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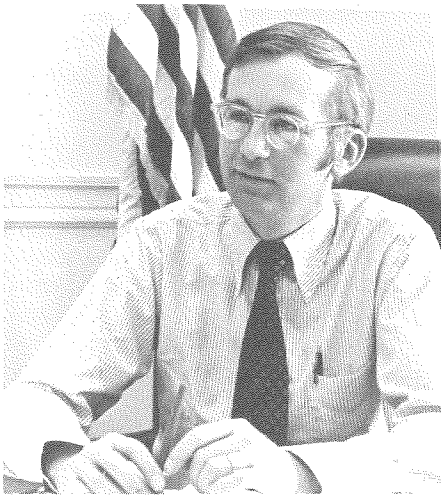
ALERT

CRIMINAL DIVISION

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



MESSAGE FROM THE ATTORNEY GENERAL JON A. LUND

In the next few issues of the ALERT Bulletin, the main articles will be concerned with some of the peripheral areas of search and seizure law such as plain view, abandonment, open fields, and emergencies. Also, we will devote one issue to criminal legislation passed by the last session of the Maine State Legislature and one issue to an index of criminal cases summarized in ALERT over the past year and a listing of new books acquired by the Law Enforcement Library during this period.

We begin this month with a discussion of the plain view doctrine. I would like to encourage all law enforcement officers to become very familiar with the requirements of this doctrine. It is a valuable investigative tool which may be overlooked by officers who are rightfully concerned with establishing probable cause and satisfying other warrant requirements.

Jon A. Lund

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Attorney General

PLAIN VIEW I

Observation by law enforcement officers of items of evidence lying in plain view has for some time been one of the most important methods of gathering evidence of crime. Such observations are not often thought of as a means of gathering evidence, perhaps because, on the surface, the plain view doctrine is so simple and seemingly self-evident, and also because officers observing items of evidence in plain view are often not even looking for evidence. Nevertheless, the plain view doctrine enables alert and observant law enforcement officers to obtain admissible evidence against offenders of the law who are careless or unwary enough to leave such evidence lying in open view. Furthermore, the observation and seizure of such items may, in most cases, be made without probable cause or the necessity of going through complex warrant procedures.

Of course, this is not to say that the plain view doctrine is a license to conduct general exploratory searches anywhere, anytime, and in any manner. The doctrine has its carefullly prescribed limitations which have been set out in court decisions over the years. This and next month's main articles in ALERT will attempt to define the plain view doctrine and illustrate its various aspects through the heavy use of recent court decisions from various jurisdictions. Whenever possible, suggested procedures for law enforcement officers will be set out.

DEFINITION

The plain view doctrine has been stated simply and concisely in the U.S. Supreme Court decision in *Harris v. U.S.*:

> "It has long been settled that objects falling in the plain view of an officer who has a right to be in a position to have that view are subject to seizure and may be introduced in evidence". 88 S.Ct. 992, 993 (1968)

The doctrine was discussed in the November 1970 issue of ALERT in connection with the article on *Search and Seizure of Vehicles Without a Warrant.* That discussion necessarily centered only on the application of the plain view doctrine to vehicles and was somewhat brief because much of the remainder of the article was devoted to other aspects of warrantless vehicle searches and seizures. In this article, the plain view doctrine will be covered in more detail and also updated from the original coverage.

It is worthwhile to note at the outset that the observation by a law enforcement officer of evidence in

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plain view is *not* considered to be a *search*. A search can be defined as a prying quest for something concealed from observation. If an item is lying in the open, unconcealed, it follows that an officer's merely looking at the item does not constitute a search. Furthermore, because such an observation does not constitute a search, it is not governed by the Fourth Amendment, and the officer, in most cases, need not obtain a warrant to seize the evidence. As the Maine Supreme Judicial Court has said:

> "Where no search is required, the constitutional guarantee is not applicable. The guaranty applies only in those instances where the seizure is assisted by a necessary search. It does not prohibit a seizure without a warrant where there is no need of a search, and where the contraband subject matter is freely disclosed and open to the eye and hand." *State v. Mosher,* 270 A.2d 451, 453 (1970)

