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ALERT

CRIMINAL DIVISION

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

MAINE CRIMINAL COURT PROCEDURE II

This month's article will continue the discussion of Criminal Court Procedure in Maine where last month's article left off. Topics to be covered include the criminal trial, judgment, appeal, post-conviction habeas corpus, and other related matters. Again, most of the information for this article has been taken from Glassman, *Maine Practice, Rules of Criminal Procedure Annotated*, to be referred to throughout the article simply as "the rules". Also, it is to be re-emphasized that the purpose of the article is not to discuss court procedure in minute detail but to convey a basic understanding of the judicial process to the law enforcement officer so that he will better appreciate his role and be able to more effectively perform his function within the system.

THE TRIAL

Both the Maine and United States Constitutions guarantee a defendant in a criminal prosecution a speedy, public, and impartial trial by jury. This guarantee has been taken to mean that a defendant must be provided a jury trial in a criminal prosecution subject to his own preference to forego the jury. Therefore, if a defendant does not wish to be tried by a jury, he may, with the approval of the court, waive in writing his right to a jury trial.

Some initial confusion may arise from the fact that there is no provision in the rules for a jury trial in a misdemeanor proceeding in the District Court. However, this has been held not to prejudice the defendant's constitutional right to a jury trial, because he has the right of appeal to the Superior Court and a *trial de novo* by a jury in that court. Therefore, even though the defendant receives an unfavorable judgment in the District Court from a judge without a jury, he can still elect to have his case retried by a jury through an appeal to the Superior Court. (This appeal from the District Court to the Superior Court is discussed on page 4 of the February 1972 ALERT). In this way, the defendant is never totally deprived of his constitutional right to a trial by jury.

Trial Without A Jury

When a case is tried without a jury, the judge must perform the jury's function of weighing the evidence, determining the credibility of witnesses, and finding the facts, in addition to his regular duties as judge. He must also make a finding as to the guilt or innocence of the defendant based upon his view of the evidence. For purposes of this article, outside of his performance of these jury functions in a non-jury trial, the judge's other regular duties are pretty much the same in either a jury or a non-jury trial. Therefore, the remainder of this article will be concerned primarily with jury trials.

Selection of Jurors

Once it has been determined that trial will be by jury, either because the defendant did not elect to waive his right to jury trial, or because he appealed from an adverse decision in the District Court, the next step in the criminal proceeding is the selection of the jurors. This step is very important because the jurors will be performing the crucial tasks of finding the facts, determining the credibility of witnesses, weighing the evidence, and ultimately issuing a verdict of guilty or not guilty. Because of the importance of the jury's function, there are detailed rules governing the selection of jurors. These rules are designed to protect both the State and the defendant from having someone who is prejudiced against their cause sit as a member of the jury during the trial of the case.

The selection of the jury is accomplished by the court through an examination of prospective jurors on the jury panel or venire. The *jury panel* is a list, compiled by local officials, according to statute, of members of the community who are considered fit for jury service. This list must be indiscriminately drawn and must not *systematically* exclude any class of persons.

The examination of prospective jurors on the panel is commonly referred to as *voir dire* the usual method of examination is to question the prospective jurors with regard to their feelings and views on various matters. The parties or their attorneys may conduct the examination unless the court elects to conduct an initial examination itself. If the court conducts an initial examination, when that examination is completed, the court must allow the parties or their attorneys to address additional questions to the prospective jurors on any subject which has not been fully covered and which is relevant to the juror's qualifications.

The purpose of the examination or *voir dire* is to determine whether any prospective juror is prejudiced about the case in any way. Typical questions asked relate to whether the prospective juror knows the defendant, the attorneys, or any of the witnesses; whether he has read about the case in the newspapers; whether he has formed any opinions on the case; etc.

If either attorney wishes to have a prospective juror dismissed on the basis of these questions or for any other reason, he may issue a challenge to that juror. There are two types of challenges available. One, a *challenge for cause*, is directed toward the qualifications of a juror and may be allowed on any of the following grounds:

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1. The juror is related to one of of the parties,
2. The juror has given or formed an opinion in the case, or
3. The juror has a bias, prejudice, or particular interest in the cause.

Each party has an unlimited number of challenges for cause available to him assuming that he can establish the grounds for such a challenge to the satisfaction of the judge.

The other form of challenge is known as the peremptory challenge. *Peremptory challenges* are available to each party as a means for dismissing prospective jurors, who may be qualified, but who for some other reason are felt to be undesirable by one party's attorney. Peremptory challenges have to be exercised with great care. It is often difficult to determine from a few questions whether a prospective juror will be receptive or antagonistic to a party's position. Furthermore, the number of peremptory challenges available to each side is limited in number.

