N.Y.S. DEFENDERS ASSOC.

New York State Defenders Association

ELEVEN SENECA STREET
HORNELL, NEW YORK 14843

JOHN P. BROWN, PRESIDENT
JOSEPH MINTZ, VICE PRESIDENT
SAMUEL J. CASTELLINO, VICE PRESIDENT
MILTON ADLER, VICE PRESIDENT
SANDERS D. HELLER, TREASURER

WILLIAM J. HOLBROOK
SECRETARY
607-324-6253

November 18, 1969

RECEIVED
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GASPERINI, KOCH & SAVAGE

Mr. Edwin L. Gasperini, Esq.
Gasperini, Koch & Savage
277 Park Avenue
New York, New York 10017

Re: Criminal Justice Section
New York State Defenders
Position Paper on New Proposed
Code of Criminal Procedure

Dear Edwin:

I enclose herewith position paper as prepared by the staff of The Legal Aid Society, concerning the New Proposed Criminal Procedure Law, Assembly Bill #6579 and Senate #S4624.

This statement has been accepted in its entirety by the New York State Defenders Association, as to the objections of the New Code and the Defenders have filed with the Code's Committee a copy of this statement in objecting to the Bill as now proposed.

It is our feeling that the changes proposed, if enacted into law, would have a far reaching effect on our concepts of the rights of defendants accused of crime and the proper administration of Criminal Justice.

I trust that this statement will be circulated to the other members of the Executive Committee and also to the members of the Defense Committee of the Criminal Justice Section.

I wish to express my sincere appreciation to the Legal Aid Society staff members in their efforts in preparing this paper. The New York State Defenders Association has been working closely

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with The Legal Aid Society over the past two and one-half years in studying this New Code and we feel that the objections as set forth warrant the utmost consideration by the Criminal Justice Section of the Bar of the State of New York.

Respectfully submitted,

John P. Brown
President

JPB/dr
Enc.

STATEMENT OF THE LEGAL AID SOCIETY STAFF
ON THE PROPOSED CRIMINAL PROCEDURE LAW (A-6579)

This memorandum is submitted to express the opposition of the staff of The Legal Aid Society to the proposed Criminal Procedure Law. We believe the Bill is sorely defective in that it offers no reasonable assurance against prolonged pre-trial detention, often of persons who are later acquitted.

I. PRE-TRIAL FELONY PROCEDURES

EXISTING LAW

Under existing law and practice a number of substantial judicial checks serve to prevent the improvident and prolonged detention of a person charged with a felony. First, the complaint or information must allege a factually sufficient charge upon the affidavit or affidavits of persons with direct knowledge of the events.[1] Upon arraignment, the people can be required to establish a prima facie case by legally competent evidence. If the hearing is waived or if the prima facie case is established, the defendant must be admitted to bail by the magistrate or a Supreme Court justice unless the crime charged is murder or it appears that the defendant has previously been convicted of a felony or any two of a selected group of misdemeanors and violations, in which cases the defendant may be admitted to bail (Code of Criminal Procedure, Sec. 552).[2] If the defendant is not released on bail or recognizance,

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1 Provision is made for the temporary detention (forty-eight hours) upon a "short form" information or affidavit where an essential affiant is physically unavailable. N.Y. City Crim. Ct. Act, Sec. 55; See also, CCP Sec. 145-a.

2 The judicial gloss on the discretionary nature of bail is to the effect that the only ground for denial is risk of flight. See People ex rel. Lobell v McDonnall, 296 N.Y. 109 (1947). As a practical matter the method of "denying" bail is to fix it in an amount beyond the defendant's financial means. See, Testimony of Bronx District Attorney Burton Roberts and Queens District Attorney Thomas Mackell, Hearing before Senate Codes Committee, June 27, 1969.

theoretically he must be released from confinement if not indicted by the time of the discharge of the grand jury then sitting.[3]

PROPOSED CHANGES

The proposed law would replace the existing felony information or complaint with a "felony complaint". The critical difference between the present and proposed procedures is that the former required evidentiary allegations sufficient to make out all the elements of the crime; that is, allegations which if given in the form of testimony would establish a prima facie case. Under the new procedure, however, all that is required is an affidavit showing reasonable grounds to believe the defendant committed the crime charged, and this may be upon the 'information and belief' rather than the personal knowledge of the complainant. (CPL Sec. 100.40 [4]).

The preliminary hearing provided in the CPL in effect tracks the changes in the complaint procedure. Again all that is required is that the prosecution establish reasonable cause to believe the defendant committed the crime and this may be done by hearsay testimony (CPL Sec. 180.60 [8]).

