

MINUTES OF THE PROCEEDINGS OF A PUBLIC HEARING  
OF THE COMMISSION FOR THE REVISION OF THE PENAL  
LAW AND THE CODE OF CRIMINAL PROCEDURE, HELD  
AT THE COUNTY OFFICE BUILDING, ROCHESTER, NEW  
YORK, ON THURSDAY, NOVEMBER 22, 1968.

Present:

Timothy N. Pfeiffer, Vice Chairman;

Judge John J. Conway, Jr.;

Senator John R. Dunne;

Assemblyman Ben Altman;

Richard G. Denzer, Executive Director;

Peter J. McQuillan, Counsel;

Robert Bentley, Counsel to the

Senate Finance Committee;

John Weinstein, Representing the Speaker

of the Assembly;

Earl W. Brydges, Jr.

P R O C E E D I N G S

JUDGE CONWAY: We are sorry that Richard Bartlett is not going to be with us today. I have my fellow Commissioner here, the distinguished Senator from Nassau County, Senator John Dunne, who is on my right.

Vice Chairman Pfeiffer will chair the hearing when he does arrive.

In front are those who have done all of the work that the Commission has accomplished. Reading from my right, and your left: Peter McQuillan, who has been an asset to us in all of the legal work necessary to bring about this monumental task, both the revision of the Penal Law and the Criminal Code.

Next is John Weinstein, a youthful member of the Bar, who is representing the Speaker of the Assembly.

Next is Bob Bentley, who has a long career as a lawyer in our area, Wyoming County, and he has just recently been elected the Republican Chairman of the County, and he was a long-time counsel

to Senator Erwin, and the Senate Finance Committee, and now, Robert, what is your title in the Senate?

MR. BENTLEY: Counsel to the Senate Finance Committee.

JUDGE CONWAY: On your far right is a man who started out with us from the very first organizational meeting, Dick Denzer, a long-time Chief of the Appeals Bureau in Frank Hogan's office, and we stole him from Mr. Hogan and prevailed upon him to become the Executive Director of our Commission, and Chief Counsel.

So, between Dick Denzer and Pete McQuillan, we have had all of this work done.

Presented to us during the years in the many meetings that we held, most of them in New York City, we have had various study drafts, and revised study drafts, and re-revisions, and we attempted to present to the Legislature what we conceived to be the best thing in both the Penal Law and the Code.

We are approaching the end, and this is probably our last public hearing, the last series

of public hearings, and it is the first in this last group. We will hold one other in Albany, and possibly a two-day session in New York in December. With that, we will be pleased to hear from any of you who are desirous of testifying and presenting your position in any field of our interest.

First, at this time, I would like to ask Dick Denzer if he would give us a brief run-down on our position that we now find ourselves in with this revised proposal for the Code.

MR. DENZER: Just to get you oriented as to the progress and timetable of the Code, there are really three drafts, or there will be three drafts of this.

The first one was put out as the "White Book." That was about a year ago, and there is nothing official about it. It is the White Book, and it is simply a proposed procedure of the Edward Thompson Company, which is a subsidiary of West Publishing, Inc., and they put it out as the first draft of our new Code of Criminal Procedure. We changed the title, as you can see, to "Criminal

Procedure Law." We weren't trying to be fancy there. It is simply a matter of having this body of law incorporated into the Consolidated Laws which include practically all of the big bodies of law such as the Insurance Law, the General Business Law, and every kind of a law that you can think of, and every volume of the Consolidated Laws end in the word "law." It so happens that the word "criminal procedure" is not a chapter of the Consolidated Laws, for some reason. It is the last big code that was left out.

You remember the Civil Practice Act was not a chapter of the Consolidated Laws until the revision a few years ago, and it was made a chapter at that time and the title was changed to the Civil Practice Act, and the Civil Practice Law and Rules.

We want to do the same thing with the Code of Criminal Procedure, and that is why we changed the name.

At any rate, that was the first draft. We held public hearings on that in February of this year. We held this all throughout the State: Buffalo, Rochester, Syracuse, Albany, New York City, and Mineola, and we had a great number of suggestions and

criticisms, and we went about changing it and we made a great number of changes.

That led to the second draft which is a blue-covered book put out by Edward Thompson and Company. I guess most of you have had this.

This was introduced in the Legislature as a study bill. I think you know what a study bill is, it is not really a bill in the true sense of the word. It is in legislative form and looks like any other bill in the Legislature, but it is only for study purposes, for circulation purposes, to acquaint the Legislature and also other agencies and people with the projects, so that there will be time to familiarize yourself with the general idea and then, we -- now we are holding public hearings on this (indicating) and after these hearings, we probably will make a good many more changes, so at least there will be a third draft, or whatever else amounts to a third draft, and it will be introduced at the next legislative session for passage. We hope it will pass. Of course, we are not sure that it will. This will be, in essence, a third draft.

We have held two sets of public hearings

on the Code of Criminal Procedure, the Criminal Procedure Law, whereas we had only one on the Penal Law.

Now, some people accused us, and I don't think it was a valid criticism, of pushing the Penal Law through too fast, or trying to push it through too fast and saying that they didn't have an opportunity to thoroughly familiarize themselves with it.

I don't think that is valid, as I say, but particularly since there was an effective date two years hence -- the Penal Law was introduced in 1965, and passed in 1965, and it didn't become effective until 1967.

To avoid any such criticism in respect to this, we are having three drafts instead of two, and two sets of public hearings instead of one, and I think that will give everyone an ample opportunity to make any comments they wish.

That is the history of it up to date, and that is the reason we are having this hearing today.

Now, I don't know if there is any other

matter which I should try to cover now. Mr. Pfeiffer should be here soon.

JUDGE CONWAY: I think perhaps we should get started with our first witness.

I am pleased to recognize the distinguished Chief of Police of the City of Rochester, William Lombard.

CHIEF WILLIAM LOMBARD: Thank you, Judge.

Gentlemen, my capacity is as Chief of Police, and I am also authorized to represent the Zone 11 Chiefs of Police Association which represents city, village and town police agencies in the 6-county area of the Genesee region. I do appreciate this opportunity to speak before the Commission on the following items of the proposed Criminal Procedure Law, and might I add that I have never seen your Blue Book. At the Chiefs' Association meeting this last July we were handed the White Book, and that is what we have been studying to the best of our ability, up to this time.

Section 1.20, Subdivision 15, is entitled "Police Officer." I am in favor of this proposal and my views and opinions are in accordance

with the staff comments concerning the definition of "Police Officer."

We in law enforcement, however, are concerned about some municipalities, primarily smaller villages or townships who employ part-time individuals to function as a Police Officer within their jurisdiction. These employees, I understand, when appointed, function in the capacity as a Police Officer with the full authority empowered by law.

These employees, in many instances, do not meet the minimum standards prescribed under Civil Service, and in fact are usually provisional appointments, and in many cases, they do not attend the mandatory police training prescribed by law.

