September 15, 1964.

MEMORANDUM

TO: Isidore Dollinger, President, New York State District Attorneys Association

FROM: Irving Anolik, A.D.A.

Re: Critique of Proposed Penal Law
Articles 55 through 75.15
Sections 55.00 - 75.15

Article 55 dealing with affirmative defense is a codification of present New York case law with respect to the concept of affirmative defense.

The only question concerning this article is whether an affirmative defense might bring within its purview an alleged coerced confession or unlawfully seized evidence. If so, then there would seem to be some question as to whether procedures should be set forth in more detail. I assume, however, that this is not within the contemplation of the Commission and consequently would be handled by new legislation which has already been drafted in the case of search and seizure and which presumably will be enacted by the next legislative session with regard to confessions.

Article 60 - Lack of Criminal Responsibility.

Section 60.00 - Infancy.

This section is a codification of Penal Law, Section 2186. I suggest that it should at least be open for discussion as to whether criminal responsibility should attach with respect to murder, kidnaping and perhaps serious crimes such as armed robbery, assault, first degree, rape, first degree, etc., at an earlier age, perhaps, 14. With respect to the age bracket between 14 and 16, there should be the choice vested in the District Attorney and the Grand Jury as to whether or not the offender is to be treated

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as a criminal or whether the matter should be referred to the Family Court.

Section 60.05 deals with an area of law which is presently in a state of turmoil.

The question of legal responsibility because of insanity or, as the proposed Penal Law refers to it, "mental disease or defect" has been and presently is being debated far and wide.

The definition of legal insanity like that of all legal concepts depends upon its specific purpose. It may have different connotations depending upon whether it relates to matrimonial disputes, contracts or torts, wills or criminal conduct.

Legal insanity may be claimed as of the time of the deed itself, or at the time of trial, or possibly at the time that punishment is to be imposed. Primarily, of course, the most important area so far as the Penal Law is concerned would be at the time that the deed occurred.

The McNaghten rule which dates back to 1843 (Queen V. M' Naghten, 8 Eng. Rep. 718 - House of Lords 1843) is the rule which has been used to a greater or lesser extent in New York State and many other jurisdictions. The present Penal Law, Section 1120 translates that rule for use in the State of New York. There have been proposals made for changes in the rule and a number of other standards have been formulated, the most noteworthy of which are reported in the case of Durham v. United States, 214 F. 2d 862 (D.C.

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Cir. 1954) and in United States v. Currens, 290 F. 2d 751 (3rd Cir. 1961).

In a rather incisive commentary on the various rules, Professor Gerhard Mueller, writing in 50 Georgetown Law Journal, p. 105 (Fall 1961) demonstrates that only the McNaghten rule relates to both elements of the crime concept, namely, the mens rea and the actus reus and, argues that any test departing from this basis is foredoomed.

It seems that most jurisdictions will rely upon the McNaghten rule, not necessarily because it is perfect, but because it at least has a long history of judicial interpretation and any new rule would require completely new interpretations which would be difficult for judges to apply and for juryes to comprehend. (See, Ehrenzweig, "A Psychoanalysis of the Insanity Plea" 73 Yale L.J. 425 (1964).

It is my opinion that no radical change should be made in the present McNaghten rule since it is possible to modernize interpretations of this very rule without bringing in concepts such as "irresistible impulse" and the like which would be more confusing and more difficult to wield than is the present McNaghten rule. I would recommend a thorough analysis of the various reports which are available, some of which I have cited, dealing with the difficulties of applying the so-called Durham rule and Currens rule.

Article 65 - Justification.

Section 65.00.

On this general topic Assistant District Attorney

Kuh, in 63 Columbia Law Review 608, 623, has made some very incisive comments. Certain portions of this, particularly those dealing with "justifiable use of physical force in defense of a person" seem to be unwise particularly in view of the riots which have occurred recently where the rioters might very well claim that they were acting justifiably because of their reasonable belief that it was necessary to defend themselves or third persons from another person's imminent use of unlawful physical force.

The language generally is quite difficult to comprehend in this article and I would suggest that it be more tightly defined and that certain portions relating to the use of force by private persons under Section 65.10 be curtailed. 65.10, Subdivision 1, it seems to me is particularly difficult to interpret and I would suggest that it be rewritten so as to eliminate the possibility that it could be expanded beyond the scope intended.

Article 65, dealing with justification generally is rather loosely worded and requires redrafting after discussion by this group. I do not intend to offer a draft since there are undoubtedly others who feel the way I do and would have suggestions to make.

Article 70 - Immunity.

It is desirable, of course, to have a recodification of the general area of immunity. I do not, however, agree with the definition set forth in Section 74.15 as to which competent authorities shall be authorized to grant

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Subdivision 1. The definition of duress appears to be far too loose and I would suggest that the present New York law is more satisfactory.

Section 75.05 - Entrapment.

Here, again, I do not recommend the change in law since it seems to me that there have been so many restrictive Court decisions which have seriously curtailed the ability of the police to cope with crime, that we should discourage any legislation which further curtails the power of law enforcement officials.

The definition of entrapment is rather loose and I can envision the probability that virtually every criminal arrested will use this as a defense for want of anything else to interpose.

Section 75.10 - Previous Prosecution.

This section deals with the very knotty problem of double jeopardy. It is certainly desirable to have this recodified but I think the Commission has gone a little bit too far. For example, under Subdivision 2, I see no reason why a person who kidnaps a victim and also robs him should not be separately prosecuted for both the kidnaping and robbery.

Another problem I envisage under 75.10 is the difficulty of determining whether a person has been previously prosecuted for the same offense as the one which he challenges. I think the general intent of Subdivision 3 is all right, but here again I think a certain degree of discussion, as to language, may be warranted.

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Section 75.15 - Untimely Prosecution, deals with the so-called problem of "Statutes of Limitations."

With respect to Subidivison 3a, I believe that the period limiting the time within which to prosecute a fiduciary for larceny should be within one year after the discovery of such larceny or in the exercise of reasonable diligence, after the time when it should have been discovered, but that there should not be an outside limit of three years over and beyond the usual period of limitations.

I believe that prosecution should be permissible within one year after discovery irrespective of the length of time that has elapsed. The reason for this is that a fiduciary very often has means of concealing larcenies which could go undetected for considerable periods of time. I see no reason to confer such benefits upon an ingenious thief who, by dint of his fiduciary capacity, may be able to outwit the victim for a sufficient period of time and thus preclude prosecution.

With respect to 75.15, Subdivision 5, I question whether a prosecution should be deemed commenced at the time of an "arrest." Quite frequently people may be questioned during the course of an investigation. There has been considerable difficulty in determining whether this constitutes and "arrest." I think that if we limited the time that an Information, indictment or complaint is lodged or a summons issued, we would avoid a good many nebulous problems.