If the defendant is remanded without bail, or if he is unable to make the bail set by the court, he may be held up to forty-five days, at the expiration of which time he must be released on his own recognizance if there has been no disposition before the grand jury.[4]

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[3] CCP Sec. 222-d. However the defendant may be retained in custody if "satisfactory cause" is shown - presumable for the failure to indict promptly. Generally speaking, grand juries in New York City sit for one month while those in most other counties sit for three months at a time.

[4] CPL Sec. 190.80. This section allows for the retention of the defendant beyond forty-five days if the delay was due to the defendant's "request, action or condition" or if the People can show some "compelling fact or circumstance which precluded grand jury action within the prescribed time or rendered the same against the interest of justice."

Comment:

In order to convict and imprison a person for the least significant criminal offense, a violation carrying a maximum sentence of fifteen days, a defendant's guilt must be established beyond a reasonable doubt by legally competent evidence. Yet the proposed CPL, with its superficial procedures sanctions the imprisonment of unconvicted persons for three times as long upon a bare prima facie case 'established' by incompetent evidence.

The essence of the proposed change is that a defendant, unable to raise bail, may be held for forty-five days upon testimony such as "The victim says the defendant stole $1000 from him." At no time prior to trial must the victim appear in court to have his testimony weighed by a judicial officer. We believe that the very least an unindicted person is entitled to before pre-trial confinement is that he be allowed to confront his accuser and that a magistrate hear and weigh the accusation.

In this connection it is significant that every district attorney who appeared before the Senate Codes Committee at its June 27, 1969 hearing on 'preventive detention' testified that preventive detention is now in force in New York by virtue of the practice of setting bail in some instances which a defendant is obviously unable to make. Yet even the proposed preventive detention bills require the magistrate to evaluate the weight of the evidence and substantial probability of conviction before remanding the defendant.[5]

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[5] See, e.g., A6579, Sec. 510.30, subdiv. 2(vi); S. 288, 91st Cong., 1st Sess., to amend 18 U.S.C. 3146(b); H.R. 12806, 91st Cong., 1st Sess., to add 18 U.S.C. 3146A(b) (2) (c). See also, Report of the Administrative Board of the Judicial Conference, The Case of the Dangerous Defendant (1969), p. 170 listing the "prospect of probable conviction" together with criminal record, sentence exposure, and ties in the community as the relevant criteria for ascertaining the risk of flight.

By eliminating the kind of preliminary hearing now in effect, the proposed CPL substantially subverts the requirement that a bailing magistrate weigh the probability of conviction along with the other criteria for the fixing of bail.

Furthermore, we believe the short-cut proposed by the CPL will have a detrimental effect upon the proper functioning of the indictment process. Under present procedures numerous cases are reduced to misdemeanors or are dismissed by the magistrate. Under the CPL, it will be virtually impossible for a magistrate or district attorney to properly evaluate a case and determine whether a reduction or dismissal is proper. Thus a substantial number of cases, which might have been weeded out at the preliminary hearing stage, will be added to the grand jury docket, perhaps while the defendant remains in jail.

Also, we regard as inadequate the provision requiring the release of any unindicted person detained forty-five days because of inability to make bail. Such a long delay between confinement and indictment, with or without a preliminary hearing, is unconscionable. In rural and semi-urban counties, the prevailing practice is to have the grand jury sit for three month terms; however, the tendency is for the grand jury to sit only for the first few days of the term, dispose of existing cases, and then adjourn sine die. Under this practice defendants arrested in the second week of the term and held in default of bail have to wait ten or eleven weeks until the next grand jury is sworn. By requiring grand jury disposition within forty-five days, the proposed CPL to some extent corrects this situation. However, it just does not go far enough. There is no good reason why a recessed grand jury cannot be reconvened every week or ten days to dispose of accumulating jail cases.

In the large urban areas, the situation is somewhat the reverse, often with three or four regular grand juries simultaneously sitting in daily three hour sessions. In New York and Bronx Counties the backlog appears to be about three or four weeks between remand and indictment or vote of no bill.

Prosecutors can meet a much shorter time limit in three ways: requiring the convening of additional grand juries, extending the sessions beyond three hours, and/or by giving precedence to the cases of unbailed defendants. Any one or combination of these suggestions are presently available to the district attorneys. To codify, as does CPL 190.80, a time limit beyond the existing needs of the present system, removes all incentive to improve upon the already unsatisfactory time lag between arrest and grand jury action.

II

Pre-trial Misdemeanors Procedures

The major shortcoming of our present system is the prolonged pre-trial imprisonment of accused persons who are ultimately found to be innocent or, if convicted have spent more time in jail prior to trial than the sentence which would be imposed. Apart from bail reform, the two ways of dealing with this problem are

(1) to speed up the pre-trial proceedings so as to offer an accused an almost immediate trial; or,

(2) to condition pre-trial confinement upon judicial evaluation of the sufficiency of the People's case.

