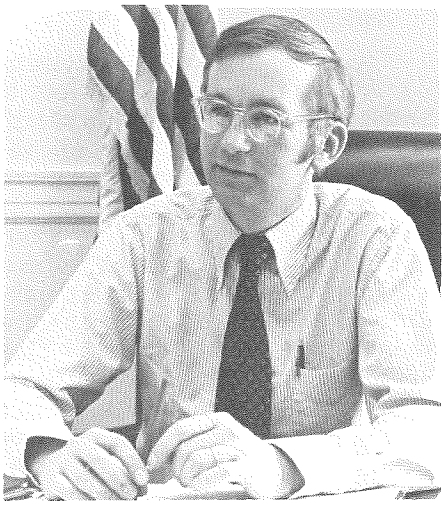
OCTOBER 1974

ALERT

CRIMINAL DIVISION

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



MESSAGE FROM THE ATTORNEY GENERAL JON A. LUND

This month's ALERT marks the beginning of our fifth year of publication. I believe that the ALERT Bulletin has been and continues to be an invaluable aid in keeping Maine's law enforcement officers abreast of new developments in criminal law and procedure. In early 1975, we will be approaching the state legislature for permanent funding for the Law Enforcement Education Section so that we may continue to publish ALERT and other law enforcement publications.

This issue of ALERT contains summaries of recent state and federal court cases of special interest to law enforcement officers. *Fisher v. Voltz,* on page two, provides guidelines regarding the liability of officers conducting warrantless searches. The legality of aerial searches is discussed in *Dean v. Superior Court for County of Nevada,* summarized on pages two and three, and in the Comment which follows that case. The court's decision in *Dean* involved "open fields" searches, a topic which will be the subject of next month's main article in ALERT.

Jon A. Lund

JON A. LUND
Attorney General

IMPORTANT RECENT DECISIONS

ARREST:
A § 1.4 Detention: "Stop and Frisk"

Defendant was convicted of violating a federal statute which prohibited the receipt, possession or transportation of a firearm by a previously convicted felon. At 2:00 a.m., defendant was stopped by two officers who found defendant's manner of driving suspicious. After the stop, defendant got out of his car and walked back to talk to the officers. On the basis of defendant's inarticulate and confused responses to questioning, one of the officers patted him down and discovered a firearm. The officer who conducted the frisk testified at trial that at no time was he in fear of life or limb, that he had no basis for a belief that defendant was armed or dangerous, and that he did not believe defendant to be armed at the time of the frisk. The defendant argued on appeal that the firearm was the fruit of an unlawful search and therefore should have been suppressed.

The court reversed the conviction. The United States Supreme Court, in *Terry v. Ohio,* established that officers may conduct a limited search of a person's outer clothing for weapons "for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual." The Supreme Court emphasized in *Terry* that the officer's belief must be based on "specific and articulable facts." In the instant case, there were no facts to lead the officers to believe that the individual was armed or dangerous. In holding the frisk invalid, the court said that the frisk was

> "undertaken as a purely routine matter and not in response to any suspicious or unnerving conduct on the part of the 'suspect.' It is precisely this reflexive police activity that the *Terry* standards were designed to curb." *U.S. v. Kirsch,* 493 F. 2d 465, 466 (Fifth Court of Appeals, May 1974).

ARREST, SEARCH AND SEIZURE:
A § 2.1 Probable Cause: Warrant
ARREST, SEARCH AND SEIZURE:
A § 3.4 Execution: Warrant

Defendant was convicted of possessing, concealing and knowingly transferring counterfeit notes, and he appealed. On appeal, defendant contended that the trial court erred in admitting as evidence counterfeit money seized during an apartment search. The First Circuit Court of Appeals denied the appeal.

Defendant's first argument was that the affidavit for the search warrant was insufficient because it did not support a conclusion that the affiant's informant was reliable or his information credible. In support of his argument, defendant cited *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964) (see discussion of *Aguilar* in the January 1973 ALERT), which dealt with bare conclusions of the affiant based upon tips from unnamed informants who may have

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spoken without personal knowledge. The court held that *Aguilar* did not control the instant case, and that the affidavit adequately supported a finding of probable cause. Unlike *Aguilar*, the informant in the instant case was named in the affidavit, and the informant's knowledge was obtained from recent personal observation. Moreover, the fact that the informant was revealed in the affidavit as a participant in the crime, and was therefore making a declaration against interest, lent further credibility to his information.

