F. Factors Involved in Publication

Publication of this report is governed in the first instance by Executive Law §63(8) which provides in its last sentence:

> "Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall disclose to any person other than the governor or the attorney-general the name of any witness examined or any information obtained upon such inquiry, except as directed by the governor or the attorney-general, shall be guilty of a misdemeanor."

While that sentence leaves publication to the discretion of the Governor or the Attorney General, that discretion is not wholly unfettered. Considerations of fairness to individuals and of public policy are also involved: specifically, of grand jury secrecy, of fairness to public officials of whom the report may be deemed critical, of fairness to individuals as to whom charges may be pending before the Grand Jury or who may be tried for an Attica related crime after such publication.

The law with respect to grand jury secrecy as it relates to the Governor and the Attorney

General is not clear. Section 190.25(4) of the Criminal Procedure Law provides that:

> "Grand jury proceedings are secret, and no grand juror or other person specified in subdivision three may, except in the lawful discharge of his duties or upon written order of the court, disclose the nature or substance of any grand jury testimony, or any decision, result or other matter attending a grand jury proceeding."

The persons specified in subdivision three are those present in the grand jury room and include the district attorney. To the extent that the Attorney General, acting under supersedeas as directed by Governor Rockefeller and continued by Governors Wilson and Carey, may be considered to occupy the position of the district attorney, he is conceivably covered by the provision, although it can certainly be argued that he acts in a different capacity under Executive Law §63(8). But clearly the Governor is not covered by CPL §190.25(4),* and the Court of Appeals has recognized that as to one not within the statutory prohibition, no secrecy is imposed. People v. Minet, 296

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* See also Penal Law §215.70 which excepts from the definition of the misdemeanor of unlawful grand jury disclosure, disclosure "in the proper discharge of ... official duties."

N.Y. 315, 324. Thus, while there may be some question concerning the Attorney General's right to direct publication of this report without court order, there can be no question of the right of the Governor to do so.

The determination whether to do so is, nonetheless, not lightly to be made for important public interests are involved. Instructive in this connection are decisions of the courts concerning when disclosure should be permitted, and what the reasons are for the confidentiality of grand jury minutes. The reasons are described in People v. DiNapoli, 27 N.Y.2d 229, 235 as: (1) prevention of flight of one about to be indicted, (2) protection of grand jurors from interference, (3) prevention of subornation and jury tampering, (4) protection of an innocent accused against whom no indictment is returned, and (5) to encourage prospective witnesses to testify freely. The same case points out that exercise of discretion to permit disclosure requires the balancing of the public interest in disclosure against that in secrecy (27 N.Y.2d at p.234) and that how widespread publication will be is a

relevant consideration (27 N.Y.2d at p.237). Disclosure to the Public Service Commission of testimony concerning bid rigging more than two years after completion of the grand jury proceedings, the conviction of appellants by guilty plea and their payment of fines, was upheld. Likewise, People ex rel Hirschberg v. Board of Supervisors, 251 N.Y. 156, 170, contains language indicating that where required by public interest, as where a District Attorney is charged with official misconduct and seeks to prevent inquiry into his actions, disclosure should be made.

A further consideration of importance is that while I do not find that there was any venality, I have, in what I consider to be the public interest, not only evaluated that question but sought an explanation for the appearance of onesidedness of the underlying investigation, and in so doing have been critical of the performance of certain public officials. There is, however, an inherent unfairness in publishing such criticism, pointed out by the Court of Appeals in Matter of Wood v. Hughes, 9 N.Y.2d 144, 154, in holding

that a Grand Jury had no authority to issue a report, as distinct from an indictment:

> "In the public mind, accusation by report is indistinguishable from accusation by indictment and subjects those against whom it is directed to the same public condemnation and opprobrium as if they had been indicted. An indictment charges a violation of a known and certain public law and is but the first step in a long process in which the accused may seek vindication through exercise of the right to a public trial, to a jury, to counsel, to confrontation of witnesses against him and, if convicted, to an appeal. A report, on the contrary, based as it is upon the grand jury's own criteria of public or private morals, charges the violation of subjective and unexpressed standards of morality and is the first and last step of the judicial process. It is at once an accusation and a final condemnation, and, emanating from a judicial body occupying a position of respect and importance in the community, its potential for harm is incalculable. A grand jury report - which as a judicial document obviously differs radically from newspaper charges of misconduct - carries the same sense of authoritative condemnation as an indictment does, without, however, according the accused the benefit of the protections accorded to one who is indicted."

