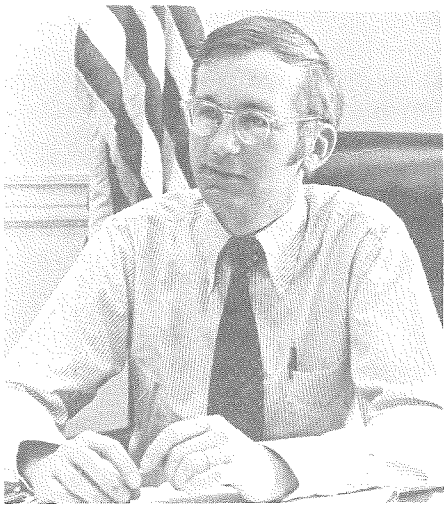
JANUARY 1974

ALERT

CRIMINAL DIVISION

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



MESSAGE FROM THE ATTORNEY GENERAL JON A. LUND

I would like to call your attention to several items in this month's ALERT Bulletin. First of all, the lead article on Hgh Speed Pursuit on page one sets out practical and legal guidelines for the law enforcement officer in this controversial area. The FORUM section, beginning on page five, discusses two innovations in ALERT which should help to make it a more useful tool for law enforcement officers. One is the establishment of in-the-field police advisors to the Law Enforcement Education Section. The other is a new indexing system for ALERT case summaries.

Finally, beginning on page seven are summaries and a comment on two very important recent U.S. Supreme Court cases on search incident to arrest—*U.S. v. Robinson* and *Gustafson v. Florida.* A recent Maine case interpreting the above decisions, *State v. Dubay,* Docket No. 996 (January 10, 1974), will be summarized in next month's ALERT, because it was released too late to be included in this issue.

Jon A. Lund

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Attorney General

HIGH SPEED PURSUIT

High speed pursuit by law enforcement officers, long employed as a law enforcement technique has recently been the subject of serious attack in the news media. Critics of high speed pursuit, most notably Ralph Nader, have pointed to national studies from which estimates such as the following have been made: between 50,000 and 500,000 high speed pursuits occur annually in the United States; between 6,000 and 8,000 of these pursuits result in crashes; in pursuit-related crashes, from 300 to 400 people are killed each year and from 2,500 to 5,000 people are injured. These figures illustrate the grave danger which arises each time an officer undertakes high speed pursuit.

Proposals have been advanced suggesting possible technological means of eliminating high speed pursuit without sacrificing effective law enforcement. Such proposals include the placing of speed governors on all motor vehicles except police vehicles and the use of remote control ignition interrupt systems. However, it is unlikely that such proposals will be implemented in the near future. Consequently, the prevention of injury and death resulting from high speed pursuit continues to rest with the law enforcement officer.

This article will examine some of the practical and legal considerations associated with high speed pursuit. The practical guidelines presented here are not meant to replace existing departmental policies but are intended merely to supplement those policies. Also, it should be noted that the discussion of the legal considerations regarding drivers of emergency vehicles is applicable not only to the high speed pursuit of fleeing motorists, but to all types of emergency situations (for example, where the police vehicle is used as an ambulance).

DEFINITION

"High speed pursuit" may be defined as

> "An active attempt by a law enforcement officer on duty in a patrol car to apprehend one or more occupants of a moving motor vehicle, providing the driver of such vehicle is aware of the attempt and is resisting apprehension by maintaining or increasing his speed or by ignoring the law officer's attempt to stop him." *Fennessy and Joscelyn,* "A National Study of Hot Pursuit," 48 DEN. L.J. 389, 390 (1972).

Of course, a more thorough definition of high speed pursuit would encompass other possible situations, such as where the officer is pursuing at very high speeds a motorist who is unaware that he is being chased. Likewise, an officer engaged in high speed pursuit will not always be using a patrol car, since in an emergency the officer may be compelled to commandeer the vehicle of a private citizen. However, the definition given above will apply to the majority of high speed pursuits.

