S. HRG. 98-429

IMPACT OF CRIME ON SMALL BUSINESS

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

IMPACT OF CRIME ON SMALL BUSINESS

BUFFALO, N.Y.—OCTOBER 12, 1983

ited for the use of the Committee on Small Business

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1983

27-542 O

CONTENTS

HEARING DATE

IMPACT OF CRIME ON SMALL BUSINESS

WEDNESDAY, OCTOBER 12, 1983

U.S. SENATE,
COMMITTEE ON SMALL BUSINESS,
Buffalo, N.Y.

The committee met, pursuant to recess, at 10:30 a.m., in room 226, second floor conference room, Federal Building, 111 West Huron Street, Buffalo, N.Y., Hon. Alfonse M. D'Amato (acting chairman of the committee) presiding.

Present: Senator D'Amato.

STATEMENT OF HON. ALFONSE M. D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK AND ACTING CHAIRMAN OF THE COMMITTEE ON SMALL BUSINESS

Senator D'AMATO [acting chairman]. The Senate Committee on Small Business will come to order.

First, let me indicate to the good people from the press that we will be holding a press conference at 11:30, if it will make your logistics a little easier. We would like at least to go through the first panel of witnesses.

[The prepared statement of Senator D'Amato follows:]

STATEMENT OF SENATOR ALFONSE M. D'AMATO

This is the fourth in a series of hearings on the impact of drug-related crime on small business. In the last year, I have chaired three such hearings of the Senate Small Business Committee's Subcommittee on Urban and Rural Economic Development, first in New York City, then in Albany and San Francisco. The fact that today's hearing is being conducted under the auspices of the full Committee on Small Business is a sure sign of the success we have had in moving our anticrime efforts closer to the forefront of national priorities, where they properly belong.

I thank the chairman of the committee, Senator Lowell Weicker, for his help and cooperation in making this hearing possible and I applaud him for his leadership in helping to maintain and increase pressure on the criminal element. He is one of those who gives more than lipservice to our often declared, but too often underfunded and understaffed, war on crime.

I welcome Mayor Griffin and County Executive Rutkowski, Salvatore Martoche, the U.S. attorney for the western district of New York, and our other distinguished witnesses, to this hearing. Their testimony will be most helpful to those of us in the Congress who are attempting to determine the nature and extent of the link between drug use and crime and the impact of crime on small business. The rising tide of crime now makes it almost impossible for small businesses in some neighborhoods to operate profitably and, most importantly, to provide jobs.

The Bureau of Justice Statistics of the Department of Justice estimates that the average small business is ten times more likely than the average individual to be victimized by crime. In many communities, this crime epidemic makes it impossible for businesses to survive. Unfortunately, dry statistics such as these are not able to tell us very much more about the impact of crime on small business. That is why

hearings such as this are necessary: They help us develop the background information necessary for legislation. I know that the Justice Department is reexamining the possibility of developing better information about this problem, and I will certainly encourage them to pursue this further.

As anyone in this room can attest, we are far from winning our war on crime. In the State of New York, there were well over one million arrests last year for offenses more serious than traffic violations. The value of property stolen in this State was more than $1.2 billion. Almost 90 percent of this property—or more than $1 billion worth—was never recovered.

The Justice Department has just completed a study which reveals that only 6 percent of burglaries, 21 percent of business robberies, 5 percent of forgeries, and less than 1 percent of drug sales ever result in an arrest. The real extent of the problem, however, becomes clear when we also realize that only a small minority of arrests ever lead to a conviction, worse still, only a minority of convictions ever lead to time served in prison. Of 143,035 felony arrests statewide last year, there were only 32,025 convictions. A total of 10,409 individuals actually went to prison last year.

In the City of Buffalo, the following serious crimes were committed last year: 42 murders; 247 rapes or attempted rapes; and 1,642 robberies, including 25 robberies of gas stations, 35 of convenience stores and 156 of other commerical establishments. There were close to 3,000 burglaries in other than people's homes. There were over 17,000 larcenies and thefts.

In total, there were almost 30,000 crimes reported and verified in Buffalo last year.

But the problem is not only a serious one for our cities. It has spread to the suburbs, small towns, and even rural areas. In Erie County last year, these serious crimes were committed: 54 murders; 307 rapes or attempted rapes; and 1,902 robberies, including 62 robberies of gas stations, 68 of convenience stores and 211 of other commercial establishments. There were over 5,000 burglaries in other than people's homes. There were close to 33,000 larcenies and thefts throughout the county last year.

In total, there were more than 51,000 crimes reported and verified in Erie County last year.

When we look more closely at drug-related crime, we see that there were 46,266 arrests for the sale and/or possession of drugs across the State. We also see that a very substantial number of commitments to the State's prisons are for drug offenses. The department of corrections has a special category, called "property and drug offenses." There were 3,148 such commitments last year. That is 30.3 percent of the total number of commitments. In Erie County, the percentage was a little higher: 35.3 percent of the commitments here were for property and drug offenses. Even these statistics may understate the true connection between drugs and crime: 57 percent of New York State prisoners have at least one drug arrest in their files.

Having stated the problem, we have a responsibility to propose some solutions. That is particularly true for elected officials, who know that 90 percent of the public does not believe that our criminal justice system is adequately dealing with the forces of lawlessness.

In the past several years, as the result of numerous hearings, meetings with citizens and public officials, and travels around the State, I have developed an 8-point program to restore sanity to that system. In my opinion, we must:

(1) Crush the major heroin trafficking operations. This must be the major priority of Federal law enforcement. In one study, 237 heroin addicts were responsible for 500,000 crimes over an 11-year period. We must take these walking crime machines off the streets and we must put their suppliers out of business. I wish to take this opportunity to applaud Mr. Martoche and local FBI, DEA, customs and police officers for their role in seizing 60 pounds—or $100 million worth of heroin. As a result of their efforts, one major trafficker has been indicted; and indictments on 6 others are expected shortly.

(2) Increase Federal law enforcement resources. This means more agents, more prosecutors, more judges, and more prisons. I would like to see the number of Drug Enforcement Administration agents doubled, at least for New York, which is the point of entry for at least 2 tons, or $6 billion worth, of heroin each year. Nationally, we have fewer drug enforcement agents,—about 2,000—than drug trafficking fugitives about 3,000.

I recently announced that the DEA would be increasing the number of agents in the New York area-but even if we doubled the number, we would not be excessive. In 1973, there were 17 DEA agents in Buffalo, today, there are only 6. I am happy today to announce that we will be able to get that number up to 9 in the next few months.

As part of my proposed increase in law enforcement resources, I have introduced legislation that would help States add 180,000 new prison cells over the next 3 years, the purpose is to correct the intolerable and unconscionable situation that exists today, where felons are released from prison, not because they have been rehabilitated, but simply because there are not enough prison cells. Nationally, as well as in New York State, we are 16 to 20 percent over capacity in our prisons.

A very important cause of both prison overcrowding and street violence is the recent surge in the number of illegal aliens who have come to the United States from numerous countries, combined with the many criminals that Castro included as part of the 1980 Mariel boatlift. The New York State prison system is 4,000 inmates over capacity; 868 of these are such aliens and refugees, including a growing number of Marielito Cubans. Nationally, the number of incarcerated illegal alien felons is estimated to be 4,000. The cost to the States of incarcerating them now $60 million per year. The cost to New York State alone is over $13 million annually. I have, therefore, introduced the Federal Alien Incarceration Responsibility (or Fair) Act to reimburse States for the cost of incarcerating these individuals. This measure passed the Senate in May as part of the Immigration Reform and Control Act by a margin of 55 to 40 and now awaits action in the House.

(3) Expand our law enforcement efforts against the newly emerging organized crime groups. Drug trafficking, by its very nature, is organized crime and every major ethnic group is now involved.

The FBI, the DEA, U.S. attorneys, and others must expand their efforts and include these other groups in their strike force and task force efforts. We also have to hit the street pusher harder. Public safety and the protection of our school-age children demand this.

(4) Free up scarce resources of the Department of Justice for this war on crime by assigning civil litigation, especially debt collection actions such as those for defaulted school loans, to private law firms. This would allow the Justice Department to focus its limited resources on criminal investigations. My legislation, S. 1356, would require this. The Senate Committee on Governmental Affairs held hearings on this legislation on July 21, 1983.

The last four points of my 8-point program were reported out of the Senate Judiciary Committee favorably, by a vote of 15 to 1, as part of the Comprehensive Crime Control Act. I was the first Senator, not a member of that committee, to cosponsor this measure.

These points are:

(5) Pretrail detention without bail for those whose release would pose a threat to the safety of the community. There is so much money being made from drugs today that no amount of bail is adequate to keep some drug dealers in jail. This is an especially timely issue which I hope the U.S. attorney, Salvatore Martoche, will be able to address. This provision also allows for hearings on the source of bail when the community danger standard cannot be met.

(6) Imprisonment of these offenders once they are convicted. We must eliminate bail pending appeal. This will assure us that major drug dealers do not skip out on bail and swell the already excessive number of fugitives.

(7) Fixed sentences, also known as determinate sentencing, which will eliminate parole for convicted Federal offenders. This will put an end to another national scandal, the wide disparity in sentences from jurisdiction to jurisdiction, and even within the same jurisdiction, from judge to judge, for essentially similar offenses. It will also do away with the current disgrace whereby major heroin dealers get away with serving only one-third of their sentences or less. In short, we need truth-in-sentencing.

Two examples clearly show the necessity for this revision. One individual was sentenced to 30 years for operating a heroin distributing ring. He was released on parole after serving only 6 years and then was rearrested for heroin dealing only 6 months later. Another drug dealer was sentenced to from 60 to 70 years; he will be out the year after next, after having served only 13 years. This is the kind of revolving door that everyone knows about. The disrespect for law that it breeds threatens our entire system of justice.

And (8) Appellate review of lenient sentences. It is not too easy for criminals to plead poor health or other extenuating circumstances and have their sentences delayed or reduced or even have their trials indefinitely postponed.

I have personally toured areas of this State that have been crippled by the blight of narcotics. The time has come to call a halt to its spread. Increased protection for small businesses against this menace is one of the best ways of doing this. Ninety-six percent of all businesses in this country are small businesses. They account for 43 percent of our gross national product and are the source of two-thirds of all new

jobs. By making it clear exactly how important an effective anticrime effort is to this vital sector of American life, we can, perhaps, actually turn the present situation around and begin to win our war on crime.

Senator D'AMATO. This is the fourth in a series of hearings on the impact of drug-related crime on small business. In the last year I have chaired three such hearings of the Senate Small Business Committee's Subcommittee on Urban and Rural Economic Development: First in New York City, then in Albany, and San Francisco.

The fact that today's hearing is being conducted under the auspices of the full Committee on Small Business is a sign of the success we have had in moving our anticrime efforts closer to the forefront of national priorities, where they properly belong.

I thank the chairman of the committee, Senator Lowell Weicker, for his help and cooperation in making this hearing possible, and I applaud him for his leadership in helping to maintain and increase pressure on the criminal element. He is one who gives more than lip service to our often-declared, but too often underfunded and understaffed, war on crime.

I welcome Mayor Griffin and County Executive Rutkowski, Salvatore Martoche, the U.S. attorney for the western district of New York, and our other distinguished witnesses to this hearing. Their testimony will be most helpful to those of us in the Congress who are attempting to determine the nature and extent of the link between drug use and crime and the impact of crime on small business.

The rising tide of crime now makes it almost impossible for small businesses in some neighborhoods to operate profitably and, more importantly, to provide jobs.

The Bureau of Justice Statistics of the Department of Justice estimates that the average small business is 10 times more likely than the average individual to be victimized by crime. In many communities this crime epidemic makes it impossible for businesses to survive.

Unfortunately, dry statistics such as these are not able to tell us very much about the impact of crime on small business. That is why we are having these hearings, to help us develop the background information necessary for legislation. I know that the Justice Department is reexamining the possibility of developing better information about this problem, and I will certainly encourage them to pursue these efforts.

As anyone in this room can attest, we are far from winning our war on crime. In the State of New York there were well over 1 million arrests last year for offenses more serious than traffic violations. The value of property stolen in this State was more than $1.2 billion. Almost 90 percent of this property—or more than $1 billion worth—was never recovered.

The Justice Department has just completed a study which reveals that only 6 percent of burglaries, 21 percent of business robberies, 5 percent of forgeries, and less than 1 percent of drug sales ever result in an arrest. The real extent of the problem, however, becomes clear when we also realize that only a small minority of arrests ever lead to a conviction. Worse still, only a minority of convictions ever leads to time served in prison. Of 143,035 felony

arrests statewide last year, there were only 32,025 convictions. A total of only 10,409 individuals actually went to prison.

In the city of Buffalo, the following serious crimes were committed last year: 42 murders, 247 rapes or attempted rapes; and 1,642 robberies, including 25 robberies of gas stations, 35 of convenience stores, and 156 of other commercial establishments.

There were close to 3,000 burglaries in other than people's homes. There were over 17,000 larcenies and thefts.

In total, there were almost 30,000 crimes reported and verified in Buffalo last year.

But the problem is not only a serious one for our cities; it has spred to the suburbs, small towns, and even rural areas. In Erie County last year these serious crimes were committed: 54 murders, 307 rapes or attempted rapes; 1,902 robberies, including 62 robberies of gas stations, 68 of convenience stores—again, small businessmen—and 211 of other commercial establishments. There were more than 5,000 burglaries in other than people's homes; and 33,000 larcenies and thefts throughout the county last year.

In total, there were more than 51,000 crimes reported and verified in Erie County last year.

When we look closely at drug-related crimes, we see that there were 46,000 arrests for the sale and/or possession of drugs across the State. We also see that a very substantial number of commitments to the State's prisons are for drug offenses.

The department of corrections has a special category, called "property and drug offenses." There were 3,148 such commitments last year. That is 30.3 percent of the total number of commitments. In Erie County, the percentage was a little higher: 35.3 percent of the commitments here were for property and drug offenses. Even these statistics may understate the true connection between drugs and crime, 57 percent of New York State prisoners have at least one drug arrest in their files.

Having stated the problem, we have a responsibility to propose some solutions. That is particularly true for elected officials, who know that 90 percent of the public does not believe that our criminal justice system is adequately dealing with the forces of lawlessness.

In the past several years, as the result of numerous hearings, meetings with citizens and public officials, and travels around the State, I have developed an 8-point program to restore sanity to that system. In my opinion, we must:

First. Crush the major heroin trafficking operations. This must be the major priority of Federal law enforcement. In one study alone, 237 heroin addicts were responsible for 500,000 crimes over an 11-year period. We must take these walking crime machines off the streets and we must their suppliers out of business. I wish to take this opportunity to applaud Mr. Martoche and local FBI, DEA, Customs and police officers for their role in seizing 60 pounds—or $100 million worth of heroin. As a result of their efforts, one major trafficker has been indicted: and indictments on six others are expected shortly.

Second. Increase Federal law enforcement resources. This means more agents, more prosecutors, more judges, and more prisons. I would like to see the number of Drug Enforcement Administration

agents doubled, at least for New York, which is the point of entry for at least 2 tons, or $6 billion worth, of heroin each year. Nationally, we have fewer drug enforcement agents—about 2,000—than drug trafficking fugitives about 3,000.

I recently announced that the DEA would be increasing the number of agents in the New York area—but even if we doubled the number, we would not be excessive. In 1973, there were 17 DEA agents in Buffalo, today, there are only six. I am happy today to announce that we will be able to get that number up to nine in the next few months.

As part of my proposed increase in law enforcement resources, I have introduced legislation that would help States add 180,000 new prison cells over the next 3 years. The purpose of this bill, S. 1005, is not prisoner comfort. The purpose is to correct the intolerable and unconscionable situation that exists today, where felons are released from prison, not because they have been rehabilitated, but simply because there are not enough prison cells. Nationally, as well as in New York State, we are 16 percent to 20 percent over capacity in our prisons.

A very important cause of both prison overcrowding and street violence is the recent surge in the number of illegal aliens who have come to the United States from numerous countries, combined with the many criminals that Castro included as part of the 1980 Mariel boatlift. The New York State prison system is 4,000 inmates over capacity; 868 of these are such aliens and refugees, including a growing number of Marielito Cubans. Nationally, the number of incarcerated illegal alien felons is estimated to be 4,000. The cost to the States of incarcerating them now exceeds $60 million per year. The cost to New York State alone is over $13 million annually. I have, therefore, introduced the Federal Alien Incarceration Responsibility (or Fair) Act to reimburse States for the cost of incarcerating these individuals. This measure passed the Senate in May as part of the Immigration Reform and Control Act by a margin of 55 to 40 and now awaits action in the House.

Third. Expand our law enforcement efforts against the newly emerging organized crime groups. Drug trafficking, by its very nature, is organized crime and every major ethnic group is now involved.

The FBI, the DEA, U.S. attorneys, and others must expand their efforts and include these other groups in their strike-force and task-force efforts. We also have to hit the street pusher harder. Public safety and the protection of our school-age children demand this.

Fourth. Free up scarce resources of the Department of Justice for this war on crime by assigning civil litigation, especially debt collection actions such as those for defaulted school loans, to private law firms. This would allow the Justice Department to focus its limited resources on criminal investigations. My legislation, S. 1356, would require this. The Senate Committee on Governmental Affairs held hearings on this legislation on July 21, 1983.

The last four points of my 8-point program were reported out of the Senate Judiciary Committee favorably, by a vote of 15 to 1, as part of the Comprehensive Crime Control Act. I was the first Senator, not a member of that committee, to cosponsor this measure.

These points are:

Fifth. Pretrial detention without bail for those whose release would pose a threat to the safety of the community. There is so much money being made from drugs today that no amount of bail is adequate to keep some drug dealers in jail. This is an especially timely issue which I hope the U.S. attorney, Salvatore Martoche, will be able to address. This provision also allows for hearings on the source of bail when the community danger standard cannot be met.

Sixth. Imprisonment of these offenders once they are convicted. We must eliminate bail pending appeal. This will assure us that major drug dealers do not skip out on bail and swell the already excessive number of fugitives.

Seventh. Fixed sentences, also known as determinate sentencing, which will eliminate parole for convicted Federal offenders. This will put an end to another national scandal, the wide disparity in sentences from jurisdiction to jurisdiction, and even within the same jurisdiction, from judge to judge, for essentially similar offenses. It will also do away with the current disgrace whereby major heroin dealers get away with serving only one-third of their sentences or less. In short, we need truth-in-sentencing.

Two examples clearly show the necessity for this revision. One individual was sentenced to 30 years for operating a heroin distribution ring. He was released on parole after serving only 6 years and then was rearrested for heroin dealing only 6 months later. Another drug dealer was sentenced to from 60 to 70 years; he will be out the year after next, after having served only 13 years. This is the kind of revolving door that everyone knows about. The disrespect for law that it breeds threatens our entire system of justice.

And eighth, appellate review of lenient sentences. It is now too easy for criminals to plead poor health or other extenuating circumstances and have their sentences delayed or reduced or even have their trials indefinitely postponed.

I have personally toured areas of this State that have been crippled by the blight of narcotics. The time has come to call a halt to its spread. Increased protection for small businesses against this menace is one of the best ways of doing this. Ninety-six percent of all businesses in this country are small businesses. They account for 43 percent of our gross national product and are the source of two-thirds of all new jobs.

If we do not feel safe at times, imagine what it is like going to your place of business—jewelry store, clothing store, whatever it might be—opening it up, and knowing that the chances are that you are 10 times more apt to be victimized than the average citizen.

At this time let us call our first panel: Mayor Griffin, County Executive Rutkowski, and Salvatore Martoche, the U.S. attorney from the western district of New York.

Gentlemen, let me first say to my distinguished colleagues in government and good friends that I thank you for taking the time from your busy schedules to be here and to share your insights with respect to the problems of crime and drugs, and particularly the impact they have had on our small business community.

I will leave it to you to testify in any order that you deem to be appropriate.

STATEMENT OF EDWARD J. RUTKOWSKI, COUNTY EXECUTIVE, COUNTY OF ERIE, N.Y.

Mr. RUTKOWSKI. Mr. Senator, we want to welcome you to Erie County and the great city of Buffalo, which is the home of the only official professional football team of the State of New York, the Buffalo Bills.

Senator D'AMATO. You will get no argument from this corner.

Mr. RUTKOWSKI. I thank you for inviting me here to provide testimony.

The topic, "The Impact of Drug-Related Crime on Small Businesses and Economic Development," is a vital concern and often ignored in discussions of the impacts of drugs.

Traditionally, when we think about drug addiction and related crimes, we think of the heroin addict slowly destroying his life and falling deeper into bondage. When we think of criminal impacts, street muggings and residential burglaries come to mind. Little attention or interest has been generally shown to the more insidious, but nonetheless widespread, impacts of drug-related crime.

It is only recently that we are beginning to understand the full economic and social impacts. Probably the most immediate harm is suffered by the struggling innercity businessman. Already suffering economic difficulty from declining patronage, high insurance rates and arson, the small businessman in these areas is forced to face the constant threat of drug-related crime. Shoplifting is prolific—in fact, a major cost factor—and armed robberies are an ever-present possibility. Police estimate that more than one-half of such crimes in these declining neighborhoods is drug related.

Crime impacts the small businessman not only through shoplifting, burglary and robbery, but also by driving customers away. Individuals from the suburbs fear to come to these areas. As a result, business declines. How much of these problems can be apportioned to drugs is difficult to define precisely. One thing is clear: it is a sizable percentage.

One instance of this is happening in the West Utica Main Street area. Small businessmen struggling with business disruptions caused by the construction of the rapid transit line are faced with severe robbery, burglary, and larceny problems. Many of these crimes are triggered by addicts seeking cash for their habits.

Police and county officials did come to their aid. However, they are barely holding the line. Several businesses did close. Others are struggling along.

What is so sad about this situation is that the rapid transit line that was to bring economic improvement to this area may find its beneficial impact stifled by drug-related despair.

In a broader sense, what happens to small businesses can happen to entire neighborhoods. The city of Buffalo is making a valiant effort to rebuild its neighborhoods. Many areas have a magnificent housing stock. Suburban residents and young married couples are looking once again to the city as a place to make their home.

Probably one of the best examples of this process can be seen in the Allentown area. Allentown has come back. However, its success would be faster, its growth greater, if it weren't for the nagging anchor of drug-related crimes.

When people in these neighborhoods are asked what is their greatest problem, the answer is always the same—crime. The police tell us crime in the Allentown area is heavily fueled by drugs. Through valiant police efforts, through the stellar performance of neighborhood groups such as Neighborhood Watch, this area has managed to pull itself up by the bootstraps. However, think what could have been if crime had been 50 to 75 percent lower? Also, think of all of the neighborhoods in Buffalo that are still awaiting their renaissance.

There is another more subtle cost that affects business and all of us. What is the cost of the young lives that are being wasted? How many potentially successful young entrepreneurs are having their future drained off by drugs? What could have been?

Instead, we have crime. We have the very real medical costs of treating the drug-dependent person. Recently Blue Cross and Blue Shield, in arguing for a rate increase, noted the increasing costs of health care for alcohol- and drug-dependent persons. These are real costs for business, as well as the individual payer of higher premiums.

Speaking of costs, we are in the process today of expanding our jail. It costs us over $30,000 per year to keep an inmate in jail. This does not include the real costs of medical treatment for the drug-dependent inmate. Currently, at least one-half of our inmates suffer from some type of drug abuse.

The easy part of the testimony is defining the nature and scope of the problem. The more difficult task is to find a solution. Several suggestions seem viable.

First, and most obvious, we need to crack down on drugs at their source. The drug traffickers must be caught and successfully prosecuted. The Federal Bureau of Investigation and the Drug Enforcement Agency are carrying on the fight. Law enforcement needs more resources, both at the Federal and local levels. We are speaking of more Federal assistance for police anti-drug efforts.

Second, it is clear, as with recent antismoking efforts, that the best way to deal with the drug problem is to stop it before it starts. Clearly, drug prevention programs aimed at those most easily recruited to drugs—the young—must be a priority.

In Erie County we presently have a program called, prevention is primary, working in the schools with youths from grammar to high school. If we can prepare youth with an antidrug message, we stop the problem before it starts. We badly need financial assistance, both to maintain such programs and increase their impact.

Finally, programs to assist struggling businessmen and community groups such as Neighborhood Watch are solely needed in the areas where drug crime abounds. The National Institute of Justice and other allied agencies could provide both financial and expert assistance for such groups, so they may carry on the fight against drug-related crimes. The best solutions are those in which the people themselves are involved.

In concluding, I just want you to know that the mayor and I, and all the elected officials here, feel that in the city of Buffalo and the county of Erie the greatest asset that we have is the minds of our young people. If those young minds are polluted or destroyed by drugs, I just am very fearful of the future of Buffalo and Erie County, but, more than that, the future of this great country.

Thank you Senator.

[The prepared statement of Mr. Rutkowski follows:]

STATEMENT OF EDWARD J. RUTKOWSKI, COUNTY EXECUTIVE, COUNTY OF ERIE, N.Y.

Good morning! I thank you for inviting me here to provide testimony. The topic, The Impact of Drug Related Crime on Small Businesses and Economic Development, is a vital concern and often ignored in discussions of the impacts of drugs.

Traditionally, when we think about drug addiction and related crimes, we think of the heroin addict slowly destroying his life and falling deeper into bondage. When we think of criminal impacts, street muggings and residential burglaries come to mind. Little attention or interest has been generally shown to the more insidious, but nonetheless widespread, impacts of drug related crimes.

It is only recently that we are beginning to understand the full economic and social impacts. Probably the most immediate harm is suffered by the struggling inner city businessman. Already suffering economic difficulty from declining patronage, high insurance rates and arson, the small businessman in these areas is forced to face the constant threat of drug related crime. Shoplifting is prolific (in fact a major cost factor), and armed robberies are an ever-present possibility. Police estimate that more than one half of such crimes in these declining neighborhoods is drug related.

Crime impacts the small businessman not only through shoplifting, burglary and robbery, but also by driving customers away. Individuals from the suburbs fear to come to these areas. As a result, business declines. How much of these problems can be apportioned to drugs is difficult to define precisely. One thing is clear, it is a sizeable percentage.

One instance of this is happening in the West Utica, Main Street area. Small businessmen struggling with business disruptions caused by the construction of the rapid transit line are faced with severe robbery, burglary and larceny problems. Many of these crimes are triggered by addicts seeking cash for their habits.

Police and county officials did come to their aid. However, they are barely holding the line. Several business did close. Others are struggling along.

What is so sad about this situation is that the rapid transit line that was to bring economic improvement to this area may find its beneficial impact stifled by drug related despair.

In a broader sense, what happens to small businesses can happen to entire neighborhoods. The City of Buffalo is making a valiant effort to rebuild its neighborhoods. Many areas have a magnificent housing stock. Suburban residents and young married couples are looking once again to the city as a place to make their home.

Probably one of the best examples of this process can be seen in the Allentown area. Allentown has come back. However, its success would be faster, its growth greater, if it weren't for the nagging anchor of drug related crimes.

When people in these neighborhoods are asked what is their greatest problem—the answer is always the same—crime. The police tell us crime in the Allentown area is heavily fueled by drugs. Through valiant police efforts, through the stellar performance of neighborhood groups such as Neighborhood Watch, this area has managed to pull itself up by the bootstraps. However, think what could have been if crime had been fifty to seventy-five percent lower? Also, think of all of the neighborhoods in Buffalo that are still awaiting their renaissance.

There is another more subtle cost that affects business and all of us. What is the cost of the young lives that are being wasted? How many potentially successful young entrepreneurs are having their future drained off by drugs? What could have been?

Instead, we have crime. We have the very real medical costs of treating the drug dependent person. Recently Blue Cross and Blue Shield, in arguing for a rate increase, noted the increasing costs of health care for alcohol and drug dependent persons. These are real costs for business, as well as the individual payer of higher premiums.

Speaking of costs, we are in the process today of expanding our jail. It costs us over $30,000 per year to keep an inmate in jail. This does not include the real costs of medical treatment for the drug dependent inmate. Currently, at least one-half of our inmates suffer from some type of drug abuse.

The easy part of the testimony is defining the nature and scope of the problem. The more difficult task is to find a solution. Several suggestions seem viable.

First, and most obvious, we need to crack down on drugs at their source. The drug traffickers must be caught and successfully prosecuted. The Federal Bureau of Investigation and the Drug Enforcement Agency is carrying on the fight. Law Enforcement needs more resources, both at the federal and local levels. We are speaking of more federal assistance for police anti-drug efforts.

Second, it is clear, as with recent anti-smoking efforts, that the best way to deal with the drug problem is to stop it before it starts. Clearly, drug prevention programs aimed at those most easily recruited to drugs—the young—must be a priority.

In Erie County, we presently have a program called "Prevention is Primary" working in the schools with youths from grammar to high school. If we can prepare youth with an anti-drug message, we stop the problem before it starts. We badly need financial assistance, both to maintain such programs and increase their impact.

Finally, programs to assist struggling businessmen and community groups such as Neighborhood Watch are sorely needed in the areas where drug crime abounds. The National Institute of Justice and other allied agencies could provide both financial and expert assistance for such groups so they may carry on the fight against drug-related crimes. The best solutions are those in which the people themselves are involved.

Senator D'AMATO. Thank you, Mr. County Executive. Mayor Griffin.

Let me suggest to you that later we will have an announcement to make, and it is in the release, with respect to additional manpower. I think, as you indicated, that there has to be a real commitment. I think our commitment to date has been lacking. We will touch on that later.

Mayor.

STATEMENT OF HON. JAMES D. GRIFFIN, MAYOR OF THE CITY OF BUFFALO, N.Y.

Mayor GRIFFIN. First of all, Senator, thanks not only for this important hearing here in Buffalo today, but for all you have been doing for Buffalo and Erie County since you became Senator. It is always a pleasure to work with you. You are always doing such a fine job for western New York. Thanks for coming.

Ed, and Sal, and I have my young cousin with me, Commissioner Cunningham. In case you might like to ask any questions, he is the guy who has the answers.

In the past decade we have seen the drug user make the transition from the ghetto and the college campus to the 12-year-old grammar school student, members of the armed services, the businessman, the professional, residents of suburbia, and the living rooms of millions of American families, and, of course, also some politicians. Indeed, the use of drugs has permeated every level of our American social structure. No longer is the drug culture relegated to the urban poor of our society.

The enormity of the profits realized from the drug traffic has even prompted legitimate businessmen and other entrepreneurs not usually involved in any type of criminal activity to become involved in the drug traffic. Only last year an international automobile magnate was arrested and indicted for allegedly trafficking

in drugs to salvage his faltering automobile empire from bankruptcy.

