MAY, 1972

ALERT

CRIMINAL DIVISION

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

CONSENT SEARCHES II

SCOPE OF CONSENT SEARCHES

There are several limitations to the scope or extent to which a law enforcement officer can conduct a search by consent. One of the most obvious of these limitations is that, although there may be a valid consent in all respects to an officer's request, it may not be a consent to **search** at all. The best example of this is the situation where an officer is permitted to **enter** someone's home in compliance with his request for an interview. This does **not** automatically give the officer a right to search the place. There is a vital distinction between the granting of admission to one's home for the purposes of conversation and the granting of permission to thoroughly search the place.

In a case illustrating this principle, officers investigating a murder knocked on defendant's hotel room door and were invited in by defendant. The defendant was not advised that they were police officers nor was any request made by them to search his room. Nevertheless, a search was conducted and incriminating evidence found.

The court held that the invitation to enter his room, extended by defendant to the person who knocked on the door, did not constitute a consent to search his room. Quoting from another case, the court said:

> "To justify the introduction of evidence seized by a police officer within a private residence on the ground that the officer's entry was made by invitation, permission, or consent, there must be evidence of a statement or some overt act by the occupant of such residence sufficient to indicate his intent to waive his rights to the security and privacy of his home and freedom from unwarranted intrusions therein. An open door is not a waiver of such rights . . ." *Duncan v. State*, 176 So. 2d 840, 853 (Supreme Court of Alabama, 1965)

"Plain View"

However, the fact that an invitation to enter premises is not the equivalent of a consent to search the premises does not mean that an officer must ignore contraband or other criminal evidence lying in plain view. Under the "plain view" doctrine, as long as an officer is in a position in which he has a legal right to be, he may seize any criminal evidence which is lying open to view.

In a case originating in Maine, officers were investigating a robbery and preliminary information led them to suspect a man named Albert. The officers went to Albert's apartment, knocked on the door, identified themselves, and were invited into the apartment by Albert's opening the door and walking back into the room. The defendant was present in the apartment as a guest of Albert. While talking to the two men, the officers noticed various objects fiting the description of items stolen in the robbery lying in plain view. They arrested the two men and seized the evidence observed.

The court held that the evidence seized was admissible against the defendant. Because the officers were rightfully in the room by Albert's invitation, they were also rightfully there with respect to defendant. Seeing what was patently and obviously open to view was therefore not a search, and seizing the evidence was not a violation of defendant's rights. *Robbins v. Mackenzie*, 364 F. 2d 45 (1st Circuit Court of Appeals, 1966).

Area of Search

Assuming, however, that an officer is able to obtain a valid consent not just to **enter** premises, but consent to actually **search** those premises, there may still be limitations on the scope or extent of the search. One such limitation relates to the bounds of the area to be searched. Although it is impossible to give operational guidelines as to how large an area a law enforcement officer may search after obtaining a person's consent, in general it can be said that it depends on the words or actions used by the person giving the consent.

Thus, in a case where an officer had received permission to "look around" an apartment, the court held that this did not authorize the officer to open and search boxes and suitcases which he had been informed were the property of persons other than the person giving consent. In other words, an officer can only search those parts of premises over which the person giving consent has some possessory right or control, and not personal property which he knows belongs to some other person. *People v. Cruz*, 395 P. 2d 889 (Supreme Court of California, 1964). In another case, where a valid consent was given to officers to search the trunk of a car, the court held that this consent did not extend to a search of the passenger area of the car and that evidence found in the passenger area was inadmissible in court. *State v. Johnson*, 427 P. 2d 705 (Supreme Court of Washington, 1967).

Furthermore, the limitation on the area of search allowed by con-

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sent applies equally to searches of the person as to premises. For example, in a case where an individual consented to a search of his person for **weapons,** it was held that this did not constitute a consent to conduct a general exploratory search of his person. Incriminating evidence seized was held inadmissible in court. *People v. Rice*, 66 Cal. Rptr. 246 (Supreme Court of California, 1968).

In a particularly interesting case involving both a non-verbal consent and a limitation on the area of the person allowed to be searched by consent, a police officer, while questioning the defendant with regard to narcotics asked him whether he was still using or carrying narcotics. When defendant replied that he was not the officer asked him if he minded if he checked him for needle marks. Defendant said nothing but put his arms out sideways. The officer did not check defendant's arms but instead patted down defendant's coat and found marijuana cigarettes.

The court held that the search went beyond the area to which the defendant had consented to allow a search.

