

# MAINE STATE LEGISLATURE

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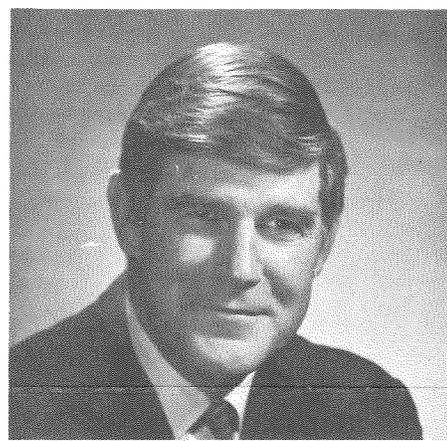
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SEPTEMBER 1971

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

## CRIMINAL DIVISION

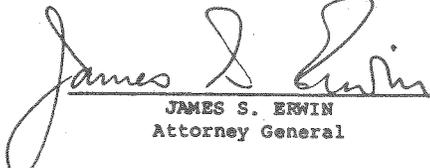


### MESSAGE FROM THE ATTORNEY GENERAL JAMES S. ERWIN

I would like to call your attention to the coming October issue of ALERT that will deal primarily with the important criminal law changes passed by the regular session of the 105th Legislature.

I feel it is important that every law enforcement officer become familiar with the laws and comments that will be set out in the October issue since these changes vitally effect the many day to day duties of all law enforcement officers. Two of the most important bills as far as the law enforcement officer is concerned are the changes in the drug and marijuana laws and the change in the implied consent law.

It is extremely pertinent to bring all these laws to your attention at this time since some were passed with an emergency preamble and became effective in law immediately and the others, without emergency preambles, would become effective on September 23, 1971. If any reader has a particular interest in any specific bill and would like a copy of the official law, please feel free to write or call this office at 289-2146.

  
JAMES S. ERWIN  
Attorney General

## ARREST III

### DISPOSITION OF PRISONER

When a law enforcement officer has arrested a person, it is his duty to take the prisoner before a magistrate, or deliver him according to the mandate of the warrant without unnecessary delay. In Maine, this requirement is covered by the Maine Practice, Rules of Criminal Procedure, Rule 5(a), which is quoted in full below:

(a) *Appearance Before the Magistrate.*

An officer making an arrest under a warrant issued upon complaint shall take the arrested person without unnecessary delay before a magistrate as commanded in the warrant; if the arrest is made at a place 100 miles or more from the place where the warrant was issued, the person arrested, if bailable, shall, if he so demands, be taken before the nearest available magistrate within the division in which he was arrested, or before a bail commissioner, who may admit him to bail for appearance before the proper magistrate. Any person making an arrest without a warrant having been issued shall take the arrested person without unnecessary delay before the nearest available magistrate within the division within which the arrest was made. When a person arrested without a warrant is brought before a magistrate, the complaint shall be filed with that magistrate forthwith. *Glassman, Maine Practice, Rules of Criminal Procedure, Rule 5 (a).*

This Rule should be read carefully and understood by every law enforcement officer. Although it is basically self-explanatory, there are a few explanatory remarks which need to be made.

First of all, Rule 5 (a) does not affect the provisions of another important

statute, 14M.R.S.A. Section 5544 which permits any person under arrest for a bailable offense to be taken before a bail commissioner before committment of jail. The exact language of that provision is as follows:

*Admission to bail before commitment;  
on Lord's Day*

Any person under arrest for a bailable criminal offense may, before commitment to jail if he so requests, be taken by the officer having him in charge before a bail commissioner, who may inquire into the case and admit him to bail. Any person arrested on the Lord's Day, or on the afternoon or evening preceding, for a bailable offense, may be admitted to bail on that day by such commissioner. 14 M.R.S.A. §5544.

The Maine State Legislature has recently passed an amendment to this statute which will take effect on September 23, 1971. It relates to bail or personal recognizance for misdemeanors and is quoted in full below.

