Draft (c.c.)

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Minutes of the Meeting of the New York State Temporary Commission on Revision of the Penal Law and Criminal Code, held at 155 Leonard Street, New York, New York, at 10:00 a.m. on Tuesday, December 18, 1962.

Present: Richard J. Bartlett, Chairman
Timothy N. Pfeiffer, Vice Chairman
Nicholas Atlas
Howard A. Jones
William Kapelman
Herbert Wechsler
Richard G. Denzer, Chief Counsel

Joseph F. Czechlewski, Representative of the Speaker of the Assembly

Excused: John J. Conway, Jr.
Philip Halpern
William Mahoney
Samuel J. Kearing, Jr., Representative of the Majority Leader of the Assembly
Herman Bass, Representative of the Majority Leader of the Senate

Joseph Kunzeman, Representative of the Assembly Ways and Means Committee

Robert Bentley, Representative of the Senate Committee on Finance

Peter Preiser, Associated Counsel

Also Present: William Bulman, Assistant Counsel, Judicial Conference

Arnold D. Hechtman, Assistant Counsel

John Kelligrew, Assistant Counsel

Peter J. McQuillan, Assistant Counsel

Charles E. Torcia, Assistant Counsel

Meeting commenced at 10:00 a.m. by Chairman Bartlett with a discussion of grand jury presentments.

Bartlett: "...I have Mr. Mahoney's vote in favor of maintaining the law as set down in Wood v. Hughes. So, we have a 5-4 vote on that."

Wechsler: "I would like to say that the tentative grand jury draft bill is a brilliant job." [prepared by Hechtman, Kelligrew, McQuillan and Torcia]

(Mr. Denzer concurred with Professor Wechsler on the staff's bill.

Bartlett: "It takes 16 to constitute a quorum? It takes 12 to indict, right?"

(Discussion ensued on the tentative bill.)

Wechsler: "I wouldn't feel too unhappy if this were passed, either."

Bartlett: "Is it necessary for us to spell out anything by waiver of immunity here, as under 2-B? I have two votes in my pocket on this issue: Messrs. Conway and Mahoney. And Mahoney will be negative on this [the grand jury issue]. Conway is for it."

Pfeiffer: "He's for the change in the law and this?"

Bartlett: "Right." It is my thought that the report ought to reflect that a majority of the Commission favor (recommend) no change in the law as established by Wood v. Hughes."

Denzer: "Just a flat outline on the law of presentments?"

Bartlett: "Right."

Pfeiffer: "Phrase it as follows: In the event the Legislature may consider a change in the Wood v. Hughes situation, the Commission recommends a bill in the form proposed."

Denzer: "Then, put in a short comment that the present law and constitutional provision respecting waiver of immunity will remain as it is. No substantive changes whatsoever are intended to be made in the area of immunity."

Bartlett: "I recommend in our report that we give some mention to the bill introduced by the

Bartlett: District Attorneys Association--the Kuh-Robbins bill."

Pfeiffer: "Include, also, that the Commission held a hearing on it."

Wechsler: "Basically, we are satisfied that adequate agencies and machinery for the investigation of persons and officials already exist and that the grand jury will best serve its function by limiting it to the return of indictments."

Denzer: "The memorandum could indicate that the abuses do not outweigh the advantages of permitting grand juries to file reports."

Wechsler: "I think it can be short, though."

Bartlett: "We can determine how we fit it together."

Wechsler: "We recognize that the Legislature may determine itself to proceed with legislation restoring some right of reporting and, therefore, we undertook to draft a bill that both meets the needs of the grand jury and at the same time limits the possibility of abuse. The memorandum can also indicate that all the members of the Commission but one agreed that this proposed bill is satisfactory [Mr. Mahoney]. It's best we don't say in our memorandum, 'Here's an idea.' I actually would not be unhappy if

Wechsler: this bill were passed."

Bartlett (to Jones): "Howard, how do you feel about it?"

Jones: "What was the thinking behind it, to make it a new section 253-a...since §253 already relates to misconduct of public officers?"

McQuillan: "We have in mind, also, §245."

Bartlett: "The 'general investigatory power'...Let me ask the staff: Was there any particular idea why this bill should follow §253?"

Jones: "Then, too, I suppose, it's being headed 'Grand Jury Reports'. Why does the opening paragraph of subdivision 1 refer to 'the court <u>for</u> which it was impanelled' instead of '<u>by</u> which it was impanelled'?"

McQuillan: "I suggest 'for' instead of 'by' because, for example, the December 1962 term of Supreme Court will generally impanel the January 1963 term of the grand jury."

Bartlett: "'<u>for</u> which it was impanelled': Will this cover all things?"...

Pfeiffer: "Will this provision cover extraordinary terms of the Supreme Court called by the Governor for special investigations?"

Jones: "§253, now,...I notice here we've veered away from that language: Is there any particular

Jones: reason for that?"

(The Commission then agreed to reletter paragraph "C" in subdivision 1 as "B" and reletter "B" as "C.")

Bartlett: "...Is this really what we're trying to say?"

Wechsler: "I think 'B' (§253-a-1) has got the 'cart before the horse.'"

(The Commission agreed that the language of §253-a-1-B should be changed to read as follows:)

"Containing recommendations of a general and objective character for legislative or executive action in the public interest"

Bartlett: "We did get into a discussion of whether 1-C could be used to castigate the accuser..."

Atlas: "May I point out that we have a criminal libel section on the books which has never resulted in a prosecution...or criminal action."

Wechsler: "I think when we get to Libel, we'll recommend a repeal of that law."

Bartlett: "That, I think, is covered by 2-C. This takes care of the matter of the grand jury shooting back at Lane, for example, in the Lane-Carlino matter."

Wechsler: "The grand jury examined the facts and found that the public official's conduct was not wrong."

Bartlett (to Jones): "Howard, any other comments on this?"

Jones: "When do we want it to take effect?"

Bartlett: "I see no reason why it can't take effect immediately."

Atlas: "I have no feeling about this at all."

Pfeiffer: "Subsection 5, would that be §2 of the bill?"

Bartlett: "When drafted in bill form, have it read that it shall take effect immediately."

Atlas: "...I think it should be said."

