

MINUTES OF A PUBLIC HEARING  
HELD BY THE TEMPORARY COMMISSION  
ON REVISION OF THE PENAL LAW  
AND CRIMINAL CODE.

Assembly Parlor  
State Capitol  
Albany, New York

February 8, 1968  
9:30 A.M.

**PRESIDING:**

HON. RICHARD J. BARTLETT, CHAIRMAN.

**PRESENT:**

HON. TIMOTHY N. PFEIFFER, Vice-Chairman of the  
Commission.

HON. JOHN R. DUNNE, Member of the Commission

HON. EDWARD A. PANZARELLA, Member of the Commission

ROBERT BENTLEY, ESQ., representing the Chairman of  
the Senate Finance Committee

STANLEY GRUSS, ESQ., representing the Minority  
Leader of the Senate.

WILLIAM R. CROTTY, ESQ. representing the Chairman  
of the Assembly Ways and Means Committee

**STAFF:**

RICHARD G. DENZER, Executive Director

JONATHAN A. WEINSTEIN, Associate Counsel

HELEN E. GORDON, Executive Secretary

P R O C E E D I N G S

MR. BARTLETT: Good morning, ladies and gentlemen. We'll begin the hearing now.

I'm Richard Bartlett, Chairman of the Temporary Commission on Revision of the Penal Law and Criminal Code. We're here this morning to hold a hearing on the proposed Criminal Procedure Law. Here with me are several members of the Commission and staff.

On my right is Edward Panzarella, Assistant District Attorney of Kings County, a member of the Commission; next to him, Robert Bentley, representing Senator Anderson, Chairman of the Senate Finance Committee, a member of the Commission, and on my left our Executive Director, Richard Denzer and Jonathan Weinstein, Assistant Counsel.

The purpose of our hearing this morning is to elicit the comment of the Bench, the Bar, law enforcement agencies and interested citizens on our proposed Criminal Procedure Law.

This has been developed over the past couple of years by the staff of the Commission. It has been tentatively adopted by the Commission.

During the past six months, some 20,000-odd copies have been distributed throughout the State.

The first hearing we held in this series was in Buffalo and then we went to Rochester, we're here today and in Syracuse tomorrow and in New York City next week. At the conclusion of the hearings, we intend again to re-evaluate our proposal in the light of comments and criticisms received at the hearings. We will, before the end of the 1968 legislative session, submit to the Legislature a proposed Criminal Procedure Law for study purposes only. We will again hold hearings toward the end of 1968 on the study bill and will make our final submission with recommendation for passage to the Legislature during the 1969 session.

Things change all the time and yet, in a sense, things don't change at all, do they? And in that connection, let me suggest that the words of the Field Commission in submitting its proposed Criminal Procedure Law, its proposed law, a hundred years ago are very appropriate to today's circumstances. They said, "In submitting the result of their labors to the Legislature, the Commissioners

will not pretend to assert that it is free from omissions and defects, for no human work can be without them. They have spared no effort to render it perfect and, in return, they ask for it the candid consideration of the Legislature and the people."

That's exactly our appeal today. We claim no special virtue. We know we have an excellent staff. We know they've done an excellent job in preparing the initial draft which was then carefully considered by the Commission itself but it's only by our obtaining the candid reaction of those who will have to work with the new Procedural Law and from the public at large that we will be able to, hopefully, finally formulate and submit to the Legislature a Criminal Procedure Law for New York State that will greatly improve the efficiency of the processes of criminal justice and at the same time guarantee fairness to those who become involved in that process.

Our first witness today will be representing the New York State Magistrates' Association, and he may well be called appropriately

"Mr. Magistrate of New York", Morris Zweig of Albany.

MR. ZWEIG: Mr. Chairman, members of the Commission, ladies and gentlemen: I wish to thank you for the opportunity to appear at this hearing on behalf of the New York State Association of Magistrates. I had the pleasure during the course of preparing the proposed Criminal Procedure Law of discussing the matter with the members of your Commission who were most cooperative and with whom I enjoyed many sessions.

At the outset, I think it is worthy of mention that you have taken 963 sections and compacted them into 387 sections, which is almost as good as we did with the Uniform Justice Court Act. We took 494 sections and made seven out of them and I know that it was a Herculean task on your part. I'm here for the purpose of making some comments and discussing a few of the matters particularly as they apply to the practice in the Courts of Special Session throughout the 57 counties.

Now, we've had a few problems and I'm in hopes that the Criminal Procedure Law, when

enacted, will iron out some of these problems and so I will take the matters that I comment on by sections and I call your attention to Section 50.15 which deals with the informations and I take it when you use information, you use the broad aspect of information and you also include the uniform traffic complaint which I think, as we can all agree upon, is also considered an information where it involves alleged violations of the Vehicle and Traffic Law.

Now, the one problem that we have had throughout the years has been the question of verification of information. The only thing today that we have with reference to the verification is stated in Section 148 of the Code of Criminal Procedure and in those sections which go from 148 to 150. Section 208 of the Vehicle and Traffic Law, amended several times, now states before whom a uniform traffic complaint can be verified. However, this has not in any way modified the provision of Sections 148 of the old Code of Criminal Procedure -- I refer to it as the old Code and this the new Code. I feel that there should be some mention

somewhere of the manner of verification and before whom such verification of the information or deposition should be made. That is silent in the new Criminal Procedure Law. If it isn't, then I have overlooked it but, as I read it under Section 50.15, it does not say before whom the information or the deposition was provided in Section 50.20 of the Criminal Procedure Law should be verified.

MR. BARTLETT: Mr. Zweig, on that point, we have had discussion in Buffalo. It was suggested -- maybe I suggested it; I don't remember -- that we might consider for the purposes of verifying pleadings in criminal justice matters by police officers of whatever rank, that we consider imposing the same liability for truthfulness as is the case with a number of filings with government today which are not sworn to. Income tax returns, for example, the statement is under penalty of perjury, I do state or affirm that the foregoing is true, and it's not sworn to before anybody. The penalty is precisely the same as if it were.

What would you think of us adopting such an approach for the information?

MR. ZWEIG: Well, you run into, or I think you might run into a little problem, not so much in the long-form information. I refer to the fact, at least I always have to make the distinction between the long-form information which is the information as we know it and which will, under your or under this new law, will be no doubt either the prosecutor's information, the grand jury information or an information laid by an officer or an individual complainant. It's always been my thought that when a person lays an information, he starts the criminal law in motion and I more or less am inclined to continue the method of verification as we have in the old Criminal Procedure Law except that I feel that Section 208 of the Vehicle and Traffic Law which now permits verification by officers of a certain type, for example, a sergeant, a lieutenant, a member of the police force, could be used so that it would not necessitate dragging the complainant before the particular magistrate for that purpose, because that would cause delay. But I do feel that a deposition or a long-form information or the

short-form information should have some verification because many times you will find that people will, under your method or perhaps under your suggested method, they would file an information and then withdraw it but when he has to verify it, when he has to swear to it, I think it has a different significance.

Now, that is an opinion based on some experience that I've had in this field.

MR. BARTLETT: I think what we're aiming at here is to assure, because he is starting in motion a serious process, we want to assure that it isn't frivolously undertaken. We want to assure also that if the Court acts upon such a statement of charge that the person making it is subject to some penalty for outright lying.

It did occur to me that that could be accomplished by making provision in the Penal Law for acquittal penalty for perjury in such circumstances even though the oath were not administered by someone.

MR. ZWEIG: Well, as I say, I would not have any serious objections to it.

MR. BARTLETT: Your point is well taken.

MR. ZWEIG: Thank you, sir.

MR. BARTLETT: We ought to specify the circumstances.

MR. ZWEIG: Now, I'm very pleased with Section 50.25 which refers to bills of particulars. We've had a very serious problem since the enactment of 147-a of the Code of Criminal Procedure which gave rise to the uniform traffic ticket and complaint for all vehicle and traffic violations. However, I find that Section 50.25 in the proposed law which provides for bills of particulars refers specifically to traffic infractions.

Now, a traffic infraction, as I read the traffic infraction, it's one defined by Section 155 of the present Code of Criminal Procedure which is a hybrid situation. That was created years ago under, as you all know, Governor Lehman's regime, and the traffic infraction was created by Judge Bergan. He wrote that and he put this nomenclature in, the traffic infraction. The purpose of it was so as not to create a criminal stigma and yet for procedural or trial purposes, it is deemed a

misdemeanor.

Now, that has been the concept over the years and I don't quarrel with that concept. However, here you specifically have omitted or have omitted -- and I don't think that this was intentional -- as to bills of particulars required to be furnished in traffic misdemeanors. You see, in the traffic cases we have two concepts here. We have the infraction which is an offense, so to speak, but which is not a crime. We also have the unclassified misdemeanor concept in which all traffic misdemeanors fall and I feel that since we are authorized or the law enforcement agency is authorized to use the uniform traffic ticket and complaint concept, the little package deal in traffic misdemeanors, for example, reckless driving, leaving the scene of the accident, driving while intoxicated and many others, they can be initiated by a uniform traffic ticket. As a matter of fact, they are every day in the week.

Now, if that is done, instead of the long-form information which is still permissible, then I feel that there should be a provision in

Section 50.25 specifying that bills of particulars apply to those cases.

Now, I think that is omitted and I haven't seen it anywhere and I looked at it again last evening.

MR. DENZER: Judge Zweig, may I interrupt for just a moment? You are recommending, I take it, that the short-form information or simplified traffic information be made applicable to charges of misdemeanors?

MR. ZWEIG: If they fall into the category of Vehicle and Traffic Law.

MR. DENZER: Of traffic, yes.

MR. ZWEIG: That's the present way.

MR. DENZER: That's the present law?

MR. ZWEIG: Yes.

MR. DENZER: That is the law today?

MR. ZWEIG: That is the law today, yes.

MR. DENZER: And you think that's salutary?

MR. ZWEIG: Well, the reason being -- I don't see the problem or I don't see any greater problem in charging a man with speeding, and let's

assume he's a three-time person, that he's a third offender. You know that the penalty for a third offender in speeding is --

MR. BARTLETT: 180 days.

MR. ZWEIG: Yes, is almost as great as a violation of reckless driving which is a misdemeanor and yet a Vehicle and Traffic Law violation. So I see no reason why the uniform traffic complaint or the short form simplified, as you call it, and properly so, should not be used or continue to be used in vehicle and traffic cases. I think as a matter of expediency, and it might be so with driving while intoxicated or an unregistered motor vehicle or an unlicensed operator and a person who operates with defective brakes, those are all traffic misdemeanors and I do not see why they could not be used. I think it would expedite the traffic enforcement, the vehicle and traffic enforcement. I'm not saying a lot for the fellow who is many times on the other side of the fence on these cases.

MR. DENZER: How about leaving the scene?

MR. ZWEIG: That falls in the same

category, yes, yes, because if you're entitled to a bill of particulars -- and I'm coming to the next step and the question of whether the bill of particulars should be verified -- if we're going to have a bill of particulars and it's going to be verified, then I feel that there is adequate protection for the defendant and that brings me down to the question of verification.

Now, nowhere in the present Section 147-a which provides for the uniform traffic ticket and complaint, is there anything which states that a bill of particulars should be verified and the concept has been throughout up until a few days ago that the bill of particulars in the uniform traffic ticket case does not have to be verified. However, a few days ago we had a decision by a county judge in Schenectady County, Judge Wemple, who wrote an opinion and it's the first recorded case that I know of, which states pointblank that the bill of particulars should be verified, that it has no effect, and one of the reasons by Judge Wemple is this, that he refers it to the civil procedure where if the first pleading is

verified then all other pleadings should be verified and he feels that the preparation of uniform traffic tickets which is verified and if a bill of particulars is to be furnished, that is if the defendant avails himself of the right to a bill of particulars and he doesn't waive it as he is permitted under the statute, then that should be verified and he has been quite clear. Frankly, I am of the opinion that the bill of particulars should be verified.

MR. BARTLETT: Judge Zweig, in traffic cases, I can see that it would be a relatively easy matter. The information is usually filed by the arresting officer; the bill of particulars is usually furnished by the arresting officer.

MR. ZWEIG: Yes, he must furnish it.

MR. BARTLETT: Let's take a nontraffic misdemeanor, however.

MR. ZWEIG: Yes.

MR. BARTLETT: Where the bill of particulars is furnished by the prosecutor. It would probably have to be on information and belief, would it not?

MR. ZWEIG: Mr. Bartlett, in a nontraffic violation as the process is today, the long-form information is used and when the long-form information is used then we fall back to Section 148 of the Code which has a specific provision as to what must be stated in the information. In other words, it's been held many, many times by leading cases that an information must state the facts sufficient to constitute the alleged crime and if you have that, there is no purpose and no need for a bill of particulars.

As a matter of fact, in felony practice, in practice in the courts of record, the only time a bill of particulars is available to a defendant is when the short-form indictment is used and, to me, the short-form indictment falls into the category more or less -- perhaps it's not a good analogy -- of the uniform traffic complaint, so where a long-form information is used no bill of particulars has ever been provided for nor do I feel it is necessary.

MR. DENZER: In New York City, Judge Zweig, bills of particulars in the long-form

information cases and indictment cases are occasionally requested.

MR. ZWEIG: In indictment cases, yes.

MR. DENZER: Yes. Well --

MR. ZWEIG: I don't object to -- I'm not commenting on that, Mr. Denzer.

MR. DENZER: Yes. Well, wouldn't you occasionally get one in a misdemeanor?

MR. ZWEIG: Never.

MR. DENZER: No?

MR. ZWEIG: No, under the statute we're not entitled to a bill of particulars where there has been a long-form information, no, not in misdemeanor cases. That would be only in felonies only when the short form is used, short-form indictment is used.

