NOVEMBER-DECEMBER 1979

ALERT

MAINE DEPARTMENT OF
THE ATTORNEY GENERAL

MAINE CRIMINAL
JUSTICE ACADEMY

MESSAGE FROM THE ATTORNEY GENERAL RICHARD S. COHEN

This issue of ALERT presents summaries of recent decisions of the Maine Supreme Judicial Court (Law Court) and the United States Supreme Court. The United States Supreme Court summaries begin on page 5.

We are in the process of completely revising the ALERT mailing list. The new mailing list will initially include only major agencies and officials of the Maine criminal justice system. Personnel of criminal justice agencies will receive copies of ALERT through their agencies and will no longer be mailed copies at their homes. Any person or agency outside the criminal justice system wishing to receive the ALERT bulletin must request inclusion on the mailing list *in writing*. Written requests should be mailed to the Maine Criminal Justice Academy, 93 Silver Street, Waterville, Maine 04901.

Richard S. Cohen

RICHARD S. COHEN
Attorney General

MAINE COURT DECISIONS

SELF-INCRIMINATION:
B §3.1(a) Identification

At 1:00 a.m. on July 6, a woman, while waiting on the lighted porch of her home, was approached by the defendant and asked to use the phone. When his request was refused, the defendant left and returned a few minutes later, masked and armed. He covered the woman's face with a scarf, took her to the lawn of the house next door, and raped her. She was able to see his face again briefly when the scarf slipped from her face. Later that same morning, the woman reported the rape to the police and helped them draw a composite picture of the defendant.

Five weeks later, on August 16, an investigating officer showed the woman 15 photographs from which she selected defendant's photograph, stating that it looked a lot like her assailant. On October 30 the officer showed the woman a single photograph of the defendant, and she made a positive identification. The trial was held five months later on March 27 at which the court allowed the woman to identify the defendant in court and also admitted into evidence the photo identification of August 16. The defendant was convicted of rape and appealed, contending that the August 16 identification was so unnecessarily suggestive as to create a substantial risk of misidentification and that the in-court identification was tainted by the August 16 and the October 30 identifications.

The Law Court outlined the required procedure for determining the admissibility of identification evidence. The trial court must hold an evidentiary hearing on the defendant's motion to suppress at which the defendant must first establish by a preponderance of the evidence that the pre-trial identification procedure was unnecessarily suggestive. If the defendant is successful, the burden then shifts to the State to show by clear and convincing evidence that the corrupting effect of the suggestive procedure is outweighed by factors indicating reliability.

The Law Court agreed with the trial court's conclusion that the August 16 identification was not

unnecessarily suggestive, noting that at least six of the men depicted in the photographic array shared the defendant's general facial characteristics and that the age distribution of the men depicted was reasonable in light of the victim's estimate that her assailant was around 30 years of age. The Law Court also found that the suggestive impact of only one photograph other than the defendant's being a close-up was of limited significance. The Law Court also agreed with the trial court's conclusion that the October 30 presentation of a single mug shot of the defendant was unnecessarily suggestive, but that the State had proven by clear and convincing evidence that the reliability of the victim's identification outweighed the corrupting effect of that suggestive police procedure. The victim had two opportunities to view her assailant at close range under adequate light; she, as a rape victim, had a particular reason to be attentive; she provided a description for a composite that bore some resemblance to the defendant; and she made a positive in-court identification of the defendant which she claimed was based on her recollection of the rape incident. *State v. Cefalo,* 396 A.2d 233 (Maine, January 1979).

COMMENT: Officers conducting photographic identification procedures should display a large number of photographs of persons similar in age and facial characteristics to the suspect. Presentation of a single photograph of a suspect to an identifying witness is almost always unnecessarily suggestive.

