

MAINE STATE LEGISLATURE

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ALERT

NOVEMBER 1976

CRIMINAL DIVISION

**MESSAGE FROM THE
ATTORNEY GENERAL
JOSEPH E. BRENNAN**

In the last couple of months, several branches of the Attorney General's Office, including the Law Enforcement Education Section and the Criminal Division, have changed their locations. The Law Enforcement Education Section, the Natural Resources Division, and the Mental Health and Corrections Division are now located in Room 507 of the State Office Building in Augusta. All correspondence should be directed to the new address. The Criminal Division and the Consumer Fraud Division have moved to the north wing of the first floor of the State House. The mailing address of each remains the same.

The Law Enforcement Education Section also has a new phone number — 289-2538. The Criminal Division phone number remains 289-2146.

JOSEPH E. BRENNAN
Attorney General

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

USE OF FORCE II

The main article in last month's ALERT began our discussion of the use of force by law enforcement officers. It was pointed out that the Maine Criminal Code has completely revised the law in this area. Subsections 1 and 2 of §107 of the Code, which establish statutory guidelines for the use of deadly and nondeadly force by law enforcement officers, were discussed last month. In this issue we will conclude our treatment of the use of force by discussing a number of additional but related provisions of the Criminal Code. Officers should read the main article of the October 1976 ALERT in order to completely understand the terms used in this article.

**MISCELLANEOUS CON-
SIDERATIONS****Effect of Excessive Force on the
Lawfulness of Arrest and the
Admissibility of Seized Evidence**

Prior to the enactment of the Criminal Code it was unclear what effect the use of excessive force would have on the legality of an arrest. Moreover, if the arrestee were searched incident to the arrest

and incriminating evidence were found, it was likewise unclear what effect the excessive use of force would have on the admissibility of the seized evidence.

§107(7) of the Code answers these questions. That section provides:

7. Use of force that is not justifiable under this section in effecting an arrest does not render illegal an arrest that is otherwise legal and the use of such unjustifiable force does not render inadmissible anything seized incident to a legal arrest.

Thus, under §107(7), if a law enforcement officer makes a lawful arrest and in doing so uses excessive force, the arrest is not rendered unlawful by the use of excessive force. Additionally, this section provides that if the officer searches the arrestee incident to the arrest and finds incriminating evidence, the fact that the officer used excessive force in accomplishing the arrest will not, by itself, make the evidence inadmissible.

Law enforcement officers should note, however, that §107(7) does *not* protect them from civil liability. §107(7) is merely intended to assure that a person who has committed a

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crime will not have the benefit of an otherwise lawful arrest or search being declared unlawful because of the use of excessive force.

Correctional and Confinement Facilities

§107(5) of the Criminal Code establishes that the rules regarding justification for use of force in a correctional facility are the same as the rules which apply when a law enforcement officer attempts to prevent the escape of an arrested person. Section 107(5) provides:

5. Except where otherwise expressly provided, a corrections officer or law enforcement officer in a facility where persons are confined, pursuant to an order of a court or as a result of an arrest, is justified in using deadly force against such persons under the circumstances described in subsection 2. He is justified in using a reasonable degree of nondeadly force when and to the extent he reasonably believes it necessary to prevent any other escape from such a facility.

Thus, as to the use of *deadly* force, a corrections officer or a law enforcement officer who is present in a facility where persons are confined pursuant to either a court order or an arrest is justified in using deadly force under the same circumstances that would justify the use of deadly force under §107(2). (Justification for the use of deadly force under §107(2) was discussed on pages 4 and 5 of the October 1976 ALERT). §107(5) also authorizes the use of a reasonable degree of *nondeadly* force when and to the extent that the corrections officer or law enforcement officer reasonably believes such force to be necessary to prevent the escape of a person confined in the facility.

