DECEMBER 1972

ALERT

CRIMINAL DIVISION

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

PROBABLE CAUSE I

Probable cause has been discussed to a limited extent previously in ALERT in the articles on Arrest and Search Warrants. (See ALERT-July, August, and September 1971, and August and September 1972.) Every law enforcement officer, therefore, should be generally familiar with the term. Nevertheless, because probable cause is so basic to criminal procedure, it is important that all officers have as complete an understanding of it as possible. This article will attempt to explain in detail all aspects of probable cause as it concerns the law enforcement officer. The material presented here should not be read in isolation but is designed to be read in conjunction with the above mentioned articles on Arrest and Search Warrants.

Definition

A good place to begin a discussion of probable cause is with a definition. Two different but similar definitions of probable cause will be quoted, one for search and one for arrest, because different types of information are required for each. The most quoted definition of probable cause to *search* is that found in *Carroll v. U.S.*, 45 S.Ct. 280 (U.S. Supreme Court, 1925). In that case, the Court said that probable cause exists when:

> "the facts and circumstances in (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that (seizable property would be found in a particular place or on a particular person.)" 45 S.Ct. 280, at 288.

Paraphrasing the *Carroll* case, theU.S. Supreme Court in *Draper v. U.S.*, 79 S.Ct. 329, (1959), said that probable cause for *arrest* exists where:

> "the facts and circumstances within (the arresting officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that (an offense has been or is being committed.)" (79 S.Ct. 329 at 333).

These definitions differ only in that the facts and circumstances which would justify an arrest may be different from those that would justify a search. In this article, we will not be concerned with these differences. They have already been covered in a previous issue of ALERT.(See August 1972 ALERT, page 2) Nor will we be concerned with the procedures for applying for arrest or search warrants since these have been discussed in the July 1971 and August 1972 issues of ALERT. Rather, this article will be concerned with that part of the definition of probable cause which is common to both arrests and searches, namely, the nature, quality, and amount of information necessary to establish probable cause. We will concentrate on facts and circumstances which the law enforcement officer must have within his knowledge before he can arrest or search, with or without a warrant. Of course, it is impossible to say exactly what combination of facts will provide probable cause in any given situation, because every situation is different in some way. Also, probable cause is by necessity a nebulous concept, impossible of exact explanation. Nevertheless, an attempt will be made to indicate the types of information which a judge or magistrate will consider in deciding whether probable cause exists, whether in an application for an arrest or search warrant or at a motion to suppress hearing.

Sources of Information

Information about possible criminal activity can come to a law enforcement officer's attention in two possible ways. (1) The officer may himself perceive the activity; or (2) someone else may perceive the activity and relay the information to the officer. These two types of information sources are treated differently by the courts in determining whether there is probable cause for a warrantless arrest or search or for the issuance of an arrest or search warrant. Because of these differences in treatment, the two types of information sources will be discussed separately in ALERT. This month's article will deal with information obtained through the officer's own senses. Next month's article will deal with information received from other persons or informants.

INFORMATION OBTAINED THROUGH THE OFFICER'S OWN SENSES

When applying for an arrest or search warrant, the law enforcement officer must state, *in writing*, in the complaint or affidavit the underlying facts upon which probable cause for the issuance of the warrant is to be based. This statement must contain all the necessary facts for

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determining probable cause because neither the judge, magistrate, nor a reviewing court may go beyond the four corners of the affidavit to obtain additional information on which to base a finding of probable cause. *State v. Hawkins,* 261 A. 2d 255 (Supreme Judicial Court of Maine, 1970). Actually, the officer need not state *all* he knows about a particular case as long as he states sufficient facts to support a finding of probable cause. Because judges and magistrates differ, and because probable cause is such an elusive concept, however, the officer takes a chance if he does not state all the facts within his knowledge in the complaint or affidavit.

The officer must have the same considerations in mind when he decides to arrest or search without a warrant. Even though he does not have to write down the facts to support a finding of probable cause in these cases, he must be prepared to justify his arrest or search if it is later challenged at trial or at a motion to suppress hearing. Therefore, whether he goes the warrant route or not, the officer must have sufficient information for probable cause in his mind *before* he conducts any arrest or search.

