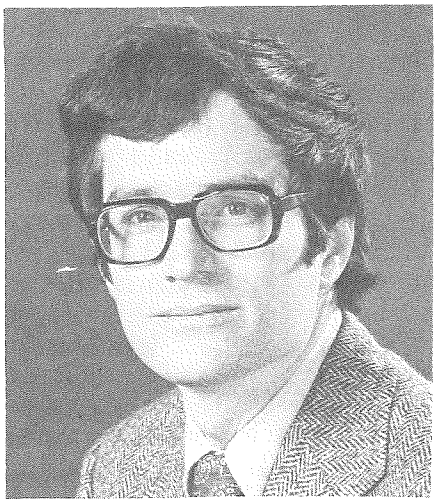
SEPTEMBER-OCTOBER 1981

ALERT

MAINE DEPARTMENT OF
THE ATTORNEY GENERAL

MAINE CRIMINAL
JUSTICE ACADEMY



MESSAGE FROM THE ATTORNEY GENERAL JAMES E. TIERNEY

This issue of ALERT is a continuation of the May-June 1981 issue and presents summaries of important court decisions of the United States Supreme Court and the Maine Supreme Judicial Court over the past two years. Again, because of the large number of cases which need to be explained and because of space limitations, the summaries will be short and concise, containing the bare necessities for understanding the decision together with brief points of advice for law enforcement officers, where necessary.

Since this issue of ALERT attempts to update law enforcement officers on developments in the criminal law dating as far back as 1979, some of the very recent developments in the law have not been included. A future issue of ALERT will deal with the very recent developments up to the date of that issue.

Jim Tierney

JAMES E. TIERNEY
Attorney General

RECENT COURT DECISIONS

ADMISSIONS AND CONFESSIONS

In *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the U.S. Supreme Court, for the first time, explained the meaning of "interrogation" for purposes of the *Miranda* case. The Court said:

> "[T]he Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. at 300-01, 100 S.Ct. at 1689, 64 L.Ed 2d at 307-08.

The Court further clarified the definition by stating that an incriminating response is any response — whether inculpatory or exculpatory — that the prosecution may seek to introduce at trial.

The *Innis* decision was designed to protect persons in custody from some of the more subtle forms of police activity which the police should know are reasonably likely to elicit an incriminating response. For example, any knowledge the police may have concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the officer's words or actions constituted interrogation. Officers, therefore, should not attempt to use subtle forms of interrogation of a person in custody, unless the person has been warned of his *Miranda* rights and has effectively waived those rights. Otherwise, any statements obtained may be inadmissible.

In *State v. Estes,* 418 A.2d 1108 (1980) the Maine court held that incriminating statements made by the defendant during a 30-minute period during which he was "booked" were admissible despite a lack of *Miranda* warnings. The court reaffirmed an earlier ruling that brief routine questions posed to a suspect during "booking" procedures do not constitute "interrogation." It is worthy of note that the court quoted the definition of "interrogation" set out in the U.S. Supreme Court case of *Rhode Island v. Innis,* summarized above.

In *State v. Price,* 406 A.2d 883 (1979) and *State v. Cochran,* 425 A.2d 999 (1981), the Maine court reaffirmed the principle that volunteered statements made by a person not subject to custodial interrogation are admissible despite the failure of police to give *Miranda* warnings. In one instance in the *Price* case the defendant admitted operating an automobile involved in a fatal accident in response to an officer's general question to a crowd of people gathered at the accident scene. The court held that the defendant was not in custody. In another instance, the defendant, while riding in a police car to the police station, asked the officer if the person involved in an accident with the defendant was dead. When the officer responded "yes," the defendant again damned himself. The court held that there was no interrogation, emphasizing that an officer has no duty to stop a defendant from making voluntary declarations.

In the *Cochran* case, the Maine court held that where the defendant went voluntarily to the police to give his side of the story with respect to an assault which occurred at a bar, there was no custodial interrogation, even though the statement was given at the police station. The statement was therefore admissible, even though the officer who received the statement did not give the defendant the *Miranda* warnings.

