

MEYER REPORT VOL I

STATE OF NEW YORK
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FOR RELEASE:
IMMEDIATE, MONDAY
OCTOBER 27, 1975

JOINT STATEMENT BY
GOVERNOR CAREY AND ATTORNEY GENERAL LEFKOWITZ

A three volume 570 page typewritten report of the Special Attica Investigation was today presented to the Governor and Attorney General by Special Deputy Attorney General Bernard S. Meyer. The report will be promptly reviewed by the Governor and Attorney General, and their respective staffs, and after such review the Governor and Attorney General will again meet with Judge Meyer to consider his report and recommendations.

It is noted that on the date of his appointment Judge Meyer expressed an expectation with the concurrence of the Governor and Attorney General, that his "full report will eventually become a matter of public record...the precise nature and timing of its eventual public release will depend upon the status of the Grand Jury investigation and rights of individuals. Grand Jury sanctity and preservation of fair trial rights of individuals must be considered."

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STATE OF NEW YORK
DEPARTMENT OF LAW
SPECIAL ATTICA INVESTIGATION

BERNARD S. MEYER
SPECIAL DEPUTY ATTORNEY GENERAL

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October 27, 1975

His Excellency Hugh Carey
Governor of the State of New York
Executive Chamber
State Capitol
Albany, New York 12224

Honorable Louis J. Lefkowitz
Attorney General of the State of
New York
2 World Trade Center
New York, New York 10047

Dear Governor Carey and General Lefkowitz:

By General Lefkowitz's letter of April 17, 1975 I was appointed Special Deputy Attorney General pursuant to Section 63 of the Executive Law "to inquire into and evaluate charges related to the conduct of the investigation into the retaking of the Attica Correctional Facility and related events subsequent thereto." Pursuant to Section 63(8), I transmit, in quadruplicate, the report of my inquiry and evaluation.

Because the inquiry and evaluation required review of testimony before the Attica Grand Juries and involved matters still pending before them and which could result in indictment of one or more persons, the report has been prepared in two parts.

Part I states my findings and recommendations, outlines the charges that led to the investigation, describes the staff who worked with me and the procedures followed and materials consulted in the course of the investigation, and,

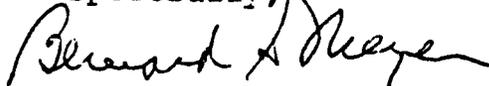
to the extent consistent, in my judgment, with the public interest in grand jury secrecy and individual rights to fair trial, sets forth the factual bases for the findings made.

Part II contains an analysis of the factors to be weighed in your determination whether to make either part available to the public and the factual bases for my findings which, in my judgment, should not be made public at the present time.

At the time of my appointment I expressed the view that, to the extent permitted by strictures of grand jury secrecy and preservation of the fair trial rights of individuals, public disclosure of the report is essential so that the issues can be thoroughly ventilated and public confidence in the criminal justice system encouraged. Since that time my attention has been called to the possible unfairness of release of the report without affording an opportunity to defend against the criticism. In structuring the report in the manner indicated I have striven to make it possible for you to make available to the public not only my findings and recommendations but also as much of the documentary and factual data upon which they are based as can be released without doing injury either to individual rights or to the underlying investigation of the tragic events that occurred on September 9th through 13th, 1971, at the Attica Correctional Facility. It has not been possible to protect in that manner the rights of persons of whom the report may be deemed critical. With respect to them, however, you may see fit to give them an opportunity prior to public release of the report to take legal action to protect their rights (see Section F in Volume 2 of the report).

I am grateful to you both for the opportunity to undertake this most challenging assignment and for the confidence in me expressed by the appointment. I am grateful also to the fourteen men and women who accepted my call for assistance, many of whom interrupted other professional pursuits to work with me during this six-month long investigation.

Respectfully,



Bernard S. Meyer

BSM:js
Atts.

STATE OF NEW YORK

DEPARTMENT OF LAW

FINAL REPORT

of the

SPECIAL ATTICA INVESTIGATION

October 27, 1975

Bernard S. Meyer
Special Deputy Attorney General

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A. Findings

1. There was no intentional coverup in the conduct of the Attica Investigation. There were, however, serious errors of judgment in its conduct. Moreover, there were, immediately after the retaking assault was over and before the investigation commenced, important omissions on the part of the State Police in the gathering of evidence. The combination of those errors and omissions has resulted in an imbalance in the prosecution.

2. Governor Rockefeller's selection of then Deputy Attorney General Robert Fischer, who was head of the Organized Crime Task Force and well qualified by his background to head the criminal investigation, was prompt and appropriate. However, the dual role of the State Police (i) in the retaking of the prison, during which 39 men were killed and 89 wounded by law enforcement personnel, and (ii) as the investigative arm of OCTF created for it a possible conflict of interest and for the Attica Investigation other problems which Fischer should have dealt with more firmly. Moreover, Rockefeller's remarks immediately after the retaking in praise of the State Police as a group were inappropriate in view of the possibility that the degree of force used by enforcement personnel may have been excessive

and of the possible effect of those remarks upon the course of the investigation.

3. The Attica Investigation was from the outset woefully understaffed. The responsibility for the inadequacy of the staff rests largely with Fischer, and not with the Executive Chamber or Simonetti.

4. The decision to conduct the investigation sequentially or chronologically rather than topically was a serious error of judgment. Investigation in depth of the later occurring events was thus deferred, which skewed the investigation's inadequate manpower away from possible retaking, rehousing and hindering of prosecution crimes by law enforcement personnel. The Attica Investigation should be continued long enough to assure presentation to a Grand Jury of all such possible crimes.

5. The charge that prosecution of law enforcement personnel for murder or other shooter crimes and for perjury was obstructed by the Attica prosecutor is not sustained by the record. The deficiencies in evidence gathering immediately following the retaking left so little available to the investigation that determination of possible criminal liability in shooter cases became inordinately difficult in all but a few extraordinary cases.

6. The First Grand Jury returned 42 indictments containing 1,289 counts against 62 inmates, but in the four cases presented to it with respect to law enforcement personnel refused to indict. This one-sidedness was partly the result of the decision to investigate chronologically which caused cases against inmates to be presented first and over a period of a year, thereby saturating the jury with evidence of inmates' guilt before any law enforcement case was presented, partly the result of partiality and emotion on the part of jurors in considering charges against enforcement personnel who were their friends or neighbors, partly the result of the fact that indictment for "technical" offenses was asked for against inmates but not against law enforcement personnel, and partly the result of legal errors by the prosecution and the presiding judge that may have created tension between the prosecution and the Grand Jury and confusion of the Grand Jury members, particularly as to the standard guiding their decision whether to indict.

7. Investigation of crimes of brutality against inmates which occurred during their rehousing and for several days thereafter was neglected, despite the fact that the area was one requiring a broadscale investigation, quickly mounted, in order

to obtain information and identification while memories were fresh. In consequence, available sources of information were not tapped nor has the investigation to date been well organized in the rehousing area. This resulted from the decision to investigate chronologically, from the inadequate staffing of the investigation and from a mistaken and misguided sense of values amounting substantially to indifference.

8. Simonetti conducted a detailed and logical investigation of the possibility that his investigation of possible law enforcement crimes may have been deliberately hindered by the State Police, but many steps should have been taken sooner.

9. Simonetti's decisions with respect to the granting of immunity demonstrate in the case of two high ranking State Police officers a lack of good judgment in failing adequately to interview them before putting them before the Grand Jury, and in a third case involving a State Trooper, both the lack of good judgment and an unreasonably lenient view of what should be regarded as a technical crime.

10. The charge that the investigation was switched in August 1974 from shooter cases to possible hindering of the investigation crimes and that the Grand Jury was recessed in November 1974 in order to frustrate presentation of

possible cases against enforcement personnel is not sustained by the evidence. Those decisions were made in good faith, and except as to the brutality area, in the proper exercise of prosecutorial discretion.

11. The evidence does not sustain the charge that certain of Simonetti's actions demonstrate his desire to prevent Bell from effectively investigating the shooter and hindering cases. Some of the actions were entirely proper; others appear to have been motivated more by the strained relationship between Bell and Simonetti than by concern for the orderly progress of the investigation, or were simply the result of poor administration, but, fortunately, it appears that none of the actions resulted in any harm to the investigation.

12. Though Bell's charge of a coverup has proved not well founded and in some parts was based more on emotion than on fact, a substantial portion of the public shared his misgivings. In bringing the matter to public attention and investigation, he has performed an important public service.

B. Recommendations

Based upon the findings stated in Section A, the analysis set forth in Sections E and G, other facts ascertained during the course of my investigation and my own experience in relation to administration of the investigation, I set forth in this Section a number of recommendations together with the reasoning which prompts them. Time and budgetary considerations have resulted in some of those items being little more than suggestions for future study, but all, whether general and for the future or specific and immediate, are matters which warrant thorough consideration if there is to be public confidence in our criminal justice system and the tragic excesses of the Attica retaking are to be avoided in the future.

My recommendations are five in number:

1. A Special Deputy Attorney General should be appointed whose function it will be to review all convictions, all pending indictments and the evidence relating to possible future indictments with a view to taking, or recommending to the Governor, whatever action he deems appropriate in this wholly unique situation, whether or not such action is recommended here, to correct the

lack of evenhandedness in the State's actions, including but not limited to (a) seeking indictments against law enforcement personnel in those cases, if any, involving serious offenses in which there is a reasonable probability of conviction, (b) making available to the employing agency evidence which, whether or not sufficient for criminal conviction, may be sufficient to prove a departmental disciplinary offense by an enforcement official, (c) reviewing pending indictments against and convictions of inmates obtained by plea or after trial with a view to recommending dismissal or pardon where the evidence does not indicate a reasonably clear probability of conviction or the offense charged is relatively minor in nature or has not resulted in substantial harm. With respect to individual inmates who sustained serious injury on September 13, 1971 or thereafter and whose injury was not the immediate and direct result of his own criminal conduct at that time, consideration should also be given to (a) having the facts certified to the Parole Board in relation to any inmate still incarcerated and (b) amending the Executive Law to permit the filing by such an inmate of a crime victim's compensation claim within, say, one year after passage of the amendment.

Clearly the State has dealt unfairly with the inmates and affirmative action is necessary to correct the

situation. Whether any individual enforcement official was justified in firing the shots he did, whether some of the shots fired resulted from malice, from emotion and hostility, improper planning by the assault commanders or their failure properly to instruct their men, the fact that thirty-nine men died and eighty-nine men were wounded by enforcement official gunfire though the inmates had no firearms makes indelibly clear that more force was used than was necessary to accomplish the retaking. Whether malicious or the unfortunate result of false rumors of throat slitting and castration, it is evident from testimony under oath* that criminal acts of brutality to inmates occurred during the rehousing. Whether resulting from a deliberate intention to obstruct possible prosecution or from poor administration and the chaos of the moment, it cannot be gainsaid that the failure properly to plan for preservation of evidence and properly to collect it once the retaking had ended has made nearly impossible the prosecution of enforcement officials for

* See, e.g., the 1971 federal proceeding entitled Inmates of Attica Correction Facility v. Rockefeller, and the more recent state court motion hearing in People v. Thompson, and testimony before the First Grand Jury taken commencing January 21, 1972, see FGJ Vols. 4, 5, 7, 8, 9, 12, 13, 15, 16, 17, 18.

any retaking death or gunshot wounding. Whether the result of the partiality of some grand jurors, or the poor budgeting and administration of the investigation leading to delayed investigation of retaking crimes, as well as the too long postponed and too sporadic investigation of rehousing crimes, it is beyond cavil that, at present writing, four years after the riot, 62 inmates have been charged in 42 indictments with 1289 separate counts while but one indictment, for reckless endangerment, has been handed up with respect to a crime by a State Trooper. Multiple count indictments are not necessarily overindictment, but it is at least questionable that the public interest was served by indictment of inmates for stealing keys (People v. Jackson and Wilson), or possession of an electric cart (People v. Ross).

While correction of the imbalance in the State's actions in relation to inmates is thus clearly called for, the exact nature of the correction is not easy of solution. During the last session of the Legislature a multi-sponsored resolution looking toward amnesty was introduced, and the concept has been given strong backing by the New York State

Council of Churches, Inc. in a fifty page memorandum which was, presumably, presented to the individual legislators. In my view amnesty is not the proper solution to Attica-related problems for a number of reasons. In the first place, under Article 4, Section 4 of New York's Constitution, the Governor's power is limited to "reprieves, commutations and pardons after conviction" (emphasis supplied) and amnesty, it has been stated in Matter of Doyle, 257 N.Y. 244, 266, can be accomplished only by legislative act. Such an act involves, of course, both the Legislature and the Governor and throws into the political arena crimes such as the death of a Correction Officer and three inmates at the hands of inmates and the killing of thirty-nine men and wounding of eighty-nine others by State Police and Correction Officer gunfire during the retaking. Determination of guilt for such crimes and of the excessiveness of force used by enforcement personnel should be made within the criminal justice system under constitutional and criminal law procedures, not in the legislative forum where extraneous considerations can be brought to bear in a strongly mounted lobbying appeal.

Secondly, the amnesty concept is generally invoked with respect to matters of conscience, such as refusal to serve in the armed services. Considering the prison conditions existing in 1971 as found by the Select Committee on Correctional Institutions and Programs (Jones Committee), one could conclude that there should be no prosecution for conspiracy to riot or for a number of lesser crimes that occurred during the four days the prisoners held the Facility, but amnesty which forgives the taking of human life misapplies the concept, except, perhaps, in cases of the most extreme provocation, not here present. Moreover, as to such retaking, rehousing or hindering crimes by individual enforcement officials as to which indictments have been, or may hereafter be, obtained, it would further perpetuate the harm resulting from the lack of evenhandedness to date and would foreclose the possibility of trial and thus dilute, if not prevent,* the catharsis that the public airing of such charges would bring.

* Public airing of the charges may also result from the trial of the pending civil action or from departmental disciplinary proceedings.

While amnesty does not appear to be the answer, development of a fair solution demands more in depth consideration of individual cases and of the underlying situation than I have been able to accomplish in the time available. What I am suggesting, therefore, is a review of the entire situation by a Special Deputy Attorney General authorized to take whatever steps, including dismissal of pending indictments or the recommendation of a pardon, he deems proper. At the very least his purpose should be to see to it that only serious crimes are prosecuted and that they are prosecuted in an evenhanded manner to the extent that evidence indicating a reasonably clear probability of conviction is available, and to bring about the dismissal without trial of indictments for relatively minor offenses or offenses as to which the evidence does not indicate such a reasonably clear probability. In spelling out the proposed review that far, I do not intend to limit in any way the bounds of the discretion to be exercised by the Deputy Attorney General in this wholly unique situation.

