

MAINE STATE LEGISLATURE

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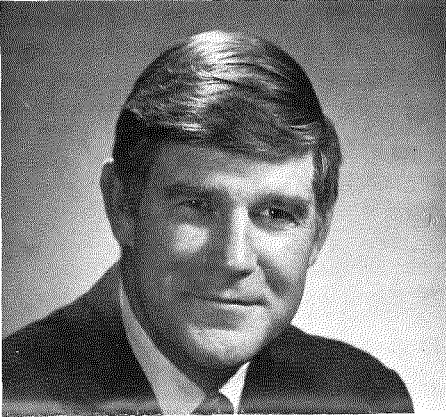
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ALERT

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

FEBRUARY 1971

CRIMINAL DIVISION



MESSAGE FROM THE ATTORNEY GENERAL JAMES S. ERWIN

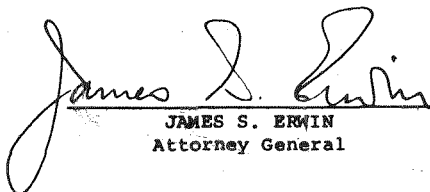
It has come to the attention of this Office that certain law enforcement personnel are unaware of the law regulating their duties with regard to the State Bureau of Identification. (Title 25 Section 1541-49).

Under this law, law enforcement officers are required to take fingerprints and/or photographs, of the following persons:

1. Any person in custody charged with the commission of a crime;
2. Any person reasonably believed to be a fugitive from justice;
3. Any suspicious person;
4. Any habitual criminal;
5. All unidentified dead persons.

Copies of the fingerprints and photographs must be furnished daily to the Supervisor of the State Bureau of Identification, 36 Hospital Street, Augusta, Maine 04330. Along with these, in the proper circumstances, should go a report of the way the crime was committed, the method of operation of the person arrested, and any psychiatric report or other pertinent information which may be necessary to keep the records of the State Bureau of Identification. The Bureau Supervisor in turn is required to compare this information with records already on file, furnish information to the proper officials on the criminal records of persons involved, and cooperate with similar bureaus throughout the nation. Furthermore, heads of all state, county, and local departments dealing with criminals are required to furnish the Bureau Supervisor with such information as will enable him to perform his duties.

Compliance with this law will make for a more effective state system of identification and thereby improved law enforcement in Maine.


JAMES S. ERWIN
Attorney General

CRIMINAL INVESTIGATION

In the January issue of ALERT, the discussion centered around suggested procedures for law enforcement officers in various situations involving bombs or bomb threats. This month's issue will deal only with the role of the law enforcement officer *after* an actual bomb has exploded. Of course, the most important considerations are the care and safety of those directly affected by the bombing and the prevention of further damage or injury. After this has been provided, the officer's main efforts will be directed toward the identification and apprehension of the person or persons responsible for the crime. Therefore, this article will deal with the basic techniques of searching the crime scene, gathering and preserving evidence, and conducting interviews with witnesses. Since these techniques are applicable to the investigation of any crime, the treatment here will be general rather than specifically directed toward bomb cases. However, where the investigation of a bomb case differs from the general discussion in such a way that it requires detailed discussion or emphasis, it will be so treated.

Investigation in General

Usually, at the first report of a crime, the investigating officer has no clear idea of what happened, how, why, or where it happened, or who did it. The purpose of the investigation is to answer these questions, and to obtain proof of the answers in the form of evidence admissible in court.

Obtaining this proof is similar to fitting together the pieces of a puzzle. The items will not be obtained by the investigating officer in any particular order and therefore the officer's method must insure that he collects all available "pieces" of the case. Therefore, an orderly procedure is absolutely required and this article will attempt to set out a step by step approach to criminal investigation.

However, before these detailed guidelines are set forth, a few preliminary considerations should be mentioned. First and foremost, the investigating officer must keep in mind at all times that the ultimate result of his investigation may be the determination of someone's guilt or innocence in court. Therefore, from the first report of a possible criminal offense, the investigating officer's thoughts and actions should be directed toward preparing a case for possible trial. This attitude will not only encourage meticulous care in the acquiring of evidence but also will save time and effort which might otherwise be wasted on irrelevancies.

Notebook

The importance of note-taking in investigating and preparing a case for prosecution should be stressed. Every officer should have a loose-leaf notebook with him at all times to keep a record of his activities. Accurate and complete notes are an aid in the preservation and identification of physical evidence, in preparing departmental reports, and may even be used to refresh the memory of the investigating officer on the witness stand at a subsequent trial. For these reasons, all facts in connection with an investigation should be accurately recorded - conversations with witnesses or suspects, what is observed, what physical evidence is recovered, where, by whom, and the time and date of each action.