When we look at the statistics that show that "half of all jail and prison inmates regularly used drugs before committing an offense," for which they are now imprisoned, we can only guess as to the total amount of crime for which drug users are responsible.

In the past few years the Federal Government has expanded its war on illicit drugs by including the FBI and some other Federal agencies among those agencies charged with the responsibility of active surveillance and enforcement action against violators of our law against drug trafficking. Previously, these agencies had not been permitted to participate in drug law enforcement.

Depending upon the severity of their drug habit, it costs an addict hundreds and, in many instances, thousands of dollars each week to sustain his habit. Most addicts support their habit by committing the crimes of robbery, burglary, prostitution, larceny, and a myraid of other offenses. In recent years we have also seen an alarming increase in the number of businessmen and professional who embezzle from their firms and clients to support their newly found cocaine habit.

Simply put, whether we number ourselves among the urban poor, the urban or suburban middle class, or business and professional people, we cannot support this habit and still maintain the lifestyle that we are accustomed to. To do both, we must necessarily resort to crime.

A recent study disclosed that drug users cost the American taxpayer in excess of $5 billion for their crimes annually in order to support their habit. We can readily see the impact that the use of drugs has on our society. We, the public, are subsidizing this habit, and organized crime of other illicit groups are reaping subtantial profits by preying upon the weakness of these unfortunates.

Only through a concerted Federal, State, and local effort can we ever expect to eradicate this cancer on our society. When sufficent funds and manpower are channeled to fight the drug problem, we can expect a substantial reduction in crime, especially violent crime and crimes against the elderly. Only when we are able to rid ourselves of the scourge of crime and drug addiction can we truly say that we are living in a "free society."

We ask, "What measures should be undertaken to assure justice in cases involving defendants charged with narcotics trafficking and drug-related crimes?" Following are a number of my suggestions. I have said these before:

Elect Federal court judges;

Reduce the terms of State and local judges to make sure that judges are more accountable to the general public;

Elimination of plea bargaining for all felony cases;

Mandatory sentences without parole should be enacted;

Convicted felons should not be released without bail;

The Federal Government should ask for more help from the local officials, as you are doing today, because I feel that our local law enforcement officers are on the frontline of this problem. Actually, it is not a problem; it is a war.

Federal money should be allocated to communities that show a reduction in the crime rate, because these communities are waging a successful fight against crime.

Senator, when you are here in western New York, you will see that our Federal, our county, our State, and our local agencies are all working together. I think this is a mark of western New York—we work at the border; we work at the county level with the sheriff's department; we work with guys like Sal Martoche and our commissioner, Jim Cunningham, and we all work as a team.

Again, I want to thank you and your staff for being here today. I am sure it is going to be a very fruitful seminar.

Thank you very much.

[The prepared statement of Mayor Griffin follows:]

STATEMENT OF HON. JAMES D. GRIFFIN, MAYOR OF THE CITY OF BUFFALO, N.Y.

In the past decade, we have seen the drug user make the transition from the ghetto and the college campus to the 12-year-old grammar school student, members of the Armed Services, the businessman, the professional, residents of suburbia, and the living rooms of millions of American families. Indeed, the use of drugs has permeated every level of our American social structure. No longer is the drug culture relegated to the urban poor of our society.

The enormity of the profits realized from the drug traffic has even prompted legitimate businessmen and other entrepreneurs, not usually involved in any type of criminal activity to become involved in the drug traffic. Only last year, an international automobile magnate was arrested and indicted for allegedly trafficking in drugs to salvage his faltering automobile empire from bankruptcy.

When we look at the statistics that show that "half of all jail and prison inmates regularly used drugs before committing an offense" (for which they are now imprisoned), we can only guess as to the total amount of crime for which drug users are responsible.

In the past few years, the Federal Government has expanded its war on illicit drugs by including the F.B.I. and some other Federal agencies among those agencies charged with the responsibility of active surveillance and enforcement action against violators of our laws against drug trafficking. Previously, these agencies had not been permitted to participate in drug law enforcement.

Depending upon the severity of their drug habit, it costs an addict hundreds, and in many instances, thousands of dollars each week to sustain his habit. Most addicts support their habit by committing the crimes of robbery, burglary, prostitution, larceny and a myriad of other offenses. In recent years, we have also seen an alarming increase in the number of businessmen and professionals who embezzle from their firms and clients to support their newly-found cocaine habit.

Simply put, whether we number ourselves among the urban poor, the urban or suburban middle class or business and professional people, we cannot support this habit and still maintain the lifestyle that we are accustomed to. To do both, we must necessarily resort to crime.

A recent study disclosed that drug users cost the American taxpayer in excess of five billion dollars for their crimes annually in order to support their habit. We can readily see the impact that the use of drugs has on our society. We, the public, are subsidizing this habit and "organized crime" and other illicit groups are reaping substantial profits by preying upon the weakness of these unfortunates. Only through a concerted Federal, State and Local effort can we ever expect to eradicate this cancer on our society. When sufficient funds and manpower are channeled to fight the drug problem, we can expect a substantial reduction in crime, especially violent crime and crimes against the elderly. Only when we are able to rid ourselves of the scourge of crime and drug addiction can we truly say that we are living in a "free society".

We ask, "What measures should be undertaken to assure justice in cases involving defendants charged with narcotics trafficking and drug related crimes? Following are a number of my suggestions:

Elect federal court judges; reduce the terms of state and local judges to make these judges more accountable to the general public; elimination of plea bargaining for all felony cases; mandatory sentences without parole should be enacted; convicted felons should not be released without bail; the federal government should ask for

more help from the local officials, as you are doing today, because I feel that our local law enforcement officials are on the front line of this problem; and federal money should be allocated to communities that show a reduction in the crime rate, because these communities are waging a successful fight against crime.

Senator D'AMATO. Thank you, Mayor.

Our U.S. attorney, Sal Martoche.

STATEMENT OF SALVATORE R. MARTOCHE, U.S. ATTORNEY, WESTERN DISTRICT OF NEW YORK

Mr. MARTOCHE. Senator, first of all, thank you very much for inviting me. I am honored to be here.

I am not going to read all of my prepared remarks. They will be submitted for the record. I am going to highlight certain points and invite some questions from you and the other gentlemen who are with you today.

Senator D'AMATO. For the record, the U.S. attorney's statement will be received as though read in its entirety.

Mr. MARTOCHE. Thank you.

If I may begin, I would like to say, without sounding like an echo——

Senator D'AMATO. Let me just exercise a little prerogative of the chairman of the committee holding this meeting today and simply say what a magnificent effort that you have made, in coordination with our drug enforcement people, the FBI, and other Federal agencies, in western New York, Brooklyn, and in New Jersey. Working together, you have made the biggest drug seizure and the most important drug arrest in New York and New Jersey in 2 years, with the seizure of almost 60 pounds of heroin. A great job with limited resources.

Let me say—so you will not get in trouble, I will say—there simply is not enough in the way of manpower and money and time and energy and resources being spent.

I have real trouble finding out why we can send hundreds of millions and billions of dollars abroad and to various programs when we are totally neglecting the war on crime that threatens our homes, our communities, and our small businesses.

People are afraid. We will hear from people later on who have seen their loved ones killed and maimed. A great part of that death, destruction, and fear comes about as result of the fact that a large percentage of crime is being committed by people who are looking for support of a drug habit. As a result of this, we all fall victim.

I cannot think of a better effort to which those in law enforcement could dedicate themselves than the eradication of organized crime, and the breaking of those who are involved in drug trafficking.

I want to suggest to you that our court system, when it gives out weak sentences of 6 to 10 years to major narcotics dealers and lets them out after only a portion of that time, does a great disservice to society. No major trafficker in drugs is going to reform when he gets back out on the street. He is going to go right back to his former pattern.

I want to say to you that you have done the people of western New York proud in the short period of time that you have been

here conducting this war. I will do everything I can in Washington to get you more resources. We will have an announcement today to share with you about a substantial increase, and it is not nearly enough in terms of manpower.

Please, Mr. U.S. Attorney, proceed.

Mr. MARTOCHE. I cannot tell you how much it means to us to have your presence here, the consciousness raising that someone with your prestige and your importance in this community can bring to this problem, and what you can carry back to Washington.

You have said it. An enormous amount of crime is committed to sustain drug habits. Huge profits are available from manufacturing and distributing drugs, which causes the concomitant growth of organized criminal groups. I think that is something which people have to realize—that this money is not being disbursed in a nonchalant manner. It is going to organized criminal groups to finance more criminal activity. Drug abuse and trafficking is a large part of the problem of crime in America.

I personally believe that we could probably reduce crime by 50 percent if we could effectively control drug abuse and trafficking in this country. We will never get this kind of drug abuse control, however, without the additional resources that you, Mayor Griffin and County Executive Rutkowski have already advocated.

You mentioned before the study conducted by John Ball in Baltimore which showed that 237 heroin addicts committed over half a million crimes in an 11-year period.

A later study done in Miami in 1979 surveyed 239 addicts and found that each addict committed an average of 337 crimes per year. In the Baltimore study, the number was about 200 crimes per year.

Two-thirds of Ball's sample of addicts engaged in various forms of theft. Many of them sold drugs to support their habit. The remainder was engaged in every kind of crime.

To support a drug habit, an addict must steal four times the value of the drugs he or she uses because fences will only pay one-fourth the value of stolen property.

The most minimal kind of a habit, a $50-a-day habit, Senator, in 11 years would cost three quarters of a million dollars, exclusive of all other costs that an individual would have. Almost no one could support this kind of a habit without engaging in a tremendous amount of criminal conduct.

Crime increases sixfold when someone is taking heroin. Six times more crime is committed by an addict when he is taking heroin than when he is in a state of control.

It is interesting to note that the Drug Enforcement Administration—I know that Larry Gallina, the head of the DEA here, is present today—suggested that in 1980, $79 billion, Senator, was spent on illicit drugs. This is an increase of $14 billion over the year before. Although $79 billion is an enormous sum, it hardly represents the full economic and human cost of drug abuse.

Street crime is only one of the effects of drug abuse. Manufacture and distribution of illegal drugs have long been the mainstay of organized criminal groups. Illegal drug traffic provides funds for extending the influence of organized crime into legitimate businesses. It relies on violence to enforce deals and gain territory. It pro-

motes public corruption. And it affects small businesses by making it much more difficult for them to survive.

Addicts at work steal goods from their employers. Addicts steal time. Addicts steal quality. These costs, added to the expense of treatment, are passed along to the consumer, when that is possible. The small businessman has a breaking point which is reached much more quickly and surely than the rare demise of a large corporation.

A 1981 study at the University of Michigan's Institute for Social Research indicates that 60 percent of all high school seniors surveyed had tried marihuana at least once; 32 percent had tried amphetamines; 17 percent, cocaine; 11 percent, barbiturates; 10 percent, LSD.

The study found a sharp rise in the use of cocaine and amphetamines. Therefore, I would like to respectfully urge this committee to consider that the problem of drug abuse has expanded far beyond just heroin. The problem includes an alarming rate in cocaine and amphetamine abuse.

The substantial impact of drug abuse on the small businessman is quickly evident. They are favorite targets. Drug abuse and related criminal activity in a community, as County Executive Rutkowski said, drives customers and suppliers away. It makes a neighborhood undesirable. Housing deteriorates. And, businesses become more difficult to sustain in the areas that need them most.

Immense spendable income, Senator, is diverted from purchasing legitimate goods in order to buy illicit drugs.

Small businesses, especially, cannot afford employees who steal from them, who do not work full schedules, who are only working up to part of their capability, and who are required to undergo expensive and time-consuming treatment.

The Attorney General, I am proud and happy to say, has formulated, at the behest of President Reagan, a strategy for carrying out coordinated, effective drug law enforcement in the United States.

I believe that for the first time the Federal Bureau of Investigation has added its resources to those of the Drug Enforcement Administration. Both now share the responsibility for the enforcement of Federal criminal drug laws. The entry of the FBI into the war against drug abuse and trafficking will add more personnel, widen geographical coverage, bring to bear the considerable expertise of the FBI in sophisticated investigative techniques such as electronic surveillance and make available the Bureau's 1,200 special agents trained in accounting, a skill that is critical to successfully carring out financial investigations.

I should point out, too, Senator, that the law enforcement coordinating committee in this district—a committee that is made up of all the local, State, and Federal law enforcement agencies in the 17 counties of the western district of New York—has unanimously identified drug abuse and trafficking as the No. 1 crime problem in this country and in this judicial district.

[The prepared statement of Mr. Martoche follows:]

STATEMENT OF SALVATORE R. MARTOCHE, U.S. ATTORNEY, WESTERN DISTRICT OF NEW YORK

Senator D'Amato, Distinguished Guests, Ladies and Gentlemen, in a decade and a half, drug abuse has grown and spread into almost all areas of American life. It has travelled to the suburbs, risen into the middle and upper classes, and entered the offices, factories, colleges and high schools of America. An enormous amount of crime is committed to sustain drug habits and the huge profits available from manufacturing and distributing drugs has promoted the growth of organized criminal groups. The pervasiveness of drug abuse and the enormous amount of crime committed to purchase and supply illegal drugs makes drug abuse and trafficking a large part of the problem of crime in America.

In an important study of the link between drug abuse and crime, John C. Ball and his colleagues in 1974 investigated the criminal careers of heroin addicts in Baltimore. They found that 237 randomly selected male addicts committed over a half million crimes in an eleven year period. This is an average of approximately 192 crimes per addict per year. A 1979 study of 239 addicts in Miami found that each addict committed an average of 337 crimes per year.

Two-thirds of Ball's sample of addicts engaged in various forms of theft, 19 percent sold drugs to support their habits and most of the remainder of the sample engaged in confidence games, forgery and procuring to obtain money for drugs.

To support a drug habit by theft, an addict must steal four times the value of the drugs he or she uses, because fences pay only about one fourth of the value of stolen property. Thus, to support a habit of only $50.00 a day, the average addict in these studies would in the course of eleven years steal three-quarters of a million dollars.

Ball also found that crime increased six fold during the time when addicts were taking heroin. On the other hand, when addicts were not using heroin, they committed 84 percent fewer crimes. Ball concluded that if we can control addiction, we can reduce crime appreciably.

The Drug Enforcement Administration estimated that the value of illicit drugs sold in the United States in 1980 was $79 billion. This represented an increase of $14 billion from the value of illicit drugs in 1979.

Although $79 billion dollars is an enormous sum, it hardly represents the economic and human cost of drug abuse. Street crime is only one of the effects of drug abuse. The manufacture and distribution of illegal drugs has long been a mainstay of organized criminal groups. The illegal drug trade provides funds for extending the influence of organized crime into legitimate business, relies on violence to enforce deals and gains territory and promotes public corruption to protect its activities.

Drug abuse has also visited and affected the work places of America. It has entered the executive's suite, the professional's office, and the worker's plant. Addicts at work steal goods from their employers, steal the time to engage in drug dealing and other crimes, steal quality from the products they produce and add these as well as treatment costs to the prices paid by consumers.

One of the most sinister aspects of drug abuse is its prevalence among college and highschool students. The University of Michigan's Institute for Social Research recently reported on its seventh, annual nation-wide survey of drug use among high school seniors. It found that 60 percent of highschool seniors used marijuana at least once, 32 percent had tried amphetamines, 17 percent had used cocaine, 11 percent barbiturates, 10 percent LSD and 1 percent heroin. The study found a sharp rise in the use of cocaine and amphetamines, while the use of barbiturates, LSD and heroin declined slightly. While the use of certain drugs has moderated from the exceptionally high rates experienced in the 1970's, the authors emphasized that overall drug use among young Americans continues at a very high level compared to earlier generations and other countries.

From this brief outline of some of the general effects of drug abuse, it is easy to see the substantial impact that drug abuse can have on small businesses. Small businesses are likely to be a favorite target for the burglaries, robberies and shoplifting by which addicts support their habits. Drug dealing and associated street crime in a neighborhood where small businesses are located can drive customers and suppliers away. As drugs and crime make a neighborhood undesirable, investment in business and housing becomes unprofitable and the neighborhood deteriorates further.

Small businesses also suffer because of the vast amount of spendable income diverted from purchasing legitimate goods. As previously mentioned, an estimated $79 billion dollars was spent on the purchase of illegal drugs in 1979. Small businesses are also the least able to bear the costs associated with having employees who are

drug abusers. They cannot afford employees who steal from them, who do not work their full schedules, who work with only part of their abilities and who require expensive care and treatment.

Recognizing the significance of drug abuse and trafficking in the overall crime problem, the Attorney General, at President Reagan's behest, has formulated a strategy for carrying out a coordinated, effective drug law enforcement program. For the first time, the Federal Bureau of Investigation and the Drug Enforcement Administration will share responsibility for the enforcement of federal criminal drug laws. The entry of the FBI into the field of drug enforcement will add many more personnel and wider geographical coverage to the enforcement effort. It will also bring to bear on the problem the Bureau's expertise in sophisticated investigative techniques, such as electronic surveillance, and make available the Bureau's 1,200 Special Agents trained in accounting, whose skill is critical to successfully carrying out the financial investigations needed to seize assets used or acquired in drug trafficking. It will also make available the FBI's intelligence sources and informants, especially those within organized crime.

To ensure that drug enforcement is coordinated into an effective program at the local level, the Attorney General has directed the establishment of Law Enforcement Coordinating Committees (LECCs). Each LECC consists of the heads of federal, state and local law enforcement agencies in a district. A Drug Enforcement Subcommittee in each LECC has the task of studying the drug problem in its district and establishing a plan for making the most effective use of the combined resources of federal, state and local agencies in the enforcement of drug laws.

The Western District of New York was one of the first in the nation to form an LECC and establish a Drug Enforcement Subcommittee and Plan. Building upon the Subcommittee's plan, a Narcotics Task Force has been established in my office which has three Assistant United States Attorneys assigned full time to the prosecution of drug cases. More Assistant United States Attorneys and Special Agents, however, are required because of the extensive dimensions of the problem. This is particularly true of Western New York which fronts on a border used to bring drugs into the country and serves as a major distribution point for drugs such as heroin.

The combined efforts of law enforcement agencies in Western New York have already produced a substantial number of prosecutions. These prosecutions include charges against persons located at or near the highest levels of the illegal drug distribution system.

The high level of drug abuse and trafficking both here and throughout the nation calls for a number of remedial steps. I would like to suggest a few. A policy designed to have the greatest impact on the problem of drugs and crime must be aimed at those who are responsible for the greatest amount of this crime. Thus, legislation should focus on career criminals and serious offenders who are responsible for the bulk of drug-related crime. More federal prosecutors and investigators are required to insure that justice, especially in these serious cases, is swiftly administered. Once speedy trials and other safeguards are in place, federal and state laws governing bail can and should be changed to allow pretrail detention of career criminals and serious drug offenders. Longer and mandatory jail sentences should be provided for career criminals, serious offenders and those who use guns to commit these crimes. The effective enforcement of stricter drug laws may require more prison space; however, the amount of space can be sharply reduced by screening-out members of the prison population who have committed minor offenses or who do not require confinement in expensive maximum security prisons. Finally, additional support should be given to the cooperative effort which federal, state and local law enforcement agencies have initiated through LECCs and Narcotic Task Forces.

Drug abuse and trafficking is a key part of the problem of crime in America. It has enormous economic and human costs. Therefore, I would like to thank the Subcommittee for recognizing the importance of this problem and concentrating more attention and effort on its control.

The federal government and the Department of Justice are committed to playing a major role in ridding our society of this cancer and with your help we will have the tools to do an effective job.

Senator D'AMATO. In your opinion, gentleman, is there any more serious problem that we face in dealing with crime, than that which is occasioned as a result of drugs? I can tell you that people in New York, the down-State communities, the neighborhoods, the shopkeepers, are under seige. Those who use our mass transit systems are in fear and do not use them in the off-hours.

What is your feeling, County Executive Rutkowski?

Mr. RUTKOWSKI. Well, we all share the same feeling. I think our mayor, and especially our police commissioner, have just done an outstanding job, but it is like wrestling with a wet mattress—just when you think you have it, it flops over on you, because the profits involved in drug trafficking are so high that just as soon as you pick up a drugpusher there is someone else there to take his or her place.

We do need funds for preventative measures. As I said before, if you destroy our young people, the minds of our young people, you destroy everything. That is really where it is at. It not only hurts businesses, but I am more concerned about the minds of our young people.

Senator D'AMATO. Let me suggest that I think that this is our Nation's No. 1 problem. This should be a priority for all on the Federal, State, and local levels. We must concentrate our efforts legislatively and educationally. We must not shirk our responsibility. To date, we have been. I think our effort has been less than complete.

That effort, by the way, also has to come at the Federal level. We have a very special responsibility. Illicit drugs are, for the most part, smuggled into this country. We need a comprehensive policy of education, interdiction, and diplomacy. We must also see that we have the necessary resource persons. I think it is scandalous that people are paroled—and I am talking about traffickers; I am talking about dangerous criminals—simply because there is not sufficient space.

I would like to commend Erie County at this time for going forward with their prison construction program. They have done an outstanding job. They have recognized their responsibility instead of saying, "No, not in my backyard."

You are to be commended.

Mr. MARTOCHE. I would just like to point out, in conclusion, Senator, that we have formed a narcotics task force in this district. Through the efforts of the Attorney General and the President, we have three attorneys committed full time, working with agents from the FBI, DEA, and Customs, to drug law enforcement. We are attacking in a much more vigorous fashion than ever before the very kinds of crimes you have been discussing.

We have also formed a financial investigations unit in our office, because I believe that while there are many people smart enough to put a great deal of distance between themselves and the drugs, they are inclined to put very little distance between themselves and the money. We are going to begin tracking the financial trails that lead to drug traffickers.

I would also like to point out that vigorous law enforcement at the local level, under the leadership of District Attorney Richard J. Arcara, who I believe you will be hearing from later, and Commissioner Cunningham, has had an enormous part in making this community as successful as it has been in the war against illegal drugs. Not that we are winning, because I think there is a long way to go, but we have been able to hold our own because of a cooperative effort.

Nevertheless more Federal prosecutors and investigators are an absolute necessity if we are going to move forward. Especially in serious cases, we need swift justice. Once speedy trials and other safeguards are in place, Federal and State laws governing bail can and should be changed to allow pretrial detention.

Senator D'AMATO. Let me get you in trouble now a second, because I agree with you on that. We are pushing for that. Let's talk about something that may be somewhat controversial.

We now have forfeiture laws, and the RICO Statute, which allow us to seize the assets, the fruits, of drug trafficking, including their magnificent estates, yachts, and cars. Now we have to turn the proceeds over to the general treasury. Many of us advocate instead, that those moneys be turned over to the Justice Department, so that we would be in a position to prosecute more effectively and use those resources to help battle crime.

In other words, if we were to seize the assets such as you have in certain cases, then those moneys would then be turned over to the Justice Department for the purpose of hiring more agents, hiring more prosecutors, and seeing that we have the resources to deal with the battle against crime.

Mr. MARTOCHE. I could not agree with you more, Senator. If we were fortunate enough to have legislation such as that enacted into law, I can assure you that the resources that would be paid for simply by that activity would cover the cost of the entire Justice Department programing at double its present capacity.

I would also like to add my voice to that of the other speakers in advocating longer and mandatory jail sentences for career criminals and serious offenders and those who use guns and weapons in the commission of crimes.

The effective enforcement of stricter drug laws may also require more prison space. However, the amount of space needed is not as great as one might first think, if we use better screening techniques to find out who needs to be incarcerated, for how long, in what kind of facility. Not everybody needs to be placed in a maximum security facility, which costs far more than incarceration in a minimum or medium security facility.

Senator D'AMATO. For white collar crime, you do not put them in a maximum security facility.

Mr. MARTOCHE. That is right.

Senator D'AMATO. You use it for the violent——

Mr. MARTOCHE. That is right.

[Brief recess taken.]

Senator D'AMATO. We will reconvene.

Sometimes—and I do not mean to be critical, unduly, but probably the best panel will be the second panel, which is a panel of victims.

We have Albert Ranni, the deputy district attorney of Erie County, who will be introducing some of the victims.

Albert.

STATEMENT OF ALBERT RANNI, DEPUTY DISTRICT ATTORNEY, ERIE COUNTY

Mr. RANNI. Good morning, Senator. How are you?

Senator D'AMATO. Good morning.

Mr. RANNI. Before I begin, let me personally express my gratitude to you and your dedicated staff, particularly Morgan Hardiman, for taking out time from you busy schedule to address and explore some of the serious and often devastating effects of violent crime on small businesses.

Fortunately, I think everyone is acutely aware of the direct and immediate and serious effect of violent crime on the victim. Cretainly this should not be deemphasized. Nevertheless, I think that often, while commiserating with this innocent victim, we tend to unintentionally overlook the dramatic effect that crime has on our community at large, our businesses, our employees, peace and tranquility of the neighborhoods.

Today, Senator, I take pleasure in introducing to you five concerned citizens, most of whom are businessmen who will relate to you their personal experiences regarding this subject matter.

I trust that their testimony will assist you and your Senate colleagues in rectifying and coming to a solution of this problem.

Our first witness is Raymond Fink. Mr. Fink is an attorney in the city of Buffalo at a downtown law firm. His father and uncle were proprietors of a clothing store. People's Clothing Store is the name of it. It was in business for approximately 50 years. It was founded by Mr. Fink's grandfather. It was located in a changing area in the city of Buffalo.

Back during the Christmas season, in December 1979, both brothers were present in the business. Three young men entered. One displayed a sawed-off shotgun and demanded the money. Both brothers fully complied with these requests.

After that, the two brothers, a sales clerk, and a patron were marched into the rear of the store where they were bound by their hands and beat and ordered to lie on their stomachs.

Without any provocation, remorse, or hesitation, these cowards, after their demands had been fully satisfied, proceeded to deliberately and systematically stab all of these innocent and helpless victims.

Defendants left their victims to die. To insure that this would be established, they locked the front door behind them and cut the telephone lines, to insure that they could not go out for help.

Fortunately, one of the victims was able to extricate himself and go out the rear door, where he was fortunate to get medical assistance.

Unfortunately, Mr. Fink's father and uncle died right on the premises.

Defendants were promptly arrested. They confessed, and they were convicted.

This was a case that I feel very close to because it was a case that I personally prosecuted.

They were sentenced to a 25-to-life sentence with imprisonment. Judge Castler, our senior court judge, remarked at the sentence that he regretted that he could not impose the death penalty on these villains.

One of the defendants, as a result of this, his picture was posted on the television. As a result of that, other victims came forward. He was subsequently convicted of another robbery.

Without any more introduction, I would introduce you, sir, to Mr. Ray Fink.

Senator D'AMATO. Mr. Fink.

STATEMENT OF RAYMOND FINK

Mr. FINK. Good morning, Mr. Senator.

It is difficult for me to be here. A lot of memories are conjured up, a lot of difficult sentiments.

I think your work is important, the work of your committee, and I think it is important that you get the feedback from the victims of crimes, particularly violent crimes, because there is very little that is often said or done for us. We are left to fend for ourselves. To some extent, we have to fend for ourselves because that is, I suppose, part of the grieving process. However, there are things that can be done, and I will keep my comments brief. It is probably a luxury you do not often have in the Senate.

There are a lot of things I should say, a lot of things I could say, but I will limit my remarks so that we can proceed.

My grandfather immigrated from Russia around the turn of the century. He spoke very little English, as did most immigrants to the United States. He carved out a career or a business for himself. He sold household goods and wares basically through a bicycle or shopping cart door to door. That was the genesis of People's Clothing.

He built that up throughout his life, and provided for my father, my uncle, his wife, my grandmother, and provided for them comfortably. He put my father and my uncle through school, and he put my uncle through law school.

When World War II came along, it interrupted everybody's lives. My father and uncle enlisted in the service and, of course, fought for his country.

After they were discharged from the service, they went back into the family business. My uncle particularly gave up a law career to become inolved in the family business and make a go of it.

My grandfather at that point was ill and had a heart condition and needed the assistance of his two sons.

My father and my uncle built that business up. It put myself, my brother, my sister, and my cousins through college; a few of us through graduate school. It enabled our two families to live fairly comfortably and with a sense of security.

On December 27, 1979, that came to an end, a complete halt. As Al indicated, my father and my uncle were brutally and savagely murdered.

One of the employees was seriously injured. In fact, he was lucky to survive. A customer who was in the store at that time was stabbed as well.

There was no remorse. That says something about the perpetrators of crime in this country.

We were left with the task of cleaning up the business. There was no way I was going to operate it on an ongoing basis. I was involved in a law career. My mother and my aunt were not inclined, especially after this event, to become involved in the business. My brother and my cousin were in college. My two other

cousins were out of town and involved in their professions and careers. So the task of liquidating the business fell upon our shoulders.

Basically, Mr. Senator, what was a viable business and which provided for two generations, over 80 years, became valueless in a matter of hours—or an hour.

Granted, the business was located in a changing area, but it served an important function in that neighborhood. The residents, the customers, who were all longstanding, bought clothing and household goods on credit, credit that they could not really obtain anywhere else. They couldn't go to the banks because their financial statements didn't justify it. Certainly unemployment and hard times were an important factor in that.

They extended credit to their customers. They knew them for a long time. They knew they would get paid, maybe $1 a week, but that is the way they conducted business and that was an important function in that neighborhood. That is a function which has been lost as well to the community, aside from our own loss.

The inventory, Mr. Senator, was sold for nickels and dimes. The accounts receivable evaporated very quickly. The real estate, a building that was initially valued at around $40,000 or $50,000 after a year or so, we sold for about $2,000. We could not afford the carrying costs. We could not even get insurance because it was vacant. The New York Fair plan wanted premiums that were something like $3,000 or $4,000 a year.

This is why I think some sort of meaningful legislation can be put forth to help some of the victims who are visited with this sort of disaster.

I also think it is important that there be some sort of—aside from financial support—some sort of psychological support, some sort of professional support for the victims.

Fortunately, our family has been fairly strong, and I think we have worked through our problems. We have been supportive of each other.

However, Desi Franklin, who almost lost his life, I do not know to this day if, emotionally, those scars have healed or whether his life has ever been put back together. He needs professional help. He is not getting it.

Mr. Essie Hall, who was the customer in the store at the time, I do not know what happened to him, but who helped him with his scars, his memories?

As I said initially, Mr. Senator, we are forced to fend for ourselves. If the rising tide of crime in this country cannot be curtailed, then some sort of meaningful legislation has to be adopted to help the victims, because the victims are an ever-increasing class of constituents in the American population. That is the tragedy.

Thank you.

Senator D'AMATO. Thank you very much, Mr. Fink.

