

M E M O R A N D U M

re:

AN ACT
TO ESTABLISH A CRIMINAL PROCEDURE
LAW, CONSTITUTING CHAPTER ELEVEN-A
OF THE CONSOLIDATED LAWS, AND TO
REPEAL THE CODE OF CRIMINAL PROCEDURE

S. 4624

A. 6579

Prepared by the
STATE OF NEW YORK
TEMPORARY COMMISSION ON REVISION
of the
PENAL LAW AND CRIMINAL CODE

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MEMORANDUM IN SUPPORT AND EXPLANATION
OF PROPOSED CRIMINAL PROCEDURE LAW

Introductory

This bill, embodying a proposed "Criminal Procedure Law," prepared by the Temporary Commission on Revision of the Penal Law and Criminal Code, is, in effect, the Commission's third draft of a complete revision of the Code of Criminal Procedure.

The first draft was published by the Edward Thompson Company in September, 1967, and following a wide circulation thereof, public hearings thereon were held by the Commission throughout the state in Buffalo, Rochester, Syracuse, Albany, New York City and Mineola, during January and February of 1968. The second draft, containing many changes from the first, consists of a study bill, submitted to the Legislature at the 1968 session and also published by the Edward Thompson Company and widely circulated. Public hearings upon that edition were also held in various parts of the state (Rochester, Albany and New York City) during November and December of 1968.

The final 1969 bill, or third draft, contains a number of formal and minor changes from the study bill or second draft, and a few of substantive significance. This memorandum first treats the final or 1969 proposal both generally and with respect to some of its major features, and then points out those changes which are of substantive importance.

A derivation table, showing the sections of the 1968 study bill from which those of the final proposal are derived, is contained in the appendix to this memorandum.

A. The Criminal Procedure Law in General

In structure, substance, form, phraseology and general approach, the proposed Criminal Procedure Law bears little resemblance to the distinctly archaic Code of Criminal Procedure. Ignoring the existing Code format, it lays a new foundation and, in the process, proposes numerous significant changes of substance in an attempt to provide a workable body of procedure accommodated to modern times. Among the innovations are a revamped lower criminal court structure (see Art. 10); a new omnibus motion technique (see §§170.30-170.45, 21C.20-210.45, 330.30-330.50, 440.10-440.40, 710.10-710.70); a reformulated system of bail and release on recognizance (Arts. 500-540); a scheme involving greatly expanded use of the so-called police summons, relabeled an "appearance ticket" (Art. 150; see, also, §140.20[2,3]); changes in the standards of proof required for preliminary judicial action in the lower or "local criminal courts" (see §§70.10, 100.40, 180.70); changes in rules of evidence and related matters (Art. 60), including abolition of the long-standing accomplice corroboration rule in favor of one followed in the federal jurisdiction (see §300.20); a new and tighter system of judicially authorized eavesdropping orders or warrants (Art. 700); establishment of a pre-trial discovery motion and remedy (Art. 240); new and comprehensive post-judgment motions and remedies for non-appellate challenges to judgments of conviction (Art. 470) important alterations in the laws relating to compulsion of evidence by grants of immunity

(§§190.40, 190.45; see, also, §§50.10-50.30); codification of the law of former jeopardy (Art. 40); checks upon lengthy incarceration of defendants prior to the filing of the ultimate charges upon which they are to be prosecuted (see §§170.70, 180.80, 190.80); substantial revision of the youthful offender process (Art. 720); and significant changes in the law relating to mental fitness of a defendant to proceed with a criminal action against him (Art. 730).

Some of the procedural areas covered and changes wrought by the proposed Criminal Procedure Law (sometimes referred to as CPL) are treated below.

1. The lower criminal court structure (see Art. 10)

While working within the framework of the existing lower criminal court structure, the proposal creates a new lexicography and a new foundation that frequently leads to procedural simplification and clarification.

The Criminal Code sets forth all of its lower criminal court procedure in terms of "magistrates" and "courts of special sessions." These are traditional oddities in that neither signifies a "court," as such, for there is no such thing as a magistrates court, in the true sense of the word, or a court of special sessions. Rather, these labels or concepts constitute mantles or hats which the various lower courts and justices (justices of the peace, police courts, village police justices, etc.) don and doff at certain stages of a criminal action. A justice of the peace, for example, is said to be and to act as a "magistrate" in the preliminary stages of a criminal action when an information is laid before him, when he issues a warrant of arrest or a summons, when he conducts a preliminary hearing upon a felony charge, when he holds a defendant for the action of a grand jury, and the like. He continues to act as a magistrate when he tries or finally disposes of an information charging a non-criminal offense, such as disorderly conduct or a traffic infraction; but when he tries a misdemeanor charge or accepts a plea thereto he automatically takes off his magistrate hat and puts on his special sessions hat, or "holds a court of special sessions."

The defects and lack of logic in this system of presenting lower court procedure seem apparent. The proposed Criminal Procedure law abandons the traditional "magistrate" and "special sessions" language in favor of a system that simply describes what the lower criminal courts are and what they do.

The first step in that direction is taken by a provision (§10.10[3]) which enumerates various specific courts constituting the lower court structure (sometimes under new labels) and blankets them under the key term, "local criminal court." The local criminal courts consist of the five regular lower court categories (district, city, town and village courts, plus the New York City Criminal Court), and--for limited purposes--Supreme Court justices and County Court judges.

With the creation of the term "local criminal court," and with the enumerative definition thereof, the proposed Criminal Procedure Law subsequently establishes its lower /

court procedure simply in terms of functions of "local criminal courts." Since all these courts perform the same basic functions, reference to the individual classifications is unnecessary in most of the provisions dealing with them. Owing to some variations in their operation and other factors, however, a number of ensuing sections do, where essential, specifically allude to village courts, town courts, city courts, etc., and provide separate procedures in certain situations.

