ALERT

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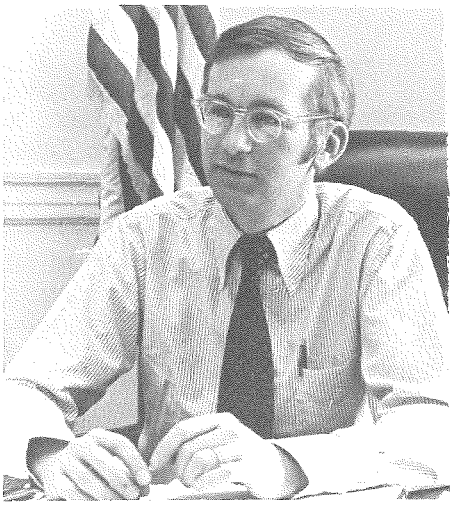
CRIMINAL DIVISION

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



MESSAGE FROM THE
ATTORNEY GENERAL
JON A. LUND

This issue of ALERT contains summaries of several U.S. Supreme Court cases of utmost importance to law enforcement officers. *Schneckloth v. Bustamonte* on page one clarifies the law on consent searches. *Cupp v. Murphy*, on page two deals with limited searches of detained persons. Following this is an extended discussion of a number of recent decisions clarifying the law of obscenity. An important Maine case, *State v. Lafferty* is summarized on page 6 and deals with probable cause to arrest and *Miranda* warnings.

Beginning with the January 1974 ALERT we will initiate a new policy of summarizing only cases of particular interest to law enforcement officers. Judges and prosecutors will receive summaries of recent criminal decisions through the bulletins and manuals in THE MAINE PROSECUTOR series. We will, therefore, no longer use the JPL designations in ALERT to call certain cases to the attention of judges, prosecutors, and law enforcement officers. This new policy will enable us to make ALERT a more concentrated tool for law enforcement officers.

Jon A. Lund

JON A. LUND
Attorney General

IMPORTANT RECENT DECISIONS

Search and Seizure — consent L

Defendant, convicted of possession of a check with intent to defraud, filed a habeas corpus petition alleging the search of a car which produced the checks was unconstitutional. Defendant and five other men were stopped by police at 2:40 a.m. because a headlight and a license plate light of their car were out. When police asked to search the car, the answer was "Sure, go ahead." This search produced the stolen checks which lead to the defendant's conviction. Defendant now alleges that in order to prove voluntary consent to search the car, the state must not only prove that consent was given without coercion, but it must also show that the defendant knew of his constitutional right to refuse to consent.

The court said that the test for a voluntary consent is whether, from the totality of the circumstances, the consent was a product of "free and unconstrained choice by its maker." The court held that although the defendant's knowledge of his right to refuse to consent to a search is one factor to be taken into account, the prosecution is not required to prove such knowledge as a prerequisite to establishing a voluntary consent. *Schneckloth v. Bustamonte,* 93 S.Ct. 2041, U.S. Supreme Court, 1973.

COMMENT: This case is very important to law enforcement officers because it changes the law relating to Consent Searches as stated in the April and May 1972 ALERTs. In those issues of ALERT, it was stated that one of the requirements for a consent to search to be valid was that the person from whom the consent is sought know that he has the constitutional right to refuse consent. The Schneckloth v. Bustamonte *case says that the consenting person's knowledge of his right is no longer a* requirement *of consent searches, but only one of the factors to be considered in determining the voluntariness of the consent. "Voluntariness," therefore, now becomes the main issue in determining the validity of consent searches.*

What this means for the law enforcement officer is that he no longer needs to make sure that a person from whom he is obtaining consent to search knows of his right to refuse to consent. If the consent is voluntary in all other respects, it is likely to be held valid by a court. [Factors which courts will consider in determining voluntariness are discussed on pages 2-5 of the April 1972 ALERT, copies of which can be obtained from the Law Enforcement Education Section.]

This is not to say that knowledge of right to refuse consent is no longer an important consideration—it is just no longer absolutely required. *Courts will be much more likely to find a consent valid if the person giving the consent knew of his right to refuse. Therefore, if an officer has any doubt about the voluntariness of a consent, he should warn the consenting person of his rights. A suggested warning appears on page two of the April 1972 ALERT.*

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Search and Seizure — search incident to arrest L

Having been notified of his wife's strangulation, defendant voluntarily came to police headquarters and there met his attorney. Police noticed a dark spot on defendant's finger and asked if they could take a sample of scraping from his fingernails. Defendant refused. Under protest and without a warrant, police proceeded to take samples, which turned out to include skin and blood of his wife and fabric from her clothing. The evidence was admitted at trial and defendant was convicted of second degree murder. In habeas corpus proceedings, defendant claims that the fingernail scrapings were a product of an unconstitutional search.

The momentary seizing of the defendant to get the fingernail scrapings was a seizure within the protections of the 4th and 14th Amendments. Also, in limited situations, warrantless searches incident to an arrest are constitutionally valid. Under *Chimel v. California,* 89 S.Ct. 2034 (1969), when a formal arrest has been made, the police are allowed to search the area into which an arrestee might reach. In the present case, no formal arrest was made, nor was there a warrant. Without a formal arrest or warrant, a full *Chimel* search, consisting of the area into which the defendant could have reached, would not have been permissible.

However, probable cause to arrest the defendant did exist. Further, after the police requested the scrapings, the defendant began rubbing his hands behind his back, perhaps attempting to destroy the evidence.

Stressing the limited nature of the search, i.e., only taking fingernail scrapings, and the easily destructible nature of the evidence, the court allowed the search under a limited application of *Chimel, supra. Cupp v. Murphy,* 93 S.Ct. 2000 (U.S. Supreme Court, May 1973).