As you know, there are a number of victim assistance programs. I do not believe that there are any geared particularly to small businesses, but certainly I think that idea deserves serious attention given that they are victimized in a disproportionate manner, because these entrepreneurs are sitting targets—people know where they are. They know there is some money there. They know

there are valuables there. Small businessmen are, therefore, much more susceptible to the holdup, to the kind of incredible savagery that some people will visit upon others.

I think we should explore the possibility of doing something at the Federal level as well, with respect to a victims' program, given the fact again that a major component of the crime problem comes about as the result of drugs.

I want you to know I feel very strongly on this issue. We have lost domestic tranquility, which is guaranteed to people by the Constitution. When they cannot feel safe in their homes, on their way to work, at their places of employment or recreation, and have to feel imperiled and see their loved ones struck down, then I think it is about time for us to look at our priorities and ask, "Where are we going?"

Certainly assistance to the victims, certainly assistance to the businesses, is necessary, so that people can feel more secure.

Let me ask you this: Did you ever ascertain whether any of the three defendants who committed this crime had any narcotics problems? Were they users? Dd that ever come out?

Mr. FINK. Mr. Senator, I believe during the trial there was testimony from the witnesses that they thought some of the perpetrators were on drugs at the time. Although that was not something that was conclusively proven, there was testimony to that effect. I am not sure about prior usage, whether there was any criminal record. However, knowing—this is certainly presumptuous, I suppose, but knowing the frequent usage of drugs in general in urban areas, there is a possibility.

Senator D'AMATO. I am wondering if the district attorney could possibly, at some time, provide that information for the record.

Mr. RANNI. It is my recollection, although the case was prosecuted several years ago, that after the crime was completed, they retreated to one of these teenager's houses. At that time when they were dividing up the money and the spoils, they had some marihuana.

Senator D'AMATO. We do not have any idea whether or not they were hardcore users of drugs?

Mr. RANNI. No, sir.

Senator D'AMATO. I would ask one other thing. Would you take a look at their record and ascertain whether or not there were any criminal charges involving drug use, sale, et cetera? I would appreciate that.

Mr. RANNI. I will, sir.[1]

Senator D'AMATO. Do you want to proceed now?

Mr. RANNI. Yes.

Senator D'AMATO. Thank you, Mr. Fink.

Mr. FINK. Thank you, Mr. Senator.

Mr. RANNI. Our next witness will be David Adler. Mr. Adler and his brother are proprietors of Trout Line Fish Co., a business that was started in the early 1900's and is located in the city of Buffalo.

Sometime in August 1982 members of the Buffalo police force responded to a complaint of a burglary in progress at this business. When they arrived, they observed two young men on the roof of

[1] Information not available at time of going to press.

the business climbing through a hole which they had caused to be put there.

Eventually both men were arrested. Burglary tools were confiscated.

Extensive property damage was caused to the roof.

One of the defendants was at that time on Federal parole.

Mr. Adler has been most unfortunate in this area, since this was about the fourth time in just 5 days that his business had been burglarized.

Mr. Adler is here and he is happy for the opportunity to explain to you, Senator, some of the background and the hardships that he has suffered.

Senator D'AMATO. Mr. Adler.

STATEMENT OF DAVID ADLER

Mr. ADLER. Good morning.

I have a list of burglaries and damage and things that happened at our store that you would not believe. A lot of them I do not even remember. It forced my father into early retirement. He could not take any more of it.

I get phone calls my time from 4 o'clock in the morning until 10 o'clock at night telling me that there is somebody in our parking lot, that they are doing damage to our building, that they are smashing our windows.

We had a retail outlet which we closed up because of that. People were always walking in and grabbing things and running out. That has since been leased by a woman who is running it, and she is running into the same thing.

Our trucks are being robbed all the time.

We caught a man a couple weeks ago stealing about $500 worth of merchandise. He tried to run us down with his car.

Senator D'AMATO. Do they come in basically to steal the fish?

Mr. ADLER. Whatever they can get their hands on.

Senator D'AMATO. Will they take a load of fish out of your place? Have you ever had that happen?

Mr. ADLER. Yes. Thanksgiving weekend they got us for about $3,000 worth of chicken products.

Senator D'AMATO. Chicken products?

Mr. ADLER. Yes.

Senator D'AMATO. They will come in and just take the chicken out?

Mr. ADLER. Yes.

Senator D'AMATO. Obviously, when they get that chicken, they have to sell it at a much discounted rate. What are you going to do with $3,000 worth of chicken?

Mr. ADLER. Some chicken and shrimp and things like that.

They robbed our truck at the Broadway market of almost $500 worth of products, while the man was standing there delivering. They pulled up with a car. They must have been waiting for him. They pulled up with a car, and somebody standing beside our truck threw a lot in, and they just drove off.

We have two separate alarm systems in our building, and they are still getting in. We have fenced it in. We had guard dogs, two of

them. They are cutting our fences at night and letting them out. It just never ends.

This year alone we must have lost about $20,000 worth of products.

Senator D'AMATO. What will happen? Have you thought of moving?

Mr. ADLER. Every time we are in the paper, I have a man in Genesee County who calls me, "I have property. I will build for you. Move out here."

My brother and I both live in this area. We do not want to move out of town.

Senator D'AMATO. If this persists, will you be forced to move out?

Mr. ADLER. Probably, yes. I will not go to work without my gun.

Senator D'AMATO. Have you ever had occasion to use that gun?

Mr. ADLER. Yes. I'm not too proud of it, but I did.

Senator D'AMATO. Would you tell us what happened?

Mr. ADLER. Well, we caught a man stealing—it was on a Friday morning. One of my men was loading his truck. He finished loading it with his helper. They went in to get the bills, came out, and they noticed there was a lot of stuff missing. Now they were only in the building for a minute or two. When they walked out, they noticed stuff was missing that they had placed on the truck.

We went looking, and we found it in a driveway about three or four houses away. There was a male loading it in a car. We were told by the neighbor there that there were two or three of them loading all this stuff in the car. That is how they got so much stuff so fast.

We blocked the driveway with a car, and he pulled right out with the car and tried to pinch me in between the two cars, smashed right into the driver's side of the car. If the driver, an employee, had not have been fast enough, the car would have gone right through the driver's door.

He kept trying to go back and forth. He kept smashing in on the car, and then I shot out his car tire. He jumped out and ran.

I have chased men. I have been in the store when they have come in and grabbed items out of our freezers in the store. I have chased them. They have pulled knives on me.

Last week one of our men went to one of the fast food stores right near our business, and one of the customers in there was trying to sell him some cocaine. He said, "I've got some nice, pure stuff. Do you want to buy some?" It is right on the corner. It is on our street.

Senator D'AMATO. How many people do you employ?

Mr. ADLER. At one time, we had about 35, but now we are down to about 25.

Senator D'AMATO. You employ 25 people?

Mr. ADLER. Yes.

Senator D'AMATO. So if you closed down, 25 people would lose their jobs?

Mr. ADLER. That is full- and part-time people.

Senator D'AMATO. Is it your feeling that a substantial number of those who come in to burglarize or what-not are drug users?

Mr. ADLER. We have some of them, when they pull up to our store, they are so high they can hardly walk.

Senator D'AMATO. Really? They come into your store to burglarize your store?

Mr. ADLER. No, no. I mean as customers during the daytime. They will come in and look around.

Senator D'AMATO. Oh, they case the place?

Mr. ADLER. When they leave, they usually walk out in the parking lot and urinate all over somebody's car and then leave.

Senator D'AMATO. I understand one of the people whom they arrested this last time was a defendant who was on parole at the time.

Mr. ADLER. I understand—I do not know if it is true or not, but I was told that he was on parole; that he was arrested for raping a woman who was in an overdose coma in Erie County Medical Hospital right up the street. I believe he is still in jail right now, but his girlfriend was murdered 2 weeks ago.

Senator D'AMATO. That case comes up this Monday?

Mr. ADLER. No, that is another one.

Senator D'AMATO. That is another case?

Mr. ADLER. Yes.

Senator D'AMATO. Boy, you've got a real—you ought to get the district attorney to just stake out that whole place. We could probably clean up half the neighborhood over there.

Mr. ADLER. We could not get any help from the city. I went over to precinct 16 and talked to the captain over there. I talked until I was blue in the face. I called Eddie Rutkowski, the Erie County executive, who is a friend of ours, and he put three detectives—four detectives and two cars there. In, I think, 3 days they have five arrests.

Senator D'AMATO. That is a pretty good place to pick them up, then. Did that stop them once the word got out?

Mr. ADLER. Since then, we have fenced everything in, with the guard dogs, the burglar alarms, and everything else.

While we had the holes in the walls, we hired a city detective on his off time to guard our place at night. He was involved in so many things that you just would not believe them, right on our corner.

They staked out our place one night, and a man came right up and looked in the police car window, climbed up on the roof and started chopping a hole. He walked right up and looked in the window.

Senator D'AMATO. It is just incredible.

Mr. ADLER. He walked right past them, looked right at them, and climbed up on the building across the street, smashed a window and went in. He came out with less than a dollar's worth of change.

Senator D'AMATO. Well, let me say, Mr. Adler, you certainly have perspicacity. There is no doubt about that. It is testimony to what people will endure to stay in business and to fight for that which they believe.

It would also seem to me that you ought to continue to call our good friend, the county executive, to see that they stake that place out regularly. It is worth at least 1 night a week. You can probably pick up three or four people.

Mr. ADLER. We were standing there talking one day. Three fellows jumped on a man. They had him upside down shaking the money out of his pockets, while the detective and I were standing there talking at 4 o'clock in the morning.

One of the TV stations came by after one of our burglaries. They asked us to put some boxes in one of our trucks, and it wasn't 10 minutes before somebody was stealing them.

Senator D'AMATO. Let me again suggest that, unfortunately, all too often we hear these kinds of cases that take place. That is why we are holding these hearings. Sometimes people think that these things only take place in New York City. They do not recognize that it is taking place not only in our urban, centers, but our suburban communities, and really througout the length and breadth of this Nation. In San Francisco we held hearings and heard similar stories.

We thank you for your participation.

Hopefully, these hearings will result in some affirmative actions to deal with these kinds of problems.

Thank you very much.

Mr. ADLER. Thank you.

Senator D'AMATO. I see we have our district attorney, Mr. Arcara, here. I would certainly like to thank him for his aid and the help of his staff in helping to make possible these hearings.

Would you like to say anything.

Mr. ARCARA. No.

Senator D'AMATO. Thank you.

Mr. RANNI. Senator, I am not sure whether I mentioned that one of the two defendants who were charged with burglarizing Mr. Adler's business was on Federal parole for a bank robbery at the time that he was apprehended.

Senator D'AMATO. He was on parole, yes.

Mr. RANNI. For bank robbery.

Senator D'AMATO. That certainly says something about our system when we are paroling bank robbers. I do not think that there are too many bank robbers who should be eligible for parole. I do not think that you go from being a bank robber to a good guy after 2 or 3 or 4 years in prison. I just do not believe it.

The parole system is probably one of the great problems that we have today. Maybe part of that is the overcrowding of prisons.

I think someone who uses a gun in the commission of a crime should serve out his full sentence. Anybody who will undertake that kind of activity has no respect for other people or life or the dignity of life. Consequently, I just cannot see, for the life of me, how we could have a parole system that turns out these people, either at a Federal level or State level.

Why don't you proceed?

Mr. RANNI. Yes, Senator.

Our next witness is Mr. William Johnson. He is the owner and operator of Johnson Fasteners Corp. It is a business that has been in existence for 20 years. It is located in the city of Buffalo. It distributes nuts and bolts, I understand.

Briefly, Senator, sometime in August of this summer Mr. Johnson's business was burglarized, at which time expensive and some-

time irreplaceable business equipment was removed from the premises.

Based upon an investigation, a search warrant was issued, and four defendants were arrested. I believe they were three brothers and one cousin.

I should mention that this case is pending trial.

One defendant in this case was a prior felon. Another defendant was a prior felon, for which he received youthful offender treatment and was at that time on parole.

The police executed a search warrant at one of the residences and found in the cupboards some of Mr. Johnson's property. I may add they also found some other property on the premises, and that property was owned by a parole officer, who happened to be a parole officer for one of these four people who was then on parole.

Another thing I should mention, I think this is about the second or third time——

Senator D'AMATO. That is not very good testimony on his behalf, is it?

Mr. RANNI. No.

I think this is about the third time in that particular year that Mr. Johnson's business had been burglarized.

He is present here. He would like to share some of his experiences with you, Senator.

STATEMENT OF WILLIAM JOHNSON

Mr. JOHNSON. Good afternoon, Senator.

Senator D'AMATO. Mr. Johnson.

Mr. JOHNSON. I am glad I do not have quite the problems that Mr. Adler has.

In a personal matter, I have been in this business—my father, like the Finks, started it in 1929. We have been in this business for 60 years in the Buffalo area.

We are located in a development area of the city. Basically, we stay there because it is the only way we can continue to exist. The fastener business is a highly competitive business. It is something where we have to keep our overhead down, and the only place you can do that is in the lower rent areas of the city.

I have had three burglaries in the last year. Fortunately, they have been burglaries and not robberies. The result, though, is that my female employees at this time will no longer work in the premises unless some of the men are in attendance. We only have nine employees.

You touched briefly before on alarm systems. People have suggested dogs to me. They have suggested alarms. These are expenses that at this time we cannot afford.

It is very inconvenient to do business the way we have to do it now. We remove our office equipment every night from the premises. We cannot leave it there.

We find that 2 days after we were burglarized the Buffalo police knew the names—they came in and told me who took it. I knew who took it myself. Yet, the laws are such, the search warrant procedures are such, that our hands were tied until we got a break that we could go in and recover the property.

27-542 O—83——3

I am personally interested in seeing these gentlemen going up before the grand jury shortly. I am interested to see if they are punished in any way for what they have done to inconvenience my business.

The other problem we have, of course, is insurance. At this point we are insured, but my insurance company, every time I report a loss to them, they basically are saying, "Well, we will see what we can do, but what are you doing about it?"

Basically, that is my story.

Senator D'AMATO. Yours is a story, again, that unfortunately has been repeated too often in too many places.

You have almost come to accept it as a method of doing business. You remove your typewriters and other kinds of things from the premises for fear they are not going to be there the next day. Is that right?

Mr. JOHNSON. That is right.

The other fear that I have, of course, is reprisal. I am in my business for 40 hours a week. These are people who live in the neighborhood. I have not only the fear of their burning my place down, but if they got into the premises, the damage they could cause just by turning over shelving and that would be just as bad as fire that destroyed us completely.

Senator D'AMATO. You really have a fear——

Mr. JOHNSON. Yes, I do.

Senator D'AMATO. In terms of even prosecuting them, don't you? Do you face this with any apprehension—the fact that they are now being charged before a grand jury?

Mr. JOHNSON. Well, no, I don't because I know the particular people who are involved. However, I could see in other instances the same thing could happen where I would be.

Senator D'AMATO. Thank you very much, Mr. Johnson.

Mr. RANNI. Our next witness, Senator, is Dr. Franklin Yartz. He is a doctor of veterinary medicine. He operates a small animal hospital in the city of Buffalo in close proximity to downtown Buffalo.

He had a receptionist as an employee. Her name is Mrs. Debra Crowney. She in her early twenties, married, and recently found out that she was pregnant.

Some time ago four men—or three men—entered the small animal hospital. Debra Crowney, the receptionist, saw them, saw these armed robbers. What she did, she turned around and ran down a corridor in an effort to alert and advise the doctor about what was about to happen.

One of these defendants leveled a sawed-off shotgun while she was running down this corridor and, without hesitation, this coward discharged it, striking her at almost pointblank range. This young mother-to-be fell in the arms of Dr. Yartz, and she was pronounced dead on arrival at the hospital.

The four defendants were arrested for this crime. Three of them were convicted. The shooter is serving a sentence of 25 to life. Two of the accomplices—one operating the getaway car and the other one who went in—are serving a 25-year sentence. One of the defendants who was charged with this crime was arrested, advised of his constitutional rights, and fully confessed to the crime. This same defendant had been implicated in the confessions of other defendants. Unfortunately, the courts ruled that at the time—prior to the time he was advised of his rights, prior to the time he gave this voluntary statement, the police had insufficient evidence to take him into custody. So that all the warnings and all the voluntary statements were obviated and were suppressed.

We have this case in New York State, the *Dunaway* case, that says if you do not have enough proof in the beginning, all the voluntariness, all the rights you are advised of do not count. Despite that voluntary confession, the confession was expunged.

The three codefendants, including the shooter, were able and willing, frankly, to testify and implicate this man. We have a rule in New York State, however, that no person can be convicted on the testimony of the accomplices, no matter how many.

This was a case, unfortunatley, where one person, despite his involvement, his self-confessed involvement, and the overwhelming proof against him, managed to escape justice.

I should add that, as a result of the publicity arising out of this tragic killing, another witness—other witnesses came forward who identified this person, the one who escaped justice, and he was prosecuted on another robbery charge in which he was involved with these three defendants, the same three defendants who were robbing this hospital, and he was convicted of the robbery ultimately.

Sir, Dr. Yartz is present, and he is happy that you are here to hear his views.

Thank you.

STATEMENT OF DR. FRANKLIN YARTZ

Dr. YARTZ. Good morning, Senator.

Senator D'AMATO. Doctor, thank you for coming.

Dr. YARTZ. With your permission, I would just like to read a story of what happened to me on December 10, 1981.

On December 10, 1981, at 10:30 a.m., three black men entered the Ellicott Small Animal Hospital with the intent of committing a robbery. One was armed with a sawed-off shotgun, one with a knife, and the third with a toy gun.

As they passed through the glass-enclosed vestibule, they were spotted by the receptionist, Debbie Crowney, who was standing at the front desk. Panicking at the sight of the ski masks and gun, she turned and ran down the hall leading to a row of exam rooms.

I was in the first exam room with a client at the time. Debbie ran down the hall and turned to enter the room through the open sliding door. A step away from entering the room, a loud pop went off, and she was thrown forward onto the counter, hitting her head. I grabbed her as she fell.

I immediately phoned 911, and an ambulance arrived within 5 minutes. Debbie was rushed to Buffalo General Hospital five blocks away, where she died approximately an hour later.

She had taken over 100 birdshot pellets directly in the center of her back at a distance of 15 feet. Her spinal cord was destroyed, and the back of her heart was full of small holes. She suffered massive hemorrhage and convulsions before she died.

I was with her husband when he was told by the doctor.

She was 2 months pregnant with her first child, and had just learned the day before that they had been approved for the mortgage on their first home.

There were no eye witnesses to the crime. No physical evidence was left behind. In response to a $1,000 reward offered by the Western New York Veterinary Medical Society and another $1,000 reward offered by the company that Debbie's father-in-law worked for, an anonymous phone call revealed to homicide detectives the names of some of the killers.

The arrest and questioning of one of the men led to a confession and naming of the other three, including a fourth who waited in the getaway car. All four were arrested and jailed within 48 hours of the crime.

It is important to note that most of these men had prior arrests. It is of particular importance that the shooter, Goldsmith, was on parole for committing a similar crime.

Fortunately, bail was set high, and the four remained behind bars.

Approximately 2 months later a grand jury issued indictments to all four men for second degree murder. Eleven months passed before the trial was scheduled to begin in January of 1983. The trial never took place.

On the strength of an eyewitness who was leaving the veterinary hospital just as the men were entering and could identify them, the defendants pleaded guilty.

The shooter, Mr. Goldsmith, received 22 years to life. A second man, Darrel Apst, received 8 to 25 years. The driver of the car, Harold Wiggins, received 7 to 21 years. The fourth man, Harold Apst, could not be convicted for legal reasons that I fail to understand, but which the district attorney has already explained to you. He was subsequently convicted of a lesser, unrelated crime.

In my opinion, the punishment of the people involved in this crime was not severe enough. I am a supporter of capital punishment and stiffer jail terms. A life—two lives—were destroyed. A family was destroyed, and many hearts were broken. This was not justice.

Senator D'AMATO. Doctor, there is nothing anyone can say when you see someone, a young life snuffed out, a family destroyed; the brutality of that incredible act; and the fact that the murderer was out on parole, and he was a murderer, an absolute, cold-blooded murderer; and that the defendants had prior arrests.

I think if there is anything that our legislators at the State and Federal levels should begin to understand, it is that when people commit violent acts against other people and use deadly force, there should be no parole. There is something called the rights of society, the rights of people to live free from the fear of these kinds of brutal attacks. We had better begin to understand that.

You cannot possibly have recovered from this terrible incident, the tragedy of seeing this young woman who worked for you, in the prime of her life, just starting to blossom, shot down in such an incredible manner. What has it done to you?

Dr. YARTZ. It certainly has affected my life. It is something that not a day goes by but that I think about it.

On the other hand, Debbie only worked for me for 3 or 4 months. What about the effect on her husband, her mother and her father, and her unborn baby?

The trauma to me, to my heart and my mind, is minuscule when it is compared to the people who knew her and loved her.

It has had an effect on my business, however. The most immediate effect was a precipitous drop in gross receipts. The veterinary hospital took on a certain stigma. Suddenly it was dangerous to go there. People did not want to be in that area.

Fortunately, time has healed some of these wounds, and people are now coming back. Things are as they were before.

In addition to this, we have had to put electric locks on the door. We have had to depersonalize our business. We took pride in personalizing it. We are aiding people with sick pets, and this is a highly personal business. I think this arm's length attitude of having to knock on the window and getting somebody to push a button to release the lock, so that you can get in with your sick animal——

Senator D'AMATO. Then you are not even sure whether you should let them in or not sometimes?

Dr. YARTZ. Well, we have an intercom system that we question them through before we let them through the door.

Senator D'AMATO. That is the way most Americans and small business people today are conducting their lives—behind grated shutters and buzzer systems.

We had a horrible story in New York. Our chief counsel can testify to that. This woman had been running a small jewelry store on Staten Island for 22 years with her husband. She had a similar incident, where two armed men came in, shot her husband after he had given them the cash and all the jewelry they wanted. The only reason they did not kill her was they needed her to buzz them out of the store.

It is the same kind of thing that we hear repeatedly. It is tragic. There are tragic consequences for the families and the victims. Somehow we forget about the victims and the families of the victims, and the scars.

Doctor, thank you for coming in and testifying so eloquently, as have the others. I certainly appreciate it.

Mr. RANNI. Senator, just to emphasize, the crime for which the shooter in this case was on parole was a robbery, an armed robbery, a previous armed robbery.

Senator D'AMATO. He was on parole?

Mr. RANNI. Yes, sir.

Senator D'AMATO. In our eight-point crime package, we say that you should eliminate parole for those people involved in these kinds of felony activities. Maybe we will save some people's lives by keeping off our streets those who are, indeed, functioning as animals.

That might be harsh, and ACLU might not like my statement.

Mr. RANNI. It sounds fine to me.

Our next-to-last witness is Mr. Brian Levin. He is the proprietor of Brian Michael's Jewelry Store. It is a retail store located in one of our affluent suburbs, in the town of Clarence. It is inside a large regional mall and has approximately a million square feet. It is the

Eastern Hills Mall. You might say I am familiar with the mall, having stopped there often. It is filled with security guards, filled with shoppers. They have all types of department stores and specialty shops.

Some time in December of last year, around the Christmas season, a woman by the name of Robin Boudery, in her twenties, went up to this retail jewelry store, flashed a firearm, and demanded all the rings on the premises.

The clerk—it may have been Mr. Levin—complied with this demand. She was successful in taking over $250,000 in retail value worth of merchandise.

The police received a tip on this, executed search warrants, arrested her, and she managed to produce—she gave a full confession—she managed to produce five crisp $100 bills and explained that this is what she received for this stolen property.

Significantly, at least in terms of this hearing, she, too, Senator, was on parole, having been convicted of a robbery in downstate New York.

Mr. Levin is here and thankful for the opportunity to address you.

Senator D'AMATO. Mr. Levin.

STATEMENT OF BRIAN LEVIN

Mr. LEVIN. Good afternoon, Senator.

It seems almost unbelievable that somebody would have the nerve to come into retail mall, where at any point in time there are possibly hundreds of people walking by, and show a gun and attempt to rob a store, but this is essentially what happened on December 15.

This woman came up to our store, and I was not there. The manager of my store was there. She showed a gun and asked him to fill her shopping bag with the rings in a certain section of the store.

He was amazed at what was going on. He couldn't believe it. He thought it was a joke. He just stood back and he said, "You must be kidding." She showed the gun and she said to him very coldly, "Is it worth your life?" Obviously, he complied, as we have trained them to do.

For about the next 4 minutes he filled the shopping bag up with approximately 300 rings.

To us, being a fairly new business—we have only been around for 5 years—it hurt us very much financially. It cost us thousands of dollars.

My manager later left to pursue a different career that he felt safer. He was having difficulty sleeping. His wife was nervous about him. He had a child who was very young. Frankly, I could not blame him. For him, it was a very traumatic situation.

For the other person who was there, who had worked for me for 4 years, for her it was a very traumatic situation. It rippled through our other stores. It rippled through my industry in this area.

To me, like a lot of other people here today, they just do not feel safe. When you think that somebody can approach you in a mall

and threaten your life, and possibly go through with it, it is unbelievable.

This particular woman who held us up, I was told by one of the sheriff department people, she would not have hesitated to shoot our manager if he would not have handed her the goods. This is what seemed so unbelievable to me. She was, from what I understand, a very cold person.

After she robbed our store, she had a tremendous amount of goods, and she proceeded to walk casually out the mall.

Frankly, I think that there is not enough of a penalty, it seems, to deter people from perpetrating some crime.

For myself, being somewhat visible in this city, I sometimes fear my life. Sometimes walking out to the mall parking lot, if I see people who were around the store, I have other security guards walk out. For my other people, I have them walk out together, just because everybody seems to now be afraid.

Terrible things are happening, such as what happened to the Fink family. There are hundreds and hundreds of situations.

Senator D'AMATO. You are one of the people that we talk about, just one of them, but a growing part of America that is fearful, fearful for their own persons, fearful that someone who has need of money or whatever is going to rob them, stick a gun in their back, shoot them. Yes, indeed, fearful that, just as with this woman, there will be no hesitancy, like the incredible situation that struck the Fink family. They came in and after they had been successful carried out a murder. They murdered two people.

Let me ask you this: What is the answer? What would you like to see? What would make you secure? What do you feel that it takes to reverse this trend?

Mr. LEVIN. I have though about it. It appears as though it is many sided. One thing would be very stiff penalties.

I have had shoplifting occur in my stores throughout the past 5 years. The first time it happened was my first year in business, and they stole a tray of jewelry that was worth $3,000. For me, at that time that was more serious than this past robbery.

They caught the people. There were three people who did it. They got off. This was in Clarence town court. They got off.

I have another case pending where we had shoplifting——

Senator D'AMATO. Now the interesting thing would be to follow the careers of those three people who got off to ascertain what took place thereafter.

Mr. LEVIN. Well, I can tell you, not only did they rob me that night, they robbed other people that night, other people in the mall. They not only found our merchandise on them, but they found other merchandise on them.

The police usually—the sheriff's department is pretty close with us because they work in the mall on private duty. So they tell us some of the things that go on.

These people are continually out on the streets doing the same thing over and over again.

Senator D'AMATO. It almost becomes a accepted situation. For example, in New York if someone robs your automobile, it is a nonevent. Don't call the police department because, look, they are just so overburdened that—well, forget about it.

We do have a crime epidemic. I see our district attorney here. I will give you some statistics.

In New York in 1960—New York City had 19,000 felonies committed. That seems like a lot, 20 years later it had over 190,000. The problem is, where do they go? We have had, if anything, a reduction in law enforcement people. We certainly have not had a tenfold increase.

Now, shockingly, the statistics are worse for Rochester and Buffalo for the same time. If you go back and follow the increase in crime during that period of time, you will see that same proportionate increases, even higher. Many people do not recognize that, but it is a fact.

What do you do? What we are really saying is that there is a quality of crime now that has become almost acceptable because there are so may other kinds of things taking place. Robberies, petty larcenies, and whatnot are just——

Mr. LEVIN. I personally do not think in all the areas police protection is that good. I know in Buffalo I don't feel as safe. We have a store in Buffalo. I know we have had things happen there where you just do not get the cooperation that you get from the sheriff's department. The sheriff's department has always been great, but the Buffalo Police department just does not seem to act——

Senator D'AMATO. Maybe they are being overwhelmed, though, with the problems.

Mr. LEVIN. I do not know if it is that.

I remember one night when we——

Senator D'AMATO. Did you ever hear the expression "shoveling against the tide?"

Mr. LEVIN. No.

Senator D'AMATO. I have had officers tell me down in the city, "We arrest them and they are back out on the streets faster than we are." They are paroled out, released on their own recognizance.

You have some people who say, "Well, listen, bail is just more than to assure your appearance."

I had a situation in Washington, D.C., that was absolutely incredible. The guy was accused of raping a little 8-year-old girl. He came in and the U.S. attorney asked for $10,000 bail. The judge said, "Oh, no. This guy always comes back." About 3 weeks later they arrested him again for threatening the witness. The U.S. attorney said, "Well, hold him on $3,000 bail." The judge said, "Oh, no."

The case made headlines when this same guy shocked everybody because he used the little girl to sell heroin. She would keep the heroin in her pocketbook. That people were surprised at.

However, the fact that he was out there on no bail, the significance of that, somehow, people did not grasp.

Mr. LEVIN. It appears as though there has to be some very dramatic steps taken. One thing, I think that sentencing has to be lengthened and has to be stiffened. People cannot be put out so quickly.

Second, it appears as though the police departments either have to be better trained or more willing to try to help you. Maybe if the first thing happened, the second thing might happen.

I know that for myself I have always felt that I was a very nonviolent person. I put off getting a pistol permit for a long time now, but, frankly, I think I am going to get one. I have the application, and I feel I am going to carry a gun. I never, ever wanted it to come to that, but at times I am afraid to walk into my house.

Actually, I am pretty disappointed. I am sure what is happening to us in the room here—it is obviously happening to many people.

It just seems that, hopefully, a lot of the politicians would take note before there are little vigilante groups cropping up, which I think would happen, people taking it into their own hands, because the laws do not seem to be capable of handling what is going on now, or something is drastically wrong.

Senator D'AMATO. Brian, thank you very much for coming in.

Mr. RANNI. Senator, the woman who committed the last mentioned robbery was, of course, convicted. She received a sentence of 5 to 10 years.

Our last witness, sir, is Mr. Marvin Frankel. He is the vice president of L. L. Burger Co.

This corporation operates a chain of moderate-sized department stores which are located in downtown Buffalo and various malls in the suburbs. The store specializes in high quality women's clothing.

