STATE OF NEW YORK
COMMISSION OF INVESTIGATION

AN INVESTIGATION OF THE SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE AND POLICE DEPARTMENT

April 1989

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TEMPORARY COMMISSION OF INVESTIGATION
OF
THE STATE OF NEW YORK

AN INVESTIGATION OF THE SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE AND POLICE DEPARTMENT

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TABLE OF CONTENTS

INTRODUCTION

In 1960 Suffolk County, covering the eastern portion of Long Island, beginning approximately 45 miles east of Manhattan and adjacent to suburban Nassau County, had a population of 666,784 and no unified police force. Today, with double the population, Suffolk County has a police department which is the 13th largest in the United States, and the County is one of the most populous and fastest growing in New York State.

Covering an area of more than 900 square miles and bordered on the south by the Atlantic Ocean and on the north by Long Island Sound, Suffolk County increased in population between 1940 and 1980 from just under 200,000 persons to approximately one and one-quarter million persons (1,284,000), with the greatest increase having occurred between 1950 (276,000) and 1970 (1,127,000) and with the population having roughly doubled each decade during that period. By the year 2000, it is estimated, Suffolk's population will exceed 1,500,000, ranking it as the third most populated county in the State and the largest outside New York City.

This population is served by a district attorney's office which currently consists of 140

assistant district attorneys plus a large staff of non-lawyers, including 40 in-house investigators and 50 Suffolk County Police Department detectives detailed to the District Attorney's Office. In 1987 the total number of positions in the Office was 325, with a budget of more than $16 million.* The Suffolk County District Attorney is Patrick Henry, who has served in that Office since 1966, first as an assistant district attorney and, since January 1, 1978, as District Attorney.

Suffolk is also served by a number of police departments, of which the largest is the Suffolk County Police Department, formed in 1960 by consolidating the police departments of the five western Suffolk towns (Huntington, Babylon, Islip, Brookhaven and Smithtown) with six incorporated villages. The Suffolk Police Department provides all police services for this heavily populated and large area. The five eastern towns (Riverhead, Southold, Southampton, Easthampton and Shelter Island), plus 16 villages, retained their own uniformed police departments, principally for patrol purposes, while the County Police Department provides other services, including basic detective services.

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* "Review of the 1988 Operating Budget," Suffolk County Legislature, October 22, 1987, p. 179ff.

In 1987 the Suffolk County Police Department had a budget of $203 million and staff of 3,461, including 2,616 sworn police personnel, of whom approximately 400 were detectives and detective supervisors.* Suffolk now has the fourth largest police department in New York State after the New York City Police Department, the New York State Police and the Nassau County Police. Suffolk also ranks as one of the highest paid departments in the nation.

The Police Commissioner leads the Department, and is appointed by the County Executive, subject to the approval of the County Legislature. The Commissioner serves at the pleasure of the County Executive. Until 1980 the Police Commissioner was appointed by the County Legislature. When the Commission's investigation began in November 1985, the Suffolk Police Commissioner was DeWitt Treder, who was replaced in April 1987, by James Caples, who was, in turn, replaced in March 1988, after a nationwide search, by Daniel Guido. Prior to his appointment, Commissioner Guido had headed several police departments, including Nassau County's.

Concomitant with its population growth, Suffolk is no longer a somewhat isolated and semi-rural

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* "Annual Report 1987, Suffolk County Police," p. 8.

area, but faces many of the same crime problems as any major metropolitan region. According to the 1987 Suffolk County Police Annual Report, in 1987 the Suffolk Police reported 26,857 felony and 87,240 misdemeanor incidents, including 36 murders/manslaughters, 182 rapes, 1,228 robberies, 1,000 aggravated assaults, 1,182 felony drug and 676 misdemeanor drug offenses. Also reported were 10,007 burglaries, 25,498 petit larcenies, 28,206 criminal mischief cases, 7,067 driving while intoxicated cases and 6,653 cases of aggravated harassment.

Given its geographic size and the diversity of its economic base, ranging from farms and seaside resorts to aerospace and high technology industries, Suffolk is a complex county with equally large and complex law enforcement problems. Although Suffolk's needs demand the highest standards of professionalism from both its Police Department and District Attorney's Office, the Department -- at least through 1987 -- and the District Attorney's Office have failed to meet the challenges put to them by a county as important as Suffolk has become.

BACKGROUND TO COMMISSION'S INVESTIGATION

While the precipitating event for the Commission's extensive investigation of the Suffolk County District Attorney's Office and Police Department was Suffolk County Court Judge Stuart Namm's public criticism, in late 1985, of police and prosecutorial misconduct in two homicide prosecutions (see (B) this section), the impetus for the Commission's investigation of Suffolk law enforcement stretches back much further. From at least the mid-1970's, there have been severe and recurring public criticisms of Suffolk County law enforcement from many quarters: in decisions by the New York State Court of Appeals, in a bar association report, in a grand jury report, in news articles, and in a controversy involving a former district attorney and then police commissioner which necessitated the appointment of a special prosecutor.

This criticism and controversy, unique to any county in New York State with respect to frequency and intensity, formed the backdrop to Judge Namm's allegations.

A. Prior Criticism of the Suffolk County District Attorney's Office and Police Department

1. Court of Appeals Cases (1976-1981)

Between 1976 and 1981, the New York State Court of Appeals reversed, or affirmed Appellate Division reversals, in eight cases, including six homicides, all tried by the Suffolk County District Attorney's Office and involving confessions by defendants. By these decisions the Court of Appeals broadened and strengthened rules in New York State which are highly favorable to defendants with respect to the right to counsel and waiver of the right to counsel.*

The primary cause for reversal in these Suffolk cases, according to judicial analysis, was failure by the Homicide Division of the Suffolk County Police Department to follow proper practices in questioning defendants and seeking confessions.

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* See People v. Hobson, 39 N.Y.2d 479, 384 N.Y.S.2d 419 (1976); People v. Macedonio, 42 N.Y.2d 944, 397 N.Y.S.2d 1002 (1977); People v. Singer, 44 N.Y.2d 241, 405 N.Y.S.2d 17 (1978); People v. Pinzon, 44 N.Y.2d 458, 406 N.Y.S.2d 268 (1978); People v. Maerling, 46 N.Y.2d 289, 413 N.Y.S.2d 316 (1978), see also 64 N.Y.2d 134, 485 N.Y.S.2d 23 (1984) and 96 A.D.2d 600, 465 N.Y.S.2d 254 (1983); People v. Garofolo, 46 N.Y.2d 592, 415 N.Y.S.2d 810 (1979); People v. Wander, 47 N.Y.2d 724, 417 N.Y.S.2d 245 (1979); People v. Bartolomeo, 53 N.Y.2d 225, 440 N.Y.S.2d 894 (1981), see also 70 N.Y.2d 702 (1987) and 126 A.D.2d 375, 513 N.Y.S.2d 981 (1987).

Among the cast of characters in these cases were police personnel who later became important actors in cases known as People v. Corso and People v. Diaz -- cases which became the initial focus of the Commission's investigation. Detective Dennis Rafferty, who played a key role in the Corso and Diaz cases, also played a role in two of the eight cases which were reversed (Bartolomeo and Maerling); Detective Edward Halverson, an important actor in the Corso case, also played a role in Singer; and even District Attorney Henry himself, during his service as an assistant district attorney, played a small role in both Singer and Maerling.

Representative quotations from these decisions indicate the nature of the criticism being directed at Suffolk law enforcement:

> . . . it is obvious that the defendant's request to remain silent was not scrupulously honored . . .. (Wynder, 47 N.Y.2d at 726.)

> . . . that good faith efforts are made to locate a defendant who is taken into custody does not absolve the police of their responsibility if their internal procedures are inadequate to keep track of those against whom the restraining hand and the accusing finger of the State come to rest. . . . These principles were ignored in this

> instance. Not only did Detective Rodriguez and his fellow officers do nothing to facilitate access by counsel, but their inaction foreclosed the possibility of any such communication.
> (Garofolo, 46 N.Y. 2d at 601.)

> Thus, in this case, when the defendant's attorney called the general information number at police department headquarters, identified himself and asked to speak with the defendant and further requested that there be no questioning, the police should have been on notice that an attorney had appeared on behalf of the defendant then in custody.
> (Pinzon, 44 N.Y.2d at 465.)

By the 1981 Bartolomeo opinion, the Court of Appeals extended the rule even further:

> Knowledge that one in custody is represented by counsel, albeit on a separate, unrelated charge, precludes interrogation in the absence of counsel and renders ineffective any purported waiver of the assistance of counsel when such waiver occurs out of the presence of the attorney. . . . [T]he interrogating detectives here, with actual knowledge of the outstanding arson charge against defendant, were under an obligation to inquire whether defendant was represented by an attorney on that charge. Having failed to make such inquiry, the officers were chargeable with what such an inquiry would have

> disclosed -- namely, that defendant did have an attorney acting on his behalf.
> (Bartolomeo, 53 N.Y.2d at 232.)

This series of cases arising out of prosecutions by the Suffolk County District Attorney has created significant difficulties for other prosecutors in New York State. This can be seen in the 1988 Legislative Proposals of the New York State Law Enforcement Council which stated: "The Bartolomeo extension of the Hobson rule poses a serious impediment to effective law enforcement" (p. 32).

2. Grand Jury Report (1976)

As long ago as 1976 the Suffolk County Police Department and District Attorney were alerted, in a grand jury report, that allegations of criminal misconduct against members of the Police Department were not handled properly. That report, entitled "Report Number II of the Second Grand Jury of the Special and Extraordinary Trial Term of the Supreme Court," resulted from the work of a special prosecutor appointed by former Governor Nelson A. Rockefeller in the mid-1970's in response to a bitter controversy involving former District Attorney Henry O'Brien and former Police Commissioner Eugene Kelley.

The report criticized the handling of criminal misconduct complaints against members of the Suffolk Police Department:

> . . . In the course of this investigation it was revealed that it had been the 'tradition' of the Suffolk County Police Department 'through the years' to decide in its 'discretion' whether to report to the Office of District Attorney allegations of criminal misconduct concerning members of that Police Department or to conduct departmental disciplinary proceedings and not refer such allegations to the District Attorney's Office.

In its "Findings" section, the report continued:

> The Grand Jury finds that the Suffolk County Police Department had conducted disciplinary proceedings in certain instances involving allegations of criminal misconduct of police officers and did not refer these allegations to the District Attorney of Suffolk County.

Unfortunately, this warning was heeded by neither the Police Department nor District Attorney, and the very same attitude toward complaints of misconduct on the part of law enforcement personnel was seen

again and again by the Commission in the course of its Suffolk investigation.

3. Suffolk County Bar Association Report on Police Brutality (1980)

On January 11, 1979, a front-page article in The National Law Journal contained allegations of widespread use of force by members of the Suffolk County Police Department Homicide Division in order to coerce confessions in murder cases. In response to this article, as well as the decisions of the New York Court of Appeals and other public criticisms, the Suffolk County Bar Association delegated to its Civil Rights Committee the task of examining allegations of brutality. After an extensive investigation, which included public hearings and a review of court records and other documents, the Bar Association issued a report which concluded:*

> . . . the Committee believes that sufficient evidence is present to indicate that there is a serious problem with respect to police brutality in Suffolk County and the manner in which such complaints are investigated and resolved (p. 53).

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* "Report of the Civil Rights Committee on Allegations of Police Brutality in Suffolk County," Suffolk County Bar Association, January 1980.

With respect to the role of the Suffolk District Attorney's Office, the Bar report charged:

> The District Attorney's Office as it presently operates does not act as an adequate check against police brutality (p. 43).

Further, the 1980 report was pessimistic that the Suffolk County District Attorney's Office would assume its proper oversight role:

> . . . The Committee believes that it would be a strong deterrent to such incidents [of misconduct] if the police are made aware that Assistant District Attorneys will not countenance police misconduct and that such matters will be thoroughly investigated and prosecuted. If this is not made a priority, and in Suffolk County the indication is that it is not, it will be the natural tendency of the Assistant District Attorney to be less than zealous in pursuing matters of police misconduct and the situation will worsen (p. 46).

The Bar Association made a series of recommendations, ranging from a change in the Suffolk County Charter permitting more civilian participation in police disciplinary investigations, to videotaping confessions, to earlier participation by assistant

district attorneys in major felony cases. Few, if any, of these recommendations were instituted by the Suffolk County Police Department or by Mr. Henry even following the Bar Association's report, and the Bar's prophesy that the "situation will worsen," as this Commission's Report will demonstrate, did indeed prove correct.

While undue force and coerced confessions by the Suffolk Police following the time period of the Bar Association's report have not been found by the Commission, other serious misconduct, all in the name of apprehending and convicting lawbreakers, has flourished.

4. Long Island University Management Report on the Suffolk County Police Department (1986)

In March 1986, then Suffolk County Executive Peter Cohalan requested that Long Island University conduct a management analysis of the Suffolk County Police Department.* This request followed several incidents provoking unfavorable publicity for the Department and resulting in a high-level personnel and administrative shake-up within the Department.

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* The ensuing report, entitled "The Suffolk County Police Department: A Managerial Analysis," was issued in August 1986.

The incidents which precipitated the University's report included criticisms by Judge Stuart Namm (see Background, section (B)) and a series of narcotics-related allegations against Suffolk police personnel, including former Chief of Detectives John Gallagher and police officers James Kuhn, Raymond Gutowski, Rebecca Bernard, Brian Merlob and Jose Ingles. (See Chapter II.)

While the Long Island University report made no pretense to being anything more than a quick review of the Department, the conclusions reached were highly critical of the Police Department's management. The report commented:

> The Suffolk County Police Department was found to be a 'reactive' Department rather than an organization that consistently and comprehensively incorporates strategic planning into the organization, staffing, budgeting, coordination and evaluation of the law enforcement services that they provide (p. 11).

Blaming certain features of the Department's contract with the Patrolmen's Benevolent Association, the report found that supervision within the Department had deteriorated:

> . . . The net result has been a continuing loss of administrative supervision and evaluation and a consequent lack of personnel accountability in the Department (p. 13).

With respect to the Detective Division, the report concluded:

> The Detective Division has increasingly adopted its own set of performance standards for admission and promotion, rather than correlating them to the standards, needs and resources of the rest of the Department -- sustaining a problem that began more than 26 years ago when the Detective Division was established virtually as an independent entity within the Department (p. 13).

The report contained numerous recommendations for reform in the areas of organization, planning, personnel, budgeting, communication and information systems (pp. 20-23).

These sample criticisms, from the Suffolk County Bar Association report, the 1976 Grand Jury Report, the Long Island University report and the New York Court of Appeals decisions, which are but a few of many such criticisms made of the District Attorney's Office and the Suffolk Police Department, demonstrate

that a substantial and reputable body of criticism of the Department and District Attorney's Office existed even before the Commission's investigation began and before any public hearings by the Commission.

B. Judge Stuart Namm's Complaint

The Commission's investigation of the Suffolk County Police Department and District Attorney's Office was initiated following an October 29, 1985, letter from Suffolk County Court Judge Stuart Namm to Governor Mario M. Cuomo, and Judge Namm's public complaints, which came to the Commission's attention. Judge Namm, who had served six years as a Suffolk District Court Judge and three years as a County Court Judge, asked the Governor to appoint a special prosecutor to pursue allegations of misconduct in two widely publicized Suffolk County murder trials which occurred in 1985 and resulted in acquittals, People v. Corso (Indictment No. 562-84) and People v. Diaz (Indictment No. 1102-84).

Judge Namm, who presided at both jury trials, stated in his request to the Governor:

> In two consecutive highly publicized murder trials, I have witnessed, among other things, such apparent prosecutorial misconduct

> as perjury, subornation of perjury, intimidation of witnesses, spoliation of evidence, abuse of subpoena power and the aforesaid attempts to intimidate a sitting judge.

Following a preliminary investigation of Judge Namm's allegations, which indicated that there was substance to the allegations, the Commission passed a resolution initiating a formal investigation on January 9, 1986.

The Commission was particularly concerned about Judge Namm's allegations regarding Suffolk County law enforcement because, for several years preceding this investigation, the Commission had received and investigated an unusually large number of complaints regarding misconduct by the Suffolk County Police Department and District Attorney's Office, indeed more than twice as many law enforcement complaints as from any other county in the State. Furthermore, in a prior Commission investigation of Suffolk County District Attorney Patrick Henry, the Commission concluded that Mr. Henry had mishandled an investigation of a charge of misconduct involving his Office. Thus, Judge Namm's allegations seemed an especially important topic to which to devote Commission resources.

C. Broadened Scope of Investigation

In the first few months of the Commission's investigation of Judge Namm's allegations, other witnesses and informants came forward or were located by Commission investigators. A substantial number of these witnesses provided additional information to the Commission regarding misconduct in the Suffolk County Police Department and District Attorney's Office in areas other than the two original homicide cases.

The new information primarily concerned narcotics investigations and prosecutions. The new allegations included illegal drug usage and related offenses by police officers and the use of illegal wiretaps in drug-related investigations. In addition, allegations were made that the son of Suffolk County Police Department Chief of Detectives John Gallagher had improperly received lenient treatment in a drug case and that other relatives of public officials had received special consideration in drug cases.

Furthermore, several complaints were made, including one by a former Suffolk assistant district attorney, that neither the Police Department nor the District Attorney's Office saw to it that all employees who were accused of misconduct, or even criminal

behavior, were properly investigated and punished when warranted.

As a result of these additional allegations, the Commission expanded its investigation to include the new material. However, within months the Commission learned that the United States Attorney for the Eastern District of New York also was investigating certain of the same allegations, and the Commission temporarily suspended its investigation of those areas which might impede the Eastern District's criminal investigation, including the Gallagher matter and certain narcotics-related offenses.

During the course of the Commission's investigation, more than 200 complainants contacted the Commission regarding Suffolk law enforcement matters. While every complaint was given at least a preliminary review, the Commission had to establish priorities based on the seriousness and frequency of certain complaints and their relevance to key issues of law enforcement administration in Suffolk County. As a result, the vast majority of complaints are neither specifically discussed nor cited in this Report. The Commission has chosen, instead, to review in detail certain cases which demonstrate failures in Suffolk

County law enforcement and which help illustrate the needed areas of reform.

The principal areas to be discussed are:

1. misconduct and mismanagement in homicide investigations and prosecutions;
2. illegal wiretapping by police personnel with the knowledge of the District Attorney's Office; and
3. misconduct, mismanagement and lack of oversight in narcotics investigations and prosecutions.

In addition, the Commission here points out how, despite over a decade of warnings -- in the form of court decisions and grand jury and bar association reports -- both the Police Department and the District Attorney's Office continued to ignore or to inadequately investigate and punish employee misconduct.

Related to this, both the Police Department and the District Attorney's Office failed, at least until very recently, to impose any sort of effective management controls and systems of oversight on their members and employees. This attitude, this mind-set, in the Commission's view, goes far toward explaining

how the problems described in this Report were able to occur and to occur on the scale here indicated.

The activities of the Commission in its Suffolk investigation have included interviews of several hundred witnesses; nearly 100 private hearings consisting of sworn testimony; four days of public hearings in Hauppauge, New York, on January 28-29, 1987 and January 13-14, 1988, during which 42 witnesses testified; and the review of tens of thousands of pages of documents, including trial and hearing transcripts, prosecution files, police reports and files, and the files of several hundred Suffolk County Police Department Internal Affairs Division investigations and hundreds more files of Suffolk County Human Rights Commission complaints involving Suffolk law enforcement. These activities have required scores of subpoenas and involved the Commission in 19 different legal proceedings. A complete account of the litigation in the Suffolk investigation is included as Appendix A to this Report.

SUMMARY OF FINDINGS

Under New York law the district attorney, a popularly elected constitutional officer, functions very much as the chief law enforcement officer within each county. Although formally independent of control by the district attorney, the various police agencies operating within each county are, as a practical matter, subject to the district attorney's power to decide which cases should be prosecuted and how they should be prosecuted. Moreover, with respect to certain types of investigative activities such as wiretaps and long-term investigations, e.g., narcotics, public corruption or homicides, the district attorney's office is frequently the lead investigative agency, effectively directing police investigators on a day-to-day basis. In addition, the district attorney is rightly perceived by the public as ultimately, if not exclusively, responsible for the integrity, if not the efficiency, of the criminal justice system within his county.

At the same time, the heads of the various police agencies, however they may be selected or appointed, also are perceived as, and do have a critical role in, seeing to enforcement of the law efficiently, effectively and with integrity. Police leadership has a responsibility which it cannot properly

abdicate to others, even to the district attorney's office.

In its investigation of the Suffolk County District Attorney's Office and Police Department, the Commission has found grave shortcomings in the leadership and management of both agencies. While the Commission feels confident that the vast majority of police and prosecutorial personnel in Suffolk are persons of ability, industry and integrity, the conclusion -- based upon the Commission's investigation -- is inescapable that these dedicated men and women, as well as the public, have been shortchanged by their leadership. There has been neither effective management nor accountability, including accountability for official misconduct.

Furthermore, while the Suffolk Police Department, with its new Commissioner and almost entirely new top staff, offers promise for reform, no such promise is yet offered by the District Attorney's Office. Quite the contrary, District Attorney Henry, who most charitably can be described as having ignored the grave and demanding responsibilities of his Office, despite clear danger signals and warnings, has exhibited increasing intransigence as the Commission's investigation uncovered ever more serious misconduct. He has

become increasingly resistant, resorting to vituperative press statements, and even to litigation, in an unsuccessful effort to block this very Report. In the Commission's view, Mr. Henry has shown himself as unwilling to reform his own Office and to exert proper authority as the highest law enforcement officer of Suffolk County.

While literally dozens of cases are cited or discussed in this Report, the Commission's major goal is not primarily the prosecution or punishment of individuals involved, although that must certainly be part of the process.* The Commission's main goal is nothing short of a major reform of Suffolk law enforcement, instituting reform which seeks justice and integrity, in place of an attitude of "You do what you've got to do to arrest and convict"; reform which replaces professionalism for the slipshod practices of the past; and instituting a system which ends the practice of sweeping law enforcement misconduct under the rug, and replaces it with a policy of investigating any and

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* The Commission's statutory duties under §7502 of Unconsolidated Laws of New York include investigation not only of criminal misconduct, but also of ethical misconduct or other improper acts. The standard used by the Commission in examining a district attorney's office or a police department is much higher than merely whether any personnel are guilty of indictable offenses.

all alleged misconduct in a meaningful way and imposing punishment as warranted.

This Report does not concern a narrow criminal investigation and does not point to a single "smoking gun." Instead, the smoking gun in this case is the day-in, day-out manner in which the Police Department (through 1987) and the District Attorney, to date, have conducted the business of law enforcement in Suffolk County so badly.

The Commission issuing this Report is a sunshine agency with the statutory mandate to publicize its findings. Bi-partisan and composed of six members having broad law enforcement experience, the Commission reaches the harsh and sweeping conclusions in this Report based on overwhelming evidence. In this Report the Commission shares its findings, the bases for its findings and its recommendations with government officials and the public in order to promote desperately needed changes in Suffolk law enforcement.

Finding 1:

District Attorney Patrick Henry has seriously failed in his stewardship as chief law enforcement officer in Suffolk County. District Attorney Henry must take responsibility for deficiencies in his

personal decision-making, particularly his tolerance for misconduct. In addition, he must take responsibility for his failure to develop and enforce proper supervisory and management systems in his Office, as well as his long-standing tolerance for inadequacies, improprieties and misconduct in the Suffolk County Police Department as revealed in many cases prosecuted by his Office.

Since the day he entered office on January 1, 1978, Mr. Henry has been on notice of at least two principal areas of Commission concern: improprieties in homicide investigations and prosecutions, through the New York Court of Appeals decisions cited above; and deficiencies in procedures in misconduct investigations, through the previously cited 1976 Grand Jury Report. Despite these longstanding warnings as well as later ones in the forms of the Bar Association report, Judge Namm's criticisms, the Gallagher case, the Commission's evidence regarding illegal wiretapping and other areas as outlined in this Report, Mr. Henry has engaged in stonewalling instead of reform. He has sought "vindication" in the press rather than the promotion of needed substantive change in Suffolk law enforcement.