In my view, however, that review should not be carried out by Simonetti. Not that I have found any

venality on his part; quite to the contrary, he has sought properly to carry out his task. Rather, I believe that there should be a new Special Deputy Attorney General because Simonetti's mistakes of judgment in the determination of priorities, his many changes and revisions in the direction of the investigation, his failure to appreciate the importance in the interest of evenhanded prosecution of pressing for additional resources, and the indifference of the rehousing investigation carried out under his administration have resulted in an imbalance which cannot be permitted to infect the review. Having headed the investigation for almost two years and been in full charge of its day to day operations for two years before that (RF 9346-48), Simonetti is, and will be perceived by others to be, too deeply involved with the matters under review to conduct the type of review here suggested.

That review should be conducted by someone who has sufficient background in the administration of criminal justice to be able, with adequate resources, to bring the review and any further investigation to a close in a relatively short period of time. The salary should be high enough to attract someone well qualified in the field, and he should be a Deputy Attorney General so that his complete authority will be clear.

He should also at such time as he deems appropriate furnish to each of the employing services information in his files which may provide a basis for disciplinary action. Such action may, of course, be based upon conduct less than criminal, and in any event requires a lesser burden of proof. The services were apparently told at the inception that all investigation was to be done by Fischer (Ex. 322) and have not, pending conclusion of that investigation, undertaken any disciplinary action. That instruction should now be changed and the head of each such service should be requested to report periodically to the Governor's Office on the status of any such proceeding.

Finally, since claims under that Law are now time barred with respect to Attica related injuries, and the inmates undoubtedly did not comply with the reporting requirement of § 631 of the Executive Law, the Legislature should be asked to amend the Crime Victims' Compensation Law (Article 22 of the Executive Law) as necessary to permit the payment of such compensation to inmate victims and their dependents, just as it was made available to enforcement personnel victims and their dependents, 1971

Public Papers of Governor Rockefeller, p. 1527, subject to the limitation that no inmate or inmate's dependents should be eligible if the inmate's own criminal conduct was the direct and immediate cause of his own injury. Since many injuries resulted simply from indiscriminate gunfire and were not the direct result of criminal conduct of the inmate, many of the wounded and the dependents of many of the dead inmates should be entitled to such compensation. Since Russell G. Oswald, who was during the Attica riot the Commissioner of Correctional Services, is now Chairman of the Crime Victims Compensation Board, the legislation should perhaps also amend EL § 628 to take care of the possibility of a tie vote should Mr. Oswald disqualify himself.

2. The disturbance control plan of the State agencies that may be required in the future to deal with any event similar to Attica should be revised to include specific provisions dealing with accountability for weapons and other evidence.

The McKay Commission's Report details (see, especially, pages 332-366) the deficiencies in planning with respect to use of force, type of firepower, photo-

graphic and other monitoring or recordation of the action, and medical facilities needed in the aftermath of the retaking. Much of what is there considered is beyond the scope of my inquiry, but what is pertinent to my mandate and important to note is that although plans for control of similar disturbances have been revised since Attica (see Ex. 357), those plans still contain no provisions with respect to accountability for weapons and weapons discharge, photographic coverage both during and after such an assault, responsibility of an agency other than that of the assault forces for accurate "scene" recording and measurement, and the other evidence gathering detail that is essential to any ensuing investigation, and the absence of which at Attica made the task of the Fischer-Simonetti investigation an infinitely more difficult if not, in many cases, an impossible one.

It may be argued that such provision will have such a chilling effect upon the members of an assault force as necessarily, by making them more hesitant to use force of the intensity properly demanded by the situation at hand, to put their own lives in jeopardy. The answer is that experience has shown the necessity for restraint

upon the use of force in the tense, hostility-laden atmosphere of an Attica riot situation, that the Penal Law's defense of justification (see PL §§ 35.05, 35.10(2); Corrections Law § 139) sufficiently protects the assault force member from criminal responsibility, and that the State has an obligation in the evenhanded administration of its laws to see to the preservation of the evidence from which can be determined whether the force used was, under the particular circumstances, within reasonable bounds or was excessive.

The evidence recordation and collection task will be more impartially performed if performed by an agency independent of the assault force. The disturbance control plan should, therefore, require the alerting, as far in advance of the actual assault as the circumstances at hand will permit, of whatever official or agency independent of the assault force (e.g., see Recommendation 3 below) is to have the responsibility for any post-assault investigation and review. Since those functions are not presently clearly assigned, it is further suggested that, as an interim measure, the disturbance control plan be revised to require that the Department of Law and the local District Attorney

both be among those alerted whenever and as soon as the plan is put into effect.

3. Consideration should be given to the creation of, or expansion of the functions of the Temporary State Commission of Investigation into, a permanent agency with statewide jurisdiction authorized to investigate and prosecute all crimes resulting from an Attica type disturbance.

The functions of the Temporary State Commission of Investigation were broad enough to permit it to conduct the criminal investigation necessitated by the Attica disturbance, but it had no powers of prosecution (Unconsolidated Laws § 7502(7)), and the Wyoming County District Attorney had made clear that he did not have the facilities for either investigation or prosecution. For several reasons there should be, either through expansion of the functions of the Commission or creation of a new division within the Department of Law or a new agency, a permanent body with statewide authority at least to investigate, and possibly also to prosecute, all crimes resulting from an Attica type disturbance.

My reasons for this proposal lie in the immediacy of the need for action which an Attica situation involves, the difficulty of obtaining staff for any temporary function and especially for one that will be centered in such usually out of the way places as those in which State correctional facilities are located and the difficulties created for any temporary agency or official by budgetary procedures.

The potential conflict created by the presence of the State Police as part of the investigative arm of an agency required to investigate the conduct of individual Troopers and Correction Officers is more fully discussed in Section E(1) below. Yet it was essential that within minutes, if not seconds, after the retaking assault ended, the process of evidence collection and investigation begin. While it is not necessary that the proposed statewide agency have a permanent investigative staff large enough to investigate the multiple crimes of Attica, the agency can maintain its own core staff and work out plans with other investigative agencies around the State for the borrowing, as need be, of additional investigative personnel, just as the State Police now do from within

their various troops, or as volunteer fire companies have traditionally done in the event of a major conflagration.

I do not mean to suggest that such an agency's functions should be limited to correctional facility disturbances, which certainly have not occurred so frequently as to warrant a permanent standby agency. Nor have I gone deeply enough into the pros and cons of a statewide agency with both investigative and prosecutorial power* to be able to take a final position. What I am suggesting

* Assembly Bill 6235 of 1973 (Our Ex. 530) providing for the creation of the Office of State Prosecutor was recommended by then Deputy Attorney General Robert Fischer, but was opposed by the District Attorneys Association. Such a proposal has found more recent backing in Nadjari, "New York's Office of the Special Prosecutor: A Creation Born of Necessity," 2 Hofstra L. Rev. 97. A more modest proposal for creation of an Office of Administrative Investigations to be headed by an Ombudsman and with power to investigate any State agency was made in S. Intro 2692 of 1965 introduced by Senator Jack Bronston. It originated in concept with a Committee of the Association of the Bar of the City of New York, and is backed in principle in the Report of the June 1975 American Assembly on Law and Changing Society II. The concept of a special prosecution office, at least on a federal level, has, however, been opposed, according to newspaper reports, by Henry Ruth, Watergate Special Prosecutor, and in conversation with me Professor Walter Gellhorn, Columbia University School of Law and generally regarded as the father of American interest in the ombudsman concept, expressed misgivings over combining the ombudsman's investigative function with those of prosecution.

is that the Attica situation may provide an additional reason for such an office and that, if there is to be such a permanent agency, Attica type disturbances* clearly should be within its competence.

4. Consideration should be given to legislation authorizing the empanelling of a statewide or regional grand jury or providing for change of grand jury venue or both.

While New York procedure formerly permitted a post-indictment voir dire of grand jurors under limited circumstances, Code of Criminal Procedure §§ 230, 232, 233, 234; see People v. Jewett, 3 Wend. 314, the Criminal Procedure Law in § 190.20(2) provides that neither the panel nor any individual grand juror may be challenged, although the court may refuse to swear a person drawn as a grand juror or may discharge him after he is sworn, if it finds him incapable of performing his duties because of bias or prejudice.

* The exact scope of jurisdiction must, of course, be determined after all interested bodies and groups have been heard by the appropriate legislative committees.

Such a provision can hardly be effective, however, in a situation such as Attica, involving as it did grand jurors drawn from the rural locality in which the prison was located, to consider charges growing out of a prison riot against both prisoners incarcerated in the institution and law enforcement officials, some of whom were friends, neighbors or employees of the jurors. More drastic measures are necessary effectively to meet the combination of possible prejudices: the natural tendency to side with persons from one's own region against outsiders and with the "establishment," on the one hand; the bias against prisoners both generally, as persons convicted of serious, and in some cases heinous, crimes, and, more specifically, that possibly induced by the presentation to the same Grand Jury of evidence of specific prisoner crimes, including the taking of Correction Officers as hostages during the four days of the riot, on the other. It would be unfair to the members of the First Grand Jury to conclude that the reason they returned indictments only against inmates was prejudice, yet as detailed in Section G(2) below there is evidence of bias of some members of that jury against indictment of law enforcement personnel.

Constitution Article I, Section 6 requires indictment by grand jury but contains no geographic limitation. At common law grand jurors could not indict concerning crimes committed outside the county for which sworn unless the Legislature directed otherwise, Mack v. People of the State of New York, 82 N.Y. 235; see Matter of Murphy v. Supreme Court, 294 N.Y. 440; People v. Abraham, 44 A.D.2d 721; People v. Cornick, 75 Misc. 2d 169. Accordingly, there is legislative power to provide either for a regional or statewide grand jury or for a change of grand jury venue. What limitations should be placed upon the type of crimes that can be considered by such a multiple county grand jury, whether the right to move for change of grand jury venue is as adequate a remedy, at whose instance the latter remedy should be invocable, who should be entitled to notice of such an application, by what standard grant of the remedy should be governed, are all matters that will require further analysis.

Worthy of note in this connection is the fact that on the recommendation of then Deputy Attorney General Robert Fischer legislation authorizing the empanelling of statewide or regional grand juries was introduced toward the end of the 1973 session of the Legislature (Assembly Bill No. 6235/1973, a copy

of which is part of our Ex. 520). The lateness of its introduction and the opposition of the District Attorneys' Association resulted in its not passing, however.

5. Consideration should be given to amending Section 73 of the Civil Rights Law to incorporate provisions similar to those relating to grand jury reports.

The fact that the publication of a grand jury report may ruin the reputation and career of a public official criticized in it caused the Court of Appeals to hold in Matter of Wood v. Hughes, 9 N.Y.2d 144, that the filing of such a report was impermissible without legislative authorization and resulted in the passage of the legislation which became Section 190.85 of the Criminal Procedure Law. Under the provisions of that section, before such a report may be released to the public the individual involved must, in the interest of fundamental fairness, be given the opportunity to answer it, and thus to get his side of the controversy before the public, and to have access to the evidence before the grand jury in order effectively to answer it.

Though a report such as this made under Executive Law §63(8) may have an equally devastating

and equally irreparable effect, neither the Civil Rights Law nor the Executive Law contains any limitation corresponding to CPL §190.85. It may well be that some or all of the reports made under either law can be differentiated, as, for example, dealing with matters of higher public interest than the average grand jury report, sufficiently to exempt them from limitation. But the concept of fairness which is the hallmark of our system of criminal justice requires at the least that the question be considered in depth by a committee or commission with a view to possible legislative limitation on reports of agencies covered by CRL §73, or at the very least on a report under EL §63(8).

C. Conduct of The Investigation

1. Procedures Followed

On December 6, 1974, Malcolm Bell, who had served the Attica investigation since September, 1973, as a Special Assistant Attorney General, was suspended by Anthony G. Simonetti, the Special Assistant Attorney General then in charge of the investigation. The reason for the suspension was Bell's refusal to give Simonetti the name of a confidential informant. On December 11, 1974, Bell resigned, explaining in a four-page letter addressed to Attorney General Lefkowitz that in his opinion the investigation as conducted by Simonetti "lacks integrity."

On December 17, 1974, the Attorney General, his first Assistant Samuel Hirshowitz, Simonetti and Edward Perry, a Special Assistant Attorney General on Simonetti's staff, met with Bell. Thereafter, on December 23, 1974, the Attorney General by letter accepted Bell's resignation and on the same day delivered a copy of Bell's four-page letter to Mr. Justice Carman Ball, the Judge in charge of the Attica Grand Juries. On December 27, 1974, Attorney General Lefkowitz delivered a copy of the Bell letter to Governor-Elect Carey.

On January 29, 1975, Bell completed and submitted to Governor Carey, but not to the Attorney General, a detailed 160-page report of his charges. The Hill-Pernasilice trial, which had commenced November 21, 1974, and involved charges against two Attica inmates for the murder of Correction Officer William Quinn, concluded on Saturday night, April 5, 1975. On April 8, 1975, The New York Times published an article revealing the existence and general nature of the Bell charges and on April 9th it printed excerpts of the Bell four-page letter to the Attorney General. On April 8th a copy of Bell's 160-page report was delivered by Governor Carey's office to the Attorney General with a request for a reply to its allegations. On April 17, 1975, at the request of Governor Carey, the Attorney General appointed me Special Deputy Attorney General "to inquire into and evaluate charges related to the conduct of the investigation into the retaking of the Attica Correctional Facility and related events subsequent thereto."

I have not regarded that mandate as limited solely to the determination whether Bell's charges are valid. In view of the effect of those charges upon the public's confidence in the criminal justice system, I

have deemed it proper to determine not only whether there was a "coverup" — whether there was venality — but also, to the extent that my investigation revealed deficiencies in the Fischer-Simonetti investigation, why such deficiencies occurred. I have not, however, delved into matters involved in the conduct of the trial of indictments obtained by the investigation (as distinct, of course, from evidence or information which became available to us as a result of those trials), such matters being for consideration of the courts in the first instance, and in any event, in view of the massive task presented by evaluation of the investigation itself, beyond the time and resources available to me for my work.