STATEMENT OF MARVIN FRANKEL

Mr. FRANKEL. Good afternoon, Senator.

Senator D'AMATO. Good afternoon.

Mr. FRANKEL. I wasn't too sure as to the format of this meeting when I was called yesterday, and I just pulled out a few notes.

I probably could find more of my merchandise down at police headquarters in the property room than I could find in some of my suburban stores.

The problem has been a continual one from Burger's point of view, and I am sure most retailers. We have seen our shortages increase over the years. In 3 years I have seen an increase from 2.3 percent of our sales to almost 3.5 percent of our sales. This makes it rather difficult for the retailers to survive. In fact, I think most retailers would trade their shortage percentage against their profit percentage.

We have made many efforts to reduce the amount of shortages. We know that a lot of the shortages and the shoplifters, the thieves, are supporting drug habits.

I think it was mentioned to me in this call to try to center on the drug element. I do not have much information, except the fact in 1972, when I arrived at Burger's, maybe a year after that, we arrested a professional shoplifter named Willie who subsequently came and asked to work for us. I was a little afraid he was going to help us out of everything we had, but I interviewed him and took a tape of the conversation. I wanted to find out what was going on. Then I did hire him, and he worked for me for a year. He was a help, but these are strange birds and he started scaring more people than providing help to us.

I did bring a copy of the taped conversation with Willie. I would be glad to give you a copy. I use it in my training course.

I took out the elements, what I call the pertinent elements, of the tape with Willie, the shoplifter. He was a professional.

Senator D'AMATO. This is incredible.

Mr. FRANKEL. I can make the tape available, too, but it is a little hard to use. I use it in my classrooms. As you know, tapes stretch and it is hard to find the points that I want to make.

At this point—this is 1973—I had asked Willie, "What amount of merchandise do you have to steal to support this habit?" He said $290. I thought he said $290 a week. "No," he said, "$290 a day." He said he really had to hustle. He worked every day at this job except Sunday.

He goes on to relate, "I try to get $65. From a $150 coat or dress," he says, "I try to get $65 out of it." He said, "If I had a customer, I'd get more money, but if I sold it to a fence," he said, "they really rob you."

He said some people, if you are really good at it, you can make up to $1,500 a day. This was in 1973. You just relate it to present dollar values.

I would be glad to let you have a copy of these training classes.

Our problem has gotten worse. We do have one of the finest women's stores in Buffalo. We have a designer dress and sportswear department that has been suffering tremendous losses. Last year our losses were, as I said, $35,000 at retail. It is a small department, and it is one or two items per style, because women who are interested in fashion do not want to see a lot of copies of those dresses around town.

This year I had my man over here who is my security director—he tells me that the designer losses for the last fiscal 3 months are close to $10,000.

We have tried to improve the situation and cut down the losses. If you go to our north town store, we have put mirrors—it is a small department—we have put mirrors in the front of the department. Now we just went and put mirrors in the back of the department. We have to try to help our employees watch the customers.

It is not always professionals. Housewives are busy at the trade as well.

We have losses in our designer department, particularly designer. We put up blockades. The shoplifters come around and reach behind the walls, and they steal the merchandise and disappear out another door.

We have worked with our retailers in the city. I, myself, was called as a witness in one of the professional shoplifter's trials.

A woman named Margaret Hartmen—it is unbelievable. I have the record of this. When I went down to copy it, it took me a half a day to copy the record over at the courthouse of trials and arrests and adjournments. It went on page after page after page. The woman is still out there working. In fact, she called me one day and said she wanted to work for me as well.

Senator D'AMATO. With our reputation——

Mr. FRANKEL. I was thinking about it.

Senator D'AMATO. Did Willie recommend you to her?

Mr. FRANKEL. Yes; I was waiting for her to come in. I was going to consider it because it might be cheap insurance to keep her out of our hair. [Laughter.]

We have studied the matter. We have tried. We have hired security. We have staff. Unfortunately, with the losses that we have been sustaining, we have had to reduce some of our staff. It is a difficult job. You cannot have one or two people in a store cover a whole store. It is almost an impossible task.

We do not know which way to turn. We are still studying the matter. I guess we will continue to study it forever, but we do not see any relief in the immediate future.

It is making retailing, the survival of retailing, very difficult.

As to the answer, my personal answer, I would like to see corporeal punishment. A little pain would sometimes deter, particularly the young ones.

Mike Yakma, my security director, is just back from Texas. He was with the Texas police force. He says that the prison systems down there are self-sustaining. If a prisoner wants to eat, he had better work. He has to work for his meals. I think maybe this would be the approach—put them away for a good, long stay, but make them work hard to earn their keep.

Senator D'AMATO. That is an interesting theory now. I am not going to propound it, but I think that you would probably have, if you would take a referendum, more people who would say let the system be more self-sustaining, because it costs about $15,000 per prisoner per annum.

I think it is the best investment we can make to build more prisons, particularly for those who commit violent crimes, because it is better to have a person in prison, even if it is at a cost of $15,000, than have him out there threatening society. I am also referring to the walking crime machine that we talk about, the "Willie" you talk about, who may not always create bodily harm in the manner in which he goes about conducting his activities, but who certainly brings about a tremendous hardship to many.

Thank you very, very much.

Mr. RANNI. That concludes the witnesses that we have to appear here, sir.

We had asked a pharmacist to come down and address you. Unfortunately, it is a small business and he could not get away.

His experience, briefly, was he was a victim of a robbery. The robber came in and demanded some dilatta, all the supply of dilatta that he had on the premises. I understand that to be a synthetic drug that has the same effect on the user as heroin.

This pharmacist explained, "You're already too late. The robbers came in Monday and they wiped me out of all my dilatta."

Sir, before I sit down, I want to thank you. On behalf of the district attorney of Erie County, I want to thank all the witnesses for sacrificing their valuable time in helping you address this pervasive problem.

Senator D'AMATO. Thank you very much.

Let me thank, particularly, the witnesses. I think sometimes the most pertinent and important part of these hearings is the witnesses—to hear the stories of the hardships, the agony, the pain that they and their loved ones have endured; the degradation of having someone take a gun and put it to your head; or thinking about the kinds of things that have been visited upon their loved

ones and the people with whom they have worked. It is just incredible.

This scenario plays out in countless places and times with the kind of frequency which deserves an absolute national priority of attention. We must address the root causes. We must protect society.

Building magnificent parks and road systems does not mean a thing if we cannot use them. It just does not mean anything if people are fearful in their homes and their neighborhoods, and we all are.

I tell you, last night at 2 o'clock in the morning I couldn't get in the house. They had locked the doors. My house is like a fortress. It really is. I do not know of many people who do not live the same way, whether it is a suburban community or an urban center.

Thank you, also, very much for coming in.

Let me thank Albert Ranni, the deputy district attorney, and, of course, District Attorney Arcara, for helping us to focus in on the problem that we face, so that we can be part of a solution-making process, one that has evaded us for too long.

Thank you very much.

Our third panel consists of Judge Timothy Drury; our district attorney, Richard Arcara; and our assistant U.S. attorney from the eastern district, Reena Raggi.

Judge, thank you for being with us. The small business community has a particular burden, given the fact that such a high incidence of crime is directed toward the small businessman. We would be most interested in your testimony today in any of the areas that you might want to touch upon.

STATEMENT OF HON. TIMOTHY J. DRURY, JUDGE, BUFFALO CITY COURT

Judge DRURY. Senator, it will be short. I really did not have much of a chance to think about these things.

I just came from what we call "intake" in this city. It is the judges that handle the cases right off the street. It is always interesting, and it gives rise to two observations.

We all talk about bail. I do not know how conversant you are with the bail statutes in New York. Bail is only to return the fellow back or woman back to court.

Senator D'AMATO. You mean it is only to guarantee that he or she will come back the date that has been set by the court?

Judge DRURY. Yes.

Senator D'AMATO. For appearance?

Judge DRURY. Yes, that is the main thing I do, that we did today.

Yet, we are called upon to guarantee the safety of the streets, keep them in the jail. Yet, here I am limited to returning them to court. You are caught betwixt and between.

Senator D'AMATO. Don't you have the ability, Judge, looking at their prior record and seeing that they do pose a danger to the community, to set bail commensurate with that danger?

Judge DRURY. Only as it affects his ability or her ability to come back. That is the hard part because I have to straddle it. It hurts me.

Senator D'AMATO. Would you support pretrial detention where there is a serious crime and the court finds that there might be a danger to society?

Judge DRURY. Yes, but only if it would not be a code word for having our prisons full of people. You cannot protect absolutely, Senator. I, of course, would like something such as that, a little more teeth in the bail statute that we have.

A lot of these people, oddly enough, do come back, but I would like a little bit of backing for what many judges do now—in effect, use pretrial detention through this maze, the statute, which only talks about returning them back to appear at the next court appearance.

Senator D'AMATO. Well, Judge, maybe this is a meaningful discussion.

Let me give you a theory. Last year, in my capacity as chairman of the Appropriations Committee Subcommittee on the District of Columbia, I came into very direct contact with the criminal justice system. When the Chief of Police came before us, Chief Turner, in the District of Columbia, which has one of the Nation's highest crime rates, and probably one of the cities which is the least safe, I said to him, "Well, Chief, why are you not requesting additional police?" He said, "Senator, that is not my problem." He said, "What we have is literally a revolving door syndrome." He said, "And, truthfully, my men are losing heart, because the criminal is back out on the streets before the arresting officer is back out on the streets."

In Washington, D.C., I might add, the system works with no regard in most cases to the nature of the crime committed or the violence of the criminal, his past record notwithstanding.

There is almost a strictly limited concern with assuring that the accused comes back to court. There are a disproportionate number of jurists who say, "That is all we want to know about," if he comes back.

Consequently, people go in and commit armed robberies and all kinds of other dangerous acts, and they are right back on the street.

Now, don't we have to address that?

Judge DRURY. Sure.

Senator D'AMATO. How do we address it?

Judge DRURY. By changing the New York statute.

Senator D'AMATO. OK. What would you suggest?

Judge DRURY. Make a coequal consideration be danger to the community as well as in returning. We would be glad to do it. We are anguished.

Senator D'AMATO. If you are a criminal and you know that as long as you keep returning for arraignments, et ceterea, or whatever it might be, they are going to give you bail and you are going to be back out on the streets, why shouldn't you just keep coming back?

Judge DRURY. That is right.

Senator D'AMATO. That is what they do. They master the system, don't they?

Judge DRURY. Yes. I agree. Give us the law, and we will apply it.

Senator D'AMATO. On the Federal level we are pushing for preventive detention. The Senate Judiciary Committee has approved it and the full Senate will soon vote on it. Maybe we can get it through on the State level and make fighting for it a priority.

You see, down State they say, "Well, we do it anyway." You will find district attorneys who say that the judges do exactly what you say they are not supposed to do technically, but they use the bail provisions as a method by which to hold those whom they consider to be dangerous.

What you are saying is put it in the law.

Judge DRURY. Please put it in the law. We like to follow the law.

Senator D'AMATO. I think you are right. I do not think there is any reason why it should not be put in the law.

Judge, do you have any other thoughts?

Judge DRURY. I would like to hear Dick on that.

The other thing is one that came to mind because I do sign a lot of search warrants. I think that we have to concentrate—use the tools that we have to concentrate on narcotics.

Senator D'AMATO. You were not here when we were talking earlier, and I think that was our major emphasis.

The major cause of these shopowners and small business people being victimized is those who are in need of money for drugs, who will commit just about any act to get it.

Judge DRURY. Prostitute themselves, steal, shoplift. I have heard these things in camera, the confidential testimony before I issue the warrant.

It is disturbing, and I just wish we could do something more about it.

STATEMENT OF RICHARD J. ARCARA, DISTRICT ATTORNEY, ERIE COUNTY

Mr. ARCARA. Senator, I welcome you to Erie County for purposes of having this hearing today.

I thought it important enough that I have submitted to you a 16-page statement that I thought reflects some very pertinent information that I request that you consider in your deliberations when you go back to Washington. I have edited that——

Senator D'AMATO. This will be part of the record as though read in its entirety.

Mr. ARCARA. I have taken some time to edit that, and I would like to take a few minutes now and go through some things which I think are important.

The issues with which you are dealing I deal with every day on a regular basis. I have been dealing with this a better part of my entire career. I really welcome this opportunity to publicly make some statements that I have not stated before.

I respectfully submit to your committee that two of the most serious and regularly occurring problems with the criminal procedure law of New York State which prosecutors in my office, and all New York prosecutors, face involve the current bail and the sentencing provisions of the law in the State. In my opinion, these present laws are woefully inadequate.

I firmly believe that the legislators and the general public are not sufficiently sensitive or adequately informed about these deficiencies in the laws, which ultimately affect each and every one of us.

As a result, I think the loss of faith in the system of justice and the tragedies suffered by the citizens of this community which have occurred and are continuing to occur are monumental.

Nothing really can erase the trauma of being the victim of a serious crime or losing a loved one to a crime statistic. I am anxious to have this role in calling to your attention and sharing with you some infomation which you may not know and which presents a strong case for amending our present laws on bail and sentencing, both at the State level and at the Federal level.

In Erie County there have been numerous cases where defendants with lengthy criminal records for committing violent crimes have been released on minimal bail over my office's objections, and who have victimized our community and who have committed other violent crimes before their pending charges were even resolved. In part, those defendants were free because the present bail statute of this State is inadequate. It pretty much parallels the Federal statute.

Our present law does not allow a judge to take into account the danger posed to society by a particular defendant when bail is being set. It only requires the judge to fix bail in an amount sufficient to insure that the defendant appears in court on all return dates. Now they can consider that as a factor, but the underlying principle here is the availability of the defendant to be present in court.

Senator D'AMATO. Mr. District Attorney, what about those district attorneys who tell me, "Ah, we don't need a preventive detention law because we and the judges can use considerations of dangerousness to hold a guy?" That is not the law is it?

Mr. ARCARA. That is not the law; that is correct. Judges may do that, Senator, but that is not the law.

Senator D'AMATO. They get away with it at times, and then there may be those judges who say, "Look, I am going to live up to the strict letter of the law. I am not going to impose my own conception of whether or not this person is a danger to the community. Therefore, I will not override the legal requirements for bail."

Mr. ARCARA. A judge who has the fortitude, you might say, to apply the law strictly will ultimately face his day of public——

Senator D'AMATO. Review.

Mr. ARCARA. Absolutely, because sooner or later someone is going to be out on bail and is going to commit another crime, and someone is going to pick that up and it is going to be a front page story.

The judges today are under a tremendous amount of criticism in this regard. I think Judge Drury indicated it. Some of it is unfair.

Senator D'AMATO. You say technically we are forcing them—let's be charitable—not to adhere to the law in some cases, because they see a danger, they see an inadequacy. In attempting to deal with that, when they see a violent person, they will set a high bail.

Why not make it easier and say, "The judge can hold a person if he represents a threat to the community?"

Now in your opinion, would they have to have a hearing to determine whether or not a person is a danger to the community?

Mr. ARCARA. We have a law now, Senator, in New York State that if someone is out on bail and they commit a felony, we can move for preventive detention, but we have the mechanics of the hearing. I think that creates very serious problems.

Senator D'AMATO. Yes.

Mr. ARCARA. First of all, we are talking about due process here. We are talking about the regulatory aspect of the criminal justice system.

I think that a hearing is not only unnecessary, but I think it would have a chilling effect, particularly if someone were to, let's say, threaten a witness or someone were to—you would have to bring these people together, bring them in the courtroom, and subject themselves to yet another hearing. We already have enough hearings and procedures in our criminal system. We do not need any more.

The question of bail—I do not think that a hearing is appropriate. I think it undermines the system. It, first of all, ties the court up some more. We are not talking about due process here.

Society has a right to protect itself from dangerous felons. I am going to cite a couple examples to you of what has occurred here recently which I think highlight this particular problem.

Senator D'AMATO. Judge.

Judge DRURY. We have a felony hearing rule of 5 days at the most at the lower court level, my level, and you can submit the grand jury minutes after an indictment.

Mr. ARCARA. Again, you are not dealing with preventive detention, though, whether or not an individual poses a danger to society. We have to use the standard considerations that you have to consider in setting bail.

Judge DRURY. I think the felony hearing would cover that in 5 days, and with possibly some use of the grand jury minutes.

Mr. ARCARA. When we say "hearing," we are not talking about taking testimony.

Judge DRURY. That is what we call a hearing.

Mr. ARCARA. Well, they are very brief. I think if you put that into—I have a feeling, Judge, that that could lead to a lot of abuses, particularly when you want someone in jail for one reason, and that is the reason that this person presents a danger to society. When you are getting into that, you are going to have to go into why is he a danger, bring in people, who was threatened, and all the other stuff that goes on. I think it is going to open up a Pandora's box if you have a full-blown hearing.

Senator D'AMATO. Counsel points out that with limited resources that really becomes a problem. You do not believe it is a constitutional requirement, then, to have a hearing? You think that if we put it in the statute that a judge can make the determination based upon prior conduct, the person's prior record, and what he is charged with. You think that he can make that judgment and have constitutional preventive detention?

Mr. ARCARA. It is certainly not a violation of the eighth amendment, Senator.

Senator D'AMATO. There has been a circuit court case on that which ruled that way, has sustained that, I think in the District of Columbia, as a matter of fact.

Please proceed.

Mr. ARCARA. Recent cases in Erie County support my position that violent crimes are being committed by defendants while out on bail, both before conviction and after conviction, pending appeal.

I want to give you an example and go off my scripture for a second. When I was an assistant U.S. attorney, some 10 years ago, I had a case that I think typifies the problem on the bail. It is not part of my memorandum here.

It was a major interstate theft case involving a group of individuals that definitely posed a serious danger to this community. My immediate and initial request to the judge for bail was $100,000.

Through a series of motions and hearings in the course of that week—I think there were four of them altogether—the bail was ultimately reduced to $75,000, $50,000, and then set at $25,000 surety.

These individuals after that week were released.

The trial occurred around 13 months later. They were sentenced to 10 years, 5 years, pending appeal. The case was argued in the second circuit. A decision came down approximately 23 months from the time of the commission of the crime.

At that time, as you know, Senator—well, there is a Federal provision that allows a judge to amend a sentence to 120 days of the last court proceeding.

These defendants were concerned with the fact that they were facing 10 years, 15 years and 10 years. They wanted to make a deal. They wanted to know what could we do for them regarding the sentence. We advised them that we would do nothing for them other than advise the court of their cooperation.

They indicated to us that they had information of many crimes that were occurring in Erie County and Niagara County.

We sat down with them, along with the FBI, about some of the activities that occurred within the 23 months that they were out on bail. After the second day, we felt that we could no longer rely upon their memory. We had to go to the various police departments in both Erie and Niagara Counties, and we established that these two individuals, along with a group of other individuals, committed 242 felonies during that period of time that they were out on bail. I am talking about robberies, burglaries, and larcenies.

So the argument about the bail question—I think that these people obviously presented a danger to the community. I was arguing that. I was arguing before that judge that these people have a record—I was using the argument of potential for flight.

That was a personal example that occurred to me when I was an assistant U.S. attorney. I think it really highlights the problem, particularly when a prosecutor takes a really strong position, as I did in that case. In fact, the judge was just totally frustrated with me because I would not bend. He kept saying, "You seem to have an answer to everything, except please tell me where they are going to go." I said, "That's the one question I can't answer."

Let me cite a couple of recent examples. Recently one defendant was arrested and charged with a sex-related crime. This defendant had a history including similar instances.

My office opposed low bail and recommended a higher bail. Defendant was released on an amount which we considered inappropriately low. It appeared that the judge was employing a criteria set forth under New York law, and felt that the amount should be sufficient to secure the defendant's appearance.

Technically, this was not a violation of the applicable statute, where, according to Richard Denzer, who is a commentator, he indicated that the present law "honors a traditional and long accepted doctrine that securing the defendant's attendance is the only purpose of fixing bail." Unfortunately, while out on bail the defendant was charged in a multicount indictment for a series of sex-related crimes involving a young child.

Another recent example—and these are all within the past couple months—another recent example which comes to mind involved a defendant found guilty by a jury in an aggravated sexual assault case. My office, following conviction, vigorously argued for the imposition of a maximum sentence. We pointed out the viciousness of the attack and the prior extensive criminal history merited nothing less than the maximum sentence allowed by law. Despite our recommendation, the defendant received a substantially lighter sentence. Compounding this injustice was that the defendant was released over our objection, on bail pending appeal. Prior to the resolving of the defendant's appeal, the defendant was charged with and indicted for the murder of a young woman. That occurred within the last month or so.

As the committee is well aware, the extremely comprehensive Federal Bail Reform Act of 1983 is currently awaiting congressional action as part of the Comprehensive Crime Control Act. Three bills to amend the New York criminal procedure law in the pretrial bail area are in the codes committees of the New York State Senate and Assembly.

It may be interesting to you to note that the present New York bail statute is derived chiefly from existing 1966 Federal standards for determining the amount or terms of bail or release necessary to insure the presence of the defendant. Therefore, since Congress now has taken the lead in recognizing the importance of preventative detention to the safety of society, it seems only appropriate that New York State, as it has in the past in this area, follow suit and adopt changes consistent with the proposed changes in the Federal law.

As district attorney of Erie County, I am firmly in favor of any proposed legislation that would permit the arraigning judge to consider, in conjunction with the factors normally taken into account, three major additional factors. Specifically, these are, one, the violent or aggravated nature of the charged offense; two, whether the person was already on some sort of release at the time of the commission of the offense; and, three, the immediate danger to the community by the person's release.

As the May 1983 report of the Senate Judiciary Committee stated:

> Where there is a strong probability that the person will commit additional crimes if released, the need to protect the community becomes sufficiently compelling that detention is, on balance, appropriate.
>
> In sum, the committee has concluded that pre-trial detention is a necessary and constitutional mechanism for incapacitating, pending trial, a reasonably identifiable group of defendants who would pose a serious risk to the safety of others if released.

The Erie County district attorney's office joins with those groups that support the concept of permitting an assessment of a defendant's dangerousness in the pretrial release decision. Like the American Bar Association, the National Conference of Commissioners on Uniform State Laws, the National District Attorney's Association, and the National Association of Pre-Trial Service Agencies, the Erie County District Attorney's office recognizes that defendant dangerousness must be a consideration in setting conditions of pretrial release and may also serve as a basis for pretrial detention.

On the question of the failures in the existing New York statute governing bail pending appeal—this ia a whole other problem—I wish to emphasize that at present a defendant convicted of any crime but a class "A" felony may make an application for bail to either a Supreme Court Justice or any justice of the Appellate Division sitting for the department in which the judgment was entered. Significantly, this application as a practical matter is seldom made by defense counsel before the justice who presided over the trial and would be in the best position to determine the merits of any potential appeal at this stage.

Senator D'AMATO. You pick your judge; right?

Mr. ARCARA. Oh, we're getting to that.

This application, though it must be made upon notice to the district attorney, requires no showing by the defendant of likelihood that he will prevail upon appeal nor does any order issued by a justice contain any conditions with respect to due diligence on the part of the defendant to perfect his appeal. The only outer boundary of the stay order is that it terminates if the appeal has not been brought to argument within 120 days.

Senator D'AMATO. Let me ask you: Where are all our great district attorneys? How come they are not pushing for this kind of change? The present situation is ridiculous. It just lets the dangerous criminal stay out on the street that much longer.

Mr. ARCARA. That is correct.

Senator D'AMATO. What is he doing? He hasn't reformed. He is doing the same thing.

Mr. ARCARA. That is right.

Experience teaches us, however, that the appellate courts routinely grant defendants' applications for extensions of orders granting bail pending appeal and, thus, defendants convicted of first degree rape, robbery, manslaughter, and burglary often, through either neglect or deliberate delay, remain free and out of prison for many months or even years.

I submit that it is precisely because defense attorneys are not forced by statute to comply with strict requirements for perfecting the appeal that defendants, convicted of violent crimes are routinely set free to endanger the community after sentence imposition.

It is my position, and one that is shared by the New York State Law Enforcement Council, that the bail pending appeal statute

must be overhauled and strengthened so as to prevent convicted felons with abominable records from remaining free to victimize innocent citizens when they should be in jail.

The New York State Law Enforcement Council, which includes the New York State District Attorney's Association, has proposed significant reforms to the bail pending appeal statute. For example, as it presently stands, to secure a stay of execution of judgment and bail pending appeal, a defendant can select the lower court or an appeallate court judge before whom he wants to make a bail application. Thus, bail pending appeal suffers from the most severe form of judge shopping.

The council notes that in the appellate division, first department, the result is that the vast majority of such appications are made before only one or two justices—those with the most liberal philosophies of bail. Similarly, my office has experienced the same phenomenon with defense attorneys regularly seeking out defense-oriented judges with liberal bail positions. New legislation would require the presiding justices of the appellate division to designate specific appellate judges in their departments to hear all bail applications for a certain period of time, thus eliminating the vice of judge shopping. It happens every day. The same judges hear the applications for bail pending appeal.

To turn to another equally important issue, sentencing is a subject about which the community can be justifiably outraged with a trial court judge imposes a lenient sentence upon a violent individual who has been found guilty of a felony. At present in New York State the only time an appellate court has any jurisdiction with respect to a sentence is in the area of reducing a sentence as excessive on the ground that it represented an abuse of the trial court's discretion or in the interest of justice. Prosecutors are never permitted the same right or luxury to challenge the trial court's abuse of discretion in this other direction.

However, on June 28, 1983, the Governor signed into law an act which is the first step in righting this essential inequity. The State sentencing guidelines committee, created by the new law, is to recommend to the Governor and legislature on January 15, 1985, statutory amendments to the penal law and criminal procedure law. Therefore, although we are more than a year away from seeing in New York State a system of definite sentences, and hopefully the abolition of the parole board as recommended by the law enforcement council, and the right of prosecutors to appeal overly lenient sentences, this establishment of the sentencing guidelines committee is nevertheless significant.

The committee is to be guided by the principles which I endorse, such as similar crimes committed under similar circumstances by similar offenders should receive similar sanctions. The severity of criminal sanctions should be directly related to the seriousness of the offense and the offender's prior criminal record.

In suggesting legislation, the committee is to operate on the principle that sentences of incarceration shall be definite sentences. The length of the actual incarceration to be served by a defendant under a definite sentence shall be the period of time imposed by the sentencing court, less good time. Thus, the parole board's discretion to release an offender after having served merely 60 days of

a 1-year definite sentence would be eliminated under the legislation to be recommended by the committee.

Let me give you one more example. We had a situation in Erie County recently where a defendant was found guilty of victimizing a senior citizen and a handicapped person by swindling them out of thousands of dollars. The defendant received a 1-year definite sentence. As part of the judge's severe condemnation of defendant's actions, the judge made it very clear on the record that he wanted this defendant to be incarcerated for the full 1 year. However, to our chagrin and over vehement objection, the parole board released this defendant after only 60 days.

As I mentioned earlier, one of the principles of the act——

Senator D'AMATO. That is why you are for elimination of the parole board?

Mr. ARCARA. Yes, sir.

Senator D'AMATO. The district attorney's associations have joined in that position?

Mr. ARCARA. Yes, sir, and the law enforcement council has, too. I am not sure whether you are familiar with the law enforcement council.

Senator D'AMATO. That was a question I had.

Mr. ARCARA. This is a group of probably some of the most distinguished law enforcement people in the State. It's the president of the New York State District Attorney's Association. It's the president of the Sheriffs' Association. It's the president of the Police Chiefs' Association. It is Mayor Koch's——

Senator D'AMATO. Criminal coordinator? John Keenan?

Mr. ARCARA. John Keenan was on that committee, along with about six of seven others.

We sat down last year and set forth about 32 proposed pieces of legislation that we were in full ageement. If any one of the members disagreed with any one of those pieces of legislation, that piece of legislation was not part of our proposed legislation.

Senator D'AMATO. Are there proposals outlined in your testimony?

Mr. ARCARA. No, sir, they are not.

Senator D'AMATO. Could you possibly——

Mr. ARCARA. Yes, sir.

I believe that will pretty much conclude my remarks.

Senator D'AMATO. We well make that part of your testimony and include it in the record. I think it is most important.

If you could also outline the procedure, that these were unanimous recommendations from this prestigious body, and who those people were, I think that would be most appropriate. I would like to share that information with my colleagues, both on the Federal and State levels.

[Subsequent information was received and follows:]

STATE OF NEW YORK

650

9/15/83 Cpls Committee no action

1983-1984 Regular Sessions

IN SENATE

(Prefiled)

January 5, 1983

Introduced by Sens. LEVY, BRUNO, DALY, FARLEY, FLOSS, GOODHUE, JOHNSON, KEHOE, KNORR, LACK, LAVALLE, MARCHI, MARINO, PADAVAN, PISANI, ROLISON, SCHERMERHORN, TRUNZO, TULLY, VOLKER--read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to permitting a judicial officer on application of a prosecuting attorney to deny bail or pretrial release to certain persons accused of dangerous crimes or to release such persons on condition in certain circumstances or to deny bail or pretrial release to persons accused of crime when necessary to protect trial witnesses, jurors or evidence or to detain or release or release on condition persons convicted of a dangerous crime who are awaiting sentence or the decision on an appeal and repealing certain provisions thereof relating thereto

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

Section 1. Declaration of policy. The originating purpose and overriding objective of government is the creation of those conditions of public order in which the law-abiding citizen is protected from the depredations of lawless forces seeking to violate the boundaries of his personal freedom. For the democratic society guarantees to each individual within the scope of its jurisdiction an area of personal liberty as free from the transgressions of malignant private power as from the overweening claims of the organized state. The legislative branch, no less than other departments of government, must devote itself to securing those desirable circumstances of social life within which the democratic promise of freedom to the public at large may become a day to day reality and to combating those threats to freedom which arise from the encroachments of criminal forces.

In recent decades, the populace has suffered from an unacceptably high incidence of dangerous criminal wrongdoing. Dangerous crimes have been

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD02400-01-3

S. 650

committed by persons with a previous conviction for dangerous criminality who are awaiting trial on a charge involving another dangerous crime when they indulge in such misconduct and by persons without a prior conviction released to await trial after being charged with a dangerous crime allegedly committed while on pretrial release in connection with a charge of having committed another dangerous crime. Some of these persons have been dangerous criminals who indulge in crime as a vocation or a way of life or compulsive lawbreakers driven by psychopathic tendencies, the dynamic thrust of neurotic maladjustment or the coercive stimulus of narcotic addiction to repetitive criminal behavior whenever they are at large in society.