It should be noted that although §107(5) establishes the general rule dealing with use of force at

correctional or confinement facilities, other statutes may also establish rules in this area. The introductory language of the section, "Except where otherwise expressly provided, . . ." indicates that §107(5) will apply unless another statute specifically authorizes or limits the use of force in correctional or confinement facilities. Thus, 34 M.R.S.A. §§558 and 595 establish additional rules regarding justification for use of force at the Maine State Prison. However if specific statutes or provisions such as these do not apply to a particular correctional or confinement facility, the use of force at such facility is governed by §107(5).

Private Person Assisting Officer in Making Arrest

Occasionally a law enforcement officer will be unable to accomplish an arrest or prevent an escape from arrest by himself. If another officer is unavailable or is unable to provide assistance, the officer attempting to make the arrest or prevent the escape from arrest may request the assistance of a private person. Justification for the use of force by a private person who is directed by an officer to assist in an arrest or the prevention of an escape is created by §107(3), which provides:

3. A private person who has been directed by a law enforcement officer to assist him in effecting an arrest or preventing an escape from custody is justified in using:

A. A reasonable degree of nondeadly force when and to the extent that he reasonably believes such to be necessary to carry out the officer's direction, unless he believes the arrest is illegal; or

B. Deadly force only when he reasonably believes such to be

necessary to defend himself or a 3rd person from what he reasonably believes to be the imminent use of deadly force, or when the law enforcement officer directs him to use deadly force and he believes such officer himself is authorized to use deadly force under the circumstances.

This section provides, therefore, that a private person who has been directed to assist a law enforcement officer is justified in using a reasonable degree of *nondeadly* force when and to the extent he reasonably believes such force to be necessary to carry out the request of the officer. However, if the person believes that the arrest is illegal, he is not justified in using *nondeadly* force.

Pursuant to §107(3) a private person assisting an officer in making an arrest or preventing an escape is justified in using *deadly* force under only two circumstances. First, the person assisting the officer may use deadly force to defend himself or a third person from what he believes to be the imminent use of deadly force. Second, deadly force may be used if the officer specifically directs the private person to use such force and the person believes that the officer himself would be authorized to use deadly force under the circumstances.

Use of Force by Private Citizens

The Maine Criminal Code establishes statutory rules not only for the use of force by law enforcement officers but for the use of force by private citizens. As discussed above, §107(3) lays out the rules respecting use of force by a private citizen who is directed by a law enforcement officer to assist in the making of an arrest or the prevention of an escape. Although the remaining Code provisions dealing with the use of force by

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persons other than law enforcement officers are beyond the scope of this article, officers should be aware of and become familiar with these sections. In order to assist officers in familiarizing themselves with these provisions, the Code provisions concerning justification for the use of force by private citizens are set forth below:

§104. Use of force in defense of premises

1. A person in possession or control of premises or a person who is licensed or privileged to be thereon is justified in using nondeadly force upon another when and to the extent that he reasonably believes it necessary to prevent or terminate the commission of a criminal trespass by such other in or upon such premises.

2. A person in possession or control of premises or a person who is licensed or privileged to be thereon is justified in using deadly force upon another when and to the extent that he reasonably believes it necessary to prevent an attempt by the other to commit arson.

3. A person in possession or control of a dwelling place or a person who is licensed or privileged to be therein is justified in using deadly force upon another:

A. Under the circumstances enumerated in section 108; or

B. When he reasonably believes that deadly force is necessary to prevent or terminate the commission of a criminal trespass by such other person, who he reasonably believes:

(1) Has entered or is attempting to enter the dwelling place or has surreptitiously remained within the dwelling place without a license or privilege to do so; and

(2) Is committing or is likely to commit some other crime within the dwelling place.

4. A person may use deadly force under subsection 3, para-

graph B, only if he first demands the person against whom such deadly force is to be used to terminate the criminal trespass and the other person fails to immediately comply with the demand, unless he reasonably believes that it would be dangerous to himself or another to make the demand.

