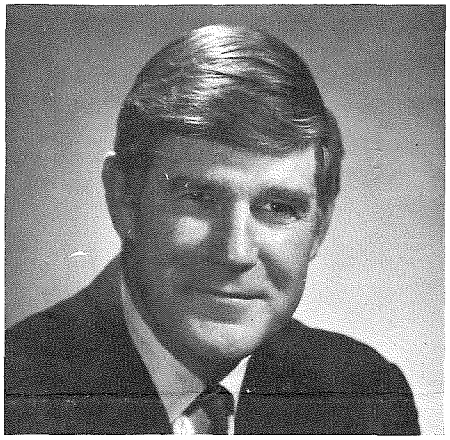
AUGUST 1971

ALERT

CRIMINAL DIVISION

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



MESSAGE FROM THE ATTORNEY GENERAL JAMES S. ERWIN

The Law Enforcement Education Section of the Criminal Division has, over the past several months, been purchasing books and other publications on various topics of interest to law enforcement personnel. Up to now, these publications have been used primarily for research in preparing the ALERT Bulletins.

However, now that we have compiled a fairly substantial Law Enforcement Library, we would like to make the materials available to all law enforcement personnel in Maine.

We, therefore, welcome all law enforcement personnel to stop in at any time and browze through the library which is located in the office of the Law Enforcement Education Section.

We expect to continue expanding the Law Enforcement Library and at some time in the future we plan to publish a list of titles, authors, and brief descriptions in the ALERT Bulletin. We sincerely hope that you will welcome this opportunity to broaden your knowledge in the law enforcement field and that you will make use of the materials we have available.

James S. Erwin

JAMES S. ERWIN
Attorney General

ARREST II

EFFECTING THE ARREST

As discussed in the July issue of ALERT under *Elements of Arrest,* an arrest basically consists of the actual restraining of a person or his submission to the custody of a law enforcement officer. The arrest may be made by actually laying hands on the accused. If there is such physical contact with the accused, only the slightest amount of touching or force is necessary. There does not have to be actual capture or retention of the person in order for there to be a legal arrest.

If there is no touching or physical contact with the accused, any action of the officer is sufficient which shows an intention of the officer to take the accused into custody, *provided* the accused submits to the direction of the officer. However, if the accused is not brought within the power or control of the officer, there is no arrest.

Notice Required of the Officer

When a law enforcement officer is making an arrest, he should, whenever possible, give notice of the following things to the person being arrested:

1. He should make known his authority by giving his identity if it is not obvious or already known to the defendant. An officer's uniform or a display of his badge is a sufficient indication of authority for this purpose. *Wilson v. Superior Court,* 294 P. 2d 36 (Supreme Court of California, 1956).

2. He should announce his intention to take the suspect into custody. This may be done by simply telling the person that he is under arrest. *State v. Parker,* 378 S.W. 2d 274 (Missouri Court of Appeals, 1964).

3. He should announce the correct grounds or reason for making the arrest. This does not need to be in technical language and need not precede the arrest. *U. S. v. Robinson,* 325 F.2d 391 (2nd Circuit Court of Appeals, 1963).

Failure to give the notice as to the grounds of arrest or stating the wrong grounds will not make an arrest illegal. It is therefore not an absolute requirement for a valid arrest. *Gearing v. State,* 185 So. 2d 652 (Supreme Court of Mississippi, 1966). However, if the officer does not announce his authority and his identity is unknown, the defendant has a right to resist the arrest as an unlawful assault on his person. This holds true whether or not the defendant is guilty of the offense. *Daniel v. State,* 132 So. 2d 312 (District Court of Appeal of Florida, 1961).

Furthermore, there are certain situations where it is not practical for the officer to give any notice when he is making an arrest. These situations are:

1. When it would endanger the officer to do so.
2. When it would adversely affect his making the arrest.
3. When the person to be arrested is in the act of committing the crime. *Squadrito v. Griebsch,* 136 N.E. 2d 504 (New York Court of Appeals, 1956).
4. When the person to be arrested is in the act of fleeing the scene of the crime.

Time of Arrest

An arrest, whether under authority of a warrant or lawfully made without a warrant, may be made on any day of the week and at any time of the day or night. However, common sense dictates that, if possible, arrests should not be made at unreasonable hours of the night or early morning or on Sunday.