In *State v. Preston,* 411 A.2d 402 (1980), however, the court held that statements taken from the defendants which were not preceded by *Miranda* warnings were inadmissible. Although the defendants were told that they were not under arrest and were free to leave and although they were questioned in familiar surroundings at a reasonable hour, the court found that the interrogation was custodial because it "focused" on the defendants as suspects and was conducted in a police car. Real evidence obtained from one of the defendants in direct response to the unlawful interrogation was also ruled inadmissible. The lesson for law enforcement officers is that whenever they want to interrogate someone and there is a question whether the person is in custody, the safest procedure is to give the *Miranda* warnings.

In *Tague v. Louisiana,* 444 U.S. 469, 100 S.Ct. 652, 62 L.Ed. 2d 622 (1980) the U.S. Supreme Court held that the state has the burden of proving that the defendant waived his *Miranda* rights and that in the absence of *any* evidence of waiver, any statement obtained is inadmissible. Officers obtaining statements from persons who waive their Miranda rights should, therefore, take careful notes of all circumstances attending the waiver, so that they will be able to provide evidence that the waiver was knowing and intelligent, when called upon to do so.

In *North Carolina v. Butler,* 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed 2d 286 (1979) the U.S. Supreme Court held that an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case. The question of waiver must be determined on the particular facts and circumstances surrounding each case, including the background, experience, and conduct of the accused. Law enforcement officers should, however, always attempt to obtain an explicit statement of waiver of *Miranda* rights before interrogating a suspect. A written waiver, signed by the suspect and witnesses, is especially strong evidence that the waiver was knowing and intelligent. When an explicit waiver cannot be obtained, officers should take great care to ensure that a suspect knows and understands his rights, but wants to voluntarily waive them, before interrogating the suspect.

In State v. Ann Marie C., 407 A.2d 715 (1979) the Maine Court held that the failure of the police to notify the parents of an arrested juvenile did not necessarily invalidate the juvenile's waiver of *Miranda* rights. Instead the court found the waiver valid under a "totality of the circumstances" test. The court warned, however, that 15 M.R.S.A. §3203 (2) (A) requires a law enforcement officer or intake worker to notify a parent, guardian, or legal custodian when a juvenile is arrested and that breach of that statutory duty was an important factor in determining whether a juvenile has effectively waived *Miranda* rights. Officers, therefore, should not take chances and should *always* notify a parent, guardian, or legal custodian when a juvenile is arrested.

In *State v. Ashe,* 425 A.2d 191 (1981), the Maine Court held that consumption of, or addition to, drugs does not *per se* render invalid an otherwise sufficient waiver of *Miranda* rights. Rather, courts will evaluate the particular circumstances of each case to determine whether a defendant's drug-related condition made him incapable of acting voluntarily, knowingly, and intelligently. In the *Ashe* case, the defendant was lucid and rational, was able to respond coherently to questions, and was able to give a narrative account of events, despite his admission that he was a heroin addict and had taken 50 percodan tablets during the day. The court found no evidence of impairment of the defendant's physical or mental condition so as to render his waiver invalid.

In *State v. Carter,* 412 A.2d 56 (1980) the Maine court held that even though the defendant had been indicted, his voluntary statements made after a knowing and intelligent waiver of his right to counsel were admissible. In the

Carter case the defendant was given *Miranda* warnings several times and affirmatively waived them; the defendant initiated the interrogation session and insisted that the detective remain to talk with him despite the late hour; the defendant was alert and aware of his surroundings and appeared neither mentally incompetent nor under the influence of drugs or alcohol; and there was no evidence of threats, intimidation, or coercion, or of deprivation of food or other basic needs. Whether an interrogation of a person is conducted before or after indictment, officers should take great pains to ensure that *Miranda* warnings are properly administered and that the waiver of those rights is voluntary, knowing, and intelligent.

State v. Ladd, 431 A.2d 60 (1981) dealt with the issue of whether police officers scrupulously honored the suspect's right under *Miranda* to cut off questioning. In that case, two police officers investigating an arson questioned the defendant who had voluntarily accompanied them to the police station. The officer who was asking all the questions got into a heated exchange with the defendant and the defendant told him "I got no more questions. I'm not going to answer anything. Because I ain't done nothing". That officer then angrily left the room. The other officer, who had known the defendant for 10 years, asked him "Do you want to talk to me anymore alone?" The defendant began talking again and eventually confessed to the arson.

