REPORT ON

THE PROPOSED NEW JERSEY PENAL CODE

ASSEMBLY, NO. 3282

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NEW JERSEY PROSECUTORS' ASSOCIATION

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Prepared by the Standing Policy Committee of the County Prosecutors' Association with the assistance of the Essex County Prosecutor's Office, Appellate Section.

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Chapter 1 - PRELIMINARY

Section 2C:1-1d(2) mandates that any person who is under a sentence of imprisonment on the effective date of the proposed Code for an offense committed prior to the effective date, may move before the courts of this State to have his sentence reviewed by the sentencing court and have a new sentence imposed as if he had been convicted under the Code. The provision requires that his term of detention or supervision will not be increased by his making such a motion.

The Prosecutors' Association is opposed to this provision of the proposed Code as it renders ineffective countless plea bargains which have been premised upon both sentence recommendation and dismissal of other charges. In many instances, defendants have pled guilty to offenses while receiving a recommendation of a specific sentence and a recommendation that other charges be dismissed. The State's motions for dismissal of these other charges have often been premised upon the expectation that the defendant will have to serve a specific term of years for the offense to which the guilty plea has been entered. Both the State and the public would be irreparably prejudiced by permitting the defendant to be re-sentenced to a more lenient term without having to face possible penalties on the previously dismissed charges. In essence, the defendant is being permitted to set aside the sentencing portion of the plea bargain while the State has no recourse with regard to the dismissed charges.

This re-sentencing provision should be deleted from the proposed Code. Such a deletion would leave in effect New Jersey's general "savings clause."

> No offense committed, and no liability, penalty or forfeiture, either civil or criminal, incurred, previous to the time of the repeal or alteration of any act or part of any act, by the enactment of the revised statutes or by an act heretofore or hereafter enacted, shall be discharged, released or effected by the repeal or alteration of the statute under which such offense, liability, penalty or forfeiture was incurred, unless it is expressly declared in the act by which such repeal or alteration is effectuated, that an offense, liability, penalty or forfeiture already committed or incurred shall be thereby discharged, released or effected; and indictments, prosecutions and actions for such offenses, liabilities, penalties or forfeitures already committed or incurred shall be commenced or continued and be proceeded with in all respects as if the act or part of an act had not been repealed or altered ... N.J.S.A. 1:1-15.

Under the proposed Code common-law crimes are abolished and an express statement is made that no conduct constitutes an offense unless the offense is defined by the Code or another statute. (2C:1-5(a)). The Prosecutors' Association does not agree with the abolition of common-law offenses and would recommend a language change in this section. Since many statutory crimes are also crimes at common-law, it is suggested that this section of the Code read as follows:

> All common-law crimes not specifically abolished or defined in this code are still in force and should be given full effect.

Present New Jersey law, N.J.S.A. 2A:85-1, provides that offenses which were of an indictable nature at common-law shall be misdemeanors. This inclusion of the common-law within our present statutory scheme presents an opportunity for growth and elasticity which is not present in the proposed Code. This is especially true in those areas of the law dealing with official corruption, i.e.,obstructing justice and misconduct in office. While those offenses are dealt with in Chapters 27 and 30 of the Code, it is conceivable that situations will arise which are not covered by the specific language of those chapters, or others.

The Prosecutors' Association would also point out that the retention of the common-law crimes acts as an effective safety valve. In those admittedly rare situations where an offense does not exactly fit into one of the criminal categories enumerated by the Code, the State would be able to fall back upon the common-law to redress wrongs committed against the public. There being no legal infirmity for prosecution for offenses which constituted common-law crimes, the prosecution for such offenses should remain at the disposal of the prosecutor.

The discretionary authority of both the prosecutor and the court are severely hampered by the limitations on dismissals provided for in 2C:1-7. This section prohibits the court from dismissing a prosecution for a first or second degree offense which involves use of a firearm when a motion for such a dismissal is made pursuant to a plea bargain. The Prosecutors' Association is of the opinion that this section should be deleted in its entirety.

At the present time, plea bargaining is a court recognized activity, Rule 3:9-3, and serves a useful function. Defendants are often indicted for violations of numerous offenses arising out of the same crime or series of crimes. It is oftentimes obvious that conviction for all of the charged offenses will result in the same ultimate sentence as would be received if there were convictions for only some of the offenses. The plea bargaining process in such a situation results in substantial savings of prosecutorial and judicial time. The effect of this section is to unduly hamper this plea bargaining process.

Although this section was obviously meant to highlight a policy of "toughness" with regard to the use of weapons in the commission of offenses, it appears to be detrimental to the system which it attempts to assist. It is within the discretion of the prosecutor to decide which, if any, offenses are to be charged against a defendant. This section would not effect the prosecutor's discretion prior

to the charging decision; however, interference with his discretion would occur after indictment. At this time, however, the prosecutor's discretionary decision to dismiss a charge must be approved by a court. Rule 3:25-1. It is thus apparent that no abuse of the plea bargaining process can occur unless both the prosecutor and the court are guilty of misconduct. There being sufficient safeguards against improper plea bargaining, this section should be deleted and should not place undue restrictions upon the process.

Chapter 2 - GENERAL PRINCIPLES OF LIABILITY

Section 2C:2-4 of the proposed Code permits a defendant to raise a defense of mistake of law as well as mistake of fact. The present law in this State does not permit ignorance of a criminal statute to affect the culpability requirement of an offense nor constitute a defense. State v. Hudson County News Co., 35 N.J. 284 (1961); State v. DeMeo, 20 N.J. 1 (1955).

As pointed out in State v. Long, 44 Del. 262, 65 A.2d 489 (Sup. Ct. 1949), "the reasons for disallowing it are practical considerations dictated by deterrent effect upon the administration and enforcement of the criminal law, which are deemed likely to result if it were allowed as a general defense." To permit such a defense would encourage ignorance and would open the floodgates to an easily contrived defense. The public should be presumed to know the proscriptions of the criminal law of the State. This section of the proposed Code should be modified so that only ignorance or mistake as to a matter of fact is a defense as in the present law. Ignorance or mistake of law should be deleted from this section.

Section 2C:2-11 of the proposed Code permits the assignment judge to dismiss a prosecution if he finds that the defendant's conduct was within customary license or the

harm caused was trivial in nature. This provision is not present in New Jersey law today and would constitute a usurpation of the prosecutor's discretionary role in the charging decision.

We fully agree with the proposition that in some instances conduct which might constitute an offense should not be prosecuted. It is evident, however, that in such instances the prosecutor has the discretion whether or not to institute proceedings against a prospective defendant. State v. Winne, 12 N.J. 152 (1953). Should the prosecutor choose to proceed against a defendant for a minor or technical violation, the grand jury will still have the opportunity to end the course of the criminal prosecution. It is for this reason that grand jurors are selected in such a manner that they will represent a cross-section of the community which will be familiar with local conditions, customs, and mores. See United States v. Duncan, 465 F.2d 1401 (9th Cir. 1972).

It is thus evident that a prospective defendant is protected from arbitrary prosecution by the powers of both the prosecutor and the grand jury. The charging discretion being within the executive branch of government, the assignment judge should not be given the authority to dismiss a *de minimis* infraction. The court's role

in the prosecution process begins after the prosecutor has made his decision to charge. As pointed out in the New Jersey Attorney General's Report on the Proposed New Jersey Penal Code, the judiciary's function, with regard to a de minimis infraction, should not affect the charging decision. Pre-trial diversion programs, imposition of lenient sentences, and expungement provisions provide a vehicle by which the judiciary may treat de minimis infractions. No purpose would be served by placing the charging decision for these offenses with the assignment judge. It is the position of the Prosecutors' Association that this section of the proposed Code be deleted in its entirety.

Chapter 4 RESPONSIBILITY

The Prosecutors' Association has studied this chapter of the proposed Penal Code in great detail and has encountered great difficulty in understanding both the language and the concepts presented. It is our belief that even if the approach taken were to be accepted, language changes need to be made in order that the legislative intent be understood. In order to better understand the concept attempted, it would be helpful to review the status of insanity law today, as well as the proposals in the 1971 Code. In this way, a comparison can be drawn to the proposed legislation and intelligent discussion can be fostered.

The law presently conceives it just to deal criminally with persons who commit hostile acts with a sense of wrongdoing. The existence of "blameworthiness in a personal sense" distinguishes those situations in which one may be subject to criminal as opposed to civil custody. State v. Lucas, 30 N.J. 37, 82, 83 (1959). Within this framework the famous M'Naghten test was formulated:

> If at the time of committing an act, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong, he was legally insane. State v. Spencer, 21 N.J.L. 196, 204, 212 (O. & T. 1846); State v. Lucas, supra.

"Disease of the mind" has never been defined by the New Jersey courts. The traditional charge under the M'Naghten rule does not attempt to define it. State v. Di Paolo, 34 N.J. 279, 292 (1963). "It is clear of course that a psychosis, as that disease is generally understood medically, is a competent cause of the required mental state. But what of other or lesser illnesses or conditions?" State v. Guido, 40 N.J. 191, 207 (1963). No answer has been forthcoming from our courts.

