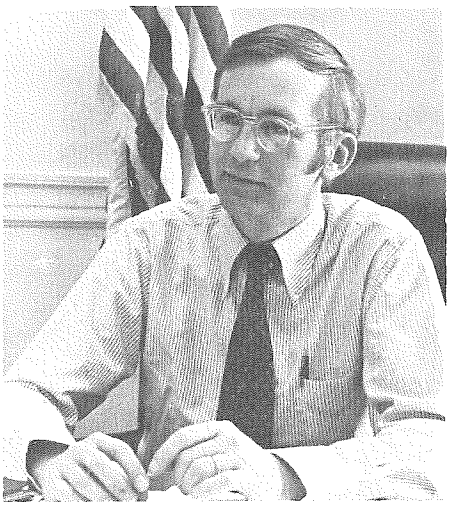
MAY 1973

ALERT

CRIMINAL DIVISION

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



IMPORTANT RECENT DECISIONS

MESSAGE FROM THE ATTORNEY GENERAL JON A. LUND

With increasing public attention being devoted to law enforcement investigative techniques, this month's issue of ALERT is timely, since it contains summaries of important cases on pre-trial identification procedures and search and seizure. There are also several case summaries of Maine Supreme Judicial Court and U.S. Supreme Court decisions. Your particular attention is called to the case of *United States v. Russell,* dealing with the subject of entrapment, which was discussed in the main article of the March and April issues of ALERT.

Jon A. Lund

JON A. LUND
Attorney General

Entrapment JPL

Defendant was convicted of having unlawfully manufactured and processed methamphetamine. An F.B.I. undercover agent, assigned to locate a laboratory where it was believed methamphetamine was being manufactured illicitly, went to defendant's home and met with defendant and two others. He told defendant he represented an organization interested in controlling the manufacture and distribution of methamphetamine. He then offered to supply defendant with an essential ingredient, propanone, in return for one-half the drug produced. During the conversation, one of the men admitted he had been making the drug for a period of time, and another showed the agent a sample. Later, the agent was shown a laboratory where he observed an empty bottle labeled "propanone".

Two days later by prearrangement, the agent returned to the defendant's house with a supply of propanone. He observed the manufacturing process and was later given one-half of the amount produced. A month later, the agent again visited defendant's house and talked about continuing the business relationship. He was given some additional methamphetamine. Three days later, the agent returned with a search warrant and seized, among other things, a bottle partially filled with propanone.

Defendant argued on appeal that the level of the agent's involvement in the manufacture of the methamphetamine was so high that a criminal prosecution for the drug's manufacture violated the fundamental principles of due process. The Court said:

> "The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise. In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of apprehension; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has

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something of value to offer them. Law enforcement tactics such as this can hardly be said to violate 'fundamental fairness' or 'shocking to the universal sense of justice'." (93 S.Ct. 1637, 1643)

Furthermore, the Court reaffirmed the principles set out in the *Sorrells* and *Sherman* cases. (See ALERT, March and April 1973) The Court said that entrapment is a relatively limited defense to be used only when the government's deception actually implants the criminal design in the mind of the defendant. In this case, the predisposition of the defendant to commit the crime was clearly shown. Therefore, even though a court might disapprove of certain law enforcement practices, the entrapment defense should not be successful unless the defendant was actually induced to commit the crime by the government. *U.S. v. Russell,* 93 S.Ct. 1637 (U.S. Supreme Court, April 1973)

Search and Seizure—Standing to Contest JP

Defendants were convicted of transporting and conspiring to transport stolen goods in interstate commerce. Defendants were arrested for stealing from a warehouse after police observed and photographed the crime in progress. Defendants confessed to this crime and admitted that they had stolen goods in the past and taken them to the warehouse of Knuckles, a co-conspirator, in another state. Police searched Knuckles' warehouse, pursuant to a defective warrant, and discovered other stolen goods. Defendants moved to suppress the evidence, but the motion was denied on the ground that they lacked standing.

