FEBRUARY 1973

ALERT

CRIMINAL DIVISION

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

PROBABLE CAUSE III

MESSAGE FROM THE ATTORNEY GENERAL JON A. LUND

In this month's issue we conclude our discussion of Probable Cause which began in the December 1972 ALERT. I would like to point out that this article on Corroboration is especially important because it attempts to tie together everything said in the three articles on probable cause. It should therefore be read in context with the previous two articles. If anyone is missing one of the two previous issues of ALERT, please write or call and we will send you a copy.

Also, you will notice that we are beginning our new column, FORUM, in this issue. We have already received a few inquiries from law enforcement officers, but we can use more. If you have a problem or question relating to your work that is worth sharing, please send it in and we will try to answer it as best we can.

Jon A. Lund

JON A. LUND
Attorney General

CORROBORATION

Oftentimes, when a law enforcement officer attempts to obtain an arrest or search warrant based on information from an informant, he will not be able to satisfy one or both of the *Aguilar* standards in his complaint or affidavit. He may not have sufficient information to establish the informant's reliability or he may not be able either to show how the informant came upon the information or to obtain sufficient detail on criminal activity from the informant to convince a magistrate of the reliability of the information. Despite this initial failure to satisfy the *Aguilar* requirements, however, the officer still has one method by which he may cure the deficiencies of the affidavit. This is by *corroboration* of the information in the affidavit from independent investigaion by himself or other law enforcement officers. *Corroboration* simply means strengthening or making more certain the information supplied by the informant by stating in the affidavit backup or supporting information obtained by law enforcement officials.

Corroboration is a very useful tool of the law enforcement officer in establishing probable cause. Most cases involve many pieces of information which are neither purely a result of the direct observation of a law enforcement officer nor purely the observations of an informant. There is usually a mixture of the two types of information. For instance, an officer may receive a tip from a third person about criminal activity, and through surveillance or independent investigation, the officer may himself perceive certain indications of criminal activity. By writing this corroborating information in the affidavit in addition to establishing the reliability of the informant and his information, the officer enables the magistrate to consider all facts which may bear upon probable cause, no matter what the source of the information is. Therefore, the magistrate is not limited to considering only the informant's information, but he may also consider other information provided by the law enforcement officer in support of the informant's information. This additional information can very often mean the difference between a warrant issuing or not issuing.

EFFECT OF CORROBORATIVE INFORMATION ON PROBABLE CAUSE

The corroborative information provided by the law enforcement officer in the affidavit may work in three possible ways:

1. The information may result from direct perception of crime or perception of such strong indications of criminal activity that the

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information may *itself* provide probable cause to search, independent of the informant's information. (See the December 1972 issue of ALERT for a discussion of the various indications of criminal activity which may contribute to probable cause). Corroborative information of this nature will provide probable cause to search even if neither Prong 1 nor Prong 2 of the *Aguilar* test is met.

2. The officer's information may support or verify the hearsay information provided by the informant. For example, if an officer has not been able to satisfy the requirements of Prong 1 and/or Prong 2 of the *Aguilar* test, his independent supporting information may provide the necessary verification of the informant's report. In other words, if some of the significant details of the informant's information are shown to be true by independent observation of the law enforcement officer, then the magistrate is encouraged to believe that all of the story is probably true.

3. More commonly, the corroborative information provided by the law enforcement officer will work in a manner that is some combination of 1 and 2 above. For example, the officer may observe certain indications of criminal activity, but not enough to provide probable cause. He may also observe certain things that tend to corroborate some of the details of his informant's information (assuming *Aguilar* requirements are not met). These observations, plus the information supplied in the affidavit about the informants's reliability and the reliability of his information may be enough to convince a magistrate that there is probable cause to search.

It must be strongly emphasized here that the officer's perceptions will serve to corroborate the hearsay information in the affidavit *only* if these perceptions are also *written down* in the affidavit. If they are not written down, the magistrate may not consider them in determining whether there is probable cause. Therefore, the officer is strongly advised to *write down* in the affidavit in addition to the information supplied to satisfy the *Aguilar* test: (1) All of *his* perceptions which relate to the criminal activity for which the search warrant is being sought; and (2) All of *his* perceptions relating to the information provided by the informant. The only exception to this advice is the situation where the officer is *positive* that he has stated enough information in the affidavit to satisfy both prongs of the *Aguilar* test. Even in this situation, however, the additional corroborative information will not adversely affect the affidavit and it is advisable to include it.