The warrant authorized the search of a second-floor apartment in the southwest corner of a specified building located at a specified address. Defendant contended that the warrant could not support a seizure of evidence from a cabinet *outside* of the apartment. The cabinet was in the southwest corner of the building, three to six feet from the entrance to the apartment, in a small hallway directly opposite the door that led into the apartment. The court held that "the officers could reasonably suppose, given the second floor layout and its proximity to the apartment, that the cabinet was appurtenant to the apartment, as in fact it was." *U.S. v. Principe,* No. 74-1043 (First Circuit Court of Appeals, June 13, 1974).

SEARCH AND SEIZURE:
A § 2.5 Persons and Places-Without a Warrant
MISCELLANEOUS:
M § 2 Law Enforcement Officers

Following an armed robbery, law enforcement officers promptly obtained arrest warrants for several known participants. In three different instances, officers, in possession of arrest warrants, entered and searched apartments which were not the homes of the suspects but of third parties. The officers entering the apartments did not have search warrants, nor did they have probable cause to believe that the suspects would be within the apartment. The owners of the apartments brought suits for damages against the officers, alleging that their civil rights had been violated by unreasonable police conduct.

The officers argued that because they had valid arrest warrants and because there were exigent circumstances, neither a search warrant nor probable cause was necessary. The court rejected this, and held that without a valid search warrant,

> "police officers may not constitutionally enter the home of an innocent citizen in search of a suspected offender for whom they have a valid arrest warrant, even under exigent circumstances, unless they also have probable cause to believe that the suspect will be found on the premises." 496 F. 2d at 341-42.

On the basis of this holding, the court reversed the decision of the lower court which had returned a verdict in favor of the officers.

The second issue was whether or not the apartment owners were entitled to punitive damages from the officers where the evidence showed that officers had left doors to some of the apartments open and had made no attempt to fasten them or otherwise preserve the security of the contents of the apartments. In light of these facts, and in light of the fact that the apartment doors had been opened by force by officers who did not have search warrants, the court upheld the punitive damages imposed upon the officers by the jury.

The third issue arose from the appeal of a senior police officer upon whom the jury had imposed punitive damages because of the wrongful acts of his subordinate officers who had "abused" an apartment occupant. The court reversed the judgment against the senior officer, holding:

> "A superior police officer may not be subjected to punitive damages because of wrongful acts by a subordinate officer if there is no evidence that the superior officer ordered or personally participated in the acts, or knew or should have known that the acts were taking place and acquiesced in them." *Fisher v. Volz,* 496 F.2d 333, 349 (Third Circuit Court of Appeals, April 1974)

SEARCH AND SEIZURE:
A § 2.5 Persons and Places-Without a Warrant

Having received a tip concerning possible marijuana cultivation in an isolated area, the county sheriff dispatched an airplane to the designated area. Using binoculars, officers were able to observe from the plane a large field of plants resembling *cannabis sativa* and surrounded by forests. Later, the officers attempted to locate the field by ground travel. They traveled a well-worn footpath through unfenced and unposted woodland. Although they were on private property, the officers observed no significant signs of private ownership. After meeting defendant (who held the land under an agreement to purchase) on the path, the officers arrived at the field and confirmed that the plants were marijuana. Defendant was indicted for possession of marijuana for the purpose of sale. He sought to quash the indictment on the ground that the evidence was obtained unlawfully, arguing that the aerial surveillance of his land was an invasion of constitutionally protected privacy.

The State argued that a property holder has no Fourth Amendment right of privacy in the airspace above his land. The court rejected this argument saying:

> "Expectations of privacy are not earthbound. The Fourth Amendment guards the privacy of human activity from aerial no less than terrestrial invasion." 110 Cal. Rptr. at 588.

However, the court held that the aerial overflights which revealed defendant's open marijuana field did not violate Fourth Amendment restrictions. As is the case with ordinary agriculturists, who do not expect their crop fields to be concealed from aerial view, defendant exhibited no reasonable expectation of privacy from overflight.