One type of information which an officer will use to support his finding of probable cause is information which comes to him through his own senses. This would include not only what the officer might have seen, but also what he might have heard, smelled, touched, or tasted. Furthermore, an officer's perceptions may be given additional weight because of his experience or expertise in a particular area. As one court has said:

> "Among the pertinent circumstances to be considered is the qualification and function of the person making the arrest. An officer of a narcotics detail may find probable cause in activities of a suspect and in the appearance of paraphernalia or physical characteristics which to the eye of a layman could be without significance. His action should not, therefore, be measured by what might not be probable cause to an untrained civilian passerby, but by a standard appropriate for a reasonable, cautious, and prudent narcotics officer under the circumstances of the moment." *State v. Poe,* 445 P.2d 196, 199 (Supreme Court of Washington, 1968).

Indications of Criminal Activity Which May Contribute to Probable Cause

When criminal activity is committed in an officer's presence, and it is perceived by the officer through one or more of his senses, this is clearly information which would be sufficient for probable cause to support either the issuance of a warrant or, in the proper circumstances, an arrest or search without a warrant. Most information which comes to an officer's attention, however, is seldom as clearcut as an offense being committed in his presence. Usually, the officer has to develop probable cause from a series of facts which do not add up to a crime being committed in his presence. The following is a list of the types of facts and circumstances which may be used by a law enforcement officer in developing probable cause along with a discussion of the weight each is likely to be accorded by a judge or magistrate.

Flight

The flight or attempt to escape of a suspect when approached by a law enforcement officer is one factor to be considered in determing whether there is probable cause. An example of this is a case in which officers in a patrol car had received information by radio about illegal activities involving non-tax-paid whiskey and had been given a description of a car and its occupants who were said to be involved in the illegal activity. When the officers spotted the car, they pulled up to it and called out the nickname of the defendant, whom they recognized. Defendant then threw his car into reverse and sped away. The officers overtook him after a short chase and approached his car. As they approached, they smelled the odor of moonshine whiskey and observed tin cans and plastic jugs in the back seat of the vehicle. They then arrested the defendant.

The court held that the arrest was valid and supported by probable cause. For purposes of this discussion, it is important that the court specifically held that the flight of the defendant was one factor *among others* to be considered in determining whether there was probable cause. *U.S. v. Brock,* 408 F.2d 322 (5th Circuit Court of Appeals, 1969).

Flight is not, however, by itself, conclusive evidence of probable cause. This point is illustrated by the U.S. Supreme Court case of *Wong Sun v. U.S.* In that case, federal officers arrested a man named Hom Way at two o'clock in the morning and found narcotics in his possession. Hom Way told the officers that he had purchased an ounce of heroin from a person named "Blackie Toy." At six o'clock that same morning, the officers went to a laundry operated by James Wah Toy. When Toy answered the door, one officer identified himself, whereupon Toy slammed the door and ran to his living quarters at the rear of the building. The officers broke in, followed Toy to his bedroom and arrested him there.

The U.S. Supreme Court held that the arrest was made without probable cause. First, the Court did not know Hom Way to be reliable. (More will be said about reliability of informants later.) Second, the mere fact of Toy's flight did not provide a justification for a warrantless arrest without further information. On this point, the Court said:

> "Toy's refusal to admit the officers and his flight down the hallway thus signified a guilty knowledge no more clearly than it did a natural desire to repel an apparently unauthorized intrusion . . .
>
> A contrary holding here would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked." (83 S.Ct. 407, at 415).

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Furtive Conduct

Law enforcement officers are frequently confronted with suspicious circumstances, furtive movements or other furtive conduct, which give them reason to believe either that criminal activity is afoot or that the person or persons observed are attempting to hide contraband, instrumentalities, or othe evidence of crime. Usually, such circumstances or conduct will at least justify an officer's further investigation to determine whether a crime is being or is about to be committed. (See the November and December 1971 issues of ALERT on Stop and Frisk.)

Furtive conduct by itself, however will usually not be enough to establish probable cause to arrest or search. The reason for this is that a person may be making a totally innocent gesture, asserting a constitutional right, or reacting in fear to an officer's approach. Such actions may often be mistaken for guilty behavior by a law enforcement officer investigating a possible crime. An individual should not be subject to arrest or search on such uncertain information.