Despite clear warnings, Mr. Henry has long tolerated unprofessional standards in investigations by the Suffolk County Police Department, including such key issues as inadequate report writing and documentation, grossly deficient oversight of wiretap operations and lax supervision of narcotics investigations and prosecutions. Deficiencies in the standards enforced by District Attorney Henry have caused significant failures in the entire system of law enforcement in Suffolk County.

Finally, Mr. Henry has had a remarkable tolerance for misconduct by his own staff and by law enforcement personnel in general. He has repeatedly defended assistants in his Office in the face of serious ethical breaches, when, instead, he should be setting the example that misconduct will not be tolerated in law enforcement.

Finding 2:

Detectives and police officers of the Suffolk County Police Department have engaged in illegal wiretapping with the approval of their supervising sergeant and the Bureau Chief of the Narcotics Bureau of the District Attorney's Office. Deficient Police Department management practices, tolerated by the District

Attorney's Office, permitted these crimes to occur and helped to conceal them.

Finding 3:

The Suffolk County Police Department and District Attorney's Office have failed to properly investigate and punish instances of employee misconduct, including criminal conduct, even when these instances were known to supervisory personnel. Both offices failed to establish minimal procedures to insure the investigation and punishment of employee misconduct, and the Police Department had a deliberate policy, at least in cases involving litigation, of not investigating and punishing misconduct at all.

Finding 4:

The Suffolk County Police Department and District Attorney's Office engaged in and permitted improper practices to occur in homicide prosecutions, including perjury, as well as grossly deficient investigative and management practices. Because of credibility problems with prosecution testimony, including police testimony, and other defects in homicide prosecutions, guilty persons may well have been allowed to go free.

Finding 5:

There has been a pervasive lack of documentation, and defective documentation, in Suffolk Police and District Attorney investigations in areas which the Commission has examined: homicide and narcotics cases, misconduct cases, cases involving pen registers, and investigations by detectives in general. The effect of such lack of documentation has been to harm investigations, conceal misconduct, and prevent plaintiffs in civil actions and defendants in criminal actions from receiving documents which should have been produced in the normal course of conducting effective police work.

Finding 6:

Prior to the Commission's investigation, and during its early stages, Suffolk narcotics investigations and prosecutions had experienced a breakdown of supervision which permitted drug use by police officers, lack of proper controls on informants, illegal wiretapping, and fraud in obtaining favorable treatment in a narcotics case for the son of the Suffolk Police Chief of Detectives.

In the final section of this Report, following its discussion of the factual bases for its

findings, the Commission presents specific recommendations for reforms, disciplinary actions and criminal referrals. However, at this point it is appropriate to note that, in managing and administering either a prosecutor's office or a police department, top management's own personal honesty and integrity -- while certainly requirements for holding such positions -- are not enough. Effective management controls and systems of accountability administered fairly but forcefully also are required. And, to be most blunt, eternal vigilance is equally required. This is public service at its highest and most responsible level, where the public is entitled to demand and receive the best from its servants. Complacency and a comfortable laissez-faire attitude cannot be accepted. These are the very areas in which the Suffolk County Police Department and District Attorney's Office failed in their responsibility. And the fault in these matters ultimately lies, according to the Commission's findings, with the past leadership of the Police Department and with the present District Attorney.

I. MISCONDUCT AND DEFICIENCIES IN HOMICIDE INVESTIGATIONS AND PROSECUTIONS

At the Commission's public hearing of January 28, 1987, the Commission's opening statement noted that in both the Diaz and Corso homicide prosecutions the jurors, who acquitted the defendants, in later interviews cited a lack of police credibility, inadequate investigation and other police errors as grounds for their decisions to acquit. On the basis of the evidence developed at that public hearing, and with further investigation, the Commission stated in the opening statement of the January 13, 1988, public hearing that a lack of professionalism by the Suffolk Police Department and District Attorney's Office had led to acquittals in the Diaz and Corso cases, and that these acquittals may have allowed the guilty to go free. The following discussion of those cases expands upon that theme.

A. People v. Diaz

Judge Namm presided at the murder trial of People v. Diaz, Indictment No. 1102-84, which was tried before a jury beginning in September 1985. James Diaz, a 22-year-old drifter, was accused of the brutal and highly publicized rape-slaying of Maureen Negus, a 35-year-old nurse and mother of two children, at her

home in Port Jefferson Station. Following the acquittal of Diaz, jurors were quoted in the press as stating that they did not believe the People's witnesses, including police testimony (Commission Public Hearing, 1987, Exhibits 2, 3 and 4).

At the Commission's public hearing on January 28 and 29, 1987, testimony demonstrated that at least five witnesses for the People in the Diaz case had presented incredible, false or perjurious testimony. In addition, evidence was presented demonstrating serious deficiencies with respect to police procedures for locating evidence at the crime scene, taking notes and documenting key events in investigations, and, following the trial, in investigating allegations of police and prosecutorial misconduct in that case.

The principal evidence at trial consisted of a confession written in Detective Dennis Rafferty's handwriting and signed by Diaz only on the first page; testimony by a jailhouse informant named Joseph Pistone; and a knife, the alleged murder weapon, which was discovered at the basement site of the murder by the estranged husband of the deceased 10 months after the slaying -- approximately 15 feet from where the body was found. There was also a crucial oral admission by Diaz that he "never wiped the blood off

the knife," which alleged statement by Diaz was not disclosed by Detective Rafferty until a pre-trial hearing held shortly after the knife was discovered in the basement.

Testimony regarding this knife played a significant role in undermining the credibility of police witnesses in the trial. The confession allegedly given to Detective Rafferty at Police Headquarters during the first evening Diaz was questioned about the murder was three pages long. Rafferty testified at the Commission's hearing that Diaz signed the first page, containing innocuous identifying information, but refused to sign the other two pages. In this alleged confession, Diaz stated that "he threw the knife into the woods," despite the fact that the knife ultimately offered by the prosecution as the murder weapon was found in the basement (Public Hearing, 1987, Exhibit 12).

In fact, another knife had been found by the police, in the backyard of the deceased's house during the search immediately following the murder. However, despite the fact that several objects and photos were shown to Diaz for identification on the night of his confession, such as a pair of white gloves allegedly used in the crime, and photos of the deceased's house,

which Diaz initialed, neither the knife found in the yard nor even a picture of that knife was shown to Diaz -- either to rule it in or out as the murder weapon. Detective Rafferty's explanation for his lapse in not showing Diaz the knife found in the yard was that Rafferty never believed that this knife was the murder weapon (Public Hearing, 1987, pp. 193-197).

Ten months after the murder, as the trial of Diaz approached, the estranged husband of the deceased, who had moved back into the deceased's house to care for his two children, discovered a knife, which was later offered in evidence by the People as the murder weapon, approximately 15 feet from where the body of the deceased had been found (Public Hearing, 1987, pp. 142-151). At the Commission's public hearing, Robert Genna, the supervisor in the Suffolk County Crime Laboratory of the Medical Examiner's Office, who had responded to the crime scene on the day of the Negus murder, explained this glaring oversight, stating that he had conducted only a "cursory examination" of the room where the knife was found, consisting of "just visually looking around" (Public Hearing, 1987, p. 115).

After the discovery of this knife, which had blood residue on it, Detective Rafferty unexpectedly

testified at a pre-trial hearing that at the time of Diaz's confession Diaz had said that "he never wiped the blood off the knife." This statement had not been included in the written confession, nor in police reports or notes, nor ever previously been told by Rafferty to Barry Feldman, the assistant district attorney handling the case, despite several days of preparation prior to the hearing, and had thus not been previously provided to the defense (Public Hearing, 1987, pp. 197-199).

Feldman was astounded at this revelation, and the issue arose of whether this testimony would be considered a recent fabrication by Rafferty (Public Hearing, 1987, pp. 570-571 and Private Hearing, Feldman, 12/3/86, pp. 45-46). Detective Rafferty conveniently recalled that he had long before told two other assistant district attorneys of Diaz's statement that he had not wiped the blood off the knife. Assistant District Attorneys Steven Wilutis, Chief Trial Prosecutor, and William Keahon, Chief of the Major Offense Bureau, testified at a pre-trial hearing and at trial that Rafferty had told them of this statement nearly a year before Rafferty testified about it at the hearing (Public Hearing, 1987, pp. 571-572). The purpose of this testimony was to answer the argument that Rafferty's

trial testimony was a recent fabrication intended to counter the statement in Diaz's alleged confession that "he threw the knife in the woods." Judge Namm testified at the Commission's public hearing that the testimony of Wilutis and Keahon on this point was not "credible" (p. 44).

In the second instance of false or incredible testimony, a jailhouse informant named Joseph Pistone gave sworn testimony before the Commission that he had perjured himself in the Diaz trial and that two Suffolk police detectives, John Miller and Leon McKenna, had suborned the perjury and coached him (Private Hearing, Pistone, 3/21/86, p. 10). Pistone testified before the Commission that Miller and McKenna had shown him the Diaz "confession" and said "this is how it happened." Pistone, who was in the Suffolk jail on larceny charges and is the son of a New York City police officer, testified at the Diaz trial that Diaz had told him in extensive detail about his murder of Negus; however, before the Commission, Pistone recanted this testimony (Private Hearing, Pistone, 3/21/86, pp. 19-31).

Barry Feldman, the trial prosecutor, testified before the Commission that Pistone was one of five jailhouse informants who were anxious to testify about Diaz. Four were rejected, but Pistone was chosen be-

cause he had "built-in inherent credibility" because he did not ask for a deal (Private Hearing, Feldman, 12/3/86, p. 60). Despite the fact that a polygraph was given to one of the four rejected jailhouse informants, which he failed, no polygraph was requested by Feldman for Pistone (Public Hearing, 1987, pp. 523-530).* Furthermore, there were no notes or reports prepared by the police or district attorney regarding the statements of any of the purported jailhouse informants except Pistone, regarding whom a few pages of notes were made by Detective McKenna, allegedly summarizing Pistone's statements about what Diaz told him (Public Hearing, 1987, p. 526).

In another instance of false testimony by the People's witnesses in the Diaz case, Deputy Director of the County Crime Laboratory Ira Dubey, who was later to plead guilty to giving false testimony about his credentials in more than 20 serious felony trials in Suffolk County, testified falsely about his academic credentials (Public Hearing, 1987, pp. 602-610). Diaz prosecutor Barry Feldman, a personal friend of Dubey, had played the key role in failing to properly

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* A polygraph administered to Pistone on February 17, 1986, by an independent polygraph expert at the request of the Commission indicated that Pistone lied at the Diaz trial and that his testimony before the Commission containing his recantation was truthful (Public Hearing, 1987, Exhibit 6).

investigate, or to tell the District Attorney, information told to Feldman in 1983 by Dubey's supervisor revealing that Dubey was testifying falsely about his credentials in criminal cases. Despite his having been previously provided this information, Feldman allowed Dubey to again testify falsely about his credentials in the 1985 Diaz trial. Feldman's explanation for allowing Dubey to so testify was that he presumed Dubey had obtained the missing academic degree since the 1983 allegations (Public Hearing, 1987, p. 610). (See Chapter V(A) for a full discussion of the Dubey case.)

The final instance of false testimony in the Diaz case discussed at the Commission's public hearing concerned testimony by Detective James McCready regarding his interviews of three railroad workers who placed Diaz near the scene of the murder close to the day of its occurrence. In his police report McCready wrote that the railroad workers recognized Diaz from pictures in the newspaper (Public Hearing, 1987, Exhibit 17). In his report McCready made no mention of any mug shots or identification procedures, and at trial McCready initially testified that the railroad workers recognized Diaz from pictures in the newspaper (Public Hearing, 1987, Exhibit 16). However, after it was demonstrated by the defense that there had not been any

pictures of Diaz in the newspaper at the time of the McCready interviews, McCready changed his testimony and, contrary to his police report, said he actually had shown mug shots of Diaz to the railroad workers (Public Hearing, 1987, Exhibit 16).

Between the time of McCready's false testimony regarding the newspaper identification and his corrected testimony about the mug shots, Assistant District Attorney Feldman assured Judge Namm that there was no need for any identification hearing because McCready had not shown mug shots to the railroad workers (Public Hearing, 1987, Exhibit 16 at 532-536). After McCready admitted showing the mug shots, Feldman attempted to explain away his prior incorrect assurance to Judge Namm by claiming that the only discussion he had previously had with McCready on this issue consisted of a very brief conversation on the way to the courtroom when McCready answered, in response to a question by Feldman, that there were "no ID problems" in this case. Feldman's affirmative representation to Judge Namm was based on McCready's brief comment, which later proved to be false (Public Hearing, 1987, p. 586). Even apart from false testimony, false representations or perjury, this was the second time in the trial that Feldman was taken by surprise by the

testimony of his own police witnesses: McCready in this instance, and Rafferty in connection with the "wiping the blood off the knife" statement.

After these four instances of false and/or highly suspect testimony, which were widely reported in the newspapers, Judge Namm spoke to Chief of Detectives John Gallagher and Assistant Chief of Detectives Arthur Feldman about misconduct in the case and the possibility of a police Internal Affairs Division investigation; however, none was ever begun. Police Commissioner Treder testified at the Commission's hearing that no police investigation was begun because the Commission was looking into the Diaz case (Public Hearing, 1987, pp. 943-947).

The Commission's investigation of the Diaz case, however, is no substitute for a proper Suffolk County Police Department Internal Affairs Division investigation. First, the Commission has no power to discipline the officers involved. Moreover, the Police Department may have let the 18-month statute of limitations on disciplinary infractions expire (see Patrolmen's Benevolent Association contract, p. 43). Failure to conduct a proper disciplinary investigation in Diaz is inexcusable (see also Chapter VI (C)).

At the Commission's public hearing, District Attorney Patrick Henry described the cursory extent of his review of the Diaz matter. Henry testified that after talking to prosecutor Feldman and "possibly" reading part of the trial transcript, he decided there was nothing wrong. Henry did not recall any problem in the testimony of Ira Dubey (Public Hearing, 1987, pp. 487-491). In the exchange cited below, District Attorney Henry revealed his blindness to the problems involved in disciplining his employees:

> Q. Did you really expect the trial prosecutor to say maybe he did something wrong in the trial?
>
> A. I think that if he had done something wrong, and coupled with my questioning him on the subject, it would have been obvious that he did something wrong.
> (Public Hearing, 1987, p. 490.)

The Commission believes that in the Diaz trial McCready, Dubey and Pistone all knowingly gave false testimony. In addition, the testimony by Wilutis and Keahon that Rafferty told them that Diaz said that he had never wiped the blood off the knife -- which testimony Judge Namm described as "incredible" -- is indeed highly suspect. However, the failure of the

Police and District Attorney to maintain proper documentation and to conduct an investigation in a timely fashion deprives any investigator, including the Commission, of adequate evidence upon which to make a definitive judgment on this issue. According to statements to the press by jurors following the trial, this false and doubtful testimony helped free Diaz.

In addition, based upon the jurors' comments, it is apparent that these verdicts also were significantly affected by the failure of police officers to take notes, record key statements by the defendant and document other case developments, which allowed doubts to be raised in the minds of the jurors. Errors such as the failure to find the murder weapon 15 feet from the body of the murder victim helped allow the defense to undermine the credibility of police testimony. Finally, the failure of the police and the prosecutor's office to investigate employee misconduct even after the trial adds to the culpability of both agencies. These and other deficiencies will be discussed in Section D of this Chapter under "Management Failures in Homicide Cases."

B. People v. Corso

The other homicide trial occasioning Judge Namm's allegations of police misconduct was People v.

Corso, Indictment No. 562-84, tried in May 1985, in which Peter Corso was accused of carrying out the 1979 gangland-style execution of a prominent Suffolk County attorney, Archimedes Cervera, in Cervera's law office. Suffolk Police Detective Edward Halverson was originally the lead detective on the case, but was replaced in 1982 by Detective Dennis Rafferty after Halverson retired.

After the Corso trial, jurors were quoted as saying that Corso was acquitted partly due to the lack of credibility of the prosecution's lead witness, Michael Orlando, and partly due to the careless and unprofessional investigative methods employed by the Suffolk Police Homicide Division (Public Hearing, 1987, Exhibit 29).* The careless methods of the police included failures to make proper notes and reports during the investigation, to preserve important evidence and to take routine steps in corroborating and supporting the conclusions of their investigation.

In regard to deficient note-taking, Detective Rafferty testified at the Commission's hearing that no

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* There was a superficial Internal Affairs Division investigation in the Corso case which concluded that some lower-ranking officers had not followed proper procedures.

police reports were submitted by the Suffolk police officers assigned to the case for inclusion in the case file for a period of six months, from June to December 1979, following the murder, despite a substantial amount of active investigative work. Although the Suffolk Police were awaiting information from the FBI regarding informant Orlando, who had information in this case, neither communications with the FBI nor the results of numerous interviews with key witnesses were recorded (Public Hearing, 1987, pp. 677-698).

In addition, although the Commanding Officer of the Homicide Division described Detective Halverson to the Commission as an "extraordinary" detective and "excellent" (Private Hearing, Dunn, 1/5/87, p. 94), Halverson's partner stated that Halverson "didn't write things down" and that he "wrote very little" (Private Hearing, Rafferty, 1/6/87, p. 93). Such a favorable judgment by Homicide's Commanding Officer of a detective who did not take notes is indicative of unprofessional standards of police supervision. Homicide investigations, like other police work, require meticulous note-taking and documentation (Public Hearing, 1987, pp. 635-653).

In fact, the Corso matter is a casebook example of why proper documentation is necessary:

personnel retire or are reassigned (Halverson himself retired in 1982) and others must continue the investigation; memories fade (the murder took place in 1979 and the prosecution in 1985); and three different assistant district attorneys were assigned to the case at various times who had to then learn the case from an incomplete case file (Private Hearing, Jablonski, 1/16/87, pp. 13-16). Without a complete and well-documented file, detectives, their supervisors and prosecutors could not adequately investigate, manage and prosecute any case.

A second investigative failure which damaged prosecution of the Corso case was police treatment of evidence, including a Sanyo answering machine and an IBM dictaphone machine, both of which belonged to Cervera and were in his office at the time he was killed. Despite the fact that his answering machine tape contained several phone calls concerning Cervera's appointments on the day of the murder, including calls from known organized crime figures, no transcript was ever made of the calls (Public Hearing, 1987, p. 703). In addition, no transcript was made of any of the recorded portions of the IBM dictaphone belts, despite the fact that Cervera was found with a demagnetizer (eraser) in his hand at the time of his death.

Incredibly, Homicide detectives never even listened to the belts themselves, but rather had Cervera's secretary listen, so that she could tell detectives if there were any valuable material on them (Public Hearing, 1987, pp. 704-705).

However, this was only the beginning of the cavalier treatment of these tapes and machines which hurt the credibility of the prosecution's case. Between the time of the murder and the trial, the machines, the belts and tapes -- which were being held as evidence in the Police Property Section -- were auctioned off to highest bidders at a police auction. During the trial itself those tapes and belts were retrieved from the buyers, but by then the tapes had been erased and reused (Private Hearing, Jablonski, 1/16/87, pp. 35-43).

The third area of failure by Suffolk law enforcement in the Corso case was neglect in carrying out and documenting standard investigative steps which should have been taken in the case. For example, after Orlando identified two associates who allegedly accompanied Corso on his way to and from the murder, efforts should have been made to confirm this information and to locate both men. The District Attorney should have directed police investigators to determine whether the

two associates were alive, incarcerated, under indictment or if there was any way to obtain their cooperation or to build a case against them (Public Hearing, 1987, p. 776). No such steps were taken.

Additionally, once the Orlando information was received, many standard investigative steps, such as obtaining fingerprint comparisons, securing photos and showing them to witnesses, requesting telephone call records and examining organized crime information from other jurisdictions, either were not pursued fully or were not pursued at all (Public Hearing, 1987, pp. 784-785).

Even after Corso's acquittal for murder, judicial action in regard to Corso and the Cervera murder was not finished. In December 1987, the Appellate Division, Second Department, issued an opinion in a narcotics case against Corso which had arisen at the time he was arrested for murder, but had been severed from the murder charge (People v. Corso, 135 A.D.2d 551, 521 N.Y.S.2d 773). While the Court determined that the Suffolk Police had probable cause to arrest Corso, this decision contained a brief discussion of some of the failures in the Cervera murder investigation.

Finally, what can only be characterized as a most bizarre judicial proceeding occurred on March 22, 1988, in the case of People v. Corso, Indictment No. 1061-87, concerning a new and unrelated narcotics charge against Corso. On that day, a guilty plea was taken from Corso in a proceeding before Justice George F. X. McInerney on a narcotics charge. At that proceeding Corso stood mute after he was asked by the prosecutor, Raymond Perini, Chief of the Suffolk County District Attorney's Office Narcotics Bureau, whether he had murdered Cervera, with Perini stating on the record that Corso had described in detail how he was paid $15,000 to murder Cervera (Corso Hearing, 3/22/88, p. 20).

In exchange for this "admission," which, even if Corso had assented, was legally useless in prosecuting Corso for murder due to his prior acquittal, the court approved Perini's "package" of recommendations, including that Corso's brother, son and ex-wife be given probationary sentences for their roles in Corso's drug ring, and that Corso, then 66 years old, be sentenced to 12-years-to-life (Corso Hearing, 3/22/88, p. 21). The net result of this "bargain" was that in order to engineer what the District Attorney no doubt believed would somehow "vindicate" the Corso

prosecutors, Perini and the District Attorney gave away far too much, and again allowed the guilty to escape imprisonment.

What this flawed plea bargain further indicated was that the District Attorney still did not understand the nature of the criticism of Corso's homicide prosecution by the Commission and from other sources. The point of this criticism was not that Corso was an innocent man, improperly prosecuted by the District Attorney's Office -- rather, the point was that the habitually defective procedures of the Suffolk Police Department and District Attorney with regard to such things as proper note-taking, evidence handling, and the need for thoroughly professional investigative and prosecutorial methods invited Corso's acquittal of Cervera's murder.

C. The Pius Cases

Early in the Commission's investigation, a preliminary review was made of another Suffolk County homicide case which came to the Commission's attention. This was a case involving four homicide convictions in which the victim was John Pius. However, the Commission decided to await the results of the various legal appeals in the Pius cases which were pending and which

have subsequently been decided. Those appeals have overturned convictions of three of the four defendants in the Pius cases, and the opinions in the reversals highlight some of the systemic problems in Suffolk homicide prosecutions.

For example, in People v. Brensic, 70 N.Y.2d 9, 517 N.Y.S.2d 120 (1987), the Court of Appeals, in reversing Brensic's conviction, criticized the interrogation of a juvenile co-defendant:

> . . . [E]vidence before the court not only failed to establish the reliability of Peter's [Brensic's co-defendant, Peter Quartararo] confession, it suggested quite the contrary, that he had a strong motive to fabricate when he confessed to his mother. Accordingly, the confession was unreliable as a matter of law and should not have been received in evidence.
>
> First, the confession was the product of the custodial questioning of a 15-year-old boy for six and a half hours, without his parents' knowledge, by two police detectives. In the course of this interrogation, Peter gave numerous versions of the events that led to John Pius' death.
>
> * * *
>
> Given this substantial evidence that the confession was but one of several, each containing material differences, that it was obtained from a juvenile after lengthy custodial questioning and that it was

> given under circumstances which suggest that it was induced by the hope of leniency, the confession should not have been placed before this jury, as evidence of defendant's guilt (pp. 21, 23).*

As in the post-acquittal attempt by the Suffolk County District Attorney to "vindicate" police and prosecutorial methods by having Peter Corso stand mute in court in response to a murder accusation, the Suffolk District Attorney followed a similarly inappropriate strategy in the retrial of Robert Brensic. On May 18, 1988, Brensic, after having served five years in state prison on his 25-years-to-life murder sentence, pleaded guilty to a reduced charge of second-degree manslaughter, accepting a 4-to-12 year sentence for which he expected to serve little or no additional prison time.

