with police, courts have generally approved further interrogation. *People v. Sunday*, 79 Cal Rptr. 752 (California Court of Appeals, 1969).

Often, a suspect may waive his rights and submit to interrogation and after an interval of time, police may wish to interrogate him again. The general rule is that warnings need not be repeated at the second interrogation. *People v. Hill*, 426 P 2d 908 (California Supreme Court, 1967).

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However, a few courts have required a repetition of the warnings under certain circumstances and since it is such a simple procedure, it is recommended that the law enforcement officer repeat the warnings before each questioning session just to be safe.

Competency of Suspect

A question that sometimes arises with respect to waiver is whether or not the suspect is competent or capable of understanding and waiving his rights. Persons that might not be considered competent to waive their rights are those in pain of injury or shock, the insane or mentally defective, those under the influence of alcohol, drugs, or medicine, or the very young or old. Courts have usually looked at the totality of the circumstances in each individual case to determine whether a suspect was capable of understanding his rights and voluntarily waiving them. *Mossbrook v. U.S.*, 409 F. 2d 503 (9th Circuit Court of Appeals, 1969). Therefore, no single factor would ordinarily be determinative of the issue.

Since no definite rules can be laid out to guide the law enforcement officer on this issue, he must proceed with caution. If a suspect is youthful or impaired in any of the ways mentioned above, the officer should take extra pains in explaining the meaning of the warnings to him. It is probably better to wait until a person under the influence of drugs or alcohol is back to normal before attempting to warn and question him. A juvenile is usually competent to waive his rights but it is advisable for the officer to try and obtain the waiver in the presence of and with the advice and consent of a parent or guardian.

In any case, unless the officer is positive that the suspect is incapable of understanding and waiving his rights, he should not refrain from trying to obtain a lawful confession from him. It is the duty of the courts, not the law enforcement officer to finally determine whether or not there was an intelligent and knowing waiver and a voluntary and trustworthy confession.

Misdemeanors and Other Proceedings

Miranda has been held to be not applicable to misdemeanors involving only fines or small jail penalties. This includes most minor traffic offenses. *State v. Zucconi*, 226 A. 2d 16 (Superior Court of New Jersey, 1967). *State v. Pyle*, 249 N.E. 2d 826 (Supreme Court of Ohio, 1969). However, where there is a possibility of a substantial term of imprisonment for a misdemeanor, *Miranda* has been held to be applicable. *Commonwealth v. Bonser*, 258 A. 2d 675 (Superior Court of Pennsylvania, 1969).

Other proceedings which *Miranda* has been held not to apply to are customs procedures, civil commitments, extradition proceedings, license revocation proceedings, interviews between probation officer and probationer, etc. It is fairly safe for the law enforcement officer to assume that, unless the suspect is subject to a possible substantial criminal penalty, *Miranda* warnings are not necessary.

SUMMARY

The problems created for the law enforcement officer by *Miranda* can be simplified if the officer knows what is required of him and approaches each situation systematically. The first question he should ask is whether the *Miranda* requirements are applicable to his particular case. To make this determination, the officer must ask whether the defendant was in custody, whether his statements were the product of interrogation, whether the person asking questions was a law enforcement officer, and whether the seriousness of the offense is significant.

Once these questions have been answered in the affirmative, the officer must concentrate on satisfying the requirements of *Miranda*. He must make sure that adequate warnings are administered, and that a clear manifestation of waiver is obtained and recorded. Other issues of concern are whether the suspect was competent to waive his rights and whether multiple interrogations are consistent with *Miranda*.

The two articles dealing with *Miranda* and the "Warning and Waiver" card that is enclosed have been designed to help the law enforcement officer answer these questions and implement the proper procedures as required by the *Miranda* decision.

A careful study of these articles along with a selective reading of cited cases should prepare the officer for any *Miranda* problem that arises in the course of his duties.

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; Interrogation L

Petitioner was convicted of second degree murder. In his habeas corpus petition he contended that his statements made to police while in custody were inadmissible under *Miranda v. Arizona* because of a failure to give *Miranda* warnings. Petitioner and his wife had both been arrested for murder. The wife had confessed and was revealing details of the crime in response to police questioning. Petitioner was present at this questioning and corrected his wife as to details of the crime on two occasions. At no time was the petitioner himself asked any questions.

The court held that the statements by petitioner were voluntary and spontaneous and not in response to any questioning or under any compelling influence. Therefore, despite the fact that petitioner was in custody, no *Miranda* warnings were required because there was no interrogation. *Haire v. Sarver*, 437 F.2d 1262 (8th Circuit Court of Appeals, February 1971).

Seizure of Evidence; Miranda; "Fruit of Poisonous Tree" J P L

Defendant was convicted of first degree murder and appealed. Police had taken defendant to the station for questioning regarding a murder and unlawfully detained him there. One of the officers spotted blood on defendant's shoes and the shoes and other clothing were taken as evidence and used at the trial.