Rather than discuss further the ways in which corroboration works and how the law enforcement officer should use corroborative information to obtain a search warrant, we turn now to a detailed discussion of two cases which illustrate the use of corroboration. The cases have been chosen because their fact situations are similar, their results are different, and they both contain an extensive discussion of corroboration. This method of presentation has been chosen because corroboration does not easily lend itself to a setting out of specific guidelines. More importantly, the law in this area is still somewhat unsettled and any hard and fast rules would be meaningless.

SPINELLI V. U.S.

The first case to be discussed is the U.S. Supreme Court decision in *Spinelli v. U.S.* 89 S.Ct. 584 (1969). This is the leading case on corroboration and should therefore be familiar to all law enforcement officers.

In this case, the defendant was convicted of traveling to St. Louis, Missouri, from a nearby Illinois suburb with the intention of conducting gambling activities prohibited by Missouri law. On appeal, the defendant challenged the validity of a search warrant which was used to obtain incriminating evidence against him. The affidavit in support of the search warrant contained the following allegations.

1. The F.B.I. had kept track of defendant's movements on five days during August 1965. On four of these occasions, defendant was seen crossing a bridge from Illinois to St. Louis between 11 a.m. and 12:15 p.m. On four of the five days, defendant was seen parking his car in a lot used by residents of a certain apartment house between 3:30 p.m. and 4:45 p.m. On one day, defendant was followed further and seen to enter a particular apartment in the building.

2. An F.B.I. check with the telephone company revealed that this apartment contained two telephones listed under the name of Grace Hagen and carried two different numbers.

3. Defendant was known to the affiant and to federal law enforcement agents and local law enforcement agents as a "bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers."

4. The F.B.I. had been informed by a confidential reliable informant that defendant is operating a handbook and accepting wagers and disseminating wagering information by means of telephones which have been assigned the same numbers as the phones in the above-mentioned apartment.

The court first discussed in detail, allegation number 4, the information obtained from the informant. The court said:

> "The informer's report must first be measured against *Aguilar's* standards so that it's probative value can be assessed. If the tip is found inadequate under *Aguilar*, the other allegations which corroborate the information contained in the hearsay report should then be considered." (89 S.Ct. 584 at 588)

The court found the informant's tip inadequate under *Aguilar*. Prong 1 was not satisfied because the affiant merely stated that he had been informed by a "confidential reliable informant." This was a mere

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conclusory statement because no *underlying circumstances* were stated to show the magistrate that the informant was reliable. (See the January 1973 ALERT).

For similar reasons, Prong 2 was not satisfied either. The affidavit did not state sufficient *underlying circumstances* from which the informant concluded that defendant was running a bookmaking operation. There was no statement as to how the informant received his information—whether he personally observed the defendant at work or whether he ever placed a bet with him. Furthermore, if the informant came by his information from third persons, there was no explanation of why these sources were reliable.

Finally, the affidavit did not describe the defendant's alleged criminal activity in sufficient detail to convince a magistrate that the information was more than mere rumor or suspicion. The only facts supplied were that the defendant was using two specified telephones and that these phones were being used in gambling operations. As the court said, this meager report could easily have been obtained from an offhand remark at a neighborhood bar.

The court then turned to a consideration of the other information supplied in the affidavit—allegations 1 and 2 above—to see if they provided sufficient corroboration of the informant's information. The court found that these two items reflected only innocent-seeming activity and data. Defendant's travels to and from the apartment building and his entry into a particular apartment could not be taken as indicative of gambling activity. And there was certainly nothing unusual about an apartment containing two separate telephones. The court, therefore, concluded:

> "At most, these allegations indicated that *Spinelli* could have used the telephones specified by the informant for some purpose. This cannot by itself be said to support both the inference that the informer was generally trustworthy and that he had made his charge against *Spinelli* on the basis of information obtained in a reliable way." 89 S.Ct. 584 at 589

Finally, the court considered the allegation that defendant was "known" to the F.B.I. and others as a gambler. The court called this a bald and unilluminating assertion of police suspicion and said that it may not be used to give additional weight to allegations that would otherwise be insufficient.