Wechsler: "It's all right with me."

Czechlewski: "...We wouldn't want the public official in the position of losing his job."

Bartlett: "That was the idea of this in the first place."

Atlas: "It's just an invitation."

Bartlett: "...We want to make sure he has the right to make a decision of whether or not he [an official] wants to appear."

Wechsler (to Bartlett): "Maybe it would be better, Dick, to say 'subpoenaed' or 'invited.'"

Bartlett: "I think this is what Joe [Czechlewski] means--I think 'invited' or 'subpoenaed' does it."

Atlas: "Or, 'appears at his own request.'"

(Mr. McQuillan read from the New York State Constitution relating to the calling of public officials before the grand

jury and the consequences of the public officer's refusal to sign a waiver of immunity.)

Bartlett: "Is the constitutional provision supplemented by legislation?"

McQuillan: "No, it's self-executing."

Wechsler: "...Give him an opportunity to keep his job, if he comes in."

(Messrs. Denzer and Atlas concurred with Professor Wechsler.)

Bartlett: "...Use the constitutional angle...be given an opportunity to appear without a waiver of immunity."

(The following words were suggested: "to appear voluntarily without signing a waiver of immunity")

Hechtman: "Even if he appears voluntarily, he may still lose his job."

Bartlett: "What Arnold [Hechtman] is saying, is, it isn't necessary to spell this out."

Hechtman: "The Constitution doesn't permit us to."

Atlas: "I'm glad I raised this."

Bartlett: "...I think Herb's original point [is good]... We ought to use 'subpoena' instead of 'invitation.'

"I think we've missed a point here: All we're saying is the public officer appeared or could have appeared..."

Atlas: "...I think you could write a book on the word 'call'...That word doesn't mean a thing except an argument."

Wechsler: "I don't agree with you, Nick, I think 'called' means 'subpoenaed' or 'compelled.'...I don't believe he's out of office (if he doesn't sign a waiver of immunity)."

Bartlett (to Denzer): "...'called' is more than 'invite.'"

Wechsler: "Well, there never has been such a case."

Atlas: "This section becomes a trap for a man who is willing to testify..."

Czechlewski: "...It could be used as a waiver against the person for whom he testified."

(Mr. Atlas suggested using the words "have an opportunity", in subdivision 2-B of the bill.)

Bartlett: "Are there any other questions on the language of the statute?"

Atlas: "Everyone knows I'm against the language of 2-B."

Bartlett: "Are there any other comments on the tenor of our report?"

Atlas: "I'm worried about the words 'pending' and 'matter' in subdivision 4."

Wechsler: "...I think it's good enough."

Bartlett: "I do, too. May we take a vote now as to our

Bartlett: recommending this bill in the event that the Legislature assumes to consider some authority for the filing of grand jury reports?"

Wechsler: "Kapelman probably favors this."

Vote on Recommendation of Commission

Drafted Bill re Grand Jury Reports:

Five of the members present were in favor of this recommendation (Bartlett, Pfeiffer, Atlas, Jones, Wechsler), and two members, by proxy votes, were also in favor (Conway, Halpern). Mr. Mahoney (by proxy) was opposed to the recommendation.

(Discussion now turned to the exonerating clause of section 1-C. Professor Wechsler said that it was his recollection that the Commission had decided to limit the exoneration to public officers.)

McQuillan: "...Our independent recollection is that it wasn't decided."

Atlas (to Denzer): "This puts the grand jury in the position of granting absolutions."

Bartlett: "I think we ought to decide whether 1-C should stand as it is here, or we should conform it to the vote taken at the last meeting."

(Chairman Bartlett then turned the meeting to a discussion of the Marchi Advisory Report (i.e., the question of identifying Commission members by name as to the position taken by them on the various proposals put to a vote.)

Bartlett: "...I think our best policy would be to call

Bartlett: to the public's attention that the Commission was divided...and the minority position was stated."

Wechsler: "...I don't think that's feasible: You can't refuse to answer that question when put to you by newspapermen (e.g., how did you vote, etc.). I'd like my position to be identified to obviate newspaper inquiry."

Atlas: "...I'd like to have my vote recorded... whether or not I go down in fame or infamy; I have strong considerations on this bill... I want to feel there is a record, when consulted."

Bartlett (to Jones): "Howard, how do you feel about it?"

(Mr. Pfeiffer and Professor Wechsler agreed on this; that is, the Commission having an identified position.)

Jones: "No, I have no objection to identification of members."

Bartlett (and Pfeiffer): "...It doesn't seem to me that we have to record our [individual] position in every single subsection of the report; if some members wish, they can do so."

Wechsler: "It is my judgment that the exoneration clause will be a failure; it will create more

Wechsler: difficulties than it's worth. I feel confident about this. I would like something said in the report about my position on this clause."

Pfeiffer: "I'd like to change my vote: I'd like to vote against exoneration."

Bartlett: "...I'd like to agree on a change of language in 1-C to conform with what we said last week."

Pfeiffer: "I vote against the inclusion of C."

Bartlett: "I'll call the other members."

Vote on Retaining 1-C as Amended Here

Two of the members present were in favor of the retention of 1-C, as amended (Bartlett, Jones), and three of the members present did not approve of the inclusion of any provision authorizing the grand jury to file a report stating* ~~its no true bill decision~~ (Pfeiffer, Atlas, Wechsler). By telephone, the Chairman contacted Judges Halpern and Kapelman and Mr. Conway. They were in favor of the retention of 1-C, as amended. Mr. Mahoney, who returned Mr. Bartlett's call, informed the Chairman that he does not favor even the submission of a bill on grand jury reports. The new subdivision 1-C is as follows: "Containing a statement that after investigation it finds no grounds for recommending disciplinary or removal proceedings against a public officer or employee."

Bartlett: "If they look into misconduct, they can

* that after investigation it finds no grounds for recommending disciplinary or removal proceedings against a public officer or employee.

Bartlett: report it. Is there anyone who prefers the language here--in C--to the substitute? I prefer the substitute. Is there anything else we have to vote on grand jury reports, understanding, of course, that we have to complete the vote on this issue?"

Atlas: "I am expressing my objection to the language general and/objective character in this bill."