SEARCH AND SEIZURE:

A §2.4 Automobiles—Without a Warrant

On December 9, 1973 an elderly man and his wife were murdered in their home. The home was ransacked and spattered candle wax was found throughout the home. Nine days later, police received information giving them probable cause to believe that the defendant's automobile had been used in the commission of the murders. They placed the auto under surveillance and began to prepare an affidavit for a search warrant. Before the warrant could be issued, the car was moved by the defendant. The police stopped it on a public highway and had it towed to a garage. About 1½ hours later, officers from the Maine State Police laboratory arrived, searched the car, and discovered wax drippings later determined to be similar to drippings found in the victim's home. The defendant's motion to suppress, contending that the police conducted an unconstitutional warrantless search, was denied. He was convicted on two counts of felonious homicide and appealed.

The Law Court upheld the denial of the motion to suppress. When there is probable cause to search an automobile stopped on a public highway, immediate warrantless searches are constitutionally permissible because of the movable nature of the vehicle. If the surrounding circumstances make an immediate search on the highway unsafe or impractical, the car may be moved to a more convenient location. If a search is promptly conducted after its arrival there, the probable cause factor existing on the public highway remains in force, and the warrantless search is constitutionally permissible. In this case, the need to employ trained officers who knew how to preserve delicate evidentiary material, such as wax drippings, made an immediate search on the public highway impractical. The short delay between the car's arrival at the garage and the commencement of the search was attributable to the time it took those trained officers to travel to the garage. The vehicle search commenced as soon as they arrived and was expeditiously carried out without unnecessary delay. There was no unconstitutional warrantless search. *State v. Morton,* 397 A. 2d 171 (Maine, January 1979).

COMMENT: Law enforcement officers may search a movable vehicle stopped on the highway if they have probable cause to believe that the vehicle contains items subject to seizure. If, for reasons of safety or practicality, the vehicle is moved to another location to conduct the search, the search should be conducted as soon as possible after its arrival there. Any unnecessary delay between the arrival of the vehicle and the search may be grounds for invalidation of the search.

INTERROGATION

B §1.3 Miranda

The defendant was arrested in connection with a homicide at 11:00 a.m. and at 1:00 p.m. was taken to the police department in a cruiser. While in the cruiser, an officer gave him the *Miranda* warnings and asked him if he wanted to talk about the crime. The defendant said he wanted to talk to an attorney and no further conversation ensued between the officer and the defendant. Six hours later, after the defendant went through booking procedures and received a visit from his wife, another officer, who did not know that the defendant had requested an attorney, visited him in his cell. The officer asked him if he wanted "to talk with anybody about the case, or whether he wanted to wait until he got in touch or his wife got in touch with an attorney." The defendant said he didn't know and the officer left the cell. A few minutes later, the defendant called the officer and said he wanted to talk to him. The defendant was taken to a detective's office where

he was again given the *Miranda* warnings. After indicating that he understood his rights, he waived his rights and confessed to the crime. He was convicted of second-degree homicide and appealed, contending that the confession was inadmissible because "once an accused requests legal counsel, the police may not initiate any further interrogation until such time as the accused has had an opportunity to consult with an attorney."

The Law Court stated that the applicable rule was that "the right to have counsel present, once invoked, may later be waived as long as the subsequent waiver is knowingly and voluntarily made and as long as the accused's right to cut off questioning is scrupulously honored." The court found that the police scrupulously honored the defendant's right to cut off questioning. When the defendant requested an attorney at 1:00 p.m., all efforts to question him ceased immediately. Six hours later, although the officer asked the defendant if he wanted to talk about the case, the officer was not aware that the defendant had asked for an attorney and the officer reminded the defendant of his ever-present option of consulting an attorney. When the defendant indicated uncertainty about talking, the officer left his cell immediately. Only when the defendant called out to the officer did the officer initiate the interrogation process.

The court also found that the defendant's waiver of his rights was knowingly and voluntarily made. The defendant was informed of his rights twice and the interrogation did not begin until the defendant indicated that he understood his rights but preferred to discuss his activities without the benefit of counsel. Furthermore, the police made no effort to intimidate the defendant.