We recognize that smaller municipalities are attempting to afford sufficient police protection to their residents or persons traveling or visiting within their jurisdiction, but are hampered through budget limitations to employ and utilize full-time police officers or departments.

In many instances, the New York State Police and County Sheriff Departments attempt to fill

the void. Law enforcement responsibilities require a professional approach with the function to be carried out by police officers who meet minimum standards under civil service regulations and are professionally trained.

The citizens of our State are entitled to nothing less, no matter where they reside or what area they travel within our State.

There is no such thing as an instant or substitute police officer, nor can any municipality expect to properly serve their community with "bargain basement" type of police services.

We respectfully recommend that within the definition of police officer under the proposed code that there be an exclusion restricting part-time police officers the full powers and authority as full-time police officers are provided for within the law.

Section 30.80 entitled "Rules of Evidence".

JUDGE CONWAY: May I interrupt you for a minute?

CHIEF LOMBARD: Yes, sir.

JUDGE CONWAY: Chief, may I thank you

for pausing. I am happy to present to everyone here the Vice Chairman of our Commission, Mr. Timothy Pfeiffer. Mr. Pfeiffer advises me that his plane was delayed because of the announcement on board that there was a lost plane in the air. We are just underway, Mr. Pfeiffer, and our first witness is Chief Lombard.

CHIEF LOMBARD: Now, referring to Section 30.80 entitled "Rules of Evidence" under Subdivision 2, in my opinion it is entirely restrictive and beyond that which was intended by the Supreme Court in the Miranda decision. It provides a legal means for a person involved in a criminal action to circumvent the law. Primarily, I am concerned about crimes against the person with the only real evidence sufficient for arrest involving a voluntary confession.

It is difficult enough today for law enforcement to obtain a statement of admission or a confession to a crime under present statutes and within the Miranda decision without imposing additional restrictions, the wording of which is properly intended by your Commission, but provides defense

counsel with many avenues in attacking the credibility of a law enforcement officer who obtained the confession. There are enough avenues presently existent without going as far as this proposed statute, and as far as homicide investigations where there are no witnesses or physical evidence to tie in the perpetrator of the crime, and in sex offense crimes involving children whose statements or identification of a perpetrator to the crime are held as being inadmissible without supporting evidence, the only solution to such crimes, and these are the kinds that create so much fear and hysteria in our communities, lies in a confession by the perpetrator of the crime. We respectfully recommend that this Commission seriously consider the impact that this section will have on effecting successful solutions to crime incidents and recognize that only the criminal will benefit from the proposed statute while sacrificing the peace of mind to decent and law-abiding citizens in our communities.

Section 365.50 entitled "Search Warrants- Execution Thereof" -- specifically, we are concerned with the staff comments noting, "in short, he may, if

he can, subdue the resistor with his hands and fists, or even by a billy within reason; all this failing, however, he may not use his revolver but must call for reinforcements."

The staff comments interpret what was intended in Subdivision 1 and 3 of this Section. Needless to say, this places the police officer who is charged with the responsibility of executing a lawful search warrant in an extremely precarious position. I am sure this Commission is aware that many persons suspected of crime, which is a basis for the issuance of a search warrant, are hard-core criminals, and they, themselves, being placed in jeopardy will utilize every means to avoid apprehension, utilizing every means that experience has shown over the past years in more than one instance where such individuals themselves resorted to the use of deadly physical force.

As a police administrator, I would not direct my officer to refrain from using deadly physical force if his life, or the life of another, is placed in jeopardy. I hope that I have misinterpreted this section and the use of deadly physical force

force, but if not, I strongly urge this Commission to reconsider. In fact, I strongly recommend that wording be included in the Subdivision which would authorize a police officer, in the execution of a legal search warrant, to use deadly physical force when his life or the lives of others are in imminent danger by a person who is acting in a threatening manner while in the possession of a deadly weapon, and has the capability of carrying out such threats.

MR. DENZER: You say you have the "White Book" ?

CHIEF LOMBARD: Yes.

MR. DENZER: We were conscious of that, and I think you will find in the Blue Book, that is Section 365.50?

CHIEF LOMBARD: That is right.

MR. DENZER: You will find this added, and he may use deadly physical force if he really believes that such is necessary to defend himself, or a third person, for what he believes to be imminent use of deadly physical force.

CHIEF LOMBARD: Fine. I am sorry we were not up to date. Apparently, this was brought

out in previous hearings.

MR. DENZER: Yes, I think it was the result of a previous hearing.

CHIEF LOMBARD: All right, fine. May I congratulate the Commission for heeding the sound advice of knowledgeable people.

Next is Section 270.05 which is entitled "Eavesdropping Warrants." I have previously expressed my opinion and position before this Commission at your hearing in this city on February 2, 1968, and I was out of time at that time, on this section, concerning the officials who are authorized to apply for an ex parte order. At that time, we had our reservations for restricting it to the Commissioner of New York City Police, to the District Attorney of a County, the Attorney General of the State, and we had expressed our concern that police executives, or police officials were not similarly authorized to apply for an ex parte order because the police, in fact the ones that carry out such orders, and it was in my opinion questioning the integrity and the capability, the intelligence, and the honesty of police throughout the State, which was of concern to me.

Then, subsequently I find that under the federal statute, it imposes restrictions to specific officials within the field of criminal justice, and at the State level, which we must comply with.

If I am not wrong, under the federal statute, it does restrict it to a prosecutor in the county, or to the Attorney General in the State. So I do recommend, however, that this Commission exert influence and every effort to permit law enforcement executives to be eligible in line for an ex parte order in the same redress as provided for in the District Attorney's office of a county, or the Attorney General of the State.

Technical surveillance equipment is extremely important to furthering criminal investigations and effecting solutions to crimes. I am in favor of restricting its use to major crime incidents and in coping with organized crime problems.

However, if the burden is placed on law enforcement to identify and apprehend individuals involved in such major crimes, then law enforcement must be given the necessary tool in order to carry

out this mandate. Being held accountable by the public, and not given the support through law is an unfair position for law enforcement officers to be placed in.

Now, we in law enforcement are also concerned about Section 165.05 of the Penal Law entitled "Unauthorized Use of a Vehicle." To speak out on this item I have asked our Detective Supervisor Richard Cutt, who has much experience in this duty in recent years through his assignment as the Officer in charge of our Auto Theft Squad within the Criminal Investigation Section of our Police Bureau.

I thank you gentlemen for your kind attention to my comments.

MR. BENTLEY: Before you go, may I inquire -- going back to Section 30.80, do you have any suggested changes in language, such as rules of evidence?

CHIEF LOMBARD: Yes, I would hope very much, sir, that we would leave the present rules on voluntary confessions as it presently prevails within the Criminal Code, and in accordance with the Miranda rule, and let it be as it is.

