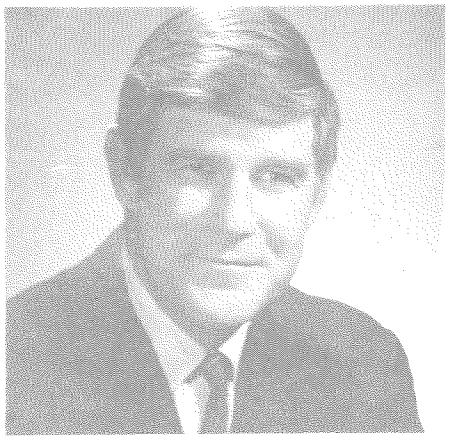
JUNE, 1972

# ALERT

CRIMINAL DIVISION

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



## MESSAGE FROM THE ATTORNEY GENERAL JAMES S. ERWIN

On page 5 of the October, 1971 issue of the ALERT Bulletin, we stated in our discussion of new Maine legislation, that forms were being prepared for use in connection with the statutory provisions relating to personal recognizance (14 M.R.S.A. §5544) and public intoxication (17 M.R.S.A. §2001). The forms have now been completed and are set out in the **From the Legislature** column of this issue. We have also again reproduced in full the statutes to which the forms refer and have included brief instructions on the use of the forms.

If there are any questions about either the statutory provisions themselves or the suggested forms, please write to the Criminal Division of this office or call us at 289-2146.

We apologize for any inconvenience that may have been caused by the delay in issuing these forms.

James S. Erwin

JAMES S. ERWIN
Attorney General

# SEARCH INCIDENT TO ARREST I

The October 1970 issue of ALERT on Search and Seizure contained a very short section on Search Incident to Arrest. This section set out the basic rule governing such searches but provided little in the way of detailed explanation. In this article, as with the article on consent searches, we will attempt to treat searches incident to arrest in depth and set out guidelines for law enforcement officers where possible.

**Chimel v. California**

It is important for every law enforcement officer to realize that since June 23, 1969, the law of search incident to arrest has been controlled by the U.S. Supreme Court case of *Chimel v. California*. This case, like *Miranda*, *Wade-Gilbert*, and others is considered a landmark case and should be familiar to all law enforcement officers.

In the *Chimel* case, law enforcement officers arrived at the defendant's home with a warrant for his arrest for the burglary of a coin shop. The defendant was not home but his wife let the officers in to wait for him. When the defendant arrived, the officers handed him the warrant and asked if they could look around. He objected but the officers searched the entire house anyway on the basis of the lawful arrest. The officers found coins and other items which were later used in court to obtain a conviction against the defendant.

The U.S. Supreme Court found the search of the entire house unreasonable. The following quotation from the case summarizes the court's reasoning:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." (395 U.S. 752, 762-63).

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This case is considered a landmark because it drastically changes the allowable area of search incident to arrest from that allowed under the previous law. Under pre-*Chimel* law, an officer was allowed to search incident to arrest the area considered to be in the "possession" or under the "control" of the arrested person. These vague standards were interpreted by the courts to include areas that were not necessarily under the defendant's "physical control" but were within his "constructive possession." This allowed law enforcement officers to search an entire residence incident to an arrest made therein and gave police almost free reign in deciding what would be searched. Furthermore, because neither written forms nor proof of probable cause before a magistrate was required, the search incident to arrest was administratively more convenient and was heavily relied on by law enforcement officers.

The *Chimel* case has changed all this and made it much more difficult for officers to obtain admissible evidence as a result of a search incident to arrest. The remainder of this article will be devoted to discussing the impact of the *Chimel* case and the various other aspects of the law of search incident to arrest.

### Allowable Purposes of a Search Incident to Arrest

Under the rule of the *Chimel* case, there are only two legitimate purposes for which a law enforcement officer may search a person incident to his arrest. The officer may:

1. Search for and remove weapons which the arrestee might use to resist arrest or effect an escape; and
2. Search for and seize evidence on the arrestee's person in order to prevent its concealment or destruction.

Law enforcement officers should always keep these allowable purposes in mind because all the other rules regarding the scope, intensity, and allowable objects of a search incident to arrest relate to the purpose for which the arrest is made. A search made incidental to arrest for any reason other than these allowable purposes will be held unreasonable by a court and any evidence seized will be inadmissible.