However, it was the conditions of Brensic's plea which indicated the length to which Mr. Henry would go to "vindicate" the prosecution in the Pius matter and to try to overcome the charges of police and prosecutorial improprieties which accompanied those reversals.

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* See also People v. Ryan, 134 A.D.2d 300, 520 N.Y.S.2d 528 (2nd Dept. 1987).

The highly favorable conditions of Brensic's plea included an agreement that Brensic would not have to testify against any of his co-defendants; a promise not to object to Brensic's parole; permission for Brensic to be released on his own recognizance and leave the State pending his new sentence; and an agreement by Brensic, the Pius family and the Suffolk County Police and District Attorney and its current and former personnel to drop, or refrain from filing, civil suits in connection with Brensic's involvement with the case.

The Suffolk assistant district attorney handling the case, Timothy Mazzei, made clear the motivation of Mr. Henry's Office in agreeing to Brensic's plea bargain in an interview which appeared in Newsday on May 19, 1988. Thus, Mazzei stated that the Office wanted a guilty plea

> because of all the horrible allegations made against us.. . . We never had the wrong guys. This was one way to prove to everyone we had the right people.

However, Mazzei's use of this plea as a defense to Suffolk police misconduct and prosecutorial overreaching was totally misguided and improper. Again the District Attorney was seeking a public relations

coup, rather than appropriate punishment or justice. The essence of the judicial criticism and other public criticism in regard to the Pius cases was not whether the Suffolk authorities "had the right people." The central criticisms concern obtaining and using an unreliable confession, and engaging in faulty and improper police and prosecutorial action, the same criticisms that have been directed at Suffolk by the New York Court of Appeals and others since at least 1976. District Attorney Henry, even at this very late date, still demonstrates his unwillingness to recognize the need for reform in his Office, and instead, seeks some sort of "vindication" in the press.

D. Management Failures in Homicide Cases

The Homicide Division of the Suffolk County Police Department, during the period which was the subject of the Commission's investigation, was commanded by a detective lieutenant and was composed of three detective sergeants and 20 experienced detectives divided into three teams, each led by one of the detective sergeants. There were about 40 homicides per year in Suffolk County, but the Homicide Division had additional duties with respect to vehicular and other deaths (Private Hearing, Dunn, 1/5/87, p. 19).

In both the Police Department and District Attorney's Office, homicide investigators and prosecutors have been considered members of elite units because of the seriousness of the crime and since homicides tend to be high profile cases. Suffolk Homicide Division detectives have been described as the best detectives in the Department (Private Hearing, McGuire, 1/5/87, p. 11), and their behavior may well be considered an indicator of the level of professionalism for all detectives in the Department.

Prior to the Commission's public hearing in January 1987, which considered criticisms of homicide investigations and prosecutions, there was no separate Homicide Bureau in the Suffolk District Attorney's Office. Homicides were handled by the Major Offense Bureau, a unit of six or seven experienced prosecutors who handled other serious felonies as well. In a reshuffling of personnel after the first Commission hearing, Mr. Henry appointed Edward Jablonski, the prosecutor in the Corso case, as the head of the new Homicide Bureau, and a new policy was established whereby assistant district attorneys would report to homicide scenes and become involved as early as possible in the investigation of homicides. While the Commission does not disagree with these changes, they

were but a weak and superficial response to the pervasive problems existing in Suffolk County with respect to homicide investigations and prosecutions. Some of those problems and their causes are illustrated in the following sections.

1. Overreliance on Confessions

From December 7 to 11, 1986, Newsday published a lengthy five-part series on deficiencies and misconduct in Suffolk homicide investigations and prosecutions. The series included a statement that 94 percent of Suffolk homicide prosecutions involved confessions or oral admissions. This figure was confirmed to the Commission by the former Commanding Officer of the Suffolk Police Homicide Division, Detective Lieutenant Robert Dunn, in a private hearing on January 5, 1987 (p. 95).

This is an astonishingly high figure compared to other jurisdictions, so high, in fact, that in and of itself it provokes skepticism regarding Suffolk County's use of confessions and oral admissions.*

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* For example, in Newsday's study which compared 361 Suffolk homicide defendants from 1975 to 1985 to 700 cases from six other large suburban counties, Suffolk's 94% confession rate far exceeded the 54% to 73% rate in the six other jurisdictions (Newsday, 12/7/86, p. 27).

Moreover, the result of Suffolk's unique incidence of confessions has been for officers to rely on confessions and neglect both routine investigative steps and proper scientific and technical evidentiary practices. The prevailing attitude has been that note-taking, forensic evidence, neighborhood canvasses and crime-scene searches are not important because ultimately a defendant will confess. Confessions are of course important, but usually insufficient, and they should not become the nearly exclusive method of developing homicide cases. With Suffolk's methods, the chances of the guilty going free are simply too high.

2. Lack of Reports and Documents

The failure of the Suffolk Police Homicide Division to maintain adequate notes and reports, and the tolerance of Mr. Henry's office for this neglect, shocked the Commission. In the Suffolk County Police Department, officers above the rank of patrolman, and all detectives, have not been required to take notes or keep memo books.* Indeed, the sole judgment as to what

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* In the New York City Police Department, the keeping of memo books is required for detectives as well as police officers, and the blank memo books have numbers which are recorded in department records each time a detective or police officer is issued a new book.

was to be recorded in written form in an investigation rested with each detective. Thus, Sergeant Kenneth McGuire, the supervisor in the Diaz and Corso cases, testified:

> Q. What was the requirement of the people in your team as to taking notes?
>
> A. Well, the men would take the notes as they pretty much saw fit while they were conducting interviews and stuff.
>
> Q. So the answer is, there was no requirement?
>
> A. There was no specific requirement.
> (Public Hearing, 1987, p. 333.)

Asked how a detective could judge in advance what information might be important later in the investigation, and thus should be recorded, Lieutenant Dunn testified that he was confident detectives could make that determination:

> Q. How does one make that determination early in an investigation, of whether information will be pertinent down the road?
>
> A. It must be dependent on the intuition and the intuitiveness of the detectives.
> (Public Hearing, 1987, p. 732.)

Related to this practice of not keeping notes or making adequate reports, Suffolk Police personnel do not prepare what they define as "negative reports." Negative reports in Suffolk are those which establish that investigatory leads on suspects, witnesses or evidence are not correct, relevant or important in the ultimate solution of a case. Suffolk does not prepare such reports so as not to "clutter up the case" with material that a "defense counsel could utilize" which were "not specifically important to the immediate investigation" (Private Hearing, Dunn, 1/5/87, p. 75). However, in the real world no detective has sufficient "intuition" to predict what information, positive or negative, will be of value as an investigation unfolds. It may be only in retrospect that two properly documented pieces of information fit together, regardless of how irrelevant they may have initially seemed, and help advance the investigation. If the information is not documented in a report, it is, for practical purposes, lost to the investigation.

After a case is closed, homicide reports and files are not sent for storage at Central Records. This is an open and well-known violation of Suffolk Police Department rules, and is supposedly done for reasons of space and "security" (Dunn, pp. 80-83).

In addition, there is also no sequential numbering of each item within a file and no regular indexing or division of the file according to subject or type of evidence (Dunn, pp. 86-89). Thus, even if a document has been entered in the file, it could later be lost or removed undetected (Dunn, p. 102).

Finally, one crucial stage of an investigation during which Suffolk police personnel produce no written reports is when a case is referred to the District Attorney's Office for prosecution, but while the police detectives who are assigned to the case are still working on the case in cooperation with an assistant district attorney. When investigative steps are taken after referral to the District Attorney, as a matter of express policy, no additional written case reporting need be done by the detectives to their police supervisors (Dunn, pp. 106-109). As a direct result of this deliberate policy, key reports concerning sensitive events which should have been produced were not. For example, in both the Corso and Diaz cases, many key events were not documented following the referral by the police to the District Attorney, in addition to inadequate documentation prior to referral. Thus, not only did police supervisors fail to require necessary documentation, but prosecutors supervising

investigations and prosecutions also failed to secure proper paperwork.

The failure of the Suffolk Police Department to produce required documentation during investigations was admitted in a memo, dated May 7, 1985, from then Commanding Officer of the Homicide Division, Detective Lieutenant Robert Dunn, to personnel in that Division:

> Departmental and Homicide Squad procedures concerning the documenting of investigative activities in the form of Supplementary reports has been, in many instances, ignored in recent years. While aware of the availability of Police reports via Subpoena and the Freedom of Information Act, our responsibilities to record basic findings (neighborhoods, interviews, etc.) for future reference and investigative cohesiveness have not been suspended.

However, the following quote bluntly recommends keeping reports to less than a minimum in order to thwart defense counsel and gives a disturbing picture of the cast of mind of one Suffolk homicide supervisor. While the supervisor supports the practice of not keeping complete notes in order to bring about "successful prosecutions," in fact, this practice helped allow Diaz and Corso to go free. In a memo from

Detective Sergeant Robert Misegades, then a team supervisor in the Homicide Division, to Detective Inspector Albert Holdorff, then Commanding Officer of the Major Crimes Bureau, dated March 16, 1983, Misegades wrote:

> To the chagrin of the defense counsel, homicide reports, historically, only reflect pertinent data as it applies to the successful prosecution of our cases. If our learned investigators from the Inspectional Services Bureau are instrumental in generating new policy so be it, but the successful prosecution of homicide cases may cease as we now enjoy it. Suffice it to say that reports need not establish or prove our integrity. If reports support an investigation without losing sight of a successful prosecution then they are necessary. They need not be necessary if they will open up areas for scrutiny or loopholes in our cases.

Thus, the absence of proper documentation in Suffolk homicide cases was actually much worse than mere incompetence or oversight -- it was part of a conscious policy, in which the District Attorney's Office acquiesced, ignoring inadequate and incomplete files, due to a blind desire to secure convictions.

Finally, even District Attorney Henry was eventually forced to admit the failure of proper note-taking in homicide investigations. At a hearing

of the Public Safety Committee of the Suffolk Legislature on August 14, 1987, Mr. Henry testified:

> Q. Let's move on to something else. There's been a great deal of criticism recently of Homicide detectives not taking proper notes during the course of their investigations. You're aware of that, I'm sure?
>
> A. Yes, I am.
>
> Q. We have taken testimony from other expert witnesses including your own chief investigator, George Holmes, on the importance of note taking. Have you taken a public position on the criticism of the Homicide Squad on this issue?
>
> A. I think I probably have. If I haven't, I will now, and that is that there should be more notes (pp. 127-128).

3. Inadequate Case Supervision

In addition to permitting inadequate investigative notes and reports, Suffolk Police supervisors also followed haphazard procedures with regard to case status reports and case management. There were no regularly scheduled case meetings on homicides, even on high profile or difficult cases (Dunn, pp. 14-16). Thus, officers working on an investigation were not only deprived of a fully documented case file, but also lacked the benefit of a regular review of the progress

of each investigation. Commanding officers claimed familiarity with only a small part of the caseload they ostensibly supervised (Dunn, pp. 20-22). Furthermore, higher-ranking personnel received statistics, but little else except an occasional oral briefing, since there were no written case status reports produced by anyone (Dunn, pp. 23-24). In addition, the assignment of personnel and investigative efforts was not determined in an active manner, nor were cases given higher or lower priority in any rational way, but rather cases merely "peter[ed] out" (Dunn, p. 24).

Thus, priorities were not set, supervision was not exercised, methods were not scrutinized -- as long as there were results -- which in Suffolk only meant "successful prosecutions." Such a weak supervisory system was ripe for the abuses discovered by the Commission.

4. Crime Scene Responsibility and Improper Handling of Evidence

The lack of a clear-cut understanding of responsibility for crime scenes was brought out at the Commission's public hearing. Thus, Robert Genna, the supervisor in the Crime Laboratory of the Medical Examiner's Office who had responded to the murder scene in the Diaz case, testified that the Homicide Division of

the Suffolk Police Department was in charge (Public Hearing, 1987, p. 131). On the other hand, the former Commanding Officer of the Homicide Division, Robert Dunn, testified that the Medical Examiner's Office had primary responsibility for crime scenes:

> If you are asking me who is in charge of the crime scene, the County Charter reveals that the Medical Examiner's Office is in charge of the crime scene, and we are subordinate to them. That's a matter of County Law (p. 753).

Clearly, they both cannot be correct. However, the Charter does, in fact, put the Medical Examiner's Office in charge. Whether that responsibility is properly placed or not is really less important than ensuring that everyone understands who in fact is in charge. When a supervisor in the Medical Examiner's Office does not know that he is in charge, he cannot take appropriate steps to ensure that evidence is properly obtained and analyzed.

The careless disregard for physical evidence in homicide cases by the Suffolk Police was demonstrated not only by the failure to find the murder weapon in Diaz and the treatment of the recording machines and tapes in Corso, but also by the treatment of a bullet in the homicide case of People v. Hamilton,

Indictment No. 843-82 (Public Hearing, 1987, pp. 229-246, 715-720). Since the members of the Homicide Division had habitually relied so heavily on confessions, they had far too little concern for physical evidence and diligent, but routine, police work.

In the Hamilton case, only after a confession was ruled inadmissible was a .22 caliber bullet, which had allegedly been found by Detective Rafferty in the pocket of a defendant when he was arrested, produced as evidence. As it turned out, this bullet had the same ejection marks as that produced by the murder weapon, a .22 caliber pistol. Rafferty testified at a pre-trial hearing that he had failed to send this bullet for ballistics tests when it was found on the defendant; instead he had put it, without any label, into the file folder, which the Commanding Officer of the Homicide Division testified at the Commission's hearing constituted a violation of Department Rules and Procedures (Public Hearing, 1987, pp. 755-759). Later, after the confession in the case was ruled inadmissible, the bullet was sent to ballistics and found to match the murder weapon. There were no notes or written references concerning the bullet anywhere prior to the confession being ruled inadmissible.

Rafferty explained away his failure to send the bullet for tests with two equally damning explanations. First, he claimed never to have had any training in ballistics (Public Hearing, 1987, p. 718) -- astounding for a detective who served 17 years in the Homicide Division. Second, he explained, "every black guy in Amityville has a .22," so he did not think the .22 caliber bullet was important (Rafferty, Private Hearing, p. 129), which just as surely demonstrated how lacking in judgment was this veteran homicide detective.

While Rafferty's convenient talent for producing crucial testimony and evidence at the 11th hour in homicide prosecutions disturbs the Commission, there is a sure remedy to these types of problems in future homicide prosecutions. If proper documentation of events is made close in time to their occurrence, later doubts about the veracity of police reports will be minimized. This is professional police practice and should be demanded of the police by Suffolk prosecutors.*

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* Not long after the Commission's hearing, Rafferty was transferred from the Homicide Division to the Robbery Squad, after a 17-year career in Homicide. While Hamilton's conviction for murder and robbery was affirmed (People v. Hamilton, 117 A.D.2d 819, 499 N.Y.S.2d 139 (2nd Dept. 1986)), a disciplinary charge against Rafferty for mishandling the bullet in the Hamilton case was sustained in a Suffolk Police Internal Affairs Division investigation.

5. Inadequate Training

Testimony before the Commission indicated a remarkable lack of training for Suffolk Homicide detectives in regard to even routine investigative techniques. For example, in regard to ballistics and firearms, Detective Rafferty was asked:

> Q. Have you ever had firearms training yourself? Not in shooting them, but impressions left, gunpowder or that sort of thing?
>
> A. No. Maybe a forty-minute course in some school I went to. (Private Hearing, Rafferty, 1/6/87, p. 132.)

and also:

> A. . . . I'm not really on top of guns and that's probably what got me messed up on that [Hamilton case].
> (Private Hearing, Rafferty, 1/6/87, p. 130.)

Detective Rafferty, one of the most experienced members of the Homicide Division, further testified:

> Q. Doesn't that case [Hamilton] prove if you had training you would have known enough to send it in and gotten the results?

A. Yes.
(Public Hearing, 1987, pp. 718-719.)

Furthermore, Rafferty's supervisor, Detective Sergeant McGuire, replied with an equally disturbing answer with respect to his own knowledge of blood-related evidence. In response to a series of questions about what the forensic laboratory can tell regarding a stain, McGuire testified:

> Q. After they have done that, what can they tell you about the stain?
>
> A. I guess they can tell you if it's blood.
>
> Q. Anything else?
>
> A. Maybe, if it's food.
>
> Q. If it is blood, what else can they tell you about it?
>
> A. I have no idea, sir. I guess they can break it down further, depending maybe on the freshness or whatever.
> (Private Hearing, McGuire, 1/5/87, pp. 65-66.)

The blind spot this indicates for this Detective Sergeant, who was a homicide team supervisor for 11 years, is remarkable. McGuire omits even simple items, for example, blood-type, let alone the more

specialized information that can be gained from the forensic analysis of blood. While the standard to be expected of a detective is not that of a ballistics or forensics expert, nevertheless, police personnel must be aware of what information and analysis the laboratory is capable of providing and what should be observed and obtained at crime scenes and elsewhere for analysis by the crime laboratory.

All of the other failures catalogued in this Report, such as inadequate note-taking and lack of careful supervision, also are indicative in one way or another of the need for increased training.*

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* The Commission is heartened by Commissioner Guido's recent public comments that improved training is one of the cornerstones to his planned reforms of the Suffolk Police Department. In an August 1, 1988, interview in Newsday, Commissioner Guido was quoted as saying, "I see training as the key ingredient in effectuating organizational change."

II. MISCONDUCT AND DEFICIENCIES IN NARCOTICS INVESTIGATIONS AND PROSECUTIONS

A. Disorder in the Narcotics Division

Before the beginning of the Commission's investigation in November 1985, and in its early stages, narcotics investigations and prosecutions in Suffolk County were described as experiencing a "breakdown in supervision." Around this time, narcotics investigations of a number of Suffolk police officers had reached public attention. These included investigations of uniformed officers Rebecca Bernard, Brian Merlob and Jose Ingles, as well as undercover Narcotics Division officers James Kuhn and Raymond Gutowski.

By March 1986, most of these allegations had become public, and had resulted in extensive and extremely unfavorable publicity for the Police Department and the District Attorney's Office. In addition to the Commission's investigation, which preceded all the other investigations, the Suffolk Police were under the scrutiny of the United States Attorney for the Eastern District of New York, a management team from Long Island University appointed by County Executive Peter Cohalan, and the Public Safety Committee of the Suffolk County Legislature.

Coupled with the intense scrutiny occasioned by these investigations and resulting publicity, at about this time the Police Narcotics Division underwent a rapid change of commanding officers. The long-time commanding officer, Detective Lieutenant Richard Siee, who had served from July 1978, to February 1985, was transferred -- and was given two subsequent promotions before his retirement, despite the fact that most of the allegations of misconduct being examined had occurred during his tenure. He was followed in rapid succession as Commanding Officer of the Narcotics Division by Detective Lieutenant Walton Brennan,* who served less than one year, from February 1985, to January 1986, and then by Detective Lieutenant Walter Cunningham, who served only from January 1986, to May 1986. Cunningham was succeeded by Detective Lieutenant Richard Franzese, who still serves in that position. Thus, within 15 months four different commanding officers had been assigned to supervise the Narcotics Division.

The effect of the crimes and misconduct of the police employees, the resulting public scrutiny and

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* Prior to becoming Commanding Officer of the Narcotics Division, Brennan had no experience in narcotics investigations.

bad publicity, coupled with the rapid changes in management, led Lieutenant Franzese to testify that "supervision definitely was a problem" in the Narcotics Division when he arrived (Private Hearing, 11/23/87, p. 75). More vividly, Detective Lieutenant Robert Sievers, who was a sergeant in the Narcotics Division during this period, testified: "The place was a zoo" (Private Hearing, 11/30/87, p. 35).

While significant narcotics-related misconduct investigated by the Commission will be discussed in subsequent sections of this Report, the key events regarding Rebecca Bernard, Brian Merlob and Jose Ingles which pre-dated the Commission's investigation, will be briefly outlined here so that subsequent events can be understood in their proper context.

In 1984, Suffolk County Police Officer Rebecca Bernard was acquitted of criminal charges of selling cocaine. However, in a disciplinary hearing in April 1986, it was determined that Bernard had violated Departmental rules based on her narcotics-related activity, and she was subsequently fired. Part of her defense was that she was conducting an unauthorized undercover narcotics investigation in the Brentwood area and that she had informed Suffolk Police supervisors about a bar that was a center of narcotics

activity and about a Suffolk police officer suspected of narcotics activity, Jose Ingles, as early as May 1982. It has been confirmed by the Suffolk Police that she had supplied this information about the bar and Ingles to them in May 1982.

However, an investigation of Ingles for drug-related charges did not begin until 1984. The investigation developed evidence that Ingles and Suffolk Police Officer Brian Merlob both used cocaine and assisted drug dealers by using their positions as police officers to investigate for the dealers potential drug buyers and by acting as bodyguards for drug dealers. The officers were indicted on numerous criminal counts, but were allowed to plead guilty to a single count, Attempted Criminal Facilitation, Second Degree (Penal Law §115.05), a class D felony, on August 30, 1985. As part of their plea agreements, both officers agreed to resign from the Department.

The charges against these three officers rocked the Department and helped set in motion a series of events which led to an investigation by the Commission of other instances of misconduct in the Narcotics Division. Of particular concern to the Commission was the apparent failure of the Suffolk Police to pursue the allegations by Bernard regarding Ingles and others

aggressively until the allegations came to public attention through Bernard's own case, rather than when they were first made by her in 1982.

B. Kuhn and Gutowski

In September 1985, Sergeant Joseph Comiskey, the supervisor of an undercover narcotics street team, reported to his superiors that a team consisting of two of his undercover narcotics officers was using cocaine heavily. These two officers, James Kuhn and Raymond Gutowski, were among Comiskey's most productive undercover officers, having made 86 undercover narcotics cases in their first year in the squad, during which they had become known as Comiskey's "A Team." While the information Comiskey gave to his superiors would be considered sensitive in any police department, this revelation was particularly explosive due to the unfavorable narcotics-related publicity the Department had already suffered concerning Bernard, Merlob and Ingles. Furthermore, the Department and District Attorney's Office had just received additional unfavorable publicity regarding the Corso and Diaz homicide cases, while the election for district attorney, in which Mr. Henry was seeking a third term, was only a few weeks away.

According to Suffolk County Police documents, the allegations made by Sergeant Comiskey of cocaine abuse by Kuhn and Gutowski were known to Chief of Detectives John Gallagher, Inspectional Services Bureau Commanding Officer Donald Jeffers and the Commanding Officer of the Internal Affairs Division, Captain Thomas Murphy, as early as October 3, 1985.* Assistant District Attorney Raymond Perini was briefed by police officials on cocaine abuse by Kuhn and Gutowski on October 9, 1985. However, an Internal Affairs Division case number was not assigned -- and the case was not given to an investigator for full investigation -- until November 6, 1985, the day after Mr. Henry's re-election as District Attorney.**

Furthermore, and again despite the fact that illegal drug use by Kuhn and Gutowski was known to Suffolk Police authorities in September 1985, the two

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* According to FBI documents, Kuhn and Gutowski's Commanding Officer, Lieutenant Walton Brennan, also knew of the drug abuse allegations on September 23, 1985.

** James Kuhn has testified before the Commission that Sergeant Robert Doyle, then assigned to the Internal Affairs Division, told him that no investigation of Kuhn was being started until after Election Day out of fear that the entire matter would become public knowledge and help Henry's opponent (Private Hearing, 12/23/87, pp. 92-93).

were reassigned from the Narcotics Division to police precincts and permitted to continue serving as police officers. Moreover, despite at least eight interviews of Kuhn by Internal Affairs Division personnel, Internal Affairs documents reveal no investigation of the questions raised by Kuhn as early as December 16, 1985, about the Timothy Gallagher case, nor any attempt to probe beyond Kuhn's cocaine abuse. (See Section C this Chapter.)

However, on February 21, 1986, based on information developed after debriefing Bernard, a Commission investigator contacted Kuhn and Gutowski. The Commission investigator asked Kuhn about three areas: irregularities in the handling of a drug case involving Timothy Gallagher, the son of Suffolk Police Chief of Detectives John Gallagher;* drug activity involving members of the Suffolk County Police Department Narcotics Division; and illegal wiretapping by members of the Suffolk County Police Department.