ELEMENTS OF THE PLAIN VIEW DOCTRINE

For purposes of discussion, the plain view doctrine can be broken into six separate elements or requirements, each of which must be satisfied by a law enforcement officer before a seizure of an item of evidence under the doctrine can be legally justified. These requirements are:

1. The officer must be in a position or place in which he has a legal right to be;
2. The officer must not unreasonably intrude on any person's reasonable expectation of privacy;
3. The officer must actually observe the item of evidence;
4. The item of evidence must be lying in the open;
5. The item of evidence observed must be "subject to seizure";
6. The discovery of the item of evidence by the officer must be inadvertent.

The greater part of the remainder of this article will be devoted to an elaboration on and explanation of these requirements.

1. The officer must be in a place where he has a legal right to be.

This first requirement is the most important element of the plain view doctrine and also the one which causes the most problems. It would be impossible to list all the situations in which a law enforcement officer would be in a place where he has a legal right to be. It is possible, however, to give several examples to convey an idea of the type of situation from which an officer can make plain view observations.

Investigation of Crime

Under the general category of investigation of crime is included everything from an officer's routinely patrolling by cruising or walking a beat to his conducting an intensive investigation of a particular crime. Observations of items of evidence lying in plain view occur frequently during investigation of crime.

In one case, a previously reliable informant had told law enforcement officers that a large amount of stolen spark plugs was to be transferred to a residence on a certain block. Soon after receiving the information, the officers observed a pickup truck and trailer being backed up to a garage on that block. The officers approached the garage for the purpose of making a general inquiry and observed cartons of spark plugs, which they seized.

The court held the seizure legal. The officers had a duty to investigate the original tip, and it was not a trespass for them to go onto another's property to make a general inquiry. Therefore, the officers were in a position in which they had a legal right to be, and they could seize the spark plugs lying in plain view. *U.S. v. Knight,* 451 F.2d 275 (5th Circuit Court of Appeals, 1971).

In another case, an officer received an anonymous phone call that property stolen in a recent burglary was at a certain address. Two officers went to the given address, knocked on the front door, and after receiving no answer, started to walk away. As they began to leave, they noticed a window just to the right of the door with draperies parted leaving about a two inch gap. The officers looked through this gap and saw items matching the description of items stolen in the burglary. They then proceeded to get a search warrant for the items observed and later seized them. The court said:

> "Under this set of facts, we cannot say that appellants could 'reasonably assume that they were free from uninvited inspection through the window' and we must hold that no search protected by the Fourth Amendment occurred." *Johnson v. State,* 469 S.W. 2d 581, 584 (Texas Court of Criminal Appeals, 1971).

The court in this case felt that the officers investigating the burglary were properly at the defendant's front door, and that looking into the window was not an unreasonable intrusion so as to constitute an illegal search.

Effecting an Arrest or Search Incident to Arrest

A law enforcement officer may lawfully seize an object that comes into view during a lawfully executed arrest or a search incident to arrest. There is a possibility of confusion here between the plain view doctine and the law of search incident to arrest. The law of search incident to arrest was discussed in detail in the June and July 1972 issues of ALERT. There it was stated that under the rule of *Chimel v. California,* 89 S.Ct. 2034 (U.S. Supreme Court, 1969), a law enforcement officer may search an arrested person only for weapons or to prevent the destruction of evidence. The extent of such a search is limited to the arrestee's person and the area within his immediate control, "construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." 89 S.Ct. 2034, at 2040.

The plain view doctrine does *not* extend the permissible area of

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search incident to arrest. The court in the *Chimel* case specifically said:

> "There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant." 89 S.Ct. at 2040.

Nevertheless, where the arresting officer inadvertently observes a piece of evidence, unconcealed, but outside the area under the immediate control of the arrestee, the officer may seize it, so long as the plain view was obtained in the course of a lawful arrest or an appropriately limited search of the arrestee.

