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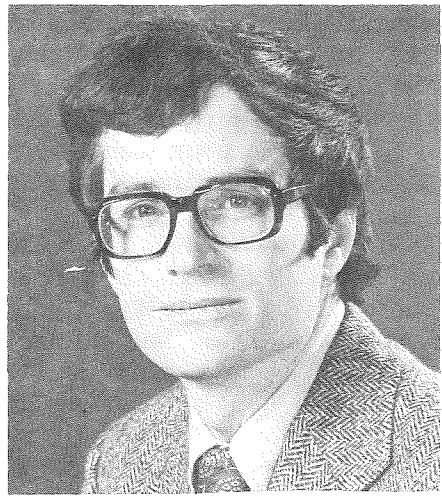
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JANUARY-FEBRUARY 1981

MAINE DEPARTMENT OF
THE ATTORNEY GENERAL

MAINE CRIMINAL
JUSTICE ACADEMY

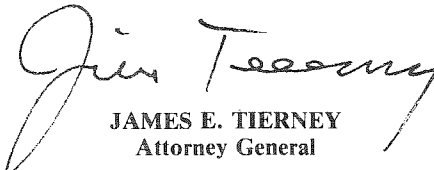


MESSAGE FROM THE ATTORNEY GENERAL JAMES E. TIERNEY

As Maine's new Attorney General, one of my major concerns will be the continued improvement of Maine's criminal justice system. I look forward to meeting and working together with criminal justice personnel at the state, county, and local levels to determine your needs and to help solve common problems.

Since the demands of my job will prevent me from personally contacting everyone, I intend to use the ALERT Bulletin as my primary means of communication with the criminal justice community. As you know, the writing and publication of the ALERT is entirely funded by subscriptions from law enforcement agencies and from individuals. I greatly appreciate the commitment and financial sacrifice that your past and present support represents and I hope it will continue during my tenure in office. I, in turn, will do everything within my power to maintain the publication of the ALERT on a regular basis.

Finally, I encourage you to send me your suggestions and comments for the improvement of the ALERT. By working together we can ensure that the ALERT will continue to provide relevant, up-to-date legal information for the entire criminal justice community.


JAMES E. TIERNEY
Attorney General

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HOMICIDE SCENE SEARCHES II

OTHER FOURTH AMENDMENT CONSIDERATIONS

As discussed in the November-December 1980 ALERT, the case of *Mincey v. Arizona* has resulted in the overruling of *State v. Chapman* and the abolition of the "homicide scene exception" in Maine. The rule established by *Mincey* is that the mere fact that a homicide has occurred does not authorize law enforcement officers to search the premises for evidence of the homicide without a warrant; to conduct such a search, a warrant must be obtained. However, in holding that there does not exist a "homicide scene exception" to the warrant requirement of the Fourth Amendment, the United States Supreme Court did *not* hold that police may *never* search a homicide scene without a warrant. Situations may arise when the law enforcement officers will be able to search a homicide scene for evidence without first obtaining a warrant. However, these situations are few, and officers should be very cautious in concluding that such a situation exists, because an erroneous determination may result in suppres-

sion of criminal evidence at the trial for murder or manslaughter. A decision to conduct a warrantless search of a homicide scene should never be made without the approval of the Attorney General's office. It is not only good practice to obtain legal advice before undertaking a warrantless search but, as will be discussed later in this article, approval of the Attorney General is required by statute.

Among the situations in which officers may search a homicide scene for evidence without first obtaining a warrant are the following:

1. **Public places.** If a homicide has occurred in a public place, there is no need to obtain a warrant to search the public place for evidence of the crime. This is because no person has an expectation of privacy in a public place and the Fourth Amendment does not apply to places in which persons have no expectation of privacy. Because the Fourth Amendment does not apply to such areas, the warrant requirement of the Fourth Amendment does not apply. Both *Mincey* and *Johnson* involved private

residences rather than public places. Nevertheless, it must be remembered that even though the Fourth Amendment may not prohibit a warrantless search of the public place, the statutory requirements prohibiting the removal of items from the scene in a medical examiner's case will still govern searches and seizures at the scene.

2. Private premises but no expectation of privacy. Even where the homicide occurs on private premises, the Fourth Amendment may not be violated by a warrantless search of the premises if the only person or persons who had a Fourth Amendment interest in the premises is the victim or victims. For example, assume that an elderly male resided in a trailer by himself and that at the time he was killed he had no guests staying with him. Since the elderly male was the only person who had an expectation of privacy in the trailer, a warrantless search would not infringe Fourth Amendment rights because the only person who had Fourth Amendment protection in the property would be dead. In such a case, a defendant would not be able to claim that evidence seized from the trailer without a warrant should be excluded under the Fourth Amendment exclusionary rule because the defendant, who had no expectation of privacy in the premises, would not be able to take advantage of the exclusionary rule at his trial. Therefore, when a homicide has occurred on private premises, law enforcement officers should quickly ascertain what persons lived on the premises or otherwise had an expectation of privacy in the premises.