On that same evening, following his conversation with the Commission investigator, Kuhn, fearing that his partner Gutowski was cooperating with the

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* Kuhn was the undercover officer who initially bought cocaine from Timothy Gallagher.

Commission, confessed to a Suffolk Police Internal Affairs Division investigator regarding the three areas of misconduct about which the Commission had asked. However, with respect to illegal wiretapping, while implicating himself and the entire Interdiction Unit of the Narcotics Division of the Suffolk Police Department, Kuhn told Internal Affairs Division investigator James Maher, "I don't care if I have to do two or three years in jail, I'm not rolling over on anybody in my old team" (Private Hearing, Maher, 12/18/87, p. 62). The information that Kuhn gave to the Internal Affairs Division that evening in February 1986, regarding routine illegal wiretapping in the Interdiction Unit was substantially the same information to which he testified at a Commission public hearing in January 1988. (See Chapter III(A).)

Shortly after February 21, 1986, when Kuhn refused further cooperation with the Internal Affairs Division or the District Attorney's Office and enrolled in a drug treatment program, the Suffolk District Attorney referred the three topics of Commission inquiry to the United States Attorney for the Eastern District of New York (Public Hearing, 1988, pp. 668-669).

In early 1987, Kuhn and Gutowski were tried and acquitted in federal court of charges of distributing narcotics (United States v. Kuhn and Gutowski, CR 87-00698, E.D.N.Y., Judge Wexler). Following their acquittal, departmental disciplinary charges were reinstituted against them. Added to the departmental charges against Kuhn was a new charge that he had engaged in illegal wiretapping through conversion of a pen register while a member of the Interdiction Unit of the Narcotics Division.

One audio tape which was taken from Kuhn as evidence by the Internal Affairs Division on the evening of February 21, 1986, was subsequently demonstrated by the Suffolk Police to be an illegal recording of telephone conversations of the subject of a Narcotics Division investigation. (Decision in Suffolk County Police Department Disciplinary Proceedings against James Kuhn, Charge #8, Specification #1, 1/20/88.)

Gutowski, rather than standing trial on the departmental charges, agreed to resign. In return the Department agreed to provide a letter stating that his drug abuse arose in the course of his police work and also agreed not to contest his application for a three-quarter disability pension, which the New York State

and Local Police and Fire Retirement System subsequently granted.

Kuhn, however, persisted through a lengthy disciplinary hearing in the summer of 1987 before former Supreme Court Justice Joseph Corso, following which virtually all of the disciplinary charges, including the wiretapping charge, were sustained, and he was fired in early 1988. After he was fired, Kuhn, like Gutowski, was awarded a three-quarter disability pension by the New York State and Local Police and Fire Retirement System, based on an application which he had made while his disciplinary charges were pending.

Kuhn and Gutowski's work as undercover narcotics officers in 1985 produced 86 criminal convictions, 84 of which were the results of plea bargains. The convictions in the two trials which included testimony by Kuhn and Gutowski were subsequently vacated due in part to the fact that Kuhn and Gutowski had perjured themselves when they testified they did not use narcotics.*

In early 1987, Kuhn's charges regarding the favored treatment accorded to Chief of Detectives

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* People v. Diane Roth, Indictment No. 900-85, Supreme Court, Suffolk County, Justice McInerney; and People v. Wayne Johnson, Supreme Court, Suffolk County, Justice Rohl.

Gallagher's son were referred by the United States Attorney for the Eastern District for State prosecution (see Chapters II(C) and VII); the wiretapping allegations were investigated by the Commission, with the initial results presented at a public hearing in January 1988 (see Chapter III).

The Commission believes that the case of Kuhn and Gutowski reveals at least two important failures with respect to narcotics matters. First, supervision in the investigation and prosecution of narcotics cases was lax. Two new and untrained undercover officers, who became heavy narcotics users themselves, made 86 cases in a seven month period during which their cases were replete with careless paperwork, missing police reports and improper handling of narcotics evidence. For example, between January 1, 1985, and September 18, 1985, Kuhn initiated some 71 Central Complaint Numbers for confidential investigations for which he never submitted the required Field Report (PDSC-1053). Furthermore, on a number of occasions Kuhn was issued cash from the Narcotics Special Cash Fund to make undercover purchases of narcotics, and while Kuhn reported expenditures for narcotics purchases in these instances, the narcotics in question were never submitted to the Criminalistics Laboratory as evidence (Decision in Kuhn

Disciplinary case, 1/20/88, especially charges #1 and #3).

Second, there was a gross failure to detect, investigate and punish police misconduct in narcotics matters. Indeed, the Commission, after only a relatively short investigation, was able to unearth criminal allegations regarding the Gallagher case, illegal wiretapping and other misconduct by police personnel in narcotics matters, yet the Internal Affairs Division and the District Attorney's Office totally failed to detect or pursue this misconduct until forced by actual or threatened adverse publicity to do so.

The evidence revealed in the Kuhn and Gutowski matter adds support to two of the conclusions reached by the Commission regarding the Suffolk County Police Department and District Attorney's Office: there has been both a serious failure of proper supervision and a most disturbing willingness to tolerate misconduct by employees unless prodded by public revelation.

C. Chief of Detectives Gallagher

One of the matters about which Kuhn was questioned by the Commission was the allegation that Timothy Gallagher had received special treatment in a

narcotics case (People v. Timothy Gallagher, Docket No. 618625-85, District Court, Suffolk Co.) because he was the son of Suffolk County Chief of Detectives John Gallagher. Kuhn was the undercover officer who bought one-eighth of an ounce of cocaine on November 2, 1984, from a youth whom he later learned was Chief Gallagher's son. Timothy Gallagher was arrested on November 1, 1985, one year after the sale. Timothy Gallagher, who did not cooperate with the police, received special consideration as an informant based on a letter, signed by Police Officer Albert Sinram and dated April 3, 1985, falsely stating that Gallagher had helped provide information in six narcotics cases. The recommendation letter was approved by Sergeant Joseph Comiskey, and a cover letter forwarding it to Raymond Perini, Chief of the Suffolk County District Attorney's Narcotics Bureau, was signed by Walton E. Brennan, Commanding Officer of the Narcotics Section, and Joseph Farnitano, Commanding Officer of the Major Crimes Bureau.

Based on this letter, Timothy Gallagher was allowed to plead guilty on December 6, 1985, to a class A misdemeanor, Criminal Possession of a Controlled Substance, Seventh Degree (Penal Law §220.03), rather than the original charge, Criminal Sale of a Controlled

Substance, Third Degree (Penal Law §220.39(1)), a class B felony. On February 14, 1986, Gallagher was sentenced to a fine of $500 and three years probation.

On February 21, 1986, the Commission asked Kuhn about his knowledge of misconduct in the Timothy Gallagher case. Kuhn then reported this Commission inquiry to Internal Affairs. While Kuhn had previously raised questions about the Gallagher matter which were never pursued by Internal Affairs, it was only after this Commission inquiry that the Gallagher case became one of the three matters referred by the Suffolk County District Attorney to the United States Attorney for the Eastern District of New York. In early 1987, following an extensive investigation of the Gallagher matter, the United States Attorney for the Eastern District decided that while there was evidence of a crime under New York State law, there was no jurisdictional predicate for a federal prosecution and returned the matter to Mr. Henry's Office with the recommendation for a special state prosecutor (see Chapter VII).

D. Eason, Savage and Donnelly

The use of Kevin Eason as a narcotics informant for the Suffolk County Police Department Narcotics Division and the Suffolk County District Attorney's

Narcotics Bureau constitutes evidence of both misconduct and a failure of supervision in narcotics investigations and prosecutions.

Kevin Eason began working as a narcotics informant for Suffolk undercover narcotics Police Officer Warren Savage in early 1984, when Eason was a 17-year old high school junior. He continued to serve as an informant for Savage until late 1986. Eason provided Savage with introductions to street-level cocaine sellers from whom Savage would make small purchases of cocaine. While Eason provided some introductions which led to arrests and guilty pleas prior to November 1985, his major informant activity occurred between October 1985, and May 1986, when Eason allegedly provided Savage and his partner, Police Officer Ellen Donnelly, with introductions which led to 140 purchases of cocaine in the Wyandanch/North Amityville area (Public Hearing, 1988, pp. 575-579). While Eason and the alleged cocaine sellers were all black, and the areas being worked were almost exclusively black, Savage and Donnelly were both white (Public Hearing, 1988, pp. 520-521). As a result of Eason's activity, a major drug raid occurred on July 21, 1986, in which 23 people were arrested. These arrests and others based on Eason's work between October 1985, and May 1986,

resulted in five narcotics trials at which Eason testified against five different defendants, one of whom was acquitted (Public Hearing, 1988, pp. 508-509). In addition, according to documents supplied to the Commission by the Suffolk District Attorney's Office, Eason's efforts also resulted in narcotics charges to which numerous other defendants pleaded guilty.

At the Commission's public hearing in January 1988, Eason testified that officers Savage and Donnelly urged him to make false identifications in many cases (Public Hearing, 1988, pp. 370-402) and that he did, in fact, testify falsely at the five narcotics trials at which he was a prosecution witness.*

For the purposes of this Report, the central point regarding Eason, however, is not how often, or

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* Eason testified before the Commission under a grant of immunity. Subsequently, in a hearing on a motion under §440 of the Criminal Procedure Law seeking to vacate the convictions in the trials at which Eason testified, Eason was again granted immunity, upon the application of District Attorney Henry's Office, whereupon Eason testified that his testimony before the Commission was false. In so doing, Eason further cast doubt on his credibility (People v. Watkins, Indictment Nos. 716-86, 764-86, 766-86 and 842-86, Supreme Court, Suffolk County, Justice McInerney, 1/25/88). Furthermore, beginning shortly after the Commission's hearing, the District Attorney's Office, knowing that the Commission was seeking to speak with Eason, secreted Eason, prevented the Commission from speaking with him and removed him from the State.

when, he lied. The Commission's concern is rather that the Police Department and District Attorney's Office continued to use Eason as an informant, and as a key witness against criminal defendants, when there was overwhelming evidence, known to the police and to Assistant District Attorney Raymond Perini, that Eason was not reliable, and that Eason's relations with Savage and Donnelly were highly suspect.

In this regard, Detective Lieutenant Richard Franzese, the Commanding Officer of the Suffolk Police Narcotics Division, testified before the Commission that he told Perini that Eason lacked credibility and that approximately 30 cases involving Eason as an informant had to be dismissed because they had not been investigated or documented thoroughly or completely. Thus, Franzese testified:

> Q. And what did you discover in a review of these cases, did you form a conclusion as to these cases, any quality thereof?
>
> A. The cases had ostensibly not been either investigated thoroughly or completely or they hadn't been documented completely. The cases in question resulted in twenty-eight dismissals or exceptional clearance.
>
> Q. And were these cases that involved the informant, Kevin Eason?

A. The majority of them, yes.

Q. Would you state how many involved Mr. Eason?

A. Approximately thirty of them, probably.

* * *

Q. Did you ever during your review of these cases and in your time as Commanding Officer of that Unit, form any opinion as to Kevin Eason's credibility with respect to cases with which he was involved and testified about?

A. Yes.

Q. What opinion did you form?

A. That his credibility was dubious.

Q. What did you base this opinion on?

A. The number of cases that he was involved in that had defects from identifications that he had supplied to the two officers.

Q. Did you ever transmit or relay this opinion to anyone in the District Attorney's Office?

A. Yes.

Q. To whom did you relay this opinion?

A. To Raymond Perini.
(Public Hearing, 1988, pp. 546-547, 554.)

Franzese further testified that, at the direction of then Chief of Detectives Arthur Feldman, he had requested a meeting with Perini at which they would interview Eason. This meeting between Franzese, Perini and Eason occurred in November 1986, after four of the five trials in which Eason testified had been concluded. At the Commission's public hearing Franzese described this meeting as follows:

> Q. Was the issue of [Eason's] credibility as a witness discussed on that occasion?
>
> A. We didn't get very far with the discussion with Mr. Eason. He was hostile and uncooperative and non-committal. The conversation never really had gotten in any of those areas.
> (Public Hearing, 1988, p. 561.)

However, despite Franzese's expressed concern about Eason's credibility, and about Savage and Donnelly, Perini was still not deterred in his reliance on Eason as a prosecution witness.

In addition to Franzese, another officer, Sergeant James R. Maher of the Internal Affairs Division, also informed Perini that Eason had no

credibility.* Maher had conducted an investigation of a police officer accused by Eason of drug sales, an allegation credited by Savage and Donnelly, but disproved after an extensive Internal Affairs investigation. Maher testified at a Commission private hearing:

> My feeling and the feeling of my bosses was that Kevin [Eason] had no credibility. He told different stories every time we talked to him.
> (Maher, 12/18/87, p. 46.)

Maher testified that this information was provided to Perini before Eason ever testified in any Suffolk narcotics prosecutions (Maher, pp. 34, 46-47).

Notwithstanding these clear warnings, Perini used Eason as a witness in narcotics prosecutions, and he approved Eason's continued use as an informant. Furthermore, Perini personally permitted Eason's continued use as an informant during an eight-month period in which Eason was arrested on three different criminal

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* Sergeant Robert Sievers, who served under Franzese, and who supervised Savage and Donnelly from February 1986, to May 1986, told the Commission that he also had problems with the credibility of Eason, as well as the credibility of Savage and Donnelly (Private Hearing, Sievers, 11/20/87, p. 14).

charges which the District Attorney's Office did not prosecute.*

In addition to revealing Perini's continuing use of an informant of dubious credibility, the Eason matter also demonstrates the startling lack of supervision in the Police Narcotics Division. Police Officers Savage and Donnelly carried out 140 undercover drug buys in eight months, with Eason providing all the introductions. The work of these officers, which was largely unsupervised, was marked by frequent errors, poor practices and frequent violations of rules and procedures. Thus, in a memorandum, dated June 12, 1986, to Detective Lieutenant Richard Franzese, Detective Sergeant Robert Sievers, who had supervised both Savage and Donnelly beginning on February 10,

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* On November 21, 1985, Eason was arrested for Recklessly Causing Physical Injury (class A misdemeanor), Suffolk County, District Court (Docket No. 20236-85); on April 29, 1986, Robbery Second Degree (class C felony), Suffolk County, District Court (Docket No. 7215-86); and on May 23, 1986, Grand Larceny (class E felony), Suffolk County, District Court (Docket No. 8740-86). Eason was never represented by counsel on any of these charges, nor was he represented by counsel in a meeting with Raymond Perini during this same time period at which Perini approved of Eason continuing as an informant and promised him "consideration" (Public Hearing, 1988, pp. 453-462). The District Attorney's Office has never pursued prosecution of Eason on these three criminal charges which he allegedly committed during the time he was acting as an informant.

1986, criticized their performance and their relationship with Eason:

> . . . As the two officers [Savage and Donnelly] were working the 'street level' investigation mentioned above a number of incidents occurred that the undersigned interpreted as indications that their police identity was compromised, they had become too 'close' to the confidential informant [Eason] and that they were not in full control of the investigation.

Testimony was also presented by Suffolk Police witnesses that officer Donnelly tasted cocaine in the presence of other officers in a police precinct (Public Hearing, 1988, pp. 541-542); that Officer Donnelly deliberately failed to keep Narcotics Division informant cards up to date by listing cases in which information was provided by Eason, contrary to Suffolk Police Rules and Procedures (Public Hearing 1988, pp. 570-573); that Savage and Donnelly relied solely on identification information provided by Eason in a significant number of cases and failed to obtain other needed corroborative identification evidence (Public Hearing, 1988, p. 538); and that deficient identification procedures used before and after the July 21,

1986, narcotics raid resulted in a number of mistaken arrests (Public Hearing, 1988, pp. 472-483).

Finally, Suffolk Police documents indicated that Savage and Donnelly were insubordinate and failed to follow legitimate orders of their supervisors, and that they were characterized as "bizarre" and "aberrant" by supervisors and recommended for psychiatric evaluations (which were never conducted).*

The problems in the investigations and prosecutions involving cases developed by Savage and Donnelly, with the assistance of Eason, are but another example of the lack of supervision and professionalism, and the tolerance for misconduct, exhibited by the Suffolk County Police Department and District Attorney's Office.

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* Rather than being vigorously investigated, Police Officer Savage was promoted to detective and transferred from Narcotics in August 1986.

III. ILLEGAL WIRETAPS

A. Illegal Eavesdropping by the Suffolk County Police Department Known to the District Attorney's Office

Testimony heard by the Commission at its January 1988, public hearing presented not only a shocking picture of illegal wiretapping by the Interdiction Unit of the Suffolk Police Department with the approval of the Bureau Chief of the District Attorney's Narcotics Bureau, but also an absence of even rudimentary management controls on electronic eavesdropping which allowed this criminal behavior to occur. The evidence presented at this public hearing demonstrated that the management of the Police Department had neither the will, nor the mechanisms, to prevent or detect illegal wiretapping in the Interdiction Unit.

1. Legal Background

At the Commission's public hearing in January 1988, testimony was offered by one current and two former members of the Suffolk County Police Department that the Suffolk County Police Department and District Attorney's Office had engaged in illegal wiretapping

through the conversion of "pen registers" to illegal use.*

A legal wiretap requires an order from a judge and is governed by stringent rules imposed by New York State and federal law specifying exactly what can and must be done in conducting the wiretap.** There are severe criminal penalties for illegal wiretapping, which under federal law is a felony, and which at the time of the incidents discussed in this Report was punishable by a maximum of a $10,000 fine and not more than five years in prison (see 18 U.S.C. §2511). Under New York law this crime is a class E felony, with a maximum of four years imprisonment (see Penal Law §250.05).

Until recently the use of a pen register has not required an order from a judge, and has not been

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* A legal wiretap intercepts and records actual audio conversations to and from a target phone, while a legal pen register is limited to providing only the outgoing telephone numbers dialed from a target phone. "The term 'pen register' means a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached . . . ." 18 U.S.C. §3127 (3). A pen register can be converted or modified to become a full-blown wiretap by the mere addition of a speaker or tape recorder.

** See 18 U.S.C. §§2510-2519 and New York Penal Law §§250.00-250.10 and Criminal Procedure Law 700.05-700.70.

subject to regulation in New York State. While the Attorney General or District Attorney must be the applicant on a wiretap, with respect to pen registers, different jurisdictions, and even different agencies within the same jurisdiction, have followed different practices: some voluntarily obtained judicial orders; some utilized search warrants; and some used no initiating legal process.

Recent federal legislation has prescribed rules for pen registers on the federal level and mandated that the states pass legislation governing pen registers or else face their proscription (see 18 U.S.C. §§3121-3127). In December 1988, New York adopted legislation which for the first time established statutory procedures regarding the application for, and operation of, pen registers (Laws of 1988, Ch. 744, art. 705). The statute provides for the issuance of judicial orders authorizing the use of pen registers, includes a requirement for "reasonable suspicion" that a designated crime "has been, is being, or is about to be committed" for their issuance, and further sets a time limit on how long they can be used. Furthermore, the statute limits the applicant to a district attorney, the New York State Attorney General or the

Director of the New York State Organized Crime Task Force, or any of their assistants.

During the period examined by the Commission, the Suffolk County District Attorney's Office voluntarily applied for orders from a judge for pen register authorizations. It was through these legal limited pen register operations that Suffolk Police personnel illegally intercepted telephone conversations.

2. Use of Pen Registers in Suffolk County

The Suffolk County Police Department and District Attorney have reported to the Commission that between 1981 and 1986 more than 50 pen registers were installed, of which 17 were operated by the Interdiction Unit of the Narcotics Division of the Police Department in narcotics investigations. With respect to other units of the Police Department, three pen registers were also used by the Internal Affairs Division, two of which were operated in the basements of the private homes of police officers.

Both pen registers and wiretaps for the Suffolk Police were installed by the Special Investigations Section of the Intelligence Division of the Police Department; the District Attorney's Office used both the Special Investigations Section for

installation and several of its own civilian employees who had the same capability (Public Hearing, 1988, p. 192). There were three officers and a sergeant in the Special Investigations Section of the Police Department during the period under Commission review, from 1981 to early 1988.

The Interdiction Unit, which actually conducted and monitored wiretap and pen register operations, was one of five units of the Police Narcotics Division. The purpose of the Interdiction Unit was to investigate major drug cases, primarily through the use of electronic surveillance. The Interdiction Unit had between 7 and 11 members, including a sergeant, during the period (1982 to 1984) in which the Commission discovered evidence of illegal eavesdropping. Some officers from this Unit have since retired from the Department, and James Kuhn has been fired. Except for Detective Albert Coletto, who remains in the Interdiction Unit, all the rest are in new units, and some have been promoted. The sergeant from that era, Donald Risener, retired on February 10, 1986, and the lieutenant (Commanding Officer of the Narcotics Division) to whom Risener reported, Richard Siee, retired in March 1988.

The locations (or "plants") of both legal and illegal pen registers and wiretaps run by the

Interdiction Unit were almost always in private houses rented for that purpose by the Suffolk Police. Rarely were government facilities used (Public Hearing, 1988, p. 132).

Management and oversight of wiretaps and pen registers conducted by the Interdiction Unit was ceded by the Suffolk Police to the Chief of the Narcotics Bureau of the District Attorney's Office, Raymond Perini, who in fact controlled the unit. Thus, Lieutenant Siee testified at the Commission's Public Hearing in January 1988:

> As long as it's understood we are talking about the Interdiction Unit. There are other units in the section for which I had responsibility, and I maintained a closer overview, but in the area of electronic surveillance, and the law specifically says it is the District Attorney who is the applicant, and therefore, he is responsible for the case development and ultimate prosecution (p. 320).

More succinctly, Siee said of the Interdiction Unit:

> They answered to the District Attorney's Office.
> (Siee, Private Hearing, 12/29/87, p. 100.)

According to Perini's own testimony, "the supervision is delegated to me" on narcotics related wiretaps, which is in conformity with statutory requirements (Public Hearing, 1988, p. 622). With regard to pen registers, Perini or his assistants prepared the applications, and were sometimes even the applicants, for all the pen register orders which Perini submitted for court approval (Public Hearing, 1988, pp. 618, 627-629).

Testimony by Lieutenant Siee, who supervised the Interdiction Unit, which was the Unit that staffed the wiretap and pen register operations, also demonstrated that Perini assumed oversight responsibility for pen registers, as well as wiretaps (Public Hearing, 1988, pp. 316-322). Furthermore, Sergeant Risener, of the Interdiction Unit, testified that it was the practice of Interdiction Unit personnel to provide information to Perini or his assistants to obtain pen register orders and to keep Perini's Bureau informed as to the evidence obtained in each case (Public Hearing, 1988, pp. 140-141). In regard to wiretaps and pen registers, the sergeant testified: "I'm sure he was aware of the results of everything. He was the Bureau Chief" (Public Hearing, 1988, p. 131).

3. Kuhn and Russo Testimony Concerning Illegal Wiretapping

At the Commission's January 1988, public hearing two former members of the Interdiction Unit, James Kuhn and Joseph Russo, testified, under a grant of immunity for eavesdropping offenses conferred by the Commission, that the Interdiction Unit had regularly modified pen registers, through the addition of tape recorders and/or speakers, to engage in illegal wiretapping. Both men testified that this was done with the knowledge of Sergeant Risener, as well as with the knowledge of the Bureau Chief of the District Attorney's Narcotics Bureau, Raymond Perini.. Their testimony was that all members of the Unit were aware of this illegal wiretapping and all engaged in it.

Kuhn testified that, while he was in the Interdiction Unit between 1981 and 1984, he and other members of his Unit routinely used modified pen register devices to illegally intercept telephone conversations of drug suspects (Public Hearing, 1988, pp. 88-118). Kuhn testified that "the accepted explanation for Interdiction was you got to do what you got to do to catch them.. . . The whole team did it, yes, sir" (Public Hearing, 1988, p. 96).