Now, Section 50.50 has me a little bit confused and I'd like your thoughts on that. By that I mean that I don't quite understand it. You provide a place where the information should be filed in the State, that an information and summons and whatever it be, whether it be a prosecutor's information -- and I think you mean

also the uniform traffic information and complaint for the simplified form -- it should be filed in the town where the alleged offense was committed. You start out with that premise and then you go on to say that in the event the Court is not available then it should be filed in the adjoining town in the same county and in villages, you say that it should be filed in the village where the alleged offense was committed, and in the event that the village court is not available, then it should be filed with the town in which the village is located and in the event the town court is absent in that part of that village then the adjoining town.

Now, that brings us back to the old Section 164 of the Code with which we've had a lot of trouble and we are still in a dither. Unfortunately, 164 of the Code has never been interpreted by an Appellate Court any higher than the County Court and, to my best knowledge, there are only two cases in the County Court and they seem to take opposite positions. Today under 164 of the Code of Criminal Procedure, when a defendant

is apprehended whether by a uniform traffic ticket or by or as a result of an arrest, he can be taken to the nearest available judge in the county from the place of arrest. Now, that isn't as simple as it sounds because case constructions have held that first you must determine who is the nearest available judge. Number two, you must also state how the officer ascertained that the judge in the town in which the alleged offense was committed is absent and we've had situations where the officer called on the telephone and the telephone did not answer so he took the position that the judge was not available and then took him to the other judge.

In other words, you have this situation and with all due respect to the officers here, I am very much opposed to shopping. Now, we hoped when we amended or when we wrote the Uniform Justice Court Act and we created the one-court concept now, with process returnable before the Court and not before the individual magistrate, that we would do away with the shopping because the officer does not know now or shouldn't know

before whom the particular action will be brought because it's returnable and we have had difficulty in getting them educated and my friend, Richard Bolton, counsel to the State Police, recognizes that because we've had a meeting with him on it. The case should be returnable before a town or village court.

Now, here we've taken a step out of it and you have a situation that town or adjoining town. Well, we're back to the shopping idea. For example, how are we going to prevent any officer from saying that the judge in that town is not available, and what is availability? How do you establish availability? And we're back to Section 164.

Now, Mr. Denzer, perhaps you recall I discussed this with you on the telephone and we have proposed, which I think is now before the Legislature, we proposed it last year and we were told why not wait until the Code of Criminal Procedure Law is being enacted and perhaps it would cure it. Unfortunately, I do not feel it's been cured.

Now, I'm dwelling and taking a lot of time

on this but I think it's very important and I hope you will bear with me. Our proposal has been that the law should read in the following manner or somewhat in this manner, that a person -- an officer -- should have the right to take a person before a court. You've done away with the word magistrate and I agree with you, it's something that means nothing, before a local criminal court as we call it anywhere in the county. Now, he doesn't -- he can shop if he wants to. Let's assume he arrests him in Town A; he can take him to the nearest judge or any judge of the county, we don't care, for the purpose of arraignment only.

MR. DENZER: Is this just in felony cases?

MR. ZWEIG: No, no, no, we're talking -- forget the felonies for a moment. I'm talking of misdemeanors and traffic infractions. The law in felony cases today is clear; he can go anywhere in the county and we have no quarrel with that. I think it's a perfectly good proposition, perfectly good rule, but in misdemeanors and traffic cases -- and, incidentally, I'm confining myself to those so

I'll make it clear -- now, if he takes the individual or if the individual desires immediate arraignment, he's taken before any judge in the town, in the county, any judge in the county, for the purpose of arraignment only with this proviso, that if the defendant decides or desires to dispose of that case then the judge shall have the right to dispose of it. On the other hand, if he enters a plea of not guilty and posts bail or is permitted to go on his own recognizance, then the judge shall transfer the case to the town in which the alleged offense was committed.

Now, I think that creates no problem and I'll tell you another thing that it does and here I was drastically taken apart before the Constitutional Convention Committee, not only on this point but on many points I assure you, and when they said how is it that one judge has 3,000 cases and the other judge has 50, now, you've just been telling us what great schools you conduct and how you are educating or have educated these justices. Have you forgotten to educate the one who has the 50 cases? You see, it's a question of human

frailties here and again, with this proposal, we will have one judge having 3,000 cases and another judge having 50 cases.

We are attempting, and we want to and we want you to help us, do away with the inactive judge. We want the one-court concept and we want every judge to do his job and that's the reason we are attempting to see that the salaries are raised for that purpose.

MR. DENZER: Well, let me ask you this, Judge: The way Section 50.50 is formulated now, the officer-complainant has to go before the court of the town in which the offense was committed. Well, wouldn't that --

MR. ZWEIG: If he is there, if he is there, if the judge is there.

MR. DENZER: Yeah, if he's there.

MR. ZWEIG: But then you say if he isn't there, to an adjoining town.

MR. DENZER: Well, yes. Now, let me say this: You referred to a telephone conversation with me which was a very helpful one, and the staff has been doing some drafting since that time

and I think along the lines which you are suggesting now, that in any such case -- and I don't care whether it's with a warrant or without a warrant or anything else --

MR. ZWEIG: Right, right.

MR. DENZER: -- but in other words where the defendant ends up in a court other than that of the town or village in which the offense was committed, that court must arraign him but after the arraignment it must send, unless the defendant wishes to plead guilty right away and so on, the court must send the case back to the court of the entity where the offense was committed.

MR. ZWEIG: Well, that's in line with what our conversation was.

MR. DENZER: Yes.

MR. ZWEIG: I'm merely calling it to the attention here because it is in the present situation.

Now, one more thing which perhaps is not too important on that phase. You have in village courts -- incidentally, gentlemen, we have in many village courts a situation where you

have acting village justices. You don't have any provision in it here and if the acting village judge has the same jurisdiction, the same duties and functions as the village judge and he acts when the village judge is disabled or is not available, then I think you might in that section give some thought to that because you do not have it in there.

MR. DENZER: We have, and I think that was also after a conversation with you.

MR. ZWEIG: Very well, very well.

Now, on the question of bail -- and I'm coming down the home stretch -- your bail provisions are provided for in two sections, 70.50 and 70.30 of the new Code.

In my opinion, it needs a little clarification as to who may take bail. You have provisions there and you refer to police departments and while I merely ask or my inquiry is this, when you use the word "police department", do you also mean the State Police or is it a police department set up in a municipality such as the town or village?

As you probably know, under the present law, in villages where there is a police department or a police chief he has the right to take bail. In towns of the first class which has a police department, the police department has a right to take bail. Unfortunately, there is no such provision today so far as the State Police is concerned. I don't know whether Mr. Bolton will like this, but I definitely would like to see a provision that an officer having the same title or the same titular capacity as we have in other police departments should have the right to take bail. We have been criticized so many times for midnight arraignments. Congressman Resnick really took me apart down in Ulster County. Of course, he takes a lot of people apart but, aside from that, because we had a midnight hearing, a midnight arraignment this happened.

Unfortunately, people who criticize sometimes do not see the woods for the trees and many times we have to have midnight arraignments because a serious crime has been committed. Now, the question arises with those, I think the person

should have the right to be arraigned immediately and bail fixed if bail is possible, if it's a bailable offense and if it does not contravene Section 552 of the Code or isn't a capital offense or he isn't the second offender in a felony, then we do exercise the right of bail.

Now, however, in the minor cases, the minor cases, in misdemeanors or in traffic cases, I see no reason why we should have or there should have to be midnight court. Gentlemen, we've been criticized for that and I'm attempting to be realistic about it. If some people do not like the midnight courts -- and frankly, I don't -- then we should have some provision whereby bail could be posted and if a person doesn't have bail that's another situation, and coming along with the bail provision, I notice that you have set up a schedule and that in a Class A misdemeanor you have up to \$500, in Class B up to 250 and then petty offenses up to a hundred. You have omitted, and I think it's an oversight, the unclassified misdemeanor.

MR. DENZER: Well, nonclassified

misdemeanor is a misdemeanor to us.

MR. ZWEIG: I see.

MR. DENZER: That is, A, B and unclassified.

MR. ZWEIG: You see, all vehicle and traffic misdemeanors are unclassified misdemeanors. All conservation misdemeanors are unclassified misdemeanors. All misdemeanors for violation of town and village ordinances where they are misdemeanors are unclassified misdemeanors and I was wondering whether there would be any harm to put a provision in, because I think it would clarify.

Now, don't you feel, gentlemen, that in an unclassified misdemeanor or a Class B misdemeanor that the \$250 is somewhat or a little bit high and your petty offenses, \$100 is somewhat high? We're dealing with human beings, with human minds and with human weaknesses, and a person may be arrested for parking and it isn't always that people have \$100 with them. What is to prevent an officer saying in a parking case -- or let me not be so ridiculous, let us take a case for not having proper tires, for having a bald tire which,

incidentally, is a violation under Section 375 of the Vehicle and Traffic Law, and a man is arrested at night and he has a bald tire and some officer, with all due respect to the officer, the fellow may give him a little rough time and say, "What do you mean, my tire is all right", and so forth, "Got just as good tires as you have". Now, he says, "O.K., Buddy, \$100 bail". I think it's a little bit high. You wouldn't fine the man over \$5 or 10 at the most and I think \$100 is a little bit high and I feel it should be more realistic.

As a matter of fact, the whole bail concept today has been seen in a different light, has taken quite a different attitude, and this is merely in the way of comment.

Now, I ask your thoughts now on Section 85.05 and 85.10 in which you require that the defendant, upon arraignment, whether it be a vehicle and traffic case, whether it be a misdemeanor, he should be furnished with a copy of the information. Now, gentlemen, this is going to cause quite a lot of trouble. We're up to our necks in paperwork and I think we all realize that in upstate New York

many courts, the majority of the courts, do not have clerks. Now, I know I'm talking and I'm slanting my remarks on the Courts of Special Sessions and, well, I'm rather fond of the Courts of Special Sessions. I think they do a pretty good job and the more I read about district courts the more I'm convinced that they do.

Now then, to be required to furnish a copy of an information, I see no purpose for it. True it is that in felony cases, the district attorney is obliged to furnish a copy of the indictment and that is proper, but we're dealing with an entirely different concept. First of all, we're dealing with felonies. We're dealing with the district attorney's office with a county prosecutor that has a staff but we're dealing here with small courts and I think we have to take that into consideration and let's assume that all the courts are abolished and we have these wonderful creations, these wonderful creations of district courts which are going to solve all problems for everybody, and the Justice Courts are abolished. Let's assume we have that. Do you not feel with

the amount of cases, with the judge having 3,000 cases a year -- and there are many judges that have more than that -- and you know, defense-minded as they may be, every lawyer is going to ask for a copy of the information, and if you have to furnish copies of the uniform complaint, copies of the long-form information, it is actually a tremendous clerical problem.

MR. BARTLETT: Of course, the uniform --

MR. ZWEIG: No reason in the world, Mr. Bartlett, because the attorney or the defendant has a right to come and make a copy of it. Now, every court does not have a photocopy machine and I see no reason why the court should have to furnish a copy of the information. The defendant should have the right to make a copy, no question about it, as he has now. I think it's an important factor here.

MR. BARTLETT: I suppose, mechanically, if we were to provide forms that produce two or three copies, as we do with so many things today, everything including laundry tickets are in triplicate, it seems to me that we might mechanically

overcome the problem the court has.

MR. ZWEIG: Oh, yes.

MR. BARTLETT: And still provide the fellow with a copy.

MR. ZWEIG: In other words, if everything was made in duplicate, yes, there would be no objection to that, of course not. But the cost of the paper is something and has gone up today too.

Now, on Section 8510, I address myself to Mr. Denzer, where in subdivision 4 of 85.10, you use the word "summons", and I take it when you use the word "summons", you include uniform traffic ticket, do you not, Mr. Denzer?

MR. DENZER: No.

MR. ZWEIG: You do not?

MR. DENZER: We carefully distinguish here between summons and appearance ticket. We try to make that distinction. The summons is something that is issued by the court after the information has been filed with the court.

MR. ZWEIG: That's to avoid the warrant, so to speak?

MR. DENZER: Yes, yes, that's right.

MR. ZWEIG: In other words, it may avoid it?

MR. DENZER: Yes. In other words, that's classified with the warrant and the appearance ticket is the partner of the arrest without a warrant.

MR. ZWEIG: Well, Mr. Denzer, I would appreciate it if at your convenience you would again review Section 85.10 for this reason: The language of 85.10 confuses me a little bit as to arraignment and also, in subdivision 4 I think it is, you state unless it's on a uniform traffic ticket and the answer has been or summons has been issued and the person appears pursuant thereto, then if it's printed in this red bold language, that thing always slew me. Then the defendant, the judge does not have to inform him of his rights because so far as he may be subjected to loss of his license, that is so because it's printed on the ticket and this gives rise to something which perhaps you gentlemen are not aware of. It gives rise to group arraignments and I'm very much opposed to group arraignments. I don't know how many of you

gentlemen have appeared in court and have seen 30 and 40 people asked to stand up, all of you who have tickets for speeding, please stand up, and there's an arraignment.

This, in my opinion, is something which must be done away with. I feel that every defendant, whether it be a vehicle and traffic case or a misdemeanor, should be arraigned; he should be apprised of his rights under the Section 699 of the old Code; he should be informed that if it's a vehicle and traffic case that his license may be suspended or revoked as the case may be, and that he should not be relegated to the reading of the bold red print on this ticket nor should a judge have the right to have 60 people -- or 30 -- if he can do it with 30, he can do it with a hundred -- and while he is doing it, somebody walks in and he is not aware of it and you have appeals and appeals and appeals.

Now, there is no problem in arraigning individuals. I've been in New York City Criminal Court. I must admire them for this, each person is arraigned individually and many nights they have

a hundred and a hundred and fifty cases.

