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Minutes of the Meeting of the  
New York State Temporary  
Commission on Revision of the  
Penal Law and Criminal Code,  
held at 155 Leonard Street,  
New York, New York, at 10:00 a.m.  
on Friday, February 15, 1963.

Present: Richard J. Bartlett, Chairman  
Timothy N. Pfeiffer, Vice Chairman  
Nicholas Atlas  
Howard A. Jones  
William Kapelman  
Herbert Wechsler  
Richard G. Denzer, Chief Counsel

Joseph F. Czechlewski, Representative of the  
Speaker of the Assembly

Stanley J. Reiben, Representative of the  
Minority Leader of the Assembly

Benjamin Altman, Representative of the  
Minority Leader of the Senate

Robert Bentley, Representative of the  
Senate Committee on Finance

William Bulman, Assistant Counsel, Judicial  
Conference

Excused: John J. Conway, Jr.  
Philip Halpern  
William Mahoney  
Donald Zimmerman, Representative of the  
Majority Leader of the Senate  
Samuel J. Kearing, Jr., Representative of the  
Majority Leader of the Assembly  
Joseph Kunzeman, Representative of the Assembly  
Ways and Means Committee

John R. Kelligrew, Assistant Counsel  
Peter J. McQuillan, Assistant Counsel

Also Present: Arnold D. Hechtman, Assistant Counsel  
Charles E. Torcia, Assistant Counsel  
Peter Preiser, Associated Counsel

The meeting was commenced at 10:00 a.m. by Chairman Bartlett

Bartlett: "While waiting for Professor Wechsler, it  
might be well for us to discuss the matter  
of amending the two-stage trial bill. Apart  
from the question of the effective date and  
its applicability...to crimes committed after  
its effective date, we wanted to make it

Bartlett: completely clear that there's no burden of proof in the second stage proceeding...In connection with the two-stage trial, they (the District Attorneys' Association) are generally in accord...They wanted to make sure that there's no burden of proof..."

(Chairman Bartlett then read line 22, page vi, of the Interim Report: "4. The proceeding shall be conducted in the same order as in the trial of an indictment as provided in section three hundred eighty-eight of the code of criminal procedure.")

Bartlett: "Their feeling is that judges will be inclined, in the absence of an express statement that it is not so, [to require the people to establish that the death penalty be imposed]... The District Attorneys' Association doesn't want to be in the position to have to urge the jury..."

Pfeiffer: "What is the issue here that you have to find the burden of proof for?"

Denzer: "That's the trouble...there is no issue... Some judges will be confused..."

Pfeiffer (to Denzer): "How can we meet it?"

(Mr. Denzer, in reading line 22, 4, page vi, of the Interim Report, suggested that subdivision 4 be amended to include

the following language: "...no burden of proof shall rest upon either party.")

Pfeiffer: "...I don't think it does any harm..."

Denzer: "That's the way it is..."

(The Chairman at this point introduced Benjamin Altman, representative of Senator Zaretski.)

Altman: "Actually, there's no burden of proof here... the District Attorney is through after his conviction..."

Denzer: "I don't think there's any harm if we put that in...It'll make them (District Attorneys' Association) feel better."

(Judge Kapelman concurred with Chairman Bartlett--to include "burden of proof.")

Denzer: "If the District Attorney doesn't want to push it, he doesn't have to."

Czechlewski: "In other words, if he (District Attorney) walks away from it, what happens?"

Bartlett: "The jury then decides...If either side wants to put something in front of the jury, they can."

Denzer: "There's one thing that bothers me, in the preceding subdivision: '...the proceeding shall be conducted in the same order'...I

Denzer: don't know what it implies to the District Attorney."

Jones: "We have to go farther--to say that either party can introduce whatever evidence they wish."

"The District Attorney must open...We don't want to leave it to inference...why should he be obligated to do it."

(Chairman Bartlett here reiterated for Professor Wechsler that the District Attorneys met with the Codes Committees and were fearful that judges may presume a burden of proof on the People.)

Kapelman (to Wechsler): "There should be no burden of proof upon either party (put this in the first sentence)."

Wechsler: "...It seems to me that if they're in doubt, impose the death penalty...It follows as a kind of corollary."

Denzer (to Wechsler): "Are you favoring or sponsoring any provision?"

Wechsler: "I'm not favoring anything; I'm just stating a problem."

"Suppose there's a controversy in the second stage as to whether the defendant was the person who was convicted of burglary in Illinois in 1961...That's putting the burden

Wechsler: on the proponent...after the District Attorney has submitted his evidence."

Denzer (to Wechsler): "Are you implying that there should be burden of proof (put) on the People?"

Wechsler (to Denzer): "...Maybe it's not politic to try to draft the position..."