I received a copy of Bell's 160-page report, on April 17, 1975, at the time of my appointment. The next day I received from Robert Patterson, Esq., who had been a member of the Goldman Panel, a copy of its report, and on April 28, 1975, I received from Simonetti his first preliminary submissions in response to the Bell report and charges. I was fortunate in being able within twenty-four hours after my appointment to obtain the services of Malachy T. Mahon, former Dean

of Hofstra Law School, as the Executive Director of my investigation. Preliminary work involved in assessing the scope of the work, obtaining space, gathering materials, interviewing Bell, Simonetti and others who could give us a birdseye view of their investigation, preparing a budget estimate, recruiting a staff, occupied us until the end of May and led to my report on June 2, 1975 that the scope of the work would require a total budget of \$330,000 and at least until the end of September to complete. Unfortunately, though I understand the Budget Division recommended that sum, the Legislature in the Supplemental Budget allowed only a total of \$250,000, which has contributed to our inability to hold the September 30th target date. One of the matters considered during the preliminary period was putting the material involved on computer in order the more readily, quickly and completely to obtain access to data related to the multitudinous issues involved in our investigation. The decision not to do so resulted from the cost involved.

As a matter of policy and in the interest of fairness to all concerned, examination of witnesses has been conducted in private, under oath and in

the presence of a court reporter; all witnesses examined, whether or not subpoenaed, have been accorded the rights given by Civil Rights Law §73 to a subpoenaed witness; and since Simonetti had had, in order to reply to it, access to Bell's 160-page report, Bell was permitted to review Simonetti's written submissions and give me his written comments thereon. Furthermore, any witness who sought the right to do so was permitted to review the transcript of his testimony in our office, although he was not given a copy.

In order to evaluate the Fischer-Simonetti investigation, it has been necessary for me to obtain an understanding of the events that transpired at Attica between September 9th and 13th, 1971. I have not, however, regarded it as my function to determine responsibility for those events. Rather I have limited my inquiry to what the underlying Fischer-Simonetti investigation has done. Time has not permitted me to track down every step taken by it during the now four years of its existence. Rather, I have reviewed its files and documents, caused a press release to be issued stating the purpose of my inquiry and asking persons with information to contact me, caused persons who did contact me or who,

through other leads appeared to be possessed of relevant information, to be interviewed by my staff investigator, and caused thirty-seven witnesses to be examined under oath, resulting in over 10,000 pages of transcribed testimony. The names of witnesses being confidential under Executive Law §63(8), the list of persons examined is set forth in Part II of this report.

In the course of the investigation, the staff has reviewed more than 33,000 pages of testimony taken before the two Attica Grand Juries, has compiled documentary material comprising over 500 exhibit folders containing over a thousand documents consisting in total of tens of thousands of pages. (A master list of these Exhibits is set forth in Part II of this report, since revelation of the titles or description of some would violate both Executive Law §63(8) and the Grand Jury secrecy statute. The documents themselves are packed in transfer files for delivery to the Attorney General as directed.) We have, moreover, in addition to the issuance of the press release already described, been in contact with the New York Civil Liberties Union, the Attica Brothers Defense and the Fortune Society, obtained and reviewed

briefs and transcripts of testimony in the action entitled Inmates of the Attica Correction Facility v. Rockefeller, brought in September, 1971, in United States District Court and of the hearing held in September, 1975, in People v. Blyden et al (Indictments 38, 39 and 41) before the Erie County Supreme Court, transcripts of various pertinent Congressional hearings and of the public and executive session hearings before, and the Report of, the New York State Special Commission on Attica (McKay Commission), the Report of the Goldman Panel and a medical inventory of Attica inmates made at its request, and Reports of the Select Committee on Correctional Institutions and Programs (Jones Committee). Documents were obtained from the Executive Chamber, the Department of Law, the State Police, the Department of Correctional Services and the Division of the Budget, as well as from witnesses examined. Press clips and magazine articles concerning the 1971 riot and appearing since April 1975 have been monitored, and an extensive file of earlier press clips made available to me by the Judicial Process Commission of the Genesee Ecumenical Ministries has also been reviewed. Contact was also made with

the Department of Justice, the Civil Rights Division of which in 1971 and 1972 made its own investigation of brutality charges, and one of my staff reviewed Department files in Washington and obtained copies of pertinent documents.

In order to cover the various facets involved in the determination whether there has in fact been any coverup, particular areas were assigned to individual staff members, each of whom reviewed the written material and conducted such examination of witnesses as related to his assigned area. Written reports in each area have been prepared and circulated to assure that data valuable in more than one area was available to the staff members working in the others. Upon those written reports, after review by me of testimony and documents referred to to the extent deemed necessary, are based the sections of this report analyzing the factual bases for the findings made. Those areas concerned the selection of the investigating agency, its budgeting and staffing; the priorities by which its resources were allocated; the pattern of the investigation, the decisions reached and work performed in process of the investi-

gation in relation to retaking deaths, rehousing brutality and the grant of immunity to certain witnesses, among other matters. In the process all of the bases of the Bell charges have been reviewed.

This report speaks in the first person singular, because the Attorney General's appointment under Executive Law §63(8) was of an individual and because I wish to make clear that I accept full responsibility for the conclusions in it and have to the fullest extent possible reviewed the materials underlying those conclusions. Having said that, I wish nevertheless to acknowledge that the task presented by the investigation could not have been accomplished without the unusually gifted staff that I was fortunate enough to be able to assemble and that their thoughts, arguments and disputations have been an important ingredient of this report.

2. Staff

MALACHY T. MAHON
Executive Director and
Special Assistant Attorney General

Professor of Law, Hofstra Law School, where he was founding Dean from 1968-73. Taught criminal law at Fordham University (1962-68) and the University of Texas (1973-74) Law Schools. Chief Counsel, New York Governor's Special Committee on Criminal Offenders (1966). Law Clerk to Justice Tom C. Clark, Supreme Court of the United States (1960-61). Law Secretary to Chief New York City Magistrate (John M. Murtagh) (1959-60). Graduate of Manhattan College (1954) and Fordham Law School (1960).

ERIC A. SEIFF
Special Assistant Attorney General

Chief Assistant Criminal Defense Division of the New York Legal Aid Society (on leave). General Counsel of the New York State Division of Criminal Justice Services (1972-74). Assistant District Attorney, New York County (1962-67). Member of the Committee on Criminal Courts, Law and Procedure, Association of the Bar of the City of New York. Graduate of Yale University (1955) and Columbia University Law School (1958).

EDWARD M. SHAW
Special Assistant Attorney General

Practicing Attorney. Served in the Office of the United States Attorney for the Southern District of New York as Chief of the Official Corruption Unit and as Executive Assistant U. S. Attorney. From July 1972 to January 1975 he was Attorney-in-Charge of the Justice Department's New York Joint Strike Force Against Organized Crime. Private practice (1961-63, 1967-69). Graduate of Harvard College (1958) and Harvard Law School (1961).

EVE M. PREMINGER
Special Assistant Attorney General

Practicing Attorney. Lecturer on Prisoner's Civil Legal Rights, Columbia University Law School (1972-). President of the Correctional Association of New York and Director of its Legal Services Bureau. (Former) Legal Officer for Columbia University (1971-73). Member of the New York City Department of Correction Advisory Board for Legal Services and the Special Committee on Penology of the Association of The Bar of the City of New York. Graduate of Columbia University Law School (1960) where she was an editor of the Law Review.

ARTHUR J. VIVIANI
Special Assistant Attorney General

Practicing Attorney. Assistant United States Attorney and Assistant Chief of the Criminal Division, Southern District of New York (1970-74). Special Agent of the Federal Bureau of Investigation (1964-69). Graduate of Manhattan College (1961) and St. John's University School of Law (1964) where he was a member of the Law Review. Holds an advanced degree in Taxation from New York University Law School (1970).

IRWIN ROCHMAN
Special Assistant Attorney General

Practicing Attorney and specializing in criminal trial work. Assistant District Attorney, New York County (1963-67). Corporation Vice President and Counsel, (1967-71). Graduate of New York University (1957) and Columbia University School of Law (1961). Member of The Committee on Criminal Courts, Law and Procedure of the Association of The Bar of the City of New York and the Criminal Courts Committee of the New York County Lawyers Association.

BOBBY C. LAWYER
Special Assistant Attorney General

Practicing Attorney. Assistant Director of Community Law Offices in Manhattan (1968-70). Assistant United States Attorney in both the Civil and Criminal Divisions of the Southern District of New York with extensive service in the Official Corruption Unit (1970-75). Member of the Committee on State Legislation, New York State Bar Association. Graduate of City College of New York (1965) and Columbia University Law School (1968) where he was an editor of the Columbia Survey of Human Rights Law.

PAULA SCHWARTZ FROME
Special Assistant Attorney General

On completion of her assignment with this investigation will become an Assistant District Attorney, Nassau County. Graduate of State University of New York at Stony Brook (1971, magna cum laude) and Hofstra University Law School (1974) where she was first in her class and a staff member of the Law Review before practicing law with a New York City law firm.

CARMINE J. MOTTO
Special Investigator

Served thirty-four years in the United States Treasury Department, beginning in 1941 as a Special Agent in the United States Secret Service, including 10 years in charge of the Special Detail on Counterfeiting, and culminating with service as Deputy Director of Law Enforcement. Also served as a New York State Trooper from 1936-41. Published a book (Undercover) in 1970, widely used as a textbook.

Legal Assistants

Robert C. Emeritz
Kevin J. Barry
David E. Robbins
Ellen S. Thomas

Administrative Assistant

Jeanne Schonberg

C. Glossary

Throughout this report there appear in parentheses abbreviated references to documents, testimony and other sources. The table below explains the various forms of citation used.

<u>Source</u>	<u>Form of Citation</u>	<u>Explanation</u>
1. Testimony before this investigation	AS 1092 ARS 9675-84	Two initials of the witness followed by one or more page numbers of the consecutively paginated transcript, or three initials where needed to avoid confusion. A table of witnesses appears in Part II.
2. Documents	Ex. 190 Ex. 6, Folder 10, 2 Retake Administration	Documents are numbered as exhibits, and bulky exhibits are divided into folders which may be paginated. A table of exhibits appears in Part II. Certain extracts from the Attica Investigation files are contained in Retake Administration binders.
3. Grand Jury Testimony	FGJ 13211 SGJ 9000	References are to the pages of the transcripts of the proceedings of the (First) Nov. 29, 1971 Grand Jury or (Supplemental) May 2, 1974 Grand Jury in Wyoming County, New York.
4. Bell Report	MBR 82	The 160-page Preliminary Report on The Attica Investigation, dated January 29, 1974, submitted to Governor Hugh S. Carey by former Special Assistant Attorney General Malcolm H. Bell.

<u>Source</u>	<u>Form of Citation</u>	<u>Explanation</u>
5. Simonetti's written response to the Bell Report		All by date of submission except "Issues and Answers" which is Exhibit 175.
6. McKay Commission testimony and final report	McKay Hearings 1800 McKay Report 92	References are to the pages of transcript of public and executive session hearings as reprinted in American Prisons in Turmoil (Part 2), Hearings before the Select Committee on Crime, H.R., 92d Cong., 2d sess. (L.C. No. Y4C86/3: P 93/pt. 2); and of <u>ATTICA</u> , The Official Report of the N.Y.S. Special Commission on Attica (Bantam ed. 1972).
7. Related Attica litigation	<u>Inmates of Attica v. Rockefeller</u> <u>People v. Thompson</u>	The record of proceedings in the September 1971 action in the U.S. District Court (W.D.N.Y.) and U.S. Court of Appeals, 453 F.2d (1971). The transcript of the September 1975 proceedings before Hon. Ann T. Mikoll, N.Y. Supreme Court (Erie Co.) on motion to dismiss indictment Nos. 38-1973, 39-1973, 41-1973 on grounds of selective enforcement.
8. Book	1971 Public Papers of Gov. Rockefeller 62	Annually published records of documents selected from the Executive Chamber files.

D. The Charges

Bell's charges, originally advanced in a four-page letter of resignation to the Attorney General, were more fully expounded in a 160-page report dated January 29, 1975 and titled "Preliminary Report on the Attica Investigation." Evaluation of those charges has not been as easy a task as it might have been, however, had Bell, who has a flair for writing, cast his report in the more pedestrian but more clearly analytical form of a legal brief.

Bell's literary bent, the obvious personality conflict between him and Simonetti prior to Bell's resignation and Bell's emotional involvement at the time he prepared the 160-page report in sustaining the position earlier taken in his letter of resignation, have in some instances resulted in subjective characterizations which manifest nothing more than the disagreement between Simonetti and Bell. Perhaps the best illustration is that whereas Bell states that Simonetti "repeatedly refused to allow witnesses to be called" (MBR 4), his testimony was that Simonetti failed to respond to his suggestion that certain witnesses be called and then recessed the Grand Jury (MB 6411, 6414, see also 151-152, 378). Another would be the complaint that Simonetti assigned back to Bell the follow up of leads suggested by Bell which

"was an excellent way not to get it done" because of Bell's overload of work (MBF 13), whereas his testimony was that he never complained to Simonetti that he could not complete the assignments nor did he ask to have more people hired (MB 241-44).

Matters such as these, as well as certain issues of law involved in the legal conclusions upon which the investigation proceeded are not analyzed at length in this report. They have, however, been considered, the first by review of the testimony of Simonetti and Bell as well as of the documentary evidence, the second by appropriate research to determine whether the legal conclusion was one upon which reasonable minds could differ. My conclusion from that consideration and from extensive analysis of the ten accusations dealt with in Sections E and G of this report is that, while there were serious errors of judgment, there was no intentional "coverup" by Fischer or by Simonetti or by any of those in the executive hierarchy above them.

So that you may more clearly evaluate my conclusions on the ten accusations which have been analyzed in depth, I set forth below the charge, the chapter(s) of Bell's 160-page report in which the charge is made, and the section(s) of this report where the analysis of each can be found. In listing the charges

I have generalized them in order not to violate individual rights or the secrecy provisions of governing statutes:

<u>Charge</u>	<u>Bell Reference</u>	<u>This Report Reference</u>
1. Refusal to present evidence on or properly to pursue investigation of crimes against inmates	1, 4, 5, 8, 24, 25, 27	G(1)(2)(3)
2. Improper immunization of witnesses	1, 10, 11, 20	G(5)
3. Failure to follow leads	1, 21*	G(1)(3)(4)(5)(6)**
4. Refusal to investigate executive involvement in funding, personnel	2, 13, 14	E(1)(2)(3); G(6)
5. Improperly switching the investigation away from shooter cases	6	G(1)(6)
6. Insufficient investigation of possible obstruction of justice charges	7	G(4)(6)

* In these chapters, Bell has charged that certain "leads" he suggested were not followed by the Attica prosecution, and that this is evidence of venality. After consideration of all those "leads" bearing on the issue of venality, I conclude that the prosecution's actions with respect to them do not support the charge.