There are a few basic note-taking techniques which will aid the investigating officer in keeping these records.

1. Notes must be legible, brief, complete, and accurate.
2. Notes should be made as soon as possible, i.e. while conducting the investigation and while the information is fresh in the investigating officer's mind.
3. Notes must be complete enough

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to answer the basic questions about a possible crime (who, what, when, where, why, how) and also to record the officer's actions, sense perceptions, and thoughts.

4. At a crime scene, all descriptive information should be recorded. This would include descriptions, locations, and positions of objects, and all relevant dimensions, distances, and measurements.
5. Enough notes should be made to fix the details of a crime permanently in the officer's memory. It is easier to discard unneeded notes than to try to recall something which was not written down at all through neglect or laziness.
6. Statements of all witnesses, victims, subjects, and suspects should be recorded fully along with their names and physical descriptions.
7. Any thing or person that is missing or unaccounted for should be carefully described.
8. Notes should be identified by the name of the officer, case number or file number, or some other effective means.

Camera

Besides a carefully kept notebook, another very useful tool is the camera. As a supplement to the investigating officer's notes, a series of photographs can convey aspects of a crime scene which cannot be adequately described in words. Careful photographs, taken from all angles in order to give a fair and complete representation of a scene, may be an invaluable aid afterwards in determining the guilt or innocence of an accused. It should be emphasized that the notebook and camera should be used together in order to be effective. More will be said about the uses of these investigative tools later in the article.

CRIME SCENE SEARCH

One of the most critical phases of criminal investigation is that involving preliminary investigation at the scene of the crime. It is at this stage that a case may be made or lost, depending upon the efficiency of the officers who conduct it. Generally, this type of investigation can be classified in four major categories.

1. Protection of the scene of the crime.
2. Recognition of the evidence.

3. Collection and preservation of the evidence.
4. Expert examination and evaluation of the evidence.

Protection of the Scene of the Crime

A crime scene may be defined as the place where a particular crime took place. It might be a room where a homicide occurred, a house in which a burglary was committed, or a building or portion thereof which has been bombed. The reasons for protecting a crime scene are to preserve evidence in its original condition and location, exclude unauthorized or unnecessary personnel from the scene, and prevent disappearance or tampering with evidence.

The following procedures are suggested for protecting the scene of a crime:

1. Proceed to the scene of the crime as soon as possible after being notified of its commission. Promptness in responding may prevent possible disturbance or destruction of evidence by witnesses or curious bystanders.
2. Immediately upon arrival at the scene, the officer or officers responsible for the investigation should exclude all unauthorized or unnecessary personnel from the crime scene, being careful at the same time to identify and segregate possible witnesses and suspects. No-one other than officers or officials with responsibilities relating to the investigation of the crime should be allowed upon the scene. This applies even to law enforcement officers of the investigating officer's own department who have no connection with the investigation.
3. The area and boundaries of the scene of the crime should be determined and blocked off accordingly. This may include an entire house and yard or, on occasion, might even include a whole city block. If so, the area should be roped off or barricaded and, if necessary, other officers should be employed to secure it. If the entire scene is inside a house, or a single room therein, doors and windows may be secured and an officer stationed at the door designated for entrance and exit.

NOTE: At the scene of a bomb explosion, there is a further factor to

be considered in protecting the scene for a search. The debris and standing structure of the building must be inspected and evaluated by building inspectors, fire marshals, and other trained personnel to insure the safety of all persons having official business in the bombed area. Particular attention should be directed toward supporting walls and damaged overhead structures which might collapse on search personnel. Gas accumulations and other materials which could produce secondary explosions in which personnel might be trapped or otherwise injured should be carefully assessed.

Recognition of Evidence

The term "evidence" can be defined as the means by which any alleged matter of fact, the truth of which is submitted to investigation, may be established or disproved. "Real" or "physical" evidence is that furnished by *things* — physical objects which can be viewed and inspected, as distinguished from "testimonial" evidence which is oral or verbal evidence given by witnesses.

After the scene of a crime has been secured, investigation should start immediately. The investigating officer must concern himself first with finding out what happened, which usually means interviewing witnesses and possibly other officers who may have arrived at the scene before him. The techniques of effective interviewing will be covered in the latter portion of this article.

From the information obtained in these interviews the investigating officer most likely will be able to determine what type of real evidence is pertinent and he can make a preliminary inventory of all objects found at a crime scene. He should remember that there almost always is evidence to be found at the scene of a crime and that part of his task is to recognize, collect and preserve it.