(The meeting then turned to a discission of Draft #6 of the Homicide Article.)

(Chairman Bartlett then reported on the Rochester Capital Punishment Hearing.)

Bartlett: "I have become concerned about the Commission presenting abolition as its final and unequivocal position. ...I think the overwhelming position of the Commission would be the abolition of capital punishment...I'm particularly concerned about an abolition recommendation that we might make and the results that might ensue if the Legislature does not follow our recommendation. I think we would be doing the abolition movement a disservice. I'm concerned about the long-range effect such a rejection of our recommendation might have on our project. I feel that we

Bartlett: should place heavy emphasis on our new Homicide Article."

Atlas: "...I don't think this Commission can evade its clear-cut responsibility to take a position..."

Bartlett: "...I want to be sure that we present our position on capital punishment to the Legislature so that it won't be an impediment in the future. Our long-range role is a revised penal law and criminal code."

(Professor Wechsler questioned why Chairman Bartlett thought this would be an impediment.)

Wechsler: "If we recommend abolition, the Legislature might be forced to take a position. We could report that we favor abolition but, then, in appropriate language, say that our two-stage bill is a major step toward abolition."

Bartlett: "I think there should be a number of outs. We shouldn't say in the report negatively 'if the Legislature opposes abolition.' We might say that New York can acquire some valuable experience under the two-stage bill and then, after a period of time, re-examine abolition in light of this experience."

Atlas: "...This is a matter of good writing, that's

Atlas: all it is. ...We are there to be helpful to the Legislature and not obstruct it..."

Wechsler: "I think we could present our recommendation now with the bill to implement it, to the legislative leaders, and say that if the recommendation is not adopted, we will make modifications of the law relating to capital punishment. It is a question for them. It is no problem for us. We want to make our position known, but we want a solution available for those who are opposed to abolition. For example, they may wish to humanize the law in some fashion."

(Chairman Bartlett mentioned that there hasn't yet been a discussion of the Executive position on this.)

Bartlett: "...I'm concerned that our over-all success is important..."

(Professor Wechsler referred to the Commission's published Interim Report.)

Bartlett: "I did want to suggest that we take this up with the Governor and the legislative leaders before a vote is taken."

(Professor Wechsler agreed.)

Wechsler: "Suppose you have those conversations before we take a vote."

Denzer: "If we submit an abolition bill and it is defeated, I don't think it will do this Commission any good."

Bartlett (to Denzer): "You mean, if the bill comes up for a vote..."

(Discussion ensued on the Delaware question--the reinstitution of the death penalty.)

Bartlett: "Delaware is a community...(This is the difference between New York and Delaware.) "I'd like to have a vote beforehand...before we decide what we'll do with our position, in relation to its presentation to the Governor and the Legislature."

Pfeiffer: "We may have to take a position which is diametrically opposed to the leaders and the Governor."

Bartlett: "I'd like to take a vote and then report the vote to the leaders. This may help shape a decision for them."

Wechsler: "Someone may be concerned with homicides committed in prison. I wouldn't oppose including this in any abolition bill. For example, Rhode Island, which is considered an abolition state, has retained the death penalty for homicides in prison committed by prisoners serving life sentences for murder."

(All the members agreed to take a vote on the question of abolition.)

Vote on Abolition of Capital Punishment 6 - 3

Four of the members present were in favor of abolition (Bartlett, Pfeiffer, Atlas, Wechsler). Mr. Jones was opposed to abolition. By telephone, the Chairman contacted Judge Kapelman and Mr. Mahoney, who were in favor of abolition, and and Mr. Conway and Judge Halpern, were were opposed to abolition.

(Discussion then ensued on Homicide Draft #6.)

Bartlett: "In the absence of Judge Halpern, we will leave that portion on felony murder, and we'll discuss it at the next meeting [January 18, 1963]."

(Mr. Denzer then explained the draft.)

Denzer: "...I've tried to collate all the basic principles under the Definitions section (§1040). Many of the provisions in this draft have adopted the language presently in the Homicide Article of the Penal Law, for examples, the definitions of excusable homicide, justifiable homicide and the abortion-manslaughter provisions of the Homicide Article."

Bartlett (to Denzer): "Incidentally, Dick, I think the report should say that this is not the ultimate revised Homicide Article, that the Commission at a

Bartlett: later date will reformulate some of the provisions in this draft."

Denzer: "I don't want to use 'recklessly' in the Murder provision."

(Mr. Denzer then discussed the definitions of "criminal negligence" and "recklessly" in his draft. He noted that Mr. Uviller, of the New York County District Attorney's office, suggested substituting the word "grave" for "substantial" in the definition of "Recklessly." After discussion, the Commission unanimously agreed to make no substantive changes.)

(Mr. Denzer then reviewed the provisions in "§1041. Murder.")

Czechlewski: "What is the definition of 'depraved?'"

Wechsler: "Very bad; morally blah ('mad dog')."

(Chairman Bartlett called for a vote on leaving subdivision 2 of §1041 as is, in Draft #6; also, substitute "design" for "intent" (§1041, subd. 1).)

Bartlett: "One way or the other, our bill is going to be adopted."

(With reference to §1042, all the members agreed on a change in language, in the first paragraph, to read as follows: "Murder is punishable by life imprisonment, unless the death sentence is imposed, as provided in section ten hundred forty-three of this Article." The Commission also suggested that changes be made elsewhere to conform with this language.)

Bartlett: "The whole Code will have to be gone through with reference to this."

McQuillan: "Section 1043 is essantially the California and Pennsylvania statutes and the A.L.I. Code."

Bartlett: "Wherever possible, the language should show preference for life imprisonment."

(In discussing the evidence to be admitted in the second stage proceeding, it was asked as to what are the California standards of admissibility. Mr. McQuillan than read the pertinent California and Pennsylvania statutes.)

Wechsler: "...It means that in California they didn't drop the rules of evidence."

Bartlett: "Are there any other questions other than the preservation of privileges that we want to discuss?"

Wechsler: "I move that the brackets around 'not legally privileged' be removed (§1043, subd. 4)."