There are, of course, differences between a grand jury and an investigating agency appointed under Executive Law §63(8) in that the person appointed to

perform the latter function will normally be more skilled in appraising efficiency in public office than is the average grand juror and in that there is in the latter position probably less chance of reckless action and more likelihood of public debate over the merits of the criticism, compare 9 N.Y.2d at p. 155.

Protection against condemnation by report is not, however, an absolute. The essential is fairness to the individuals involved, which the Legislature has provided in relation to grand jury reports by Criminal Procedure Law §190.85. Under that section before such a report may be released to the public, the individual involved must, in the interest of fundamental fairness, be given opportunity to answer it and to have access to the evidence before the grand jury, Matter of Second Report of Grand Jury, 26 N.Y.2d 200, 204; see also Matter of Report of May, 1972 Grand Jury, 75 Misc. 2d 310. There are, however, no similar provisions in Executive Law §63(8), and while a 63(8) appointee inquires into "matters concerning the public peace, public safety and public justice," which may be deemed

a higher public interest than that involved in the report of a grand jury, it is, nonetheless, true that both concern "public officers whose reputations and careers may well be ruined, regardless of the final outcome of the charges, by publication of the Report," Matter of Second Grand Jury Report, 26 N.Y.2d at p. 205.

Finally to be considered are the rights of individuals accused or yet to be accused by the Attica Grand Juries which may be prejudiced by publication, as well as the interest of the State that prosecutions for Attica crimes not be aborted by prejudicial publicity. The latter is a less likely alternative than the former since there are court designed palliatives. The former, it appears, involves potential prejudice of not only the petit jury, but the grand jury as well, see Beck v. Washington, 369 U.S. 541; but see People ex rel Sears v. Rossiti, 50 Ill.2d 51, 277 N.E.2d 705; United States v. Knowles, 147 F.Supp. 19, 21. Yet it is also true that the American Bar Association's Standards for the Administration of Criminal Justice relating to Fair Trial and Free Press specifically recognize, at

least as to the duty of a lawyer with respect to public statements that "Nothing in this Canon is intended to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies," Section 1.1, final paragraph; but cf. Code of Professional Responsibility as adopted by the New York State Bar Association, DR 7-107 (I) which omits the reference to "lawful issuance of reports."

In final analysis, your determination whether to release all or part or none of the report at this time, must be predicated, as already noted, upon a balancing of the public interest in the working of the criminal justice system and the public interest in protecting individual rights to due process. Consistent with the views expressed in my public statement at the time of my appointment, I have divided the report into two parts, the first of which I believe, on balance, should be released now, the second of which should not be published until the conclusion of the work of the Attica Grand Juries and, as to individual cases, until disposed of. Of course, the discretion to be exercised is yours, not mine, and the division I suggest is simply

my considered opinion, for whatever help to you it may be in reaching your own conclusion. Involved in my division are two judgments of which you should, in exercising your judgment, be aware. The first is that the section on Administration of the Investigation (G(6)) has been placed in Part II solely because of its revelations concerning

The second is that because of the public importance of the issues I have deemed it proper in the public part to include all of the findings, even though doing so reveals that certain matters were or are before a Grand Jury, and to cite the testimony of witnesses who appeared before me by using their initials, even though doing so may reveal that a particular person did appear as a witness, cf. Executive Law § 63(8).

Whether you decide to follow my proposed division or some other, there are, I suggest, two problems that should be carefully considered. Judge Fischer has requested that any material critical of his actions "be submitted directly to the court controlling the grand jury for its review in appropriate proceedings, and to the Appellate Division charged with reviewing the professional conduct of

counsel" (Ex. 520, Letter of 9/16/75, p. 21). In my view, the rights of all persons or groups identified in or identifiable from the material you allow to be published will be sufficiently protected if they are given notice of that fact and access to the report prior to publication and told that it will be publicly released, say, seven or ten days later. In this way, any individual who feels that his due process rights are being violated will have reasonable opportunity, see People v. Penn Central, 34 A.D.2d 278, to contest through court proceedings the conclusions reached as to him.

The second problem results from the argument made before me that since both Simonetti and I function in place of the Attorney General, my requirement that a person testify would, in effect, constitute a grant of immunity from prosecution. However tenuous the argument, I did not permit the witness involved in that incident to testify, thus assuring that no claim of immunity could be made. To the extent that any testimony of a "target" before me may later be made available by the Attorney General to the prosecution office, it should only be made available after consideration of the possibility that an immunity argument by the target defendant may later be made.