The investigating officer must also remember, as mentioned earlier, that the evidence he gathers at the crime scene may be used later at a criminal trial. Therefore, as an aid to recognizing evidence, he should evaluate the preliminary information he has received from witnesses and personal observations and attempt to determine what criminal charge or charges probably will be placed against the offender. He then should list the elements of each offense to be charged

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and compare his available evidence with the elements to be proved. Thus, he can determine what strengths and weaknesses there are in the evidence available at the moment and he can determine what directions to take in his subsequent investigation.

The investigating officer must use caution not to overlook any relevant piece of material. Even though he may think that some object which he uncovers is a minor article with no apparent bearing on the case, it later may prove to be a major evidentiary item. Therefore, even the most insignificant objects should be gathered, identified, and recorded. The following are some of the more common types of real evidence which may be found at the scene of a crime:

1. Blood or semen stains.
2. Fingerprint or footprint impressions.
3. Weapons or tools.
4. Shell casings.
5. Glass or wood fragments.
6. Hairs or fibers.
7. Debris, such as dirt and sand.
8. Clothing or pieces thereof.
9. Cigarette butts, packages, and matchbook covers.
10. Documents, such as suicide notes, checks, threatening letters, etc.

In the case of a bombing, the primary objectives of the search are to establish the nature of the bomb, the method of ignition, and other evidence which may assist in the identification and apprehension of the person or persons involved. Special attention should be directed toward the recovery of residues from the explosive material, parts of the ignition device, and the bomb container, location or placement of the bomb, method of entry into the building, and other factors dictated by the circumstances. In most cases involving high explosives, the location of the bomb at the time of detonation can be determined by a critical study of the fragmentation and the direction of the explosive forces, as noted from a study of various parts of the original structure recovered in the debris.

Collection and Preservation of Real Evidence

The actual picking up and carrying away of physical evidence at a crime scene is a process involving many considerations. Before anything else, the investigating officer should be aware that there may be Fourth Amendment search and seizure requirements to be met before search-

ing the scene. Discussion of these requirements may be found in the October and November issues of *ALERT*. Once these requirements have been satisfied, the investigating officer may find the following guidelines helpful in collecting the evidence:

1. Plan and organize the investigation.

An investigating officer should make a preliminary survey of the scene, determine what work must be done, and in what order. He should then check his equipment and be sure it is sufficient to do the job. This should be followed by a detailed examination of the scene, using care not to disturb or obliterate any evidence, and taking plenty of time to be most thorough.

2. Photograph the scene.

Before any physical objects are moved or examined minutely, the entire scene should be recorded on film. It is a good rule to take more photographs than seem necessary rather than too few. There are too many times in the courtroom when it has been found that additional photographs would have been helpful. A thorough photographic coverage of a scene often will call attention to matters that were missed in visual observation. It also can be of assistance in later study and reconstruction of the scene. It is suggested that, at the least, the following types of photographs be taken:

- (a) Photo of entry and exit.
- (b) Photo of point of attack (body, safe, cash drawer, etc.)
- (c) Overall photos of entire crime scene.
- (d) Close-up photos of all evidentiary items.
- (e) Overall views of the outside, showing entry and escape routes and general neighborhood surroundings. This would include a photo of the people standing around watching. They are potential witnesses or suspects.
- (f) Color photos of human bodies, if any, blood stains, and any other evidentiary items which show color.

Investigating officers should be aware that in order to have a photograph admitted in evidence at a trial, it is necessary that it be identified by a witness and be verified by him on personal knowledge that it is a true and accurate portrayal of its subject

matter. While it is not necessary that this witness be the photographer, he must have personal knowledge of the scene or object in question and be able to testify that it is correctly portrayed by the photograph.

For this reason, chalk marks, arrows, and other types of identifying markers should not be included in the original photographs of the scene of a crime. If it is felt necessary to accent certain places, areas, or things in a photograph, such as skidmarks, the place where a dead body was found, and the like, this can be done after all the necessary preliminary photographs of the scene have been taken. A second set of pictures then can be taken of the scene with the accent markers properly placed. In a bombing case, it is often useful to obtain photos and/or drawings of the structure before the bombing in order to aid in the reconstruction and selection of items for examination.

Identifying records should be made of each photograph taken, indicating the object photographed, date and time, direction in which the camera was pointed, distance, and lens settings. Each photograph taken should have a number and this number should be placed on the back of the print along with the case number.

3. Sketch the scene and make measurements.

A sketch of the scene of the crime should be made, showing in accurate perspective all items of evidence, furniture, doors, and windows. A large sheet of paper should be used if much area is involved. Usually an officer's notebook is not large enough for necessary details.

