SEPTEMBER 1972

ALERT

CRIMINAL DIVISION

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

SEARCH WARRANTS II

EXECUTION OF THE WARRANT

In last month's ALERT, we discussed the procedures which must be followed in order to obtain a search warrant. We ended that discussion with a detailed summary of the contents of a warrant and included a sample warrant form. This month's article will deal with the rights, obligations, and limitations of the law enforcement officer, once the warrant has been issued and the officer has it in hand.

The execution of a search warrant is essentially the carrying out the command or commands appearing on the face of the warrant itself. An officer can, therefore, determine much of his behavior from simply reading the warrant. However, many of the commands of a search warrant need further clarification and other limitations and duties are imposed by the Maine Rules of Criminal Procedure and various court decisions. The entire subject of execution of search warrants, therefore, will be covered in detail.

Who May Execute

The only person who may execute a search warrant is an officer who is authorized to enforce or assist in enforcing any law of the State of Maine. The warrant will be directed to a particular officer or class of officers. Only the named officer or a member of the named class of officers is authorized to execute the warrant. Of course, if a warrant is directed to a particular officer such as a sheriff, his deputies may execute the warrant and the sheriff himself need not be present. Also, private persons may be enlisted to help in the execution of a warrant. In this instance, however, an officer to whom the warrant is directed must be personally present at the search scene.

Time Considerations

There are three aspects of time which affect a law enforcement officer in the execution of a search warrant. The first of these is the allowable time which an officer may delay between the issuance of the warrant and its execution. Rule 41(d) of the Maine Rules of Criminal Procedure sets the outer time limit for the execution of a search warrant, requiring that it be executed and returned only within ten (10) days after its date. Rule 41(c), however, requires that the warrant be executed "forthwith". In order to resolve this apparent ambiquity, federal courts and courts in other states with similar statutes have required that the warrant be executed within a reasonable time after issuance, as long as it is within the statutory period. *U.S. v. Harper*, 450 F. 2d 1032 (5th Circuit Court of Appeals, 1971). *Therefore, even though an officer executes the warrant within the statutory ten* (10) *day period, the search could still be held unlawful.* The search would be unlawful if there were:

1. *Unnecessary delay* in executing the warrant; and
2. Such a delay resulted in some *legal prejudice* to the defendant.

What is an unnecessary delay is determined by the circumstances of each case. One of the chief concerns of courts is that probable cause, existing at the time of issuance of the warrant, continues untill the time of its execution. In one case, a warrant for the seizure of equipment used to manufacture LSD was executed six (6) days after its issuance. The court held the extension was timely, as the premises were under daily surveillance, and no activity was noted until after the first five (5) days. The court said in that case:

> "While it is desirable that the police be given reasonable latitude to determine when a warrant should be executed, it is also necessary that search warrants be executed with some promptness in order to lessen the possibility that the facts upon which probable cause was initially based do not become dissipated. A search warrant may be served any time within ten (10) days after the warrant is issued, provided that the probable cause recited in the affidavit continues until the time of execution, giving consideration to the intervening knowledge of the officers and the passage of time." *U.S. v. Nepstead*, 424 F. 2d 259 (9th Circuit Court of Appeals, 1970).

There are several reasons why an officer would be justified in delaying the execution of a search warrant. For example, weather conditions, distance factors, traffic problems and similar obstacles may prevent the prompt execution of the warrant. Delays may be necessary to gather sufficient manpower for the search or to protect the safety of the searching officers. Other reasons accepted by the courts for delaying the execution of a search warrant are prevention of destruction of evidence, or prevention of the flight of a suspect. And where the warrant is for the search of both a person and premises, the officers may delay the search until the person is present on the premises. *People*

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v. Stansberry, 268 N.E. 2d 431 (Illinois Supreme Court, 1971). It is suggested that officers be prepared to give convincing reasons for any delay in executing a warrant.