> "Bowens' putting out his arms sideways in response to a query whether he minded allowing the officer to check 'if he had any marks on him' could hardly be said to be naturally indicative or persuasive of the giving of an intended consent to have the officer switch instead to a general search of his pockets-in which he had two marijuana cigarettes." *Oliver v. Bowens*, 386 F. 2d 688, 691 (9th Circuit Court of Appeals, 1967).
> peals, 1967).

It would seem then, as a general rule, that if an officer asks for and obtains a consent to search a specific area, whether in a place or on a person, the officer is limited to that specific area. If he goes beyond it, any evidence he seizes is likely to be held inadmissible in court.

Time

Another limitation on the scope of a search by consent relates to the length of time over which the consent is valid. A Maine case, *State v. Brochu*, illustrates this limitation well. In that case, officer's were investigating the death of defendant's wife and they obtained a valid consent from the defendant to search his home. The officers conducted a search and found nothing. At this point in time, defendant had not been accused of anything. However, later in the day, police received information giving them probable cause to arrest the defendant for his wife's murder and to obtain a search warrant for his premises. Defendant was arrested that evening but the search warrant could not be executed at that time because it ran only in the daytime. Therefore, officers went back the next day with the search warrant and found certain incriminating evidence.

Since there was some question as to the validity of the warrant, the State attempted to justify this second search on the basis that the defendant's earlier consent continued in effect, after his arrest, to the next day. The court rejected this contention with the following reasoning:

> "The officers entered the defendant's home on the 5th under the protection of his consent. By nightfall, however, the defendant had ceased to be the husband assisting in the solution of his wife's death and had become the man accused of his wife's murder by poison (and) held under arrest for hearing. When the defendant became the accused, the protective cloak of the Constitution became more closely wrapped around him . . . The consent of December 5 in our view should be measured on the morning of the 6th by the status of the defendant as the accused. There is no evidence whatsoever that the consent of the 5th was ever discussed with the defendant at or after his arrest, or that he was informed of the State's intent to enter and search his home on the 6th on the strength of a continuing consent. We conclude, therefore, that consent of the defendant had ended by December 6, and accordingly the officers were not protected thereby on the successful search of the 6th." *State v. Brochu*, 237 A. 2d 418, 421 (Supreme Judicial Court of Maine, 1967).

It is recommended then, that once an officer performs a consent search and stops it for whatever reason, if he desires to conduct a search of the same place or person the next day or later the same day he should obtain a new consent from the person involved. This would be especially true in cases where intervening events, such as the arrest of the consenting person, suggest that a second consent might not be given so readily as the original consent.

Revocation of Consent

Although there is some disagreement on the question, the prevailing view appears to be that consent, once given, may be withdrawn at any time after the search has been partially completed. A case illustrating this principle involved a police officer investigating a defendant who was parked at a late hour in a high arrest area of town. The defendant consented to the officer's looking around inside his vehicle. After doing so, the officer asked to look in defendant's trunk. Defendant also initially consented to this. However, after the officer had spent some time looking in the trunk, the defendant felt he was being harassed and he told the officer to stop. The officer did not stop at this time and later found contraband in the trunk.

The court held that the defendant had withdrawn his consent and that the evidence found after the withdrawal was inadmissible in court.

> "Neither do we find any reason to hold that a consent, once given, may not be withdrawn. It is true that the contrary view has been expressed . . . We do not believe that this is the present law, particularly in view of the explicit statement in the *Miranda* case that a defendant consenting to answer police questioning without a lawyer may withdraw such waiver at any time. We see no reason, in this respect, to distinguish between withdrawal of waiver of legal representation during investigation and withdrawal of consent to search once given." *People v. Martinez*, 65 Cal. Rptr. 920, 922 (Appellate Department, California Superior Court, 1968).

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WHO MAY GIVE CONSENT

In general, the only person who is able to give a valid consent to a search is the person whose constitutional protection against unreasonable searches and seizures would be invaded by the search if it were conducted without consent. This means, for example, that where the search of an individual's body or clothing is contemplated, the only person who can consent to such a search is the individual himself. The same rule applies to searches of premises except that because several people may have varying degrees of interest in the same premises, more than one person may be qualified to give consent to search. Furthermore, in certain situations, the law recognizes authority in a third person to consent for the person with the primary interest in the property in his absence. Since questions of who may give valid consent are often confusing and complicated and since courts tend to carefully scrutinize any waiver of a person's constitutional rights, it is worthwhile to examine some examples of consent search situations where the person giving consent is not the person against whose interests the search is being conducted.