Each item in the sketch should be identified, the direction north shown, along with date, time and case number. A field sketch need not be a work of art but should be sufficiently accurate and detailed so that a scale diagram can be prepared from it if necessary for subsequent trial. The name and signature of the officer preparing the sketch should be at its bottom.

Accurate measurements should be made of all pertinent items, such as the size of a room, the length of skidmarks, the size of entry to a house or room, distances between objects, and the like. Every item also should be properly located by accurate measurements. These measurements may be made by triangulation, that

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is, by measuring to an object from two different fixed points. Also, it is important that all measuring instruments be checked over for accuracy.

4. *Collect all physical evidence.*

After records of the entire scene of the crime have been made by photographs, sketches, and notes, the collection of all items of real evidence should be accomplished. Different types of real evidence will require different procedures and containers for collecting them. It is beyond the scope of this article to go into detail as to the precise procedures for collecting each type of real evidence. Therefore, the following brief guidelines will have to suffice.

(a) Where fingerprint evidence may exist, collecting it should be done before collection of other items of evidence. Latent fingerprint impressions should be dusted, photographed, and then lifted.

(b) Real evidence like footprints, tire tracks, and tool marks, which cannot be placed in containers and carried away, should be photographed, and then casted or molded.

(c) Other evidentiary items should be picked up and placed in suitable containers. Extreme care must be taken that the container selected will adequately protect the evidence. As each item is picked up, it should be carefully examined and detailed notes made as to such things as size, color, shape, and location. Each item of evidence should be kept in a separate container to avoid confusing intermingling or possible contamination.

The officer who picks up any evidentiary item in this process should be responsible for its identification and submission for analysis or evaluation, in order to keep proof of the chain of identification to a minimum. It should be remembered that the fewer the persons who have handled a piece of real evidence, the fewer the witnesses who will have to take the stand to establish its identity. A good practice is to assign one man to be responsible for picking up evidentiary items.

5. *Identify and preserve all items of physical evidence.*

Each evidentiary item should be marked with the case number, time, and date, and the officer's initials, if space permits. On extremely small items, the officer's initials will suffice. It should be kept in mind that each item may have to be identified later

in court and this is one of the methods of doing it.

Items which cannot be marked, such as liquids, new clothing, valuable jewelry or antiques, and the like, can either have identification tags attached, or have the essential information contained in appropriate labels attached to their containers. Perishable items should be placed under refrigeration immediately. All liquids should be placed in sealed containers to avoid contamination and possible evaporation. All clothing and similar material which is damp from blood or other liquid stains should be air dried before packaging.

Extreme caution should be exercised as to the places where initials or other identifying marks are placed on items which are to be sent to a laboratory for processing. They should not be placed where they will adversely affect proper analysis or examination. As an example, a bullet to be sent into the laboratory for ballistic tests should not be marked anywhere but upon its base or nose, where comparison of land and groove markings will not be affected.

Real evidence should be stored in a place which is protected and safe and to which there is only controlled access. The whereabouts of evidentiary items, and many times, their conditions, from time of discovery until their presentation in court usually must be accounted for on the witness stand. If and when an item is removed by anyone from its designated storage place, he should be required to give a signed receipt showing the time, date, and reason for removal.

Expert Examination and Evaluation of the Evidence

Expert examination, analysis, and evaluation of most types of physical evidence found at the scene of a crime can be performed. However, all the preliminary steps of collection, identification, preservation, and packaging should be performed before an item of evidence is sent to the laboratory. Then, extreme care should be exercised in sending the evidence along.

Every package of evidence sent to the laboratory should be accompanied by a letter, a copy of which should be placed in the case file. The letter should contain the following information:

1. Type of crime and names of victims and suspects.

2. Description in detail of each piece of evidence sent, along with all pertinent facts which may be helpful in making an examination, analysis, and evaluation.

3. Type of service desired.

The following agencies provide laboratory services to law enforcement personnel in the State of Maine:

State

State Police Laboratory, 36 Hospital Street, Augusta, Maine 04330. This laboratory will render certain services free of charge to any law enforcement agency in the state. The services it offers are in the areas of photography, latent fingerprint work, firearms identification, crime scene searches, and any type of comparison work.

State Identification Laboratory, Department of Health and Welfare, State Office Building, Augusta, Maine 04330. This laboratory provides its services for a fee in the areas of drug identification, blood alcohol examination, and general toxicology.

Dr. Irving Goodof, Thayer Hospital, Waterville, Maine 04901. Dr. Goodof will provide services in the areas of blood identification and typing, hair comparison, and tissue examination. This laboratory is only available on a limited emergency basis. It should therefore only be consulted in significant cases when no other facility is available.