What you have done, the way I look at it, is include many words which can be attacked in all different ways. What is a friendly involvement? Certainly a defense attorney is not going to call a police officer in an interview room a friendly involvement.

MR. BENTLEY: It has been our thought that we were following the rule there, and I am interested in finding the distinction that you are making. Perhaps you can submit these distinctions.

CHIEF LOMBARD: Yes. Subdivision 1 to 6, and the last one I think has to do -- in compliance with the Miranda decision, certainly leave it in effect, but the subdivisions previous to that, I don't think, of any part -- I don't think it has any part, but build into the statute the legal words affording -- legal technicalities for ruling a good solid conference inadmissible.

MR. DENZER: The trouble is, Chief, that the present law couldn't say anything. Section 395 of the Code talked about involuntary, but it doesn't say what is meant by involuntary, and that throws everything into the courts, and the courts are able

to go farther than we could. We are presented with a job of definition here, and trying to crystallize what does make a confession, for instance.

CHIEF LOMBARD: That was my whole point. In my opinion, I think in your deliberations you have gone beyond what is intended by the Supreme Court in this Miranda decision. To put it candidly, you have out-decided the Supreme Court decision.

MR. DENZER: Of course, by the use of any physical force -- that is obvious, such as threats and so forth.

CHIEF LOMBARD: That has all been understood for years, and is nothing new.

MR. DENZER: By means of any other improper conduct, or undue pressure -- well, this is really a statement.

CHIEF LOMBARD: Why make the legal wording -- why make it a legal statute? Part of it is as part of the wording of the statute. The Judge, I think, is put in a very difficult position here when confronted with such things as involuntary confessions. He has got a problem now without trying to be a psychiatrist, to probe into the minds of law

enforcement officers, and did you, or did you not use force or threatening remarks or actions. What does constitute threatening remarks and what is the devious intent on the part of an officer.

We have to use a great deal of imagination, and patience, and perseverance, when we are trying to extract a confession from an individual that we expect committed a crime. It isn't accomplished instantly, but it takes a great deal of time to bring a person along.

In these serious crimes against a person, that is all we have. There is nothing else.

MR. BENTLEY: Maybe some morning Miranda will be overruled.

CHIEF LOMBARD: I think this has been said, and I hope that will be the case.

MR. BENTLEY: We are a little optimistic.

CHIEF LOMBARD: We can hope.

MR. DENZER: If it is overruled, that would be all right here, because this doesn't say anything about Miranda, but first advising the defendant and according him such rights as are in the Constitution.

Tape 2

If this is what the Constitution says under Miranda, that is what he has, and if it doesn't, he doesn't have that.

At any rate, I want to say that we didn't intend to make anything any tougher on the confession basis for the police. We were simply trying to codify what we thought to be the law.

We will give it another look. If we have, that wasn't our intention.

CHIEF LOMBARD: We are concerned, again, sir, -- well, we are going to make a request, but then the burden comes right up the line through prosecution, after indictment, and then your judges, whoever they may be, are now placed in this very difficult position of deciding as to the voluntariness of a confession.

VICE CHAIRMAN PFEIFFER: They always have been.

CHIEF LOMBARD: They always have been, that is the point, but why put additional means here, additional means in a legal statute for a defense attorney to take advantage of them. Who is going to interpret it? We have got enough hearings facing

the court now.

VICE CHAIRMAN PFEIFFER: You will have to interpret it.

CHIEF LOMBARD: By implication, a threat -- well, however, the wording is, but it is such that it goes way beyond what is in the best interest of the community as a whole. My point is, are we trying to initiate law to protect criminals? It is as simple as that. It is laws that are for the people and it is, they are made in the best interest of those who abide by the law.

JUDGE CONWAY: May I say we have with us Ben Altman of the Bronx, an Assemblyman. Also we have Mr. Earl Brydges, Jr., of Niagara County.

DETECTIVE SUPERVISOR RICHARD CUTT: Gentlemen, I am glad to have this opportunity to express my views concerning the unauthorized use of a vehicle as defined in Section 165 of the Penal Law of the State of New York.

Having had the opportunity to work entirely on stolen vehicles for the last two years, has given me a chance to observe both the good and the bad part of this law. First of all, I believe

that we made the unauthorized use of a vehicle a misdemeanor, and it has helped to increase the rate of stolen vehicles. One of my reasons for making this statement is that a period from June 3, 1968 until July 4, 1968 there were 51 persons arrested for unauthorized use in the City of Rochester. Of the 51 people, 14 of these people had been arrested more than once since September of 1967. Two had been arrested three times since September of 1967.

VICE CHAIRMAN PFEIFFER: For the same crime?

DETECTIVE CUTT: Yes, the same crime. To cite a recent case, a boy 16 years of age was arrested by our squad on May 11, and again on June 6, and again on July 3, 1968, for unauthorized use of a vehicle. Three times in less than two months.

In this period of time, your Honor, he had stolen roughly 30 vehicles, and four of these were brand new Pontiacs, and sustained minor damage, and neither of his two previous arrests for unauthorized use had been disposed of in a court at the time of the third arrest.

On his first two arrests he was paroled

in the custody of his parents, and no bail or anything set on it. There have been several other cases very similar to this case as I mentioned, since the new law has taken effect.

For a comparison basis, in June of 1967, we had 93, and in June of 1968, we had 133, an increase of 40 thefts since the new law had been in effect.

We were one of the few cities in the country in 1967 to show a decrease in auto thefts, and we were down 22 percent. I believe the reason for this decrease was the fact that the first eight months of 1967 the majority of the arrests were made and were felonies.

In all of the arrests made in 1967 I can only remember a few where the person had been arrested twice, and none where they had been arrested three times. For the year 1968, there will be an increase in car thefts as we are already 63 vehicles ahead of 1967. We have 1,013 stolen vehicles in 1967 as compared to 1,076 so far to date. So far this year we have made 245 arrests, 40 of these have been repeats, as compared with 199 for the entire year of

1967.

I also believe that joy-riding, or the unauthorized use of a vehicle is being considered too lightly by the court. We believe that when a person takes a vehicle, he or she is more dangerous than a burglar because they have at their disposal a dangerous weapon, especially when about 80 percent of those arrested for unauthorized use do not possess a driving license, or have little or no training in driving. These people are a danger to themselves, and to us, and to the law-abiding citizens. Auto theft is one of the most costly crimes in the country, and by being created as a misdemeanor, I can only see it rising steadily in the future.

The present law regarding the unauthorized use is good in the sense that it gives a person a chance by not being charged with a felony for joy-riding theft, but I believe that one change should be made, and that is if on the second arrest, it should automatically become a felony, regardless of the value of the car, and it should have a mandatory sentence involving the same.

Under the present statute, the unauthorized

use has been taken out of the section it is in, and placed in its own section of the penal law where it belongs. If it were made a felony on the second offense, it could remain in the same section, because a 1959 Chevy can kill as easily as a 1968 Chevy.