The Court agreed that the defendants had no standing to contest the search and seizure as:

"the defendants . . . (a) were not on the premises at the time of the contested search and seizure; (b) had no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Brown v. U.S.,* 93 S.Ct. 1565, 1569, (U.S. Supreme Court, April 1973)

Fair Trial JP

Defendant was convicted of murder and appealed. After defendant had been arrested for murder, another person (MacDonald) made a written confession of the murder, but later repudiated it. Also, on three separate occasions, MacDonald orally admitted the killing to three separate friends. At trial, defendant was unable to cross-examine MacDonald or to present witnesses in his own behalf because of certain Mississippi rules of evidence. One rule, known as the "voucher rule," prevents a party from impeaching his own witness. (Defendant, in this case, had called MacDonald as a witness when the state failed to do so.) The other rule, Mississippi's hearsay rule, prevented the admission of the testimony of the three friends to whom MacDonald had admitted the killing.

The Court held that the defendant had been denied a fair trial. The Mississippi "voucher" rule prevented the defendant from cross-examining MacDonald, and thereby, from exploring the circumstances of the three prior oral confessions and from challenging the repudiation of the written confession. Defendant was thus prevented from contradicting testimony which was clearly "adverse" to him.

Also, the trial court erred in excluding the testimony of the three friends to whom MacDonald orally confessed on the basis that it was hearsay evidence. The statements were originally made and later offered at trial under circumstances that provided considerable assurance of their reliability:

(1) Each statement was made spontaneously to a close acquaintance shortly after the murder had occurred;

(2) Each one was corroborated by some other evidence in the case;

(3) Each statement was very much self-incriminatory, thereby, falling within the "declaration against interest" exception to the hearsay rule;

(4) MacDonald was present in the courtroom and could have been cross-examined by the state.

Chambers v. Mississippi, 93 S.Ct. 1038, (U.S. Supreme Court, February 1973)

Habeas Corpus JP

Defendant, a Negro, was convicted of entry into a federally insured bank with intent to commit larceny. Three years after his conviction, defendant brought a habeas corpus proceeding on the ground of unconstitutional discrimination in the composition of the grand jury that indicted him. He had at no time during the initial proceedings against him attacked the grand jury's composition, although he could have done so.

The Court held that defendant had waived his right to attack the grand jury's composition because Federal Rules of Criminal Procedure, Rule 12(b) (2), provides for the waiver of such claims if they are not made by pre-trial motion. Furthermore, the Court held that there was no "cause shown" under the rule to grant relief from the waiver provision. The challenged jury selection method had long been in use; the grand jury that indicted the defendant also indicted two white accomplices; and the case against defendant was a "strong one". *Davis v. U.S.,* 93 S.Ct. 1577, (U.S. Supreme Court, April 1973)

Habeas Corpus JP

In 1948, defendant was indicted for first degree murder by a grand jury. On the advice of counsel, he pleaded guilty and was sentenced to 99 years in prison. Many years later, defendant sought habeas corpus relief on the basis that he was deprived of his constitutional right because Negroes had been excluded from the grand jury which indicted him.

The court held that when a criminal defendant has solemnly admitted in open court that he is, in

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fact, guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. The court did, however, set out an alternative method of relief.

> "In order to obtain his release on federal habeas corpus under these circumstances, respondent must not only establish the unconstitutional discrimination in selection of grand jurors. He must also establish that his attorney's advice to plead guilty without having made inquiry into the composition of the grand jury rendered that advice outside the 'range of competence demanded of attorneys in criminal cases.' " *Tollet v. Henderson,* 93 S. Ct. 1602, 1609, (U.S. Supreme Court, April 1973)

Pretrial Identification L

Defendants were convicted of rape, robbery, and other crimes. The victim had given the police a general description only and had been unable to positively identify the defendants at a lineup, although she had been informed that the suspects were in the lineup. Later, a policeman showed her a single photograph of each defendant to clarify a matter of their physical characteristics on which she and the officer differed. Again, she couldn't be sure if these were the men. Then, before trial, the U.S. Attorney showed her the same photographs again. At trial, although she admitted that the photographs and lineups probably had some effect in bolstering her in-court identification, she positively identified both defendants.

