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MEMORANDUM FOR THE COMMITTEE FOR THE CRIMINAL COURTS BRANCH

FROM: EDWARD Q. CARR, JR.

SUBJECT: The Proposed New York Penal Law

The Proposed New York Penal Law introduced in the 1964 legislature as a "study bill" (Sen. Int. 3918, Ass. Int. 5376) represents several years of study and discussion by the members and staff of the Temporary State Commission on Revision of the Penal Law and Criminal Code. Public hearings are being held by the Commission throughout the state in November 1964 to give ear to suggestions and comments which (together with the Commission's reconsideration of its proposal since last spring) will lead to a revised proposal put forward in the 1965 legislature to replace the present Penal Law.

The Penal Law today is in many respects a patchwork of irrational, conflicting and confusing provisions, many of which have no relation to the serious purposes of the criminal law.

In almost every aspect the work of the Commission is an excellent job and a great improvement over the existing law.

The staff attorneys of the Criminal Courts Branch have all reviewed the 1964 bill. We have had several staff discussions of the many changes worked in the law and have reviewed informally with the Commission's staff all the problems we could see in the proposal.

There is only one provision of the new Penal Law on which we recommend strongly that the Legal Aid Society oppose the Commission's proposal at the public hearings in New York City next week. That is found in the following statute (sec 30.10 of the 1964 bill) providing additional punishment for "persistent felony offenders":

1. Definition of persistent felony offender.
 - (a) A persistent felony offender is a person who stands convicted of a felony after having previously been convicted of two or more felonies, as provided in paragraphs (b) and (c) of this subdivision.
 - (b) A previous felony conviction within the meaning of paragraph (a) of this subdivision is a conviction of a felony in this state, or of a crime in any other jurisdiction, provided:
 - (i) that a sentence to a term of imprisonment in excess of one year, or a sentence to death, was imposed therefor; and
 - (ii) that the defendant was imprisoned under sentence for such conviction prior to the commission of the present felony; and
 - (iii) that the defendant was not pardoned on the ground of innocence.
 - (c) For the purpose of determining whether a person has two or more previous felony convictions, two or more convictions of crimes that were committed prior to the time the defendant was imprisoned under sentence for any of such convictions shall be deemed to be only one conviction.

2. Authorized sentence. When the court has found, pursuant to the provisions of the code of criminal procedure, that a person is a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and circumstances

of his criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized by section 30.00 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by that section for a class A felony. In such event the reasons for the court's opinion shall be set forth in the record.

Section 30.10 is intended to replace sections 1941 and 1942 of the present Penal Law providing for increased punishment for a second or subsequent felony conviction. Under those statutes the increased punishment is mandatory:

for a second or third felony conviction the minimum term must be at least $\frac{1}{2}$ the maximum punishment for a first offender, and the maximum term may be as much as twice the maximum term for a first offender (Penal Law sec 1941); and

for a fourth or subsequent conviction the minimum term must be at least 15 years and the maximum must be life imprisonment (Penal Law sec 1942).

Under those statutes a prior conviction in another state or country is taken into account for additional sentence if the crime would have been a felony under New York law.

Every Legal Aid defense attorney and, we believe, most other attorneys, many prosecutors and judges, abhor those present statutes in their operation. They are arbitrary, unduly harsh and restrictive of the discretion of a sentencing judge. They are not really necessary, as in almost every case the normal maximum penalty for a felony will give ample range to take into account prior convictions under the sentencing practices we find in New York City.

One of the worst effects of these laws is the distortion they work in the criminal process from the time of first consideration of a plea. The ominous threat of a life sentence can and does affect a defendant's decision to contest the issue on a pending charge and may lead court prosecutor and defense to bizarre pleading and sentence arrangements to avoid the impact of the law in a case where it is clearly unwarranted.

The Commission's proposal will be a great improvement over the present law in making the imposition of additional punishment discretionary with the sentencing judge. The basis for exercise of that discretion is spelled out sufficiently in subdivision 2 of the statute so as to permit appellate review to bring about some uniformity of practice in this area.

However, it is the opinion of all staff attorneys of the Criminal Courts Branch that the proposed section 30.10 has one serious defect.

Under the proposed provision a conviction of a crime in any other jurisdiction will be counted as a felony under this statute if the offender was actually imprisoned under a sentence with a term in excess of one year or under a commuted death sentence. This will obtain irrespective of whether such crime would have been a felony if committed in this state. Under existing law the test is whether the crime would have been a felony in New York.