## SCOPE OF SEARCH INCIDENT TO ARREST

### Types of Evidence Which May be Seized

In general, the types of evidence which a law enforcement officer may search for and seize incident to an arrest is the same as it is for any search and seizure, whether under warrant or not. The range of seizable objects therefore includes:

1. **Weapons** which the prisoner may use to injure the officer or others or effect his escape;
2. **Fruits of the crime** for which the arrest is made;
3. **Instrumentalities** used to commit the crime;
4. **Contraband,** the possession of which constitutes a crime; and
5. **Evidence** of the crime or evidence that the person arrested committed it. *People v. Lewis*, 311 N.Y.S. 2d 905, 909 (Court of Appeals of N.Y., 1970).

Furthermore, in connection with a search incident to arrest, an officer may seize not only evidence tending to establish the crime for which the arrest is made but also evidence of other crimes. In a case illustrating this point, the defendant was arrested under a warrant for possessing and transporting explosives. During a search incident to the arrest, the arresting officer found a third person's Selective Service Certificate and Classification Card. Defendant was convicted of knowingly and unlawfully having in his possession a Selective Service Certificate and Classification Card issued to another. The court held that the certificate and card were admissible in court, despite the fact that they did not relate to the offense of possessing explosives.

> "The general rule is that incident to a lawful arrest, a search without a warrant may be made of portable personal effects in the immediate possession of the person arrested. The discovery during a search of a totally unrelated object which provides grounds for prosecution of a crime different than that which the accused was arrested for does not render the search invalid." *U.S. v. Simpson*, 453 F. 2d 1028 (10th Circuit Court of Appeals, 1972).

### Object Must be Related to Offense

Despite the broad range of evidence seizable under a search incident to an arrest, an officer may **not** conduct a full scale exploratory search of every person he arrests and the area within his immediate control. The officer must have a definite object or class of objects in mind when he conducts the search. The search must not go beyond the reasonable limits within which that object or class of objects is likely to be found . Furthermore, the object searched for must be related to the offense which prompted the arrest.

In one case, officers lawfully arrested the defendant for a violation of a loitering and prowling statute. The court said that since there could be no fruits of the crime of loitering and prowling, the only warrantless search permitted in this case was a protective search for weapons. Therefore, a patdown search of the outer clothing of the defendant which revealed a bottle of pills and a hypodermic needle was held to be lawful. The court felt that these items bore some resemblance to weapons when felt through the pocket and that therefore the search was reasonably related to the offense which prompted the arrest. *Commonwealth v. Dial*, 276 A. 2d 314 (Superior Court of Pennsylvania, 1971).

There are many offense like loitering for which there are no fruits of the crime or other seizable evidence, the most common of these being minor traffic offenses. When a person is arrested for one of these offenses, an officer may only conduct a limited search for weapons. Any further search would likely be held unlawful. An example is a case where a defendwas arrested for failure to have a driver's license. The arresting officer frisked the defendant's outer clothing for weapons and removed a cigarette package. The package contained marijuana cigarettes and the defendant was convicted of unlawful possession of marijuana.

The reviewing court held that the seizure of the cigarette pack was unreasonable in that it was not reasonably limited in scope to the circumstances which justified the search in the first place. The

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officer was only justified in searching for weapons, and he could not have expected to find a dangerous weapon inside the small light cigarette package. Therefore he was not allowed to seize it. *Gustafson v. State*, 243 So. 2d 615 (District Court of Appeal of Florida, 1971).

There is still some difference of opinion as to whether an officer should be allowed to search at all incident to an arrest for a minor traffic offense or other misdemeanors. Some courts say that an officer could not reasonably expect every person committing a minor offense to be carrying a weapon. Nevertheless, if an officer has reason to believe that an arrested person is dangerous at any time, he is justified in frisking him for weapons. The officer's protection and safety is of prime importance and will always support this limited type of search.

## PERMISSIBLE SEARCH OF THE PERSON

The search of an individual's person incident to arrest comes under the *Chimel* rule, limiting such a search to the area within the arrestee's immediate control. Since a person's entire body and whatever he was wearing at the time would be under his immediate control, further guidelines are necessary to help the officer determine the limits on his authority.

When the officer is searching for weapons incident to arrest, all that is generally required is a patdown of the outer clothing. If a hard object which could possibly be a weapon is felt, the officer may seize it. If no such weapon-like object is felt, the officer has satisfied the purpose of his search and may not search further.

If the officer is searching for destructible evidence, however, the extent of the search may go beyond a mere patdown of the outer clothing. Just how far the officer may go will depend upon the nature of the crime for which the person was arrested. For example, if the arrest was for a drug related offense, there is the possibility that the arrested person will attempt to conceal or destroy the evidence. Because of the size and nature of drug evidence, an officer is allowed to make a thorough search of an individual's person incident to his arrest. On the other hand, as we have seen, if the arrest was for an offense which could produce no evidence, such as loitering or a minor traffic offense, then no search beyond a cursory search for weapons is justified. In every case, the officer should make sure 1) that he has a legitimate purpose for making a search and 2) that the extent of the search relates to that purpose.