5. As used in this section:

A. Dwelling place has the same meaning provided in section 2, subsection 10; and

B. Premises includes, but is not limited to, lands, private ways and any buildings or structures thereon.

§105. Use of force in property offenses

A person is justified in using a reasonable degree of nondeadly force upon another when and to the extent that he reasonably believes it necessary to prevent what is or reasonably appears to be an unlawful taking of his property, or criminal mischief, or to retake his property immediately following its taking; but he may use deadly force only under such circumstances as are prescribed in sections 104, 107, and 108.

§106. Physical force by persons with special responsibilities

1. A parent, foster parent, guardian or other similar person responsible for the long term general care and welfare of a person is justified in using a reasonable degree of force against such person when and to the extent that he reasonably believes it necessary to prevent or punish such person's misconduct. A person to whom such parent, foster parent, guardian or other responsible person has expressly delegated permission to so prevent or punish misconduct is similarly justified in using a reasonable degree of force.

2. A teacher or other person entrusted with the care or supervision of a person for special and limited purposes is justified in

using a reasonable degree of force against any such person who creates a disturbance when and to the extent that he reasonably believes it necessary to control the disturbing behavior or to remove a person from the scene of such disturbance.

3. A person responsible for the general care and supervision of a mentally incompetent person is justified in using a reasonable degree of force against such person who creates a disturbance when and to the extent that he reasonably believes it necessary to control the disturbing behavior or to remove such person from the scene of such disturbance.

4. The justification extended in subsections 1, 2 and 3 does not apply to the purposeful or reckless use of force that creates a substantial risk of death, serious bodily injury, or extraordinary pain.

5. Whenever a person is required by law to enforce rules and regulations, or to maintain decorum or safety, in a vessel, aircraft, vehicle, train or other carrier, or in a place where others are assembled, may use nondeadly force when and to the extent that he reasonably believes it necessary for such purposes, but he may use deadly force only when he reasonably believes it necessary to prevent death or serious bodily injury.

6. A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious bodily injury upon himself may use a degree of force on such person as he reasonably believes to be necessary to thwart such a result.

7. A licensed physician, or a person acting under his direction, may use force for the purpose of administering a recognized form of treatment which he reasonably believes will tend to safeguard the physical or mental health of the

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patient, provided such treatment is administered:

A. With consent of the patient or, if the patient is a minor or incompetent person, with the consent of the person entrusted with his care and supervision; or

B. In an emergency relating to health when the physician reasonably believes that no one competent to consent can be consulted and that a reasonable person concerned for the welfare of the patient would consent.

8. A person identified in this section for purposes of specifying the rule of justification herein provided, is not precluded from using force declared to be justifiable by another section of this chapter.

§107 Physical force in law enforcement

* * *

4. A private person acting on his own (*not at the direction of a law enforcement officer*) is justified in using:

A. A reasonable degree of nondeadly force upon another when and to the extent that he reasonably believes it necessary to effect an arrest or detention which is lawful for him to make or prevent the escape from such an arrest or detention; or

B. Deadly force only when he reasonably believes such force is necessary:

(1) To defend himself or a 3rd person from what he reasonably believes to be the imminent use of deadly force; or

(2) To effect a lawful arrest or prevent the escape from such arrest of a person who in fact

(a) has committed a crime involving the use or threatened use of deadly force, or is using a deadly weapon in attempting to escape; and

(b) the private citizen has made reasonable efforts to advise the person that he is a private citizen attempting to effect an arrest or prevent the escape from arrest and has reasonable grounds to believe the person is aware of this advice or he reasonably believes that the person to be arrested otherwise knows that he is a private citizen attempting to effect an arrest or prevent the escape from arrest.

* * *

8. Nothing in this section constitutes justification for conduct by a law enforcement officer or a private person amounting to an offense against innocent persons whom he is not seeking to arrest or retain in custody.