The second aspect of time which relates to the execution of a search warrant is the time of day during which it may be executed. Rule 41(c) of the Maine Rules of Criminal Procedure requires that warrants be served in the daytime. However, if the affidavits upon which the warrant is based are positive that the property is on the person or in the place to be searched, the issuing magistrate may direct in the warrant that it be served in the nighttime. The officer should check the warrant to see if a nighttime search is authorized.

Courts have differed in their interpretations of when "daytime" and "nighttime" begin and end. This article will not go into a discussion of those differences. Probably the safest standard for a law enforcement officer to adopt is that it is "daytime" when there is sufficient natural light to recognize a person's features at a reasonable distance. Otherwise, it is "nighttime".

The third aspect of time, as it relates to the execution of a search warrant, is the amount of time allowed for the law enforcement officer to perform the search *once it is initiated*. Since the warrant is a mandate of the court, the officer should be allowed to take as much time as necessary to carry out its purposes. This is particularly so when the items specified are small and easily concealed. *State v. Gray*, 447 P.2d 475 (Supreme Court of Montana, 1968). However, if the officer searches a place or person beyond a reasonable time for purposes of harassment or intimidation, it is likely that the search will be declared unlawful.

Gaining Entry

The manner of entry into premises to execute a search warrant must meet constitutional standards of "reasonableness". If the officer does not meet these standards, any subsequent search and seizure may be held illegal and the evidence obtained as a result may therefore be inadmissible in a criminal prosecution.

The general rule for gaining entry to premises to execute a search warrant is that the law enforcement officer must:

1. Announce his identity as a law enforcement officer;
2. Indicate that he possesses a search warrant; and
3. Announce that it is his purpose to execute the warrant.

If he is then refused entry, he may break open any outer or inner door, any window, or any other part of the house to carry out the command of the warrant.

There are, however, recognized exceptions to this rule requiring that officers first be refused admittance after an announcement of purpose before they are allowed to break in. One exception is for cases involving possible concealment or destruction of evidence or escape of a person to be searched. These situations arise frequently and often involve an officer knocking on a door and announcing his identity, and before he can complete his announcement of authority and purpose, he hears footsteps running from the door, whispers, flushing toilets, or other suspicious sounds. This most often occurs in drugs, gambling, and illicit liquor cases. In these cases, where the officer has reason to believe that evidence will be concealed or destroyed, or that a person to be searched will escape, he may enter by force without completing his announcement of authority or purpose. *The important thing to remember, however, is that the officer must have specific substantial reasons for believing that evidence would be lost or that a person would escape if he did not act immediately. A forced entry without announcement of purpose will not be justified simply by the fact that a case involves narcotics, gambling, liquor, or anything else.* As the Supreme Court of California has said:

> "Under the Fourth Amendment, a specific showing must always be made to justify any kind of police action tending to disturb the security of the people in their homes. Unannounced forcible entry is in itself a serious disturbance of that security and cannot be justfied on a blanket basis. Otherwise, the constitutional test of reasonableness would turn only on practical expediency, and the amendment's primary safeguard—the requirement of particularity—would be lost. Just as the police must have sufficiently particular reason to enter at all, so must they have some particular reason to enter in the manner chosen." *People v. Gastelo*, 432 P. 2d 706 (1967).

It is, therefore, strongly urged that officers keep a careful record of all the facts and circumstances which led them to believe that there was an immediate danger of loss of evidence or escape. Otherwise, if the officer cannot specifically justify his actions, any evidence he seizes after an unannounced entry may not be admissible in court.

Another exception to the rule requiring announcement of authority and purpose before entry to search is that the announcement is not necessary if the occupants of the premises to be searched already know of the officer's authority and purpose before any announcement. In a recent case, officers with a search warrant knocked on the defendant's apartment door and it swung open partially so the officers and occupants were clearly visible to each other. One of the officers was known to the occupants as a narcotics officer. The officers made no announcement of purpose, but waited about twenty (20) seconds and then entered the apartment to conduct the search.