COMMENT: Certain aspects of this decision should be emphasized to clear up any possible misunderstandings as to the permissible extent of the search of a detained person by law enforcement officers. First of all, the Court clearly held that even though the defendant was not arrested, his detention against his will constituted a seizure of his person and was governed by the Fourth Amendment. Since the police in this case did not have a warrant, nor could they satisfy any of the exceptions to the warrant requirement, the Supreme Court had to justify the search incident to the detention on the basis of the unique facts of the case. These facts were:

1. Defendant was not arrested but was detained only long enough to take the fingernail scrapings.

2. The search was very limited in extent. [The Court was careful to point out that a full Chimel search would not have been justified without an arrest. The officers therefore could not have searched the defendant's entire person and the area into which he could reach. See ALERT for June and July 1972 on Search Incident to Arrest.]

3. The evidence — blood on the fingernails — was readily destructible.

4. The defendant made attempts to destroy the evidence.

5. There was probable cause to arrest the defendant even though he was not actually arrested.

All of these considerations were essential to the Court's decision. Therefore, a law enforcement officer should make sure all five factors are present when he conducts a warrantless search of a detained person. If they are not all present, the officer should take the safer route and apply for a warrant.

Obscenity; Search and Seizure JPL

The U.S. Supreme Court has recently reviewed cases relating to obscenity and, through a series of decisions, has established new guidelines in an attempt to clarify this confusing area of the law. The recent decisions involve a new test for defining obscenity [*Miller v. California,* 93 S.Ct. 2607 (1973)], recognition of state's power to prohibit the sale or exhibition of pornography to consenting adults [*Paris Adult Theatre I v. Slaton,* 93 S.Ct. 2628, (1973)], transportation of obscene material across international borders and in interstate commerce [*U.S. v. 12 200-Ft. Reels of Super 8 m.m. Film,* 93 S.Ct. 2665 (1973) and *U.S. v. Orito,* 93 S.Ct. 2674 (1973)], and obscenity in unillustrated books [*Kaplan v. California,* 93 S.Ct. 2680 (1973)]. The recent decisions also covered the search warrant requirement in obscenity cases [*Heller v. New York,* 93 U.S. 2789 (1973)], the standard of reasonableness required [*Roaden v. Kentucky,* 93 S.Ct. 2793 (1973)], and the need for jury trials in civil obscenity proceedings [*Alexander v. Virginia,* 93 S.Ct. 2803 (1973)]. These cases will be discussed as a unit in hopes of providing a better understanding of the scope and implications of the new obscenity decisions.

The U.S. Supreme Court reaffirmed its holding in *Roth v. U.S.,* 77 S.Ct. 1304 (1957) that obscene material is not protected by the First Amendment. The court also took a new and more definite position on the meaning of obscenity by establishing basic guidelines courts must use in deciding what is obscene. The basic guidelines established by *Miller v. California, supra,* are as follows:

1. Whether "the average person, applying contemporary community standards, would find that the work, taken as a whole appeals to the prurient interest."

2. "Whether the work depicits or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law," and

3. "Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

The purpose of this new test is to provide "Positive guidance" for federal and state courts to prosecute for the sale or exposure of obscene material which depicits or describes "patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, written or authoritatively construed."

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In seeking a "contemporary community standard" to determine if a work, taken as a whole, appeals to prurient interests, the court rejected the "national standard" approved in *Memoirs v. Massachusetts,* 86 S.Ct. 975 (1966), because it was "neither realistic or constitutionally sound to read the First Amendment as requiring the people of Maine to accept public depiction of conduct found tolerable in New York." The court did not announce a "correct" standard, but did approve the use of a state-wide standard in California. The meaning of "patently offensive" and "prurient interest" are questions of fact for the jury (or judge in jury waived trials) to be determined from the community standard.

In order to prohibit obscenity, state laws must define the sexual conduct which, if portrayed offensively, is obscene. This is a requirement under #2 above. State laws found acceptable were Oregon 1971, c. 743, Art. 29, §255-262 and Hawaii Penal Code, Title 37, §1210-1216, 1972 Hawaii Session Laws pp. 126-129. These state laws have specific definitions of sexual conduct which is prohibited. For example, Hawaii defines sexual conduct as follows:

> "acts of masturbation, homosexuality, lesbianism, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast or the breasts of a female for the purpose of sexual stimulation, gratification, perversion." 1972 Hawaii Session Laws, Sec. 1210 (7), p. 127.

Finally, the court abolished the previous "utterly without redeeming social value" test, and replaced it with the following: "only works of serious literary, artistic, political or scientific value" are entitled to 1st Amendment protection. The redeeming social value standard was discarded because it placed a "burden virtually impossible to discharge" on prosecutors since it had to had to be affirmatively proven that the material was "utterly without redeeming social value." The new standard places a more acceptable burden on the prosecutor by holding him to a lesser standard in proving his case.

In *Paris Adult Theatre I v. Slaton,* 93 S.Ct. 2628, (1973), the U.S. Supreme Court held that states have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation. States may prohibit the exhibition of pornography to consenting adults in "adult only" theatres from which minors are excluded.

In *U.S. v. Orito,* 93 S.Ct. 2674 (1973) and *U.S. v. 12, 200-Ft. Reels of Super 8 m.m. Film,* 93 S.Ct. 2665 (1973), the Court held that the zone of privacy announced in *Stanley v. Georgia,* 89 S.Ct. 1243 (1969), which allowed possession of obscene books in the home, did not include the right to transport obscene material in interstate commerce [*U.S. v. Orito, supra*] or across the U.S. border [*U.S. v. 12 200-Ft. Reels of Super 8 m.m. Film, supra*].

Finally, in *Kaplan v. California,* 93 S.Ct. 2680 (1973), the court held that an unillustrated book may be obscene. Specifically, the court said "obscenity can . . . manifest itself in conduct, or in the pictorial representation of conduct, or in written and oral description of conduct." Thus, expressions by words alone can be "legally obscene" and unprotected by the 1st Amendment.

When searches and seizures involve allegedly obscene material, 4th Amendment standards of reasonableness collide with 1st Amendment rights of expression. The U.S. Supreme Court attempted to untangle these problems in a series of decisions which followed the establishment of the new obscenity guidelines of *Miller v. California, supra.* In *Heller v. New York,* 93 S.Ct. 2789 (1973), the court held that a pre-seizure hearing on the issue of obscenity is not necessary where a film is seized for the purpose of preserving it as evidence in a criminal proceeding, and pursuant to a warrant issued by a neutral magistrate following a finding of probable cause after viewing the film. After the seizure, however, a prompt hearing on the issue of obscenity must be available to interested parties. The court said that the seizure is designed to preserve evidence and not "directed at the absolute suppression of the materials themselves." Where other copies of a film are not available to a defendant to show until a trial, the court must therefore allow the defendant to copy the film or the court must return it.