§108. Physical force in defense of a person

1. A person is justified in using a reasonable degree of nondeadly force upon another person in order to defend himself or a 3rd person from what he reasonably believes to be the imminent use of unlawful, nondeadly force by such other person, and he may use a degree of such force which he reasonably believes to be necessary for such purpose. However, such force is not justifiable if:

A. With a purpose to cause physical harm to another person, he provoked the use of unlawful, nondeadly force by such other person; or

B. He was the initial aggressor, unless after such aggression he withdraws from the encounter and effectively communicates to such other person his intent to do so, but the latter notwithstanding continues the use or threat of unlawful, nondeadly force; or

C. The force involved was the product of a combat by agreement not authorized by law.

2. A person is justified in using deadly force upon another person:

A. When he reasonably believes it necessary and he reasonably believes such other person is:

(1) About to use unlawful, deadly force against himself or a 3rd person; or

(2) Committing or about to commit a kidnapping, robbery or a forcible sex offense against himself or a 3rd person; or

B. When he reasonably believes:

(1) That such other person has entered or is attempting to enter a dwelling place or has surreptitiously remained within a dwelling place without a license or privilege to do so; and

(2) That deadly force is necessary to prevent the infliction of bodily injury by such other person upon himself or a 3rd person present in the dwelling place;

C. However, a person is not justified in using deadly force as provided in paragraph A, if:

(1) With the intent to cause physical harm to another, he provokes such other person to use unlawful deadly force against anyone; or

(2) He knows that the person against whom the unlawful deadly force is directed intentionally and unlawfully provoked the use of such force; or

(3) He knows that he or a 3rd person can, with complete safety

(a) retreat from the encounter, except that he or the 3rd person is not required to retreat if he or the 3rd person is in his dwelling place and was not the initial aggressor; or

(b) surrender property to a

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person asserting a colorable claim of right thereto; or

(c) comply with a demand that he abstain from performing an act which he is not obliged to perform.

Since the provisions dealing with the right of citizens to use force involve complicated and extremely important legal issues, officers are advised to refer citizens with questions on the subject to their local prosecuting attorney. In addition, the Law Enforcement Education Section will send a copy of this ALERT to any citizen who requests it.

The Defense of "Justification"

Throughout our discussion of the use of force we have referred to the use of force which is "justifiable." "Justification" is a technical term which, under the Code, means that a person has a defense to a crime or crimes which might arise from his conduct. In other words, conduct which would otherwise be criminal is made lawful if it is within the scope of conduct which is declared to be justifiable.

§101 establishes the defense of justification in the following terms: "Conduct which is justifiable under this chapter constitutes a defense to any crime" The use of deadly and nondeadly force under the circumstances described in §107(1) and (2) is declared to be "justifiable" by the introductions to those two subsections which provide that "[a] law enforcement officer is *justified* in using" either deadly or nondeadly force under the specified circumstances. Thus, for example, a law enforcement officer using nondeadly force to accomplish an arrest technically would be committing the crime of assault under 17-A M.R.S.A. §207. However, although the officer may subsequently be charged with assault, he has a defense because

his conduct was justifiable under §107(1).

In addition to those provisions of Chapter 5 of the Code which specify the type of conduct which is justifiable, officers should be aware of several other sections which relate directly to the scope of the defense of justification. First, §107(8) provides:

8. Nothing in this section constitutes justification for conduct by a law enforcement officer or a private person amounting to an offense against innocent persons whom he is not seeking to arrest or retain in custody.

This means that the defense of justification authorized by §107 protects the arresting officer from potential criminal liability arising from his conduct towards the arrestee; it does not protect him from criminal liability for injury to innocent bystanders. For example, if a law enforcement officer recklessly shoots an innocent bystander when the officer is, with justification, shooting at an escaping criminal, the officer may be criminally liable for recklessly wounding or killing the bystander.

It should be noted that language similar to that found in §107(8) is found in §101(1), which provides in part:

" . . . [I]f a person is justified in using force against another, but he recklessly injures or creates a risk of injury to 3rd persons, the justification afforded by this chapter is unavailable in a prosecution for such recklessness."
...

This provision, like §107(8), is designed to make sure that when persons are justified in using force they do not disregard the risk created to innocent bystanders. The language in §101(1) applies to *each* of the types of justifiable use of force established by Chapter 5.