The Commission seeks to change the present rule on the ground that the law has been difficult to administer. They cite the case of People v. Olah, 300 N.Y. 96. Olah pleaded guilty under a New Jersey statute dealing with larcenies of amounts in excess of twenty dollars (\$20). The indictment charged that he had stolen \$200. A theft of more than \$100

is a felony in New York. The Court of Appeals held that this was not a prior felony - that the statute, not the indictment, determined the status of the crime.

Actually, as the Court there interpreted it, this is a simple rule to administer - all you have to do is look at the statute under which the defendant was convicted. Any other rule would require a new factual determination and often this would be impossible. Olah may have pleaded guilty because he stole more than \$20 - not because he stole \$200.

The Commission seeks to avoid the entire problem by ignoring both the foreign statute and the facts to which it was applied - it looks only to the sentence. This is simple enough but it seems retrogressive and is not in keeping with the aim of the proposed law to reserve this special sentence "for only those who persist in committing serious crimes" (Commission Notes, p. 285). This requires that we determine whether the prior crimes were "serious". We believe that the statute is a better indicator than the sentence for this purpose.

It is not unreasonable that New York standards of seriousness should control. New York will be imposing the life sentence. It is a matter of setting a single, clearly definable, standard (would the crime be a felony in New York) or accepting blindly the disparate sentencing standards of 50 other jurisdictions.

The Legal Aid Society defends many Negroes who have migrated from the South. There is reason to believe that in the Southern states there is a double standard in the enforcement of the law and in the punishment of its violators as between Negroes and whites.

Further, some crimes in the South are not crimes in New York - or will not be crimes here if this proposed Penal Law is passed. For example, miscegenation is a felony throughout the entire South (Texas, Art. 492, sentence: 2 to 5 years; Alabama, Sect. 360, sentence: 2 to 7 years). Sodomy between consenting adults is punishable in Texas (Art. 524: 2 to 15 years), Georgia (Sec. 26 - 5902 (b): 1 to 10 years), Alabama (Sect. 106: 2 to 10 years), and other jurisdictions.

More important is the fact that many of the Southern penal codes have not been revised in half a century. The sentences they mandate are out of line with both present and proposed New York law.

For example look at the larceny statutes in New York and some of the Southern states. Presently in New York it is grand larceny if the theft is of \$100 or more (the Commission proposes to raise this amount to \$250). In Mississippi and Alabama it is a grand larceny if the theft is of more than \$25 (Miss. Sect. 2240: 5 years; Ala. Sect. 331: 1 - 10 years). In Texas and Georgia it is a grand larceny if the theft is of more than \$50 (Tex. Art. 1421: 2 - 10 years; Ga. Sect. 26 - 2642: 2 - 5 years).

These discrepancies are significant because more of Legal Aid's out-of-state clients come from the South than from any other region.

The Commission explains that their proposal will permit the recognition of serious Federal crimes that are not crimes under New York law, and they would rely on the discretionary feature to permit the court to weigh the substance of the foreign conviction and provide fairness to the offender.

With regard to the federal crimes the reasoning is more apparent than real. Forgeries and narcotic sales in federal courts would both be felonies in New York under the present rule. In our experience these crimes represent the bulk of the recidivist crimes in the federal jurisdiction that have relevance to a persistent offender statute.

With regard to the discretionary aspect of the proposed statute it is to be noted that the proposed statute reduces the number of felonies necessary for a life sentence from four to three. The discretionary aspect may well justify this reduction. As practicing lawyers we are concerned here also with the knowledge that judges are human and calendars are crowded and there is a constant pressure for pleas. Any defendant, under the proposal, who has twice been sentenced to a term of more than a year - whatever the crime and whatever the jurisdiction - will now feel an enormous pressure to plead guilty and not test his innocence against the judge's patience. The fear will be real whether or not it is realistic. If the crime charged is a serious or a notorious one there will always be an implicit threat of a life sentence however minor the underlying crimes may be. Discretion, though necessary and desirable, permits abuse. Judges have abused their power under the sentencing provisions of Article 7A of the present Correction Law (the indefinite penitentiary sentence for misdemeanors), and the Commission recognizing this has omitted that provision from its bill. A similar possibility of abuse inheres in this section which the present New York rule inhibits.

We believe that by eliminating the reference to the New York standard for seriousness of crimes the Commission's proposal creates more problems than it solves. We recommend that this proposal be opposed.