Executing a Search Warrant

It is still unsettled law whether a law enforcement officer executing a valid search warrant can seize items of evidence lying in plain view, which were not particularly described in the warrant. (See ALERT, September 1972, p.4) In a Maine murder case, an officer was searching the defendant's apartment under a valid search warrant which described several articles to be seized. During the search, he observed, in plain view, a piece of a gold chain that looked similar to a broken gold chain that the officer had found at the murder scene. Rather than seize the chain immediately, the officer applied for a second warrant authorizing a search for the seizure of the fragment of chain. The court held the seizure of the chain to be lawful. *State v. Berube,* 297 A.2d 884 (Supreme Judicial Court of Maine, 1972)

The officer arguably could have seized the chain fragment during the execution of the first warrant under the plain view doctrine. Nevertheless, the safer and recommended procedure in this situation is for the officer to apply for another search warrant, *unless* there is an immediate danger of the evidence being lost or destroyed. Officers should watch the summaries of recent court decisions in ALERT for further guidance in this area.

Hot Pursuit

A law enforcement officer who is lawfully on premises in hot pursuit of a dangerous person may seize items of evidence which fall within his plain view. In the U.S. Supreme Court case of *Warden v. Hayden,* the police were informed that an armed robbery had taken place and that a suspect, wearing a light cap and dark jacket had entered a certain house less than five minutes before they reached it. Several officers entered the house and began to search for the described suspect and for weapons which he had used in the robbery and might use against them. One officer, while searching the cellar, found in a washing machine, clothing of the type that the fleeing man was said to have worn. The Court held that the seizure of the clothing was lawful.

> "(T)he seizures occurred prior to or immediately contemporaneous with Hayden's arrest, as part of an effort to find a suspected felon, armed, within the house into which he had run only minutes before the police arrived. The permissible scope of search must, therefore, at the least, be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape." 87 S.Ct. 1642, at 1646 (1967).

If, however, the felon had already been taken into custody when the officer looked into the washing machine, the seizure of the clothing would have been unlawful. There no longer would have been any danger of the fleeing felon using a weapon against the officers, and therefore, no reason to look for weapons in the washing machine.

To sum up then, an officer who is in hot pursuit of a fleeing felon is in a position in which he has a legal right to be and may seize items of evidence in plain view in the course of his pursuit and in protecting himself from harm.

Responding to an Emergency

Related to the hot pursuit situation is the situation where an officer responds to an emergency and observes items of evidence in plain view. An example is a case in which two police officers responded to a report by two citizens that a woman was screaming for help in a certain house. The officers went to the house, and a man answered the door, said "Wait a minute" and then closed the door again. One officer heard shuffling inside the apartment and the other observed a man attempt to escape out a back window. One of the officers then broke open the door, after identifying himself and demanding admittance. While this officer was investigating the situation inside, he observed marijuana in plain view on a table.

The court found that the combination of circumstances presented to the officer justified his forced entry.

> "The probability that a woman within the apartment was the unwilling victim of some criminal act was increased rather than lessened by the conduct of those within the apartment after the police presented themselves at the door; that conduct can only have had the effect of heightening the sense of emergency . . .
>
> Having entered reasonably in an emergency 'they did not have to blind themselves to what was in plain sight simply because it was disconnected with the purpose for which they entered.' " . . . *People v. Clark,* 68 Cal. Rptr. 713, 717 (Court of Appeal of California, 1968).

There is a temptation for law enforcement officers to attempt to justify otherwise illegal searches by resorting to this combination of the plain view doctrine and response to an emergency. It should be noted that the courts will look carefully at these types of cases and will rule the search illegal if a genuine emergency does not exist or if a search goes beyond what is necessary to respond to the emergency. Again, when there is a question as to the legality of a

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search or seizure, the officer should apply for a warrant.

The important thing to remember in all these cases, however, is that the officer must have a legal justification to be in the position or place from which he observes evidence in plain view. If he is in such a position, the general rule is that his observations are not searches, and items of evidence may be seized without violating the Fourth Amendment.