Persons Having Equal Rights or Interests in Property

It is well settled that when two or more persons have substantially equal rights of ownership, occupancy, or other possessory interest in premises to be searched or property to be seized, any one of such persons may legally authorize a search and seizure thereof, and thereby bind the others and waive their right to object. An example is a case where police obtained a valid consent to search a defendant's apartment from a co-defendant in a case involving a break into a bank. The co-defendant who gave the consent was living with the defendant at the time and evidence showed that he had a right to use and occupy the premises. The police found evidence incriminating the defendant in the apartment.

The court held that the co-defendant, being a joint tenant or resident of the apartment, could consent to the entry and search of the apartment.

> "This court and other courts have held that where there are multiple lawful residents of a premises, any one of such persons may give permission to enter and that if incriminating evidence is found, it may be used against all." *Wright v. U.S.*, 389 F. 2d 996, 998 (8th Circuit Court of Appeals, 1968).

In determining whether a person is a joint occupant of premises, courts will look to such factors as payment of rent, length of stay, whether the person left his belongings on the premises, whether the person possessed a key, and whether there was any written or oral agreement among other parties as to the person's right to use and occupy the premises.

Another case which illustrates the same principle, only applied to personal property, is the U.S. Supreme Court case of *Frazier v. Cupp*. In that case, the defendant, at his murder trial, objected to the introduction into evidence of clothing seized from his duffel bag At the time of the seizure, the by the defendant and his cousin and had been left in the cousin's home. When police arrested the cousin, they asked him if they could have his clothing. The cousin directed them to the duffel bag and both the cousin and his mother consented to its search. During the search, the officers came upon defendant's clothing in the bag and it was seized as well.

The Court upheld the legality of the search over defendant's objections.

> "Since Rawls (the cousin) was a joint owner of the bag, he clearly had authority to consent to its search. The officers therefore found evidence against petitioner while in the course of an otherwise lawful search. (*plain view doctrine*) . . . Petitioner argues that Rawls only had actual permission to use one compartment of the bag and that he had no authority to consent to a search of the other compartments. We will not, however, engage in such metaphysical subtleties in judging the efficacy of Rawl's consent. Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside. We find no valid search and seizure claim in this case." *Frazier v. Cupp*, 394 U.S. 731, 740 (U. S. Supreme Court, 1969)

Landlord-Tenant

A landlord has **no** implied authority to consent to a search of a tenant's premises or a seizure of his property during the period of the tenancy. This rule holds true even though the landlord has the authority to enter the tenant's premises for the limited purposes of inspection or for performance of repairs or housekeeping services. *Chapman v. U. S.*, 81 S. Ct. 776 (U. S. Supreme Court, 1961). However, once the tenancy has terminated, and the landlord has the primary right to occupation and control of the premises, the landlord may consent to a search of the premises. Furthermore, the landlord's consent will be valid after the termination of the tenancy even though the former tenant has left personal belongings on the premises. *People v. Urfer*. 79 Cal. Rptr. 60 (Court of Appeal of California, 1969)

Hotel Employee—Hotel Guest

The U. S. Supreme Court has held that the principles governing a landlord's consent to a search of tenant's premises apply with equal force to consent searches of hotel (and motel) rooms allowed by hotel employees. In the case of *Stoner v. California*, police were investigating a robbery and they went to the defendant's hotel. The defendant was not in his room and police obtained permission from the hotel clerk to search the room. Items of evidence incriminating the defendant in the robbery were found in the room.

The Court held that the search was illegal and that the items seized could not be used against the defendant in court. The defendant's constitutional right was at stake here—not the clerk's or the hotel's. Therefore, only the defendant, either directly, or through an agent, could waive that right. There was no evidence that the police had any basis whatsoever to believe that the night clerk had been authorized by the

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defendant to permit the police to search his room.

> "It is true, . . . that when a person engages a hotel room he undoubtedly gives 'implied or express permission' to 'such persons as maids, janitors or repairmen' to enter his room 'in the performance of their duties' . . . But the conduct of the night clerk and the police in the present case was of an entirely different order . . .
> No less than a tenant of a house . . a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures . . . That protection would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel." *Stoner v. California*, 376 U.S. 483, 489-90 (U. S. Supreme Court, 1964).