3. Consent Search. If a homicide occurs on private premises, and a person who has a legitimate expectation of privacy in those premises voluntarily consents to a search of the premises, law enforcement officers may conduct a warrantless search of the

premises pursuant to the consent. An officer who intends to rely on a consent to search premises for evidence of a homicide should be sure that the consenting party in fact has the authority to consent to a search of each portion of the premises which is to be searched pursuant to the consent. (For a review of the law relating to consent searches, see Chapter III-B of the Maine Law Enforcement Officer's Manual.)

4. Search Incident to Arrest. When an officer makes a custodial arrest, he may make a warrantless search of the person of the arrestee and the area within the arrestee's immediate control. This same authority applies when the officer arrests a person at the scene of a homicide. Thus, at the scene of a homicide, facts of which an officer is aware may give him probable cause to believe that a person present at the scene committed the homicide. In such a case, the officer may conduct a warrantless search of the arrestee and the area within the arrestee's immediate control. (For a review of the law relating to the "search incident to arrest" exception to the warrant requirement, see the Chapter III-A of the Maine Law Enforcement Officer's Manual.)

5. Automobiles. Nothing in *Mincey v. Arizona* suggests that if the victim of a homicide is found in an automobile and someone other than the victim has an expectation of privacy in the automobile, that the *Carroll* doctrine would not apply to a search of the automobile if (1) the officer had probable cause to believe that the automobile contained evidence of the homicide and (2) it is possible that the vehicle could be moved before the officer returned with a warrant. Likewise, nothing in *Mincey* suggests that officers may not make an administrative inventory of the contents of an automobile which contains the victim of a homicide and which has been seized. (See

Chapter III-D of the Maine Law Enforcement Officer's Manual.)

6. Arson scenes. Occasionally, law enforcement officials will be summoned to the scene of a fire which is quickly determined to be the result of arson and in which a person has been killed. Special procedures relating to searches and seizures at arson scenes were set out by the United States Supreme Court in *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (U.S. Supreme Court, 1978). Under *Michigan v. Tyler*, law enforcement officials who arrive at the scene of an arson and discover at the scene a homicide victim may remain at the arson scene for a reasonable period and search for the cause of the fire. This authorization to remain at the scene for a reasonable period to search *for the cause of the fire* is permitted by *Michigan v. Tyler*, and is not prohibited by *Mincey v. Arizona*, because of the significant public interest in insuring that the fire does not rekindle. However, once the fire is fully extinguished and the cause of the fire is ascertained, any further search of the premises for evidence of the crime of arson or the crime of homicide may only be accomplished pursuant to a warrant.

The law enforcement officer should be familiar with each of the foregoing alternatives authorizing a warrantless search so that at a particular homicide scene the officer will be prepared to make an investigation to determine whether any of these alternatives can be relied on to authorize a warrantless search. In making such a determination, the officer must be very careful to insure that all of the facts needed to rely upon a given alternative are present. Before an officer conducts any warrantless search of a homicide scene relying on one of these alternatives, the officer must first obtain the approval of the represen-

tative from the Attorney General's office.

Once again, it must be remembered that even though a warrantless search of the homicide scene may be permitted under one of these theories, any such search is still subject to the requirements and prohibitions of the statutes pertaining to medical examiner cases. These statutes will now be discussed.

STATUTORY PROVISIONS

In addition to the requirements of the Fourth Amendment governing searches and seizures of items at homicide scenes, law enforcement officers must also be aware of statutory provisions governing such searches and seizures. In Maine, these statutes are contained in the "Medical Examiner Act," 22 M.R.S.A. §§3021-3033. Although the provisions of the Act were discussed at length in the May-June 1977 Alert, the Act was substantially amended in 1979, after the Alert article had been written.

The purpose of this portion of this article is not to explain all of the provisions of the Maine Medical Examiner Act or to discuss fully all of the procedures to be followed by law enforcement officers in medical examiner cases. This portion of the article will discuss only those provisions of the Maine Medical Examiner's Act which pertain to the seizure of evidence at homicide scenes. Each of the relevant sections of the Act will be quoted in its entirety and will be followed by an explanatory comment.

The statutes mandating or prohibiting police conduct with respect to evidence at homicide scenes are the following sections of the Maine Medical Examiner's Act:

22 M.R.S.A. §3026. Reports of Death.

* * *

4. Cases involving criminal violence. Any law enforcement officer or medical examiner who has become aware of a death involving criminal violence, or in which criminal violence is suspected, other than by motor vehicle, shall immediately notify the Attorney General and the Chief Medical Examiner.