(The motion was seconded by Judge Kapelman. Howard A. Jones dissented but, subsequently, Mr. Jones changed his vote to conform with the majority. The motion was carried unanimously. The Commission agreed that the recommendation or consent of the District Attorney not be required so that §1043, subdivision 2, be operative.)

Bartlett (to McQuillan): "What does California say, Pete?"

McQuillan: "The statute is silent."

(The Chairman called for additional comments on subdivision 5; there were none.)

(Judge Kapelman suggested that consideration be given to reversing the order of presentation in closing arguments since, unlike the case in chief, the prosecution does not have the burden of proof. The Commission rejected this suggestion and unanimously agreed to make no changes in subdivision 5.)

(Discussion of §1044. Manslaughter followed. Mr. Denzer felt that no substantive changes were made in the Manslaughter-abortion provisions of the Penal Law. It was decided to discuss this and eventually redraft these provisions at another time. It was agreed that subdivision 6 of §1044 would become the new subdivision 3, and 3, 4 and 5 would be subsequently renumbered.)

(Professor Wechsler then initiated a discussion of the Illinois Code provisions in relation to manslaughter under an erroneous belief of a right to kill. Chairman Bartlett then read from the Illinois Criminal Code (§9-2, subd. B) regarding a killing under a mistake of fact.)

Bartlett: "We now have a 'reasonable belief' clause (§1040, Justifiable homicide) but we don't have an 'unreasonable belief' clause."

(Professor Wechsler said that he considered subdivision 1, of the second paragraph of Justifiable homicide, p. 2, as a "reasonable belief" clause.)

(Mr. Denzer said that he would use the Illinois Criminal Code for his revisionary work.)

(Professor Wechsler cited an English murder case: The jury

should have that kind of evidence in order to reduce the charge from murder to manslaughter.)

(It was agreed that Mr. Denzer would formulate this along the lines of the Illinois Code; and to leave the language that was bracketed, but delete the brackets.)

Wechsler: "I prefer the use of the word 'excuse' rather than 'explanation' [in §1044-6; now renumbered §1044-3] with respect to mistaken belief."

(Mr. Pfeiffer indicated that he preferred the word "excuse" to "explanation," also. It was agreed to reinstate the former phrase: "reasonable explanation or excuse.")

(The members agreed on the term of imprisonment for Manslaughter to be fifteen years.)

(Judge Kapelman and Professor Wechsler were excused at 2:30 p.m.)

(The members present discussed the two-stage proceeding.)

Denzer: "Draft a two-stage proceeding for kidnapping. When the victim isn't returned alive, we need a two-stage proceeding. Spell out the two-stage proceeding again. Make kidnapping two stage."

Bartlett: "If the jury recommendation comes in for other than death, then it will stay as it is now: The judge will impose sentence within the limits of the statute."

Denzer: "The question of aiding a suicide...is defined and punished as Manslaughter in the First Degree."

(It was decided that this should changed to Manslaughter--with no degree.)

Bartlett: "We've never come to grips as to whether I should introduce the bill to amend McNaughton. I was going to suggest that the notice of the next meeting should include a notice of this. January 18th, we'll take up the question of felony murder."

Pfeiffer: "I move that we adjourn with the hope that the members have a Merry Christmas and a Happy New Year."

(The motion was unanimously approved. The meeting was adjourned at 3:00 p.m.)

Respectfully submitted,

Rita Cheren

Notes for Stenographer per Chairman Bartlett:

1. The American Law Institute voted down 2-1 in favor of abolition of capital punishment.
2. Mail revised Grand Jury draft; and Homicide draft #7 (as discussed at meeting) to members and ex-officio members. With reference to the Homicide draft, members should communicate comments to Mr. Denzer.

Proposed Changes in Draft #6
of the Homicide Article:

It was agreed that the words "commits an act which", under Criminal negligence, be deleted

It was agreed that the words "commits an act which", under Recklessly, be deleted.

In §1041. Murder, subdivision 1, it was agreed that the word "design" be substituted for "intent;" also, that the words "commits an act which" be deleted. In subdivision 2, it was agreed that the words "commits an act involving a grave risk of human fatality and thereby" be deleted.

In §1042, paragraph 1, it was agreed that the words "either by death or" be deleted and that the words "unless the death sentence is imposed" be added following the word "imprisonment." [Note: It was later agreed, by the staff, to delete the words "of this Article", following the word "forty-three." A new paragraph "3" was to be added under §1042. [shifted from §1043]

In §1043. Determination of sentence for murder, it was agreed that subdivision 2 be revised and added to §1042 as a new paragraph "3". The present subdivision 3, of §1043, would be renumbered "2" and it was agreed that just the brackets would be deleted from the language "unless the court for good cause shown discharges that jury, and impanels a new jury for that purpose." The present subdivision 4, of §1043, would be renumbered "3" and it was agreed that just the brackets would be deleted from the language "not legally privileged".

The present subdivision 5, of §1043, would be revised and renumbered "4". The present subdivision 6, of §1043, would be renumbered "5". It was agreed that a new subdivision "6" would be added.

In §1044. Manslaughter, it was agreed that the present subdivision 6 would become the new subdivision "3" and that the word "design" would be substituted for "intent"; also, that the letters (a) and (b) would be added before designated clauses in present subdivision 6. In clause (a), it was agreed that the words "or excuse" would be added, to make the phrase read as follows: "for which there is a reasonable explanation or excuse". The new clause (b) would be revised, and there would also be an alternate (b). In subdivision 2, of §1044, it was agreed that the words "commits an act which" would be deleted. It was agreed that the paragraph following present subdivision 6 would follow the new subdivision "6" [which, in substance, is present subdivision 5 renumbered]. It was agreed that the term for Manslaughter would be changed from twenty to fifteen years. It was agreed that present subdivision 3, 4 and 5 would be renumbered "4", "5", and "6".

In §1045. Criminally negligent homicide, it was agreed that the words "commits an act which" be deleted from the first paragraph.

Draft # 6

ARTICLE 94

HOMICIDE

§ 1040. Definitions

Homicide. Homicide is the killing of one human being by the act, procurement or omission of another.

Excusable homicide. Homicide is excusable when committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with ordinary caution, and without any unlawful intent.