Effecting the Arrest Under a Warrant

There are certain additional considerations in executing an arrest under authority of a warrant. First of all, when an officer is directed to serve a warrant of arrest, any questions as to his reasonable belief in the guilt of the defendant, his personal knowledge of facts pertaining to the offense, or his complete lack of knowledge are immaterial. There is no requirement that the offense be committed in his presence or that he have reasonable grounds of suspicion that the

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defendant committed the offense. His duty and authority require him to carry out the command as stated in the warrant and the only questions which concern him are (1) the identification of the person arrested as the one for whom the warrant was issued, and (2) whether the warrant is valid or fair on its face.

Where the accused is identified in the warrant by name, the law enforcement officer is required to exercise reasonable diligence to make sure that he is arresting the person designated in the warrant and no other. If the person being arrested denies his identity and there is a reasonably simple and direct means of checking, the officer may incur liability if he goes ahead with the arrest and disregards the evidence. *Wallner v. Fidelity & Deposit Co. of Maryland,* 33 N.W. 2d 215 (Supreme Court of Wisconsin, 1948). The same holds true where the warrant merely describes the person to be arrested without naming him. The officer must be very careful in determining whether the person arrested is the person identified in the warrant.

The requirement that the warrant be valid or fair on its face is important because a warrant which is not valid on its face gives the officer no protection and he is acting without authority insofar as such a warrant is concerned. Therefore, the officer is bound to examine the warrant and if it is obviously bad, he acts at his peril in carrying it out. While he is not concerned with the actual facts of the case, he is bound to know the law.

In order to determine whether a warrant is valid on its face, the officer must look to several things. First of all, if the court issuing the warrant clearly has no jurisdiction, the warrant is void on its face. Likewise, the warrant is void if it does not disclose any legal offense charged against the person to be arrested, or when it fails to name or describe any identifiable person. *Gattus v. State,* 105 A.2d 661 (Court of Appeals of Maryland, 1954). A warrant that is not signed is also void on its face.

Once it has been determined that the warrant is valid or fair on its face, the officer must carry it out and serve it on the named individual. He no longer has any discretion of his own and is merely carrying out the command of the court.

> "When the warrant purports to be for a matter within the jurisdiction of the justice (magistrate), the ministerial officer is obliged to execute it, and of course must be justified by it. He cannot inquire upon what evidence the judicial officer proceeded, or whether he committed an error or irregularity in his decision . . . , the constable has nothing to look to but the warrant as his guide . . . *"Alexander v. Lindsey,* 55 S.E. 2d 470, 473 (Supreme Court of North Carolina, 1949).

The officer executing the warrant must also check the warrant to see that he is either specifically named or comes within the class of officers designated to serve the warrant. If the warrant is directed to all law enforcement officers in the state, it is permissible for any recognized officer to execute it. If, however, the warrant is directed only to a sheriff of a certain county, for example, only that sheriff can execute it.

The warrant may be executed at any place within the State of Maine. *Glassman, Maine Practice, Rules of Criminal Procedure, Rule 4 (c) (2).* However, a Maine law enforcement officer may not go into another state to arrest under a warrant except in cases of fresh pursuit which will be discussed later.

When actually making the arrest under the warrant, the officer should give the same notice that he would ordinarily give in making any arrest. It is also always best for the officer to have the warrant in his possession at the time of arrest. However, this is no longer essential. The officer may make a legal arrest pursuant to a warrant even though the warrant is not in his possession. However, if he does so, he must inform the defendant of the offense charged and of the fact that the warrant has been issued. If the defendant requests, the officer must show him the warrant as soon as possible. *Glassman, Rule 4 (c) (3).*

Service of Summons

A magistrate may, under certain circumstances, issue a summons instead of an arrest warrant. (See July 1971 ALERT). A summons is served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion who resides there. It may also be served by mailing it to the defendant's last known address. *Glassman, Rule 4 (c) (3).* As with a warrant, the summons may be served at any place within the State of Maine. *Glassman, Rule 4 (c) (2).*

Aid in Making the Arrest

A law enforcement officer may require a private citizen to aid him in making an arrest whenever necessary. Maine law requires that any person so-called upon by a law enforcement officer to assist him in the execution of his official duties, including the arrest of another person, is legally obligated to obey the officer. If the person refuses or neglects to aid the officer, he may be punished for his refusal. *17 M.R.S.A. 2951.* When a private citizen acts in aid of a known law enforcement officer, he has the same rights and privileges that the officer has. While so acting, he has the status of a temporary law enforcement officer. As such, he has the right to use force and to enter property. If the person called upon acts in good faith, he does not have to inquire into the authority of the officer making the arrest. He is protected from liability even if the officer was acting illegally.

