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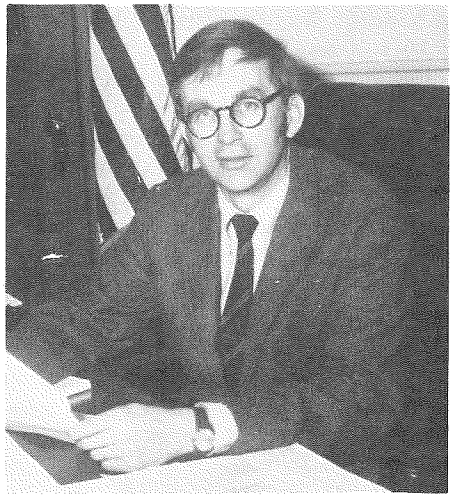
ALERT

CRIMINAL DIVISION

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



MESSAGE FROM THE ATTORNEY GENERAL JON A. LUND

I would like to take this opportunity to introduce myself as the newly elected Attorney General of Maine. I intend to keep a close watch on the problems and needs of Maine's law enforcement officers throughout my term of office and I plan to use the ALERT Bulletin as a means of communication between this office and the officer in the field.

In this regard, I would like to announce the beginning of a new column in the ALERT Bulletin, starting with the next issue. The column will be entitled FORUM and will consist of questions and answers, comments, and advice on various aspects of the law enforcement officer's occupation. I am hoping that you, the law enforcement officer, will provide input to this new feature by sending in questions arising from your daily experiences. With your help, ALERT can indeed become a forum for sharing problems and solutions of all law enforcement personnel in Maine.

Jon A. Lund

JON A. LUND
Attorney General

PROBABLE CAUSE II

In last month's issue of ALERT, we discussed the development of probable cause to arrest or search through the perceptions of the law enforcement officer. While this is an important source of information for probable cause, it is not possible for a law enforcement officer to be present at the scene to observe every crime that happens. In fact, the majority of crimes are committed out of the presence of law enforcement officers, and yet there is still an obvious need to make arrests and searches in these types of crime. More importantly, arrests and searches made in connection with crimes committed out of the presence of law enforcement officers must conform to the same constitutional standards as those made in connection with observed crimes.

The difficulty for the law enforcement officer lies in obtaining the authority to arrest or search when he has not personally observed any facts or circumstances upon which probable cause may be based. The only solution, of course, is that his information must come from third persons or informants who have themselves personally observed such facts and circumstances. The difficulty does not stop there, however. The officer is still faced with the task of convincing, in the case of a search warrant, the District Court Judge or Complaint Justice, and in the case of an arrest warrant, the District Court Clerk or Complaint Justice, that the information supplied to him by the informant is reliable and worthy of being acted upon. This and next month's issues of ALERT will be devoted to a discussion of the procedures to be followed by law enforcement officers in establishing probable cause to arrest or search, with or without a warrant, when the information comes from persons other than the officer himself.

For purposes of discussion, we will concentrate on the situation where the officer is applying for an arrest or search warrant based upon information from third persons. We do this to make the presentation more easily understandable and to emphasize again that the officer must *write down*, in the complaint or affidavit, the information upon which probable cause is to be based. The same probable cause considerations, however, are involved in arrest warrants and in warrantless arrests and searches, except of course, that the information need not be written down in the warrantless situation. The term *informant* will be used throughout the discussion to refer to any third person from whom a law enforcement officer obtains information on criminal activity.

INFORMATION OBTAINED BY THE OFFICER THROUGH INFORMANTS

The method of establishing probable cause through the use of an informant's information is sometimes referred to as the *hearsay*

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method of establishing probable cause, as opposed to the direct observation method discussed in last month's ALERT. The hearsay method has been developed in recent years though decisions of the U. S. Supreme Court and various state courts. These decisions have set out definite requirements for law enforcement officers in preparing complaints or affidavits for warrants using information received from third persons, although there are many areas that still need to be clarified. The purpose of these requirements is to ensure that there is a substantial basis for the magistrate to credit the hearsay information. If the officer does not carefully follow these requirements, either he will be unable to obtain a warrant, or, in the case of a warrantless arrest or search, his arrest or search will later be declared unlawful and any evidence seized will be inadmissible in court.