Once all the challenges available to both the prosecution and defense are exercised, a jury of 12 remains and is sworn in by the judge to try the case. In some cases, additional jurors are selected as alternates, who sit in on the case but do not enter deliberations, unless one of the regular 12 jurors becomes ill or dies, or is unable to serve for some other reason. It should be noted that the parties may agree, with the approval of the court, to a jury of less than 12. However this is rarely done, except in cases where a juror dies during trial and there is no alternate to take his place. After administering an oath to the jurors, the judge admonishes the jurors to discuss the case with no one until the jury goes into deliberations to decide the case after hearing all the evidence.

Presentation of Evidence

The presentation of evidence in a criminal trial generally begins right after the impaneling of the jury with the opening statement of the prosecutor. In his opening statement, the prosecutor gives an outline of what he intends to prove by the evidence he will present. Following this, the defense counsel is permitted to make an opening statement to the jury outlining what he intends to prove. Sometimes, however, for strategic purposes, the defense counsel will wait until the prosecutor has presented the State's evidence before giving his opening statement, thereby concealing the course of his defense until the government's proof is disclosed.

In either case, after the opening statement or statements are given, the prosecutor begins the introduction of the State's proof. The State is entitled to present its evidence first in criminal cases because it is the plaintiff in the case and therefore has the burden of proof. The burden of proof means the duty to establish the truth of facts alleged in support of every element of the offense charged against the defendant. In a criminal case, the burden of proof is upon the prosecution from the beginning to the end of the trial because of the presumption that the accused is innocent. Furthermore, the prosecution is required to prove the defendant's guilt *beyond a reasonable doubt*. Reasonable doubt is a term requiring little interpretation although various courts have attempted to formulate somewhat involved definitions which add little beyond its plain meaning. Suffice it to say that proof beyond a reasonable doubt requires that the guilt of the defendant be established to a reasonable, but not absolute or mathematical certainty. Probability of guilt is not sufficient.

Rules of Evidence

The determination of what evidence will be admissable in court and what evidence will be excluded is governed by the rules of evidence, which are designed to ensure that only trustworthy, competent, and credible information is presented to the jury.

These rules have already been discussed in the April 1971 issue of the ALERT Bulletin and will not be covered again here. Law Enforcement officers are encouraged to reread the April 1971 issue both as a refresher to their understanding of the rules of evidence and as an integral part of this article on criminal court procedure.

Order of Presentation of Evidence

The order of presentation of evidence begins with the *direct examination* or *examination in chief* of the prosecution's first witness. This witness will be someone whom the prosecution has called and whom the prosecutor expects to give evidence favorable to the State's position. It is an examination designed to elicit evidence to prove the State's case against the defendant. A law enforcement officer is almost always involved as a witness for the prosecution, sometimes as its only witness. For a discussion of the importance of the officer as a witness and various techniques and suggestions for testifying in court, officers are referred to the March 1971 issue of ALERT.

When the prosecutor is through questioning his witness, the defense counsel then has a right to question the same witness. This is known as *cross-examination* and the purpose of it is to either discredit the information given by the witness or to impeach his credibility as a witness. In Maine, the defense attorney on cross-examination is not limited, as he is in some states, to questioning the witness only on matters raised by the prosecutor during direct examination. He may cross-examine the witness as to any other matter which is relevant and material to an issue in question. What is relevant and material of course is to be determined by the judge.

After cross-examination, the prosecutor may wish to re-examine his witness in order to rehabilitate him in the eyes of the jury. This is called *redirect* examination. Unlike cross-examination, the scope of redirect examination is limited to the matters brought out in the previous examination by the adverse party. This same rule applies if the defense counsel wishes to conduct a recross-examination. This order of presenting evidence by direct examination, cross-examination, redirect, and recross is followed for all of the prosecutor's witnesses until all the State's evidence has been presented.

Motion For Acquittal

After the prosecutor has presented the State's evidence, either the defense counsel or the court itself may move for a judgment of acquittal. A judgment of acquittal will be granted in cases where the evidence is insufficient to sustain a conviction on the offense or offenses charged. This will usually mean that the judge has decided that reasonable men could not conclude that guilt had been proven

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beyond a reasonable doubt. If the motion is not granted at the close of the State's evidence, the defense may then offer its evidence and the motion may be renewed at the close of all the evidence or at some time in the judge's discretion after the jury returns a verdict or is discharged without having returned a verdict.