> "It would be manifestly unfair to impose civil liability upon a private person for doing that which the law declares it a misdemeanor for him to refuse to do." *Peterson v. Robinson,* 277 P. 2d 19, 24 (Supreme Court of California, 1954).

Using Discretion in Deciding Not to Arrest

It is fitting to mention here that there are many situations in which a law enforcement officer clearly has the power to arrest but good police practice indicates that he should not exercise that power. Although it is beyond the scope of this article to give detailed guidelines in this area, a brief discussion is necessary to set out general principles.

Most important, a law enforcement officer should be guided by the principle that his primary job is to protect the public at large. Therefore, where an arrest might either cause greater risk of harm to the public or would only cause embarrassment to an individual who poses no real threat to the community, proper police practice may call for a decision not to exercise the full extent of the officer's arrest powers.

As an example, in situations where a crowd is present, it is often unwise to arrest a person or persons who are creating a minor disturbance. There is always the danger of aggravating the disturbance and possibly precipitating a riot or civil disorder. If there is a less drastic way to handle the matter, it should be explored even though there may be actual legal grounds for an arrest. The same thing applies to minor domestic disputes or the handling of intoxicated persons who are creating no danger and may need no more than an assist in getting home. It should always be remembered that an arrest is a significant restraint on a person's freedom and should always be justified by the circumstances.

Oftentimes local law enforcement agencies will have definite policies covering the behavior of officers in this area. At other times the individual officer will

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be called upon to exercise his own common sense and good judgment. In any case, the officer should realize that not all situations in which he *may* make an arrest are situations in which he necessarily *should* make an arrest.

PLACE OF ARREST

As stated earlier, when acting pursuant to a warrant, a law enforcement officer may make an arrest at any place within the State of Maine where the defendant may be found. Similarly, the officer may serve a summons at any place within the State of Maine. *Glassman, Rule 4 (c) (2).*

However, an officer generally has no official authority to arrest *without* a warrant outside of the territorial or geographical limits of the county or district for which he has been elected or appointed. This area is usually referred to as his *bailiwick.* Thus a sheriff has no official powers beyond the county in which he has been elected. Likewise, a municipal police officer does not have authority beyond the limits of the city in which he has been appointed. On the other hand, the authority of state law enforcement officers is state wide and the power to arrest runs throughout the state.

A Maine law enforcement officer has no authority to arrest in another state except as a private citizen or in the case of fresh pursuit. Both of these instances will be discussed in further detail.

Citizen's Arrest Authority

The previously discussed restrictions on the law enforcement officer's authority do not mean that he has no right whatsoever to make an arrest without a warrant outside his own bailiwick. As a private citizen, he has the same authority as any other private citizen to make an arrest without a warrant. A private citizen, under the common law, has the authority to arrest any person whom he has probable cause to believe has committed a felony. However, he can justify the arrest only by further showing that the felony was *actually committed.* This differs significantly from the authority of a law enforcement officer who is justified even if no felony was committed as long as he had probably cause.

A private citizen has the further authority to arrest for felonies and "breach of the peace" misdemeanors *committed in his presence.* In the case of a felony, this is not only a privilege but a duty. As to misdemeanors, there is no clear definition of "breach of the peace" but, practically speaking, the misdemeanor must cause or threaten direct harm to the public. While this does not mean the harm must always be physical, this will usually be the case.

Therefore, the law enforcement officer may, as a private citizen, arrest without a warrant under the above circumstances anywhere in the State of Maine without regard to whether or not he is within his bailiwick. Furthermore, depending on the law of citizen's arrest in other states, a Maine law enforcement officer may have further arrest authority outside the borders of Maine as a private citizen. It would be wise, however, to be familiar with the law of another state before making an arrest there because many of the states have enacted statutes which may be different from the law in Maine.

Fresh Pursuit

The area in which a law enforcement officer may make a lawful arrest without a warrant may also be extended beyond the borders of his bailiwick in cases of fresh pursuit. Fresh pursuit refers to the situation where an officer is attempting to make an arrest for a *felony* within his bailiwick and the defendant, in order to escape, flees from the area into another jurisdiction. Under certain conditions, the officer may pursue the defendant and arrest him wherever he finds him within the state.