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Defendant also claimed that the officers' warrantless foot expeditions to the marijuana field were unlawful. However, because there were no signs of private ownership or exclusion of travelers along the path, the path was a place where reasonable expectations of privacy had not yet been exhibited. Therefore, because the officers observed the contraband from the path, the warrantless entry and seizure was not unlawful. *Dean v. Superior Court for County of Nevada,* 110 Cal. Rptr. 585 (Court of Appeal of California, November 1973).

COMMENT: It is important to note that the aerial surveillance in this case involved an area within the "open fields" and with respect to which there was no reasonable expectation of privacy. A view by police helicopter of marijuana plants growing in a defendant's backyard *has been held to be an unconstitutional invasion of privacy. See* People v. Sneed, *108 Cal. Rptr. 146 [Court of Appeal of California, 1973].*

SEARCH AND SEIZURE:
A § 2.3 Incident to Arrest

Indicted for possession of an unregistered submachine gun, defendant filed a pre-trial motion to suppress the gun as evidence, arguing that it was seized as a result of an illegal search. Five narcotics agents had gone to defendant's house for the purpose of executing an arrest warrant for one Frick, who was wanted for participation in a plan to assassinate a federal judge. The agents had neither an arrest warrant for defendant nor a search warrant for the residence. Frick was believed to be a very dangerous person, and the agents found Frick hiding next to two loaded rifles. Frick was arrested, advised of his rights, and handcuffed. After observing a partially burned cigarette, believed to be marijuana, on the floor, the agents arrested defendant, advised him of his rights and handcuffed him. The agent in charge of the detail felt that precautionary measures were necessary for the safety of the agents because of their unfamiliarity with the house located in a rural area, the heinous nature of the crime for which Frick was arrested, Frick's known propensity for using confederates, and the lateness of the hour. Therefore, the agent directed that a quick check of the house be made to ensure that no one was in the house who might harm the agents. During this check an agent found in plain view on a bedroom floor a submachine gun which, it was later learned, belonged to defendant. The District Court granted defendant's motion to suppress on the grounds that the search was unjustified because the area subject to Frick's and defendant's immediate control was secure.

The Court of Appeals reversed, holding that neither the principles of the Fourth Amendment nor the limitations of *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (U.S. Supreme Court, 1969), are infringed by allowing officers to make a cursory security search to protect their lives under circumstances such as those in this case. Because Frick was believed to be a very dangerous man and was known for using confederates, the agents' search of the house to look for confederates was a limited reasonable intrusion to insure their safety. Therefore, the sub-machine gun that was in plain view and seized as a result of this intrusion was admissible in evidence.

It was significant that the agents were looking for *people* that might be in hiding and be dangerous to their safety. They were not looking for *things.* The court indicated that any further search for evidence without a warrant would have been unlawful. *U.S. v. Looney,* 481 F. 2d 31 (5th Circuit Court of Appeals, July 1973)

SEARCH AND SEIZURE A§2.6
Abandonment

Upon receiving a tip from an informer regarding illegal drug traffic, law enforcement officers proceeded to a winding dirt road to investigate. While traveling along the road, the officers noticed a jeep wagoneer coming towards them and attempted to flag the vehicle down. Rather than stopping, the jeep wagoneer accelerated past the police and a subsequent high speed chase resulted in the jeep crashing. The driver fled on foot. While several officers pursued the driver, one officer approached the crashed vehicle and found no other passengers inside but noticed through the window several burlap bags containing brick-like objects. The officer noted that these brick-like objects were similar in size to kilo bricks of marijuana and also detected a strong odor of marijuana through an open window. The officer then reached through the open window, retrieved a brick-like object from the burlap bag, opened it, and discovered a kilo of what he believed to be marijuana. The vehicle was towed to a police station and a subsequent search revealed additional marijuana. The defendant was subsequently charged with the unlawful transportation of 256 pounds of marijuana. A motion by defendant to suppress the marijuana as being evidence illegally seized was granted. The state appealed.