A typical case illustrating this point involved a police officer who had spotted a car parked illegally with the defendant sitting in it. The officer pulled up next to the vehicle in order to advise the defendant it was illegally parked. As the officer alighted, he noticed the defendant lean forward in the driver's seat. The officer directed defendant to get out of the car, patted him down, and searched under the seat of the car. Marijuana was found and seized.

The Court held the search and seizure to be illegal. In order to constitute probable cause for a search, there must be something more than a furtive gesture such as a motorist bending over in the front seat. The gesture must have some guilty significance arising either from specific information known to the officer or from additional suspicious circumstances observed by him. In this case, there were no such additional factors, and the search was not justified. *Gallik v. People,* 489 P.2d 573 (Supreme Court of California,1971).

Where there are such additional circumstances, however, furtive action may provide one of the factors upon which probable cause may be based. In one such case, officers entered the home of one Bracamonte to execute a search warrant. As they entered, they spotted defendant standing in the living room. The officers recognized defendant because they had been told by informants that defendant was a narcotics dealer, and they had observed him in the company of narcotics suppliers on several occasions. The officers noticed that defendant's right hand was clenched in a fist behind his right leg and they asked him what he was concealing. Defendant made a further gesture to conceal his hand from view and then raised it in an upward motion toward his mouth. One officer grabbed his hand and opened his fist finding a balloon which contained what was later determined to be heroin. Defendant was placed under arrest.

The court held that the officers had probable cause to arrest defendant and to search him incident to the arrest. The court said that defendant's presence in a place suspected of narcotics activity, his past dealings in narcotics, combined with his furtive movements supplied the necessary probable cause. With respect to the furtive movements, the court said:

> ". . . to add to the highly suspicious circumstances, appellant not only attempted to hide something behind his leg in a clenched fist, but when the officer inquired as to what he was hiding, appellant moved the clenched fist rapidly toward his mouth. Swallowing narcotics is a popular method of avoiding detection, and movements of the hand toward the mouth have consistently been held to be the type of furtive movement that may be assessed in the probable cause equation." *People v. Rodriquez,* 79 Cal. Rptr. 20 (California Court of Appeal, 1969).

Perceptions of Narcotics Usage

An officer's perceptions of narcotics usage may be considered in determining the existence of probable cause. This is similar to perceptions of furtive conduct except that furtive conduct is usually voluntary whereas indications of narcotics usage are usually involuntary. The indicators of narcotics usage that are considered by courts in determining whether there is probable cause are abnormal contraction of pupils, discolored tissue on arms, fresh needle marks on arms, slurred speech, difficulty in balancing, nervousness, sweating, and heavy eyelids. Observation of one or two of these factors, standing alone, is probably not sufficient information to establish probable cause. When many such factors are present, however, or when there are other suspicious circumstances, chances are greater that the information available will support a finding of probable cause.

An example of perceptions of narcotics use providing probable cause is a case where officers were investigating a report of suspicious activity of a person who had boarded a bus. The officers checked the bus and asked the suspicious person to dismount. While talking to him, they noticed that he was extremely nervous, sweating profusely, and the pupils of his eyes were extremely constricted despite poor lighting. The officers shined a flashlight in his eyes and noticed no apparent reaction to the light. Questions had to be repeated to him as though he were in a daze. The officers, being experienced narcotics officers, formed the opinion that the defendent was under the influence of a narcotic and arrested him. The court held that the observations of the officers were sufficient to establish probable cause to arrest. *People v. Gregg,* 73 Cal. Rptr. 362 (Court of Appeal of California, 1968).

Admissions

A defendant's admission of criminal conduct to a law enforcement officer can often provide probable cause for the arrest. In fact, oftentimes this is all that is needed because an admission provides such direct evidence of the

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defendant's guilt that the officer need look no further. An example is a case where officers observed a vehicle driven by defendant fail to stop for a traffic light and followed it into a gas station. The officers intended only to issue a traffic citation. As the vehicle stopped, the defendant and two passengers stepped from the vehicle and advanced toward the officers. The officers patted them down to protect themselves and one officer thought he felt capsules in defendant's pocket. He asked him if he had any pills in his pocket and the defendant responded "They're reds. They belong to my mother." The officer then asked the defendant to take out the pills and seized them. Later chemical analysis indicated they were seconal.