The Maine court held that the defendant's statement was ambiguous as to whether he was refusing to answer further questions from *either* officer or only from the officer who up to that time had alone questioned him. Therefore the question of the other officer was a limited inquiry solely for clarification and did not violate the defendant's right to cut off questioning. The confession was admissible.

The court emphasized that a distinction must be drawn between, on the one hand, an inquiry for the limited purpose of clarifying whether the defendant is invoking his right to remain silent or has changed his mind regarding an earlier assertion of the right and, on the other hand, questioning aimed at eliciting incriminating statements concerning the very subject on which the defendant has invoked his right. The court also noted that the behavior of the two officers in this case had some of the appearance of the "rough guy-nice guy" interrogation technique. The court warned that the use of that technique runs the serious danger of a later court determination that the police have not scrupulously honored the suspect's right to cut off questioning.

The important point of advice for law enforcement officers is that when a suspect indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. Only when there is a genuine ambiguity as to the suspect's intention may an officer ask a question to clarify that intention.

In another case dealing with the suspect's right to cut off questioning, *State v. Ayers,* 433 A.2d 356 (1981), the Maine court emphasized that the police may not deny a person in custody the opportunity to retract a previously given waiver of *Miranda* rights and to reassert the right to be silent. In the *Ayers* case, the defendant, a murder suspect, waived her *Miranda* rights and was being interrogated by a police detective. During questioning, she became distraught and began sobbing. The detective, referring to her display of emotion, told her that "it's not going to work this time. We are just going to wait until you are ready to talk." Soon after, the defendant confessed to the murder.

> The court said that this case was "Not a case like *State v. Ladd* [summarized above] in which the police questions and statements were directed to clarifying whether the intention of the person in custody was to remain silent. Here the police made clear to [the suspect] that they were insisting that she talk and that they would persist in making sure that she would resume answering their questions." (433 A.2d at 362)

The officer, therefore, made it explicitly plain to the suspect that it would be futile for her to seek to retract her prior waiver and to reassert her constitutional right to cut off questioning and resume silence. Her confession was thus obtained in violation of her constitutional rights and was inadmissible in her trial for murder.

Again, the basic rule for law enforcement officers is that they must scrupulously honor a suspect's right to cut off questioning. This means not only that officers must cease questioning a person after the person has exercised his right of silence, but also that officers must avoid any statements or actions which prevent or hinder the person's exercise of that right.

In *United States v. Henry,* 447 U.S. 264, 100 S. Ct. 2183, 65 L.Ed. 2d 115 (1980) the United States Supreme Court held inadmissible statements made by an indicted and imprisoned defendant to a paid undisclosed government informant who was in the same cell block. Although the informant was instructed not to initiate con-

versations with the defendant, his instructions to pay attention to information furnished by the defendant created a situation likely to induce the defendant to make incriminating statements without the assistance of counsel. This indirect and surreptitious type of interrogation was an impermissible interference with the defendant's right to the assistance of counsel in violation of *Messiah* v. U.S., 337 U.S., 201, 84 S.Ct. 1199, 12 L. Ed. 2d 246 (1964).

The Court emphasized the potential susceptibility of an incarcerated person to subtle influences of government undercover agents. The *Henry* case illustrates that courts will carefully examine any attempts to obtain statements from indicted persons in the absence of counsel, especially if the person is incarcerated.

In *Edwards v. Arizona,* ____ U.S. ____, 101 S. Ct. 1880, 68 L.Ed 2d 378 (1981) the U.S. Supreme Court held that under *Miranda,* once an accused in custody has clearly asserted his right to counsel, law enforcement authorities may not, at their instance, reinterrogate him. Specifically, the Court said:

> "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights....
>
> [A]n accused...having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." ____ U.S. at ____, 101 S.Ct. at 1884-85, 68 L.Ed. 2d at 386.

The important point of this case is that once an accused in custody has claimed his right to counsel, only the accused can reinitiate the process of interrogation in the absence of counsel. If the police attempt to reinterrogate the accused, even after repeating the *Miranda* warnings, any statement obtained will be inadmissible.