The court held that the unannounced police intrusion here was reasonable. Because the defendant recognized the officers through the partially open door and knew one to be a narcotics officer, the Court found that the defendant was reasonably certain of the police purpose before the officers entered his apartment. A formal announcement of authority and purpose in this case would have been a useless gesture. *U.S. ex rel Dyton v. Ellingsworth*, 306 F. Supp. 231 (U.S. District Court D. Delaware, 1969).

Again it is strongly urged that the officer keep a careful record of the facts and circumstances which gave him reason to believe that the defendant already knew his authority and purpose, making a formal announcement unnecessary. Also, it is a good idea for the officer to announce that he possesses a warrant, even though he does not announce anything else. This fact may not be as obvious to the

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occupant of the premises as the officer's authority and purpose may be.

A third exception exists when officers are justified in a belief that there would be a danger to the life and limb of an officer or someone within the premises if an announcement of authority and purpose was given. In a case illustrating this exception, FBI Agents believed that a suspect, wanted for murder of a policeman and armed bank robbery, who was also a prison escapee with a reputation for always being armed, was within an apartment. They entered the apartment quietly without making any announcement of their authority or purpose. The court found that the entry to arrest the defendant was lawful on the theory that an announcement would have increased the peril of the agents. *Gilbert v. U.S.*, 366 F. 2d 923 (9th Circuit Court of Appeals, 1966). Although this case involved an entry to arrest, the principle applies equally to an entry to search.

Entry When No Response or No One Home

The requirement that an officer be refused admittance after his announcement of purpose before he may break into premises does not mean that the refusal must be actually stated. If an occupant of the premises is silent, and fails to call out or open the door after a reasonable opportunity to do so, this may be considered the equivalent of a refusal to admit the officer and the officer may then break in. *U.S. v. Poppitt*, 227 F. Supp. 73 (U.S. District Court, D. Delaware, 1964). What constitutes a reasonable opportunity to respond depends on the circumstances of each case. It has been held that an officer who yelled, "Police Officer", and simultaneously kicked down the door, did not comply with standards of reasonableness. *People v. Benjamin*, 455 P. 2d 438 (Supreme Court of California, 1969).

A like rule applies if the residents of the premises are absent. There is no prohibition against executing a search warrant when premises are unoccupied. In fact, if an officer reasonably believes from the circumstances that no one is in the house, he need not make any announcement. As one case stated:

> "In this case it would have been an empty gesture for the officers to have announced to an empty house that they were officers and that they were present for the purpose of executing a search warrant." *U.S. v. Hawkins*, 243 F. Supp. 429 (U.S. District Court, E. D. Tennessee 1965).

Detention and Search of Persons on the Premises

When a search warrant is issued for the search of a named person or a named person *and* premises, there is no question that officers executing the warrant can detain and search the person named. However, often a person not named in the warrant is on the premises to be searched and the question arises as to whether that person may be detained or searched. *The general rule is that the warrant gives a law enforcement officer no authority to search a person who merely happens to be on the premises.* In an illustrative case, police were executing a search warrant for narcotics in the dormitory room of a female university student. She was not present at the time the warrant was served, but the defendant, a male, was seated in the room when police entered. Although the officers did not know the defendant, they immediately searched him, found narcotics on his person, and then searched the room and found more narcotics.

The court held the evidence found on the defendant was inadmissible in court. The court said that a warrant for a search of premises provides no basis for search of a person who merely happens to be present on the premises and who is not connected in any other way with the premises being searched. *State v. Bradbury*, 243 A.2d 302 (Supreme Court of New Hampshire, 1968). It should be noted that there is an absence of Maine law on this point. It is therefore suggested that if an officer has a reasonable belief that a person found in a place to be searched might be concealing property *described in the warrant*, the officer might search him for that property only.