One significant feature of this new scheme is the inclusion of the New York City Criminal Court, as a "local criminal court," within the ambit of the proposed Criminal Procedure Law. Under existing law, this court operates almost entirely under its own "New York City Criminal Court Act" and its procedure is governed only in small part by the Code of Criminal Procedure (see CCP §740-d). In an endeavor to provide as much procedural uniformity as possible in the state lower court structure, the proposed formulations embrace the New York City court, allowing for and specifying variations where necessary.

This new and comprehensive lower court scheme would necessarily require the repeal of the principal procedural provisions - some in conflict with the proposal - now contained in the New York City Criminal Court Act, the Uniform District Court Act, the Uniform City Court Act and the Uniform Justice Court Act. Such repealing legislation will be submitted prior to the effective date of the proposed CPL.

2. Preliminary hearings in the local criminal courts.

Among the noteworthy changes in the lower or "local criminal court" procedure are those relating to preliminary hearings, both with respect to felony cases and with respect to misdemeanor cases.

(a) As to misdemeanors:

Outside of New York City, there is not and never has been any procedure for a preliminary examination or hearing of a misdemeanor case by the magistrate or local criminal court with which the charge is lodged in order to determine whether the case should be further prosecuted. In New York City, however, the situation is different owing to procedure derived from the old dual lower court system (the Magistrates Court and the Court of Special Sessions) which prevailed prior to 1962. Under that system, misdemeanor charges, if they were to be tried or prosecuted, had to be sent by the Magistrates Court, which did not have trial jurisdiction thereof, to the Court of Special Sessions which did. A hearing, therefor, was held in the former court and, if there was sufficient proof of the defendant's commission of a misdemeanor, he was held for the action of the latter court.

With the consolidation of these courts in 1962 into a single New York City Criminal Court, the entire reason for the preliminary hearing vanished. In a vestigial manner, however, the New York City Criminal Court Act (§40[2]) still entitles the defendant to a preliminary hearing in most misdemeanor cases. This anachronism is especially unfortunate in view of that court's overpowering volume problems.

The proposal eliminates the misdemeanor hearing in the New York City court by the simple process of not providing for it. (It is to be remembered that virtually all of the procedural provisions of the New York City Criminal Court Act are to be repealed.)

(b) As to felonies:

Under the Criminal Code (§208), the standard of proof necessary for a "magistrate" or local criminal court to hold the defendant for the action of the grand jury upon a felony charge following a preliminary hearing is very cloudy, but most judges require a legally sufficient or prima facie case.

The proposal authorizes such a holding upon the less demanding standard of "reasonable cause to believe that the defendant committed a felony," and, further, permits such "reasonable cause" to be established by hearsay (§§180.60[8], 180.70).

Apart from acceleration of the criminal process, this is a most logical change when it is considered that a police officer is under a duty to arrest a person for a felony upon "reasonable cause" and bring him to court promptly; and that a prima facie case will later have to be established in the grand jury before the defendant is indicted and prosecuted (see §190.65[1]). To predicate reasonable cause as sufficient for the first screening process is hardly shocking, especially since most jurisdictions never require any more than that at any stage prior to trial.

3. Arrests without a warrant

The proposed CPL makes several significant changes in the law dealing with arrests without a warrant by police officers and other peace officers.

(a) Concerning misdemeanors not committed in officer's presence

The Criminal Code provisions dealing with warrantless arrests by police officers and peace officers in general are quite confusing (CCP §177). One matter that is clear from the statute, however, is that, while an arrest for a felony may be made upon "reasonable cause" to believe that the defendant committed it, in the officer's presence or otherwise, a misdemeanor arrest is not authorized - upon reasonable cause or any other basis - unless the crime or the conduct comprising it is committed "in his [the officer's] presence" (CCP id., subd. 1).

Especially in connection with crimes divided into degrees - ordinarily with the higher degrees being felonies and the lowest a misdemeanor - the "in his presence" distinction appears illogical and in some respects almost absurd. Accordingly, the proposal eliminates that distinction. Making the general rule the same for all peace officers, police and non-police, the appropriate sections authorize an arrest for any crime - misdemeanors as well as felonies - upon reasonable cause to believe that the person in question committed it whether in or out of the officer's presence (CPL §§140.10[1], 140.25[1]).

(b) Concerning difference in powers of police officers and other peace officers

Under the Criminal Code (§154), a "peace officer" is defined by enumeration of a long list of public servants of one sort or another, including regular "police officers," who are also defined by enumeration (§154-a). In its provisions dealing with arrests and other law enforcement activities, the Code, for the most part, speaks merely in terms of "peace officers" and does not bother to distinguish between police officers and other kinds of peace officers. Although it cannot really mean it, the Code, by its loose language, seems to imbue every peace officer (e.g., a court attendant) with the full arrest powers of a police officer by authorizing him to make "reasonable cause" arrests anywhere at any time for any offense (§177).

In struggling with this problem, the proposed CPL, in its first two drafts, pursued a rather intricate technique which, though preserving the necessary powers of the various peace officer groups, involved elimination of the term "peace officer." The final proposal, however, restores that term, defines both peace officers and police officers in approximately the same manner as does the present Code (§1.20[33,34]), and the pattern is such that all peace officers will retain their exemptions with respect to the weapons crimes of the Penal Law. The proposal does, however, limit the non-police peace officer's authority to make a regular police or reasonable cause arrest to those situations where he is "acting pursuant to his special duties" (§140.25) - in the course of his employment or function as a court officer, conservation officer, probation officer, etc. It is noteworthy that nothing contained in these provisions precludes any such agency from obtaining legislation or promulgating regulations according its members the broadest possible functional scope.

(c) Police officers - the bailiwick problem

In a similar vein, the Criminal Code's sweeping and imprecise language leaves, in some quarters, a doubtless unintended impression that any police officer, regardless of the limited geographical scope of his department or force, may make police or reasonable cause arrests without a warrant for any offense no matter where committed. Any such proposition would authorize a village police officer from St. Lawrence County, for example, while vacationing in New York City, to assume all the arrest powers of a New York City police officer, and, for that matter, to act as a state trooper anywhere in the state. Such complete ignoring of inherent territorial limitations does not, in the Commission's view, accord with orderly law enforcement practices, and it creates significant fiscal problems for agencies dealing with tort liability and Workmen's Compensation.

