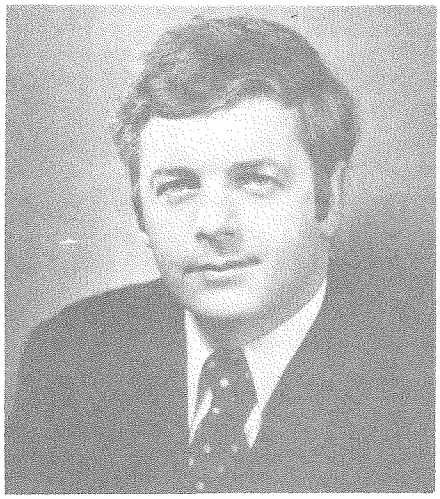
NOVEMBER-DECEMBER 1977

ALERT

CRIMINAL DIVISION

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



CASE SUMMARY INDEX

January 1977 - December 1977

MESSAGE FROM THE ATTORNEY GENERAL JOSEPH E. BRENNAN

You have probably noticed that the most recent ALERTs have all been double issues. This is the result of our decision to publish the ALERT every two months, rather than nine times per year. Given the increased length of the issues, we expect to cover the same amount of material as in the past. The reduction to six issues per year will save us considerable mailing costs.

On the subject of the ALERT, a substantial number are returned to us as a result of incorrect addresses. Thus, we strongly urge you to notify us if you move. This will insure that you receive all of the ALERTs on time. It will also spare our staff unnecessary work.

We welcome any suggestions you might have regarding either the substance or format of the ALERT. Suggestions should be sent to the Law Enforcement Education Section.

Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General

The following index on ALERT case summaries contains entries for all the case summaries which have appeared in the ALERT since January 1977. The index is based on the Table of Contents in NEDRUD, THE CRIMINAL LAW, a monthly compilation of case summaries relating to criminal law and procedure. A copy of the NEDRUD index was inserted in the January 1974 ALERT. (Any officer who does not have a copy of the NEDRUD index may obtain one by contacting the Law Enforcement Education Section.)

The index is broken down into nine general categories such as **ARREST; SEARCH AND SEIZURE; CONFESSIONS / SELF-INCRIMINATION; CRIMES / OFFENSES;** etc. Each general category is then broken down into numerous subcategories. The individual entries under the subcategories consist of three lines containing the following information:

1. A brief phrase or sentence describing the nature or holding of the case. (Often this brief description will refer to the subcategory heading).

2. The title and citation of the case along with an abbreviated designation of the jurisdiction in which the case was decided and the year in which it was decided. The Maine Supreme Judicial Court, First Circuit Court of Appeals, and U.S. Supreme Court entries are highlighted by putting Me., 1st Cir., and U.S. in bold face print.

3. The month and page of the issue of ALERT in which the case summary appears. Where a case summary begins on one page and ends on another, both pages will be included. (e.g., pp. 6-7).

Two further features of this index are worthy of mention. First, the index is not divided into two sections—Important Recent Decisions and Maine Court Decisions. Each index subcategory contains entries of cases from the Maine Supreme Judicial Court, the First Circuit Court of Appeals, and the U.S. Supreme Court. Secondly, if a case summary has discussed two or more different holdings, the case will be indexed under each of the two or more NEDRUD categories appropriate for the particular holdings.

A. ARREST, SEARCH AND SEIZURE

ARREST AND DETENTION A § 1

A § 1.1 Reasonable Grounds

Whether an arrest has been made determined from perspective of outside observer viewing the entire situation.
State v. Kelly, Me., 376 A.2d 840 (1977)
September-October 1977, pp. 7-8

A § 1.3 Misdemeanors

Arrest for traffic offenses upon instant pursuit held lawful.
State v. Fitanides, Me., 373 A.2d 915 (1977)
July-August 1977, p. 9

Arrest for misdemeanor committed in officer's presence upheld.
State v. Ronan, Me., A.2d (December 7, 1977)
November-December 1977, p. 4

SEARCH AND SEIZURE A § 2

A § 2.1 Probable Cause: Warrant

Information of unnamed agents in affidavit accorded "presumptive reliability."
U.S. v. Emery, 541 F.2d 887 (**1st Cir.** 1976)
February 1977, pp. 7-8

Information in affidavit stale.
State v. Willey, Me., 363 A.2d 739 (1976)
March-April 1977, pp. 3-4

A § 2.3 Incident to Arrest
Footlocker seized incident to arrest could not be searched without a warrant.
United States v. Chadwick, 97 S.Ct. 2476 (1977)
November-December 1977, p. 5.

