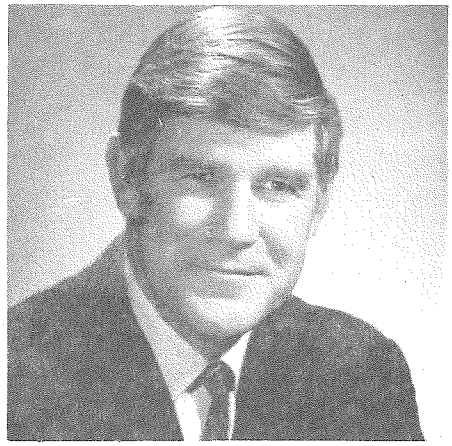
NOVEMBER 1971

CRIMINAL DIVISION

ALERT

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



MESSAGE FROM THE ATTORNEY GENERAL JAMES S. ERWIN

As is stated in the introduction to the main article of Stop and Frisk in this issue, "stop and frisk" has become and is a major subject of controversy in the field of law enforcement. I believe it would be particularly well to mention at this time that it is not the intention of this office to set policy for law enforcement agencies to follow in regard to the areas of law written about in the articles in Alert.

The main purpose of the subjects written about is to educate individuals working within the criminal justice system in relevant areas of the criminal law and not to set up policy for law enforcement agencies to follow. This is the responsibility of the head of each individual law enforcement agency. Hopefully, the articles in ALERT will provide some guidance to these agency heads in setting up workable, legally adequate policy guidelines for their personnel.

The main point to be made is that each individual officer, before adopting a pattern of behavior in relation to any area of the criminal law, should consult with his superiors to determine if there is an established departmental policy covering that area.

James S. Erwin

JAMES S. ERWIN
Attorney General

STOP AND FRISK I

In the July, August, and September 1971 ALERT bulletins, the topic of arrest was covered in some detail in the main articles of each issue. In those articles, an arrest was described as "the apprehension or detention of the person of another in order that he may be forth-coming to answer for an alleged or supposed crime". **State v. MacKenzie**, 210 A.2d 24, 32 (Supreme Judicial Court of Maine, 1965). This article will discuss "stop and frisk", a police procedure involving the detention or restraint of a person but falling short of the purpose and consequences of an actual arrest. As a preliminary definition, "stop and frisk" is a police practice involving the temporary detention, questioning, and limited search of a person suspected of criminal activity. It is initiated on something less than probable cause for the purposes of crime prevention and investigation and for the protection of the law enforcement officer carrying out the investigation. This definition will be refined during the course of the article.

In recent years, "stop and frisk" has become a major subject of comment and controversy in the field of law enforcement. This is not because it is a new procedure. In fact, it has been a long recognized procedure for law enforcement officers to stop suspicious persons for questioning and, occasionally, to search these persons for dangerous weapons. Nevertheless, it has taken the law and the courts a long time to respond to this practice and, as a result, "stop and frisk" has only recently been given judicial approval by the U.S. Supreme Court. This approval was given in 1968 in the case of **Terry v. Ohio**, 392 U.S. 1 and its companion cases of **Sibron v. New York** and **Peters v. New York**, 392 U.S. 41.

This article will discuss these important cases in detail and several others which have followed from 1968 to the present. An attempt will be made to set forth guidelines for the law enforcement officer to follow in his daily duties. However, it must be remembered throughout that this is a very sensitive and complex area of the law and there are still many questions regarding stop and frisk which have not been answered. As a result, clearcut procedures for all situations are not available. These problem areas will have to be dealt with in the future as the as the courts resolve them on a case by case basis. The ALERT bulletin will cover these developments in the *Important Recent Decisions* and *Maine Court Decisions* columns.

DISCUSSION OF THE TERRY, SIBRON, AND PETERS CASES.