The proposal predicates a general rule that a police officer may make "reasonable cause" arrests only for offenses committed within his bailiwick, or geographical area of employment (§140.10[1]). To this rule, however, there are certain exceptions. One is that in his own bailiwick he may arrest a person who has committed an offense elsewhere in the state if another police officer authorized to make the arrest requests him to do so as his

agent (§140.10[3a,i]); or if - as added in the final draft (id., subd. 3[a,ii]) - he has reasonable cause to believe that such person has committed a felony and will be difficult to find if not immediately apprehended. Also, a police officer when outside of his bailiwick may arrest a person upon reasonable cause to believe that the latter has committed a felony in his presence (id., par. [b]).

4. The appearance ticket

The term "appearance ticket," as used in the proposal, denotes a citation or notice issued by a police officer or other public servant, of a kind usually but improperly referred to as a "summons."

On a state-wide basis, the use of appearance tickets is at present largely confined to traffic infraction cases (see Vehicle and Traffic Law §207). In New York City, however, numerous non-police public officials and employees, such as those of the Sanitation, Fire, Building and Markets Departments, are authorized to issue and serve such tickets in cases involving offenses peculiarly within their ambits (violations of the Health Code, building regulations, etc.; see N.Y.C. Crim. Ct. Act. §57).

Employed in this manner, an appearance ticket is a substitute for or an alternative to an arrest without a warrant. Upon the theory that the virtues of this alternative have not been sufficiently exploited, the proposal empowers any police officer to issue and serve an appearance ticket upon a person, instead of arresting him, in any case in which an arrest for a misdemeanor or a petty offense would be authorized (§150.20[1]); and similar provision is made for the issuance and service of such tickets by other public servants who are by other statutes specially authorized to do so (id., subd. 3).

Another subdivision of the statute in question (§150.20[2]) presents a method of employing the appearance ticket in combination with an arrest without a warrant. It contemplates an arrest by a police officer who, after taking the defendant to a station house, determines that, in view of the defendant's roots and all the circumstances of the case, prompt booking, formal charges, court arraignment and bail are unnecessary. In such a case, the officer may then abandon the post-arrest procedure and, instead, issue and serve an appearance ticket upon the defendant in the same manner as if he had never arrested him. As provided in the next section (§150.30), still another alternative, involving issuance of a ticket upon a deposit of bail, is available (see, also, §140.20[2,3]).

The results to be expected from the new appearance ticket scheme are (1) an immense saving of police time, (2) elimination of much expense and embarrassment to defendants charged with minor offenses who are excellent risks to appear in court when required, and (3) above all, a significant reduction of that portion of our jail population consisting of unconvicted defendants awaiting trial or other disposition of their cases.

5. Concerning bail

(a) The unsecured and partially secured bail bonds

Another type of endeavor to reduce the unconvicted portion of our jail population is found in the proposed CPL provisions dealing with the subject of bail.

One of the current difficulties in this field is that the courses of action available to the court for assuring the defendant's future attendance are quite limited. On the one hand, a judge may commit the defendant to prison or fix bail - which may well be beyond the defendant's means. On the other, he may release the defendant upon his own recognizance. In many instances, none of these decisions seems attractive or satisfactory.

With this in mind, the proposal inserts two intermediate devices, one termed an "unsecured bail bond" and the other a "partially secured bail bond" (§520.10[1]). The unsecured bond is executed by a surety (other than a bonding company), or by the defendant himself where permitted by the court, who deposits no security with the court but contracts to pay a designated sum of money in case of the defendant's failure to appear (§500.10[19]). The "partially secured bail bond" differs only in that the surety or obligor deposits a fractional sum of money fixed by the court, not to exceed ten percent of the total undertaking (id. [18]).

The possible advantages of these new devices may be hypothetically illustrated by a case of a young man charged with burglary who has previously been embroiled with the law but resides in the community and whose father is a reputable person long employed in the same position at a fairly modest but adequate salary. Here, a judge not inclined to release the defendant on his own recognizance doubtless would, under present law, fix bail, and in a fairly substantial and possibly burdensome amount owing to the seriousness of the crime. If so authorized, however, he might well be satisfied to release the defendant upon his father's undertaking to pay \$1,000 (possibly accompanied by a \$100 deposit) in the event of the defendant's failure of appearance.

(b) Preventive detention

Another change relates to the criteria for commitment, fixing of bail or releasing defendants on their own recognizance. Strictly and traditionally speaking, the only reason for bail or commitment is, under present law, to assure the defendant's future appearance in the action, and the only factors to be considered in determining the amount of bail are those relating to the risk of the defendant's non-appearance. As a practical matter, however, courts invariably consider whether the defendant is likely to be a danger to society during release. In the case of a defendant charged with forcible rape who has a bad record of sex crimes, for instance, it would be a rare judge who would not commit him or fix very high bail regardless of the likelihood of his future attendance; nor, in the opinion of most, could the judge be faulted for such action. The proposal candidly recognizes this factor and expressly predicates possible danger to society as one of the factors to be considered upon the bail determination (§510.30[2]).

6. Verification of information and other instruments
(§100.30)

The proposal authorizes the verification of an information, misdemeanor complaint, felony complaint and supporting deposition by (1) having the deponent swear to it before the court, or (2) having the deponent swear to it before another police officer of designated rank, or in some cases before a non-police public servant, or (3) not requiring the defendant to swear to it at all but merely having him sign such an instrument containing a form notice that false statements therein are punishable as a class A misdemeanor pursuant to a specified Penal Law section (CPL §100.20).

Only the first of these methods - a swearing before the court - is permitted under present law. Relaxing the procedure to allow police officers and witnesses to have the verification performed in the station house, and in fact to authorize verification without actual oath, should be of immense aid in speeding up the criminal process and should save many hours of both police and private citizen time.