The person who steals my vehicle a second time is making a mockery out of the court, and should be handled as a felony. By doing this, I think we can again show a decrease in auto theft.

MR. DENZER: Speaking of auto theft, are these joy-riding cases or actual theft you are referring to?

DETECTIVE CUTT: I would say 95 percent of our thefts are joy-riding thefts.

MR. DENZER: If it is a real theft, he can be charged with larceny, as he has been.

DETECTIVE CUTT: Right.

MR. DENZER: If it is just a plain joy-riding case -- well, that is a misdemeanor?

DETECTIVE CUTT: What seems to be happening is that we are making a mockery out of this in the courts. We have had several arrested three times.

MR. DENZER: Why not grand larceny?

DETECTIVE CUTT: We can't. We have to appropriate the car.

MR. DENZER: It then becomes a question of fact as to whether he intended to sell it, or was just joy-riding?

It seems to me that to make the arrest a felony --

DETECTIVE CUTT: I don't think we have the grounds to put our information together before the court. We have to prove that he has intention to deprive the owner, and by talking to this person, 99 percent will tell you that they took the car with the intent to drive over to John's house and leave the car there.

MR. DENZER: Then you are speaking of pure joy-riding cases, and not true automobile theft?

DETECTIVE CUTT: Automobile theft we have no problem. We can prosecute a case as larceny, but the headache is the unauthorized use as a misdemeanor.

VICE CHAIRMAN PFEIFFER: Do you have the figure on the age?

DETECTIVE CUTT: The average age is 16, 15, 16, and 17.

VICE CHAIRMAN PFEIFFER: School kids?

DETECTIVE CUTT: A lot of them, sir.

JUDGE CONWAY: Is the end result -- can that be accomplished in the statute, but the second time around the judge will take care of him as unauthorized use, and he has the same disposition?

MR. DENZER: Isn't a year enough? As a matter of actuality, what sentences are imposed on these, the fellow who does this for a second time? Does he get a full year?

DETECTIVE CUTT: He is punishable up to a year.

MR. DENZER: I know that, but what are they getting?

DETECTIVECUTT: Some of these have been handled as disorderly conducts in the court.

MR. DENZER: Then the penalties that you have are not being used, so I don't see how an increase in penalties will help.

DETECTIVE CUTT: My contention is that if it was made a felony, with a mandatory jail

sentence, I think the kids would think twice before they stole a car, because they have got an awful grapevine going. If they find that John gets sent away for stealing a car a second time, they won't steal it.

JUDGE CONWAY: Anything else, gentlemen?  
Thank you.

VICE CHAIRMAN PFEIFFER: Do we have Deputy Commissioner Thomas Blair here?

COMMISSIONER BLAIR: Mr. Chairman, and distinguished members of the Commission: I want to express my appreciation and the appreciation of the Buffalo Police Department for the invitation extended to appear here and make comments, on the proposed study bill for the Criminal Procedure Law.

Now, the advantages to the public safety currently afforded by Section 154 of the Code of Criminal Procedure, wherein the State has provided for peace officers, will be lost if the Legislature should accept the Temporary Commission's proposal to eliminate the idea of peace officers.

The remedy for the fast-growing list of peace officers in Section 154 of the present code

is not to delete the section, as the Temporary Commission proposes, but rather to scan closely those who are there, who are included as peace officers, and then deleting therefrom those mentioned who are not clearly performing the peace-keeping functions .

It is to be observed that the Commission has already increased by at least 40 percent those who have been classified as police officers in the proposed Criminal Procedure Law at the beginning of the current year. That is not intended as a criticism, it is just presented to demonstrate that the list will continue to grow, and to declare again that the remedy for the long list of those included as peace officers by Section 154 of the present code is to review it closely, and delete therefrom those aforementioned.

MR. BENTLEY: May I interrupt you?

Do you have a copy of this new one?

COMMISSIONER BLAIR: I do, sir.

MR. DENZER: Not the Blue Book, but a typewritten draft?

COMMISSIONER BLAIR: You raised up a

copy of the Blue Book, and I have that.

MR. BENTLEY: Do you have any subsequent drafts?

COMMISSIONER BLAIR: No, sir.

MR. DENZER: We have arranged the whole thing in this peace officer area differently.

JUDGE CONWAY: Do we have copies of that for him, please?

COMMISSIONER BLAIR: I received that on November 4, together with the invitation to appear here, and I assumed that it was the study bill which was to be used.

MR. DENZER: We, of course, have a lot of criticism along the lines of what you are speaking about now, about elimination of the peace officers, and we finally agreed with you, and a number of other people, that perhaps the best thing to do was not approach it that way, not to eliminate the peace officers, so in a draft we installed in the final draft, we have restored the term "peace officers" and we have approached it a little differently.

COMMISSIONER BLAIR: I am sorry to have

taken up your time with material that wasn't included in this.

MR. DENZER: It wasn't circulated well enough.

MR. BENTLEY: Excuse me for interrupting you.

COMMISSIONER BLAIR: Now, I will go to Section 120, and that is Section 120 of the proposed bill and that is defining the terms for general use in this chapter.

Now, a term very generally used throughout the chapter is "arrests" and yet nowhere in the chapter is it defined. It is defined in the present code and we feel it should be defined in the study bill, if the study bill is to be enacted by the Legislature as law.

On Section 30.80, Chief Lombard touched on that. We feel that it should be redrafted in view of, and along the lines of Title II of the Omnibus Crime Control Act of 1968, Section 701-A, because the Omnibus Bill expresses the problem of admissibility of confessions in positive terms, not in negative terms, as does the Temporary Study

Commission bill. It makes the trial judge the arbitrator of the issue of the voluntariness of a confession.

We felt that the trial judge, by education and by experience, is the best person to determine whether or not a confession was voluntary.

On Article 50, which refers to the misdemeanor complaint principle, this is another accusatory instrument, and the proposal is a very good one, but the one example given on page XVIII is misleading. There are two examples there given about a possible drug case, and the other is -- it says that the arrest for petit larceny in connection with a car reported stolen.

Now, in reading Article 155, 160, and 165 of the Penal Law, and comments therein by the staff of the Temporary Commission, it can lead to only one conclusion, and that is the example, the example given is probably one of unauthorized use of a motor vehicle, and not petit larceny.

MR. DENZER: No, I think in the illustration it talks of a car with a value less than \$250.

COMMISSIONER BLAIR: And it speaks in terms of larceny.

MR. DENZER: That is for illustrative purposes.

COMMISSIONER BLAIR: I have to concur with the thinking of the Detective, or Assistant Chief Detective, and his presentation. We are experiencing some of the problems he mentioned in the great increase in number of vehicles, let's say, unlawfully taken.

Then we go to Section 60.40. This ~~Section~~ Section restricts the arrest by policemen in areas where they can execute a warrant of arrest. Well, I will pass that one.

