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Memorandum

Re: Report submitted by Hon. Liston F. Coon, to the Commission on behalf of the County Judges of the Sixth Judicial District.

The County Judges of the Sixth Judicial District met at Binghamton on October 29,1964, for a discussion of the proposed Penal Law. Following this conference, Judge Coon submitted to the Commission a Report containing suggestions and comments in nine areas of the study bill. Subsequent to the submission of this Report the Commission held seven public hearings throughout the state and a series of executive meetings.

A revised bill is about to be introduced in the Legislature. This new bill incorporates a number of changes suggested to the Commission during the past year by many interested persons and groups.

This memorandum will comment briefly on the suggestions contained in the County Judges Report:

(a) The Report recommends that Sections 25.00 and 25.05 clarify the question of how "the court may modify or enlarge the conditions" of probation or conditional discharge, noting that the draft is not clear as to whether such modification or enlargement may be done ex parte or only after a hearing. COMMENT: The procedure for modifying or enlarging the conditions will be spelled out in the proposed Code of Criminal Procedure. This Commission staff has under study several alternative methods, including " ex parte" and "a hearing." A tentative draft of this procedural machinery will be submitted to the County Judges for their suggestions and criticisms in the near future.

(b) The Report observes that the standard in Section 40.00 is vague and indefinite. This section authorizes a fine if the defendant "has gained money or property through the commission of the crime." COMMENT: The revised bill is designed to overcome this problem with the following language: "As used in this section the term 'gain' means the amount of money or the value of property derived from the commission of the crime, less the amount of money or the value of the property returned to the victim of the crime or seized by or surrendered to lawful authority prior to the time sentence is imposed. When the court imposes a fine for a felony the court shall make a finding as to the amount of the defendant's gain from the crime. If the record does not contain sufficient evidence to support such a finding the court may conduct a hearing upon the issue."

(c) The Report notes that Sections 125.00(3) and 125.05(2) provide for assaults in the third and second degree by means of a deadly weapon. The suggestion was made that assault by a "dangerous weapon" be included as a means of effecting second or third degree assault. COMMENT: This suggestion was adopted by the Commission. In the new bill about to be submitted assault in the third degree and second degree refer both to a deadly weapon and to a "dangerous instrument." The

latter term, which replaces "dangerous weapon," is defined as "any instrument, article or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury, and includes a 'vehicle' as that term is defined in this section."

(d) The Report observes that Section 220.50 (4) uses the terminology "refusal to be sworn as a witness." It suggests that this language be changed to read "refusal to take an oath as a witness," since affirmations are permitted by those with scruples against "swearing." COMMENT: The language "refusal to be sworn as a witness" was adopted for two reasons: (1) it appears in the contempt section (§750) of the Judiciary Law; and (2)in the "Perjury" article of the proposed Penal Law "oath" is defined as "including an affirmation and every other mode authorized by law of attesting to the truth of that which is stated"; and "swear" is defined as "to state under oath."

(e) The Report notes that district attorneys often require, as a prerequisite to an abandonment prosecution, that U.S.D.L. procedures be first pursued unsuccessfully. The Report then suggests that consideration be given to amending Section 265.00 (Abandonment of a Child) to reflect whether or not it be the legislative intent to require U.S.D.L. proceedings in advance of prosecution. COMMENT: The new proposal does not expressly require, as a condition precedent to prosecution, that a U.S.D.L. proceeding be initiated unsuccessfully; it would appear that the legislation need not expressly declare that such a proceeding is a prerequisite to a prosecution. A number of crimes in the new Penal Law afford alternate remedies, e.g., custodial interference (§140.35) would give rise to a contempt action for violating the court order.

(f) The Report observes that Section 265.15 (4) omits the provision of Section 484(3) of the present Penal Law making it a crime to give alcoholic beverages to a child. It was the consensus of the judges that the proposed section should include the "giving" as well as the "sale." COMMENT: The new bill adopts this proposal as follows: "He gives or sells or causes to be given or sold any alcoholic beverage, as defined by section three of the alcoholic beverage control law, to a child less than eighteen years old; except that this subdivision does not apply to the parent or guardian of such child."

(g) The Report notes that Section 270.00, defining a licensing officer for firearms, raises the question again of the role of the county judge in issuing pistol permits. The Report suggests that licensing responsibility be placed in the respective Sheriff Departments and the Chiefs of Police in cities. COMMENT: The Commission adopted the view that all provisions relating to firearms would be restated verbatim in the revision since these provisions were the recent product of four years of study by the Joint Legislative Committee on Firearms and Ammunition. Hence, the Association's recommendations should be submitted to this latter Committee.

(h) The Report points out what appears to be a meaningless provision in Section 270.05, subd. 4, relating to air-guns. COMMENT: Same as (g), supra.

(i) The Report notes that Section 435.45 places certain duties on "overseers of the poor" with respect to lotteries. COMMENT: The Commission agrees that this section is archaic, and it is, accordingly, deleted from the new bill. The question of seizure and disposition of gambling funds will be dealt with in the revised Code of Criminal Procedure.

PJM:b
2/15/65