** Most, though not all, of the leads are analyzed in the indicated Sections. Those not discussed have not been considered sufficiently relevant to evaluation of the prosecution's investigation to warrant discussion.

<u>Charge</u>	<u>Bell Reference</u>	<u>This Report Reference</u>
7. Replacement of Bell with other attorneys in presentations to the Grand Jury	9, 12	G(6)
8. Proposed premature termination of the Grand Jury presentation	17, 18	E(3); G(6)
9. Instructions to Bell to cease writing memoranda to Simonetti	19	G(6)
10. Insistence upon knowing the identity of Bell's confidential informant	22	G(4)(6)

E. Factual Basis for Findings

1. Establishment of the Investigation

a. Conclusions

Governor Rockefeller's selection of Deputy Attorney General Robert Fischer, who was head of the Organized Crime Task Force and well qualified by his background to head the criminal investigation, was prompt and appropriate. However, the role of the State Police in retaking the prison and as the investigative arm of OCTF created problems for the Attica investigation which Fischer should have dealt with more firmly. Moreover, the Governor's remarks immediately after the retaking in praise of the State Police as a group were inappropriate in view of the possibility that the degree of force used by some Troopers and others may have been excessive and of the possible effect of those remarks upon the course of the investigation.

(1) Selection of the investigator

Governor Rockefeller's desire to have all facets of the Attica uprising looked into is apparent from the many fronts on which he moved: establishing a criminal investigation under Robert Fischer; requesting the Chief Judge of the Court of Appeals to recruit a Citizens' Commission on Attica (the McKay Commission) as an

impartial and independent group to report on the events of September 9th to 13th, 1971 wholly apart from issues of criminality; requesting the Presiding Justice of the Appellate Division, Fourth Department to recruit a group to assure protection of the constitutional rights of Attica inmates (the Goldman Panel); setting up the Select Committee on Correctional Institutions and Programs (the Jones Committee) to look into and suggest remedies for the underlying causes of the riot; and through a meeting on September 24, 1971 of Attica involved persons from various executive departments and agencies, and the assignment to Executive Chamber personnel of the task of preparing a chronology ("Events at Attica"), seeking to establish for his own information what the facts were.

Establishment of the criminal investigation was initiated on September 13th and Fischer and Simonetti were both at Attica on that day. No fault can be found on the part of anyone for the fact that there was not present at Attica at 9:30 in the morning of September 13th a Special Prosecutor in full control of a highly trained, independent criminal investigative team, ready

to take over all aspects of evidence gathering. Even if the State officials responsible for making decisions at Attica between September 9th and September 13th had not been preoccupied with efforts to achieve a peaceful solution, it was hardly foreseeable that so much bloodshed in the retaking would be caused by State Police personnel, and certainly not predictable that the gathering of evidence of what was to happen at the retaking would be as deficient as it turned out to be.* Nor was it unreasonable that involvement of the United States Department of Justice Civil Rights Division was not considered on the 13th** since questions of the justification for State Police conduct at the retaking were doubtless obscured by widespread and apparently credible reports that many hostages had been brutally murdered by inmates.

Fischer's professional background, which Governor

* As to that deficiency, see infra this Section, Subd. (b)(2), and Section G(2) of this Report.

** NAR 8876-8877. By October 5, 1971, however, the Civil Rights Division was, at the suggestion of the Goldman Panel, requested to investigate brutality claims, see infra Section G(3).

Rockefeller stressed in his testimony was of great importance to him in making the selection (NAR 8654), was well suited to the task, and the Governor was certainly justified in concluding that Fischer was capable of handling the job. However, Fischer was, at the time of his appointment, the head of OCTF, an agency which depended entirely upon the State Police for its investigative support, and it should have been obvious by September 14th that a full investigation would be necessary into possible criminal liability of State Police officers for excessive use of force during the retaking. These factors do raise several serious questions as to the wisdom of Fischer's continuing in both positions.

The first is whether the Governor should have been concerned that Fischer's relationship with the State Police in the conduct of OCTF's organized crime investigations might interfere with his disposition to investigate vigorously and completely the questions of State Police liability which might arise in the Attica investigation. Although ideally the man appointed to conduct this investigation should have had no pre-existing ties with the State Police, the Governor testified that he had complete

confidence in Fischer's independence and impartiality (NAR 8660), and Fischer had been openly critical of the State Police role as OCTF's investigative arm before September 1971 in discussions with the Governor's Counsel, Michael Whiteman, and State Police Superintendent Kirwan himself (RF 3069, 3070-73, 3029). Thus, Fischer had amply demonstrated that his conduct would not be colored by any favoritism toward the State Police occasioned by their role as his investigative arm at OCTF.

Second, was it proper to appoint a man whose immediately available investigative support was the very agency which he was required to investigate? In fact, the Governor appointed Fischer, not the State Police, nor, for that matter, the entire OCTF, to run the Attica investigation. In the Governor's view, the existing staff of OCTF attorneys was a plus of Fischer's appointment (NAR 8666). Moreover, both the staffing history of the investigation set forth in Section E(2) below and the Governor's testimony that "we gave [Fischer] a free hand to employ other people if he wanted, and under whatever circumstances he felt necessary," including, specifically, independent investigators (NAR 8665, 8660-62), make

clear that the decision was not improper.

Third, since Fischer's OCTF assignment was full-time, was it reasonable to conclude that he could do justice to both jobs? The testimony of the Governor that Fischer's Attica role "superseded in importance" his OCTF functions (NAR 8651), and of Attorney General Lefkowitz that "we all were aware" that OCTF matters would have to be "neglected for a while" (11,101), satisfies me that Fischer's OCTF responsibilities, as the Governor could reasonably have perceived them in September 1971, were not so burdensome as to preclude effective management of the Attica investigation.

(2) The role of the State Police

The State Police should have been removed from any role whatsoever in the initial gathering of evidence of what happened during the retaking, or in any subsequent investigation of the Attica events relevant to the retaking. While it does have its own Inspection Staff charged with the responsibility of investigating conduct of its own Troopers, which I have no reason to believe does not generally perform its function well, the

highest ranking State Police officers on the scene at Attica were all either with, or about to be transferred to, the Inspection Staff.* Moreover, the planning by the State Police for the gathering of evidence relating to the retaking and their acts and omissions to act in this connection during the first twenty-four hours after conclusion of the retaking on the morning of September 13, 1971, were extraordinarily deficient. Illustrative are the failure on the part of the State Police command to account for which trooper had which weapon, either on the issuance of weapons prior to the retaking or on their surrender immediately thereafter; the failure to arrange for comprehensive motion picture coverage of the retaking;** the taking of incomplete statements from assault personnel; the failure to mark the location of bodies precisely; and a general failure to recover and tag shells and other physical evidence in the yards and on the catwalks.

* WK 6547-6548.

** WK 6578-6580

Clearly, it asks too much of any law enforcement agency, and of public confidence in the administration of justice as well, for the agency to investigate its own members' possible misconduct,* especially on the scale and in the emotionally charged context of Attica. That does not, however, answer the question whether the State Police should have been relieved of investigative responsibility.

As a practical matter, there simply was no other agency that could have been mobilized quickly enough on September 13th to perform such immediately necessary tasks as accounting for use of weapons, photographing death scenes, marking bodies and gathering physical evidence. Moreover, early reports were that many hostages who died in the retaking had had their throats cut, and it was not until September 14, when Dr. Edland, a Rochester medical examiner, reported that all of the hostages had died of gunshot wounds, that it became clear that, since

* I have not considered it my function to determine whether there was in fact misconduct, but only whether Fischer or Simonetti, both of whom were on the scene on September 13th, bear any responsibility (see text above) and whether a sufficient probe has been made by the Fischer-Simonetti investigation of possible obstruction of justice charges, see Section G(4) below.

the inmates had no firearms in their possession, all of the thirty-nine deaths which occurred during the retaking were the result of shots fired by State Police or other State personnel (NAR 8682-83). However, it was not until some time on the 14th that Fischer was given full control of the investigation and of the State Police.

Neither Fischer nor Simonetti bears any responsibility for the deficiencies in the gathering of retaking evidence immediately after the retaking was over, and my own review of the evidence developed by them during the first few weeks of their investigation does not suggest that at that time* they should have concluded that the State Police were deliberately seeking to establish a broadscale coverup (cf. § G(4) below) of their own members. However, especially in view of Fischer's testimony concerning his own prior experience with the State Police, he should have more firmly and directly exercised the authority given him over the State Police on September 15th, to direct their actions and review what they were doing. Moreover, once independent

* Inadequate staffing (see Section E(2) below) and deferral of the fullscale retaking investigation until June 1972 (see Section E(3) below) delayed until much later the hindering investigation.

investigators became available in October 1971, it was a serious mistake to continue the State Police in any investigative capacity, if for no other reason than that it was bound to make more difficult the obtaining of information about the retaking from inmate witnesses to have State Police present during their questioning, even though an independent investigator was also present. A much larger request for independent investigators would have permitted complete separation of the State Police from the investigation and was clearly the preferable course.

(3) The Governor's remarks.

Immediately following the retaking and in several later instances during the early weeks after September 13, 1971, the Governor made statements in praise of the actions of the State Police in the retaking. He testified that he was speaking of the State Police as a group and their action in saving hostages, and not about individual troopers (NAR 8691, 8695-8696, 8769), and that inhibiting the investigation was the furthest thing from his mind (NAR 8750-8751, 8773). Since he was

prepared to fund the investigation to whatever extent needed, see Subd. E(2) below, the statements clearly were not improperly motivated. They were, nevertheless, as he acknowledged in his testimony before me, capable of being misconstrued as approval of all State Police conduct during the retaking. To the extent that the statements suggested such approval or minimization of or skepticism about possible law enforcement crimes against inmates, they may have influenced decisions concerning priorities and staffing and thus have disadvantaged the investigation. Whatever the pressures upon the Governor to explain the events at Attica, comments in praise of the State Police, particularly after September 14th when the possibility of the use of criminally excessive force by individual troopers was apparent, were inappropriate and should not have been made.

b. The Factual Bases for the Conclusions.

(1) Selection of the investigator.

The idea of appointing Judge Fischer to head the Attica investigation originated on September 13 with either Attorney General Lefkowitz or Robert Douglass, Secretary to the Governor, or Michael Whiteman, Counsel to the

Governor, and was approved by Governor Rockefeller (LL 11,079-082; NAR 8647-50).* At the time of the Attica uprising, the District Attorney for Wyoming County was Louis James. James, whose only previous experience as a prosecutor had been service as an Assistant District Attorney for three months before his election, operated a one-man office as District Attorney (LJ 2702-03). His role in the Attica matter prior to the retaking on September 13th was limited to consideration and rejection of the possibility of granting amnesty to inmates involved in the riot (LJ 2704-07).

Shortly after 9:00 a.m. on Monday, September 13th, James received a telephone call from Superintendent Mancusi, in which Mancusi said that retaking of the prison was imminent and requested that James go to Attica "as soon as possible ... to be on hand to give them possible legal advice" (LJ 2708). James arrived at Attica as the

* With the exception of preliminary discussion concerning the circumstances surrounding the death of Correction Officer Quinn, who died before the retaking, and the assignment by the State Police of a group of its own men to follow the assault troops for purposes of evidence gathering, there appears to have been no consideration given prior to the retaking to any investigation which might be required to look into crimes occurring prior to, in connection with, or as an aftermath of the riot (LJ 2714; RD 2915-16, 2992-97; WK 6529-30; HW 7228-7233).

retaking was ending, and met in Superintendent Mancusi's office with Correction Commissioner Russell Oswald, Mancusi, Dr. Hurd, Director of State Operations, Douglass, and various legislative leaders (LJ 2709-10). At this time, James "put in a personal plea" to Douglass, Hurd, and State Senator John Dunne, explaining

" ... my lack of any staff and the obvious magnitude of this criminal work, and I said, 'Will you please put in a direct plea to the Governor to transfer jurisdiction to the State Attorney General's office to investigate, present and ultimately prosecute?' ... I said, 'Gentlemen, the size of this thing, look out the window, you can just visualize the hundreds of possible cases that need to be investigated. I don't have the staff to cope with it.'" (LJ 2711-13).

(See also, MW 1592, RD 2925).

Douglass and Hurd replied that they would communicate James' request to the Governor "right away" and that "they thought [James] could rest easy in the thing, that the thing would be set in motion and it would be done that day" (LJ 2715). Douglass asked James whether he would like to have help in the interim from the Organized Crime Task Force ("OCTF") and James replied that he would (LJ 2724). "Events at Attica" confirms this. Its entry for 11:15 a.m. on September 13th is:

"District Attorney Louis James arrived at the prison. He advised that the resources of his office were far too limited to undertake an investigation and possible prosecution of the dimensions that would obviously be necessary. After speaking with Douglass and Whiteman, Shapiro advised James that Judge Fischer's organization would provide the necessary resources and arranged to have one of Fischer's assistants meet with James that afternoon" (Ex. 431, p. 52).

Fischer testified that shortly after 1:00 p.m. Whiteman telephoned him to ask him to go to Attica "to overlook the thing from a law enforcement point of view; that is, a prosecution of any of the criminal events, and let him know what the situation is" (RF 3038). Fischer then telephoned Anthony Simonetti, who was in charge of the OCTF Rochester office, asking that Simonetti go to Attica (AS 439-40; RF 3041). Fischer and Simonetti both arrived at Attica in the late afternoon of September 13th (RF 3038-40; AS 444-45).

At Attica on the 13th James told Simonetti of the request he had made and the assurances he had received (LJ 2726).^{*} Simonetti and James then agreed that

* James also spoke with Fischer about his request to be relieved when he first saw Fischer at Attica on the 14th or the 15th. James testified that whether or not Fischer's designation as prosecutor had officially been made when they met, it was clear from their conversation that Fischer understood he was to have the job (LJ 2758-59).

they should

"make [themselves] available for such appropriate help as we might give, particularly giving any advice on any legal problems that would touch into the ultimate prosecution phase of the thing" (LJ 2728).

James's further participation in the events at Attica on the 13th was limited to discussing with State Police Captain Henry Williams the advisability of immediate interrogation of inmate witnesses and State Police assault personnel, and of moving bodies out of the county because of a lack of adequate morgue facilities (LJ 2715-19; 2730-31).

Either on the afternoon of the 13th or the morning of the 14th, Governor Rockefeller called James's home, and in James's absence told his wife that he was aware of James's request to be relieved by the Attorney General's office and "that I could count on that being done" (LJ 2742-43). Although James was at Attica from Monday through Friday, the 17th, his role was a "diminishing one," and the advice he was called on to give after the 13th was "very nominal" (LJ 2744-45; 2760).