7. Omnibus motions

The proposal adopts a streamlining system of motion practice which may be referred to as the omnibus motion technique. This is chiefly reflected in the following motions:

- (1) Motion to dismiss indictment (§210.20) and information (§170.30);
- (2) Motion to suppress evidence (Art. 710);
- (3) Motion to set aside verdict (§330.30);
- (4) Post-judgment motions - to vacate judgment and set aside sentence (Art. 440);

Each of these motions embraces many grounds or contentions which under present law must be separately raised by different types of motions, some of which must be brought in different courts. The motion to dismiss an indictment accommodates all contentions now raised by demurrer, motion to dismiss on the ground of insufficient grand jury evidence, plea of double jeopardy and several other motions and devices (§210.20[1]). The two post-judgment motions encompass all contentions challenging an indictment or other accusatory instrument which now sail under the flags of coram nobis, motion for resentencing, motion for a new trial by reason of newly discovered evidence, state habeas corpus and federal habeas corpus (§§440.10[1], 440.20[1]).

Perhaps the most intricate of these omnibus motions is the motion to suppress evidence (Art. 710). There are certain kinds of evidence or potential evidence which may be excludable by reason of the manner of its acquisition, and the admissibility of which is ordinarily litigated upon a pre-trial motion and proceeding. Among the types of evidence excludable in this manner are tangible property obtained by an unlawful search and seizure, evidence obtained by improper eavesdropping, and evidence of a defendant's confession or admission involuntarily given to a police or other law enforcement official. The Criminal Code provides two separate

motions and procedures in this area; for pre-trial challenges to evidence claimed (a) to be the product of unlawful search and seizure or (b) to consist of involuntary statements of a defendant (CCP §§813-c-813-h). The CPL study bill, or second draft, combined these two and the presently uncodified motion addressed to eavesdropping into a single motion to suppress; the motion as then drafted accommodated any of the three indicated challenges plus a contention of inadmissibility based upon the "poison fruit" doctrine (study bill §375.20).

The final bill adds another ground or kind of challenge, derived from some United States Supreme Court decisions of fairly recent vintage. This consists of a claim that potential identification testimony should be excluded upon the ground that it emanates from an improper pre-trial identification of the defendant by the prospective witness (§712.20[5]).

8. Compulsion of grand jury testimony by immunity grant

The proposal completely overhauls the method of compelling a witness to testify in a grand jury proceeding through an offer or grant of immunity. The primary change applies only to grand jury proceedings and not to trials or other proceedings, criminal or otherwise. This change automatically confers immunity upon any grand jury witness (§190.40), in contrast to the present complex system which requires several occurrences before the witness receives immunity (CCP §619-c), thus subjecting the whole scheme to grave constitutional attack and doubt. Also, the proposal extends the immunity statute structure to investigations into any crime (§§50.20, 50.30, 190.40), in contrast to the present law, which illogically confines its utility to cases involving certain selected crimes.

The net effect of these innovations upon grand jury investigations would unquestionably be (1) to remove the present doubt and confusion as to whether a so-called "target" of an investigation may be called as a witness and compelled by an offer of immunity to testify concerning the activity of other persons implicated in the crime under investigation; and (2) to extend the immunity grant weapon to prosecutors in their investigation of all crime rather than, as at present, only with respect to investigation of a selected few offenses.

9. Discovery (Art. 240)

Discovery in criminal cases has never before been the subject of statute in New York. The case law on the subject is rather sparse, unsatisfactory and inconsistent, so that it is difficult to discern whether there is any criminal discovery in New York, or if so how much.

The discovery article of the proposal (Art. 240) is virtually identical with that adopted in the federal jurisdiction in 1966 (Fed. "Rules of Criminal Procedure," Rule 16). It represents a rather moderate, middle-of-the road approach, half way between the extreme liberal position which advocates almost unlimited discovery and the extreme prosecution approach which would permit virtually none.

10. Elimination of the accomplice corroboration requirement

§300.20 of the proposal would change the New York rule requiring corroboration of accomplice testimony (CCP §399) and replace it with a doctrine similar to that prevailing in the federal jurisdiction (e.g., United States v. Vito, 1961, 294 F. 2d 524, 526, cert. den. 369 U.S. 823, 82 S. Ct. 837; Pina v. United States, 1948, 16 F. 2d 890, 802; United States v. Becker, 1933, 62 F. 2d 1007, 1009). The proposed provision, however, is stricter than the federal rule in that it mandates the cautionary instructions concerning accomplice testimony. In the federal courts, such instructions, though deemed "usually desirable," are "never an absolute necessity" (United States v. Becker, supra).

The present New York rule (CCP §399) is, of course, predicated upon the theory that accomplice testimony is sometimes apt to be unreliable by reason of possible motives of self interest on the part of the witness. The difficulty with this principle lies in its rigidity. It is true that few would favor a criminal prosecution based solely upon the testimony of a single polluted and self-interested source; nor, in general, are prosecutors inclined to initiate or conduct such actions, or juries to convict in such cases. In many instances, however, the indicated credibility defects are not present and the accomplice testimony may be highly reliable and utterly convincing. Yet, such testimony - indeed the testimony of twenty such witnesses - is arbitrarily stamped insufficient as a matter of law.

The federal rule is adopted herein in the belief that it provides desirable flexibility without sacrificing essential safeguards.

11. The trial court's charge to the jury-in general (Art. 300)

In its mandates concerning the principal matters which a trial judge conducting a jury trial must submit to the jury in its charge (§300.10), and especially with respect to the counts and crimes contained and charged in an indictment which must or may be submitted under varying circumstances (§§300.40, 300.50), the proposal is considerably more precise, clear and thorough than the existing Code of Criminal Procedure. Among other matters, the Article codifies the rather difficult principles relating to questions of when the court is authorized or required to submit lesser offenses included within the crimes charged (§300.50).

One provision which may or may not work a change in the present law is of particular interest to trial judges. Whether or not such actually is the law, almost every trial judge believes that, in the course of his charge to a jury, he is required to marshal the evidence in exhaustive detail in every case. If such be the rule, it is illogical and wasteful, and the proposal changes it by requiring reference to the evidence only to the extent necessary to explain the application of the law to the facts (§300.10[2]).