Host—Guest

A different situation is presented when the person against whom a search for evidence is directed is merely a guest on the premises of his host and the host consents to a search of the premises. Here, courts have generally held that the host or primary occupant of the premises may give a valid consent to a search of the premises and any evidence found would be admissible against the guest. An example is a case where a lady householder had "taken in," without payment of rent, her grandnephew and another young man. While she was tidying up her home, she found a loaded pistol and other items which caused her to be alarmed. She called the police and gave them permission to search the premises. The incriminating evidence found by the police as a result of this consent search was held admissible in court over the objections of the guests. *Woodard v. U. S.*, 254 F. 2d 313 (District of Columbia Court of Appeals, 1958).

However, if the person against whom the search for evidence is directed is a long-term guest and has a section of the premises set aside exclusively for his own use, the consent of the host may not be effective to authorize a search. *Reeves v. Warden*, 346 F. 2d 915 (4th Circuit Court of Appeals, 1965). The question of whether a host may consent to a guest's premises turns then on such factors as the length of time of the guests stay, the exclusiveness of his control of a particular area of the premises, and his reasonable expectation of privacy in that area of the premises.

Employer-Employee

In general, an employer may consent to a search of any part of the employer's premises that is used by an employee. Thus, it has been held that a search of an employee's locker in his employer's plant was legal upon the consent of the employer. The court in that case considered the fact that the employer owned the property, and under the terms of the contract between the employer and the employee's union, the employer retained a master key to all employee lockers. *State v. Robinson*, 206 A. 2d 779 (Superior Court of New Jersey, 1965).

However, in situations where the employer does not retain such control over the premises, he may not effectively consent to a search of an area used by an employee. For example, a leading case in this area held that the official superior of a government employee who was assigned a desk for her exclusive use could not validly consent to the search of the employee's desk. The court's reasoning was as follows:

> "In the absence of a valid regulation to the contrary, appellee was entitled to, and did keep private property of a personal sort in her desk. Her superiors could not reasonably search the desk for her purse, her personal letters, or anything else that did not belong to the government and had no connection with the work of the office. Their consent did not make such a search by the police reasonable." *U.S. v. Blok*, 188 F. 2d 1019 (District of Columbia, Court of Appeals, 1951).

Courts have generally held that the reverse situation—whether an employee can consent to the search of his employer's premises— depends upon the scope of the employee's authority. Generally, the average employee, such as a clerk, janitor, handyman, driver, or other person temporarily in charge, may not give such consent. *U. S. v. Block*, 202 F. Supp. 705 (U. S. District Court, S. D. New York, 1962). However, if the employee is a manager or other person of considerable authority who is left in complete charge for a substantial period of time, then it is likely that he would be able to effectively consent to a search of his employer's premises. *U.S. v. Antonelli Fireworks Co.*, 155 F. 2d 631 (2nd Circuit Court of Appeals, 1946).

School Official—Student

Situations often arise in which a high school or college administrative official consents to law enforcement authorities' searching of lockers or rooms of students for various reasons. The high school situation usually involves lockers and the college situation dormitory rooms. Courts have treated the two differently.

Courts have generally held that the search of a high school student's locker, when authorized by a school official, is valid because of the relationship between the school authorities and the students. The school authorities are held to have an obligation to maintain discipline over students and usually they retain partial access to the students' lockers so that neither has an exclusive right to use and possession of the lockers. Thus, in a case where the locker of a student suspected of burglary was opened by police with the consent of school authorities and incriminating evidence found, the court said,

> "Although a student may have control of his school locker as against fellow students, his possession is not exclusive against the school and its officials. A school does not supply its students with lockers for illicit use in harboring pilfered property or harmful substances. We deem it a proper function of school authorities to inspect the lockers under their control and to prevent their use in illicit ways or for illegal purposes. We believe this right of inspection is inherent in the authority vested in school administrators and that the same must be retained and exercised in the management of our schools if their educational functions are to be maintained and the welfare of the student bodies preserved." *State v.*

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Stein, 456 P. 2d 1, 3 (Supreme Court of Kansas, 1969).

The courts have come to a different result when college dormitory rooms are the subject of the search. In these cases, the courts stress the fact that a search cannot be based on the college's authority to maintain discipline over young students. *People v. Cohen*, 292 N.Y.S. 2d 706 (District Court of New York, 1968). Also, even though a college may reserve the right to enter the rooms of students for inspection purposes, such a regulation cannot be applied so as to give consent to a search for evidence for the primary purpose of criminal prosecution. *Piazzola v. Watkins*, 442 F. 2d 284 (5th Circuit Court of Appeals, 1971). Therefore, in a case where police with the aid of the Dean of Men searched the defendant's room at a university and found marijuana, the evidence was held to be inadmissible in court. Even though the university had the right to check the room for damages, wear and unauthorized appliances, this did **not** mean that the defendant "was not entitled to have a 'reasonable expectation of freedom from governmental intrusion', or that he gave consent to the police search, or gave the University authority to consent to such search." *Commonwealth v. McCloskey*, 272 A. 2d 271, 273 (Superior Court of Pennsylvania, 1970).