Denzer: "As long as you can't get a standard here... I'd be in favor of including it...If you're leaving it blank, you're avoiding the problem completely...If you are in favor of imposing the burden on the people..."

Wechsler: "There are two kinds of burden: (1) evidence; and (2) persuasion."

Denzer: "In a regular trial, you start with the presumption of innocence which puts the burden of evidence on the People."

Wechsler: "Forget the jury trial...Take the instance of sentence: The judge is obtaining information on the background of the defendant... Doesn't the judge presume that there isn't a bad history...Doesn't the judge act on this?"

Pfeiffer: He (judge) certainly presumes he's a first offender..."

Kapelman (to Denzer): "Shouldn't the burden be on the State, if it's seeking a more severe penalty?"

Denzer: "There you start with a certain starting point..."

Kapelman: "The defendant doesn't want to die..."

Denzer: "The State would have to do something..."

Pfeiffer: "That's what we have now: 'The Court shall charge the jury!...'"

Denzer (to Kapelman): "I agree with you intellectually, but I want to prevent disagreement."

Jones: "Why isn't it enough to say that either party may introduce evidence?"

Wechsler: "Let's try to change that sentence [in §388 of the Code]."

Pfeiffer: "Couldn't we say that the court shouldn't charge the jury at all?"

Altman: "...What if we eliminate the first sentence entirely?..."

Wechsler: "Suppose we say the court shall determine the proceeding."

Bartlett: "The difficulty in referring to §388, apart from who opens, is that the District Attorney is under some obligation to press for the death penalty...This is the question they raise; they don't want to be put in that position."

(Chairman Bartlett then inquired as to whether or not there is any question about order in the California and Pennsylvania statutes. Mr. Torcia consulted the Pennsylvania and California statutes.)

Wechsler: "The thing they're worried about will not be a practical problem."

Bartlett: "It's nothing to prevent his making a statement to the jury."

Wechsler: "I think that we should change that first sentence: 'The proceeding shall be conducted in such order as the court shall direct...'"

Kapelman (to Wechsler): "Doesn't this put the burden on the defendant?"

Wechsler: "I think the burden should be put on the defendant."

Denzer: "If it were up to the court, ask the District Attorney if he has any evidence he wants to present. Then, ask the defendant if he has any evidence he wants to present..."

Wechsler (to Denzer): "I don't think that matters, Dick (as to who presents evidence first)."

Denzer: "We do, in our bill, start with the premise that life imprisonment is the basic penalty..."

Bartlett (to Denzer): "But that may have been shown in the case in chief, Dick."

Pfeiffer: "What do you think the action of the District Attorneys would be to Herb's suggestion?"

Denzer: "I think it would alleviate their fears somewhat."

Kapelman: "What if you eliminate the first sentence entirely?"

Wechsler: "...It would be taken to mean that the right to open and close is the same as the case in chief."

Pfeiffer: "To bring it to a head, I move that we eliminate the first sentence."

Kapelman: "I second that." (And leave nothing.)

Bartlett: "Before we take a vote on that, may I call your attention to an early draft that the staff presented on this question? (See page 6--closing arguments.) I think there's something to be said for that."

Kapelman: "The California statute makes no mention of the burden of proof..."

Bartlett: "It may well have been that the burden of proof was established in an earlier case."

Pfeiffer: "In §§2 and 3, you talk about proof..."

(Mr. Denzer indicated that in subdivision 3 there should be a statement that there is no burden of proof on either party.)

Bentley: "Might I suggest, Mr. Chairman, that you don't give away all of your trading bait?"

Bartlett: "...Might we say that I might effect such amendment to the bill at such time as it may be necessary?"

Wechsler: "I don't see why you have a problem on the specific request that there should be no burden of proof...It seems to me that we can easily convince them (District Attorneys' Association) that this would be more trouble than help..."

Bartlett: "I think that the District Attorneys' Association would be satisfied by the amendment."

Wechsler: "I think it would be an improvement to take the sentence out (first sentence of subdivision 4, of the Homicide bill)."

(Mr. Pfeiffer was in accord with Professor Wechsler.)

Pfeiffer: "Apart from that [sentence], the District Attorneys are in favor?"

Bartlett: "Yes, they are in favor of the bill."

"We're agreed that this sentence will come out."

Denzer (to Bartlett): "The staff would like to discuss subdivision 6, the appeal provision of the Homicide bill, on page vii [of the Interim Report]."

Denzer: "We've discussed this a great deal. The more we've discussed it, the less we like it...It makes a kind of game on this...The first year, there will be a problem with the Court of Appeals. Undoubtedly, there will be a great number of reversals...on technical points...If the defendant's lawyer can raise a number of points, he's 'home free' on the sentencing, at least."