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"High speed" pursuit should be distinguished from "fresh" pursuit. Fresh pursuit refers to the situation where an officer attempts to make an arrest for a crime committed within his bailiwick and the defendant, in order to escape, flees into another jurisdiction. Under the doctrine of fresh pursuit, the arrest of the defendant is legal only where the pursuit has taken place under certain conditions. For a general discussion of fresh pursuit see the August 1971 ALERT at p. 3. For discussion of Maine statutes authorizing municipal and county law enforcement officers to pursue fleeing offenders across local boundaries see the October 1971 ALERT at p. 3 and the September 1973 ALERT at p. 8.

PRACTICAL CONSIDERATIONS

Whether or Not to Pursue

High speed pursuit poses a most difficult problem for the law enforcement officer. While the officer may feel duty-bound to pursue and apprehend a fleeing violator of the law, once the officer elects to engage in high speed pursuit, he exposes himself, the fleeing violator, pedestrians, and drivers and passengers of other motor vehicles to the possibility of serious injury. Other less serious but potential dangers include the possibility of extensive damage to personal property and injury to the public image of law enforcement officers generally.

Unfortunately, there exists no easy solution to the problem. The decision as to whether or not to engage in high speed pursuit must rest in the discretion and sound judgment of the law enforcement officer. It is unfortunate that the officer normally has but little time in which to decide whether or not to pursue. However, when the officer must make this decision it is most important that he ask himself the following question: Will the danger which will be prevented by the apprehension of the person outweigh the danger to the public which will be created by the high speed pursuit? If, in the judgment of the law enforcement officer, the danger created by the possible escape of the fleeing violator outweighs the danger created by the high speed pursuit, *and no reasonable alternative exists,* then the officer is justified in engaging in high speed pursuit.

Listed below are some of the considerations which the law enforcement officer should be mindful of when contemplating high speed pursuit. These guidelines are not meant to take the place of those procedural standards for pursuit which are promulgated by the officer's own department. To the contrary, the officer should at all times be familiar with the local or departmental high speed pursuit procedure. Familiarity with local procedure will diminish the likelihood not only of over-reaction and disregard for proper caution, but also of undue hesitation and failure to respond to the situation.

When deciding whether or not to engage in high speed pursuit, the officer should consider:

1. Availability of reasonable alternatives

Because of the attendant dangers of high speed pursuit, the possibility of apprehending the offender in another, less dangerous manner should be considered. Questions to ask include: Is the person sufficiently well identified that he may be apprehended at a later time when there will be little difficulty in locating him? Are there other law enforcement officers in the direction the offender is traveling who can accomplish the apprehension in a safer manner? Can apprehension be made by means of a *roadblock?*

2. Seriousness of crime involved

When balancing the need for immediate apprehension against the danger created by high speed pursuit, a paramount consideration is the seriousness of the crime committed. Most violators of the law merit only moderate pursuit speed. However, when the individual is in the act of committing a serious crime or, for other reasons, poses a great danger to the public, the use of high speed may be justified. Thus, high speed pursuit may be justified to apprehend a fleeing felon, such as a person who has committed a murder or participated in an armed robbery, since an individual who has committed crimes of this nature obviously poses a serious threat to the public.

3. Condition of the road

The degree of danger created by the high speed pursuit will depend largely on the road conditions. The officer should always anticipate possible dangers created by changed road conditions. The pursuit may commence on a turnpike and end up on a dirt road or begin on a rural highway and end up on a street in a densely populated area. Whenever the officer encounters changed road conditions he must again weigh the relative dangers and decide whether or not to continue pursuit. When deciding whether to pursue or whether to continue pursuit, questions to ask are: Are there many curves, blind drives or alleys, or intersections in the road? Is there much motor vehicle traffic on the road? Will there be much pedestrian traffic on the road? Are there construction sites on the road?

4. Weather conditions

Of course as weather conditions vary, the perils of high speed pursuit may increase. Driving at high speeds on wet roads or roads covered with snow or ice is extremely dangerous even for the most experienced driver.

5. Condition of the law enforcement officer's vehicle

The officer who undertakes a high speed pursuit in a vehicle which is inadequately equipped to perform under high speeds merely increases the possibility of injury to himself and others. Since the officer who must participate in a high speed chase generally receives no prior warning, he should at all times be aware of the condition of

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his vehicle. Questions to ask include: Are the tires, brakes, lights (low and high beams) etc. in sufficient condition to perform properly at high speeds, over rough terrain and in heavily congested areas? Are the siren and flashing light in satisfactory condition so that they will give adequate warning to the public?