Fischer understood by some time on the 14th that he was definitely to be in overall command of the

Attica investigation (RF 3050). On September 15th, the Governor issued a release confirming this appointment:*

"Governor Rockefeller and State Attorney General Louis Lefkowitz announced today that Deputy Attorney General Robert E. Fischer has assumed direction of the investigatory efforts by law enforcement officers looking into the 5-day uprising at Attica State Correctional Facility. The Governor and Mr. Lefkowitz said that Mr. Fischer was also acting at the request of Wyoming County District Attorney Louis R. James. The investigation will focus on alleged criminal acts in connection with the 5-day disturbance at Attica." (Ex. 331, folder 4; RF 3048).

On the same day Fischer issued his own release, which read in part as follows:

"I have been directed by the Governor and the Attorney General to undertake an investigation of any criminal acts which may have occurred at this facility since Wednesday, September 8th. The Governor's direction was given to me shortly before noon today. I have met with Commissioner Oswald and Colonel George Infante, the Senior Representative of the New York State Police, and have established the physical and legal requirements of our office.

* Technically, Governor Rockefeller's designation of Fischer on September 15, 1971 was followed up on October 29, 1971 by a formal direction to Attorney General Lefkowitz, pursuant to Section 63(2) of the Executive Law, that he supersede District Attorney James in the conduct of Grand Jury and trial proceedings relating to the Attica matter (Ex. 353, pages 3-4). In turn, Lefkowitz delegated these responsibilities to Fischer (Ex. 353, pages 3-4).

"Representatives of our office will remain on the scene; available members of our staff are arriving here now to conduct the investigation.

"We are coordinating our efforts with the Wyoming County District Attorney.

"I have been on the scene as an observer less than 48 hours.

"Now, at the Governor's direction, my office is responsible for conducting an investigation relating to criminal events ..." (Ex. 146, p. 3).

On October 6, 1971, Fischer formally announced that he had appointed Simonetti to be directly in charge of the Attica investigation (Ex. 308, p. 2). However, as early as September 14, Fischer had concluded that Simonetti would be his principal aide (RF 3077-78) and, although that may not have been made explicit between the two until shortly before October 6, 1971 (AS 560, 565-66; RF 3083-89), Simonetti was the only attorney working under Fischer on the investigative as distinct from the legal aspects of the Attica matter until Edward Hammock joined the staff on a part-time basis on September 28, 1971 (Ex. 308, p. 2).

From 1961 to 1966, Fischer had been District Attorney of Broome County. In 1957, he had been assigned

to supersede the District Attorney in a Section 63 investigation in Buffalo. Thereafter, he served two and one-half years as a County Judge, presiding over criminal felony cases. Since 1970, he had been a Deputy Attorney General in charge of the State Organized Crime Task Force, with statewide jurisdiction to investigate organized crime cases (RF 3020-36).

(2) The role of the State Police.

The State Police has, from OCTF's inception, been its investigative arm (RF 3022). Fischer testified that long prior to Attica, he realized that OCTF lacked direct control over the State Police in the conduct of investigations, and had become "totally dissatisfied with the State Police operation in the so-called organized crime area" (RF 3028). He described his pre-Attica concerns about the State Police as follows:

" ... I think that the problem of experience was on the leadership administrative level of the State Police; that they were properly described as extremely jealous of their prerogatives, control ..." (RF 3030).

" ... I had some analysis, personal analysis of the State Police command and how it operated, and the administrative level, vis-a-vis the working level of the State Police. I think it should

be stated for everybody's understanding presently -- and it reflects to some extent my prior experience over the years -- that the State Police on an administrative level is very protective of its image, what it perceives to be its public image, and in substance the command had a don't rock-the-boat philosophy; that is, don't raise any problems, and the fewer problems that are raised, why, everybody will get along and progress." (RF 3052-53).

Mindful of this experience, Fischer told Whiteman, sometime before the formal announcement of Fischer's appointment on September 15th, 1971, that he would not take the job unless he were given full control of the State Police in the conduct of the investigation.

Whiteman assured Fischer that he would have direct control, and so advised State Police Lieutenant Colonel Infante in Fischer's presence (RF 3073-74; 3099). Superintendent Kirwan had the same understanding (WK 6544-45).

Fischer testified that he was aware "from the beginning" that the "conduct of the State Police, any personnel who participated in it, would be subject to criminal inquiry" (RF 3123). Moreover, Fischer and Simonetti both testified that very soon after arriving on the scene at Attica, they found the State Police unresponsive to their directions (AS 505-26, 568-86; RF 3152-63). Thus Simonetti immediately became concerned

that the State Police was "dribbling" rather than quickly turning over to Fischer the reports being written on their investigation. As a result, Fischer called a meeting on the evening of September 16, 1971, which he attended with Simonetti, Infante, Major Monahan, Captain Henry Williams and other OCTF and State Police personnel (Ex. 146, p. 10). Contemporaneous notes of an OCTF staff assistant described the meeting as follows:

"Simonetti began by making a speech directed at Col. Infante concerning the failure of the State Police to supply the OCTF with homicide files requested 24 hours earlier. Simonetti was quite impassioned and stood while he spoke. Infante listened in silence. When Simonetti sat down, Fischer looked inquiringly at the group and said, 'Better said than unsaid' The next two days, relations between OCTF personnel and State Police were under extreme strain" (Ex. 146, p. 10). (See also AS 506-10; RF 3152-56).

Other difficulties also occurred. On September 18, 1971, Simonetti discovered that the State Police had not, as earlier directed, been requiring its men to give Miranda warnings in inmate interviews, and Fischer complained directly to Infante (Ex. 146, p. 10; AS 512; RF 3158). Another incident detailed in Section G(1) below concerned State Police action which Fischer regarded as overprotectiveness by the Police

command. The conclusions he drew from the incident were as follows:

"I can't say at this time nor could I really say at any time that there was an attempt by the State Police and Infante, in particular, to misrepresent to me what had occurred. I think what bothered me the most was here was a man who apparently was in charge of the State Police on a gross state level who was taking the time during this period to spend a great deal of time undertaking an inquiry addressed to a specific item which appeared to be supporting a thesis that would be helpful to the State Police." (RF 3064).

Although there was frequent contact in the early days of the investigation (HW 7431-35), Fischer did not institute any systematic management of the State Police investigation to direct their actions or review what they had done (RF 3143-52). His explanation was that in the first few days "I would assume we were addressing an even more important problem of getting a place to sit, let alone having a meeting," and said that attempting to solve the issue of control through regular meetings "just didn't raise itself as an immediate problem." (RF 3152).

Fischer and Simonetti were both concerned that the State Police should not participate in investigation of its own conduct,* and agreed within a very few days

* Simonetti's own early Notes of the investigation state that "Within the first 24 hours it became apparent that independent investigators were required to examine the troopers regarding their retaking actions." (Ex. 13, p. 3).

to retain a staff of independent investigators to investigate those aspects of the matter involving the conduct of State employees (RF 3123-28; AS 514-17). By early October, 1971, the investigation had secured a total of nine independent investigators, all of whom had previous experience in homicide investigations with the New York City Police Department (AS 621).

The retaining of an independent investigative staff did not immediately accomplish the removal of the State Police from the retaking investigation. A team of twelve State Police officers remained assigned to the Attica investigation departing only in the early summer of 1972, when five new independent investigators were added to the staff as part of a concentration of effort on the retaking events (AS 621).* Until that time, the

* Captain Henry Williams of the State Police played a part (HW 7226) in setting up the State Police assault plan for the retaking, and, during the last two weeks of September, 1971, in gathering evidence concerning the events of the retaking. He then remained assigned to Attica for several months, acting in a liaison role between Fischer's investigation and the State Police. However, Simonetti and Hammock argued to Fischer that it was inappropriate for a State Police official who had been directly involved in the retaking events to play any role whatsoever in their investigation, and, as a result, Williams was relieved of this assignment (AS 518-21, 1119-31).

principal mission of this State Police team was investigating the pre-retaking deaths of Correction Officer Quinn and inmates Hess, Privitera and Schwartz. In the course of this assignment State Police officers, typically with an independent investigator present but sometimes alone, participated in many inmate interviews (EH 2350, 2404-2421). Although these interviews were principally directed at inmate crimes, the witnesses often had information about the retaking (EH 2350, 2404, 2421; FC 4539-42).

(3) The Governor's remarks.

In his September 13, 1971 press statement Governor Rockefeller noted that:

"We can be grateful that the skill and courage of the State Police and correction officers, supported by the National Guard and Sheriffs' deputies, saved the lives of 29 hostages and that their restraint held down casualties among prisoners as well." (Public Papers of Governor Rockefeller, 1505).

On September 16, 1971, the Governor was reported in the New York Times as stating:

"Asked if he thought that there was an emotional reaction on the part of the troopers when they assaulted the prison, the governor said, 'No, I don't. I think that they did a superb job.'" (NAR 8759).

At a press conference on the same day, the following exchange occurred:

"QUESTION: Governor, one of the basic questions that is involved at this moment is the question of who killed the hostages. We now have a second autopsy report that says they died of gunshot wounds. Do you think that there was indiscriminate shooting by the State Police?

"GOVERNOR ROCKEFELLER: No, I don't think there was indiscriminate shooting but I think the hostages who died of gun wounds were caught in a crossfire and I can explain very simply how this happened. The instructions were to shoot the executioners who stood with knives at the throats of the hostages. Some of them had additional prisoners, I mean prisoners who were standing behind the guards, the hostages, with a knife or whatever it was at their backs. So the instructions were two: to shoot the minute the gas was down, the executioners. This is the sharpshooters. The other instruction was they were to storm the four passageways, the top of the passageways where the barricades had been built leading to where the prisoners were held and what was known as Times Square, which was the middle of the courtyard on top of the path. Now, it is evident that both the gunshots included rifles, shotgun and pistols. If you visualize the effect of the gas coming down, which comes in a semi-fog, causes haze, the effect of the gas which operates in three seconds, which would be to doubling up somebody, and the instructions which was to try and save these men, to me it's extraordinary that 28 men were saved under these circumstances. At the same time the men who had scaled the walls and were coming out over the top of these passageways, having to break through the barriers, being fought by prisoners as they came, again with instructions if they were attacked or obstructed in getting to the hostages, they were to shoot. So they converged

in four different lines towards the hostages. Again, there was the possibility here of the crossfire, and I think this is exactly what happened.

"QUESTION: A crossfire between the Troopers or a crossfire between prisoners and Troopers?

"GOVERNOR ROCKEFELLER: No, the prisoners didn't have guns. They had tear gas guns, but no guns.

"QUESTION: So this was a crossfire between two different areas?

"GOVERNOR ROCKEFELLER: Four.

"QUESTION: Four different areas?

"GOVERNOR ROCKEFELLER: Yes.

"QUESTION: You feel, then that there was no indiscriminate shooting, that they were caught in that crossfire?

"GOVERNOR ROCKEFELLER: That's right.

* * *

"QUESTION: In view of the fact, sir, that you believe that these hostages were killed in the crossfire of the Troopers' guns, then you feel that this is a case of justifiable homicide?

"GOVERNOR ROCKEFELLER: Well you are using words that are a little beyond my legal capacity.

"QUESTION: Not legally, for the moment, but morally.

"GOVERNOR ROCKEFELLER: I certainly do. If you talk morally, I certainly do. As I say

again, I think the State Police, and backed up by the others, but they and the National Guard, which handled the helicopter, achieved what at the time was considered to be an almost impossible task." (Ex. 353).

As a result of that conference, the Governor was quoted on page 31 of the New York Times of September 17th as follows:

"Asked if he believed morally these deaths [hostages] constituted justifiable homicide, he said

'if you are talking morally, I certainly do,'

adding that under the circumstances the troopers had achieved an almost impossible task."

Finally, on September 24, 1971, the Governor held a meeting attended by Executive Chamber personnel, Attorney General Lefkowitz, high State Police officials, Commissioner Oswald, Fischer and others, in order to obtain direct reports as to the details of what had happened at Attica from September 9 through September 13. Memoranda based on contemporaneous notes of that meeting made by Rodney Campbell, who edited Commissioner Oswald's book, Attica: My Story, read in part as follows:

"The Governor kicked off the meeting by paying tribute to those involved in the courageous and successful action. 'It's a miracle we got so many out alive.'

"Then he asked for a reconstruction of what took place. He checked the maps and photographs of Attica and then began an interrogation of the state officials who had taken the actions as ordered by Commissioner Oswald. The Governor stressed throughout that this was no 'turkey shoot' and that the immediate aim was to render harmless the executioners who had been deput[ized] to kill their own hostages in the event of police action." (Ex. 185).

Although Governor Rockefeller testified that he was sure he had not made the 'no turkey shoot' remark (NAR 8748), he acknowledged that he "expressed an appreciation to everybody concerned" (NAR 8749).

When asked whether his comments might reasonably have been expected to appear to Fischer and the State Police as a pre-judgment by the Governor of the question of State Police criminal liability, and therefore to have had a dampening effect on the investigation, the Governor testified:

" ... [p]erhaps if I were a lawyer, I might have said to the press Look, I don't think I ought to discuss this whole question at all until the investigation is completed, in light of that which you said, in order to have avoided the possibility--I only say 'possibility'-- of any statement I have made having an effect on either the police or Judge Fischer.

"Not being a lawyer, and this subject being a very hot one in the public's mind, and being under great pressure to have a press conference

and explain the situation as I saw it, I said what I did, which was what I thought, what I felt.

"Now, as to the effect of these statements on the police, of course that's got to be a matter of conjecture, because there can be no proof one way or the other.

"I have very high regard for the state police. They have a long tradition of great integrity and outstanding service, with very low corruption, when you take police across the country. In fact, I only know of two cases.

"I would doubt that what I said would affect a police officer assigned to do a specific investigation. But this is a judgmental question and you have a perfect right to come to any conclusions of your own to read into the minds of a state police investigator.

"As far as Judge Fischer is concerned, I know Judge Fischer very well. He is totally independent, totally his own man. He is not taking instructions or advice, when he takes an investigation. That's his record. That's his history. That's his reputation.

"And every contact I have had with him leads me to a confirmation of that opinion about him, that he does what he thinks is right. He is a man of tremendous integrity and he would be influenced in no way by anything I said.

"So that on Fischer, I would have no concern that this would in any way influence him. On the police, I would not think so, but I can see how you can make a case sufficient; and that would then have to be a question of judgmental value and we couldn't prove it one way or the other." (NAR 8765-67).