It is important to note that since the decision in the *Spinelli* case, the U.S. Supreme Court has decided that the alleged criminal reputation of a suspect *may* be considered by a magistrate in evaluating an affidavit for a search warrant. *U.S. v. Harris,* 91 S.Ct. 2075 (1971). In the *Harris* case, the court said that reason why criminal reputation couldn't be used in *Spinelli* was because *Spinelli* contained no factual indication of past criminal activities on the defendant's part to back up the assertion. The affiant officer in the *Harris* case had stated in the affidavit that the defendant had a reputation for four years as a trafficker of non-tax-paid distilled spirits, that the officer had received information from all types of persons as to the defendant's activities, and that during this period, a sizeable stash of illicit whiskey had been found in an abandoned house under defendant's control. The Court held that when a criminal reputation is supported by such factual statements indicating prior criminal conduct, the reputation can be considered along with the other allegations. Criminal reputation will be considered again below in the discussion of the second case. The important thing for the law enforcement officer to remember is that if he wishes to use a suspect's criminal reputation in an affidavit in support of a warrant, he should provide *underlying facts* indicating prior criminal conduct.

The *Spinelli* case is valuable to the law enforcement officer in that it traces through all the *Aguilar* requirements for establishing probable cause using an informant's information and gives reasons why each test was not met by the affidavit in that case. It then considers other information in the affidavit as corroboration of the informant's information and gives specific reasons why the corroborative information is inadequate. Officers should read the case in its entirety to clear up any questions not answered in this article.

We turn now to a consideration of *Dawson v. State,* 276 A.2d 680 (Court of Special Appeals of Maryland, 1971), a case also involving gambling. The case is very similar to the *Spinelli* case, except that the search warrant in *Dawson* was found to be valid. Our discussion will center on the differences between the two cases which caused the court in the *Dawson* case to reach a different conclusion.

DAWSON V. STATE

In this case, the defendant was convicted of unlawfully maintaining a premises for the purpose of selling lottery tickets and of unlawfully betting, wagering or gambling on the results of horse races. He appealed claiming, among other things, that the search warrant for his home was illegal because adequate probable cause had not been shown. The affidavit for the warrant contained nine paragraphs. The first paragraph listed the investigative experience of the affiant and ended with his conclusion that gambling activities were at that time being conducted at defendant's premises. The third through ninth paragraphs contained the direct observations of the affidavit. These paragraphs will be considered later. The second paragraph dealt with hearsay information and is quoted below.

> "That on Thursday April 17, 1969 your affiant interviewed a confidential source of information who has given reliable information in the past relating to illegal gambling activities which has resulted in the arrest and conviction of persons arrested for illegal gambling activities and that

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the source is personally known to your affiant. That this source related that there was illegal gambling activities taking place at 8103 Legation Road, Hyattsville, Prince George's County, Maryland by a one Donald Lee Dawson. That the source further related that the source would call telephone #577-5197 and place horse and number bets with Donald Lee Dawson."

The court analyzed this paragraph in terms of the two-pronged *Aguilar* test. Considering the reliability of the informant's *information* first, the court found that *Aguilar* was satisfied. The affidavit stated that the informant had personally called the phone number 577-5197 and had placed horse and number bets with the defendant. This is in contrast with the *Spinelli* case, where nothing was said about how the informant obtained his information.

As to the reliability of the *informant,* the court felt that the information furnished was more borderline. In that the affidavit stated that both arrests and convictions had resulted from the informant's information in the past, it was more than a mere conclusory statement. Also the circumstances stated went further to establish the informant's reliability than those in *Spinelli* where the informant was merely described as a "confidential reliable informant." The court implied that more specific information on the informant's reliability would have been desirable, but said:

> "It may well be that the facts here recited are enough to establish the credibility of the informant. In view of the strong independent verification hereinafter to be discussed, however, it is unnecessary for the State to rely exclusively on such recitation." 276 A.2d 680 at 686.

The court, then, assumed for purposes of discussion that the reliability of the informant had *not* been adequately established, and it went on to discuss *corroboration.*

In its discussion of corroboration, the court made a concerted effort to compare the affidavit in this case with that in *Spinelli.* We turn now to a discussion of the information in paragraphs three through nine of the affidavit in *Dawson* to see how it corroborates the informant's information.