Attorney—Client

Consent given by a defendant's attorney, when duly authorized to do so, makes an ensuing search of the defendant's premises lawful. Thus, in a case where a calf and a cow were seized from defendant's property and evidence relating thereto introduced against him in court, it was held that the search and seizure were legal because consent to search had been given by defendant's attorney after consulting with defendant. *Brown v. State*, 404 P. 2d 428 (Supreme Court of Nevada, 1965).

Husband—Wife

Although there is some disagreement on the issue, it is generally held that one spouse may consent to a search of family premises on the basis that husband and wife are joint occupants with equal rights in the premises. An example of this is a case where officers were investigating a murder and questioned a suspected defendant's wife in regard to it. The wife volunteered information that defendant had fired a pistol into the ceiling of their home some time ago. She later validly consented to officers searching for and seizing the bullet in the ceiling, which was used as evidence in convicting defendant.

The court sustained the search on the basis that the consent was voluntary, the place of the search was the home of defendant's wife, and the premises were under the immediate and complete control of the wife at the time of the search. Furthermore, the bullet could not be considered a personal effect of the husband, over which the wife would have no power to consent to search.

It is important to note the underlying rationale of the court's decision that the wife could consent to a search of the family premises.

> "It is not a question of agency, for a wife should not be held to have authority to waive her husband's constitutional rights. This is a question of the wife's own rights to authorize entry into premises where she lives and of which she had control." *Roberts v. U. S.*, 332 F. 2d 892 (8th Circuit Court of Appeals, 1964).

A similar situation was presented in the recent U. S. Supreme Court case of *Coolidge v. New Hampshire*. In that case, two officers went to the defendant's home, while he was at the police station under investigation for murder, in order to check out his story with his wife. While there, the officers asked the wife if defendant owned any guns, and she replied, "Yes, I will get them in the bedroom." She then took four guns out of a closet and gave them to the officers. The officers then asked her what her husband had been wearing on the night in question, and she produced several pairs of trousers and a hunting jacket. The police seized all this evidence, and it was used against the defendant in court.

The Court found no objection to the introduction of the above described evidence in court. In fact the Court found that the actions of the police did not even amount to a search and seizure. Because the Court discusses in detail the significance of the actions of the police, and because of the importance of the issue, it is worthwhile here to quote the Court's opinion at length.

> ". . . it cannot be said that the police should have obtained a warrant for the guns and clothing before they set out to visit Mrs. Coolidge, since they had no intention of rummaging around among Coolidge's effects or of dispossessing him of any of his property. Nor can it be said that they should have obtained Coolidge's permission for a seizure they did not intend to make. There was nothing to compel them to announce to the suspect that they intended to question his wife about his movements on the night of the disappearance or about the theft from his employer. Once Mrs. Coolidge had admitted them, the policemen were surely acting normally and properly when they asked her, as they had asked those questioned earlier in the investigation, including Coolidge himself, about any guns there might be in the house. The question concerning the clothes Coolidge had been wearing on the night of the disappearance was logical and in no way coercive. Indeed, one might doubt the competence of the officers involved had they not asked exactly the questions they did ask. And surely when Mrs. Coolidge of her own accord produced the guns and clothes for inspection, rather than simply describing them, it was not incumbent on the police to stop her or avert their eyes. (403 U.S. 443, 448-49)

In assessing the claim that this course of conduct amounted to a search and seizure, it is well to keep in mind that Mrs. Coolidge described her own motive as that of clearing her husband, and that she believed that she had nothing to hide. She had seen her husband himself produce his guns for two other policement earlier in the week, and there is nothing to indicate that she realized that he had offered only three of them for

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inspection on that occasion. The two officers who questioned her behaved, as her own testimony shows, with perfect courtesy. There is not the slightest implication of an attempt to coerce or dominate her, or for that matter, to direct her actions by the more subtle techniques of suggestion that are available to officials in circumstances like these. To hold that the conduct of the police here was a search and seizure would be to hold, in effect, that a criminal suspect has constitutional protection against the adverse consequences of a spontaneous, good-faith effort by his wife to clear him of suspicion." (403 U. S. 443, 449-50)

Parent—Child

A parent's consent to search premises owned by the parent will be effective against a child who lives on those premises. In this context, one court has said,

> "Hardy's father gave his permission to the officers to enter and search the house and the premises *which he owned* and in which his son lived with him. Under the circumstances presented here the voluntary consent of Hardy's father to search *his own* premises is binding on Hardy and precludes his claim of violation of constitutional rights." *Commonwealth v. Hardy*, 223, A.2d 719., 723 (Supreme Court of Pennsylvania, 1966).