The court found that the usage of the term "reds" to describe seconal was so common that they could take judicial notice of it. The admission by the defendant was held to be sufficient in itself to provide probable cause and the arrest and seizure were both upheld. *People v. Hubbard,* 88 Cal. Rprt. 411 (California Court of Appeal, 1970).

It is worthy of note that in the preceding case the court discussed at length whether the defendant should have been given *Miranda* warnings before the officer asked him about the pills. It was held that defendant was not in custody for purposes of *Miranda* because there was no "compelling atmosphere" and he was only subject to a "transitory" restraint. The important thing for the law enforcement officer to remember, however, is that whenever a defendant's admission or confession becomes part of a case, the requirements of *Miranda* must be satisfied, if they apply. Otherwise the admission or confession itself and any evidence seized as a result of it wil be inadmissible in court. Guidelines for the law enforcement officer with respect to *Miranda* can be found in the May and June 1971 issues of ALERT.

Failure to Explain or Evasiveness

When a suspect, confronted by a law enforcement officer, provides an implausible or unreasonable explanation for his suspicious conduct or presence near the scene of a crime, this conduct may contribute to probable cause for an arrest. There are so many possible examples of this type of situation that it is difficult to cover it completely in an article of this length. Nevertheless, common examples of this type of behavior are failure to produce identification, giving of a false identification or alias, and lying about other things which are contrary to facts within an officer's knowledge. Usually, failure to explain or evasiveness standing alone will not be enough to provide probable cause.

In one case, State Police had been notified that rental trucks were being used to transport stolen goods in a certain area of the state. One officer patrolling in this area stopped a rental truck for a routine check for registration, driver's license, and rental papers. Noticing that the truck was heavily loaded, the officer asked the defendant what he was carrying. The defendant claimed that his truck was empty. A subsequent search revealed a cargo of stolen cigarettes.

The court held that probable cause to search was provided by the officer's knowledge that rental trucks were being used in the area to transport stolen goods combined with the defendant's obvious lie. A search warrant was not needed in this situation because the truck was a movable vehicle and could be searched under the doctrine of the case of *Chambers v. Maroney* once there was probable cause to search. (See ALERT, November 1970) *U.S. v. Gomori,* 437 F.2d 312 (4th Circuit Court of Appeals, 1971).

High Crime Area

Another factor which may contribute to a finding of probable cause is a suspect's unusual behavior in or near a high crime area. In a case illustrating this point, officers at 3:30 a.m. spotted a parked car with its headlights on in an area in which drug offenses were frequently committed. They noticed a second car across the street and a man receiving something from a white paper sack held by the driver. The officers approached the second car and observed a broken left window vent and the defendant in the back seat stuffing something behind the seat cushion. They ordered all four occupants out of the car and as they emerged a sack fell to the ground and broke, disgorging numerous pills and capsules resembling dangerous drugs. The occupants of the car were then arrested.

The court held that the combination of circumstances—the high-crime neighborhood, the hour, the apparent transfer of something, the suspicious conduct of some of the men, the broken vent window, and finally the broken bag full of pills and capsules—was sufficient to give the officers probable cause to arrest the occupants of the car. *People v. Nieto,* 72 Cal. Rptr. 764 (Court of Appeal of California, 1968).

It should be noted that the mere observance of a suspect acting in an innocent manner in a high crime area will not be enough for probable cause. There must be other facts indicative of possible criminal activity before there can be justification for an arrest or search.

Presence at the Scene

Closely related to the observance of a suspect in a high crime area is the observance of a suspect's presence and conduct near the scene of recent criminal activity. Again, this, standing alone, will not support probable cause for an arrest or search, but combined with other factors, it may be sufficient.

In a Maine case illustrating the point, an officer received radio report that a break was in progress at a certain building. When the officer got to the building, he discovered that the rear window had been broken and metal bars over the window spread to permit the entrance of a person. He observed no suspects at the scene but heard voices coming from the second floor porch of an adjoining building. He entered this building and went up to the roof where he found defendants, lightly clad on a cold night, attempting to conceal themselves. He arrested them, frisked them for weapons, and found coins which were later admitted into evidence.