Federal

Federal Bureau of Investigation Laboratory, U.S. Department of Justice, Washington, D.C. 20535. This large criminal laboratory provides its services free of charge to any law enforcement agency in the country and will furnish technicians to testify in local courts concerning their findings. It will process any kind of evidence but will not handle anything that has been processed by any other lab.

INTERVIEWING

As was mentioned above, the interview with witnesses is often the way in which an investigating officer will obtain preliminary information about what happened at a crime scene and get an idea of what to look for in the way of real evidence. However, interviews are an important source information in themselves. In fact, testimonial evidence of witnesses in court is often as, if not more, effective in proving a case than the physical

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evidence collected at the scene. Therefore, it is essential that the investigating officer obtain as much information as possible from the interview.

Interviews should be conducted as soon as possible after the event in question, while facts and images are still fresh in the mind of witnesses. Too many times a witness's memory can be unduly influenced by the passage of time and discussions with other persons before his story has been pinned down.

The basic ingredient in an interview is to get the person interviewed talking. The officer obtains no information when he himself is talking. Strokes of brilliance and clever questions which "pay off" are rare. What is needed is a good basic technique, combined with persistence.

General Approach or Attitude

In order to make a good initial impression on the person interviewed, the investigating officer's appearance should be clean and neat, and he should attempt to avoid anything that would be offensive or distasteful to the interviewee (chewing gum, smoking a cigar, loudness, etc.). The officer's initial approach should be courteous and cordial in order to create a relaxed atmosphere. He should also convey an air of frankness and openness so the interviewee will not become unduly wary of trick questions or clever techniques on the officer's part. The officer must be patient and show an interest in both the person interviewed and the information given. He must also control his own emotions and not indicate his personal feelings and attitudes in such a way as to pass judgment on or intimidate a witness.

Preparation for Interview

Every interview requires some preparation. The amount of preparation in each case will depend upon the time available, the information at hand, and various other factors. In any case, the investigating officer should have in mind what information he wants from a particular interview. In a complex case, it may be desirable to make a list of the information to be sought. In a proper case and time permitting, the officer may even want to find out general information about the interviewee from relatives and friends before contacting him.

Physical Aspects of an Interview

The time of an interview should be carefully considered and an attempt should be made to gear it to

when the interviewee is least busy and is free to devote full attention to the interview. Whenever possible, it is the better practice to interview a witness in private, preferably in some neutral setting such as his home, office, or similar place where he more likely will be relaxed and feel comfortable. A police station usually is the least desirable place to conduct an interview. Also, it is generally best not to have relatives, friends, and telephones around so that the witness can talk freely without being overheard or interrupted.

Investigating officers should realize that all interviews are time consuming and they should not be impatient. A witness should be given plenty of time when being interviewed so that he can give his whole story in as much detail as possible. The best procedure is to let the witness tell the story in his own words and later narrow the questioning down to specifics, if and when necessary.

Notes should be taken during an interview unless it distracts the witness or appears to have an adverse effect on his willingness to talk. In such cases, the interviewing officer should have the witness tell his whole story and then go back over the main points and at this time take down notes. A statement may be prepared then, using the notes as a basis, to be signed by the witness. Sometimes, if available, it may be better to use a tape recorder in these situations.

All the while the officer is interviewing the witness, he should be carefully observing and evaluating him in order to properly weigh his statement and to assess his future value as a witness. Some of the things to look for during the interview are the physical and emotional condition of the witness, his mental ability and education, his experience, and his apparent prejudices or bias.

Different types of cases require different interviewing approaches and different kinds of questions. A bombing situation requires special consideration in regard to people questioned. First of all, everyone at or near the bomb scene when the police arrive should be interviewed in great detail as to suspicious activity on the part of persons in the area and facts on the explosion itself. Particular facts which should be elicited include:

1. Sound of the explosion.
2. Force of the explosion.
3. Color of the smoke.

4. Odor of gases produced.
5. Color of flame.

A saturation interview project should then be instituted throughout the neighborhood of the crime scene, immediately. It is essential to get the information while facts and circumstances are still fresh in people's minds. Also, since the bomb may have been placed hours before and activated by a time mechanism, persons who were in the area during an appropriate interval before the explosion should be asked about their observations. Finally, suppliers of explosives and sources of other materials used in the construction of a bomb should be contacted. The identities of suspicious purchasers may serve as investigative leads.

Interrogation

Some of the suggestions above concerning "interviews" are applicable also to interrogation of persons suspected or accused of having committed a particular crime. However, when a suspect or accused is in custody, i.e., under arrest or deprived by officers of his freedom of action in any significant way, the rules set forth in the U.S. Supreme Court's *Miranda* decision come into effect. They require that the person detained for questioning be advised of his right to remain silent; the fact that anything he says can be used as evidence against him in court; his right to have a lawyer present during questioning; and his right to have a lawyer appointed free of cost if he cannot afford one. Further discussion of the application of these rules is beyond the scope of this article and will be covered in detail in a future issue of ALERT.