### Portable Effects

Courts have held that a search incident to the arrest of a person may extend to portable effects in his possession or under his control. Portable effects would include such things as the person's baggage, purse, or packages or bundles he is carrying. In one case, the defendant was arrested on a drug offense while carrying a small overnight suitcase. The suitcase was searched and LSD tablets were found inside. The court upheld the search of the suitcase as a valid search incident to the arrest. *U.S. v. Mehciz*, 437 F. 2d 145 (9th Circuit Court of Appeals, 1971).

In another case, defendants were arrested for walking on the highway at night without a light. As part of a search for weapons, an officer squeezed a laundry bag that one defendant was carrying and felt "two objects that were hard and more or less unidentifiable." The officer opened the bag and discovered a mixture appearing to be a drug. He then further searched the bag and found other drugs. The defendant was convicted of unlawful possession of drugs.

The reviewing court held the initial search of the laundry bag for weapons as a lawful search of an area within the "immediate control" of the defendant. The officer was then entitled, under *Chimel*, to proceed with a further search of the bag for other evidence of the drug offense which the arrestee might attempt to destroy. *State v. Gabriel*, 288 A. 2d 279 (Supreme Court of Delaware, 1972).

### Clothing

In certain instances, officers may even seize items of clothing that an arrested person is wearing. Thus, a seizure, incident to an arrest for murder, of the arrestee's blood-stained clothing and shoes for the purpose of laboratory analysis was upheld. The court felt that if the clothing and shoes had not been seized, the defendant or someone else might have concealed or destroyed these items. *Commonwealth v. Gordon*, 246 A. 2d 325 (Supreme Court of Pennsylvania, 1968).

### Money

In general, it is not proper for an officer to take money from a person incident to his arrest. This is usually done during the booking process when a person is thoroughly searched before being locked up. However, if the money is somehow connected to the crime for which the arrest is made, it may be seized. Examples would be counterfeit money, marked money used by police in making a "buy" of illegal goods or contraband, and money which is part of the fruits of a crime. In a case where officers seized a revolver, shells, and money, incident to an arrest for robbery of a cab driver, the court held the seizure was lawful. Especially convincing was the fact that the amount seized was nearly the same as the amount stolen, and the bills were folded in the manner the cab driver had described. *State v. Johnson*, 420 S. W. 3d 305 (Supreme Court of Missouri, 1967).

### Use of Force

When making a search of a person incident to arrest, a law enforcement officer may use the degree of force necessary to protect himself, prevent escape, and prevent the destruction or concealment of evidence. Because the courts will review the use of force strictly, an officer should use as little force as is necessary to accomplish his legitimate purpose.

Courts have upheld seizures of drugs when the arrested person attempted to swallow them and an officer put a "choke hold" on the defendant, forcing him to spit the drugs out. *Salas v. State*, 246 So. 2d 621 (District Court of Appeal of Florida, 1971).

A search incident to arrest to prevent the concealment of evidence may even extend to pump-

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ing the stomach or probing body cavities. However; the following conditions should be met before such a search is conducted:

1. There must be good reason to believe that the person has within his body evidence which should be removed. In a recent case, officers actually observed the defendant thrust drug capsules into his mouth and quickly swallow them. *People v. Jones*, 97 Cal. Rptr. 492 (Court of Appeal of California, 1971).

2. The search must be made by a doctor working under sanitary conditions and in a medically approved way.

3. Force may be used only to the extent necessary to make the person submit to the examination. *Blackford v. U.S.*, 247 F. 2d 745 (9th Circuit Court of Appeals, 1957).

This completes the first section of the article on Search Incident to Arrest. In next month's ALERT we will discuss the limitations on the search of premises incident to arrest along with other related issues.

# FROM THE LEGISLATURE

The regular session of the 105th Maine State Legislature passed amendments to the laws on Admission to Bail (14 M.R.S.A. 5544) and Public Intoxication and Disturbance (17 M.R.S.A. 2001). These amendments provide for different operating procedures for law enforcement officers under these statutes. The following discussion will set out the statutes in full and provide forms for use in connection with the statutes. In order to avoid confusion, the new sections of the statutes will be underlined.