> "The defendant's statement came after a relatively short period of incarceration: a little over eight hours. The interview was also brief, roughly one hour, and took the form of a calm narrative on the part of the defendant with the policemen interrupting only occasionally to ascertain the time frame of the events being discussed. No promises were made, and no abuse of a physical or psychological nature was inflicted. The defendant, no stranger to the criminal process, was given food and coffee and allowed to speak to his wife when she arrived. In short, the atmosphere surrounding the defendant's confession was a far cry from the rubber-hose-and-naked-light-bulb atmosphere that motivated the *Miranda* Court to formulate its prophylactic rules."

State v. Stone, 397 A.2d 989, 996 (Maine, February 1979).

COMMENT: The reasons why the court allowed the second attempt to interrogate the defendant are that the defendant's right to cut off questioning the first time was scrupulously honored; the second attempt was made by a different officer who did not know of the defendant's request for counsel; and the second officer reminded the defendant of his option to consult an attorney. If any of these factors had been missing, the court may have held the defendant's waiver of rights invalid. The safest procedure for the law enforcement officer is to immediately cease questioning a person who exercises his right to remain silent or to consult an attorney. Any future attempt to interrogate the person should come a significant time after the first attempt; should be accompanied by Miranda *warnings; and should not involve any promises, pressures to cooperate, or any other illegal tactics.*

SEARCH AND SEIZURE

A §2.4 Automobiles— Without a Warrant

NARCOTICS

C. §4.1 Narcotics — Drugs

A law enforcement officer stopped an automobile for what he believed to be a faulty exhaust system. As the officer approached the auto, he smelled what he believed was marijuana smoke emanating from it. He ordered the occupants out of the auto and searched it without consent. In an unlocked glove compartment he found what was later determined to be a usable amount of marijuana. The defendant was adjudicated to have committed a civil violation by possessing a usable amount of marijuana and appealed contending that the search and seizure was illegal.

The Law Court stated that, even though the officer was looking for evidence of a civil violation, governmental rummaging about in a citizen's private belongings is still a *search* within the meaning of the Fourth Amendment. The court held, however, that the search fell within the automobile exception to the search warrant requirement. The odor of the marijuana was sufficient to establish probable cause to search, and the movability of the automobile provided sufficient exigent circumstances for a warrantless search. The court also noted that marijuana, a schedule Z drug, is specifically declared to be contraband, and thus subject to seizure by the State, by 17-A M.R.S.A. §1114. *State v. Barclay,* 398 A.2d 794 (Maine, March, 1979).

INTERROGATION

B §1.3 Miranda

In the early morning of November 14, in a fit of drunkenness and passion, the defendant killed his wife's mother and great uncle. The bodies were discovered at 7:30 a.m. on that day. During

the police investigation at the scene, the defendant struck up a conversation with some of the investigators. Because he was a relative of the victims, an officer asked the defendant to accompany him to the police station. The defendant was given *Miranda* warnings in connection with a request that he take a benzidine test to detect blood invisible to the naked eye. He consented to the test and the results were found to be positive. He was given *Miranda* warnings again that day, but no incriminating statement was taken.

At 4:00 p.m. on November 15, the defendant, by prior arrangement, returned to the police station to take a polygraph test. Before administering the polygraph test, the polygraph examiner (a deputy sheriff) gave the defendant *Miranda* warnings which he waived. The examiner then explained how the polygraph worked, and the defendant was read and signed a polygraph examination consent form which included another statement of the *Miranda* warnings. The polygraph examination, began at 6:30 and lasted about one hour. After the examination, the examiner told the defendant he believed he was lying about his lack of involvement in the homicides. Shortly thereafter the defendant admitted involvement in the killings and agreed to discuss his actions with the police. At about 8:00, the polygraph examiner left the room briefly to get two other officers. The defendant was then questioned by the three officers and by 10:30 he signed a written confession. At no time on November 15 did the defendant request an attorney or ask that the testing or interrogation cease. He was found guilty of the murders and appealed, contending that he should have been reread his *Miranda* rights subsequent to his first admission of guilt to the polygraph examiner and just prior to the crucial interrogation that led to the oral and written confessions.