Officers should also be aware of that language in §101(1) which affords law enforcement officers

some protection in the event that a particular use of force statute requires the officer's belief to be reasonable and it is subsequently determined that the belief was not reasonable. Section 101(1) provides in part:

" . . . If a defense provided under this chapter is precluded solely because the requirement that the actor's belief be reasonable has not been met, he may be convicted only of a crime for which recklessness or criminal negligence suffices, depending on whether his holding the belief was reckless or criminally negligent."

The effect of this section is to limit the potential criminal liability of an officer using physical force in law enforcement to a crime involving recklessness or criminal negligence if the only reason that the defense of justification is not applicable is that the requirement that the officer's belief be reasonable has not been met. Said slightly differently, if the only reason that the defense of justification is not applicable is that the officer did not have a belief that was reasonable, the officer may be convicted only of a crime requiring a reckless or criminally negligent state of mind. For example, if a law enforcement officer does not establish that he had a reasonable belief that deadly force was necessary to effect the arrest of a person, and the person is killed, the officer cannot be convicted of criminal homicide in the 1st or 2nd degree since those crimes require an intentional or knowing state of mind. The most the officer could be convicted of is criminal homicide in the 4th degree if he were reckless, or criminal homicide in the 5th degree if the officer were criminally negligent. In effect, this section limits the possible criminal liability of an arresting officer using physical force based on poor judgment.

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Use of Force and Juveniles

A question frequently raised by law enforcement officers is whether the general rules relating to use of force by officers apply to situations in which force must be used upon juveniles. The answer to this question is that the rules prescribed by §107 apply *equally* to force used upon juveniles and force used upon adults. If the officer's conduct is otherwise justifiable, the defense of justification supplied by that section will be available regardless of the age of the person upon whom force is used. A person's age will have a bearing on use of force only in determining the amount or degree of force to be used. Thus, for example, under ordinary circumstances, the amount of force needed to effect the arrest of a large adult is greater than that needed to apprehend a small boy.

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 the fleeing suspect in a situation where the use of deadly force is not justified or if the warning shots accidentally strike an innocent bystander. As a matter of policy, most police departments prohibit the firing of warning shots because such shots are of limited usefulness, may create a hazard to innocent people, may induce the fleeing person to return the fire, 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.

CONCLUSION

Until the enactment of the Maine Criminal Code there were few guidelines for the use of force by Maine law enforcement officers.

However, the Criminal Code, particularly in §107, has provided clear statutory standards for the use of force. The main articles in this and last month's issues of ALERT have attempted to explain those Code provisions relating to force which will have the most significance for law enforcement officers. Because of the newness of the law, problems may arise in applying the use of force provisions that have not been answered in this article. These problems should be brought to the attention of the Law Enforcement Education Section so that they may be dealt with in the Forum column of future issues of ALERT. Officers should also examine the Maine Court Decisions section of future ALERTs and take note of any court decisions interpreting the Code use of force sections.

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.

NEWS FROM THE ACADEMY

The following information, items and announcements concern the Maine Criminal Justice Academy in Waterville, which is a bureau of the Department of Public Safety and is the training institution for all law enforcement officers in the State of Maine.

Upcoming In-Service Police Schools

The following in-service schools are in addition to those recently announced in the Academy's In-Service flyer:

Basic Photography:

February 1-3, 1977

Academy

Drug Investigators School:

February 7-18, 1977

Academy

Organized Crime:

February or March, 1977

Academy

Hazardous Materials:

March, 1977—Academy

Boat Theft Investigations:

March, 1977—Academy

April, 1977

Scarborough S.P. Barracks

Information and applications about the above training programs may be obtained thru local police agencies or from the Academy. Please contact David H. Dix, In-Service Training Officer at 289-2788.

Comments directed toward the improvement of this bulletin are welcome. Please contact the Law Enforcement Education Section, Criminal Division, Department of the Attorney General, Room 507 - State Office Building, 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.

Joseph E. Brennan	Attorney General
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