12. Two changes in appellate law

The whole area of appeals has been overhauled and reformulated by the proposal (Arts. 450, 460, 470), with several changes of substance inserted. Two of the more interesting of these are treated below.

(a) Concerning review of sufficiency of grand jury evidence

The long-standing and controversial rule of People v. Nitzberg (289 N.Y. 523) is that an improper denial of a motion to dismiss an indictment upon the ground of insufficient grand jury evidence requires a reversal of the judgment of conviction on appeal no matter how strong and sufficient the trial proof was. This doctrine, shocking to many, is changed by the proposed provision that denial of the motion "is not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence" (§210.30[6]).

(b) Appeal from trial order of dismissal

The Criminal Code, while according the People an appellate remedy for an improper trial court dismissal of an indictment upon alleged insufficiency of grand jury evidence, provides no such remedy for an improper dismissal or "directed acquittal" - termed a "trial order of dismissal" in the proposal (§290.10)-based upon alleged insufficiency of trial evidence. This clearly appears as a gap in the law. The proposed CPL fills this gap with provisions authorizing an appeal by the People from such an order; the order is reversible not only upon a determination that the trial evidence was legally sufficient, but also upon a determination that, though insufficient, it would have been sufficient had the trial court not improperly excluded admissible evidence offered by the People (§§280.10, 450.20[2], 450.40).

13. Youthful offender treatment
(Art. 720)

The Youthful Offender process is very cumbersome under the Criminal Code, partly because an investigation of the Youthful Offender candidate is required in every case, regardless of the nature of the crime charged or of background factors.

One of the innovations worked by the proposed CPL in this area is as follows. Eligible youths are divided into three categories. Without defining two of these, it suffices to point out that the first group consists of those youths who are charged with misdemeanors only and have no previous convictions for crimes or Youthful Offender adjudications. Under the study bill, members of this group were not required to undergo investigation but were automatically granted Youthful Offender treatment (study bill §400.20[2]). Under the final bill, however, the court may in its discretion either grant Youthful Offender treatment without an investigation or order an investigation and determine the matter later (§720.20[1,2]).

The last change was made because it frequently happens that youths of this group, though having no prior convictions or Youthful Offender adjudications, have two or more as yet undisposed of cases pending against them at the same time, and many judges feel that they should not be rigidly bound to grant Youthful Offender treatment in such instances.

14. Fitness to proceed

Under the existing Code, when a defendant under indictment is found mentally unfit to stand trial, he is generally committed to Matteawan State Hospital - a Department of Correction facility (§662-b[1]). He remains confined in this institution until he is found to be able to stand trial (§662-b[2]). The Code provides no machinery for periodic judicial review of the need for continued confinement.

Under the proposal, an indicted defendant who lacks the mental capacity to proceed to trial, is committed to the custody of the Commissioner of Mental Hygiene (§730.50[1]). The latter must place the defendant in a non-correctional facility, unless the court determines that the defendant is "dangerously" mentally ill (§730.60[1]). The proposal mandates periodic court review of the need for hospitalization (§730.50[2][3]). It also provides that a defendant may not be confined under a criminal order of commitment for more than two-thirds of the authorized period of imprisonment for the highest crime charged in the indictment (§730.50[3]).

Most of the provisions in Article 730 are based upon the recommendations made in 1968 by the Special Committee on the Study of Commitment Procedures and the Law Relating to Incompetents of the Association of the Bar of the City of New York. The recommendations are contained in the Committee's 261 page report, "Mental Illness, Due Process and the Criminal Defendant."

B. Changes of substance from 1968 study bill

The final proposal of 1969 shows a great many formal and language alterations from the 1968 study bill and some changes of substance. The important changes of substance are noted below.

(1) As already indicated, the final bill, in its general definitions section, defines the term "peace officer" (F §1.20[33])* - by enumeration, in the same manner as does the existing Criminal Code (§154) - whereas the study bill contains no such definition (see S §1.20). Also as previously explained, the final bill, unlike the study bill (S Art. 70), uses the term peace officer in its Article dealing with warrantless arrests (F Art. 140) and, while in one sense according full "reasonable cause" arrest powers to non-police peace officers, limits their authority to make such arrests to those occasions when they are acting pursuant to the special duties of their particular employment (F §140.25).

(2) The final proposal's provision dealing with the circumstances in which a confession or other statement of a defendant is deemed "involuntarily made" and, hence, inadmissible in evidence (F §60.45) differs from the study bill provision (S §30.80). The prohibition of the latter was considerably more restrictive than any rule established by the United States Supreme Court, or by any decision or statute, and the final proposal substantially conforms the exclusionary principles of this area to existing law.

(3) In establishing the procedure to be followed with respect to a "simplified traffic information," the study bill declares that a defendant arraigned thereon is entitled as of right to a "bill of particulars," which is described as an unverified instrument which designates factual particulars, needed by the defendant for purposes of defense, without reciting items of evidence (S §50.25[3,4]). The final proposal somewhat changes this concept by entitling the defendant to a "supporting deposition" rather than a bill of particulars. Unlike a bill of particulars, a supporting deposition is a verified instrument which must contain evidentiary matter showing reasonable cause to believe that the defendant has committed the offense charged (F §100.25[2]). It is this that the defendant really needs in order to ascertain fully the charge against him.

(4) The final bill increases by one the kinds of offenses for which fingerprinting and photographing of an arrested person are required. The added offense is one of "Loitering" for homosexual purposes (cf. F §160.10[1] and S §80.10[1]). Also, the final bill, unlike the study bill, permits a police officer to fingerprint an arrested defendant in certain situations even though he is not required to do so (F §160.10[2]).

* The letter "F" is used in article and section citations to denote the final 1969 proposal, and the letter "S" to denote the 1968 study bill.