While the M'Naghten test may appear harsh in comparison to others;[1] its justification was amply set forth in State v. Spencer, supra at 206:

> We must administer the laws with firmness, however much we may in our hearts pity the culprit; and we are bound to be jealous of those defenses, which call for

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1. A. Irrestible Impulse Test - a person is excused from criminal responsibility when his act is the product of an emotional or mental disturbance, which so overwhelms his reason, conscience, or ability, that the impulse to act cannot be overcome.

B. Durham Rule - If the crime is the product of a mental defect or mental disease, insanity will be a good defense. Durham v. United States, 94 App. D.C. 228, 214 F. 2d 862 (D.C. Cir. 1954).

C. Mc Donald Variation to Durham Rule - One is relieved of criminal responsibility when he has an abnormal condition of the mind which substantially affects the mental or emotional process or substantially impair behavioral controls. Mc Donald v. United States, 312 F.2d 847 (D.C. Cir. 1962).

D. 1971 Penal Code Test - A person is not criminally responsible for conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial and adequate capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

> the exculpation of the offender where the criminal act is clearly proved upon him. Otherwise, we shall have no security for our lives or for the lives of our families. These considerations lie at the foundation of the law of insanity as I have expounded it to you, gentlemen, in relation to excusing a man from the consequences of his own atrocious acts. The law is stringent and suspicious, and it has to be so. If it were not so, we should be overrun with crimes and atrocities committed under the plea of insanity, or of some insane delusion. This is all that is meant when it is said that insanity is a defense not favored in the law.

Thus, the defense of insanity for the purpose of abrogating responsibility contains a legal rather than a medical standard, while the proofs to sustain the defense may derive from medical and/or lay testimony. New Jersey has rejected any test which incorporates volition, a defendant's ability to control his acts, and has utilized a cognitive test, that is, whether the defendant knew what he was doing and knew it was wrong.

> Criminal responsibility must be judged at the level of the conscious . If a person thinks, plans and executes the plan at that level, the criminality of his act cannot be denied, wholly or partially, because though he did not realize it, his conscious was influenced to think, plan and execute by unconscious influences...
> <u>State v. Sikora</u>, 44 <u>N.J.</u> 453, 470 (1965).

So, for example, testimony of "partial" or "diminished" responsibility rather than insanity is not admissible to totally exculpate an accused, but it is admissible if it rationally bears on the degree of the offense for which a defendant will be held accountable. State v. Di Paolo, 34 N.J. 279, 294-297 (1961), explaining State v. Cordasco, 2 N.J. 189 (1949). Similarly, "an adult's responsibility for a crime is not measured by a comparison of his mental ability with an infant's, but rather the test is his appreciation of the nature and the quality of his act and the difference between right and wrong in its commission." State v. Huff, 14 N.J. 240, 250 (1954).

It is of importance to note that the only reported cases discussing the use of "diminished capacity" are homicide cases where it has been indicated that the voluntary use of liquor or drugs may create a lack of specific intent which would lower the offense from first degree murder to second degree murder. State v. Maik, 60 N.J. 203, (1972); State v. Trantino, 44 N.J. 356 (1965); State v. Hudson, 38 N.J. 364 (1964); State v. Di Paolo, supra; State v. White, 27 N.J. 158, 165 (1958). "It cannot reduce the crime below murder in the second degree, and this because of the demands of public security." State v. Maik, supra at 215.

An area of confusion exists in regard to crimes other than murder. Other jurisdictions will allow intoxication to be used as a mitigating factor to show the

absence of specific intent as in robbery. 8 A.L.R. 3rd 1236, 1246. Our Supreme Court has, however, criticized the distinctions drawn between specific and general intent crimes and indicated that no New Jersey case actually holds the voluntary intoxication claim to be a valid defense to a specific intent crime.

> The distinction thus made between a "specific intent" and a "general intent" is quite elusive, and although the proposition (voluntary intoxication as a defense of specific intent crime) stated in the preceding sentence is echoed in some opinions in our State, see State v. White, supra, 27 N.J. Misc. 395, 133 A. 46 (Supreme Court 1926), it is not clear that any of our cases in fact turned upon it. State v. Maik, supra at 214-215.

Paradoxically, while voluntary intoxication may reduce felony murder to second degree murder because the perpetrator could not form the intent to commit the felony, it cannot serve to acquit the offender. This limitation rests upon the demands for public security. State v. Maik, supra at 214-215.

The present status of insanity law can be summarized thusly: M'Naghten insanity is admissible to show that a person is not criminally responsible for the conduct of which he is charged. Where a defendant has been charged with murder in the first degree, his mental state is admissible to prove that he was unable to formulate the specific elements constituting a willful, deliberate, or premediated killing (dminished capacity). There is a question of whether his mental capacity would be admissible

to disprove specific elements of crimes other than first degree murder. There is no case in New Jersey holding so.

The 1971 Penal Code codified the law in both of these areas. Section 2C:4-1 permitted the use of evidence of mental disease or defect to show that a defendant lacked the capacity to appreciate the wrongfulness of his conduct, and thereby completely excluding responsibility. Additionally, Section 2C:4-2 permitted evidence of mental disease or defect whenever it was relevant to prove that a defendant did not have a specific state of mind which was an element of a particular offense. In substance, therefore, the affirmative defense of insanity was continued, although the test was changed to something less than M'Naghten. It was also made clear that evidence of mental disease or defect would be admissible in order to establish "diminished capacity". The Criminal Law Revision Commission believed that it would be inappropriate to foreclose the admission of such evidence in light of its admissibility in homicide cases.

The proposed Penal Code abolishes insanity as a specific, separate defense to a charge of a crime. 2C:4-1. This means that a defendant would no longer be permitted to introduce evidence of mental disease or defect to negate a general <u>mens rea</u>. Instead, he would only be permitted to introduce this evidence to prove that he did not have a state of mind which was an element of a particular offense.

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2C:4-2a. At first blush, this appears to be a sound approach to the question of responsibility. However, there are practical problems which may render the insanity area a disaster in terms of fairness to society.

The application of the proposed Code can best be described by the use of an example. Assuming a defendant were charged with kidnapping, the State would have to prove that he unlawfully confined another person with the purpose of holding that person for ransom or reward or as a shield or hostage. 2C:13-1. The mental element needed for a conviction of this offense is that of purpose. The Code states:

> A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. 2C:2-2b(1).

Under the proposed Code, a defendant would be permitted to introduce evidence of mental disease or defect bearing upon his ability to form the mental state (purposely) which is a requirement of the kidnapping statute. Assuming the jury were to determine that the defendant did not possess such a mental state, it would then have to consider if the mental disease or defect permitted the defendant to form a lesser mental state, and possibly cause him to be guilty of another offense.

Section 2C:13-2 describes the crime of criminal restraint. A person is guilty of this offense if he "knowingly" holds another in a condition of involuntary servitude. 2C:13-2. The jury would then have to consider whether or not the defendant's mental condition enabled him to formulate such an intent. Knowingly is defined in the Code in Section 2C:2-2.

> A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conviction if he is aware that it is practically certain that his conduct will cause a result.

It would thus be the jury's function to determine, with exactness, the defendant's mental state and, therefore, the degree of culpability. It would appear that an impossible task is being requested.

In all likelihood, a jury confronted with these complex definitions of "purposely" and "knowingly" would be unable to accurately apply psychiatric testimony. If they believed that a defendant suffered from mental disease or defect, their deliberations would most likely result in an acquittal. Although the proposed Code attempts to establish a "diminished capacity" defense, it has, in effect, retained insanity as a specific defense. One of the attendant problems with the wording of this section is that a jury, believing

that a defendant did not have a particular state of mind for an offense, will return a judgment of acquittal rather than a judgment of guilty of a lesser offense. This not guilty verdict will not specify whether the jury believed that the defendant did not have a specific state of mind required or whether the jury did not believe the State had proven some other element of the offense beyond a reasonable doubt. Although the proposed Code abolishes insanity as a specific, separate defense, its effect would be the same as if it were not abolished while giving a defendant the right to raise the issue of his mental state in every case.

After studying this area in depth, the Prosecutors' Association takes the position that the proposed Code's new approach should be rejected and that the law of insanity be codified to basically conform to the status of the law today. We recommend that insanity be retained as a specific, separate defense which would, if proven, relieve a defendant of criminal responsibility. It is also our recommendation that the admissibility of evidence of mental disease or defect to show a diminished capacity not be made a part of the Code, but should be left to judicial interpretation.

Section 2C:4-1 of the proposed Code should be deleted and in its place should be the following:

> A person is not criminally
> responsible for conduct if
> at the time of such conduct
> he was laboring under such

> a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong.*

Since we recommend no codification of the right to present evidence to negate a particular state of mind, Section 2C:4-2 should be deleted from the Code in its entirety.

A section requiring notice of the insanity defense should be enacted and should be modeled after the 1971 Code. (2C:4-3)

> a. Mental disease or defect excluding responsibility is an affirmative defense.
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> b. If a defendant intends to claim insanity or mental infirmity as a defense, he shall serve notice of such intention upon the prosecuting attorney in accordance with the Rules of Court.
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> c. When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the verdict and judgment shall so state.