G. Factual Bases for Findings

1.

a. Conclusions

Twenty-nine inmates and ten hostages died of gunfire as a result of the Attica retaking and some eighty-nine other persons were wounded (McKay Report, p. 373).

In his testimony Bell covered some two dozen cases, some involving

In view of the vast amount of material involved in analyzing all of the cases referred to, I deal in this section

with the eight cases considered most representative. Though not here analyzed, the others have been looked into as well, and found not sustained.

Unlike the other Sections of this report which set forth the reasoning supporting the stated conclusion immediately following the conclusion itself, in this Section there will be found in each of the cases analyzed a subdivision headed "Evaluation." It is upon the bases of those evaluations that the conclusion stated above rests.

b. The Factual Bases for the Conclusions

The McKay Report* lists Edward R. Menefee as an inmate who died in Meyer Memorial Hospital from shotgun fire which originated in the Times Square stairwell (McKay Report 498,

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* Since the McKay Commission obtained much of its information on a confidential basis, its files were not readily available to the Attica investigation (AS 10954, 10957; Fischer v. Citizens Committee, 72 Misc. 2d 595, affd. 42 A.D.2d 692).

To Simonetti's knowledge, the only basis for believing that Menefee was even found at the bottom of the stairwell was the McKay Report statements referred to above (AS 10954-55, 10958, 11238-39). Even if Menefee was the inmate found at the bottom of the stairs, Simonetti noted, Menefee died in the hospital before he was questioned and could have simply fallen near the stairwell after being shot elsewhere (AS 10954-55).

(2) Grand Jury Action With Respect to Inmates

One year after its empanelment, on December 15, 1972, after hearing numerous witnesses, the Grand Jury handed up thirty-seven indictments, all against inmates (Ex. 35; AS 11199, 11209). Five additional indictments, all against inmates, were handed up in August and November, 1973 (Ex. 35).

A total of sixty-two inmates were indicted in forty-two separate indictments, containing an aggregate of 1,289 counts, all for felonies. Table 1 below shows for each class of felony the total counts together with the maximum sentence possible. Table 2 breaks the indictments down by nature of offense, class of felony and cumulative number of counts and of persons indicted for each offense. Table 3 shows the number of counts on which each of the sixty-two inmates was indicted.

Table 1

Class of Felony	Maximum Sentence Per Count	Total Counts
A	Life	681
B	25 yrs.	136
C	15 yrs.	11
D	7 yrs.	160
E	4 yrs.	301
		1,289

Table 2

Alleged Offense	Penal Law Sections	Felony Class	Total Counts	Number of Persons Indicted
Murder	125.25	A	15	8
Attempted Murder	110/125.25	B	4	4
Kidnapping 1st	135.25	A	666	20
Kidnapping 2nd	135.20	B	129	28
Unlawful Imprisonment 1st	135.10	E	149	37
Coercion 1st	135.65	E	152	37
Assault 1st	120.10	C	7	5
Assault 2nd	120.05	D	118	27
Sodomy 1st	130.50	B	3	2
Sexual Abuse 1st	130.65	D	3	2
Robbery 2nd	160.10	C	3	3
Attempted Arson	110/150.15	C	1	1
Possession of Weapon	265.05	D	16	12
Promoting Prison Contraband 1st	205.25	D	23	16

(1) The sources of information available.

(A) Inmates of Attica Correctional Facility v. Rockefeller

The attorneys for the inmates instituted a class action in federal court alleging brutality and testimony was taken before Judge Curtin in that action beginning on September 14, 1971. The State was represented by Fischer and David Richman, of his staff. The eyewitness testimony was given beginning on September 16, 1971, September 30, 1971 and October 4, 1971, by the following:

James Watson, a young National Guardsman and law student, testified that on September 13th he observed inmates beaten on stretchers (Ex. 367, Folder 2, 29), poked in the groin and rectum with nightsticks (ibid. 42), beaten while running through gauntlets (ibid. 42-46), and other severe beatings (ibid. 50) including one inmate beaten by seven Correction Officers (ibid. 55). Although he did not identify any of the participants, he gave a reasonably complete description of an individual he described as in charge and the "most vicious" (ibid. 59, 60) and whom he might have been able to identify through photographs if he had been interviewed immediately.