MR. BARTLETT: I agree with you but, in all candor, doesn't all this operate to the detriment of the defendant? I won a case one night in a group arraignment situation because the arresting officer couldn't pick Mr. Brown out from Mr. Jones. Individual arraignment would have solved that problem for him.

MR. ZWEIG: No, I feel -- you see, we have the unfortunate situation, Mr. Denzer, we had a year ago two cases which were decided in New York City, Littario and Kohler, and in those cases they said we're not dealing with upstate, it may be different upstate but under Section 41 of the Criminal Court Act in New York City you do not have to advise the defendant as to his right to counsel in a vehicle and traffic infraction and I think that's a far cry. I don't think that that is right.

MR. DENZER: Well, are you including parking violations in this?

MR. ZWEIG: Well, vehicle and traffic infractions. If they come under that, of course,

in New York City you have your own ordinance and whatnot and you have a little different situation.

MR. DENZER: Well, the definition of a traffic infraction there in the Penal Law includes parking tickets, parking violations, which is one of the things, and you know the mess there is in New York City on that. There are millions of them every year.

MR. ZWEIG: Except this, Mr. Denzer, that the Littario and Kohler cases involved two speeding cases. As a matter of fact, one man went to jail for 180 days, the other fellow went to jail and I don't know, maybe he's still there, unless they listened to Judge Desmond's dissenting opinion. He may be out but there was a strong dissenting opinion in those cases and the majority of the Court ruled that in vehicle and traffic infractions, by virtue of the Criminal Court Act in New York City, they said it didn't apply to New York City. It may apply upstate. You see, this is the problem; east is east and west is west and never the twain speak with each other.

MR. DENZER: Well, that's exactly it. Now, you say you were in the Criminal Court there observing, but my impression is that the volume is so tremendous in these traffic cases that it would be unrealistic to require the Court to give all these instructions in the cases.

MR. ZWEIG: Well, you may make an exception to parking as far as that's concerned.

MR. DENZER: Well, parking, of course, is the main volume, but you know, going through a play street and all that kind of thing, I'm afraid that if we required the Court to give the instructions in every traffic case in New York City, we'd have chaos down there.

MR. ZWEIG: Well, of course, under your present Criminal Court Act in New York City, it has been interpreted by this case that you do not have to but upstate New York you do.

MR. BARTLETT: But if we sorted out -- I'm not so sure just how we could go about it, but if we sorted out the non-moving violations, this constitutes the huge volume in New York.

MR. ZWEIG: Right.

MR. DENZER: Right. A speeding case, yes, I suppose there would be time for that.

MR. ZWEIG: Well, you see, we are under the point system, the blue stamp situation, and if you do this, for this offense you get two points. They're no longer up on points, they've done away with it. If you get two points or you get three points, if you get five points you get a warning letter and if you get six points you're invited to a clinic. If you get eight points you're invited to a hearing. If you get ten points you're a persistent violator and if you get twelve points they send you to Siberia. So we have that situation and so I think it's important.

Today, under our system, a license is not a privilege any longer. A license is a property right and that's been held by the Court of Appeals in *People ex rel. Moore against Fletcher* and those are serious situations, and I don't mean that we should be promiscuous about it but I feel that it is no harm to tell the defendant too much rather than not tell him enough because we have been chastised by the higher courts.

Let's take, for example, the People against Seaton which is a recent case in the Court of Appeals, where the defendant pleaded guilty, didn't want assigned counsel, the Judge sent her -- a woman -- to jail for affecting the welfare and morals of her own children. She left them out in the rain and the Judge sent her to jail. The Court of Appeals chastised that Judge and he said that when a person pleads guilty before you and he's not represented by counsel, you must lean over, take her by the hand so to speak, and tell her what she's doing and does she want to do it.

Now, if that's as far as the courts have gone in these situations, then let us protect and avoid that situation by providing for it in the Code. Does it not make sense, gentlemen? If we're going to do that, then we won't have this situation.

All right. Now, I'd like your thoughts on Section 180.10 in which you say in subdivision (d), when you have A, B, C, D, this is the individual judge trying the case, the single judge

trying it and it says in subdivision (d) the court must then consider the case and render a verdict.

Gentlemen, I'd like your thoughts on whether it would not be feasible to permit the court in nonjury cases to reserve decision. This is quite a problem. We have no provision for it today. We have a provision in the civil procedure where a court can reserve decision for ten days and longer by consent of the parties but do you know, gentlemen, all along ever since the Code of Criminal Procedure has been enacted there has never been a provision authorizing a court to reserve decision, and this is important, and Section 702-a, which was amended in 1953, it was thought that that gave the court the right to reserve decision but courts have given it a different construction and I'll tell you why I feel this is important.

Many times, and today everybody or most everybody is going to have a trial, you have the probationary license situation in vehicle and traffic cases and I particularly referred to those.

A person who gets a new license today, he has to be a good boy for six months. If he picks up the one moving violation, his license is cancelled for 60 days. He must take another test. If he gets another probationary license he goes through life today on probation. Thus whenever he gets a violation he's going to have a trial. Why? He has nothing to lose and everything to gain. So we are having trial and trial and trial.

Now, many times you have serious situations. You may have three or four witnesses and, incidentally, Mr. Denzer, I'm pleased to tell you that most of our cases now are being tried with stenographic records. We have made a tremendous drive, of course, although in upstate New York it's a problem getting stenographers. Now, be that as it may, the judge hears three or four witnesses. He's attempting to listen to the motions and has to rule on the motions and he's attempting to listen to both sides. The case is concluded and under Section 85.10 he must render a verdict and, of course, you've made a distinction between verdict and judgment and I think you've done

a very fine job, and I'm very much in favor of that but I feel that the judge should have the right to reserve decision. For what purpose?

MR. BARTLETT: For how long, Judge?

MR. ZWEIG: So that he may get the testimony, he may look it over.

MR. PANZARELLA: Ten days?

MR. BARTLETT: Ten days, did you indicate?

MR. ZWEIG: Ten days.

MR. BARTLETT: I mean I asked for how long.

MR. ZWEIG: I would say not longer than ten days unless by consent.

MR. BARTLETT: We do have an unhappy circumstance in non quasi and quasi cases in Family Court where you're waiting months for a disposition. It just seems to me that if we were to give any flexibility at all, you know, we should give some reasonable period of time.

MR. ZWEIG: Well, not too long. Well, if you feel ten days is too long, then make it five days for this reason. The conscientious judge -- and we have many -- would like to review

the testimony. I mean you have a serious situation, where the fellow is a third speeding offender or let's say reckless driving, and his license is in jeopardy and the judge would like to make a fair decision and many times -- and I think you'll all agree with me -- when you read the testimony you'll glean something which you did not before and it enables a Court to make a proper decision. I think it's needed. If it is permissible in civil cases, by all means it should be permissible where persons' liberty or a person's property rights are involved. And I do not feel that there would be any harm, and I think it's very, very necessary.

Now, one word about appeals. Under Section 235, Mr. Denzer and I have discussed that or was it Pete? Perhaps I discussed it with Peter McQuillan. You now provide for the alternate method of appeal and I notice in your commentary you say that it is a little bit archaic and you have given an alternate method, one by filing a notice of appeal and the other where there is no stenographic record and the other by filing an affidavit of

errors, and you have an alternate method and in some instances, you permit both, first the filing of a notice of appeal and then 30 days later the filing of an affidavit of error.

I was wondering and I had quite a problem when we were revising the Uniform Justice Court Act. The gentleman in charge of the Committee wanted or said that we should change the method of appeals and have the same method as you have in indictable cases. Frankly, gentlemen, Section 749, '50, '51, up to '56 is a very simple method of taking an appeal. I don't think there's anything complicated without it.

Now, how much simpler can it be than within 30 days after the judgment is rendered to prepare an affidavit of errors. Now, there isn't anything magic in an affidavit of errors. It's an affidavit in which the errors complained of are alleged and the affidavit is filed with the Court by mail or in person and when three days thereafter, you file a copy with the District Attorney and the appeal is deemed to have been taken.

Now, I have no objection to the notice of appeal, but in your commentaries you said that some lawyers may not know the procedure. Mr. Denzer, he's a lawyer and he should know the procedure. There are many lawyers that may not know the procedure of how to take an appeal to the Court of Appeals but the Court of Appeals has not simplified the method of taking an appeal for that reason.

Now, I'm not saying this critically, believe me.

MR. DENZER: Well, now, just let me tell you why that's in there, Judge.

MR. ZWEIG: Yes.

MR. DENZER: Some of the members, a number of the members, of the Commission are from New York City.

MR. ZWEIG: Right.

MR. DENZER: And they're a little mystified by the affidavit of error system and they felt that perhaps if they were involved in one of these appeals outside of New York, they might not know the system and suddenly they find

themselves out of court and there's something to what you say. I suppose a lawyer should know the procedure in the county in which he's operating.

MR. ZWEIG: I think so. Mr. Denzer, the reason I say it, we're interested in, I think, the fact that the simpler we draw a law the less it can be torn apart. The simpler it is to interpret it by our high courts, and I think the method of affidavit of errors is very simple.

Now, we come rather to a very important matter and I would suggest that it be retained. Now, however, we come to a very important situation. In 1961, Sections --

MR. BARTLETT: Just excuse me, Judge. I think -- I was trying to think back to our discussions of the affidavit of error point. I think the point was that where a record is taken, all the defendant need do within 30 days of conviction, of imposition of judgment, is to decide whether to appeal or not.

MR. ZWEIG: That's right.

MR. BARTLETT: In the nonrecord case, he must not only make the decision whether to

appeal or not, he must prepare his appeal, decide the grounds he's going on and bolster it as he does in the affidavit of errors, and I think it was the time concept far more than anything else. We felt that the defendant, the time burden on the defendant should not be determined by the question of whether or not a stenographic record had been kept.

MR. ZWEIG: In other words, Mr. Bartlett, you feel that if he files a notice of appeal then within 30 days he gets his case together, then files the affidavit of errors.

MR. BARTLETT: That's it.

MR. ZWEIG: Which would be dual.

MR. BARTLETT: It would be dual. I was trying to think what the major point was. Mr. Denzer raised one, but the other went to the time question.

MR. ZWEIG: I see. Well, frankly, I can understand if it's a very complicated case that he may not, within 30 days have the time to prepare an affidavit of errors. However, the affidavit of errors, the person who has done a lot

of appeal work in local courts, preparing an affidavit of errors is not a very difficult job because most of them are prepared in such a manner that he can argue including who shot Lincoln and because it is a rule today that what you don't state in the affidavit of errors you can't argue, so I've never found it to be a very complicated procedure, frankly. I think the procedure is simple and I don't want to complicate it. That's the only reason.

However, we do have something here which is important. In 1961, Section 756 of the Code of Criminal Procedure was amended. Prior to that, the court -- that section deals with the return on an appeal to be made by the Court. The statute then and as you have it now, says that within ten days after the taking of the appeal, the filing of the affidavit of errors or your notice of appeal, the Court must make a return and that has a somewhat of an awesome, a very awesome, significance, the making of a return, and we've spent a lot of time attempting to teach justices, both lawyer and nonlawyer justices, how to make a

return because it's quite a document.

Now, in the amendment in 1961 it said or it added before that that all a Court had to do was prepare his return, file it in the County Clerk's Office and he was finished. Now, under the amendment, he must file the original in the County Clerk's Office, including the minutes, including the testimony, and then serve a copy by mail or otherwise upon the District Attorney and one upon the defendant or his counsel. Fine, no objection to that.

The problem arises with minutes, and if we have no statutory definition as to whether a copy of the transcript of the stenographic record must be furnished to the District Attorney and to the defense counsel, unfortunately this has never been decided by any Appellate Court with the exception of two County Court decisions. We have the Rochford case decided in Nassau County which holds that a copy of the stenographic record must be furnished the defendant free of charge. We have the Freeman case in Seneca County which holds it must not be given to the defendant free of charge

and that the defendant, if he wants a copy of the testimony, should pay Miss Williman and get a copy of the testimony.

Now, I do not think that that is a harsh rule with this exception. If the defendant is indigent then, in my opinion, they should be furnished with a copy of the testimony. That has been established on a preliminary examination case in a felony in People against Montgomery recently by the Court of Appeals. Where the defendant is indigent, I think the indigent law should apply throughout and for consistency and uniformity, the man should be entitled to a copy of the record, but I do not feel that in a local case -- and let me be specific. A man is tried for speeding. There is a stenographic record. The town or village has paid the stenographer \$25 -- I hope Pauline isn't insulted. Now, then the person has been convicted and an appeal is taken. The minutes must be ordered because the original must be sent to the County Clerk's Office under the statute.

Now then, the town or village now has to pay for a copy for the District Attorney and a copy

for the defense counsel. That will involve, when you finish, about \$100. The fine was \$10. The community gets \$5 out of the case. The remuneration from the State Comptroller's Office has no bearing with the fine, I think we all agree. We're not in business for fines, but with the practical situation, frankly, everyone is going to want a trial, everyone is going to take an appeal if there's a conviction and the first thing you know the towns and villages are out of business. Maybe that's a good way and I better not say this for the opponents of the local courts because maybe they will say this is a way to get rid of them. I feel -- or rather I do not feel that it is practical, I do not feel that it is fair or just that the municipality should be required to pay for the minutes for the District Attorney or for the defense counsel. The minutes are filed in the County Clerk's Office. It is public. Each party has a right to go and make a copy or do anything the party desires and I think it is absolutely impractical. For example, gentlemen, you have a Motor Vehicle hearing. Mr. Bartlett, I'm sure you've

had many of them. You have a Motor Vehicle hearing and your man gets a bad deal. Now, there is a right of an appeal. You cannot review that case unless you order the minutes and even the indigent defendant law does not help you. I pay --

MR. BARTLETT: Perhaps the answer, Judge Zweig --

MR. ZWEIG: Pardon?

