

Cover-Up at Attica: Often Charged but

By MICHAEL J. KAUFMAN

Charges that the office of the special state prosecutor covered up crimes allegedly committed by law enforcement officers during the Attica prison uprising have been made with regularity almost since the criminal investigation of Attica crimes began three days after the disorders were quelled on Sept. 13, 1971.

Lawyers have said it boldly in court. Two state commissions have implied it, and state legislators have questioned why, after three and a half years, only inmates have been indicted, with no state troopers or guards charged. However, inquiry into these complaints has consistently been put off because, in each instance, Anthony G. Simonetti, the chief Attica prosecutor, pointed out that two grand juries were still sitting in Wyoming County, presumably still sifting evidence on the uprising.

"You can draw your own inferences," Mr. Simonetti said a month ago when he was asked whether the grand juries had before them evidence of crimes by law officers. While he cited the secrecy of the grand jury process, the prosecutor nonetheless conveyed the impression that indictments, or perhaps a presentment—a wide-ranging critical report—against troopers and guards, were at least possible.

Last week, the most serious charge came to light. In a 160-page report to Governor Carey, Malcolm Bell, a former key aide to Mr. Simonetti who had access to information from the inside, spelled out his allegations that he had been thwarted from the top in calling witnesses and bringing evidence against guards and troopers to the Grand Jury.

Autopsies Made

Official autopsy reports and video tapes, left little doubt that inmates and guards had been killed by law officers, and that inmates had been beaten by guards after the prison was secure. However, there is some question whether such acts can be attributed to identifiable individuals and whether they constitute crimes for which culpability can be legally proved.

Certainly, there is no dispute of autopsy reports that showed that 39 persons, including 10 prison employees, were killed by bullets fired by the state police and by unauthorized contingents of correctional guards.

There is also a videotape made by the state police of the assault that shows subdued inmates, stripped and crawling on the ground, being occasionally beaten by helmeted men in gas masks.

Furthermore, National Guard troops, who did not take part in the assault, have testified they saw inmates being beaten with sticks and stabbed with screwdrivers after authorities against control of Attica.

The most comprehensive public account of such acts is contained in the report of the McKay Commission. This was a nine-member panel headed by Robert B. McKay, then the dean of New York University Law School, which was appointed by the chief judge of the Court of Appeals and charged with determining what had happened during the four September days that ended with the bloodiest conflict in American prison history.

Beginning its work early in October, 1971, the commission staff interviewed hundreds of inmates, troopers, prison guards and National Guard members, as well as state officials. It zealously guarded the confidentiality of its inmate informants, and it deleted the

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names of any living persons who it felt could be incriminated.

This decision led to frequent skirmishes with the special prosecutorial panel, then headed by Deputy Attorney General Robert E. Fischer, over the problems raised by the parallel inquiries. Guaranteed confidentiality, inmates and others talked more freely to the McKay investigators than to the prosecutors, and at one time Mr. Fischer sought to subpoena the McKay files, a move that was blocked in court.

When the McKay panel issued its report on the first anniversary of the quelling of the riot, it concluded, in part, that "indiscriminate shooting" by the assault force had taken place and that correction officers had taken "vengeful reprisals" on inmates.

Documentation in Report

Even without the names, the McKay report contained documentation that indicated specific criminal acts. For example, the report said that the bullets that had killed one of the hostage correction workers had been traced through ballistics to a private weapon owned by a correction officer. From a lawyer associated with the commission, it was learned that the officer in question had been interviewed, and that he had been shaken and contrite. He reportedly said he had been aiming at an inmate who was holding a knife to the hostage when he killed his colleague.

There is no clearcut definition of what criminal charge, if any, could be sustained by this act, although a number of legal experts have suggested that perhaps negligent homicide or reckless endangerment could apply.

The McKay Commission used this incident to underscore its contention that state officials had failed to communicate a battle order to guards not to take part in the assault. That order had been issued on the assumption that guards had been under severe strain and were too overwrought to act coolly. Some lawyers content that such unauthorized participation by the guards in itself could warrant charges of official misconduct by the state officials planning the assault.