A § 2.4 Automobiles—Without a Warrant

Gun in plain view after officer lawfully in car.
U.S. v. Petrozziello, 548 F.2d 20 (**1st Cir.** 1977)
March-April 1977, p. 6

A § 2.5—Without a Warrant

Warrantless search of foot locker after lawful arrest held invalid.
United States v. Chadwick, 97 Ct. 2476 (1977)
November-December 1977, p. 5.

A § 2.6 Consent

Consent given by occupant of defendant's home held valid.
State v. McLain, Me., 367 A.2d 213 (1976)
March-April 1977, p. 2

Consent to search by intoxicated person.
State v. Kelly, Me., 376 A.2d 840 (1977)
September-October 1977, pp. 7-8

A § 2.7 Inspections

Reasonable suspicion not necessary to inspect packages at international border.
U.S. v. Emery, 541 F.2d 887 (**1st Cir.** 1976)
February 1977, pp. 7-8

EFFECTING THE ARREST, SEARCH OR SEIZURE A § 3

A § 3.3 Authority—Resisting Arrest—Force

Officer had authority to complete "instant pursuit" arrest. Defendant had no legal right to resist lawful arrest.
State v. Fitanides, Me., 373 A.2d 915 (1977)
July-August 1977, p. 9

A § 3.5 Delay in Arrest or Search

Delay caused by defendant did not invalidate "instant pursuit" arrest.
State v. Fitanides, Me., 373 A.2d 915 (1977)
July-August 1977, p. 9

A § 3.6 Subpoena—Summons

Grand jury subpoena to appear in a lineup not a seizure under Fourth Amendment.
In re Melvin, 550 F.2d 674 (**1st Cir.** 1977)
March-April 1977, p. 6

SUPPRESSION OF EVIDENCE A § 4

A § 4.5 Informer Privilege

Bare assertion of entrapment by defendant not sufficient to require disclosure of informer's identity.
State v. Brooks, Me., 366 A.2d 179 (1976)
February 1977, p. 8

B. CONFESSIONS/SELF-INCRIMINATION

INTERROGATION B § 1

B § 1.1 Voluntariness

False statement by officer to suspect did not render confessions involuntary.
Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977)
February 1977, p. 7

Defendant impaired by alcohol voluntarily waived his rights.
State v. Peterson, Me., 366 A.2d 525 (1976)
March-April 1977, pp. 1-2

Volunteered statements held admissible.
State v. Lewis, Me., 373 A.2d 603 (1977)
May-June 1977, p. 6

Police officer's promise rendered confession involuntary.
State v. Tardiff, Me., 374 A.2d 598 (1977)
July-August 1977, p. 10

Waiver of rights by intoxicated person.
State v. Kelly, Me., 376 A.2d 840 (1977)
September-October 1977, pp. 7-8

B § 1.2 Interrogation—Massiah

When adversary proceedings have commenced, defendant has a right to counsel during interrogation.
Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed. 2d 424 (1977)
March-April 1977, pp. 5-6

B § 1.3 Miranda

Fact that interrogation of suspect occurred in police station did not amount to custody.
Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed. 2d 714 (1977)
February 1977. p. 7.