The seizing of a film, being a restraint on 1st Amendment rights of expression, requires that a warrant be issued prior to the seizure. In issuing warrants affecting 1st Amendment rights, the standard of reasonableness is much higher. Only in extraordinary circumstances, "where police action literally must be 'now or never' to preserve the evidence of the crime," will it be reasonable to permit seizures without a warrant. *Roaden v. Kentucky,* 93 S.Ct. 2793 (1973).

As a final note, the U.S. Supreme Court held in a rather short opinion, that a jury trial is not constitutionally required in a state civil proceeding against magazines alleged to be obscene. *Alexander v. Virginia,* 93 S.Ct. 2803 (1973).

Search and Seizure—Automobile L

Defendant was convicted of murder and in habeas corpus proceedings challenged that conviction, claiming that the two searches which produced incriminating evidence were unconstitutional. After defendant had been involved in an accident while driving a rented car, he admitted to police that he was a member of the Chicago police department. Believing that Chicago police are required to carry their revolvers at all times, and acting pursuant to standard police procedures which favor the finding of police revolvers before the weapons fall into untrained or malicious hands, the police went to the private service station where the wrecked rented auto was and searched the auto several hours later. The police

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found a flashlight in the front seat and police uniform trousers, gray pants, a night stick with defendant's name on it, a raincoat, a portion of a floor mat and a towel in the trunk. These items were covered with blood. After consulting with his attorney, defendant informed police that he believed there was a body lying near his brother's farm. Police found the body. While at the farm, police observed through the window of defendant's personal car a pillow case, briefcase and back seat all covered with blood. Police then obtained a warrant to search and impound the wrecked car and defendant's car. In executing the warrant, police discovered in plain view in defendant's personal car a blood-covered sock and a blood-covered piece of floor mat in addition to items named in the warrant.

Defendant argued first that the warrantless search of the wrecked rented auto was unconstitutional and secondly, that the two items taken from his personal auto were illegally seized since they were not specifically listed on the application for the search warrant.

The U.S. Supreme Court, in a 5-4 decision, upheld the constitutionality of the search of the wrecked auto. The court characterized the warrantless search of the wrecked auto as reasonable for two reasons. First, the police were justified in taking the auto into custody because it created a traffic hazard and the defendant was unable to have it moved in his intoxicated condition. Secondly, the search for the revolver was a standard police practice used to prevent police weapons from falling into potentially dangerous hands.

The Court also held constitutional the seizure of the items from defendant's personal car. Since the warrant was validly issued and the car was the item designated to be searched, the police were authorized to search the car. Although the sock and the floor mat were not listed in the warrant, in executing the valid warrant the officers discovered these items in plain view in the car and therefore could constitutionally seize them without a warrant.

Defendant also attacked the failure to list the sock and the floor mat in the return warrant. However, the Court held that since the items were constitutionally seized, failure to list them on the return warrant did not raise a *constitutional* question. Any consequences stemming from the omission of the items from the return warrant are purely a question of *state law. Cady v. Dombrowski,* 93 S.Ct. 2531 (U.S. Supreme Court, June 1973)

Pre-Trial Identification L

Defendant was convicted of robbing a bank and appealed. After a bank robbery on August 26, 1965, a government informer told the police he had discussed the robbery with the defendant. The police, before taking defendant into custody or charging him, showed witnesses 5 black and white mug shots and all four witnesses made uncertain identifications of the defendant. The defendant was then indicted. Nearly 3 years later, the police and prosecutor, while preparing for trial, showed five color photographs to the witnesses who had previously identified the defendant. Three out of the four witnesses still could identify the defendant. The defendant claims that the second showing of the color photographs was a post indictment identification, a critical stage at which he had a right to have counsel present.

The U.S. Supreme Court held that the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender. Applying a "traditional test" of the Sixth Amendment counsel guarantee, the court found that the photographic identification was not a trial-like confrontation where "the accused required aid in coping with legal problems or assistance in meeting his adversary." *U.S. v. Ash,* 93 S.Ct. 2568 (U.S. Supreme Court, June 1973).

Search and Seizure — automobile

The defendant, a Mexican citizen holding a valid U.S. work permit, appealed a conviction of having knowingly received, concealed and facilitated the transportation of illegally imported marihuana. The defendant's car was stopped and searched, without a warrant or probable cause, by the U.S. Border Patrol on a highway that does not touch the Mexican border. This search produced large quantities of marihuana. The government's major argument was that since the car was within 20 miles from the border, the search is justified as being "within a reasonable distance from any external boundary of the United States and they may search without probable cause or a warrant. The defendant claims the search was not a border search and therefore unconstitutional since probable cause or a warrant was lacking.

The U.S. Supreme Court held that the search of defendant's car, on a road that lies at all points at least 20 miles north of the Mexican border, was not a border search or its functional equivalent and was therefore unconstitutional because probable cause or a warrant was lacking. The Court refused to apply the *Carroll* doctrine, *Carroll v. U.S.,* 45 S. Ct. 280 (1925), which allows the warrantless search of motor vehicles when probable cause exists. "The *Carroll* doctrine does not declare a field day for the police in searching automobiles ... Automobile or no automobile, there must be probable cause for search."

The government also argued that a warrantless search by a roving border patrol is a permissable administrative inspection to prevent aliens from illegally entering the country. *Camara v. Municipal Court,* 87 S.Ct. 1727 (1967), approved administrative inspection to enforce community health and welfare regulations on less than probable cause to believe that particular buildings were the site of particular violations. The court held that even assuming this was an administrative inspection, *Camara, supra,* still required either consent or a warrant. In this case, neither consent nor or a warrant was present and the search would still be illegal. *Almeida Sanchez v. U.S.,* 93 S.Ct. 2535 (U.S. Supreme Court, June 1973).