(5) The study bill requires that the fingerprinting and photographing for designated offenses be performed only upon an arrest of a person for such an offense (S §80.10[1]). The final bill further provides for fingerprinting and photographing in connection with such an offense not only upon an arrest therefor but also when the defendant has been served with a summons or an appearance ticket for alleged commission thereof; and it describes the manner in which this is to be achieved (F §§130.60, 150.70, 160.10; see, also, §120.90).

(6) Both the study bill and the final proposal establish a general rule to the effect that a police officer's power to make police or "reasonable cause" arrests applies only where the offense in question is or was committed within his bailiwick or "geographical area of *** employment"; but both bills make generous and significant exceptions to this rule (F §140.10; S §70.30). The final bill adds an exception not found in the study bill; namely, that a police officer may arrest a person in his (the officer's) bailiwick when "he has reasonable cause to believe that such person has committed a felony somewhere[else] in the state and that it will be difficult to find or arrest him therefor unless he is apprehended immediately" (F §140.10[3,a,ii]).

(7) Two changes in the procedure to be followed by a police officer after making a warrantless arrest are worthy of note (F §140.20; S §70.50).

(a) Both the study bill statute and the final provision authorize the arresting officer in non-felony cases to serve an appearance ticket upon the defendant, either unconditionally or upon the posting of designated station house bail, instead of promptly taking him to a court, and they require the officer either to serve a ticket or fix bail if an appropriate local criminal court is not readily available (F §140.20[2,3]; S §70.50[3,4]). To all this, the final proposal adds a proviso: that a police officer is never required "to serve an appearance ticket upon an arrested person or release him from custody at a time when such person appears to be under the influence of alcohol, narcotics or other drug to the degree that he may endanger himself or other persons" (F §140.20[3]).

(b) The study bill section perhaps leaves an unintended impression that following an arrest the arresting officer must always proceed with the case either by taking the defendant to court or employing the appearance ticket and station house bail procedures, and that even if he becomes satisfied that the arrested person is completely innocent, he may not terminate the matter and unconditionally release him (S §70.50). The final proposal explicitly authorizes such a release under such circumstances (F §140.20[4]).

(8) At one time, a procedural device known as the "D.O.R." (discharge on own recognizance) was used in some courts, and prolifically in the New York City Criminal Court, on or following arraignment of the defendant. This was nothing more than an adjournment without date in contemplation of an ultimate dismissal. If the defendant behaved himself and the People did not restore the case to the calendar in a year or so, the charge would be dismissed. In recent years, the D.O.R. has fallen into disuse and many judges and prosecutors, who deem it a valuable and salutary vehicle for disposition of some types of cases, seem to feel that legislation is needed

to restore it. While this is probably not so, the final proposal - unlike the study bill - does codify the old D.O.R. under the more descriptive label of "adjournment in contemplation of dismissal" (F §170.55). This provision, which applies only to non-felony prosecutions in the local criminal courts, deems a charge dismissed six months after the adjournment if the case has not been restored to the calendar within that period (id., subd. 2).

(9) The Code of Criminal Procedure contains a section providing that after a magistrate has held for grand jury action a defendant charged with a felony who has waived examination, the "county court," upon motion of the district attorney, may return the case to the magistrate, who may then rescind his original holding for the grand jury and take other action (CCP §190-a). No such provision is contained in the CPL study bill, but the final bill adds a section embodying the substance of the Code section (F §180.40).

(11) The study bill authorizes a local criminal court to reduce a felony charge pending before it to a misdemeanor or petty offense which is supported by the available evidence, only when it is satisfied that the proof does not support the felony charge; if it does, the court may not reduce but must hold the defendant for grand jury action (S §§90.40[1,3], 90.69[1,]).

The appropriate section of the final bill changes that proposition by according the local criminal court discretion to reduce to a non-felony offense even though it is satisfied that a felony also was committed - provided that the district attorney consents to the reduction (F §§180.50 [2b], 180.70[3]).

(11) Under certain circumstances a defendant may be convicted, either by verdict or plea, of a lesser offense than the one charged so long as it is a "lesser included offense" (F §§220.10[4,5], 300.40[3], 300.50; S §§115.10[4,5], 155.30[3], 155.40). The final bill and the study bill differ slightly in their definitions of the term "lesser included offense" (F §1.20[37]; S §1.20[35]). Either definition, however, places substantial limitations upon the kinds and numbers of lesser offenses which are proper subjects of conviction in any given case.

This is largely unavoidable in the area of conviction by verdict owing to certain inherent restrictions involved in the court's submission of a case to a jury. It is both possible and desirable, however, to expand artificially the concept of a "lesser included offense" solely for purposes of conviction by plea of guilty, and thus to inject much greater flexibility in the criminal process. The study bill did not attempt any such project but the final proposal does (F §220.20).

(12) Upon the subject of removal of indictments from one superior court to another of the same county at the instances of the courts or judges rather than of the parties, the study bill contains a rather narrow section, derived from the Criminal Code, authorizing the Supreme Court in any particular county to transfer its indictments to the County Court of such county (S §120.10). Expanding the procedure of this area, the final bill seeks more flexibility by authorizing transfer of indictments in both directions -

from Supreme Court to County Court and vice versa - with the particular courts or judges empowered to order such transfers in any given Department to be determined by rules of the Appellate Division of such Department (F §230.10).

(13) In connection with appeals, the final proposal adds three provisions not contained in the study bill which achieve the following:

(a) Extend the defendant's time for taking an appeal from a judgment of conviction when the People, by means of a specialized new appellate vehicle, succeed in having the original sentence set aside and a more severe sentence or resentence imposed (F §450.30[4]);

(b) Authorize the Court of Appeals and the Appellate Divisions to promulgate rules, if they so desire, establishing periods of limitation - of which there are none either under the Criminal Code or the study bill - for the making of motions for reargument of appeals (F §470.50[2]; cf. S §240.90); and

(c) Provide for an appeal to the Court of Appeals from an order of an intermediate appellate court dismissing an appeal to the latter (F §470.60[3]; cf. §§ 240.97).