Terry v. Ohio

In this case, a police detective with 39 years experience had observed two men alternately pace back and forth, about five or six times, and peer into a store window, each time returning to a corner to confer with each other. The two men were joined briefly by a third man and when he walked away, the first two resumed their pacing, peering and conferring. When the third man rejoined them again, the detective, suspecting that the men were "casing" the store for an armed robbery, approached them, identified himself, and asked their names. When the men "mumbled something," the detective grabbed Terry, spun him around in order to place him between the other two suspects and himself, and patted down the outside of his clothing. Feeling a pistol in Terry's coat pocket, the officer seized it and patted down the outer clothing of the other two men. One more weapon was found. Terry and the

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other man were arrested and convicted of carrying concealed weapons. They appealed, claiming that the weapons were obtained by means of an unreasonable search and should not have been admitted into evidence at their trial.

The U. S. Supreme Court affirmed the convictions. The Court said that even though "stop" and "frisk" represented a lesser restraint than a traditional "arrest" and "search", the procedure is still subject to the 4th Amendment limitations. However, it was not subject to as stringent limitations as a traditional full arrest and search. Rather than apply the "probable cause" standard to stop and frisk, the constitutional test to be applied is whether or not this type of search and seizure is an unreasonable one.

In discussing the reasonableness of the officer's actions in this case, the Court first mentioned the long tradition of armed violence of American criminals and the number of law enforcement officers killed or wounded in action. In view of this, the court recognized a need for law enforcement officers to protect themselves in situations where suspicious circumstances indicate possible criminal activity by potentially dangerous persons, but probable cause for an arrest is lacking. In these situations, the Court felt it would be unreasonable to deny an officer the authority to take necessary steps to determine whether a suspected person is armed and to neutralize the threat of harm. The Court concluded that:

> "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and
>
> that the persons with whom he is dealing may be armed and presently dangerous,
>
> where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and
>
> where nothing in the initial stages of the encounter serves dispel his reasonable fear for his own or others' safety,
>
> he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. (392 U.S. at 30-31).

Sibron v. New York

The **Sibron** case arose from another instance of police surveillance, in which a uniformed beat patrolman observed Sibron in the company of several known drug addicts for a period of eight hours. The officer did not, however, see anything pass between Sibron and the others, nor did he hear any of their conversation. Sibron later entered a restaurant where he spoke to three other known addicts but again nothing was observed to pass between them.

On the basis of these actions alone, the policeman accosted Sibron with the remark, "You know what I am after." Sibron mumbled a reply and began to reach into his pocket. The policeman intercepted his hand, reached into the same pocket, and discovered envelopes containing heroin. Sibron was convicted of unauthorized possession of narcotics and appealed on the basis that the seizure was made in violation of his Fourth Amendment rights.

The Supreme Court found that the policeman in the **Sibron** case did not have probable cause to make an arrest and therefore could not justify the search as incidental to arrest. The officer knew nothing of the conversations between Sibron and others, and saw nothing pass between them. All he had to go on was the fact that the others were addicts. This was not enough. "The inference that persons who talk to narcotics addicts are engaged in criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." (392 U.S. at 62). There was no basis to arrest until after the unlawful search.

Moreover, nothing on the record gave the slightest impression that the officer even thought that Sibron might be armed, so that this concern of the **Terry** case could not be part of this case. The **Terry** case certainly did not authorize a routine frisk of everyone on the street seen or encountered by an officer. The officer in **Sibron** was apparently after narcotics and nothing else. His search was therefore unreasonable under the standards announced in the **Terry** case.

Since there was neither probable cause to arrest nor sufficient justification to frisk, the heroin seized by the officer was not admissible in evidence and the conviction of Sibron was reversed.

Peters v. New York

In the **Peters** case, an off-duty patrolman heard a noise outside his apartment door. He saw two men tiptoeing furtively about the hallway, neither of whom he recognized, although he had lived in the building for twelve years. After telephoning the police, he entered the hallway with his gun drawn, and slammed the door behind him. The two suspects then fled down the stairs and the patrolman gave chase. He caught up with the defendant, questioned him, and patted down his clothing. In the course of the frisk, the officer discovered a hard object which he believed could be a weapon, but turned out to be an envelope containing burglar's tools. Peters was convicted of possessing burglar's tools.