Sections 2C:4-4 through 2C:4-6 address themselves to the issue of whether a defendant is competent to stand trial. We fully support these sections as written, with one exception.

The proposed Code requires that if a defendant who is ruled unfit to proceed remains unable to proceed after 12 months, the court shall dismiss the charges and either order the defendant released or civilly committed. 2C:4-6c. It is

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*This is the traditional M'Naghten test, which we believe should be the test for excluding responsibility.

our position that no period of time should be specified as the trial court should have full discretion in determining the length of time after which to dismiss. There will clearly be situations where, after 12 months, it is obvious that a defendant will be competent after a few more months of treatment. Mandatory dismissal of the charges is unwarranted.

The permitted scope of psychiatric and other expert testimony is stated in Section 2C:4-7. It is our belief that the scope should not be codified here as the subject is adequately defined by the rules of evidence and case law. This section should be deleted.

Section 2C:4-8 describes the procedure to be followed after a conviction is rendered. Although a jury has obviously rejected the insanity defense, this section gives the defendant or the prosecutor the right to move for sentencing under this section. In this way, the defendant's sentence will be aimed at treatment of his mental condition rather than punishment or deterrence. We support this section, including the lesser test for mental disease for sentencing purposes.*

Should a defendant be acquitted by reason of insanity, the judgment will so state and the court should be permitted to control disposition. A statute will need

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*To sentence a defendant under this section, the Court only needs to find that the defendant at the time of the crime suffered from a mental disease or defect which substantially impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. 2C:4-8c.

to be drafted to cover this contingency and should basically give the court the same powers of disposition which it is given when a convicted defendant moves for sentencing under 2C:4-8. These include:

> (1) If the court finds that the defendant may be released without danger to the community without supervision, the court shall so release the defendant; or
> (2) If the court finds that the defendant may be released without danger to the community under supervision or under conditions, the court shall so order; or
> (3) If the court finds that the defendant cannot be released with or without supervision or conditions without posing a danger to the community, it shall commit the defendant to a mental health facility approved for this purpose by the Commissioner of Institutions and Agencies for an indeterminate term not to exceed the maximum term of imprisonment provided by law for the crime of which the defendant has been convicted. 2C:4-8c(1)-(3).

Our last criticism of this chapter of the Code is that section dealing with periodic review by the court of each case where commitment to a mental institution has been effectuated. We would only suggest that section be amended to specify that this review be done administratively by the court and not in open court in an adversarial proceeding.

Chapter 5 - INCHOATE CRIMES

Section 2C:5-2e permits, where a defendant is charged with conspiracy, an affirmative defense that the defendant, after conspiring to commit a crime, informed the authorities of the existence of the conspiracy and of his participation therein, and thereby thwarted the commission of any offense. This renunciation is required to be made under circumstances which manifest a complete and voluntary renunciation of criminal purpose. It is the position of the Prosecutors' Association that renunciation of purpose should not be a defense to the crime of conspiracy nor any other crime. Once the conspiracy has been formulated, a crime has been committed and should be punished under the criminal laws of this State.

It is noteworthy that the commentary of the Criminal Law Revision Commission does not set forth any reasons why this provision was added to change the existing law. It would appear, however, that the only rationale which could exist for permitting such a defense would be that it might induce a conspirator with second thoughts to come forward to the police authorities. This renunciation by the conspirator should not permit him to be completely absolved of criminal liability because he has participated in the criminal act of conspiracy. The law should remain

as presently, whereby a co-conspirator's renunciation is a factor which would be brought forth before a sentencing court and which would be considered within the sentencing decision. Assistance to the authorities should not result in an absolute defense.

Chapter 11 CRIMINAL HOMICIDE

The Proposed Code defines criminal homicide as murder, manslaughter or negligent homicide. 2C:11-2b. The Prosecutors' Association is in general agreement with this method of classification, with one exception. It is our feeling that negligent homicide should be deleted from the Proposed Code. In its place should be a statute similar to our present N.J.S. 2A:113-9, Death by Auto.

> Any person who causes the death of another by driving a vehicle carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others, is guilty of a crime of the fourth degree; but no record of a judgment or conviction hereunder shall be admissible in a civil action for damages arising out of the accident in which the death occurred.

The offense of negligent homicide would give rise to a flood of criminal prosecutions every time a death arises out of an accident. Many of such accidents would not have a sufficient degree of purposefulness, knowledge, or recklessness to justify a charge of criminal homicide. Resorts to civil remedies will be sufficient in the absence of those elements showing an intent to cause the death.

The felony murder rule as enumerated in 2C:11-3 changes the law as it presently exists. Criminal homicide

constitutes murder when the actor or a co-actor, in the course of committing various crimes, causes the death of a person other than one of the participants. This definition appears to require that the death be caused by one of the participants in the underlying felony. Also, an act of criminal homicide does not constitute murder if it is one of the participants whose life is lost. The Prosecutors' Association would suggest that this definition be modified to include the death of any person, other than a participant, which ensues from the commission of the underlying felony. In this way, the participants in the felony would be guilty of murder if a stray police bullet were to kill a bystander or if a storekeeper were to accidentally shoot a bystander while protecting his property. When an actor proceeds to commit any of the enumerated felonies, he should be presumed to bear the risk of any consequences, including the death of a victim or bystander.

In this regard, the Prosecutors' Association is opposed to the affirmative defenses provided in the Proposed Code. A defendant who has acted with another is permitted to raise as a defense, and must prove, that he did not commit the homicidal act or aid in its commission, that he was not armed with a deadly weapon, that he had no reasonable ground to believe that another participant was armed with such a weapon, and that he had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death

or serious physical injury. As noted earlier, it is our belief that a participant in any of the crimes enumerated in the statute should bear full responsibility for the acts of his co-participant. The questions of whether a co-participant actually caused the death, and whether he was armed during the offense, are factors which should more properly be considered at the time of sentencing. In this way, participants with less culpability would be sentenced accordingly. The felony murder rule should read as follows:

> Except as provided in section 2C:11-4a(1) and 11-5, criminal homicide constitutes murder when:
>
> > It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, aggravated rape, aggravated sodomy, aggravated arson, burglary, kidnapping or criminal escape, and in the course of and in furtherance of such crime or of immediate flight therefrom a death of a person other than one of the participants ensues.

It is the consensus of the Prosecutors' Association that the penalties provided for murder in 2C:11-3b are not sufficiently stringent to act either as a deterrent or as punishment. It is recommended that capital punishment be restored (see appendix) and that a life sentence be permitted for the offense of murder. Additionally, we believe that a

defendant should be required to serve at least twenty years before being paroled if he has committed a murder purposely, knowingly, or in the course of the commission of the enumerated crimes.[1]

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1. In advocating the restoration of the death penalty, the Prosecutors' Association recognizes that the application of such a penalty should be limited to only those murder situations without extenuating circumstances. Should this penalty be restored, it will need to be done in such a manner as not to violate either the federal or state constitutions.

Chapter 14 SEXUAL OFFENSES

This section of the proposed Penal Code divides all sexual offenses into four separate categories: Rape, Sodomy and Related Offenses, Corruption of Minors and Seduction, and Sexual Assault. 2C:14-1 et seq. The Prosecutors' Association is in general accord with this means of classification of offenses, with some reservations.

Section 2C:14-1 defines the offense of rape and specifically excludes spouses from the proscription. We can see no rational basis for following this common law rule that a husband cannot be guilty of raping his wife. No longer do we live in a society where a wife is considered the chattel of her husband, to be used or abused at his whim and pleasure. The Code's definitions of both aggravated rape and rape require an element of either force or coercion. Because a woman may be married to a particular man does not give rise to justification for coerced intercourse.

It has been argued by some that permitting prosecutions for rape between husband and wife would open the floodgates to this type of prosecution where marital difficulties exist. We have full faith, however, in prosecutors' ability to screen complaints, especially where these complaints arise out of a family dispute. The elements of these events, including force or coercion, if

proved, mandate application of this statute. The Prosecutors' Association would, therefore, recommend that section a of 2C:14-1 be amended to read:

> Any person who would have sexual intercourse with another is guilty of aggravated rape if:

If this suggested amendment is made, 2C:14-1a (4) will, by necessity, need to be amended to read "the other person is less than 12 years old, and not his legal spouse." This section of the statute places strict liability upon an actor who engages in sexual intercourse with a person less than 12 years of age. This strict liability should obviously not apply where the infant is the legal spouse of the actor.

Another problem arises in the gradation of aggravated rape. The offense is classified as a crime of the first degree if the actor inflicts serious bodily injury upon anyone or if the victim was not a voluntary social companion of the actor and had not previously permitted him "sexual liberties." All other aggravated rapes are classified as crimes of the second degree. It should be noted that sexual intercourse is defined as intercourse "per os" or "per anum" with some penetration. A problem arises in defining the previous term "sexual liberties." In essence, aggravated rape is a crime of the first degree if the victim had not previously permitted the actor "sexual liberties." This term is in dire need of definition, as it will have a tremendous effect upon the potential sentence to which the actor will

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be exposed. It is suggested that the term "sexual liberties" be deleted and the term sexual intercourse be substituted. In this way, it is clear that only previous acts of coitus will lessen the aggravated rape to a crime of the second degree.