(Judge Kapelman here interjected: "He still has life imprisonment to contend with." Judge Kapelman also noted a case in which a man can be tried a third time on a common law murder charge.)

Denzer: "...Have it mandatory that he conduct a second proceeding."

(At this point, Mr. Denzer commented to Professor Wechsler that he thought that the way it stands now, a defendant could be sent back to face a sentence of life imprisonment.)

Wechsler: "...Mapp made this point: Such a provision would mean to...support by Breitel...persuaded those who wanted that provision for humanitarian reasons...Here, the appellate court would know conviction that the <sup>^</sup> /was solid and in any event, this only applies when the appellate court finds an error (in the sentence stage)...I think if

Wechsler: we've got a solid conviction, we should worry less about this."

Jones: "Here, you're precluding the Court of Appeals from sending back the defendant after a second-stage proceeding."

Wechsler: "Have there been any objections by others to this provision?"

Bartlett: "I haven't heard any."

Kapelman: "I move that we adhere to the provisions of this section."

Wechsler: "...If it's changed, I think that it should be discretionary with the Court of Appeals... not in the trial court."

Bartlett: "I want to have a pretty good idea as to what the desirable alternative is (based on the Commission's opinions)" [so that he can make the changes before the bill reaches the Legislature].

Bentley: "It seems to me in the second stage that the defendant has had an opportunity to say what he wants to say in his own behalf...The Court of Appeals has this record...If they feel there has been any error, they can read the record."

Bartlett: "The last thing I want to discuss is the effective date. Howard and I worked it out that the effective date shall be July 1, 1963 and that the procedure shall govern all capital cases commenced on or after July 1, 1963. We did not discuss its applicability as to the commission of the crime at all."

Denzer (to Bartlett): "You would make it applicable to all cases commencing on or after July 1, 1963?"

Bartlett: "Right."

Denzer: "This new procedure may or may not be favorable to the defendant...But here we have the peculiar thing that some defendants may regard it as unfavorable--a 2nd felony offender may want the old procedure."

Wechsler (to Bartlett): "You don't like this proposal, Mr. Chairman?"

Bartlett: "No, this is a staff proposal (Proposed Amendment to Commission's Two-Stage Bill)."

Bentley: "I'd like to refer to the Loretto Case..."

Kapelman: "...I don't think so; the trial had commenced after...That's what he (Bentley) said: If he were tried in May, would he get the benefit immediately?"

Atlas: "Has anybody paid any attention to the Query"

Atlas: at the bottom of the page?"

Bartlett: "I don't think we can get into that. I haven't said that we can't consider another date besides July 1st: That's in the bill."

Atlas: "Is there some real trouble about the Query at the bottom of the page?"

Denzer: "If there is any problem, let the court wrangle this out."

(The Members here discussed the fact that there hasn't been a first degree murder trial in New York City for many months.)

Wechsler: "I think after you get into trial progress, the option to have either the new or the old procedure gives the defendant a terrific weapon (for changing the nature of the proceeding)."

Denzer (to Wechsler): "On the main point, do you like the idea as it's stated before you, to give the defendant his choice?"

Wechsler: "I do. I would like to see §12 acceptable to the Office of the Governor at the earliest date...hoping it would take place immediately."

(The Chairman here solicited comments from Mr. Jones.)

Jones: "My only question is the question of notice to the Bench and Bar. We have to assume that

Jones: the bill is not going to be discussed in all circles until it's signed...It changes the long-standing rule in reference to the scope of psychiatric testimony. This bill will be signed and held over the bill period."

Bentley: "I don't think we should use the words 'to take place immediately' in this bill."

Bartlett: "As a practical matter here, this bill is likely to be signed at the end of April. Can we leave this point at this: That we'll make the necessary amendments to generally follow the suggestions in §11 of this proposal, as it is in the staff proposal, and it will remain July 1st, 1963 unless the Governor's Office indicates an earlier date is acceptable to them...In capital cases, you don't have to worry about generally informing the Bar."

(The Chairman then turned the meeting to a discussion of the proposed Insanity bill.)

Bartlett: "May we come to a discussion on our proposal to replace McNaughton? It's evident, Gentlemen, that we're going to have a real scrap on this. Last Monday, the District Attorneys' Association met with the Codes

Bartlett: Committees of both houses...They claim to be opposed to our bill to amend McNaughton. The claim of the District Attorneys' Association seems to be that: (1) McNaughton may need amending; (2) that we've made no real effort to assess the experience in other states that have the A.L.I. rule; we can point to no case of recent vintage in New York State where the defendant would have been acquitted with our rule. Of course, I'm simply relating to you what was said."

Wechsler: "Who was there?"