The next is Section 60.63. That has to do with the service of a search warrant, and was touched upon by Chief Lombard. It says that the police officer may use such physical force as is authorized by Subdivisions 1 and 2 of Section 35.30. We wonder, perhaps --

MR. BENTLEY: No, it is Section 35.30 -- it is not 1 and 2.

COMMISSIONER BLAIR: Section 35.30,

Subdivision 1 and 2. Possibly it has been changed.

SENATOR DUNNE: That has been deleted.

COMMISSIONER BLAIR: All right.

Moving on to the next Section, that is Section 60.70, Subdivision 5, and this really doesn't affect the police officers, but it may affect towns and villages. It speaks in terms of normal courts and emergency courts and we propose this question: What, if at the time of the issuance of the warrant, a substantial possibility exists that the town or village court issuing the warrant under Section 60.35 does not exist, and thus it is an accusatory instrument and it is not attached to the warrant. In such an event, what does the police officer do with his prisoner?

MR. DENZER: That is a good point, Commissioner, and we have been working on it. We are changing the language a little so that any time the court may attach a copy at any time he wants to. It doesn't have to be a substantial possibility, in other words.

COMMISSIONER BLAIR: I know that it affects towns and village police officers. The only

reason I bring it up as a city police officer is that we do, in our police academy, we do try to train some town and village police officers, and in the course of this we would like to give them the answers, if they should arise as questions.

MR. DENZER: That is a good point.

COMMISSIONER BLAIR: Now, under 60.70, on Subdivision 4, it appears to us to be a great deal of unnecessary paper work for the delegated officer. This is where there is a delegated police officer who has the warrant, and he has passed it along to the officer, apparently to be called the delegated officer for service.

Its purpose, we feel, could as well be accomplished by having the officer relate to the magistrate whatever information he, the delegated officer, may have concerning the warrant.

Under Section 60.70, Subdivision 6, it is possible that the nearest place having fingerprinting and photographing facilities would be in the county of issuance. It would seem to be in the defendant's interest to take him before the magistrate then in the issuing county, or at least

to the closest available magistrate for the purposes of this Section.

Now, getting over into summonses, under 65.30, if the offense charged in the summons is a misdemeanor, and this may be related to the definition of what is an arrest, if the offense charged in the misdemeanor, how does the person summoned get mugged and fingerprinted? You are just issuing summonses to him, and you are not taking him in to any physical custody of any kind. If the person is to be mugged and printed, what if the summons is served by a private person? 65.10 authorizes the court from which the summons is issued to allow it to be served by any other person at least 18 years old, designated by the court.

If there is no fingerprinting, or photographing facilities available when a summons is issued to acquire jurisdiction of a person, doesn't this provide unequal treatment where facts are identical, but a different jurisdiction covering the techniques is involved, and say a warrant of arrest is used? A lot of this hinges around what is an arrest.

MR. DENZER: We tried to define it, and we couldn't.

JUDGE CONWAY: How would you, Commissioner?

COMMISSIONER BLAIR: I believe that the present Code of Criminal Procedure somewhat well defines it, and that is taking a person into custody so that he may be held to answer for a crime. I recognize that that definition, when we get to the areas of issuance of a summons, or the appearance, creates difficulty. But I don't think there is a lot of difficulty. It can be worked out with a definition of an arrest in the statute.

Under Section 70.30, this provision has the effect -- well, it has the same general effect as the elimination of the term police officer, but now I understand that the term police officer is going to stay on the books. But, here are some examples of how this proposal, if enacted, would affect the actions of a city, town or village policeman who is beyond the boundary of his appointing jurisdiction when any of the following occurs within his view: "Sexual abuse of a child of a second degree, inciting a riot, rioting second degree, possession of

a firearm, metal knuckles, razor or dagger, and so forth, and in none of the four would the policeman act as a policeman to arrest or disarm the offender.

"If he were to take any action at all, it would have to be as a private person, and as such he would be restricted to the use of plain physical force to make the arrest of the offender."

Now, how can a summary arrest, as a policeman who has been well trained, and training is required by the State of New York and the statutes, an executive law, the general municipal law, and the regulation of the new municipal Police Training Council, how can that be harmful to the malefactor, and the citizens of a civilized society in any of the foregoing situations mentioned?

It is interesting here to note that Deputy Sheriffs, and if there are any present I am sorry if they are offended, who usually owe their appointment as a Deputy to their particular political affiliation, and members of the State Police, at least those not assigned to the Thruway Authority, who have the authority to make a summary arrest in each example mentioned.

Now, perhaps this is, in connection with this, a misleading comment of the Commissioner on page XVII of the study bill, the second last paragraph. It refers to the fact that most police groups would favor a print which would establish every police officer, no matter what his bailiwick or classification, as a police officer with full police powers everywhere in the State. Thus, a village police officer from St. Lawrence County visiting in New York City would have as much police authority there as a New York City policeman himself, and indeed, every local officer of every town and village would enjoy the same powers as a State Trooper.

Now, that is not quite so, that they would enjoy as much authority as a New York --

MR. BENTLEY: I think you have taken out of context. I think this was a criticism of an overall statute.

COMMISSIONER BLAIR: I am quoting from the -- I am saying that the Commission's comments, or if it was the staff that prepared it, was somewhat misleading to say that a St. Lawrence County village officer on vacation going into New York City would have

all of the powers that a New York City police officer would have. To me --

MR. BENTLEY: That was in reference to a proposal made by a Commissioner.

MR. DENZER: That was the attitude of the police in general, the attitude that they wanted no barriers and no fences. A policeman wants to be able to act as a police officer wherever he is in the State.

COMMISSIONER BLAIR: Not as a police officer, but as a peace officer of the State.

MR. DENZER: Peace officer, or police officer?

COMMISSIONER BLAIR: As a peace officer of the State, Counsel, I cannot go into the New York City area and enforce their administrative code, or any of their local rules and regulations which is as it should be, but I do believe that the principle of a peace officer is someone who has the ability to maintain the peace in matters affecting the State, crime, felonies, misdemeanors, and I do believe that he should have the powers, so long as he has the background and training.

MR. BENTLEY: Tom, you and I have gone around on this quite often. Now, the Mayor wouldn't even pay the salaries, let alone pay the liability of all of the policemen that come in.

COMMISSIONER BLAIR: Sir, we have on three occasions over the past two years where the Mayor not only consented but directed, dissipated Buffalo police officers into the surrounding communities to help them when emergency situations arose in those communities.

MR. BENTLEY: Speaking to the Mayors Conference, they say "No, never."

COMMISSIONER BLAIR: Well, I say it is my belief that this is a somewhat misleading comment, and to say that -- it is saying that the City of Buffalo Police officers can walk into West Seneca and enforce their town regulations. That is not so. They do not have that power and they should not have it.