The Defendant's Evidence

Assuming that the court does not grant a motion for judgment of acquittal at the close of the prosecution's evidence, the defense counsel then has an opportunity to present his evidence. Depending on the case, the defendant presents his case in chief and may present one or more of several possible defenses to refute the proof offered by the State. Among the defenses available to the defendant are alibi, insanity, self-defense, and, entrapment. In presenting any of these defenses, the defendant may call a varied assortment of witnesses on direct examination. The prosecutor has a right to cross-examine these witnesses the same as the defense counsel had with the State's witnesses as discussed above.

The defendant may or may not choose to testify in his own behalf. He has an absolute constitutional right *not* to testify. If he does testify, he is treated much like any other witness, with a few exceptions. If he does not choose to testify, the prosecuting attorney is not permitted to comment upon that fact to the jury. The basis for this principle is the constitutional privilege which protects a person from self-incrimination.

Rebuttal by the Prosecution

Assuming again that a motion for judgment of acquittal is not granted at the close of defendant's evidence, the prosecution is entitled to present rebuttal proof at this time. Rebuttal proof is designed to controvert evidence presented by the defense and to rebut any special defenses raised. Rebuttal proof is limited to new matter brought out in the defendant's case in chief. Law enforcement officers may be called as witnesses again at this stage of the prosecution to correct errors or misleading impressions that might be left after defendant's proof.

Closing Arguments

After all the evidence has been presented, both the prosecutor and defense attorney are allotted specified amounts of time under the rules for final argument. In the final argument, the attorney for each side attempts to convince the finder of fact of the correctness of his position. The attorney for the state presents his argument first and is followed by the attorney for the defense. The attorney for the state is then allowed to present a short rebuttal. Much leeway is given for the attorneys for both sides to use their wit and imagination to win the jury over to their respective positions. However, they are required to confine themselves to a discussion only of the evidence presented and reasonable inferences to be derived from that evidence.

Instructions to the Jury

After the final arguments and before the jury retires for deliberations, the judge must give instructions to the jury regarding the law of the case. The attorney for each side is given an opportunity to submit written requests to the judge for particular instructions that he wishes to be given. In a typical case, the instructions will cover such matters as the province of court and jury, the presumption of innocence and the burden of proof, various evidentiary problems, a definition of the offense or offenses charged, additional clarification of the critical elements of these offenses, any defenses which are properly in the case, and the procedures to be followed in the jury room. The exact content of the instructions is a matter for the judge's discretion but the attorneys are given an opportunity to object to any portion of the charge or any omission therefrom.

The judge may summarize the evidence for the jury, help them recall details, and attempt to resolve the complicated evidence into its simplest elements. However, the judge may not express any opinion on any issue of fact in the case nor may he favor either side in summarizing the evidence.

Verdict

After receiving instructions, the jury retires to the jury room to begin deliberations on a verdict. The *verdict* is the decision of the jury as to the defendant's guilt or innocence and it must be unanimous. If the jurors are unable to agree on a verdict, a hung jury results and the case must be retried. If however, an agreement is reached, the jurors return to the courtroom and the verdict is read in open court by the jury foreman. Any party or the court itself may then request a *poll* of the jury. This simply involves asking each individual juror if he concurs in the verdict. The purpose of polling the jury is to make sure that the verdict was not reached as a result of the coercion or domination of one juror by some of his fellows or as a result of sheer mental or physical exhaustion of a juror. If, during the poll, it is found any juror did not concur in the verdict, the whole jury may be directed to retire for further deliberations or they may be discharged by the judge.

SENTENCE AND JUDGMENT

After the defendant's guilt or innocence has been determined, either by verdict of the jury or by a judge without jury, the judge must enter a judgment in the case. The judgment is merely the written evidence of the final disposition of the case by the court. If the defendant is found not guilty or for some other reason is entitled to be discharged, the judgment is entered accordingly and the defendant is free forever from any further prosecution for the crime for which he was tried. However, if the defendant is found guilty, the judge must pass sentence on the defendant before entering judgment.

The determination of the sentence is perhaps the most sensitive and difficult decision the judge has to make because of the effect it will have on the defendant's life. For this reason, there are several provisions in the rules directing and guiding the judge in his determination. One of these provisions requires the judge to impose sentence without unreasonable delay. This protects the defendant from a prolonged period of uncertainty as to his future. Also, before imposing sentence, the judge is required to address the defendant personally and ask him if he desires to be heard prior to the imposition of sentence. The defendant may be heard personally

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or by counsel or both. The purpose of this provision is to enable the defendant to present any information which may be of assistance to the court in lessening his punishment.