The court reversed the decision of the trial court saying the evidence was properly seized and was therefore admissible. The court reasoned that a person has no Fourth Amendment right to protection against search and seizure when the property has been abandoned. In this case, the defendant fled the scene after his vehicle had crashed. Under the circumstances, this flight was sufficient to establish a reasonable belief in the mind of the officer that the vehicle had been abandoned. Once the vehicle had been abandoned, the officer had a right to take immediate charge of the vehicle and its contents. *State v. Childs,* 519 P.2d 854 (Supreme Court of Arizona, 1974).

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MAINE COURT DECISIONS

ARREST:
A § 1.1 Reasonable Grounds
SEARCH AND SEIZURE:
A § 2.3 Incident to Arrest
SEARCH AND SEIZURE:
A § 2.4 Automobiles—Without a Warrant
SELF-INCRIMINATION:
B § 3.1 [a] Identification: Stovall

After a consolidated trial, defendants were convicted of attempting to commit the offense of breaking and entering with intent to commit larceny. At 11:00 p.m., a Miss Breton heard the sound of glass breaking near the rear of a restaurant located across the street from her apartment. After she summoned her father to the window, the Bretons observed two figures standing near the restaurant. After telephoning the police, they observed the two figures emerge from behind the restaurant and proceed at a pace faster than a normal walk. When the figures passed beneath a street light, Miss Breton observed that both were male, one had darker hair than the other, one wore light colored pants and a green shirt, and both wore red gloves. Mr. Breton observed that one was taller than the other, both wore red gloves, but no hat, they wore light colored pants but darker jackets, and the taller had a "lantern jaw." Soon after the men disappeared, a vehicle appeared from the direction in which they had been going, and Mr. Breton observed that the car was a dark green Ford with a peculiar taillight configuration and that the garb of the driver was similar to that of one of the men he had just seen. When a law enforcement officer arrived and examined the rear door of the restaurant, he observed evidence of a possible break, including a safety hasp which had been unscrewed. After the Bretons related to the officer all that they had observed (except the "lantern jaw" characterization), the officer departed in the direction the Bretons had observed the green car travelling. Less than a mile from the restaurant, the officer observed flashing taillights behind a garage. Because the garage was closed and the streets otherwise vacant, the officer drove behind the garage to investigate. There he observed a green Ford with a taillight configuration similar to that described by Mr. Breton. The car contained two occupants, one taller than the other, and the officer observed that one occupant wore clothing similar to that described by the Bretons. After the occupants alighted from the car at the officer's request, the officer observed a screwdriver on the front seat. He then arrested the occupants, seized the screwdriver, and reached under the front seat and found two pairs of red gloves which he also seized. Summoned to the garage and asked if he had earlier seen the two men or the vehicle, Mr. Breton identified the car and said that he could identify one defendant by his "lantern jaw," although he could not positively identify the other. At trial, Mr. Breton made an in-court identification of one defendant but could not positively identify the other.

On appeal, defendants argued that it was error to deny their motion to suppress, and error to admit the screwdriver and gloves because the search was not incident to a *lawful* arrest, there having been no probable cause to arrest. The Law Court rejected this argument, holding that there was probable cause to arrest. Notwithstanding the legality of the arrest, a question remained as to the propriety of the seizure of the gloves from beneath the front seat when the occupants were outside the car. The court upheld the seizure of the gloves incident to the arrest. Because both defendants were standing beside the car and neither had been handcuffed, the front seat area was within the conceivable control of the arrestees and could be searched incident to the arrest.