In order for the arrest to be legal, the pursuit must take place under the following conditions:

1. The officer must have had valid authority to arrest for a *felony* in the first place.

2. The pursuit must be of a fleeing criminal attempting to avoid immediate capture.

3. The pursuit must have been started promptly and maintained continuously.

The main thing to remember is that the pursuit should be fresh. It must flow out of the act of attempting to make an arrest and be a part of the continuous process of apprehension. This does not mean that the pursuit has to be instantaneous but it does have to be made without unreasonable delay or interruption. There should not be any side trips or diversions-even for outside police business. However, the pursuit is not legally broken by unavoidable interruptions connected with the act of apprehension such as eating, sleeping, obtaining further information, etc.

The Maine Legislature has recently passed legislation extending the authority of *municipal* police officers to arrest on fresh pursuit for *misdemeanors.* This provision will take effect on September 23, 1971 and is quoted in full below:

> §-*2402–A. Arrest in other municipalities*
>
> Every municipal police officer in fresh pursuit of a person who travels beyond the limits of the municipality in which the officer is appointed shall have the same power to arrest such person as the officer has within the said municipality. This section shall apply to both felonies and misdemeanors.
>
> With respect to felonies, the term "fresh pursuit" as used in this section shall be as defined in Title 15, section 152; with respect to misdemeanors, "fresh pursuit" shall mean instant pursuit of a person with intent to apprehend.

NOTE: Title 15, Section 152 allows the arrest, on fresh pursuit, of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed.

Outside the Boundaries of Maine

Fresh pursuit may sometimes carry the law enforcement officer outside the boundaries of the State of Maine. Ordinarily, a Maine officer has no authority beyond that of a private citizen to make arrests in another state. However, Maine and several other neighboring states have adopted the "Uniform Act on Fresh Pursuit" which gives certain arrest powers to law enforcement officers of other states coming into Maine in fresh pursuit and gives the same powers to Maine officers crossing into another state. Among the other states which have adopted this act are New Hampshire, Vermont and Massachusetts. The pertinent portion of this act is quoted below:

> "Any member of a duly organized state, county or municipal police unit of another state of the United States who enters this State in fresh pursuit and continues within this State in such fresh pursuit of a person in order to arrest him on the ground he is believed to have committed a felony in such other state, shall have the same authority to arrest and hold such person in custody as has any member of any

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duly organized state, county, or municipal police unit of this state to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this State. This section shall not be construed so as to make unlawful any arrest in this State which would otherwise be lawful." *15 M.R.S.A. 154.*

A Maine law enforcement officer who makes an arrest under this act in a neighboring state must take the person arrested before an appropriate court without unreasonable delay. The best procedure is to immediately contact law enforcement personnel in that state for advice and aid in locating the right court. Also, since law enforcement officers from neighboring states have the same right if they, while in fresh pursuit, apprehend a fleeing felon in Maine, Maine officers should provide assistance to the officers in bringing the person arrested before an appropriate magistrate in Maine.

USE OF FORCE

A law enforcement officer making an arrest has the right only to use that amount of force reasonably necessary to effect the arrest and to detain the arrestee. The officer may use reasonable force also to:

1. Overcome the offender's resistance to lawful arrest;
2. Prevent his escape;
3. Retake him if he escapes; and
4. Protect himself from bodily harm.

Of course, reasonable force depends upon all the facts and circumstances surrounding the arrest as they appear to the arresting officer, as a prudent and cautious man, before and at the time of making the arrest. Some of the facts and circumstances to be considered are the nature of the offense, the defendant's reputation, the available help, the presence of weapons, the defendant's words or actions, etc.

Under no circumstances, however, is an officer permitted to use unreasonable force or subject the offender to wanton violence in effecting an arrest. All law enforcement officers should remember that generally, the sole purpose of an arrest is to bring the alleged offender before a court of law and not for the purpose of giving any officer the opportunity of wreaking the public's or his personal vengeance upon the prisoner.

In general, the amount of force allowed to be used in making an arrest (outside of self defense) depends on whether the offense is a felony or a misdemeanor. The more serious the offense, usually the greater degree of latitude the officer has in using forcible means.

Felonies

Felonies are considered to be serious offenses and therefore, the use of strong measures may be justified to overcome resistance and effect an arrest. *Stinnett v. Virginia,* 55 F. 2d 644 (4th Circuit Court of Appeals, 1932). The officer need not retreat or desist from his purpose in order to avoid the necessity of resorting to extreme measures, but he must stand his ground and use all necessary force to bring the offender into his custody. However, the use of deadly force is permitted only as a last resort where otherwise the officer would have to give up his attempts.