The Law Court stated that a confession is not necessarily invalid because the *Miranda* warning is not repeated in full each time the interrogation process is resumed after an initial interruption. The ultimate question is whether the defendant, with full knowledge of his legal rights, knowingly and intentionally relinquished them. The court enumerated five factors to be considered in evaluating the carry-over effect of *Miranda* warnings given prior to an interruption in the interrogation process:

1) the time lapse between the last *Miranda* warnings and the accused's statements. In this case the defendant's first incriminating admission was made only 4 hours after he had been given general *Miranda* warnings and about 1½ hours after he had been given *Miranda* warnings in connection with the polygraph examination;

2) Interruptions in the continuity of the interrogation. In this case the interrogation was halted only briefly at around 8:00 p.m. when the polygraph examiner left the room to summon two detectives;

3) Whether there was a change of location between the place where the last *Miranda* warnings were given and the place where the accused's statement was made. In this case no change of location took place;

4) Whether the same officer who gave the warnings also conducted the interrogation resulting in the accused's statement. In this case two of the three officers participating in the final interrogation had given the defendant *Miranda* warnings;

5) Whether the statement elicited during the complained of interrogation differed significantly from other statements which had been preceded by *Miranda* warnings. In this case the defendant had already admitted his involvement in the crime to the polygraph examiner before he left the room to get the two detectives. The statements made thereafter to the three officers were consistent with the admission made to the polygraph examiner.

The court concluded that *Miranda* had been satisfied and that the defendant's incriminating statements had been correctly admitted into evidence. *State v. Ruybal,* 398 A.2d 407 (Maine, March 1979).

INTERROGATION

B §1.3 Miranda

The defendant was arrested at his home after a shooting spree and taken to the police station. While two officers removed his handcuffs and began a preincarcerative search, the police chief arrived at the station. The chief, who had known the defendant for many years, asked "What's going on?" The defendant said, "I wanted to make a massacre." The chief then asked "What do you mean, a massacre?" to which the defendant replied that he wanted to kill everyone in his family. The defendant was convicted of murder, aggravated assault, and attempted murder, and appealed contending that the admission of his statements into evidence violated *Miranda.*

The Law Court held that neither of the chief's questions rose to the level of interrogation under the *Miranda* rule. Brief neutral questions which are not part of an effort to elicit a confession or admission do not constitute interrogation. The chief's question "What's going on?" was merely a natural reaction to the sight of a long-time acquaintance being held in custody. Also,

threshold or clarifying questions — neutral questions posed by police in response to an ambiguous statement by a suspect — do not constitute interrogation. The Chief's question "What do you mean, massacre? fell within this category. Since neither question constituted "interrogation, the admission into evidence of defendant's responding statements did not violate the *Miranda* rule. *State v. Simoneau,* 402 A.2d 870 (Maine, June 1979).

U.S. SUPREME COURT DECISIONS

ARREST AND DETENTION
A §1.4 Detention: "Stop and Frisk"
SEARCH AND SEIZURE
A §2.4 Automobiles—Without a Warrant

A law enforcement officer in a cruiser stopped an automobile occupied by the defendant and seized marijuana in plain view on the car floor. The defendant was subsequently indicted for illegal possession of a controlled substance. At a hearing on the defendant's motion to suppress the marijuana, the officer testified that prior to stopping the vehicle he had observed neither traffic or equipment violations nor any suspicious activity, and that he made the stop only to check the driver's license and the automobile's registration. The officer was not acting pursuant to any standards, guidelines, or procedures relating to the spot-checking of documents promulgated by either his department or the state Attorney General.

The U.S. Supreme Court held that the random, discretionary stopping of an automobile and the detention of the driver by a law enforcement officer in order to check his driver's license and the automobile's registration are unreasonable under the Fourth Amendment except when (1) there is at least a reasonable and articulable suspicion that a motorist is unlicensed or that an automobile is not registered; or (2) either the vehicle or an occupant is otherwise subject to seizure for a violation of law. Stopping an automobile and detaining its occupants constitute a seizure within the meaning of the Fourth and Fourteenth Amendments, even though the purpose of the stop is limited and resulting detention quite brief. *Delaware v. Prouse* U.S. ,99 S. Ct. 1391, 59 L.Ed 2d 660 (U.S. Supreme Court, March 1979).