With regard to his comments at the meeting on September 24, 1971, he added that inhibiting the investigation in any way

"was the furthest thing from my mind. I was trying to find out what had happened, and which I got a pretty good picture from that discussion, of the action, how it started, what the timing was and so forth, and what was the cause of the deaths...." (NAR 8750-51).

In relation to the appropriateness of the State Police action he referred to, he pointed out (NAR 8769, see also 8691, 8695-8696) that:

"We are now talking about the action of the state police as a group.

"Now, the state police, as a group, were ordered to go in at the request of the Superintendent of Correction -- I guess it would be the Superintendent and with my approval. So they were carrying out an order by their chief.

"Now, when law enforcement officers or members of a military force carry out an order, and if you were involved in approving that order, unless you do not believe in what you were doing, you have got to think that it was the right thing to do. I had no question in my mind.

"So, therefore, when you are talking about the action, we are now talking about the overall action of going in to secure the prison and release the hostages.

"Okay. Now, when you come down to whether individual troopers, state troopers, conducted themselves properly or improperly, that's a different

question. But the action of freeing hostages and securing order in the prison is, in my opinion, was and is, an appropriate action."

2. Budget and Staffing

a. Conclusions

The Attica investigation was from the outset woefully understaffed. The responsibility for the inadequacy of the staff rests largely with Deputy Attorney General Fischer, and not with the Executive Chamber.

With respect to size of staff, the raw statistics of what happened at Attica from September 9 through September 13 were sufficient to compel the conclusion that a full investigation would be extraordinary in scope and even with unlimited staffing would take a long time to complete. Immediately apparent was the fact that there were four principal areas for investigation—conspiracy to riot, pre-retaking deaths, retaking deaths and wounding, and alleged rehousing brutality*—which would require interviews of many hundreds if not thousands of potential witnesses. The retaking itself presented an investigative task which was breathtaking in scope. In the space of only a few minutes thirty-nine people were

* A fifth, with respect to possible obstruction of justice, was not immediately apparent.

killed and eighty-nine seriously wounded. More than one thousand persons, of whom early, detailed interviews were essential, witnessed some part of the events occurring during those few minutes. The task of collating and analyzing physical evidence was colossal. It was thus obvious from the outset that the investigation required a staff of many experienced investigators to ferret out the details and a substantial number of attorneys to coordinate their efforts and shape the preparation of prosecutable cases. Clearly, a staff of ten lawyers and fifty investigators would have been reasonable; yet the investigation began with Deputy Attorney General Fischer serving as head of both it and OCTF, Anthony G. Simonetti from the OCTF staff as full-time Chief Assistant of the investigation and one other part-time attorney, and an investigative staff of eight (soon increased to nine) independent investigators and twelve BCI men who, it was early known, could not be used for the retaking or rehousing investigations.

While responsibility for inadequacy of the staff rests, as I have noted, with Fischer, review of his contemporaneous correspondence with Budget satisfies me

that this resulted from the manner in which he approached administrative and budgetary problems and not from either any impropriety on his part or on the part of the Governor, his Executive Chamber staff or the Budget Division.

Governor Rockefeller made it clear at the outset that the investigation should have whatever it needed to get the job done, and the record is plain that on the several later occasions when Fischer's specific requests for additional staff were made known to the Governor, most dramatically on the occasion of the request made in July 1973 not only to continue the investigators then on staff but also to add ten more investigators and seven more lawyers, the Governor immediately took action to assure that the requests were met.

Less clear is why the investigation began with only nine independent investigators. Fischer testified that he made no assessment of needs (RF 3171-74, 9086), and that the request principally reflected the number of investigators who were then available (RF 9108). Simonetti testified, however, that nine investigators were clearly inadequate (AS 8286), that he would have sought and obtained more if he had thought there was authority to seek

more (AS 8289), and that he understood that the authorization to hire eight (soon increased to nine) reflected the imposition by Budget of a ceiling on the number of investigators authorized (AS 8288-90, 8301).

I am satisfied that neither Fischer nor Simonetti has sought to misstate to us his honest recollection of what happened. While I credit Fischer's testimony (RF 3177) that his initial request for only nine investigators resulted from his desire to get the investigation started promptly, I conclude that it was based upon inadequate consultation with his staff and that he made a serious error in not himself carefully assessing the needs of the investigation at its outset, and in failing at later stages of the investigation, when staff needs were substantially easier to estimate, himself to re-evaluate those needs (RF 9125-44). A further error of judgment on his part was in not seeking investigative support from a broader base. No effort was made to seek investigators from any source other than contacts within the New York City Police Department which Simonetti had made while an Assistant District Attorney in New York County (RF 3185-3189). While New York County detectives may be

expected to be broadly experienced, it is probable that additional investigators could have been quickly obtained from other areas within or without the State who would have competently served the investigation.

Since there is no support in the record for Simonetti's belief that Budget had imposed some limit on investigative staff,* I conclude that his misconception resulted from a failure of communication between him and Fischer.** Since Simonetti had made known to Fischer his

* Indeed, the McKay Commission obtained sufficient funding that at its peak its permanent staff consisted of 36 persons—18 attorneys, 6 investigators, 2 researchers, 10 office and clerical personnel—assisted by more than 60 per diem and volunteer workers, as well as professional consultants, Report of New York State Special Commission on Attica, p. xxvii.

** That Fischer requested only nine investigators at the outset may have resulted from his belief that, since the Attica investigation was to be funded within OCTF's budget, no more investigators could have been hired out of funds available to the investigation before the next fiscal year. Thus Edward Hammock explained the small initial staff as follows:

"Simonetti didn't have any idea of how many people he needed, but he certainly knew that he needed more than he had and wanted to get more, and one of the recurrent problems was, you know, how are we going to get more people. And his answer, as he gave it to me from Fischer, was that you've got to do it out of the OCTF budget.... There were no separate created budgets for this investigation.

Continued ...

views as to larger staff needs, had no prior experience whatsoever in dealing with budget matters (AS 8284), and was intentionally separated by Fischer from direct responsibility in the staffing area so that he could concentrate on the investigation itself (RF 9137), the fault cannot be attributed to Simonetti. Fischer having testified quite candidly that there was "no question" that "the staffing was my responsibility" (RF 9144), the failure must be attributed to him.

Contributing factors were the difficulties with Budget resulting from a misunderstanding between them and the Executive Chamber concerning the agreement by the latter that ten of the investigators recruited from

Continued...

"Now, the investigators, I think they were getting that money from accruals in the OCTF budget, it wasn't separate money. So there was a fiscal stricture that he was working under and with." (EH 2344; see also RF 3180-81, 9095).

New York City could be promised, as an inducement to make the move to Attica, ultimate permanent status with OCTF. Problems with Budget also arose because of delay in obtaining requested increases in the investigative staff and over salary scale of some of the lawyers, but at least as to the former much of the difficulty arose from the investigation's failure adequately to document its needs and from its constant underestimation of the time required for its completion, both of which made it entirely reasonable for Budget to have taken the positions that it did.

b. The factual basis for the conclusions.

The Attica investigation began its work in mid-September, 1971, with Simonetti as its only full-time employee. Fischer himself was on the scene at Attica for a period of about a month, supervising the beginning stages of the investigation (RF 3077). On September 28, 1971, Edward Hammock, a former Assistant District Attorney in New York County and then the head of a narcotics rehabilitation program in New York City, joined the staff on a part-time basis (EH 2317-20). Several OCTF staff attorneys also worked briefly during the early weeks on

legal problems arising out of the riot, but did not, except for Roger Bradley, participate then or later in the investigation itself (MS 7823-27). Additions to the attorney staff as the investigation progressed were as follows: two were added between November 1971 and April 1972; another was employed in March of 1973; between April and December 1973 ten attorneys were added and one resigned, bringing the total attorney staff to fifteen. The present staff consists of twelve attorneys. (Ex. 519).

At the outset of the Attica investigation its only investigative support was the State Police. As indicated elsewhere,* Fischer and Simonetti agreed almost immediately that an independent staff of criminal investigators would be necessary in order to assemble the facts concerning possible criminal liability of state officials in connection with the planning and execution of the retaking. In October 1971, the investigation retained nine independent investigators, all former New York City homicide detectives; in January and once again in June 1972, five more investigators were added; and in July of 1973, ten more were hired.

* See §E(1) of this Report.

(1) Attorney recruitment

As already noted, Fischer started the investigation with one full-time attorney, supplemented on September 28, 1971 by Edward Hammock, who began as a part-time staff member. Thereafter, the attorney staff was further supplemented as set forth above.

Differences between Fischer's office and Budget over attorneys were limited to the question of pay scale, and did not extend to numbers of attorneys sought and authorized. Although Budget on several occasions refused to authorize requested salaries on the ground that they substantially exceeded Law Department pay scales, Simonetti testified that the only attorney his office lost over this issue was Roger Bradley, an OCTF attorney, who had worked on legal and factual aspects of the investigation from its inception.* On July 25, 1973, at the same time he approved the substantial additional group of attorneys and investigators requested by Fischer at the July 16th meeting with Governor Rockefeller, Budget Director Dunham

* In addition, the hiring of another attorney, Louis Aidala, was substantially delayed as a result of a salary dispute with Budget (RF 9205-06).

rejected an application for a substantial raise for Bradley, stating (Ex. 333).

"However, in the overall request, there is one position I am compelled to withhold approval. It is the position for Roger Bradley at \$25,000. Mr. Bradley was admitted to the Bar in 1970, three years ago and has been with the Task Force for two years. His past experience would not seem to warrant an increase of \$7,000 in a two year period. Such an increase is far beyond the promotional opportunities afforded State employees in the competitive service. I am, therefore, not approving the requested increase."

As a result, Bradley left OCTF. (AS 8971).

(2) Investigator recruitment

On September 19, 1971, reacting to their dispute with the State Police over issuance of Miranda warnings to inmates, Simonetti and several OCTF lawyers and investigators met at a motel near the prison to consider their staff needs. Contemporaneous notes of this meeting kept by Emerson Moran, an OCTF aide to Fischer, read in pertinent part as follows:

"Establishment of a separate investigative body to be utilized by the OCTF was discussed. Simonetti acted as the informal chairman of the meeting. The possibility of obtaining the approval of the Governor for an independent investigative body was debated. Also, the lawyers felt a black attorney should be added to the Attica staff.

"Simonetti and Croswell [an OCTF investigator] discussed the possibility of hiring retired New York City Police Department Detectives....

* * *

"Simonetti pointed out that the problem with the SIU [Special Investigation Unit] is that they are forced to serve two masters, the OCTF and Division Headquarters. Spont expressed his belief that the relations with the New York State Police would never be the same again.

"The question arose as to how many investigators would be needed. Croswell said, thinking the optimum, on a long-range basis 100 investigators; Simonetti felt that for Attica alone, he would need twenty-five; Richman felt the Attica investigation would take fifty or more. An informal agreement was reached in the group to attempt to obtain fifty investigators and eight lawyers.

"At 5:30 p.m., Fischer returned Simonetti's calls and they discussed the situation.

"Simonetti spent a good part of the remainder of the evening reaching out to New York City to contact investigators in whom he had confidence and whom he believed would be available for the Attica investigation" (Ex. 146, pp. 14-15).

Simonetti testified that these notes were generally consistent with his own memory of the substance of the meeting, except that he did not recall the precise figure of eight lawyers being mentioned (AS 8273-

75). He further testified that the results of the meeting were quickly communicated to Fischer (AS 8279).

Fischer testified that he did discuss the need for independent investigators with Simonetti. However, he said that he had no recollection of any figure of twenty-five or fifty investigators being mentioned to him (RF 9073), and he testified that in any event, in his view, it was impossible to make any definite statement in the fall of 1971 as to how many investigators would be necessary, and that he had never attempted to make such an estimate (RF 3171-74; 9086).

After talking with Simonetti, Fischer called the Governor's Counsel, Michael Whiteman, and told him, without mentioning any numbers, that he wanted to hire independent investigators. Whiteman told Fischer to "go ahead." (RF 9070-74).

On September 27, 1971, Governor Rockefeller signed a "Certificate of Allocation" from the Governmental Emergency Fund authorizing a total allocation of \$4,000,000 from the Fund for "emergency and unanticipated" expenses to be incurred in connection with the Attica uprising up through March 31, 1972 (Ex. 333). This authorization

referred to a total of \$20,000 as Department of Law "expenses" and \$180,000 as "expenses of investigations and committees" of "all State Departments and Agencies." The document also stated that the funds were needed, among other things, for "a thorough criminal investigation of these events."* At the same time, the legislative leaders signed a "Certificate of Intent" to make a sufficient appropriation at the next regular session of the legislature to reimburse the Fund for the \$4,000,000 allocation to Attica (Ex. 333).

Fischer testified that he was assured by Whiteman, at the outset of the investigation, that he would receive "whatever we needed" in investigative staff (RF 3181). Governor Rockefeller and Richard Dunham,

* \$3,800,000 of the \$4,000,000 was allocated for rehabilitation and repairs at Attica and purchase of additional security equipment at all of the major state prisons. The \$20,000 of Governmental Emergency Funds assigned to the Law Department was expended on the Attica Investigation by October 22, 1971. Since those funds and others available to the Law Department were insufficient to fund the Attica investigation through the end of the 1971-72 fiscal year, a deficiency appropriation of \$74,000 was later obtained to carry the project until March 31, 1972. (Letter from Albert Singer, Administrative Director of Law Department, to Dunham, dated December 16, 1971, Ex. 333).

then the Budget Director, likewise both testified that the Governor made clear to Dunham his intention that all of Fischer's needs should be met (NAR 8774-75; RD 7529-93).

During the fall of 1971 neither Fischer nor the Law Department submitted to the Budget Division any written estimate of or justification for the investigation's specific lawyer and investigator needs, or any estimate of the duration of the investigation (AS 8281-82). It also appears that beyond the September 19th motel meeting referred to above, which Fischer did not attend, Fischer never conducted any detailed discussions with his staff or others in an effort to make a complete assessment of staff needs or any projection of how long the investigation might be expected to take, based upon whatever facts about the Attica events were then available to him (RF 3171-74, 9086).

The Law Department's budget requests for 1972-73 were submitted in September, 1971, and therefore made no provision for Attica staff (Ex. 333). The investigation's first request to Budget was incorporated

in a letter dated September 28, 1971 from Albert Singer, the Law Department's Administrative Director, to Dunham, which reads in pertinent part:

"Due to the uncertainty as to the duration of this investigation, for a period of not to exceed three months we propose to pay eight special consultant investigators at a rate of \$15,000 per year on the basis of vouchers submitted. If the investigation continues for a longer duration, we will request that these positions be provided in a segregation."
(Ex. 333, emphasis in original).