Frank Lott, an inmate, told of being beaten in a gauntlet by Attica Correction Officers on the 13th (Ex. 367, Folder 2, 46-47), of observing inmates marked with an "X" on their naked backs (ibid. 49), of subsequent death threats to him from correction officers led by Deputy Warden Pfeil (ibid. 53), and of "LD" Barkely being alive after the retaking (ibid. 48).

Roger Champen, an inmate, testified to being kicked in the throat and beaten by a Correction Officer whom he identified as Mr. Reddy (ibid. 95), and being marked with an "X", spit upon, having matches thrown upon him and beaten by other guards (ibid. 96) and receiving death threats several nights after the 13th from a group of Correction Officers led by Deputy Warden Pfeil.

Herbert Blyden, an inmate, testified to being beaten in a gauntlet (ibid. 132-34) by Correction Officers whom he recognized but was reluctant to identify for fear of retaliation (ibid. 136, 137), and to death

Clarence Jones, Co-Chairman of the Goldman Panel, testified as to his personal observations of

injuries sustained by certain inmates (Ex. 357, Folder 3, 214), including cigarette burns on Frank Smith (ibid. 211-213). Three inmates, William Jackson (ibid. 287), Charles Colvin (ibid. 261) and Gary Haynes (ibid. 716) testified to their own beatings (ibid. 243, 264, 269-70), and other abuses, including cigarette burns and the refusal of medication by the prison doctor, Dr. Sternberg (ibid. 323). A fourth inmate, James Young, was not called but it was represented to the court that his testimony would be cumulative of that already given (ibid. 347). On cross-examination Colvin testified that he could identify the Correction Officers involved (ibid. 295), and that they came from Auburn Prison (ibid. 297).

Fischer had received no specific complaints about brutality (Ex. 272; RF 3264) and first became aware of the allegations in the federal court proceeding (RF 3263-66). He called the Governor's office during the first week after the uprising (RF 3269), reached either Michael Whiteman or Howard Shapiro (RF 3266, 3291) and informed him that there were allegations of past and continuing brutality and that he thought something should

be done (RF 3267). He was subsequently informed that the Governor intended to have Presiding Justice Harry Goldman, Appellate Division, Fourth Department, appoint a committee of observers to go into the prison. The observers were appointed on September 15th and arrived at the institution on September 17 (Ex. 279, 5).

He testified that if inmates had come to him with specific complaints about brutality in late September of 1971 he would have used two of his OCTF attorneys to investigate the allegations (RF 11,925, 11,928),

Fischer also testified that in appearing in the federal court proceeding he had several purposes (RF 9298), that he sought to "identify whether, in fact, brutality had occurred" (RF 3266) and was concerned from the beginning with developing inmate confidence in the integrity and fairness of his investigation (RF 3307),

but that it was also of great importance that insofar as the federal court proceeding sought to enjoin interrogation of inmates it not be successful because that would mean "that we would never have a chance to talk to anybody on the interior" (RF 9299; see also Ex. 520, p. 12).* He was shown portions of his cross-examination of the inmates, including his intrusion of the issue of Officer Quinn's death (RF 9301) and his lack of response to positive identifications (RF 9310) and asked whether he believed his cross-examination contributed to his goal of building inmate confidence in the objectivity of his investigation (RF 9311). He responded:

> "I do ...
> At least in my limited experience, the first thing you have to exhibit to anyone you interrogate and particularly if they exhibit some professional background in criminality is that you are not a damn fool and that what is said is going to be tested ... I don't think you can indicate that you are a patsy and accept everything that comes out of their mouth." (RF 9312)

* The injunction requested was denied, Inmates of the Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 21-22.

He was, however, interviewed by the FBI three months after he testified and was unable to make any positive identifications (Ex. 270). So far as appears from the list of persons interviewed by the investigation (Ex. 15), there has been no follow-up interview of Colvin, Haynes, Jackson or Young in relation to their brutality testimony.

(B) The Goldman Panel

As already noted, after Fischer informed the Governor's Counsel of the allegations of brutality, a citizen's panel was appointed on September 15th by Mr. Justice Harry Goldman (Ex. 279). Members of the panel were Donald H. Goff, General Secretary of the Correctional Association of New York; Clarence B. Jones, Editor and Publisher of the Amsterdam News; Austin MacCormick, Executive Director of the Osborne Association, Inc.; Louis Nunez, National Executive Director of Aspira of America, Inc.; and Robert P. Patterson, Jr., member of the law firm of Patterson, Belknap & Webb (Ex. 279).