COMMENT: This case prohibits law enforcement officers from stopping randomly chosen motor vehicles for license or registration inspection without a reasonable articulable suspicion of a violation or other legal grounds for the stop. It does not prohibit, however, stopping vehicles and checking documents according to procedures that involve less intrusion or that do not involve the unconstrained exercise of an officer's discretion. The Court in this case suggested that the questioning of all on-coming traffic at roadblock-type stops was one permissible alternative.

ARREST AND DETENTION
A §1.1 Reasonable Grounds
A §1.4 Detention: "Stop and Frisk"
INTERROGATION
B §1.1 Voluntariness
B §1.3 Miranda
B §2.4 Derivative Evidence ("Fruit of the Poisonous Tree")

The defendant was picked up at his neighbor's home by the police and taken to the police station for questioning about an attempted robbery and homicide. Although he was not told that he was under arrest, he would have been physically restrained if he had attempted to leave. The police did not have probable cause to arrest the defendant. He was given *Miranda* warnings, waived his right to counsel, was questioned, and eventually made statements and drew sketches incriminating him. His motions to suppress the statements and sketches were denied and he was convicted.

The U.S. Supreme Court first examined the seizure of the defendant and held that the police violated his Fourth and Fourteenth Amendment rights. The seizure was much more intrusive than a traditional "stop and frisk" and could not be justified on the mere grounds of "reasonable suspicion" of criminal activity. Whether or not technically characterized as an arrest, the seizure was in important respects indistinguishable from a traditional arrest. Instead of being questioned briefly where he was found, the defendant was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was free to go and would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. The mere facts that the defendant was not told he was under arrest, was not "booked", and would not have had an arrest record if the interrogation had proven fruitless, did

not make his seizure something less than an arrest for purposes of the protections of the Fourth Amendment. The seizure was, therefore, illegal because unsupported by probable cause.

The Court then held that the statements and sketches were inadmissible because the connection between the illegal seizure and the obtaining of incriminating statements and sketches was not sufficiently attenuated to permit their use at trial. Even though proper Miranda warnings may have been given and the defendant's statements may have been "voluntary" for purposes of the Fifth Amendment, this does not mean that the Fourth Amendment is automatically satisfied. Courts focus on the causal connection between the Fourth Amendment violation and the statement to determine whether the statement has been obtained by exploitation of the illegal arrest. Factors to be considered in making this determination include the closeness in time between the arrest and the statement, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. In this case, the defendant was seized without probable cause in the hope that something might turn up, and he confessed very soon thereafter, without any intervening event of significance. *Dunaway v. N.Y.*, U.S. , 99 S.Ct 2248, 60 L.Ed. 2d 824 (U.S. Supreme Court, June 1979)

COMMENT: This case contains two important items of advice for law enforcement officers. First, even though an officer does not intend to arrest a person in the traditional sense, a court may find that his actions are tantamount to an arrest if they are indistinguishable from an arrest in important respects. Therefore, if an officer seizes or detains a person significantly, beyond a mere "stop and frisk" or other brief stop or detention, but does not comply with all the requirements of a technical arrest, the seizure or detention may, nevertheless, be considered an arrest for purposes of the Fourth Amendment. As such, the seizure or detention will be declared illegal unless it is supported by probable cause.