MR. BARTLETT: Perhaps the answer is this: The burden of financing the furnishing of counsel under the indigent defendant law is upon the county.

MR. ZWEIG: That's right.

MR. BARTLETT: Perhaps realistically where the minutes ought to be furnished to the defendant because of indigency, it should be a county charge and surely the prosecutor's right to minutes or the prosecutor's copy of the minutes, since he is a county officer, also would be a charge.

MR. ZWEIG: I agree with you. That's why I bring that up.

MR. BARTLETT: I think we can probably handle that in the County Law. It is something I

think we can handle in the County Law itself as an amendment to the indigent defendant law.

MR. ZWEIG: Mr. Bartlett, the reason I brought it up is since it has never been provided for, I feel this is the time to iron it out.

MR. BARTLETT: Very good.

MR. ZWEIG: Now, one -- just one more thing and I'm finished. You've been very generous and you've given me a lot of time.

MR. BARTLETT: You've been very helpful.

MR. ZWEIG: Thank you, sir. The youthful offender cases. Now, the procedure, you have simplified some of the procedure in the youthful offender law and in my opinion you've done a very fine job with one exception, and I don't mean that literally, with one exception, but with one comment that I have, and that is this: You now provide, you have changed the qualification under the old 913 (e) to (r), we know that the person has had a felony conviction and we know he's not eligible. Now, you have taken this out and you've said he is not eligible to be treated as a youthful offender if he has been convicted of a crime and

in your commentary you say the purpose is -- and I can appreciate your thoughts in that -- that we're trying to save him if he's to be saved from being convicted of a crime. If he's already been convicted of a crime then there's no purpose in treating him as a youthful offender. I think that was your reason.

Well, may I make this suggestion? True it is that the purpose of the youthful offender law is an attempt to rehabilitate the youth without inflicting the stigma of criminality against him. That is very true. However, let's take this position. Let us assume that a youngster driving an automobile, between the age of 16 and today they can drive at 16 if he's had the schooling, and 17 he gets a full-fledged license and at 18 he gets married and at 19 he's a grandfather but be that as it may, let us assume that one of the persons --

MR. BARTLETT: Will you settle for a father at 19?

MR. ZWEIG: One of these persons in this category -- no, I appeared before a ladies' group one time when they wanted to amend the youthful

offender law and thought that they should, and I think that you know the group I'm referring to, and they wanted the youthful offender law to be extended to age 21 and taken out of the courts and put into Family Court. The Family Courts would have loved that, you know, and I said, "Why make it 21; why don't you be realistic, treat him as a youthful offender until he becomes 62. Then he's eligible for Social Security".

Now, but to come back to this, you see, we're using the word "crime" literally here. Now, let's assume a youngster 17 years of age was driving an automobile and his license expired, that is, his registration expired one day and during that one day, and with the system, with the staggering system now that you have, many people do not receive their car registrations on time and they have a problem and they drive. They're arrested and the charge is operating an unregistered motor vehicle. Gentlemen, that's a misdemeanor. Now, the boy was one day late. Now, let's assume he goes before a judge and he says to the judge, "True, I don't have my license, I sent it in", and

the judge says, "I won't pay any attention to that". He's before a District Court judge and the District Court judge says "You're supposed to know the law and you're not supposed to drive". Or he's before some pretty stiff town or village judge and that boy is convicted of a misdemeanor.

Now, that type of a misdemeanor up until last year it was a misdemeanor if your handbrake wasn't in operation, and we finally had the Legislature amend that. We have some misdemeanors which are really petty and yet they are misdemeanors.

Now, I feel if a youngster is convicted of that type of a crime, I do not feel that he should not be eligible for youthful offender treatment. I feel if he's convicted of a misdemeanor perhaps of the type now contained in Section 552 of the Code, something that covers moral turpitude, yes. I think you should make a distinction. Of course, with a felony, there's no question.

MR. DENZER: Instead of 552, how about any crime defined in the Penal Law because all of these penalty crimes that you mention are really outside the Penal Law.

MR. BARTLETT: One possibility, in the circumstance you gave, as the draft is now, he would have to get YO treatment on the driving of an unregistered vehicle assuming no prior record.

MR. DENZER: You were speaking of that as having been convicted of that.

MR. ZWEIG: Yes.

MR. BARTLETT: I understand.

MR. DENZER: And then standing.

MR. ZWEIG: Yes, today that's right.

One more point on that, gentlemen, and I'm finished. You now require that the District Attorney file the youthful offender information and this is for the purpose of information to me. Under the present law, it is not required. Under the present law, as you know, youthful offenders are recommended either by the District Attorney, by the grand jury or by the Court itself. Where, in our local courts -- and I'm limiting myself to the local courts -- if a judge feels in his discretion, and it was discretionary, that the youngster should be treated as a youthful offender, then he has the right after making an investigation

to proceed with the matter and he can order the officer or the complainant, the original charge is dismissed and he can order a new information to be laid.

Why is it necessary to disturb or annoy the District Attorney in misdemeanor cases? What would be wrong or is it not practical to have the complainant or to have the officer prepare the information and do this for the youthful offender? I don't feel -- because many times, gentlemen, the District Attorney doesn't come out himself. Many times he is not involved in the case. Let's say a reckless driving case --

MR. BARTLETT: What we're really talking about is the --

MR. ZWEIG: Mechanics.

MR. BARTLETT: -- the prosecutor, and he may be the policeman, that's true, in the circumstances.

MR. ZWEIG: Right, right, I think that's true.

Gentlemen, thank you very, very much for giving me your time and I appreciate very much

your listening to me and being so patient.

Thank you.

MR. DENZER: Judge Zweig, I don't know how many of the members of our Commission are fully aware of this, but I always regard Judge Zweig as, practically speaking, a member of the staff.

MR. ZWEIG: Thank you.

MR. DENZER: The official members of the staff are New York City boys including myself. We have had very little experience and very little knowledge of court procedure outside of New York City and every time we get in trouble, we just pick up the phone and call Judge Zweig and that's been very frequently, I might add, and I want to say that a great deal of what is in here, particularly in the first part of this proposal, represents Judge Zweig's thinking and in a genuine sense he is a member of the staff.

MR. ZWEIG: Mr. Denzer, thank you very much. It was one of the nicest things anyone has said to me.

MR. BARTLETT: I'll just add a P.S. to

that, Judge. You've raised a number of very important and interesting points this morning. It would have been a great many more if we hadn't consulted with you before this morning.

MR. ZWEIG: Thank you, Mr. Bartlett.

MR. BARTLETT: The next witness will be the Chairman of the Parole Board of the State of New York, a most distinguished public servant and another gentleman upon whom we have called a great deal for guidance, not just in connection with the Code but in connection with the Penal Law as well, Chairman Russell Oswald of the Board of Parole.

CHAIRMAN OSWALD: Mr. Bartlett, members of the Commission, I consider it a real privilege to be given a couple of moments of your time this morning principally because of the high regard in which I hold this Commission as a result of the farsighted work which you have done in the past.

I'd like to direct my attention for not more than a minute or two to a concern which all of our staff has with the Section 120 of the proposed Criminal Procedure Law dealing with police officers.

At the present time, as you know, parole officers have a peace officer status. Parole officers in the State of New York are in the front line today of the law enforcement and criminal or crime control problems. They, by the very nature of their job, must have sidearms. They make their own arrests.

A matter of not more than two months ago, a parole officer while going to duty saw a person running from a bank and apprehended this individual after the person had robbed the bank. Frequently, the parole officer in the areas in which he must work by virtue of his assignment, while apprehending a parolee, is surrounded by groups of persons threatening them and suggesting that he not make the arrest.

I think that it is of the utmost importance that the powers which the parole officers in the State of New York currently have ought not be diminished and I would earnestly urge your group at the time this Code is submitted for passage to concomitantly propose a section -- that a section be added in the form of enabling

legislation to the Executive Law making parole officers peace officers under this statute.

MR. BARTLETT: Mr. Chairman, let me say that within the past two weeks, I personally have had occasion to investigate the duties and responsibilities of parole officers. I was aware before that of the very difficult challenge involved in their task, but I really didn't have an appreciation of the peace officer function that is undertaken by parole officers to the extent I learned about them more recently and let me say that in our staff notes appears one very important sentence and we had no idea how important it was when we wrote it. It says that this proposed list of police officers in subdivision 15 is not complete and the Commission is giving further study to including other public servants performing police functions. At least, speaking for myself, I don't think there's any question but the parole officers fall in that category.

CHAIRMAN OSWALD: Thank you very much.

MR. BARTLETT: We'll consider it. Thank you very much, Russ, for coming.

For the Police Conference of New York,  
Chief Joseph Dominelli of the Town of Rotterdam.  
I've got the right town, haven't I, Chief?

CHIEF JOSEPH DOMINELLI: Right.

Chairman Bartlett, members of the  
Commission, I'm speaking in behalf of the 50,000  
members of the Police Conference of the State of  
New York. Due to the inability of Mr. Sgaglione  
to appear here, he designated me to read this  
statement to you. He was unexpectedly called back  
to New York City this morning.

I, too, would personally like to state  
that I can appreciate the tremendous task that  
you undertook when this Commission performed the  
job that they performed and actually, in going  
through the proposed Code with many, many meetings  
of our board of officers and various people that  
were naturally interested, we were amazed at the  
small number of suggestions or exceptions that we  
could find. So I wish to compliment you and I know  
that Al would do the same and he asked me to extend  
his compliments to you gentlemen and we appreciate  
it very much.

MR. BARTLETT: Thank you very much.

CHIEF DOMINELLI: This is a memorandum of the position of the Police Conference of New York, Inc. in relation to the proposed Criminal Code. It is a result of many conferences with various unit members of the Police Conference, committee meetings of the Police Conference attended by chiefs, policemen, detectives and other representatives of all phases of police work, as well as their counsels.

One of the objections we have which required more explicit definition than appears in the Act is the objection to the loose use of the word "public servant" which is used frequently in the Act, for instance, in Section 365.05 and Section 365.35, and other places in the Act.

It is a confusing and ambiguous and loosely used term which may lead to great difficulties in the future. The powers given to such public servants under the Act include applications for search warrants and so forth.

MR. BARTLETT: Chief.

CHIEF DOMINELLI: Yes, sir.

MR. BARTLETT: You know that the term "public servant" is a defined term in the Penal Law?

CHIEF DOMINELLI: Well, we researched that and I would like your opinion of how you define this other than what we find here.

MR. BARTLETT: Rather than rely on my memory, Mr. Harvey has a copy in his hand, I see, and it would be in the ten hundreds -- thank you, Art.

MR. DENZER: It is defined there and then Section 1.02.

MR. BARTLETT: That's not to say that you still might not have some problem with its use but we do define, in subdivision 15, public servants means any public officer or employee of the State or any political subdivision thereof or any governmental instrumentality of the State or any person exercising the functions of such public officer or employee. The term "public servant" includes a person who has been elected or designated to become a public servant.

In connection with that, and I didn't mean

to suggest that it was a narrow definition, but it's a broad one.

CHIEF DOMINELLI: Well, I have the following sentence, so to speak, that would clarify what I mean by definition of public servant. It's actually loosely drawn and it could include, when you talk about a public employee, actually any State employee could be considered a public employee.

MR. BARTLETT: Yes, that's correct.

CHIEF DOMINELLI: And you're giving him a wide power in an application for search warrants, or it could be conceivable.

MR. BARTLETT: No, not application. Under Section 365, only the prosecutor or the Attorney General may make application.

CHIEF DOMINELLI: It talks about a public servant too.

MR. BARTLETT: No, not application too.

MR. DENZER: You're talking about eavesdropping though.

MR. HARVEY: It's in there.

MR. BARTLETT: Oh, I'm sorry.

CHIEF DOMINELLI: It's in there.

MR. BARTLETT: The reason for our using the term "public servant" in connection with the execution of eavesdropping warrants -- and maybe it's unnecessary -- but we contemplated specialists who are in the employ, for example, of or used by the New York City Police Department who may not themselves be police officers, electronics experts, if you will.

CHIEF DOMINELLI: Right.

MR. BARTLETT: Used in the actual execution of the eavesdropping warrant. Now, perhaps -- I take it, it's your point that we ought to limit that to peace officers, is that it?

CHIEF DOMINELLI: I think this is the point we're undoubtedly trying to make here, no question about it.

MR. DENZER: Well, as far as search warrants are concerned, the proper applicants are police officers, a District Attorney or other public servant acting in the course of his official duties. Maybe that is too broad.

CHIEF DOMINELLI: This is the point we have. I think we have an objection to saying as a

public servant in that terminology there.

MR. BARTLETT: Perhaps we could strike that altogether. Good point.

CHIEF DOMINELLI: Thank you.

In Section 1.20, as you heard Mr. Oswald from the Parole Board, the Chairman, we too would like to see the inclusion in this definition under paragraph 15 of police officers, the Capital Buildings Police and we feel that the determination should be made whether it also includes the Palisades Interstate Park Police because they work for an Interstate Commission. Do you wish to express some sentiment on the Capital Buildings?

MR. BARTLETT: No.

CHIEF DOMINELLI: Or would you consider including them at a later date?

MR. BARTLETT: I think General Schuyler is going to appear this afternoon on this point, but let me say that it's been suggested and we're ready to consider it but, Chief, on this point I don't think the Commission has any enormous problem with the kind of people you're suggesting be added

here. It's terribly important to us, however, to know the position of the policemen of this State on the extension of that list to the point we find it in the present Code of Criminal Procedure. What is the position of the Police Conference, for example, to including all the court attendants in the State, including all the correction officers whether they be State or local, including the dogcatchers, and the list is interminable now? Does the Police Conference believe that we ought to limit this to people who are really performing police duties?

CHIEF DOMINELLI: This is our position that we take.

MR. BARTLETT: This is good.