Moreover, some criminals abuse the privilege of pretrial liberty by threatening, attacking or intimidating witnesses or jurors or interfering with trial evidence. Sometimes a defendant's intention to engage in such activity is manifest when the court first confronts the task of making a pretrial release determination with respect to him. At other times, it becomes known when the defendant misbehaves during the period of pretrial release. In either case, the court should be provided with remedies adequate to vindicating the integrity of the trial process.

The person accused of a crime has no absolute constitutional right to pretrial release and the individual and social interests supporting the pretrial release of persons accused of a dangerous crime who have a prior conviction for a dangerous crime or who allegedly perpetrated the dangerous crime while on pretrial or post trial release in connection with a prior charge of committing a dangerous crime are overbalanced by the individual and social interests in protecting society and its members from the prospective criminal conduct of that element of such accused persons who pose the danger of pretrial recidivism. And where a person charged with any criminal offense has interfered with a witness, juror or trial evidence after release or has indicated an intention to do so if released to await trial, the social interest in protecting the integrity of the criminal justice system from the interfering pressures exerted by such a person and persons similarly motivated overrides his interest and the interests of similarly motivated persons in pretrial liberty and justifies a mechanism for detaining such persons.

It is thus hereby declared to be the policy of the state of New York to create a mechanism for denying bail or any other form of pretrial release to accused persons of such type when necessary to safeguard the safety of any other person or the community or the integrity of the criminal justice system and when detention is not necessary for the achievement of these goals, to impose such a condition or conditions on release as is or are necessary to protect the safety of any other person or the community or the integrity of the criminal justice system.

§ 2. The criminal procedure law is amended by adding a new section 180.05 to read as follows:

§ 180.05 Proceedings upon felony complaint subject to provisions of section 530.15.

Notwithstanding the provisions of any other section of article one hundred eighty of this chapter, where a defendant is subject to the provisions of section 530.15 of this chapter and such section is invoked by the court in accordance with its provisions, the release of the defendant at the arraignment upon an adjournment for the purpose of obtaining counsel or pending the holding of a felony hearing or during a period of adjournment of the felony hearing or at any time for any other purpose in connection with the proceedings of a felony complaint shall

be subject to the provisions of section 530.15 of this chapter and the court may deny release where such section authorizes such denial.

§ 3. The opening paragraph of section 180.80 of such law, as amended by chapter five hundred fifty-six of the laws of nineteen hundred eighty-two, is amended to read as follows:

Upon application of a defendant, except a defendant for whom a detention hearing has been ordered under section 530.15 of this chapter, or who has been ordered detained under such section, against whom a felony complaint has been filed with a local criminal court, and who, since the time of his arrest or subsequent thereto, has been held in custody pending disposition of such felony complaint, and who has been confined in such custody for a period of more than one hundred twenty hours or, in the event that a Saturday, Sunday or legal holiday occurs during such custody, one hundred forty-four hours, without either a disposition of the felony complaint or commencement of a hearing thereon, the local criminal court must release him on his own recognizance unless:

§ 4. Section 180.80 of such law is amended by adding a new subdivision four to read as follows:

4. Where a detention hearing has been ordered pursuant to section 530.15 of this chapter, the defendant against whom a felony complaint has been filed in a local criminal court, and who either at the time of arraignment thereon or prior or subsequent thereto, has been committed to the custody of the sheriff pending disposition of the felony complaint or detention proceeding, shall be detained in custody pending the holding of the detention hearing and the decision of the judicial officer thereon in accordance with the provisions of section 530.15 of this chapter unless the defendant is released pending the detention hearing pursuant to the permission of such section. The detention hearing may be held at the same court session as and immediately after the felony hearing and the evidence or information presented at the felony hearing may be considered by the judicial officer presiding at the detention hearing. The rules of evidence and the limitations on the introduction of evidence applicable to the felony hearing shall not be enforced in connection with the detention hearing, which shall be conducted in accordance with the provisions of section 530.15 of this chapter. Where a judicial officer before whom such a felony hearing has been held renders a decision on such hearing finding that there is not reasonable cause to hold the defendant, the defendant shall not be held for a detention hearing and shall be released.

§ 5. Such law is amended by adding a new section 530.15 to read as follows:

§ 530.15 Pretrial detention or conditional release of certain persons charged with dangerous crimes to protect community safety and persons charged with any criminal offense where necessary to protect a trial witness, juror or evidence; post trial detention or conditional release of certain persons convicted of a dangerous crime.

1. Definitions. As used in this section the term:

(a) "Judicial officer" means, unless otherwise indicated, a judge of a superior court or a judge of a local criminal court.

(b) "Detention" means total detention or partial detention, that is, detention during a certain portion of the day, week and/or month and release for the remainder of the time for employment or familial purposes or to enable the person to prepare his defense or for other limited purposes found by the judicial officer to justify such release,

whether such release is unsupervised or whether the judicial officer places the person in the partial or total custody or supervision of some designated person or public officer or organization during the time when the accused person is not in detention.

(c) "Detained" means that a person charged with a crime is subjected to detention as defined in this subdivision.

(d) "Dangerous crime" means the following crimes defined by the penal law of this state: assault second and first degrees; manslaughter second and first degrees; murder second and first degrees; rape first degree; sodomy first degree; sexual abuse first degree; kidnapping second and first degrees; criminal mischief first degree when the charge is damaging property by means of explosives; arson third, second and first degrees; robbery second and first degrees; criminal possession of a weapon in the second degree when the charge is possession of a machine gun or loaded firearm with intent to use the same unlawfully against another in violation of section 265.03 of the penal law; criminal possession of a dangerous weapon in the first degree when the charge is possession of any explosive substance with intent to use the same unlawfully against the person or property of another in violation of section 265.04 of the penal law; or the manufacture, transport, disposition and defacement of weapons and dangerous instruments and appliances when the charge is manufacture of a machine gun or the causing of such manufacture in violation of subdivision one of section 265.10 of the penal law or the transporting or shipping of any machine gun or firearm silencer in violation of subdivision two of section 265.10 of the penal law.

(e) "Substantial probability" means a standard of proof requiring more proof than the "probable cause" standard and less proof than the "beyond a reasonable doubt" standard and corresponding to the "fair preponderance of the evidence" rule of proof in civil cases.

(f) "Conviction" means the verdict of a jury in a jury trial or the decision of a judge in a non-jury trial finding the accused person guilty after a trial on a criminal charge or a plea of guilty to a criminal charge by the person accused in the charge.

(g) "Convicted" means that a person accused in a criminal charge has suffered a conviction.

2. Probation department's duty to supply information on request and to supervise persons released on condition. A judicial officer before whom there is pending a motion or proceeding to detain a particular person under the authority of this section may request from the probation department of the county in which the motion or proceeding is pending information concerning the said person and this information shall be supplied by the probation department in the form of a prompt report to the judicial officer. The judicial officer may consider this information in making the decision as to whether or not to detain the person and in deciding what form of detention or release to order. The judicial officer may also ask the probation department to render to the judicial officer an opinion in writing as to whether such a particular person should be detained and, if detention is recommended, what form of detention should be ordered. The opinion of the probation department or any officer of such department shall not be binding upon the judicial officer.

The probation department of a county in which such a particular person is released on condition or under restrictions shall supervise such person and report promptly to the judicial officer who ordered the release

of such person or the court in which the release was ordered whenever such person violates the conditions of release. The probation department shall also make such a prompt report to the prosecuting authority involved in the case.

3. Release or conditional release in absence of detention. (a) When any person charged with but not yet convicted of a dangerous crime appears for the first time before a judicial officer, the judicial officer, unless the prosecuting attorney moves to detain the person pending trial and the judicial officer orders a detention hearing in accordance with the provisions of subdivision four of this section, may either release the person on recognizance or, in order to assure the safety of any other person or the community from dangerous crime, may release the person on one or more of the conditions specified in paragraph (b) of this subdivision except as provided in subdivisions eleven and thirteen of this section.

(b) When the judicial officer is a judge of a city court, town court or village court sitting in a local criminal court which is a city court, town court or village court, he may not order release on recognizance or on bail or on any other condition when the person is charged with a class A felony or it appears that the person has two previous felony convictions. When the judge of a local criminal court is prohibited under this paragraph from granting the release of the person, a judge of a superior court holding a term thereof in the county, upon application of the person, may order release on recognizance or on bail or on other condition or conditions in accordance with the provisions of this subdivision. Such superior court judge may also, upon application of the prosecuting attorney, order that a detention hearing be held in superior court when such a hearing is authorized under the proceedings of subdivision four of this section.

(c) The judicial officer may impose such condition or conditions as is or are reasonably necessary, and none beyond that reasonably necessary, to assure the safety of any other person or the community from dangerous crime. However, when the judicial officer finds that a detention hearing is authorized under the provisions of subdivision four of this section, the judicial officer may order that such a hearing be held if the prosecuting attorney moves for the holding of such a hearing.

(d) Notwithstanding the foregoing provisions, the judicial officer may not issue an order under this subdivision releasing the person accused of a dangerous crime on recognizance or on one or more conditions unless and until the prosecuting attorney has had an opportunity to be heard in the matter, or, if the matter is within the cognizance of a local criminal court, after knowledge or notice of the application and reasonable opportunity to be heard, has failed to appear at the proceeding or has otherwise waived his right to do so and unless and until the judicial officer has been furnished with a report of the division of criminal justice services concerning the person's criminal record, if any, or with a police department report with respect to the person's prior arrest record. When the judicial officer has been furnished with any such report or record, it shall furnish a copy thereof to counsel for the person or, if the person is not represented by counsel, to the person.

(e) In accordance with the provisions of paragraph (d) of this subdivision, the judicial officer may order one or more of the following conditions of release:

(1) Place the person in the custody of a designated person or persons or organization or organizations agreeing to supervise him or in the custody of a public officer or public officers.

(2) Place restrictions on the travel, association, employment, places of visitation or place of abode of the person during the period of release.

(3) Prohibit absence from residence or employment for a period of more than two hours without prior permission of the court or the probation department having jurisdiction.

(4) Require check-in with a probation officer or at a police precinct either by phone or in person, either periodically as provided by the judicial officer or at such time or times as the judicial officer may direct.

(5) Impose a nighttime curfew.

(6) Require the reporting of a change in business, financial, employment, health or marital status, the docketing of any judgment or lien or the filing of an additional criminal charge against the person in any jurisdiction where the same is known to the person or the reporting of any other matter relevant to assuring the safety of any other person or the community from dangerous crime.

(7) Require participation in a treatment program for alcoholics or for drug or narcotic addicts and regular check in at a hospital or other treatment facility.

(8) Require the posting of bail.

(f) In determining which conditions of release, if any, will reasonably assure the safety of any other person or the community, the judicial officer shall, on the basis of available information, take into account such matters as the nature and circumstances of the offense charged, the weight of the evidence against the person before the court, his family ties, employment, financial resources, character and mental conditions, past conduct, present criminal plans or intention, length of residence in the community, record of convictions, record of previous adjudication as a juvenile delinquent or youthful offender and any record of appearance at court proceedings, flight to avoid prosecution, or failure to appear at court proceedings as well as other relevant matter concerning which the judicial officer has information.

(g) A judicial officer authorizing the release of a person under this subdivision shall issue an appropriate order containing a statement of the conditions imposed, if any, and shall set forth in writing the reason for requiring the conditions imposed. The judicial officer shall inform such person of the penalties applicable to violations of the conditions of his release, shall advise him that a warrant for his arrest will be issued immediately upon any such violations, and shall warn such person of the penalties provided in this section. The word, "conditions" in this paragraph and in paragraphs (h) and (i) of this subdivision means one or more conditions.

(h) A person for whom conditions of release are imposed may appeal from the order imposing such conditions pursuant to subdivision five of this section.

(i) A judicial officer ordering the release of a person on any condition specified in this subdivision may at any time amend his order to impose additional or different conditions of release, except that if an order imposing conditions has been appealed pursuant to subdivision five of this section and an appellate court has approved or disapproved any conditions imposed pursuant to this subdivision or has imposed different

or additional conditions, the judicial officer may not thereafter impose conditions different from those approved or imposed by the appellate court or impose conditions disapproved by the appellate court except where the judicial officer is acting on the basis of new information which was not considered by the judicial officer in imposing the conditions of release which were the subject of the appeal. In such a case, the order imposing the additional or different conditions must specify the new information on which those conditions are based.

(j) If the person is subsequently convicted of the offense charged, he shall receive credit toward service of sentence for the time he was detained for failure to meet a condition or conditions of release imposed pursuant to this subdivision.

(k) Information or testimony stated in, or offered in connection with, any order entered pursuant to this subdivision need not conform to the rules pertaining to the admissibility of evidence in a court of law. The accused person shall have the opportunity to present such information through an oral statement made to the judicial officer by the person's attorney or by the person himself, if he appears pro se, and by proffer of written or other matter, when it is relevant, and the prosecuting attorney shall have the same opportunity to make an oral statement and to present written or other matter. Neither the accused person or the prosecuting attorney shall have the right to present oral testimony but the judicial officer may, in his discretion, require the presentation of such testimony under oath.

(l) Where one party is permitted to present such oral testimony, the adversary party shall also be permitted to present oral testimony. Each party shall have the right of cross examination when the court, in its discretion, grants the parties the opportunity to present oral testimony.

(2) Nothing contained in this section shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court.

4. Detention prior to trial. (a) Subject to the provisions of this section, a judicial officer, before whom an accused person appears for the first time on a criminal charge is authorized to order pretrial detention of such a person when the person is:

(1) A person charged with a dangerous crime if:

(i) the person has been convicted of a dangerous crime within the ten year period immediately preceding the person's first appearance before a judicial officer in connection with the offense with which the person is currently charged; or

(ii) the dangerous crime was allegedly committed while the person was, with respect to another dangerous crime, on bail or other pretrial release or on probation or parole or mandatory release pending completion of a sentence or at large after such release, probation or parole was revoked; or

(2) A person charged with any offense if such person, for the purpose of obstructing or attempting to obstruct justice, threatens, injures, intimidates or attempts to threaten, injure or intimidate any witness or juror or prospective witness or juror or evinces an intention by words or deeds to do any of the foregoing acts or destroys, tampers with, secretes or interferes with evidence in his criminal case or attempts to destroy, tamper with, secrete or interfere with such evidence or evinces an intention by words or deeds to do so.

(b) No person described in paragraph (a) of this subdivision may be ordered detained unless the judicial officer:

(1) Holds a pretrial detention hearing in accordance with the provisions of paragraph (c) of this subdivision;

(2) Finds:

(i) that there is a clear and convincing evidence that the person is a person described in subparagraph one or two of paragraph (a) of this subdivision;

(ii) that in the case of a person described in subparagraph one of paragraph (a) of this subdivision, based on the factors set out in paragraph (c) of subdivision three of this section, there is no condition or combination of conditions of release which will reasonably assure the safety of any other person or the community from dangerous crime and that if released on recognizance or on condition or conditions, the person would commit the same dangerous crime for which he is present before the judicial officer or the same dangerous crime for which he was previously convicted or in connection with which he was on bail, probation, parole or release when he allegedly committed the offense with which he is currently charged or, based upon information before the judicial officer, including information as to the past conduct, character, mental conditions, record of convictions or present criminal plans or intention of the person, among other things, the person would commit another dangerous crime;

(iii) that in the case of a person described in subparagraph two of paragraph (a) of this subdivision, based on the factors set out in paragraph (c) of subdivision three of this section, there is no condition or combination of conditions of release which will reasonably assure that the person will not do an act with respect to a witness, juror or trial evidence of a type described in subparagraph two of paragraph (a) of this subdivision and that if released, the person would do an act with respect to a witness or juror or trial evidence of a type described in subparagraph two of paragraph (a) of this subdivision;

(iv) that, except with respect to a person described in subparagraph two of paragraph (a) of this subdivision, on the basis of information or evidence presented by proffer or otherwise to the judicial officer, there is a substantial probability that the person committed the offense for which he is present before the judicial officer and, where the person is a person described in clause (ii) of subparagraph one of paragraph (a) of this subdivision that there is a substantial probability that the person committed the offense alleged in the charge for which he was on bail, probation, parole or release as described in clause (ii) of subparagraph one of paragraph (a) of this subdivision when he allegedly committed the offense for which he is present before the judicial officer;

(3) Issues an order of detention accompanied by written findings of fact and the reasons for its entry.

(c) The following procedures shall apply to pretrial detention hearings held pursuant to this subdivision:

(1) Whenever the person is before a judicial officer, the hearing may be initiated on oral motion by the prosecuting attorney, and shall not be held in the absence of a motion by the prosecuting attorney.

(2) Whenever the person has been released pursuant to subdivision three of this section and it subsequently appears that such person may be subject to pretrial detention, the prosecuting attorney may initiate

S. 650

a pretrial detention hearing by ex parte written motion. Such a hearing may not be held in the absence of a motion by the prosecuting attorney.

Upon such a motion, the judicial officer may issue a warrant for the arrest of the person or a summons directing the person to appear in court at a particular time and place.

(3) The pretrial detention hearing shall not be held unless it affirmatively appears from allegations made by the prosecuting attorney or from information within the knowledge of the judicial officer referred to in subparagraph two of paragraph (c) of this subdivision that the person comes within one of the detention categories described in paragraph (a) of this subdivision. Where a pretrial detention hearing is authorized under the provisions of this subdivision, the judicial officer may order it held. If the judicial officer orders it held, it shall be held immediately upon the person being brought before the judicial officer for the first time in connection with the offense with which the person is charged unless:

(i) the court rules that it shall be held at a subsequent time or postpones a decision as to whether it should be held, which decision shall not be postponed for a period of more than three days and which hearing shall not be ordered to take place on a date more than three days after the time of the person's first appearance before the judicial officer except as hereinafter provided with respect to the granting of a continuance to the person in extenuating circumstances; or

(ii) the person or the prosecuting attorney moves for a continuance which is granted by the judicial officer. A continuance granted on motion of the person shall not exceed five calendar days unless there are extenuating circumstances. A continuance on motion of the prosecuting attorney shall be granted upon good cause shown and shall not exceed three calendar days. The person may be detained pending the hearing, except that the person must be released under the provisions of subdivision three of this section if the judicial officer before whom the matter is pending finds that some form of release will not endanger the safety of any other person or the community during the period of the continuance, postponement or delay.

(4) Whenever the person is charged with a dangerous crime within the definition of this section in a city court, town court or village court:

(i) if the crime the person is charged with is a class A felony or it appears that the person has two previous felony convictions, a city court, town court or village court may not entertain an application from the prosecuting attorney to order a pretrial detention hearing for such person or to detain such person pursuant to this subdivision. In such circumstances, the prosecuting attorney may apply orally and ex parte to a judge of a superior court holding a term thereof in the county for an order directing that such a detention hearing be held and if such a hearing is ordered by a judge of the superior court, it shall be held in superior court. Whenever the prosecuting attorney makes application to a city court, a town court or a village court for a detention hearing or for detention of a person under this section and such court is barred under this subdivision from entertaining the application, the city court, town court or village court shall transfer the application to the superior court of the county and it shall be entertained by the superior court. If the application is granted in superior court, the detention hearing shall be held in superior court.

(ii) where the prosecuting attorney intends to make such an application to a judge of the superior court, he may apply orally and ex parte

S. 650

to the city court, town court or village court to transfer custody of the person to the superior court and the city court, town court or village court shall then order the transfer of the custody of the person to the superior court forthwith. Instead of applying to the city court, town court or village court to order such transfer of custody to the superior court, the prosecuting attorney may make an ex parte oral application to a judge of the superior court holding a term thereof in the county for an order transferring custody of the person to the superior court. The oral application shall state the facts which make the relief sought appropriate and either shall allege that the prosecuting attorney intends to apply for a detention hearing as soon as custody is transferred to superior court or shall request that the order transferring custody shall also order the holding of a detention hearing.

(iii) when such application has been made by the prosecuting attorney to a superior court judge or when the prosecuting attorney has represented to the city court or town court or village court his intention to make such an application, the city court or town court or village court shall, upon ex parte oral application of the prosecuting attorney, order the person committed to the custody of the sheriff or other appropriate official for twenty-four hours to give the prosecuting attorney sufficient time in which to make such an application to a superior court judge. The superior court judge may postpone the detention hearing or a decision as to whether or not a detention hearing should be held in accordance with the provisions of subparagraph three of paragraph (c) of subdivision four of this section and may order the person detained or released on condition pending the hearing or decision on the prosecuting attorney's motion requesting the hearing in accordance with the provisions of subparagraph three of paragraph (c) of subdivision four of this section.

(5) The person shall be entitled to representation by counsel and shall be entitled to present information or evidence by proffer or otherwise, to testify, to present witnesses in his own behalf and cross examine witnesses presented against him. The prosecuting attorney shall appear either in person or by an assistant prosecuting attorney at the pretrial detention hearing and shall have rights equivalent to those accorded the accused person in this paragraph. When the prosecuting attorney seeks to prove that the person previously has been convicted of a dangerous crime, the prosecuting attorney may use a court finding to that effect made against the person in a proceeding conducted under section 400.15 of this chapter to determine whether the person was a violent felony offender or under section 400.16 of this chapter to determine whether the person was a persistent violent felony offender or under section 400.21 of this chapter to determine whether the person was a second felony offender.

(6) Information stated in or information or evidence in connection with, any order entered pursuant to this subdivision need not conform to the rules pertaining to the admissibility of evidence in the court of law.

(7) Testimony of the person given during the hearing shall not be admissible on the issue of guilt in any other judicial proceeding, but such testimony shall be admissible in proceedings under subdivisions seven and eight of this section and in perjury proceedings.

(8) The prosecuting attorney has the burden of proof upon all the issues in the detention proceeding.

(i) if, at the conclusion of the hearing, the prosecuting attorney has made out a case for detention and the judicial officer determines that no condition or combination of conditions of release will reasonably assure the safety of any other person or the community from dangerous crime, the judicial officer may either:

(A) detain the person under an order of total detention; or

(B) order partial detention by providing that the person shall return to detention after a specified release period or periods of hours, days, or weeks or any combination thereof, with the person either being released without supervision or custodial control or placed under the supervision of some designated organization or organizations, private individual or individuals or public officer or officers during the time when the person is not in detention or during a portion of such time. The release may be ordered for employment or familial or other limited purpose or to enable the person to prepare his defense.

(ii) the judicial officer shall choose the form of detention appropriate to the situation but he shall not determine the form of detention until the prosecuting attorney has had an opportunity to be heard in the matter and the judicial officer has been furnished with a report of the division of criminal justice services concerning the person's criminal record, if any, or with a police department report with respect to the person's prior arrest record, if any.

(iii) at the conclusion of the hearing, if the prosecuting attorney has not made out a case for detention of the person, the judicial officer may not detain the person and shall treat him in accordance with the provisions of subdivision three of this section.

(g) Appeals from orders of detention may be taken pursuant to subdivision five of this section.

(d) The following shall be applicable to persons detained pursuant to this subdivision:

(1) The case of such person shall be placed on an expedited calendar and, consistent with the sound administration of justice, his trial shall be given priority.

(2) Such person shall be treated in accordance with subdivision three of this section in the following situations:

(i) upon the expiration of sixty calendar days, unless the trial is in progress or the trial has been delayed at the request of the person other than by the filing of timely motions excluding motions for continuances; or

(ii) whenever a judicial officer finds that a subsequent event has eliminated the basis for such detention.

(3) The person shall be deemed detained pursuant to subdivision six of this section if he is convicted.

(4) If the person is subsequently convicted of the offense charged, he shall receive credit toward service of sentence for the time he was detained pursuant to this subdivision.

5. Appeal from a detention order or from conditions of release. In any case where a condition or conditions of release is or are imposed pursuant to subdivision three of this section or where a person is detained for failure to meet a condition or conditions of release imposed pursuant to subdivision three of this section or pursuant to an order of a judicial officer issued after a hearing as provided in subdivision four of this section, an appeal may be taken to the court having appellate jurisdiction over such judicial officer. Any order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, (a) the court may remand the case for a further hearing, or (b) may, with or without additional evidence, order the person released pursuant to paragraph (a) of subdivision three of this section, changing the terms or conditions of release, if any, in accordance with the provisions of subdivision three of this section. The appeal shall be placed on an expedited calendar, given priority and determined promptly.

6. Release after conviction. (a) A person who has been convicted of a dangerous crime which is a class A felony, except a person who is a juvenile offender in an action which has been removed to the family court after verdict, must be detained and committed or remanded to the custody of the sheriff or appropriate official. A person convicted of a dangerous crime which is not a class A felony and awaiting sentence, except a person who is a juvenile offender in an action which has been removed to the family court after verdict, may be likewise detained unless the judicial officer finds by clear and convincing evidence that he is not likely to pose a danger to any other person or to the property of another person. Upon such finding, the judicial officer shall treat the person in accordance with the provisions of subdivision three of this section.

(b) A person who has been convicted of a dangerous crime other than a class A felony, or found to be a youthful offender for having committed such a crime, and sentenced to a term of confinement or imprisonment and has filed an appeal may be detained unless the judicial officer finds by clear and convincing evidence that (1) the person is not likely to pose a danger to any other person or to the property of another person, and (2) the appeal raises a substantial question of law or fact likely to result in a reversal or an order for a new trial. Upon such findings, the judicial officer shall treat the person in accordance with the provisions of subdivision three of this section. For the purposes of this subdivision, the term "appeal" means an appeal from a judgment of conviction or sentence or from an order of an intermediate appellate affirming or modifying a judgment of conviction or a sentence.

(c) Nothing in this subdivision shall be deemed to extinguish or limit the provisions of existing law prohibiting the release of a person accused, convicted or sentenced on a criminal charge.

(d) In determining whether to release a person convicted of a dangerous crime pending sentencing or appeal, the judicial officer may apply either this subdivision or sections 530.45 and 520.50 of this chapter.

7. Penalties for offenses committed during release. (a) Any person convicted of an offense committed while released pending trial, sentence or appeal pursuant to this section shall be subject to the following penalties in addition to any other applicable penalties:

(1) A term of imprisonment of not less than one year and not more than five years if convicted of committing a felony while so released; and

(2) A term of imprisonment of not less than ninety days and not more than one year if convicted of committing a misdemeanor while so released.

(b) The giving of a warning to the person when released of the penalties imposed by this subdivision shall not be a prerequisite to the application of this subdivision.

(c) Any term of imprisonment imposed pursuant to this subdivision shall be consecutive to any other sentence of imprisonment.

8. Penalties for violation of conditions of release. (a) A person who has been conditionally released pursuant to subdivision three of this section and who has violated a condition of release shall be subject to revocation of release, an order of detention and prosecution for contempt of court.

(b) Proceedings for revocation of release may be initiated on motion of the prosecuting attorney. The provisions of paragraphs (c) and (d) of subdivision four of this section shall apply to this subdivision. A warrant for the arrest of a person charged with violating a condition of release may be issued by a judicial officer of the court in which the release was ordered. A proceeding for revocation and detention may be initiated by the prosecuting attorney before any judicial officer of the court in which release was ordered. No order of revocation and detention shall be entered unless, after a hearing, the judicial officer finds that:

(1) There is clear and convincing evidence that such person has violated a condition of his release; and

(2) Based on the factors set out in paragraph (c) of subdivision three of this section, there is no condition or combination of conditions of release which will reasonably assure that such person will not pose a danger to any other person or the community.

(c) Contempt sanctions may be imposed if, upon a hearing and in accordance with principles applicable to proceedings for criminal contempt, it is established that such person has intentionally violated a condition of his release. Such contempt proceedings shall be expedited and heard by the court without a jury. Any person found guilty of criminal contempt for violation of a condition of release shall be imprisoned for not more than six months, or fined not more than one thousand dollars, or both.

9. Nothing in this section shall interfere with or prevent the exercise by any court of its power to punish for contempt.

10. Nothing in this section shall be deemed to limit the judicial power under existing law to deny bail or deny release on recognizance or to order and fix bail to assure the appearance of a defendant accused of a crime at judicial proceedings related to that crime or to order such defendant released on recognizance when bail is judged unnecessary to assure his appearance.

11. Notwithstanding the provisions of this section, and even after release on condition or detention has been ordered hereunder, the judicial officer may elect to apply existing law, including its provisions concerning bail and recognizance, instead of the provisions of this section.

12. Nothing in this section shall be deemed to limit or interfere with the power of a court or judge to grant habeas corpus relief.

13. Nothing in this section shall be deemed to extinguish or limit the provisions of existing law prohibiting the release of a person accused, convicted or sentenced on a criminal charge.

§ 6. Section 510.10 of such law is amended to read as follows:

§ 510.10 Securing order; when required.

[When] Except as provided in section 530.15, when a principal, whose future court attendance at a criminal action or proceeding is or may be required, initially comes under the control of a court, such court must, by a securing order, either release him on his own recognizance, fix bail or commit him to the custody of the sheriff. When a securing order is revoked or otherwise terminated in the course of an uncompleted action or proceeding but the principal's future court attendance still is or may be required and he is still under the control of a court, a new securing order must be issued.

§ 7. Section 510.20 of such law is amended by adding a new subdivision three to read as follows:

3. A defendant charged with a dangerous crime within the definition of section 530.15 of this chapter or conditionally released or detained under such section shall have the same rights to apply for release on recognizance or on bail and to be heard on such application as are granted in subdivisions one and two of this section. However, the court to whom the application is addressed shall, before deciding the application, ascertain what action has been taken or order issued with respect to the defendant under section 530.15 of this chapter, if any, whether an appeal has been taken from such an order, whether it has been denied, or whether any motion or application has been made to vacate or modify such an order or to relieve the defendant partially or completely from its terms.

§ 8. Section 510.30 of such law is amended by adding a new subdivision four to read as follows:

4. The provisions of this section shall not apply in the case of a defendant with respect to whom the provisions of section 530.15 of this chapter have been invoked.

§ 9. Subdivision one of section 510.40 of such law is amended to read as follows:

1. [An] Except when section 530.15 of this chapter is invoked, an application for recognizance or bail must be determined by a securing order which either:

(a) Grants the application and releases the principal on his own recognizance; or

(b) Grants the application and fixes bail; or

(c) Denies the application and commits the principal to, or retains him in, the custody of the sheriff.

§ 10. Section 530.10 of such law is REPEALED and a new section 530.10 is added to read as follows:

§ 530.10 Order of recognizance or bail; in general.

1. A court is authorized, in the exercise of its discretion, to invoke section 530.15 of this chapter, in circumstances in which such section permits its remedies to be invoked, during the pendency of either:

(a) A criminal action; or

(b) An appeal taken by the defendant from a judgment of conviction or a sentence or from an order of an intermediate appellate court affirming or modifying a judgment of conviction or a sentence.