As in the definition of aggravated rape, the definition of rape in 2C:14-1b should be amended to exclude the phrase "not his spouse." The crime should apply to spouses as well as unmarried persons.

Section 2C:14-2 is entitled Sodomy and Related Offenses. This section closely parallels the rape statute only instead of speaking in terms of sexual intercourse, aggravated sodomy and sodomy are defined in terms of "deviate sexual conduct." This "deviate sexual conduct" is defined for purposes of this chapter as including "sexual intercourse per os or per anum between persons who are not husband and wife." As we indicated in the earlier discussion regarding rape, the Prosecutors' Association is in favor of applying this proscription to husband and wife situations. As long as force or coercion is used by the actor, he should be prosecuted.

It should be noted that the sodomy statute does not require penetration as in the rape statute. Although "deviate sexual conduct" is defined as "including" sexual intercourse, it does not specifically define any other acts.

It is our belief that the definition of deviate sexual conduct should be amended to include both contact of sexual organs without penetration and coerced fellatio and cunnilingus.

Lastly, the Prosecutors' Association is of the belief that included within Chapter 14 should be a proscription against penetration per os or per anum where the actor uses an inanimate object rather than his sexual organ. Such a crime is at least as heinous as rape or sodomy and should be punished accordingly. A proscription against this type of crime could be placed either within the rape statute (2C:14-1) or the sodomy statute (2C:14-2) as the crimes are classified in the same manner. It is apparent, however, that traditional concepts of the definition of rape call for the placing of this type of proscription within the sodomy statute.

The proposed Code defines corruption of minors as sexual intercourse with another not the actor's spouse or engaging in deviate sexual conduct when the actor is either a guardian or supervisor of the victim or if the victim is less than 16 years old and the actor is at least four years older. 2C:14-3. The Prosecutors' Association is in general accord with this statute; however, a change is recommended in that section which proscribes sexual or deviate sexual conduct for a person four years older than a victim under the age of 16. It is easy to envision situations

where an 18 year old youth might not be able to ascertain the age of a 14 year old girl. Should he engage in sexual intercourse with this 14 year old, he would be guilty of committing this offense. It is our belief that an older male would be better able to ascertain that a girl is of tender age than would a teenage boy. We would, therefore, recommend that section 2C:14-3a(1) be amended so that a person would be guilty of corruption of a minor or seduction if he is at least 21 years of age and the other person is less than 16 years of age.

Various statutes in this chapter of the Code use ages of the victim in defining the offenses. Section 2C:14-5 indicates that when a definition of criminality of conduct depends upon a child's age being below 12 years, mistake as to age is not a defense. This section goes on to indicate that when the criminality depends upon the child being below a critical age other than 12 years, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age. The Prosecutors' Association is of the opinion that mistake as to age should not be a defense to any of the sexual offenses delineated in this chapter. 2C:14-1, rape, and 2C:14-2, sodomy, only use the age of 12 as a cut off point. The Code, as written, would not permit mistake as to age to be raised as a defense to these crimes. However, 2C:14-3, corruption of minors, and 2C:14-4, sexual assault, use ages of the victim

in order to define the offenses. We do not believe that such a defense should ever be permitted, as the actor acts at his own peril when engaging in sexual activities with women younger than he. In this regard, we have noted previously our recommendation that one of the definitions of corruption of minors be amended to require that the actor be at least 21 years of age and the other person less than 16 years of age.

Although we have recommended the deletion of the spousal exclusion for the crimes of rape and sodomy, these exclusions remain within the definitions of corruption of minors and sexual assault. The definition of spouse, however, as provided in the Code, will present myriad problems of proof, both for the State and for a defendant. Although we agree with the general philosophy that persons living together as man and wife should be considered as such for purposes of application of the spousal exception to these crimes, a practical definition is extremely difficult. It is stated in the Code that the spousal exception shall extend to persons "living as man and wife, regardless of the legal status of their relationship." 2C:14-5b. No further definition is given, although such would appear to be warranted. It is also indicated that the spousal exclusion will not be operative with regard to spouses living apart in a state of legal separation or for a period of 18 months. Problems of proof will arise when unmarried persons are living

together under various arrangements, varying in degree from merely co-tenants in an apartment to living together as husband and wife. A problem also arises where a husband and wife may be in the habit of separating whenever such should be their desire. It is unclear from this definition of spousal relationship where these couples would stand with respect to the spousal exclusion. It is therefore necessary that this definition be changed to establish the scope of the exclusion.

Chapter 34 PUBLIC INDECENCY

The initial section of Chapter 34 provides a brief explanation of the disorderly persons offense of open lewdness. Specifically, any flagrantly lewd and offensive act which a person knows or reasonably expects is likely to be observed by members of the public who would be affronted or alarmed is proscribed. A final statutory caveat, however, requires that the act be committed "in a place exposed to public view." 2C:34-1.

The Prosecutors' Association is in accord with the Code's intent to proscribe the delineated conduct. The descriptive terms "flagrantly" and "offensive" as well as the definition of "lewd acts" provide reasonably clear guidelines of prohibited conduct without encompassing merely indecent or suggestive acts. See <u>State v. Brenner</u>, 132 <u>N.J.L.</u> 607 (E. & A. 1945); <u>State v. White</u>, 129 <u>N.J.L.</u> 200 (Sup.Ct.1942), aff'd 130 <u>N.J.L</u>. 527 (E. & A. 1943). However, the Association objects to the Code's proposed limitation that an act of lewdness be in a place "exposed to <u>public</u> view" wherein "members of the <u>public</u>" may be located. These phrases are inherently vague and will create undesired disputes about the locale of the act and the public's potential access to it. If it is the Code's intent to prohibit "any flagrantly lewd and offensive act",

it should not matter where the act is committed as long as the victim, wherever he is situated, is "affronted or alarmed."

The Criminal Law Revision Commission's 1971 proposal suggested a more practicable definition of open lewdness. It deleted the requirement that the act be committed in a place exposed to public view and merely required that the act be observed by "others" who would be affronted or alarmed. In this matter private sexual conduct remains excluded from this section since neither participant would be affronted. Yet, acts committed either in private places or in public places wherein the acts are not likely to be exposed to members of the public will be proscribed as long as the act is "lewd" and "affronts or alarms" the observant. Thus, the Association suggests the following definition of open lewdness:

> A person commits a disorderly persons offense if he does any flagrantly lewd and offensive act which he knows or should reasonably expect to know is likely to be observed by others who would be affronted or alarmed.

Section 2C:34-2 encompasses prostitution and related offenses and adopts, almost verbatim, the proposals enunciated in the Criminal Law Revision Commission's 1971 Code. The Association voices no objection to this section

as it realistically mirrors the public's attitude and law enforcement's view about the issue. The legislation's rationale is thoroughly discussed and supported in the Criminal Law Revision Commission's Commentary at 301-305.

Section 2C:34-4 contains provisions concerning obscenity for persons under 16 years of age. As is readily inferred from the incorporated age limitation, the section fails to proscribe dissemination of obscene materials among adults. Although the subsequent section prohibits public communication of obscenity, the actual transferral of this material is not regulated when persons 16 years of age or older are involved. The Association believes there is a residue of hard core pornography which law enforcement authorities must be able to regulate even in cases of consensual adults.

Of primary concern is the public's demand that the proliferation of obscene materials in book stores, movie theaters, peep shows and massage parlors be terminated. These locations easily escape statutory regulation as proposed in the Code since their pornographic product can readily be hidden from public view. Section 2C:34-5 merely prohibits communication of obscenity in such a manner that it "may be readily and distinctively perceived by the public by normal unaided vision or hearing <u>when viewing or hearing it in, on or from a public street, road, thoroughfare, recreation or shopping center or area, public transportation facility or vehicle used for public transportation.</u>"

(emphasis supplied). Clearly these materials may continue to exist "behind closed doors" easily accessible to the public. Experience has proven that an adult's desire to obtain obscene material must yield to law enforcement's need to regulate the sources of dissemination.

The Association's position is fortified by the present, viable definition of obscenity contained in N.J.S.A. 2A:115 as construed by the New Jersey Supreme Court in State v. DeSantis, 65 N.J. 462 (1974). Since the DeSantis opinion incorporated the holdings pronounced in the United States Supreme Court's decision of Miller v. California, 413 U.S. 15 (1973), which articulated a three-pronged adult standard with respect to obscenity, the present New Jersey law appears constitutionally sound. Those standards are:

(1) Whether the "average person, applying contemporary community standards" would find that the work taken as a whole, appeals to the prurient interest.

(2) Whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law, and

(3) Whether the work, taken as a whole lacks serious literary, artistic, political or scientific value.

Thus, the Association believes that the present law remains an effective tool for law enforcement. It may be utilized

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not only to terminate dissemination of proscribed material but should aid in discouraging the establishment of centers of dissemination.