"Any arresting officer may either take any person under arrest for a misdemeanor, excepting persons arrested for violation of Title 17, Section 2001 (Public Intoxication and Disturbance), before a bail commissioner, who shall inquire into the charge and pertinent circumstances and admit him to bail if proper, or without fee may take the personal recognizance of any person for his appearance on a misdemeanor charge.

Any person who has been arrested and bailed shall be issued a written summons to appear in court and

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such person shall give a written promise to the arresting officer or bail commissioner to so appear. It shall be unlawful for any person to violate his written promise to appear in court, either by himself or his attorney. Any person who violates this section shall be punished by a fine of not more than \$500 or by imprisonment for not more than 6 months, or by both."

This statute would be operative in situations where the arrested person could not be taken before a magistrate immediately and is to be committed to jail. The defendant could avoid confinement in jail by seeking immediate release on bail through the office of a bail commissioner or through personal recognition.

Another aspect of Rule 5 (a) which may need further comment is the phrase "without unnecessary delay." The whole purpose of the requirement that an arrested person be brought before a magistrate without unnecessary delay is so that he may be fully advised of his rights and promptly have a determination as to whether there is probable cause for his continued detention. "Without unnecessary delay" must be given a common sense meaning because of the fact that in Maine, a District Court judge may not be readily available and distances to be traveled in order to bring the defendant before a magistrate may be great. Therefore, the requirement cannot be stated in terms of minutes and hours but depends on all the circumstances. If the officer brings the arrested person before a magistrate as soon as one is available and does not detain the arrested person to elicit a confession from him or harass him, this should satisfy the requirement of the rule.

### Juveniles

An additional requirement, when the person arrested is a juvenile, is that the arresting officer is required to notify as soon as reasonably possible (1) the parents or legal guardian having control over the juvenile, and (2) the State Probation and Parole Board or its representatives. The above should be notified of the fact of the arrest and of the time and place of the filing of the petition against the juvenile. 15 M.R.S.A. § 2607.

In general, the Juvenile Offender Law (Title 15, M.R.S.A.) should be consulted for procedures regarding the handling of juvenile offenders.

### Protection and Welfare of the Prisoner

Despite the provisions discussed above, there will still be occasions when a

magistrate or bail commissioner is not available, thereby delaying the arrested person's appearance. Furthermore, delay may be requested by the prisoner himself or be caused by his being sick, intoxicated or otherwise incapacitated. In these situations, it is the duty of the officer to keep the arrested person safely in custody for the necessary period of time until he can be brought before a magistrate. For this purpose, the officer may exercise such degree of control over the prisoner as may be necessary to prevent his escape, although he must not subject him to any greater restraint than is reasonably justified to keep him safely in custody.

It may become necessary for the law enforcement officer to physically confine the prisoner rather than keep him in the officer's personal custody. Ordinarily the place of confinement will be a jail, but the officer may choose any safe, suitable place if a jail is unavailable.

Once an officer has a prisoner in his custody, he has certain responsibilities toward the prisoner. He has the responsibility to take care of the life, health, and safety of the prisoner and may be liable in damages if he fails to do so. Therefore, if the defendant is sick or injured at the time of the arrest or later, it is the duty of the officer to see that he receives adequate medical attention. He may even have to take him to the hospital before taking him to jail if the defendant's condition requires it. The officer, however, is not personally liable for the expenses involved.

Any unnecessary force, violence or brutality used against a prisoner is unlawful and the officer may be liable for assault and battery. Furthermore, if the prisoner is assaulted or injured by other prisoners, and the officer either negligently or wilfully allowed such assault, then the officer may be personally liable for the damages.

### Handcuffing

One of the ways in which an officer may prevent the escape of a prisoner and also protect himself from harm is to handcuff the prisoner. The law leaves the decision whether or not to use handcuffs largely up to the discretion of the individual law enforcement officer. He will be held liable for assault or otherwise only in cases of clear abuse of this discretion.