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The court found that the radio warning that a break was in progress, the observations of the officer at the scene, the presence of the defendants near the scene of the crime, lightly clad on a cold winter night, and their attempt to conceal themselves were sufficient to give the officer probable cause to arrest the defendants. *State v. Mimmovich,* 284 A.2d 282 (Supreme Judicial Court of Maine, 1971).

Reputation of Premises

The mere fact that a person is on premises where officers have reason to believe there is criminal activity will not alone justify either his arrest or a search of his person. Such a fact, however, may be considered with others in assessing probable cause for an arrest. We have already seen an example of this in the case of *People v. Rodriquez* in the section on *Furtive Conduct,* so a further example is not necessary here.

Association With Other Known Felons

Association of a suspect with other known felons is treated in much the same way as presence on ill-reputed premises for purposes of determining probable cause. It will not be sufficient alone to provide probable cause to arrest or search, but is one factor to be considered along with other indications of criminality.

In an illustrative case, police had arrested two associates of the defendant and her companion in connection with a bank robbery and had found part of the stolen money on these associates. The police knew that the defendant and her companion and the alleged robbers had been staying at the same motel when the alleged robbers were arrested only two days after the robbery. The police also knew that they had recovered only a portion of the money from the bank. The additional fact that defendant and her companion had moved from the motel where they were staying immediately after their associates were arrested and registered under an assumed name at another motel convinced the court that officers had probable cause to arrest the defendant. *U.S. v. Whitney,* 425 F.2d 169 (8th Circuit Court of Appeals, 1970).

Past Criminal Conduct

The mere fact that a suspect has a known criminal record will not alone provide probable cause for an arrest. As the U.S. Supreme Court said in the 1964 case of *Beck v. Ohio:*

> "We do not hold that the officer's knowledge of the petitioner's physical appearance and previous record was either inadmissible or entirely irrelevant upon the issue of probable cause . . . But to hold that knowledge of either or both of these facts constituted probable cause would be to hold that anyone with a previous criminal record could be arrested at will." 85 S.Ct. 223, at 228 (1964).

As the court implies, however, the prior criminal activity of the suspect is a factor to be considered among others in the determination of probable cause. In an illustrative case, an officer observed in plain view in the back of a truck, coils of copper wire, which were of a type and amount that was not readily available to the ordinary citizen, nor would the ordinary citizen ever have use for those types and amounts. The officer knew this because he had considerable experience investigating copper wire thefts. Furthermore, the officer knew the defendant to be a copper wire thief and had arrested him on several felony charges before.

Based on this information the court found probable cause to seize the wire in the truck. The court emphasized, however, that the officer could not have seized the wire unless he had a reasonable foundation for the belief that it was stolen. The large amount and unusual nature of the copper wire observed in the back of the defendant's truck provided this reasonable foundation. These observations plus the knowledge of defendant's prior criminal activity provided probable cause to seize the wire. Defendant's prior criminal activity alone would not have been enough. *State v. Temple,* 488 P.2d 1380 (Court of Appeals of Oregon, 1971).

Unusual Hour

The time of day can also be a factor in determining whether there is probable cause to arrest or search. Of course, a person will not be subject to search merely because he happens to be acting in an innocent manner at an early hour of the morning. If, however, other factors are present, such as furtive conduct in a high crime area, the hour of the day may be a relevant factor in determining whether an arrest or search is justified. The case of *People v. Nieto* appearing above under the *High Crime Area* category is a good example of how the time of day enters into the probable cause equation. Another good example of how time of day enters into the determination of probable cause is the Maine case of *State v. Stone* 294 A.2d 683 (Maine Supreme Judicial Court, 1972), which is summarized on pages 3 and 4 of the November 1972 ALERT.

Suspect Resembles Description

A law enforcement officer may have obtained a physical description of a suspect or seen a mug shot from a police bulletin or wanted poster. If he spots someone who closely resembles such a description, an arrest of that person will be valid as based on probable cause. In fact, it has been held that the arrest would be justified even if the person arrested was the wrong person.