The Aguilar and Hawkins Cases

The leading case setting out the standards for establishing probable cause under the hearsay method is the U. S. Supreme Court case of *Aguilar v. Texas,* 84 S. Ct. 1509 (1964). The leading *Maine* case in the area is *State v. Hawkins,* 261 A.2d 255 (Supreme Judicial Court of Maine, 1970). Both cases set out the same *two-pronged test* for determining probable cause when the information in the complaint or affidavit is either entirely or partially obtained from an informant.

(1) The complaint or affidavit must describe underlying circumstances from which a neutral and detached magistrate may determine that the *informant* is *reliable;* and

(2) The complaint or affidavit must describe underlying circumstances from which the magistrate may determine that the *informant's information* is itself *reliable* and not the result of mere rumor or suspicion.

This article will discuss each of the prongs of the *Aguilar* test separately, emphasizing the duties of the law enforcement officer in each case.

Prong 1: Reliability of the Informant

The law enforcement officer must demonstrate to the magistrate, in the complaint or affidavit, underlying circumstances sufficient to convince the magistrate that the informant is a reliable, credible person. The amount and type of information the officer must provide depends partially upon whether the informant's identity is disclosed or undisclosed.

Disclosure of Informant's Identity

Whether the informant's identity is disclosed or not is an important consideration in establishing the reliability of an informant. If a law enforcement officer identifies his informant by name in the affidavit, a magistrate is more likely to credit the reliability of the informant because he can have the disclosed informant appear before him if he feels further facts are necessary. Therefore, usually, if the informant is named in the affidavit, the officer does not need to do anything further to establish his reliability. *People v. Glaubman,* 485 P.2d 711 (Supreme Court of Colorado, 1971).

When the informant's identity is undisclosed, however, the magistrate has no way of determining for himself whether the informant is reliable. The magisrate must depend entirely on the information supplied to him by the law enforcement officer in the affidavit. Therefore, the magistrate requires detailed factual information from the officer on the informant's reliability where his identity is undisclosed. We will see in the next two sections that courts make a further distinction between the ordinary citizen informant and the criminal informant as to the amount and quality of information needed to establish an informant's reliability.

Ordinary Citizen Informant

Some courts have said that an undisclosed ordinary citizen informant is presumed reliable and no further evidence of his reliability need be stated in the affidavit. As one court has stated:

> "One cannot approach the problem of informants whose information may or may not be sufficient to create 'probable cause' as if there were only two classes: reliable informants whose information has previously been tested by the police and 'all others'. A multitude of cases....attest to the fact that information from a citizen who purports to be the victim of or to have witnessed a crime may, under certain circumstances, provide a sufficient basis for an arrest." *People v. Griffin,* 58 Cal. Rptr. 707 (California Court of Appeals, 1967).

As the above quote indicates, both victims of crime and eyewitnesses to crime are considered to be reliable informants even though their reliability has not been previously tested. *U. S. v. Mahler,* 442 F.2d 1172 (9th Circuit Court of Appeals, 1971). The reason behind this rule has been stated by the Supreme Court of Wisconsin:

> "(A)n ordinary citizen who reports a crime which has been committed in his presence, or that a crime is being or will be committed, stands on much different ground than a police informer. He is a witness to criminal activity who acts with an intent to aid the police in law enforcement because of his concern for society or for his own safety. He does not expect any gain or concession for his information. An informer of this type usually would not have more than one opportunity to supply information to the police, thereby precluding proof of his reliability by pointing to previous accurate information which he has supplied." *State v. Paszek,* 184 N.W. 2d 836, 843, (1971).

Fellow law enforcement officers are also considered to be reliable informants without having their reliability established. *Brooks v. U.S.,* 416 F.2d 1044 (5th Circuit Court of Appeals, 1969). Information passing through too many officers' mouths, however, will lose its reliable character. In one case, for example, an officer recited in the affidavit that he had been told certain facts by a fellow officer, who had been told by another officer, who in

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turn had been told by an officer in another state. The court refused to find probable cause where there was no other information presented in the affidavit except the multiple hearsay. *Ferry v State,* 262 N.E. 2d 523, Supreme Court of Indiana, 1970.