6. Ability of the law enforcement officer to control his vehicle at high speeds

The officer must be honest in his evaluation of his ability to handle his car at high speeds. Over-confidence may jeopardize not only his own life but the lives of others. An officer who feels that his ability to control his vehicle at high speeds is inadequate should undertake refresher training.

7. The law enforcement officer's familiarity with the area

The officer's ability to negotiate roadways will depend largely on his knowledge of the road conditions within the area. An officer thoroughly familiar with local highways will present less danger to the public when engaging in high speed pursuit. To avoid unnecessary risks, all law enforcement officers should familiarize themselves with the road conditions and driving hazards within their assigned areas. All officers should know the location of every sharp curve, intersection, blind roadway, congested area, traffic control and other possible hazard.

8. Character of the pursued driver

The decision of the pursued driver to flee may be a rational one. For example, a pursued felon, mindful of the penalties which await him if he is apprehended, may decide that the risks of pursuit are less significant than the risk of apprehension. However, the decision to flee at high speeds may be made on a less rational basis. A national study of high speed pursuit has concluded that the drivers most likely to attempt to flee from a law enforcement officer are young (under 24) male drivers with relatively poor driving records. *Fennessy & Joscelyn, supra,* at 398. Thus, the pursued driver may often be a teenager who simply panicked. The same national study determined that alcohol plays a role in more than half of the cases of high speed pursuit. *Id.* Consequently, one-half of the drivers pursued at high speeds may have been too intoxicated or otherwise impaired to have appreciated the consequences of their decision to flee. If the law enforcement officer is aware that he is pursuing, for example, a youthful driver whose flight was prompted by mere panic, the officer should exercise greater caution and be sooner prepared to discontinue pursuit than in the case involving pursuit of a dangerous felon.

9. Effect on the public image of law enforcement officers

Since the law enforcement officer is expected at all times to maintain self-control and to use good judgment, the use of poor discretion by an officer who elects to engage in high speed pursuit lowers the confidence of the community in the officer's ability (and in the ability of law enforcement officers generally) to perform his duties. The significance of this consideration is amplified by the fact that the news media tend to highlight instances of high speed chase and any injurious consequences thereof.

Law enforcement officers must bear in mind that they too must obey the laws. Members of the community who observe or hear of law enforcement officers manifesting a reckless disregard of the law, even though in the performance of their duties, will in turn reflect a diminished respect for the law. Unless the public interest in apprehending the person outweighs the danger created, a high speed chase is not warranted.

After the Officer has Decided to Pursue

If, after reflection upon the foregoing considerations, the officer determines that high speed pursuit is justified, he should immediately attempt to obtain an identification of the pursued vehicle — including license plate number, year, make, model and color. He should then relay this information to headquarters, which can notify other units.

The officer who has commenced high speed pursuit must be constantly alert for changing circumstances which might warrant termination of pursuit. For example, an officer who has chased a fleeing offender from a turnpike into a densely populated area must re-consider the relative dangers and decide whether or not to continue pursuit at high speed. Since changed circumstances may demand a halt to the high speed pursuit, or since the officer may simply lose the suspect, the officer should attempt from the outset to obtain an identification of the driver — including sex, race, age, hair, and type and color of clothing. A detailed identification will facilitate subsequent apprehension.

Although it is imperative that the officer use his siren and flashing light to warn the public, he should not rely on these warning devices to clear the way. For one reason or another, occupants of motor vehicles or pedestrians may be oblivious to the warning signals of an approaching emergency vehicle. An emergency situation does not free the officer from his duty to drive safely.

During a high speed chase, the officer should anticipate attempts by the fleeing driver either to damage the pursuing police vehicle or to attempt to force it off the road. The driver may suddenly apply his brakes, hoping to cause the police vehicle to collide with his own. A collision of this sort might puncture the radiator, put out the lights or cause other incapacitating damage to the officer's car. To bring about a collision the fleeing offender might also stop his car and abandon it in the road around a sharp curve or over a hill.