Also, if an officer reasonably believes that a person on the premises poses a threat of physical harm to the officer, he may perform a limited pat-down or frisk of the person for weapons. The officer must be able to point to specific facts and circumstances which led him to believe the person was dangerous. A mere blanket statement that the officer believed the person dangerous will not justify a protective frisk. (See the November and December 1971 issues of ALERT on Stop and Frisk).

Of course, if what the officer observes on the premises gives him probable cause for a felony arrest, or an offense is being committed in his presence, he may arrest the person. Then, the person may be searched incident to the arrest within the limits established by the *Chimel* case. (See the April and May 1972 issues of ALERT).

Intensity of the Search

A search under a search warrant may extend to all parts of the premises described in the warrant. For example, an individual's dwelling place will include his house, garage, and other buildings generrally associated with and included within a house or home. *State v. Brochu* 237 A.2d 418 (Supreme Judicial Court of Maine, 1967) It does not follow, however, that the officer executing the warrant may look everywhere within the described premises. He may only look where the items described in the warrant might be concealed. For example, if a search warrant indicated that the items sought were stolen tires, the officer would not be authorized to rummage through desk drawers and other places too small to hold these items. Yet, he would have such authority if the items described in the warrant were coins or pills. The officer should be prepared to justify his looking into any enclosed areas such as drawers and containers by the nature of the items he is looking for.

Furthermore, the officer must be reasonable with regard to the degree of force he uses in conducting the search. An otherwise reasonable search may become unreasonable due to the manner in which it is conducted. Therefore, as we have said, an officer may break into a house or other objects of search if he is denied access to them. Nevertheless, he must exercise a high degree of care to avoid unnecessary damage to the prem-

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ises or objects. He must conduct the search in a manner designed to do the least damage possible, while still making a thorough examination of the premises. He should carefully replace articles which were necessarily disturbed during the search. Finally, he should avoid any unnecessary injury to the feelings of those present. As the Supreme Judicial Court of Maine has said in a early case:

> "Officers must not allow their zeal and beliefs to blind them to the rights of the owners, and occupants of the dwelling house they search. Those rights, as well as the interests of the prosecutor, are to be regarded and protected by officers . . . However confident the officers were of the guilt of the occupant, the house and its owner were not thereby outlawed." *Buckley v. Beaulieu*, 71 A. 70, 72 (1908).

Seizure of Items Not Named in Warrant

The question arises as to whether it is proper for a law enforcement officer to seize items *not* named in the warrant when found during the lawful execution of a warrant. By lawful execution of a warrant, we mean a search (1) limited in area to the place named in the warrant; and (2) limited in the sense that the police were only looking in places where the items named in the warrant might be concealed. The answer to this question is by no means clear. Some courts have held that the only items which may be seized pursuant to a search warrant are those named in the warrant, leaving nothing to the discretion of the officer. In a Maine case, *State v. Brochu*, a search warrant was obtained for "a container or vile containing methyl alcohol." Officers went to the described premises and seized a vodka bottle containing a small quantity of methyl alcohol along with a funnel, three small glass jars, and a cloth. The court held that the funnel, jars, and cloth did not come within the description in the warrant of the property for which the search was instituted. They were, therefore, inadmissible in court. *State v. Brochu*, 237 A.2d 418, (Supreme Judicial Court of Maine, 1967).

The *Brochu* Case would seem to indicate that Maine law enforcement officers are strictly limited to seizing only the items specifically named when executing a search warrant. Several other courts, however, have permitted an exception to this rule in the case of *contraband* found in *plain view* during a lawful execution of a search warrant. An example is a case in which officers had a valid search warrant for a specific type of firearm, a "9 MM Schmeisser, Model MP 40, Machine Pistol, bearing Serial No. 7000 . . ." The officers went to the apartment described in the warrant and while searching for the described pistol, they found an unregistered short-barreled rifle which was not named in the warrant, and seized it.

The court found the seizure lawful. The court emphasized that the officers were within the area specified to be searched in the warrant and that they limited their search to those areas in which the pistol described in the warrant could have been concealed. They were, therefore, in a place where they had a legal right to be. It was not unreasonable for the officers to seize contraband (the unregistered short-barreled rifle) in plain view. *U.S. v. Zeidman*, 444 F. 2d 1051, (7th Circuit Court of Appeals, 1971).