The Supreme Court affirmed the conviction of Peters. However, the decision was not based upon the officer's authority to "stop and frisk". Rather, the Court felt that the facts were strong enough to give the officer probable cause to arrest the defendant for attempted burglary, and for purposes of the Fourth Amendment, the search was properly incident to a lawful arrest. Emphasis was placed by the Court on the defendant's furtive action and his flight in establishing probable cause. The Court said in this respect,

> "(I)t is difficult to conceive of stronger grounds for an arrest, short of actual eyewitness observation of criminal activity. . . (D)eliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest." (392 U.S. at 66-67)

Thus, in this case, questions of the reasonableness of the stop and the frisk did not come up because there was probable cause to arrest

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and the search was justified as incidental to the arrest.

We turn now to a discussion of some general principles regarding "stop and frisk" which can be derived from the **Terry, Sibron** and **Peters** decisions. An effort will be made where possible to set forth guidelines and suggestions to aid the law enforcement officer in determining what action to take, if any, in a "stop and frisk" situation. Direct quotations from the **Terry, Sibron** and **Peters** decisions will be used whenever appropriate because it is important that law enforcement officers become familiar with the exact language of the Court in these important cases.

THE REASONABLENESS STANDARD

In order to fully understand the reasons for the restrictions placed on law enforcement officers in stop and frisk situations, it is vitally important first of all for the law enforcement officer to realize that "stop and frisk" procedures are serious intrusions upon an individuals privacy and are governed by the Fourth Amendment to the Constitution, which prohibits unreasonable searches and seizures. As the Supreme Court stated in the **Terry** case:

> "It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search". Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity". It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." (392 U.S. at 16-17.)

This passage serves to emphasize that the Fourth Amendment is as applicable to "stop and frisk" procedures as it is to any other search and seizure and that despite the fact that a stop and frisk is a lesser form of intrusion or interference, it is still constitutionally protected. However, the Fourth Amendment is not applicable to "stop and frisk" in the same way that it is in traditional search and seizure law. In a traditional search and seizure or arrest situation, a law enforcement officer would have to determine whether "probable cause" existed before he could justify a particular search, seizure or arrest. This would be true whether a warrant was being sought or whether the situation fell within one of the exceptions to the warrant requirement.

This is not the case, however, with "stop and frisk". Here we deal with the many and varied situations in which a law enforcement officer must take swift action based on sometimes brief on-the-scene observations. This type of police conduct has not historically been, nor could it be, as a practical matter, subjected to the warrant procedure. The police conduct in a "stop and frisk" situation must therefore be tested, not by a probable cause standard, but under the Fourth Amendment's general prohibition against unreasonable searches and seizures.

The question for the law enforcement officer then becomes whether or not it is reasonable, in a particular set of circumstances, for him to seize a person and subject him to a limited search of his person when there is no "probable cause" to arrest.

COMPETING INTERESTS

To help in answering this question, it is worthwhile to consider the competing interests involved in a "stop and frisk" situation. On one side there is the individual's privacy and his right to be free from unreasonable searches and seizures.

In the words of the Supreme Court,

> "Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." (392 U.S. at 24-25)

On the other side are the governmental interests involved. One of these governmental interests is effective crime prevention and detection.

The other governmental interest, and the one which the Court was most concerned with in the **Terry** case, is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could be used against him.

> "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded." (392 U.S. at 23)

With these competing interests in mind, the law enforcement officer must evaluate each situation and determine for himself what action, if any, is justified by the circumstances. This determination can be broken down into two considerations:

1. Whether **any** police interference at all is justified by the circumstances; and
2. If so, **how extensive** an interference do those circumstances justify.

In setting out guidelines to help the law enforcment officer answer these questions, the "stop" aspect and the "frisk" aspect will be considered separately. The reason for this is that the "stop" and the "frisk" each have different purposes behind them, different sets of circumstances which will justify them, and different consequences for the individual who is subjected to the procedure.

DETERMINATION OF WHETHER TO STOP

The Supreme Court has recognized that stopping persons for the purpose of investigating possible criminal activity is necessary to the government's interest in effective crime prevention and detection.