As a general rule, deadly weapons should not be used in high speed pursuit. Rather than resort to use of deadly weapons, the officer should radio for assistance and

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continue pursuit. Only if (1) the operator of the pursued vehicle has been positively identified as a wanted felon, (2) there exists no possibility of injuring innocent persons, and (3) there is great danger that the lives of others will be endangered if immediate apprehension is not accomplished, should the use of deadly weapons be considered. (See the August 1971 ALERT at pages 4 - 5 for a discussion of the use of force when making an arrest.)

If the law enforcement officer is involved in a minor traffic accident in the course of a high speed pursuit, he might take either of two possible courses of action. First, he might continue in pursuit of the suspect and radio to headquarters for another car to be dispatched to handle the investigation of the accident. The officer should then return to the scene of the accident as soon as possible. Alternatively, the officer might stop at the scene for identification before proceeding further. If he chooses to stop, the officer should radio headquarters to assign other units to pursue the suspect.

To reduce the period of time during which innocent parties will be exposed to the dangers of high speed pursuit, apprehension should obviously be accomplished as soon as possible. When making apprehension the officer should consider the safety of other vehicles and should never stop the suspect on a hill, curve, railroad crossing or intersection. Once apprehension is made, the officer should advise headquarters of this fact so that headquarters can (1) dispatch other units to assist if necessary and/or (2) notify previously alerted units so that they may return to their normal duties.

LEGAL CONSIDERATIONS

Emergency Vehicles Exempt from Traffic Regulations

Under ordinary circumstances *all* motor vehicle operators, law enforcement officers and civilians alike, must obey the motor vehicle laws. However, under special circumstances, "emergency vehicles" are exempt from the operation of traffic regulations. Although no Maine statute expressly grants this exemption, the Maine Supreme Judicial Court has held that emergency vehicles responding to emergency calls are exempt from traffic regulations. *McCarthy v. Mason,* 132 Me. 347, 171 A. 656 (1934) (holding emergency vehicles exempt from speed regulations); *Russell v. Nadeau,* 139 Me. 286, 29 A.2d 916 (1943) (holding emergency vehicles exempt from regulations involving traffic control devices). Like ambulances and vehicles of the fire department, police vehicles, when responding to emergency calls, are "emergency vehicles" and therefore are exempt from traffic regulations. The reason for excusing police vehicles from speed limitations and other traffic regulations is obvious. To limit the speed of an emergency police vehicle would diminish the efficiency of the law enforcement officer in the performance of the emergency services he provides for the public.

Emergency Vehicles Have Right-of-Way

In addition to its exemption from traffic regulations, a police vehicle engaged in high speed pursuit (or involved in some other emergency situation) must also be given the *right-of-way* by other vehicles, provided the following two conditions are satisfied: the police vehicle (1) must be responding to an emergency call and (2) must be sounding a siren and emitting a flashing light. 29 M.R.S.A., §946. If these conditions are met and an accident is caused by the failure of another driver to yield the right-of-way, the law enforcement officer will not be liable for any resulting injury, *provided that* the officer was exercising due care.

The officer engaged in high speed pursuit must exercise special caution at intersections. He cannot drive through an intersection in blind reliance upon his right-of-way and with little regard for the safety of others. Although the officer has a right to assume that other vehicles will respect his right-of-way, he should slow down, or even stop if necessary, when approaching an intersection at high speed.

Duty to use Reasonable Care

Although his emergency vehicle is exempt from traffic regulations and is entitled to the right-of-way, the officer engaged in high speed pursuit may nevertheless be liable for failure to drive safely. A law enforcement officer on an emergency call is required to exercise reasonable care, under the circumstances of the emergency situation, to prevent injury to himself and others. This does not mean that a lesser degree of care is required of the officer than is required of the civilian driver. Under ordinary circumstances, the civilian driver is required to exercise reasonable care to prevent injury to the person or property of others. The officer on an emergency call is held to the *same* degree of care. However, in determining what is "reasonable" the special circumstances of the emergency situation are taken into consideration. Thus, the Maine Supreme Judicial Court has stated that operators of emergency vehicles must "exercise reasonable precautions against the extraordinary dangers of the situation which duty compels them to create." *Russell v. Nadeau, supra,* at 288. Stated another way, a law enforcement officer engaged in high speed pursuit must exercise the care which a reasonable and prudent driver of an emergency vehicle would exercise in the execution of his duties under similar circumstances. Even if the driver of another vehicle fails to yield the right-of-way to the police vehicle, the officer must still use reasonable care to avoid a collision.

