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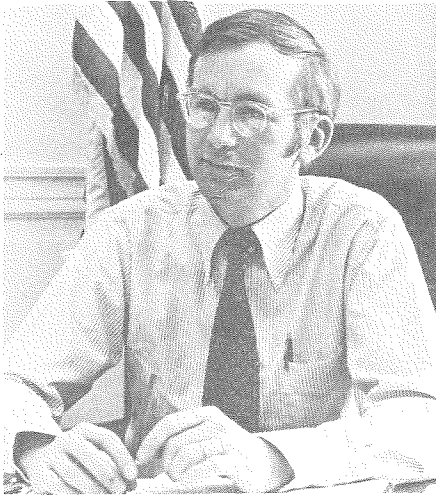
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ALERT

MARCH 1974

CRIMINAL DIVISIONFROM THE OFFICE OF
THE ATTORNEY GENERAL
OF THE STATE OF MAINE

**MESSAGE FROM THE
ATTORNEY GENERAL
JON A. LUND**

The main article of this month's ALERT deals with the use of deadly force by law enforcement officers. Because this is a very sensitive aspect of the officer's duties, I strongly encourage all officers to make sure they fully understand their rights and limitations in this area. If any questions remain after studying the article, officers may contact the Law Enforcement Education Section for advice and assistance.

I would also like to report that we have received a good response to our request for in-the-field police advisors to the Law Enforcement Education Section. We could still use a few more in-the-field advisors, however, especially from the very large and very small departments. Further information on the program can be found on page 5 of the January 1974 ALERT.

Jon A. Lund
JON A. LUND
Attorney General

DEADLY FORCE

Among the most important decisions a law enforcement officer must make are whether or not to use force in accomplishing a lawful arrest, and if force is used, how much. The August 1971 ALERT, pp. 5 and 6, discussed the use of force generally in effecting an arrest. This article deals solely with the use of deadly force in effecting an arrest or preventing escape.

Law enforcement officers should acquaint themselves with the law relating to the use of deadly force because serious consequences may follow from its use, namely, possible death of the arrestee, death or injury to innocent bystanders, and possible criminal and civil liability of the arresting officer if deadly force is improperly employed.

The discussion that follows regarding the use of deadly force assumes that the initial conduct of the officer in attempting the arrest was lawful and that he had a right to make the arrest. A review of the July 1971, August 1971, and September 1971 ALERTs dealing with the law of arrest is suggested in conjunction with a reading of this article. It is important for the law enforcement officer to note that before he arrests a person, he should give notice or warning to the arrestee of his authority and his intention to arrest, unless the circumstances clearly show that the arrestee knows of the law enforcement officer's intention to arrest.

The August 1971 ALERT, p. 1, discusses the notice requirement and should be carefully reviewed, since notice to the arrestee is especially important where deadly force is employed.

Limited Right

The right to use force, and specifically deadly force, is a right given to law enforcement officers to carry out their lawful duties. It is not an absolute right and therefore carries limitations and restrictions with its use. If the law enforcement officer properly employs deadly force, he will be protected from civil or criminal liability. If deadly force is misused, the right will not provide a shield for the officer's unlawful conduct. The law enforcement officer should therefore keep in mind that the use of deadly force is a right which is not absolute and which will provide protection from criminal and civil liability only when lawfully used.

MISDEMEANORS**General Rule**

The use of deadly force is never permitted for the sole purpose of effecting the arrest of a misdemeanor, regardless of whether or not the person being arrested is guilty of the misdemeanor for which the arrest is being attempted.