In these paragraphs, the affiant stated that a surveillance of the defendant's activities had been conducted over a six day period in April of 1969. The following things were observed or otherwise learned of during this period and stated in the affidavit:

—Defendant was observed to be engaged in no apparent legitimate employment during the period.

—Defendant had two telephones in his residence with two separate lines, both of which had silent listings.

—One of defendant's silent listings had been picked up in the course of a raid on a lottery operation three years earlier in another town.

—On each day of observation, the defendant was observed to purchase an Armstrong Scratch Sheet, which gives information about horses running at various tracks that day.

—On each morning of observation, defendant was observed to leave his house between 9:02 and 10:20 a.m., to return to his house between 11:20 a.m. and 12:06 p.m. and to remain in his house until after 6 p.m. The affiant, who was experienced and expert in gambling investigations, stated that the hours beteen noon and 6 p.m. are those when horse and number bets can be placed and when the results of betting become available.

—On each day of observation, defendant was observed, during his morning rounds, to stop at a number of places, including liquor stores and restaurants, for very short periods of time. He never purchased anything from any of the stores nor did he eat or drink at the restaurants. The affiant stated that such brief regular stops are classic characteristics of the pick-up man phase of a gambling operation.

> "He picks up the 'action' (money and/or list of bets) from the previous day or evening from prearranged locations—'drops.' At the same time, he delivers cash to the appropriate locations for the pay-off of yesterday's successful players." (276 A.2d 680 at 689).

—On one of the days, defendant was observed in close association all day with another person who was known to have been arrested for alleged gambling violations three years before.

—Finally, it was ascertained that defendant himself had been arrested and convicted of gambling violations about three years before.

The court considered each one of these allegaions in detail. It found that each allegation, taken separately, could admittedly have been consistent with innocent conduct on the defendant's part. The court, however, refused to consider each allegation separately. Instead, the court said:

> "(P)robable cause emerges not from any single constituent activity but, rather, from the overall pattern of activities. Each fragment of conduct may communicate nothing of significance, but the broad mosaic portrays a great deal. The whole may, indeed, be greater than the sum of its parts." (276 A. 2d 680, at 687).

Furthermore, the court placed great weight on the investigating officer's experience in investigating gambling activities and the interpretations he was able to place on the defendant's conduct.

The court, therefore, concluded:

> "In reviewing the observations, the ultimate question for the magistrate must be—What is revealed by the whole pattern of activity? In the case at bar, the various strands of observation, insubstantial unto themselves, together weave a strong web of probable guilt." (276 A.2d 680 at 689).

The court then went on to compare this case with the *Spinelli*

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case and to explain why the affidavit here was sufficient to provide probable cause where the one in *Spinelli* was not. The court pointed out several differences between this case and the *Spinelli* case. (1) In *Spinelli*, there were no observations of the "pick-up man" type of activity, whatsoever. (2) In *Spinelli*, there was no observed association with a previously arrested gambler. (3) In *Spinelli*, there was no daily purchase of an Armstrong Scratch Sheet to evidence some daily interest in horseraces. (4) In *Spinelli*, neither Spinelli's nor Grace Hagen's phone number had been previously picked up in a raided gambling headquarters. (5) In *Spinelli*, Spinelli was not a convicted gambler. (6) Finally, and perhaps most importantly, the confidential hearsay information in *Spinelli* was so inadequate under *Aguilar* as to lend *no* additional light or interpretation to the direct observations. In contrast, in the *Dawson* case, the confidential hearsay information was very substantial and would significantly enhance the direct observations, if it were so needed. This is important to the law enforcement officer because it emphasizes the point that the courts will look to the totality of the information provided in the affidavit rather than attempt to mechanically determine the existence of probable cause through a rigid formula. As the court in the *Dawson* case stated:

> "The hearsay information may, of course, reinforce the direct observation just as the direct observation may reinforce the hearsay information. There is no one-way street from direct observation to hearsay information. Rather, each may simultaneously cross-fertilize and enrich the other." (276 A.2d 680 at 690).