Officer's Liability for Injury

Unlike several other states, Maine does not grant its law enforcement officers statutory immunity from liability in accident cases involving emergency vehicles. Consequently, to avoid liability for injuries inflicted during high speed pursuit, a Maine law enforcement officer should (1) undertake high

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speed pursuit only in response to an *emergency call;* (2) when high speed pursuit is necessary, use *both* the siren and flashing light to warn the public; and (3) exercise reasonable care to avoid injury to others.

What is an "Emergency Call"?

The most difficult question as to the liability of the officer under emergency circumstances involves the term "emergency call". Since the exemption from traffic regulations and the right-of-way privilege apply only to emergency vehicles responding to emergency calls, officers will avoid liability for injuries stemming from high speed pursuit only when pursuit is undertaken in response to an emergency call. Note that the word "call" in this context means not only a message or communication from a citizen, superior officer or police dispatcher, but a "call to duty," which may also arise from a dangerous situation observed only by the officer. The general rule is that an emergency call exists when the occupants of the police vehicle truly believe that an emergency exists and have reasonable grounds for such belief. An emergency need not *actually* exist. A requirement that an emergency exist in fact would penalize conscientious law enforcement officers for responding to duty and would reward apathetic officers for neglect of duty.

Whether or not there are reasonable grounds to believe that an emergency exists depends upon the particular circumstances involved. Courts have held that police vehicles are emergency vehicles responding to emergency calls in situations where the police vehicle was: (1) responding to a call for the apprehension of a man with a gun; (2) pursuing felons who were fleeing in a stolen car; (3) responding to a fire alarm; (4) acting as an ambulance. On the other hand, courts have held that the clocking of a speeding automobile is *not* an emergency call exempting the police vehicle from the operation of traffic regulations.

Commandeering of a Private Vehicle

A law enforcement officer has the right to commandeer an automobile or other vehicle belonging to a private citizen when the automobile is to be used to pursue an escaping felon or to perform some other emergency service. *Matter of Babington v. Yellow Taxi Corp.,* 250 N.Y. 14, 164 N.E. 726, (1928); *Berger v. City of New York,* 260 App. Div. 402, 22 N.Y.S. 2d 1006 (1940), *aff'd,* 285 N.Y. 723, 34 N.E. 2d 894 (1941). An officer should consider the commandeering of a private vehicle for high speed pursuit only in cases involving serious crimes or especially dangerous persons and only when there exists no other adequate means of, pursuit.

CONCLUSION

As long as high speed pursuit is required for the apprehension of fleeing violators of the law, there will continue to be great risk to law enforcement officers, to private citizens and to property. To minimize risk, officers should always exercise sound judgment before electing to undertake high speed pursuit. Pursuit should be attempted only when absolutely necessary and only when the danger created by the possible escape of the fleeing motorist outweighs the danger created by the pursuit. It is also important that local departments establish strict guidelines for high speed pursuit and ensure that the officers within the department have a thorough awareness of those guidelines. Conscientious adherence to departmental standards by law enforcement officers will decrease the possibility of injury as well as the likelihood of civil liability.

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.

In-The-Field Police Advisors To The Law Enforcement Education Section

The Law Enforcement Education Section is instituting a new procedure whereby we hope to be able to communicate more effectively with law enforcement officers throughout the state. We feel that there is a need for us to become more familiar with the everyday problems of officers in the field so that we can better address these problems in ALERT.

We are therefore setting up, on a volunteer basis, a staff of in-the-field police advisors to the Law Enforcement Education Section. These in-the-field advisors would make themselves available for monthly consultation with attorneys in the Law Enforcement Education Section. Through this monthly contact, the Law Enforcement Education Section should be able to obtain continuous, practi-

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cal, down-to-earth information to enable it to serve all law enforcement officers better.