The Attorney General's office must be notified because under 5. M.R.S.A. §200-A the Attorney General has full responsibility for the direction and control of all investigation and prosecution of homicides in the state. When an officer encounters a homicide scene, after checking the victim, ascertaining the need for aid, and conducting the security check, his next step must be to notify the Attorney General and the Chief Medical Examiner. This notification is ordinarily accomplished by the officer's communicating the fact of the homicide to the Maine State Police, which agency in turn will notify the Attorney General and the Chief Medical Examiner.

22 M.R.S.A. 3027. Procedure at Scene of Death

1. Except as otherwise provided in this section.

A. In any medical examiner case no person shall move or alter the body or any objects at the scene of death prior to the arrival, or without the express authorization of the medical examiner or Office of the Chief Medical Examiner;

* * *

C. In any medical examiner case in which criminal violence other than by motor vehicle is suspected, no person shall move or alter the body or any objects at the scene of death prior to the

arrival, or without the express authorization, of the Attorney General or his authorized representative.

2. Preservation or removal of the body. In any medical examiner case where the body is in danger of being destroyed or lost, or the location of the body renders it a serious threat to the safety or health of others, any person may take whatever steps are reasonably necessary for the retention or preservation of the body prior to the arrival or authorization of the medical examiner or Office of the Chief Medical Examiner, provided that such person shall first, whenever practicable, exactly mark the location and position of the body.

* * *

3. Procedures. Before removal of the body as provided in subsection 2, the law enforcement officer shall whenever possible arrange for photographs, measurements and a record of the location and position of the body.

Where the death is suspected of involving criminal violence other than by motor vehicle, the procedure in this subsection shall be undertaken with the supervision of an authorized representative of the Attorney General.

In all medical examiner cases in which criminal violence other than by motor vehicle is suspected, the procedure in this subsection may be waived concurrently by the Chief Medical Examiner and the Attorney General or his authorized representative.

* * *

Section 3027 (1) (A) and (C) prohibit law enforcement officers and other persons from moving or altering the body, or moving or

altering any objects, at the scene of an apparent homicide without express approval of the Attorney General's office and the medical examiner. This statute is designed to ensure that when the medical examiner and trained homicide detectives arrive at the scene, the scene will still be undisturbed so that these officials will be better able to determine the cause of death. Moreover, the prohibition against moving the body or objects at the scene will permit photographs to be taken which will depict the scene precisely as it was first discovered. Under section 3027 (1) (C) the officer who arrives at the homicide scene may not move the body or items at the scene during his initial entry into the premises, during his examination of the body (except as is necessary to determine if the victim is still alive), or during the security check of the premises. Therefore, although it may be constitutionally permissible for the law enforcement officer to seize items lying in plain view and subject to seizure under the plain view doctrine because they are evidence of an unlawful homicide, such seizure is prohibited by the statute without the express authorization of the Attorney General's office.

Also, the law enforcement officer must be aware that §3027 (1) (C) provides that "no person" may move the body or objects at

the scene. Because the prohibition against the movement of the body or objects applies to *all* persons, not merely law enforcement officers, the statute imposes the duty on the law enforcement officer who first arrives at a homicide scene to secure the premises to prevent other persons from moving the body or objects at the scene. This securing of the premises, of course, will occur after the officer has examined the victim, conducted his own security check of the premises, and notified the Attorney General and the Chief Medical Examiner of the occurrence of the homicide.

Section 3027(2) contains an exception to the prohibition in section 3027(1) (C) against moving the body at the scene of the homicide, because in certain situations the body must be moved as soon as possible either for purposes of public health and safety or to preserve the body itself. Section 3027(2) provides that in any medical examiner case (deaths attributable to criminal violence are included among the medical examiner cases) in which the body "is in danger of being destroyed or lost, or the location of the body renders it a serious threat to the safety or health of others" the officer may move the body or take whatever other steps are reasonably necessary to preserve the body prior to the arrival of the medical examiner. Of course, such

movement of the body should occur only when absolutely necessary, and whenever possible the officer should obtain authorization from the Attorney General's office or the office of the Chief Medical Examiner. Furthermore, if it is necessary to move the body in order to preserve it from destruction or harm, or to protect the public health or safety, the removal should be done in such a way as to cause the least amount of alteration to the body and the scene. Additionally, section 3027(2) provides that when an officer has determined that the public health and safety or the need to preserve the body requires that the body be moved before the arrival of the medical examiner, the officer must, whenever practicable, "exactly mark the location and position of the body." This requirement of marking the location is designed obviously to assist the medical examiner in determining the cause of death when he is unable to view the body exactly where it was found.

This article will be concluded in the next issue of ALERT.

The matter contained in this bulletin is intended for the use and information of all those involved in the criminal justice system. Nothing contained herein is to be construed as an official opinion or expression of policy by the Attorney General or any other law enforcement official of the State of Maine unless expressly so indicated.

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