It is therefore again strongly urged that the law enforcement officer, when applying for a search warrant *write down* in the affidavit, *all* the information he has relating to a suspect's criminal activity, whether it be direct observation or hearsay. Then, if either the hearsay or direct observation information, taken separately, is insufficient to establish probable cause, the court still has the opportunity to consider the two types of information in corroboration of each other, and perhaps find enough for probable cause in this manner. NOTE: This is *not* to say that a law enforcement officer should just state all his information in a haphazard manner in the affidavit and hope the magistrate can somehow put it all together and find probable cause. Where an informant's information is involved, the officer should carefully set out the required information to satisfy both prongs of the *Aguilar* test. (See the January 1973 ALERT). He should also, however, state in an orderly manner, any corroborative information, in order to give the magistrate the chance to consider that information on its own merits and also to consider it in conjunction with the informant's information.

SUMMARY

This concludes the three articles on probable cause, which have appeared in the December 1972, January 1973 and February 1973 ALERTS. It is perhaps worthwhile to briefly review some of the major points of advice that have been presented in these articles. In the December 1972 issue we attempted to define probable cause and we discussed some of the various indications of criminal activity which a magistrate will consider in determining the existence of probable cause. The main advice for the law enforcement officer presented here was that there are many different types of information which can contribute to probable cause and that the officer should keep *all* of his senses tuned to these various indications of criminal activity. More, importantly, *before* an officer acts, either to apply for a warrant, or to conduct a warrantless arrest or search (under the proper circumstances), he should make sure that he has sufficient information upon which to base his action and that he can support his actions before a magistrate or judge.

The January 1973 article attempted to present guidelines for establishing probable cause when the information about criminal activity comes from an informant. The main point of advice for the law enforcement officer was that he must satisfy the two-pronged requirements of the *Aguilar* and *Hawkins* cases before the hearsay information can be considered toward establishing probable cause. The purpose of these requirements is to ensure that the magistrate has a substantial basis for crediting the information supplied and that the information is not based on mere rumor or suspicion. It should again be emphasized that when applying for an arrest or search warrant, the officer should avoid stating conclusions in the complaint or affidavit without also stating *underlying facts and circumstances* to back up those conclusions.

In this month's article, we discussed how an officer can cure the defects in an affidavit which does not satisfy the *Aguilar* requirements by corroborating the information in the affidavit with information obtained through his own perceptions. Again, emphasis was placed on the desirability of *writing* in an *orderly* manner, in the complaint or affidavit, *all* the relevant information in the officer's possession. This is the only way that the magistrate can consider *all* the available information in determining whether there is probable cause for the issuance of a warrant.

By keeping these items of advice in mind and carefully following the guidelines presented in the articles, the law enforcement officer should have little trouble justifying any arrest or search, whether conducted with or without a warrant.

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.

FORUM

This column is designed to provide information on the various aspects of law enforcement that do not readily lend themselves to treatment in an extensive article. Included will be comments from the Attorney General's staff; short bits of legal and non-legal advice, announcements, and questions and answers. Each law enforcement officer is encouraged to send in any questions, problems, advice or anything else that he thinks is worth sharing with the rest of the criminal justice community.

Identification of Physical Evidence

It has come to our attention that there has been some difficulty in getting certain items of physical evidence admitted into court because of improper identificaion. We, therefore, suggest the following procedures:

1. Every item of physical evidence that is picked up by a law enforcement officer should be identified by his initials and the date received.

2. Where possible, the officer should not write on the item of evidence. The item should be placed in a proper container or tagged and the officer's initials and date received should appear on the container or tag.

3. If the item is a drug, blood sample, or the like, and is taken to the lab, the officer should record in his notes the date the item was taken to the lab, to whom it was delivered, and the lab number assigned to each separate item.

4. If possible the officer should see to it that as few persons as possible handle each item of evidence before it gets into court.

* * *

Suspension of Driver's License

The following question comes to us from the Belfast Police Department:

Question: When does the time period for the suspension of a person's driver's license begin to run against the person?

Answer: The time period against the person begins to run as soon as the order of suspension is issued by the Secretary of State. The person may not be brought into court for operating after suspension of license, however, until notice of suspension has been *delivered* to him. It is suggested that if a law enforcement officer does not know whether notice of suspension has been so *delivered,* that he call 289-2386 to obtain this information. The officer should take no action against the person unless notice of suspension has been *delivered* to that person.