With respect to defendants' challenge to Mr. Breton's in-court identification, the court indicated that even if the pre-trial confrontation (behind the garage) was defective, the in-court identification could still be upheld since the evidence clearly indicated an independent source (observation at scene of crime) for the in-court identification. However, because evidence of the pretrial confrontation was presented before the jury, the court elected to address the constitutionality of that confrontation. The court announced that in cases such as the instant case which deal with the constitutionality of pre-trial lineups or showups, or pre-trial photographic identifications, it would apply the following test: Looking at the totality of the circumstances, was the out-of-court confrontation unnecessarily suggestive, and, if so, to what extent might the suggestiveness have induced the witness to misidentify. (This test is not applicable to one-way mirror and similar identification procedures, since such procedures will be held violative of due process without regard to the impact which they may have on a witness. See *State v. Rowe,* 314 A. 2d 407 (Supreme Judicial Court of Maine, 1974). In the instant case, where the confrontation took place within fifteen minutes of the crime and where Breton declined to yield to the temptation to identify both defendants, the court held that the confrontation was not so suggestive as to be conducive to misidentification. The court noted that a "one-man showup," such as that in the instant case, is inherently suggestive, but where the confrontation takes place within minutes of the crime, the "probability of accuracy resulting from such an immediate identification outweighs and offsets any likelihood of misidentification. . ." *State v. York,* 324 A.2d 758 (Supreme Judicial Court of Maine, August 1974).

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ARRESTS:
A § 1.4 Detention: "Stop and Frisk"
CONFESSIONS/SELF-INCRIMINATION:
B § 1.3 Miranda

Defendant was convicted of an armed assault (17 M.R.S.A. § 201-A) upon one Bouchard. After Bouchard had reported to police that he had just been threatened by the gun-wielding defendant, an officer was contacted by police radio and instructed to "look for" defendant, who was said to be carrying a gun. When the officer observed defendant entering a bar, he radioed for assistance and another officer responded. The two officers entered the bar and saw defendant entering a washroom. When defendant emerged from the washroom, the officers stopped him and frisked him. While frisking defendant, one officer asked him where the gun was. Defendant answered that "he did not have the gun with him." The officer then asked defendant what he did with the gun and defendant replied "that he had sold it 5 minutes before, that he no longer had it." After releasing defendant, the officers entered the washroom where they found a gun which Bouchard later identified as the one used by defendant. The officers then arrested defendant. On appeal, defendant contended that the two statements concerning the whereabouts of the gun should not have been admitted into evidence because he had not been advised of his rights under *Miranda v. Arizona.*

The court noted initially that the officers had acted properly, under *Terry v. Ohio,* in both detaining briefly and frisking the defendant. However, the court also noted that defendant was significantly deprived of his freedom and that his statements were therefore the result of custodial interrogation. The question before the court then was whether the *Miranda* rule required the exclusion from evidence of defendant's answers to questions regarding the whereabouts of the gun. The court acknowledged that law enforcement officers may ask questions concerning the whereabouts of dangerous weapons. However, because such questioning is only allowed for purposes of *defense* and not for purposes of *evidence-gathering,* the court held that the *Miranda* rule requires the exclusion of incriminating admissions concerning a gun, made during custodial interrogation, by a defendant who has not been warned of his rights against self-incrimination.

Thus, in the instant case the defendant's statements concerning the gun should have been excluded. However, because no objection had been made to this testimony when it was given at trial, and because there was other evidence showing that defendant had been in recent possession of the gun, the court concluded that manifest injustice did not result from this testimony and denied the appeal. *State v. Hudson,* 325 A.2d 56 (Supreme Judicial Court of Maine, September 1974).

SEARCH AND SEIZURE: A § 2.4 Automobiles-Without a Warrant
SEARCH AND SEIZURE: A § 2.6 Consent
SELF-INCRIMINATION: B § 3.1[a] Identification

After one Caron was beaten and robbed by an armed assailant who wore a stocking over his face, officers received an anonymous call saying that the assailant was named Jimmy Johnson and that he could be found at a certain hotel with his blonde girlfriend. Arriving at the hotel, the officers found defendant sitting with a blonde. When the officers learned that defendant used the name Jimmy Johnson, they asked him to accompany them to the station for questioning and defendant consented. During the interrogation, defendant's car was found. A bullet clip was observed protruding from underneath the driver's seat, but defendant was not informed of this. When asked if he would consent to a search of the vehicle, defendant refused. After a magistrate refused to issue a warrant for insufficient probable cause, officers persisted in their efforts to obtain defendant's consent to search. They persuaded defendant to accompany them to look at the car and told him that if they saw anything suspicious they would have a right to search the vehicle. An officer then looked through the window, allegedly spotted the gun clip, and remarked that the sighting of the gun clip entitled him to search the car. The defendant acquiesced and informed the officer that a pistol could be found in the glove compartment.

