

MAINE STATE LEGISLATURE

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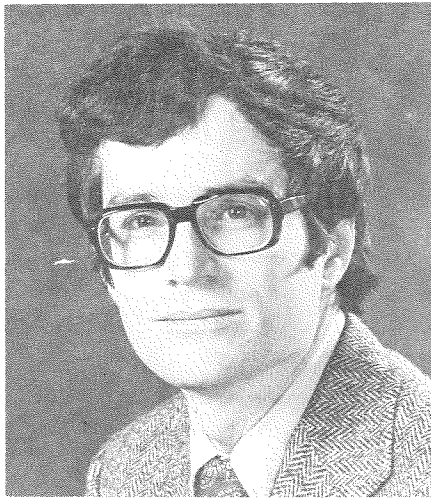
MARCH-APRIL 1981

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ALERT

MAINE DEPARTMENT OF
THE ATTORNEY GENERAL

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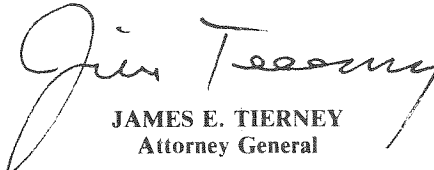


MESSAGE FROM THE ATTORNEY GENERAL JAMES E. TIERNEY

I would like to take this opportunity to announce that James W. Brannigan, Jr. of Augusta, Maine has been appointed as Deputy Attorney General in charge of the Criminal Division of the Attorney General's office, effective April 13, 1981. Mr. Brannigan brings a broad range of experience to the job, having been a federal prosecutor for 14 years, serving in New York, California, and Maine. He also served as interim United States Attorney for Maine in 1979 and 1980 and as an Assistant Attorney General for Maine in 1976 and 1977.

John S. Gleason, former Deputy Attorney General in charge of the Criminal Division will remain with this office in the Civil Division and will handle civil litigation.

Finally, I would like to express my appreciation to those departments and agencies which recently subscribed to ALERT and helped bring us closer to our goal of maintaining the publication on a self-sustaining basis. Departments and agencies that intend to renew their ALERT subscriptions this fall should make sure that sufficient funds for this purpose are allocated in their budgets for next year.


JAMES E. TIERNEY
Attorney General

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HOMICIDE SCENE SEARCHES III

This is the concluding article in the series on homicide scene searches. Because the discussion of the Medical Examiner Act in the last issue of ALERT ended in the middle of an explanation of 22 M.R.S.A. §3207, subsection 3 of that section will be reproduced again here to aid in the continuity of that discussion.

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(3) imposes additional requirements on the law enforcement officer who has determined that a body must be moved prior to the arrival of the medical examiner in order to preserve the body or to protect the public health and safety. Section 3027(3) requires that before the body is moved the officer must, whenever possible, arrange for (1) the body to be photographed in the exact location where it was found, (2) measurements to be taken with respect to the exact location where the body was found, and (3) a record to be made of the location and position of the body where it was found. Although this subsection permits the requirement of photographing and diagramming to be waived concurrently by the Chief Medical Examiner and the Attorney General's office, if these procedures are not waived the statute requires that the photographing procedure be "undertaken with the supervision of an authorized representative of the Attorney General."

22 M.R.S.A. §3028. Investigation autopsy

1. Authority to conduct investigation. The medical examiner shall have authority to conduct an investigation of the cause and manner of death in a medical examiner case. He shall immediately proceed to the scene and, subject to the authority of the Attorney General, assume custody of the body for the purposes of the investigation, and shall retain custody until the investigation has been completed or until the Chief Medical Examiner has assumed charge of the case.

* * *

3. Assistance of law enforcement agency. The medical examiner, or the pathologist as described in subsection 9, may request the assistance and use of the facilities of the law enforcement agency having jurisdiction over the case for the purposes of photographing, fingerprinting or otherwise identifying the body. That agency shall provide the medical examiner or pathologist with a written report of the steps taken in providing the assistance.