An example is a case where an officer had received a photograph of a murder suspect at an early morning briefing session. He studied the photograph and later, while cruising in his patrol car, observed defendant, who closely resembled the suspect in the photograph, driving the other way. The officer pulled defendant's car over, arrested defendant for murder, and found evidence of another crime as a result of a search incident to arrest. It turned out that defendant was not the person portrayed in the police photograph.

The court, however, held that the arrest was valid because probable cause could be found where the defendant bore a striking resemblance to a picture of a murder

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suspect in a police bulletin. And even though defendant was not the murder suspect, the court said that once the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, the arrest of the second party is a valid arrest. The evidence seized incident to the arrest was therefore found to be admissible. *People v. Prather,* 74 Cal. Rptr. 82 (California Court of Appeal, 1969).

Facts Arising During Investigation or Temporary Detention

It is very important for the law enforcement officer to realize that probable cause to arrest or search may arise during investigation or questioning of a suspect or in the typical "stop and frisk" situation. In these situations, the officer may initially only be seeking information or merely investigating suspicious circumstances. Yet during the temporary detention other facts may come to the officer's attention either from the words or actions of the detained person or form other sources. For example, the person may give evasive answers, attempt to flee, act in a furtive manner, or the officer may perceive any of the other indications of possible criminal activity discussed above. If these facts and circumstances are sufficient to establish probable cause to arrest or search, then the officer may act accordingly.

The most important case in this area is, of course, the U.S. Supreme Court case of *Terry v. Ohio,* 88 S.Ct. 1868 (1968). This case has been summarized and discussed in detail in the November 1971 issue of ALERT and will not be repeated here. It should be noted that the November and December 1971 issues of ALERT deal with the entire area of "stop and frisk" and several of the cases summarized deal with the manner in which probable cause to arrest or search may arise from the "stop and frisk" situation. Officers are encouraged to review both of these issues and study the examples in the context of this article.

SUMMARY

This article has presented several examples of the types of facts and circumstances which may form a basis for probable cause, though this list is by no means exhaustive. The law enforcement officer should look for these types of information when he is on the beat and should know what weight a judge or magistrate is likely to give to each type of information in determining whether there is probable cause. Most importantly, however, the officer should make sure that he has sufficient information before he acts. Thus, if he decides to make an arrest or search without a warrant, he should be prepared *at that time* to justify his action with specific facts and circumstances sufficient for probable cause. Likewise, if the officer decides to apply for a warrant, he must state *in writing,* in the complaint or affidavit, the specific facts and circumstances which he feels give him probable cause to arrest or search. Of course, because probable cause is such an indefinite concept and because some judges and magistrates have stricter standards than others, the court may still find a lack of probable cause despite the officer's painstaking efforts. Nevertheless, a careful and systematic approach by the officer is likely to result in more solidly based cases, less waste of time and effort, and fewer violations of individual rights.

* * * *

This concludes the first section of the article on probable cause. In next month's article, we will discuss the requirements of establishing probable cause when the information comes to the officer through a third person or informant.

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.

IMPORTANT RECENT DECISIONS

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

Search and Seizure JPL

Defendant was convicted of conspiracy, and fraudulently uttering worthless checks. Virtually all of the state's evidence consisted of testimony by a co-conspirator who had previously pleaded guilty to the same crimes. The police learned of the existence of this witness during the course of an admittedly illegal search of defendant's apartment. The witness had no prior record and was not under any suspicion when she was discovered standing in defendant's apartment during the illegal search. Nor did the prosecution produce any evidence suggesting that the police would ever have discovered the existence of the witness by subsequent legal methods. Finally, the evidence suggested that the witness would never have voluntarily come forward to the police because she was in great fear of going to prison and her testimony incriminated herself.

Under these facts, the court found that the witness's testimony was the "fruit of the poisonous tree" and inadmissible under the exclusionary rule of the 4th Amendment. *Commonwealth v. Cephas,* Supreme Court of Pennsylvania (May, 1972).

Identification

Defendant was convicted of armed robbery. He was identified at trial by an eye-witness to the crime. The prosecutor also introduced evidence that the same eyewitness had previously picked defendant out of a group of 7 mugshots, out of a photograph of a six-man lineup and finally out of a subsequent, live, five-man lineup. Following the second pretrial identification, an F.B.I. agent told the eyewitness, "we think this is the man, too."