> "(I)t is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a

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person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." (392 U.S. at 22)

Given this authority, the law enforcement officer must determine under what circumstances it is appropriate for him to stop a person for investigation. The officer may consider many factors. The following is a partial list of possible indications of criminal behavior which the officer should consider in deciding to make the initial stop.

1. The suspect is known to have a felony record.
2. The suspect fits a "wanted" notice.
3. The suspect makes furtive or evasive movements.
4. The suspect's actions are unusual for the time of day or night.
5. The suspect's clothing is peculiar or inappropriate e.g. a coat on a hot day.
6. The suspect's vehicle is peculiar in some respect, e.g. clean license on a dirty car.
7. The suspect is in an unusual place or is acting strangely.

Any one of these things alone may not give the officer sufficient grounds to stop a person. However, a combination of these factors or others, evaluated in light of the officer's experience, may cause the officer to decide that an investigation is warranted.

The important thing for the officer to remember is that he must be able to justify any investigative stop by showing concrete facts and circumstances indicating possible criminal activity which caused him to decide to take action. As the Supreme Court said in **Terry.**

> "(I)n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (392 U.S. at 21)

This means that a court will not accept a mere statement or conclusion by an officer that he was suspicious of criminal activity. The officer must be able to back up his conclusion by reciting the specific facts which led him to that conclusion. Furthermore, the officer's decision to initiate a stop will be judged against the folowing objective standard:

> "Would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." (392 U.S. 21-22)

This objective standard is really very similar to the standard imposed upon law enforcement officers in traditional search and seizure or arrest situations. For example, assume that an officer is attempting to obtain a warrant for a person's arrest. Since probable cause is required to obtain that warrant, the officer will have to produce specific, reliable facts sufficient to support a reasonable belief that a specific crime has been or is being committed. In the stop and frisk situation, no crime has been committed—there is only a probability that criminal activity is under way, possibly only in the planning stage. However, the officer must still come up with concrete, reproducible facts indicating a probability of impending criminal activity to justify his initial intrusion. The common element to the two situations is that the officer must be able to justify his action to a magistrate's or judge's independent judgement, detached from the heat and excitement of the moment of the seizure or search. The only difference then is in the type of information that has to be given, and in the case of an investigative stop, the officer need only show facts indicating the possibility that criminal behavior is afoot.

Extent of Stop

Once an officer has determined that the circumstances justify his interfering with an individual to investigate possible criminal activity, the question arises as to what extent do those circumstances allow him to interfere. In other words, how long may the person be detained and how much questioning may he be subjected to? This question can only be dealt with in general terms because the Supreme Court has not yet set down any detailed guidelines.

An investigative stop can range anywhere from a friendly encounter with no imposed restraint or interference, to an angry confrontation resulting in the use of force or violence. Again the officer's actions must at all times be justified by the circumstances. He must be able to point to specific concrete facts and circumstances to indicate that the extent of his interference with an individual was reasonable.

For instance, an officer's initial questioning of a suspect may assure the officer that no further investigation is necessary. As an example, a law enforcement officer observed a young man carrying a flashlight and a small box walking on the sidewalk of a residential street at 2:40 A.M. The officer passed him with the patrol car and asked him what he was doing. He replied that he was collecting night crawlers for fishing bait. The officer wished him luck and drove on.

On the other hand, the answers given by the stopped person may cause the officer to believe more strongly that something is amiss. In this situation he is permitted to investigate further or, if he has probable cause at the time, to arrest the person.

For example, an officer saw the defendant wearing one topcoat and carrying another. The defendant seemed to be attempting to hide something under the coat he carried. Considering this behavior suspicious, the officer stopped defendant and asked him what he had under his raincoat. Defendant replied that he had a tape recorder. When the officer asked him to identify himself, he handed the officer a driver's license describing an older person of a different race from defendant. The officer then arrested the defendant.