Another provision of the rules with a similar intent enables the court, in its discretion, to direct the State Board of Probation and Parole to make a pre-sentence investigation and report to the court before the imposition of sentence. This report will contain any prior criminal record of defendant and such other information on his personal characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful to the court in reaching its decision.

The court has a number of alternatives open to it in regard to sentencing depending largely on the Maine Criminal statutes. Some criminal statutes have mandatory sentences, some have fixed maximum and/or minimum sentences, and others leave the matter of sentencing to the judge. Therefore, depending upon the offense for which the defendant has been convicted, the court may have very broad discretion in fixing sentence, or no discretion whatsoever.

Probation

The court also has the power to place a defendant who has been convicted of an offense not punishable by life imprisonment on probation. Probation is defined by statute as a procedure under which a person found guilty of an offense is released by the court without being committed to a state penal or correctional institution, subject to conditions imposed by the court. Probation of a defendant may be effected in one of two ways. The court may sentence the defendant, suspend the execution of the sentence, and place the defendant on probation; or the court may continue the matter for sentencing for a period of not more than two years and during that period place the defendant on probation. Once a defendant is placed on probation, he is under the control and supervision of the State Probation and Parole Board, although still under the jurisdiction of the court.

POST-TRIAL REMEDIES

After judgment has been entered, there are still several remedies open to the defendant to challenge the decision of the court. One of these is the motion for judgment of acquittal discussed earlier. The rules provide that this motion can be made after the jury has been discharged as long as it is made within a specified time after such discharge.

Another motion open to the defendant is the motion for a new trial. This motion may be made in addition to a motion for acquittal or, when it is made alone, it is deemed to include a motion for judgment of acquittal. Therefore, if the defendant moves for a new trial, the court, in granting it, may either enter a final judgment of acquittal or grant a new trial. Under the rules, a new trial may be granted by the court if it is required in the interest of justice. The usual ground for granting a new trial is the insufficiency of the evidence to support the verdict, but the Maine courts have also considered errors of law made during the trial under the motion.

Another ground for granting a motion for a new trial, which carries with it a difference in procedure, is the discovery of new evidence. The procedural difference is an extended time period during which a motion for a new trial based on the ground of newly discovered evidence may be made. The time period is two years—much longer than the period for a motion based on any other ground. The reason for this is to allow a reasonable amount of time to discover new evidence. In order to justify the granting of a motion for a new trial on the ground of newly discovered evidence, it must be shown that the new evidence will probably change the result of the trial, that it has been discovered since the trial, that it could not have been discovered before trial by the exercise of due diligence, that it is material to the issue, and that it is not merely cumulative or impeaching.

Another post-trial motion available to the defendant is the motion for arrest of judgment. This motion can only be granted if the indictment, information, or complaint on appeal from the District Court does not charge an offense or if the court was without jurisdiction of the offense charged.

Revision and Correction

Either by motion of the defendant or by motion of the court, the defendant may obtain a revision or correction of his sentence under the proper circumstances. The power to revise a sentence is granted to enable the trial court to change a sentence which is inappropriate in a particular case, even though the sentence may be legal and was imposed in a legal manner. This power to revise includes the power to increase as well as to reduce a sentence.

In contrast with the power to revise, the power to correct a setnence is granted to enable the court to change a sentence because the sentence was either illegal or it was imposed in an illegal manner. An illegal sentence might might be one which was in excess of the statutory maximum. An illegally *imposed* sentence might be one where the defendant was not personally addressed by the judge and given an opportunity to be heard before sentencing. In any case, the court must exercise both its power to revise and correct a sentence within specific time periods under the rules or the powers are lost.

Post-Conviction Habeas Corpus

If the defendant fails to move or the court fails to act to correct a sentence within the statutory period, the defendant must seek relief regarding his conviction and sentence through the civil remedy of post-conviction habeas corpus. Post-conviction habeas corpus is a relatively new procedure in Maine, replacing several previous remedies, and is now the single remedy available in the state for collateral attack on a judgment of conviction. The grounds upon which post-conviction relief may be granted are stated specifically in the rules and are as follows:

1. illegal imprisonment
2. errors of law of record
3. sentence imposed in violation of the United States Constitution
4. sentence imposed in violation of the Maine Constitution
5. errors of fact not of record which by reasonable diligence could not have been known to the accused at the time of trial and which, if known, would have prevented conviction.