**14 M.R.S.A. 544. Admission to bail before commitment; on Lord's Day**

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

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

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

The first paragraph of this statute was previously the entire law dealing with admission to bail before commitment. It merely states that if a person under arrest for a bailable criminal offense so *requests*, the arresting officer may take him before a bail commissioner for the purpose of admitting him to bail. If the arrest occurs on the Lord's Day or on the evening before, the arrested person may be admitted to bail on that day. This paragraph remains in effect.

The second paragraph, however, amends the first by giving the law enforcement officer broader authority with respect to the disposition of persons arrested for misdemeanor offenses. First of all, the arrested person no longer has to **request** that he be brought before a bail commissioner. The arresting officer himself may now, on his own initiative, bring the arrested person before the bail commissioner for all misdemeanor offenses except **Public Intoxication and Disturbance** (17 M.R.S.A. § 2001). Special provisions relating to that offense will be discussed below.

Furthermore, the arresting officer may completely bypass the bail commissioner and himself take the personal recognizance of any person arrested for a misdemeanor. Personal recognizance involves releasing the arrested person upon his promise to appear in court at a given date and time to answer the charges against him. The officer, under the provisions of the third paragraph, must issue the arrested person a written summons and obtain a written promise to appear in court from him. The following form is suggested for use in obtaining the promise to appear:

PERSONAL
RECOGNIZANCE BAIL

I understand that I have been arrested by _____ (Officer)

of the _____ (Name of Department)

and that I am charged with the offense of

_____.

I understand that by affixing my signature to this form I am giving my written promise to appear at the Maine Disctrict Court to be held in

_____ (City or Town) on

_____ (Date) at _____ (Time)

to answer to the misdemeanor offense for which I have been arrested.

I further understand that it shall be unlawful for me to violate this written promise to appear in court, either in person or through an attorney, and that I could be subjected to a fine of not more than $500 or by imprisonment for not more than 6 months, or by both, should I fail to keep this written promise to appear.

_____ (Bailee's Signature)

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This form may also be used by bail commissioners in obtaining the written promise to appear.

The Legislature has established a somewhat different procedure for dealing with persons arrested for **Public Intoxication and Disturbance** (17 M.R.S.A. § 2001). The provisions of that statute are as follows:

**17 M.R.S.A. 2001. Public Intoxication and disturbance**

Whoever is found intoxicated in any street, highway or other public place, or is found intoxicated in a motor vehicle while said motor vehicle is in any street, highway or other public place, shall be punished for the first offense by a fine of not more than $20 or by imprisonment for not more than 30 days, or by both, and upon any subsequent conviction by a fine of not more than $60 or by imprisonment for not more than 90 days, or by both.

Whoever is found intoxicated in his own house or in any other building or place, disturbing the peace of his own or any other family or the public peace, shall be punished for the first and any subsequent conviction as provided in the preceding sentence. Any such intoxicated person shall be taken into custody by any sheriff, deputy sheriff, liquor inspector, constable, marshal, police officer or watchman and committed to the watchhouse or police station or restrained in some other suitable place, until a complaint can be made and a warrant issued against him, upon which he may be arrested and tried.

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

The first two paragraphs of this statute require a law enforcement officer to take a person arrested under this statute into custody and to restrain him until a complaint can be made and a wararnt issued against him. Under the new third paragraph, however, this procedure need not be followed to completion. The new procedure allows the accused person to be released outright, with no complaint issuing, if the following conditions are met:

1. The person has been arrested for the offense of **Public Intoxication and Disturbance** (17 M.R.S.A. § 2001);
2. No more than 18 hours have passed since the person was arrested;
3. It appears to the arresting officer that the accused is not a danger to himself or others; and
4. The accused consents in writing to his release from custody.

After such release, the arresting officer or the officer in charge may, with the written consent of the accused, make reasonable arrangements to transport the accused to his home or some other suitable place. Since both the release and the transportation arrangements require the written consent of the accused, the following form, in which the two are combined, is suggested for use in obtaining consent:

CONSENT TO RELEASE FORM
(PUBLIC INTOXICATION AND DISTURBANCE, 17 M.R.S.A. § 2001)

I understand that I have been arrested by _____, a law enforcement officer of the _____ for the offense of **Public Intoxication and Disturbance** (17 M.R.S.A. 2001). I further understand that, with my consent, under certain circumstances, I may be released from custody and no complaint will issue against me.

(Name of Officer)

(Name of Department)

Wishing to go about my personal affairs, I hereby consent to my release from custody. I realize that by so consenting, I am waiving or relinquishing any right to have my case disposed of in open court. I further consent to arrangements being made for my transportation home or to some other suitable place as may be reasonable under the circumstances.