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Due Process; Right to Counsel — Probation Revocation JP

Defendant's probation was revoked without a hearing after he had been arrested while committing a burglary and admitted his guilt. In habeas corpus proceedings, defendant argued he was denied due process when his probation was revoked without hearing. He also argued that he had a right to counsel at a revocation of probation hearing.

The U.S. Supreme Court said that since revocation of probation results in a loss of liberty, due process demands that a preliminary and final hearing be held. The Court did not agree, however, with defendant's claim of an absolute right to counsel at these hearings, saying due process requires only that the issue of right to counsel be decided on a case-by-case basis in the area of probation revocation. The following guidelines for appointment of counsel in probation revocation proceedings were established.

> "Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record."

The case was remanded for hearing and a determination of whether counsel should be appointed pursuant to the above-mentioned guidelines. *Gagnon v. Scarpelli,* 93 S.Ct. 1756 (U.S. Supreme Court, May 1973).

Sentencing JP

Defendant had his conviction for assault with intent to commit murder and the accompanying sentence of 19-40 years overturned and a retrial ordered when his confession and guilty plea were found to have been coerced. On retrial, defendant was again found guilty and sentenced to 25-50 years. Defendant appealed to the Michigan Supreme Court claiming the imposition of the harsher sentence on retrial violated the due process guidelines of *N. Carolina v. Pearce,* 89 S.Ct. 2072, (1969). In *N. Carolina v. Pearce,* the United States Supreme Court said that whenever a "judge imposes a more severe sentence upon a defendant after a retrial, the judge must set forth the reasons for the harsher sentence and the reasons must be based upon 'objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceedings.' " The Michigan Supreme Court reversed the harsher sentence, finding that *N. Carolina v. Pearce,* supra, and its guidelines should be applied retroactively. The State of Michigan appealed to the U.S. Supreme Court.

The U.S. Supreme Court held that the due process guidelines of *N. Carolina v. Pearce,* supra, are not to be applied retroactively. Due process had always applied to resentencing and the guidelines of Pearce, supra, were designed only to preserve the integrity of the criminal process and did not create any new constitutional right that had not existed prior to the decision. *Michigan v. Payne,* 93 S.Ct. 1966 (U.S. Supreme Court, May 1973).

Habeas Corpus; Exhaustion of State Remedies JP

While serving time in prison, defendants' accumulated good-behavior-time credits (which go towards a reduction in sentence) were canceled without proper notice or hearing. The normal procedure to correct illegal conduct by prison officials is to seek relief in the state courts and then, after all attempts in state courts have failed, seek relief in habeas corpus proceedings in Federal District Court. Defendants, wishing to by-pass the time consuming process of exhausting state remedies, filed a complaint in Federal District Court claiming the cancellation of good-behavior-time credits violated §1983 of the Civil Rights Act. Violations of the Civil Rights Act entitle persons so injured to immediate relief in Federal Courts without exhausting available state remedies.

The court said that the well-established habeas corpus procedure has been the exclusive means for a state prisoner to attack his confinement. The broad language of the Civil Rights Act, although capable of including the violations claimed by the defendants, will not be read to provide a means of by-passing traditional habeas corpus proceedings. Since defendants' claim of a constitutional violation is based upon the lack of proper administrative hearing, they must exhaust state remedies before seeking relief through habeas corpus proceedings. *Preiser v. Rodriquez,* 93 S.Ct. 1827 (U.S. Supreme Court, May 1973).

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MAINE COURT DECISIONS

Arrest—Probable Cause; Admissions and Confessions; Chain of Custody; Murder L

Defendant was convicted of the murder of his wife, and he appealed. Based on information obtained at the scene and a statement from defendant's wife before she died that her husband was the assailant, a police radio message was transmitted requesting the apprehension of the defendant. As a result of a telephone call advising them of the defendant's likely whereabouts, officers arrived at an apartment and observed defendant leaving the building and entering an automobile. The automobile matched the description of that previously given by police communication. As the officers approached the car, the defendant said, "I give up, I'm not armed." He was immediately frisked, handcuffed, and placed in the cruiser.

At the time of the arrest, the officers were not aware of the precise charge against the defendant. The officers said nothing to the defendant, nor did they give him any warning or advice. En route to the police station, after inquiring as to the condition of his wife, defendant stated, "I know I got her twice with a knife, once on the stomach good and once when she fell down." This statement was not made in response to police interrogation.

After he was taken to the sheriff's office, defendant was interviewed by a State Police detective. Having been given the Miranda warnings, defendant wrote a four-page statement admitting his guilt in the death of his wife. The detective then interrogated the defendant to obtain explanations of ambiguities arising from poor English, lack of punctuation and misspelling in the statement. The detective was later allowed to testify as to the explanations given him by the defendant.

The Law Court rejected defendant's contention that the arrest was invalid for lack of probable cause. Probable cause must be judged on the basis of *all* the information in the possession of law enforcement officers, including, as in the instant case, both the arresting officers and officers at headquarters. If that knowledge in its totality shows probable cause, an officer who makes an arrest upon an order to do so acts upon probable cause. In the instant case, the Court concluded that the totality of police knowledge gave rise to probable cause to arrest the defendant.

The Court also held that the defendant's initial statement and the statement he made en route to the police station were admissible even though Miranda warnings were not given to the defendant before he made these statements. The Court stated that:

> "spontaneous or voluntary statements *which are not the product of custodial interrogation* are admissible without prior *Miranda* warnings, even though made while under arrest." 309 A.2d at 655.

Defendant argued that the signed confession and his subsequent oral statement explaining ambiguities in the written confession should not have been admitted at trial since such statements were not voluntary. The Court rejected this argument, holding that there was sufficient evidence from which the presiding justice could find that the statements were voluntary. The evidence demonstrated that, prior to any questioning, defendant had been informed of his constitutional rights and had acknowledged to the officer his understanding of his rights; the questioning lasted only thirty minutes; there was no evidence of force or duress; and defendant showed no sign of incapacity.