Interrogation in defendant's home, at a reasonable hour and in presence of friends did not amount to custody.
State v. McLain, Me., 367 A.2d 213 (1976)
March-April 1977, p. 2

Interrogation three hours after waiver of Miranda rights permissible.
State v. Peterson, Me., 366 A.2d 525 (1976)
March-April 1977, pp. 1-2

Person questioned in a police cruiser held not to be in custody.
State v. Lewis, Me., 373 A.2d 603 (1977)
May-June 1977, p. 6

B § 1.5 Youth-Incompetents

Facts did not justify finding that the defendant, an escapee from a mental institution, waived his right to counsel.
Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)
March-April 1977, pp. 5-6

PROCEDURE B § 2

B § 2.3 Evidence

Confession induced by promises of police officer held inadmissible.
State v. Tardiff, Me., 374 A.2d 598 (1977)
July-August 1977, p. 10

SELF-INCRIMINATION B § 3

B § 3.1(a) Identification: Wade-Gilbert-Stovall

Grand jury can subpoena defendant to appear in lineup.
In re Melvin, 550 F.2d 674 (**1st Cir.** 1977)
March-April 1977, p. 6

Lineup procedure held to be extremely fair.
State v. Boucher, Me., 376 A.2d 478 (1977)
September-October 1977, p. 7

C. CRIMES/OFFENSES

HOMICIDE—ASSAULT C § 1

C § 1.2 Assault—Threats

Under pre-Code law, defendant's resistance to lawful authority a factor in determining whether assault and battery high and aggravated.
State v. Thompson, Me., 370 A.2d 650 (1977)
March-April 1977, pp. 4-5

Assault not justified by defendant resisting a lawful arrest.
State v. Fitanides, Me., 373 A.2d 915 (1977)
July-August 1977, p. 9

ROBBERY-BURGLARY-THEFT-DESTRUCTION OF PROPERTY C § 2

C § 2.1 Robbery—Extortion

Defendant guilty of robbery since he was available to assist perpetrator to escape.
State v. Bellanceau, Me., 367 A.2d 1034 (1977)
March-April 1977, p. 5

C § 2.3 Theft

Sufficient evidence to find defendant committed theft
State v. McLain, Me., 367 A.2d 213 (1977)
March-April 1977, p. 2

SEX—CRIMES AGAINST MINORS C § 3

C. § 3.1 Rape-Molestation (Incest)

Sufficient evidence of force through intimidation to justify conviction for rape.
State v. Jones, Me., 370 A.2d 249 (1977)
March-April 1977, p. 4

TRAFFIC OFFENSES C § 6

C § 6.1 Automobile Homicide

Results of blood alcohol test admissible in reckless homicide case.
State v. Rhoades, Me., A.2d (December 2, 1977)
November-December 1977, p. 4

C § 6.2 Driving While Intoxicated—Blood Test

After defendant had twice refused a test officer was not obliged to assist when defendant later requested a blood test.
State v. Allen, Me., 377 A.2d 472 (1977)
September-October 1977, p. 8

C § 6.3 Speeding—Other Offenses

Requirement that operator of motorcycle wear protective headgear is constitutional.
State v. Quinnam, Me., 367 A.2d 1032 (1977)
March-April 1977, pp. 2-3

Erroneous instructions given to jury in speeding prosecution.
State v. Fitanides, Me., 373 A.2d 915 (1977)
July-August 1977, p. 9

IN GENERAL C § 7

C § 7.1 Conspiracy—Attempt—Parties

Defendant guilty of robbery since he was available to assist perpetrator to escape.
State v. Bellanceau, Me., 367 A.2d 1034 (1977)
March-April 1977, p. 5

D. DEFENDANT'S RIGHTS/ DEFENSES

RIGHT TO COUNSEL D § 1

D § 1.1 Pretrial

Right to counsel after judicial proceedings initiated.
Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)
March-April 1977, pp. 5-6

D § 1.3 Trial—Sentencing; Waiver

Prosecution did not sustain burden of proving defendant intentionally waived right to counsel.
Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)
March-April 1977, pp. 5-6

D § 3.6 Self-Defense—Property—Others

No self-defense since defendant was resisting lawful arrest.
State v. Fitanides, Me., 373 A.2d 915 (1977)
July-August 1977, p. 9

E. EVIDENCE/WITNESSES

EVIDENCE E § 1

E § 1.1 Sufficiency

Evidence sufficient to justify conviction for rape.
State v. Jones, Me., 370 A.2d 248 (1977)
March-April 1977, p. 4

Evidence sufficient to support finding that defendant perceived officer's signal to stop.
State v. Fitanides, Me., 373 A.2d 915 (1977)
July-August 1977, p. 9