Bartlett: "Frank D. O'Connor (Queens County); John M. Braisted, Jr., President (Richmond County); John Casey (Rensselaer County); John J. Conway, Jr. (Monroe County); Isadore Dollinger (Bronx County); John T. Garry, 2d (Albany County); ? Smith (Suffolk County); ? Darrigand (Oneida County); Henry DeVine (Chief Assistant District Attorney, Nassau County); Benjamin Jacobson (Assistant District Attorney, Queens County); Alex Wilsey; ? Blumenfeld; Richard H. Kuh. I'm not offering a single one of these arguments as what we should be persuaded by...I'm only

Bartlett:            stating it...It's a very large group; they had a lot to say. I would judge that there were a dozen District Attorneys plus an assortment of Assistants.

"Let me get to the point raised by Jack Conway: Jack is concerned that the trend in the District of Columbia under Durham will happen under the A.L.I. rule, on the ground that the psychiatrist will say that the defendant does have a mental disease and will be excused. The Durham rule isn't that different from ours that we won't have the same trouble as they're having in the District of Columbia. This is something that we have to develop. Following this meeting, they discussed the matter with both Julius Volker and John Hughes, the Chairmen of the two Codes Committees. They thought there was some real merit in another hearing being held by them."

Wechsler:            "I do, too."

Bartlett:            "I'm in complete accord, and I think we should do a job of getting witnesses to appear--one of whom should be the author of this rule: Professor Wechsle<sup>r</sup>."

Bartlett: "I think we have to flush out our opposition. Let me have Dick [Denzer] relate what we've been doing with Illinois."

Denzer: "...Illinois has been having this for one year now. At Herb's suggestion, I got in touch with Professor Solomon [of the University of Chicago]...Harold was very accommodating. He sent me a letter with a list of names, including one district attorney, a list of judges, etc., to whom we might speak to. There haven't been that many cases in Illinois-- about six--but the general feeling is that things are going along there just as they were before."

Bartlett: "...meaning, the same number of convictions when the defense of insanity was raised. I think we may have to get some people to come here."

Wechsler: "David Acheson, U. S. Attorney for the District of Columbia...He's allied with us with respect to adopting the A.L.I. formulation in lieu of the Durham rule; Oliver Gash..."

(Mr. Denzer here mentioned a letter which he had received from Hon. F. Ray Keyser, Superior Judge and Chancellor of Vermont, concerning the Vermont statute dealing with the defense of

insanity, and including a copy of the Judge's charge to the jury in the case of State v. Hood. Mr. Bartlett mentioned that he had written to Judge Keyser.)

Kapelman: "What about getting someone from Vermont?"

Bartlett (to Wechsler): "The real difficulty with Richard Kuh in this area (McNaughton)...is that there is one line in the hearing transcript which leads him to believe that you didn't read his proposal."

Bartlett: "No date's been set for it: I think it would most likely be on a Wednesday...the earliest I think would be two weeks from Monday..."

Wechsler: "March 4th and March 5th."

Bartlett: "I have one particular suggestion that we should do some work with the County and State Bar committees--particularly the State."

(Judge Kapelman suggested enlisting William Mahoney. Professor Wechsler suggested Court of Appeals Judge Fuld.)

Denzer: "John Kelligrew said there are about five cases."

Bartlett: "He's getting that together for me?"

(Mr. Bentley here suggested another witness: Paul Shannahan, Esq., of Syracuse.)

Bartlett: "With the five District Attorneys of New York City opposed to this..."

Wechsler: "They're divided."

Bartlett: "There seems to be no opposition from the other offices..."

(Chairman Bartlett then suggested circularizing all the legislators after the hearing.)

Bartlett: "The Assembly vote on this bill was 100-13. My judgment now is that we ought to consider the element of time."

Denzer: "Harold Solomon suggested we talk to Frank Allen on this. He's in Michigan."

Bartlett: "We have to determine definitely whether a hearing will be held and where."

Kapelman (to Reiben): "There will be no hearing on the two-stage bill."

Bartlett: "I also suggested that the staff ought to scan the file for judicial approval."

(Chairman Bartlett here suggested possible witnesses from the Department of Mental Hygiene.)

Bartlett: "I'd rather have Paul Hoch as a witness."

(Professor Wechsler suggested Dr. Lawrence C. Kolb, Director, New York State Psychiatric Institute; and several professors of the Committee of the New York State Psychiatric Association.)

Bartlett: "Does Judge Cardozo express some dissatisfaction with the Schmidt Case?"

(Professor Wechsler also suggested Manfred S. Guttmacher, M.D., Chief Medical Officer of the Medical Service of the Supreme Bench of Baltimore as being the best witness for the insanity hearing.)

(Chairman Bartlett asked for a discussion on the capital punishment report.)