It should be emphasized that other courts have disagreed with this view of the law and still others have extended the plain view doctrine even further. Neither the Supreme Judicial Court of Maine, nor the U.S. Supreme Court has clearly decided this question, and therefore, no definite guidelines can be given for the Maine officer. It is probably a safe procedure for the officer to seize *contraband* if he comes upon it in plain view during the course of a lawful execution of a search warrant. However, it is doubtful whether the officer would be authorized to seize stolen property, instrumentalities of crime, or "mere evidence", under these circumstances. The better procedure therefore is to keep an officer on the premises and go to a magistrate and get another search warrant for the items observed. The officer is encouraged to check the *Important Recent Decisions* and *Maine Court Decisions* columns in future ALERTS for further developments in this area.

One further limitation on the "plain view" doctrine should be noted here. The U.S. Supreme Court decision in the 1971 case of *Coolidge v. New Hampshire* requires that, absent exigent circumstances, the discovery of evidence in plain view must be *inadvertent*. This means that if officers go somewhere where they have a lawful right to be (for instance, into someone's home for purposes of executing a search warrant), they may not seize evidence in plain view *if they knew before they entered the premises that the evidence would be there.* Where an officer knows in advance the location of evidence and he intends to seize it, he must obtain a search warrant, or the seizure will be unlawful and the evidence will be inadmissible in court. (91 S. Ct. 2022 at 2040).

There have been few court interpretations of this inadvertency requirement and there are many questions to be answered. Again the officer is encouraged to check the case summaries in future issues of ALERT.

Duties After Search is Completed

As we discussed earlier, a search warrant must be executed and returned within ten (10) days after its date. Proper execution of a warrant requires more than merely conducting a search and seizing items described in the warrant. Maine Rules of Criminal Procedure, Rule 41(d) requires that an officer who takes property under a warrant must give to the person from whom or from whose premises the property is taken, a copy of the warrant and a receipt for the property. If the person is unavailable, the officer must leave a copy of the warrant and a receipt at the place from which the property was taken.

The officer must return the warrant to the issuing magistrate promptly after its execution. The warrant must be accompanied by a written inventory of any property taken under the warrant. This inventory must be verified by the officer and must be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they were present. If they were not present, the inventory must be made in the presence of at least one other credible person.

The Supreme Judicial Court of Maine has held that giving the

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receipt for property taken and making the return of the warrant with inventory are ministerial acts. A ministerial act is one which is performed in obedience to the command of a legal authority and which requires no exercise of judgment or discretion by the person performing it. Failure to perform acts of this nature will not void a search warrant or the search conducted under the warrant. *State v. Brochu*, 237 A. 2d 418 (1967).

In another Maine case, officers, after conducting a search and seizure pursuant to a warrant in a second-floor apartment, posted a copy of the warrant and receipt on the door of a first-floor apartment, occupied by a different person. The Court held that this action did not comply with the requirements of Rule 41(d). Again, however, the court did not invalidate the search and seizure because posting the warrant and receipt were ministerial acts. *State v. Martelle*, 252 A.2d 316 (1969).

It would seem from these two cases that the Supreme Judicial Court of Maine was very lenient in its enforcement of Rule 41(d) of the Rules of Criminal Procedure. A quote from the *Martelle* case, however, warns officers not to take Rule 41(d) lightly:

> "Official dereliction in the punctilious observance of Rule 41(d) which has the force of law respecting the steps to be taken in the execution of search warrants cannot be overlooked and imposes upon us the instant duty of forewarning all enforcement authorities that we expect full compliance in the future. We are inclined to believe that there exists no such general practice justifying at this time the adoption of an exclusionary rule to compel obedience." (252, A.2d at 321).