In short, the Prosecutors' Association concludes that the Code's intent to only regulate the dissemination of obscene materials to children below 16 years of age is unduly restrictive, manifesting a parochial approach to an important issue of public concern. Furthermore, the attempt to proscribe merely the public communication of these materials will inhibit law enforcement's ability to regulate the centers of dissemination. Thus, the Prosecutors' Association strongly urges that the existing laws on obscenity, as construed by the judiciary of this State, provide a framework to prohibit the utterance, sale or distribution of obscene material in consensual adult situations. This, or similar legislation, should be enacted.

Chapter 37 GAMBLING OFFENSES

This chapter of the proposed Code makes radical changes in the area of gambling and gambling related offenses. The apparent stress seems to be on the areas of organized gambling activity, with a resultant deemphasis upon prosecution for social gambling activities. Although the gambling laws should generally apply only to gambling activities conducted on a profit basis, the myriad situations where gambling occurs requires that severely strict control be effectuated. The proposed statutes go too far in attempting to isolate only major gambling enterprises and permits too little control over the lower echelons of a gambling activity. This section should be rewritten with an eye towards the gambling laws as they exist today.

In the definitional section of the act (2C:37-1) a very broad definition of a "player" is given and would appear to place the burden on the State to show that a person received a profit from the illegal gambling itself (aside from his own winnings) before that person became more than a "player." As long as the person gambled at a social game of chance on equal terms with the other participants, he is not considered to have rendered any material assistance to the operation of the gambling activity even if he performs acts "directed toward the

arrangement or facilitation of the game." There is therefore nothing in the definition of player that expressly limits the term to the "friendly card game" situation. Thus, the term could be extended to encompass the person who allows others to run a bookmaking or lottery operation in premises owned by him, or does acts in furtherance of a bookmaking or lottery operation. Because this definition is so broad, persons who are presently charged with "working for" a bookmaking or lottery operation could not be prosecuted unless it was shown by the State that he was receiving a profit other than personal gambling winnings. This is a burden which would be practically impossible for the State to sustain.

This section relating to gambling offenses has the noble aim of seeking to prosecute only organized gambling activity which is operated as a business. Unfortunately, it is extremely difficult to find and prosecute those persons in the higher echelons of such organized activity. It is therefore necessary that the players, as well as the organizers, be prosecuted for these gambling activities. Only in this way can the gambling laws act as a deterrent to those persons who would participate. Only the "social game" should be excepted from the proscriptions of the gambling statutes.

The definitional section of Chapter 37 defines bookmaking as "advancing gambling activity by unlawfully

accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events." The wording of this definition is much too vague in that it fails to define "casual or personal fashion." Thus, any defendant arrested for bookmaking could easily avail himself of this defense. It could be argued by any bookmaker that he knows all of his bettors and is accepting these bets in a personal fashion. Thus, the bartender accepting bets from his patrons or a factory worker accepting bets from his fellow employees could use the defense that his activities were in a "casual or personal fashion". As suggested by the Attorney General in his report on the proposed Penal Code, this definition should be modified so as to define bookmaking as the acceptance of bets on a regular systematic basis for the purpose of making a profit. The definition should also specify that bookmaking does not apply to occasional wagers between individuals.

The proposed Code creates a new offense called "Promoting Gambling." This offense is defined as accepting or receiving money pursuant to an agreement whereby the person participates or will participate in the proceeds of gambling activity or engages in conduct which materially aids any form of gambling activity. 2C:37-2. There appears to be no problem with the definition of this new offense; however, the gradation of penalties appears to present unsurmountable problems for the State.

This section provides that if a bookmaker receives or accepts in any one day more than five bets totalling more than $1,000.00, or receives, in connection with a lottery or policy scheme, money or written records from a person other than a player or more than $100.00 in any one day of money played in such activity, he is guilty of a crime of the third degree. If a bookmaker receives or accepts three or more bets in any two week period, he is guilty of a crime of the fourth degree. Accepting fewer bets than those noted above constitutes a disorderly persons offense. The State is, therefore, placed in a position that it must prove the date on which bets were accepted and the amount of the bets accepted. In order for an offender to be sentenced for a crime of the third degree, the State would have to show that in one particular day he had received more than five bets totalling more than $1,000.00, or that he received more than $100.00 in any one day of money played in such activity. These differentiations bear little relationship to the degree of involvement of a particular offender. The degree of involvement is not necessarily reflected by the amount of play found in a person's possession, and that should not be the factor which determines the degree of punishment. The Prosecutors' Association finds the distinctions in the various grades of 2C:37-2 to be unacceptable. Instead, this legislation should provide only one penalty, fine

and incarceration, the extent of which should be within the discretion of the sentencing judge.

Section 2C:37-3 of the proposed Code makes it an offense to possess gambling records. Under present law, it is no defense to this charge that the records represented the bets of the defendant himself. 2C:37-3b(1) makes it a defense to such a prosecution that the record possessed represented the defendant's own plays in a number not exceeding ten. It is also made a defense that the record was neither used nor intended to be used in the operation or promotion of a bookmaking scheme or enterprise or in the operation of a lottery or policy scheme. It is our position that these should not be defenses to the crime of possession of gambling records. The proscriptions of the statute could easily be circumvented by recording a minimum number of bets on any particular slip or memorandum.

As in the previous section, 2C:37-2, the offense of possession of gambling records is graded into several levels. This section, however, does not suffer from the same practical problems of proof as the earlier section. In a situation where a person is charged with possession of a gambling record, objective proof of the possession is available to the prosecutor. Additionally, objective proof is available which would show the number of bets or plays which were represented by the particular record. Therefore, the grading of offenses as presented in the proposed Code are practical in nature.

It is necessary at this time to point out an ambiguity in the language of the gambling section of the proposed Code. In the penalty provisions, 2C:37-2, 2C:37-3 and 2C:37-4, the offenses are graded and state "notwithstanding the provisions of 2C:43-3, shall be subject to a fine of not more than ______ ." It might thus appear that although a particular offense is classified as a crime of the third degree, fourth degree or disorderly persons offense, an offender is only subject to a monetary fine. It is our belief and hope, that the legislature did not intend that these monetary fines were to be the sole punishment for violation of the gambling statutes. These various grading sections should read:

> ...and notwithstanding the provisions of 2C:43-3, shall be subject to a fine of not more than ________ as well as the remaining authorized dispositions enumerated in Chapter 43.

The proposed Code retains the present offense of maintaining a gambling resort. The proposed statute requires, inter alia, that the State prove that the accused accepted or received money or other property pursuant to an agreement whereby he participates in the proceeds of the gambling activity. This provision is unacceptable to the Prosecutors' Association in that it requires an element which would be practically impossible for the State to establish. This section should be amended to comply with present law, which does not require the maintainer of a gambling resort to receive anything of

value in return.

The present law pertaining to gambling has served a useful purpose for many years. It had been tested by many appellate and trial courts and found to be legally sufficient. Within the context of these opinions, the terms and provisions of the various gambling statutes have been defined and refined so that their meanings are clear. The proposed Code places a harsh burden on the State with respect to the quantum of proof necessary to obtain a conviction; it creates so many exceptions to the criminal statute that effective enforcement would be impossible. The history of law enforcement in this State has shown that the backbone of organized crime is the money it derives from illegal gambling activities. This money is not only rechanneled back into illicit endeavors, but it is also used to infiltrate and control legitimate businesses. Although it is a noble goal to attempt to focus criminal prosecution on the upper echelons of gambling organizations, all levels of the operation need, by necessity, to be subject to criminal prosecution. Without the cooperation and participation of bettors, bookmakers, and players at all levels, syndicated gambling cannot long survive. The Prosecutors' Association therefore strongly recommends that the proposed Code incorporate the gambling laws as they now exist. Alternatively, we would recommend that those sections noted earlier be amended to reflect our views.

Chapter 43 - AUTHORIZED DISPOSITION OF OFFENDERS

This chapter of the proposed Penal Code presents the sentencing alternatives available to a court upon conviction of an offender. The Prosecutors' Association is in general agreement with the philosophy of this section, with certain reservations to be discussed later. Of utmost importance, however, is our view that the entire specter of sentencing alternatives should be the subject of an in-depth study which should be performed by a cross-section of the criminal justice community.* The areas which should be explored range from minimum sentence to the restoration of the death penalty. In this regard, a resolution has already been passed by the Prosecutors' Association recommending the authorization of the death penalty in certain instances (See Appendix).

Our recommendation for a study commission is not to be construed as a total rejection of the provisions of the proposed Code. To the contrary, most provisions are acceptable to this Association, with various alterations and deletions. It is not our intention to impede the passage of this Bill by our suggestion for a commission; however, the need for such a commission will not be alleviated by passage, with or without alterations.

Section 2C:43-1 divides the crimes into four degrees for purposes of sentencing. It also provides

* We note that such a study is presently under way by the Master Correctional Plan Council for the State of New Jersey.

that offenses outside the Penal Code which are denominated high misdemeanors are, for sentencing purposes, to be considered crimes of the third degree, while those denominated misdemeanors are to be crimes of the fourth degree. This separation of crimes into four categories instead of our present two (N.J.S. 2A:85-6 and N.J.S. 2A:85-7), with their countless exceptions for specific crimes, serves the useful purpose of making sentences more uniform. This goal is achieved by giving the sentences for each degree a range into which the imposed sentence must fall. See 2C:43-b.