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Defendant said the agent's remark and the use of defendant in two separate lineups constituted undue suggestiveness on the part of the police and tainted the courtroom identification.

The court, adopting the "totality of the circumstances" test, ruled that the photographic identification procedure was not impermissibly suggestive. The court stressed (1) that the eyewitness had a chance to see the defendant unmasked at a distance of only 30 to 40 feet in clear daylight; (2) that the eyewitness gave the police a description of defendant at the scene of the crime that later proved accurate; (3) that the eyewitness was shown a batch of mugshots on the day of the crime that did not include defendant and did not mistakenly identify any of them and (4) that the eyewitness picked defendant out of a group of seven mugshots and this happened before the F.B.I. agent made his suggestive remark. *United States v. Higgins,* 458 F. 2d 461. (3rd Cirucit Court of Appeals, March, 1972).

Detention JPL

Defendant was convicted of possession of stolen checks. The checks were found inside his car when police searched the car after ordering defendant to roll down his window for questioning. The police based the search on the smell of marijuana escaping from the car after the window was rolled down. Defendant argued that the original police order to roll down the window was inreasonable. The prosecution argued that the police may, under certain circumstances, momentarily detain, or seize, a person for questioning on less than probable cause. The court agreed with the prosecution's legal conclusion but disagreed with its analysis of the facts.

The court noted that (1) the police had no report of a crime in that particular area; (2) had no tips or other information concerning the defendants or their car; (3) nothing unusual happened in the car during the short time it was under observation; (4) the hour was 11:15 P.M., not an unusual time for two men to be abroad in a car in June.

The court concluded that "at best, the police were acting upon a generalized suspicion that any black person driving an auto with out-of-state license plates might be engaged in criminal activity." The momentary detention of a citizen for questioning is not permitted on such scant basis. *U.S. v. Nicholas,* 488 F. 2d 622 (8th Circuit Court of Appeals, September, 1971).

Miranda; Competency JP

Defendants were convicted of armed robbery. They had confessed after supposedly waiving their Miranda rights. On appeal, defendants successfully argued that they could not have voluntarily and knowingly waived their Miranda rights because they were retarded. The court stressed two facts in reaching this conclusion: (1) four experts testified for the defense that defendants were retarded and incapable of understanding or waiving their Miranda rights. The prosecution produced no experts to contradict this testimony: (2) both defendants, who were 16 and had 60 I.Q.'s, had never been in trouble before. The Court's implication seems to be that defendants had no chance to absorb the meaning of Miranda through constant repetition *Cooper v. Griffin,* 455 F. 2d 1142 (5th Circuit Court of Appeals, February, 1972).

MAINE COURT DECISIONS

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Manslaughter JP

The Supreme Judicial Court has confronted anew the old question of what should be done when:

a. The defendant is charged only with murder;
b. The evidence is sufficient to prove murder;
c. There is no evidence of provocation or passion that would tend to show manslaughter;
d. And the jury finds defendant Not Guilty of murder, but Guilty of manslaughter.

The answer—as it was in the past—is that in such a situation, the conviction stands. The theory is that a defendant cannot be heard to complain of an error which works to his advantage. *State v. Heald,* 292 A. 2d 200 (Supreme Judicial Court of Maine, July 1972).

Pre-Trial Identification L

Defendant, a young black man, was convicted of rape and appealed. After the alleged rape incident, the victim gave a description of her assailant to the police as a man wearing a blue blazer and white trousers. The next day, the police went to defendant's hotel and requested that he come to the police station for line-up identification. Two other black men, were placed in the line-up with him, and all were of approximately the same height and wore similar clothing except that defendant was the only one wearing white sneakers. (The victim laer testified at trial that her assailant had worn white sneakers. It is unclear, however, whether the police knew this at the time of the line-up). The victim identified defendant as her assailant through a one-way mirror. Defendant did not have counsel at the line-up.

Defendant claimed on appeal that the identification was inadmissible in court since he was entitled to counsel. The Court, following the U.S. Supreme Court decision in *Kirby v. Illinois,* held that defendant was not entitled to counsel at the line-up because no formal charges had been brought.