Other courts have suggested that more information about an undisclosed ordinary citizen informant is required to establish his reliability. For instance, the Supreme Court of Virginia found the informant reliable in a case where the affidavit stated that, while the informant had not previously furnished to the police information concerning violations of the narcotics laws, he was steadily employed, was a registered voter, enjoyed a good reputation in his neighborhood and had expressed concern for young people involved with narcotics. *Brown v. Commonwealth,* 187 S.E. 2d 160 (1972).

In another Virginia case, an officer applying for a search warrant stated in the affidavit that he had known the ordinary citizen informant and his family for many years and that the informant was known to be reliable. The court said:

> "Although more extensive background information would be highly desirable, 'a common sense and realistic' interpretation of the affidavit. . . . leads us to the conclusion that it contains information reported by a first time citizen informer whose name was withheld by the affiant.
>
> Public-spirited citizens should be encouraged to furnish to the police information of crimes. Accordingly, we will not apply to citizen informers the same standard of reliability as is applicable when police act on tips from professional informers or those who seek immunity for themselves, whether such citizens are named . . .or, as here, unnamed." *Guzewicz v. Commonwealth,* 187 S.E. 2d 144 (1972).

We can see, then, that there is some disagreement as to how much backup information needs to be stated in the affidavit to establish the reliability of the undisclosed ordinary citizen informant. Since the issue has not been settled, we strongly recommend that the law enforcement officer make every effort to provide additional information in the affidavit, if available, relating to the citizen informant's reliability as was done in the two Virginia cases cited above. As the case law on this point develops in the future, we will summarize the court decisions in the *Important Recent Decisions* and *Maine Court Decisions* columns of ALERT.

The officer is reminded that once he has established the reliability of the informant, he must still satisfy the second prong of the *Aguilar* test, that is, to demonstrate underlying circumstances to show that the informant's information itself is reliable. Procedures for doing this will be covered later in the discussion of prong two of the *Aguilar* test.

Criminal Informant

Unlike the ordinary citizen whose reliability may sometimes be presumed, the criminal informant's reliability must be established by a statement of underlying facts and circumstances establishing reliability. A criminal informant is either a person with a criminal record, or an accomplice in a crime. Usually, the criminal informant will not want his identity disclosed in the affidavit, but even if it is disclosed, the law enforcement officer should follow the same procedures to establish the reliability of the informant. Those procedures are that the law enforcement officer must state in the affidavit the reasons why he believes a criminal informant to be a reliable, credible person. The following things will be considered relevant by a magistrate toward establishing the reliability of a criminal informant:

1. *Informant has given accurate information in the past.*

The usual method of establishing the reliability of a criminal informant is by showing that the informant has given accurate information in the past which has led to arrests, convictions, recovery of stolen property, or some like accomplishment. This is sometimes referred to as establishing the informant's track record.

Courts will usually not read affidavits attempting to establish the reliability of informants with undue technicality. *U.S v. Ventresca,* 85 S.Ct. 741 (U.S. Supreme Court, 1965). Nevertheless, a law enforcement officer may not simply state by way of conclusion that the informant is reliable or credible because he has been reliable in the past. He must give a factual statement that the informant had given accurate information in the past.

It should be noted that the important factor in establishing the reliability of an informant by this method is the *accuracy* of the information supplied by the informant in the past. In one case, a defendant argued that the reliability of an informant against him had not been established because there was no proof that his prior tips had resulted in convictions. The court found the informant reliable despite the failure of any of his tips to result in convictions. The language of the court in emphasizing the importance of the *accuracy* of the tips, rather than their resulting convictions, is worthy of quotation:

> "Convictions, while corroborative of an informer's reliability, are not essential in establishing his reliability. Arrests, standing alone, do not establish reliability, but information that has been proved accurate does. Arrestees may not be prosecuted; if prosecuted they may not be indicted; if indicted they may not be tried; if tried, they may not be convicted. If a case is tried, the informer may never testify; his credibility may never be passed upon in court. The true test of his reliability is the accuracy of his information." *People v. Lawrence,* 273 N.E. 2nd 637, 639 (Appellate Court of Illinois, 1971).