Fischer testified that the panel members told him they believed there had been post-riot brutality (RF 3267, 11,896), and at its first press conference

on September 18th the Panel stated that in view of the reports they had received of physical abuse there was a pressing need for monitors (Ex. 258, 8). The Panel members decided, however, that they could not turn over to Fischer the brutality information received (Ex. 272; RP 11,888; RF 11,896, 11,905-06). Robert Patterson acknowledged that he had informed a Justice Department attorney that they had not turned the information over to Fischer because of a lack of confidence and conflict (Ex. 272, 5) and explained that the reasons were that the State Police were Fischer's investigators and because he had been told by Fischer that he would be unable to investigate crimes against inmates for some time (RP 11,889).

The Goldman Panel members were later interviewed by the FBI (Ex. 200, pp. 14-125), but that data did not reach the Fischer-Simonetti investigation until some time in 1973 or perhaps 1975 (see subd. (C) following). Simonetti himself had no contact with the Goldman Panel (AS 8343).

(C) The federal investigation

The members of the Goldman Panel were concerned that

> "the State Police under Mr. Fischer cannot conduct an objective and impartial investigation of the allegations against State Police and Correction Officers of post-riot brutality and physical mistreatment of inmates" (Ex. 257, 1; see also Ex. 279, 2),

and that there would be a lack of public confidence and a credibility gap because of the "obvious conflict" in Fischer's dual role of investigating crimes by both inmates and law enforcement personnel, which "bothered them no end" (Ex. 272, 5; Ex. 279, 10-11, 20). Their concern led them to suggest on September 23,1971 to the Governor's Counsel, Michael Whiteman, that the Civil Rights Division of the United States Department of Justice be asked to intervene. After a number of follow-up calls they were advised by Howard Shapiro, Assistant Counsel,* that Fischer should make the request (Ex. 279). Fischer called K. William O'Connor, head of the Civil

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* Patterson testified that Shapiro was not responsive to the suggestion for intervention, and was very hard to persuade, for which reason the panel felt it necessary to make its request directly to the Governor (RP 11,853-54, 11,859-60, 11,863-64).

Rights Division, and reported back that the Department was not overly enthusiastic (Ex. 279, 25). The Panel then contacted O'Connor and was told that Fischer's call was not deemed a formal request (Ex. 257). Fischer then sent a letter which stated that he was making the request on behalf of the Goldman Panel (Ex. 277). The Panel members feared that was not strong enough and so advised Governor Rockefeller in two confidential memoranda (Ex. 279, 2 and 3 ff.) on October 1st and 4th. On October 5th Governor Rockefeller wrote to Attorney General Mitchell formally requesting intervention (Ex. 272).

Both Fischer's letter to Justice and the Governor's letter to Mitchell emphasized the conflict confronting Fischer in trying to interview inmates who might also be prospective defendants about retributive acts by troopers and Correction Officers (Exs. 272, 277). Fischer testified that, initially, he felt no more conflict in investigating brutality allegations than in other area of the investigation (RF 3231, 3243, 3237). The Governor testified that whatever the wording of his letter to Mitchell, he was unconcerned about any possible conflict (NAR 8851, 8856) and had complete confidence

in Fischer's ability to conduct the investigation (NAR 8852). He considered intervention by the Justice Department a "good idea" (NAR 8859) because it would be an impartial investigation (NAR 8844, 8848) and agreed that those who had been accused of being involved were perhaps "[not] the best ones to investigate" (NAR 8845) and that the investigation by the Justice Department would be helpful in assuring public confidence (NAR 8854-56).

As a result of the Governor's request, two Justice Department attorneys, O'Connor and Robert Murphy, met with Fischer and Max Spoont on October 12, 1971 (Ex. 272, 12-13; RF 3345). Fischer testified that there was general agreement to cooperate (RF 3345). It was agreed that the federal investigation would be by the FBI and that any resultant prosecution would probably be done by the State (Adm. File, Memo #5; Ex. 272, 13).

There was no thought that the State investigation would be deferred during the pendency of the federal investigation; in fact, it was generally understood that if any deferring was to be done, it would be by Justice, so as not to interfere with the State (Ex. 266, Interview with Robert Murphy; Adm. File Memo #5).

