Minutes of the Meeting of the New York State Temporary Commission on Revision of the Penal Law and Criminal Code, held at the Glenburnie Club, Lake George, New York, at 10:00 a.m. on Monday, July 9, 1962 and Tuesday, July 10, 1962

The Chairman called upon Peter Preiser to summarize his study on the present sentencing structure in New York. A report of this survey was distributed to the Commission members before the meeting. Mr. Preiser discussed the felony-misdemeanor system of classification, sentences authorized by statute and the calculation of terms of imprisonment. He noted that other matters relevant to the present system, e.g., probation, parole, prison, facilities, etc. will be analyzed in another report. Mr. Preiser said that he is reviewing the sentencing plan in other jurisdictions, e. g. California, and that he is studying material published by the National Council on Crime and Delinquency. Professor Wechsler criticized the penal law work of this Council. He also suggested that Mr. Preiser include in his reports a study of the youthful offender and the problem of collateral disability resulting from a felony conviction.

The Commission agreed that these staff reports, factual in their approach, should be published for the Legislature and, since they bespeak the public want, need to rationalize this whole body of law. Mr. Pfeiffer suggested that the staff prepare a summary of these reports, in three or four pages, highlighting the defects in the present structure. Judge Halpern said that the

Commission must decide to either rectify the present scheme leaving it basically unchanged, or make a radical policy decision. Professor Wechsler suggested that the Commission set a tentative recommendation on the sentence structure, which would point the way out of the present morass. This recommendation, he said, in summary form or in bill form, could be attached to the published critique of the present structure.

The Chairman said that the Commission will meet in the fall with Correction Commissioner McGinnis and Parole Chairman Oswald, so that the members may familiarize themselves with prison facilities and parole practice. He suggested that this meeting be at Sing Sing State Prison. Professor Wechsler said that it would be enlightening for the Commission to observe an actual parole hearing. He also noted that these officials have a great deal to say on the sentence structure. Mr. Bentley expressed the view that a study of prison facilities exceeds the authority of the Commission. The Chairman disagreed, noting that the scope of the Act creating the Commission is sweeping, e.g., §2(j) of the Act provides that the Commission shall make such changes and revisions as will "regulate existing procedures for commitment of persons to the various state institutions". Professor Wechsler pointed out that under the present New York structure, the court can determine

the extent of the sentence and the type of institution where it may be served. The court, he said, outht to make a more limited set of judgments. If a judge wants to impose more than a local jail term he should not name the institution: instead, the defendant should be committed to the Department of Correction. This Department, he continued, should be charged with the task of utilizing its resources, e. g., reshuffling facilities. Mr. Preiser said that the Commissioner of Correction has authority to transfer a prisoner to any state prison even though the court order of commitment names a specific institution.

The Commission agreed that before the staff can formulate any proposed provisions, it needs to know how many distinctions ought to be drawn at the legislative level. A revised structure will, it was agreed, retain the felony-misdemeanor distrinction, and an offense category lower than misdemeanor. A decision must be made as to how many variations are desirable within the felony area.

The Chairman called for comments on the Model Penal Code's classification of felonies for purpose of sentence into three categories of relative seriousness. Professor Wechsler said that the basic sentence provisions of the Code are in Article 6 (page 91, Proposed Official Draft) Section 6.01, he said classified felonies into three degrees. Section 6.02, Professor Wechsler continued, deals with the penal dispositions authorized.

Section 6.06 provides a statutory maximum (ordinary term) as follows: first degree felony, life; second degree felony, ten years; third degree felony, five years. This section recognizes the court's role in sentencing and provides that the minimum should be fixed by the court, as follows: first degree felony, one year to ten years; second degree felony, one year to three years; third degree felony, one year to two years. In all cases, he said a sentence of imprisonment for a felony under the Code must be indeterminate, with a substantial spread between the minimum (which must be at least one year) and the maximum. Apart from the death penalty, the severest sentence envisaged is ten years to life. This sentencing scheme, he continued, was drawn from very extensive studies of what actually happens in practice in the best systems, even when longer maxima have been used. This sentencing however, had to be supplemented by what is called "extended terms" (Section 6.07). The Code provides that the use of an extended term should not in any case be mandatory on the court. Section 7.03 sets forth the criteria for the use of this sanction: if the court finds that the defendant is a persistent offender, a professional criminal or a dangerous mentally abnormal person whose commitment for an extended term is necessary for protection of the public or that he is a multifple offender whose criminality was so extensive that an extended term is warranted. Under most habitual offender laws a jury

verdict is required on the question of previous convictions. The Code calls for a court determination of this issue. Judge Halpern asked whether there is a constitutional right to a jury trial on a contested multiple offender information (Penal Law §1943). Mr. Preiser said that there is no such right, citing a study make by the Law Revision Commission. Legislative Doctrine (1959) No. 65 (n) L. R. C. Reports, 1959, pages 489-545. Professor Wechsler said that Section 7.03 also sets out minimal conditions that must be established before an extended term is imposed: this is a safeguard against possibly abusive findings. He also pointed out that the Code contains no restrictions on the court's power to suspend the execution of sentence, except for murder (Section 6.02).

Judge Halpern said that he would like to see a staff study to segregate the various problems related to sentencing. He said that under the Model Penal Code there is very little room for the individualization of sentencing by the judge. It is, he continued, far more minimum than our system now provides. The Chairman pointed out that under Section 6.06 the court does exercise influence upon the length of the minimum. Professor Wechsler noted that this is a much disputed area. Accordingly, he said, alternate Section 6.06 (Proposed Official Draft, page 98) was adopted under which the court may fix a maximum lower than the statutory maximum prescribed in Section 6.06.

The Chairman suggested that the Commission could determine at a later date whether to choose the scheme embodied in Section 6.06 or the alternate. He said that Mr. Preiser will continue with his sentencing study, concluding with an analysis of penal institutions, and that he will draft a proposed sentencing structure along the lines of developing categories of uniform limits. Mr. Bass said that the Judicial Conference is planning an institute on sentencing. Professor Wechsler discussed the workings of the Federal Pilot Sentencing Institutes, noting that provation reports are distributed to the judges in advance of the convention. At the meeting the cases are analyzed and a diversity of views expressed. Mr. Conway suggested that the Commission meet with the liason committee of t the County Judges Association. The Commmission agreed that this meeting be held after the fall conference with McGinnis and Oswald. The Chairman said that he would communicate with Judge Robert J. Trainor, who was designed as chairman of the liason committee by Judge Arthur C. Aulisi, President of the Association.

PJMcQ/cd
September 5, 1962

Language as suggested by Prof. Wechsler to be used on p. 15 of the Interim Report, last sentence, last paragraph.

"The do give some indication, however, of the task of revision envisioned by the legislature in the Act establishing the Commission and defining its broad responsibility for recommending the reformations that the legislature evidently had in mind."