Torcia: "I've worked out an outline...I can have a rough draft by the second week in March."

(Mr. Denzer thought there would be some inconsistency in having this issued.)

Wechsler: "...It would seem to me that our timing is terrible...I don't think we influence public opinion by a document which is a re-write of other documents. The real alternative that we should consider is that the real issue is the consideration of the abolition of the death penalty for New York."

Bartlett: "I think we're going around in circles on this--I don't think we were firmly wedded to the proposition that this report should be submitted to the Legislature before the end of the session. It strikes me that we can get all the available data we need on capital punishment within the next two to three months...can be done by May 1st."

Wechsler: "I think the important thing is the report, not the date."

Bartlett: "We can start with the record of capital convictions: (1) What sort of person was involved; and (2) What was the nature of the crime."

Bentley: "We've agreed that any report we issue now will be useless for the 1963 Legislature?"

(The Commission Members agreed with Mr. Bentley.)

Bartlett (to Torcia): "Let's start with New York County--How many murder indictments in the past few years?"

(The total number of indictments for Murder-1 and Murder-2 in New York State for the years 1960 and 1961 is 491.)

Bartlett: "Let's summarize and say that we're going to complete the job as soon as possible."

(Judge Kapelman proposed that the Commission should take a definite stand on the abolition of capital punishment.)

Bartlett: "Let's hope we'll have a good report by the first of April--or the first of May."

(Mr. Denzer indicated that he had received a statement from Peter McQuillan, from a meeting of the Police Chiefs, District Attorneys and law enforcement agencies: They have come up with three bills which they hope to get through the Legislature. He mentioned that Frank Hogan said at a recess that he hoped

that the Commission would endorse this "package." The three bills are: (1) Bill similar to Uniform Arrest Act which would permit policemen to stop a person on the street when he has reasonable grounds to suspect that the person has committed a crime. If the man does not answer questions properly, then he may be detained for two hours for questioning; (2) Another bill deals with the arrest provision which in felony cases a policeman can make an arrest--this bill would conform misdemeanor arrests to felony arrests--when the officer has reason to believe that a crime was committed in his presence; (3) Search warrant provision: a policeman can get a warrant signed by the magistrate. The policeman doesn't have to announce himself.)

Jones: "There is a problem here, because each one of these bills was introduced last year."

Bartlett: "In the event these three bills get through the Legislature, and the Governor asks our opinion, then we'll speak."

(Chairman Bartlett then asked Peter Preiser to discuss his sentencing study.)

Preiser: "The first phase of the sentencing study has been fully completed. You haven't received the last one-third of it because the staff has been tied up on other matters. You have received the section on fines; and 'good time'

Preiser:           earned upon serving the maximum of sentence. The starting point here would be to divide the crimes into various degrees--the category system already devised by the Commission--then, the question is terms. I'll have to discuss with the Commission the question on general design (i.e., the validity of continuing the distinction between penitentiaries and county jails. Article 7-A, which is the New York City indeterminate term, is going to be a thorny problem because there is a heated controversy going on now in New York City. The City Commissioner would like to see that provision abolished."

Bartlett:          "How much do we have to decide tentatively in fixing the categories of felonies?"

Preiser:            "I'd like to submit this in a memorandum."

Bartlett:          "If the framework you're going to recommend to us fits the framework of our present constitutional setup, then we have no problems."

Preiser:            "Then, of course, the Commission can make comments."

Bartlett:          "Then you propose to get up a memorandum proposing an outline for the framework of your sentencing structure?"

Preiser: "We'll have basic problems to deal with, including suspended sentences and consecutive and concurrent sentences."

Pfeiffer: "Don't forget, we'll have to look at the Correction Law..."

Preiser: "I've consulted the Correction Law."

Bartlett (to Preiser): "Pete, can you outline the categories and then the number of grades for misdemeanors (and felonies)."

Wechsler:(to Preiser): "Also, give us your opinions on parole."

Preiser: "The Governor in his memorandum of approval, in re the 'good time' statute, [stated] that the ruling by legislative commissioners is 'arbitrary and capricious.' The Governor has asked us to pay particular attention to that. The Department of Correction has credited the 'good time' against the statute."

(It was agreed by all the Members to draft a resolution in honor of the late Herman Bass, to be sent to his family.)

The Meeting was adjourned sine die at 1:45 p.m.

Respectfully submitted,

Rita Cheren

AN ACT

To amend the code of criminal procedure, in relation to grand jury reports

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The code of criminal procedure is hereby  
I 2 amended by inserting therein a new section to be section two  
T 3 hundred fifty-three-a, to read as follows:

4 §253-a. Grand jury reports.