Defendant also contended that the presiding justice erred in admitting testimony by a serologist regarding blood tests performed on physical evidence. An officer of the State Police had personally packaged the exhibits and had sent them by registered mail to an F.B.I. serologist, who received the package intact. Registered mail receipts were introduced to support this testimony. After conducting the tests, the serologist returned the exhibits by mail to the State Police where they were received by the same officer who had originally packaged and sent them. Defendant argued that the use of the mails to transmit the exhibits constituted a break in the chain of custody of the evidence. The Court rejected defendant's contention, holding that the use of the mails to transmit physical evidence does not, under ordinary circumstances, constitute a break in the continuity in the handling of physical evidence. However the Court expressly recommended the *personal* handling of exhibits in criminal cases whenever circumstances reasonably permit.

The Law Court also decided to reaffirm the interpretation it had given Maine's felonious homicide law in *State v. Wilbur,* 278 A.2d 139 (Supreme Judicial Court of Maine, 1971). In so doing, the Court rejected the interpretation given the law by the First Circuit in *Wilbur v. Mullaney,* 473 F.2d 943 (1st Circuit Court of Appeals, 1973). *State v. Lafferty,* 309 A.2d 647 (Supreme Judicial Court of Maine, September 1973).

Pre-Trial Identification: Miranda; Discovery JPL

Defendant was convicted of robbery. Four days after the robbery a lineup was conducted in the county jail, where the defendant was being held on an unrelated charge. The victim was asked to view, under very good lighting conditions, four men standing in a wire enclosed area. Three of the men, one of whom was the defendant, were bare to the waist. The fourth man wore a shirt. The defendant wore civilian clothes and was dressed in the same way as two of the three other persons. No suggestion was made to the victim by the officers that they suspected any particular person in

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the group. The victim identified the defendant as the robber even though the defendant did not have a beard such as the robber had on the night of the robbery. There was no attorney representing the defendant at the lineup.

Applying *Stovall v. Denno,* 87 S.Ct. 1967 (1967), the Court held that the lineup was conducted fairly and did not violate the defendant's due process rights: "In the totality of the circumstances surrounding the lineup the confrontation was not necessarily suggestive nor conducive to irreparable mistaken identification." 304 A.2d at 913-914. The Court also held, following *Kirby v. Illinois,* 92 S.Ct. 1977 (1972), that the absence of counsel at the lineup did not violate defendant's Sixth Amendment rights. Under *Kirby,* the right to counsel does not attach to identifications made before the bringing of formal criminal charges. In the instant case the lineup was conducted before formal charges for robbery had been brought against the defendant.

At the time of the pre-trial identification, the investigating officer had received information that the defendant, in the course of the robbery, had sustained an abrasion on the back of his left wrist. At trial, the officer testified concerning his observation, made at the pre-trial lineup, of the bruise on defendant's left wrist. Rejecting defendant's Fifth Amendment claim, the Court stated:

> "Failure to give the *Miranda* warning to the defendant prior to the officer's viewing of Mr. Emery's left wrist did not constitute a violation of Fifth Amendment rights against compulsory self-incrimination. A defendant may be compelled to display identifiable physical characteristics, such as in the instant case to expose his bruised wrist, and such investigative procedures for evidentiary identification purposes infringe no interest protected by the privilege against compulsory self-incrimination. Compelled use of an accused's body as 'real or physical evidence' when material is outside the protection of the Fifth Amendment the scope of which relates only to testimonial or communicative acts on the part of the person to whom the privilege applies." 304 A.2d at 914-915.

The Court was also faced with an issue involving discovery. Applying the test of *Brady v. Maryland,* 83 S.Ct. 1194 (1963), the Court held that refusal by the State to allow the defendant to inspect certain evidence which was never in the possession of the State was not an unconstitutional suppression of evidence. Under *Brady,* the standards by which the prosecution's conduct is to be measured are: "there must be (a) a suppression by the prosecution after a request by the defense, (b) the evidence must be favorable to the defense, and (c) it must be material." *State v. Emery,* 304 A.2d 908, 912 (Supreme Judicial Court of Maine, May 1973).

Disorderly Conduct—Complaint JPL

Defendant was convicted in the District Court of disorderly conduct and appealed to the Superior Court. The Superior Court denied defendant's motion to dismiss the complaint on constitutional grounds. Defendant then moved to report the case to the Supreme Judicial Court, asking that the Court determine whether the disorderly conduct statute was unconstitutionally vague and overbroad.

The Court did not reach the constitutional issues because it found that the complaint did not allege the offense of disorderly conduct. The complaint alleged that defendant did unlawfully create a breach of peace by using offensive language, to wit, language so vile and obscene as would offend common decency to describe in the complaint and being disorderly in that he was using offensive language and refused to leave a service station when asked to by the owner to the annoyance of customers and owner. Nowhere, however, did the complaint specify the particular language used by the defendant. The Court said:

> "The expression of opinion by the complainant as to the vile and obscene nature of Defendant's undisclosed language does not inform either the Defendant or the Court whether the words spoken by the Defendant were such as not only to offend the sensibilities of the complainant but also 'to outrage the sense of public decency' or whether, even though of such a nature as to be offensive to some or all of his listeners, they were afforded constitutional protection. Thus, the Defendant is insufficiently informed to enable him to prepare for trial and the Court is unable to determine whether the allegations would support a conviction if one should be had . . . The allegation that the Defendant refused to leave the station when asked to do so by the owner suggests a trespass but cannot be said to be an allegation of conduct which can 'outrage the sense of public decency' unless read in connection with the allegation of accompanying speech. Here again the allegation that the Defendant was 'using offensive language' leaves too many questions unanswered. When the particular language used is not specified neither the Defendant nor the Court knows whether the Defendant is charged with asserting points of view, however annoying to the listeners, which are protected speech under the First Amendment of the United States Constitution and by Article I, §4 of the Constitution of Maine." *State v. Good,* 308 A.2d 576, 578-79 (Supreme Judicial Court of Maine, July 1973).

COMMENT: This case indicates that when a law enforcement officer prepares a complaint for disorderly conduct, based on offensive language, he should carefully specify the exact language used.