In *State v. Ann Marie C.,* 407 A.2d 715 (1979), six days after a juvenile had been illegally arrested for making a bomb threat, she again made a bomb threat and later confesed to it. The Maine court held that any causal connection between the arrest six days earlier and the defendant's confession to the second bomb threat had been sufficiently attenuated so that the confession was not required to be excluded from evidence. The court considered the length of time between the events and the intervening circumstances of another bomb threat by the defendant, (who had been released on her own recognizance) followed by another arrest, *Miranda* warnings, and the defendant's waiver of her rights.

Officers should note that the admissibility of a confession following an illegal arrest depends on the following factors:

(1) the voluntariness of the statement;

(2) the giving of *Miranda* warnings;

(3) the length of time between the illegal arrest and the confession;

(4) the presence of intervening circumstances; and

(5) particularly, the purpose and flagrancy of the official misconduct.

The mere giving of Miranda warnings will not guarantee the admissibility of the statement.

A recent U.S. Supreme Court case, *Rawlings v. Kentucky,* 448 U.S. 98, 100 S. Ct. 2556, 65 L.Ed. 2d 633 (1980), illustrates the importance that court attaches to the fifth factor listed above. In the *Rawlings* case, the defendant was illegally detained by police officers at a friend's house while other officers left to obtain a search warrant for the house. When officers returned with a search warrant, the defendant was given the *Miranda* warnings and admitted to ownership of illegal drugs. The Court held that his statement was not obtained by exploitation of the illegal detention and was admissible. The Court reasoned that the statement was voluntary and spontaneous, having been made almost immediately after the *Miranda* warnings were given. Also, although the time between the initial detention and the statement was only 45 minutes, the atmosphere was congenial and the police conduct, although illegal, did not rise to the level of conscious or flagrant misconduct.

In *State v. Theriault,* 425 A.2d 986 (1981), the Maine court held that "[d]espite the giving of *Miranda* warnings, a confession may be involuntary not only when it is extorted from the accused by a threat but also when it is elicited by a promise of leniency. The promise must amount to more than a mere admonition or exhortation to tell the truth." 425 A.2d at 990. In the *Theriault* case, police officer's statements to the defendant, after *Miranda* warnings, that telling the complete truth would make him feel better or make people think more of him were in the nature of "exhortations" rather than promises of prosecutorial leniency. Nothing in the officers' statements, considered either by themselves or in the context of all the circumstances, amounted to an express or implied promise that if the defendant confessed, the law enforcement authorities would seek to invoke less severe penalties against him than if he did not. The defendant's statements were, therefore, admissible.

PRE-TRIAL IDENTIFICATION

In *State v. Doughty,* 408 A.2d 683 (1979) the Maine Court held that even though the photographic identification procedure used by the police was conducive to irreparable mistaken identification it did not create a substantial likelihood of misidentification, because the victim of the robbery was able to make a reliable identification based on his perceptions at the time of the crime. In that case an officer, before showing the photographic array to the victim, indicated that he knew who the assailant was. Also, after the victim selected the defendant's picture, another officer indicated that he had made a correct identification. Both of the actions of the officers were improper. Even though the identification in this case was found to be "reliable" for other reasons, officers should not risk losing valuable identification evidence by coaching victims or witnesses in any way. Officers must conduct all identification procedures fairly and impartially.

In *State v. Commeau,* 409 A.2d 247 (1979), an improperly conducted identification procedure resulted in the suppression of the identification evidence. In that case, soon after a robbery of a store, the police arrested the defendant at his home, brought him out of his house in handcuffs, and presented him to a witness who was sitting in a police car surrounded by officers and other police cars. The court found that the suggestivity of these circumstances was not counterbalanced by other factors indicating that the identification was reliable. The police should have conducted a lineup or, if doubts as to the identification needed to be resolved promptly, the police should have attempted to lessen the suggestiveness of the one-man showup.

In *State v. Baker,* 423 A.2d 227 (1980), the Maine Court held that photographic and in-person lineup procedures used by the police to investigate a bank robbery were not unduly suggestive. It is helpful to briefly describe those procedures to provide guidance for police in conducting identification procedures. All three photo arrays used by the police contained pictures of white males of reasonably similar age and facial characteristics and were fairly representative of people who might fit the defendant's general description. The in-person lineup likewise presented six white males of the same general age, build, and facial features, all having some facial hair. Furthermore, the police never showed the witnesses a photograph of the defendant alone; never commented on the witnesses' failure to identify anyone pictured in the first two photo arrays; did not indicate that the witness had made "correct" choices from the third photo array or the in-person line-up; and repeatedly cautioned both witnesses not to discuss the robbery or the photo arrays between themselves. The conduct of the police in this case may be considered as a model for the conduct of identification procedures.