Second, a confession obtained by exploitation of an illegal arrest will be inadmissible in court. Officers cannot avoid the effect of the illegal arrest by simply giving the arrested person Miranda *warnings. Other factors indicating that the confession was sufficiently an act of free will must be present. As stated in the summary, other factors to be considered are the closeness in time between the arrest and the statement, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.*

ARREST AND DETENTION

A §1.1 Reasonable Grounds

SEARCH AND SEIZURE

A §2.3 Incident to Arrest

At 10:00 at night Detroit police officers found the defendant in an alley with a woman who was in the process of lowering her slacks. When asked for identification, the defendant gave inconsistent and evasive responses. He was then arrested for violation of a Detroit ordinance which provided that a person commits an offense if (a) an officer has reasonable cause to believe that given "behavior warrants further investigation," (b) the officer stops him, and (c) the suspect refuses to identify himself. In a search incident to the arrest, officers discovered drugs on the defendant's person and he was charged with a drug offense. His motion to suppress the drug evidence was denied. The Michigan Court of Appeals held that the Detroit ordinance was unconstitutionally vague, that both the arrest and search were invalid because the defendant had been arrested pursuant to that ordinance, and that the evidence obtained in the search should have been suppressed.

The U.S. Supreme Court reversed holding that the defendant's arrest, made in good-faith reliance on the Detroit ordinance, which at the time had not been declared unconstitutional, was valid regardless of the subsequent judicial determination of its unconstitutionality, and therefore the drugs obtained in the search should not have been suppressed. The Constitution permits a law enforcement officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense. Here the arresting officer had abundant probable cause to believe that the defendant's conduct violated the ordinance — the defendant's presence with a woman in the circumstances described clearly was "behavior warranting further investigation" under the ordinance. The defendant's responses to the request for identification constituted a refusal to identify himself as the ordinance required. Under these circumstances, the arresting officer did not lack probable cause simply because he should have known the ordinance was invalid and would be judicially declared unconstitutional. A prudent officer, in the course of determining whether the defendant had committed an offense under such circumstances, should not have been required to anticipate that a court would later hold the ordinance unconstitutional.

Since the arrest under the presumptively valid ordinance was valid, the search which followed was valid because it was incident to that arrest. The constitutionality of a search incident to an ar-

rest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. A lawful arrest, standing alone, authorizes a search of the person incident to that arrest. *Michigan v. DeFillippo,* U.S. , 99 S.Ct. 2627, 61 L.Ed. 2nd 343. (U.S. Supreme Court, June 1979)

COMMENT: This case stands for the principle that officers are charged to enforce laws until and unless they are declared unconstitutional. Once a law is enacted, law enforcement officers need not speculate on its constitutionality, unless the law is so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.

INTERROGATION
B §1.3 Miranda
B §1.5 Youths
JUVENILE DELINQUENCY — M §1

The 16½ year old respondent was taken into custody by police on suspicion of murder. Before being questioned at the station house, he was fully advised of his *Miranda* rights, whereupon he asked to see his probation officer. The respondent was, at the time, on probation to the juvenile court and had had considerable previous experience with the police, having served a term in a youth corrections camp and having a record of prior offenses. When police denied his request, the respondent stated that he would talk without consulting an attorney. He then made statements and drew sketches implicating him in the murder. Upon being charged in Juvenile Court with the murder, he moved to suppress the incriminating statements and sketches on the ground that they had been obtained in violation of his *Miranda* rights. He contended that his request to see his probation officer was an invocation of his Fifth Amendment right to remain silent, just as if he had requested the assistance of an attorney. The court denied the motion, holding that the facts showed that the respondent had waived his right to remain silent, notwithstanding his request to see his probation officer. The state supreme court reversed, holding that the respondent's request for his probation officer was a *per se* invocation of his Fifth Amendment rights, as if he requested an attorney.

The U.S. Supreme Court held that a juvenile's request to speak with his probation officer does not constitute a *per se* request to remain silent nor is it tantamount to a request for an attorney. The *Miranda* rule that interrogation must cease if an accused indicates in any manner that he wishes to remain silent or to consult an attorney is based on the unique role that attorney's play in the adversarial system of criminal justice. A probation officer, despite his statutory duty to protect a juvenile's interests and despite the existence of a relationship of trust and cooperation, is not capable of sufficiently protecting a juvenile's Fifth Amendment rights or of rendering other legal assistance. Furthermore, a probation officer has a conflicting statutory duty to report wrongdoing by the juvenile and to serve the ends of the juvenile court system.