Kuhn also testified that on two different occasions during an investigation for which he was the

coordinator he personally reported conversations to Perini from an illegal wiretap using a pen register. Kuhn testified that Perini knew these conversations were illegally recorded because Perini had applied for this pen register order only days before and that on one occasion Perini told Kuhn to be sure to get rid of the tape (Public Hearing, 1988, pp. 100-105).

In addition, Kuhn supplied to the Commission seven audio tapes of conversations illegally intercepted from pen registers. These included conversations of relatives, friends and the attorney of the subject of an Interdiction Unit narcotics investigation.

One of these tapes contained recordings of an ironic blunder by the Suffolk Police officers who were engaged in the illegal wiretapping. After a series of illegally intercepted conversations of the subject's telephone, which the Commission has been able to date and identify, there follows a 14-minute recorded portion of the tape containing the voices of the illegal wiretappers recorded at the plant where the pen register was being monitored.* At the end of this

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* Experts testified before the Commission that there were numerous technical ways that such conversations could be accidentally recorded in such a set-up (Public Hearing, 1988, pp.46-48).

14-minute portion of the tape, Angelo Carrion, a member of the Interdiction Unit at that time, is heard to say, "We didn't turn off the speaker." The tape then reverts to additional illegally recorded conversations, which can be placed by internal evidence as following close in time after the conversations recorded before the accidentally recorded voices of the Interdiction Unit members.

In a written analysis of this audio tape done for the Commission by an independent audio expert often relied on by the federal government, who was not informed of the nature of the recording, the expert reported:

> . . . Apparently two males were aware of the recording of themselves along with at least one other male since toward the end of this recording after the other(s) have left one comments to the other about the speaker being loud and that they did not want the others to hear the sounds that would indicate that the conversation was being tape recorded.

The expert's report also confirms that the tape contains recorded telephone calls at the beginning and end, interrupted by a live 14-minute recorded

portion, and that the tape is continuous with no editing, intentional over-recording, or erasure.

Kuhn identified the voices of Interdiction Unit members Joseph Brock, Andrew Nimmo, Angelo Carrion and James Kevins as speakers appearing on the live portion of the tape.

Joseph Russo, a former Suffolk County Police Officer who was forced to retire from the Suffolk Police Department after 17 years in the Narcotics Division after he was investigated for suspected drug sales, also testified about illegal wiretapping at the Commission's public hearing on January 13, 1988. Russo testified that from 1981 through 1983, while he was in the Interdiction Unit, he and other members of that Unit routinely used modified pen registers to illegally intercept telephone conversations (Public Hearing, 1988, pp. 50-88). Russo testified that all members of the Unit participated:

> Q. Was there anyone of your colleagues or anyone from your squad, who refused to take part in the practice of listening in on the pen register?
>
> A. No. Everyone knew, if you didn't you were gone.
> (Private Hearing, 11/6/87, p. 107.)

Russo also testified that in one case for which he was the coordinator, where a pen register installed in the suite of offices of the Suffolk Police Chief of Detectives had been used to illegally record conversations, he had discussed and played tapes of the illegal wiretaps for Raymond Perini on seven different occasions (Public Hearing, 1988, pp. 72-80). Russo testified that these tapes were played in Perini's office and that on at least one occasion, in response to a direction from Perini to "take care of all those tapes," Russo told Perini "not to worry" and that the tapes "would be destroyed." Two days later, Sergeant Risener, his supervisor, also asked Russo if he "got rid of those tapes" (Public Hearing, 1988, pp. 75-77).

Russo also testified about the accidental tape recording provided by Kuhn and identified the officers overheard. In this regard Russo testified:

> Q. Could you recognize the voices of any of the people you heard on that tape?
>
> A. Yes, I do.
>
> Q. Could you name them please?
>
> A. Andy Nimmo, Angelo Carrion and Paul Dessert. But there were other voices that I did not recognize at the time.
>
> * * *

Q. Mr. Russo, is there any question in your mind that these were overheard conversations which were illegally recorded in the course of the [deleted] investigation?

A. No.

Q. Is there any question in your mind that the muffled conversation of the names you mentioned were officers who were recorded in the room while the illegal operation was under way?

A. That's correct.
(Public Hearing, 1988, pp. 84, 86.)

In attempting to determine who was present in the plant on the day in question, and during other specifically dated illegal interceptions known to the Commission, the Commission examined the attendance sheets for the Interdiction Unit. However, six former members of the Interdiction Unit testified that attendance sheets were deliberately not maintained in an accurate manner in the Interdiction Unit. They contended that even if Suffolk County Police Department records indicated that police officer "X" of the Interdiction Unit worked on a certain day, that, in fact, might not be true. They added that Sergeant Risener would make sure that the official records of work days conformed to contract provisions, even though his subordinates might not have worked the hours or

days he reported. In their testimony the Interdiction Unit members advised the Commission not to take their attendance records seriously (Private Hearings: 2/9/88, Dessert, Brock, Coletto, Laskowski; 2/10/88, Nimmo, Kevins). This contrasts with the testimony of Sergeant Risener, who contended that he kept accurate attendance records for his Unit (Private Hearing, Risener, 10/29/87, pp. 51-53).

The Rules and Procedures of the Suffolk County Police Department (Chapter 3 -- Absence and Attendance) require accurate records, and each officer must swear to and sign a copy of his attendance record once a year. Nonetheless, the Commission believes that the attendance records for the Interdiction Unit most likely are false, based on corroborating testimony of other credible witnesses. If this is in fact the case, this lapse in recordkeeping is simply additional proof of deliberate misconduct and improper management in the Police Department.

Finally, a partial record of Interdiction Unit attendance at the plants was obtained by the Commission from the so-called "line sheets" that are prepared in connection with legal wiretaps, listing each call, the officer who monitored the call, and other information. These records are ordinarily sealed

pursuant to eavesdropping orders and are not intended or available for police attendance purposes. However, according to the witnesses before the Commission, legal wiretaps were almost always conducted at the same location and on the same days as illegal wiretaps through pen registers, as was the case with the pen register in which the accidental, 14-minute recording occurred. Based on the line sheets, the members of the Interdiction Unit who worked at the plant on the same day as the illegal wiretapping, when the accidental 14-minute recording occurred, were Kevins, Russo, Nimmo, Carrion, Coletto and Laskowski, most of whom were identified on the accidentally recorded tape by Kuhn and Russo.

4. Sloan Testimony Concerning Illegal Wiretapping

The third police witness who testified to illegal wiretapping by the Suffolk Police Department and District Attorney's Office was Detective Lieutenant George Sloan, a 25-year veteran of the Department and the Commanding Officer of the Sex Crimes Unit.* Sloan, who appeared without immunity, testified that in 1983, while he was in the Internal Affairs Division, he was

* Sloan retired in the spring of 1988, following the Commission's public hearing.

assigned to investigate Joseph Russo in relation to the allegation that Russo was involved with his brother-in-law, Mark Falk, in the sale of cocaine.*

In the course of the Falk/Russo investigation, a pen register was installed in the basement of Sloan's residence upon the approval and the court application of Raymond Perini, Chief of the Narcotics Bureau in the District Attorney's Office, who was helping to supervise the investigation.** Sloan was assisted in the investigation by Sergeant James Thompson of the Suffolk County Police Department. Prior to the Falk/Russo investigation, Sloan had never used a pen register, nor did he know what a pen register was (Public Hearing, 1988, pp. 240-245).

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* It was as a result of police actions in this investigation that Joseph Russo's wife, Maureen Falk (Russo), the sister of Mark Falk, filed a federal action under 42 U.S.C. 1983 against Sloan, Falk v. Sloan (CV85-2938), E.D.N.Y, which is pending, alleging misconduct in the manner in which she was treated during the investigation.

** Although a pen register order was obtained by Perini, neither the Police nor the District Attorney's Office have been able to produce a copy of the application that was submitted for the Falk pen register order. Copies of every other application were turned over to the Commission by the Suffolk County District Attorney upon subpoena. Perini's explanation for his Office's failure to produce the Falk application was: "I don't know where it is. I found copies of the order. I cannot find the application" (Public Hearing, 1988, p. 640).

Detective John Lechmanski, a member of the Special Investigations Section of the Suffolk County Police Department, who installed the pen register in Sloan's basement, also testified at the Commission's public hearing on January 13, 1988. Lechmanski had been installing electronic equipment for the Suffolk County Police Department for 21 years. Lechmanski testified that on his own initiative he provided Sloan with a tape recorder and instructed Sloan how to connect the tape recorder to the pen register in order to convert the pen register to a full-blown wiretap (Public Hearing, 1988, pp. 199-235). Lechmanski testified that this was the only occasion on which he showed any personnel of the Suffolk Police Department how to convert a pen register into a wiretap (Public Hearing, 1988, p. 215).

Lieutenant Sloan testified that Sergeant Thompson later connected the pen register to a tape recorder, converting the pen register to an illegal wiretap, and urged Sloan to monitor the phone of Mark Falk on this illegal wiretap (Public Hearing, 1988, pp. 255-257). Sloan testified that he disconnected the wiretap as soon as Thompson left (Private Hearing, 11/30/87, pp. 70-72). Shortly thereafter, according to Sloan, after a breakfast meeting at the Sea Coral Diner

in Hauppauge, Perini asked Sloan what he was hearing on the pen register (Public Hearing, 1988, pp. 259-261).

In their testimony before the Commission, Perini and Thompson both denied that they either converted the pen register to a wiretap or asked Sloan what he was hearing on the pen register, just as Perini also denied the allegations of Russo and Kuhn. In addition, Thompson specifically accused Sloan of lying and in his testimony made reference to Sloan's having been "admitted for psychiatric care on several occasions" (Public Hearing, 1988, p. 300; see also id., p. 308), apparently referring to and misrepresenting an instance in which Sloan had voluntarily sought treatment for alcohol abuse at a residential center. The fact that Sloan, a detective lieutenant with 25 years service and an unblemished record, came forward without immunity with this testimony, which could well have damaged his police career and his position as a defendant in the Falk case, lends great credence to his description of these events.

B. Management Failures Concerning Electronic Surveillance and Pen Registers

Testimony was presented before the Commission by numerous police personnel indicating management

failures in at least four areas which helped permit illegal wiretapping to occur:

1. failure in case review and oversight;
2. weakness in inspections;
3. lack of proper recordkeeping and controls; and
4. lack of training.

1. Failure in Case Review and Oversight

Detective Lieutenant Richard Siee, the Commanding Officer of the Suffolk County Police Narcotics Division, which included the Interdiction Unit, from 1978 to 1985, exercised virtually no oversight over the operations of the Interdiction Unit. In effect, he abdicated control over the Interdiction Unit to Raymond Perini, Chief of the District Attorney's Narcotics Bureau.

Siee testified that in his seven years as commanding officer he had not reviewed wiretap or pen register applications and orders (Public Hearing, 1988, p. 316), and that he provided little review or control of Interdiction Unit cases. He provided no input into deciding whether electronic surveillance was appropriate in a given investigation, and little monitoring of the progress of investigations using electronic surveillance once they were in operation (Public

Hearing, 1988, pp. 316-322). This was in spite of the fact that he was the direct line supervisor, above Sergeant Risener, of the men in the Interdiction Unit who were engaged in one of the most sensitive activities in the entire police department.

Admitting his lack of knowledge and oversight, Siee testified that he believed a "subpoena" was needed for a pen register (Private Hearing, Siee, 12/29/87, p. 58), and admitted that he had seen a pen register "only once," and then it was not in operation (Siee, p. 51). Siee rarely reviewed written reports of Interdiction cases, and required no written progress reports, but rather relied on conversations in which Sergeant Risener would give him an "overview" (Public Hearing, 1988, pp. 322-325 and Siee, p. 54).

Siee's management amounted to gross neglect. While the District Attorney has the responsibility for applying for electronic surveillance authorizations and meeting legal requirements, the Police Department cannot thereby abandon supervisory responsibility for its personnel involved in investigations utilizing wiretaps and pen registers. The Interdiction Unit should operate under the strictest supervision, yet it was functioning virtually without supervisory control above the rank of sergeant. Furthermore, this lack of

supervision by Commanding Officer Siee was allowed to continue undisturbed by the higher levels of command in the Suffolk County Police Department.

2. Weakness in Inspections

One of the most effective means of preventing or detecting illegal wiretapping as it was carried out in Suffolk would have been to have had frequent unannounced inspections of the plants conducted by knowledgeable and conscientious supervisors. This the Suffolk Police Department did not do.

Sergeant Risener testified that the lieutenants who were the Commanding Officers of the Narcotics Division visited the plant locations from "every two weeks" to "never" (Public Hearing, 1988, pp. 132-133), and other supervisors visited only rarely (Private Hearing, Risener, 10/29/87, p. 54). Moreover, Lieutenant Siee testified that, even if he were to observe it, he could not determine if equipment was being used properly and according to court order (Public Hearing, 1988, pp. 327, 332). Siee did not think electronic surveillance orders were kept at the plants (Siee, p. 59), and he never asked Interdiction Unit personnel to show him orders for the operation of electronic eavesdropping equipment (Public Hearing, 1988,

pp. 327-328). Furthermore, no police personnel above Sergeant Risener had keys to the wiretap plants, so they were unable to let themselves in, or go there to inspect the set-up and equipment when the plant was not in operation (Siee, p. 73).

Since the Commanding Officer of the Interdiction Unit took almost no steps to inspect the plants in a serious way, and, by his own admission, would not have recognized misconduct even if he saw it, members of the Unit were essentially unsupervised. Frequent visits by superiors, unannounced and at odd and varying hours, demands to see electronic surveillance orders and inspection of the equipment to see if it was being used in conformity with the court orders, among other activities, could have provided a substantial deterrent to and check against illegal wiretapping.

3. Lack of Proper Recordkeeping and Controls

The absence of recordkeeping by the Interdiction Unit was at times so extreme as to encourage the belief that accurate records and a paper trail, which could help determine responsibility for misconduct, were avoided.

a) Pen Register Tapes and Reports

The content of Interdiction Unit case files regarding the use of pen registers was meager. Actual paper tapes of pen register number printouts were routinely discarded -- frequently after no analysis or only a casual glance. Even when numbers were checked and allegedly analyzed, the results would be kept haphazardly on yellow sheets and then discarded (Public Hearing, 1988, pp. 127-130). Furthermore, no Coles Directory was even kept at the plants. The Coles Directory is a standard investigative tool, a so-called reverse telephone directory, which lists telephone numbers in sequence so that one can determine the name and address of a subscriber whose phone number is known, which is the situation with pen register printouts. Testimony was offered that a call was made to Police Headquarters in Yaphank to have the Coles Directory checked there whenever a subscriber had to be identified (Private Hearing, Risener, 10/29/87, pp. 63-65). However, since pen registers can generate a great many telephone numbers, such a cumbersome system would strongly discourage the systematic checking of telephone numbers from pen register tapes.

The Interdiction Unit's lack of interest in, and cumbersome system with regard to, pen register-

generated phone numbers and paper tapes is consistent with the testimony indicating that the actual purpose of the pen registers in that Unit was to illegally overhear conversations. The failure of the Interdiction Unit to maintain a written record and a paper trail of telephone numbers obtained from pen registers helped the members of the Unit to conceal that they were using illegally heard conversations, not telephone numbers, to obtain leads in their investigations. The failure of Suffolk police personnel to maintain proper records, which helped to conceal misconduct, has also been demonstrated in the Homicide and Narcotics Bureaus, and has been a pervasive and serious problem revealed throughout the Commission's investigation.

b) Controls on Electronic Eavesdropping Equipment

There was little effort by the Suffolk Police Department to maintain adequate written records to keep track of the responsibility for highly sensitive and valuable electronic eavesdropping equipment, including pen registers. No inventory was kept of equipment being used by different teams and units (Slee, p. 76), and no receipt was signed by the member of a team or unit receiving the eavesdropping equipment (Public Hearing, 1988, pp. 193-195). Once the equipment was

delivered to the plant, where also no receipt was signed, there was no system there to control responsibility for the equipment (Risener, p. 59). Many police departments keep rigid control -- requiring, at a minimum, signing in and out -- with regard to equipment which is of little value and not sensitive. It is thus surprising that Suffolk County had lax controls over sensitive equipment worth approximately $4,000 per unit (Public Hearing, 1988, p. 193).

c) Attendance Records

As described in Chapter III (A)(3) attendance records of the members of the Interdiction Unit were kept in a deliberately falsified manner by Sergeant Risener, with the acquiescense of his men. There were no valid sign-in sheets kept at the plants and the records provided to the Department were not correct as to who worked on different days and times, so that no one knew the actual schedule of the members of the Interdiction Unit except Sergeant Risener. Lieutenant Siee testified that he had no reason to believe Risener did not keep accurate attendance records, although, in fact, Risener did not (Siee, p. 85). Risener's system violated Department policy and the Patrolmen's Benevolent Association contract, and also gave Risener

the opportunity to dispense favors and rewards as he saw fit. This gave Risener another tool to reward, control and encourage conformity with illegal wiretapping and other misconduct by his subordinates.

4. Lack of Training

Virtually all of the police officers who were assigned to the Interdiction Unit for major drug operations using wiretaps and pen registers lacked adequate experience or training. Indeed, police management described many of these officers as being "green" (Siee, p. 67). At most, their specialized narcotics training consisted of a two-week federal Drug Enforcement Administration school, covering the entire range of narcotics investigation, which often did not begin until long after their assignment to the Interdiction Unit had begun, and which Siee stated might have only "glossed over" wiretaps (Siee, p. 48).*

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* A grand jury report which touched on eavesdropping and training was issued on October 28, 1988 (Hon. Alfred Tisch, Suffolk County Court) in a matter concerning allegations of illegal wiretapping by the Riverhead Town Police. At page 22, that report stated:

(Footnote continued on next page).

Siee, who served seven years as the commanding officer supervising the Unit conducting wiretaps,

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(Footnote continued from previous page)

165. There has been no formal instruction on the crime of Eavesdropping at the Suffolk County Police Academy either in lesson plans or as part of the cirriculum [sic] since the Department was formed in 1960.

166. There has been no formal training on the crime or law of Eavesdropping in advanced in service programs at the Academy since at least 1970.

Relevant recommendations in the grand jury report included:

ADMINISTRATIVE ACTION

I.

It is recommended that recruit training for all department employees include N.Y.S. Penal Law §250.05, Eavesdropping, and related areas.

II.

It is recommended that advanced in service training for Department employees include Penal Law §250.05, Eavesdropping, and related areas.

III.

It is recommended that all examinations for supervisory personnel include questions on N.Y.S. Penal Law §250.05, Eavesdropping, and related areas.

testified that he had never read the federal wiretap statute and did not recall whether the men in the Unit were required to read either the federal or State wiretapping statutes (Public Hearing, 1988, p. 315). Never in their careers in the Interdiction Unit were members provided with lectures or written training materials or guidelines, except on the issue of minimization, and that was done because proof of such formal attention to minimization might be needed when the District Attorney's Office appeared before a judge authorizing electronic surveillance or on a motion to suppress.

In sum, almost all that the members of the Interdiction Unit knew about wiretapping was learned on the job from Sergeant Risener, who was the direct overseer, and one of the principal architects, of the illegal wiretapping.

As a final word on the pervasive management failures in the Interdiction Unit, long tolerated by Lieutenant Siee and his superiors, Sergeant Risener testified: "I don't think we received direction from anybody" (Public Hearing, 1988, p. 164). This absence of proper oversight allowed illegal wiretapping to occur.

IV. ASSISTANT DISTRICT ATTORNEY PERINI AND THE DISTRICT ATTORNEY'S OVERSIGHT ROLE

An important figure whose name has appeared recurrently throughout the Commission's investigation into misconduct and mismanagement in both the District Attorney's Office and the Police Department is Assistant District Attorney Raymond Perini, who until very recently served as Chief of the Narcotics Bureau in the Suffolk County District Attorney's Office.

Mr. Perini joined the Suffolk District Attorney's Office in 1976, after serving as an assistant district attorney since 1973 in the Kings County District Attorney's Office. Although there was no separate Narcotics Bureau in the Suffolk District Attorney's Office in 1976 (narcotics prosecution was then part of the Rackets Bureau), Perini's first assignment and major responsibility in the Suffolk District Attorney's Office was narcotics investigations and prosecutions, for which he was delegated primary responsibility. When in 1984 a separate Narcotics Bureau was formally established by District Attorney Henry, Perini was named its first Chief, and the Bureau grew to include six assistant district attorneys and three secretaries serving under him. In this position, Perini's immediate supervisor was then Chief Assistant District

Attorney David Freundlich, who in turn reported directly to Mr. Henry. According to Mr. Perini, his Bureau prosecuted "to fruition" approximately 1,200 to 1,500 felony drug cases per year, including trying approximately 40 to 60 felony drug cases each year.

The Narcotics Bureau under Perini was responsible for narcotics-related wiretaps, including wiretap applications and supervision of court-authorized wiretaps. In addition, Perini's Bureau also undertook responsibility for obtaining court authorizations for pen registers in narcotics cases. Also, the Commission's public and private hearings established that, as might be expected, Mr. Perini exercised on a day-to-day basis at least some level of responsibility for and supervision over police officers assigned to narcotics investigations, particularly with respect to the monitoring and supervision of wiretaps, but also extending to the use of informants and other routine police work.

The turmoil and misconduct in narcotics investigations and prosecutions, described in Chapter II of this Report, and the illegal wiretapping, described in Chapter III, occurred under the supervision of Raymond Perini, in his role as Chief of the Narcotics Bureau of the Suffolk County Police Department, a position he left on March 13, 1989.

Based on the results of its investigation, the Commission is forced to conclude that Perini knowingly allowed, and indeed condoned, illegal wiretapping by the Interdiction Unit and condoned what he assumed to be illegal wiretapping in Lieutenant Sloan's investigation of Officer Russo. This finding is supported not only by the testimony of Kuhn and Russo, but also by that of Lieutenant Sloan, a 25-year veteran of the force. In addition, in a number of critical respects, the testimony of all three of these witnesses, all of whom provided detailed, highly specific testimony against Perini, was corroborated by compelling independent evidence, especially the Interdiction Unit tape provided to the Commission by Kuhn, the evidence provided to the Commission concerning the operation of the Interdiction Unit, and, finally, the testimony of Detective Lechmanski concerning his having shown Lieutenant Sloan how to convert the pen register installed in Sloan's basement to a wiretap. Although in their testimony before the Commission both Perini and Thompson denied the allegations of involvement in illegal wiretapping made against them, the Commission finds that these denials are not credible.

In here making public its findings with respect to what it has concluded was Perini's direct

and continuing involvement in illegal wiretapping activities, the Commission is cognizant and would indeed caution the reader that the Commission is not a criminal court or jury. It has no power or authority to make any formal finding of guilt or innocence of any crime. That is the proper role of the criminal justice system, where an accused is entitled to and has available to him all the procedural and substantive protections there provided, including the right of cross-examination and the standard of proof beyond a reasonable doubt. However, the Commission is a "sunshine" agency, with statutory duty and responsibility to publicly report its findings, especially concerning governmental misconduct and illegality, where it believes, as is here the case, that this is in the public's interest, where it will serve to demonstrate the need for reform or to deter future misconduct. In this regard there can be no immunity from criticism or other special rule for government officials, however prominent or powerful or high-ranking, including district attorneys or their assistants, or for attorneys generally or any other class of persons. Indeed, it should be noted, one of the specific reasons for the establishment of this very Commission by the New York State Legislature was to serve as a check on misconduct and

corruption in law enforcement. (See, e.g., In Re Di Brizzi, 303 N.Y. 206 (1951); 1953 McKinney's Session Laws, Ch. 887, pp. 1776, 1867, 1871-1873 (Recommendations from First Report of the New York State Crime Commission); and 1958 McKinney's Session Laws, pp. 1792-1794 (Message of the Governor).)

Beyond the question of what the Commission has concluded concerning Perini's knowing involvement in illegal wiretapping activities, the Commission has also concluded that, the very least, Perini was guilty of gross negligence with respect to the discharge of his de facto, apparently freely accepted by him, responsibility for day-to-day supervision of the Suffolk Police Department's Narcotics Division, including the Interdiction Unit. Further, the Commission believes that even in his role as prosecutor, Perini was irresponsible and grossly unprofessional.