The court held that the initial suspicious circumstances justified at least the mere questioning of the defendant by the officer. Then, at the point where the officer checked the license, he had "probable cause not only to investigate further but to place the appellant under arrest with the very reasonable belief that the appellant's possession indicated, at the least, receiving stolen goods." **Commonwealth v. Howell,** 245 A.2d 680 (Superior Court of Pennsylvania, 1968)

Other cases dealing with the extent of the stop will be discussed in a later section of this article.

DETERMINATION OF WHETHER TO FRISK

The determination by a law enforcement officer of whether or not to "frisk" a suspect is a separ-

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ate issue from the determination of whether to stop. There is a different governmental interest to be served and there is a different set of factors to be considered by the officer.

The governmental interest that is served by giving police the authority to frisk is that of the protection of the officer and others from possible violence from persons being investigated for crime. As the Supreme Court said,

> "(W)e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest." (392 U.S. at 24)

Balanced against this interest is the invasion of privacy which would necessarily result from giving police the right to frisk suspects. The Supreme Court expressed its concern for this in the following language:

> "We must still consider, however, the nature and quality of the intrusion on individual rights which must be accepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking." (392 U.S. at 24)

As we noted earlier, the Court considers the stop and frisk procedure to be a serious intrusion on a person's privacy, possibly inflicting great indignity and arousing strong resentment.

Taking both sides of the issue into consideration, the Court set out a limited authority for a protective frisk by law enforcement officers in the following terms:

> "Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." (392 U.S. at 27)

Limited Authority

The most important thing for the law enforcement officer to remember is that his authority to frisk is a limited and narrowly drawn authority. The officer does **not** have the right to frisk everyone that he stops to investigate the possibility of criminal activity. Before he decides to conduct any frisk, the officer must have "reason to believe that he is dealing with an armed and dangerous individual". This does not mean that the officer must be absolutely certain that the individual is armed. Rather the issue is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." (392 U.S. at 27)

Thus, the officer is governed by an objective standard as he is in determining whether to stop. He must be able to justify his search or frisk of the individual by pointing to specific facts and "specific reasonable inferences which he is entitled to draw from the facts in light of his experience." (392 U.S. at 27)

There are many factors which an officer may take into consideration in deciding whether or not it is appropriate to frisk a person. Some things will carry more weight with one officer than another because of differences in experience and knowledge.

The following is a partial list of things to be considered in deciding whether or not to frisk an individual.

1. The suspected crime involves the use of weapons.
2. The suspect is nervous or "rattled" over being stopped.
3. There is a bulge in the suspect's clothing.
4. The suspect's hand is concealed in his pocket.
5. The suspect does not present satisfactory identification or an adequate explanation for his whereabouts.
6. The area the officer is operating in is known to contain armed persons.

Any one of these things taken alone may not give sufficient grounds to frisk a suspect, but a combination of these elements or others, evaluated in light of the officer's knowledge and experience, might provide a justification to frisk. Specific cases dealing with situations where a frisk was or was not authorized will be discussed in a later section of this article.

Scope of Search

A further limitation on a law enforcement officer's frisk authority relates to the scope or extent of the search allowed. The Supreme Court requires a frisk to be "a **reasonable** search for weapons for the protection of the police officer". (392 U.S. at 27) Since the **only** justifiable purpose of a frisk is the protection of the officer and others, the search must be limited to what is minimally necessary for his protection. Therefore, the frisk must initially be limited to a patdown of the **outer** clothing. There is no authority to reach inside clothing or into pockets in the **initial** stages of a frisk. During the patdown, if the officer detects an object which feels like it might be a weapon, he may then reach inside the clothing or pocket and seize it. If it turns out that it is not a weapon, but instead some other implement of crime (such as burglar's tools) it would be admissible in evidence for the crime to which it related (e.g. attempted burglarly). However, if the officer does not feel an object which seems to be a weapon, but instead feels a package or bulge which he believes might be evidence of some other crime (such as possesion of narcotics or lottery tickets), he may not seize the package or object. The search must end at this point. The reason for this is that the only authorized purpose for a frisk is the protection of the officer and others, **not** to obtain evidence for use at a subsequent trial. If the officer feels no weapon like object during the course of his pat-down, he can no longer reasonably fear that the person is armed. Therefore, any further search without probable cause would exceed the purpose of the frisk, namely, the protection of the officer. Such a search would be unreasonable under the Fourth Amendment and any evidence obtained through it would be excluded.