MR. DENZER: But it would permit the peace officer, a village police officer in St. Lawrence County to come to Buffalo and act as a policeman, so far as misdemeanors are concerned, and

all violations, as far as that is concerned?

COMMISSIONER BLAIR: He would have the power, Counsellor, but he would not have the duty, and let me say this, and I believe that that is the principle that Chief Lombard -- I don't see him now -- was getting at in the area of confession, they were by statute, and you are more or less somewhat hemming in the trial judge. I believe that it is a matter best left for policy. I know what our policy is, that you do not get involved in misdemeanor cases outside of the jurisdictional territory. I believe that you should have the power in the event that an emergency arises, without question, without having an officer present from the jurisdiction into which you proceed, and thereon, in effect say you are here, and I commission you to act as my agent to arrest this individual for this -- for violating, or inciting a riot.

MR. BENTLEY: Do you want the individual liability if you make a mistake?

COMMISSIONER BLAIR: I believe that has been pretty well arranged now where you are invited in. There are arrangements under the general municipal

law providing for questions of liability.

MR. BENTLEY: Let's take where you  
volunteer --

COMMISSIONER BLAIR: No, I am not going  
to volunteer. I am not going to go out into  
jurisdiction unless I am invited in. If, as a police  
officer, I am down in New York City and I see someone  
being held up, then I deal as a peace officer of the  
State, I should take some action.

MR. DENZER: As a private citizen?

COMMISSIONER BLAIR: Speaking of a  
hold-up?

MR. DENZER: One of the subdivisions  
there permits you to arrest on a felony that is  
committed in your presence.

COMMISSIONER BLAIR: That was an  
addition of Subdivision 4, Section 730, but I say  
that in effect you are restricting officers when  
you don't at least give them the power, not the duty,  
the authority to go in, which is as it is at present.

MR. MCQUILLAN: With respect to  
misdemeanors at present?

COMMISSIONER BLAIR: There is a

possibility that that has been changed by the addition of 182-B to the present Code of Criminal Procedure which becomes effective on July of this year.

MR. MC QUILLAN: That is with respect to felonies. But with respect to misdemeanors, the peace officer has the authority?

COMMISSIONER BLAIR: No, he doesn't. It does by implication. May I suggest that if this Commission would move for the repeal of that particular section it would be helpful.

MR. MC QUILLAN: That section was recommended by the Police Chiefs' Association and the Police Conference. That particular section was recommended by them. There was no recommendation from either group that embraced misdemeanors.

COMMISSIONER BLAIR: As I say, perhaps by inference -- failing to mention misdemeanors, the door is shut. I don't know. We will have to await some action by the group or Commission to interpret the laws, to wit, the court and whatever they decide they will abide by.

MR. WEINSTEIN: This would send your

policemen into an adjoining jurisdiction, if you requested it, at the consent of your Mayor and wouldn't your policemen, going to an adjoining jurisdiction have the consent of the town or the city official of that adjoining jurisdiction?

COMMISSIONER BLAIR: He would probably have it.

MR. WEINSTEIN: Wouldn't they have the same rights and responsibilities on liability?

COMMISSIONER BLAIR: Oh, on liability, yes. I believe that it would be protected liability-wise.

MR. WEINSTEIN: Would they theoretically be special officers of that local jurisdictional police force?

COMMISSIONER BLAIR: Why make it theoretically, Counsellor? That is the point I am trying to make here.

MR. MC QUILLAN: That is expressly provided for in the General Municipal Law that they have all of the powers that they have in their own bailiwick when they are called in to another bailiwick on an emergency request.

COMMISSIONER BLAIR: If that is enacted, it will be the statute enacted subsequent to that, will it not? If this is enacted in its present form, will it amend or alter that provision?

MR. MC QUILLAN: Not in the least.

COMMISSIONER BLAIR: If you had a view of a Supreme Court Justice, or the Chief Judge of the Court of Appeals, I would feel better. I apologize, no offense, but why put it in?

What is so horrendous about a village officer having the authority to put all of the training -- if he is a duly appointed policeman of a village, he has to have the same training as the City of Buffalo and the City of New York policeman, or a State Trooper, and as a condition to his permanent appointment as such, so what is so horrendous about having, well, having the opportunity to use that particular person, and that training that goes with it in the event that something like this does occur?

MR. DENZER: If he is wounded, will the village pay for the injury?

COMMISSIONER BLAIR: That is provided for if he is invited -- if he is wounded outside of

his jurisdiction, then he may be acting at his own risk. I do not know.

MR. DENZER: That is a sticky problem.

COMMISSIONER BLAIR: That is not as dangerous in my opinion, Counsellor, as the safety of the individual that he may be injured himself in trying to protect a law-abiding citizen. You see? As far as I am concerned -- well, you use the word "dangerous" and I believe you get into the physical, and you say physical danger and to me that isn't as -- well, dangerous as physical danger to the person of the law-abiding citizen.

MR. DENZER: That is what makes this a tricky problem.

COMMISSIONER BLAIR: Counsellor, I hope you don't get the impression that I think it is an easy area, because I don't.

Now, another principle that is involved here, Counsellor, while we are on the subject of this is this: That as you, let us say, in effect you are diminishing the powers of the local police officer. In my opinion you may, inadvertently, be leaving a vacuum, you see, that the State may start

to pick up and fill, and if it does, where does it stop, if it starts to take over? Would you wind up with the control of the police in the State, only down in the Governor's office in Albany? No, I shouldn't like to see that event come to pass.

MR. DENZER: May I make one point here: It is not that we are changing the law, there just wasn't any by-law in the code. That wasn't dealt with at all. Now, we felt that we had to do something with it, and grapple with the subject. We think that maybe we are codifying what is the law, if you go into the cases and practices, and we don't know. But, we are not changing the present code because it just doesn't say anything about this.

COMMISSIONER BLAIR: It leaves it open, and it is a matter of policy, but you are changing it in that you are closing off some of the areas that maybe available under the present code. Now, if it can be demonstrated, and perhaps you have made a survey or a study of how many times local police officers have abused the present power that they have when they were beyond their city boundaries --

MR. DENZER: No.

COMMISSIONER BLAIR: If you have, I will --

MR. DENZER: No, we haven't.

COMMISSIONER BLAIR: Well, may I go into the next area?

Again, under Section 70.70, Subdivision 1, and this is the "stop and frisk," and the study bill says, the current provision in the Code of Criminal Procedure refers to this in a public place, and the study bill says it is a public place located within the geographical area of such officer's employment.

Now, again, this is the same principle. I feel that it is a lessening of the protection of the law-abiding citizen if a further restriction by the statute of the authority or the powers of a city, town, village and county police officer is involved.

Under Section 75.20, and this is the area of "appearance ticket" that we start by saying that the appearance ticket is to me an excellent one.

MR. DENZER: When you arrest him and you take him to the station house you fingerprint him.