CHIEF DOMINELLI: We take the position that they basically should be Civil Service career police officers.

MR. BARTLETT: Right.

CHIEF DOMINELLI: With definite police functions.

MR. BARTLETT: Right, knowing that there are several different kinds of police officers.

CHIEF DOMINELLI: Right, there are several different kinds, depending how different people would interpret that but we feel definitely that the Capital Police Force has a definite police function. We feel most importantly that they are protecting the life and property of the State of New York and the representatives of the State of New York.

MR. BARTLETT: Don't you think, Chief, that the fact that we have minimal training requirements for the policemen in this State today, the 240-hour course for recruits and now the new course that we're undertaking for supervisory personnel, that any group who are accorded police officer status should be required to take that training?

CHIEF DOMINELLI: I think this is an excellent point. I think it's a point that would probably be acceptable to our organization, again dependent upon the type of police that we're talking about that would be included in this minimal training program.

MR. BARTLETT: One other point: I under-

stand it to be the position of the regular police of this State, both State and local, that not only do they have the right to exercise the authority accorded to policemen while they are off duty but they also have the responsibility to undertake action where it's proposed -- where it's appropriate.

CHIEF DOMINELLI: Right.

MR. BARTLETT: Would it not be fair to say that anyone who is accorded police officer status should understand that it couples both the authority and the obligation to act in appropriate circumstances?

CHIEF DOMINELLI: I would say, I would assume that they would understand that, yes.

MR. BARTLETT: Thank you. I think we're in accord with the Conference on this point.

CHIEF DOMINELLI: In relation to Section 60.60 which refers to warrants of arrest, we oppose the enactment of paragraph 3 unless the Penal Law is corrected to define use of force as being necessary to effect an arrest.

In subdivision 2, it appears to be the

same as past legislation which allows arrest with knowledge of a warrant but not necessarily in possession of the same, and we are in favor of it.

MR. DENZER: Chief, let me say on this that we're toying with some new provisions.

MR. BARTLETT: That's a bad word, seriously considering.

MR. DENZER: Seriously considering them. This problem of a warrant being issued in one county and then it's found that the defendant is in another county at some distance and there's a telecommunication of some kind between the two counties, and yet an officer in the county of arrest doesn't have any warrant, we're trying to work out something whereby he can make that arrest as if he were an officer named in the warrant.

I understand that probably the police do that somehow anyway and even now. I suppose you use the telephone and teletype and whatnot and people are picked up on warrants even though the arresting officer doesn't have a warrant in his possession, and I suppose that's a necessary tool

of the police.

CHIEF DOMINELLI: Well, I know you recall at the Combined Law Enforcement meeting, I think it was at the Thruway, a couple months ago you discussed that at great length and you were very, very sympathetic and in effect we're talking about a teletype message acting as a warrant, knowledge of a warrant being issued for a particular person in a particular county and the knowledge being given by the teletype message. This is what we were talking about.

MR. DENZER: That's correct. There doesn't seem to be any explicit authority now for that although it's done, I'm sure.

CHIEF DOMINELLI: Thank you, sir.

In Section 70.20, we think that added thereto should be power given an officer to make an arrest anywhere in the State even if it is a misdemeanor if it is committed in the presence of the officer. If police officers are willing to extend their duties and powers so as to make their skills available to the community on a large scale, it seems that the statute should reflect this concern

of theirs in controlling crime on a statewide basis.

For an example, the necessity for such legislation referred to an incident which occurred on Saturday, December the 10th, 1966 in New York City. An individual went berserk with a rifle, went berserk and killed two innocent strangers passing through Bryant Park which is located on 42nd Street and 6th Avenue. An offduty patrolman from Troy, New York, through his training, dedication and initiative, brought these killings to a halt by putting four shots into the berserk individual.

Perhaps this immediate response by Patrolman John Gray of the Troy Police Department halted another Texas tower incident where many were killed and/or injured. It may surprise you to know, and perhaps Patrolman Gray is unaware, but he was not protected by any State statute in acting as a policeman within the City of New York and we brought this to the attention of Mr. Denzer at the Combined Law Enforcement Council meeting also.

MR. BARTLETT: This is a very difficult

area, as you know, Chief.

CHIEF DOMINELLI: Right.

MR. BARTLETT: I was surprised to hear it stated by the representative of the Buffalo police force that he thought that they did have statutory authority to act in such circumstances but they're the only people in the State who are clear on that if that's their view.

Quite apart from the work of the Commission, let me say that consideration is being given to dealing with the bailiwick problem at this session of the Legislature. It's a very difficult one. As you know, the problems of municipal tort liability and compensation are very much involved and one of the problems we've had in the past in defining the authority of the policeman outside of his bailiwick has been the question of who's responsible, is it the municipality in whose service he's employed. The Troy policeman, for example, if he acts in New York City, is the City of Troy responsible from a tort liability point of view and from a compensation point of view, and when we resolve those questions, I think it will be fairly

easy to deal with the kind of authority we ought to give the policeman.

CHIEF DOMINELLI: I realize, of course, the tort factors that are involved here and I also realize it was brought to our attention prior to the meeting by this gentleman on the end, a member of your committee, I just don't know his name.

MR. BARTLETT: Mr. Bentley, yes.

CHIEF DOMINELLI: Mr. Bentley, and he pointed out to us that it has to be an act of the Legislature to amend the General Municipal Law. We are aware of this and we have a bill being sponsored by legislators to amend the General Municipal Law.

I also understand there are certain provisions made available by certain cities by State law that by enactment of a local ordinance it gives a policeman in that city statewide jurisdiction. Now, this was brought to my attention just last week and I am not fully aware of it but I understand there is provision in the law.

MR. BARTLETT: Yes, Pete McQuillan made

reference to this.

CHIEF DOMINELLI: Yes, it was brought to our attention just recently.

Well, of course, there are various sections or portions of Section 70.20 that I will refer to in reading this memorandum and it refers also to subsection 1 of 70.20 which allows any person to arrest under such circumstance. We do not want the officer to be confined to a citizen's arrest but to be allowed to make an arrest as an officer and, of course, this is along what we're talking about relative to statewide jurisdiction.

We find Section 70.30 quite confusing and we think the sections can be reworded so that an officer does not have to sit down with the proposed Code and spend a half hour trying to determine whether he has the right to arrest. We suggest some clarification of the same.

MR. BARTLETT: Under 70.30?

CHIEF DOMINELLI: Under 70.30.

MR. BARTLETT: Gosh, Chief, is there any way of stating it more clearly than under (a) and (b) of sub 1? We'd be glad -- may I ask that in

this instance the Conference submit to us specific language they would like to see in here if they find this unsatisfactory?

I think the only problem I can see here that is not created by the present law, and I don't think it's a problem, I think it's just being honest about it, we specifically refer to geographic jurisdiction which the present law does not but the case law clearly does, and I think we're trying to incorporate in 70.30 what the law is right now.

We intended, I think it's fair to say, no extension or limitation on the present law as to arrest without a warrant by an officer.

MR. DENZER: Well, I think the chief's point here must be considered in connection with the point he made before; that is, you want the police to be able to arrest anywhere in the State for a crime committed in their presence.

CHIEF DOMINELLI: Right.

MR. DENZER: And this says whether he's present or not he can only arrest if the crime was committed in his bailiwick. He can only make the arrest, and you don't like that.

CHIEF DOMINELLI: What we're talking about is an extension of that authority. For example, it could be conceivable that a New York City Housing Authority policeman or a Transit Authority policeman -- now, where would you draw the line in his geographical jurisdiction? He could walk out of the subway, see a crime being committed and what would he do?

Now, let's remember one thing. He's in uniform. He can react as a citizen, right. It's being committed in his presence but what protection would he have relative to tort that we just got through discussing here? I think this is the point we're raising here.

MR. BARTLETT: I think it's clear that any police officer in the employ of the City of New York has jurisdiction throughout the City of New York.

CHIEF DOMINELLI: Well, I understand if this law is enacted the way it's worded presently, this would raise some question and this was why it was proposed. It was brought up by one of our authority members, that they probably would have a

lot more knowledge relative to this than I would.

MR. BARTLETT: We'd appreciate it if they would give us some suggested language. We would appreciate that.

CHIEF DOMINELLI: We'll see that this is done, thank you.

Again under Section 70.40 on page 104, subparagraph 3, we object to the reference to 35.30 of the Penal Law unless that is changed to allow us to use all physical force necessary.

MR. BARTLETT: Well, you don't --

CHIEF DOMINELLI: Well, we know that presently you have a proposal, we're talking about deadly physical force.

MR. BARTLETT: Yes, let me ask in that connection, Chief. As I understood the position of the Combined Law Enforcement Conference of the Combined Council of Law Enforcement officials last week, they approved with the changes we discussed of the Penal Law Commission proposal for amending Article 35 except for the restoration of the complete fleeing felon rule. Is that not so?

CHIEF DOMINELLI: That's my impression.

MR. BARTLETT: That's the way we left it.

CHIEF DOMINELLI: Right.

MR. BARTLETT: I ask that question because I became a little confused myself by newspaper reports I read after the meeting. It was my understanding that the policy question upon which we differed that day was the extent to which the fleeing felon rule be restored, the Commission's position being that it be restored for felonies involving the use of force, the Combined Council's position being that it be restored for all purposes.

CHIEF DOMINELLI: I'm aware of that and I was present when it was stated.

MR. BARTLETT: Now, but surely your reference to subparagraph 3 of 70.40 would not require any rewording of that. Your quarrel is with what is contained in Article 35?

CHIEF DOMINELLI: Right.

MR. BARTLETT: You certainly didn't mean to suggest, did you, that the police officer in every arrest situation should be able to use whatever force is necessary?

CHIEF DOMINELLI: Well, let me read this please, so I'll know what we're saying. I'm quoting numbers here and I don't have the capacity to retain them.

MR. BARTLETT: Well, 70.40, Chief, says in order to effect such an arrest such police officer may use such physical force as is authorized by Sections 1 and 2 of Section 35. --

CHIEF DOMINELLI: 35.30.

MR. BARTLETT: All right. Now, 35.30 sets forth the degree of force which a police officer is justified in using in effecting arrests or preventing an escape.

It was not your point, was it, that there should be no limitation on the degree of force used in any arrest circumstances because, as I understood it, you were only asking for deadly physical force for felonies?

CHIEF DOMINELLI: Fleeing felonies, that's right. Well, it could be conceivable under a different situation, arrest without a warrant or with a warrant where you will be confronted with a situation where deadly physical force would be

necessary.

MR. BARTLETT: In a nonfelony?

CHIEF DOMINELLI: Pardon me?

MR. BARTLETT: In nonfelony circumstances?

CHIEF DOMINELLI: But this is provided for.

MR. BARTLETT: It's provided for now and we have no quarrel with that. That's the self-defense provision.

MR. DENZER: In other words, if the Penal Law were amended the way you want it, then you wouldn't have any quarrel with this section?

CHIEF DOMINELLI: This is the point we're making.

MR. DENZER: Thank you.

MR. BARTLETT: I appreciate your clarifying the area of difference we have between the Commission's position and the Combined Council's position.

CHIEF DOMINELLI: Chairman Bartlett, I think we all understand now it's probably the only area there is of disagreement.

Section 70.70 on page 106 is quite

similar to Section 180-a of the Code of Criminal Procedure which is commonly known as the stop and frisk law and, of course, we favor it very, very strongly.

Section 95.40 compels a witness to give evidence before a grand jury and in so giving evidence which may incriminate him, he receives immunity unless he waives such immunity or it is gratuitously given.

The problem we have with that is to see whether or not some provision should be put in there protecting police officers and refraining from making them subject to discharge if they accept a waiver of immunity or testify.

MR. BARTLETT: Of course, I think not to cut it short but this whole discussion, I understand the position of the police on it. It's at the moment at least a constitutional question in New York.

CHIEF DOMINELLI: This is a constitutional question.

MR. BARTLETT: And until such time as that's clearly held to be in violation of the

Federal constitution --

CHIEF DOMINELLI: This is in Schedule A which I have attached to the memorandum I gave you.

MR. BARTLETT: I think it's fair to say, Chief, when we really find out what the Court meant in the Garrity case then we'll be able to know what application the provisions of the New York State constitution have.

CHIEF DOMINELLI: This was the basis for including this in the memorandum. We now go to Section 205.20 which appears on page 268.

The position taken by the Police Conference is that there should be no discretion in the Court on sentencing if it appears that the felon is a persistent felony offender. The position of the police officers in relation to the problem is that the Courts have been too lenient in their treatment of persistent felonies. By leniency, they have released as many more who have shown a pattern of disregard for law and order that is consistent and should not be ignored in sentencing.

We feel the only deterrent to those who

show a record of continuous law violation is a strong attitude of the courts resulting in sentences which reflect this policy.

MR. BARTLETT: Of course, Chief, you know that this represents a change in two particulars from the old law and the first one being that you only require two prior felony convictions rather than three prior felony convictions and I must say in that, the fact that we were reducing the requirements for the imposition of persistent felony offender sentences, motivated us to make this discretionary with the court.

An example might be a conviction at age 17 and again at age 19 and the third conviction coming at age 50, and we thought that the court ought to at least have flexibility in whether it should be imposed or not. We've been assailed on the other hand for including this at all, as you know, and especially because we predicate it on only three felony convictions rather than four.

I understand your position.

CHIEF DOMINELLI: In relation to Section 365.05 on page 393, we object to the broad reference

to public servant and we have covered that previously.

As to Section 365.50 on page 399, we object to the words "other than deadly physical force" as it appears in the next to the last line of the first paragraph. If the police have a right to make an entry, they should use such force as is necessary to get in and not be put in a position of not being able to subdue the resistor with weapons.

The staff comment on this section says, "in which the police officer can subdue the resistor with his hands and fists or even with a billy within reason". All this failing, however, he must not use his revolver but must call for reinforcements.