The court reversed the convictions of both defendants because it was unable to conclude that the identification procedures used with respect to both defendants were not so impermissibly suggestive, as to give rise to a very substantial likelihood of irreparable mistaken identification.

> "Something happened in the eight months' interval between the first lineup and the trial that changed the ability of the victim to make a visual identification of both her attackers with greater positiveness than she did within a few days of the crime and we do not find in the record that clear and convincing evidence that is required before we can conclude that the change was not caused by the numerous suggestive factors which were proved to exist, the most suggestive of which was the display of the two photographs . . *U.S. v. Gambrill,* 449 F.2d 1148 (District of Columbia Court of Appeals, July 1971)

Pretrial Identification L

Defendant was convicted of stealing, and taking by force and violence, property of the United States while it was lawfully in the possession of an officer of the United States. A United States sky marshall was assaulted, threatened, and robbed of his revolver by two men in his motel room. Although his face was sprayed with a substance, partially blinding him, the marshall testified that he observed the faces of the robbers for 2 or 3 minutes in the light before the spraying. Nine days after the incident, police investigators found the revolver and other possessions of the marshall at the residence of one of the defendants during the execution of an unrelated narcotics search warrant. A week later, the marshall identified the photos of the two defendants from a spread of eight photos. The photos bore the number 112470, and the defendants claimed that because the robbery occurred on November 23, 1970, the photos were unnecessarily suggestive. The marshall testified, however, that the numbers did not register as signifying a date and that he looked only at the faces.

The court held that the photos were not "unnecessarily suggestive and conducive to irreparable mistaken identification."

> "With the vivid memory left by the robbery and accompanying threats of having his head cut or blown off, the witness Byars 'testimony that the numbers on the photographs did not influence his identifications because they did not register as signifying a date and that he looked only at the faces in the photographs was justifiably credited by the district court.' " *U.S. v. Counts,* 471 F.2d 422, 425 (2nd Circuit) Court of Appeals, January 1973)

Search and Seizure; Execution of Warrant L

Defendant was convicted of receiving and concealing marijuana, knowing it had been imported contrary to law. A customs inspector saw a suspicious looking package and found it to contain a broken plaster of paris stature packed with a pound of hashish. The package was addressed to defendant. Agents sprayed the package with fluorescent dust, repacked it, and arranged for its delivery to defendant's home. They watched the delivery, and then one agent left to get a search warrant. He returned with the warrant and other officers, and they knocked on the front door and loudly announced they were federal agents with a search warrant. A second or two after knocking, they tried the door, and finding it unlocked, walked in. They found defendant and his wife there and immediately started to execute the warrant. They found the hashish stashed away in plastic bags after an extensive search. Defendant claimed on appeal that the officers made an improper entry because, although they had knocked and stated their office and purpose, it was not shown that they had been refused admittance, which is one of the statutory requirements before officers may break in.

The court reversed the defendant's conviction.

> "The statute applies to a critical situation which is fraught with danger for the entering officers as well as the occupants of the dwelling. Prompt action and surprise may be necessary to forestall escape, the destruction of evidence, or even violence; yet prompt action and surprise may also precipitate such consequences. In short, the execution

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of a warrant is a job for a professional, trained both to perform his mission and to heed the statutory commands to show a decent respect for the privacy of the citizen before bursting into his home. . . Presumably, there was some possibility of resistance, but surveillance suggested no special risks within the apparently peaceful home of a student couple, and the presence of five armed officers was adequate protection against foreseeable risks of violence.