Any law enforcement officer who is interested in acting as an in-the-field advisor to the Law Enforcement Education Section should contact us either by letter or by phone at 289-2146. If you write, please make sure to include a phone number at which we can reach you during the day. Hopefully, through a combined effort, the services of the Law Enforcement Education Section to law enforcement officers can be improved for the benefit of the entire criminal justice system in Maine.

Possession of Firearms by Convicted Felons

Question:
What is the law in Maine regarding the possession of firearms by convicted felons?

Discussion:
Under 15 M.R.S.A. §393, it is unlawful for a convicted felon to possess a concealable pistol, revolver or other firearm until five years from the date of discharge or release from prison or the termination of probation. A pistol, revolver or other firearm means any weapon capable of being concealed upon the person and includes all firearms having a barrel of less than 12 inches in length. 15 M.R.S.A. §391. A violation of this statute is considered a felony, punishable by imprisonment for not less than one nor more than five years. The law exempts any person commissioned as a law enforcement officer or employed as a guard or watchman from violations of this law. 15 M.R.S.A. §392

The law also strictly provides that any convicted felon who, during the five year period following his discharge or release from prison or the termination of probation, is convicted of any offense other than misdemeanors punishable by not more than $100 or imprisonment for 90 days or less, is forever barred from having in his possession a concealable pistol, revolver or other firearm.

Proof of Operation in O.U.I. Cases

Question:
In an O.U.I. (operation under the influence of intoxicating liquor) case in which the passenger in the defendant's car was killed, the defendant told the investigating officer at the scene of the accident that he, the defendant, was the driver. The defendant also admitted to the doctor in the emergency room that he was the driver. Assuming there is no other evidence of operation, may testimony concerning the defendant's admissions be admitted at trial to prove operation?

Discussion:
Assuming no other evidence of operation, testimony as to defendant's admissions is inadmissible at trial to prove operation. Under the principle of corpus delicti, the State is required to prove every element of the offense charged *without* the use of a confession. In an O.U.I. case, as well as in other cases involving motor vehicle violations, operation is an essential element of the State's case. Thus, the State must prove the element of operation independent of a confession — either by direct observation or by circumstantial evidence. See *State v. Hoffses*, 147 Me. 221, 85 A. 2d 919 (Supreme Judicial Court of Maine, 1952) (indicating what constitutes sufficient evidence to warrant the introduction of admissions in an O.U.I. case). Until the State has proved operation by independent evidence, the confession cannot be admitted into evidence. *State v. Jones*, 150 Me. 242, 108 A. 2d 261 (Supreme Judicial Court of Maine, 1954). In the above hypothetical case, since there was no evidence of operation by the defendant other than his own admissions, the State failed to establish a corpus delicti and defendant's admissions were therefore inadmissible to prove operation.

Law enforcement officers should, therefore, be very thorough when investigating O.U.I. or other motor vehicle violations. If the officer himself did not observe the person driving the vehicle, the officer should immediately try to obtain other eyewitnesses or gather circumstantial evidence to prove operation. If the officer cannot prove operation without relying on the admission or confession of the offender, then the corpus delicti cannot be established, and the case is likely to be dismissed.

New Indexing System for ALERT Case Summaries

Beginning this month, there will be a new system of indexing case summaries in the ALERT. The index will be based on the Table of Contents in NEDRUD THE CRIMINAL LAW, a monthly compilation of case summaries in the criminal area, published by LE Publishers, Inc., 612 N. Michigan Avenue, Chicago, Ill. 60611. A copy of the NEDRUD index categories is included with this month's ALERT as a separate page. Officers are encouraged to become familiar with the new categories, and for future reference, it may be advisable to place this index category page at the front or back of the three-ring binder in which the ALERT bulletins are kept.

When future case summary indexes are published in ALERT, these new NEDRUD categories will be used instead of the categories used in the October 1972 and October 1973 issues of ALERT. Also, all case summaries in ALERT, starting with this issue, will be given NEDRUD index categories. In a future issue of ALERT, all case summaries appearing in ALERT since its inception in October of 1970 will be indexed under the NEDRUD system.

If any law enforcement officer is confused regarding the use of the new indexing system, he should contact the Law Enforcement Education Section. We will attempt to clear up any such misunderstandings in the FORUM section of a future issue of ALERT.