Chapter III of this Report describes a virtually unsupervised Interdiction Unit, with inadequate inspections, poor training, poor documentation and control of equipment and no meaningful supervisory control above the rank of sergeant. Additional witnesses and police personnel have also testified before the Commission about misconduct in the investigation and prosecution of narcotics cases. Perini used testimony from an

unreliable informant* to secure numerous narcotics convictions and he allowed certain undercover narcotics officers to make a tremendous number of cases which his Bureau then prosecuted. These included 86 criminal convictions based on the work of officers James Kuhn and Raymond Gutowski, and 140 narcotics buys by Officers Warren Savage and Ellen Donnelly, despite many obvious violations of proper police procedures in the work of these officers (see Chapter II(B) and (D)).

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* For an example of Perini's allowing false testimony to stand in a narcotics prosecution, see People v. Pelchat, 62 N.Y.2d 97, 476 N.Y.S.2d 79 (1984), a narcotics prosecution by the Suffolk County District Attorney's Office in which the New York Court of Appeals reversed the conviction and dismissed the indictment. In that case Perini allowed a guilty plea to be taken to an indictment which was based on "mistaken" testimony of a police officer before a grand jury, even though Perini knew the grand jury testimony was mistaken when he took the plea. The police officer had informed the prosecutor that, contrary to his grand jury testimony, he actually had never observed the defendant engage in criminal conduct. Regarding the Suffolk prosecutor, the Court of Appeals wrote (62 N.Y.2d at 108):

> Just as he could not sit by and permit a trial jury to decide a criminal action on evidence known to be false, he could not permit a proceeding to continue on an indictment which he knew rested solely upon false evidence . . ..

However, Perini allowed just such false testimony to stand without intervention.

Furthermore, Perini approved of lenient treatment in a drug case for the son of then Suffolk Chief of Detectives, John Gallagher, based on fraudulent documents. Perini's failure to properly supervise and review the fraudulent material submitted to him in such a sensitive case amounted to malfeasance in office and should have been reason enough for him to be fired by Mr. Henry. (See Chapters II(C) and VII.) However, rather than punish Perini, District Attorney Patrick Henry never wavered in his protection of Mr. Perini. Indeed, Henry in fact joined with Perini in seeking to block the Commission's work, including attempting to prevent the publication of this very Report. (See Appendix A.)

What this investigation has revealed concerning Mr. Perini presents the startling, but thankfully rare, example of what can occur through the misuse and abuse of the tremendous power of a prosecutor, especially in an office in which the district attorney fails to properly supervise and control his assistants.

V. FAILURE BY THE DISTRICT ATTORNEY'S OFFICE TO INVESTIGATE AND PUNISH MISCONDUCT BY AGENCY EMPLOYEES AND OTHER LAW ENFORCEMENT PERSONNEL

One of the most disturbing findings of the Commission has been the systematic failure of the District Attorney's Office to investigate and take appropriate action where it has uncovered or been informed of misconduct by its own employees and other law enforcement personnel. The Commission does not base this finding on isolated instances of cases "falling through the cracks," but rather the Commission has discovered gross dereliction in not investigating known, credible and easily verifiable allegations of misconduct.

A. Ira Dubey

In a December 10, 1986, article in Newsday, it was charged that Ira Dubey, former Deputy Director of the Suffolk County Crime Laboratory, who had testified as an expert witness for the prosecution in dozens of Suffolk homicide and other felony trials, had repeatedly testified falsely concerning his academic credentials. The specifics of the allegations were that Dubey claimed a Master's degree in forensic science, which he had never received, and a Bachelor's degree

from Rensselaer Polytechnic Institute, when in fact his Bachelor's degree was from a different institution.

Newsday's revelation led to the appointment of Pierre G. Lundberg as a Special District Attorney on December 17, 1986, to investigate Dubey's conduct. Mr. Lundberg's investigation eventually led to Dubey's pleading guilty to three counts of Perjury in the Third Degree, class A misdemeanors, on April 14, 1987 (People v. Dubey, Indictment No. W376/87, Suffolk County Court, Judge Rohl), and admitting on the record that he had lied about his credentials in at least 20 other Suffolk prosecutions.

As it turns out, however, the very same allegations which formed the basis for the investigation and prosecution of Dubey had been reported to Suffolk County Assistant District Attorney Barry Feldman, then Deputy Chief of the Trial Bureau, and the prosecutor in the Diaz case, in October 1983, three years earlier (Chapter I (A)). Feldman discussed the allegations with Suffolk County Assistant District Attorney Steven Wilutis, the Chief Trial Prosecutor, who was also a witness in the Diaz case (Chapter I (A)). Dubey, both before and after this time, performed forensic work on many cases prosecuted by Feldman and Wilutis, including the Diaz case. These allegations were made by Andrew

Varanelli, Chief of the Crime Laboratory, to Dr. Sidney Weinberg, the Chief Medical Examiner, who conveyed them to Feldman by telephone.

In an April 22, 1987, letter supplied to the Commission by Special District Attorney Lundberg, Mr. Lundberg reported that "Wilutis and Feldman considered Dubey to be professionally helpful to the District Attorney's Office and, in Feldman's case, also a personal friend." Feldman and Wilutis never reduced to writing the allegations that were made to them about Dubey, failed to tell the District Attorney of the allegations, and, after an investigation which consisted merely of a cursory review of four transcripts involving equivocal testimony by Dubey about his academic degrees, Wilutis and Feldman, to quote Lundberg's letter, "unilaterally terminated their investigation." Feldman later acknowledged that while he knew that Dubey did not have a Master's degree, he believed that Dubey had not testified falsely (Public Hearing, 1987, pp. 608-610).

However, Wilutis and Feldman did even more than unilaterally terminate their "investigation." On April 11, 1984, six months after the allegations were made by Varanelli about Dubey, Wilutis wrote a

confidential memorandum to Patrick Henry praising Dubey and criticizing Varanelli. Wilutis wrote:

> Suffolk County is most fortunate to have one of the nation's foremost serologists in . . . Ira Dubey. . . . He is an extremely bright and articulate witness. His credentials are impressive. . . For some reason, which I can only assume to be professional jealousy, Mr. Varanelli has, within the past month ordered that Mr. Dubey will no longer handle all homicide crime scene searches and scientific evaluations, as he has in the past; instead, all forensic scientists in the lab will handle murder cases on a rotating basis.
> (Quoted in People v. Morales, Indictment No. 251-84, Decision after CPL 440.10 hearing, June 20, 1988, Suffolk County Court, Judge Namm.)

Furthermore, at the Commission's public hearing on January 29, 1987, Feldman, when asked why he permitted Dubey to testify falsely concerning his credentials in the Diaz case, on October 7, 1985, long after he, Feldman, knew of the allegations against Dubey, testified:

> . . . I thought we had put this whole issue to bed. I had no reason to think that he misrepresented. . . . I had no reason to think that in the two subsequent years

that he might not have gotten his Master's degree.

Q. Did you ask?

A. No.
(Public Hearing, 1987, p. 610.)

It was not until three years after Feldman and Wilutis killed the allegations against Feldman's friend and their star forensic witness, Ira Dubey, that the Dubey matter was properly investigated and prosecuted and Dubey's perjury conviction obtained by a special prosecutor following Newsday's revelation. The Commission concludes that Feldman and Wilutis, because of their personal and professional relations with Dubey, improperly protected and defended him in the face of serious criminal charges, which in fact proved to be true.

Section DR7-102(B)(2) of the Code of Professional Responsibility states that "a lawyer who receives information clearly establishing that a person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal." In the Commission's view, Feldman and Wilutis plainly failed to live up to this standard.

Feldman and Wilutis, as high-ranking representatives of the District Attorney's Office, took it

upon themselves to investigate serious criminal charges against a personal friend and helpful prosecution witness in many cases they themselves had prosecuted. They failed to tell the District Attorney of the allegations, and then "exonerated" Dubey based on a cursory, totally inadequate investigation. The Dubey matter, in fact, ultimately required a special prosecutor, but Feldman and Wilutis blatantly ignored the obvious conflicts inherent in their investigating Dubey. The Commission is referring the misconduct in this matter by Feldman and Wilutis, who have both subsequently left the Suffolk District Attorney's Office, to the New York State Grievance Committee for the 10th Judicial District, which considers disciplinary complaints against attorneys for the counties of Nassau and Suffolk.

Finally, it should be noted, in February 1987, after Feldman's misconduct and incompetence in the Dubey and Diaz matters had been discussed by the Commission with District Attorney Henry, with the Commission recommending that Feldman be fired, Henry refused. Instead, Henry gave Feldman a lateral transfer to the position of Bureau Chief of the East End Bureau, based in Southampton. By this action, Henry again demonstrated his unwillingness to take even

minimal steps to show that misconduct in his Office would not be tolerated.

B. David Woycik

Another example of the improper manner in which allegations of employee crimes and misconduct were handled by the Suffolk County District Attorney is to be found in the case of David Woycik. During the summer of 1987, the Public Safety Committee of the Suffolk County Legislature conducted an investigation of law enforcement activities in Suffolk County and held six days of public hearings, of which the Woycik matter was one subject. That investigation revealed that in 1982 Suffolk County Police Officer Theodore Adamchak had related a story to Patrick Leis, Bureau Chief of the District Court Bureau of the Suffolk District Attorney's Office, and to others in the District Attorney's Office, regarding a subordinate of Leis, Assistant District Attorney David Woycik. That story was later recounted in a written statement given by Adamchak to then Detective Sergeant Alan Rosenthal of the District Attorney's Squad. In Adamchak's statement he said that after he testified in a Driving While Intoxicated trial which Woycik was prosecuting, Woycik handed Adamchak an attorney's business card with

Woycik's name and a telephone number on it. Woycik told Adamchak that if Adamchak made any arrests and could refer anyone to him, he would then "refer them to Spota and we would all make some money." Woycik mentioned the figure of $100 but Adamchak did not know if Woycik meant Adamchak would get the full $100 or share the $100 (Suffolk Legislative Hearing, 8/13/87, pp. 32-46).*

Following Rosenthal's taking Adamchak's written statement, Rosenthal took a similar statement from Suffolk Police Officer William Brown. In that statement Brown recounted that Woycik had asked Brown, while Brown was processing an arrestee in a Driving While Intoxicated case, if Brown was aware that various law firms paid a percentage of their legal fees to officers who referred cases to them. According to Brown, Woycik went on to say that detectives had been referring cases to lawyers for 30 percent of the fee. Woycik told Brown that if he would refer cases to the firm of Sullivan and Spota, there would be remuneration for Brown (Suffolk Legislative Hearing, 8/13/87, pp. 30-32).

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* Adamchak was later expelled from the Suffolk County Patrolmen's Benevolent Association for his testimony before the Suffolk Legislature, becoming the first member expelled in the union's history.

The "Sullivan and Spota" firm mentioned was composed of Gerard Sullivan and Thomas Spota, both former Chief Trial Prosecutors in the Suffolk County District Attorney's Office. Spota then and now has also served as legal counsel to the Detectives' Association of the Suffolk County Police Department.

The investigation of Adamchak's 1982 allegations was assigned to then Assistant District Attorney James O'Rourke, Bureau Chief of the Special Investigation Unit, who reported directly to District Attorney Henry. Subsequently, in April 1984, O'Rourke left the District Attorney's Office and sublet office space from Sullivan and Spota. He joined that firm as a partner in April 1985 (Suffolk Legislative Hearing, 9/3/87, p. 129).*

Rosenthal, who had assisted O'Rourke in the Woycik investigation, testified at the Suffolk Legislative Hearing that the Woycik matter was a very unusual case, and that many important investigative steps were taken in that case which confirmed the basic allegations of Adamchak. However, Rosenthal admitted that

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* Upon O'Rourke's resignation in April 1984, as Bureau Chief of the Special Investigation Unit, which handled political corruption, Henry did not appoint a successor and allowed the Unit to disband. However, Henry resurrected the Unit on November 13, 1987.

these steps could not be determined from the file. For example, the file did not indicate when the case was assigned; the substance of a telephone call which was made to the Sullivan and Spota firm by O'Rourke, which supposedly exonerated them; the date of entry to the case of an attorney for Woycik; what steps were taken to talk to other police officers about possible referral fees offered to them, or any legal memoranda regarding what crimes might have been committed by Woycik. Rosenthal testified the file might warrant a "C or an F" grade (Suffolk Legislative Hearing, 8/13/87, p. 134). He also testified regarding the written statement he took from Adamchak: "If he [the committee investigator] were to take a statement like this from a witness, you would either fire him, not pay him or throw the statement at him. It is not complete enough" (Suffolk Legislative Hearing, 8/13/87, p. 110).

O'Rourke testified at the hearing that in the course of this investigation he never examined Woycik's personnel file because it would contain only "administrative nonsense" (Suffolk Legislative Hearing, 9/3/87, p. 29). In fact, however, the personnel file revealed other disturbing and possibly relevant facts regarding Woycik: that Gerard Sullivan had recommended Woycik for employment in the District Attorney's Office; that

Woycik had applied for a gun permit to use in a part-time job with a vending company suspected by the Suffolk Police of organized crime connections; and that Woycik had "lost" his assistant district attorney's identification and badge and not reported this loss for 10 months.

The District Attorney's investigation showed that the business card given to Adamchak by Woycik listed a telephone number and the address of the law office of Sullivan and Spota. O'Rourke testified he relied on a telephone call to Sullivan and Spota before absolving them of any suspicion of misconduct. O'Rourke also testified that when he asked Sullivan and Spota why Assistant District Attorney Woycik had a telephone listing at their office, they simply replied that Woycik was planning to leave the District Attorney's Office, rent office space from them, and "hit the ground running." Furthermore, they informed O'Rourke, Woycik had already referred one civil case to them in which a settlement was expected in the near future. However, they denied knowledge of any offers or payments to police officers for referral fees (Suffolk Legislative Hearing, 9/3/87, pp. 119-121).

After their cursory investigation, Rosenthal and O'Rourke concluded that the approaches for referral

fees were limited to Police Officers Adamchak and Brown. Neither Rosenthal, who was then assigned to the District Attorney's Squad, nor his superiors in the District Attorney's Office reported this investigation to the Internal Affairs Division of the Suffolk County Police Department.

At the conclusion of the investigation, in January 1983, O'Rourke decided that there was no prosecutable crime by Woycik and that instead a letter should be sent to the Grievance Committee. However, John Mullin, now a Suffolk District Court Judge, who was then First Assistant District Attorney, overruled even that step, and District Attorney Henry approved that final decision (Suffolk Legislative Hearing, 9/3/87, p. 123). At the time of the Suffolk Legislature's hearing on the Woycik matter, Mark Cohen, Chief Law Assistant in the District Attorney's Office, still maintained that there should have been a letter sent to the Grievance Committee (Suffolk Legislative Hearing, 8/13/87, p. 270). O'Rourke thought that a request for the appointment of a special district attorney would have been appropriate if the Woycik allegations were known while Woycik was still in the District Attorney's Office (Suffolk Legislative Hearing, 9/3/87, p. 124).

District Attorney Henry testified at the legislative hearing that the Woycik investigation occurred right after Woycik had already been fired for placing an attorney advertisement in the Yellow Pages. At that hearing Henry continued to maintain that no letter to the Grievance Committee was called for. Nonetheless, Henry testified:

> Q. Do not the allegations in the official statements of Officers Brown and Adamchak, if believed, indicate that a member of your office attempted to corrupt at least two members of the Suffolk County Police Department, is that correct?
>
> A. Yes.
>
> Q. And also --
>
> A. [Interposing] And I do believe it. I believe these two statements.
> (Suffolk Legislative Hearing, 8/14/87, pp. 128-129.)

However, Henry not only approved the decision not to send a letter to the Grievance Committee, but he also approved of the quality of the Woycik investigation itself:

> . . . I have no quarrel with the extensiveness of the investigation as I understand it, but certainly

the documentation of the investigation is lacking. (Suffolk Legislative Hearing, 8/14/87, p. 128.)

Based on the superficial nature of the Woycik investigation, and a review of the possible criminal offenses involved, the explanations as to why there were no prosecutable crimes in the Woycik matter, let alone a Grievance Committee letter, are disturbing. Moreover, the attitude displayed by Patrick Leis, then Chief of the District Court Bureau, and now an Acting Supreme Court Justice in Suffolk, is revealing of the attitude displayed by the District Attorney's Office regarding the Woycik allegations. When Adamchak took his allegations to Leis about Woycik, who was one of Leis's subordinates, Leis took no notes and made no memorandum of the complaint, but rather referred Adamchak to Mr. O'Rourke's Bureau. When Leis checked on the allegations three weeks later, he learned they were being investigated.

In addition, when Leis appeared before the Suffolk Legislature in 1987, he testified that since Adamchak's allegations referred to possible referral fees in "civil" cases, rather than "criminal" cases, that it was an "ethical" matter, and not a "criminal" matter.

> Q. So, what you're telling us, if officer Adamchak had told you that the kickbacks related to the criminal cases instead of civil negligence cases, you would have treated the matter differently?
>
> A. We're talking kickbacks in criminal cases, you're talking about a man who is committing a crime, either one of my assistants or Adamchak or someone. And I would have absolutely treated it differently. You're talking criminal activity, yes.
>
> Q. And what would you have done differently?
>
> A. I would have gone directly to the District Attorney and I would have an investigation commenced immediately and would have checked on a daily basis. There would have probably been some undercover work, all kinds of things. This would have been a serious situation, . . . (Suffolk Legislative Hearing, 8/13/87, pp. 52-53.)

However, at the time Adamchak complained to Leis, there was no way that Leis could have determined that no criminal violations had occurred, whether there were referral fees offered on either civil or criminal cases (see, for example, Judiciary Law §§479, 481, 482, 491 and Penal Law Article 200 - Bribery Involving Public Servants and Related Offenses). Thus, his explanation of his understanding of the gravity of the matter reveals that his perception was both faulty and premature.

Although there were no legal memoranda in the Woycik file, a decision was made by O'Rourke, approved by Henry and Mullin, that there were no prosecutable crimes by Woycik. Whether there were no prosecutable crimes or not may be debatable, but without a thorough investigation, such a conclusion was totally irresponsible.

In the Commission's view, the key point about this incident is not the misconduct of David Woycik, which was reprehensible, unethical and possibly criminal, but rather what this incident says about how Mr. Henry's Office responded to misconduct. Mr. Henry's Office's failures in the Woycik case include the deplorable state of the Woycik file, the superficial nature of the investigation, the failure to inform Police Department management or the Internal Affairs Division of the incident, the failure to prosecute Woycik or even send a letter to the Grievance Committee, and the conflicts and interrelationships between the District Attorney's Office, including among O'Rourke and Spota and Sullivan, which allowed Spota and Sullivan to be exonerated by a mere telephone call in which they denied any improprieties.

In addition to revealing how the District Attorney's Office failed to properly investigate and

punish serious employee misconduct, the Woycik matter also demonstrated a serious systemic defect in the operation of that Office. On May 6, 1987, the Commission requested District Attorney Henry's Office to provide the file of any misconduct investigation concerning David Woycik, which the Commission already knew existed, of which it had a partial copy, and which was prior to any action by the Suffolk Legislature. The Commission was told that there was no District Attorney file concerning misconduct by Woycik, but the Commission was given his personnel file, which contained no hint of the advertisement or the reason for his "resigning" from the Office, nor any hint of the Woycik referral fee investigation. Only after the Suffolk Legislature's Public Safety Committee decided to present the Woycik case at a public hearing, and after the Committee had informed District Attorney Henry that they knew such an investigation had occurred and provided the District Attorney with additional known details, was the District Attorney's file on the Woycik incident located and provided to the Committee and to the Commission.

Memory, however, should not be the method to be relied on to locate records regarding investigations of employee misconduct. Complete files, and the

retrievability of files, are crucial to investigating cases of misconduct, to analyzing them as to type and who is accused, to checking records in the future for personnel decisions on such things as promotion or firing, and for answering requests in the future from outside agencies or potential employers.

The Suffolk District Attorney reported to the Commission in an October 6, 1987 letter that allegations of District Attorney's Office employee misconduct, except for criminal convictions, are not placed in an employee's personnel file, but rather are kept in the file of the criminal case in which the misconduct was alleged to have occurred or are kept in the office of the District Attorney's Chief Investigator. How patterns of misconduct are discerned, how the record of each assistant district attorney is reviewed, or how complete responses to outside agencies and employers are made at a later date, is not clear. In sum, the District Attorney's Office has not employed care or diligence with respect to maintaining a proper record of allegations and investigations of misconduct.

While the Commission will make a referral to the Grievance Committee of Woycik's misconduct (see Recommendations, F(2)), the Commission also agrees with the conclusion of the Suffolk Public Safety Com-

mittee in the Woycik matter. As the Committee wrote in its final report:

> The manner in which the Suffolk County District Attorney's Office conducted a potentially serious corruption case involving an alleged kick-back scheme between an Assistant District Attorney, police officers from the County Police Department, and a prominent criminal defense law firm in Suffolk County comprised of former high-ranking members of the Suffolk County District Attorney's Office does not inspire confidence in the ability of that office to conduct an aggressive, thorough, comprehensive investigation of what is generally viewed as the most serious of potential corruption, i.e., the erosion and undermining of public confidence in our criminal law enforcement community through efforts to bribe or influence police officers.
>
> In particular, the procedures utilized by the District Attorney's Office leave a great deal to be desired.*

C. **People v. Hansen**

At the Commission's public hearing in January 1987, a former Suffolk assistant district attorney, Steven Burton, testified regarding a case he had

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* "Report of the Suffolk County Public Safety Committee's Investigation Into Law Enforcement Activity Within the County of Suffolk" (1987), p. 28.

prosecuted, People v. Hansen (Docket Numbers 1955352 and 1955353, Suffolk County District Court, Judge Colaneri), a 1981 prosecution for Driving While Intoxicated. Burton testified that during the trial, Police Officer Walter Matejovic, a breathalyzer technician with the Suffolk County Police Highway Patrol Bureau, who was a witness in the Hansen case, came to Burton and admitted that he had testified falsely and submitted fabricated evidence in the case.

Matejovic explained to Burton that he had lost the original certified breathalyzer test kit carton and had asked for and received a forged box from another member of his unit. Matejovic admitted to Burton and to other police personnel that at the Hansen trial Matejovic had knowingly testified falsely that the forged carton was the original carton. Matejovic said that he was reporting this to Burton because Matejovic feared the original evidence, which Matejovic had lost, had been found by, and was then in the possession of, the defendant (Public Hearing, 1987, pp. 354-360).

Burton, a new assistant district attorney who had been admitted to the bar for only a few months, talked to his Bureau Chief, Robert Folks, Chief of the District Court Bureau, and sent him a memo, dated March

12, 1981, outlining this incident. Folks told Burton to seek a dismissal, which Burton did, by reporting the incident to the trial judge and requesting a dismissal in the interest of justice. Burton sent a confirming memo to Folks along with the forged carton, which was given to Burton by the court, and the original carton, which Burton had received from Hansen's defense counsel (Public Hearing, 1987, pp. 360-369).

Richard Sperl, who had been the supervising sergeant of the Breathalyzer Test Section at the time of the Hansen case, testified at the Commission's public hearing that Matejovic himself had told Sperl about his forgery and false testimony (Public Hearing, 1987, pp. 379-383). Police Officer James McCarthy, of the Breathalyzer Section, testified that he had provided the forged evidence to Matejovic (Private Hearing, McCarthy, 1/21/87, pp. 26-34).

Robert Folks, who was an Assistant United States Attorney in the Southern District of New York at the time of his testimony before the Commission, appeared at two private hearings and at the public hearing. At his first private hearing, Folks claimed not to recall the Hansen matter (Folks, 1/6/87); at the second private hearing, Folks had some recollection of the incident, including a conversation with Mr. Henry

about it (Folks, 1/15/87). At the public hearing, however, Folks was able to provide more detail about the incident, and remembered reporting the false testimony and fabricated evidence personally to Mr. Henry (Public Hearing, 1987, pp. 416-419, 432-433).