Of greater significance was the risk that the evidence might be flushed down a toilet before it could be seized. Again, however, the agents had taken the precaution of spraying the evidence with fluorescent dust and had already analyzed the hashish before permitting its delivery in order that the crime could be committed. The likelihood that criminal behavior would remain undetected or unprovable was insufficient to obviate the obligation to respect the statutory command. Indeed, the agents themselves did not believe it was necessary to make such a prompt entry and had not concluded that they had been refused admittance.

Even though special circumstances may constitute a constructive 'refusal' to admit officers who have announced their purpose, . . . such circumstances are not evidenced here . . . In short, without an overly hasty purpose, the constables blundered.

The price which society must pay to forestall the repetition of such blunders is that the accused shall go free, or at least at his trial, the evidence seized as the result of that invasion of his home may not be used against him. Otherwise, the congressional requirement of professionalism in the execution of search warrants might not accomplish its dual purpose of protecting the privacy of the home and insuring a high degree of expertise in the performance of a vital police function." *U.S. v. Pratter,* 465 F.2d 227, 230-233 (7th Circuit Court of Appeals, September 1972)

Search and Seizure; Traffic Stop L

Defendant was convicted of mail theft. He was a passenger in a car stopped for making an illegal lane change. When a check of the registration revealed that the driver was not the owner as he had claimed, the defendant was asked to identify himself. He stated that he did not have any identification, but when requested to produce something with his name on it, he gave the police a letter he stated was addressed to his wife. Examination of the letter indicated that the name and address on it was different from that which defendant had initially given. The officer seized the letter and later found that the defendant's possession of the letter (a government check) was unauthorized.

The Court held that the investigative stop for the traffic violation was proper. When the driver was unable to show ownership, the police properly asked the defendant for identification and for corroborating documents. The court specifically held that this was not a request for consent to search but for proof of identity. As such, the officers were justified in their actions. *U.S. v. Hunter,* 471 F.2d 6 (9th Circuit Court of Appeals, December 1972)

Search and Seizure—Plain View Doctrine L

Defendant was convicted of manufacturing a stimulant drug. On several occasions, law enforcement agents observed the defendant purchase laboratory equipment and chemicals used in the manufacture of amphetamine and carry them into his home. On one occasion, the agents entered the apartment with defendant's consent on the pretense of making an emergency phone call. They observed the laboratory equipment on a kitchen counter. The agents, stationed at a nearby apartment, also observed someone working in the laboratory, and they detected a smell of ether, which is employed in manufacturing amphetamine. Later that night, the agents observed defendant dismantling the laboratory equipment. Believing that defendant was attempting to flee, the agents went to his apartment, arrested him, and seized the laboratory equipment, which was in plain view.

Defendant claimed that the seized equipment should not have been admitted into evidence because, although it was in plain view, the agents knew beforehand that the equipment was in the apartment. Defendant cited the case of *Coolidge v. New Hampshire,* 91 S.Ct., 2022, which held that the "plain view" doctrine applies only when the discovery of the evidence is *inadvertent,* not where the discovery is anticipated, where the police know in advance the location of the evidence, and intend to seize it. (See ALERT, September 1971, P. 4.)

The court held that the warrantless seizure in this case was valid. The *Coolidge* case was distinguished on the basis that the warrantless seizure there was *planned.* In this case, the agents made efforts to obtain a search warrant; a warrantless seizure was not planned. When the agents saw the equipment being dismantled, however, they reasonably concluded that defendant's flight was imminent and that incriminating evidence was about to be carried away. The situation having become acute, immediate action by the agents was required. "Coolidge does not require suppression of evidence seized in plain view during an arrest where the circumstances have become exigent merely because prior knowledge of the evidence was acquired shortly before the seizure." *U.S. Lisznyai,* 470 F.2d 707, 710 (2nd Circuit Court of Appeals, December 1972)

COMMENT: This case indicates, again, the strong preference of the courts for warrants. It is likely that the court would have held the search illegal in this case, had not the agents already begun the process of obtaining a search warrant when the emergency plain view search was made. Here, however, the attempt to obtain a warrant clearly showed that a warrantless seizure of the evidence in plain view was not planned.