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Hopefully, this new indexing system will eventually make it much easier for law enforcement officers to find cases in a particular area of the law and will improve their effectiveness in carrying out their daily duties.

IMPORTANT RECENT DECISIONS

SEARCH & SEIZURE:
A §2.3 Incident to Arrest

Defendant was convicted of possession of heroin, and he appealed. While operating an automobile, defendant was stopped by an officer who, as a result of a previous check of defendant's operator's permit, had probable cause to believe that defendant was operating the automobile after revocation of his permit. Operation of a motor vehicle after revocation of one's permit carried a mandatory minimum jail term, a mandatory minimum fine or both. The officer then effected a full custody arrest and, in accordance with prescribed police procedures, made a thorough search of defendant's person. In the course of the search, the officer found in defendant's coat pocket a cigarette package containing heroin.

The Court held that since the custodial arrest of defendant was lawful, that fact alone was sufficient to justify the search of defendant incident to the arrest. The Court stated:

> "It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."

Defendant argued that the officer should have done no more than conduct a limited frisk for weapons under the guidelines of *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). The Court determined, however, that *Terry* is not applicable since *Terry* involved an investigative stop based on less than probable cause to arrest, whereas the instant case involved a full custodial arrest based on probable cause.

The Court likewise rejected defendant's argument that a full search was not necessary since there could be no evidence or fruits of the crime in the case of a minor traffic violation such as the one with which defendant was charged. A search incident to a lawful arrest rests as much on the need to disarm the suspect as it does on the need to preserve evidence on his person. Furthermore, it did not matter that the officer did not fear the defendant or suspect that he might be armed, since it is the fact of the custodial arrest and not any such fears or suspicion which give rise to the authority to search. *U.S. v. Robinson*, 42 U.S.L.W. 4055 (U.S. Supreme Court, December 1973).

SEARCH & SEIZURE:
A §2.3 Incident to Arrest

Defendant was convicted of possession of marijuana, and he appealed. An officer who observed defendant's car weaving across the center line stopped the vehicle and asked defendant to produce his operator's license, which defendant failed to do. Defendant was then placed under arrest for failure to have his operator's license in his possession. (The legality of the arrest was not in issue). Having taken the defendant into custody in order to transport him to the stationhouse for further inquiry, the officer conducted a search of defendant's person in the course of which he found marijuana in a cigarette box.

In this case, the companion case to *U.S. v. Robinson* (summarized above), the court relied on its holding in *Robinson* and held that upon arresting defendant and taking him into custody the officer was entitled to make a full search of defendant's person incident to the arrest. As in *Robinson*, the fact of the lawful custodial arrest gave rise to the authority to search.

In *Gustafson* (as well as in *Robinson*), the Court approved the opening and inspection of containers removed from an arrestee's person in the course of a search incident to arrest. The Court indicated that when the officer came upon the cigarette box in the course of his lawful search, he was entitled to inspect it. When his inspection revealed homemade cigarettes which he believed to contain an unlawful substance, the officer was entitled to seize them as "fruits," instrumentalities, or contraband' probative of criminal conduct."

The Court found no merit to defendant's claim that *Robinson*, which involved a mandatory sentence, should not apply to a search incident to the arrest of a traffic offender who did not face a minimum sentence, but who was being taken into custody after arrest for further inquiry. The defendant also contended that *Robinson* should not apply because, unlike *Robinson*, the officer in the instant case was not required to take the defendant into custody and there existed no departmental policy establishing the conditions under which a full scale search could be conducted. The Court considered this distinction to be constitutionally insignificant. *Gustafson v. Florida*, 42 U.S.L.W. 4068 (U.S. Supreme Court, December 1973).

COMMENT: In the Robinson *and* Gustafson *decisions the United States Supreme Court has clarified the types of cases in which a law enforcement officer may conduct a full search of a person incident to arrest. These two decisions change the law regarding Searches Incident to Arrest as stated in the June 1972 ALERT at pp. 2-3. In that issue of ALERT it was stated that an officer may not conduct a full scale exploratory search of every person he arrests. Under* Robinson

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and Gustafson *whenever an officer makes a* lawful custodial arrest *he is entitled to make a full scale search of defendant's person incident to the arrest.*

Thus, the officer no longer must have a specific class of objects in mind when conducting a search incident to arrest. Even if the arrest is for an offense which could produce no evidence, such as a minor traffic violation, once a custodial arrest is made the officer may conduct a thorough search of the defendant's person. The fact of the lawful custodial arrest authorizes the search.