The right to handcuff is freely recognized in cases involving felony arrests but it is not confined to such cases. Circumstances often justify such precautions in misdemeanor cases also, especially where a breach of the peace is involved. In deciding whether or not to

use handcuffs, the officer is entitled to consider a variety of factors — the nature of the person arrested, his reputation or record, the time of day or night, possible violence, the number of prisoners involved, the distance to the jail, etc. Again, if an individual department has a policy regarding handcuffing, it should be consulted and followed by the officers of that department.

### Property of Prisoners

When a person is arrested, it is normal procedure for police to search his person for weapons and evidence and to place all his belongings in safekeeping for return to him when he is released. This is standard practice and presents no particular problems.

However, there are some situations, especially in connection with vehicles, where the officer may come under an obligation to take positive steps to protect the defendant's property or become liable in damages for failure to do so. For example, in an often cited case, a trucker was arrested and taken to jail, leaving his truck standing in a docking area on the waterfront. Over the trucker's protests, the arresting officer and his superior refused to allow him to remove the truck to a place of safety and refused to take any steps themselves to protect it. While the defendant trucker was in jail, his truck was stripped and, in attempting to steal it, the thieves had damaged the transmission. The officers were held liable for the damages. *Whitehead V. Stringer*, 180 P. 486 (Supreme Court of Washington, 1919).

Furthermore, when a vehicle is taken into police custody to safeguard it, it is a good idea for law enforcement officers, as a regular procedure, to examine the contents of the vehicle for purposes of taking inventory. For a further discussion of inventory and search of vehicles, see the November 1970 issue of *ALERT on Search and Seizure of Vehicles Without a Warrant*.

### Identification of Prisoner

Pre-trial procedures for identifying persons arrested for a crime take many different forms. One aspect of these identification procedures is the confrontation of the prisoner with victims or witnesses of the crime, sometimes accomplished through the use of a police lineup. The defendant has no right to object to being viewed by witnesses for identification purposes and by the same token, has no right to demand to be placed in a lineup. For a discussion of lineup

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techniques and the right to counsel, see the December issue of ALERT on *Pre-trial Identification and Lineups*. In addition, law enforcement officers clearly have the right to take fingerprints, footprints, or photographs of the defendant for purposes of identification or evidence. These may even be taken by force if necessary. *Schmerber v. California*, 384 U.S. 757 (U.S. Supreme Court, 1966). Photographs may be useful to show that at the time of arrest, the defendant had dyed his hair or grown a beard, or to show bruises or scratches which might be evidence in crimes of violence.

"Such procedures and practices and tests may result in freeing an innocent man accused of crime, or may be part of a chain of facts and circumstances which help identify a person accused of a crime or connect a suspect or an accused with the crime of which he has been suspected or has been accused. The law is well settled that such actions, practices, and procedures do not violate any constitutional right." *Commonwealth v. Aljoe*, 216 A.2d 50, 52-53 (Pennsylvania Supreme Court, 1966).

Law enforcement officers also have the authority to make a physical examination of the defendant for measurements, scars, bruises, tattoos, etc. To enable this to be done, the defendant may be required to disrobe against his will. Courts have allowed an examination of an arrested person's bodily cavities as long as the methods used did not amount to excessive force or brutality and did not "shock the conscience" or offend the sense of justice. *Blackford v. U.S.* 247 F. 2d 745 (9th Circuit Court of Appeals, 1957). Furthermore, the U.S. Supreme Court has held that there is no denial of due process of law in taking a blood sample from a person who is unconscious and unable to give consent, and no unreasonable search and seizure or violation of his privilege against self incrimination when such specimen is taken from him without his consent while he is in lawful custody. *Schmerber v. California*. 384 U.S. 757 (1966)

#### Release of Prisoner Prior to Appearance Before a Magistrate

After an arrest *without* a warrant has been made, it sometimes occurs that further investigation convinces the officer that no offense actually has been committed, that the person arrested is innocent, or that the evidence against him is insufficient to justify making a formal charge. In such circumstances, it is the

practice for law enforcement officers in some jurisdictions to use their own judgment in releasing the arrested person. There is little reason or justice in requiring that a person, now believed innocent, be held in custody until he can be taken before a magistrate.