Search and Seizure—Stop and Frisk L

Defendent, charged with possession of marijuana, was granted a motion to suppress evidence, and the State appealed. An officer observed defendant and two companions hitchhiking, and he detained them for questioning. When defendant seemed nervous and kept grabbing at his sleeping bag as if he wanted to leave, the officer patted down the bag and felt a lump which felt like some kind of weapon. He then patted down defendant. The officer asked defendant if he would show him what was in the bag. Defendant unrolled the bag, revealing a knife, fork, and spoon set and several plastic bags of marijuana.

The court held that the pat-down of the sleeping bag constituted an illegal search. Citing *Terry v. Ohio,* 88 S.Ct. 1868, the court applied the standard that a police officer can undertake a pat-down search only "where the officer has reason to believe that he is dealing with an armed and dangerous individual." Here there were no circumstances to indicate that defendant was such an individual. Defendant's nervousness and haste to leave could easily be explained by his desire to end the uncomfortable situation. Furthermore, the officer could not justify the pat-down search on the basis of defendant's violation of hitchhiking regulations, any more than he could do so for any other mere traffic violation.

The court also held that the search of the sleeping bag, which followed the pat-down, could not be justified as a consent search:

> "In the present case, the officer's request, and defendant's assent, immediately followed the illegal pat-down search; neither any time, nor event intervened. We must . . . conclude that the consent and prior illegal search are inextricably joined; that the consent, being itself the fruit of an illegal assertion of authority, cannot justify a further illegal search." *People v. Lawler,* 507 P.2d 621 (Supreme Court of California, March 1973)

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.

Indictments JP

Defendant was convicted of breaking and entering with intent to commit felony or larceny and appealed. He argued that the State failed to prove, beyond a reasonable doubt, that the unlawful entry occurred "in the nighttime," as alleged in the indictment.

The court said:

> "Whether an illegal entry in violation of Section 754 takes place 'in the nighttime' is pertinent only when the structure entered is a 'dwelling house,' and even then, it is significant only because it obviates the necessity of proving a 'breaking'. In the case before us, the object of the illegal entry was 'a building in which valuable things are kept' and not a 'dwelling house;' therefore, that portion of the indictment charging 'in the nighttime' is not an essential allegation. '(U)nder the general rule . . . whenever an allegation may be struck out of the indictment without injury to the charge, it may be treated as surplusage.' " *State v. Mihill,* 299 A.2d 557 (Supreme Judicial Court of Maine, January 1973)

Argument; Impermissible Prosecutorial Comment JP

Defendant was convicted for breaking, entering and larceny in the nightime. During defense counsel's closing argument, he argued that the State should have produced more witnesses. In rebuttal, the County Attorney said that the defendant had as much power as the state to obtain witnesses he wants or needs. He went on to say:

> "And who after all, Ladies and Gentlemen, knows what takes place at the scene of a crime? Probably those that have committed the crime, if you find that these two defendants did so do, know more about it than anyone else. Even the investigators. But that's a fact which you must find."

The Court said that the standards by which a defendant's Fifth Amendment rights are enforced must meet minimum *federal* criteria as to impermissible comment on defendant's failure to testify. It then held that the comment here was impermissible because either direct *or equivocal* prosecutorial comment on the defendant's failure to testify is constitutionally prohibited.

The Court went on to set out rules as to when impermissible prosecutorial comment can be deemed harmless error. It then concluded:

> "Our analysis leads us to the conclusion that the language used by the County Attorney may fairly be construed as an ambiguous comment suggesting that the absence of the appellant, as a witness, aided the State in establishing the identity of the person criminally responsible for the crime charged. Since there was a rational basis for a verdict of acquittal on the failure of the State to prove this identity, constitutional error was committed which mandates the granting of a new trial. *State v. Tibbetts,* 299 A.2d 883, 890-891 (Supreme Judicial Court of Maine, January 1973)

Evidence JP

Defendant was convicted of assault with a dangerous weapon and appealed. During trial, a qualified ballistics expert testified that the spent shell, introduced in evidence, was fired by the handgun introduced in evidence. Defendant argued that this testimony was "presented as a statement of fact", as opposed to being "only an opinion and not an observed fact".