Subsequent Investigation

After physical evidence has been gathered at the scene and available witnesses interviewed, further investigation most likely will be necessary to piece together loose ends and clear up cloudy information. This may involve finding further witnesses, sifting and evaluating clues, and running down leads. Each crime presents its own problems of investigation, but the following general suggestions may be helpful:

1. Screen the neighborhood of the crime scene for additional witnesses and other evidence.
2. Interview neighbors, relatives, and friends of victims and sus-

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pects in order to find out background information.

3. Circulate pertinent information to other law enforcement agencies, news media, and other possible victims, requesting their assistance.
4. Be on the alert for the commission of similar crimes, stolen vehicles, pawned articles, loose conversation, etc., which might lead to the identification of the guilty party.
5. Compare statements of witnesses and interview them again if necessary.
6. Maintain constant liaison with the prosecuting attorney for his assistance and counsel, particularly in matters pertaining to warrants, arrests, lineups, interrogation of suspects, and the filing of proper charges.

This last suggestion is probably the most important of those listed and deserves further comment. It ties in closely with the previously mentioned factor of always keeping case preparation in mind while investigating. Besides investigating the case carefully and thoroughly, and keeping in close communication with the prosecuting attorney, the most important thing investigating officers can do for the prosecutor is to efficiently organize their cases for court preparation. This includes all the suggestions discussed above such as note taking, photographing the scene, proper labeling and filing, etc.

However, one further step that will bring all this information together is the preparation of a case summary sheet for the use of the prosecuting attorney. On this sheet should be a listing of all witnesses and a brief statement of what they can testify about. Also, a concise summary of the facts of a case along with diagrams and brief descriptions of physical evidence should be included.

The case summary sheet should be forwarded to the prosecuting attorney prior to trial so that he may have ample time to study it and arrange for a pre-trial conference with the investigating officer and such other witnesses as he may desire. The purposes of such a conference usually are to:

1. Clear up uncertain or involved points.
2. Anticipate possible defenses.
3. Determine possible need for additional evidence.
4. Determine possible desirability of changing charge or filing additional charge.

5. Plan trial strategy.

After this, the investigating officer's final contact with a case will be his testimony in court, if he is called to testify. There are important suggestions and procedures concerning the officer's appearance in court also, but they are beyond the scope of this article. Again, a future issue of *ALERT* will be devoted to this topic.

Summary

The investigation of criminal cases is an essential step in the process of

apprehending and determining the guilt or innocence of an offender. An organized, careful, well-documented approach is the only way to insure that every clue is uncovered and every important piece of information is brought to light at a subsequent trial. This approach, together with close cooperation between law enforcement officers, prosecuting attorneys, and resources in the community, will ensure that the entire criminal justice system in Maine will operate more efficiently.

IMPORTANT RECENT DECISIONS

Note: Cases that are considered especially important to a particular branch of the law enforcement team will be designated by the following code: J - Judge, P - Prosecutor, L - Law Enforcement Officer.

Information Untimely Presented J

Although it sympathizes with a trial judge who was untimely presented at sentencing with important information somehow left out of the presentence report, the United States Court of Appeals for the Second Circuit finds reversible error in his refusal to hear it. The defendant, an 18 year old confessed bank robber, had two policemen in the courtroom to testify to his extensive and productive cooperation with the police, but every time the prosecutor or the defense counsel tried to interject statements about the cooperation — of which the presentence report said nothing — they were cut off in mid-sentence. Emphasizing the responsibility of the prosecutor to make sure that all material information is indeed timely presented to the court, the Second Circuit declares that the sentencing judge has the basic obligation to listen to and seriously consider any information material to litigation. One of the important functions of the prosecutor upon a sentence is to make sure that all information in his possession material to punishment and favorable to the accused is presented to the court and that the sentence is not based on mistakes of fact or faulty information. *United States v. Malcolm* (2d Circuit Court of Appeals, October 1970).

Grand Jury Secrecy J

An Ohio State court enjoined all 300 grand jury witnesses from making any public statements about the Kent State shootings. The witnesses brought a civil rights class action to prohibit enforcement of this injunction.