* * *

Section 3028(1) requires that upon being notified of an apparent homicide the medical examiner must proceed immediately to the scene. Under this provision, the medical examiner is given power, subject to the authority of the Attorney General, who has the ultimate authority for the investigation and prosecution of homicides, to assume custody of the body for purposes of the investigation of the cause and manner of death. Because the medical examiner is not equipped to carry out all phases of the investigation into the cause and manner of death (e.g., fingerprinting,

photographing, etc.), the medical examiner must be empowered to enlist the assistance of law enforcement personnel to carry out these functions. Section 3028(3) provides this authorization. Under section 3028(3), if requested to do so by the medical examiner, the law enforcement agencies having jurisdiction over the case must provide assistance and use of their facilities to the medical examiner "for the purposes of photographing, fingerprinting or otherwise identifying the body." Section 3028(3) also contains a reporting requirement, requiring the agency to submit to the medical examiner a written report of the steps taken in providing the assistance requested by the medical examiner.

An examination, both of these statutes which relate to the seizure of evidence at homicide scenes and of the constitutional principles discussed in the first part of this Article, illustrates the complexity of the investigation in homicide cases. Crucial, on-the-spot decisions must be made which involve constitutional, statutory, medical, and investigative considerations. Ordinarily neither the law enforcement officer, the prosecuting attorney, nor the medical examiner is trained to make *all* of the necessary determinations at a homicide scene. Consequently, cooperation among the three agencies is required. By requiring this cooperation, the provisions of the Medical Examiner Act are designed to prevent loss or destruction of critical evidence and avoid the suppression of evidence at trial.

PROCEDURAL GUIDELINES FOR HOMICIDE SCENE SEARCHES

The law enforcement officer who arrives at the scene of a homicide, therefore, must be

mindful of both constitutional and statutory limitations on his authority to search for and seize evidence. Additionally, he must avoid any conduct or action, such as premature moving of objects or destruction of latent fingerprints, which may alter the scene and hinder the determination as to the cause of death or the identity of the perpetrator. To assist the law enforcement officer in understanding the interrelationship of these considerations, this part of the Article will present suggested procedural guidelines setting forth a step-by-step approach to the initial investigation of a homicide scene.

These guidelines are intended to apply to the ordinary situation. There will, of course, be situations which require a deviation from one or more of the suggested guidelines. It must be remembered that by statute the Attorney General is given ultimate authority over the investigation and prosecution of homicides. Consequently, with respect to *any* homicide the officer must first check with the representative of the Attorney General's office to ascertain the precise procedure to be followed for the seizure of evidence or other investigative activity at a homicide scene.

1. When the law enforcement officer has probable cause to believe that within private premises is a person who is the victim of a homicide or who is in need of immediate aid, the officer may and should enter the premises to examine the person.
2. After entering the premises, the officer should:
 - a. Check to see if the person is alive, and if necessary, summon medical assistance immediately; and

- b. conduct a security check of the premises for other victims and for the perpetrator(s) (examining only those places in which victim or perpetrator might reasonably be found).
3. During the entry into the premises and the security check, the officer:
 - a. should, if possible, make a mental note of any items lying in plain view which may constitute evidence of a crime;
 - b. should **not** search for items of evidence; and
 - c. should **not** seize or disturb items of evidence lying in plain view, but should leave this task to a trained evidence technician.
 4. After completing the security check and if there is evidence a homicide has occurred, the officer should:
 - a. notify the State Police (who will in turn notify the Attorney General's office and the office of the Chief Medical Examiner) of the occurrence.
 - b. secure the premises.
 5. Upon arrival at the scene, the "primary investigator" of the homicide should:
 - a. question the first officer(s) at the scene as to his observations;
 - b. observe the body and the immediate scene to confirm the existence of criminal conduct;
 - c. perform an additional security check if there is reasonable indication that the check performed by the first officer at the scene was not sufficiently thorough;
 - d. **not** search for items of evidence;
 - e. examine, without seizing or disturbing, evidence lying in plain view; and
 - f. ascertain, if possible, the identity of the person or persons who had a Fourth Amendment protected interest in the premises.
6. After arrival at the scene, the the "primary investigator", in consultation with the representative of the Attorney General's office, should:
 - a. determine whether the victim(s) was the only person who had an expectation of privacy in the premises, and, therefore, whether there is a need to obtain a warrant to search the premises. If there is any question as to whether the victim(s) was the only person with a Fourth Amendment protected interest, a warrant should be obtained;
 - b. determine whether to attempt to obtain a voluntary consent to search the premises from a resident or occupant of the premises, after ensuring that the individual has a Fourth Amendment interest in the premises sufficient to authorize the person to consent to a search; and
 - c. if it is determined that someone other than a victim may have an expectation of privacy in the premises and that a consent to search cannot be obtained, determine whether any "plain view" evidence should be seized immediately by technicians or whether, in the exercise of caution, a warrant should be obtained for its seizure; and
 - d. determine what, if any, search for latent fingerprints should be conducted before a warrant is obtained.
 7. As soon as is practicable, areas and items in plain view should be photographed and diagrammed.