2. A person's reasonable expectation of privacy must not be violated by unreasonable governmental intrusion.

There are limits, however, to the general rule that any observation made by a law enforcement officer while he is in a place where he has a legal right to be will not be considered a search. In a recent California case, a law enforcement officer observed defendant and another man go into the men's room of a city park and not come out for about five minutes. The officer then entered the plumbing access area of the rest room and observed the men performing illegal sexual acts. The officer observed no other suspicious acts by the defendant before he made the observation.

The court held that this was not a plain view observation by the officer but an illegal search. The language of the court in this case is worthy of quotation:

> "The People here urge us to hold that clandestine observation of doorless stalls in public rest rooms is not a 'search' and hence is not subject to the Fourth Amendment's prohibition of unreasonable searches. This would permit the police to make it a routine practice to observe from hidden vantage points the rest room conduct of the public whenever such activities do not occur within fully enclosed toilet stalls and would permit spying on the 'innocent and guilty alike.' Most persons using public rest rooms have no reason to suspect that a hidden agent of the state will observe them. The expectation of privacy a person has when he enters a rest room is reasonable and is not dimished or destroyed because the toilet stall being used lacks a door.
>
> Reference to expectations of privacy as a Fourth Amendment touchstone received the endorsement of the United States Supreme Court in *Katz v. United States* (1968) . . . 88 S.Ct. 507 . . . Viewed in the light of *Katz*, the standard for determining what is an illegal search is whether defendent's 'reasonable expectation of privacy was violated by unreasonable governmental intrusion.' " *People v. Triggs*, 506 P.2d 232 at 236-37 (Supreme Court of California, 1973)

Therefore, what might seem on the surface to be a mere plain view observation becomes a *search* when it unreasonably intrudes upon a persons reasonable expectation of privacy. As a search, the officer's observations must be based on probable cause, at the minimum, in order to be reasonable. In this case, the officer's only suspicion was the defendant's prolonged stay in the rest room, which could have been consistent with innocent activity. This suspicion was nowhere's near enough to provide probable cause. The officer's clandestine observations were, therefore, prompted only by a general curiosity to determine what, if anything, was going on within the rest room. As such, the observations were an illegal exploratory search under the Fourth Amendment.

This case and others following the *Katz* decision present problems for law enforcement officer with regard to the plain view doctrine. The officer must not only determine whether he is in a position in which he has a legal right to be, but he must also make sure that he is not intruding upon someone's reasonable expectation of privacy. The latter determination can be a difficult one and there are few guidelines as yet to aid the officer.

3. The officer must observe the item of evidence

The law enforcement officer must actually *see* the item of evidence lying in the open in order to lawfully seize it under the plain view doctrine. At first this seems to be merely stating the obvious. A California case, however, has held that officers, who merely *smelled* fresh marijuana but did *not* actually *see* it lying in the open, could not legally search for the marijuana and seize it without a warrant. In that case, officers had made a legal entry of an apartment to arrest some suspects. They were, therefore, in a place where they had a legal right to be. They did not find any of the suspects in the apartment, but distinctly smelled fresh marijuana. They traced the smell to a closed bag inside a carton in the closet. The officers opened the bag, seized the marijuana, and arrested the defendant several hours later when he arrived back at the apartment.

The court held the seizure of the marijuana illegal. The court said that if the evidence had been in plain *sight*, the officers could have seized it, because the officers where rightfully on the premises looking for persons believed to be in hiding. In this case, however, the marijuana was *not* in plain sight. It was in cellophane bags inside a closed brown paper bag that was in an open box in an open closet. The officers, in smelling the marijuana and tracing it to the bag, had *probable cause* to believe that marijuana was in the bag. They could, therefore, have obtained a *search warrant* for the marijuana based on probable cause. They could *not*, however, legally go into the bag and seize the marijuana because the marijuana itself was not in plain view. In this case, there were no exigent circumstances to justify an immediate seizure of the marijuana.

The language of the Supreme Court of California is valuable here to try to clear up a point on probable cause which confuses many law enforcement officers.

> "However strongly convinced officers may be that a search will reveal contraband, their belief, whether based on the sense of smell or other sources, does not justify a search without a warrant. 'The point of the Fourth

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Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.' " . . . *People v. Marshall,* 69 Cal. Rptr. 585, 588-89 (Supreme Court of California, 1968).