In granting relief to the petitioners, the court said that the state court injunction violated both the witnesses' right to speak and the public's First Amendment right to know about a topic of crucial, nationwide public interest. The state court injunction did not serve any of the traditional purposes of grand jury secrecy such as preventing improper influences on jurors and witnesses. Also, the injunction was overbroad in that previously established grand jury secrecy rules may prohibit a witness from divulging his testimony but may not prohibit him from divulging knowledge, insofar as he did not acquire that knowledge in the jury room. The court quoted the case of *Carroll v. Comrs. of Princess Anne City*, 393, U.S. 175 with approval.

"An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order. In this sensitive field, the state may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'"

U.S. v. Dellapia (2nd Circuit Court of Appeals, October 1970).

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Impartial Trial J

The State introduced evidence of a defendant's prior felony convictions, as a basis for the enhancement of his penalty in a burglary prosecution. The judge whom the case was before had previously prosecuted this same defendant in one of these prior felony trials. The defendant claimed a violation of his constitutional right to a trial before an impartial judge.

On appeal, the court decided that the mere participation of a judge in a prior conviction, the record of which was alleged for enhancement of punishment only, did not disqualify the judge from the case before him. However, the conclusion would have been different had the judge participated or shown actual prejudice in the very case before him. *Hathorne v. State*, (Texas Court of Criminal Appeals, October 1970).

Miranda Warnings Not Required in Non-Custodial Tax Investigation L

The Third Circuit Court of Appeals rejects the contention of defendant that once the Intelligence Division of the IRS comes into the picture, the taxpayer must be given full Miranda warnings. The court holds that the affirmative duties which Miranda imposes arise not because the defendant has become the focus of a potential indictment, but because the government has in some meaningful way imposed restraint on his freedom of action. The court does note that cases may arise in which the pressures exerted or promises made by Revenue Agents or Special Agents may make the statements of the defendant taxpayer actually involuntary. However, this is not such a case. *Jaskiewicz v. United States* (3rd Circuit Court of Appeals, October 1970).

Post Conviction Relief J

A manslaughter defendant, who pleaded guilty and received lesser punishment for a lesser offense than that for which he was charged, sought post-conviction habeas corpus relief. The petition was denied because defendant's assertions of error were unfounded and unproved. In its decision, the court expressed disapproval of defendant's frivolous petition and suggested that perhaps parole authorities should penalize unfounded applications for post-conviction relief, especially where untrue statements are made with knowledge of their falsity. *Renfrow v. Commonwealth* (Kentucky Court of Appeals, October 1970).

Pre-Trial Identification (Voice) JPL

The defendant sought habeas corpus relief, challenging his rape conviction on the ground that the station-house identification by the victim was suggestive and "conducive to irreparable misidentification." The court applied the *Stovall* "totality of the circumstances test" and found the following factors convincing in granting relief to the petitioner.

1. The victim was blindfolded at the time of the attack and could only identify her assailant by voice.

2. Police had told the victim that they had a suspect they wanted her to listen to and she was brought to the station in an expectant frame of mind.

3. The victim was allowed to listen only to the defendant's voice and no other voices were presented for comparison.

4. There were no emergency circumstances (such as a danger of the victim dying) to justify a hasty and objectionable identification process.

5. The victim was English and the court felt that where the identification was based only on voice, a special difficulty presented itself where the identifier was of a different nationality than the defendant.

Roper v. Beto (United States District Court for the Eastern District of Texas, September 1970).

Public Trial J

A juvenile defendant requested a completely private trial in a bomb case to avoid publicity. The judge allowed this request except for the admittance of certain members of the news media into the courtroom. On defendant's appeal from this decision, the court ruled that the constitutional right of a public trial runs to the public as well as to the individual defendant. The public has a right to know what is transpiring in its courts and to oversee their administration. *In Re Jones* (Illinois Supreme Court, October 1970).

Search and Seizure L

The court said that a warrantless inspection of motor vehicles limited to determining their serial numbers for purposes of identification is not search within the 4th Amendment and even if it were, it is a reasonable search. The police, however, must be rightfully on the premises where the cars are and must do no damage to the cars. *Johnson v. U.S.* (5th Circuit Court of Appeals, 1970).

Miranda — IRS

Having publicly announced a regulation requiring its special agents to warn taxpayers under criminal investigation of their right to counsel and their right to remain silent, the IRS must play by its own rules, the First Circuit holds. While *Miranda v. Arizona* may not require that such warnings be given at an investigation, the Due Process Clause requires that the IRS adhere to the standards of behavior that it has formerly and purposely adopted in the light of constitutional requirements — even if its standards may go somewhat further than required by the court. Under these circumstances, the court held that the agency had a duty to conform to its procedure, that citizens have a right to rely on performance, and that the courts must enforce both the right and duty. *United States v. Leahey*, (1st Circuit Court of Appeals, October 1970).