However, the reverse of this rule would not be true. Thus, a minor living in the home probably cannot give a valid consent to a search of the parental home in the absence of his parents. *May v. State*, 199 So. 2d 635 (Supreme Court of Mississippi, 1967).

Bailor—Bailee

A bailee of personal property may consent to its search if he has full possession and control of the property. (A bailee is a person in rightful possession of personal property by permission of the owner or bailor). One example of this situation is the case of *Frazier v. Cupp* discussed earlier. Another example involved a defendant who loaned his car to a friend for his personal use. Police, who were investigating a theft, asked the friend for permission to search the trunk of the car. The friend opened the trunk and the police found incriminating evidence against the defendant.

The court held that the search was legal and that the evidence found was admissible against the defendant. The friend had been given rightful possession and control over the automobile and could do with it whatever was reasonable under the circumstances. The defendant had reserved no exclusive right to the trunk when he gave his friend the key. The friend's opening of the trunk for the police, then, was a reasonable exercise of his control over the car for the period during which he was permitted to use it. *U. S. v. Eldridge*, 302 F. 2d 463 (4th Circuit Court of Appeals, 1962).

However, if the person giving consent has only limited custody over the property, such as for shipment or storage purposes, evidence found by law enforcement officers would not be admissible in court against the owner of the property. Thus an airline could not consent to the search of a package which defendant had wrapped and tied and delivered to the airline solely for transportation purposes. *Corngold v. U. S.*, 367 F. 2d 1 (9th Circuit Court of Appeals, 1966). Nor could the owner of a boat who had agreed to store certain of defendant's items on his boat, give a valid consent to police to search and seize the items. *Commonwealth v. Storck*, 274 A. 2d 362 (Supreme Court of Pennsylvania, 1971).

SUMMARY

Because consent to search may often be obtained by law enforcement officers with little effort, courts tend to look very closely at the circumstances surrounding the giving of consent. The courts exercise a strong presumption against such a waiver of constitutional rights and they place a heavy burden on prosecutors to prove that a consent to search was validly obtained. Therefore to ensure that consent searches are validly obtained, the following requirements are briefly set out to guide law enforcement officers.

1. A person must be aware of his right to refuse to consent to a search. If the person is unaware of this right, he should be so informed. A simple warning like the one cited in the April 1972 ALERT article would suffice for this purpose.

2. Consent to search must be given freely and voluntarily. Officers should not use force or otherwise coerce or deceive the person into giving his consent. Also, officers should document the words or actions used by the person in giving his consent, as they may be important later in determining the voluntariness of the consent. Especially important are any indications of cooperation with officers.

3. Consent to search must be clear and explicit. The best way an officer can ensure that this requirement is met is to use the **Consent to Search** form set out in the April 1972 ALERT.

4. The scope of a consent search may be limited in both area and time. These limitations are usually determined by the intent of the consenting person as indicated by his words or actions. An officer should carefully determine the extent of his authority to search before beginning. Moreover, consent to search may be revoked by the person giving it at any time.

5. The Constitutional right to refuse to consent to a search is a personal right of the individual against whom the search is directed. A third person will not be able to effectively waive that person's right unless 1) he has been specifically authorized to do so, or 2) he has an equal or superior interest in the premises or property to be searched.

ALERT

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

FROM THE LEGISLATURE

The 105th Maine State Legislature met in Special Session during the months of January, February and March of 1972. They passed several bills relating to the Criminal Justice System in Maine. We will summarize the more important bills and also mention two important bills that were not passed. It will not be necessary in every instance to quote the wording of each bill verbatim. However, where the wording is essential, the full text will be included.

The following bills were passed by the Special Session of the Maine State Legislature and have become law. Chapter references are included for those who wish to read the bills in their entirety.