The McKay report was particularly critical of the planning that went into the assault, citing that the only ammunition issued had been the heaviest possible dum dum bullets and shotgun pellets that sprayed over the widest arcs. The report also charged that no thought had been given to preventing reprisals and that medical support units had not been sufficiently warned and so had turned up late and ill-equipped.

Still, the transformation of such allegations into formal charges requires action by a grand jury. And while traditionally grand juries have been controlled by prosecutors, the jurors bring to their task regional attitudes and social perceptions.

Rumors After Revolt

In rural, sparsely populated and almost entirely white Wyoming County, Attica is a major employer, and many people who live there know and sympathize with correction officers. News accounts two years after the riot quoted people in the county as still believing that hostage guards had been killed by having their throats slashed by inmates.

The foreman of the first grand jury, which voted 62 indictments against inmates, is Raymond Becker, who employs a number of correction officers to drive his fleet of school buses. One of these drivers is Donald Melven, who supplied the essential testimony that led

to the conviction two weeks ago of two inmates indicted in the death of William Quinn, the only guard to have died at Attica at the hands of inmates.

Among the charges that have been leveled over the years is that the prosecution established priorities that gave pre-eminence to the alleged crimes by inmates. As far back as October, 1971, still another state commission empaneled to oversee the transition of Attica and to assure that the rights of inmates were being protected expressed concern over this matter.

Robert P. Patterson, one of the six members of that panel and now Mr. Bell's lawyer, questioned the appointment of Capt. Henry Williams as head of the prosecution's investigation, since Captain Williams had been in charge of the troopers who had conducted the assault on the prison and those who had stayed on after order was restored.

The panel complained to Mr. Fischer about his, and Captain

Williams, was ultimately replaced. The over-eager group, which was called the Goldman Panel after its head, Justice Harry D. Goldman of the State Supreme Court, issued a report in November, 1971, saying that Mr. Fischer's staff was "concerning themselves solely" with investigating charges against the inmates and not with those charges made by inmates against officers.

So concerned was Mr. Patterson, that he petitioned first Mr. Fischer and then Governor Rockefeller to ask the Civil Rights Division of the United States Justice Department to undertake an "investigation of the criminal charges which the prisoners were bringing to the panel's attention."

F.B.I. Agents Sent

In November, teams of agents of the Federal Bureau of Investigation were sent to Attica by order of the Attorney General John N. Mitchell, responding to Mr. Rockefeller's request.

No report of their efforts has ever been made public, and

no Federal grand jury was convened. However, William O'Connor, Deputy Attorney General in the Civil Rights Division, said in Washington two days ago that the inquiry was still technically open. He said it had not been pursued actively because "the state appeared to be doing its duty."

The charges of prosecutorial unevenness have been echoed more recently by lawyers for the inmate defendants facing trials. In the just completed trial of the killing of the correction officer, William M. Kuntler, a defense lawyer, raised a defense of "fabrication and selective prosecution."

It was also suggested in the recent comments of Dr. John Cudmore, a National Guard major, who had told the McKay commission in public televised hearings that he had seen atrocities committed by guards on inmates immediately after the rebellion was quashed. Dr. Cudmore said he had not been consulted by the state prosecutors until two and a half years

later, when he could no longer recall the faces of the men he had seen committing what he had thought were crimes.

Mr. Bell's concern over a cover-up mounted until he resigned from Mr. Simonetti's staff last December, sending a letter to State Attorney General Louis J. Lefkowitz outlining his complaints. Mr. Bell became concerned with what he considered to be Mr. Lefkowitz's inattentiveness, and in January submitted to Governor Carey a more detailed account of his allegations.

Five days after the existence of Mr. Bell's account was reported, Mr. Lefkowitz and the Governor announced they would appoint someone to review the Bell allegations. At the same time, Assemblyman Arthur O. Eve, Democrat-Liberal of Buffalo, is studying the possibility of introducing a resolution requesting the Governor to grant amnesty to those involved in the Attica rebellion, inmates as well as troopers and guards.