It is strongly urged, therefore, that officers take pains to carefully comply with the requirements of Rule 41(d). Otherwise, the courts may take stronger steps to ensure strict compliance.

This concludes our coverage of the law of search warrants. All Maine law enforcement officers are again reminded that because of recent U.S. Supreme Court limitations on warrantless searches, there is a much greater need for law enforcement officers to obtain search warrants before conducting searches and seizures. It is, therefore, essential for officers to be thoroughly familiar with the information presented in this and last month's ALERT Bulletin and to implement this knowledge in their daily operations.

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.

Burglary; Defined JP

Defendant entered the home of an elderly couple that he knew, telling them that he wanted to look for his billfold. This was a phony excuse. Shortly after he entered the house, three of his confederates burst into the house and ransacked the house while detaining the elderly couple in one of the rooms. The four men opened bureau drawers and boxes in search of money. But, there was no evidence that they forcibly opened any inner doors. Defendant was charged with burglary, but he was charged with breaking *after* entering. He was convicted.

The Supreme Judicial Court reversed and ordered a new trial. The Court said there was evidence that defendant broke *and* entered because the violent entry of his associates could be attributed to him under our aiding and abetting laws. But, the court said there was no evidence that defendant broke *after entering*. The court said that the Legislature intended the breaking *after* entering part of the burglary statute to apply only to "breaks in the structure of the building including inner doors and other inner barriers which are intended to deny access to parts of the dwelling to persons whose entrance is not desired." The Law Court said that the crime of burglary is not committed by a break by the culprit into trunks, boxes or articles of furniture.

Although, it is not important to this decision, the Law Court repeated its definition of "breaking". The court said "a breaking occurs when the obstruction is moved to a material degree to permit passage." *State v. Cookson*, 293 A.2d 780 (Supreme Judicial Court of Maine, July 1972).

Lesser Included Offenses JP

The Supreme Judicial Court has held that a charge of Death Caused by Violation of Law statute (29 M.R.S.A. § 1316) is not necessarily included in the charge of Reckless Homicide (29 M.R.S.A., § 1315). Defendant in this case speeded and then crossed a center line at an intersection, causing a fatal accident. He was charged only with Reckless Homicide. The jury acquitted him on that charge, but found him guilty of Death Caused by Violation of Law statute, even though that charge had not been included in a separate count, on the theory that this lesser offense is always included in the more serious Reckless Homicide charge. The Supreme Court said that the only motor vehicle violation necessarily included in the charge of Reckless Homicide is operating to endanger. And because the State did not allege here that defendant was operating to endanger, his conviction had to be reversed.

The Court suggested strongly that when the State cannot allege operating to endanger, it can never rest on a blanket Reckless Homicide charge and still hope for a conviction on the Death Caused by Violation of Law Statute. Instead, the State should charge Reckless Homicide in one count and then bring a separate count alleging Death Caused by Violation of whatever motor vehicle law defendant violated. If the State brings two separate counts, it can lose on the Reckless Homicide Count and still win legitimately on the Death Caused by Violation count. *State v. Leeman*, 291 A. 2d 709 (Supreme Judicial Court of Maine, June 1972).

Fair Trial JP

In June the Maine Supreme Judicial Court handed down three decisions dealing with defendant's right to speedy trial. They are *State v. O'Clair*, *State v. Brann*, and *State v. Staples*, The main point of *O'Clair* seems to be that

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a defendant will not be allowed to claim denial of his right to a speedy trial when he has, by his own actions, contributed to the delay or consented to the delay. This is especially true when the State, as it did in *O'Clair*, brings defendant to trial only one month after he first claimed that he was being denied a speedy trial.