The Association's only criticism of this section is that provision excluding the New Jersey Controlled Dangerous Substances Act from the sentencing provisions of the Code. This exclusion was made by the Criminal Law Review Commission in the 1971 Code because "[t]he drug laws are...so new and continue to be sufficiently controversial that we believe it would be inappropriate to change them again so soon after enactment." Commentary (Oct. 1971) p.312. It is the position of the New Jersey Prosecutors' Association that the penalties for which provision is made in the Penal Code should apply to all criminal violations, as well as those in the New Jersey Controlled Dangerous Substances Act. In order to accomplish such an end, it would be necessary to amend the Controlled Dangerous Substances Act. In this

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regard, it would also be necessary to delete a portion of 2C:43-2a so that all criminal violations would be sentenced under the Code.

Under the proposed Code, the court is given continued jurisdiction over the defendant for purposes of a motion for modification of sentence at any time. 2C:43-2(e). Although this section restricts each defendant to one such motion each year, the effect would be a flood of frivolous motions from all inmates each year. Since the procedure for motion for reduction of sentence is appropriately handled by the Rules Governing the Courts of the State of New Jersey, this section (2C:43-2(e)) should be deleted in its entirety.*

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*Rule 3:21-10 reads as follows:

Reduction or Change of Sentence

(a) Time. Except as provided in paragraph (b) hereof, a motion to reduce or change a sentence shall be filed not later than 60 days after the date of the judgment of conviction, or, if a direct appeal is taken, not later than 20 days after the date of the judgment of the appellate court. The court may reduce or change a sentence, either on motion or on its own initiative, by order entered within 75 days from the date of the judgment of conviction or, if a direct appeal was taken, within 35 days of issuance of the judgment of the appellate court and not thereafter.

(b) Exceptions. A motion may be filed and an an order may be entered at any time (1) changing a custodial sentence to permit entry of the defendant into a custodial or non-custodial treatment or rehabilitation program for drug alcohol abuse, or (2) amending a custodial sentence to permit the release of a defendant because of illness or infirmity of the defendant or (3) changing a sentence for good cause shown

(continued)

The Association is in accord with the provisions of the Code providing for fines far exceeding these which exist in today's statutes. (N.J.S. 2A:85-6 provides for a maximum fine of $2000 for a high misdemeanor and N.J.S. 2A:85-7 provides for a maximum fine of $1000 for a misdemeanor). The present monetary fines were established in 1898 (L.1898, c.235) and do not take into account the monetary inflation which has occured since that time. The proposed fines are realistic in light of today's money value.

Of extreme importance is the Code's authorization for an order of restitution. At the present time, restitution can only be ordered as a condition of probation (N.J.S. 2A:168-2) or as a condition of parole (N.J.S. 30:4-123.6). This provision is desirable as it places the financial burden of the loss due to the crime upon the person responsible. Full support is given to this provision by the Association.

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*continued

upon the joint application of the defendant and prosecuting attorney.
(c) Procedure. A motion filed pursuant to paragraph (b) hereof shall be accompanied by supporting affidavits and such other documents and papers as set forth the basis for the relief sought. A hearing need not be conducted on a motion filed under paragraph (b) hereof unless the court, after review of the material submitted with the motion papers, concludes that a hearing is required in the interest of justice. All changes of sentence shall be made in open court upon notice to the defendant and the prosecuting attorney. An appropriate order setting forth the revised sentence and specifying the change made and the reasons therefor shall be entered on the record.

Section 2C:43-4(b) authorizes the court to request that the Attorney General institute proceedings to dissolve the corporation, forfeit its charter, revoke any franchises, or revoke the certificate authorizing it to do business in this State, if the corporation is convicted of an offense or a high managerial agent is convicted of an offense in conducting the affairs of the corporation. Since this power is already reposed within the Attorney General [N.J.S. 14A:12-6(1); N.J.S. 14A:12-6(3)], this section is unnecessary and should be deleted from the Bill.

The Code provides that any person who, at the time of sentencing, is less than 26 years of age may be sentenced to a reformatory pursuant to N.J.S. 30:4-146 and N.J.S. 30:4-153. 2C:43-5. The Association supports this provision as it reduces the maximum age of inmates in the reformatories to 25, a more realistic age to be considered a youthful offender. Of most importance, however, is the deletion of that provision in the 1971 Code which permitted reformatory sentences only if convicted of a crime of the second, third, or fourth degree. The present Code permits all youthful offenders to be eligible for sentence to a reformatory, regardless of the seriousness of the offense.

The proposed Code provides for terms of imprisonment different from those of the 1971 Code.

Crime	1971 Code	Proposed Code
First Degree	10-20 yrs.	8-15 yrs.
Second Degree	5-10 yrs.	5-8 yrs.
Third Degree	3-5 yrs.	3-5 yrs.
Fourth Degree	18 mos. max.	18 mos. max.

It is the consensus of the Prosecutors' Association that the terms of imprisonment specified in the 1971 Code should be adopted at the present time and not those specified in 2C:43-6(a) of the proposed Code. In the absence of a comprehensive study into sentencing alternatives, the terms of imprisonment listed in the 1971 Code would be acceptable. In this regard, the alternative of statutory minimums should be considered and studied by any commission.

For the purposes of a deterrent effect, the extended terms of imprisonment authorized by 2C:43-7(a) should be increased to comply basically with the 1971 Code. We recommend that these extended terms be as follows:

Murder....................30 yrs. to life imprisonment
Crime of First Degree....20 yrs. to life imprisonment
Crime of Second Degree...10 yrs. to 20 yrs.
Crime of Third Degree.... 5 yrs. to 10 yrs.

Pursuant to this Association's Resolution recommending the restoration of the death penalty, the maximum sentence for murder, as provided in 2C:11-3(b), should be amended to reflect this position.

Chapter 44 - AUTHORITY OF COURT IN SENTENCING

The first section of this chapter, 2C:44-1(a), creates the presumption that upon sentencing the court should deal with a person "without imposing sentence of imprisonment." Imprisonment is authorized only if the court is of the opinion that such a course is necessary for the protection of the public. Additionally, 2C:44-1(d) provides for a presumption of imprisonment where a statute defining an offense of the first or second degree provides for a presumption of imprisonment or where a statute outside the Penal Code defining an offense which would be a first or second degree offense under the Code provides for a mandatory sentence. The court, however, has the discretion not to imprison if it is of the opinion that imprisonment would be a serious injustice which overrides the need to deter such conduct by others.

It is the position of the New Jersey Prosecutors' Association that these presumptions of incarceration and non-incarceration should not be included within the Penal Code. Wide latitude and discretion is presently reposed within the sentencing judge and such should remain the policy. The considerations enumerated in 2C:44-1(a) and (b) are those same considerations which would naturally enter into a sentencing decision by a court even in the absence of

statutory authority. Having full faith in the discretionary sentencing decisions of trial judges, this Association does not approve of any presumptions in the area of sentencing.

It should also be stressed that the presumption of withholding sentence of imprisonment is not consonant with the present need for deterrence to stem the tide of increasing criminal activity. The climate is not proper for the creation of legislation which would permit a larger number of convicted persons to remain outside the penal institutions. Effective law enforcement requires use of the incarceration alternative without the encumbrance of any presumptions.

Section 2C:44-3 enumerates those instances when a court may impose an extended term of imprisonment. Although agreeing with the philosophy of this section, the Association finds the criteria to be impractical and prefers those criteria as set forth in the 1971 Code.

Section (a) of the criteria for extended terms permits such term for a persistent offender only if:

1) the person is 21 yrs. of age or over

2) has been convicted of a crime involving the infliction, or attempted or threatened infliction of serious bodily injury

3) has at least twice previously been sentenced as an adult for such crime to a custodial term

4) one of the prior offenses was committed within five years preceding the commission of the offense for which he is being sentenced

The 1971 Code defines a persistent offender more simply:

1) the person is 21 years of age or over

2) he has previously been convicted on at least two separate occasions of two crimes committed at different times when he was at least 18 years of age.

The 1971 Code provision is preferable because it permits the sentencing court to consider the length of time since the last conviction without being bound by a five year limitation. Also, the earlier provision did not make reference to the question of whether a defendant had been incarcerated for the earlier offenses. Such should be considered by the sentencing court, but should not be a binding criteria.

The proposed Code permits an extended term of imprisonment if the defendant is a "professional" criminal. This term is defined in such a manner as to render proof of such cricumstances almost impossible. It would be necessary to show that:

1) the offense was a part of a continuing criminal activity,

2) in concert with five or more persons; and

3) the defendant was in a management or supervisory position; <u>or</u> gave legal, accounting or other managerial counsel.

The 1971 Code permits a finding that a defendant is a professional criminal if he is over twenty-one and:

1) the circumstances of the crime show he has knowingly devoted himself to criminal activity as a major source of livelihood; <u>or</u>

2) he has substantial income or resources not explained as being derived from a source other than criminal activity.