The FBI began its inquiry on October 19, 1971 (Ex. 271, 21). It interviewed all members of the Goldman Panel (Ex. 200, 14-125), various defense attorneys (ibid. 66-76), inmates (ibid. 28-36) and some of the medical personnel who participated in the treatment and removal of injured inmates and hostages after the retaking (ibid. 37-66).

It also obtained the transcripts and documents in the federal court proceeding (ibid. 123-125); and a variety of films, photographs, video tapes, official reports, medical records (ibid. 7) and interview statements.

On October 28, 1971 the FBI submitted a lengthy report to the Civil Rights Division. On December 3, 1971 the Division requested further investigation by the FBI (Ex. 271, 1),including interviews of 31 inmates and four other persons and additional documents. The request was based on an exhaustive examination of the prior material submitted, including, inter alia, the federal court transcript and the medical records (Ex. 271, 1-10). Two additional reports submitted by the FBI show that sixteen of the inmates refused to speak to the FBI, six could not identify their assailants, five said they might be

able to make identifications from photographs, and two refused to make identifications or provide information (Ex. 270; Ex. 271, 15-16). The Civil Rights Division then sent attorneys to reinterview inmates with relevant information who had talked to the FBI and to attempt to interview those inmates believed to have relevant information who had refused to cooperate with the FBI (Ex. 271, 53, 54, 18). A fourteen page report of the result of the attorneys' interviews was prepared for the Justice Department files on February 28, 1972 (Ex. 271, 55-68). It recorded interviews with four inmates who were confined to their cells during the entire uprising and who witnessed and/or suffered severe beatings. Three of the statements identified by name Correction Officers involved. Three of the Correction Officers were named by all three of the inmates. (Ex. 271, 55-63).*

The report stated also that the attempt to interview the inmates who had refused to cooperate with the FBI was unsuccessful (Ex. 271, pp. 67-68).

Since the Justice files did not indicate what happened thereafter to its investigation, a member of my staff interviewed such of the Justice attorneys as could be reached (Ex. 266, interviews with K. William O'Connor, Ben Krage, Robert Murphy). Murphy's recollection was that the investigation ended with the attorneys' report, in light of the inmates' refusal to cooperate. O'Connor assumed, without specific recollection, that he had decided after receiving the report to wait and see what happened. Krage recalled the militant, hostile attitude of the inmates, and said the investigation just died, but no one wished to close it formally because of the publicity that would result.

The Fischer investigation complied with FBI requests for materials (AS 8346, 8364). It was not, however, aware when the FBI investigation ended (AS 8373) and was not furnished either the FBI reports or the attorneys' report, though exchange of information had been agreed upon (EH 7648-51).

In August 1973, Malone of Fischer's staff reviewed the Justice files in Washington and requested copies of one inmate interview and some medical records (Ex. 272, 22). He does not recall seeing the Attorneys'

Report when reviewing the files (BM 5585). In December 1973, Leonard Brown, a staff investigator, obtained permission to borrow back photographs previously turned over to Justice (Ex. 272, 25-27). The next contact was not until March 1975, when two State investigators again reviewed the files and obtained a copy of the first FBI report* (Ex. 200). They did not, however, obtain copies of the second and third FBI reports, which Simonetti knew nothing of until informed by my staff on August 26, 1975 (AS 10915).

Simonetti's recollection as to why the FBI file was not again reviewed until 1975 is that Attorney General Saxbe was contacted in September 1974 (Ex. 272, 31; AS 10, 908), but permission was not granted until Edward Levi became Attorney General (AS 10,908, 10,911). Frank Allen, Deputy Chief of the Criminal Division of Justice's Civil Rights Division stated, however, that he told Assistant Attorney General Perry of Simonetti's staff in October 1974 that the files could be seen at any time. (Exs. 266; 272, p. 29).

(D) The McKay Commission files

Though the interviews conducted by the McKay Commission were unsworn, they were a potential source of

information concerning post-retaking brutality which the Commission found to have existed (McKay Report, 426-54). To obtain access to the McKay file, Fischer issued a subpoena (Ex. 193, Folder 3), which the Commission moved to quash (Exs. 191, 192, 193). Fischer's position was that McKay materials were necessary to comply with the Brady and Rosario doctrines and also should be examined prior to Grand Jury action on an indictment (Ex. 193, Folder 1, 26). The subpoena was quashed on the ground of public interest privilege, 72 Misc. 2d 595, and that holding was affirmed, 42 A.D.2d 692.