After seizing the pistol and the clip, officers took defendant to the station and arranged for an identification of defendant by Caron. The court's statement of the identification procedure follows:

> "Caron was placed in one of three adjoining rooms with Detective Bolduc. The lights in this room were not on as were the lights in the immediately adjoining room. The defendant was caused to stand in the third adjoining room with Officer Haskell known by Caron to be a policeman. The lights were on in this room and the doors leading from one room to another were open so that the victim could see into the third room from his position in the first. Officer Haskell conversed with the defendant to permit a voice comparison by the victim . . . The defendant was unaware that anyone was listening or that he was being viewed for purposes of identification of the robber." 320 A.2d at 902.

Although Caron was unable at that time to identify defendant as his assailant, additional evidence was later discovered pointing to defendant's participation in the robbery and defendant was rearrested. At defendant's preliminary hearing, Caron saw defendant sitting in the rear of the court room wearing a crimson shirt with the word "jail" written across it.

Charged with assault and battery of a high and aggravated nature (17

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M.R.S.A. § 201) and robbery (17 M.R.S.A. §3401), defendant moved to suppress both the property seized from the car and, in anticipation of its use at trial, any identification testimony by Caron. After hearing, the presiding Justice suppressed the pistol and the clip and ordered that Caron's identification testimony not be used at trial. The State appealed and the issue was reported to the Law Court.

With respect to the seized property, the court concluded that there was insufficient probable cause to search the car for any of the property used in the robbery. Therefore, the defendant's consent was required to permit the warrantless search. However, the court held that the defendant did not consent and that the search was unlawful. The court stated:

> "Where an officer without using physical violence or threats conveys to the defendant by affirmative misrepresentations that he has the right to search without a warrant as in the instant case, the defendant's consent to the search given in response to such false assertions must be regarded as the mere submission of a law abiding citizen to an officer of the law and cannot be construed as a valid waiver of his constitutional rights against an unreasonable search and seizure." 320 A.2d at 900.

Likening the show-up identification in the instant case to the one-way mirror technique, the court held that both confrontations, at the police station and at the preliminary hearing, were unfairly conducted and unduly suggestive. The court sustained the presiding Justice's supression of any intended in-court identification of defendant by Caron. Although in-court identifications may be admitted despite an unlawful out-of-court confrontation if they have a source independent of the unlawful confrontation, in the instant case the presiding Justice could properly have found insufficient evidence of independent source. *State v. Barlow,* 320 A.2d 895 (Supreme Judicial Court of Maine, June 1974).

CRIMES/OFFENSES:
C § 6.2 Driving While Intoxicated —Blood Test
SELF-INCRIMINATION:
B § 3.1 Nontestimonial Evidence: Schmerber

Defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor in violation of 29 M.R.S.A. §1312 (the so-called "Implied Consent Law"). Immediately upon placing defendant under arrest, the officer advised him of the consequences of refusing to submit to a blood test, as required by §1312(1). Defendant then indicated he wished to take a blood test, and the test was administered. At trial, the blood test results were admitted in evidence. During cross-examination of the arresting officer, the officer was asked whether he had informed the operator that if he took the test, the results of the tests would be used against him in court. The officer replied that he had not.

On appeal, defendant argued that, for the chemical test results to be admissible in evidence, the arresting officer must inform the operator that the test results may be used against him in court. Defendant also contended that for the test results to be admissible in evidence, the operator must consent to the test, by some affirmative act or statement, at the time the officer directs the test to be taken.

The Maine Law Court denied the appeal. The court held that although law enforcement officers must inform the operator of the consequences of refusing to submit to a test, they are not required to inform the operator that the test results are admissible in evidence and may be used against the operator.

The court also held that an affirmative act or statement of consent to submit to a test is not required for the test results to be admissible in evidence. 29 M.R.S.A. §1312 clearly indicates that the act of operating a motor vehicle is all that is required for a person to consent to the taking of a blood test. The court also upheld the constitutionality of *implying* consent to a chemical test from the mere act of operating a motor vehicle. *State v. Shepard,* 323A. 2d 587 (Supreme Judicial Court of Maine, August 1974).

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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