The procedure for obtaining post-conviction habeas corpus relief is quite involved and will not be detailed here. Suffice it to say

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that it involves the filing of a petition by the defendant, the filing of a responsive pleading by the Attorney General, and may or may not involve a hearing, depending on whether or not the justice to whom the matter is assigned is able to make a decision on the basis of the petition and response. The alternatives open to the justice deciding the matter are to deny the petition and decline to issue the writ of habeas corpus, or to make any other appropriate order such as resentencing, remanding the defendant for resentencing, or setting aside the conviction or sentence. The order of the justice making a final disposition of the petition constitutes a final judgment of the case for purposes of appeal.

APPEAL

In Maine, a defendant has a right to appeal when he has been convicted of a crime in the Superior Court and the trial justice has denied all his post-trial motions. The court which hears the appeal is the Supreme Judicial Court, which is referred to as the *Law Court* when it exercises its appellate function.

The appeal procedure under discussion here is not to be confused with the procedure whereby a defendant appeals to the Superior Court from a misdemeanor conviction in the District Court. As discussed earlier in this article, that procedure grants a defendant the right to an entirely new trial (*trial de novo*) in the Superior Court and is designed to ensure a defendant his constitutional guarantee to a jury trial. If the defendant receives an unfavorable decision in the *trial de novo* in the Superior Court, he may then appeal to the Law Court.

The procedure for a defendant to appeal a decision of the Superior Court is quite involved and will not be detailed here. It involves the filing of a notice of appeal, the designation of the parts of the trial record to be considered on appeal, the filing of a statement of points on appeal, the filing of briefs, and the arguing of the briefs before the Law Court. If a defendant is unable to afford a lawyer to handle his appeal, provision is made in the rules for a lawyer to be appointed by the court.

Under a statute passed in 1967, the State, in certain circumstances, is given the right to appeal decisions of the Superior Court adverse to it. Previous to the enactment of this statute, the State did not have this right. The three situations in which the State may appeal from adverse rulings are as follows:

1. Adverse rulings on motions made prior to trial which terminate the proceeding, e.g., the granting of a motion to dismiss an indictment.
2. Adverse rulings on motions made prior to trial which do not treminate the proceedings but are essentially interlocutory, e.g., the granting of a motion to suppress evidence.
3. Adverse rulings of the court on a question of law when the defendant has been convicted and has himself appealed from the judgment.

The procedure for the State to appeal adverse rulings is essentially the same as it is for the defendant.

The important thing to remember about the appeal procedure to the Law Court is that it is *not* a retrial of the case, nor is it ordinarily a re-examination of factual issues. The determination of factual issues is the function of the jury or, in a non-jury case, the lower court judge. The function of the Law Court in an appeal is primarily to review the *legal* issues involved in the case. A simple example will illustrate this point.

Suppose a law enforcement officer has obtained a confession from a defendant but has forgotten to give him his *Miranda* warnings prior to a custodial interrogation. During the trial of the case, the trial judge erroneously permitted the officer who obtained the confession by means of the custodial interrogation, to read it to the jury over defense objections. The jury convicted the defendant. On appeal, the defendant argues that the trial judge committed an error of law in letting the jury hear the confession.

The appellate court, under these assumed facts, would very likely reverse the conviction on the basis of the error of law made by the trial judge. Along with reversal, the usual procedure is to remand or send the case to the trial court for a new trial with instructions to exclude the confession from the jury in the new trial. A second jury would then hear the evidence in the case, without the tainted proof, and render another verdict.

Therefore, even though a conviction is reversed on appeal, it does not necessarily mean that the defendant is acquitted and can go free. It usually means simply that the defendant has won the right to be tried again.

Final Judgment Rule

Appeals may only be taken from cases which have come to a final judgment . This means that the Law Court will not decide any legal issues nor will it review the denial of any motions until the case has been fully disposed of by the Superior Court. The reason for this rule is to prevent unnecessary delays in the conduct of trials which would result if the parties could appeal issues during the course of a trial.

There are two minor exceptions to the rule requiring a final judgment before legal issues in a case can be appealed. One of these exceptions is the *report* of cases to the Law Court. This procedure enables the Superior Court, when the defendant and the State agree, to refer certain questions of law, arising during the trial of a case, to the Law Court for decision. These questions must be of sufficient importance or doubt to require an immediate decision of the Law Court. Furthermore, a decision of the Law Court on the question must, at least in one alternative, finally dispose of the case.