In February 1974 Simonetti decided he needed the McKay statements of all litterbearers and doctors

(Ex. 456). Negotiations during the Spring and Summer between Simonetti and Bell for the investigation and the attorneys for the McKay Commission culminated in a proposed consent order (Ex. 259) and an agreement that upon receipt by the Commission's attorney of a release from the person interviewed, the interviewer notes would be released (ibid.). Simonetti's recollection is that the matter just lapsed because the investigation wanted

to wait to see whether the material would be requested at trial as Brady or Rosario material (AS 8529-30).

The McKay Commission also took public testimony which was published. At pages 1617 and 1618 of those hearings Senator John Dunne, who had been a member of the Observers Committee,

Shapiro testified at the McKay Hearings (p. 954) that he had no recollection of seeing any mistreatment or brutality although he had noted the Senator's remarks in a chronology prepared for the Executive Chamber (HS 2808, 2892-97, Ex. 33).

(E) BCI interviews

The Bureau of Criminal Investigation of the State Police conducted a number of inmate interviews during the first few weeks after the riot, which were designed theoretically to obtain all information possessed by the inmates interviewed. While it could hardly be expected that inmates fearful of retribution would volunteer information about brutality by enforcement personnel, so little such data was obtained by the BCI that the investigation several years later analyzed all interviews

(F) Other possible sources

There were at Attica on September 13, 1971 not only inmates and Correction Officers, but officials of the Department of Correctional Services, of the Executive Chamber, the Commissioner of the Office of General Services, State Troopers, National Guardsmen, Sheriff's deputies, civilian employees of the prison, civilian doctors, newsmen and members of the Observers' Committee, a total in all of some three thousand persons. The efforts

made by the Fischer-Simonetti investigation to reach the individuals in these various groups is detailed in Subdivision 2 of this Section, below. That there were others with information of importance to the investigation and prosecution of crimes of brutality against inmates is evident from the interviews conducted by my investigation as a result of contacts made with us after my public request for information (see Section C(1) above). Those interviews, which are being made available to the Attica investigation at the time this report is filed, detail specific acts of brutality and are by persons who believe they can identify the perpetrator, or where not may serve as important corroborative evidence.

In summary, the information available from these witnesses is as follows:

Kevin Burke. A National Guardsman who treated wounded inmates only to have bandages ripped off, saw stretchers deliberately tilted, saw guards beat inmates on medical carts with clubs, saw a prison doctor pull an inmate off a cart and kick him in the stomach, saw inmates beaten while running a gauntlet, heard a civilian who appeared to be in charge refuse to allow Dr. Cudmore of the National Guard set up a field hospital on prison

ground. He believes he can identify the doctor and the civilian who refused to allow the hospital to be set up, and could have identified guards involved in the medical cart incident had he been contacted shortly after the event. He appeared before the McKay Commission, and in September, 1975 testified on the motion hearing in People v. Thompson. The files of the investigation (Exs. 277, 463) contain no record of Burke or any attempt to interview him.

Jacques Roberts. An inmate who details being beaten with clubs when taken into custody, running the gauntlet in A yard, having teeth knocked out by a guard named _____ (phonetic spelling) and being beaten with rifle butts while lying prone, hearing a shot fired immediately after an officer in an orange raincoat said, "This nigger ain't dead yet," having a lit cigarette shoved by a trooper into his rectum and against his buttocks, having his finger broken in a second gauntlet, being assaulted by troopers when he went to the prison hospital for treatment. He states that he can identify, in addition to the trooper who shoved the cigarette into him and some of the troopers who assaulted him in the hospital.

Robert S. Jenks. A staff physician at Genesee Memorial Hospital who arrived at the prison shortly after noon on September 13th who observed an inmate with large wounds around his rectum which were not from gunshot and which, he later heard, had been caused by a broken bottle; heard a guard say he saw a hostage who was castrated; was refused permission to evacuate to Genesee Hospital an inmate who had suffered severe brain damage; on the 14th saw people with fractures that had not yet been treated and people in need of transfusion who had not yet received it. He was visited by the FBI, and asked by McKay Commission people to testify on a day on which he could not be available. No one else ever contacted him. He cannot identify the individuals involved.

James O'Rourke. A United States Army observer, who

Ray O. Morrow. Former Sheriff of Ontario County who described acts of brutality but was no longer able to make identification of the perpetrator, though he believed he would have been able to earlier.