But when you serve a ticket on him --

COMMISSIONER BLAIR: You have to take him to the station house in an appearance ticket because it speaks in terms of a desk officer for the purpose of either the appearance ticket, or for fixing recognizance or bail.

MR. DENZER: One is that you just hand him a ticket out in the street without arresting him --

COMMISSIONER BLAIR: That is what we should like to see.

MR. DENZER: That is in there --

COMMISSIONER BLAIR: It is?

MR. DENZER: Sure, that is the first thing he can do. It is Subdivision 1 --

COMMISSIONER BLAIR: Of what section?

MR. DENZER: It is 75.20, whenever a police officer is authorized, etcetera, to arrest a person he may, it said, issue to and serve upon said person an appearance ticket.

The second one says that after he arrests him and does take him to the station house, then he can serve a ticket on him instead of taking him to court. There are two different kinds of situations.

COMMISSIONER BLAIR: For the purpose of satisfying Section 80.10, is that an arrest? Is the first case an arrest where he lets him go on the street?

MR. DENZER: No.

COMMISSIONER BLAIR: Is the second one an arrest?

MR. DENZER: Yes.

COMMISSIONER BLAIR: If you can clear that up, fine. As I say, I like the idea, we do, the Buffalo Police Department very much, and we believe that it is an implementation, as proposed, which seems at least to provide more paper work for the police and the courts without a correspondingly increased benefits to society.

Now, at the present time, the Code of Criminal Procedure provides for the parole of certain arrestees at the discretion of the responsible station house officer. That is in the Code of Criminal Procedure.

Now, is it possible to achieve the same purpose as the appearance ticket, without the paper work, to expand 554 of the Code, and make it

discretionary in lieu of bail, to give him an appearance ticket?

MR. DENZER: Oh, sure. You come back to the station house and you want to take him to court, and you hand him a ticket just as you would have out in the street. That is all there is to it.

Now, if you want to attach bail conditions to it, there is more than there is under the present Code, but it is as simple as that. Just hand him a ticket to appear, and it is dated next Tuesday, or whenever you want, and that is all there is to it.

COMMISSIONER BLAIR: But if I get him into the station house, Counsellor, and I decide that bail is to be used, why issue him an appearance ticket? That is the paper work.

MR. DENZER: Instead of getting bail bonds, and all of that kind of business, which the present Code speaks of, you get \$50 in cash, or whatever it is, and issue him a ticket. The ticket simply requires him to appear, and if he doesn't then the bail is forfeited or the cash is forfeited. That is all there is.

COMMISSIONER BLAIR: Now, here is the next

one: Can an appearance ticket be issued in cases where police officers accept custody of persons turned over to them by private persons who have arrested the subject they are turning over?

MR. DENZER: As long as you get -- when an arrest has been made, under any condition, as long as a police officer has custody of him, he can issue him a ticket.

COMMISSIONER BLAIR: Now, on 70.54, Subdivision 4, it says that in a local criminal court, if it is not available, an appearance ticket must be served unconditionally upon the defendants or pre-arraignment bail fixed, as in Subdivision 3.

Now, because of the wording of the statute, it seems as though we must either give an appearance ticket, or fix bail for persons like disorderly drunks who are still drunk, and drunken drivers.

MR. DENZER: It is more or less the present law. If you can't take him to a court, you've got to fix bail there according to the present code. I don't know what you can do about that.

COMMISSIONER BLAIR: Because bail, as I

understand it, is a constitutional matter of right?

MR. DENZER: Well, I don't know -- not pre-arraignment bail. I think before the court he has a right.

COMMISSIONER BLAIR: Then, you are saying in effect that the desk officer, despite this section, can hang onto a drunken driver?

MR. DENZER: Not very long.

COMMISSIONER BLAIR: At least until he sobers up? That is the issue.

MR. DENZER: I see that problem.

COMMISSIONER BLAIR: This speaks in terms of "must."

MR. DENZER: I think there should be special provisions for covering that kind of a case that where it is necessary, or for the welfare of the community, something of that nature --

COMMISSIONER BLAIR: That would perhaps be a bad provision to put in for a policeman, because there would be many policemen who would say what is within his welfare. No, I wouldn't like to see that. If you just say fix bail, and let it go at that.

MR. DENZER: Fix bail --

COMMISSIONER BLAIR: It is the impression of the policemen that I have discussed this with, that they have got to let the drunk go, period, if the bail is fixed.

MR. DENZER: He has one of two things.

COMMISSIONER BLAIR: You wouldn't give him an appearance ticket if he was drunk.

All right, next is under Section 80.10 where we say that following that arrest, the arresting officer must take or cause to be taken fingerprints, photographs of the defendant, and is the list including felonies now and misdemeanors?

Now, as a policeman, it doesn't seem reasonable to me that persons arrested for misdemeanors -- certain ones, yes, but for any misdemeanor should be fingerprinted and photographed. It is around the 4th of July and here is a 16-year-old boy with some sparklers, and he got arrested, and it is a misdemeanor. According to this, if we take him to the station we fingerprint him, mug him, and I don't feel that that is necessary in our society.

MR. BENTLEY: I don't either.

MR. DENZER: You want a list that says --

JUDGE CONWAY: This would include cherry bombs and other types.

COMMISSIONER BLAIR: I wouldn't know, but I certainly know sparklers shouldn't be involved.

MR. DENZER: This is a misdemeanor in the Penal Law and it doesn't mean any one of those millions of misdemeanors --

COMMISSIONER BLAIR: No, sir, the requirement outside of the Penal Law is that a second conviction raises it to a felony classification.

MR. MC QUILLAN: Could I ask you a question on that? Would it be workable to delegate to NYSIIS the authority to promulgate the list of misdemeanors, or the theory that perhaps the Chiefs and the Commissioners around the State may agree on this?

COMMISSIONER BLAIR: I think that would be a reasonable approach, NYSIIS, perhaps with the Chiefs, and perhaps the District Attorneys have some views, and perhaps the Judges have some views. To make it a blanket requirement that for any misdemeanor you will be mugged and fingerprinted, that

is too much like registration, the number tattooed on the arm, to me.

MR. DENZER: Your point is well taken.

MR. BENTLEY: I think we ought to take a look at this whole subject before you mug anyone.

MR. DENZER: Yes.

JUDGE CONWAY: You have lots more time.

COMMISSIONER BLAIR: I can shut this off at any time.

JUDGE CONWAY: No, go ahead.

COMMISSIONER BLAIR: I have another couple of points. One, again in the Section concerning determination with the normal court or the emergency court, the Commission at page XXII says that the rule is defined to prevent the judge-shopping by police officers who are well aware of the ideas and the heart and the soft touch of the village justices of their county.

Well, I know several hundred town and village police officers and I don't know of a one of them who has ever engaged in that judge-shopping. I have been familiar with attorneys who have engaged in forum-shopping, but as far as police officers

looking for a tough judge, the town and village officers -- well, I just felt I would have to say something on that.