Another exception to the final judgment rule on appeals is the appeal of interlocutory rulings. An *interlocutory ruling* is one which does not decide the cause, but only settles some intervening matter relating to it. Examples of interlocutory rulings would be pre-trial rulings on such matters as the suppression of evidence, change of venue, discovery, and joinder of parties. Review of such rulings may be granted on the motion of an adversely affected defendant if the trial judge determines that there is a question of law which ought to be decided by the Law Court before any further proceedings are taken. There is no requirement that the decision of the Law Court on the question of law presented has to finally determine

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the outcome of the case in either alternative.

Written Opinions

When the Law Court decides a case, it delivers a written opinion explaining and justifying the decision. In this way the higher court explains to the trial judge what errors he made and also informs the losing party to the appeal not only that he lost, but why he lost. Furthermore, the reporting of opinions in writing helps to guide the lower courts if a similar issue to the one decided should arise again in the future. The decisions of the Maine Law Court are compiled and published in a series of reported court decisions entitled the *Atlantic Reporter* which can be found in all law libraries in Maine. The summaries of these decisions are reported each month in the **Maine Court Decisions** column of the ALERT Bulletin. Copies of the full opinion for any case can be obtained by writing the Law Enforcement Education Section or calling us at 289-2146.

Appellate Review of Certain Sentences

Under a statute passed in 1964, the legislature set up a special procedure by which a defendant could have the *propriety* of his sentence reviewed by the Supreme Judicial Court. The purpose of the statute is to prevent miscarriages of justice and to ensure that uniform standards are applied in imposing sentences in criminal cases. To carry out the purposes of the statute, the legislature created a new division of the Supreme Judicial Court to be known as the Appellate Division. This new division is not to be confused with the Supreme Judicial Court sitting as the Law Court to hear appeals. The Law Court does not review the propriety of sentences except, of course, in cases of illegality. Likewise, the new Appellate Division does not review alleged errors of law in the proceedings, but only the propriety of the sentence imposed.

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This concludes our discussion of Maine Criminal Court Procedure. Hopefully, this article has provided law enforcement officers with a better understanding of some of the legal terms and procedures involved in a criminal case from the initial report of a crime to an appeal to the Law Court. Although much of the information has little direct bearing on an officer's daily duties, the article will have served its purpose if it has helped him to better perceive his role in the entire criminal justice system and the importance of the proper performance of that role to the effective and just operation of that system.

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.

Habeas Corpus; Exhaustion of State Remedies JP

Defendant was indicted as "John Doe", his real name being unknown to the Grand Jury. The indictment was amended after the defendant's arrest and his name was substituted for "John Doe". He challenged his conviction, claiming the indictment was illegal under the state statute. He then filed a petition for writ of habeas corpus in Federal District Court, which dismissed the petition, but the Court of Appeals reversed, holding that the indictment procedure was violative of equal protection.

The United States Supreme Court reversed and remanded since the petitioner-defendant had not exhausted his available state remedies as required by 28 U.S.C. §2254. The Court held that the substance of a federal habeas corpus claim must in the first instance be fairly presented to the state courts. Here the state's highest court had not been presented with the equal protection claim, therefore the petitioner had not exhaused his state remedies *Picard v. Connor*, 92 Sup. Ct. 509 (United States Supreme Court, December, 1971).

Right to Appeal; Forma Pauperis JL

Petitioners were prisoners in a Texas county jail who claimed that they were denied access to hardbound law books and other legal matter. The prison custodians answered that prison security necessitated removing hardback covers to avert smuggling. The District Court, without conducting a hearing into the matter, dismissed the complaint, and the Court of Appeals refused to docket the cases without prepayment of filing fees and security. Petitioners sought to appeal in forma pauperis, but the District Court refused leave to appeal in this form, claiming that the appeal was frivolous and not in good faith. Their application was also denied at the Court of Appeals.

The Supreme Court granted certiorari and remanded the case to the Court of Appeals so that the petitioners could have their appeal docketed without prepayment of fees as security. The stated effect of the decision is to remove the discretionary denial of proceeding in forma pauperis on appeal only because the district court judge feels the appeal is without merit if it involves fundamental civil liberties. Here, the access to law books would be considered fundamental, and thus the petitioners should be allowed to pursue their appeal in forma pauperis, irregardless of the district court judge's opinion as to the frivolity of the case. *Cruz v. Hauck*, 92S. Ct. 313 (U.S. Supreme Court, November, 1971).

Terms of Parole; Ex-Convicts as Co-Employees JPL

Petitioner's parole was revoked because of his association with other ex-convicts. Petitioner in his petition for habeas corpus denied that the record supported this conclusion. The Court of Appeals sustained the revocation on the ground that petitioner worked in a nightclub that employed other ex-convicts.