Defendant contended that the clothing was inadmissible because it was taken from defendant without benefit of counsel and because he hadn't been given *Miranda* warnings. The court said that *Miranda* warnings are required to be given before custodial *interrogation*, not as a condition precedent to the seizure of evidence. Also, an attorney need not be ap-

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pointed for an accused person before evidence may be seized.

Defendant also contended that the discovery in the police station that defendant was wearing blood-stained clothing was the "fruit" of an unlawful detention requiring suppression of the clothing. The court held that, granting the illegality of the detention, the clothing had been discovered, not by exploitation of the illegal detention but by means sufficiently distinguishable as to dissipate the effect of the original illegality. *People v. Walker,* 183 N.W. 2d 871 (Court of Appeals of Michigan, October 1970)

Identification, Right to Counsel J P L

Defendant was convicted of armed robbery and appealed. Defendant's attorney was present at the lineup at which defendant was identified. However, police would not let the attorney accompany the victim when, immediately after the lineup, he was taken outside the lineup room to make his identification.

The court held that defendant's right to have counsel present during lineup included the right to have him present when identification was made by a witness immediately thereafter. The reason for this is to insure that the attorney will be aware of any suggestion by law enforcement officers, intentional or unintentional, at the time the witness makes his identification. *People v. Williams,* 478 P. 2d 942 (California Supreme Court, January, 1971).

Search and Seizure, Electronic Surveillance J P

Defendant was convicted of jury tampering in violation of a federal obstruction of justice statute. He appealed claiming that his Fourth Amendment right to be free of illegal searches and seizures was violated by government surveillance of his conversations by means of an electronic receiver and tape recorder which was placed in the automobile of a government informant.

The court held that defendant's rights were not violated because the taping of the conversations was done with the consent of the informant and there was no trespass onto defendant's premises. *U.S. v. Hoffa* 437 F 2d 11 (6th Circuit Court of Appeals, January, 1971)

Search and Seizure L

Defendant had been charged with illegal possession of a sawed-off shotgun. His motion to suppress the shotgun as a fruit of an illegal search and seizure was granted, and the state appealed.

Officers had been told by witnesses that defendant had placed a golf bag containing a shotgun under the hood of his car. They were further informed that defendant, an outpatient of the hospital, had become drunk on the premises the previous day and had been told to leave. The officers asked defendant if he had a gun and he answered "No". They then opened the hood of defendant's car and found the shotgun there.

The court relying on the U.S. Supreme Court cases of *Terry v. Ohio,* 392 U.S. 1 (1968) and *Chambers v. Maroney,* 399 U.S. 42 (1970) justified the search in the following language:

> "Even in the absence of reasonable and probable cause to arrest a suspect, an officer investigating a possible crime based upon a suspect's suspicious behavior may take necessary precautionary measures to ascertain that the suspect does not have access to weapons in order to protect himself, others in the vicinity, or the prospective victims of violence, pending an on the spot investigation, even to the extent of invading the suspect's security of his person. The officer need not be absolutely certain that the suspect has access to such weapon. It is sufficient if the circumstances would warrant a reasonably prudent man in the belief that his personal safety or that of others is in danger. Under exigent circumstances, compliance with warrant requirements may be excused. . . . There is a recognized difference between the search of a store, dwelling, or other structure and that of an automobile because the high mobility of the motor vehicle makes it impracticable to obtain a warrant in most instances."

People v. Green, 93 Cal Rptr 433 (California Court of Appeal, March, 1971)

MAINE COURT DECISIONS

Discovery J P

Defendants were convicted of the crime of conspiracy. They appealed on the basis that the trial court had erroneously refused to direct the state to provide the defense with the out of state criminal record of an unindicted co-conspirator, for purposes of impeaching his testimony at trial.

The court held that criminal records are public records and that defense counsel could get that information by other means if they wished. Furthermore, *Rule 16, Maine Rules of Criminal Procedure,* allows discovery of records which are "within the possession, custody, or control of the state". Here there was no showing that the requested criminal records were within the possession of the state.

State v. Toppi, 275 A. 2d 805 (Supreme Judicial Court of Maine, April, 1971).

Breaking and Entering J P

Defendant was convicted of breaking and entering with intent to commit larceny. He appealed, claiming that the evidence was not sufficient to sustain the conclusion that there was a "break" and "entry" into the building.

The evidence showed that all the windows and doors had been closed late in the afternoon of the day of the questioned burglary. Later that evening, defendants were found in the building and all the doors and windows were closed.

The court held that there is a "breaking" when a person gains entrance to a building by moving to a material degree something that bars the way, including a closed door or a closed or partially open window.

The court held that the evidence in this case was sufficient for a jury to conclude that there had been a breaking. *State v. Mower,* 275 A. 2d 584 (Supreme Judicial Court of Maine, March, 1971)

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.

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.