Defendant also claimed that even if he was not entitled to have a lawyer present at the line-up, the line-up was overly suggestive (because of the one-way mirror and the white sneakers) and the identification should not have been admissible because it violated due process. The Court said that the prosecution did not get enough

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evidence on the record for the court to make an informed judgement as to whether or not the line-up was overly suggestive. As mentioned above, it was not known whether the police deliberately asked the defendant to put on the white sneakers for the line-up. With regard to the use of the one-way mirror, the Court said:

> "While the record does not reveal any evidence of intentional unfairness by the police in their use of the one-way mirror on this occasion, the potential for unfairness of the device is great and the threat to due process is enormous. The Defendant is excluded from the presence of the victim and the police and is unaware of the circumstances under which the identification procedures are being conducted on the other side of the mirror. He must depend upon the police and those persons the police have permitted to be present for information upon which the fairness of the viewing may be judged. His counsel at trial is gravely handicapped in protecting the defendant from effects of possible improper suggestion contributing to the identification." *State v. Boyd,* 294 A.2d 459 at 463 (Supreme Judicial Court of Maine, September 1972).

Search and Seizure—automobile L

Defendant was convicted of two counts of possession of certain drugs and appealed. The fact situation was as follows:

Defendant was seriously injured in an automobile accident. The investigating trooper, upon arriving at the scene, was told that defendant was unconscious with one eye hanging out of his head. The trooper, believing the accident might be fatal, began a warrantless search through the car for the license and registration of the car's owner. His purpose, apparently, was to provide quick notification to families in the event of serious bodily injury or death. But he also may have been looking for evidence of criminal conduct. The record is unclear and, as a result, the decision deals with both possibilities. The trooper's search eventually led to the inside of a jacket pocket where the trooper found the drugs.

The Supreme Judicial Court reversed the convictions, stating that the drugs found inside defendant's jacket should have been suppressed. The Court first assumed that the trooper's purpose was exclusively to look for information that would aid him in notifying next-of-kin and held as follows:

1. The Fourth Amendment's prohibition against unreasonable searches and seizures applies to administrative, non-criminal, searches. Therefore, any warrantless,non-criminal search, like its criminal counterpart, must be based on: a) the existence of probable cause and b) sufficient exigent circumstances to justify the intrusion upon privacy. The state must prove the existence of both of these elements before the warrantless search can be justified.

2. The state failed to prove the existence of probable cause to search the inside of the pocket of defendant's jacket. More specifically, the Court said that the State has not asserted through statute any police duty to notify next-of-kin nor any other governmental interest that would justify a finding of probable cause. In other words, although the express holding is "no probable cause", what the Court is really saying is that probable cause to search cannot exist in a vacuum. There must first be an important police power interest to justify the search; and the notification of next-of-kin is not important enough to justify an invasion of privacy. At least this is true in the absence of any statute to the contrary.

3. The Court recognized that under 29 M.R.S.A. §891, the trooper had a right to be at the scene of the accident and a duty to investigate it. Nevertheless, the Court said the duty to investigate did not give the trooper the right to be present "in the interior of the pockets of a personal jacket of the defendant without his consent, the interior of defendant's jacket having in no (way) been knowingly exposed to public view . . ."

4. Having found no probable cause (or more accurately, no asserted state interest that would justify a finding of probable cause) the Court said it was not necessary to determine whether exigent circumstances existed to justify the warrantless search.

After examining the case on the assumption that the trooper's purpose in searching the car was exclusively non-criminal, the Court examined the fact situation on the assumption that the trooper was also searching for evidence of criminal conduct. With this assumption in mind, the Court held:

1. Although, under this assumption, there is a government interest important enough to justify a search if there is probable cause to believe any criminal conduct was involved, the search was still invalid because there was not, in fact, a shred of evidence at the scene of the accident to indicate that any criminal conduct was involved.

2. Even if there had been enough evidence to make a finding of probable cause of criminal conduct, the search would still be invalid because there were no exigent circumstances to justify the trooper's decision to search without a warrant. The Court pointed out that there was no immediate danger that the automobile and its contents would be removed so that the police officer would be frustrated if he took the time to get a warrant. The auto was immobilized and subject to the custody of the police, and all of its occupants had been take to the hospital. *State v. Richards,* 296 A.2d 129 (Supreme Judicial Court of Maine, October 1972).

ALERT

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