On October 6, 1971, Budget's Deputy Director Charles Palmer replied to Singer, with a copy to Fischer, as follows:

"Because of the unusual nature of this investigation we are authorizing eight special consultant investigators on a temporary basis to be paid at a rate of \$15,000 per year for up to three months...."

"These positions are being established specifically for the Attica investigation with the understanding that there is no commitment to continue them once the investigation is completed." (Ex. 333).*

* Singer testified that the request for eight investigators originated with Fischer (ARS 10271). The initial group of investigators was extended through the end of fiscal year 1971-72 by periodic letter requests (See, e.g., letter from Singer to Dunham, December 10, 1971, Ex. 408).

Shortly thereafter Singer requested and received from Budget authorization to hire one more temporary investigator in a supervisory capacity (Ex. 333). Largely through his own individual efforts, Simonetti, in late September and early October 1971, hired a total of nine former New York City Police detectives as investigators (RF 9078-82; Letter, Fischer to Dunham, June 5, 1972, Ex. 333). Fischer testified that he was told by Whiteman that he could assure each of these men of State law enforcement employment beyond the completion of the Attica investigation, and that that assurance was given (RF 9105-08).

On January 14, 1972, Fischer met with Whiteman and Singer and representatives of the Budget Division. Stressing his lack of direct control over State Police investigators in OCTF investigations generally, Fischer requested that the nine independent investigators assigned to Attica be retained as permanent OCTF investigators after completion of the Attica investigation. The question was not resolved, and a Budget Division staff member who attended noted in a memorandum of the meeting that

"We must address ourselves to the need for a permanent investigating staff for the OCTF which will be over and above any staff supplied by the State Police" (Magill memorandum, January 14, 1972, Ex. 333).

Thereafter, in communications between Fischer and the Law Department and Budget Division throughout 1972 and the first six months of 1973, the immediate needs of the Attica investigation and long-range OCTF needs were similarly interwoven.

On January 26, 1972, Singer forwarded to Dunham Fischer's request for authorization to hire five more independent investigators for the period January 27 through September 30, 1972. Singer's letter reads in part:

"These investigators are required for the continuing investigation at Attica, including investigations and interrogation activities at Attica and in other correctional facilities throughout the State.

"Judge Fischer has advised me that this additional investigative staff is urgently required and must be provided at the earliest possible date in order to insure that he can carry out his responsibilities in accordance with the directive of the Governor. I therefore request that this matter be given your prompt attention so that such staff can be put to work immediately." (Ex. 333).

According to Simonetti, the request was part of a stepping up of investigative activity on the pre-retaking inmate crimes, to enable the staff to turn more quickly to the retaking investigation (AS 8322-23).

On January 28, 1972, Budget replied to this request as follows:

"Because of the unusual nature of the investigation we are authorizing an additional five special investigators on a temporary basis at a rate up to \$15,000 per year for the period January 27 through March 31, 1972. As discussed previously, additional funding will be needed for the Attica investigation during 1972-73, and I anticipate these funds will be requested in the supplemental budget request. Until these funds are approved in the supplemental budget, authorization for the temporary staff for the Attica investigation can only be made through March 31, 1972." (Ex. 333).

The Law Department's Supplemental Budget Request for 1972-73 was forwarded by Singer to Dunham on March 15, 1972. For the Attica investigation the Law Department requested ten permanent and five temporary investigators, stating in justification for the ten permanent investigators:

"... They are expected to be transferred, after a six-month period, to positions paid

from Federal funds for organized crime activities. These investigative positions are needed after the conclusion of the Attica Investigation for the expanding investigation into organized crime." (Ex. 333).*

A March 31, 1972 Budget Division staff memo analyzing the request noted that:

" ... [A]bsolutely no information has been supplied as to the length of the investigation or need for the sizeable staff and funds requested." (Memorandum, Van Laak to Palmer, Ex. 333).**

A later staff memo recommended disapproval of the application for permanent status for ten investigators, stating that:

"the need for continuing [them] as permanent Task Force investigators has not been justified, especially since 52 State Police are assigned to this function" (Memorandum, Van Laak to Palmer, April 10, 1972, Ex. 333).

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- * According to Singer, the language of this request was either drafted or specifically approved by Fischer's office (ARS 10280-10285).
 - ** Pending Budget's consideration of the Supplemental Request, the fourteen investigators had been extended on a temporary basis from April 1, 1972 through June 30, 1972 (Letter from Palmer to Singer, March 30, 1972, Ex. 408).

A staff memo at Budget analyzed the request as follows:

"He requests Budget approval and the necessary funds to accomplish the move. However, neither his letter nor the attached memorandum from E. D. Croswell [of the Task Force] gives any indication of the length of time that the space will be required nor a terminal date for the Attica Investigation. Implicit in this request is the continuation of the 20 investigator positions. Funds were provided to continue these positions until October 1. Additional money will be required. Also, a decision is needed concerning the advisability of continuing 10 of these positions on a permanent basis." (Ex. 333).

On September 8, 1972, Singer wrote to Dunham repeating the request for office space and stating:

"I have been advised that it is probable that activities involving the Attica Investigation will probably extend to 1975. In all probability, the major activities, including trials, will extend through the current fiscal year and fiscal year 1973-74."* (Ex. 333).

The letter also noted that retaining the twenty investigators on the Attica matter through the end of the fiscal year would result in a deficiency of over \$200,000, but explained that if the Attica investigation were finished

* A December 4, 1972 memorandum from Palmer to Dunham indicates that after receiving the September 8, 1972 letter Dunham again spoke to Governor Rockefeller (Ex.333). Dunham testified that the purpose of the meeting was to discuss alternative methods of funding the Attica investigation's deficiency (RD 7539-44). Again, Governor Rockefeller did not recall the specific conversation (NAR 8793).

before the end of the fiscal year and some or all of the investigators switched over to general OCTF work, the deficiency could be pro tanto reduced, because of the availability of federal funds for general OCTF investigative work.

On September 15, 1972, Palmer wrote to Singer (Ex. 408) rejecting the idea of incurring a deficiency, indicating that a transfer of \$112,000 would be made to OCTF to continue the twenty investigators through December 1972, and going on to state that "at that point we will be able to reassess the situation and to consider what further action, if any, should be taken after the legislature convenes." The letter approved the move to New York City and closed with Palmer's statement that "we earnestly hope that the Task Force will be able to make considerable headway in completing the investigative work on Attica during the next three months."

On November 17, 1972, Fischer wrote letters to the Attorney General and to Singer, indicating that inmate indictments would be filed by the end of the year and that "substantial work remains to be done in regard to some few but serious retributive acts by

Correction personnel." He predicted that the entire investigative staff would be needed for Attica work at least until April 1, 1973, and perhaps throughout the succeeding fiscal year (Ex. 333). On November 20, 1972, passing on this forecast in a letter to Dunham, Singer requested a deficiency to cover the investigators until April 1, 1973 (Ex. 408).

On December 7, 1972, Dunham wrote the Attorney General as follows:

"As you know, the Organized Crime Task Force now has 20 investigator positions assigned to work on Attica.

"The funds for these positions originally were scheduled to expire on September 30, 1972 and subsequently were extended to December 31, 1972.

"Last September, when the authorization for these positions was extended, we understood that the investigators had approximately 200 interviews to complete and that the staff of 20 investigators would be able to almost totally eliminate this backlog by December 31st.

"Similarly, we understood when we approved the move of the group's office from Attica to New York City effective last October 1st, that the investigation interviews were well on the way to completions.

"If, as you have requested, we are going to recommend a deficiency appropriation to continue

some or all of the investigators, we are going to need some documentation to supplement that provided in Al Singer's November 20th letter as to why the investigators' work has not been completed as originally contemplated and when it will be completed. Also, we will need information concerning how much of the investigators' time now is being spent on interviewing persons in the Attica and surrounding areas." (Ex. 333).

On December 13, 1972, Fischer wrote to Singer justifying the continuing need for investigators. The last paragraph of the letter indicates the extent of Fischer's frustration with the budgetary situation.*

It stated:

"It is now clear that we must keep the 18 investigators for the foreseeable future for these reasons:

- (1) We do not know how soon or where these

* His attitude toward Budget is expressed in his testimony (RF 9124, see also 9120) that:

"I didn't go to Budget and try to set this thing up mechanically. I went through the Governor's counsel's office. What I am suggesting here is that I didn't feel it was my function to, after having the Executive Department's ... implicit understanding that what I would need to carry the thing through and do it, that I will get, so I didn't feel I had to go to Budget, a branch of the Executive Department, and say 'Here's what I need, and I seek your approval.' It was inconsistent, as far as I was concerned. It never occurred to me that this is what I would have to do."

cases will be tried. That decision will be made by the Court. However once this is decided the presentation of the cases will depend to a great extent on the detailed knowledge of the investigative teams and the cooperation they have developed with the inmate witnesses on the cases to which they have been assigned. I cannot now judge the time range for this, but must anticipate this need throughout the next year.

- (2) The Grand Jury will continue to sit and investigation will continue in order to support submission to the Grand Jury (a) review of the multiple deaths resulting from State Police and Correction gun shots, (b) two additional inmate homicides, (c) any brutality complaints against public officers after retaking and (d) public presentment by the Grand Jury on all issues.

"In summary, the investigative phase for Grand Jury presentation of the majority of the inmate crimes completes only one phase of our Attica problem, and the need for retention of the 18 men will continue as noted.

"I hope and trust that we will not have to continue with requests to Budget on an interim or quarterly basis. These continuing efforts are time consuming and troubling for everyone - you, Budget, and for me and my staff. It seems entirely logical to me to adequately budget Attica and these 18 men for the rest of this and the next fiscal year, so that we can proceed with some plan of operation on which we can rely. I would be happy to report our status, needs and use of the men to Budget quarterly if there is need for justification beyond the public facts of Attica now known." (Ex. 333).

On the same day, attaching a copy of his letter to Singer, Fischer wrote to the Attorney General that:

"I cannot anticipate our full needs for the Attica investigation for next year, but it is apparent that my people will be hard pressed at every turn. The trial preparation and presentation of these cases will be demanding while the Grand Jury continues. I hope that the problems we are to meet will not be compounded by Budget limitations and that sufficient funds are assured to meet emergencies as well as those demands we can anticipate." (Ex. 333).

On December 14, 1972, the Attorney General forwarded to Dunham Fischer's December 13th letter to Singer, stating:

"It would be appreciated if this letter could be considered as a request to continue these investigators through March 31, 1973, and as an amendment to our budget request for the Organized Crime Task Force to provide for twenty Special Investigators rather than the original ten indicated in our budget documents." (Ex. 333).

The request that the twenty investigations be carried through March 31, 1973 was approved, the funds being provided through a deficiency request of \$124,700 in the 1973-74 budget (Memorandum, Van Laak to Palmer, May 14, 1973, Ex. 333).

In its Budget request for 1973-74, submitted on October 2, 1972, the Law Department requested that provision be made for the ten investigators on a permanent basis (Ex. 333). The Budget Division's recommendation, approved by the Legislature, was for retention of the ten investigators on a temporary basis (Memorandum, Van Laak to Palmer, May 14, 1973, Ex.333).

In its Supplemental Budget request for 1973-74 the Law Department sought to continue the other ten investigators in order to maintain the level of twenty. The request was justified in language based upon Fischer's December 13th letter, as follows:

"Thirty-eight indictments relating to the Attica matters have been handed down by the Grand Jury which is expected to hand down additional indictments. These indictments are the direct result of the investigative team's activities during the past year. The retention of these men for the next fiscal year is necessary for the following reasons:

(1) The decision as to where these cases will be tried will be made by the Court. Once this is decided, the presentation of the cases will depend to a great extent on the detailed knowledge of the investigative team and the rapport they have developed with the witnesses on the cases to which they have been assigned.

(2) The Grand Jury is continuing to sit and investigations are continuing to support submission to the Grand Jury of additional matters.

"It is expected that the need for the investigative staff will continue throughout the 1973-74 fiscal year and we, therefore, request the retention of this staff" (Ex. 333).

The Budget Division, in a staff memo dated April 4, 1973, analyzed this request as follows:

"Of the twenty Investigator positions functioning during 1972-73, 10 were recommended for retention in the Executive Budget as requested by the Department of Law. The Supplemental Budget contains a recommendation to retain the remaining 10 during 1973-74 to work on Attica matters.

"The justification given is two-fold:

1. Investigators will be required to testify before the courts with regard to individuals indicted as a result of their investigations.

2. Investigations are continuing to support submission to the Grand Jury of additional matters.

"It has not been determined how long the Grand Jury will continue to sit or if the investigative phase is decreasing in magnitude. No tangible information has been made available in this regard. It is entirely possible that the 10 investigators approved by the Legislature are sufficient to perform this function.

"The matter of retaining investigators on the State payroll in order to be available to

testify is not convincing. They could, of course, be subpoenaed to testify as required in which case they would be entitled to expenses only.

"With regard to the Attica Grand Jury, Mr. Fischer still maintains that the conclusion of the term cannot be determined. No estimate of a final date was given. The phase of the Grand Jury deliberation is confidential and it is, therefore, not known whether the retaking phase is now under consideration.

"In conclusion, there is insufficient information available to make a truly informed recommendation with regard to Supplemental Budget requests for the Attica investigation. There is an impression that much more information could be made available without jeopardizing confidentiality. It could also be that no substantial justification exists for the retention of an additional 10 investigators. Without further information I am recommending that the 10 not be funded with additional temporary service money." (Memorandum, Walker to Magill, Ex. 333).

On May 17, 1973, Fischer wrote Dunham summarizing his investigation's trial commitments, alluding to the fact that the Grand Jury was "likely" to file a presentment necessitating "possible" further investigation, and stressing the need for "a majority" of the investigators to be involved in indexing of testimony and exhibits "for the next few months." Noting further that the "actual trial process" could be expected to

take "at least a year," Fischer concluded that the staff requirements set forth previously to Budget "were and are a minimum to fill these demands."* (Ex. 333).

On June 6, 1973, sending copies to Governor Rockefeller and Fischer, the Attorney General wrote Dunham as follows:

"As you know, the ten additional Investigators for the Organized Crime Task Force-Attica group were not included in the Supplemental Budget. The Task Force has advised me that these Investigators are essential for the continuation of the Grand Jury proceedings and the prosecutions, including the trials that are scheduled for October in Buffalo.