NOTE: This issue of ALERT has been designed to set out general guidelines on "stop and frisk" for the law enforcement officer. The discussion has necessarily centered around the Supreme Court decisions in the **Terry, Sibron** and **Peters** cases. Next month's issue of ALERT will deal with the application of these guidelines to specific "stop and frisk" situations and will consist largely of summaries of actual court decisions. In addition, the next issue will discuss some of the collateral issues in-

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volved in "stop and frisk" such as how it relates to Miranda, Fifth Amendment rights, automobiles, and several other issues.

MAINE COURT DECISIONS

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

Robbery; Photograph Identification JPL

Defendant was convicted of robbery and appealed on two issues.

The defendant claimed that since the state elected to charge him with robbery by putting in fear, the evidence did not support the verdict of guilty since the victim did not testify to her fear. The Court stated that the victim's testimony of her nervousness and quick compliance with the robber's orders would support a jury's finding of fear. The Court also said that a conviction of robbery may be supported by either evidence of force or evidence of fear, and that these requirements were alternative.

The defendant also claimed that the pretrial identifications were prejudicial. The police first showed the victims their mug book which did not contain a picture of the defendant. On a second occasion the victims were shown photographs of three individuals from which they identified the defendant, whose photograph was of a different size and texture than normal mug shots. On a third occasion the victims were shown a picture of the defendant with two other pictures of other men, but this time the photographs were of the same size and texture. Again the victims identified the defendant.

The defendant argued that this procedure was so suggestive that it tainted the in-court identifications so as to discredit them. The Court disagreed relying on the fact that the victims were never told which of the men the police suspected and that their identification was so positive as to conclude that it was not from the result of police coaching. The court also noted, however, that the police procedure in this case was not an ideal method of pretrial photographic identification and that they disapprove of this particular practice. **State v. Levesque,** 281 A. 2d 570 (Supreme Judicial Court of Maine, September 1971)

Bookmaking and Conspiracy; Sufficiency of Indictment; Effect of witness plea of immunity. JP

Defendant was charged by indictment with conspiracy to commit the crime of bookmaking. He attacked the sufficiency of the indictment since it went no further than charging him with placing a bet with a bookmaker which he claims could not result in a conspiracy because bookmaking itself requires the activity of at least two participants. The Court disagreed indicating that the indictment does not charge the defendant with being merely a bettor, but does sufficiently charge him and two others with conspiring to gain an illegal objective: bookmaking, citing the Maine Rules of Criminal Procedure, Rule 7 (c).

Defendant also appealed from a ruling denying his motion for a mistrial which was made on the grounds that the state presented a witness who they knew would plead 5th amendment immunity, the plea being prejudicial to the defendant since some of the questions asked concerned the witness' activities with the defendant. The Court indicated that there was evidence that the state in good faith did not know the witness would plead immunity and that the instructions by the judge to the jury that they were not to draw any factual inferences from the plea eliminated any prejudice to the defendant.

The Court also held that circumstantial evidence that the defendant engaged in gambling oriented activities may be admitted on the issue of conspiracy to engage in bookmaking. **State v. Goldman,** 281 A. 2d 8 (Supreme Judicial Court of Maine, August 26, 1971)

High and Aggravated Assault; Evidence JP

Defendant was convicted of high and aggravated assault and battery from which conviction he appealed. The defendant claimed the jury may not consider evidence of an intent to commit a felony in determining whether the assault was of a high and aggravated nature. The Court disagreed, citing numerous judicial and legislative precedents, which support the proposition that intent to commit a felony may be admitted into evidence to show that an assault was of a high and aggravated nature.

The court, in passing, also noted that assaults have traditionally been considered lesser included offenses in assault with intent to kill, murder, manslaughter, rape and robbery. **State v. Thayer,** 281 A. 2d 315 (Supreme Judicial Court, Sept. 21, 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

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