In consideration of my release, I hereby waive all claims for damages or injuries against the officers holding me in custody and against _____ Name of Town, City, State, etc. which might arise from my detention.

_____ (Signed) _____ (Date)

_____ (Witness)

# 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.

**Indictment** JP

Defendant was convicted of breaking, entering, and larceny in the nighttime. He appealed claiming that the indictment upon which he was tried was unconstitutionally vague. The indictment was captioned "Breaking, entering, and larceny in the nighttime," but it bore an incorrect statutory citation. Furthermore, the person in the dwelling was specifically named and the indictment stated that the defendant put him in fear of great bodily harm.

The court held that the excess language and improper citation created such an uncertainty as to the charge upon which defendant was being tried as to amount to an unintended denial of a fair trial. *State v. Moody*, 287 A. 2d 833 (Supreme Judicial Court of Maine, March 1972).

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**Search and Seizure; Probable Cause** L

Defendant was convicted of breaking, entering, and larceny in the nighttime. On appeal, defendant claimed that certain evidence admitted in court against him was obtained as a result of an illegal earch and seizure. Police were investigating a break in a night club where a cash register and some cigarettes had been stolen. An officer was sent to observe defendant's car which was parked. The hood was warm and inside the car, wood chips and playing cards were observed. When defendant came out to the car, the officer arrested him. The car was towed to the police garage where it was searched, and items were found which connected defendant to the break at the night club.

The court held that the items found as a result of this search were inadmissible in evidence. The search could not be justified as incident to arrest (even if the arrest were legal) because the search was made at the police garage some time after the arrest on the street.

> "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Preston v. U.S.*, 376 U.S. 364, 367 (1964).

Neither could the search be justified on the basis of probable cause. In order to justify the search on this basis, there must have been information that would entitle a reasonable and cautious man to believe that the search would disclose the stolen items or items which would aid in the identification of the thief. Here there was no evidence that the information available to the police **before** the search in any way connected either the defendant, his car, or the items seen in his car in any way with the break at the club. Since probable cause for a search cannot be based on items found during the search, there was no probable cause here and the search was illegal. *State v. Fletcher*, 228 A. 2d 92 (Supreme Judicial Court of Maine, March, 1972).

**Indictment** JP

The defendant was convicted of taking indecent liberties under 17 M.R.S.A. 1951. Defendant claimed among other things that the indictment failed to inform him of the specific acts charged and against which he had to defend. The indictment alleged that he did "feloniously take indecent liberties with the sexual parts of one (name omitted), a female child who was then and there under the age of 16 years . . ."

The Court held that an indictment is never required to state the evidence supporting it. The discovery procedure is open to the defendant for the purpose of ascertaining the evidence against him. Here the defendant had a transcript of the testimony of the complaining witness and a copy of the written statement she had given. This was sufficient to completely inform him of the evidence the State had in its possession and would be expected to produce at trial. *State v. Stoddard*, 289 A. 2d 33 (Supreme Judicial Court of Maine, March 1972).

# IMPORTANT RECENT DECISIONS

**Miranda** JPL

Defendants were convicted of simple battery. Defendants were university students and had mistakenly beaten up another student. When they realized their mistake, they apologized to their victim and later went to a university security officer and made incriminating statements. Defendants claimed that these statements were inadmissible because they had not been given *Miranda* warnings.

The court held the statements wer admissible because *Miranda* warnings were not required. The warnings are only required when a custodial interrogation is conducted by a governmental law enforcement officer. The university security officer was not such an officer. Furthermore, *Miranda* warnings are only required when a defendant is in custody or deprived of his freedom of action in any significant way. Here, defendants were not deprived of their freedom because they had voluntarily gone to the university security officer. *State v. Himel*, 257 So. 2d 670 (Supreme Court of Louisiana, January, 1972).

**Arrest and Frisk** L

Defendant was convicted of possession of heroin and marijuana. After observing illegal drugs in the room of one Villemyer, officers decided to wait for his return to the room. He arrived, accompanied by defendant and another person, and the officers arrested him. Then, the officers, in order to secure the situation, frisked Villemyer's other companion and asked defendant to open her purse for a weapons check. Drugs were observed inside the purse.

Defendant contended that a frisk for weapons must be limited to a "pat down" of a person's outer clothing. The court said that, while this is usually the case, it depends on the circumstances of each case. In this case, the purse was "large" and "bulky" and therefore it was reasonable for the officers to believe that a weapon could be concealed in it. The officers could look in the purse as a proper precaution for their own safety. *State v. Dougherty*, 493 P. 2d 1383 (Supreme Court of Oregon, February, 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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# ALERT



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