In this context, it is important to remember that the officer always has the right to summon aid. As mentioned above, every private citizen is required by law to assist an officer in making an arrest if so requested. Therefore, the officer will not be justified in using firearms or other deadly force if the arrest can be accomplished or an escape prevented by summoning and using such assistance.

Furthermore, the law enforcement officer should have *actual knowledge* both that a felony has been or is being committed and that the person to be arrested committed it before using deadly force in making an arrest or preventing an escape. Although courts have differed in this area, it is clear that an officer uses deadly force at his own peril if the wrong person is injured or killed or no actual felony has been committed. Even though the officer is justified in making an arrest on probable cause, if he is in fact proven wrong, he may not be able to justify a killing or maiming to effect that arrest.

Misdemeanors

In arresting for a misdemeanor, a law enforcement officer is entitled to use whatever physical force is reasonably necessary under the circumstances to make an arrest or prevent escape. However, except in cases of self-defense, the officer is *never* justified in using firearms or other deadly force to effect an arrest in a misdemeanor case. The rule is that it is better that a misdemeanant escape rather than a human life be taken. The reason for this is that usually, the security of life and property is not significantly endangered by a misdemeanant being at large, while the safety and security of society usually require the speedy arrest and containment of a felon. *Holloway v. Moser,* 136 S.E. 375 (Supreme Court of North Carolina, 1927). Shooting or using other deadly force toward a suspect in a misdemeanor case is excessive force constituting an assault. If the officer kills the suspect he may be guilty of murder or manslaughter.

Self Defense

Regardless of whether the offense is a felony or misdemeanor, the law enforcement officer in making a *lawful* arrest, may use whatever force is reasonably necessary under the circumstances, including deadly force, if the officer reasonably believes that the suspect is about to assault him and that he will thereby be placed in peril of death or serious injury. Many law enforcement agencies have departmental policies with regard to self defense and these should be consulted and followed whenever possible. The duty of the officer is to be the aggressor and press forward to place the person under restraint. This cannot be accomplished by purely defensive action on the officer's part. Therefore, if the officer has lawful authority to make an arrest, he is not required to back down in the face of resistance to the arrest. *State v. Williams,* 148 A. 2d 22 (New Jersey Supreme Court, 1959). When the officer is faced with the choice of abandoning the arrest attempt or using deadly weapons in *self-defense,* he has the right to use them if it becomes necessary. Again, it is the officer's obligation to do his duty and continue his efforts, matching force with force even to the extent of shooting if necessary.

Resistance to Arrest

In Maine, there is statutory law which makes it illegal for a person to assault, intimidate, or in any manner wilfully obstruct, intimidate or hinder a law enforcement officer in the lawful discharge of his official duties. 17 M.R.S.A. 2952. Assuming that this statute covers resistance to arrest, in order for such resistance to be illegal, the original arrest must have been lawful, i.e. the officer must have had the right to make an arrest at that time and place. Also, the officer must have given notice as to his identity as an officer or the person arrested must have known he was an officer. Otherwise, the person has the *right* to resist and there can be no offense of resisting arrest. *City of Seattle v. Gordon,* 342 P. 2d 604 (Supreme Court of Washington, 1959).

Furthermore, if the original arrest was invalid for any reason – invalid warrant, misdemeanor not committed in the officer's presence, etc. – then the person being arrested has a legal right to resist the arrest and use whatever force necessary to free himself. *State v.*

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McGowan, 90 S.E. 2d 703 (Supreme Court of North Carolina, 1956). This holds true even though the person may actually be guilty of the offense.

It should be noted that there are many types of hindrance or obstruction of a law enforcement officer that may not be violations of the law. The term resistance implies opposition by direct forcible means against the officer's person in order to prevent him from taking the accused into custody. Indirect interference in the form of protests or threats unaccompanied by force or danger will not constitute resistance. Also, resistance does not include flight from an officer or mere concealment to avoid being arrested. In the language of the Virginia Supreme Court of Appeals:

> "The fact that the accused sought to escape the officer by merely running away was not such an obstruction as the law contemplates. While it is the duty of every citizen to submit to a lawful arrest, yet flight is not such an offense as will make a person amenable to the charge of resisting or obstructing an officer who is attempting to make an arrest, as there is a broad distinction between avoidance and resistance or obstruction." Jones v. Commonwealth, 126 S.E. 74, 76-77 (Virginia Supreme Court, 1925).