What the police officer is faced with is opposing a householder who resists his entry with a revolver or such weapons as would call for the use of a revolver, but must he stand by or must he run? The position of the police officer in such a situation is ludicrous as well as dangerous.

MR. BARTLETT: Chief, in this instance,

the example you give, very clearly the policeman would have the right to use deadly physical force because he's confronted with deadly physical force. We make it clear, for example, in Article 35 that there is no duty on the part of the police officer to retreat where he is in the execution of his duty. He, therefore, if he is resisted by the use of deadly physical force, could use it himself.

Our point is, and I don't think we've changed the law even slightly in connection with the execution of search warrants because I think this was the law before, to the extent anybody can tell you what the law was before because it was very hazy, but you would agree, would you not, that in the execution of a search warrant the policeman ought to use deadly physical force only in those circumstances where he's confronted with it?

CHIEF DOMINELLI: Where it's used against him, yes, I agree. The staff comments were the things that we were thinking about.

MR. BARTLETT: O.K. We'll give our attention to this to be sure it's perfectly clear.

CHIEF DOMINELLI: I think this was the basis of the inclusion.

MR. BARTLETT: I don't think we have any difference here.

CHIEF DOMINELLI: No, sir.

MR. BARTLETT: Gentlemen, the statute says other than deadly physical force but that clearly, however, the self-defense provisions come into the police officer's actions if he is confronted with deadly physical force on the part of the householder or the dwelling occupier. If it needs clarifying, we'll clarify it.

CHIEF DOMINELLI: Mr. Chairman, as you, I know, realize, it was stated here previously by the Judge, I think, that I know it's extremely difficult to make simple laws when it comes to this type of force but our basis for this, the basis of most of our arguments, have been the wording. There are so many words that are put into this type of a law that it does confuse the man out in the street and he is naturally confronted with an extremely hazardous condition under situations that would make him be reluctant and, in

fact, he could place his own life in jeopardy. It's as blunt as that.

MR. DENZER: Well, in the regular Penal Law justification provisions, we're very careful to insert everywhere that when the police officer, the private citizen, whoever it is, is confronted with deadly physical force he can always use it.

Now, unfortunately, the Penal Law doesn't deal with the search warrant situation so we had to put it in here and maybe that should be stressed again here. That's probably the trouble.

MR. BARTLETT: We can do it.

CHIEF DOMINELLI: Thank you.

We'll discuss Section 370.05 which confines to a very small number the right to apply for eavesdropping warrants. Under this section, it must be done by the District Attorney or the Attorney General and this does not include any assistants. It is the feeling of the police officers that by omitting the police chiefs or others as individuals who may apply for eavesdropping warrants, they have greatly hampered the police efforts and deprived them of a very potent weapon

against organized crime. We feel that the police officers should be permitted to make such application.

MR. BARTLETT: The motivation of the Commission here, of course, was to respond to the Berger case. It seemed to us that under Berger, the thrust of Berger was to limit the use of eavesdropping if it's permitted at all, involving grave considerations of public policy and that public officers at policymaking levels should determine in the first instance whether an application should be made.

I understand the police position on this, but in the event it were broadened, Chief, you wouldn't go back to the old rule, would you, above the grade of sergeant, I think it was?

CHIEF DOMINELLI: Sergeant was allowed. No, I think there should be more discretion used. I think it should certainly be extended to a chief of police or commissioner of police at least, at least extended to that person with a responsibility that they have in their community.

MR. BARTLETT: May I suggest, so that none

of us are lulled into inactivity here, I have strong reason to believe that the eavesdropping question will be dealt with by the Legislature this year and so I hope you'll make your views known to the appropriate legislators.

CHIEF DOMINELLI: Again we realize the tenor of the community relative to eavesdropping and wiretaps and so forth. We have a tough row to go.

MR. BARTLETT: It's a hot issue.

CHIEF DOMINELLI: And we realize that.

MR. BARTLETT: But I just want to point out that this part of our proposal very likely will be acted upon this year by the Legislature.

CHIEF DOMINELLI: I think that's a true statement. Thank you.

MR. BARTLETT: In your comments as to 370.20, they are to the same effect?

CHIEF DOMINELLI: Same way.

MR. BARTLETT: And I told you why we used public servants in the execution because it might be an electronics expert retained, you know, who's not necessarily a policeman but we'll give

consideration to this.

CHIEF DOMINELLI: Good. Well, I certainly appreciate the opportunity, Mr. Bartlett, and members of the committee, to afford me the opportunity to speak to you and to make the views of the Police Conference known to you and we would like to offer any assistance that we may give and make ourselves available any time that you may think that we could project something that may be of some value.

Thank you very much, sir.

MR. BARTLETT: Thank you, Chief, and specifically you will give us some suggested language on the arrest without a warrant section?

CHIEF DOMINELLI: Definitely.

MR. BARTLETT: Which we may consider. Thank you very much for giving us the benefit of your views.

CHIEF DOMINELLI: Thank you, sir.

MR. BARTLETT: We'll take a break just for a couple of minutes and then we will take one more witness before we break for noon.

(Whereupon a short recess was taken.)

MR. BARTLETT: Since there appear to be no other witnesses who wish to be heard this morning we will, therefore, recess for lunch and convene again at 2 p.m. Before recessing, I would like to introduce the other members of the Commission who are here with me, Vice-Chairman, Mr. Timothy Pfeiffer who will preside this afternoon; Senator John Dunne; representing Senator Zaretzki is Mr. Stanley Gruss; representing Assemblyman Lifset is Mr. William Crotty.

We will now recess.

(Whereupon at 12 noon a luncheon recess was taken until 2 p.m.)

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AFTERNOON SESSION

MR. PFEIFFER: Gentlemen, ladies, it's 2:15. Let's start, please.

The first witness, I think, is Mr. Berlat. Is Mr. Berlat, are you here? Mr. Berlat here? Mr. Berlat is legislative counsel of the New York State Council of Young Democratic Clubs. You wish to be heard, sir?

MR. BERLAT: Thank you, sir.

Members of the Temporary Commission, I represent the several thousand college students of the New York State College of Democratic Clubs.

We are extremely concerned about the newspaper accounts of the Commission's recommendations to change Article 35 of the Penal Law in regard to offenses involving the lack of culpability. Unfortunately, I was just able to get a copy of these proposed changes today so that most of the remarks that I have are based on newspaper accounts. Quickly looking over this, I see nothing that deviates from what the newspaper accounts had on it.

We are firmly in favor of continuing the present provisions of the Penal Law concerning the

use of deadly physical force by an arresting officer or by an aggrieved party and the use of reasonable physical force by the same.

MR. PFEIFFER: You say you are in favor, you mean --

MR. BERLAT: The new Penal Code provisions.

MR. PFEIFFER: The new Penal Code provisions or Penal Law provision?

MR. BERLAT: Right.

MR. DENZER: By "new" you mean the proposed amendments?

MR. BERLAT: No, we mean what is presently the law that went into force as of September 1st, 1967.

MR. CROTTY: Penal Law.

MR. BERLAT: We are well aware that there has been a great deal of controversy over these provisions in the past six or seven months. We feel that most of the opposition to these sections has been generated by the urban unrest exploding into riots and the rising public awareness of the harm.

Serious as these circumstances are, they

do not justify the retrogression or, as the papers have it, the liberalization of the Penal Law. Urban unrest will not be solved by stricter police procedure. It cannot be solved by anything that this Commission may do. However, the recommendations of this Commission can throw new fuel on an already simmering situation. Police relationships with urban ghetto dwellers are at a very low point. Publicity to changing the Penal Law at this point will generate and will only cause a further decline in such relations.

We have seen no evidence for these changes other than the hysterical cries of the population alarmed by very real dangers and given a convenient scapegoat. This scapegoat will do absolutely nothing toward solving urban unrest, riots and et cetera. We have heard several reports that the number of armed robberies has risen rapidly since the new Penal Law went into effect. Presumably, this is due to the supposed immunity from being shot at by a policeman in making an arrest and escape and criminal neglect in escape.

As I understand the law, and I am not a

lawyer, a policeman may use deadly physical force if he has reasonable knowledge that such force was used or threatened to be used in committing a crime. I believe that the policeman would have such reasonable knowledge in most cases involving the use of deadly physical force. In those where he did not have that knowledge, any use of deadly physical force would probably endanger innocent passer-bys and cause more harm to the community than allowing the policeman to use deadly physical force in the case of any fleeing felon. I do not believe that armed robberies will be increased because of this provision of the law because the felon has no idea of knowing whether the policeman would have knowledge of the felon's use of physical force and the felon will, therefore, hesitate to use a gun or threaten its use with the knowledge that the police can use deadly physical force against him.

In short, I think that this provision makes it likely that the number of armed robberies will decrease. Not even criminals want to be shot at.

It is also the belief of my organization that the State is moving away from the idea that murder is justified at any time. This we applaud. We feel that the restrictions on the use of deadly physical force by the police and by private citizens will help to decrease the number of murders that are committed unintentionally. As an example, I note the instances where a wife has shot her husband because she mistook him for a prowler. Under the new law, while she might still have the gun and still be ready to shoot, she would be under a greater obligation to know the intentions of the suspected intruder before she shot.

With proper education upon the issuance of police permits, such unintentional deaths can be drastically reduced.

It also appears to my organization that most of the criticism of the Penal Law, Article 35, is based on supposition instead of fact. We would hope that the Commission engages in more study before it carries through its proposals to change Article 35.

We feel that the new law is deserving of

a trial period before any attempt should be made to change it. In the past seven months, we have heard of no instances where Article 35 has hindered a policeman in performing his duty or in preventing an individual from defending himself or his personal property. We believe that Article 35 spells out in clear and precise language very reasonable and necessary restraints upon those who exercise authority. We hope that the Commission will allow this provision to have adequate opportunity to prove its effectiveness.

Finally, we feel that the great public outcry in Article 35 has been caused by an unwillingness of many of our public servants to deal forthrightly, to deal with the many problems of the poor, the disadvantaged, the minority groups in our cities. These men have drawn a red herring across the facts because the drive for equal action for these groups has become beclouded and they have capitalized on the legitimate public fears of riots and crime to propose false solutions. We hope that the Commission will resist such attempts and help to educate the public that

increased severity of law enforcement will not solve but will increase urban unrest.

On behalf of the New York State College Young Democrats I want to thank the Commission for the excellent work they have done in revising our Penal Code, Penal Law and our Code of Criminal Procedure. We are very happy that the Commission has continued to place New York State in the forefront of modern law enforcement and we hope that the Commission's work is continued in the future.

Thank you very much.

MR. PFEIFFER: Thank you. Do you have any comment on the proposed Criminal Procedure Law? What you're dealing with, what you have, is the Penal Law, of course.

MR. BERLAT: Yes, I know I spoke to Mr. Bartlett about this this morning. Our organization has taken no official stand on the Code as it didn't have a chance to look at it when it passed through. It did take a stand on the Penal Law and wanted to be heard on this.

MR. PFEIFFER: Thank you very much.

MR. DENZER: Your remarks are very warming

to us. I only hope that you can get the Legislature to agree with them for all of us.

MR. BERLAT: We will be talking to the legislators about this too and we hope to make sure that the provisions of the law stay the same as they are at the present time instead of having the changes.

MR. DENZER: Well, your assistance is very much appreciated.

MR. BENTLEY: Of course, you realize you're talking to an alumnus when you said that.

MR. BERLAT: Thank you.

MR. PFEIFFER: Is General Schuyler here? He was to come at 2:30, was it?

MR. DENZER: Yes, it's 2:20.

MR. PFEIFFER: Is there anyone else who wishes to be heard at this time?

MR. BENTLEY: Maybe Mr. Bolton would like to answer the charge of Judge Zweig about judge-shopping.

MR. PFEIFFER: We're always glad to hear from Mr. Bolton either in camera or in public.

MR. BOLTON: It's never in camera with

Pauline here.

You're not being facetious? Well, maybe I could say something on this.

Judge Zweig mentioned this, and I would do this commenting only because I presume you're waiting for General Schuyler. Judge Zweig mentioned that there has been recently -- and this applies particularly to the time since Judge Zweig became president of the Magistrates' Association or, as Mr. Crotty knows, there's quite an old relationship between Judge Zweig and myself, as former partners --

MR. CROTTY: Going to give away your age.

MR. BOLTON: We have had a series of particularly interesting meetings and one long meeting with the magistrates. The efforts that Judge Zweig -- and primarily he -- and this association are making to change what were former practices in this area and former difficulties are very extensive and our conversations take up this matter. We've run into quite an area of problem.

First of all, every judge is not of the same disposition, same ability, and by disposition is not nearly as anxious as some other judge to work

and so, therefore, it's only natural for a person to go to that man who's going to give him the greatest service, and this is something that occurs.

Now, the approach that is being made is that these courts have a thorough understanding of what Judge Zweig was saying today. The Court of Special Sessions at the town level, the village level, the city level, the municipality, the return should be made to the court and not to an individual judge and this is the primary difference that we have to get at and then, of course, which judge is assigned and how the matters are handled then become a matter for that municipality in the discipline and administration of its own officials.

When we get past the procedure or what used to be the practice under the former Justice Court Act, instead of addressing ourselves -- and we're primarily talking about the volume right now of traffic cases -- when we get past the practice of making the return to Judge Jones or Judge Smith and making the return to the court, because we handle so many of these as you can well understand, when we get past that point and when we get that

discipline in there, I think that's going to take care of a good deal of it.

The next part is for the magistrates to so discipline themselves that they will always have people who are assigned. I have to say one thing, and it is, I think, important to your consideration of arraignments and everything else that Judge Zweig was talking about. I have to say that we personally have a great feeling for the devotion to duty and so forth of these magistrates. He has mentioned several times alternative methods and for the rural areas of upstate New York, this is quite a problem.