Search and Seizure—Probable Cause; Plain View L

The defendant, charged with possession of marijuana, was denied a motion to suppress evidence and appealed. Police,

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having obtained a valid warrant to search a public billiard parlor, entered the premises, notified all the patrons that a search was about to be conducted and ordered the people up against one wall. The police, noticing five clear plastic bags containing a grassy substance in a corner, arrested all 28 people for being knowingly in the presence of marijuana and searched them. The search incident to the arrest of the defendant produced a small amount of marijuana from his pocket. After all persons had been searched, the police noticed a bag of grassy substance protruding from a jacket pocket in plain view. The jacket belonged to the defendant and he was arrested on a new charge of possession.

The Court said that merely finding five bags of marijuana was insufficient to establish probable cause for the arrest of 28 people for being knowingly in the presence of marijuana, because there was no proof that the bags were visible to the people prior to the police entering. Absent probable cause to arrest, the search of the defendant incident to the arrest was illegal and the marijuana found on his person must be suppressed. However, the seizure of marijuana from defendant's jacket was lawful since it was in plain view. See the June-July and August 1973 issues of ALERT on Plain View. *State v. Burns,* 306 A.2d 8 (Supreme Judicial Court of Maine, June 1973).

Implied Consent Law JPL

Defendant was convicted of O.U.I. and appealed, claiming his statutory and constitutional rights had been violated because police denied him a reasonable opportunity to acquire an additional urine or blood test administered by a physician of his own chosing as provided in 29 M.R.S.A. §1312. After his arrest and having been brought to police headquarters, defendant refused to indicate whether he wanted an additional blood or urine test. Police then took defendant four miles away to a physician who administers blood or urine tests for police. During the police test at the doctor's office, defendant decided to have his own additional blood test, made arrangements with his physician and a local hospital, and then requested that the police take him to the hospital so his additonal test could be taken. The police refused, saying that under police procedure any additional tests must be performed at the police station. Defendant then requested and obtained an additional blood test from the police physician. Defendant argued on appeal that under the circumstances he did not have a "physician of his choosing" as provided by the statute and to which he was entitled under due process of law.

The Court held that, even when police take a defendant from the police station to a physician's house four miles away to have the police test administered, the strict adherence to police procedure which required a defendant's own physician to administer tests at the police station would not deprive a defendant of his statutory choice of an additional test to be administered by a physician of defendant's own chosing. Police can establish a routine procedure for the administering of tests outside police headquarters without generating an additional right on the part of the defendant to have his test performed at a place of his own chosing, regardless of the reasonableness of the place.

The refusal to change police procedure in this case was not, per se and as a matter of law, sufficient "to have subjected defendant to that degree of duress rendering his designation" of the police physician an illusory one. Under the totality of the circumstances, it is reasonable to conclude that the police "permitted" a physician of defendant's own choosing within the meaning of the statutory language and that police conduct did not deprive defendant of his ability to acquire evidence on his own behalf in violation of due process. *State v. Roberge,* 306 A.2d 13 (Supreme Judicial Court of Maine, June 1973).

Corpus Delicti JP

Defendant was convicted of two murders and appealed. One of defendant's contentions was that various extra-judicial inculpatory statements made by him were erroneously allowed into evidence by the presiding justice at trial because the evidence, independent of the internal substantive content of his inculpatory statements, was insufficient to establish the "corpus delicti" by the legally required quantum of proof.

The Court held that the presiding justice had correctly ruled that the "corpus delicti" as to each indictment had been established. (The facts upon which this ruling was based appear in the decision but are too long and involved to be repeated here.) The Court applied the standard formulated in *State v. Wardwell,* 183 A.2d 896 (Me. 1962) and reiterated in *State v. Grant,* 284 A.2d 674 (Me. 1971) as to the quantum of proof required to establish "corpus delicti." That standard is that the State must present:

> "credible evidence, which, if believed, would create in the mind of a reasonable man, not a mere surmise or suspicion, but rather a really substantial belief that . . . (the) crime (charged in the indictment) had been committed by somebody . . ." 308 A.2d at 880.

Defendant also claimed error because, although the presiding justice had himself found an adequate independent showing of corpus delicti and had admitted defendant's extra-judicial inculpatory statements into evidence, he gave to the jury the role of determining the same evidentiary admissibility issue de novo. The Court, after extended discussion, found no federal constitutional mandate prohibiting this procedure. Nevertheless the Court clarified its own policy choice in the formulation of the law of Maine that:

> "it is the *exclusive* function of the presiding justice to determine the adequacy of an independent showing of corpus delicti as the precondition of the evidentiary admissibility of extra-judicial inculpatory statements of a de-

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fendant." 308 A.2d at 885.

Although it was improper under Maine law for the trial judge to permit the jury to consider whether the corpus delicti had been established, the Court concluded that such error, under the circumstances of the instant case, was not serious enough to require reversal. *State v. Kelley,* 308 A.2d 877 (Supreme Judicial Court of Maine, July 1973).

Rape; Fair Trial JP

The defendant was convicted of rape and appealed. On June 12, 1971, at about 11:00 p.m., a young woman was struck on the chin while walking home, dragged into the bushes, told not to scream ("if you do you're dead"), and then raped. The young woman accurately described her attacker and, later that night, positively identified the defendant. The trial was not held until July 1972, some 13 months after the arrest. Defendant argued that as a matter of law he could not be convicted of rape since there was no evidence of the woman complaining, screaming, or resisting. The defendant also argued that his constitutional right to a speedy trial was violated by the 13 month delay.

The Law Court held that evidence of resistance of the victim only goes to the issue of consent or lack thereof and is not a necessary element of rape. In this case, the threat of death and the use of violent force prevented any resistance by the young woman and the jury could so conclude.