* * *

Loud Party on University Campus

The following fact situation was sent to us by an officer in the Gorham Police Department:

The officer received a complaint of a loud party at approximately 12:15 a.m. He observed that the noise was coming from a building on the campus of the University of Maine. He summoned a security guard to assist him in answering the complaint. Upon reaching the lobby of the campus building, the officer was approached by a gentlemen identifying himself as the house director. The officer identified himself and stated the reason for his being there. The house director stated that he would handle the matter. The officer got the impression that the house director would not have let him past the lobby. The officer complied with his wishes, not being on sure ground as to his authority.

Question: Would the officer have violated anyone's constitutional guarantees by disregarding the wishes of the house director and going to the source of the complaint?

Answer: Under the facts stated above, the officer would probably not have been invading anyone's constitutional rights by going directly to the source of the complaint. Assuming that the loud noise was continuing, he may have had a basis for an arrest for disorderly conduct. These facts, however, present an example of the type of situation where an officer may have the authority to take action, but he probably should exercise his discretion and *not* take the full action available to him. If the officer had forced his way past the house director, he may have caused a heated argument. If he attempted to exercise his authority in the room where the noise was coming from, he may have touched off something more serious. In either case, his actions would have adversely affected relations between the campus and the community. More importantly, this is the type of situation which could have been easily handled by the house director without risk of conflict. If the loud party continued after warnings from the officer, he would then be justified in taking more extensive action. Generally, in a situation such as this, which is neither an overly serious matter nor an emergency, the officer should seek to resolve the difficulty with as little friction as possible.

Question: In the above situation, would the house director, through his insistence on preventing the officer from passing, be in jeopardy of being arrested for interfering with the lawful duties of a law enforcement officer?

Answer: It is possible that if the house director actively interferred with the officer's carrying out of his duties, he could be subject to arrest. Again, however, the officer is strongly advised to attempt to remedy the underlying problem with the least conflict possible. He should use his power of arrest in this situation only as a last resort.

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.

Fair Trial JP

Defendant was convicted of larceny from the person and appealed alleging incompetency of counsel. The incompetency alleged was counsel's failure to cause a proper service of subpoena on a defense witness, failure to request a continuance when a defense witness refused to appear, and counsel's decision to proceed with trial without the testimony of the absent witness. The issue of incompetence of counsel was raised for the first time on appeal.

The Law Court held that:

> "incompetency of counsel may be considered on direct appeal only if it clearly appears from the face of the record that it amounted to a denial of constitutional right to adequate counsel representation resulting in a failure of due process and a deprivation of a fair trial."

The court held the record did not disclose such a denial of constitutional rights. *State v. Burnham,* 296 A.2d 689 (Maine Supreme Judicial Court, November 1972).

Evidence JP

Defendant was convicted of assault and appealed on the ground that the circumstancial evidence was insufficient to support a finding that defendant assaulted victim. The circumstantial evidence was that defendant was standing near victim prior to assault, that defendant had prior to the incident purchased beer in a nearby store and victim had been struck by a beer bottle, and that after being struck, victim heard defendant mumble about a fight.

The Law Court held that since the trial justice had carefully and correctly explained the circumstantial evidence rule to the jury, and since the jury had seen and heard the witnesses, the jury could have concluded that there was no other reasonable hypothesis than that defendant was solely responsible for the assault. The Court further stated that it was the jury's prerogative to reject as pure conjecture the theory that an unknown party had thrown the beer bottle.

Defendant also claimed the participation of the presiding justice in the examination of the state's witnesses was prejudicial. The court held that the examination conducted by the justice was not "so highly prejudicial and calculated to result in injustice that an unjust verdict would inevitably result or . . . that the accused has not had the impartial trial to which under the law he is entitled."

The Law Court also noted that in the situation where counsel believes the intervention of the presiding Justice has exceeded allowable limits, counsel "should immediately utilize M.R. Crim. P., Rule 51 and make known 'to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefore.' " *State v. Haycock,* 296 A. 2d 489 (Supreme Judicial Court of Maine, November 1972).

Appeal; Trial de Novo JP

Defendant was convicted of assault and battery in District Court and was convicted of assault in Superior Court, the battery language in the complaint having been struck.However, the sentence received by defendant in Superior Court, following a jury trial in the de novo proceeding, was harsher than originally imposed in the District Court proceeding. Defendant appealed on the grounds that the harsher sentence violated due process, imposed an unconstitutional limitation on the right to trial by jury, and had a "chilling" effect on the exercise of the right to appeal misdemeanor convictions.