"The Investigators are required to transport and protect witnesses appearing before the Grand Jury and during the trials. The liaison developed between the witnesses and the Investigators is an essential factor in insuring that the witnesses testify in these cases. Loss of the Investigators will seriously impede these proceedings. In

* Fischer acknowledged in his testimony that his letter to Dunham of May 17, 1973, purporting to explain his needs, was nothing more than a "puff of smoke" (RF 9197). His misunderstanding of his part in the standard and necessary procedures governing the staffing and funding of an agency clearly appears in his explanation of the content of the May 17 letter:

"As far as Budget Director Dunham is concerned - I shouldn't characterize it this way because he is a fine gentleman. He has a function to fulfill. He is an accountant, a fellow who plays with figures and plays with bureaucracies and plays with legislatures; and I didn't, in fact I wouldn't attempt to seek real justification from Dunham as to what I needed and what I wanted." (RF 9198).

addition, the Investigators are continuing to index and cross index thousands of statements by witnesses required for the Grand Jury proceedings and for trial purposes.

"It is imperative that provision be made to continue the services of the Investigators in order to carry on the work of the Attica group both before the Grand Jury and the trials. We will be responsible for jeopardizing these proceedings by failing to make the necessary staff available to carry out this essential work.

"I am, therefore, asking your assurance that funds will be made available to continue the services of all temporary Investigators during the current fiscal year so as to insure that the Attica prosecutions are not impeded by lack of essential staff.

"I would appreciate hearing from you on this matter at your earliest possible convenience." (Ex. 333).

On June 22, 1973, Palmer forwarded to Dunham a proposed draft letter to the Attorney General turning down his plea to continue all twenty investigators.

Palmer's covering memorandum stated:

"Basically, Judge Fischer is upset because his budget only contains funds to continue 10 of his current 20 investigators. We would need to find an additional \$150,000 - \$200,000 to continue all 20 for the entire fiscal year.

"As the draft letter indicates, the Task Force indicated on several occasions in the past that workload of the investigating staff would decline before the beginning of the current

fiscal year. Neither the Department, nor the Task Force, has provided us with any meaningful justification for retaining all 20 investigators.

"Now, of course, we are receiving blanket statements that the Attica investigations will be impeded if any of the contemplated cutbacks take place." (Ex. 333).

The letter proposed by Palmer was never sent. The copy of the Attorney General's June 6th letter to Dunham which had gone to the Governor's office bears the Governor's handwritten initialled note: "Dick D. we must take care of this" (Ex. 333). In late June 1973, after it became apparent that the Attica inmate indictments were being sent to trial on an expedited basis, Simonetti wrote several memoranda to Fischer urging the pressing need for an additional complement of attorneys and more investigators on top of the twenty already being requested (AS1982,1993). On July 13, 1973, Fischer and Simonetti met with the Governor, the Attorney General and Budget Director Dunham. The immediate result was authorization to Fischer not only to retain the twenty investigators but also to hire seven more lawyers and ten more investigators. (Letter, Dunham to

Singer, July 27, 1973, Ex. 408). Fischer agreed that whatever he needed he got and got quickly when he advised the Governor of his need (RF 9338).

In its 1974-75 Budget Request, the Law Department sought continuation of its entire complement of investigators and attorneys, as augmented in July, 1973. This request was approved, and Fischer and Simonetti both testified that the investigation has had no further difficulties with the Budget Division (RF 9203-04; AS 8969).

3. The Fixing of Priorities

a. Conclusions

The decision to conduct the investigation sequentially or chronologically rather than topically was a serious error of judgment which skewed the investigation's inadequate manpower away from the retaking, rehousing and hindering areas.

Since the security of other New York prisons had to be maintained, the possibility that the Attica riot was part of a conspiracy was understandably a matter of concern to the Governor and the Department of Correctional Services and did require early investigative attention. Likewise, the four pre-September 13th deaths, clearly all the result of deliberate acts, demanded immediate, thorough attention. But since it was known by September 14 that all of the retaking deaths resulted from trooper or correction officer gunfire, and considering the magnitude of the retaking investigation and the obvious importance of investigation promptly while memories were fresh, it was a serious error of judgment to have assigned only two investigators to the retaking area during the first nine months of the investigation. It was also known by September 14th or a few days later that there were serious claims of brutality

to inmates during rehousing. It was a serious mistake largely to ignore that important phase of the investigation.

Instead of proceeding chronologically, the investigation should have been divided topically into two separate lawyer-investigator teams, one to look into crimes by inmates and the other to look into crimes against inmates, including not only retaking but rehousing crimes. Though proceeding sequentially would be reasonable if the investigation's only duty was preparation of a report or "presentment," it was wholly unsuited to the criminal investigation that was the prime responsibility of the Attica investigation.

Inevitable by-products of the decision to proceed chronologically were that for about a year the Grand Jury heard almost nothing but evidence of inmate crimes, and that when the retaking investigation began in earnest in June 1972 there were repeated interruptions caused by the necessity of preparing for trial of the inmate crimes.

Possible obstruction of justice charges against individual members of the State Police are dealt with in Section G(4) below. It is here pertinent to note, however, that had the retaking investigation proceeded earlier, the need for the obstruction of justice investigation would have been sooner perceived and earlier inquired into.

b. The Factual Bases for The Conclusions

The Governor's Executive Order of October 29, 1971, which formally established the investigation called for inquiry into

" ... any and all acts heretofore or hereafter committed or omitted or alleged to have been committed or omitted, relating to, in any way connected with, or occurring during the possession and control of a portion of Attica Correctional Facility by inmates of said facility, located in Wyoming County, between on or about September 9, 1971 and September 13, 1971 and the resumption of possession and control thereof by lawful authorities including, but not limited to, violations of any provision of law relating to the commission of criminal acts or omissions, the investigation, detection, apprehension and prosecution of the person or persons believed to have committed the same and of any offense arising out of such investigation and prosecution, and the conduct of persons, public servants, agents and officers ... "

and also required inquiry pursuant to Section 63(8) of the Executive Law "into matters concerning the public peace, public safety and public justice with respect to the subjects which are within the scope of this requirement."

Simonetti testified that

" ... our approach was to reconstruct the events starting on 9/8 rather than go after people and crimes." (AS 763)

and further that

" ... our approach to this investigation was to develop the events and to find out through evidence sequentially each and every thing that happened, and then determine by evaluation of that evidence whether or not it fell within the ambit of the criminal law proscriptions outlined in the Penal Law and whether or not it was within the discretion of the prosecutor to indict for that crime or not."
(AS 767)

Because of the "any and all" phraseology of the order he "thought it was our obligation ... to look into and reconstruct every event" (AS 770).

It was, therefore, planned to have the Grand Jury make a "presentment,"* as well as make a final report to the Attorney General pursuant to Executive Law §63(8) which would be published for the information of the public (Ex. 95, memo of AGS to File dated 11/12/73). Months of staff work went into the drafting of the presentment (FGJ 17808), including establishment of a Grand Jury committee to work on it, several long drafts and at least two grand jury sessions (Exs. 24, 95, 96, 143; FGJ 17807-17865; 17909-17964).

The Governor's press statement of September 13, 1971, concluded with the notation that he had

* The word is commonly misused to refer to a report by the Grand Jury. Technically a "presentment" is an accusation of crime by the Grand Jury itself, see Matter of Wood v. Hughes, 9 N.Y.2d 144, 148, fn. 1; Mack v. People, 82 N.Y. 235, 237.

"ordered a full investigation of all the factors leading to this uprising including the role that outside forces would appear to have played" (Public Paper of Governor Rockefeller 1506),

and Fischer at the meeting of September 24, 1971, made reference to the possibility that lawyers had acted as couriers between prisons (RC 2571).

With respect to the question of conspiracy to cause the riot, five or six investigators were assigned, during September and October, 1971, to make a "scatter-gun" inquiry (AS 742; RF 3255-3261), but by January, 1972, (AS 739, 759) and possibly as early as October, 1971, (AS 762) it had been decided that no criminal conspiracy case should be prosecuted (AS 735-794). Nonetheless, the subject was reopened for further inquiry a number of times thereafter, in April, 1973, (AS 774-775), November, 1973, (AS 779) and November, 1974, (AS 783).

While both Fischer and Simonetti testified that they viewed an investigation of all of the forty-three deaths which occurred, without distinction between homicide by inmates and possible homicides by State Police Officers, as the primary responsibility of the investigation

(RF 3210-17; 9273; AS 605-08), two contemporaneous memoranda suggest that investigation of homicides by inmates was to take precedence.* Thus the notes of Emerson Moran, an aide to Fischer, indicate that at a meeting of September 20, 1971, Fischer

"determined that our initial focus would be first on the four homicides (Quinn and the three inmates) which occurred prior to the assault, and, secondarily, to examine the question of justifiability of the State Police role during the assault on September 13" (Exhibit 146, p. 18).

Likewise, a Justice Department aide reported to his superior that in a telephone conversation on September 27th Fischer said that:

" ... the investigation would proceed on the following issues in the priority indicated: (1) what caused the riot (genesis); (2) who killed the four persons whose homicides occurred during the seizure and holding of the prison by the prisoners ... ; (3) what happened regarding the deaths of the inmates and the guards at the time the prison was retaken and (4) what, if any, other violations, including violations of state secured civil rights to be free from assault and battery on the part of the prisoners, occurred." (Exhibit 272, p. 1).

However, Fischer testified that these statements

* One explanation for Fischer's apparent emphasis on inmate crimes in the very early stages of the investigation may have been his view, stated in his letter to Lefkowitz of June 14, 1972 (Ex. 333, quoted in full at pp. 101-02, infra) that "Initially, the investigation was oriented primarily toward inmate crimes since the initial silence of inmates in this regard had to be broken through early or not at all."

did not reflect his view on priority and that the Quinn, Hess, Schwartz and Privitera deaths were distinguishable only in that they, unlike the retaking deaths, were obviously the result of intentional homicide, and therefore demanded immediate attention (RF 3209, 9274-75).

Concentrated investigation of the retaking was not in fact begun until the summer of 1972, when five new independent investigators were added to the staff, bringing the total to twenty, and Edward Hammock, of the attorney staff, was assigned full-time to retaking (EH 2402-04). Until that time the great majority of the investigation's resources were devoted to inquiry into inmate crime, only two of the independent investigators (who numbered ten by early fall 1971 and fifteen by February 1972) were assigned full-time to the retaking, and Simonetti himself was the only staff attorney devoting substantial amounts of time to coordinating that phase of the investigation (AS 5811; see also FC 4826-28). Edward Hammock, who was on the scene from September 28, 1971 on, testified that inmate crimes received far more attention than retaking during the first year and that "given the amount of manpower we had, we couldn't decide to begin at the end and work toward the beginning" (EH 2360-64).

Michael McCarron, one of the two investigators assigned to the retaking from the outset, testified that the work which he and his partner, acting as a team, performed from October 1971 through June 1972 included the following: (1) between October and December 1971 they interviewed about one hundred and fifteen State Police shooters at points all around the State, about fifteen National Guardsmen and a group of Wyoming Deputy Sheriffs (MM 5709-13, 5813-15);* (2) from January to March 1972 they interviewed "eighty to ninety" wounded inmates who had been witnesses to the retaking (MM 5713-15); (3) from March** through June 1972 they interviewed some (but not all, for lack of time) of the many inmates in custody in C Block during the riot who had been in a position to witness the retaking (MM 5717-20); (4) in addition, throughout

* McCarron described the task as "mammoth," and testified that in conducting the interviews he and his partner were "preparing, of course, for the day when we would get enough people in to retake and to really do this job" (MM 5511).

** After five new investigators joined the staff in February 1972, one of them was assigned to work with McCarron and his partner on retaking (MM 5811).

the period, the two investigators began the task of sorting and analyzing ballistic, photographic and other physical evidence in an effort to reconstruct the facts as to who shot whom (MM 5702-21).

McCarron testified that "the priorities were on the inmates and the internal homicides," and that on the frequent occasions on which he told Simonetti that "two men ain't going to do 39 [death] scenes" and requested additional lawyer and investigative resources on retaking, he was advised that efforts were being made to increase staff (MM 5805-08).

Leonard Brown, an investigator, confirms McCarron's view. He testified:

"It was always in my mind that there's going to be a big rehousing and retaking investigation in the future. That was always conveyed to me. As soon as we get through with the inmates, everybody is going to be thrown into the retaking and rehousing. Some guys were doing the metal shops, some guys were doing the coal yard incident, some were doing the laundry incident, and things like that. And it was always said, all right, when we get through with all of these cases, everybody's going to be doing

retaking, rehousing. That was the way it was conveyed to me" (LB 4652-53).

Fischer's repeated expressions to us of surprise that only two investigators were assigned to retaking until the Spring of 1972 (e.g., RF 3217-19, 9289) strongly indicate that he was simply not current with the progress of this crucial phase of the investigation. As for Simonetti, he testified that

"The value judgment was made that ... the best way to handle under all of the circumstances the retaking deaths was to place it in the hands of two very competent homicide investigators who would take all of the material and ... analyze it from expert point of view to the point that they felt they understood the parameters of the situation, and then go out and start interviewing troopers. And that's the way it was handled" (AS 611).

With respect to rehousing, Fischer testified at his first appearance before me that this area of investigation was of no lesser importance or priority than the others (RF 3300), but when shown a Justice Department memorandum stating that he had told a Justice attorney that rehousing "was of a lower priority than the causes of riot and the deaths involved," stated that, although he had no independent recollection, he was not in disagreement with the attorney's description (RF 9315).

Robert Patterson, a member of the Goldman Panel, testified that a few days after the Panel's arrival at the prison on September 17th, he became aware that Fischer had decided "to place his initial emphasis on investigation of the crimes committed by inmates" (RP 11,833) and that Fischer told him that he was not in a position to, or was not going to, proceed with regard to possible crimes against inmates for several months (RP 11,833), probably five or six months (RP 11,869, 11,875-76). Fischer had no recollection of making such a statement (RF 11,893, 11,927, 11,900), although he did recall discussing with Patterson and other members of the Goldman Panel the difficulties he foresaw in conducting the rehousing investigation and stating that his immediate inquiry would be directed to the sure murders and the other deaths (RF 11,900-01).

Simonetti, in his testimony, frankly conceded that rehousing was of low priority (AS 8386, 8486, 8491, 8544) although "we did devote effort from time to time ..." (AS 8486). As he put it:

"When it came to rehousing, it was always a question of the neglected child of the investigation, given the parameters and the dimensions of the other areas of investigation, and giving consideration to our limitations." (AS 8493).

Factual data concerning the relation between the chronological decision and the evidence presented to the Grand Jury during the first year, the interruptions in the retaking investigation necessitated by preparation for inmate trials and the delay in beginning the hindering investigation will be found in Sections G(2), G(3) and G(4) of this report.