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The reason is that "it is better to allow one guilty of a misdemeanor to escape altogether than to take his life." *Reneau v. State*, 70 Tenn. 720, 721 (Supreme Court of Tennessee, 1879). For example, shooting the tires of the car of a drunken driver who fails to stop on command is unlawful and an arresting officer using such deadly force may be criminally and civilly liable if death results. Also, if a law enforcement officer shoots and kills a misdemeanant to check his flight, the officer may be criminally and civilly liable for the injury or death he causes. In *Padilla v. Chavez*, 306 P.2d 1094 (Supreme Court of New Mexico, 1957), a policeman was held civilly liable when he shot a misdemeanant who had assaulted him but who had withdrawn and was walking away. The court, in sustaining the recovery by the misdemeanant, held that the officer was not justified in using deadly force in trying to effect the arrest of the misdemeanant as he walked away, even if the officer aimed only at the lower part of the misdemeanant's body. Using deadly force on a misdemeanant is excessive even if it is intended only to wound him. The general rule then is that an officer has no right, except in self-defense, to use deadly force to arrest a misdemeanant, even if the misdemeanant cannot otherwise be taken. *Shine v. State*, 204 So. 2d 817 (Court of Appeals of Alabama, 1967).

Resisting Arrest

An arresting officer is justified in using as much force as is reasonably necessary to overcome a misdemeanant resisting arrest. The officer is under no obligation to retreat and may press forward and become the aggressor to accomplish the arrest. In becoming the aggressor, the officer should not use force or violence disproportionate to the amount of resistance being offered. An officer may be liable for any excessive or unnecessary force he employs. Moreover, the law enforcement officer should refrain from using deadly force on a misdemeanant

resisting arrest unless the officer is in imminent danger of great personal injury or loss of life.

FELONY

Common Law

At common law, a law enforcement officer had the right to use such force as under the circumstances appeared reasonably necessary to effect the arrest of a felon. If reasonable force necessitated the use of deadly force, a resulting death of a felon would be justified. *Stinneth v. Commonwealth*, 55 F. 2d 644 (Fourth Circuit Court of Appeals, 1932). Courts generally construed 'necessary' very strictly and held that all other reasonable efforts to apprehend the felon must have failed before deadly force could be justified. The reason the common law allowed the use of deadly force to arrest a felon was that at common law all felonies were punishable by death. The killing of a felon, therefore, did not result in any different punishment than if he had been tried and convicted. Thus, at common law, the officer's right to use deadly force in making an arrest existed only when a felony had been committed and the felon could not be taken without the use of deadly force.

Maine Law

The Supreme Judicial Court of Maine has not decided a case dealing with the use of deadly force by a law enforcement officer nor has the legislature passed a statute that would be expressly controlling. There is one Maine Superior Court opinion, written by a three judge court in a civil suit for wrongful death, which deals with the use of deadly force by a law enforcement officer. *Hilton v. State*, Docket Number 1467 (Me. York County Superior Court, 1973). In that case, a state trooper was assisting other law enforcement officers in attempting to execute an arrest warrant upon a suspect for the offense of breaking and entering in the nighttime, a felony in Maine. The state trooper shot

and killed the suspect in an attempt to prevent the suspect from avoiding arrest.

The court did not accept the common law rule which allowed the use of deadly force on any felon attempting to avoid arrest. In recognition of the criticisms of the common law rule, the court adopted Section 3.07(2)(b) of the Model Penal Code. That section reads in part as follows:

"The use of deadly force is not justifiable under this section unless:

- (i) The arrest is for a felony; and
- (iv) The actor believes that:
 - (1) the crimes for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed."

The court went on to say:

"We believe that the adoption of the Model Penal Code Rule strikes the appropriate balance between the legitimate needs of law enforcement and the sanctity of human life which is one of the basic values of our community. The law is an institution which seeks to accommodate and balance the competing interests and needs of society. While law enforcement officers must be free to use reasonable force to protect themselves and to protect society, absent some reason to believe that the person to be apprehended has used or threatened to use deadly force or that there is substantial likelihood that if not apprehended that person will cause death or serious bodily harm to another individual there is no legal or moral justification for the use of deadly force." *Hilton v. Maine*, at 5.

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The court concluded that since the state trooper had no basis to believe that the crime for which the arrest was being made involved conduct including the use or threatened use of deadly force or that there was substantial risk that the person being arrested would cause death or serious bodily injury, the use of deadly force and the resulting homicide was not justified.