In a word, then, if an officer has probable cause to believe that an item of evidence is in a certain place, but he does not see the item lying in his plain view, the officer must obtain a search warrant before he can legally seize the item unless there are truly exigent circumstances.

The remaining three elements of the plain view doctrine and other related matters will be covered in next month's issue of ALERT.

* * *

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.

Standards for Issuing Licenses to Carry Concealed Weapons

Question

What are the standards for issuing certificates licensing persons to carry concealed weapons under 25 M.R.S.A. §2031?

Discussion

25 M.R.S.A. §2031 forbids a private citizen from carrying a concealed weapon unless he obtains a license from the chief of police or city marshall of a city or the selectman of a town. This statute authorizes the local official to issue a license to legal residents of the city or town who are of good moral character, but does not contain any more guidelines as to when the official may refuse an application. The result is that the official has a great deal of discretion. Supreme Court decisions dealing with discretionary licensing authority unanimously hold that this discretionary power must be exercised fairly and consistently. The city or town official must have good cause to refuse to license an individual, and must treat all applicants equally. A refusal must be based on valid reasons of public safety. (See, *Cox v. New Hampshire,* 312 U.S. Supreme Court, 1946), which upheld a licensing ordinance only because the discretionary powers were expressly limited by the state court to reasons of public health and safety).

Some guidelines are found in 15 M.R.S.A. 393. This statute forbids a convicted felon from possessing a concealable firearm during a five-year period after his release from confinement or probation. Additionally, if such a person is then convicted of any felony or serious misdemeanor during that five-year period, he is forever barred from possessing a concealable weapon. The policy behind this law is obvious. For reasons of public safety, people with criminal tendencies should not have firearms which can be concealed.

At a minimum, then, the city or town official can refuse a license to anyone with a criminal background, or anyone whose record shows that he is not of good moral character. Before refusing a license on this ground, the official should have some evidence of the applicant's moral character in case the refusal is challenged in the courts. Mere rumors or unsubstantiated gossip are not sufficient. The official could also set stricter guidelines, such as requiring the applicant to show why he needs to carry a concealed weapon. Again, if this rule is used, the official must treat all applicants equally.

Miranda Warnings—Real Estate Commission Investigations

Question:

Do investigators for the Real Estate Commission have to give *Miranda* warnings when questioning persons in connection with possible violations of the law on Real Estate Brokers and Salesmen (Chapter 59, Maine Revised Statutes)?

Discussion

The applicable statute 32 M.R.S.A. §4056 reads in part:

> "4. *INVESTIGATIONS.* The commission shall investigate any violation of this chapter by licensees and non-licensees and report its findings from time to time to the office of the Attorney General or appropriate county attorney for prosecution."

The requirement that the commission report the findings of investigations to the appropriate prosecuting attorney would seem to make the investigators for the commission agents for the prosecution for purposes of gathering evidence. Ordinarily, as agents for the prosecution, the investigators would be required to give suspects the *Miranda* warnings, or else evidence obtained would not be admissible in court. *Miranda,* however, has been held to be *not* applicable to misdemeanors involving only fines or small jail penalties. All the penalties under Chapter 59, Maine Revised Statutes are fines or short jail sentences. Therefore, investigators do not have to give *Miranda* warnings when investigating offenses under this chapter.

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It should be pointed out, however, that during questioning of a suspect for a violation of Chapter 59, an investigator for the Real Estate Commission may begin to discover evidence of more serious crimes carrying substantial criminal penalties. If this should happen, the investigator should either give the *Miranda* warnings before continuing the questioning or else he should immediately contact the appropriate prosecuting attorney and report his findings.

Implied Consent Law—Telephone Calls to Lawyers

Occasionally, in O.U.I. arrests, the accused insists upon calling his attorney for advice before he makes a decision under Maine's Implied Consent Law (29 M.R.S.A., Sec. 1312). Typically the accused has three alternative choices under the Statute. He can elect to submit to a blood test, a breath test or refuse to submit to any test at all. To refuse is in itself a violation of the law for which a statutory penalty is imposed.