Justifiable homicide. Homicide is justifiable when committed by a public officer, or a person acting by his command and in his aid and assistance:

1. In obedience to the judgment of a competent court; or,

2. Necessarily, in overcoming actual resistance to the execution of the legal process, mandate or order of a court or officer, or in the discharge of a legal duty; or,

3. Necessarily, in retaking a prisoner who has committed, or has been arrested for, or convicted of a felony, and who has escaped or has been rescued, or in arresting a person who has committed a felony and is fleeing from justice; or in attempting by lawful ways and means to apprehend a person for a felony actually committed, or in attempting by lawful ways and means to apprehend a person for a crime actually committed, when the circumstances are such that one would have reasonable cause for believing the committed crime was a felony, or in lawfully suppressing a riot, or in lawfully preserving the peace.

Homicide is also justifiable when committed:

1. In the lawful defense of the slayer, or of his or her husband, wife, parent, child, brother, sister, master or servant, or of any other person in his presence or company, when there is reasonable ground to apprehend a ~~design~~ INTENT on the part of the person slain to commit a felony, or to do some great personal injury to the slayer, or to any such person, and there is imminent danger of such design being accomplished; or,

2. In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling or other place of abode in which he is.

Criminal homicide. Criminal homicide is homicide which constitutes murder, manslaughter or criminally negligent homicide as defined in this article, and which is neither justifiable nor excusable. A homicide which is either justifiable or excusable does not, regardless of any other factors, constitute murder, manslaughter or criminally negligent homicide.

Criminal negligence. A person who commits an act which creates a substantial and unjustifiable risk of human fatality, does so with criminal negligence, within the meaning of this article, when he is or ought to be ~~should~~ aware of that risk ~~but fails to perceive it.~~ The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his disregard or failure to perceive it involves a gross deviation from the standard of care that a reasonable person would observe in his situation.

Recklessly. A person who commits an act which creates a GRAVE ~~substantial~~ and unjustifiable risk of human

fatality, does so recklessly, within the meaning of this article, when, though aware of that risk, he consciously disregards it. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his disregard thereof involves a gross deviation from the standard of care that a reasonable person would observe in his situation.

§ 1041. Murder

A person is guilty of murder when:

1. With ~~intent~~ design to kill another person, he [commits an act which] causes the death of such person or of a third person, except when the crime constitutes manslaughter as defined in subdivision six of section ten hundred forty-four of this article.

2. Under circumstances evincing a depraved indifference to human life, [he recklessly ~~commits an act involving a grave risk of human fatality and thereby~~ causes the death of another person.

3. Either alone or in concert with others, he commits or attempts to commit a felony and, in the course of and in furtherance of such crime or of the immediate flight of the perpetrators thereof or any one of them, one or more commits an act [involving a grave risk of human fatality]* which causes the death of a person other than one of the perpetrators; [except that it shall constitute an affirmative defense to a prosecution under this

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*Alternatives:

1. inherently dangerous to human life;
2. which he knows to be dangerous to human life;
3. likely to cause serious physical injury [either directly or through the operation of fear or fright].

subdivision, which defense must be established by a preponderance of the evidence, that a defendant

(a) did not commit the homicidal act, nor aid, abet, induce, counsel or procure it in such fashion as to render him a principal therein, and

(b) did not carry any weapon [capable of inflicting serious physical injury] or know that any of his confederates carried such a weapon, and

(c) did not contemplate that either he or any confederate might commit an act [involving a grave risk of human fatality].]

Alternative Subdivision 3

[3. Either alone or in concert with others, he commits or attempts to commit a felony and, in the course of and in furtherance of such crime or of the immediate flight of the perpetrators thereof or any one of them, one or more commits an act [involving a grave risk of human fatality] which causes the death of a person other than one of the perpetrators, and when, in addition, the actor

(a) is the person who commits the homicidal act or aids, abets, induces, counsels or procures it in such fashion as to render him a principal therein, or

(b) carries a weapon (capable of inflicting serious physical injury), or

(c) knows that a confederate is carrying such a weapon, or

(d) contemplates that he himself might, under certain circumstances or eventualities, commit an act (involving a grave risk of human fatality), or

(e) contemplates that a confederate might, under

certain circumstances or eventualities, commit an act (involving a grave risk of human fatality).

It shall be presumed that a person participating in such a felony enterprise, though not in the homicidal act, (a) contemplated that one or more of his confederates might, under certain circumstances or eventualities, commit an act or acts (involving a grave risk of human fatality), and (b) knew that any confederate carrying a weapon (capable of inflicting serious physical injury) was so armed.]

§ 1042. Punishment for murder; plea of guilty to murder with a sentence of life imprisonment

Murder is punishable ~~either by death or by life~~ unless the death penalty is imposed, imprisonment, as provided in section ten hundred forty-three of this Article. delete

With the consent of the court and the district attorney, a person indicted for murder may plead guilty to murder with a sentence of life imprisonment, in which case he must be sentenced accordingly.

§ 1043. Determination of sentence for murder

1. When a defendant has been found guilty of murder after trial and such verdict has been recorded upon the minutes, it shall not thereafter be subject to reconsideration by the jury.

2. The court shall impose the sentence of life imprisonment if it is satisfied that: (a) defendant was under 18 years of age at the time of the commission of the crime; or (b) the sentence of death is not warranted because of substantial mitigating circumstances, ~~established by the evidence at the trial.*~~

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*Consideration might be given to an additional requirement of the recommendation or consent of the district attorney.

3. Unless the court imposes the sentence of life imprisonment pursuant to subdivision (2) hereof, it shall, as promptly as practicable, conduct a proceeding to determine whether defendant should be sentenced to ~~death or to~~ life imprisonment or to death. Such proceeding shall be conducted before the court sitting with the jury that found defendant guilty (unless the court for good cause shown discharges that jury, and impanels a new jury for that purpose).

delete just brackets, return the language

4. In such proceeding, evidence may be presented on any matter relevant to sentence including, but not limited to, the nature and circumstances of the crime, defendant's background and history, and any aggravating or mitigating circumstances. Any relevant evidence (not legally privileged) shall be received regardless of its admissibility under the exclusionary rules of evidence.

delete just brackets, return the language

5. When the presentation of the evidence is concluded, defendant or his counsel and the district attorney, in that order, may present closing arguments. The court shall then instruct the jury on any matters appropriate in the circumstances, including the law relating to the possible release on parole of a person sentenced to life imprisonment.