2. Whether or not the circumstances are such that section 530.15 of this chapter is authorized to be invoked under the provisions of subdivision one of this section, a court, under circumstances prescribed in this article, and upon application of a defendant charged with or convicted of any offense, is authorized or required to order bail or recognizance for the release or prospective release of such defendant during the pendency of either:

(a) A criminal action based on such charge; or

(b) An appeal taken by the defendant from a judgment of conviction or sentence or from an order of an intermediate appellate court affirming or modifying a judgment of conviction or a sentence.

3. The remedies provided in subdivision two of this section constitute an alternative to the remedies established in subdivision one in those

S. 650

circumstances in which both are available and, in such circumstances, a court, in the exercise of its discretion, may decide in each particular case whether the provisions of subdivision one or subdivision two shall be invoked.

§ 11. The opening paragraph of section 530.20 of such law, as amended by chapter five hundred thirty-one of the laws of nineteen hundred seventy-five, is amended to read as follows:

When a criminal action is pending in a local criminal court, such court, except a city court, town court or village court, may, in the exercise of its discretion, invoke section 530.15 of this chapter in those circumstances in which such section permits its remedies to be invoked. If such section is not invoked, upon application of a defendant, such court must or may order recognizance or bail as follows:

§ 12. Subdivision one of section 530.30 of such law is REPEALED and a new subdivision one is added to read as follows:

1. When a criminal action is pending in a local criminal court, other than one consisting of a superior court judge sitting as such, a judge of a superior court, holding a term thereof in the county:

(a) May, upon application of a defendant, order recognizance or bail when such local criminal court lacks authority to issue such an order, pursuant to paragraph (a) of subdivision two of section 530.20 of this chapter; or

(b) May, except when section 530.15 of this chapter has been invoked by the local criminal court, order recognizance or bail upon application of a defendant when such local criminal court:

(i) Has denied an application for recognizance or bail; or

(ii) Has fixed bail which is excessive. In such case, such superior court judge may vacate the order of such local criminal court and release the defendant on his own recognizance or fix bail in a lesser amount or in a less burdensome form.

(c) May, instead of acting under paragraph (a) or (b) of this subdivision, invoke section 530.15 in the exercise of discretion in those circumstances in which section 530.15 permits its remedies to be invoked when the local criminal court has not invoked section 530.15 and when the local criminal court:

(i) Lacks authority to issue an order for recognizance or bail, pursuant to paragraph (a) of subdivision two of section 530.20; or

(ii) Has denied an application for recognizance or bail; or

(iii) Has fixed bail which is excessive.

§ 13. Subdivision three of section 530.30 of such law is amended to read as follows:

3. Not more than one application may be made by a defendant pursuant to this section.

§ 14. The opening paragraph of section 530.40 of such law is amended to read as follows:

When a criminal action is pending in a superior court, such court may, in the exercise of its discretion, invoke section 530.15 of this chapter in those circumstances in which such section permits its remedies to be invoked. If section 530.15 of this chapter is not invoked, such court, upon application of a defendant, must or may order recognizance or bail as follows:

§ 15. Subdivision one of section 530.45 of such law, as added by chapter four hundred thirty-five of the laws of nineteen hundred seventy-four, is amended to read as follows:

S. 650

1. [When] Except when section 530.15 of this chapter is invoked, and provides to the contrary, when the defendant is at liberty in the course of a criminal action as a result of a prior order of recognizance or bail and the court revokes such order and then either fixes no bail or fixes bail in a greater amount or in a more burdensome form than was previously fixed and remands or commits defendant to the custody of the sheriff, a judge designated in subdivision two, upon application of the defendant following conviction of an offense other than a class A felony and before sentencing, may issue a securing order and either release defendant on his own recognizance, or fix bail, or fix bail in a lesser amount or in a less burdensome form than fixed by the court in which the conviction was entered.

§ 16. Section 530.50 of such law is amended to read as follows:

§ 530.50 Order of recognizance or bail; during pendency of appeal.

[A] Except when section 530.15 of this chapter is invoked, and provides to the contrary, a judge who is otherwise authorized pursuant to section 460.50 or section 460.60 to issue an order of recognizance or bail pending the determination of an appeal, may do so unless the defendant received a class A felony sentence.

§ 17. Subdivision one of section 530.60 of such law, as numbered by chapter seven hundred eighty-eight of the laws of nineteen hundred eighty-one, is amended to read as follows:

1. [Whenever] Except when section 530.15 of this chapter has been invoked and provides to the contrary, whenever in the course of a criminal action or proceeding a defendant is at liberty as a result of an order of recognizance or bail issued pursuant to this article, and the court considers it necessary to review such order, it may, and by a bench warrant if necessary, require the defendant to appear before the court. Upon such appearance, the court, for good cause shown, may revoke the order of recognizance or bail. If the defendant is entitled to recognizance or bail as a matter of right, the court must issue another such order. If he is not, the court may either issue such an order or commit the defendant to the custody of the sheriff.

§ 18. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law, and shall remain in effect for a trial period of three years thereafter.

STATE OF NEW YORK

S. 2087 A. 2689

9/28/83 Codes Committee no action

1983-1984 Regular Sessions

SENATE—ASSEMBLY

February 1, 1983

IN SENATE -- Introduced by Sens. COOK, DALY, GOODHUE, KEHOE, LACK, LEVY, STAFFORD -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

IN ASSEMBLY -- Introduced by M. of A. CASALE -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to denial of recognizance or bail in certain cases and providing for expeditious trials in such cases

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

Section 1. Section 500.10 of the criminal procedure law is amended by adding a new subdivision twenty-one to read as follows:

21. "Person who must be committed to the custody of the sheriff" means a person who:

(a) Is charged by felony complaint, or indictment with one or more of the following crimes: murder in the first degree, murder in the second degree, kidnapping in the first degree, kidnapping in the second degree, arson in the first degree, arson in the second degree, rape in the first degree, sodomy in the first degree, attempt to commit any of the foregoing crimes, manslaughter in the first degree, robbery in the first degree, burglary in the first degree, robbery in the second degree as defined by subdivision two of section 160.10 of the penal law, or burglary in the second degree as defined by subdivision one of section 140.25 of the penal law; and

(b) Either: (i) has previously been convicted of one or more of the offenses listed in paragraph (a) of this subdivision and such offense was committed within twenty years preceding the date of the commission of the alleged crime for which a securing order is being sought; or (ii)

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD02692-01-3

is subject to an order of recognizance or bail made by a court of this state in the course of another criminal action based upon a charge of one or more of the offenses listed in paragraph (a) of this subdivision and the crime presently charged is alleged to have been committed while the defendant was at liberty pursuant to such order; or (iii) had escaped from a detention facility in this state, and the crime presently charged is alleged to have been committed while the defendant was at liberty as a result of such escape.

(c) A principal may not be determined to be a person who must be committed to the custody of the sheriff unless the district attorney makes an application to the court requesting such determination.

(d) If a principal be determined to be a person who must be committed to the custody of the sheriff the court may nevertheless issue an order providing for recognizance or bail if it further determines that the interests of justice so demand and provided that the reasons therefor be clearly stated upon the record.

§ 2. The opening paragraph of section 510.10 of such law is designated subdivision one and a new subdivision two is added to read as follows:

2. Any principal who has been determined to be a person who must be committed to the custody of the sheriff shall after having been detained in custody for a period of one hundred eighty days or more upon the charge underlying such determination be entitled to make an application for a securing order. Upon such an application the court shall consider the matter as if the principal were not a person who must be committed to the custody of the sheriff.

§ 3. Section 510.20 of such law is amended by adding two new subdivisions three and four to read as follows:

3. In any case in which the court concludes that a defendant is apparently a person who must be committed to the custody of the sheriff, the defendant must be given an opportunity to be heard within seventy-two hours of the courts reaching of such conclusion for the purpose of controverting any factor specified in paragraph (a) or (b) of subdivision twenty-one of section 500.10 of this title, relied upon to support such conclusion. If the defendant does contest any such factor, the burden of proof shall be upon the people to prove the contested factor by clear and convincing evidence and the court may receive any relevant evidence not legally privileged. For the purposes of any such hearing the date shown on the fingerprint report as the date of arrest for a prior crime shall be deemed prima facie evidence of the date on which that crime was committed.

4. If a principal has been determined to be a person who must be committed to the custody of the sheriff the principal, upon request, shall be entitled to a review of his status in open court at least every fourteen days during the continuance of such custody.

§ 4. Paragraph (a) of subdivision two of section 510.30 of such law is amended by adding a new subparagraph (ix) to read as follows:

(ix) If he is a defendant, whether he poses a threat to any other person in the community.

§ 5. Section 510.30 of such law is amended by adding two new subdivisions four and five to read as follows:

4. Where a local criminal court lacks authority to order recognizance or bail by reason of the fact that the defendant is apparently a person who must be committed to the custody of the sheriff and after a hearing finds there is reasonable cause to believe the defendant committed a

felony but there is not reasonable cause to believe the defendant committed one of the crimes specified in paragraph (a) of subdivision twenty-one of section 500.10 of this title, the court shall convert the felony complaint into one that does not charge a crime specified in such paragraph by making appropriate notations upon or attached thereto and the court may then proceed to determine an application for bail or recognizance in the same manner and in accordance with the same criteria as it would with respect to a defendant other than one who must be committed to the custody of the sheriff.

5. Where an application for recognizance or bail has been denied solely on the ground that the defendant is a person who must be committed to the custody of the sheriff, an application for recognizance or bail may be granted by a judge of a superior court pursuant to section 530.30 of this chapter if the defendant has not been indicted, or pursuant to section 530.40 of this chapter if an indictment has been filed, in any case where the court determines that:

(a) the defendant has not been afforded an opportunity for trial within sixty days from the date of arrest, computed after excluding the number of days the criminal proceeding has been delayed pursuant to request or consent or the condition of the defendant or by reason of motions made or other action on the part of the defendant, or the people have not proceeded with due diligence at any stage of the criminal action; and

(b) the people are unable to show good cause why an order of recognizance or bail should not be granted, but good cause for the purpose of such showing shall not include the lack of judicial or non-judicial personnel or the lack of an available courtroom or adequate prosecutorial staff; and

(c) the court in its discretion is of the opinion that recognizance or bail should be granted.

§ 6. Such law is amended by adding a new section 510.60 to read as follows:

§ 510.60 Person who must be committed to the custody of the sheriff; trial preference.

When a person has been determined to be a person who must be committed to the custody of the sheriff the criminal action pending against him shall be placed upon an expedited calendar and, consistent with the sound administration of justice, his trial shall be given priority.

§ 7. Section 530.10 of such law is amended to read as follows:

§ 530.10 Order of recognizance or bail; in general.

Under circumstances prescribed in this article, a court, upon application of a defendant charged with or convicted of an offense, is required or authorized to order or to deny bail or recognizance for the release or prospective release of such defendant during the pendency of either:

1. A criminal action based upon such charge; or

2. An appeal taken by the defendant from a judgment of conviction or a sentence or from an order of an intermediate appellate court affirming or modifying a judgment of conviction or a sentence.

§ 8. Subdivision two of section 530.20 of such law, as amended by chapter five hundred thirty-one of the laws of nineteen hundred seventy-five, subparagraph (ii) of paragraph (b) as amended by chapter two hundred eighteen of the laws of nineteen hundred seventy-nine, is amended to read as follows:

2. When the defendant is charged, by felony complaint, with a felony, the court may, in its discretion, order or deny recognizance or bail except as otherwise provided in this subdivision:

(a) A city court, a town court or a village court may not order recognizance or bail when (i) the defendant is charged with a class A felony, or (ii) it appears that the defendant has two previous felony convictions;

(b) [No] A local criminal court [may] must not order recognizance or bail [with respect to] when it appears that the defendant is a person who must be committed to the custody of the sheriff. In any other criminal case where a defendant is charged with a felony, a local criminal court must not order recognizance or bail unless and until:

(i) The district attorney has been heard in the matter or, after knowledge or notice of the application and reasonable opportunity to be heard, has failed to appear at the proceeding or has otherwise waived his right to do so; and

(ii) The court has been furnished with a report of the division of criminal justice services concerning the defendant's criminal record if any or with a police department report with respect to the defendant's prior arrest record. If neither report is available, the court, with the consent of the district attorney, may dispense with this requirement; provided, however, that in an emergency, including but not limited to a substantial impairment in the ability of such division or police department to timely furnish such report, such consent shall not be required if, for reasons stated on the record, the court deems it unnecessary. When the court has been furnished with any such report or record, it shall furnish a copy thereof to counsel for the defendant or, if the defendant is not represented by counsel, to the defendant.

§ 9. Subdivisions two and three of section 530.30 of such law are renumbered subdivisions three and four and a new subdivision two is added to read as follows:

2. Notwithstanding the provisions of subdivision one of this section, when it appears that the defendant is a person who must be committed to the custody of the sheriff, a superior court judge may not order recognizance or bail unless such order is authorized by the provisions of subdivision five of section 510.30 of this chapter.

§ 10. Section 530.40 of such law is amended by adding a new subdivision five to read as follows:

5. Notwithstanding the provisions of subdivision two of this section, a superior court may not order recognizance or bail when it appears that the defendant is a person who must be committed to the custody of the sheriff unless such order is authorized by the provisions of subdivision five of section 510.30 of this chapter.

§ 11. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law.

STATE OF NEW YORK

1462

9/22/53 Codes Committee no action

1983-1984 Regular Sessions

IN ASSEMBLY

January 13, 1983

Introduced by M. of A. ROBACH, SEMINERIO -- Multi-Sponsored by -- M. of A. CASALE, HARENBERG -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to denial of application for recognizance or bail by defendants whose release would pose a threat to the safety of the community

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

Section 1. Section 510.30 of the criminal procedure law, subparagraph (v) of paragraph (a) of subdivision two as amended by chapter four hundred eleven of the laws of nineteen hundred seventy-nine, subdivision three as added by chapter seven hundred eighty-eight of the laws of nineteen hundred eighty-one, subparagraphs (vi), (vii) and (viii) of paragraph (a) of subdivision two as renumbered by chapter four hundred forty-seven of the laws of nineteen hundred seventy-seven, is amended to read as follows:

§ 510.30 Application for recognizance or bail; rules of law and criteria controlling determination.

1. Determinations of applications for recognizance or bail are not in all cases discretionary but are subject to rules, prescribed in article five hundred thirty and other provisions of law relating to specific kinds of criminal actions and proceedings, providing (a) that in some circumstances such an application must as a matter of law be granted, (b) that in others it must as a matter of law be denied and the principal committed to or retained in the custody of the sheriff, and (c) that in others the granting or denial thereof is a matter of judicial discretion.

2. (a) The court must consider the safety of the community with respect to a defendant who:

(i) Is charged with the class A-1 felonies of murder in the first or second degree or the class A-1 felonies of kidnapping or arson in the

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD02464-02-3

first degree or the class B violent felony offense of manslaughter in the first degree; or

(ii) Is charged with any violent felony offense as defined in subdivision one of section 70.02 of the penal law, and has been previously convicted of a violent felony offense within the past ten years, or a felony defined by similar elements under the laws of another jurisdiction; or

(iii) Is charged with committing a second felony offense arising out of a distinct criminal transaction, while charges remain pending on a prior charge of a felony offense.

(b) Upon an application for recognizance or bail, the court, upon determining that the defendant is a person as defined in paragraph (a) of this subdivision must deny the application and commit the defendant to the custody of the sheriff, unless the court determines that mitigating factors and the interests of justice indicate that the defendant would not pose a threat to the safety of the community and that the defendant should therefore be treated in accordance with subdivision three of this section. No money bail can be fixed to insure the safety of the community.

(c) A defendant committed to the custody of the sheriff under this subdivision must be treated in accordance with subdivision three of this section:

(i) Upon the expiration of ninety calendar days, unless the trial, which, in the case of a defendant being treated in accordance with subparagraph (iii) of paragraph (a) of this subdivision, may be of any pending felony case, is in progress or the trial has been delayed at the request of the defendant, other than by the filing of timely motions, excluding motions for continuance; or

(ii) Whenever the court finds that a subsequent event has eliminated the basis for such detention.

3. To the extent that the issuance of an order of recognizance or bail and the terms thereof are matters of discretion rather than of law, an application is determined on the basis of the following factors and criteria:

[(a)] With respect to any principal, the court must consider the kind and degree of control or restriction that is necessary to secure his court attendance when required. In determining that matter, the court must, on the basis of available information, consider and take into account:

(i) The principal's character, reputation, habits and mental condition;

(ii) His employment and financial resources; and

(iii) His family ties and the length of his residence if any in the community; and

(iv) His criminal record if any; and

(v) His record of previous adjudication as a juvenile delinquent, as retained pursuant to section seven hundred fifty-three-b of the family court act, or, of pending cases where fingerprints are retained pursuant to section seven hundred twenty-four-a of such act, or a youthful offender, if any; and

(vi) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and

(vii) If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability

A. 1462

or improbability of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and

(viii) If he is a defendant, the sentence which may be or has been imposed upon conviction.

[(b)] 4. Where the principal is a defendant-appellant in a pending appeal from a judgment of conviction, the court must also consider the likelihood of ultimate reversal of the judgment. A determination that the appeal is palpably without merit alone justifies, but does not require, a denial of the application, regardless of any determination made with respect to the factors specified in [paragraph (a)] subdivision three of this section. If the defendant-appellant was a defendant as defined in paragraph (a) of subdivision two of this section when charged, a judgment of conviction upon a felony charge within the categories of paragraph (a) of subdivision two of this section mandates a denial of the application.

[3] 5. When bail or recognizance is ordered, the court shall inform the principal, if he is a defendant charged with the commission of a felony, that the release is conditional and that the court may revoke the order of release and commit the principal to the custody of the sheriff in accordance with the provisions of subdivision two of section 530.60 of this chapter if he commits a subsequent felony while at liberty upon such order.

§ 2. This act shall take effect immediately.

NEW YORK STATE LAW ENFORCEMENT COUNCIL

To the Members of the Legislature

In recent years many of us active in the field of law enforcement have become increasingly concerned about deep-seated problems in our system of criminal justice and public disenchantment with the failure to enact necessary reforms. The system is widely regarded as being in a state of crisis. Too many criminals, often repeat offenders, never come to justice. In some jurisdictions, record numbers of cases are awaiting trial. Defendants convicted of serious crimes frequently receive inadequate and disparate sentences. Often, career criminals sentenced to apparently long prison sentences are released after only a few years. Lower courts in some of our major cities face staggering caseloads and grossly inadequate trial capacity. Both local and state correctional facilities are overcrowded. Public understanding of and respect for the criminal justice system may be at an all-time low.

In December, 1982, major law enforcement organizations, officials, and leading members of New York's business community therefore joined together to form the New York State Law Enforcement Council. These organizations are the New York State District Attorneys Association, the New York State Attorney General's Office, the New York State Association of Chiefs of Police, the New

York State Sheriffs Association, the New York City Coordinator of Criminal Justice, and the Citizens Crime Commission of New York City. That our membership spans both the public and private sectors is, we think, unique. The members of the Council are described in more detail at the end of this statement.

The Council's primary objectives are to increase the efficiency of the criminal justice system, to provide law enforcement with important new tools needed to combat crime, to correct glaring deficiencies in our laws which erode public confidence in our system of justice, and to provide law enforcement agencies with critically needed additional resources. In seeking to attain these objectives, we hope to promote public understanding and respect for the system.

Notably, each of our recommendations has the unanimous backing of all six Council members. We thus speak with a single voice on these important criminal justice issues.

We are fully aware that no single antidote will cure the system's ills, and that the prospect of improvement lies in taking a series of steps over a period of time which cumulatively will bring about fundamental reform. We have enclosed a summary of our initial 21 initiatives, plus legislation supporting those initiatives. Several pieces of legislation are still being completed or reviewed.

The task is difficult, but we are convinced that the time has come for action. We will continue to work together to obtain passage of our proposals, and we ask for your support.

NEW YORK STATE LAW ENFORCEMENT COUNCIL

THE MEMBERS OF THE COUNCIL

The New York State Law Enforcement Council was founded in August, 1982. Its six members are either primary participants in law enforcement statewide or active and effective participants in efforts to improve the criminal justice system. The purpose of the Council is to advocate criminal justice proposals deemed important by each of its members. Those members are described below.

The New York State District Attorneys Association was formed to promote cooperation among prosecutors throughout the state and to improve their effectiveness and efficiency. The Association has approximately 600 members, including virtually every District Attorney in the state, many former District Attorneys, and present and past members of their staffs.

The primary activity of the Association is monitoring and proposing legislation. Its Executive Committee receives advice on legislative matters from a Legislative Committee comprised of senior members of every major District Attorney's office in the state as well as from several specialized subcommittees.

The New York State Attorney General is the state's chief legal officer and has important criminal jurisdiction in the field of white collar crimes. The bulk of the Attorney General's criminal work involves offenses against or involving state agencies or its employees and offenses committed by persons or entities regulated by the state. The Attorney General also has specific grants of jurisdiction to prosecute violations of the state Tax Law, the Education Law, the Labor Law, the Donnelly Act (unlawful monopolies), the Martin Act (securities violations), the Environmental Conservation Law, and the Real Property Law. The state Organized Crime Task Force also functions under the supervision of the Attorney General.

The Attorney General maintains a legislative office in Albany, and submits a number of criminal justice bills to the legislature each year as part of his legislative program.

The New York State Association of Chiefs of Police was founded in 1901. It represents law enforcement administrators at all levels of government, including federal, state, county, town, city, village and police districts. Its roughly 900 members and its professional staff in Albany have long been effective in providing advice to the legislature and executive branch on law enforcement and criminal justice.

The New York State Sheriffs Association has been in existence since 1934. Every sheriff in the state belongs to the Association, as do many undersheriffs and past sheriffs.

The Association is active in efforts to improve the prevention, detection and prosecution of crime. It advises members of the state legislature on the feasibility and implications of proposed legislation affecting sheriffs, their duties, and their constituents; provides education and training to sheriffs and their staffs; appears amicus curiae in cases affecting its members; and educates members of the public in the sheriff's duties.

The two remaining members of the Council focus primarily on the criminal justice system in New York City.

The New York City Coordinator of Criminal Justice, appointed by the Mayor, advises him on questions of public safety and works to increase coordination and cooperation among public and private criminal justice agencies. The Coordinator and his staff work closely with the police, prosecutors, defense attorneys, the courts, citizen groups, state and federal officials and other city agencies to study the criminal justice process and improve its efficiency and effectiveness.

As the Mayor's criminal justice advisor, the Coordinator reviews the budget requests of all city agencies for programs related to criminal justice and recommends priorities among these proposals. The Coordinator also prepares the Mayor's criminal justice legislative program each year and lobbies in conjunction with concerned citizens and criminal justice experts on behalf of these and other important reform initiatives.

The Citizens Crime Commission of New York City brings a direct citizen perspective to the Council. Although it, too, is devoted to reducing crime and improving the criminal justice system, it is an independent, non-profit, non-partisan watchdog organization. Formed in 1979, the Commission functions under the direction of a board of citizens comprised of leading members of the business community in New York. It is funded entirely by the business community and private foundations.

The Commission's professional staff researches and reports on crime and criminal justice; makes recommendations aimed at significantly reducing crime, particularly violent street crime; observes government agencies to determine how they can be made more effective; promotes responsible citizen anti-crime programs; and provides accurate information on the functioning of the criminal justice system to the public. It has been cited by prominent news organizations as a particularly respected and effective watchdog which speaks strongly and with common sense about the problem of crime.

January. 1983

NEW YORK STATE LAW ENFORCEMENT COUNCIL

MEMORANDUM IN SUPPORT

TITLE — AN ACT to amend the Penal Law in relation to creating additional degrees of the crimes of bail jumping and escape and providing mandatory and consecutive sentences

SUMMARY OF PROVISIONS — This bill which differs substantially from last year's proposal, would enhance penalties for bail jumping or escape with the highest of such offenses becoming a class D felony where the substantive crime with which the accused was originally charged was a class A or class B felony. It would also. in most instances. call for mandatory and consecutive sentences.

STATEMENT IN SUPPORT — As originally conceptualized. a charge of bail jumping was to act as an inducement to an individual to appear in court upon charges pending against him for which he had been at liberty pursuant to an order of bail or recognizance (see gen.. Hechtman. Practice Commentary. McKinney's Consolidated Laws of New York, Book 39, Penal Law Section 215.56. pages 534-536).

The reality is. however, that when one is at liberty upon a charge of a weighty magnitude, such as a class A or class B felony. it inures to his benefit in many instances to delay the prosecution so that the People's proof will, with the passage of time. become less precise and compelling, if not completely unavailable. Fading memories and the loss or misplacement of real evidence are oftentimes the offspring of extended and frustrating adjournments.

In such instances, if a defendant fails to appear in order to avoid prosecution, and thereby enhances the chances of a dismissal or an acquittal predicated on the unavailability of crucial evidence, he could only be charged with a class E felony where initially an A felony might have been involved. The deterrent effect of such a bail jumping statute, especially in light of the extremely onerous burden which has been placed upon the various warrant squads in locating such fugitives. is marginal at best and

For example, as of November, 1982, the New York City Police Department reports that nearly 269,000 outstanding warrants are yet to be executed upon. Clearly, it is worth the gamble of absconding for a period of time in order to diminish the possibility of a conviction on a serious charge, where the risk, if the defendant is returned to court at all, is merely a conviction on an E felony.

The instant bill would help to remedy this anomaly by raising penalties for bail jumping and, where convictions are obtained on both the underlying charge and the bail jumping offense, requiring that the sentences be mandatory and consecutive. In order to protect a defendant, however, in light of the potential gravity of his non-appearance, the bill calls for its more onerous provisions to be triggered only in those cases where indictments have already been returned.

Penalties for escape have also been enhanced. Obviously, where an accused has been in custody and absconds, no less a sanction than in a bail jumping situation should be available.

The bill contains ameliorative provisions for cases in which mitigating circumstances are found to exist. First, incarceration is not mandatory in such cases where misdemeanor convictions are obtained. In addition, although sentences of imprisonment are mandatory following convictions for felonies under the bill, where mitigating factors are present these sentences can be made to run concurrently with other sentences imposed on pending charges.

Undoubtedly, society has a strong interest in an accused felon being brought to the bar to answer the charges which have been lodged against him. As a consequence, where an accused undermines society's legitimate right in this regard by attempting to circumvent the criminal process, the criminal justice system should have a potent response. The availability of more severe sanctions in the bail-jumping and escape statutes -- which obviously lend themselves to less complex proof than the original substantive charge -- would accomplish such a result.

AN ACT to amend the Penal Law in relation to creating additional degrees of the crimes of bail jumping and escape and providing mandatory and consecutive sentences therefor.

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

Section 1. Section 215.55 of the Penal Law is hereby renumbered to be section 215.54.

§2. The Penal Law is amended by adding a new section 215.55 to read as follows:

§215.55 Bail jumping in the third degree

A person is guilty of bail jumping in the third degree when by court order he has been released from custody or allowed to remain at liberty, either upon bail or upon his own recognizance, upon condition that he will subsequently appear personally in connection with a criminal action or proceeding, and when he does not appear personally on the required date or voluntarily within thirty days thereafter.

Bail jumping in the third degree is a class A misdemeanor

§3. Section 215.56 of the Penal Law is amended to read as follows: §215.56 Bail jumping in the second degree

A person is guilty of bail jumpiing in the second degree when by court order he has been released from custody or allowed to

EXPLANATION: Matter underlined (italics) is new;
matter in brackets [ ] is old law to be omitted.

remain at liberty, either upon bail or upon his own recognizance, upon condition that he will subsequently appear personally in connection with [a criminal action or proceeding.] a charge against him of committing a felony, and when he does not appear personally on the required date or voluntarily within thirty days thereafter.

Bail jumping in the second degree is a class [A misdemeanor] E felony.

§ 4. Section 215.57 of the Penal Law is amended to read as follows:

§215.57 Bail jumping in the first degree

A person is guilty of bail jumping in the first degree when by court order he has been released from custody or allowed to remain at liberty, either upon bail or upon his own recognizance, upon condition that he will subsequently appear personally in connection with [a] an [charge against him of committing] indictment pending against him which charges him with the commission of a class A or class B felony, and when he does not appear personally on the required date or voluntarily within thirty days thereafter.

Bail jumping in the first degree is a class [E] D felony.

§5. Subdivison two of Section 205.10 of the Penal Law is amended to read as follows:

2. Having been arrested for, charged with or convicted of a class C, class D or class E felony, he escapes from custody; or

§6. Section 205.15 Escape in the first degree

A person is guilty of escape in the first degree when:

1. Having been charged with or convicted of a felony, he escapes from a detention facility; or

2. Having been [adjudicated a youthful offender, which finding was substituted for the conviction of a felony, he escapes from a detention facility] arrested for, charged with or convicted of a class A or class B felony, he escapes from custody; or

3. Having been adjudicated a youthful offender, which finding was substituted for the conviction of a felony, he escapes from a detention facility.

Escape in the first degree is a class D felony.

§7. Subdivision five of section 60.05 of the Penal Law is amended to read as follows:

5. Certain class D felonies. Except as provided in subdivision six, (a) every person convicted of the class D felonies of attempt to commit assault in the first degree as defined in section 120.10, or assault in the second degree as defined in section 120.05, attempt to commit a class C felony as defined in section 230.30, must be sentenced in accordance with section 70.00 or 85.00[.], and (b) every person convicted of the class D felonies of bail jumping in the first degree as defined in section 215.57 or escape in the first degree as defined in section 205.15, must be sentenced in accordance with subdivisions one, two or three of section 70.00.

§8. Section 60.06 of the Penal Law is hereby renumbered to be section 60.07

§9. The Penal Law is amended by adding a new section 60.06 to read as follows:

§60.06 Authorized dispositions: bail jumping in the second degree· escape in the second degree

Except as provided in subdivision six of section 60.05, every person convicted of the class E felonies of bail jumping in the second degree as defined in section 215.56 and escape in the second degree as defined in section 205.10 must be sentenced in accordance with section 70.00 or 85.00.