E § 1.3 Identification

Grand jury could subpoena defendant to appear at lineup.
In re Melvin, 550 F.2d 674 (1st Cir. 1977)
March-April 1977, p. 6

Witness pre-trial identification of defendant based upon single photograph, although suggestive, was reliable.
Manson v. Brathwaite, 97 S.Ct. 2243 (1977)
November-December 1977, p. 5

WITNESSES E § 2

E § 2.3 Credibility

Exclusive province of fact-finder to determine credibility of witness.
State v. Jones, Me., 370 A.2d 248 (1977)
March-April 1977, p. 4

F. PROCEDURE

JURORS F § 2

F § 2.6 Judge-Jury Relationship

Instruction did not constitute expression of opinion.
State v. Thompson, Me., 370 A.2d 650 (1977)
March-April 1977, pp. 4-5

G. ADJUDICATION

SENTENCING G § 2

G § 2.1 Probation

Revocation for failure to maintain good behavior.
State v. Columbo, Me., 366 A.2d 852 (1976)
March-April 1977, p. 4

MAINE COURT DECISIONS

ARREST

A § 1.3 Misdemeanors

The defendant was convicted of reckless driving and assault and battery upon a police officer. On the evening of March 1, 1976, the defendant was operating a motor vehicle along Water Street in Augusta. At this time, an Augusta police officer was seated inside a restaurant when he heard a loud crash, felt the structure of the building shake and saw the bumper of a car penetrate the wall of the building. The officer ran outside and observed the defendant sitting behind the steering wheel attempting to extricate the car from the wall. The defendant was placed

under arrest. Eventually, the defendant was involved in a fist fight with a second police officer who ordered him inside a cruiser.

At trial, the defendant challenged the legality of his warrantless arrest for the misdemeanor of reckless driving. He claimed that the offense was not committed in the officer's presence and therefore his arrest was unlawful. He further claimed that since his warrantless arrest was unlawful, he had the right to use force in resisting it, and thus his conviction of assault and battery against the officer could not stand. The trial Judge instructed the jury that if it believed the officer's testimony regarding what he actually saw (i.e., the bumper of the automobile coming through the restaurant wall and the defendant attempting to extricate the car therefrom), it would be authorized to conclude that the offense of reckless driving occurred in the officer's presence.

The Law Court agreed with the trial Judge that the question of whether the offense was committed in the officer's presence was a question of fact to be resolved by the jury. The Law Court held that even though the officer did not personally observe *all* the elements of the crime, he may still make a warrantless arrest if, based on what he did see, it was reasonable to infer that the defendant committed the crime. Thus, in this case, the officer actually perceived *some* facts and, based upon this perception, he inferred that the defendant committed the misdemeanor of reckless driving. Ultimately, the jury must decide whether that inference was reasonable. Here, the jury did find it reasonable and therefore the defendant's convictions must stand. *State v. Ronan,* A.2d (Maine Supreme Judicial Court, December 7, 1977).

COMMENT: Although the facts of this case arose prior to the effective date of the Maine Criminal Code, the opinion provides some guidance to law enforcement officers with respect to what is meant by the term "committed in his presence." The Court has indicated that in misdemeanor cases the "committed in his presence" requirement may be satisfied even though the officer does not have personal knowledge of all the facts necessary to establish the commission of the crime. If the officer has personal knowledge of some facts, he may draw reasonable inferences from those facts. In other words, in determining whether an offense has been committed in his presence, the officer is not limited to those facts which he has actually perceived. He may also draw reasonable inferences from those facts. The inferences must be reasonable and ultimately the jury will have to decide this issue.

Under the Criminal Code, 17-A M.R.S.A. §15(2) defines what is meant by the phrase "committed in his presence" for the purpose of making a warrantless arrest for a Class D or E crime. Section 15(2) states that a crime has been or is being committed in the officer's presence

> *. . . when one or more of the officer's senses afford him personal knowledge of facts which are sufficient to warrant a prudent and cautious law enforcement officer in believing that a Class D or Class E crime is being or has just been committed and that the person arrested has committed or is committing it."*

This definition appears to be similar to that formulated in the Ronan case.