In *State v. Furrow,* 424 A.2d 694 (1981), the Maine court held that the defendant was not entitled to the presence of counsel while a pre-indictment voice identification procedure was being conducted. The court reasoned that a voice identification procedure was no different than any other identification procedure with respect to the Sixth Amendment right to counsel.

The court also stated that it was proper for a law enforcement officer conducting a lineup to instruct witnesses that the perpetrator of the crime could have changed his appearance since the time of the crime. The court reasoned that such an instruction only called the witnesses' attention to the obvious and did not single out any person as the perpetrator.

SCIENTIFIC EVIDENCE

In *State v. Boutilier,* 426 A.2d 876 (1981), the Maine Supreme Judicial Court held that the expert testimony of a State Trooper relating to the speed of a vehicle as determined from tire marks on the road was inadmissible. The court reasoned that because the trooper disagreed with his instruction manual and used a method of determining vehicle speed other than that prescribed in the manual, his testimony lacked sufficient scientific reliability. The important advice for officers who qualify as experts in any field of scientific evidence is that they should follow instruction manuals *to the letter* when conducting investigations. If personal opinions are introduced or shortcut techniques are used, the test loses its scientific reliability in the eyes of the court and the expert testimony will be inadmissible.

In *United States v. Euge,* 444 U.S. 707, 100 S. Ct. 874, 63 L.Ed.2d 141 (1980), the U.S. Supreme Court held that the compulsion of handwriting exemplars was neither a search and seizure subject to Fourth Amendment protections nor testimonial evidence protected by the Fifth Amendment privilege against self-incrimination.

In two cases, *State v. Trafton,* 425 A.2d 1320 (1981) and *State v. Burnham,* 427 A.2d 969 (1981), the Maine Supreme Judicial Court reiterated its position that not only are the results of a lie detector test inadmissible, but a witness's expressions of willingness or unwillingness to take such a test are likewise inadmissible.

MISCELLANEOUS

In *State v. John W.*, 418 A.2d 1097 (1980), the Maine Supreme Judicial Court held that under 17-A M.R.S.A. §501(2) (Disorderly Conduct) taunting or insulting words which would have a direct tendency to cause a violent response by an ordinary citizen would not necessarily have a direct tendency to cause a violent response by a police officer. Since police officers are trained to exercise a higher degree of restraint than the average citizen, conduct directed toward a police officer "must be egregiously offensive, so offensive as to have a direct tendency to cause a violent response even from a police officer." 418 A.2d at 1106. In the *John W.* case, the offender, a juvenile, while engaged in the permissible activity of verbally protesting the arrest of his sister, directed foul language at the arresting officer. The court held that the juvenile's conduct was not so egregiously offensive and likely to provoke a violent response as to forfeit the defendant's constitutional right to freedom of speech. A law enforcement officer should not arrest for disorderly conduct unless words or actions directed towards him would have a direct tendency to cause a violent response by an ordinary police officer. Also, officers should remember that persons involved in an arrest have a constitutional right to argue, to object, or to protest the arrest.

State v. MacArthur, 417 A.2d 976 (1980) held that the requirement in 17-A M.R.S.A. §752-A (Assault on an officer) that the complaint "may only be brought by the chief administrative officer of the law enforcement agency in which the officer against whom the assault was allegedly committed is a member" is designed merely to assure some degree of impartial administrative review of a police officer's decision to initiate the criminal process. It does not require the chief administrative officer to initiate or participate in the grand jury proceedings leading to indictment for the offense.

Comments directed toward the improvement of this bulletin are welcome. Please contact the Criminal Division, Department of the Attorney General, State House, Augusta, Maine 04333.

ALERT

James E. Tierney — Attorney General
James W. Brannigan, Jr. — Deputy Attorney General
John N. Ferdico, Esq. — Editor

ALERT
Maine Criminal Justice Academy
93 Silver Street
Waterville, Maine 04901

BULK RATE
U.S. Postage
PAID
Permit #8
Augusta, Me.