A 5 1. The grand jury, upon concurrence of twelve  
L 6 or more of its members, may submit to the court for which it  
I 7 was impanelled, a report:

8 A. Concerning ~~non-criminal~~ misconduct, non-  
C 9 feasance or neglect in office by a public officer  
I 10 or employee; or

11 B. Stating that after investigation it finds  
L 12 no grounds for recommending disciplinary or re-  
I 13 moval proceedings against a public officer or  
T 14 employee; or

A 15 C. Proposing recommendations for legislative  
L 16 or executive action in the public interest based  
I 17 upon stated findings of a general and objective  
L 18 character.

I 19 2. The court to which such report is submitted  
C 20 shall examine it and the minutes of the grand jury and, except

21 ~~as otherwise provided in subdivision three or four hereof~~, shall  
S 22 <sup>and</sup> file such report as a public record if <sup>only</sup> the court is satisfied  
I 23 that:

24 A. The report is the result of an investiga-  
25 tion authorized by section two hundred forty-five  
26 or two hundred fifty-three of this code, and is  
27 supported by credible and legally admissible  
28 evidence; and

*Change of language to be made*

*Advised*

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*was in fact presented in the Court*

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B. When the report is submitted pursuant to paragraph A of subdivision one hereof, each person named therein was afforded an opportunity to testify before the grand jury prior to the filing of such report; and

C. When the report is submitted pursuant to paragraph B or C of subdivision one hereof, it is not critical of an identified or identifiable person.

3. Upon the filing of a report pursuant to paragraph A of subdivision one hereof, ~~the court shall order it sealed and it shall not be subject to subpoena or public inspection, except upon order of the court.~~ However, the court shall direct the district attorney to deliver a true copy of such report, for appropriate action, to the public officials who have disciplinary or removal authority over each public officer or employee criticized therein.

*moved by Ralph [unclear] by Michael*

4. Upon the filing of a report pursuant to ~~paragraph B or C~~ of subdivision one hereof, if the court finds that the filing of such report as a public record may prejudice fair consideration of a pending criminal matter, it shall order such report sealed during the pendency thereof, and it shall not be subject to subpoena or public inspection, except upon order of the court.

*after Michael*

§ 2. This act shall take effect immediately.

1 his defense, the proceedings against such defendant shall be resumed  
2 as if no examination had been ordered.

3 } When a psychiatrist who has examined the defendant testifies  
4 } concerning his mental condition at the time of the conduct charged  
5 } to constitute a crime, he shall be permitted to make a statement as  
6 } to the nature of his examination, his diagnosis of the mental condi-  
7 } tion of the defendant and his opinion as to the extent, if any, to  
8 } which the capacity of the defendant to know or to appreciate the  
9 } wrongfulness of his conduct or to conform his conduct to the  
10 } requirements of law was impaired as a result of mental disease or  
11 } defect at that time. He shall be permitted to make any explanation  
12 } reasonably serving to clarify his diagnosis and opinion and may be  
13 } cross-examined as any other witness <sup>as to</sup> including any matter bearing  
14 } on his competency or credibility or the validity of his diagnosis or  
15 } opinion.

16 } A statement made for the purposes of examination or treatment  
17 } to a psychiatrist designated pursuant to the provisions of section  
18 } six hundred fifty-nine by a person subjected to psychiatric examina-  
19 } tion or treatment shall not be admissible in evidence against him  
20 } in any proceeding on any issue other than that of the existence of  
21 } mental disease or defect, but such statement shall be admissible  
22 } whenever it has a direct bearing on such issue whether or not it  
23 } would otherwise be deemed to be a privileged communication. In  
24 } no event shall any such psychiatrist, or any other person present  
25 } during the psychiatric examination conducted by that psychiatrist,  
26 } testify in any criminal proceeding to a statement made by the  
27 } defendant during the course of the psychiatric examination, which

1 *statement relates to the criminal conduct charged or to any prior*  
2 *criminal conduct, unless the defendant or his counsel elicits such*  
3 *testimony.*

4 § 2. This act shall take effect September first, nineteen hundred  
5 sixty-two.

Proposed Amendment to Commission's  
Two-Stage Bill

§11. This act shall apply to a prosecution for murder in the first degree or for kidnapping committed on or after the effective date of this act. When such a crime has been committed prior to the effective date of this act, the provisions of law in effect at the time such crime was committed shall apply to a prosecution for such crime as if this act were not in force. When, however, the trial of an indictment charging a crime committed prior to such effective date has not commenced, the defendant, at any time prior to the commencement of trial, may elect, in open court and upon the minutes, to have the provisions of this act apply, in which event this act shall be applicable to the case.

§12. This act shall take effect

Query: Should consideration be given to extending the right of election to a defendant whose trial is in progress on the effective date? If so, should the right be absolute or discretionary in such a case?