(14) The study bill provisions dealing with bail do not permit any local criminal court, other than a Supreme Court justice sitting as such, to fix bail or release on his own recognizance a defendant charged with a class A felony in or before such court or a defendant charged with a felony who has two prior felony convictions (S §285.30[2]). The final bill changes this rule to some extent by authorizing District Courts and the New York City Criminal Court - but not city, town or village courts - to release defendants on bail or recognizance in such circumstances provided that the district attorney is accorded an opportunity to be heard in the matter (F §530.20[2]).

(15) The final proposal contains an Article consisting of three sections, entitled "Forfeiture of Bail and Remission Thereof" (F Art. 540, §§ 540.10-540.30), as well as another section dealing with the surrendering of a defendant upon forfeiture of a bail bond (F §530.80), none of which is contained in the study bill.

These provisions, which are adopted from the Criminal Code (see §§590-606), were not included in the study bill because the Commission had for some time been considering transferring the Code sections in question to another body of law, such as the General Obligations Law. Since that plan has been discarded, the surrender, forfeiture and remission provisions are now included in the final CPL proposal.

(16) For reasons very similar to those expressed in the preceding paragraph, two provisions derived from the Criminal Code dealing with witness fees, which were not included in the study bill, are now added to the final proposal (F §§ 610.50, 620.80).

(17) Since submission of the study bill in 1968, with its Article addressed to eavesdropping warrants (§ Art. 370), the entire area of eavesdropping has been drastically affected by the requirements and limitations of federal legislation on the subject, contained in a federal bill colloquially known as the "Safe Streets Act." Accordingly, the final proposal's Article devoted to "Eavesdropping warrants" (F Art. 700) is appreciably different from that of the study bill.

(18) As already pointed out (Part A of memorandum, No. 7), the final bill expands the pre-trial motion to suppress evidence, as it appears in the study bill, by adding another kind of evidence which is a subject of suppression thereunder, namely, potential identification testimony emanating from an improper pre-trial identification of the defendant by the identifying witness (F Art. 710, §712.20[5]; cf. S §75.20).

(19) Also as previously shown (Part A., No. 13), whereas the study bill extends Youthful Offender treatment to a large group of youth defendants as a matter of right and without any investigation of them (S §400.20[2]), the final proposal changes that principle by granting the court discretion either to accord Youthful Offender treatment to a member of this group without any investigation or to order an investigation of the defendant and determine the matter thereafter (F §720.20 [1,2]).

(20) The study bill provides that, in the absence of certain factors and circumstances, a defendant charged with a felony in a local criminal court who has spent more than forty-eight hours in the custody of the sheriff without any disposition of the matter or commencement of a hearing is ordinarily entitled to be released on his own recognizance pending such disposition or hearing (S §90.70). The final provision increases the forty-eight hour period to seventy-two hours (F §180.80).

APPENDIX

DERIVATION TABLE

The left column of this table lists each section of the 1969 bill (A.6579) establishing a Criminal Procedure Law. The right column shows the corresponding section of the 1968 study bill (S.5878)* from which the new section is specifically or generally derived. The word "new" indicates that there is no counterpart in the 1968 study bill.

<u>1969 Bill</u>	<u>1968 Study Bill</u>
1.00	1.00
1.10	1.10
1.20	1.20
10.10	5.10
10.20	5.20
10.30	5.30
20.10	10.10
20.20	10.20
20.30	10.30
20.40	10.40
20.50	10.50
20.60	NEW
30.10	15.10
30.20	15.20
40.10	20.10
40.20	20.20
40.30	20.30
40.40	20.40
50.10	25.10
50.20	25.20
50.30	25.30
60.10	30.10
60.15	30.15
60.20	30.20
60.25	30.30
60.30	30.40
60.35	30.50
60.40	30.60
60.45	30.80
60.50	30.90
60.55	30.95
60.60	NEW
70.10	35.10
70.20	35.20
100.05	50.05
100.10	50.10
100.15	50.15
100.20	50.20
100.25	50.25
100.30	50.27

*NOTE: - The 1968 Study Bill contains a Distribution Table and a Derivation Table with respect to the existing Code of Criminal Procedure.

1969 Bill

1968 Study Bill

100.35	50.30
100.40	50.35
100.45	50.40
100.50	50.45
100.55	50.50
110.10	55.10
120.10	60.10
120.20	60.20
120.30	60.30
120.40	60.35
120.50	60.40
120.60	60.45
120.70	60.50
120.80	60.60
120.90	60.70
130.10	65.10
130.20	65.20
130.30	65.30
130.40	65.40
130.50	65.50
130.60	NEW
140.05	70.10
140.10	70.30
140.15	70.40
140.20	70.50
140.25	NEW
140.30	70.53
140.35	70.55
140.40	70.57
140.45	70.60
140.50	70.70
140.55	70.80
150.10	75.10
150.20	75.20
150.30	75.30
150.40	75.40
150.50	75.50
150.60	75.60
150.70	NEW
160.10	80.10
160.20	80.20
160.30	80.30
160.40	80.40
170.10	85.02, 85.05, 85.10
170.15	85.20
170.20	85.21
170.25	85.22
170.30	85.25
170.35	85.30
170.40	85.35
170.45	85.40
170.50	85.45
170.55	NEW
170.60	85.60
170.65	85.65
170.70	NEW
180.10	90.10
180.20	90.25
180.30	90.30
180.40	NEW
180.50	90.40
180.60	90.50
180.70	90.60
180.80	90.70