Since this decision is from a civil case in Superior Court and is in conflict with the common law, there is still a serious question as to the exact status of the law in Maine regarding the use of deadly force. In light of this conflict, it is suggested that law enforcement officers apply the more restrictive view of the Model Penal Code. Thus, deadly force should not be used to effect the arrest of a felon unless the law enforcement officer believes that the crime for which the arrest is made involved conduct including the use or threatened use of deadly force, or that there is substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

Resisting Arrest

When an officer has the authority to arrest a felon, he has the right to use force reasonably necessary to effect the arrest. Where the offender offers physical resistance to arrest or maintenance of custody, the officer need not retreat but may become the aggressor and use as much force as is reasonably necessary to overcome the resistance. If deadly force is absolutely necessary to overcome the resistance and unavoidably results in the death of the offender, the use of deadly force will be justified.

SELF-DEFENSE

A law enforcement officer may use all reasonably necessary force in self-defense, when making a lawful arrest. Before deadly force is justified, however, the law enforcement officer must be placed in

sufficient danger so that it is reasonable for him to believe that deadly force is necessary to save his life or prevent grave bodily injury. This rule applies whether the arrest is for a misdemeanor or a felony.

To invoke the right of self-defense while attempting a lawful arrest, the arresting officer need not establish that he was not the aggressor or that he had an opportunity to retreat. Since it is the officer's affirmative duty to make a lawful arrest, he may be the aggressor and press forward and still properly claim the right of self-defense.

A requirement of self-defense is that the law enforcement officer must reasonably believe that deadly force is necessary. His belief may be founded upon the facts as they reasonable appear to him and if his belief is reasonable, deadly force is justified even if it subsequently turns out that the facts are otherwise.

PREVENTING ESCAPE

Escape refers to the situation where the misdemeanor has been arrested and reduced to custody or confined, and then he takes flight. The law regarding the use of deadly force to prevent escape is very much the same as that regarding the use of deadly force to arrest. A law enforcement officer may not use deadly force to prevent the escape of a misdemeanant under any circumstances. It is better to allow a misdemeanor to escape rather than to take his life.

Because of the present confusion in the Maine law on the use of deadly force to arrest a felon, it is suggested that law enforcement officers apply the rule of the *Hilton* case to the escaping felon situation. Therefore, an officer should not use deadly force to recapture an escaping felon unless the officer believes (1) that the crimes for which the original arrest was made involved conduct including the use or threatened use of deadly force; or (2) that there is a substantial risk that the escaping person will cause death or serious bodily harm if his apprehension is delayed.

MISCELLANEOUS CONSIDERATIONS

Warning Shots

Warning shots should not be fired to effect an arrest or prevent an escape. An officer may be civilly or criminally liable if, for example, his warning shots accidentally strike a fleeing misdemeanor or if the shot strikes an innocent bystander. As a matter of policy, most police departmentst prohibit the firing of warning shots because such shots are of limited usefulness, may create a hazard to innocent people, may induce the escapee to return the use of deadly force when he otherwise would not, and may create the mistaken impression on the part of fellow officers that deadly force is justified. It is therefore suggested that the law enforcement officer not fire warning shots.

Use of Firearms to Halt a Motor Vehicle

A law enforcement officer is not justified in using his firearm to disable or halt a motor vehicle to effect the arrest of a misdemeanant. If an officer uses such deadly force to stop or halt the motor vehicle, he can be held civilly and criminally liable if death or injury results to the misdemeanor or a passenger.

To justify the use of firearms in the case of an escaping felon in a motor vehicle, an officer must have no other reasonably apparent method of effecting the arrest or preventing the escape of the fleeing felon and the officer must otherwise have the right to use deadly force to effect the arrest. (See discussion on the right to use deadly force to arrest a felon on p. 2 of this month's ALERT.)