During his appearance at the public hearing, Henry could not recall speaking to Folks about this matter, denied receiving any documents from Folks, and stated that no investigation of this matter had ever been undertaken by his Office (Public Hearing, 1987, pp. 502-504). Moreover, Mr. Henry's Office was never able to produce any documents to establish that this matter was ever investigated by that Office, and apparently the matter was never reported by the District Attorney's Office to police supervisors or to the Internal Affairs Division of the Suffolk Police Department, and no Police Department disciplinary investigation was ever conducted (Public Hearing, 1987, Exhibit 53, and pp. 397-399, 407-435, 502-504).

Following the Commission's hearing, Mr. Henry requested the appointment of a Special District Attorney to investigate the Hansen matter, as well as the Gallagher matter (see Chapter VII). In February 1988, a grand jury declined to indict Walter Matejovic for criminal offenses in the Hansen matter. Despite

extensive investigation by the Special District Attorney and, prior to his appointment, by the Commission, a number of relevant items of evidence were never located. Thus, neither the transcript nor the reporter's notes for the day of the Hansen trial at which Matejovic testified could ever be found. Furthermore, the fabricated breathalyzer evidence presented at the trial could not be located. Finally, the Special District Attorney was never able to determine who in the District Attorney's Office either prevented or failed to authorize a full examination of the Hansen misconduct at the time it occurred. The absence of this evidence and/or the failure to explain its absence by the District Attorney and the police personnel involved is but one element of the Hansen matter that concerns the Commission.

The Hansen case demonstrates once again the continuing pattern of failure on the part of both the District Attorney's Office and the Police Department to conduct proper investigations of allegations of employee misconduct. As a result of such failure, Matejovic and McCarthy, both admittedly involved in the fabrication of false evidence and perjury, were never punished for their conduct in this incident.

VI. DEFICIENCIES IN THE OVERSIGHT OF POLICE PERSONNEL

The Commission has determined that misconduct, improprieties and poor management were characteristic of the oversight and control of police personnel by the Suffolk County Police Department. Problems ranged from deficiencies in routine management functions, such as personnel evaluation and overtime rules, to the disastrous failure in the procedures employed by the Department in the investigation and punishment of police misconduct. The net result was a department not under proper management control.

A. Lack of Personnel Evaluation

The Commission found that there was no process of regular, written evaluation by supervisors of personnel in the Homicide Division, or elsewhere in the Department. Written personnel evaluations are a standard part of management practices in well-managed organizations to assist in personnel development and as a tool for motivating and monitoring personnel. Detective Sergeant Kenneth McGuire, who was the team leader in both the Corso and Diaz cases, testified at the Commission's hearing about the lack of personnel evaluations:

Q. Did you do any personnel evaluations of the men who worked under you?

A. I have done that, yes.

Q. Were you doing that when you retired in March of 1986?

A. No. They had gotten away from it.

Q. What do you mean 'they had gotten away from it'?

A. Maybe five or six years ago we nad to do periodic reports, and then we just didn't have to submit them anymore.

Q. So there was no written evaluation of men in your squad which was submitted above you to your supervisors?

A. Not for the last couple of years while I was on the job.
(Public Hearing, 1987, pp. 339-340.)

Suffolk Police Department management cannot forego such an important tool as regular, written personnel evaluations.

B. Disproportionate Salary and Overtime

The total salary and overtime for the jobs performed by the Suffolk Police Homicide detectives and supervisors was extraordinarily high. Their high salaries, greatly boosted by overtime, provided a strong economic incentive for detectives to remain in Homicide.

Detective Rafferty testified before the Commission that he regularly logged 1200 hours of overtime per year while in Homicide and Detective Sergeant McGuire testified that he earned $15,000 in overtime in his final year on the force (Public Hearing, 1987, p. 303). Part of the desirability for a great deal of overtime is that pensions can be greatly increased depending on the salary earned near the end of one's career, which was the case with certain Homicide personnel whose earnings are listed below. In sum, the Department did not take adequate steps to monitor and control overtime (Suffolk Legislative Hearing, 6/29/87, p. 22; 6/30/87, pp. 194-225).

Reference to the Suffolk County payroll records presents a fuller picture of the total annual salaries (including overtime and other payments) for Homicide Division personnel, many of whom are discussed in this Report:

1986

Detective Lieutenant Robert M. Dunn Commanding Officer	$97,118
Detective Sergeant Kenneth W. McGuire	80,966
Detective Sergeant Robert F. Misegades	71,745
Detective Leon E. McKenna	70,931
Detective Sergeant Richard A. Jensen	62,900
Detective Kevin J. McCready	60,409
Detective John F. Miller	55,739

1985

Detective Robert C. Amato	$89,158
Detective John F. Miller	69,880
Detective Walter Warkenthien	67,748
Detective Anthony Palumbo	65,231
Detective Dennis W. Rafferty	63,388

By comparison, Police Commissioner Treder was paid $85,727 in 1985, less than one of the detectives in the Homicide Division.

While the image of the elite Homicide Division was matched by high salaries paid to its members, it was not, unfortunately, accompanied by a high degree of professionalism in their performance.

C. The Skorupski Case and the Failure to Investigate and Punish Police Misconduct

At the Commission's January 1987, public hearing, testimony was given regarding the case of Joseph Skorupski. Testimony was presented that in 1985, when Skorupski was 17 years old, he was mistaken by Suffolk Police personnel for a suspect in a series of rapes and robberies, and was stopped, a shotgun fired near him, and a gun barrel placed in his mouth while he was threatened with death and beaten by the apprehending officers (Public Hearing, 1987, pp. 810-834).

Following this incident, the doctor who examined Skorupski at the hospital called the Commanding Officer of the unit which mistakenly apprehended Skorupski to complain about the use of excessive force. Despite the call, the only aspect of the incident investigated by the Suffolk Police Department was the shotgun discharge, and only because the Department had a rule that all weapon discharges had to be investigated. According to testimony by Suffolk Police Commissioner DeWitt Treder, no Internal Affairs Division disciplinary investigation was ever conducted of the excessive force allegations relative to Joseph Skorupski, despite the fact that several supervisory personnel in the Police Department had full knowledge of the incident, including the fact that Skorupski had to be treated at the hospital shortly after he was stopped by the Suffolk Police (Public Hearing, 1987, pp. 934-943).

Following the public hearing, on February 4, 1987, Judge John Bartels dismissed Skorupski's federal civil suit against Suffolk County and the Police Department (Skorupski v. County of Suffolk, 652 F. Supp. 690 (E.D.N.Y. 1987)). Based on testimony at the Commission's hearing, which led to further Commission investigation including extensive review of Internal

Affairs Division statistics and documents, it appeared that certain claims made in affidavits submitted in the Skorupski case by the Suffolk County Police Department falsely described and misrepresented the Department's actual practices with regard to investigations of police misconduct.

In particular, two affidavits by Inspector Robert Snow, Commanding Officer of the Inspectional Services Bureau (which included the Internal Affairs Division), dated August 1 and September 2, 1986, contained inaccurate and incomplete statistics and statements regarding complaints of police misconduct made to the Suffolk Police Department in the years 1981-1985, greatly understating the number of complaints and falsely asserting that all were investigated. Subsequent private hearings by the Commission with Snow, and with Robert Kearon, Assistant Deputy Commissioner for Legal Affairs of the Suffolk County Police Department, who prepared the Snow affidavits, revealed not only misleading affidavits, but also improper practices with respect to many types of police misconduct investigations.

While the affidavits stated that all allegations of misconduct were investigated, in fact, during the two and one-half year period between October 1983

and May 1986, the Suffolk Police, with the cooperation of then County Attorney Martin Bradley Ashare, had a deliberate policy of not investigating for disciplinary purposes complaints regarding matters in which there was also litigation against the County or Police Department or police personnel or in which a notice of claim pursuant to General Municipal Law §50-e had been filed. Furthermore, even after the termination of any litigation, no disciplinary investigations of those cases were conducted.

Suffolk's system for misconduct cases allowed two different Suffolk Police Department units to investigate misconduct incidents. If there was no litigation, the Internal Affairs Division, given certain conditions and in the best of circumstances, might investigate allegations of police misconduct for disciplinary purposes. Internal Affairs, based at Police Headquarters, had assigned to it approximately 20 police personnel, principally sergeants and lieutenants, and was commanded by an inspector.

However, if litigation was involved, the Claims Investigation Unit handled the investigation, with the sole aim of developing evidence to be used by the Police Department and County in the defense of that litigation, not for disciplinary purposes. The Claims

Investigation Unit was composed of five police officers assigned to the County Attorney's Office. If an Internal Affairs Division investigation had been started, but litigation ensued, the Internal Affairs Division disciplinary investigation was halted and the case file forwarded to the County Attorney to assist in the defense of the civil litigation. However, even if the litigation terminated, cases were not sent back to Internal Affairs for a disciplinary investigation (Private Hearing, Snow, 5/1/87, pp. 26-44, 64-68).

By Suffolk's own confused and fragmentary statistics, almost 100 allegations of undue force and other serious misconduct by the police which occurred between 1983 and 1986 were never investigated for disciplinary purposes (see Hearing before Judge Bartels in Skorupski v. County of Suffolk, Civ. No. 86-0219, E.D.N.Y., 6/23/87).*

The failure to disclose the Department's policy of not investigating any cases involving

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* In 1986, during the early stages of the Commission's investigation, and following a decision in the case of Fiacco v. City of Rensselaer, N.Y., 783 F.2d 319 (2d Cir. 1986), an upstate New York case which demonstrated to Suffolk that the system of non-investigation they had adopted would not survive judicial scrutiny, the Suffolk policy was changed, so that at least in theory even cases involving litigation would be investigated for disciplinary purposes.

litigation for disciplinary purposes was not the only misleading aspect of the Snow affidavits filed in the Skorupski case, nor the only defective element of the Suffolk Police Department's disciplinary practices. Other procedures, or the absence of procedures, also resulted in many other allegations of undue force and misconduct not being investigated, documented, reviewed or punished properly.

For example, in addition to complaints of police misconduct made to the Suffolk Police Internal Affairs Division, and theoretically investigated by Internal Affairs, civilian complaints of police misconduct could also be logged and investigated at the precinct level using the Civilian Complaint Report form (PDCS-1300), with the possible imposition of local "command discipline" (Snow, pp. 17-25, 119). When the affidavits were submitted in the Skorupski case, Snow failed to include these cases in his statistics, in part because until May 1986, there was no Department policy or procedure which required Civilian Complaint Reports filed in the precincts, or their results, to be forwarded to the Internal Affairs Division. Thus, as Snow later acknowledged, there was some unknown number of cases involving police misconduct, filed on Civilian Complaint forms at the precincts from 1981-1986, about

which the Commander of the Internal Affairs Division knew nothing. How many such cases existed, whether they all were investigated, and the number of disciplinary sanctions imposed were all unknown to Snow and thus not included in his affidavits (Snow, pp. 20-22).

At a private hearing before the Commission, Snow testified that it was desirable that a police officer's direct supervisor investigate that police officer when there were allegations of misconduct (Snow, pp. 76-80). However, the Commission has reviewed a number of Suffolk precinct misconduct investigations in which, for example, a superior officer investigated a subordinate in his command. Not surprisingly, in some of those cases the superior officer himself could have been found to be at fault or guilty of misconduct in his supervision of the subordinate, which failure of supervision then gave rise to the incident of misconduct. In effect, Snow approved -- and the Department approved -- a policy pursuant to which superior officers investigated their own actions, in a terribly flawed procedure for misconduct investigations.

Finally, a third category of complaints made to Internal Affairs, labeled "alerts," involved allegedly less serious cases which were referred by the Internal Affairs Division to the precincts for

investigation. Not only did the Police Department have no written guidelines as to what was not "serious," but in actual practice an accurate determination is almost impossible at the initial complaint stage. In any such case the Commanding Officer of Internal Affairs had the power to decide whether to send the case to the precinct for investigation or to have the Internal Affairs Division investigate it. However, prior to 1986, if the case was referred to the precinct, the precinct was not required to report back to Internal Affairs the result of its investigation (Snow, pp. 69-80). Furthermore, cases investigated and punished at the precinct level were required by the Suffolk County Police Department Rules and Procedures (§5/6.31) to be expunged from the files after 24 to 36 months, thus further burying such cases.

In a third affidavit to Judge Bartels, dated May 12, 1987, after the Commission's findings were brought to the attention of the Court and became public, Snow admitted omitting from his first two affidavits any information regarding allegations of misconduct characterized as "alert" cases. However, he did provide statistics for one year, 1984, indicating that for that one year alone his original affidavit failed to mention 60 allegations of misconduct and 16 unknown

cases "missing from the files." Of the 60 allegations of misconduct which had been referred to the precincts, and never followed up by the Internal Affairs Division, "8 involved some sort of criminal conduct, 22 alleged harassment, one alleged property damage and 29 alleged undue force." Snow was only able to ascertain the results in 19 of the 29 alerts alleging some degree of force (Snow Affidavit, 5/12/87).

Clearly, not only were Snow's first two affidavits, which were prepared by Robert Kearon, false and misleading, but also the procedures of the Suffolk Police for investigating misconduct were a travesty, which ensured that a substantial number of cases would not be investigated and allowed a large, but unknown, number of other cases to be buried in the precincts, without review by Internal Affairs.

After an examination of Inspector Snow in a proceeding before Judge Bartels on June 23, 1987, Judge Bartels reversed his decision of February 1987, and brought Suffolk County and the Police Department back into the Skorupski action as defendants. In the Court's oral decision it indicated that Snow's affidavits regarding misconduct investigations by the Suffolk Police were not consistent with his testimony and were misleading (Skorupski v. County of Suffolk, Hearing,

6/23/87, pp. 67-71). In June 1988, after the trial had commenced, Suffolk County settled the Skorupski litigation by agreeing to pay $80,000 to Joseph Skorupski.

With regard to the misleading affidavits which were prepared by Robert Kearon, who still serves as Assistant Deputy Commissioner of Legal Affairs of the Suffolk Police, Kearon could hardly claim ignorance of investigative procedure involving misconduct by the Suffolk Police and County Attorney's Office. Prior to assuming his police post in 1986, Kearon had served in the Torts Division of the Suffolk County Attorney's Office, first as Deputy Bureau Chief and later as Chief of that Division. When he first joined the Police Department, Kearon had even retained his title as Chief of the County Attorney's Torts Division. Kearon, at the least, prepared and submitted misleading and erroneous affidavits to the Court. Even if ignorance were to be accepted as excusing these actions, the conclusion is inescapable that Kearon's conduct in the Skorupski case was below acceptable professional standards.

The Commission is referring this matter to the Grievance Committee for the 10th Judicial District for the Committee's consideration of whether Kearon violated DR7-102(A)(6) of the Code of Professional

Responsibility, which states, "In his representation of a client, a lawyer shall not . . . participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false" (see Recommendations, F(3)).

The Suffolk County Police Department's irresponsible behavior with regard to misconduct investigations was neither recent nor due to lack of notice of the shortcomings of the Department's procedures and practices. The Suffolk County Bar Report of 1981 treated deficiencies in Suffolk Police Department misconduct investigations in considerable detail (see Background, A(3)), and, even earlier, the 1976 Grand Jury Report also provided the Department with notice of the need to reform its procedures in misconduct investigations (see Background, A(2)). However, the Department did not take that path and in fact gave up investigating for disciplinary purposes any litigated cases at all. The reaction of the Department toward the Bar Report and charges of deficient misconduct investigations, and its defensive attitude which prevented reforms of the improper practices in the Internal Affairs Division, is summed up well in a memo dated April 1, 1981, from then Deputy Police Commissioner Charles F. Peterson to then Police Commissioner Donald J. Dilworth:

Subject: Meeting with Allen Smith, Assistant County Attorney, New Head of Torts Bureau.

1. Federal Court Awards:

We discussed this. I told him it was my view, not that the Officers were necessarily acting improperly, but that,

(a) The Bar Association of Suffolk County has succeeded in poisoning the minds of prospective jurors for the personal gain of lawyers, and

(b) It is my belief that the Eastern District is a hostile Federal Court, and that all local law enforcement is suffering because of it.

2. Records Retentic..

. . . We discussed the fact that Philadelphia makes no investigation into Brutality arrests, except by use of Patrol Sergeants. The records are promptly destroyed.

. . . we are allowing greedy lawyers to beat us over the head with our own records.

This is not only a blind denial of existing problems, but a favorable comment by the then second highest-ranking supervisor in the Suffolk Police Department about a better method of covering up misconduct. The consistent policy in misconduct

investigations, homicide investigations, and elsewhere in the Department and District Attorney's Office where the Commission has looked, has been a policy of creating as few documents as possible, even absolutely necessary and legitimate documents, in order to avoid possible future criticism by concealing misconduct and to avoid proper discovery in litigation.* This is an unacceptable policy in both the Police Department and District Attorney's Office.

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* Not surprisingly, this attitude and practice has not gone unnoticed by the courts. Thus, for example, in Mercy v. County of Suffolk, 93 F.R.D. 520 (E.D.N.Y. 1982) then District Judge George C. Pratt stated (at page 523):

> . . . In this court's experience, of the many different police departments who have appeared as defendants, Suffolk County has been one of the most reluctant to cooperate in . . . disclosures.
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> [T]he court's discovery order has been willingly accepted and complied with by Nassau County, and no one there has complained that it has resulted in less candor during internal affairs investigations. Yet, Suffolk County has not only opposed the discovery order and its related search for the truth, but in doing so it has retained outside counsel, at considerable expense to the county, to prepare briefs and appear for oral argument. The net result is an expenditure of more time and yet further expense to the taxpayers of Suffolk County who in the end must pay the bill.

VII. THE APPOINTMENT OF A SPECIAL DISTRICT ATTORNEY IN THE GALLAGHER CASE

A. The Appointment of a Special District Attorney

Following the Commission's January 1987 public hearing, at the suggestion of Lawrence T. Kurlander, the Governor's then Director of Criminal Justice, on February 20, 1987, representatives of the Commission met with Mr. Henry in an effort to resolve questions raised at the public hearing and to bring about needed reforms. Those in attendance were Mr. Henry, accompanied by Mark Cohen, then Chief of the Appeals Bureau of the Suffolk County District Attorney's Office, and Commissioners Trager and Culhane (who joined the meeting in progress), accompanied by Commission counsel. While both Mr. Henry and the Commissioners agreed that the discussions held during that meeting were to be kept confidential, Mr. Henry subsequently breached that agreement, in litigation seeking, inter alia, to block the publication of this Report, there offering a fragmentary and misleading report of what had transpired at the meeting. This compels the Commission to offer a full account of that meeting.

Mr. Henry opened the meeting by stating: "I probably can't run again." He also indicated his

preference for the early appointment of a special district attorney in the case of People v. Hansen (see Chapter V(C)). Furthermore, Mr. Henry described certain reforms he had just instituted in the Suffolk County District Attorney's Office regarding homicide prosecutions and in the Major Offense Bureau, and he stated that Assistant District Attorney Barry Feldman, the prosecutor in the Diaz case, had been removed as Bureau Chief of the Felony Trial Bureau and reassigned as Bureau Chief of the East End Bureau.

Chairman Trager stated that if there was any question of Mr. Henry's personal misconduct, as opposed to poor management, he would not have agreed to meet with Mr. Henry. Chairman Trager stated that Mr. Henry "wasn't watching the store," and as the leading law enforcement official in the County, he should take the lead in helping reform the Police Department and his own Office.

Chairman Trager also stated that Assistant District Attorney Feldman should be publicly fired based on his actions in the Diaz case and the Dubey matter. He further stated that, based on Assistant District Attorney Perini's behavior in the Gallagher case, Perini should also be fired. Chairman Trager

urged Henry to seek a special district attorney in both the Hansen matter and the Gallagher matter.

In response to Chairman Trager's comments regarding the accusations against Perini, Henry stated that it was impossible that Perini was guilty of any misconduct in the Gallagher case. Henry further stated that it was probably not appropriate for him to suggest a name to Justice Thomas Stark, the Supervising Judge for the Criminal Courts of Suffolk County, who would appoint the special district attorney in Gallagher and Hansen. Since the necessity for a special district attorney was occasioned by possible misconduct in Henry's own Office, and thus there was a possible conflict of interest on his part, he felt he should not recommend a replacement for himself. Chairman Trager agreed with this position, and it was then agreed that the Commission would be notified when an application was to be made. Henry assured the Commissioners that he would notify the Commission prior to making an application for a special district attorney in the Hansen and Gallagher matters.

Finally, Mr. Henry stated that in his opinion Police Commissioner Treder had been a weak Commissioner and not up to the job, and that David Freundlich,

Henry's First Assistant, should be appointed Suffolk County Police Commissioner.

Despite Mr. Henry's assurances, on May 29, 1987, the Suffolk County District Attorney's Office, without notice to the Commission, appeared before Justice Stark and requested the appointment of a special district attorney in the Hansen and Gallagher matters. The application with respect to the Gallagher matter failed to state that Perini could be a target in the case. Similiarly, the application in the Hansen matter neglected to inform the Court that several officials in the District Attorney's Office, including Mr. Henry himself, were accused of having roles in the failure to investigate possible crimes by police personnel. As a result, these applications, made without any notice to the Commission, deprived the Court of important information the Commission would have supplied regarding both the Hansen and Gallagher matters that was relevant to the selection of a special district attorney.

On May 29, 1987, Justice Stark designated Harvey Arnoff as Special District Attorney. Arnoff had very limited criminal law experience, having served less than one year as an assistant district attorney in Suffolk County in the early 1970's. In June 1987, Arnoff informed Commission Assistant Counsel John

Kennedy that he intended to have designated as an investigator to assist him in his role as Special District Attorney a Suffolk County Police Department detective assigned to the Suffolk County District Attorney's Squad. Kennedy questioned the appropriateness of such an appointment in light of the allegations made with respect to the District Attorney's Office. Nevertheless, Arnoff retained that detective, John Scott, as his investigator.

In part based upon this action by Arnoff, in a letter dated June 16, 1987, to Justice Stark, the Commission requested reconsideration of Arnoff's appointment as Special District Attorney. In that letter, the Commission outlined its concerns regarding Arnoff's independence, experience and judgment, including his hiring an investigator from the very Office he was investigating.

Following the Commission's letter to the Court, Arnoff sent a letter to the Commission accusing it of seeking to "thwart, delay and obfuscate" his investigation. He also accused the Commission of "character assassination," saying that it made a "gratuitous attack" on his "character and reputation." Arnoff vigorously defended his choice of an investigator from the District Attorney's staff.

Also following the Commission's June 16, 1987, letter to the Court, the Commission received a copy of a letter from District Attorney Henry to the Court, dated June 23, 1987. Mr. Henry's letter described the Commission's letter as "shocking and disappointing." Mr. Henry offered a strong endorsement of Arnoff, stating that, "based on our knowledge of Mr. Arnoff's reputation, we anticipate only a fair, thorough and vigorous investigation and have every expectation that Mr. Arnoff will fulfill his mandate."

On August 24, 1987, Justice Stark revoked the appointment of Arnoff as Special District Attorney in the Hansen and Gallagher matters, and on September 8, 1987, Justice Stark appointed Stephen P. Scaring as Special District Attorney in Hansen and Gallagher.

Thereafter, in October 1987, former Suffolk County Police Department Sergeant Joseph Comiskey pled guilty to a class E felony, Offering a False Instrument for Filing, in the Gallagher matter, and began cooperating with the prosecution. In February 1988, former Chief of Detectives Gallagher and Police Officer Albert Sinram were indicted under Suffolk County Indictment Number 139/88 for Offering a False Instrument for Filing in the First Degree (class E felony-Gallagher), Tampering With Physical Evidence (class E felony-

Gallagher), Conspiracy in the Fifth Degree (class A misdemeanor-Gallagher) and Official Misconduct (class A misdemeanor-Gallagher and Sinram). Gallagher is the highest ranking official of the Suffolk Police ever indicted for a crime. The charges against Gallagher and Sinram alleged in sum and substance that the defendants prepared and filed with the Suffolk County District Attorney's Office falsified police forms for the purpose of obtaining a probationary sentence for Gallagher's son, Timothy, on a pending narcotics conviction. Specifically, it was alleged that the forms falsely claimed that Timothy Gallagher had cooperated with the police by providing information leading to narcotics arrests, when in fact he had never performed such a role.