The police officer, confronted with such an individual demanding to call his attorney, may be faced with a difficult choice. Blood or breath tests, if they are to accurately reflect the defendant's condition at the time of arrest, must be administered at or shortly after the time of arrest. If the individual's demand for a phone call is granted, the added delay in locating and conferring with his attorney may be long enough to cause the subsequently administered blood or breath test to reflect an inaccurately low blood alcohol level. On the other hand, if the phone call is not allowed and the accused persists in his refusal to make a choice absent consultation with his attorney, and therefore no test is administered, the defendant may later successfully argue that the State has deprived him of evidence (the test result) that he had a legal right to, and that may have aided in his defense.

The central question is "Does the accused have the right to condition his choosing under the Implied Consent Statute on being allowed to consult first with his attorney?" There is no Maine decision directly on this point. The majority of other States' courts hold generally that a defendant has no right to call his attorney—he must make the choice on his own. One recent New Hampshire case holds that the choice to be made is not essentially a "lawyer's decision" and can be made by an ordinary layman without the advice of counsel. But there is a substantial minority of State courts that adhere to the opposite view. Several of these decisions refer to "Basic governmental fair play" in determining that a phone call should be allowed, if requested within a reasonable time after the arrest. One court has gone so far as to define such a reasonable time as half an hour. The theory is that such a reasonable and timely request, if granted, will not weaken the State's case in any way and should therefore be granted.

A police officer confronted with this situation in an O.U.I. arrest should not hesitate to grant a request for a phone call if made soon after the arrest. If the defendant successfully reaches and consults with his attorney, he will more than likely proceed to make a choice under the Implied Consent Law, and an accurate test result will be available. If the phone call is allowed but the attorney cannot be reached, then the State has fulfilled its obligation. Further delays are not warranted and at this point the defendant must choose on his own or the State will be fully justified in treating this as a refusal to submit to a test.

The important consideration is to allow the phone call if reasonably requested, especially if doing so will not weaken the State's case. This simple precaution will eliminate, at no cost to the State's case, a subsequent defense claim of "lack of basic governmental fair play".

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.

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.

Discovery JP

Defendant was convicted for sale of a narcotic drug, LSD-25. He had filed a pretrial discovery motion requesting the State to produce a sample of the evidence and to fund an independent chemical analysis of the substance. ¾ of the evidence, one tablet, had been destroyed during the State's chemical analysis. The court denied the motion to produce, but granted the defendant the funds to obtain the services of an independent chemist for consultation and trial purposes. The defendant appealed the partial denial of the motion.

The Law Court denied his appeal, basing its decision on the discovery provision, Rule 16, of the Maine Rules of Criminal Procedure. This rule requires the State to produce material for inspection and testing only if the defendant shows that the requested matter is material to the preparation of his defense, *and the request is reasonable.*

The Law Court construed the requirement of reasonableness by discussing the factors which a judge should consider when entertaining a discovery motion. One is the need to safeguard the evidence. In this case, defendant failed to specify in his motion any measures designed to protect the evidence from loss or misuse.

A second factor is the need to preserve the evidence. Whenever testing procedures will destroy the evidence, a court must consider whether there is enough evidence for testing and for trial. In the case at hand, the small quantity of

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LSD-25 justified the denial of the motion to produce.

Anticipating that 16(a) motions for production will increase along with the growing number of drug cases, the Law Court provided guidelines for these requests. To safeguard evidence, they approved of orders requiring the independent chemical analysis to be made under the State's supervision. In the event the evidence must be preserved, the defendant's chemist can consult with the State's chemist and study the testing prodedures for trial preparation.