DRAFT 7

ARTICLE 94

HOMICIDE

§ 1040. Definitions

Homicide. Homicide is the killing of one human being by the act, procurement or omission of another.

Excusable homicide. Homicide is excusable when committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with ordinary caution, and without any unlawful intent.

Justifiable homicide. Homicide is justifiable when committed by a public officer, or a person acting by his command and in his aid and assistance:

1. In obedience to the judgment of a competent court; or,
2. Necessarily, in overcoming actual resistance to the execution of the legal process, mandate or order of a court or officer, or in the discharge of a legal duty; or,
3. Necessarily, in retaking a prisoner who has committed, or has been arrested for, or convicted of a felony, and who has escaped or has been rescued, or in arresting a person who has committed a felony and is fleeing from justice; or in attempting by lawful ways and means to apprehend a person for a felony actually committed, or in attempting by lawful ways and means to apprehend a person for a crime actually committed, when the circumstances are such that one would have reasonable

cause for believing the committed crime was a felony, or in lawfully suppressing a riot, or in lawfully preserving the peace.

Homicide is also justifiable when committed:

1. In the lawful defense of the slayer, or of his or her husband, wife, parent, child, brother, sister, master or servant, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony, or to do some great personal injury to the slayer, or to any such person, and there is imminent danger of such design being accomplished; or,

2. In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling or other place of abode in which he is.

Criminal homicide. Criminal homicide is homicide which constitutes murder, manslaughter or criminally negligent homicide as defined in this article, and which is neither justifiable nor excusable. A homicide which is either justifiable or excusable does not, regardless of any other factors, constitute murder, manslaughter or criminally negligent homicide.

Criminal negligence. A person who creates a substantial and unjustifiable risk of human fatality, does so with criminal negligence, within the meaning of this article, when he should be aware of that risk but fails to perceive it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his failure to perceive it involves a gross deviation from the standard of care that a reasonable person would observe in

his situation.

Recklessly. A person who creates a substantial and unjustifiable risk of human fatality, does so recklessly, within the meaning of this article, when, though aware of that risk, he consciously disregards it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his disregard thereof involves a gross deviation from the standard of care that a reasonable person would observe in his situation.

§ 1041. Murder

A person is guilty of murder when:

1. With design to kill another person, he causes the death of such person or of a third person, except when the crime constitutes manslaughter as defined in subdivision three of section ten hundred forty-four.
2. Under circumstances evincing a depraved indifference to human life, he recklessly causes the death of another person.
3. Either alone or in concert with others, he commits or attempts to commit a felony and, in the course of and in furtherance of such crime or of the immediate flight of the perpetrators thereof or any one of them, one or more commits an act [involving a grave risk of human fatality]\* which causes the death of a person other than one of the perpetrators; [except that it shall constitute an affirmative defense to a prosecution under this

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\*Alternatives:

1. inherently dangerous to human life;
2. which he knows to be dangerous to human life;
3. likely to cause serious physical injury [either directly or through the operation of fear or fright].

subdivision, which defense must be established by a preponderance of the evidence, that a defendant

(a) did not commit the homicidal act, nor aid, abet, induce, counsel or procure it in such fashion as to render him a principal therein, and

(b) did not carry any weapon [capable of inflicting serious physical injury] or know that any of his confederates carried such a weapon, and

(c) did not contemplate that either he or any confederate might commit an act [involving a grave risk of human fatality].]

Alternative Subdivision 3

[3. Either alone or in concert with others, he commits or attempts to commit a felony and, in the course of and in furtherance of such crime or of the immediate flight of the perpetrators thereof or any one of them, one or more commits an act [involving a grave risk of human fatality] which causes the death of a person other than one of the perpetrators, and when, in addition, the actor

(a) is the person who commits the homicidal act or aids, abets, induces, counsels or procures it in such fashion as to render him a principal therein, or

(b) carries a weapon (capable of inflicting serious physical injury), or

(c) knows that a confederate is carrying such a weapon, or

(d) contemplates that he himself might, under certain circumstances or eventualities, commit an act (involving a grave risk of human fatality), or

(e) contemplates that a confederate might, under

certain circumstances or eventualities, commit an act (involving a grave risk of human fatality).

It shall be presumed that a person participating in such a felony enterprise, though not in the homicidal act, (a) contemplated that one or more of his confederates might, under certain circumstances or eventualities, commit an act or acts (involving a grave risk of human fatality), and (b) knew that any confederate carrying a weapon (capable of inflicting serious physical injury) was so armed.]

§ 1042. Punishment for murder;  
plea of guilty to murder  
with a sentence of life  
imprisonment

1. Murder is punishable by life imprisonment, unless the death sentence is imposed as provided in section ten hundred forty-three.