Nevertheless, despite the obvious injustice of prolonging the detention of such persons, some courts have been slow to depart from the rule laid down in early cases, that the arresting officer has no right to dispose of his prisoner otherwise than by taking him before the nearest magistrate without unnecessary delay. Therefore, in order to protect himself from liability, the wisest course for the officer to follow when he feels a prisoner should be released is to obtain a written waiver from him. Since it is the arrested person's right to go before a magistrate on the offense, he can waive that right, consent to his release, and the arresting officer is protected from any claim of damages for false arrest. It must be re-emphasized, however, that it is the arrested person's *right* to be taken before a magistrate and the officer may not release the person if he insists upon being taken to court to remove any possible stigma or suspicion connected with his arrest.

It is worthy of note that the Maine State Legislature has recently passed an amendment to legislation dealing with the pre-arraignment release of persons arrested for Public Intoxication and Disturbance. 7 M.R.S.A. Section 2001. This amendment takes effect September 23, 1971 and is quoted in full below:

"When 18 hours after an accused is taken into custody, if it appears to the arresting officer that the accused is not a danger to himself or others, with the written consent of the accused, the accused may be released from custody and no complaint shall issue. After such release the arresting officer or the officer in charge may, with the written consent of the accused, make such arrangements to transport the accused to his home or some other suitable place as may be reasonable under the circumstances."

#### EFFECT OF ILLEGAL ARREST

Although a detailed discussion is beyond the scope of this article, law enforcement officers should be made aware of some of the possible consequences of an illegal arrest, both to themselves and to the prosecution of the person arrested.

First, it is an almost universal rule that jurisdiction to try a person actually

before the court is in no way affected by the manner in which the person was brought before the court. Therefore, the fact that one is illegally arrested is not ground for quashing the indictment, information, or complaint brought against him and does not preclude a trial on such charges or affect the validity of the proceedings in any way. *State v. Boynton*, 62 A.2d 182 (Supreme Judicial Court of Maine, 1948).

However, while an illegal arrest does not deprive the court of jurisdiction to try an offender, the exclusionary rule of evidence can sometimes have the same effect. This rule states that any items of evidence seized during a search incident to an *unlawful* arrest will be inadmissible in court in a prosecution against the person arrested. *District of Columbia v. Perry*, 215 A.2d 845 (District of Columbia Court of Appeals, 1966). Therefore, for example, if the only evidence which the state has to convict an armed robbery suspect is a gun, stocking, and large roll of bills taken from his person during a search incident to an unlawful arrest, the offender will very likely go free because these items will be inadmissible in court.

Another possible consequence of an unlawful arrest, mentioned throughout this article, is that the arresting officer can be sued for false arrest or false imprisonment. All that is necessary to make out a case for false arrest or imprisonment is that the individual be restrained of his liberty without legal justification. There does not have to be any malice or bad motive on the part of the arresting officer. However, as a practical matter, a person will be more likely to go to the trouble of suing an officer who had apparent ill feeling toward him or offended him either verbally or physically at the time of the illegal arrest.

Furthermore, depending upon the circumstances and the degree of force used, an officer's actions in making an *unlawful* arrest may give rise to a civil suit for damages or criminal prosecution against him for anything from assault and battery to murder, the same as any other aggressor. In such cases, he is not even entitled to the right of self-defense as long as his acts are illegal.

It should be again noted in this context that an officer can be civilly and criminally liable even if the arrest is *lawful*, if he uses excessive and unreasonable force in making the arrest.

#### Summary

The responsibility of the law enforcement officer is to enforce the laws of the community and protect the public at large. To enable him to do this, he is

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