The criteria as delineated in the 1971 Code suffice to show the defendant's activity as a "professional criminal" and lend themselves to proof by the State. The proposed Code criteria place too great a burden on the State. In proving the case, the State would not necessarily be able to show that the defendant's position in the criminal affair was supervisory in nature nor should it be forced to prove that the defendant acted with five or more persons. It is therefore recommended that the 1971 Code provision for a finding that a defendant is a professional criminal be adopted.

For some inexplicable reason, Section 2C:44-3(c) has been deleted in the proposed Code. That section read:

> The defendant is a dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public. The Court shall not make such a finding unless the defendant has been subjected to a psychiatric examination resulting in the conclusion that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behaviour with heedless indifference to consequences; and that such condition makes him a serious danger to others.

This section was aimed at the offender who, by reason of his mental condition, has no moral scruples against the commission of offenses. This criteria for an extended term should be retained.

It is pointed out in the Commentary of the 1971 Code that section 2C:44-5(a)(3) is contrary to the present law. That section limits the aggregate of consecutive terms imposed at one time to the length of the longest extended term authorized for the highest grade and degree of crime for which any of the sentences was imposed. No reason, however, is given for the desirability of such a limitation. This section would prohibit consecutive life sentences as well as terms of years consecutive to a life sentence. In fact, if a defendant were sentenced to the maximum extended term on one charge, no other sentence imposed at the same time could be made to run consecutively to the extended term.

It is the position of the Prosecutors' Association that this provision places too great a restriction upon the sentencing court, which may, in appropriate circumstances, find the consecutive sentences warranted. The deterrent effect of a possible consecutive sentence would disappear were a potential defendant to know that his aggregate sentence could be no greater than the maximum for the worst offense. This section should be deleted.

Chapter 45 - SUSPENSION OF SENTENCE; PROBATION

Chapter 45 of the proposed Code encompasses the judiciary's power to suspend sentence or to impose probation, provisions with which the Prosecutor's Association is in general accord. In implementing possible conditions for a suspended sentence or for probation, the courts are granted a wide range of alternatives which are reasonably related to insure a defendant's rehabilitation. See Section 2C:45-1(b)(1 to 11). The proposals incorporate those suggested by the Criminal Law Revision Commission in the 1971 Code and largely mirror present statutory provisions encompassed in N.J.S.A. 2A:168-2. Wisely, the courts are not restricted to specified conditions, but they may require a defendant "(t)o satisfy any other conditions reasonably related to...(his) rehabilitation..." which are not unduly restrictive of his liberty or incompatible with his freedom of conscience.

The Association notes, however, that a previous condition of probation encompassed in N.J.S.A. 2A:168-2 that a defendant may be held responsible for the costs of prosecution has been eliminated from the proposed Code. The Criminal Law Revision Commission's Commentary suggests that the prior law is "unsound" as it is readily replaced

by alternative financial sanctions (at 344-345). The Association realizes the futility in requiring the poor to pay for these costs. However, the Association urges that statutory provisions remain in effect which would allow the costs of prosecution to be imposed in applicable cases. If accompanying enacting legislation is necessary,* it should be provided. The exorbitant costs required to maintain the operation of even a single courtroom are unfairly overburdening the taxpayer. This proposal could aid in alleviating this expense. The commentary's statement that alternative financial sanctions exist to induce a defendant's responsibility ignores the critical problem of judicial expense.

Chapter 2C:45-2 encompasses the period of the suspension of probation and possible modification of its accompanying conditions. Although the proposed legislation places no minimum term for the suspension or probation, thus altering existing law which requires a minimum of one year supervision for crimes (see N.J.S.A. 2A:168-1), the Association believes that the proposal provides increased judicial flexibility. We disagree with the Criminal Law Revision Commission's Commentary that any

* The New Jersey Supreme Court has stated that the "costs of prosecution" provision in N.J.S.A. 2A:168-2 requires separate enacting legislation. See State v. Mulvaney, 61 N.J. 202 (1972).

correctional program of less than one year will be ineffective. As the Commentary concedes, 2C:45-2(b) already enables the court to discharge a defendant before the one year minimum period of supervision. Adoption of the Commission's proposal would merely create undesired confusion. Thus, a requirement for a minimum period of suspension or probation is unnecessary.

Chapter 2C:45-3 provides that a court may insure a defendant's appearance during the term of suspension or probation by means of arrest or the issuance of a summons. 2C:45-3(a)(1). A peace officer,however, must have probable cause to believe that the defendant either has failed to comply with a condition of his suspension or probation or has committed another offense in order to arrest him without a warrant. 2C:45-3(a)(2). This alters existing law incorporated in N.J.S.A.2A:168-4 which, in essence, permits probation officers to arrest a defendant "upon the request of the chief probation officer..." The new proposal's requirement of probable cause should insure unnecessary harassment by police officers.

The Association agrees that the revocation of the suspension or probation should not occur upon a "technical" violation of a court's order of conditions but upon violation of a "substantial requirement". 2C:45-3a(4).

However, we disagree with the limited course of action a court may follow if a suspended sentence or probation is revoked. Specifically the Code suggests that imprisonment may not be imposed unless the defendant has been convicted of another offense or his continued liberty involves an excessive risk that he will commit another offense. These limitations appear to be a further extension of the proposed legislation's pervasive de-emphasis on incarceration, a position which the Association previously has criticized. The Association, therefore, recommends that this provision simply empower the court to impose any sentence that might have been imposed for the offense for which the defendant was originally convicted. Since there may be a miltitude of situations where imprisonment is justified, the Code's proposed language is unduly restrictive and should be eliminated.

Chapter 2C:45-4 requires written notice and a hearing if a revocation or modification of the conditions of the suspension or probation is intended. A defendant may hear, present and contest the evidence and be represented by an attorney. These proposals encompass present law and meet with the Association's approval.

Chapter 46 - FINES AND RESTITUTIONS

Chapter 46 concerns the imposition of fines or orders of restitution, either of which may be a condition of probation. Payment may be made in installments in applicable cases. If default occurs, modification or suspension of the payment plan may be ordered, or, failing these alternatives, imprisonment may be imposed. These provisions closely parallel existing law pronounced in State v. DeBonis, 58 N.J. 168 (1971). The Association is in accord with the proposals in this section.

RESOLUTION

WHEREAS the State of New Jersey has not had any valid statute with regard to the imposition of Capital Punishment since its Supreme Court decision in State v. Funicello; and

WHEREAS many questions have been raised with regard to the results of the absence of Capital Punishment in New Jersey's criminal law; and

WHEREAS numerous sister states are considering or have passed new legislation to provide for Capital Punishment within the framework of the United States Constitution, as interpreted by the United States Supreme Court; and

WHEREAS numerous organizations and individuals within this State have recommended the passage of Capital Punishment legislation in New Jersey; and

WHEREAS historically, the New Jersey Legislature has provided, and the people of New Jersey have endorsed, the imposition of Capital Punishment for certain classes of criminal conduct; and

WHEREAS the members of this Association agree that the question of the necessity of Capital Punishment is an urgent one to the entire law enforcement community, specifically, and to the public, generally;

NOW THEREFORE be it hereby resolved, on this   day of   , 1975, that the New Jersey Legislature enact legislation within the Constitutional framework as interpreted by the New Jersey Supreme Court and the United States Supreme Court to provide for the imposition of Capital Punishment for those classes of criminal conduct which have historically been the subject of such punishment in New Jersey.

The County Prosecutors' Association
Of New Jersey

KARL ASCH
UNION COUNTY PROSECUTOR
PRESIDENT

WITNESS:

JAMES M. COLEMAN, JR.
MONMOUTH COUNTY PROSECUTOR
SECRETARY-TREASURER

New Jersey State Library

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JOSEPH P. LORDI
PROSECUTOR

PAUL T. MURPHY
FIRST ASSISTANT PROSECUTOR

Penal Code

ESSEX COUNTY COURTS BUILDING
NEWARK, N. J. 07102
TELEPHONE (201) 961-7470

May 9, 1975

Honorable Walter Qualls
Executive Assistant to the Speaker
New Jersey Assembly
State House
Trenton, New Jersey 08625

Dear Mr. Qualls:

I am writing you to bring to your attention certain provisions of the proposed penal code which I, as Prosecutor of Essex County, feel suffer from certain deficiencies. I ask that you consider these sections and give them close scrutiny for I believe they do not serve the public interest as well as they should.

Section 2C:1-7 of the proposed penal code seeks to limit both the Court and Prosecutor in dismissal of armed offenses. While I cannot quarrel philosophically with any approach that expresses concern with armed offenses, I believe the section unnecessarily hampers the plea bargaining process. Section 2C:1-7 forbids the Court from dismissing certain armed offenses on motion by the prosecutor if the dismissal is sought as part of a plea bargain. There are obvious situations which come up routinely, such as where a defendant pleads to a murder indictment in a felony murder situation and the armed robbery charge is dismissed or where a defendant commits an armed robbery of several bar patrons at the same time and the State takes a plea to one and dismisses another, where this section will unduly disrupt a process that is vital to our criminal justice system. Plea bargaining serves many socially valuable services, not the least among which is the easing of the ever constant burgeoning of criminal cases. There is nothing unholy about honest plea bargaining between a prosecutor and defendant. The attempt to take one offense and immunize it from plea bargaining when there are so many equally serious offenses, such as murder, rape, sodomy and arson, is perhaps ill-advised.