The terms of parole forbid the petitioner to "associate" with other convicts. However, the parole board's regulations require "satisfactory evidence" of parole violation to justify parole revocation. The Supreme Court ruled that incidental contacts between ex-convicts in the course of employment for a common employee was not

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violative of the parole conditions. Co-employment alone does not mean association as contemplated by parole terms, otherwise employers would be forced to hire only one parolee or suffer the loss of the other parolee to prison. The parolee's job would also be vulnerable to the chance his employer may hire another parolee. On the basis of this the Supreme Court reversed the Court of Appeals' ruling. *Arciniega v. Freeman*, 92 S. Ct. 22 (United States Supreme Court, October, 1971).

Appeal—Indigence JP

Defendant was convicted in District Court for smuggling marijuana while represented by a privately retained counsel. He appealed to the Court of Appeals which affirmed the conviction. After this appeal the private counsel withdrew because defendant was without funds. The Court of Appeals then denied the defendant's pro se motion for appointment of counsel to assist in preparing petition for writ of certiorari. Apparently the basis for denying the motion is a Court of Appeals rule that an *appointed* counsel after an adverse decision in that court must inform his indigent client of his right to appeal and prepare a petition for certiorari. Because this rule is designed for indigents with appointed counsel, the Court of Appeals must have felt that this was of no benefit to the defendant.

The Supreme Court vacated and remanded the case in order that the Court of Appeals may give further consideration to the request for counsel, while granting the defendant's motion for leave to proceed in forma pauperis. The decision of the Supreme Court was based upon the provisions of the Criminal Justice Act which provide for appointed counsel to help a federal prisoner in seeking certiorari to the Supreme Court. *Doherty v. United States* 92 Sup. Ct. 175 (United States Supreme Court, November, 1971).

Double Jeopardy, Identification Adjudicated JPL

Defendant was tried for the bombing death of only one victim, although his son had been killed and wife severly injured by the blast. He was acquitted, but immediately re-arrested on informations charging murder of the son and assault upon the wife. The defendant pled former jeopardy and collateral estoppel, and moved to dismiss. The trial court denied the motion and struck the defenses. The State Court of Appeals sustained the defendant's appeal, finding that the record demonstrated that the retrial of the defendant would require relitigation of the same fact—whether it was defendant who had mailed the bomb. The Supreme Court of the state reversed, holding that a ruling on the admissibility of evidence had resulted in the acquittal and because the court felt the evidence was admissible, the issue of the identity of the bomber had not been fully litigated.

The U.S. Supreme Court took jurisdiction since a constitutional issue was presented—the second trial of a defendant charged with the same offense. The Court cited *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed 2d 469 which held that collateral estoppel in criminal trials is an integral part of the protection against double jeopardy guaranteed by the 5th and 14th Amendments. Since the issue of identity was decided by the jury at trial, the consitutional guarantee applies, irrespective of whether the jury had considererd all the evidence. *Harris v. Washington*, 92 S. Ct. 183. (United States Supreme Court, November, 1971).

Search and Seizure; Automobile Without a Warrant L

Defendant was convicted of grand theft and burglary and appealed claiming an illegal search and seizure. Officers in patrol cars had received information over the radio that eyewitnesses had observed unusual after-hours activity at a shopping center and that a maroon colored automobile was near the scene. A few minutes later, officers spotted a maroon car in the area and stopped it for investigation. Several suits of clothes were observed in plain view in the back seat. The officers then made a warrantless search of the trunk and found more evidence.

The Court approved of the search of the trunk of the car.

> "Under *Chambers v. Maroney*, 399 U.S. 42, . . . the warrantless search was justified. The police officers had probable cause to search the vehicle, and they were confronted with the alternative of having to seize the car and hold it until a search warrant could be obtained or searching the car without a warrant. Given these circumstances, warrantless searches of automobiles are justified regardless of whether or not the searches are 'incident to arrest'." *Dyson v. People*, 488 P. 2d 1096, 1097, (Supreme Court of California, September, 1971).

Search and Seizure; Deceased Victim on Premises J P L

Defendant was convicted of aggravated assault and appealed claiming among other things an illegal search and seizure. Defendant's wife was found dead in the mobile home in which they lived together. Defendant was immediately arrested and taken to the police station. About two hours later, a police officer went back to the mobile home and, without a warrant, searched the premises and seized several items. He could have easily obtained a warrant if he had tried.

The Court said that the search could not be justified as incident to a lawful arrest because defendant was already in custody. Nor could it be supported by exigent circumstances or the necessity of preserving destructible evidence.