AN ACT Providing for a Full-Time Attorney General (Chapter 550)

This bill provides that the office of Attorney General of the State of Maine shall be a full-time job rather than part-time as it has been previously. The Attorney General will receive a higher salary and will not be allowed to engage in the private practice of law during his term of office. The purpose of the bill is to enable the Attorney General to devote full time to his duties as such. The effective date of this act is January 3, 1973.

AN ACT Providing Funds to Carry Out Duties of the Criminal Division of the Department of the Attorney General (Chapter 166)

AN ACT to Provide Funds to Assist County Attorneys in the Administration of the Court System (Chapter 180)

AN ACT to Appropriate Moneys for the Expenditures of State Government and Other Purposes for the Fiscal Years Ending June 30, 1972 and June 30, 1973. (Chapter 179)

The above three bills will be considered together because they all involve appropriations for the operation of the Attorney General's office. The first mentioned bill provides funds for the addition of three trial attorneys and two secretaries to the Criminal Division in order to properly handle the increased case load of murder prosecutions and investigations. The second mentioned bill provides funds for the related purpose of relieving the heavy case-loads of county attorneys. The funds will be used to supply coordinated prosecutive assistance to the county attorneys throughout the State upon request by the respective county attorneys. The third mentioned bill provides funds "to be utilized at the discretion of the Attorney General, for use in the detection or apprehension, or both, of persons involved in illegal drug activity." All three bills went into effect immediately upon passage.

AN ACT Relating to Penalty for Sale of Certain Drugs (Chapter 621)

This bill amends several sections of the Drug Laws in Title 22 of the Maine Revised Statutes Annotated. It also adds several sections to it. The changes will take effect on June 9, 1972.

Because of the importance of the changes, each section of Title 22 affected by this bill will be set out in full below. All new material will be set in bold type.

22 M.R.S.A. § 2212-C. Selling of certain hallucinogenic drugs.

Whoever, except the laboratory of the Department of Health and Welfare, delivers, barters, gives or furnishes any of the substances listed in section 2212-B shall upon conviction thereof be punished by a fine of not more than $3,000 or by imprisonment for not more than 10 years, or by both for the first offense; and for a 2nd or subsequent offense, by imprisonment for not less than 2 years nor more than 10 years for which the imposition or execution of such sentence shall not be suspended and probation shall not be granted.

22 M.R.S.A. 2212-E. Selling of certain hallucinogenic drugs.

Whoever, except the laboratory of the Department of Health and Welfare, sells any of the substances listed in section 2212-B shall upon conviction thereof be punished by not less than one nor more than 5 years imprisonment and by a fine of not more than $1,000 for the first offense; and for a 2nd offense by not less than 5 nor more than 10 years imprisonment and by a fine of not more than $5,000; and for a 3rd or subsequent offense by not less than 10 nor more than 40 years imprisonment and by a fine of not more than $10,000. The imposition or execution of sentences for conviction of violation of this section shall not be suspended and probation shall not be granted.

COMMENT: The effect of these two sections is to remove the sale of certain hallucinogenic drugs from the provisions of section 2212-C and to create new and stiffer penalties for sale under 2212-E. (The hallucinogenic drugs referred to in these sections are too numerous to mention but include substances commonly known as LSD and STP. For a complete listing of substances, section 2212-B, as amended in 1971, should be consulted.)

22 M.R.S.A. 2210. Sale of Barbiturates. It shall be unlawful for any person, firm or corporation to sell, furnish or give away, or have in possession, any drug bearing on its container the legend "Caution-Federal law prohibits dispensing without prescription," any veronal or barbital, or any other salts, derivatives or compounds of barbituric acid, or any registered, trademarked or copyrighted preparation registered in the United States Patent Office containing the above substance, or any drug designated by the board as a "potent medicinal substance" pursuant to section 2201, **or have in possession, furnish or give away, or offer to give away amphetamines or derivatives or compounds thereof,** except upon the written order or prescription of a physician, surgeon, dentist or veterinary surgeon. These provisions shall not apply to the possession, sale, furnishing or giving away, or the offering to sell, furnish or give away such drugs, by drug jobbers, drug wholesalers and drug manufacturers and their agents and employees to registered pharmacists and the pharmacies registered under Title 32, section 2901, nor to physicians, dentists, vetinary surgeons or hospitals, nor to each other, nor to the sale at retail in pharmacies by pharmacists to each other acting in good faith. Nothing in this section shall be construed to affect the right of a physician, surgeon, dentist or veterinary surgeon in good faith

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and in the legitimate practice of his profession personally to administer, prescribe or deliver any of the foregoing substances to his own patients.