The Law Court, following the recent Supreme Court case of *Barker, v. Wingo* 92 S.Ct. 2182, (1972), stated four factors that must be considered in deciding an issue on speedy trials. "The four factors are length of delay, reason for delay, the defendant's assertion of his right and prejudice to the defendant." None of these factors alone are sufficient, and thus the mere lapse of time is *not* by itself a constitutional violation. In this case, no other factor except the length of time (13 months) was present and, absent other factors, there was no violation of defendant's right to a speedy trial. *State v. Carlson,* 308 A.2d 294 (Supreme Judicial Court of Maine, July 1973).

Night Hunting;—Sufficiency JP

Defendants were convicted of night hunting and appealed, alleging insufficient evidence to support the verdict and error in allowing instructions to the jury that evidence was both direct and circumstantial. Wardens had stopped a car late at night which had been driving slowly past an open field with a light shining toward an area where deer were often seen. Defendants were both passengers, one in the back seat, the other on the passenger side of the front seat. The wardens found a flashlight, rifle and ammunition on the floor of the front seat.

Citing the prior Maine cases of *State v. Allen,* 121 A.2d 342 (Me. 1956), and *State v. Vicniere,* 128 A.2d 851 (Me. 1957), the Court stated that the elements justifying a conclusion of guilt in night hunting cases were as follows: "(a) presence of the defendant in time and place relative to the commission of the offense charged; (b) night-time as defined by statute; (c) ready availability to defendants of specific instrumentalities uniquely useful for the accomplishment of the offense and (d) a purpose to search, find and possess game". Here the evidence was sufficient.

On the issue of instructions, defendant's argument that only circumstantial evidence was present was erroneous since there was direct testimony by the Wardens as to what they saw.

The Court also noted that a person who commits an act constituting any part of the essential elements of the crime, as mentioned above, is guilty as a principal. It was therefore proper for the Superior Court to find the defendant in the rear seat guilty of the crime of night hunting because he had committed more than one essential act of the crime. *State v. Pike,* 306 A.2d 145 (Supreme Judicial Court of Maine, (June 1973)

Breaking, Entering and Larceny JP

Defendant was convicted of breaking, entering and larceny and appealed. He argued that the state had failed to prove lack of consent on the part of the corporate owner to the taking of its property.

The Court held that the testimony of appellant's accomplice describing in detail the nighttime break and entry into the plant, the subsequent stealing of the corporate property therefrom, and its removal to a gravel pit where it was hidden, together with other evidence, justified the jury in finding beyond a reasonable doubt that there was no consent to the taking.

The Court also held that testimony introduced by the State showing that defendant, in the course of the burglary, broke into vending machines on the premises and removed goods from them was admissible as part of the 'res gestae' and as tending to show the larcenous intent of defendant, even though some of the facts shown might tend to suggest or prove that defendant was guilty of another crime for which he was not on trial. *State v. Carlson,* 304 A.2d 681 (Supreme Judicial Court of Maine, May 1973).

Evidence—Sufficiency; Instructions JP

Defendant was convicted of larceny and appealed,claiming that the evidence was insufficient to sustain the conviction and that the jury instructions were improper.

The Court held that the record amply justified the jury's finding. The evidence showed that defendant received $6,900 in cash for the purpose of counting it preliminary to his turning over some coins he had agreed to sell to those who supplied the $6,900. He told the prospective purchasers of the coins that his partner in an outside room wanted to see the cash. Defendant then left the room and disappeared with the $6,900.

Defendant claimed that the trial court's instructing the jury in terms of the State's contention caused the jury to conclude that the presiding justice believed the State's contention. The Court held that this was not improper because the instructions also called attention to the defendant's position without emphasizing either position to the prejudice of the other. *State v. DeMatteo,* 308 A.2d 579 (Supreme Judicial Court of Maine, July 1973).

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Jurisdiction—Burden of Proof JP

Defendants were convicted of rape and appealed. The trial judge, as trier of fact, entertained reasonable doubt as to whether the crime with which defendants were charged was committed in Maine or New Hampshire. The issue presented for resolution on appeal was what quantum of proof is necessary to establish the jurisdiction of a Maine court in a criminal case.

The Court held:

"We declare the rule of Maine to be that the State must prove the sovereign power of this State to prosecute the crime by evidence convincing in its effect beyond a reasonable doubt." 305 A.2d at 561.

The Court reasoned:

"We are persuaded to this conclusion because the establishment of such a stringent standard of proof reflects the gravity of the effect upon the judicial process and upon the rights of defendants of an erroneous factual determination of the issue of jurisdiction." *State v. Baldwin,* 305 A.2d 555, 559 (Supreme Judicial Court of Maine, June 1973).

COMMENT: There is a considerable split of authority on this question throughout the jurisdictions. In a case of first impression the Law Court has adopted the rule recommended by the Model Penal Code. The Court expressly declined to rule on the quantum of proof required to establish venue in a criminal case.

Sentencing JP

Defendant (19 years old) was convicted of selling amphetamines and was sentenced to an indeterminate term of imprisonment in the Men's Correctional Center. (Because defendant was between the ages of 19 and 26, the Presiding Justice was allowed two sentencing options: (1) to commit defendant to the Maine State Prison or to a jail for a definite term with a maximum of two years (under 22 M.R.S.A. §§2210, 2215, which define the offense of selling amphetamines and prescribe the maximum period of incarceration) or (2) to commit defendant to the Men's Correctional Center without fixing the term of commitment (under 34 M.R.S.A. §802, which also provides for a maximum period of commitment of 3 years). Defendant argued on appeal that the sentence imposed violated his constitutional rights of due process and equal protection by exposing him, by virtue of his age, to a potentially longer period of confinement than that prescribed by statute for the crime charged.

The Law Court denied the appeal, holding that "(i)mportant rational penological elements reasonably geared to defendant's age, rather than defendant's age by itself, supported the sentencing classifications . . ." (305 A.2d at 281). The Court based its finding of "rational basis" upon the following elements: (1) young criminal offenders may be constitutionally distinguished as a special class subject to longer confinement if such confinement is "under different conditions and terms than a defendant would undergo in an ordinary prison." *Carter v. United States,* 306, F.2d 283, 285 (District of Columbia Court of Appeals, 1962); (2) such "different conditions" were present since the special rehabilitative and correctional Center were not present at the jails or the Maine State Prison; (3) the requirement that the judge, if he elects to commit defendant to the Center, do so without fixing the duration of confinement, is critical to ensure rehabilitational and correctional progress. *State v. Sargent,* 305 A.2d 273 (Supreme Judicial Court of Maine, May 1973).