Forcible Entry of Dwellings

The right of a law enforcement officer to enter a dwelling to effect an arrest depends upon whether he has legal authority to arrest. If he has the legal authority to arrest, whether with or without a warrant, he also has the authority to enter any dwelling house, forcibly if necessary, and search for the suspect when he reasonably believes that the person whom he seeks to arrest is in that dwelling house. This authority to enter a dwelling to arrest applies even to misdemeanor cases if the officer has legal authority to make an arrest for a misdemeanor.

Demand for Admittance

Before an officer may rightfully force his way into a dwelling for the purpose of arresting someone inside, as a general rule, he must first announce his authority and purpose to arrest someone inside and then demand admittance. Only if this demand is refused may the officer then resort to forcible entry. In the words of the United States Supreme Court:

> "The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage, and should not be given grudging application . . . Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. The petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose. Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed." *Miller v. U.S.* 357 U.S. 301 (1958).

However, under certain circumstances, the failure to make a preliminary announcement and demand for admittance will be excused. These situations are as follows:

1. When the officer's purpose is already known to the offender or other person upon whom demand for entry is made. As the U.S. Supreme Court stated in the *Miller* case:

> "It may be that, without an express announcement of purpose, the facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture." (375 U.S. 309-10);

2. When the officer's personal safety might be imperiled by compliance with such requirements. *Fairman v. Warden,* 431 P 2d 660 (Supreme Court of Nevada, 1967);

3. When the incidental delay might defeat the arrest by permitting the offender to escape. *State v. Fair.* 211 A. 2d 359 (Supreme Court of New Jersey, 1965);

4. When the preliminary warnings might permit destruction of important evidence by those inside the house. This situation often comes up in drug cases where the evidence is often small and easily destroyed or disposed of. This issue has been dealt with in two fairly recent cases. In *Ker v. California,* 374 U.S. 23 (1963) the U. S. Supreme Court held that the unannounced entry into the defendant's apartment was proper when otherwise, evidence of narcotics activity would have been destroyed. However, the holding in the *Ker* case was limited to the particular facts of that case. There the officers not only reasonably believed that the defendant was in possession of narcotics but defendant's furtive conduct in eluding them shortly before the arrest gave them grounds to believe that he might have been expecting the police.

In a more recent case, *Meyer v. U.S.,* 386 F. 2d 715 (9th Circuit Court of Appeals, 1967), the officers had nothing to justify their unannounced entry into a dwelling except the claim of a general propensity of narcotics violators to destroy evidence. The court held that the entry was unlawful.

> "Under the Fourth Amendment, a specific showing must always be made to justify any kind of police action tending to disturb the security of the people in their homes. Unannounced forcible entry is in itself a serious disturbance of that security and cannot be justified on a blanket basis. Otherwise, the constitutional test of reasonableness would turn only on practical expediency, and the amendment's primary safe-guard — the requirement of particularity, would be lost. Just as the police must have sufficient particular reason to enter at all, so must they have some particular reason to enter in the manner chosen." (386 F. 2d 715, 718)

NOTE: The topic of arrest will be concluded in the September issue of ALERT.

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

Defendants were convicted of illegal possession of marijuana and sentenced. They petitioned for a writ of habeas corpus. Police had obtained information that marijuana was in the room of defendants, who were students at a university. The university cooperated fully with the police in searching the room pursuant to a regulation which allowed the university to enter rooms of students for inspection purposes.

The court held that the search was a violation of defendants' Fourth Amendment rights. The university regulation was reasonable as long as it was limited in its application to furtherance of the univer-

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sity's function as an educational institution. However, once the regulation was applied so as to authorize a search of students' rooms for criminal evidence, the regulation constituted an unconstitutional attempt to require students to waive their protection from unreasonable searches and seizures as a condition to their occupancy of rooms. *Piazzola v. Watkins,* 442 F. 2d 284 (5th Circuit Court of Appeals, April 1971).

Arrest - Wrong Person L

Defendant was convicted of robbery and appealed. Police had been given information by two men arrested in defendant's car that defendant was implicated in a theft. Police checked defendant's association with the men and obtained his address and description. They then went to defendant's apartment, arrested one Miller, who looked like defendant, and searched the apartment and found incriminating evidence. They had neither search nor arrest warrants.