CRIMES/OFFENSES

C § 6.1 Automobile Homicide

The defendant was convicted, by a jury, of the crime of reckless homicide in violation of 29 M.R.S.A. §1315 (now repealed). In order to sustain a conviction under this statute the State must prove that the defendant operated a motor vehicle "with reckless disregard for the safety of others and thereby cause(d) the death of another person." In the instant case, the State alleged that the defendant was under the influence of intoxicating liquor while he was operating a motor vehicle.

The defendant submitted to a blood test the results of which demonstrated a 0.20% by weight of alcohol in his blood. The results of the test were admitted into evidence. In his instructions to the jury, the trial Justice read from 29 M.R.S.A. §1312 which deals with the offense of operating under the influence of intoxicating liquor and specifies the inferences which the jury may draw from blood alcohol test results. In particular, the trial Justice told the jury that if the test results showed a 0.10% or more by weight of alcohol in the defendant's blood, it was prima facie evidence that the defendant was under the influence of intoxicating liquor. The defendant claimed that this was error because he had never been charged with a violation of 29 M.R.S.A. §1312 (O.U.I.)

However, the Law Court held that whether a person is under the influence is relevant on the issue of whether he is guilty of reckless driving. Therefore, the jury in such a case is entitled to know the significance of a 0.20% blood test result. *State v. Rhoades,* A.2d (Maine Supreme Judicial Court December 9, 1977).

COMMENT: Although this case involved a violation of 29 M.R.S.A. §1315; which is now repealed, the decision would also apply to prosecutions for manslaughter (17-A M.R.S.A. §203) under the Criminal Code. What the opinion essentially says is that where a person's intoxication is relevant on the question of whether he was

operating a motor vehicle in a reckless manner, it is permissible to tell the jury: (1) the results of any blood test and (2) what inferences may be drawn from the results. This is so even though the defendant is not being tried for operating a motor vehicle while under the influence of intoxicating liquor.

IMPORTANT RECENT DECISIONS

SEARCH AND SEIZURE:
A § 2.3 Incident to Arrest
A § 2.5 Without a Warrant

Defendants had been observed loading a heavy footlocker on a train and were suspected of transporting drugs. Narcotics officers at the point of the train's destination used a police dog to detect the presence of illegal drugs inside the footlocker. Defendants were arrested as they were loading the footlocker into a waiting automobile. Federal agents seized the footlocker at the time of the arrest and an hour and a half later they opened it, without obtaining a warrant, and found marijuana inside. The United States Supreme Court held that the marijuana was illegally seized and should have been suppressed.

The Government gave three arguments in support of the warrantless search. First, the Government argued that the Warrant Clause of the Fourth Amendment applies only to searches of persons and their private dwellings, offices and communications. The Supreme Court rejected this distinction after examining the language and history of the Fourth Amendment. The Court noted that important privacy interests were at stake on the facts of this case.

> "By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause."

The Government also contended that the rationale of Supreme Court cases upholding warrantless searches of automobiles applies equally to footlockers and other luggage. The Court rejected this argument, noting that the factors which support a diminished expectation of privacy for automobiles do not apply to footlockers. Thus, footlockers are not generally open to public view or subject to frequent government regulation; they are generally intended to carry personal effects and therefore carry a much greater expectation of privacy than automobiles. Although luggage has some characteristics of mobility, since the footlocker in this case was in police custody there was no danger of it being removed before a search warrant could be obtained.

Thirdly, the Government argued that any warrantless search is permissible as long as the property searched is in the possession of a person arrested in public and there is probable cause to believe the property contains contraband or evidence of crime. The Court refused to apply the search incident to arrest exception in this manner. In this case the agents had reduced the property to their exclusive control, and there was no longer any danger of the defendants seizing a weapon or destroying evidence contained therein. The search was therefore not incident to the arrest, nor could it be justified by any other exigency. *United States v. Chadwick,* 97 S.Ct. 2476 (1977).

EVIDENCE:
E § 1.3 Identification

Defendant was convicted on drug charges and argued on appeal that his due process rights had been violated by the admission into evidence of identification testimony given by the officer who bought the drugs from defendant. Following the drug buy, the officer had described defendant to other officers, one of whom obtained a photograph of defendant which matched the description given by the officer and left it on the first officer's desk. From this picture the first officer identified defendant as the man who had sold him the drugs.