The Court said:

"We consider this argument to be nothing more than a hypertech-

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nical exercise in semantics. An expert may, on certain facts, have firm convictions, while on other facts, his opinions may tend to be somewhat equivocal. In either event, he still expresses an opinion, which based on appropriate instructions, is proper for a jury to consider." *State v. Thomas,* 299 A2d 919, 920. (Supreme Judicial Court of Maine, February 1973)

Search and Seizure; Palm print JPL

Defendant was charged with unlawful homicide under such circumstances as to constitute murder, and he filed a motion to suppress certain palm print evidence. A palm print had been lifted at the scene of a violent murder. Because of information the police had on defendant, he was questioned as a suspect. Some time later, defendant was arrested for speeding and was immediately taken to the police department where his palm prints were recorded. His palm print matched that of the print lifted at the scene of the crime.

The Court interpreted the statute which gives the State Police the authority to take fingerprints "of any person in custody charged with the commission of crime . . ." (25 M.R.S.A., 1542) The Court said that palm prints come under the heading of "Fingerprints;" "that 'fingerprint' is a generic name for impressions of the papillary ridges or friction skin which are not confined to the human finger alone, but are found with equal importance and equal persistency in the human palm." (301 A.2d 348, 353) The Court also held that speeding is a "crime" for purposes of the statute. Therefore, under the statute, the palm print was properly taken after defendant's arrest for speeding.

Defendant also claimed that the admission of the palm print would be a violation of his rights under the Fourth Amendment. The Court, distinguishing the case of *Davis v. Mississippi,* 89 S.Ct. 1394, held that once a person is *lawfully in custody,* the taking of his fingerprints after his arrest does not violate his Fourth Amendment rights. In *Davis,* as opposed to this case, the fingerprints had been taken during an *illegal* detention. *State v. Inman,* 301 A.2d 348 (Supreme Judicial Court of Maine, March 1973)

Verdicts JP

Each of two defendants was separately indicted for two felonies, namely, robbery and assault of a high and aggravated nature. The facts underlying each indictment arose from the same transaction. The jury found each defendant not guilty of robbery, but convicted one defendant of assault of a high and aggravated nature and the other defendant of simple assault. The defendants both argued on appeal that the verdicts were inconsistent with each other, contending that the jury, on the facts, should have returned the same verdict against each appellant.

The Court said:

"A careful study of the record does not fully support this argument on the facts. Peters' testimony clearly depicted Devoe as the initial aggressor, who also used strong language from which the jury could infer an intent on the part of Devoe to inflict serious bodily harm, or even death, upon Peters. Although Peters did testify that Ryder kicked him while he was prone on the sidewalk, the jury may have discounted the factual accuracy of this testimony because of confusion incident to the melee. Since the jury could find that Devoe was the aggressor and harbored personal motives of ill will against Peters, it could conclude that Devoe's participation in the assault was greater in degree than that of Ryder. In that respect the two verdicts are not necessarily inconsistent." *State v. Devoe,* 301 A.2d 541, 544 (Supreme Judicial Court of Maine, March 1973)

Appeal J

Defendant was convicted of an attempt to break and enter with intent to commit larceny and appealed. He claimed that the verdict against him was contrary to the weight of the evidence. Neither a motion for a new trial, nor a motion for judgment of acquittal was addressed to the Court below.

The Court held that, except in exceptional circumstances and to prevent manifest injustice, it would decline to treat the issue unless a foundation had been properly laid at the trial level. Defendant did not properly lay a foundation, since he could have moved for a judgment of acquittal or for a new trial, and he failed to do so. *State v. Gamage,* 301 A.2d 347 (Supreme Judicial Court of Maine, March 1973)

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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