This concludes the series of articles dealing with homicide scene searches. Law enforcement officers should become very familiar with homicide scene procedures because at any time an officer may be called to the scene of a potential homicide and will be required to act quickly and decisively. He will be required to know and apply not only the procedures discussed in this series of articles relating to searches and seizures of physical evidence, but also the various other procedures applying to medical examiner cases. Failure to carefully adhere to these procedures may result in irreparable damage to an entire homicide investigation and prosecution.

Although this series of articles has attempted to provide a comprehensive discussion of homicide scene search procedures, no set of laws or guidelines can cover every situation which may arise at a potential homicide scene. Therefore, when an officer is uncertain about how to proceed, he should obtain the advice of a representative of the Attorney General or the Chief Medical Examiner.

MAINE COURT DECISIONS

SELF-INCRIMINATION

B §3.2 Exercising the Privilege LAW ENFORCEMENT OFFICERS M §2

The Portland Police Department conducted an internal investigation into the alleged use of excessive force by several police officers in making arrests at a civil disturbance. Each officer investigated was told that a failure

to answer questions could result in disciplinary action. Relying on the City's promise of maximum possible confidentiality contained in its contract with the police union, each officer answered questions put to him. Authorized police summaries of the interviews were given to the press, but the press requested access to the complete transcripts. The press based its request upon section 408 of the Maine Freedom of Access Act, 1 M.R.S.A. §401 et seq. (1978) which read in pertinent part:

"Except as otherwise provided by statute, every person shall have the right to inspect and copy any public record during the regular business hours of the custodian . . ."

Section 402(3) of the Act, however, defined "public records" to exclude:

"B. Records that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this state in civil or criminal trials if the records or inspection thereof were sought in the course of a court proceeding;" (hereinafter referred to as Exception B)

The affected officers immediately sought a preliminary injunction against public disclosure of their statements, contending that the investigatory records fell within Ex-

ception B to the Freedom of Access Act because use of those records as evidence in a criminal trial against them would be barred by their Fifth Amendment privilege against self-incrimination. The preliminary injunction was denied and they appealed.

The Law Court found that the threat of "disciplinary action" was sufficient to constitute coercion of the officers to testify because the threatened penalty "reasonably appears to have been of sufficient appreciable size and substance to deprive the accused of his 'free choice to admit, to deny, or to refuse to answer.'" (400 A.2d at 344). Since the Fifth Amendment forbids any use of such a coerced statement in a criminal proceeding against the person forced to make the statement, the entire statements of the officers would be within the scope of their Fifth Amendment privilege against self-incrimination. The court also found that Exception B to the Freedom of Access Act encompassed those records of subject matter that would be subject to the Fifth Amendment privilege against self-incrimination if sought to be used as evidence in a criminal trial. Finally, the court found that the confidentiality clause of the contract between the city and the policeman's union required more than merely closing

sessions at which interrogation of police officers is conducted; it also required protection for any transcript made of the interrogation. The court therefore held that the city must, upon the police officers' demand, maintain the confidentiality of the statements they made in the disciplinary investigation of their role in the civil disturbance. *Moffett v. City of Portland*, 400 A.2d 340 (Maine, April 1979).

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

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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