It is worthwhile to give some examples of the kinds of statements in affidavits that have been found to be satisfactory to establish the reliability of a criminal informant. In one

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case, the court found sufficient a statement that the informant had "furnished reliable and accurate information on approximately 20 occasions over the past four years." *U. S. Dunnings,* 425 F.2d 836, 839 (2nd Circuit Court of Appeals, 1969). In another case, the court held that the reliability of the informant was sufficiently shown where the affidavit stated that the informant's information "has recently resulted in narcotic arrests and convictions." *State v. Daniels,* 200 N. W. 2nd 403, 406-407 (Supreme Court of Minnesota, 1972). A third more detailed affidavit, which was found to be sufficient specified that on one occasion within the last two weeks a search warrant had been issued pursuant to information from the informant and narcotics were seized and within the last month the informant introduced the officer to an individual who he said was a dealer and heroin was purchased by the officer from that person. *U. S. v. Smith,* 462 F.2d 456 (8th Circuit Court of Appeals, 1972).

It is strongly suggested that, where possible, the officer follow the example of the third case cited and give as much detail as to the informant's reliability as possible. In the other two cases, even though the court found the informant reliable, the affidavits were very close to being conclusory statements and therefore, insufficient.

2. *Informant made admissions or turned over evidence against his own penal interest.*

The U. S. Supreme Court has held in the case of *U. S. v. Harris,* 91 S.Ct. 2075 (1971) that an admission made by an informant against his own penal interest is sufficient information to establish the reliability of the informant. In that case, the informant admitted that over a long period and currently he had been buying illicit liquor at a certain place. The court said:

> "People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a "break" does not eliminate the residual risk and opprobrium of having admitted criminal conduct." (91 S. Ct. 2075 at 2082).

The Supreme Judicial Court of Maine has extended the U. S. Supreme Court's decision to include the turning over of self-incriminating evidence to the police, as conclusive evidence of an informant's reliability. In the case of *State v. Appleton,* 297 A.2d 363 (Supreme Judicial Court of Maine, November 1972) an informant had purchased certain drugs at the defendant's apartment and the same day brought those drugs into the police to be tested. A law enforcement officer applied for a search warrant of the apartment stating both that the defendant had purchased the drugs and that he had delivered them to the police.

The Court held that these actions of the informant justified a belief in the credibility of his story. The court said that "(a)n informant is not likely to turn over to the police such criminal evidence unless he is certain in his own mind that his story implicating the persons occupying the premises where the sale took place will withstand police scrutiny." (297 A.2d 363, 369)

Therefore, a law enforcement officer may easily establish the reliability of an informant if the informant has made admissions or turned over evidence against his own penal interest. The officer need only state in the affidavit the underlying facts of the admission or turnover of evidence.

3. Informant has served as such over a period of time.

It has been held that the reliability of an informant can be established by a law enforcement officer even though he does not demonstrate the informant's "track record" or his admission or turning over of evidence against his penal interest. In the case of *U.S. v. Stallings,* 413 F.2d 200 (7th Circuit Court of Appeals, 1969), the officer, applying for a search warrant, merely stated in the affidavit that his informant was an informant of the local police department and the Federal Bureau of Narcotics during a two-month period and that he had been actually purchasing unlawful drugs from the defendant during this period. The court held that the informant's reliability, while not expressly stated, could be inferred from the statement made by the officer.

It should be noted that this method of establishing reliability is only to be used in emergencies or where it is inconvenient or impossible to use other methods. This method also has not been specifically approved by the Maine Supreme Judicial Court-another reason for using it only when necessary.

Prong 2: Reliability of the Informant's Information

In addition to demonstrating the reliability of the informant to the magistrate, the law enforcement officer must also demonstrate. in the affidavit, underlying circumstances as to the reliability of the informant's information. This is usually done by showing how the informant knows the information he has furnished. To satisfy this requirement, therefore, the affidavit must show either:

1. that the informant himself has seen or perceived the fact or facts asserted firsthand; or
2. that his information is hearsay but there is good reason for believing it--perhaps one of the usual grounds of crediting hearsay discussed above.