Law enforcement officers should also be mindful of the following limitations which still exist with respect to search incident to arrest:

1. An officer may not use an arrest as a pretext or subterfuge to search for evidence. Even though the arrest may be technically valid, if the purpose of the officer in making the arrest is to justify an otherwise unlawful search, the search will be held unreasonable.

2. Chimel v. California, *395 U.S. 752, 89 S.Ct. 2034, 23 L. Ed. 685 [1969], still controls the scope of the search made incident to arrest. Under* Chimel, *the officer may search only the arrestee's person and the area within his immediate control. The situation where this rule will most frequently apply is that involving automobiles. When an officer makes a custodial arrest of the occupant[s] of an automobile, he is not entitled to make a full scale search of the car. He can only search that area of the car within the arrestee's immediate control, that is, the area from which the arrestee might obtain a weapon or destructible evidence.*

3. Although the officer may make a thorough search of the person incident to arrest, he may use only that degree of force necessary to protect himself, prevent escape, and prevent the destruction or concealment of evidence. This point was emphasized by the Supreme Court, in U.S. v. Robinson, *which referred specifically to the absence in the* Robinson *search of any "extreme or patently abusive characteristics which have been held to violate the Due Process Clause . . ."*

4. An officer may make a thorough search of the person incident to an arrest only when he has taken the arrestee into custody. In both Robinson *and* Gustafson, *the Court stated that a full search of a person incident to an arrest is reasonable under the Fourth Amendment "in the case of a lawful* custodial *arrest." [Emphasis added] The language "custodial arrest" may at first seem redundant. However, the Court used this language because in many states, and frequently in common usage, the term "arrest" is also applied to situations where the officer merely issues an individual a summons to appear in court, rather than taking him into custody. Thus, if an officer makes a "traffic arrest" by merely issuing a summons and does not take the individual into custody, the officer may not conduct a full search of his person. Finally, it should be noted that the* Robinson *and* Gustafson *cases in no way affect the rule of* Terry v. Ohio *pertaining to "Stop and frisk." Under* Terry, *an officer temporarily detaining a suspicious person for questioning may do no more than make a limited search for weapons when he has "reason to believe that he is dealing with an armed and dangerous individual." [See the November 1971 and December 1971 ALERTs for a discussion of Stop and Frisk].*

DEFENSES: D §3.2 Entrapment

Defendant was convicted of distributing heroin in violation of 21 U.S.C. §846 and appealed, claiming that his evidence at trial established the defense of entrapment as a matter of law. The uncontroverted evidence showed that a friend-turned-informant persistently urged the defendant during daily conversations over a period of more than two weeks to obtain some heroin for him. Defendant finally yielded and arranged a sale.

Although it noted that the informant's conduct "reflected no great credit on the government, whose agent he had become," the court rejected the appeal, applying the entrapment test of *United States v. Russell,* 411 U.S. 423, 92 S.Ct. 1637, 36 L.Ed. 2d 366 (1973) (see May 1973 ALERT, at pp. 1-2), which looks to the predisposition of the defendant to commit the crime rather than the conduct of the informant. Under *Russell,* it is irrelevant that the informant's conduct might have induced a hypothetically innocent person to commit the crime; it is only important that his conduct did not improperly induce *this* defendant. Noting that the defendant in the instant case had a history of illegal heroin use, had admitted to recently distributing heroin to friends, had energetically bargained with the purchasing federal agents for a larger commission on the sale and had requested to be involved in any future heroin sales, the court determined that the jury could have found beyond a reasonable doubt that defendant was not entrapped. *U.S. v. Principe,* 482 F.2d 60 (First Circuit Court of Appeals, August 1973).

Comments directed toward the improvement of this bulletin are welcome. Please contact the Law Enforcement Education Section, Criminal Division, Department of the Attorney General, State House, Augusta, Maine.

ALERT

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