The lesson of this decision is that a motion for discovery must have a proper foundation. Before requesting production, the defendant should discover the results of the State's tests, the quantity of evidence consumed by testing and the amount remaining. He then should frame his request in the form of an affidavit, using these facts to show that his request is reasonable, i.e., that the evidence will be safeguarded and preserved. The use of the affidavit will enable a judge to rule on the motion on the basis of facts rather than on unsupported assertions. As well as expediting motion hearings, this practice will ensure an adequate record for appellate review. The test for a reversal will be whether the presiding judge abused his discretion by arbitrarily denying a reasonable and feasible request. *State v. Cloutier,* 302 A.2d 84 (Supreme Judicial Court of Maine, March 1973)

Venue JP

The defendant was convicted for sale of heroin. He had filed a pretrial motion requesting change of venue, alleging that he would not receive an impartial jury in Androscoggin County. Among other things, he alleged that:

1. widespread gossip and rumors prevented the selection of an impartial jury;
2. because his arrest was part of a drug raid in which others were arrested, he risks guilt by association if any members of his jury are jurors in trials of those arrested with him.

The trial court denied his motion. On appeal to the Law Court, defendant claimed that he was denied a fact hearing on his motion.

The Law Court denied his appeal, rejecting the claim that a fact hearing is required for every motion. The court explained that the substance of the issue should determine the manner in which it is decided. In this case, the issue was whether or not the defendant could be tried by an impartial jury. When the motion was heard, the defendant failed to bring forward any factual basis for a change of venue. Moreover, the issue of juror prejudice is best resolved during *voir dire.* At this point, defense counsel can question prospective jurors to determine if they may be prejudiced by pretrial publicity or gossip, or are involved in the trials of other individuals associated with the defendant.

The court also noted disapproval of motions for change of venue because of possible guilt by association and indicated that the proper cure is a continuance or severance. *State v. Pritchett,* 302 A.2d 101 (Supreme Judicial Court of Maine, March 1973).

Instructions to Jury JP

The defendant was convicted of high and aggravated assault for wounding his victum with a firearm. His defense was the use of justifiable force to repel the victim, who, he claimed, advanced towards him in a threatening manner with a tire iron in hand. The victim admitted advancing towards the defendant, but denied having anything in his hand. During the jury instructions, the judge illustrated the principle of self-defense with a hypothetical which distinguished justifiable from unjustifiable self-defense. The example, involving an armed attacker as opposed to an unarmed attacker, indicated that the former situation justified the use of arms to repel the attacker where the latter situation did not justify use of arms.

The Law Court agreed that this portion of the instructions may have mislead the jury because whether or not the victim was armed was a material fact in dispute. The jury may have believed that a finding that the victim was unarmed *required* a verdict of unjustifiable force. Because the totality of circumstances, including the defendant's *belief* that his victim was armed, determines whether a given amount of force is lawful, the court ordered a new trial. *State v. Brown,* 302 A. 2d 322, (Supreme Judicial Court of Maine, March 1973).

Indictments—Breaking, Entering and Larceny in the Daytime JP

Defendant was convicted of breaking, entering and larceny in the daytime under 17 M.R.S.A. §2103. On appeal, he claimed that the indictment did not charge a criminal offense. The indictment charged the defendant with breaking, entering and larceny during the daytime in a dwelling house where valuable things are kept. The applicable statute provides punishment for larceny, without breaking, in a dwelling house at nighttime, and breaking, entering and larceny in an enumerated list of buildings and ". . . other buildings. . . in which valuable things are kept. . ." The statute provides a lesser punishment if the offense is committed in the daytime.

The court agreed that breaking, entering and larceny during the daytime in a dwelling house is not explicitly covered by Maine law. Two issues were then isolated. One, whether 17 M.R.S.A. 2103 forbids this by implication, was not raised by defendant and went undecided. The second, whether the statute, covers it by its terms, was answered affirmatively, and the appeal was denied.

The court reasoned that the general term, ". . . other buildings. . . . in which valuable things are kept . . ." is limited by *ejusdem generis* to mean only those kinds of buildings specifically defined in the preceding list. That list, although

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not specifying dwelling houses by name, includes mobile homes and other buildings used for dwelling purposes. This, the court held, shows legislative intent that dwelling houses in which valuable things are kept is within the statute's coverage. The indictment, then, because it specified that the dwelling house contained valuable things, charged an offense under the statute. *State v. Lerman,* 302 A.2d 572 (Supreme Judicial Court of Maine, March 1973).