Informant's Information is Firsthand

If the informant came upon his information by personal observation, the law enforcement officer should have few problems in satisfying the second prong of the *Aquilar* test. The officer merley has to state, in the affidavit, *how, when,* and *where* the

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informant perceived the information which he has furnished. A perfect example is a case where the officer stated in the affidavit:

> "I have received information from an informant....that a Gregory Daniels who resides at 929 Logan N, down has been selling marijuana, hashish and heroin. My informant further states that he has seen Daniels sell drugs, namely: heroin and further that he has seen Daniels with heroin on his person. The informant has seen heroin on the premises of 929 Logan N (down) within the past 48 hours." *State v. Daniels*, 200 N.W. 2d 403, 404 (Supreme Court of Minnesota, 1972).

The court said, with regard to this affidavit:

> "There seems to be no dispute that such personal observation satisfies that part of the *Aguilar* test which requires that the affidavit contain facts to enable the magistrate to judge whether the informant obtained his knowledge in a reliable manner." 200 N.W. 2d 403, 406.

It is very important that the officer state in the affidavit the *time* when the informant obtained his information. This is especially true in affidavits used to apply for search warrants because probable cause to search can go stale with time. In one case, a law enforcement officer stated in his affidavit that his informant had told him that he had sold certain (stolen) property to the defendant. But the officer did not state when the sale took place. The court said that the affidavit was deficient because it failed to show that the information received from the informant was fresh as opposed to being remote. *Windsor v. State*, 265 So. 2d 916 (Court of Criminal Appeals of Alabama, 1972).

Informant's Information is Hearsay

Satisfying the second prong of the *Aguilar* test is more complicated when the informant received his information from yet a third person. Not only must the informant himself be proven reliable under prong one, but his informant must also be proven reliable under prong two. This can be done by any of the usual methods for crediting hearsay mentioned above. For example, if the informant's hearsay comes from one of the participants in a crime in the nature of an admission against interest, this should be sufficient to establish the reliability of the informant's informant. The officer must still, however, state in the complaint or affidavit, sufficient facts to enable a magistrate to judge whether the informant's informant obtained his knowledge in a reliable manner.

The law enforcement officer should keep in mind that his main purpose in applying for an arrest or search warrant is to show in the affidavit or complaint that there is a substantial basis for crediting the information supplied. This means that the officer must convince the magistrate that the affidavit is not merely based upon casual rumor overheard at a bar or on the street, or is an accusation based merely on an individual's reputation. This is the reason for the requirement of stating underlying facts to back up statements of both the informant's reliability and the reliability of his information.

Detailing Informant's Information

Courts recognize one other method of satisfying the second prong of the *Aguilar* test besides stating how, when, and where the informant came by the information which he provided. In the U.S. Supreme Court case of *Spinelli v. U.S.*, 89 S.Ct. 584 (1969), the court said:

> "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." 89 S.Ct. 584, 589.

The *Spinelli* case cited another U.S. Supreme Court case, *Draper v. U.S.*, 79 S.Ct. 329 (1959) as an example of sufficient use of detail to satisfy the second prong of the *Aguilar* test. In the *Draper* case, the informant did not state the way in which he had obtained his information. The informant did, however, report that the defendant had gone to Chicago the day before by train and that he would return to Denver by train with three ounces of heroin on one of two specified mornings. In addition, the informant went on to describe, with minute particularity, the clothes that the defendant would be wearing and the bag he would be carrying upon his arrival at the Denver station. The Supreme Court said:

> "A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way." 89 S.Ct. 584, 589.

The Court went on to point out in a footnote that the *Draper*, case involved the question whether the police had probable cause for an arrest *without* a warrant. The court said, however, that the analysis required for an answer to this question is basically similar to that demanded of a magistrate when he considers whether a search warrant should issue. The important thing for the law enforcement officer to remember is that if he does not know the manner in which his informant obtained his information, he can still satisfy the second prong of the *Aguilar* test. The officer should obtain as much detail as possible from the informant and he should state *all* of it in the complaint or affidavit.