§10 The Penal Law is amended by adding a new section 60.12 to read as follows:

§60.12 Authorized dispositions· bail jumping in the third degree: escape in the third degree

When a person is to be sentenced upon a conviction of the crimes of bail jumping in the third degree as defined in section 215.55 or escape in the third degree as defined in section 205.05, the court must sentence the defendant in accordance with the provisions of subdivision one of section 70.15

§11. Subdivision one of section 70.15 of the Penal Law, as last amended by chapter 175 of the Laws of 1981, is amended to read as follows:

1. Class A misdemeanor. A sentence of imprisonment for a class A misdemeanor shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed one year: provided, however, that a sentence of imprisonment imposed upon a conviction [to] to bail jumping in the third degree as defined in section 215.55 and escape in the third degree as defined in section 205.05, must be for a period of no less than one year, and a sentence of imprisonment imposed upon a conviction of criminal possession of a weapon in the fourth degree as defined in subdivision one of section 265.01 must be for a period of no less than one year when the conviction was the result of a plea of guilty entered in satisfaction of an indictment or any count thereof charging the defendant with the class D violent felony offense of criminal possession of a weapon in the third degree as defined in subdivision four of section 265.02, except that the court may impose any other sentence authorized by law upon a person who has not been previously convicted in the five years immediately preceding the commission of [the] any such [offense] offenses [for] of a felony or a class A misdemeanor defined in this chapter, if the court having regard to the nature and circumstances of the crimes and to the history and character of the defendant, is of the opinion that such sentence would be unduly harsh.

§12. The Penal Law is amended by adding a new subdivision 2-C of section 70.25 to read as follows:

2-C. When a person is convicted of bail jumping in the third degree as defined in section 215.55, bail jumping in the second degree as defined in section 215.56, bail jumping in the first degree as defined in section 215.57, escape in the third degree as defined in section 205.05, escape in the second degree as defined in section 205.10 or escape in the first degree as defined in section 205.15, and in accordance with this chapter, a sentence of imprisonment is imposed, it shall run consecutively with the sentence imposed on any charge pending at that time when such offenses were committed. Provided, however, that the court may, in the interest of justice, order a sentence to run concurrently in a situation where consecutive sentences are required by this subdivision if it finds mitigating circumstances that bear directly upon the manner in which the crime was committed. The defendant and the district attorney shall have an opportunity to present relevant information to assist the court in making this determination and the court may, in its discretion, conduct a hearing with respect to any issue bearing upon such determination. If the court determines that consecutive sentences shall not be ordered, it shall make a statement on the record of the facts and circumstances upon which such determination is based.

§13. This act shall take effect on the ninetieth day next succeeding the date on which it shall have become a law.

NEW YORK STATE LAW ENFORCEMENT COUNCIL

MEMORANDUM IN SUPPORT

TITLE

AN ACT to amend the criminal procedure law in relation to stays of judgment and bail pending appeal.

SUMMARY OF PROVISIONS

The bill, modified from last year to accommodate suggestions by the legislative leadership, provides that applications to the Appellate Division for stays of judgment and bail pending appeal be made to the presiding justices of the appellate divisions in their respective departments, who then may designate another justice to hear the application. In addition, it prohibits a post-sentence application where a pre-sentence application has been made, and authorizes the issuance of a stay only where there is a likelihood that the defendant will succeed on appeal. The bill also authorizes judges to require defendants who receive stays to remain in the jurisdiction; requires defendants to exercise due diligence to perfect their appeals to the Appellate Division; and requires defendants to perfect their appeals to the Court of Appeals, within 120 days.

STATEMENT IN SUPPORT

Under existing law, defendants convicted of first-degree rape, robbery, manslaughter, and burglary may remain free from any custodial restraints for months, and possibly years, while their appeals are "pending." To secure a stay of execution of judgment and bail pending appeal, a defendant can select a judge before whom he wants to make a bail application. The current law thus permits convicted felons to "judge shop" on bail pending appeal applications. Obviously defendants seek out the judges with the most liberal philosophies of bail. In the Appellate Division, First Department, for example, the result is that the vast majority of such applications are made before only one or two justices.

Moreover, although the present law lists a number of factors to be considered in evaluating a stay application, no clear standard of review is enumerated. Under current law, a judge can stay the execution of a judgment and release the defendant on bail without any concrete showing being made that a reversal or significant modification of the judgment of conviction is likely. A threshold showing of likelihood of success on appeal should be required.

In addition, under current law, once a defendant is out on bail pending appeal, he is under no obligation to report to a court during the entire period his appeal is pending. Generally, no restrictions are placed on the defendant's freedom to travel, and it is not uncommon for defendants to leave the state while they are free on bail.

There is no requirement in the current law that a defendant, who is free on bail pending appeal, exercise due diligence to perfect the appeal. Appellate courts can, and frequently do, extend the time to perfect appeals without such a showing.

The continued existence of these practices and procedures engenders deep bitterness and cynicism on the part of crime victims, police officers, and prosecutors who watch convicted felons avoid terms of imprisonment while their attorneys dawdle on their appeals. The defendants who lose their appeals (which occurs in the vast majority of cases) often have greater difficulty confronting their prison terms because of the great lapse of time. Some secure meaningful employment; some go back to school; some get their lives in order. For these defendants, the extra taste of freedom makes the belated imposition of the prison sentence a bitter pill to swallow. A small but significant percentage of these defendants ultimately abscond, refusing to surrender. Many others appear for surrender but argue for resentence, based on the new circumstances of their lives. For most defendants out on bail pending appeal, their ultimate obligation to "face the music" becomes far removed and disassociated from the crime of which they were convicted.

Some defendants who secure stays of judgment and bail pending appeal, of course, prevail on their appeals. It is also evident that some defendants have legitimate claims of error warranting the issuance of stays and bail. The attached bill is designed to limit the issuance of stays to these situations, and to close other gaps in the existing law. Defendants would not be able to pick their judges for these bail applications; the judges would be assigned by the presiding justices of the appellate divisions. When a defendant is granted bail pending appeal, he can be required to report in on a regular basis and can be precluded from leaving the state.

Moreover, defendants will not be able to dawdle on their appeals, since the proposed bill requires a showing of due diligence to secure extensions of time to perfect their appeals to the Appellate Division beyond the 120 days provided.

FISCAL IMPLICATIONS — NONE

§ 460.50 Stay of judgment pending appeal to intermediate appellate court.

1. Upon application of a defendant who has taken an appeal to an intermediate appellate court from a judgment or from a sentence of a criminal court, a judge designated in subdivision two may issue an order both (a) staying or suspending the execution of the judgment pending the determination of the appeal, and (b) either releasing the defendant on his own recognizance or fixing bail pursuant to the provisions of article five hundred thirty. That phase of the order staying or suspending execution of the judgment does not become effective unless and until the defendant is released, either on his own recognizance or upon the posting of bail.

2. An order as prescribed in subdivision one may be issued by the following judges in the indicated situations:

(a) If the appeal is to the appellate division from a judgment or a sentence of either the supreme court or the New York City criminal court, such order may be issued by (i) a justice of the appellate division of the department in which the judgment was entered, or (ii) a justice of the supreme court of the judicial district embracing the county in which the judgment was entered;

(b) If the appeal is to the appellate division from a judgment or a sentence of a county court, such order may be issued by (i) a justice of such

EXPLANATION: Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.

appellate division, or (ii) a justice of the supreme court of the judicial district embracing the county in which the judgment was entered, or (iii) a judge of such county court;

(c) If the appeal is to an appellate term of the supreme court from a judgment or sentence of the New York City criminal court, such order may be issued by a justice of the supreme court of the judicial district embracing the county in which the judgment was entered;

(d) With respect to appeals to county courts from judgments or sentences of local criminal courts, and with respect to appeals to appellate terms of the supreme court from judgments or sentences of any criminal courts located outside of New York City, the judges who may issue such orders in any particular situation are determined by rules of the appellate division of the department embracing the appellate court to which the appeal has been taken.

3. An application for an order specified in this section must be made upon reasonable notice to the people, and the people must be accorded adequate opportunity to appear in opposition thereto. Not more than one application may be made pursuant to this section. With respect to applications to the Appellate Division, such applications must be made to the presiding justice of the appellate division for the department in which the appeal is to be taken by submission thereof, either in writing or orally to the clerk of the appellate division. The presiding justice must then designate a justice of the appellate division to determine the application. The clerk must then notify the people of the application and must inform both parties of

such designation. An application may not be brought under this section if one has previously been made pursuant to CPL § 530.45.

4. An application under this section may be granted only upon a showing by the defendant that there is a likelihood the appeal will result in a reversal of the judgment of conviction or a modification of the judgment which reduces the defendant's sentence.

[4.] 5. Notwithstanding the provisions of subdivision one, if within one hundred twenty days after the issuance of such an order the appeal has not been brought to argument in or submitted to the intermediate appellate court, the operation of such order terminates and the defendant must surrender himself to the criminal court in which the judgment was entered in order that execution of the judgment be commenced or resumed; except that this subdivision does not apply where the intermediate appellate court has:

(a) Determined that the defendant has exercised due diligence, to perfect the appeal, and

[a] (b) Extended the time for argument or submission of the appeal to a date beyond the specified period of one hundred twenty days, and

[b] (c) Upon the application of the defendant, expressly ordered that the operation of the order continue until the date of the determination of the appeal or some other designated future date or occurrence.

[5.] 6. Where the defendant is at liberty during the pendency of an appeal as a result of an order issued pursuant to this section, the intermediate appellate court, upon affirmance of the judgment, must by appropriate certificate remit the case to the criminal court in which such judgment was entered. The criminal court must, upon at least two days

CONTINUED

1 OF 2

notice to the defendant, his surety and his attorney, promptly direct the defendant to surrender himself to the criminal court in order that execution of the judgment be commenced or resumed, and if necessary the criminal court may issue a bench warrant to secure his appearance.

[6.] 7. Upon application of a defendant who has been granted a certificate granting leave to appeal pursuant to section 460.15 of this chapter, and in accordance with the procedures set forth in subdivisions three, four and five of this section, the intermediate appellate court may issue an order both (a) staying or suspending the execution of the judgment pending the determination of the appeal, and (b) either releasing the defendant on his own recognizance or fixing bail pursuant to the provisions of article five hundred thirty. That phase of the order staying or suspending execution of the judgment does not become effective unless and until the defendant is released, either on his own recognizance or upon the posting of bail.

§ 460.60 Stay of judgment pending appeal to court of appeals from intermediate appellate court.

1. (a) A judge who, pursuant to section 460.20 of this chapter, has received an application for a certificate granting a defendant leave to appeal to the court of appeals from an order of an intermediate appellate court affirming or modifying a judgment including a sentence of imprisonment, a sentence of imprisonment, or an order appealed pursuant to section [450.15]

460.15 of this chapter, of a criminal court, may, upon application of such defendant-appellant issue an order both (i) staying or suspending the execution of the judgment pending the determination of the application for leave to appeal, and if that application is granted, staying or suspending the execution of the judgment pending the determination of the appeal, and (ii) either releasing the defendant on his own recognizance or continuing bail as previously determined or fixing bail pursuant to the provisions of article five hundred thirty. Such an order is effective immediately and that phase of the order staying or suspending execution of the judgment does not become effective unless and until the defendant is released, either on his own recognizance or upon the posting of bail.

(b) If the application for leave to appeal is denied, the stay of suspension pending the application automatically terminates upon the signing of the certificate denying leave. Upon such termination, the certificate denying leave must be sent to the criminal court in which the original judgment was entered, and the latter must proceed in the manner provided in subdivision five of section 460.50 of this chapter.

2. An application pursuant to subdivision one must be made upon reasonable notice to the people, and the people must be accorded adequate opportunity to appear in opposition thereto. Such an application may be made immediately after the entry of the order sought to be appealed or at any subsequent time during the pendency of the appeal. Not more than one application may be made pursuant to this section.

3. Notwithstanding the provisions of subdivision one, if [within one hundred twenty days after the issuance of a certificate granting leave to

appeal, the appeal or prospective appeal has not been brought to argument in or submitted to the court of appeals, the operation of an order issued pursuant to subdivision one of this section terminates and the defendant must surrender himself to the criminal court in which the original judgment was entered in order that execution of such judgment be commenced or resumed; except that this subdivision does not apply where the court of appeals has (a) extended the time for argument or submission of the appeal to a date beyond the specified period of one hundred twenty days and (b) upon application of the defendant expressly ordered that the operation of such order continue until the date of the determination of the appeal or some other designated future date or occurrence.] the defendant fails to perfect his appeal within one hundred twenty days after the issuance of a certificate granting leave to appeal, the operation of such order terminates and the defendant must surrender himself to the criminal court in which the judgment was entered in order that execution of the judgment be commenced or resumed.

4. Where the defendant is at liberty during the pendency of an appeal as a result of an order issued pursuant to this section, the court of appeals upon affirmance of the judgment, must, by appropriate certificate, remit the case to the criminal court in which the judgment was entered, and the latter must proceed in the manner provided in subdivision [five] six of section 460.50 of this chapter.

§530.45 Order of recognizance or bail; after conviction and before sentence

1. When the defendant is at liberty in the course of a criminal action as a result of a prior order of recognizance or bail and the court revokes such

order and then either fixes no bail or fixes bail in a greater amount or in a more burdensome form than was previously fixed and remands or commits defendant to the custody of the sheriff, a judge designated in subdivision two, upon application of the defendant following conviction of an offense other than a class A felony and before sentencing, may issue a securing order and either release defendant on his own recognizance, or fix bail, or fix bail in a lesser amount or in a less burdensome form than fixed by the court in which the conviction was entered.

2. An order as prescribed in subdivision one may be issued by the following judges in the indicated situations:

(a) If the criminal action was pending in supreme court or county court, such order may be issued by a justice of the appellate division of the department in which the conviction was entered.

(b) If the criminal action was pending in a local criminal court, such order may be issued by a judge of a superior court holding a term thereof in the county in which the conviction was entered.

3. An application for an order specified in this section must be made upon reasonable notice to the people, and the people must be accorded adequate opportunity to appear in opposition thereto. With respect to applications to the Appellate Division, such applications must be made to the presiding justice of the appellate division for the department in which the action is pending by submission thereof, either in writing or orally to the clerk of the appellate division. The presiding justice must then designate a justice of the appellate division to determine the application. The clerk must then notify the people of the application and must inform both parties of such designation. Not more than one application may be made pursuant to

this section. Defendant must allege in his application that he intends to take an appeal to an intermediate appellate court immediately after sentence is pronounced. An application under this section may be granted only upon a showing by the defendant that there is a likelihood the appeal will result in a reversal of the judgment of conviction or a modification of the judgment which reduces the defendant's sentence.

4. Notwithstanding the provisions of subdivision one, if within thirty days after sentence the defendant has not taken a appeal to an intermediate appellate court from the judgment or sentence, the operation of such order terminates and the defendant must surrender himself to the criminal court in which the judgment was entered in order that execution of the judgment be commenced.

5. Notwithstanding the provisions of subdivision one, if within one hundred twenty days after the filing of the notice of appeal such appeal has not been brought to argument in or submitted to the intermediate appellate court, the operation of such order terminates and the defendant must surrender himself to the criminal court in which the judgment was entered in order that execution of the judgment be commenced or resumed; except that this subdivision does not apply where the intermediate appellate court has (a) determined that the defendant has exercised due diligence to perfect the appeal, and [a] (b) extended the time for argument or submission of the appeal to a date beyond the specified period of one hundred twenty days, and [b] (c) upon application of the defendant, expressly ordered that the operation of the order continue until the date of the determination of the appeal or some other designated future date or occurrence.

6. Where the defendant is at liberty during the pendency of an appeal as a result of an order issued pursuant to this section, the intermediate appellate court, upon affirmance of the judgment, must by appropriate certificate remit the case to the criminal court in which such judgment was entered. The criminal court must, upon at least two days notice to the defendant, his surety and his attorney, promptly direct the defendant to surrender himself to the criminal court in order that execution of the judgment be commenced or resumed, and if necessary the criminal court may issue a bench warrant to secure his appearance.

§ 530.50 Order of recognizance or bail; during pendency of appeal.

A judge who is otherwise authorized pursuant to section 460.50 or section 460.60 to issue an order of recognizance or bail pending the determination of an appeal, may do so unless the defendant received a class A felony sentance. A judge issuing an order of recognizance or bail may require, as conditions thereof, that the defendant shall physically appear before the sentencing court when notified to do so and that the defendant shall not leave the state during the pendency of the appeal.

EXECUTIVE CHAMBER
MARIO M. CUOMO, GOVERNOR

Press Office
518-474-8418
212-587-2126

FOR RELEASE:
IMMEDIATE, THURSDAY
JULY 28, 1983

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

JULY 28, 1983

MEMORANDUM filed with Assembly Bill Number 8077, entitled:

"AN ACT creating a state committee on sentencing guidelines and making an appropriation therefor"

#62
(Chapter #711)

A P P R O V E D

The bill establishes a State Sentencing Guidelines Committee to develop guidelines and recommendations for the implementation of a system of determinate sentencing.

The Executive Advisory Commission on Sentencing and the Executive Advisory Commission on the Administration of Justice each concluded that inconsistency and unjustified disparity in sentencing undermines the credibility and effectiveness of the criminal justice system. The concept of fairness in sentencing depends, in large measure, upon the imposition of similar penalties upon similar offenders who commit similar crimes.

To remedy the problem of disparate sentences the Commissions recommended the adoption of a system of determinate sentencing. Such a system would be based upon the concept that a court rather than the Board of Parole should set the actual period of confinement. It would ensure that both the defendant and the public will know at time of sentence the nature and length of the sentence.

The bill provides the mechanism by which the State can take the first major step toward the adoption of determinate sentencing.

Pursuant to the guidelines, judges would be authorized to enhance or reduce the guideline sentence in the presence of specified aggravating or mitigating factors.

In addition to formulating mandatory sentencing guidelines the Committee will be responsible for:

- recommending all necessary and appropriate amendments of the law for implementing the guidelines;
- establishing a mechanism for time allowances for good behavior for incarcerated inmates; and
- determining the impact of the guidelines on judicial, prosecution and defense resources, prison population, jail population, probation and parole services.

The bill directs the Sentencing Guidelines Committee to transmit the guidelines and recommend statutory amendments to the Governor and the Legislature on January 15, 1985. The guidelines shall have force and effect upon enactment into law.

The bill contains a $500,000 appropriation to fund the Committee.

The bill is approved.

STATE OF NEW YORK

S. 6811 A. 8077

1983-1984 Regular Sessions

SENATE—ASSEMBLY

June 15, 1983

IN SENATE -- Introduced by Sens. Stafford, Barclay, Babbush, Bruno, Connor, Farley, Floss, Gold, Goodman, Halperin, Johnson, Knorr, Nolan, Padavan, Present, Rolison, Schermerhorn, Smith, Trunzo, Volker, Weinstein -- (at request of the Governor) -- read twice and ordered printed, and when printed to be committed to the Committee on Finance

IN ASSEMBLY -- Introduced by COMMITTEE ON RULES -- (at request of M. of A. M. H. Miller, Waldon, Weprin, W. J. Ryan, Halpin, Seminerio, Gantt, Tonko, Patton, Barraga, Bennett, Bianchi, Branca, Brodsky, Catapano, Conners, Duane, Dugan, Engel, Feldman, Goldstein, Griffith, Harenberg, Harrison, Hevesi, Hochbrueckner, Jacobs, Lane, Lipschutz, Marchiselli, McCann, McPhillips, Murtaugh, Nadler, Newburger, Orazio, Parment, Pillittere, Pordum, Proud, Straniere, Vitaliano, Yevoli, Weinstein) -- (at request of the Governor) -- read once and referred to the Committee on Codes

AN ACT creating a state committee on sentencing guidelines and making an appropriation therefor

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

Section 1. Committee constituted. *A state committee on sentencing guidelines is hereby created.* 1. The committee shall consist of:

a. Two judges of courts of criminal jurisdiction appointed by the chief judge of the court of appeals, one of whom shall be appointed for a term of two years and the second of whom shall be appointed for a term of four years.

b. One member of the bar of the state experienced in the defense of criminal cases appointed by the governor to be appointed for a term of three years.

c. One district attorney appointed by the governor to be appointed for a term of three years.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD11728-05-3

d. Two members of the bar of the state appointed by the governor for a term of four years.

e. One person with a background in probation services who is not a member of the bar of the state appointed by the governor for a term of two years.

f. One person with a background in sentencing policy and quantitative research appointed by the governor for a term of four years.

g. Six persons, each of whom shall be a member of the bar of the state, two of whom shall be appointed by the temporary president of the senate for a term of four years and three years respectively, two by the speaker of the assembly for a term of four years and three years respectively and one each by the minority leader of the senate and minority leader of the assembly for terms of three years.

The governor shall designate one appointee to serve as chairman and the temporary president of the senate and the speaker of the assembly shall each designate one appointee to serve as associate chairmen of the committee.

No public officer shall be deemed to have vacated or forfeited his office by reason of membership on the committee. No senator or member of the assembly shall be eligible for membership on the committee.

2. Each member shall continue to serve during the term of his appointment as long as the appointee occupies the position which served as the basis for the appointment, unless relieved of responsibility by the appointing official. At the request of the appointing official, each member shall continue in office until his successor is duly appointed. A member shall be eligible for reappointment, and appointment may be made to fill an unexpired term.

3. Vacancies in the committee shall be filled for the unexpired term in the same manner as original appointment.

4. The members of the committee shall receive no compensation for their services, but shall be allowed actual and necessary expenses incurred in the performance of their duties.

§ 2. Principles of sentencing. The committee on sentencing guidelines shall premise the guidelines upon the following principles:

1. Similar crimes committed under similar circumstances by similar offenders should receive similar sanctions. The severity of criminal sanctions should be directly related to the seriousness of the offense and the offender's prior criminal record.

2. The sanction imposed shall be a measure consistent with the principles of sentencing set forth herein.

3. Sanctions of incarceration shall be established when:

a. confinement is appropriate to protect society by restraining a defendant who has a history of conviction for serious criminal conduct;

b. confinement is appropriate to justly punish a defendant or to avoid deprecating the seriousness of the offense;

c. confinement is appropriate to provide an effective deterrent to others likely to commit similar offenses; or

d. measures less restrictive than confinement have been applied frequently or recently to a defendant and have been unsuccessful.

4. In formulating sentencing guidelines the committee shall consider availability of probation resources, resources of the division of parole, and resources of any other alternative to detention or incarceration as well as prison resources and local jail resources.

§ 3. Powers and duties of committee. 1. The committee shall transmit

their implementation to the governor and legislature on January fifteenth, nineteen hundred eighty-five. Such guidelines shall have no force and effect unless enacted into law. The guidelines shall prescribe non-incarcerative and incarcerative sentences which shall be imposed upon conviction of a crime.

a. The guidelines shall conform to the principles of sentencing established by this act.

b. Sentences of incarceration, when required by the terms of the guidelines so established, shall be definite sentences. The length of incarceration to be served by a defendant under a definite sentence shall be the period of time imposed by the sentencing court, less good time.

c. Sentencing guidelines shall specify the non-incarcerative sentence or incarcerative sentencing range which is presumptively appropriate for each offense, based upon the seriousness of the offense and the prior criminal history of the offender. The guidelines shall further provide for specified aggravating and mitigating circumstances which may be taken into account by a sentencing court and a procedural mechanism for determining sentences for purposes of deviating from the presumptively appropriate sentences to the extent authorized by the guidelines.

2. The committee shall monitor the operation of the sentencing guidelines and if appropriate recommend modification of the guidelines. The committee shall transmit a report to the governor and the legislature every two years on the operation of the guidelines and recommend modification, if any, of the guidelines.

3. Duties of the committee. The committee shall recommend all necessary or appropriate amendments to the penal law, the criminal procedure law, the correction law and the executive law necessary for implementing the guidelines which shall include:

a. the repeal of all provisions of law inconsistent with this act or the guidelines established by the committee, and recommending conforming amendments where appropriate;

b. the redefinition of any crime if the current definition needs further articulation to conform to the principles of this act or the guidelines recommended by the committee;

c. the establishment of a mechanism for time allowances for good behavior for incarcerated inmates;

d. the establishment of a mechanism for the division of parole to compute and apply time allowances for good behavior;

e. the provision of a statement of the estimated effect of the guidelines on judicial, prosecution and defense resources, prison population, jail population, probation and parole services;

f. the establishment of a mechanism by which a court may review the sufficiency of evidence to support charges contained within an accusatory instrument; and

g. the establishment of a procedure for appellate review by either party to ensure proper operation of the guidelines.

4. Miscellaneous powers. With respect to the performance of its functions, duties and powers the committee may:

a. maintain offices, hold meetings and function at any place within the state as it may deem necessary;

b. establish policies for the operation of the committee as it may deem necessary;

c. utilize, with their consent, the services, equipment, personnel, information and facilities of federal, state, local and private agencies and instrumentalities with or without reimbursement therefor;

d. enter into and carry out contracts and other transactions with any public agency or with any person, firm, association, corporation, educational institution, or non-profit organization;

e. request whatever information, data and reports from any state agency or judicial officer as the committee may from time to time require and as may be provided consistent with other law;

f. request the attendance and testimony of witnesses and the production of any evidence that relates to a matter on which the committee is empowered to act under this act;

g. request and receive from any department, division, board, bureau, commission or other agency of the state, or of any political subdivision thereof, all assistance, information and data necessary to enable the committee properly to carry out its functions, powers and duties hereunder; and

h. perform whatever other functions are necessary to carry out the purposes of this act.

§ 4. Duties of the chairman and associate chairmen. 1. The chairman shall preside at meetings of the committee;

2. The chairman and associate chairmen shall:

a. direct the preparation of requests for appropriation for the committee and the use of funds made available to the committee; and

b. employ and at pleasure remove an executive director, a counsel and other assistants as they may deem necessary, prescribe their duties and fix their compensation within the amounts appropriated and available therefor.

§ 5. Meetings. 1. The committee shall meet at least monthly.

2. A majority of the membership then serving shall constitute a quorum for the conduct of business.

3. The committee shall exercise its powers and fulfill its duties by the vote of a majority of the members.

§ 6. Appropriation. The sum of five hundred thousand dollars ($500,000), or so much thereof as may be necessary, is hereby appropriated out of any moneys in the state treasury in the general fund to the credit of the state purposes account, not otherwise appropriated, and made immediately available to the state committee on sentencing guidelines for its expenses, including personal service, in carrying out the provisions of this act. Such moneys shall be payable on the audit and warrant of the state comptroller on vouchers certified or approved by the chairman of the committee on sentencing guidelines or by an officer or employee of the committee designated by the chairman.

§ 7. Effective date. This act shall take effect on the sixtieth day after it shall have become a law.

Mr. ARCARA. I will tell you one thing, if I may comment just briefly. It was very frustrating for me, Senator. We, the council, went to Albany on a number of occasions. We attempted to persuade the codes committee——

Senator D'AMATO. You met the assembly codes committee?

Mr. ARCARA. Yes.

Senator D'AMATO. Mr. Miller.

Mr. ARCARA. Mr. Miller.

Senator D'AMATO. Unfortunately, Dominick DiCarlo, who used to be able to keep Miller under some check, left the assembly and is now assistant secretary of state.

I don't know. I think possibly you could have obtained some legislation through his persuasiveness and eloquence. He certainly did much to enhance the criminal justice system in New York, but the same name keeps cropping up. It has for a decade now—Miller and the codes.

Mr. ARCARA. It is a very powerful position, and it is a real education for me because the issues that we were dealing with were really the nuts-and-bolts issues. We were talking about the more controversial-type issues. We were talking about those issues that we as prosecutors need in order to make some headway in this most serious problem this country is faced with today, and that is crime on the street, and to restore some public confidence in the criminal justice system today.

I am sure, Senator, you are out on the streets as much as I am, and it is very disheartening to talk to people.

Senator D'AMATO. They have given up.

Mr. ARCARA. They really have.

I sit here, like on the question of bail, not able to make an argument on why a particular person presents a danger to the community, knowing full well that that person is going to be back on the street on bail and is going to violate a person out there in some form or another.

It is very frustrating for me not to be able to have the mechanisms. If I make a mistake or if I am not as forceful in the prosecution of cases, then I would like to be held accountable for that, but it is very difficult to be held accountable and feel inadequate when the machinery that is available to us is not there.

I use an example that I thought up one evening in my office. It is like a police officer was using a .32-caliber handgun, and he was determined that a .38 was much more effective. You can rest assured that .38 will be in the hands of that police officer a more effective deterrant and more effective handgun in performing his duties. That is what we are talking about here. We need some .38's, and we are not getting them. We are using a lot of .32's out there, and they are not doing the job.

Thank you. I am sorry I dominated this discussion.

Senator D'AMATO. No, no. That is fine. It blended in with what the judge had to say.

What you did is really fortify some positions that I think our staff and I may have had. That is why I would like to see some of those recommendations.

I think we do have to do something about the revolving door system, about the person who is out there on bail committing more and more crimes. It is true in the narcotics area as well.

[The prepared statement of Mr. Arcara follows:]

STATEMENT OF RICHARD J. ARCARA, DISTRICT ATTORNEY, ERIE COUNTY

Two of the most serious and regularly recurring problems with the Criminal Procedure Law of New York State which the prosecutors in my office and all New York prosecutors face involve the current bail and sentencing provisions. In my opinion, these present laws are woefully inadequate. I firmly believe that legislators and the general public are not sufficiently sensitive or adequately informed about the deficiencies in the laws which ultimately affect each and every one of us. As a result, the loss of faith in the system of justice and the tragedies suffered by the citizens of this community which have occurred and are continuing to occur are monumental.

Nothing really can erase the trauma of being the victim of a serious crime or losing a loved one to a crime statistic. That is why I am very pleased with this opportunity to address this committee. I am anxious to have this role in calling to your attention and sharing with you some information which you may not know, and which presents a strong case for amending our present laws on bail and sentencing.

The problems that I will be addressing are not new nor are they unrecognizable. Simply stated, they just have not been given the attention they deserve. There are several Bills at this time in the Codes Committees of the New York State Senate, such as Bill No. 650, and in the Assembly, such as Bill Nos. 1462 and 2689 that would vastly improve the effectiveness of the criminal justice system and the safety of our community. I have endorsed a number of them and have contacted many of our State Senators and Assemblymen asking them for their commitments to support those Bills. One of my main concerns is that the Bills may die in Committee. We cannot afford to let this happen.

Let me now briefly try to highlight for you some of my reasons and some of the examples which are supportive for my positions on changing New York State's bail and sentencing provisions.

In Erie County there have been numerous cases where defendants with lengthy records for committing violent crimes have been released on minimal bail over my office's objections, and who have victimized our community and who have committed other violent crimes before their pending charges were even resolved. In part, those defendants were free because the present bail statute of this State is inadequate. Our present law does not allow a judge to take into account the danger posed to society by a particular defendant when bail is being set. It only requires the judge to fix bail in an amount sufficient to insure that the defendant appears in court on all return dates. In my opinion, if the provision for preventive detention was expanded to include the situation where a defendant poses a danger to society, what I am about to call to your attention from actual cases would not have occurred.