Information JP

Defendant was convicted for escaping from the Waldo County Jail. He then appeared in District Court for another charge, and no action was taken on the escape charge. Subsequently, he appeared in Superior Court, waived indictment and pled guilty to an information charging escape from lawful detention, and was sentenced. His habeas corpus petition cited two grounds contesting his confinement. He claimed that the information did not allege lawful detention in the county jail, and therefore, did not properly charge the criminal offense of escape from lawful detention. Further, he claimed that his guilty plea is ineffective because the information proceedings at Superior Court were not authorized by Maine law.

The Law Court found his detention in the county jail was lawful, even though the information cited the wrong statute. Relying on the Maine Rules of Criminal Procedure, Rule 7(c), the court held that the error did not mislead the defendant to his prejudice because the Superior Court justice noted the mistake, and defendant's counsel voiced no objection to proceeding under the erroneous information.

The second ground challenged the jurisdiction of the Superior Court. The defendant claimed that at the time of his appearance in Superior Court, prosecution by information could proceed only if expressly authorized *by statute* 15 M.R.S.A. 701. Because no statute authorized the action, the judgment and sentence were challenged as ineffective. The Court rejected this claim because 4 M.R.S.A. 9 authorizes it to promulgate *procedural rules* which can repeal or amend inconsistent *procedural statutes.* Since Rule 7(b) of M.R. Criminal Procedure, promulgated by the Law Court, authorizes prosecution by information without a preliminary hearing or bind-over at District Court, the phrase *by statute* in 15 M.R.S.A. 701 was repealed because of the inconsistency. The judgment, then, was authorized by Maine Law, and the appeal was denied. *Eaton v. State,* 302 A.2d 588 (Supreme Judicial Court of Maine, April 1973).

Pre-Trial Identification JPL

Defendant was convicted of rape and sodomy. While in custody but before being arrested, he took part in a line-up and was identified by his victims through a one-way mirror. This identification was not offered as evidence at his trial, but the victims made an in court identification of the defendant.

On appeal, defendant claimed that the pre-arrest lineup violated his fifth and sixth amendment rights because the police did not advise him of his right to counsel during the lineup. Another issue involved the shirt he wore during the lineup. The victims' description of their attacker mentioned a plaid shirt. During the lineup, only the defendant wore a plaid shirt. This, it was claimed, was unduly suggestive and tainted the lineup. A final point questioned the use of a one-way mirror for a lineup.

The Law Court rejected the defendant's fifth and sixth amendment claims, following *Kirby v. Illinois,* 92 S.Ct. 1877 (1972). In that case, the U.S. Supreme Court ruled that the right to counsel does not attach to identifications made before commencement of ". . . adversary judicial criminal proceedings—. . . formal charge, preliminary hearing, indictment, information, or arraignment" id at 1882. Since *Kirby* held that police custody is not such an event, the defendant in the case at hand clearly did not have the right to counsel at his pre-arrest lineup.

The court did agree that the use of a one-way mirror and the distinctive clothing of the defendant violated his right to procedural due process. The one-way mirror prevents the participant in a lineup from observing the identification procedure, and encourages unobservable improper police assistance to the victims. The distinctive clothing obviously prejudices the wearer by setting him apart from the others. Even if this error is unintentional, as in the present case, or is the product of inadvertancies, due process is violated because of undue suggestion. By way of guidelines, the court noted that one-way mirrors will be allowed only when ". . . exceptional circumstances of exigency or practical necessity . . ." justify their use. When distinctive clothing is involved, "(t)he burden in such case is on the State to affirmatively show additional circumstances . . . mitigating the suggestiveness initially indicated . . ."

The improper pretrial identification cast doubt on the subsequent in court identification. To avoid reversible error, the State must show, by clear and convincing evidence, that the later identification was independent of the earlier improper one. *U.S. v. Wade,* 87 S.Ct. 1926 (1967). The court found overwhelming evidence indicating that the victim's ability to make the in court identification did not depend upon the unconstitutional lineup, and denied the appeal. *State v. Northup,* 303 A.2d 1 (Supreme Judicial Court of Maine, April 1973).

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