We have found that the availability of magistrates is a magnificent thing for us. We would have a great deal of difficulty by geographical location if we reduced ourselves down to another system where, let's say in the County of Rensselaer, there are only two magistrates because that would mean bringing people and carrying them -- and now we're talking about maybe a hundred or two hundred miles, for the purpose of arraignments and so on. The magistrate could well get back as anyone

else is well aware and say that "my hours are from so-and-so in the morning and 7 at night. I'm not taking anything else any other time".

But when he spoke about an accusation made about midnight justice and so forth, I think we all have to realize that there are times that the willingness on the part of a magistrate to work at midnight or at 2 or 3 in the morning is one of the greatest benefits that a defendant can have because he gets an immediate arraignment instead of having to be held over until the morning as the magistrate could say, you see, "I don't have any hours, my official hours are this and the law only says that I have to work between these hours".

Now, these people are willing and ready and this helps as we are talking about immediate arraignments. It's very important in this area.

In the discussion this morning about the issuance of process, a question was asked, are you not doing this now on the basis of arrests on warrants without possession of warrants or with the teletype or the communications system. I think we mentioned this informally but perhaps you should know that the

practice is not to arrest on the basis of a teletype communication under the present Code even though a warrant has been issued.

Now, we are reading the new law and, hopefully so, that the teletype communication would be a formal means of setting up the agency to permit the State trooper in Buffalo to execute a warrant that was obtained in Clinton County up in Plattsburgh, let's say. It's our concept that we would do this only if a warrant were issued. We would never do it, and it's too dangerous; it's open to too many difficulties and abuses to do it other than if there were a warrant issued because right now -- and I think we mentioned this to you, Dick, in an informal meeting -- but I mentioned to counsel at one time that we have computers, as you know, now making these, and the sources that are supplying information and demands of these computers are such that we're running presently into problems where there are not cancellations of process. The machine is going out and, in effect, sending the information out, the arrest is being made and we find out that the thing has already been

withdrawn.

Since we see that kind of problem we're going to be quite meticulous. We would like to be able to have the process issue on the agency principle where a warrant in a misdemeanor case had been issued but we're insisting upon the issuance of a warrant for our own protection and I mentioned the use of the computer to you before and in all of your thoughts, please remember that this machine is working. It's only a machine as certain people nicely know about their machine and it's only going to do what people are putting in and particularly it's still going to do it even if people don't take out and that's one of our problems in that area. And I'm only hitting the general areas here.

We are quite concerned and I think that I would like to comment a little bit on your process of the summons and the appearance tickets and so forth, the further extension of what is the uniform traffic ticket concept in a long list of these cases. This we highly applaud. I think we're going to get into an area here where we're going to be able to a lot more effectively do our job and I say

this because, you see, as I mentioned a moment ago, this is a big geographical concept we're dealing with.

The difference between arrest and taking the defendant to a magistrate and then back to a jail and so forth, we may be talking about a hundred, two hundred miles, and every time that we talk about mileage we talk about time and this is extremely important with the Division of State Police as in any other police agency but since it's our own problem, we wish to emphasize that this is important to us because every time that a trooper is taking a defendant from one place to another just for the purpose of serving this process and transportation in this way, we're taking him off of a tour of duty in which he is then no longer able to enforce other laws or to perform his duty. So time spent in this travel and transportation is of extreme importance and I think it's going to become of concern. If you started adding it up, it's the same as saying how many other troopers are you then affecting. You're almost, in effect, putting other troopers at work by saying it.

The question of bail is one which is a very complex or somewhat of a difficult problem for us in that we have almost historically not wanted to have the responsibility of money. We have got to get at this some way. We're having problems now with people from out of State, particularly Canadian people, on misdemeanor cases or traffic cases and, of course, if they go back up there that's about the end of it, you know. You have no reciprocity with Canada and certainly not with a lot of other states. It's difficult to take them in. Judge Zweig mentioned the amounts. I think that we would go along with a lot of his thoughts on lowering the amounts because not everybody has that much money on them and we would hope that bail could be made. I think that we would like bail to be made in a way without having to take a person in and incarcerate. Not only does that first of all clear up this problem of transportation, because the only place you can take them is so far off, but more and more the availability of lockups and so forth are decreasing in upstate New York. There are people in the villages and towns and in the

cities and so forth, smaller cities, that just don't have the personnel available to maintain lockups so they don't take them.

Now, we're running into a lot of mileage and, therefore, in that area, we go along with a great deal of Judge Zweig's comments.

MR. DENZER: Do you think the tendency of the police would be to set this prearraignment bail at a rather high figure? In other words, these figures which you find in here, of course, are not mandatory. They're simply the outside limits.

MR. BOLTON: Yes.

MR. DENZER: But it's possible, I suppose, that some police officers might be inclined to set it near the maximum.

MR. BOLTON: The trouble is you'd almost have to, as a rule -- as a departmental rule or division rule -- you'd have to set some sort of a figure giving very little latitude to the person taking it. Otherwise, he would be open to accusations that you set it up or you set it down. So in order to keep yourself from being exposed, we would have to probably set a rule as to what it is,

not give a latitude to the person taking it.

Now, this is not so difficult in the city but out in the rural areas where we have to administer, say, 200,000 men doing this and/or the sergeant taking it, we are better off with a set rule or a set amount and the concept of it is that the person is bailed. That's the reason we want him. We'd just as soon he be bailed. Right now, we have nothing to do with him except take him somewhere and that, as I say, may involve a couple hundred miles. We would prefer that he be bailed. We're better off that way. Now, particularly this is true since a lot of times we're talking about the great volume of cases, traffic cases with out-of-State people who are in a state where there isn't any reciprocity or with Canadian people most of the time, you know, this bail is going to be forgotten and we would like to be able to have a process by which we can say that closes this case or, in effect, that's the same as a plea so that you can stop the computation of statistics and have a lot of open cases but we'd rather a set amount be an amount that is feasible and by that

I mean reachable by the ordinary person, so that we can say that this is the amount of bail and we're not giving our people any latitude for such-and-such, that this is what it is and if it's set by the statute, you see, we're much better off to say that that is our rule.

But this, however, is a very important area and the administration of it or how to take it without having someone say that you took more is a big problem. We've purposely avoided that for years.

MR. DENZER: Well, that's very, very helpful.

MR. BOLTON: We don't necessarily want it now. I have spoken to you about other matters but I was filling in until General Schuyler came. He's here.

MR. PFEIFFER: Thank you, Mr. Bolton.  
Well, General Schuyler?

GENERAL C.V.R. SCHUYLER: Thank you, sir.

Gentlemen, with your permission, I would like to make a statement concerning the duties and responsibility of our Capital Buildings Security

Police force in the relationship of their responsibilities to some of the provisions of your proposed new criminal law.

MR. PFEIFFER: Glad to hear you.

GENERAL SCHUYLER: Gentlemen, as Commissioner of General Services, it is my responsibility to provide security for State buildings and properties in the capital city. To facilitate the discharge of this duty, in 1963 with the approval of the Governor and with funds authorized by the Legislature, a Capital Buildings Security Police force was created. That force now numbers 82 officers and men. In 1964, its members were granted peace officer status by the Legislature.

They are responsible to me for control of traffic and maintenance of order and security in the buildings, roads and grounds of the State Office Building Campus, the Capitol, the Executive Mansion, the Governor Alfred E. Smith Building and certain other State properties in Albany. Their jurisdiction would extend also to the South Mall when and as construction there is completed.

I am disturbed to note that the proposed

Criminal Procedure Law, as I believe it is presently drafted, may seriously impair the effectiveness of this force and create a dangerous gap in the protection by the State of its employees and of State property and of the public on State properties.

As I understand it, the Criminal Procedure Law would eliminate the concept of peace officers and sharply limit those described as police officers. While I entirely sympathize with the reasoning behind these changes, I am confident that a careful analysis of the purposes of the training and of the responsibilities of our Capital Buildings Security Police will justify their inclusion in the police officer definition.

The State Office Building Campus comprises 438 acres of State land and it accommodates almost 11,000 employees and about 5,200 vehicles every day. As the South Mall moves toward completion, we must plan to substantially augment our security police force to provide security for another daily working population of perhaps 10,000 more State employees and 3,500 vehicles.

As you know, the mall complex will include an extensive cultural center and museum, roadways and large parking areas, a meeting hall, restaurants, children's play areas and promenades, which will attract an estimated one million visitors annually. Because the Albany police decline to patrol State properties within the city, the sole protection for these employees, visitors and official guests at both the Campus and later at the South Mall will rest with the Capital Buildings Security Police. State Police assistance, of course, is available on call for emergencies, but it is my understanding that they are not staffed and do not propose to staff for the day-to-day responsibilities of just ordinary patrolling and security protection.

All police are required to complete the 240-hour course prescribed by the Municipal Police Training Council and the Office for Local Government. These men must pass the same civil service examination required of all full-time police officers of the various municipalities. About 24 hours of this course are devoted to the proper handling of firearms.

The chief of our force is Chief Barrett who is here today, who came to us from his post as a captain in the Schenectady Police Department, and he has been with us since the inception of our organization. While I am satisfied of the need of our Capital Police to bear arms, I am far more concerned that the new law will strip our officers of their authority to make arrests without a warrant on reasonable cause to believe that a crime has been or is being committed.

In recent months, we have experienced several incidents which, convincingly I think, demonstrate our need for police officer status.

A number of bomb threats have occurred at the Capitol and at the State Office Building Campus requiring evacuation of large numbers of people. On two recent occasions, persons carrying loaded guns have been encountered, one at the Capitol and one at the Campus. Our police handled them both adequately. During the 1966-67 fiscal year, our force investigated about 150 criminal complaints and, in addition, made about 200 arrests for other infractions principally of the traffic laws.

As you can see, it's really a working police force and it's not intended as a palace guard.

Under Article 70 of the proposed Criminal Procedure Law, only a police officer may arrest upon reasonable cause. Unless our people are recognized as such under Section 1.20, subdivision 15, a breakdown of police protection within the geographical area of this jurisdiction of ours could develop. Certainly, few officers would risk the arrest of a person reasonably suspected of carrying a gun in Capitol Park unless they are somehow protected by police officer status. Such instances, of course, could be multiplied by any number of cases in our experience. So to assume that unarmed officers with only citizen powers of arrest will suffice in this situation is, I think, somewhat risky.

In summary then, none of the very important reasons for limiting the numbers and types of functionaries entitled to police status would seem to apply to the Capital Buildings Security Police.

I'd be most grateful if this situation could be revised to recognize this real and pressing need which I think exists.

I am grateful to you for this opportunity to talk to you. With your permission, I'd like to leave with you a copy or two of this statement and, of course, I'd be very happy to expand further in response to any questions you might like to address.

MR. PFEIFFER: Thank you very much, General. We appreciate your appearing.

MR. DENZER: General, yes. General, I take it that the Albany Police Department has no jurisdiction on the Capitol Grounds?

GENERAL SCHUYLER: They say not.

MR. DENZER: Yes. Now, the list of police officers as such, as you have noted, is rather limited in our proposal, in fact only five categories. There is a rather extensive comment on that provision and in the middle of it somewhere, which probably most people would not see unless they scanned this with a fine-tooth comb, we have this little statement: "The proposed list of police

officers in subdivision 15 is not complete and the Commission is giving further study to including other public servants performing police functions."

Now, it's our intention to investigate this whole area further to determine who really are genuine police officers. In other words, we don't want to include humane society agents and court attendants and so on. All I want to say here at this point is you certainly made out a very strong case and a very persuasive case for including the Capital Police in that group and while I can't speak for the Commission at this moment, my guess would be that the commissioners would agree with everything you say and that the Capital Police should be included among the police officer category.

GENERAL SCHUYLER: Well, thank you, sir. It was that very little provision that you quoted me that encouraged me to come before you today thinking that this would perhaps be a very appropriate time to bring this to you.

MR. PFEIFFER: General, you say in the statute creating the Capital Security force that the members of the force are designated as peace

officers in the existing statute?

GENERAL SCHUYLER: Let me just make this statement: We looked into this, when we first created this force in 1963. We studied the question as to whether legislation was required. In view of the fact that legislation does impose on the Commissioner of General Services responsibility for the security of the Capitol and adjacent buildings, the Attorney General agreed that special legislation for the creation of our force was not necessary, so we created the force with the approval of the Governor and we included funds in the budget for that force. They were approved.

The following year, we asked for and got a modification to existing law, the law this lists the various categories of peace officer, and that modification included members of the Capital Buildings Security Police as peace officers. That is our status today.

MR. PFEIFFER: I see. So that it wouldn't be advisable really and not proper for the Legislature to determine and enact into law that the members of the force are police officers, not

police officers, not peace officers and then they'd automatically come within this?

MR. DENZER: Yes.

MR. PFEIFFER: It's easier probably to change this, I suppose.

MR. DENZER: They're not classified under the present Code as police officers but as peace officers.

GENERAL SCHUYLER: That is right, sir, and we have on some occasions, at least last year we submitted a proposed modification which did raise us up to police officer status. It was not acted upon; it was not acted upon.

MR. DENZER: Well, it would seem that it is a police group. There doesn't seem to be any doubt of that.

GENERAL SCHUYLER: We think it is, sir, and our officers have complained on numerous occasions, particularly these two cases, for example, where men were caught with loaded pistols, that they were really endangering their own status by the searching of these men for loaded weapons.

Both times or at least one time, the man

denied having a weapon with him even though he had been seen with it. Our policeman searched him nevertheless, found it -- took him down to the Magistrate's Court in Albany and booked him for carrying a loaded weapon.

MR. DENZER: Mr. Bolton, would it be your opinion that the Capital Police are a genuine police group in the sense that we talk about police departments and police forces?