The Court held that an inquiry into the totality of the circumstances surrounding the interrogation to ascertain whether the accused in fact knowingly and voluntarily waived his right to remain silent and to have the assistance of counsel, is an adequate approach, even where interrogation of juveniles is involved.

> "The totality approach permits —indeed it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." U.S. at , 99 S. Ct. at 2572, 61 L.Ed. 2d at 212.

In this case, the Court held that because the respondent was 16½ years old, because he had considerable experience with the police, and because there was no indication that he was of insufficient intelligence, he voluntarily and knowingly waived his Fifth Amendment rights. *Fare v. Michael C.,* U.S. , 99 S.Ct. 2560, 61 L.Ed. 2d 197 (U.S. Supreme Court, June 1979).

COMMENT: This case establishes the principle that the validity of a juvenile's waiver of Miranda *rights to remain silent and to have the assistance of counsel is to be determined by an evaluation of the totality of the circumstances surrounding the interrogation. Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination. At the same time, the totality approach does not impose rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation. The safest procedure for the law enforcement officer is to cease interrogation when a juvenile requests to see a parent, probation officer, or other person, unless the juvenile is near adulthood, has had considerable experience with*

the police, and is clearly intelligent enough to understand his rights and the consequences of waiver. Of course, if the juvenile specifically requests an attorney or asks to remain silent, the interrogation must cease.

SEARCH AND SEIZURE

A §2.4 Automobiles—Without a Warrant

Acting on probable cause, based on information from a reliable informant that the defendant would be arriving at an airport carrying a green suitcase containing marijuana, police officers placed the airport under surveillance. They observed the defendant retrieve a green suitcase from the airline baggage service, place it into the trunk of a taxi, and enter the taxi with a companion. When the taxi drove away, the officers pursued and stopped it several blocks from the airport. They requested the driver to open the trunk and, without asking the defendant or his companion's permission, they opened the unlocked suitcase and discovered marijuana. The defendant's motion to suppress the marijuana obtained from the suitcase was denied, he was convicted of possession of marijuana with intent to deliver, and he appealed.

The U.S. Supreme Court held that, in the absence of exigent circumstances, police are required to obtain a warrant before searching luggage taken from an automobile properly stopped and searched for contraband. There is no justification for extension of the "automobile exception" to the warrant requirement to the warrantless search of personal luggage merely because it was located in an automobile lawfully stopped by the police. The reasons behind the automobile exception are (1) that the inherent movability of automobiles often makes obtaining a warrant impracticable, and (2) that the configuration, use, and regulation of automobiles may often decrease the reasonable expectation of privacy associated with automobiles as distinguished from other types of property. These considerations did not apply to the suitcase in this case. Once the police had seized the suitcase and had it exclusively within their control, there was not the slightest danger that it or its contents could have been removed before a valid search warrant could be obtained. The extent of its mobility was in no way affected by the place from which it was taken. Therefore, as a general rule, there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places.

Also, luggage is a common repository for one's personal effects and is therefore inevitably associated with the expectation of privacy. A suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations. Therefore, where the police, without endangering themselves or risking the loss of evidence, lawfully have detained a criminal suspect and seized and secured his suitcase, they should delay the search of it until after judicial approval has been obtained. *Arkansas v. Sanders,* U.S. , 99 S.Ct. 2586, 61 L.Ed.2d 235 (U.S. Supreme Court, June 1979).

COMMENT: Despite the Court's holding in this case, officers need not delay the search of all *lawfully seized containers and packages until a warrant can be obtained. If, for example, police have probable cause to believe that the container contains an immediately dangerous instrumentality, such as explosives, they may open the container and disarm the instrumentality or otherwise end the danger. Also, some containers, like a gun case for example, may be opened because their outward appearance gives away their contents and therefore they cannot support a reasonable expectation of privacy. Of course, if the contents of a package are open to "plain view," those contents may be seized without a warrant if they are contraband or evidence of a crime.*

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 04333.

ALERT

Richard S. Cohen — Attorney General
John S. Gleason — Deputy Attorney General
John N. Ferdico, Esq. — Editor
Sandra Moores — Secretary