Nothing in this subchapter shall apply to a compound, mixture or preparation which is sold in good faith by a pharmacy for the purpose for which it is intended and not for the purpose of evading this subchapter if:

1. Contains other drugs. Such compound, mixture or preparation contains a sufficient quantity of another drug or drugs to cause it to produce an action other than its hypnotic, somnifacient, stimulating or depressant action; or

2. Spray or gargle. Such compound, mixture or preparation is intended for use as a spray or gargle or for external application and contains some other drug or drugs rendering it unfit for internal administration.

22 M.R.S.A. 2210-A. Sale of amphetamines.

It shall be unlawful for any person, firm or corporation to sell or offer to sell, any amphetamines or deriviatives or compounds thereof. The persons exempt from the provisions of section 2210 shall be exempt under this section.

22 M.R.S.A. 2215. Violations generally.

Whoever violates any provision of sections 2201 and 2210 or is found to be under the influence of any of the substances enumerated in section 2210 in any street, highway or other public place shall upon conviction be punished by a fine of not more than $1,000 or by imprisonment for not more than 2 years, or by both, for each offense. **Whoever violates any provision of section 2210-A shall be punished by imprisonment for not less than one nor more than 5 years and by a fine of not more than $1,000 for the first offense; and for a 2nd offense shall be punished by not less than 5 nor more than 10 years imprisonment and by a fine of not more than $5,000; and for a 3rd or subsequent offense by not less than 10 nor more than 40 years imprisonment and by a fine of not more than $10,000. The imposition or execution of sentences for conviction of violation of section 2210-A shall not be suspended and probation shall not be granted.** State law enforcement officers, members of the Board of Commissioners of the Profession of Pharmacy and pharmacy inspectors shall have the right to inspect the records of any apothecary store which relate to any of the substances enumerated in section 2210 or designated as "potent medicinal substances" under section 2201.

COMMENT: The effect of these sections is to remove the sale of amphetamines, their derivatives and compounds from the provisions of section 2210 *and to create a new section dealing only with selling or offering to sell these substances. Also, under the new portion of section* 2215 *(in bold), the penalties for selling or offering to sell these substances is significantly increased. It is especially worthy of note that the offense now carries a mandatory prison sentence and that sentences shall not be suspended nor probation granted.*

22 M.R.S.A. 2362. Uses of narcotic drugs.

Whoever shall possess or have under his control any narcotic drug, except as authorized in this chapter, shall upon conviction thereof be punished by a fine of not more than $50,000 or by imprisonment for not more than 20 years, or by both for the first offense; and for a 2nd or subsequent offense, by imprisonment for not less than 5 years nor more than 20 years for which the imposition or execution of such sentence shall not be suspended and probation shall not be granted.

22 M.R.S.A. 2362-C. Penalty

Whoever shall manufacture, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized in this chapter, shall upon conviction thereof be punished by imprisonment for not less than one nor more than 20 years and by a fine of not more than $50,000 for a first offense; and for a 2nd offense by imprisonment for not less than 5 nor more than 20 years and by a fine of not more than $50,000, and for a 3rd and subsequent offense by imprisonment for not less than 10 nor more than 40 years and by a fine of not more than $50,000.

The imposition or execution of sentences for violation of this section shall not be suspended and probation shall not be granted.

COMMENT: The effect of these two sections is to increase the potential penalty for manufacturing, selling, prescribing, administering, dispensing, or compound- any narcotic drug.

Two bills of importance to the Maine criminal justice system were not enacted into law. One of these, **AN ACT Relating to Full-time Prosecuting Attorney,** would have abolished the present part-time county attorney system and created a system of state-wide prosecuting attorneys appointed by the Attorney General and confirmed by the legislature. Under this bill, the Attorney General would have set up district offices throughout the State, wherein the District and Superior Courts would have the assistance of full-time prosecutors on a day-to-day basis. Also under this bill, the state-wide prosecution system under the Attorney General would have been able to render full-time legal assistance to all law enforcement agencies. This bill was passed by the legislature, but failed to become law after being vetoed by the Governor. Several other prosecutional bills were introduced to the legislature, but failed to come out of committee with an "ought top pass" report.

The other bill, **AN ACT to create a Crime Laboratory,** would have created and staffed a statewide crime laboratory to be operated by the State Police on a no-fee basis for all agencies of the Maine criminal justice system. This bill failed to pass in the legislature.

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.