MR. BOLTON: Certainly as you have been distinguishing them, Mr. Denzer, and with the requirement of training, certainly their obligations and so forth, very definitely.

MR. DENZER: Well, certainly the training requirement is very important. One of our cautionary approaches here is not to include in the police category those groups which do not take the police training or are not required to take the police training courses but the Capital Police, you say, do.

GENERAL SCHUYLER: They do.

MR. DENZER: Are required to do it?

GENERAL SCHUYLER: They are, sir.

MR. BOLTON: And you would still have your geographical jurisdictional considerations in there which is fine by you, General.

GENERAL SCHUYLER: Which I think is very clear, yes.

MR. BOLTON: And we do not wish to police this, speaking for the State Police.

GENERAL SCHUYLER: I'm sure you don't.

MR. PFEIFFER: There's no conflict there.

MR. BOLTON: I can confirm what the General said.

MR. PFEIFFER: Could we have a copy of your statement?

GENERAL SCHUYLER: Yes, sir, I have a few copies here. I can leave them with you.

MR. PFEIFFER: Thank you very much indeed.

GENERAL SCHUYLER: Thank you.

MR. PFEIFFER: Is there anyone else who wishes to be heard?

MR. BOLTON: Could I continue if there's no one else? I don't want to interfere with anyone else.

GENERAL SCHUYLER: Sorry to interrupt you.

MR. BOLTON: No, no, I was just holding forth until you came.

There was one area, if no one else is to speak, there's one area which I honestly feel -- and this is not taking the section of this proposed law but rather to think in terms of perhaps a new approach in the area of the trial and the production of evidence and so forth, when you speak of subpoenas for production as to all of the witnesses. I think that we're now into an area in the criminal law where some deep consideration has to be given to the method of production of evidence, that is physical evidence, and by subpoena duces tecum, this general area.

At present, we're operating under the provisions of the Civil Practice Laws and Procedure. There is no specific section of the Code and there isn't any in your new proposed law as a specific section that deals with this.

The present section of the Civil Practice Act provides that the production of papers and so forth by subpoena duces tecum must be on the order of a court and I might say that most lawyers don't

know this -- as a matter of fact, I didn't know it either -- but the people, without the forms, you know, they write the forms just as they do any other witness subpoena and they leave a place for the attorney demanding this production to sign and no place for a judge. It doesn't even indicate that the judge should sign. But, of course, the provisions of the Act do provide that a judge sign it.

Now, there is a provision which seems to be a little bit in the air because the notes of the Commission indicate that they are not really sure it should be in and that is a provision for notice to the opponent for the production of the books, records and so forth.

Now, we have taken this position, whether rightly or wrongly, that unless there is notice to the opponent we would say that the judge should waive it. He has the right to waive it, of course, if he so desires but if he doesn't specifically on the subpoena waive it, we assume that he hasn't waived it.

Now, the reason this is a problem is

because of the general complexion and trend in the criminal law for it to become more and more akin in its proceedings to a civil case, and I think this is the danger not only here but in several other places. It isn't like a civil case. We cannot have the open end disclosure of all your work papers and records and everything else and I don't it should go either way. I think that the whole approach to the criminal proceeding and its real merit throughout the years has been in this concept of an adversary proceeding in which each side tries its case and each side has its evidence with the Court sitting on the case and, in effect, ruling upon it.

This should be very definitely preserved and this is one area where I'm afraid that we keep getting off stride. We are operating, as it were, with a civil practice concept in this field of the production of evidence in a criminal case. Now, I would suggest that perhaps you should study this and perhaps put in our own section in the Criminal Code, or in the Criminal Procedure Law, one that deals with the production of books, records

and papers. I would suggest that it be very clear there that this production be based only upon motion.

Now, the reason for this is because, quite obviously, if you don't have that, the right to request the subpoena says bring down the whole Division of State Police Building. You know, bring everything. Now, of course, this is nonsense. The only thing that really should be produced is that which may be used in a trial, not a lot of other things. It isn't just a complete fishing expedition where you throw out a whole net and it should be for the judge to pass upon that first.

MR. PFEIFFER: That's true in a civil proceeding too, isn't it?

MR. BOLTON: It is, but it's being forgotten. More and more, most every subpoena that comes in is just signed by the lawyer and he goes through a whole list of things, none of which will ever be usable in a trial. Now, if we have the judge pass on it first --

MR. DENZER: You mean that in every case the District Attorney would have to, instead of just issuing the subpoena, would have to or must go

before the judge and a motion must be made and then the defendant served with motion papers and you argue it out before the subpoena is served. I mean, is that the --

MR. BOLTON: I'm talking about the work and the papers of the prosecution or the police agencies and this is the area I'm talking about.

MR. DENZER: Yes.

MR. BOLTON: Rather than just the issuance, that it be brought before the Court, as I think it does so provide, but I want to make this clear, there's an evasion, an inroad being made, and erosion in the civil and I don't want that to happen in the criminal.

MR. PFEIFFER: Isn't it true that normally if you have a very broad subpoena and the civil -- either in a civil or criminal case, and the person on whom it's served thinks it's just a fishing expedition, he can make a motion to set the subpoena aside?

MR. BOLTON: Yes.

MR. PFEIFFER: Isn't that the normal way, and then the judge decides on what he will say or

whether he will permit the moving party to produce certain things and what he will permit to be produced?

MR. BOLTON: That's very true, but what I'm trying to get to in my next step is that I think we should be very careful perhaps to define what is usable, what is returnable because the courts are getting to a place where they are getting into areas that are not ever to be usable.

Now, particularly, those things which are usable in the trial are statements made by the officer of his own knowledge, and it would be under the Jenks rule. If he is a witness and it's a conflict, has he made a statement that's conflicting. There is nothing now that provides for him going into every report of anybody, every piece of physical evidence, anything else, except that there isn't -- well, that's definite except that the courts don't understand it. They really don't understand it. I rather urge -- and I'm not proposing a specific suggestion but this just occurred to me this noontime that I think that it would be well to consider this because each day I

see this coming in from all over the State. I see judges passing upon it, saw one this morning, things that he was ordering us to deliver that would never under any concept ever be admissible at trial.

MR. PFEIFFER: What can you do with that?

MR. BOLTON: I'm not sure yet.

MR. PFEIFFER: What will you do, go before the judge and protest and make a motion to have it made more precise? I don't mean this particular case.

MR. BOLTON: I'm not sure because, you see, now you're getting me into a central entity. Actually, the District Attorney ought to be doing this. He has done it and he didn't understand it, I'll be honest with you. He didn't understand it, so my only true remedy, if I want to follow through what you say is to ask the Attorney General to go there and move to suppress this and now we're getting into something that's very complicated and I don't think really very good. We shouldn't be coming in as a third party there in a criminal proceeding and, in effect, represented by the

District Attorney and I would urge and I always do urge him but you have to explain this. Most of them haven't even read this section -- not most of them but a good many haven't even read the section -- on subpoenas duces tecum. They don't have it.

My urging here is only in that there is quite an erosion in this field in the civil area. I wouldn't want to see it in the criminal area.

MR. PFEIFFER: You want to have some affirmative provision in the Criminal Procedure Law.

MR. BOLTON: If you have it as a separate one, then whatever the erosion that takes place in the civil area will not necessarily affect the criminal. That's my thought as I sat here and it's becoming quite a problem and I'm sure you might very well do something with it but you can see, those of you who have been prosecutors and are now, you can see what the problem is. And it was never intended to be this that we're getting and moving toward it. If it were clear as to what is producible and that it were reviewed first by the judge before your order to so produce, we might get

to it in that way.

MR. PFEIFFER: Supposing you have a fraud case.

MR. BOLTON: A which?

MR. PFEIFFER: A fraud case. You jolly well may want to get all the papers that the defendant has got or papers from banks, get everything, because the innocent papers will fit in with those not so innocent from which he can built up his case.

MR. BOLTON: You're speaking as a prosecutor.

MR. PANZARELLA: That's right.

MR. PFEIFFER: From the prosecutor's angle.

MR. PANZARELLA: Now, if you're going to give notice to the defense of what you're doing --

MR. BOLTON: I'm speaking of one-sided subpoenas really.

MR. PANZARELLA: Yes, you were.

MR. BOLTON: No, I'm speaking -- please understand me. I don't know whether this is right or fair or otherwise but I'm speaking about the

production of police evidence, police records in a case.

MR. PANZARELLA: Well, doesn't your District Attorney --

MR. BOLTON: Not to change the other at all.

MR. PANZARELLA: Doesn't your District Attorney move to quash the subpoena?

MR. DENZER: Maybe the District Attorney --

MR. BOLTON: He gets confused. To be very honest with you, he gets truly confused and then he reads this other thing that says well, there isn't really any notice and it's to be interpreted very loosely and there isn't any protection of anybody else and he doesn't really argue it. If it were clearly stated, just as you feel it to be and perhaps know it to be, then he'd have something to put his back up to and he could understand it.

MR. PANZARELLA: Well, as I understand it, only under the Rosario decision in the State of New York when the prosecution offers a witness at that time, defense asked for all prior statements,

writings, transcripts and what have you, of that particular witness.

MR. BOLTON: M-m h-m-m.

MR. PANZARELIA: So until such time your defense can sort of under a discovery proceeding bring on a subpoena duces tecum. We've moved to quash them and that provision will stay.

MR. BOLTON: I have you, sir, sitting as the mover or the judge, then there isn't any problem. Truly, I think it can be done.

MR. DENZER: Well, as I understand this, there are three parties not two here. There's the District Attorney and the defendant, the People and the defendant, and one or the other is issuing this subpoena for records. Then there is the party who is subpoenaed, in this case the State police, and it's the State police or it's the witness who is contesting the subpoena rather than one of the parties. Isn't that the idea I mean? In other words, let's say that the District Attorney of some county issued a subpoena duces tecum for you to produce all the records in connection with such-and-such a matter and you don't want to do it.

MR. BOLTON: Who ordered us?

MR. DENZER: The District Attorney, let's say the District Attorney, and you don't want to do it. I mean, it's you, not a party, it's you who are objecting and want to quash the subpoena and isn't it a three-party kind of thing?

MR. BOLTON: It can very well be, yes.

MR. DENZER: Yes.

MR. BOLTON: It can very well be because we are constantly requested to disclose our papers and work in civil cases all the time and then we are into a truly third-party and it can be in a criminal action too.

MR. DENZER: Well, you probably have a legitimate defense to the production, that is, when you receive a subpoena duces tecum in a civil case, and to produce all the records I think you can probably assert confidentiality there and prevail on that, can't you? I mean, no judge is going to -- or is that so? I don't know, maybe some judge might not, I don't know.

MR. BOLTON: I don't want to answer that. The problem is becoming more intense there and my

only feeling -- and it's only a suggestion, it's a suggestion in that the practice is becoming so much looser in one area that many jurists are, in effect, thinking the same way as they do civilly and if it were just considered separately, even if it were on the same terms and so that it were truly preserved in the criminal as distinctly that no matter what happened over there, we would still have it here, that is just a thought that came to me and I'm sure that in your wisdom you could resolve it.

MR. CROTTY: What would you have to do, Dick, enumerate certain specific things that were not to be produced by the State Police or any applying agency? You'd have to enumerate them in the statute, wouldn't you, or otherwise how would you know?

MR. BOLTON: Well, you could place a limitation in the statute. You have some limitation in there now when it can be done, the type of thing that can be produced, yes, you do.

MR. DENZER: Well, you have in mind some proceeding where you receive notice and you come in

and argue that it's too broad or that these records are confidential and you don't think they should be subject to production and so on.

MR. BOLTON: Our problem isn't so much -- to answer Mr. Crotty's question, it isn't so much in the area of physical evidence. It's more by way of reports that are made by one officer in which he includes actually as hearsay because he's the reporting officer, he includes as hearsay everything everybody else has done who has worked under him or with him that because he writes the report it's all there.

Now, this is under no circumstances a situation or under no circumstances do I see that it's ever usable in a courtroom, ever usable.

MR. CROTTY: As a work record?

MR. BOLTON: Except that small portion of it which is his own statement and if we have some way to truly let the Court understand that which is the Jenks rule and otherwise, and make it separate, perhaps we can get a little better discipline, if all of this, as I say, if all of the District Attorneys and the judges held to the

requirements as spoken here a moment ago, and I'm not sure that we'd ever need this but I can see it eroding and I don't think it should erode here because this will destroy -- as a matter of fact, it will destroy the adversary proceeding, taking it a few steps further.

MR. CROTTY: But that would never get before the jury, would it, Dick?

MR. BOLTON: Pardon?

MR. CROTTY: I mean even if you issued a subpoena duces tecum and the evidence that was asked for was produced, if they call it evidence, wouldn't the judge have to review it before he will permit it to be submitted to the jury?

MR. BOLTON: Our procedure now is to recommend that it be given in its entirety to the judge for his review in camera and that he extract that which would only be usable but you don't have to get many steps away from that bill before you have somebody say that I'm not even sure that I want the judge to look at it but I want to look at it.

Now, this has been a trend in a good many areas of the law, the criminal law, and we've

been falling into this. I don't want to let that happen here. I want to let the judge know that this is what should be done and even if it provided for the judge to look in camera, I have no fault to find about that and if that were an established procedure, fine, and that takes off the burden or the accusation of withholding on the part of the District Attorney because he isn't withholding. He's saying, "You look at it, Judge." That is, I think, good procedure. I like that procedure but now it's a procedure that we have to explain at length and maybe it's followed some places but I've had my eyes opened.

MR. PFEIFFER: Thank you very much and we'll certainly consider it.

Is there anyone else who wishes to be heard?

(No response.)

MR. PFEIFFER: Thank you very much, witnesses and spectators. The meeting is adjourned.

(Whereupon at 3:10 p.m. the public hearing was adjourned.)