Nevertheless, the Court found the search to be permissible.

> "The traditional right of citizens to be free from unreasonable searches and seizures and unreasonable and unnecessary invasions of their privacy is not violated when the premises upon which a deceased victim is found are searched without a warrant. The need for all citizens and particularly potential victims such as this to effective protection from crime, particularly while in their own home, would indicate that a warrantless search of the premises is not made unreasonable or unconstitutional by the fact that the defendant exercises joint control over the premises. *State v. Sample*, 489 P.2d 44 (Supreme Court of Arizona, September, 1971)

Miranda; Consent Search J P L

Defendant was arrested for passing counterfeit money. He appealed a denial of his motion to suppress certain evidence taken from his home. After his arrest, defendant was jailed and given the

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Miranda warnings. He waived his *Miranda* rights and spoke with Secret Service Agents for two hours. At a subsequent interrogation, however, he exercised his right of silence and later, at a commissioner's hearing, asked for an attorney. After this hearing, the agents asked defendant for consent to search his home which he eventually gave in writing. Incriminating evidence was found by the agents in the defendant's home.

The Court held that the search of defendant's home violated his *Miranda* rights.

> "The very purpose of the *Miranda* warning (sic) are to permit a defendant to refuse further interrogation and to enable him to obtain legal advice as to his rights. The interrogating officers, in any case, when a defendant so expresses himself and lodges such a request, should not continue interrogation nor seek further to procure consensual admissions from him, whether in the form of confessions, consents to search, waiver of privilege or otherwise." *U. S. v. Fisher*, 329 F. Supp. 630, 634 (U. S. District Court, Minnesota, July, 1971)

COMMENT:

This case extends the meaning of the Miranda *decision. Once an individual exercises his* Miranda *right to counsel, he may neither be questioned further nor may any other kind of consent or waiver be obtained from him until he has obtained counsel.*

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.

Dying Declarations JPL

Defendant was convicted of manslaughter and appealed. He claimed that certain dying declarations of the victim, his wife, should have been excluded from evidence. These dying statements were made after the wife had been transported from the crime scene to the hospital and referred to the fact that defendant had tried to stab her twice before.

The Court held that dying declarations, in order to be admissible, had to be an integral part of the circumstances immediately attending the homicide and forming a part of the *res gestae*. A declaration as to a previous transaction was inadmissible. Because testimony relating to these dying declarations was particularly damaging to defendant, his main defense being accident, the Court granted defendant a new trial. *State v. Chaplin*, 286 A.2d 325, (Supreme Judicial Court of Maine, January, 1972).

Instructions to Jury J

Defendant was convicted of breaking and entering in the nighttime and appealed. The basis of his appeal was alleged errors in the instructions to the jury at trial. Defendant claimed that in giving an instruction relating to the alibi defense, the judge conveyed to the jury that the burden was on the defendant to prove his alibi. Defendant also claimed that the judge failed to give an instruction that the testimony of an accomplice is to be viewed with caution and carefully scrutinized.

As to the first claim, the Court held that the judge's instruction was not improper and did not shift the burden of proof to the defendant. The judge had stated specifically that the State had to prove the defendant was at the scene of the crime. Furthermore, in explaining the nature of alibi evidence, the judge said "Does it create in your mind a reasonable doubt as to his guilt? It is for you to say."

As to the second claim of defendant, the Court said that the defendant is entitled to a cautionary instruction with respect to an accomplice's testimony if he requests it. However, failure to give it when not requested was not such an obvious error or defect as to affect substantial rights of the defendant. Here, defendant's attorney neither requested this instruction nor did he object to the instructions given before the jury retired to consider its verdict. *State v. Jewell*, 285 A.2d 847 (Supreme Judicial Court of Maine, January, 1972).

Trial; Defendant's Right to be Present J

Defendant was convicted of sodomy and appealed. There were many points raised on appeal, only one of which is important enough to mention here. During the trial, a hearing was held in the judge's chambers without the presence of the jury to resolve certain legal issues. The defendant was not present at this hearing though he was represented by his attorney. Defendant argued that he was unconstitutionally deprived of his right to be present at every stage of his trial.

The Court decided that defendant's absence during the hearing did not deprive him of his constitutional right to be present.

> "A defendant has the absolute right to hear everything the jury hears. He does not have 'a right' to be present when, outside the presence of the jury, discussion is had only concerning questions of law to which discussions the defendant could be expected to add little." *State v. White*, 285 A.2d 832, 835-36, (Supreme Judicial Court of Maine, January, 1972).

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.

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