This concludes our discussion of the two-pronged *Aguilar-Hawkins* test for establishing probable cause when the information is obtained by the officer through informants. If the officer, in his complaint or affidavit, can satisfy both prongs of the test, the magistrate is more than likely to issue the arrest or search warrant. If the officer is unable to satisfy both prongs of the test, there is still the possibility that the information may be corroborated from another source. In next month's issue of ALERT, we will discuss *corroboration* in detail and will briefly consider when disclosure of informants is required.

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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--probable cause L

Defendant was convicted of possession of a sawed-off shotgun. At two o'clock in the morning, two police officers were parked in a shopping center and saw a car driving slowly past with a beer can on its roof. They suspected violation of the "open bottle" law, which prohibits the keeping of an open container of beer in a motor vehicle, and they stopped the car. As they did so, the officers noticed the defendant shove something under a pile of clothes in the rear seat of the car. Thinking the item was an open can of beer, one officer reached into the back seat under the clothes, and retrieved the item. It turned out to be a sawed-off shotgun. On appeal, the defendant contended that the officers did not have probable cause to stop and search the car, because the beer can was unopened and on top of the car rather than inside.

The court found probable cause for the search.

"Upon stopping the car, the officers witnessed the defendant hiding something under some clothes in the back seat. This action, combined with the facts stated above, gave them probable cause to believe that the defendant was violating the 'open bottle' law and entitled them to conduct a limited search under the clothing. We specifically note that the search here was strictly limited to the area of the car where the officers believed that the defendant had hidden the open container, and no attempt was made to conduct a general exploratory search of the car, even after the sawed-off shotgun was discovered. Consequently, in view of the limited nature of this search which we believe was conducted with probable cause, it cannot be said that the search was unreasonable under the Fourth Amendment. Of course, the fact that the search turned up the illegal weapon in this case instead of the illegal beverage does not render the search invalid." *U.S. v. Parkam*, 458 F.2d 438 (8th Circuit Court of Appeals, April 1972)

Search and Seizure-Automobile JPL

Defendant was convicted of robbery of a bank. Shortly after the bank was robbed, police found a car belonging to the girlfriend of the defendant, a suspect in the robbery. The police had earlier found the keys to this car in the pocket of another man who had already been arrested for the robbery, At this time, the police knew that two other men involved in the robbery were still at large. An officer found the defendant's girlfriend's car in a parking lot and opened it with one of the keys. Inside he found a watch with defendant's name on it. He also searched the trunk of the car. Defendant claimed that the warrantless search of the car was unlawful.

The court held the search to be lawful. It determined that the officer's opportunity to search the car was "fleeting" so that the search was reasonable under the U.S. Supreme Court's decision in *Chambers v. Maroney*. Although the car was not stopped while in motion on a public highway, the court found that it was still moveable. The other robbers were still at large and could have moved the car with another key or destroyed the evidence in it. Moreover, the court concluded that it would have been an impractical drain on law enforcement manpower for the police to keep a special detail guarding the vehicle while a warrant was obtained, especially with the robbers still at large. *U.S. v. Ellis*, 461 F.2d 962 (2nd Circuit Court of Appeals, May 1972).

COMMENT: This case provides a good illustration of the emergency circumstances which can justify searching a vehicle without a warrant. The decision is also noteworthy because the court recognized the manpower problems which police must overcome in solving crimes and enforcing the law. This is especially relevant in Maine with its small widely dispersed population and small understaffed police departments.

Miranda JP

Defendant was convicted of burglary. Defendant chose to testify on his own behalf and came to regret this decision. Defendant argued that he should have been given some kind of Miranda warning before testifying. The court said it knew of no constitutional principle which requires the giving of warnings to a defendant before he testifies in his own behalf. Defendant had counsel at his trial but the court in its ruling makes no distinction between defendants with lawyers and defendants who represent themselves. *People v. Williams*, 282 N.E. 2d 503, (Appellate Court of Illinois, April, 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

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