Prevention of Crime

The right to use deadly force in preventing criminal activity is more limited than is the right to use deadly force after criminal activity

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has occurred. The law regarding the use of deadly force to prevent the commission of a crime is best described as follows:

“ . . . the rule does not authorize the killing of persons attempting secret felonies, not accompanied by force, but is limited to some atrocious crime attempted to be committed by force; such as murder, robbery, housebreaking in the nighttime, rape, mayhem . . .” *Storey v. State*, 71 Ala. 329, 339 (Supreme Court of Alabama, 1882.)

Deadly force is not permitted for the purpose of preventing non-dangerous felonies. For example, the use of deadly force to prevent a larceny where no violence is threatened is not justified. *Commonwealth v. Emmons*, 43 A.2d 568 (Superior Court of Pennsylvania, 1945).

Deadly Force and Warrant Considerations

The presence or absence of an arrest warrant has a direct bearing upon an officer's liability for the use of deadly force in making an arrest, if it later turns out that (1) no felony has in fact been committed, (2) the person against whom deadly force is used did not commit the crime, or (3) the criminal act was only a misdemeanor. Where an arrest warrant is present and the officer is otherwise justified in using deadly force, he will not be liable if, for example, no felony was actually committed. This is so because the officer is acting pursuant to the arrest warrant. In the warrantless arrest situation, where an officer acts upon reasonable grounds to believe that a felony has been committed and the arrestee committed it, courts differ as to whether or not an officer will incur liability if he is in fact mistaken. Since officers are held to a high degree of care and diligence, the safest approach for the officer in the warrantless arrest situation is not to consider the use of deadly force unless the officer knows that a felony has in fact been committed and that the person he is attempting to arrest committed the

felony. Under no circumstances should an officer use deadly force if he merely suspects that a felony has been committed.

Deadly Force and Unlawful Arrest

The law enforcement officer should remember that he is justified in using deadly force to make an arrest only so long as his actions are lawful. At common law, a person had a right to use whatever force necessary to resist an unlawful arrest. Some courts have modified this right by prohibiting the taking of life to resist an unlawful arrest or by prohibiting forcible resistance to arrest, leaving the arrestee to his civil remedies for assault and false arrest. Other courts allow a person to resist an unlawful arrest even to the extent of killing the arresting officer, if the killing is necessary to save himself from serious bodily harm, the danger of such harm is real or apparent, and there are no other safe means of averting the real or apparent danger except by killing the arresting officer. *Morris v. Commonwealth*, 411 S.W. 2d 678 (Court of Appeals of Kentucky, 1967). The law enforcement officer should therefore carefully consider the lawfulness of his conduct before he employs the use of deadly force.

Use of Deadly Force by Private Citizens

Law enforcement officers are often asked by private citizens about the rights of the private citizen to use deadly force in protecting his person or property or in effecting a citizen's arrest. Such questions present extremely sensitive legal issues, and only qualified attorneys should attempt to answer them. It is suggested that law enforcement officers refer any questions about the use of deadly force by private citizens either to their local county attorney or the Criminal Division of the Attorney General's Office.

GUIDELINES

It is essential that all police departments formulate written policy for the use of deadly force. It is important that the law enforcement officer know when and in what situation deadly force is justified. The following are suggested guidelines taken from the President's Commission on Law Enforcement and Administration of Justice—Task Force on Police p. 189 and 190.

1. Deadly force should be restricted to the apprehension of perpetrators who, in the course of their crime threatened the use of deadly force, or if the officer believes there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if his apprehension is delayed. The use of firearms should be flatly prohibited in the apprehension of misdemeanants, since the value of human life far outweighs the gravity of a misdemeanor.
2. Deadly force should never be used on mere suspicion that a crime, no matter how serious, was committed or that the person being pursued committed the crime. An officer should either have witnessed the crime or should have sufficient information to know, as a virtual certainty, that the suspect committed an offense for which the use of deadly force is permissible.
3. Officers should not be permitted to fire at felony suspects when lesser force could be used; when the officer believes that the suspect can be apprehended reasonably soon thereafter without the use of deadly force; or when there is any substantial danger to innocent bystanders. Although the requirement of using lesser force, when possible, is a legal rule, the other limitations are based on sound public policy. To risk the life of innocent persons for the purpose of apprehending a felon cannot be justified.