6. The jury shall then retire to consider the penalty to be imposed. If the jury report unanimous agreement on the imposition of the penalty of death, the court shall impose the sentence of death. If the jury report unanimous agreement on the imposition of the penalty of life imprisonment, the court shall impose the sentence of life imprisonment. If, after the lapse of such time as the court deems reasonable, the jury report themselves unable to agree upon a verdict, the court shall discharge

the jury and shall impose the sentence of life imprisonment.

§ 1044. Manslaughter

A person is guilty of manslaughter when:

1. With intent to inflict serious [severe, substantial, appreciable] physical injury upon another person, he commits an act which causes the death of such person or of a third person; or,

2. He recklessly ~~commits an act which~~ causes the death of another person; or,

3. With intent to kill an unborn quick child, he injures the mother and thereby causes the death of such unborn quick child; or,

4. With intent to procure the miscarriage of a woman, whether she is actually pregnant or not, he provides, supplies or administers to her, or advises or procures her to take, any medicine, drug or substance, or uses or employs, or causes to be used or employed, any instrument or other means of aborting her, and thereby causes the death of such woman or of any quick child of which she is pregnant, except that this subdivision shall not apply to the commission of such acts when they are necessary to preserve the life of the woman; or,

5. Being a woman quick with child and intending to produce her own miscarriage, she takes, uses or submits to the use of any drug, medicine or substance, or any instrument or other means, and thereby causes the death of such child, except that this subdivision shall not apply to the commission of such acts when they are necessary to preserve the life of either the woman or the child; or

6. With intent to kill another person, he commits an act which causes the death of such person or of

a third person and which would constitute murder under subdivision one of section ten hundred forty-one of this article except that it is committed under the influence of extreme emotional disturbance for which there is reasonable explanation, OR EXCUSE or under an erroneous belief of a right to kill based upon a mistake of fact for which there is reasonable explanation. [In either instance, the reasonableness of such explanation shall be determined from the viewpoint of a person in the actor's situation under the circumstances as the actor believes them to be.]

Delete?

Belief that the circumstances gives the person the right to kill

Manslaughter is punishable by imprisonment for a term not exceeding ~~twenty~~ [fifteen] years.

§ 1045. Criminally negligent homicide

A person is guilty of criminally negligent homicide when, with criminal negligence, he ~~commits an act which~~ causes the death of another person.

delete phrase

Criminally negligent homicide is punishable by imprisonment for a term not exceeding five years.

§ 1046. What proof of death is required

No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of killing by the defendant, as alleged, are each established as independent facts; the former by direct proof, and the latter beyond a reasonable doubt.

RGD and Staff/rc
December 13, 1962

TENTATIVE DRAFT BILL TO AMEND THE

CODE OF CRIMINAL PROCEDURE

IN RELATION TO GRAND JURY REPORTS

§253-a. Grand jury reports.

1. The grand jury may, upon concurrence of twelve or more of its members, submit to the court for which it was impanelled, a report:

A. Concerning non-criminal misconduct, non-feasance or neglect in office by a public officer or employee; or

B. Concerning matters of a general and objective character, and containing recommendations for legislative or executive action in the public interest; or

C. Exonerating from blame any person who has been publicly criticized ~~for allegedly criminal conduct~~ in connection with alleged misconduct.

2. The court to which such report is submitted shall examine it and the minutes of the grand jury and, except as otherwise provided in subsection three or four hereof, shall file such report as a public record if the court is satisfied that:

A. The report is the result of an investigation authorized by this code, and is supported by credible and legally admissible evidence; and

B. Where the report is submitted pursuant to subsection one-A hereof, each person named therein was ~~invited to or given~~ AFFORDED the opportunity to testify before the grand jury prior to the filing of such report; and

C. Where the report is submitted pursuant to subsection one-B or one-C hereof, it is not critical of an identified or identifiable person.

3. Upon the filing of a report pursuant to subsection one-A hereof, the court shall order it sealed and it shall not be subject to subpoena or public inspection, except upon order of the court. However, the court shall direct the district attorney to deliver a true copy of such report, for appropriate action, to the public officials who have removal or disciplinary authority over each public officer or employee criticized therein.

4. Upon the filing of a report pursuant to subsection one-B or one-C hereof, if the court finds that the filing of such report as a public record may prejudice fair consideration of a pending criminal matter, it shall order such report sealed during the pendency thereof, and it shall not be subject to subpoena or public inspection, except upon order of the court.

PJMcQ/ADH/cd
December 17, 1962

RE: SUPPLEMENTAL MATERIAL TO HOMICIDE DRAFT

California and Pennsylvania "split-verdict" statutes and unenacted New Jersey Bill thereon

CALIFORNIA PENAL CODE

Section 190.1

[Offense for which penalty is death or life imprisonment: Procedure for determining penalty: Death penalty for person under eighteen prohibited: Burden of proof as to age: Determination of sanity: Trier of fact: Evidence admissible: Procedure where jury unable to reach decision.] The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of the fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of the fact shall be a jury unless a jury is waived. If the defendant

was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty.

In any case in which defendant has been found guilty by a jury, and the same or another jury trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury. [Amended by Stats 1959, Ch. 738, §1, p. 2727.]

PENNSYLVANIA STATUTES

Title 18-Pennsylvania Statutes-§4701. Murder of the first and second degree.

All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree. All other kinds of murder shall be murder in the second degree. The jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether the person is guilty of murder of the first or second degree. If such person is convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly.

Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall, in the manner hereinafter provided, fix the penalty. In the trial of an indictment for murder, the court shall inform the jury that if they find the defendant guilty of murder in the first degree, it will be their further duty to fix the penalty therefor, after hearing such additional evidence as may be submitted upon that question. Whenever the jury shall agree upon a verdict of murder of the first degree, they shall immediately return and render the same, which shall be recorded, and shall not thereafter be subject to reconsideration by the jury, or any member thereof. After such verdict is recorded and before the jury is permitted to separate, the court shall proceed to receive such additional evidence not

previously received in the trial as may be relevant and admissible upon the question of the penalty to be imposed upon the defendant, and shall permit such argument by counsel, and deliver such charge thereon as may be just and proper in the circumstances. The jury shall then retire and consider the penalty to be imposed and render such verdict respecting it as they shall agree upon. A failure of the jury to agree upon the penalty to be imposed, shall not be held to impeach, or in any way affect the validity of the verdict already recorded, and whenever the court shall be of opinion that further deliberation by the jury will not result in agreement upon the penalty to be imposed, it may, in its discretion, discharge the jury from further consideration thereof, in which event if no retrial of the indictment is directed, the court shall sentence the defendant to life imprisonment upon the verdict theretofore rendered by the jury, and recorded as aforesaid. The court shall impose the sentence to be fixed as in other cases. In cases of pleas of guilty, the court where it determines the crime to be murder of the first degree, shall, at its discretion, impose sentence of death or imprisonment for life. Where a sentence of death is imposed, the clerk of the court, wherein conviction takes place, shall, within ten (10) days after such sentence of death, transmit a full and complete record of the trial and conviction to the Governor.

Whoever is convicted of murder of the second degree is guilty of a felony, and shall for the first offense, be sentenced to undergo imprisonment by separate or solitary confinement not exceeding twenty (20) years or fined not exceeding ten thousand dollars, or both, and for the second offense shall undergo imprisonment for the period of his natural life. [As Amended, 1959, Dec. 1, P.L. 1621, §1.]

STATE OF NEW JERSEY

(NOT ENACTED)

2A:113-4. Every person convicted of murder in the first degree, his aiders, abettors, counsellors and procurers, shall suffer death [unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed] or be punished by life imprisonment at the discretion the jury trying the case, and the penalty shall be fixed as hereinafter provided. In the trial of an indictment for murder the court shall inform the jury that if they find the defendant guilty of murder in the first degree it will be their further duty to fix the penalty therefor after hearing such additional evidence as may be submitted upon that question. Whenever the jury shall agree upon a verdict of murder in the first degree they shall immediately return and render the same which shall be recorded and shall not thereafter be subject to reconsideration by the jury or any member therof. After such verdict is recorded and before the jury is discharged or permitted to separate the court shall proceed to receive such additional evidence not previously received in the trial as may be relevant, competent and material upon the question of the penalty to be imposed upon the defendant, which shall consist of evidence of the circumstance surrounding the crime; of the defendant's background and history and of any facts in aggravation or mitigation of the penalty, and shall permit such argument by counsel and deliver such charge thereon as may be just and proper in the circumstances. The jury shall then retire and consider the penalty to be imposed and render such verdict respecting it as they shall agree upon. A failure of the jury to unanimously agree upon the penalty to be imposed shall not be held to impeach or in any way affect the validity of the

verdict already recorded and whenever the court shall be of the opinion that further deliberation by the jury will not result in a unanimous agreement upon the penalty to be imposed, the court may in its discretion discharge th jury from further consideration thereof in which event if no retrial of the indictment is directed the court shall sentence the defendant to life imprisonment upon the verdict theretofore rendered by the jury and recorded as aforesaid. The court shall impose the sentence so fixed as in other cases.

Every person convicted of murder in the second degree shall suffer imprisonment for not more than 30 years.

This act shall take effect immediately.

C O P Y

MEMORANDUM AND DRAFT BILL

SUBMITTED BY

NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION

October 17, 1960

Re: Proposed penal and correction law amendments to provide a different method for arriving at a recommendation for life imprisonment in all capital cases.

Under the law in New York today a defendant who is convicted of common law murder in the first degree must be sentenced to death. However, a defendant who is convicted of felony murder is eligible for a recommendation of life imprisonment by the jury.

Originally, the purpose of the New York recommendation section was to protect the lookout in a felony murder case from the same harsh punishment as that imposed upon the actual killer. Juries, however, in practise have frequently made the actual killer the equal beneficiary of the life imprisonment recommendation, and so the section has become a mode of tempering the law's severity -- but a mode of so doing that now is illogically limited to felony murder cases.

Existing law contains another major weakness. The jury frequently has no idea of the defendant's background, work record, previous criminal record or psychiatric history at the time it determines whether or not to recommend life imprisonment. It seems undesirable that a jury should decide whether or not to take a life in the absence of this knowledge. Two recent cases, tried in New York County, serve to illustrate this point.

In People v. Ulmer, tried in 1959, the defendant had previously been convicted of another murder in a southern state, and was an escapee from prison when he committed the murder for which he was tried here in New York. Since the defendant did not testify the fact of his prior conviction was unknown to the jury which recommended life imprisonment. Informal conversations with members of the jury after the verdict indicated that if they had been aware of the defendant's prior murder conviction they would not have recommended life imprisonment.

In People v. Hawa, also tried in 1959, the defendant had committed at least five other robberies with a loaded gun within a two week period prior to the fatal stick-up for which he was convicted. This fact was unknown to the jury and it recommended life imprisonment.

(In both these cases the trial judges abided by the jury's recommendations, as is overwhelmingly the custom when juries recommend life imprisonment.)

Another difficulty presently existing with regard to the jury's recommendation in a felony murder case is the fact that the recommendation is part of the jury's verdict and it must be unanimous. Because of this fact juries are hung on occasion, on the question of whether or not to recommend life imprisonment.

The result is either a retrial, with the concomittant expense and uncertainty, or the practical necessity of permitting the defendant to plead guilty to a lesser degree of homicide.

The states of California and Pennsylvania have recently adopted statutes that largely eliminate these objectionable features. These statutes provide a two-stage procedure in capital cases; first the jury brings in its verdict of guilty or not guilty; then, if the verdict is guilty of a capital crime, it hears evidence that may be significant for purposes of sentence, and deliberates further before determining whether or not to bring in a recommendation of life imprisonment. See 18 Pa. Stat. Ann. §4701, and Calif. Pen. C. §190.1.