1969 Bill1968 Study Bill

190.05	95.05
190.10	95.10
190.15	95.15
190.20	95.20
190.25	95.25
190.30	95.30
190.35	95.35
190.40	95.40
190.45	95.50
190.50	95.45
190.55	95.55
190.60	95.60
190.65	95.65
190.70	95.70
190.75	95.75
190.80	95.80
190.85	95.85
190.90	95.90
200.10	100.05
200.20	100.20
200.30	100.30
200.40	100.40
200.50	100.45
200.60	100.50
200.70	100.60
200.80	100.70
200.90	100.80
210.05	105.05
210.10	105.20
210.15	105.30
210.20	105.40
210.25	105.45
210.30	105.50
210.35	105.55
210.40	105.60
210.45	105.65
210.50	105.70
220.10	115.10
220.20	NEW
220.30	115.20
220.40	115.30
220.50	115.40
220.60	115.50
230.10	NEW
230.20	120.20, 120.30
230.30	120.40
230.40	NEW
240.10	125.10
240.20	125.20
240.30	125.30
240.40	125.40
250.10	130.10
250.20	130.20
260.10	135.10
260.20	135.15
260.30	135.20
270.05	140.05
270.10	140.10
270.15	140.15
270.20	140.20
270.25	140.25
270.30	140.30
270.35	140.35
270.40	140.40

1969 Bill1968 Study Bill

270.45	140.45
270.50	140.50
280.10	145.10
280.20	145.15
290.10	150.10
300.10	155.10
300.20	30.70
300.30	155.20
300.40	155.30
300.50	155.40
310.10	160.10
310.20	160.20
310.30	160.30
310.40	160.40
310.50	160.50
310.60	160.60
310.70	160.70
310.80	160.80
320.10	165.10
320.20	165.20
330.10	170.10
330.20	170.20
330.30	170.30
330.40	170.40
330.50	170.50
340.10	175.10
340.20	175.20
340.30	175.40
340.40	175.50
340.50	175.60
350.10	180.10
350.20	180.20
360.05	185.05
360.10	185.10
360.15	185.15
360.20	185.20
360.25	185.25
360.30	185.30
360.35	185.35
360.40	185.40
360.45	185.45
360.50	185.50
360.55	185.55
370.10	190.10
380.10	195.10
380.20	195.20
380.30	195.30
380.40	195.40
380.50	195.50
380.60	195.60
380.70	195.70
390.10	200.10
390.20	200.20
390.30	200.30
390.40	200.40
390.50	200.50
390.60	200.60
400.10	205.10
400.20	205.20
400.30	205.30
400.40	205.40

1969 Bill

1968 Study Bill

410.10	210.10
410.20	210.20
410.30	210.40
410.40	210.30
410.50	210.60
410.60	NEW
410.70	210.50
410.80	210.70
410.90	210.80
420.10	215.10
420.20	215.20
420.30	215.90
430.10	220.10
430.20	220.20
430.30	220.30
440.10	225.10
440.20	225.20
440.30	225.30
440.40	225.40
450.10	230.10
450.20	230.20
450.30	230.30
450.40	NEW
450.50	230.40
450.60	230.50
450.70	230.60
450.80	230.70
450.90	230.80
460.10	235.10
460.20	235.20
460.30	235.25
460.40	235.30
460.50	235.40
460.60	235.50
460.70	235.60
460.80	235.70
470.05	240.10
470.10	240.20
470.15	240.30
470.20	240.40
470.25	240.50
470.30	460.50
470.35	240.70
470.40	240.80
470.45	240.85
470.50	240.90
470.55	240.95
470.60	240.97
500.10	270.10
510.10	275.10
510.20	275.20
510.30	275.30
510.40	275.40
510.50	275.50
520.10	280.10
520.20	280.20
520.30	280.30
530.10	285.10
530.20	285.30
530.30	285.40
530.40	285.50
530.50	285.60
530.60	285.70
530.70	285.80
530.80	NEW

1969 Bill

1968 Study Bill

540.10	NEW
540.20	NEW
540.30	NEW
550.10	300.10
550.10	305.10
570.02	310.02
570.04	310.04
570.06	310.06
570.08	310.08
570.10	310.10
570.12	310.12
570.14	310.14
570.16	310.16
570.18	310.18
570.20	310.20
570.22	310.22
570.24	310.24
570.26	310.26
570.28	310.28
570.30	310.30
570.32	310.32
570.34	310.34
570.36	310.36
570.38	310.38
570.40	310.40
570.42	310.42
570.44	310.44
570.46	310.46
570.48	310.48
570.50	310.50
570.52	310.52
570.54	310.54
570.56	310.56
570.58	310.58
570.60	310.60
570.62	310.62
570.64	310.64
570.66	310.66
580.10	320.10
580.20	320.20
580.30	320.30
590.10	322.10
600.10	324.00
600.20	324.05
610.10	325.10
610.20	325.20
610.30	325.30
610.40	325.40
610.50	NEW
620.10	330.10
620.20	330.20
620.30	330.30
620.40	330.40
620.50	330.50
620.60	330.60
620.70	330.70
620.80	NEW
630.10	335.10
630.20	335.20
640.10	340.10
650.10	345.10
650.20	345.20
650.30	345.30

1969 Bill1968 Study Bill

660.10	350.10
660.20	350.20
660.30	350.30
660.40	350.40
660.50	350.50
660.60	350.60
670.10	355.10
670.20	355.20
680.10	360.10
680.20	360.20
680.30	360.30
680.40	360.40
680.50	360.50
680.60	360.60
680.70	360.70
680.80	360.80
690.05	365.05
690.10	365.10
690.15	365.15
690.20	365.20
690.25	365.25
690.30	365.30
690.35	365.35
690.40	365.40
690.45	365.45
690.50	365.50
690.55	365.55
700.05	NEW
700.10	NEW
700.15	NEW
700.20	NEW
700.25	NEW
700.30	NEW
700.35	NEW
700.40	NEW
700.45	NEW
700.50	NEW
700.55	NEW
700.60	NEW
700.65	NEW
700.70	NEW
710.10	375.10
710.20	375.20
710.30	375.30
710.40	375.40
710.50	375.50
710.60	375.60
710.70	375.70
720.05	400.05
720.10	400.10
720.15	400.15
720.20	400.20
720.25	400.25
720.30	400.27
720.35	400.30
720.40	400.35
720.45	400.40
720.50	400.45
720.55	400.50
720.60	400.55
720.65	400.60
720.70	400.65

1969 Bill

1968 Study Bill

730.10
730.20
730.30
730.40
730.50
730.60
730.70

405.10
405.20
405.30
405.40
405.50
405.60
405.70