These recent cases involve crimes committed by defendants while out on bail both before conviction and after conviction pending appeal. For example, one defendant was arrested and charged with sex related crimes. The defendant's history included similar instances. My office opposed low bail and recommended higher bail, but the defendant was released on an amount I considered to be inappropriately low. It appears that the judge in employing the criteria set forth in CPL Section 510.30(2)(a) felt that amount to be sufficient to secure the defendant's appearance. Technically, this was not a violation of the operable statute, for according to Commentator Richard G. Denzer, Criminal Procedure Law Section 510.30(2)(a), enacted in 1970, "honors a traditional and long accepted doctrine that securing the defendant's attendance is the only purpose of fixing bail." Unfortunately, while out on bail the defendant was charged in a multi-count indictment involving another series of sex related crimes.

Another example which comes to mind involved a defendant found guilty by a jury in an aggravated sex assault case. My office, following conviction, vigorously argued, for the imposition of a maximum sentence. We pointed out that the viciousness of the attack and the prior extensive criminal history merited nothing less than the maximum sentence allowed by law. Despite our recommendation, the defendant received a substantially lighter sentence. Compounding this injustice, was that the defendant was released over our objection, on a minimum bail pending

appeal. Prior to the resolving of defendant's appeal, the defendant was charged with and indicted for a homicide.

While these two examples may be dramatic, it is sad to say that they occur more often than they should. I sincerely believe that if significant changes were adopted in both the pre-trial bail and bail pending appeal laws, the incidents of such horrible and notorious failures of the criminal justice system would be greatly reduced.

As the Committee is well aware, the extremely comprehensive Federal Bail Reform Act of 1983 is currently awaiting congressional action as part of the Comprehensive Crime Control Act. Three bills to amend the New York Criminal Procedure Law in the pre-trial bail area are in the Codes Committees of the New York State Senate and Assembly. For the record, I have copies available of the proposed New York legislation. It may be interesting to you to note that the present New York bail statute is derived chiefly from existing 1966 federal standards for determining the amount or terms of bail or release necessary to insure the presence of the defendant. Therefore, since congress now has taken the lead in recognizing the importance of preventive detention to the safety of society, it seems only appropriate that New York, as it has in the past in this area, follow suit and adopt changes consistent with the proposed changes in the federal law.

As District Attorney of Erie County, I am firmly in favor of any proposed legislation that would permit the arraigning judge to consider, in conjunction with the factors normally taken into account, three additional factors. Specifically these are (1) the violent or aggravated nature of the charged offense; (2) whether the person was already on some sort of release at the time of the commission of the offense; and (3) the immediate danger to the community by the person's release.

Indeed, within the existing guidelines, the Assistant District Attorneys of my office have been recommending either detention or high bail in an attempt to insure that defendants who can be reasonably identified as posing a serious risk to the safety of others will not be released into the community. Unfortunately, however, the judges of New York State are strait jacketed to a certain extent by the current bail statute. The passage of the pending state legislation which I mentioned would give our judges a legitimate basis for detaining pre-trial those individuals whose release would jeopardize community safety.

Adoption of legislation that permits consideration of the dangerousness factor would render the monetary figure at which bail is set a truer measure of the court's judgment as to the kind of control needed over those individuals who can be released without serious risk of community harm.

As the May, 1983 Report of the Senate Judiciary Committee stated:

"The decision to provide for pre-trial detention is in no way a derogation of the importance of the defendant's interest in remaining at liberty prior to trial. However, not only the interests of the defendant, but also important societal interests are at issue in the pre-trial release decision. Where there is a strong probability that the person will commit additional crimes if released, the need to protect the community becomes sufficiently compelling that detention is, on balance, appropriate.

* * * * * * *

"In sum, the committee has concluded that pre-trial detention is a necessary and constitutional mechanism for incapacitating, pending trial, a reasonably identifiable group of defendants who would pose a serious risk to the safety of others if released."

The Erie County District Attorney's Office joins with those groups that support the concept of permitting an assessment of a defendant's dangerousness in the pre-trial release decision. Like the American Bar Association, the National Conference of Commissioners on Uniform State Laws, the National District Attorney's Association, and the National Association of Pre-Trial Service Agencies, the Erie County District Attorney's Office recognizes that defendant dangerousness must be a consideration in setting conditions of pre-trial release and may also serve as a basis for pre-trial detention.

On the question of the failures in the existing New York statute governing bail pending appeal, I wish to emphasize that at present, a defendant convicted of any crime but an "A" felony may make an application for bail to either a Supreme Court Justice or any Justice of the Appellate Division sitting for the department in which the judgment was entered. Significantly, this application as a practical matter is seldom made by defense counsel before the Justice who presided over the trial and would be in the best position to determine the merits of any potential appeal at this stage. This application, though it must be upon notice to the District Attorney, requires no showing by the defendant of likelihood that he will prevail upon appeal nor does any order issued by a justice contain any conditions with re-

spect to due diligence on the part of the defendant to perfect his appeal. The only outer boundary of the stay order is, as I noted previously, that is terminates if the appeal has not been brought to argument within 120 days. Experience teaches, however, that appellate courts routinely grant defendants' applications for extensions of orders granting bail pending appeal and thus defendants convicted of First Degree Rape, Robbery, Manslaughter, and Burglary often, through either neglect or deliberate delay, remain free and out of prison for many months or even years.

I submit that it is precisely because defense attorneys are not forced by statute to comply with strict requirements for perfecting the appeal that defendants, convicted of violent crimes are routinely set free to endanger the community after sentence imposition. As District Attorney of Erie County, it is my position, and one that is shared by the New York State Law Enforcement Council, that the bail pending appeal statute must be overhauled and strengthened so as to prevent convicted felons with abominable records from remaining free to victimize innocent citizens when they should be in jail.

The New York State Law Enforcement Council which includes the New York State District Attorney's Association has proposed significant reforms to the bail pending appeal statute. For example, as it presently stands, to secure a stay of execution of judgment and bail pending appeal, a defendant can select the lower court or appellate court judge before whom he wants to make a bail application. Thus, bail pending appeal suffers from the most severe form of judge shopping. The Council notes that in the Appellate Division, First Department, the result is that the vast majority of such applications are made before only one or two justices—those with the most liberal philosophies of bail. Similarly, my office has experienced the same phenomenon with defense attorneys regularly seeking out defense oriented judges with liberal bail positions. New legislation would require the presiding justices of the appellate divisions to designate specific appellate judges in their departments to hear all applications for a certain period of time, thus eliminating the vice of judge shopping.

Although the present law lists a number of factors to be considered in evaluating a stay application, there is not clear standard of review; indeed, one of these defense-oriented judges can stay the execution of a judgment and release guilty defendant on bail without requiring any showing of the likelihood of his success on appeal. Interestingly enough, the vast majority of defendants who are released on bail pending appeal do not prevail in the appellate court. Thus, they are eventually ordered to surrender to serve their sentences once their convictions have been affirmed. Very often, we have a very difficult time in executing these surrender orders upon defendants who have been legally avoiding serving their sentences for many months or even years. In some unfortunate cases, these defendants even abscond and leave the jurisdiction, thus avoiding the sentence entirely.

Requiring a defendant to show that there has been error committed at his trial which will result in his reversal on appeal will not in any way impede the defendant's constitutional right to appeal the judgment of conviction. What it will mean, however, is that these convicted felons, many of whom have been found to have engaged in dangerous and anti-social acts, will be in jail while their attorneys perfect their perfunctory appeals which the hearing judge has found not to contain any meritorious issue. That is as it should be.

Currently, there is no requirement in the law that defendants free on bail pending appeal exercise any due diligence in perfecting their appeals. The only outer limit is the 120 days which is uniformly and easily extended by the court upon motion by defense counsel. The proposed legislation would require defendants to exercise due diligence to perfect their appeals. Moreover, it would place upon defendants certain restrictions in their activities—for example, prohibiting them from traveling out of this state unless by court order and to report to the court periodically.

Admittedly, these proposed legislative changes will not cure all of the many problems existing in this area. However, they would go far in putting the brakes on a run-away vehicle. It is too late for all those innocent victims who were terrorized by convicted felons out on bail pending appeal. However, we can do something about this outrageous circumstance in the future. These proposed amendments unfortunately, were not acted upon by the last session of the New York legislature. We all must be vigilant in pushing for the passage of this type of legislation.

On a positive note, however, the New York State Legislature and Governor Cuomo have finally taken one step in the right direction when the Governor signed on June 10, legislation which altered the bail jumping statute. The new laws make it a class "E" felony punishable by up to four years in prison for a defendant to jump bail which has been granted on a pending felony charge. In addition, when a

defendant jumps bail when his pending charge is a class "A" or "B" felony, he can be convicted of class "D" felony bail jumping, subjecting him to up to seven years in prison. Similarly, other new legislation which was concurrently passed provides that a sentence for bail jumping shall run consecutively with the sentence imposed on any charge pending at that time when such offense was committed. Only in the discretion of the court after hearing both defense and the prosecution at a formal proceeding shall such sentences be ordered to run concurrently. Unfortunately, however, the United States Senate Judiciary Committee noted in its report that statistics show that defendants who jump bail are not the same defendants who commit crimes while on release. However, I do feel that this is a first step in the right direction which must be supplemented by major revisions in the preventive detention and the bail pending appeal areas.

To turn to another equally importance issue, sentencing is a subject about which the community can be justifiably outraged when a trial court judge imposes a lenient sentence upon a violent individual whom a jury has found guilty of a felony. At present in New York State, the only time an appellate court has any jurisdiction with respect to a sentence is in the area of reducing a sentence as excessive on the ground that it represented an abuse of the trial court's discretion. Prosecutors are never permitted the same right or luxury to challenge the trial court's abuse of discretion in the other direction.

However, on June 28, 1983, Governor Cuomo signed into law an act which is the first step in righting this essential inequity. The State Sentencing Guidelines Committee, created by the new law, is to recommend to the governor and legislature on January 15, 1985 statutory amendments to the Penal Law and Criminal Procedure Law. Therefore, although we are more than a year away from seeing in New York State a system of definite sentences, perhaps with the concomitant abolition of the parole board as recommended by the Law Enforcement Council, and the right of prosecutors to appeal overly lenient sentences, this establishment of the Sentencing Guidelines Committee is nevertheless significant. The Committee is to be guided by principles which I endorse, such as similar crimes committed under similar circumstances by similar offenders should receive similar sanctions. The severity of criminal sanctions should be directly related to the seriousness of the offense and the offender's prior criminal record.

In suggesting legislation, the Committee is to operate on the principle that sentences of incarceration shall be definite sentences. The length of actual incarceration to be served by a defendant under a definite sentence shall be the period of time imposed by the sentencing court, less good time. Thus, the parole board's discretion to release an offender after having served merely sixty days of a one year definite sentence would be eliminated under the legislation to be recommended by the committee.

We had this very situation in Erie County recently where a defendant was found guilty of victimizing a senior citizen and a handicapped person by swindling them out of thousands of dollars. The defendant received a one-year definite sentence. As part of the sentencing judge's severe condemnation of defendant's actions, the judge made it very clear on the record that he wanted this defendant to be incarcerated for the full one year. However, to our chagrin, and over our vehement objection, the parole board released this defendant after only sixty days!

It is hoped that the legislation suggested by the Sentencing Guidelines Committee would not only eradicate the parole board's authority in this area but would devise a new scheme of definite sentences. As it now stands, the only definite sentence that a judge can give is one year or less. If a judge wants to insure that the defendant serves five years, he/she must nevertheless impose an indeterminate sentence with a minimum of five years and a maximum, for example, of fifteen years. However, there is always the chance that the parole board, which decides if the defendant shall be released after having served the minimum sentence, might in that case require the defendant to serve in fact seven years of a fifteen year maximum. In that situation, the intent of the sentencing judge that the defendant serve five years is thoroughly and totally frustrated. A new system of definite sentences would cure this problem. It would also, I believe, be appreciated by defendants who would know the actual length of their incarceration, thus better enabling them to plan both for their imprisonment and for their future.

As I mentioned earlier, one of the principles of the act creating the Sentencing Guidelines Committee is the establishment of a procedure for appellate review of sentences by either party. Legislation that would permit prosecutors to appeal a lenient sentence would go far in restoring public trust in the criminal justice system and in the role of the prosecutor as chief law enforcement officer. With respect to today's topic of drug related crimes, those judges who, in the opinion of my office,

have imposed too light a sentence on one charged with Criminal Sale of a Controlled Substance, will have their sentences reviewed by an appellate court. This newly signed legislation was supported by the National District Attorneys Conference of which I am Assistant Secretary. I sincerely believe that one of the roles of a prosecutor is to initiate and support legislative packages which have as their ultimate goal better law enforcement and the protection of society.

Another of the legislative proposals of the New York State Law Enforcement Council involves an act to amend the Penal Law in relation to the calculation of terms of imprisonment. As pointed out by the Council's memorandum in support, under the present law, an adult defendant who is convicted of multiple, unrelated felonies and given consecutive indeterminate prison sentences can serve no more than twenty years total, or if one of the sentences was for a class "B" felony conviction, no more than thirty years total, provided that all of the offenses were committed prior to the imposition of any of the sentences. Indeed, so long as no class "A" felony conviction is involved, such an adult defendant will serve no more than twenty years, counting time off for good behavior in prison, no matter how violent, vicious or numerous the crimes involved. The present statutory scheme totally frustrates the intent of the court in sentencing a violent, vicious offender. Worse, it gives the defendant a "free ride" for the additional felonies committed prior to the imposition of the first sentence.

By removing the limits on adding the periods of consecutively imposed indeterminate sentences, such legislation will permit the sentences served to be a far more accurate reflection of the intent of the sentencing court. As noted previously, the goal of imposing definite sentences is one which has been adopted by the legislature and the governor. Accordingly, adoption of this present proposal to add the periods of consecutively imposed indeterminate sentences is precisely in line with that aim.

Unfortunately, in the last session of the legislature, this proposal was not adopted. Thus, more work needs to be done in the sentencing area as in the other fields where a tough prosecutorial stance has the potential to protect society from its most serious offenders. Indeed, I have already written the Chairmen of the powerful Codes Committees in both houses of the New York legislature, stressing the importance of passing legislation in the preventive detention area and I hope to be able to report at any future senate hearings that we are making headway in these critical and indeed life-threatening areas of bail, sentencing and parole. Thank you.

Senator D'AMATO. Our final panelist is Reena Raggi, who is the assistant U.S. attorney for the eastern district, and who has worked so well and closely with our own U.S. attorney here in western New York.

Reena, thank you for coming up today.

STATEMENT OF REENA RAGGI, CHIEF, NARCOTICS SECTION, EASTERN DISTRICT OF NEW YORK

Ms. RAGGI. Thank you, Senator.

I, too, have a prepared statement, which rather than read, I would just ask its submission.

Senator D'AMATO. It is submitted as part of the record and made a part of the hearing.

Ms. RAGGI. Senator, I just have a few comments that I would like to add to everything else that has been said this morning.

Coming as I do from the eastern district and focusing on narcotics work there, I have to say that many of the problems that have been outlined by varous of the witnesses before the committee this morning are ones that I am all too familiar with. In fact, we feel in our district that we experience these problems in the most aggravated sense. In many ways we are the Port of New York, having the major airports of the State located in our district, and miles of coastline. For this reason, we see millions of dollars of drugs imported into the State of New York through our district.

I want to spend just a few minutes today speaking about the effect that drug trafficking has on small businesses, since that, of course, is the committee's main concern here.

To say that the effect is devastating is, by no means, an overstatement. As so many of the witnesses have pointed out to you this morning, drug trafficking and the crime that it encourages simply destroys our communities.

Some of the witnesses I think have shown you communities already destroyed. Others have given examples of communities on their way to destruction because of the crime that is generated by the drug problem in this State.

People move out of these areas that are controlled by drug organizations. They do not want to raise their children on street corners where heroin or cocaine is sold. They move out of these communities because they fear the violent crimes that they and their businesses are subjected to by people addicted to drugs. In fact, I think what we see small businesses being the victim of is not only the junky, who needs their cash registers to support his habit, but often of the junky's dealer, because narcotics traffickers—that is never their sole criminal activity. More often than not, the individual who enjoys the narcotics concession for his neighborhood also enjoys many of the other criminal privileges. You will find him extorting businessmen in that area to provide protection for the very crimes that they generate by their drug trafficking.

I think one area of business-related problems that come from narcotics, which has not been discussed particularly this morning, is that narcotics traffickers have every interest in corrupting the small businesses that are in their communities. These businesses can actually assist them in their narcotics trafficking. They have every reason to do that.

There are two way specifically. One is by setting up or taking over import-export businesses. These are ideal vehicles for narcotics traffickers. Routinely, the way we see heroin coming into the State of New York is imported through what, for all intents and purposes, look like legitimate businesses. We see heroin coming in to businesses that are supposed to be importing cheese or wine or olive oil.

To give you just a few examples, because I know time is already short here, last year the most significant narcotics seizure in the United States, not simply the State of New York, for 7 years, 115 pounds of heroin, coming into the Port of New York, was supposed to be going in expresso coffee machines consigned to a gift store in the eastern district.

The early part of this year, January of this year, Italian authorities in Florence seized 80 pounds of heroin that was hidden in a shoe shipment that was supposed to go to a retail shoe shop here in New York.

Now only last month, as you, yourself, noted, over 55 pounds of heroin was seized in part consigned to a tile manufacturer, the Niagara Ceramic Tile Co., right here in Buffalo.

The problem is statewide, and it does involve the corruption of businesses to effect the narcotics trafficking goals.

The other interest that narcotics traffickers have in corrupting small businesses is taking over those businesses that are cash in-

tensive. The reason for this is that these are ideal mechanisms for them to launder their profits.

If you want to know what my biggest narcotics defendants do for a living, they own pizza parlors; they own laundromats; they own grocery stores. It is through these kinds of businesses that they can somehow hide the cash that they have generated through their narcotics trafficking.

Not only do they use businesses to launder their trafficking, we find that they corrupt these businesses in a variety of ways.

Two years ago our office and State prosecutors went after a family operating in Brooklyn and Queens that owned a variety of grocery stores. We had them on four narcotics cases, involved in the distribution of anything from a couple of ounces to the importation of 40 pounds of heroin—this one family.

They own these grocery stores. Not only were they laundering money through them, but it turned out that they were engaging in massive food stamp fraud through these businesses, taking in hundreds of thousands of dollars of fraudulent food stamps. That way they were able to generate the money for their narcotics trafficking and hide the profit, all while corrupting these businesses, which has a tragic effect for neighborhoods.

These people are not interested in providing real grocery stores or real laundromats or in really servicing these people in the way that Mr. Fink described his father as being interested in servicing a community. These people are just looking for fronts.

When the community is not serviced, people move out. When people move out, it only leaves these inner-city areas more prey to the narcotics traffickers. So it becomes a vicious circle.

Senator, to the extent we try to combat this problem, I think, as the district attorney said, we are very vigorous in doing this. We sometimes feel we do not necessarily have all the weapons we need to do it.

Some of the concerns we have are with sentencing and fines in the narcotics area. As the Senator knows, the maximum narcotics fine for your standard distribution—the maximum sentence and fine is zero to 15 years in the Federal system and a $25,000 fine.

It is rare that we get the full 15 years in any but the most exceptional circumstances. As has been discussed at length today, with the parole system, we do not talk about anybody really doing 8 years, 10 years, or 15 years.

Similarly, while the $25,000 fine may seem high to those of us on Government salaries, it is not high to people who profit to the tune of $2 million, $3 million, and $4 million a year doing narcotics trafficking. In fact, we rarely see monetary fines imposed in narcotics cases except in the instances of the biggest traffickers.

If you want to talk about ways in which we can go after these businesses, these profits that these people have accumulated, we are left having to use those statutes that Congress has given us that require us to trace illicit proceeds, the Rico statute, the continuing criminal enterprise statute. I think all of us in prosecution have those statutes right at the forefront of our minds these days. This is a top priority of the Justice Department, to go after this kind of criminal profit.

However, the statutes do involve a considerable amount of work. We have to trace the proceeds. We have to be able to prove that they are narcotics proceeds. We cannot assume that simply because someone did have 40 kilograms of heroin that the money that they had in the bank was narcotics proceeds. This takes considerable investment of prosecutorial and agent time.

Senator D'AMATO. Shouldn't that be amended?

Ms. RAGGI. Well, I think that, if I understand it correctly——

Senator D'AMATO. If I have you and you are convicted of this massive importation of drugs, or becoming involved in this ring, shouldn't the onus now be upon you to demonstrate to me where you got the funds for, let's say, your magnificent estate, boats, et cetera? What would you think about that?

Ms. RAGGI. Well, I have to respond that, to a certain extent, we can do it in some ways. When we proceed civilly, the defendants have a tremendous amount—well, they have much more burden to come forward than they do in a criminal case, but the burden is still on the Government because, obviously, we would be depriving people of property, and we have to do that in accordance with whatever laws you tell us have to be complied with.

What I am suggesting with respect to increased fines is that the court could almost make that presumption that a drug dealer has profited to the tune of $25,000 or, if the fines were increased, $50,000 or $100,000, and fine him that amount. Nobody will have to prove where it came from. However, as I said, the fines of $25,000 as a maximum, in a drug case are such that it really does not act as a serious deterrent on major violators.

I also would have to note that the Internal Revenue Service is, of course, very anxious to go after drug dealers and the profits they have. However, recent Supreme Court decisions do put something of a cloud over how much we are going to be able to share with the Internal Revenue Service and assisting them in going after drug dealers. That is one area that I think the Justice Department in Washington has made specific recommendations to the Senate and House.

I can only say that those of us in the field who prosecute these cases are concerned about the limitations we would have on being able to share evidence with the IRS. These people are drug traffickers, and this is the amount of money we can show you they have. Under the present system, the IRS might have to start from scratch.

[The prepared statement of Ms. Raggi follows:]

STATEMENT OF REENA RAGGI, CHIEF, NARCOTICS SECTION, EASTERN DISTRICT OF NEW YORK

The Eastern District of New York is comprised of the boroughs of Brooklyn, Queens, and Staten Island and the Long Island counties of Nassau and Suffolk. With its miles of coastline, its piers and its two major airports, LaGuardia and John F. Kennedy International, it is, in effect, the port of New York, and as such the entry point for hundreds of pounds of narcotics smuggled annually into the United States.

On occasion, smugglers are small-time traffickers, seeking to profit quickly from one importation. More often, however, they are members of large, sophisticated and well-financed organizations whose narcotics activities can best be analogized to international business ventures. Many of these organizations use the Eastern District as their base of operations, often taking over whole neighborhoods, so that Jackson

Heights in Queens has become synonymous with Colombian cocaine trafficking and 18th Avenue in Brooklyn and Knickerbocker Avenue in Queens have become synonymous with Italian heroin trafficking.

The effect this illicit trafficking has on small businesses in our district is devastating. Most obviously, such trafficking has destroyed the neighborhoods controlled by these organizations. Law abiding citizens either move out or live in fear of the economic and physical power wielded by drug dealers, the latter power often demonstrating itself in violent and destructive crime. Not surprisingly then small businessmen are reluctant to invest in such areas. Their clientele shrinks annually. Moreover, they are the victims of both the junkie, who terrorizes them in search of the money needed to support his habit, and the junkie's supplier who, because of his general crime connections, will often extort businessmen purportedly to protect them from the very situation which the dealer has created.

In fact, this corruption of small businesses as a result of narcotics trafficking goes deeper. Not only are legitimate businesses destroyed; corrupt businesses are actively used to further smuggling activities.

Most obviously, one sees this with respect to import-export companies which are created simply as fronts to facilitate the importation of narcotics. We routinely see heroin sent to companies in the United States which purport to be importing cheese or olive oil. Last year, 115 pounds of heroin was seized in New York concealed in espresso coffee machines destined for a gift shop in the Eastern District of New York. Early this year Italian authorities seized 80 kilograms of heroin destined for New York hidden in a shipment of shoes consigned to a retail store. Just last month, 18 kilograms of heroin was seized hidden in a shipment of tiles consigned to the Niagara Falls Ceramic Tile Company in Buffalo.

Also attractive to large-scale narcotics dealers are those small businesses which generate substantial amounts of cash. These are ideal laundering vehicles for illicit proceeds. Not surprisingly then, our most significant drug traffickers are frequently the owners of pizzerias, grocery stores, and laundromats. One family, responsible for the importation of millions of dollars of heroin from Italy into New York, owned grocery stores that generated hundreds of thousands of dollars of cash sales a year. Not only did this provide an easy means of laundering profits, the family had a further arrangement for making money by taking in thousands of fraudulent food stamps which they would cash.

The corruption of small businesses by drug dealers is one which we combat primarily through the Racketeering Statute and the Continuing Criminal Enterprise Statute of the Drug Act. These two laws both provide for the seizure of businesses or assets generated by or used to facilitate drug trafficking. We also look forward to the passage of pending legislation streamlining the procedures for federal forfeiture of such assets. Plainly it is when we disgorge their profits that we are most successful in our fight against organized narcotics trafficking.

Senator D'AMATO. Let me thank you so very much.

Let me ask you: How do you see the battle against drugs, the importation of drugs into the United States? How are we doing? What more needs to be done to curb the flow of drugs into this country?

Ms. RAGGI. Well, I wish I could sit here and report to you that we are almost at the end of our battle, but that is hardly the truth. The importation of two drugs, cocaine and heroin, into the New York area is by no means diminishing. In fact, to the extent you could judge the amount of cocaine in New York by its price, the price of cocaine is going down in New York, not up, which has to suggest that there is more available.

When seizures such as the one that we coordinated with the U.S. attorney's office here in Buffalo continue to take place, I do not think anybody can think that the heroin inflow is diminishing, either.

To the extent that all of our offices now have more prosecutors, you will be seeing more cases brought. That certainly has to make some kind of an impact. My own office started this year with five prosecutors devoting their full time to narcotics trafficking cases. We now have nine. By the time the Presidental Task Force is at its

full complement, we will have 13. That has to increase the impact we make.

The increase in agents will also help, but ultimately I think it is going to have to be a concerted effort where diplomatic channels are also going to have to come into play with source countries, because unless it becomes difficult or impossible or, for some reason, against the interest of the governments of source countries to continue to encourage the production of illegal drugs, we are not really going to have the kind of impact that is going to make a difference on our streets.

Senator D'AMATO. One of the problems that disturbs me is what appears to be a lack of effort made to prosecute street suppliers who have such an adverse impact on the small business community. I was down on the Lower East Side, and I was horrified. It is incredible. Maybe we will bring our District Attorney Arcara and our U.S. Attorney Sal Martoche down to the Lower East Side, and they will see something that will make them feel not quite so bad.

You need to see the horror show that is played out in full view of the police and the community, and the incredible impact that this has on the quality of life, the degradation of life it causes.

What can be done? What efforts are needed? What would you suggest?

Ms. RAGGI. Well, Senator, I have to say that federally very little has been done traditionally with respect to that kind of narcotics trafficking. It begins to sound like a broken record, like we are making excuses to say that we just do not have the manpower to do it, but that is the honest answer. The number of arrests that could be made in locations like the Lower East Side would keep not simply our narcotics section, but our entire office, busy doing nothing but those kinds of crimes.

The Federal priority has traditionally been with respect to importation, because of the feeling that if we can somehow keep the drugs out of the country, we will ultimately have a beneficial impact on the street sales.

However, no one who goes to the Lower East Side can feel completely comfortable with that answer. I know that you share that view.

A few individuals this morning testified that the community itself has to come to a point where it so abhors drug trafficking and becomes so fed up with it, and does not make heros out of people who engage in it, that we not only work as prosecutors making it a crime to engage in this activity, but we react as a public, making it something that we find abhorrent and shameful to enage in.

Otherwise, all I can say is that the more people that have engaged in this activity, both federally and State, the more we will try to make some kind of an impact on the areas you are talking about.

Senator D'AMATO. I would really like to see us do something in that area, and, as you said, the record begins to wear thin. We lose our effectiveness. It is a matter of perception. I think people need some hope. I think the communities in some of these areas have lost hope. They are fearful and have abdicated the streets, in some of those cases, to the criminal. There are many trapped people in

the neighborhood who just keep quiet, and they figure if you leave us alone, we will leave you alone. There is an uneasy truce.

I have just one other question. With what frequency have you observed that narcotics defendants make bail?

Ms. RAGGI. If I can put them into two categories, one rarely makes it and one almost always makes it.

In our district, if you are an importer who is not a U.S. citizen, it is unlikely that you are going to be out on bail, the primary reason being that we operate under the system that both gentlemen have spoken about this morning where the primary consideration, of course, is, is this person likely to return for trial? With a foreign national with no roots in this country, it is easy to argue to a court that it is unlikely that this person is going to return unless you set a very high bail.

The type that almost always gets out, however, is the one with roots in the community. By this, I mean almost any kind of roots, whether you are a U.S. citizen, a foreign-born national. As long as you are in this country legally, if you have a home, if you have a family here, the chances are pretty good that you are going to make bail for the following reason: Even if you talk about a bail of $500,000, which sounds like a tremendous amount, nowadays they do not have to come in put $500,000 in cash on the table. They put together three or four homes. It does not take that much nowadays to come up with $500,000 in property. You have a couple of friends or neighbors or family members put up property, and you are out on bail.

I have two cases in my office now that are tremendously significant. One involves foreign nationals, foreign-born nationals, who were importing. They are all in. They have not made bail. The other group is a domestic distribution ring, whom I would by no means suggest to you are less significant narcotics traffickers than the first, and they are all out on bail.

Senator D'AMATO. That is well put. Consequently, there is need for the kind of reform that our district attorney has testified to.

It is 2 o'clock. I thank this panel for coming forth and testifying with, I think, a great cogency, about the need for us to intensify our efforts and to address some of the glaring deficiencies at our Federal and State levels.

In the Federal area we are making headway. The Judiciary Committee has reported out the Comprehensive Crime Control Act 15 to 1, which will set a standard the States, then, can begin to follow.

I do not think the best laws in the world are going to stop this problem, but certainly it is going to give us the tools to make it possible to be much more effective in dealing with the problem than we are today.

I want to commend Morgan Hardiman and my chief counsel, Mike Haynes, for their fine work in preparing for this fourth hearing.

Certainly we want to get a flavor of what is taking place in other parts of the country. We were going to be down in Florida when they had the riots that broke out. That is why this committee has not gone down to that part of the country to ascertain the problems there and get the dimensions. I think we know the problems.

What we are looking for are some answers, some solutions, and some thoughts on how to deal with the problems.

This panel certainly has come forth with some possible solutions.

This committee stands in recess. I thank you for your participation.

[Whereupon, the committee recessed, to reconvene at the call of the Chair.]

○

END

END