As with the pre-trial felony procedures, the proposed CPL fails to deal with this problem. Not only does it remove the present barely adequate palliatives, but it gives legislative approval to prolonged pre-trial incarceration with no judicial intervention.

The CPL seems to assume that the present system of prosecution and trial cannot be adapted to offer all misdemeanor defendants a very prompt trial.

If we accept this assumption, then there must be some meaningful preliminary judicial screening of the sufficiency of the case against the unbailed defendant. Under existing law, this screening takes place by examination of the sufficiency of complaint and by the preliminary hearing. The proposed CPL does away with the preliminary hearing altogether in misdemeanor cases and makes a slim instrument of the new misdemeanor complaint, which, like the proposed felony complaint, may be based on hearsay.

We believe that as a bare minimum the new procedure law must contain provisions guaranteeing without equivocation or qualification that no alleged misdemeanant may be held in pre-trial confinement for more than a very short period (ideally 48 hours, certainly not more than 5 days) without a judicial screening of probable cause and legal sufficiency of the case against him. In default of such a trial or hearing, the defendant must be released.

It would be appropriate to include a provision allowing for a hearing to be continued upon proof by the prosecution of the temporary unavailability of an essential witness.

III

The Indictment

The CPL's provisions (210.30, 210.45) with respect to challenging the sufficiency of the indictment are painfully inadequate and like the pre-trial procedures already discussed, result in a dubious time saving at the expense of basic principles.

New York stands committed to the proposition that no

person shall be held to answer for a felony except upon an indictment returned on legally sufficient evidence.

The proposed sections remove all possibility of judicial review - either by the trial court or an appellate court - of the sufficiency of the evidence upon which the indictment was founded.

A - Sufficiency of evidence

Section 210.30 sets forth the requirement that in order to challenge the sufficiency of the evidence supporting an indictment the defendant or his attorney must support the challenge "by sworn allegations of fact supporting such claim". Thus a defendant, with no knowledge of the testimony or evidence before the grand jury must present sworn factual allegations to the effect that there was not sufficient evidence before the grand jury. We join with Chief Judge Fuld and former Presiding Justice Botein in being at a loss to fathom how a defendant is supposed to know and swear to what happened in the secret grand jury proceedings. (See, People v Howell, 3 N.Y. 2d 672, at 680, dissenting opinion, Fuld, J.).[6]

We recognize that the 'sworn allegation' provision in section 210.30 is a codification of the procedures already authorized but not required by the majority in the Howell decision; however, by codification of the present discretionary requirements of a motion to inspect the CPL will discourage

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6 Justice Botein wrote, as quoted in Judge Fuld's dissent in Howell:

> ". . . to demand any clearer showing would virtually require the defendant from extrinsic sources and without access to the minutes, not only to present a reconstruction of the evidence before the Grand Jury, but to secure a certification of its faithfulness from the district attorney. Except in a bizarre situation . . . this is manifestly impossible".

the present practice in most courts of declining to follow the letter of the Howell criteria.

B. Appealability

Subdivision 6 of section 210.30 provides that there shall be no appellate review of the correctness of an order denying a motion to dismiss when there has been a subsequent conviction upon legally sufficient evidence. The CPL is silent with respect to whether there may be appellate review following a guilty plea to the indictment or a lesser included charge. (Present case law is hopelessly confused as to whether a guilty plea constitutes an abandonment or waiver of a claim against the sufficiency of the evidence).

The Staff Comment to this provision, appearing under Section 110.30(6) of the September 1967 draft, states that this provision for non-reviewability is designed to work a change in a "widely criticized principle of New York Law" which has been "regarded by many as shocking."

Clearly none of the judges of the Court of Appeals have so regarded this principle. When, in People v. Jackson, 18 N.Y. 2d 516 (1966), the Court of Appeals was asked to change this non-statutory principle to achieve the result sought by this proposed law, the Court unanimously answered that such a suggestion was "unthinkable" (18 N.Y. 2d at 520).

The thrust of the CPL's provisions with respect to the assailability of the indictment is to erode the state constitutional provision requiring felony prosecutions to be upon an indictment lawfully obtained. By removing or severely limiting a defendant's ability to insist upon compliance with the constitutional mandate, the CPL has cheapened and subverted the integrity of the indictment process.

We are aware of no right had by a civil or criminal

litigant which is made as difficult to assert as this and, there is no other right or privilege granted by law or the constitution which is totally immunized from appellate review. The concept of complete insulation from appellate review is one completely foreign to New York law. It is jurisprudentially unsound, constitutionally unwise, and realistically unnecessary.