The *Brann* and *Staples* cases emphasize that defendant must show some sort of damage caused by the delay before he can win dismissal on speedy trial grounds. In *Staples*, which was the strongest case from the defense point-of-view, defendant was indicted for robbery on April 2, 1970, demanded a prompt trial on May 13, 1970, and had not yet been brought to trial when he filed his Motion for Dismissal on speedy trial grounds on January 18, 1971. **Staples** failed to allege how the delay had hurt his preparation for trial. Apparently, he was relying on the long delay creating some sort of presumption of prejudice. But, the Law Court found no denial of speedy trial. The decision is made more important by the fact that the Law Court assumed: (1) that the defendant contributed in no way to the delay; (2) that the State's delay was unnecessary and could have been shortened by five months if the State had made a "good faith" effort to bring defendant to trial; and (3) that the delay under all the circumstances, was unreasonable. Even assuming all three points, the Law Court held that there was no denial of trial without a showing of prejudice by defendants. More specifically, the Law Court held that the nine (9) months' delay did not create any kind of presumption of prejudice. The burden remained on defendants to show how their case has been hurt by the delay. If they can make no showing, they lose.

The *O'Clair* case mentioned above, also contains interesting holdings on the form of indictments and on the admissibility of third party declarations in criminal trials. These holdings should interest prosecutors and judges. *State v. O'Clair*, 292 A. 2d 186; *State v. Brann*, 292 A. 2d 173; *State v. Staples*, 292 A. 2d 173 (Supreme Judicial Court of Maine, June 1972).

Larceny JPL

Defendants were observed forcibly removing a copper lightning rod cable from a dwelling house. They were convicted of Grand Larceny. The case presented a variety of proof problems in larceny cases. Among other things, the Court held that:

1. To sustain a conviction, the police do not have to provide evidence that the severance of the cable and the taking away were two separate acts with an interval in between the acts. This clears up an old common law doctrine suggesting that fixtures attached to real estate (as opposed to personal property) could not be stolen. The Supreme Judicial Court said such technical distinctions among different types of property were outdated. The larceny statute, according to the court, applies to any fixture having identifiable status and value as personal property;
2. To prove that the stolen property exceeds One hund- ($100) Dollars; and therefore, constitutes a felony, the State must prove the fair market value of the particular stolen goods at the time they were stolen. When there is no market for the goods, the State can resort to replacement cost. However, in figuring replacement cost, the State must have evidence showing the market depreciation rate of the stolen goods, so that the jury can compute the true value of the stolen goods. The proper formula under the replacement cost method is: Retail cost of new copper cable *minus* Depreciation factor *equals* True cost of stolen copper cable.

The Court made it clear that the State must produce experts to establish these figures, if it is to meet its burden of beyond a reasonable doubt. *State v. Day*, 293 A. 2d 331 (Supreme Judicial Court of Maine, July 1972).

Drugs; Sale JPL

The Supreme Judicial Court has interpreted the marijuana statute, 22 M.R.S.A. § 2361 to mean that a person can be convicted of selling the drug, even if he is asked by a law enforcement officer to go out and purchase the drug. This case, therefore, clarifies the scope of the word "sale", and holds that acting as a kind of "agent" of the law enforcement officer is no defense, even if defendant receives no profit in the deal.

The case further holds that de fendant cannot be simultaneously convicted of sale and possession of drugs if it was necessary for him to have possession in order to make the sale. In this case, the only marijuana proven to be in defendant's possession was the exact amount he sold to the undercover agent. Of course, if the police could show two separate amounts. —one which he sold and one which he kept—then defendant is still subject to both charges. *State v. Allen*, 292 A. 2d 167 (Supreme Judicial Court of Maine, June 1972).

Escape JP

Defendant argued that his escape from county jail was not a crime because the jail authorities had no copy—either original or photostated—of the order sending him to jail. The Court held that the jail authorities do not need a copy of the court order in their possession as long as there is a court order in existence. *State v. Morton*, 293 A.2d 775 (Supreme Judicial Court of Maine, August 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.

ALERT

James S. Erwin — Attorney General
Richard S. Cohen — Deputy Attorney General In Charge of Law Enforcement
Chadbourn H. Smith — Chief, Criminal Division
John N. Ferdico — Director, Law Enforcement Education Section

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