Section 2C:1-7 also comes into immediate conflict with R.3:25-1 of our Court Rules which regulates the dismissal of indictments. This conflict between the proposed section and the Court Rule poses possible constitutional problems between the Supreme Court with its rule making power and the Legislature. Therefore, I strongly urge that this specific section be deleted from any codification that is passed.

The proposed code also makes radical changes in the area of gambling and gambling-related offenses. I urgently recommend that this area be given serious reconsideration. The provisions of the new code, as they now read, can only be deemed a boon to the elements of organized crime in this State.

In the definitional section of the Act (2C:37-1) a very broad definition of a "player" is given and would appear to place the burden on the State to show that a person received a profit from the illegal gambling itself (aside from his own winnings) before that person became more than a "player". The code specifically classifies a "player" as someone who "performs, without fee or remuneration, acts directed toward the arrangement or facilitation of the game, such as inviting persons to play, permitting the use of premises therefor, or supplying cards or other equipment used therein." Such a definition would make it virtually impossible for the State to overcome the presumption that a person is a "player" since it has been our experience that such "fee or remuneration" is in cash. The new definition of "player" is also ambiguous in its scope of application. Nothing in the definition expressly limits the term to the 'friendly card game' situation. Thus, the term could be extended to encompass the person who allows others to run a bookmaking or lottery operation in premises owned by him, or does acts in furtherance of a bookmaking or lottery operation. Therefore, the definition is ambiguous and poses the danger of preventing the State from prosecuting those individuals under the traditional concept of 'working for' a bookmaking or lottery operation.

Section G defines bookmaking as "advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcome of future contingent events." Nowhere in the act is the phrase "casual or personal fashion" defined or explicated. Thus, any defendant arrested for bookmaking could easily avail himself of this defense. In fact it could be argued that a bookmaker who happens to know all his bettors is accepting bets in a personal fashion. This definitional section would appear to eliminate the possibility of the State obtaining a viable conviction of a bartender accepting bets from his patrons, a factory worker accepting bets from his fellow employees, or anyone operating as an accomodation bookmaker.

The new code also creates the offense of promoting gambling. Thus, if a person accepts in one day more than five bets totaling more than $1,000 or if in a lottery operation, has money or written records representing more than $100 play for one day, he may be

found guilty of the offense of promoting gambling. Unfortunately, an individual's interest in a gambling operation is not always reflected in a dollar amount. The setting of the arbitrary level of $1,000 or $100 per day is unrealistic and would allow many very important bookmakers and members of a lottery operation to escape the scope of this law. With respect to the two offenses, lottery and bookmaking, the State would be required to prove the date on which the bets were accepted and the amount of the bet accepted. This definition, particularly with respect to lottery, creates an extremely heavy burden to prove that all the bets were accepted as play for one day.

Section 2C:37-3 likewise provides for possession of gambling records including flash paper and water. The statute provides defenses including the commonly used defense that a particular gambling record represents bets of the defendant himself as long as there are less than ten bets on the record. A defendant could easily circumvent this provision by just recording less than ten bets on each piece of paper.

With respect to maintaining a premises for gambling, the proposed code would require the State to prove that the defendant had knowledge of the use of his property, that he permitted the activity to continue, and that he accepted or received money or property pursuant to an agreement or understanding whereby he was to participate in the proceeds of such gambling. This last element would be all but impossible to prove and is not a requirement under the present statutory scheme.

Lastly, the new code appears to eliminate custodial sentences for gambling offenses. If there are no custodial sentences for any violation of this provision, the immediate effect is a mere licensing of illegal gambling.

The present law pertaining to gambling has served a useful purpose for many years. It has been tested in court and found not wanting. Its terms and provisions have been defined and refined by case law. The proposed code is full of language and ambiguities that work to the benefit of those involved in syndicated gambling. It appears that the new code varies greatly from the final report of the New Jersey Criminal Law Review Commission in October, 1971. The proposed code places such a burden on the State with respect to the quantum of proof necessary to obtain a conviction, and creates so many exceptions to the criminal statute, that it would be impossible to enforce effectively. The sad history of this State has proved

that the backbone of organized crime is the money it derives from its illegal gambling activities. This money is not only rechannelled back into illicit endeavors. It is also used to infiltrate and control legitimate businesses. Syndicated gambling cannot long survive without the cooperation and participation of bettors, bookmakers, players, etc. at all levels of the operation. The new code attempts to focus criminality only on one sector of this criminal skein, the upper echelons. This is, in my view, an unrealistic and unworkable approach.

Therefore, I strongly recommend that the Legislature retain the present laws as they pertain to gambling in their present form. Alternatively, I recommend that the definition of "player" be rephrased so as to become perfectly clear that that defense only applies in the 'friendly card game' situation and not in a bookmaking or lottery situation. In addition, the definition should be re-worded so that the defense would not be available to those involved in the big-scale floating card games.

I also urge that the definition of bookmaking be changed and the phrase "rather than in a casual or personal fashion," be eliminated from the definition. The present definition of bookmaking as elucidated by the case law is sufficient and provides a workable enforcement tool. With regard to the new offense of promoting gambling, I recommend that the dollar amounts be eliminated altogether or at least reduced to a more realistic figure such as $100 per day for bookmaking and $50 per day for lottery. In addition, the definition should be changed so that the State does not have to prove that particular amounts of bets were accepted as play on a particular day.

The maintaining a premises for gambling section should be modified so that the third element of the offense, new to the law, of accepting money or property pursuant to an agreement to share in the proceeds of the gambling is deleted. If this new element is allowed to remain, the section is almost totally unenforceable. Lastly, custodial sentences must remain as a sanction for punishment of gambling offenses. Without the threat of custodial sentences, the law carries no viable deterrent. The propriety of custodial sentences for gambling offenders has repeatedly been upheld by our Courts, most recently in State v. Souss, 65 N.J. 453 (1974).

Another section that I believe warrants serious reconsideration is Section 2C:34-4. I note that this section fails to prohibit dissemination of obscene materials in consensual adult situations. It

has been my experience as Prosecutor that the public at large still desires, indeed demands, protection from the flood of salacious material that has enundated this State in recent years. Our recent history has shown that for the period of approximately 18 months during which a federal court injunction prohibited State law enforcement authorities from enforcing the State Obscenity Law, movie theatres and book stores selling obscene material proliferated in great numbers much to the alarm, dismay and consternation of parents, civic and religious leaders and the general public as a whole.

Without a viable law regulating the dissemination of obscene material to adults, less advantaged sections of our communities and certain areas of this State are bound to fall prey to the 'Times Square Syndrome', with blocks of nothing but pornographic book stores, peep shows, movie theatres and massage parlors. This is exactly the evil which was recognized by the Commission to Study Obscenity and Depravity in the Public Media when it made its report to the Legislature in 1971. Now, for the first time in several years, this State has a viable State Obscenity Law. The New Jersey Supreme Court in State v. DeSantis, 65 N.J. 462 (1974) has conformed the State law to the constitutional standards articulated by the United States Supreme Court in Miller v. California, 413 U.S. 15 (1973).

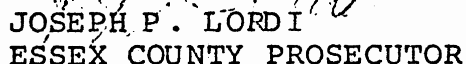
With the more clearly defined and workable definition of obscenity, law enforcement authorities are now able to isolate hard core pornography from other forms of expression which are protected by the First Amendment. The potential for infringement upon individual rights is greatly lessened. The Legislature should not now back away from a good law that properly balances the rights of the individual against the societal right to be free from morally debilitating material.

Therefore, I strongly urge that a section be added to the code prohibiting the uttering, sale or distribution of obscene material in consensual adult situations. The language of the new section should conform precisely with the tri-partite test as first enunciated in the Miller case and adopted in State v. DeSantis, supra.

I might also add that Section 2C:4-6(c), which mandates the dismissal of proceedings against an accused one year after he has been found unfit to stand trial, creates an unnecessary and undesirable limitation on the court's discretion. Prejudice to a defendant can be determined on a case by case basis without imposing an arbitrary standard. Therefore, I suggest that the words "the court shall" in the above section should be changed to "the court may" dismiss the charges.

In sum, the proposed penal code suggests many good and needed changes to our system of criminal laws. The foregoing objections should not be construed as in any way derogatory to the efforts of the many conscientious and devoted individuals who spent a great deal of time and effort on this project. However, I would be remiss in my duties as Prosecutor if I did not speak out on those sections which I believe undermine the honest efforts of law enforcement to adequately protect this society. I do not believe that this code should be passed in toto in its present form in the hopes that remedial amendments to it will follow. The sections that I have addressed myself to above demand immediate attention. In their present form they pose a serious threat to effective enforcement of our laws. I trust that in your capacity as a legislator, you will not allow this threat to become a reality.

Sincerely,



JOSEPH P. LORDI
ESSEX COUNTY PROSECUTOR

JPL:SC