2. With the consent of the court and the district attorney, a defendant indicted for murder may plead guilty to murder with a sentence of life imprisonment, in which case he must be sentenced accordingly.

3. When a defendant has been found guilty of murder after trial, the court shall impose the sentence of life imprisonment if it is satisfied that: (a) the defendant was under eighteen years of age at the time of the commission of the crime; or (b) the sentence of death is not warranted because of substantial mitigating circumstances.

§ 1043. Determination of sentence  
for murder

1. When a defendant has been found guilty of murder after trial, and such verdict has been recorded

upon the minutes, it shall not thereafter be subject to reconsideration by the jury.

2. Unless the court imposes the sentence of life imprisonment pursuant to subdivisions two or three of ten hundred forty-two, it shall, as promptly as practicable, conduct a proceeding to determine whether defendant should be sentenced to life imprisonment or to death. Such proceeding shall be conducted before the court sitting with the jury that found defendant guilty unless the court for good cause shown discharges that jury, and impanels a new jury for that purpose.

3. In such proceeding, evidence may be presented on any matter relevant to sentence including, but not limited to, the nature and circumstances of the crime, defendant's background and history, and any aggravating or mitigating circumstances. Any relevant evidence, not legally privileged, shall be received regardless of its admissibility under the exclusionary rules of evidence.

4. The proceeding shall be in the same order as in the trial of an indictment as provided in section three hundred eighty-eight of the Code of Criminal Procedure. The court shall charge the jury on any matters appropriate in the circumstances, including the law relating to the possible release on parole of a person sentenced to life imprisonment.

5. The jury shall then retire to consider the penalty to be imposed. If the jury report unanimous agreement on the imposition of the penalty of death, the court shall impose the sentence of death. If the jury report unanimous agreement on the imposition of the penalty of life imprisonment, the court shall impose the sentence of life imprisonment. If, after the lapse of such time as

the court deems reasonable, the jury report themselves unable to agree, the court shall discharge the jury and shall impose the sentence of life imprisonment.

6. On an appeal taken by the defendant from a conviction where the judgment is of death, the court of appeals, if it finds substantial error in the sentencing proceeding only, may set aside the sentence of death and remand the case to the trial court, in which event the trial court shall [impanel a new jury to determine the sentence] [either impose the sentence of life imprisonment or impanel a new jury to determine the sentence] [impose the sentence of life imprisonment].

§ 1044. Manslaughter

A person is guilty of manslaughter when:

1. With design to inflict serious [severe, substantial, appreciable] physical injury upon another person, he causes the death of such person or of a third person; or,
2. He recklessly causes the death of another person; or,
3. With design to kill another person, he causes the death of such person or of a third person under circumstances which would constitute murder under subdivision one of section ten hundred forty-one except that the crime is committed (a) under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse, the reasonableness thereof to be determined from the viewpoint of a person in the actor's situation under the circumstances as the actor believes them to be, or [(b) under an unreasonable misapprehension of fact concerning the circumstances at the time of the

*mandatory: must be present if jury is*

*discharge jury and in its discretion either impanel a new jury or impose a life imprisonment*

killing, which misapprehension would have, if reasonable, rendered the killing justifiable pursuant to the definition of that term contained in section ten hundred forty.]

Alternate:

[(b) under a mistaken belief at the time of the killing that the circumstances were such that, if they existed, they would justify or exonerate the killing under the principles of justifiable homicide as defined in section ten hundred forty, but the belief is unreasonable.]

4. With intent to kill an unborn quick child, he injures the mother and thereby causes the death of such unborn quick child; or,

5. With intent to procure the miscarriage of a woman, whether she is actually pregnant or not, he provides, supplies or administers to her, or advises or procures her to take, any medicine, drug or substance, or uses or employs, or causes to be used or employed, any instrument or other means of aborting her, and thereby causes the death of such woman or of any quick child of which she is pregnant, except that this subdivision shall not apply to the commission of such acts when they are necessary to preserve the life of the woman; or,

6. Being a woman quick with child and intending to produce her own miscarriage, she takes, uses or submits to the use of any drug, medicine or substance, or any instrument or other means, and thereby causes the death of such child, except that this subdivision shall not apply to the commission of such acts when they are necessary to preserve the life of either the woman or the child.

Manslaughter is punishable by imprisonment for a term not exceeding fifteen years.

§ 1045. Criminally negligent homicide

A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person.

Criminally negligent homicide is punishable by imprisonment for a term not exceeding five years.

§ 1046. What proof of death is required

No person can be convicted of murder, manslaughter or criminally negligent homicide unless the death of the person alleged to have been killed and the fact of killing by the defendant, as alleged, are each established as independent facts; the former by direct proof, and the latter beyond a reasonable doubt.