IV

The Guilty Plea (Article 220)

Although there are numerous statutory rules governing the procedures surrounding pre-trial, trial, and post-trial events, the proposed CPL is noteworthy for its absence of any procedural standard governing the manner of taking a guilty plea. Indeed the CPL removes some of the existing standards.[7]

We strongly urge that as a bare minimum the record of every guilty plea be required to show that:

1. the court has inquired on the record and is satisfied that the plea is knowingly and understandingly entered;

2. the plea is substantially in accord with the conduct of the defendant which is confessed in open court; or if the defendant refuses to acknowledge guilty conduct, he has been affirmatively advised by the Court of his right to trial by the court or jury;

3. the defendant has been specifically advised by the court of the grade of offense or offenses to which he has pleaded guilty and the maximum punishment therefore.

4. the defendant has been specifically advised by the court of any liability or exposure to punishment, custody, or rehabilitative treatment in

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[7] E.g., CCP, section 335-c provides that a defendant must be warned of possible multiple offender punishment before his plea is given.

addition to or different from that provided in Penal Law, Section 70.00(2) or Section 70.15;

5. the court has specifically stated the terms of any promises, or the absence of the same, with respect to sentence and the defendant, his counsel, and the prosecutor have acknowledged the accuracy of this statement.

To some extent the above requirements, particularly numbers 1,2,3, and 4 seem to be mandated by the Supreme Court decision in Boykin v. Alabama, 395 U.S. 238 where the Court held:

> "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."

Our proposals represent no revolutionary concept of law or burdensome procedure. They merely reflect our concern that too many persons are rushed through the pleading parts with too little awareness of the consequences of their pleas. When a defendant opts to plead guilty, thereby saving the state days or weeks of trial time, it is not asking too much to insist that the court spend a few more minutes to ascertain the full extent of the defendant's willingness to plead and his awareness of the consequences.

Apart from the fact that common decency would require no less, in the long run such a procedure would result in a net time saving for the court by eliminating many of the grounds for withdrawal of plea motions and post-conviction motions challenging the plea or sentence.

V

Accomplice Testimony

The proposed CPL would do away with the requirement in present Code Section 399 that an accomplice's testimony must

be corroborated and substitutes therefor a requirement that the jury be instructed that such testimony is "inherently suspect" (CPL 300.20).

The rule requiring corroboration of accomplice's testimony is a sound one; it recognizes that a person who has committed a crime may be all too willing to point the finger of guilt at anyone in return for an offer of immunity or more lenient treatment which flows from his testimony.

We believe it shocking that there should be a rule of law which allows a defendant to be found guilty 'beyond a reasonable doubt' solely upon testimony which, as a matter of law, is 'inherently suspect'. Our experience with the operation of such a rule in the federal courts gives us every reason to urge that it not be adopted in New York.

VI

Speedy Trial

As evident from some of the preceding comments, one of our prime concerns and major criticisms of the proposed CPL, and to some extent the existing Code, is the inordinate and unjustifiable delay between the arrest and final disposition of the cases of unbailed defendants. The recent Report to the Mayor's Criminal Justice Coordinating Council[8] has found that the median length of pre-trial detention in felony cases was 5.6 months and that 75 defendants had been held over a year without trial.

All agencies considering the problem have universally condemned the vague and unilluminating speedy trial provisions which merely state, as does proposed CPL 30.20, that "the defendant is entitled to a speedy trial."[9]

What is needed is a speedy trial provision in both misdemeanor and felony prosecutions imposing an absolute limit on the length of pre-trial detention. Such provisions are in force in states having crime rates and population density similar to New York.[10]

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8 "The Problem of Overcrowding in the Detention Institutions of New York City: An Analysis of Causes and Recommendations for Alleviation" (Vera Institute of Justice, Jan. 1969)

9 President's Commission on Law Enforcement and The Administration of Justice, The Challenge of Crime in a Free Society, p. 155 (1967); American Bar Association, Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial, p. 14; Report of the Mayor's Coordinating Committee, etc., p. 66.

10 E.g., Illinois Rev. Stat. c. 38, sec. 103-105(a) (1965) (120 days from arrest to trial); California Pen. Code, section 1382 sets a 15 day limit on the time an unindicted defendant may be held without trial and 60 days from indictment, or criminal information, to trial.

What makes a speedy trial mandate with a clear time limit more essential under the proposed CPL than under the present Code, is that under present procedures there has been some judicial determination, at arraignment, that the defendant probably would be found guilty. Under the proposed CPL the defendant can be held by a magistrate for forty-five days without judicial scrutiny of the People's case, then indicted upon what should be legally sufficient evidence (but which no court may examine for sufficiency) and then held for some indefinite period of time without trial.

We refuse to believe New York judges, prosecutors, and defenders are so over-burdened that this is the best we can do.

Edward O. Carr, Jr.
Attorney-in-Chief

Milton Adler
Attorney-in-Charge
Criminal Courts Branch

Leon B. Polsky
Attorney-in-Charge
Appeals Bureau

James T. Prendergast
Director of Research and
Legislation