Arson JP

The defendant moved to dismiss the indictment charging him with first degree arson. From a denial of the motion, the defendant moved and the court ordered that the case be reported to the Law Court under Rule 37 A (b) M.R. Crim. P. for determination of the issues raised. Defendant contended that 17 M.R.S.A. §161, specifying property the burning of which constitutes first degree arson, was unconstitutionally vague in light of 17 M.R.S.A. §163 (third degree arson), since the property specified in the latter section encompassed all property subjected to the greater penalty of §161.

The Court rejected the defendant's due process argument, choosing instead to view the issue as one of statutory interpretation. The Court concluded that the legislature had intended to exclude from the operation of §163 the burning of property covered by §161 and that the failure of the legislature to state this intention expressly in §163 was but an "inadvertent omission."

The Court also held that "it is criminal under Section 161 for a husband to burn a dwelling house belonging wholly or in part to his wife or himself, including that situation in which the husband is in rightful possession.". *State v. Denis,* 304 A.2d 377, 384 (Supreme Judicial Court of Maine, April 1973).

Evidence JP

Defendant was convicted of high and aggravated assault, and he appealed. At trial, the prosecutor was allowed, over defendant's objection, to read to the alleged victim of the assault various portions of the latter's extrajudicial statement and to ask the alleged victim whether he remembered having given such information to the police. Aside from the extrajudicial statement, the State's case hinged on the testimony of two witnesses whose credibility was clearly suspect. The defendant himself denied having intentionally struck the victim.

The Court sustained the appeal, holding that the procedure by which the prosecution brought to the knowledge of the jury a portion of the victim's out-of-court statement was a violation of the defendant's rights under the "confrontation clause" of the Sixth Amendment.

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The Court also concluded that the constitutional error was not harmless error even though the jury had acquitted defendant of kidnapping. The prosecution argued that the acquittal for kidnapping revealed that the jury was not in any way biased against the defendant in spite of the admission of the improper evidence and that therefore the error was harmless. However, the Court held that the error was not harmless since the improperly admitted evidence lacked probative value as to the essential elements of kidnapping but was highly material to proof of the elements of high and aggravated assault. *State v. Gervais,* 303 A.2d 459 (Supreme Judicial Court of Maine, April 1973).

Breaking, Entering and Larceny—Lesser Included Offense JP

The defendant had been originally indicted for breaking, entering and larceny. The county attorney was permitted to dismiss that part of the indictment which exceeded "the crime of breaking and entering a building in which valuable things are kept with intent to commit larceny," and the defendant pleaded guilty to this allegedly lesser charge. A petition for post-conviction relief was granted defendant on the theory that the crime the defendant had pleaded to was not a lesser included offense of the original breaking, entering and larceny and therefore the indictment could not support the conviction. The State appealed.

In *State v. Leeman,* 291 A.2d 709 (Me. 1972), the court held that, in determining whether an offense is a lesser included one, "the lesser included offense must be such that it is impossible to commit the greater without having committed the lesser."

In comparing the two offenses involved in this case, the Court found that breaking and entering with intent to commit larceny requires a specific *intent* to commit larceny at the same time as the illegal entering of the structure. Without this intent, no violation of the section is possible. However, the crime of breaking, entering and larceny does not require "the proof that the specific intent to commit the crime alleged to have been consummated while in the structure existed coincident with the unlawful entry. Thus the indictment could not uphold the conviction of breaking, and entering with intent to commit larceny.

The Court also rejected the State's argument that the defendant should be "estopped from challenging the effect of his guilty plea to the amended indictment". Nothing in the record supported the contention. Therefore, since the attempted amendment to the indictment charged an entirely different offense, a practice not allowed under either pre-rule or post-rule procedure in Maine, the State's appeal was denied. *Little v. State,* 303 A.2d 456 (Supreme Judicial Court of Maine, April 1973).

Indictment—Sufficiency JP

The defendant pleaded guilty to an indictment charging him with unlawful sale of marijuana in violation of 22 M.R.S.A. §2384(1). Defendant now appeals from his conviction claiming the indictment to which he pleaded guilty was defective in that it did not contain the language "intent" when it charged the offense.

The court initially commented that although the permissible areas of attack on a conviction based on a guilty plea are limited, defendant's appeal falls within that narrow area when he challenges the sufficiency of the indictment. Convictions based on guilty pleas can be attacked by direct appeal only in the following circumstances:

1. The trial court had no jurisdiction to impose the particular sentence;
2. The sentence is so constitutionally oppressive as to amount to cruel or unusual punishment;
3. The indictment is insufficient; or
4. There has been a constitutional deficiency surrounding the entry of a plea of guilty; (a) if the issue has been raised by a timely motion made to the Presiding Justice to withdraw the guilty plea, (b) if the motion has been denied and (c) if there has been an evidentiary hearing before the Justice which presents to the Law Court on appeal a record upon which the circumstances of the alleged error may be examined.

The crime charged in this case was a statutory crime and the indictment must be read against the wording of the statute. The statute reads:

> "By those under 21. Whoever, being less than 21 years of age, sells, exchanges, delivers, barters, gives or furnishes Cannabis or Peyote to any person shall be punished by imprisonment for not less than one nor more than 5 years." (22 M.R.S.A. §2384(4)).

The Court held that the statute did not require a specific intent, only a "general intent to perform the prohibited act." The indictment adequately charged the offense and the absence of the word "intent" did not render the indictment defective.

The Court refused to hear defendant's claim that the entry of the guilty plea was constitutionally defective since no motion had been previously filed to withdraw his plea as is required. *State v. Kidder,* 302 A.2d 320 (Supreme Judicial Court of Maine, March 1973).

COMMENT: The language of 22 M.R.S.A. §2384 [4] quoted above has been repealed and replaced by a new section 2384. See September 1973 ALERT, p. 2.

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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.