(2) The investigation conducted

(A) The first month

On October 6, 1971, the first group of investigators, consisting of nine State Police (Ex. 356, Folder 187) and nine independent investigators (Ex. 519), were given their respective assignments, most of which were in the area of pre-riot events and inmate crimes committed during the riot. (See Section E(3) above.) Two investigators were, however, assigned at that time to the

retaking (BM 5704, AGS Report of 6/3/75, p. 15). This retaking assignment did not include rehousing (JM 5839; AS 8356) and there was no formal commencement of a rehousing investigation at that time. No separate file was set up for rehousing information and leads (AS 8358), and although some rehousing information developed as a result of the investigation of gunshot injuries (EH 7625-27), there was no procedure for transmittal or collection of such information (BM 5533; EH 7640).

In describing problems which were encountered in the early retaking investigation, Fischer emphasized the delay caused by the necessity for answering McKay Commission inquiries (Ex. 520, p. 4) and the lack of opportunity to interview inmates during the fall of 1971 resulting from the pendency of litigation relating to their representation and constitutional rights (RF 3214-15, 3231-33), and also indicated that McKay Commission representatives had disadvantaged his own efforts by suggesting to inmates that "they [Fischer's group] are looking at you criminally so you may not want to talk to them, but you can talk to us" (RF 9278). I have not

(7) Undertakers

Other than identifying the State Police officials who gave the order to obtain statements from undertakers as to whether there were gunshot wounds in the bodies of hostages, and to determine the reasons for the order, investigation was unnecessary, for the State Police had turned the bodies over to the medical examiners who had

already publicly announced that the deaths were caused by gunfire and knew that independent pathologists had been retained. It was, therefore, unrealistic to believe that obtaining the statements was a coverup effort by the State Police.

(1) Weapons Accountability

(A) The Problem

The State Police troopers who responded to Attica on September 9, 1971, came with a variety of firearms. As each individual trooper arrived, he had in his possession his own sidearm, which was registered in official State Police files. Some troopers also brought rifles and shotguns with them. These "long" weapons were registered in State Police records to a specific station, but not to a specific trooper (Retake Admin. 1234).

(8) The New York Times Transcript

Bell's report states that it seemed obvious from the September 14, 1971 issue of the Times that its reporters had monitored the State Police radio and had a complete and accurate transcript, perhaps even a tape, which could contain much relevant material, but which, despite Bell's urging, Simonetti refused to seek (MBR 36, 37).

Bell testified that he first mentioned this matter to Simonetti in conversation before he mentioned it again in a memo in early October 1974, that Simonetti wanted to avoid publicity, and told Bell to ask Moran the best way to do that; that Moran suggested contacting the Times through counsel and Bell learned that the Times law firm was Cahill, Gordon and asked Simonetti for permission to call Cahill, which was refused; that he then repeated the request in writing, but never received an answer; that he needed permission to make the call, because Simonetti had not yet made up his mind as to what he wanted to do about the matter, but never got it (MB 188-91).

Simonetti's response in "Issues and Answers" (Ex. 175, p. 9) was that the Times would be contacted "when it is timely." He testified that if the Times had such evidence it would have "volunteered it" (AS 1887), that he was not sure when he first learned of the possible existence of such a transcript but directed that a letter be written to the appropriate law firm, and if such a letter had not been written he would be embarrassed (AS 1887-93), that if such a transcript existed it would be significant evidence (AS 1896-97), that Bell requested permission to contact the Times in a memo of November 21, 1974, and the lead was given to Perry to follow in December after Bell left, and that he could not say why, on June 13, 1975, when he testified about the question, the Times had not yet been contacted.*

A memo from Savino to Simonetti dated December 30, 1974 says that Perry is attempting to determine whether the Times had a log (Ex. 2, p. 11) and Moran testified

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* Both the Times and UPI (which, it appeared from a portion of "Events at Attica" (Ex. 237), might have had a similar transcript) were contacted by my investigation. Neither did (Ex. 431a).

that he was contacted by Perry in relation to the matter (EM 2258). Perry testified that a possible Los Angeles Times log had been checked into and it was learned through Moran that this was just a reporter's notes of time plus what was then said on the radio as best he could get it down in longhand (EP 5403, 5472), that though the New York Times should have been followed up, it was not of major importance because it would simply fill in the chinks in a picture of what happened on the 13th of which the investigation already had the broad outline and exact times of events would not be too important (EP 5427-32).