On July 6, 1988, Supreme Court Justice Kenneth K. Rohl declared the appointment of Special District Attorney Scaring null and void and dismissed the indictment against Gallagher and Sinram. Justice Rohl reasoned that the order removing the first Special District Attorney, Arnoff, was caused by improper interference by the Commission in writing to Justice Stark concerning Arnoff's fitness to be the Special District Attorney. Special District Attorney Scaring appealed this order to the Appellate Division, which

reversed Judge Rohl, declaring that the dismissal of the Gallagher and Sinram indictment was improper, and stating that there was no impropriety by the Commission, contrary to what the Appellate Division characterized as the "gratuitous comments" by Judge Rohl (People v. Gallagher, 533 N.Y.S.2d 554, 556 (2nd Dept. 1988), reversing 140 Misc.2d 281, 531 N.Y.S.2d 970 (Sup. Ct., Suff. Co., 1988)). After the New York Court of Appeals denied leave to appeal, the Gallagher case was reassigned to a Suffolk County Court Judge and Gallagher and Sinram are now awaiting trial.

B. Problems Involving County Law §701

The problems inherent in the use of County Law §701 for the appointment of a Special District Attorney are clearly demonstrated in the Gallagher and Hansen matters.*

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* County Law §701 reads as follows:

> Whenever the district attorney of any county and his assistant; if he has one, shall not be in attendance at a term of any court of record, which he is by law required to attend, or is disqualified from acting in a particular case to discharge his duties at a term of any court, a superior criminal court in the county wherein the action is triable may, by order appoint some attorney at law having

(Footnote continued on next page)

This section requires the appointment of a special district attorney be made by a judge of a local superior criminal court and also requires that an attorney appointed as special district attorney either have an office or reside in the county. However, despite the intended purpose of County Law §701 of resolving conflicts in prosecutions and allowing objective and aggressive pursuit of allegations of misconduct which may touch the district attorney's own office, because of this statute's provisions relating

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(Footnote continued from previous page)

> an office in or residing in the county, to act as special district attorney during the absence, inability or disqualification of the district attorney and his assistant; but such appointment shall not be made for a period beyond the adjournment of the term at which made. Where, however, an appointment is required under this section for a particular case because of the disqualification of the district attorney, the appointment may be made for all purposes, including disposition. The special district attorney so appointed shall possess the powers and discharge the duties of the district attorney during the period for which he shall be appointed. The board of supervisors of the county shall pay the necessary disbursements of, and a reasonable compensation for, the services of the person so appointed and acting, as certified by the presiding judge or justice. The provisions of this section shall also apply to a county wholly contained within a city.

to who shall make such appointments and who may be thus appointed, in fact the statute has major deficiencies in the case of disqualification of the district attorney.

First, given the local nature of the application and appointing process and the web of existing friendships and relationships in law enforcement, it is sometimes difficult to have a truly aggressive and objective local prosecutor appointed.

Second, even if a qualified local attorney is appointed, he still faces impossible conflicts. Local criminal defense attorneys constantly rely on a relationship of trust and confidence between themselves and the district attorney's office to negotiate pleas and represent the interests of their criminal clients. Accordingly, for a special district attorney to investigate and aggressively prosecute members of the district attorney's own office offers the distinct risk of upsetting the delicate and important relationships existing between the defense lawyer/special district attorney and the district attorney's office. The perception of such a risk could restrain the eagerness of a special district attorney's investigation and prosecution due to the appointee's understandable concerns regarding his law practice and livelihood, as well as

concern regarding the best interests of his current and future private criminal clients. The Grand Jury Report in the Tawana Brawley case in Dutchess County addressed this very point. That Report stated:

> To be effective, Special District Attorneys must have a working knowledge of the Penal Law and Criminal Procedure Law, and must be experienced in handling criminal cases. These criteria virtually dictate that a Special District Attorney must be an active, practicing criminal defense attorney. However, any such attorney who resides in the county in which the matter requiring investigation arises is almost certain to be already representing clients being prosecuted by the District Attorney. . . . In cases where the disqualification of the District Attorney is based on a possible connection between the District Attorney or an Assistant District Attorney and the matter being investigated (as occurred here), the Special District Attorney will be placed in an untenable position. He will be required to investigate potentially criminal acts by a prosecutor who is likely, at the same time, to be prosecuting some of his clients. The Special District Attorney's duty to his clients could jeopardize his effectiveness as a prosecutor and, conversely, his role as a prosecutor could prove inimical to the interests of his clients (pp. 5-6).

These criticisms of County Law §701 as it applies in the situation of disqualification of the district attorney are in the Commission's view entirely well taken. Moreover, what occurred in the Gallagher and Hansen matters graphically illustrates the nature of the problem.

In Gallagher and Hansen, District Attorney Patrick Henry's Office prepared the application for appointment of a special district attorney, which did indicate that members of Mr. Henry's Office might be material witnesses in those cases. However, these applications failed to indicate that members of Mr. Henry's Office might in fact be targets for criminal prosecution. This application was made without notice and without opportunity for the investigating agency in Hansen (the Commission) or in Gallagher (the Eastern District), who referred the cases to Henry, to be heard before the appointment was made.

The first appointee, Mr. Arnoff, had served in the Suffolk District Attorney's Office for less than a year in the early 1970's and had conducted primarily a civil practice since that time. His relationship to Henry, Perini or others in the District Attorney's Office, if any, is not known to this day. However, Arnoff's conflict in terms of the District Attorney's

Office became undeniable when he hired as his investigator a Suffolk County Police detective who was a long-time member of the District Attorney's Squad. As stated by the Appellate Division, Second Department, in People v. Gallagher (533 N.Y.S.2d at 556):

> Arnoff's decision to appoint a detective from the same office that he would be investigating created the same conflict of interest which had precipitated the initial disqualification of the Suffolk County District Attorney.

As the Commission has noted, there are serious problems with respect to the appointment of special district attorneys under the present County Law §701. The Gallagher and Hansen matters underscore how serious these problems are. Included in the Recommendations section of this Report is the Commission's recommendation for amending County Law §701 to address these problems (see Recommendations, E, and Appendix B). The Commission is hopeful that the Legislature will give careful consideration to this proposal.

RECOMMENDATIONS

A. Mr. Henry's Successor Must Take Strong, Positive Steps to Reform and Effectively Lead the District Attorney's Office

On March 14, 1989, Patrick Henry announced that he would not seek re-election to the Office of Suffolk County District Attorney, a position he will have held for 12 years. In November of this year his successor will be elected by the voters of Suffolk County. The Commission is certain that person will want to bring honor to this Office. Good intentions, though, will not be enough. Mr. Henry's successor also will have to confront and take heed of the repeated criticisms, from many responsible sources, of Suffolk law enforcement.

While this Report has pointed out serious misconduct by a few of Mr. Henry's assistants, including some of his highest-ranking assistants, the Commission is confident that the great majority of attorneys who have served under Mr. Henry are persons of dedication, integrity and ability. At the same time, as this and earlier criticisms of Suffolk law enforcement have observed, there is a fully documented record of misconduct and toleration for misconduct on the part of certain members of the Suffolk County District Attorney's Office which has disserved the cause of justice and the

people of Suffolk County. This cannot be allowed to continue.

In a district attorney personal honesty and integrity are not enough. The new district attorney will have to set the tone of how the People's business is to be conducted, be vigilant with respect to misconduct in law enforcement, and set the example of what is expected of assistant district attorneys: integrity, strength of character, discipline, and the capability to develop technical competence in these assigned positions.

The observations and commentaries in this recommendation, although general in nature, are central to achieving the reforms needed in Suffolk County law enforcement. That reform must begin at the very top of the Office of the District Attorney.

B. Illegal Wiretapping

1. Criminal Referrals

Criminal referrals with respect to illegal wiretapping, in violation of Penal Law §250.05, and perjured testimony involving those offenses pursuant to Penal Law §210.00ff, will be made to an appropriate prosecutor. Due to the tolling provisions of CPL

30.10(3)(b) regarding public employees, the State statute of limitations on these offenses has not run.

2. Changes in Management Procedures in the Use of Pen Registers and Electronic Surveillance

Police management must exercise greater supervision over personnel involved in the use of pen registers and electronic surveillance. This should include greater caution in the location of operations, more frequent unannounced inspections of plants, review of all applications and orders, review of all case files, better control over wiretap and pen register equipment, including appropriate receipts and inventories, and management trained to detect and understand violations of eavesdropping orders and procedures.

C. Employee Misconduct

1. Changes in Suffolk County Disciplinary Procedures

a) The Commission recommends that the Suffolk County Human Rights Commission be given subpoena power and the power to investigate complaints made to it of undue force by police officers.

b) The Suffolk County "Whistleblower" Law (Local Law No. 26-1979) should be amended to broaden the list contained in Section 3(A) of persons to whom

protected complaints can be made. The list currently contains only County officials. The list should be broadened to include State and federal officials, agencies and commissions, including federal prosecutors.

2. Reforming Suffolk County's Contract with the Patrolmen's Benevolent Association

In the collective bargaining process, Suffolk County should consider seeking the following changes in its contract with the Patrolmen's Benevolent Association:

a) The Patrolmen's Benevolent Association contract currently permits arbitration for disciplinary infractions at the option of the officer (PBA contract, p. 44). The power to discipline belongs in the hands of top management, not in the hands of outside arbitrators. There should be no compromise in dealing with misconduct by law enforcement personnel. This section should be considered for elimination in the next round of contract negotiations.

b) The PBA contract currently imposes an 18-month statute of limitations on disciplinary actions against police misconduct (PBA Contract, p. 43). Such limitation, like Section 75(4) of the Civil Service Law, should not apply where the misconduct complained

of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.

3. Change in Suffolk County Police Department Rules and Procedures

The procedures for handling misconduct complaints through "Command Discipline" (Suffolk County Police Department Rules and Procedures §5/6.0) must be more specifically defined to prevent serious complaints from being investigated at the precinct level (see, for example, Rules and Procedures, §5/6.4DD, 6.5F, 6.5G), and the complaints and results should be forwarded to the Internal Affairs Division and not expunged (see Rules and Procedures, §5/6.31).

4. Reporting Allegations of Employee Misconduct to the Suffolk County Police and District Attorney

The District Attorney should inform the Police Commissioner or the Police Internal Affairs Division of all allegations of misconduct involving a police officer. The standard of proof in a criminal prosecution, i.e., "beyond a reasonable doubt," is much higher than the standard of proof applicable to disciplinary proceedings. Conversely, the Police Department should report to the District Attorney's Office suspected misconduct by employees of the District

Attorney's Office. In addition, the Police Department should also be required to report to the District Attorney's Office instances of police misconduct which involve possible criminal conduct.

5. Suffolk County Police Internal Affairs Division Investigations

The Commission believes that the Suffolk County Police Department dragged its feet and delayed (or never began) a number of Internal Affairs Division investigations during the course of the Commission's investigation in order to avoid unfavorable publicity, embarrassment and further criticism. However, since his appointment, Commissioner Guido has taken steps to complete investigations and resolve existing complaints. The Commission commends those efforts and urges that delay and avoidance of Internal Affairs investigations not be repeated in the future.

6. Investigations of Employee Misconduct by the Suffolk County District Attorney's Office

Investigations of employee misconduct by the Suffolk County District Attorney's Office should be fully documented, and the documentation should be maintained in the personnel files of employees investigated for misconduct.

D. Changes in Management Procedures

Throughout this Report management failures in homicide, narcotics, wiretapping and misconduct cases have been documented in detail, often followed by specific remedies suggested by the Commission. Therefore, recommendations will not be offered here for every one of the dozens of management failures discovered, but rather the recommendations will respond to some pervasive and serious problems which may not yet have been adequately addressed by the Department.

1. The Rules and Procedures of the Suffolk County Police Department have not unequivocally required detectives to prepare and retain memo books. Section 9/4.13 of the Suffolk County Police Department Rules and Procedures states:

> Police Officers assigned to any precinct command, the Barrier Beach Section of the Marine Bureau, the Marine Bureau when on shore assignment, the Highway Patrol Bureau and the Special Patrol Bureau, will maintain a Memorandum Book to record all activities, duties and actions performed by them except when assigned to administrative duties or other non-enforcement, non-patrol duties. The Memorandum Book is submitted to the supervising officer for certification and is to be produced when required by the Police Commissioner, by Court order, or for inspection by a

> superior officer. Memorandum Books and inserts are provided by the Department and are to be preserved by the individual officer for future reference.

This section should be amended to clearly mandate that all detectives are required to keep and retain memo books. Furthermore, this section and other regulations on report writing and documentation by police personnel should be enforced by appropriate supervisory action.

2. The Commission strongly supports the expressed desire of Commissioner Guido to improve training for personnel.

3. A more clearly defined career path system for police personnel must be developed.

4. Police management should exercise caution in allowing personnel to remain for lengthy periods in narcotics assignments. Keeping even effective officers in the Narcotics Division for extended periods is not a desirable practice.

5. Management of both the Medical Examiner's Office and the Police Department must insure that responsibilities and command at homicide scenes are clearly understood and followed by all personnel. (See Suffolk County Charter and Suffolk County Police Department Rules and Procedures §14/3.0.)

6. The use of informants by police personnel must be regularly reviewed by higher authority and informant cards must be kept in an up-to-date and accurate fashion, permitting auditing and review.

B. Amendment of County Law §701

In New York State there are two methods by which a special prosecutor is appointed. Executive Law §63 provides that the Attorney General, at the request of the Governor or certain other State officials, or in certain statutorily defined situations, can serve as or appoint a special prosecutor. County Law §701 provides that:

> Whenever the district attorney of any county. . . shall not be in attendance at a term of any court of record. . . or is disqualified from acting in a particular case to discharge his duties at a term of any court, a superior criminal court in the county wherein the

> action is triable may, by order appoint some attorney at law having an office in or residing in the county, to act as special district attorney. . . .

The principal problem with County Law §701 is that the appointment process involving a special district attorney in cases of disqualification is too parochial (see Chapter VII (B) quoting the Grand Jury Report in the Tawana Brawley case). To further insulate cases from conflicts, in cases of disqualification, special district attorneys should be appointed by the Presiding Justice of the Appellate Division for the department which includes the county in which the matter will be heard, and the special district attorney should not have to reside or have an office in that county, as the statute now requires.

Furthermore, the statute should provide for removal by the appointing court or justice only for cause, and provide more specifically for staffing and compensation in a way to minimize conflicts (see Appendix B for model statute).*

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* Additional problems regarding prosecutors appointed pursuant to County Law §701 which the Legislature may wish to address have been demonstrated recently in two cases in New York. In one case the Rensselaer

(Footnote continued on next page)

F. Referrals to the Grievance Committee for the 10th Judicial District

1. The behavior of Barry Feldman and Steven Wilutis in allowing the perjured testimony of Ira Dubey to go uncorrected (see Chapter V(A)) will be referred for possible violation of DR7-102(B)(2) of the Code of Professional Responsibility, which demands that "a lawyer who receives information clearly establishing that . . . a person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal." (Both Feldman and Wilutis have left the District Attorney's Office.)

2. David Woycik's behavior in offering fees to police officers to refer cases (see Chapter V(B))

(Footnote continued from previous page)

County Attorney declined to defend a civil lawsuit brought by an accused against a special district attorney and denied any County liability for the acts of the special district attorney (New York Law Journal, 3/7/89, p. 1, col. 4). In another case, People v. Leahy, 72 N.Y.2d 510, 534 N.Y.S.2d 658 (1988), an indictment was dismissed because a special district attorney lacked jurisdiction over the subject matter of the indictment and was not authorized to present the matter to the grand jury. The problem was created because the defendant was not one of the five specifically named persons, and thus part of the "particular case" in the appointing order under §701, even though the alleged crime was part of the overall incident subject to investigation and prosecution by the special district attorney.

will be referred for possible violation of DR2-103(B), which states: "A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client. . . ."

3. The behavior of Robert Kearon in preparing false and misleading affidavits in the Skorupski case (see Chapter VI(C)) will be referred for possible violation of DR7-102(A)(6), which states: "In his representation of a client, a lawyer shall not . . . participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false."

G. Personnel

The Suffolk Police Commissioner should review the actions of Robert Kearon, Assistant Deputy Commissioner for Legal Affairs of the Suffolk County Police Department, relating to the preparation of the false and misleading affidavits in the Skorupski case to determine if disciplinary action against Kearon is warranted. (See Chapter VI(C) and also Recommendations, F(3).)

APPENDIX A

RESISTANCE AND LITIGATION IN SUFFOLK INVESTIGATION

During the Commission's investigation, the cooperation received from the Suffolk County Police Department and District Attorney's Office has undergone a complete reversal with respect to each agency. In the early part of the investigation, with only a few exceptions, the District Attorney's Office provided documents and cooperated in the Commission's inquiry. However, the District Attorney started to resist the Commission's investigation at the time of the request for the appointment of a special district attorney in the Gallagher matter, and greatly intensified his resistance at the time of the Commission's second public hearing, in January 1988, which dealt with illegal wiretapping and narcotics prosecutions.

In addition, the District Attorney's Narcotics Bureau Chief, Raymond Perini, refused to testify voluntarily at a private hearing and unsuccessfully moved to quash a Commission subpoena (see In the Matter of a Subpoena of the State Investigation Commission Returnable January 8, 1988 (Supreme Court, Suffolk County, Justice McInerney, written decision 1/12/88)). Later, the District Attorney's Office began a broad-scale, but meritless and ultimately unsuccessful, legal

action to block the public release of the Commission's final Report and otherwise attack the Commission's investigation (see Henry v. New York State Commission of Investigation, 535 N.Y.S.2d 859 (Supreme Court, Suffolk County, 1988), in which Justice Mullen dismissed Henry's petition on June 20, 1988). The District Attorney also appealed this case to the Appellate Division, Second Department, and lost (141 A.D.2d 914, 533 N.Y.S.2d 690), further wasting taxpayer money and demonstrating his intransigence, rather than attempting to correct the serious problems which have been so clearly demonstrated to exist in the District Attorney's Office.

In contrast, the County of Suffolk initially fought the Commission's investigation. Early in the investigation, then County Attorney, Martin Bradley Ashare, and the Police Department initiated a lawsuit to block the Commission from obtaining key records (see Suffolk County v. Commission of Investigation, Index No. 86-2073 (Supreme Court, Suffolk County, Justice McInerney, decision 3/17/86)). However, after the Commission won this litigation, and after a barrage of publicity unfavorable to the Suffolk Police Department appeared in Newsday, the posture of the County and the Police Department began to change to one of increased

cooperation. While there was resistance on one additional matter when the County represented a former Suffolk assistant county attorney who moved to quash a Commission subpoena for his testimony, after the County lost in federal court (see Skorupski v. County of Suffolk, CV-86-0219 (E.D.N.Y., 5/29/87, Judge Bartels)), as well as in State Supreme Court (see Catterson v. Commission of Investigation, Index No. 87-10717 (Supreme Court, Suffolk County, Justice McInerney, 6/25/87)), and the Appellate Division, the County's resistance subsided.

In addition to the failures of cooperation and resort to litigation by the County and District Attorney, the principal resistance to the Commission's investigation has come from the Suffolk police unions, including the Patrolmen's Benevolent Association, and both the Detectives' and the Superior Officers' Associations. All legal attempts by these groups to block the Commission's investigation were also unsuccessful (see Suffolk County Patrolmen's Benevolent Association v. Commission of Investigation, Index No. 86-5180 (Supreme Court, Suffolk County, Justice McInerney); Suffolk County Detectives' Assn. v. Comm. of Invest., Index No. 86-2072 (Supreme Court, Suffolk County, Justice McInerney, 3/17/86); Suffolk County Superior Officers'

Assn. v. Suffolk County Police Dept. and Comm. of Invest., Index No. 15792 (Supreme Court, Suffolk County, Justice McInerney, 8/29/86)).

Finally, the Commission's Suffolk investigation was also subject to judicial review in another 11 separate proceedings, in each of which the Commission achieved favorable results. Three motions to quash Commission subpoenas have either been denied by the courts or withdrawn (see Anonymous v. Comm. of Invest., Index No. 86-19048 (Supreme Court, Suffolk County, Justice McInerney, 10/27/86); Halverson v. Commission of Investigation, Index No. 86-15104 (Supreme Court, Suffolk County, Justice McInerney); Kevins v. Comm. of Invest., Index No. 88-1060 (Supreme Court, Suffolk County, Justice McInerney, withdrawn 2/4/88)).

In addition, three Commission motions to compel attendance at hearings were successful or were rendered moot by reason of the appearance of the witness: Commission of Investigation v. Weber, Index No. 40424/86 (Supreme Court, New York County, Justice Stecher, 3/11/86); Commission of Investigation v. Illari, Index No. 42100/87 (Supreme Court, New York County, Justice Stecher, 6/9/87); Commission of Investigation v. Keahon, Index No. 46183/86 (Supreme Court, New York County, Justice Stecher, 10/16/86).

Four other motions by the Commission were also successful: In the Matter of the Application of the Commission of Investigation to Authorize the Disclosure of Eavesdropping Warrants, Applications and Recordings Pursuant to Criminal Procedure Law Article 700 (Supreme Court, Suffolk County, Justice McInerney, 8/15/86); In the Matter of the Application of the State Commission of Investigation [In re Pistone] (Supreme Court, Suffolk County, Justice McInerney, 1/21/87); In the Matter of the Application of the Commission of Investigation [In re Hansen] (Supreme Court, Suffolk County, Justice McInerney, 1/21/87); and In the Matter of the Application of the Commission of Investigation [In re Criscuolo] (Supreme Court, Suffolk County, Justice McInerney, 1/29/87).

Finally, the Commission filed an amicus curiae brief in the Appellate Division, Second Department, in the successful appeal by Special District Attorney Scaring in the case of People v. Gallagher, 533 N.Y.S. 2d 554 (1988), which resulted in reinstatement of the Gallagher/Sinram indictment, which had been dismissed by Justice Kenneth Rohl (140 Misc.2d 281, 531 N.Y.S.2d 970 (Supreme Court, Suffolk County, 1988)).

APPENDIX B

DRAFT LEGISLATION, COUNTY LAW §701

§701 Special district attorney

1. Whenever the district attorney of any county and his assistant, if he has one, shall not be in attendance at a term of any court of record, which he is by law required to attend, or is disqualified from acting in a particular case to discharge his duties at a term of any court, an attorney at law may be appointed, as provided herein, to act as special district attorney during the absence, inability or disqualification of the district attorney and his assistant. Where such appointment is required because of the absence or inability of the district attorney and his assistant, the appointment of the special district attorney shall be made by a superior criminal court in the county wherein the action is triable and shall not be made for a period beyond the adjournment of the term at which made; the attorney so appointed shall be an attorney having an office in or residing in said county. Where an appointment is required under this section for a particular case because of the disqualification of the district attorney, the appointment of the special district attorney shall be made by the

presiding justice of the Appellate Division of the Supreme Court for the department which includes the county wherein the action is triable and may be made for all purposes, including disposition; a special district attorney required to be appointed because of the disqualification of the district attorney need not have an office in or reside in said county.

2. A special district attorney appointed pursuant to this section shall possess the powers and discharge the duties of the district attorney during the period for which he shall be appointed. The board of supervisors or other governing body of the county shall pay the necessary disbursements of, and reasonable compensation for, the services of the person so appointed and acting, as certified by the court or justice appointing said special district attorney. Upon application of the special district attorney, or on the court's own motion, a court or justice appointing a special district attorney pursuant to this section may, by order, authorize the appointee, for the purposes of carrying out the duties of the office of special district attorney, to hire assistant special district attorneys and other employees, on such terms and in such number as the court or justice may authorize, the expense of which shall likewise be a county charge.

The appointing court or justice may remove a special district attorney only for good cause, upon notice to the appointee of the cause for his proposed removal.

3. The provisions of this section shall also apply to a county wholly contained within a city.

END

OF

TITLE