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4. Officers should never use warning shots for any purpose. Warning shots endanger the lives of bystanders, and in addition, may prompt a suspect to return the fire. Further, officers should never fire from a moving vehicle.

5. Officers should be allowed to use any necessary force, including deadly force, to protect themselves or other persons from death or serious injury. In such cases, it is immaterial whether the attacker has committed a serious felony, a misdemeanor, or any crime at all.

6. In order to enforce firearms use policies, department regulations should require a detailed written report on all discharges of firearms. All cases should be thoroughly investigated to determine whether the use of firearms was justified under the circumstances.

MAINE COURT DECISIONS

SELF-INCRIMINATION:

B §3.1[a] Identification: Wade-Gilbert-Stovall.

Defendant was convicted of uttering a forged instrument in violation of 17 M.R.S.A. §1501 and appealed claiming that the pre-trial stationhouse identification violated his right to counsel under the Sixth Amendment to the U.S. Constitution and his right to due process of law under the Fourteenth Amendment. The stationhouse identification involved the bank teller to whom the forged instrument was presented looking through a one-way mirror at the defendant who was talking to a police officer in a small room. The defendant was not aware of the fact that he was being observed and he had no lawyer with him.

The court held that the defendant did not have a right to counsel at the identification, because the Sixth Amendment right to counsel does not apply to police-arranged investigatory confrontations before formal charges are brought against a defendant. The court, however, found that the use of the one-way mirror for the one-man showing was a prima facie violation of due process. The Court quoted from the 1973 Maine case of *State v. Northup*, 303 A.2d 1 (Supreme Judicial Court of Maine, 1973):

"We now decide that whenever a one-way mirror is used in a lineup so that the accused is unable to know what occurs on the other side of the mirror or the accused is presented in such a way that he is, in practical effect, presented singly and in a context marking him conspicuously as the suspect, there is prima facie violation of constitutional due process. The burden in such a case is on the State to affirmatively show additional circumstances either mitigating the suggestiveness initially indicated, or provide a justification or excuse for the practice in accordance with the standard that particularly compelling or exigent circumstances make the practice reasonably necessary."

Despite the finding that the stationhouse identification was unlawful, the court held that the later in-court identification of the defendant had a source independent of the unlawful identification, because the witness had had several other opportunities to observe the defendant. The in-court identification was therefore admissible as evidence and did not violate defendant's due process rights. *State v. Rowe*, Docket No. 100 (Supreme Judicial Court of Maine, January 25, 1974).

COMMENT: The lesson of this case for the law enforcement officer is contained in the above quote from the case State v. Northup. Paraphrasing that quote, any police-arranged confrontation with a witness in which either a one-way

mirror is used or the accused is presented singly in such a way as to mark him conspicuously as the suspect, will be a prima facie violation of constitutional due process. The effect of a prima facie violation is that the results of the identification procedure will not be admissible in court unless the law enforcement officer can show additional circumstances either mitigating or justifying the suggestiveness of the procedure. Possible examples of such circumstances would be a victim in danger of dying so that there wasn't time to conduct a formal lineup or a witness in danger of great bodily harm if recognized by the accused, thereby justifying the use of a one-way mirror. (See June-July 1973 ALERT, p. 8 for a discussion of State v. Northup.)