The Law Court, relying heavily upon the recent United States Supreme Court decision in *Colten v. Kentucky,* 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed. 2d 584 (1972), which is factually akin to the present appeal, held that the trial de novo is not only a "completely fresh determination of guilt or innocence", but also "represents a fresh evaluation for purposes of sentence made." The reasoning was partially on the basis that testimony heard by the court on appeal may be more complete and substantially more favorable to either the state or the defendant then that which was presented to the judge in the District Court."

The Law Court distinguished the line of cases exemplified by the United States Supreme Court decision in *North Carolina V. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, (1969) and the Maine Law Court decision in *Weeks v. State,* Me., 267 a.2d 641 (1970) which held that a defendant who has successfully demonstrated trial error on appellate review, and received a conviction on retrial, cannot be given a harsher sentence as a result of the retrial, in the absence of later "bad activity." The Law Court noted that neither *Pearce* nor *Weeks* addressed itself to the two-tier, trial de novo situation and emphasized that in *Weeks* the Maine Court had not attempted to establish an absolute bar to heavier sentences on reconviction, being impressed "by the desirability of the second sentence being based upon the most complete and current information available at that later time."

As to defendant's argument that the possibility of receiving a harsher sentence upon appeal would discourage defendants from appealing in

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order to obtain a jury trial and thus result in an unconstitutional limitation on the right to jury trial, the Law Court stated that the imposition of an additional penalty on those who elect to exercise their right to jury trial is unconstitutional. However, in the two-tier, trial de novo situation, the defendant can receive no punishment greater after a jury conviction then he could have received after conviction in the District Court. As long as the risk is the same in both courts, there is no constitiutional problem. The fact the District Court did not impose the harshest sentence possible is not controlling. *State v. Keegon,* 296 A.2d 483 (Maine Supreme Judicial Court, October 1972).

Evidence JP

Defendant was convicted of murder and appealed on the ground that statements made by the deceased, prior to the shooting, were not admissible as spontaneous statements under the exception to the hearsay rule and that admission of testimony concerning such statements was not harmless error.

The Law Court first noted that the spontaneous statement rule is a true exception to the hearsay rule, that is, the statement is being offered for the truth of the matter asserted and the declarant is not available for cross examination The court held that for a so-called spontaneous statement to be allowed:

> There must be some occurence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting. The utterance must have been before there has been time to continue and misrepresent, i.e. while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance. The statement need not be strictly contemporaneous with the exciting cause . . . The utterance must relate to the circumstance of the occurance preceding it.

Since there was no evidence of any startling occurance, other than the shooting which occurred after the statements, the court held "the protective principles which alone permit the admission into evidence of what would otherwise be inadmissible hearsay testimony were not met on these facts." The court further held that the error in admitting the statements was not harmless. *State v. Ellis,* 297 A.2d 91 (Maine Supreme Judicial Court, November 1972).

Fair Trial; Venue JP
Search and Seizure—Plain View JPL

Defendant was convicted of murder and he appealed on the grounds that the trial court abused its discretion when it denied defendant's motion for a change of venue. Defendant's motion was based upon certain pretrial newspaper articles. The articles in question followed the course of the investigation from an initial article reporting the murder through to the defendant's arraignment. The articles ceased slightly under four months before trial.

The Law Court held that while newspapers have an "obligation not to slant or color" the news so as to prejudice a defendant's right to a fair and impartial jury, newspapers have a "right and duty to report important community events factually and truthfully . . ." In this case the Law Court found the articles to contain "little more than normal and factual coverage of the news."

The Law Court also held that when an officer, searching defendant's apartment under a valid search warrant which described several articles to be seized, observed, in plain view, a piece of a gold chain similar to a broken gold chain that the officer had found at the murder scene, the officer had probable cause for a second warrant. The chain was lawfuly seized by the officer acting under the second warrant. *State v. Berube,* 297 A.2d 884 (Maine Supreme Judicial Court, December 1972).

COMMENT: When an officer is searching a premises for articles specified in a warrant, he may come upon other articles which he believes are subject to seizure under Rule 41[b], Maine Rules of Criminal Procedure. Although it can be argued that these other articles are in plain view, the recommended procedure for the officer is to apply for another search warrant, unless there is an immediate danger of the evidence being lost or destroyed.

ALERT

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