On appeal, it was admitted that the identification procedure was suggestive, since only one photograph was used, and unnecessary, since there were no exigent circumstances. The Court concluded, howver, that the reliability of the identification should be the controlling factor, as determined by the witness' original opportunity to view the defendant, the witness' degree of attention, the accuracy of his prior description, the witness' degree of certainty, and the time lapse between the crime and the subsequent identification.

Applying these criteria to the present case, the Court found the single photograph identification reliable and admissible. The Court noted in particular, that the witness making the identification was an experienced officer specially trained to pay scrupulous attention to detail, and this factor contributed to the reliability of the identification. *Manson v. Brathwaite,* 97 S.Ct. 2243 (1977).

Items of Interest

The following is a copy of a letter from Henry F. Ryan, M.D., Chief Medical Examiner, to Major Albert T. Jamison, of the Maine State Police. The letter should be of interest to all law enforcement officers.

November 17, 1977

Major Albert T. Jamison
Maine State Police Dept.
36 Hospital Street
Augusta, Maine 04330

Re: Fatality Toxicology

Dear Major Jamison:

A number of problems have arisen with laboratory testing of blood drawn at funeral homes usually in fatal motor vehicle accidents. While I have asked medical examiners to personally procure the specimens, often they do not and the police ask the funeral director to obtain their sample. I will continue to urge medical examiners to render this service but in order to insure meaningful results and proper processing, I would like all State Police Officers advised of the following:

1. All toxicology specimens submitted on fatalities should note the name of the medical examiner and that a copy of the results be sent to him as well as the Chief Medical Examiner's Officer.

2. Samples should be drawn before embalming using scrupulously clean equipment preferably the apparatus in the kits. The use of funeral director's equipment has been associated with contamination in several cases. When the laboratory notes contamination with methanol or formaldehyde, all the results including ethanol are thrown into question for legal purposes.

3. Samples should be taken from blood vessels not by blind puncture into the chest. Intracavity effusions in trauma cases are occasionally contaminated by stomach, esophagus or intestinal contents and are worthless, if this occurs. A small amount of spillage from the stomach can raise the blood alcohol level in the blood-filled chest to a very high level or any intermediate value. Blind attempts at cardiac puncture except in the most experienced hands can easily be contaminated with fluid from the chest cavity.

Sincerely,

HENRY F. RYAN, M.D.
Chief Medical Examiner

The following notice from the Motor Vehicle Division deals with a policy change in scheduling "Refusal Hearings" conducted under 29 M.R.S.A. §1312. Any questions concerning this policy change should be directed to Mr. George Storer, Motor Vehicle Division, at 289-2398.

IMPLIED CONSENT TO CHEMICAL TESTS REFUSAL HEARINGS

A change in the policy of the Motor Vehicle Division in scheduling "Refusal Hearings" held under 29 M.R.S.A. §1312 (Implied Consent Law) will become effective in January, 1978.

Currently, in an effort to accommodate requests for such hearings, most hearing dates have been scheduled by telephone contact. This has created an unacceptable amount of clerical time being spent in an attempt to set a hearing date which is agreeable to all parties concerned. In addition, an unusual number of "Refusal Hearings" are requested, by the defendant, to be held in Augusta. This has adversely affected the enforcement officer's appearance at such hearings, creating unnecessary mileage costs and prompting complaints from enforcement agencies that the distance and time involved prevents the police officers from performing his regular duties.

In the future, notification of "Refusal Hearings" shall be in accordance with 29 M.R.S.A. §54. The notice shall state the place, day and hour of the scheduled hearing. Service of notice on the defendant will be made by registered or certified mail. Written notification will also be sent to the arresting officer. Whenever possible, hearings will be scheduled at the nearest facility where hearings are conducted and within a reasonable time from receipt of a hearing request.

It is hoped that this change and your cooperation will result in a better system for this type of hearing.

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 04333.

ALERT

This bulletin is partially funded by a grant from the Maine Criminal Justice Planning and Assistance Agency.