ARREST AND DETENTION:

A§1.1 Reasonable Grounds

SEARCH AND SEIZURES:

A§2.4 Automobiles: Without a Warrant

SUPPRESSION OF EVIDENCE:

A§4.1 Hearing

Summoned at 2:00 A.M. to a store which had been burglarized, officers discovered two sets of footprints in fresh-fallen snow. The footprints led from the store to an automobile which the two persons apparently had entered. Since the tire tracks of the automobile were identifiable by a distinctive tread, the officers followed them for a block where they met another officer who had found a checkbook in the road belonging to the storeowner. Continuing down the road where the checkbook had been found, the officers found a bag containing electrical parts at the side of the road. They then came upon a parked car in the middle of the road with its lights off. The only other vehicle the officers had encountered since leaving the scene was driven by a person known to the officers. As the patrol car approached, the parked car turned its lights on and drove off. The officers then stopped the car and arrested its two occupants for

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breaking and entering. A search of the passenger's person revealed a revolver. The officers discovered in plain view another revolver and burglar tools within the automobile. Although the trunk and glove compartment were searched, nothing was removed. After impounding the automobile and obtaining a warrant, the officers seized from the automobile property stolen from the store. Defendants were charged with breaking, entering and larceny and moved to suppress the evidence removed from the automobile, arguing that its seizure was tainted by an unlawful arrest and an illegal search. The trial court granted defendants' motion on the basis that the officers lacked probable cause to arrest, reasoning that because the officers did not follow a single, continuous set of tire tracks to the point of arrest, they had no evidence which would have singled out defendants' automobile as the car containing the guilty pair.

The Law Court reversed the ruling by the lower court, saying that the standard of probable cause applied by the trial court was too rigid. The Law Court noted that the apprehension took place early in the morning in a sparsely populated area and the officers had observed only one other vehicle earlier, the operator of which was known to them. The officers had followed the identifiable tire tracks, found a discarded checkbook and a bag of electrical equipment in the road, and came upon a very suspicious automobile in the middle of the road, which turned on its lights and began to drive away when the officers approached. "Although the possibility of mistake existed, as it invariably does in a probable cause situation", the officers "would have been remiss in their duty if they had not arrested the defendants promptly."

The court also upheld the search of the automobile made at the time of the arrest. Since the arrest was lawful, the officers could search the defendants incident thereto. When a revolver was found on one of the defendants, the officers were justified in looking within the car for further weapons and seizing the

revolver lying in plain view. The search of the locked trunk was justified since there was present both probable cause to search and exigent circumstances, namely, the mobility of the vehicle, the time and place of apprehension and the possibility of rendezvous with confederates.

Finally, the court held that the quantum of proof required to prove that there was probable cause to arrest or to conduct a warrantless search is a preponderance of the evidence. *State v. Heald*, Docket No. 873 (Supreme Judicial Court of Maine, January 19, 1973).

COMMENT: This decision of the Supreme Judicial Court of Maine was handed down over a year ago on January 19, 1973, but was impounded and publication withheld from the public. Since the defendants' trial on the merits was yet to come, the Law Court felt a premature release of the decision might have a prejudicial affect on the trial.

**WITNESSESS:
E §2.4 Accomplice**

Defendant was convicted of robbery, and he appealed. At trial the witnesses against defendant were the victim, who was blind and who identified the defendant through his "audio characteristics," and the defendant's girlfriend, who described the robbery in great detail. Arguing that he was convicted on the uncorroborated testimony of an accomplice (the girlfriend), defendant contended that the Maine rule which allows convictions to be had on the uncorroborated testimony of an accomplice should be changed.

The Law Court denied the appeal and reaffirmed Maine's "firmly established and well entrenched rule" that a conviction may be had upon the unsupported testimony of an accomplice. The Court also suggested that the rule may not have been applicable to the instant case because (1) there was serious question as to whether the defendant's girlfriend was in fact an accomplice and (2) her testimony was corroborated in

several important respects by the blind victim. *State v. Smith*, 312 A.2d 187 (Supreme Judicial Court of Maine, November 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

The matter contained in this bulletin is intended for the use and information of all those involved in the criminal justice system. Nothing contained herein is to be construed as an official opinion or expression of policy by the Attorney General or any other law enforcement official of the State of Maine unless expressly so indicated.

Any change in personnel or change in address of present personnel should be reported to this office immediately.

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This bulletin is funded by a grant from the Maine Law Enforcement Planning and Assistance Agency.