The proposed New York statute would call for a similar procedure in New York. Moreover, it would make the jury's recommendation of life imprisonment binding on the trial court. In both Pennsylvania and California this procedure has proven workable. Under it the jury has sufficient information before it as to the defendant's prior criminal record, his family status, his employment record, and his prior juvenile record to make an intelligent determination as to whether or not life imprisonment should be recommended in a particular case. The version of the rule proposed in the instant statute would give the defendant the benefit of any failure of the jury to agree as to whether or not to recommend that his life be spared. This would be done by the simple expedient of providing that if the jury were unable to agree on punishment, then punishment should be imprisonment for the remainder of the defendant's natural life.

Because it is anticipated that applying the new bill to all persons convicted of capital crimes would lead to some decrease in the incidence of capital punishment, it might -- in turn -- require steps to protect society from the paroling of dangerous killers. Therefore, the instant bill would also call for the repeal of subdivision 6 of section 1945 of the penal law. This section, enacted during the 1960 Legislative Session, provided that a defendant who was sentenced to imprisonment for his natural life is eligible for parole as if the term was one of forty years to life.

AN ACT

To amend the penal law and the correction law in relation to the jury determination of the punishment for murder in the first degree and kidnapping.

The People of the State of New York, represented in Senate and Assembly, do enact as follow:

Section one. Subdivision six of section nineteen hundred and forty-five of the penal law, and section one thousand and forty-five-a of the penal law are hereby repealed.

Section two. Section twelve hundred fifty of the penal law, as last amended by chapter seven hundred seventy-three of the laws of nineteen hundred thirty-three, is hereby amended to read as follows:

§1250. Kidnapping defined.

A person who wilfully:

1. Seizes, confines, inveigles, or kidnaps another, with intent to cause him, without authority of law, to be confined or imprisoned within this state, or to be sent out of the state, or to be sold as a slave, or in any way held to service or kept or detained, against his will; or,

2. Leads, takes, entices away, or detains a child under the age of sixteen years, with intent to keep or conceal it from its parents, guardian, or other person having the lawful care or control thereof, or to extort or obtain money or reward for the return or disposition of the child, or with intent to steal any article about or on the person of the child; or,

3. Abducts, entices, or by force or fraud unlawfully takes, or carries away another, at or from a place without the state, or procures, advises, aids or abets such an abduction, enticing, taking, or carrying away, and afterwards sends, brings, has or keeps such person, or causes him to be kept or secreted within this state.

Is guilty of kidnaping, which is a felony and is punishable, if a parent of the person kidnapped, by imprisonment for not more than ten years and, if a person other than a parent of the person kidnapped, by death [Provided, however, that the jury, upon returning a verdict of guilty against a person upon whom the death penalty would otherwise be imposed, may recommend imprisonment of the convicted person, in lieu of death, and upon such recommendation such person shall be punished by] or imprisonment [under] for an indeterminate sentence, the minimum of which shall be not less than twenty years and the maximum of which shall be for the natural life of such convicted person. The punishment shall be at the discretion of the jury trying the case, which shall, in the manner provided in Section 1045 of the Penal Law, fix the penalty. Provided, further, that notwithstanding the foregoing provisions of this section with respect to punishment by death, if the kidnapped person be released and returned alive prior to the opening of the trial, the death penalty shall not apply nor be imposed and the convicted person shall be punished by imprisonment in the same manner as though the jury had [recommended] fixed imprisonment for an indeterminate sentence as the punishment.

Section three. Section ten hundred forty-five of the penal law, as last amended by chapter sixty seven of the laws of nineteen hundred thirty-seven, is hereby amended to read as follows:

§1045. Punishment for murder in the first degree

Murder in the first degree is punishable by death [unless the jury recommends life imprisonment as provided by section ten hundred forty five-a.] or imprisonment for natural life, at the discretion of the jury trying the case, which shall, in the manner hereinafter provided, fix the penalty.

In the trial of an indictment for murder in the first degree, or kidnapping, punishable by death or an indeterminate sentence,

the court, as part of its charge to the jury, shall inform the jury that if they find the defendant guilty of murder in the first degree, or kidnapping, punishable by death or an indeterminate sentence, it will be their further duty to fix the penalty therefor, after hearing such additional evidence as may be submitted upon that question. Whenever the jury shall agree upon a verdict of guilty of murder in the first degree or kidnapping, punishable by death or an indeterminate sentence, they shall immediately return and render the same which shall be recorded, and it shall not thereafter be subject to reconsideration by the jury, or any member thereof. Within five days after such verdict is recorded the court shall proceed to receive such additional evidence not previously received in the trial as may be relevant and admissible upon the question of the penalty to be imposed upon the defendant, which may consist of evidence of the circumstances surrounding the crime, of the defendant's background and history, including his record of convictions, and of any facts in aggravation or mitigation of the penalty and shall permit such argument by counsel and deliver such charge thereon as may be just and proper in the circumstances. If, at this stage of the proceedings, the defendant seeks to introduce evidence of his psychiatric background, the People shall have the right to apply to the court for appointment of a psychiatrist and the court shall appoint a licensed psychiatrist so that the defendant may be examined psychiatrically. If the defendant refuses to submit to psychiatric examination by this court appointed psychiatrist, the defendant shall be precluded from introducing evidence of his psychiatric background at the penalty stage of the proceedings.

If the penalty part of the proceedings lasts more than one day, the jury may be permitted to separate at the end of each trial day during that stage of the proceedings, but the jury shall not be permitted to separate after it has started

to deliberate on the penalty.

After the jury has heard the court's charge as to what issues they may consider in determining punishment, the jury shall then retire and consider the penalty to be imposed and render such verdict respecting it as they shall agree upon. A failure of the jury unanimously to agree upon the penalty to be imposed, shall not be held to impeach or in any way affect the validity of the verdict already recorded, and whenever the court shall be of the opinion that further deliberation by the jury is not likely to result in agreement upon the penalty to be imposed, it may, in its discretion, discharge the jury from further consideration thereof, in which case the defendant who was convicted of murder in the first degree shall be sentenced to life imprisonment, and the defendant who was convicted of kidnapping shall be sentenced to an indeterminate sentence, upon the verdict theretofor rendered by the jury and recorded as aforesaid.

Section five. This act shall take affect July first, nineteen hundred and sixty-one.