The court held that the police had probable cause to arrest defendant. Also, they had a reasonably good faith belief that the man arrested was defendant.

> "(S)ufficient probability, not certainty is the touchstone of reasonableness under the Fourth Amendment and on the record before us the Officers' mistake was understandable and the arrest a reasonable responsé to the situation facing them at the time."

The police were therefore justified in doing what the law would have allowed them to do if in fact the man arrested was defendant. The arrest was reasonable under the Fourth Amendment.

The search was also reasonable because incident to the arrest. This case happened before the U. S. Supreme Court ruling of *Chimel v. California,* 395 U.S. 752 (1969) which narrowed the scope of permissible searches incident to arrest. *Hill v. California,* 91 U.S.S.C. Rptr. 1106 (U.S. Supreme Court, April, 1971).

Search Warrant, Execution L

Police officers were on defendant's premises pursuant to a valid search warrant for specifically described articles. The police found none of the described articles but did find other articles, which they seized. The latter articles were later found to be stolen. In a prosecution for receiving stolen property, defendant attempted to suppress the seized articles as evidence against him on the grounds that they were seized in violation of his constitutional rights.

The court held that, despite the fact that the officers were lawfully on the premises pursuant to a warrant, they had no right to seize articles not described in the warrant. The articles were not seized incident to arrest, nor were they instrumentalities of a crime, or contraband. The officers neither knew nor had probable cause to believe the articles had been stolen.

They had no right to seize and remove the articles on the hope or possibility that upon further investigation they might discover that the articles had been stolen. The articles were thus inadmissible as evidence on the receiving stolen property charge. *Commonwealth v. Wojcik,* 266 N.E. 2d 645 (Supreme Judicial Court of Mass., February 1971).

MAINE COURT DECISIONS

Habeas Corpus; Fair Trial J

Petitioner was convicted of rape and petitioned for post-conviction habeas corpus relief. Petitioner claimed that he was deprived of a fair trial because the trial attorney failed to allow him to testify in his own behalf and to otherwise advise him of his rights in this regard.

The court held that counsel's advice that petitioner not testify was a judgment decision founded on recognized trial tactics and lay within the area in which much discretion must be permitted counsel. *Hardy v. State,* 278 A. 2d 129 (Supreme Judicial Court of Maine, June 1971).

Indictment JP

Defendant was convicted or murder and appealed. The indictment alleged that defendant at a stated time and place did unlawfully and with malice aforethought kill the specifically named victim. Defendant claimed that the indictment was defective because the word "wilfully" was absent and it was not alleged that the victim was a human being.

The court held the indictment to be sufficient. The word "wilfully" may be dispensed with since the expression "malice aforethought" is of like meaning, though more intense, and makes unnecessary the allegation of wilfulness. Also, in general, it is unnecessary to allege that the person killed was a human being. *State v. Hachey,* 278 A. 2d 397 (Supreme Judicial Court of Maine, June, 1971)

Loitering JP

The Supreme Judicial Court of Maine in a proceeding on report from the Superior Court of Cumberland County held a loitering ordinance of the City of Portland null and void. The ordinance read:

> "No person shall loiter in, on, or adjacent to any of the streets, ways, or public places, in the City of Portland . . . . ."

The Court said that without more, the ordinance provided an incomprehensible criterion of criminal conduct and therefore was constitutionally inadequate to delimit a class of human behavior which shall be the subject of punishment. *State v. Aucoin,* 278 A. 2d 395 (Supreme Judicial Court of Maine, June 1971).

Habeas Corpus, Right to Counsel J

Petitioner was convicted of intoxication in a public place and breaking arrest, both misdemeanors. In his petition for a writ of post-conviction habeas corpus, he attacked the validity of the convictions on the ground that the presiding judge did not inform him that if he was indigent, counsel would, at his request, be appointed to assist him.

The court held that indigent persons who are without attorneys and who are facing criminal charges which *might* result in an imposition of a penalty imprisonment for a period of more than six months or a fine of more than $500 or both must be informed by the court of their right to appointed counsel and have such counsel appointed unless they waive such right. Furthermore, this also applies to those persons who are subject to indeterminate commitment in the Men's or Women's Correctional Center upon conviction for a misdemeanor under 34 M.R.S.A. Section 802. *Newell v. State* 277 A. 2d 731 (Supreme Judicial Court of Maine, June, 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**

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