Police Didn't Coerce Confession by Showing Suspect Gory Evidence LJ

Defendant contends that psychological coercion was exercised by police in confronting her with a suitcase, thereby prompting her to make incriminating statements. The suitcase contained a bloody quilt and bedspread which defendant had left in a neighbor's closet sometime after the alleged murder, and that when confronted with the suitcase, she said "My God, don't open that." The court held that this was merely a confrontation of defendant with some evidence of the crime and her reaction thereto was spontaneous and obviously voluntary. Such a confrontation does not constitute coercion, for the police have a right to disclose evidence to an accused which they believe points to his guilt. *People V. Weinstein* (Illinois Supreme Court, October 1970).

Obscenity J

The court used the following language in ruling a certain book obscene:

"That the dominant theme of the book in question, taken as a whole, appeals to a prurient interest in sex, that the book is patently offensive because it affronts contemporary national community standards relating to the description or representation of sexual matters, that it is utterly without redeeming social value, and that these elements coalesce in the book."

Childs v. Oregon, (9th Circuit Court of Appeals, August 1970).

MAINE COURT DECISIONS

Note: Cases that are considered especially important to a particular branch of the law enforcement team will be designated by the following code: J - Judge, P - Prosecutor, L - Law Enforcement Officer.

Hostile Witness JP

Defendant had been convicted of robbery by stealing with force and violence. He appealed, claiming that the State was erroneously allowed to impeach its own witness. The witness in question had himself been indicted for the same crime but had been granted immunity to testify against defendant and another co-defendant.

On direct examination by the State, this witness's testimony differed from a prior statement he had made to a state police officer. The court granted the State's request to have the witness declared hostile, allowed the State to cross-examine the witness, and permitted his prior inconsistent statement to be introduced through the state police officer. The jury was instructed that the evidence of the prior inconsistent statement of the witness, testified to by the state police officer, was offered solely for the purpose of impeaching or discrediting the witness's testimony and was not to be given weight as bearing on the truth of what the witness had said on the prior occasion.

The Supreme Judicial Court found that it was within the discretion of the trial court to declare the witness hostile upon the state's request, and that there was no abuse of that discretion in this case. The court also found the trial court's instructions to the jury to only consider the prior inconsistent statements for impeachment purposes and not for the truth of the statements to be properly and clearly conveyed. *State v. Fournier*, Docket No. 606 (July 1970).

Sufficiency of Indictment JP

Petitioner had been convicted of assault and battery, sought post conviction habeas corpus relief, and appealed the denial of that relief. He had originally been indicted for rape but the state was granted a motion to dismiss all of that part of the indictment which charged in excess of assault and battery. Petitioner pleaded guilty to assault and battery and was sentenced.

In the habeas corpus petition, petitioner challenged the sufficiency of the indictment. The indictment read [defendant] ". . . did by force and against her will ravish and carnally know [victim] a female who had attained her fourteenth birthday." Petitioner argued that once the words "ravish and carnally know" were stricken from the indictment, there was insufficient language remaining to properly charge assault and battery.

The court said "The act of dismissing all of the indictment which charges in excess of assault and battery does not involve a physical striking out of printed words from the indictment. The indictment remains intact but the State no longer charges the Defendant with more than the necessarily included - and still remaining - charge of assault and battery which is implicit in the words "ravish and carnally know." The indictment charging the greater offense need not set out specifically all the essential averments relating to the lesser offense if they are necessarily included in the greater." *Wilson v. State*, Docket No. 616 (August 1970).

Indictment J - P

An indictment charging the defendant with reckless homicide read in part "after having consumed a certain quantity of intoxicating liquor." The court allowed defendant to have this passage struck from the indictment as surplusage. (Rule 7d [MRCP]). The words "certain quantity" fell far short of charging intoxication or impairment or influence due to alcohol, any of which might be an important contributing factor in a reckless homicide case. Without this passage, the indictment stated other facts which would effectively support a reckless homicide charge. The inclusion of the passage added nothing and could only inflame and prejudice a jury against the defendant. Furthermore, the indictment, with the disputed passage included, gave the defendant no notice or warning that the prosecutor would seek to prove impairment, intoxication, or influence as an element of the reckless homicide charge.

State of Maine v. Lester Grant, Law Docket No. 348 (June 1970).

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

ALERT

The matter contained in this bulletin is information for the criminal law community only. If there is any question as to the subject matter contained herein, the cases cited should be consulted. Nothing contained herein shall be considered as an Official Attorney General's opinion unless otherwise indicated.

Any change in personnel, or change in address of present personnel should be reported to this office immediately.

James S. Erwin	Attorney General
Richard S. Cohen	Chief, Criminal Division
John N. Ferdico	Editor

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