MR. DENZER: That came from the present President of the Magistrates Association.

COMMISSIONER BLAIR: All right.

I would like to comment on Chief Lombard's comment on the use of force in the execution of a search warrant. Let me say that as a practical matter, if you are set upon in the process of executing a search warrant, you, many times, won't have the opportunity to retreat and go and get the additional force you need. In many cases, it is practically an impossibility, and can result, in my opinion, in an increased number of injuries among peace officers engaged in the service of warrants.

ASSEMBLYMAN ALTMAN: Are you saying that it has to be an opportunity to retreat? I am not sure wherein that appears.

COMMISSIONER BLAIR: Well, in the Commission's comment, let me see -- it is in the current one, and I believe it was 365.50, Subdivision 1, and now there has been an additional one for

self-defense, but many times it is too late, until you are prepared and ready. As a practical matter let me read this --

MR. DENZER: You think he should be able to shoot somebody in order to get this?

COMMISSIONER BLAIR: No, not in order to get in. But I think that if, in the process of serving the warrant, I think he should know that if it becomes necessary, he can resort to whatever force is necessary in order to execute the warrant.

MR. DENZER: Suppose he can't overpower the fellow, he tries it, and he can't do it? Would you permit him to shoot him for the sole purpose of executing the warrant?

COMMISSIONER BLAIR: We are at a tough point, aren't we?

MR. DENZER: Yes.

COMMISSIONER BLAIR: The issue becomes just how valuable is our whole law enforcement and whole judicial situation, and whole organization. In other words, how do we get individuals for evidence before the bar, right? How important is it to get it before the bar?

MR. BENTLEY: Not by shooting him.

COMMISSIONER BLAIR: Well, --

MR. BENTLEY: Chief Lombard made the comment before he had seen the new section and the new section is different.

COMMISSIONER BLAIR: I know you have added something.

MR. BENTLEY: You can use force to protect yourself.

COMMISSIONER BLAIR: Apparently the Commission feels it is sufficient. Fine, I just want it on the record. That is all.

Under Section 37.00 the wiretapping, I have to concur with what -- with some of Chief Lombard's comments that I believe that the Burger decision has enough restrictions, I think, that perhaps this goes a little bit beyond the restrictions of the Burger decision. It may be useful to add here what has been added under -- I don't know if it is Title III, or Title IV of the Omnibus Crime and Safety Control Act, something like that, and that is some section that would authorize the disclosure of information or contents by the investigating

law officer to other investigative or other law enforcement officers, and also to make sure that whatever information he has, it would be authorized to permit him such use as is appropriate to the performance of his official duties.

Also, in the Omnibus Act there was a provision that establishes a Commission that is going to make reports, I believe, over the years. I observed that under Section 370.55 here, that every order, a return is required to be made to the Judicial Conference. It may be useful in the areas of invasions of privacy, which is what it amounts to, if the Judicial Conference were required to make some reports, and perhaps some suggestions and conclusions, perhaps five years after the enactment of the particular session.

ASSEMBLYMAN ALTMAN: The Judicial Conference usually does make comments on a periodic basis. That is what we require.

COMMISSIONER BLAIR: Fine. I don't like the principle of requiring this, Counsellor --

ASSEMBLYMAN ALTMAN: It is not a question

of requirement, but we have a practice where it does that.

COMMISSIONER BLAIR: Do you have a particular objection to putting it in the form of a directive in the statute? The only reason I say that ~~is only~~

MR. BENTLEY: I believe it is in the Judicial Law.

COMMISSIONER BLAIR: I see. The only reason I say that is that you make a requirement that a police officer request it, in cases -- well, it would include misdemeanors and up -- where they forward the prints and mugs to NYSIIS, and there is a requirement that the Police Department request them to send back the criminal information on the individual.

MR. ALTMAN: This is an area that we will have sufficient review on by all parties, and we will be able to investigate from time to time, we as citizens.

COMMISSIONER BLAIR: All right. Gentlemen, I thank you for the opportunity, and for your graciousness.

JUDGE CONWAY: We thank you for your searching analysis.

VICE CHAIRMAN PFEIFFER: The next speaker is the Commissioner of Public Safety of the City of Rochester, Mark H. Touhey.

COMMISSIONER MARK H. TOUHEY, JR.: I will be very brief, and I intend to limit my remarks to you in the areas of eavesdropping warrants. I, as you, realize that the entire area is fraught with constitutional questions. I, too, believe, however, that the present legislation under which we are operating is good, with the exception of an area to which I shall refer very shortly.

Now, I realize that this current legislation was drawn in an effort to comply with the questions raised by the Supreme Court in the Burger decision, and I think the Committee has done an excellent job in trying to determine just exactly what the Supreme Court wanted.

I am sure that we all realize that regardless of the legislation, that there will always be those, always be those who will attack it for various reasons, just like there will always

be those who will attack law enforcement, and won't be happy until law enforcement removes all of the equipment they have, including their uniforms, and they don't even come out on the street.

I firmly believe that such legislation, such legislation in the area of eavesdropping warrants is not only desirable, but absolutely necessary in the modern society in which we live.

Now, I served eighteen and a half years as a Special Agent of the F.B.I., and I don't believe that there is any organization in the law enforcement field that has more studiously guarded the rights and constitutional guarantees of all people, and I offer that to you simply so that we have established a program of reference as far as I am concerned.

I think I know that indiscriminate, unreasonable, and unnecessary penetration by the State will not be tolerated by our citizens. However, reasonable penetration is surrounded by appropriate safeguards to protect their liberty, and their privacy, and at the same time to allow the State to carry out its governmental functions that are demanded, and I say demanded by our citizens.

Now, the current eavesdropping legislation limits application for the type of warrants to the district attorneys, and the Attorney General, unless I am incorrect, or to those individuals who are specifically acting or discharging the duties of the district attorneys, or the Attorney General of the State of New York.

Frankly, I believe that applications for eavesdropping warrants should be allowed to other individuals. It is not really material who makes the application for a warrant, it really isn't material but what is important, and what is material to the adequate admission of criminal justice is the identification of the official who decides whether or not a warrant should be issued. In the concept which we have placed this we have many to whom are granted, between the State and the individual in order to assure that the rights of both are adequately protected, and it is an old and time-honored custom.

It is the type of custom, or concept, which has served our form of government so well over the years.

As long as the current legislation, or proposed legislation inserts a competent judge between the State and the individual, then the rights of both are adequately protected, I feel.

Therefore, I offer the following for your consideration, and only for your consideration, gentlemen: I think it is far too much to expect that the District Attorney, or the Attorney General of the State, can be available at all times, under all circumstances to file applications for eavesdropping warrants. With proper and due respect to the District Attorney, and to the Attorney General of the State, these individuals are not, are not the foremost law enforcement officers in the country, or in the State. Speaking specifically to the area of the District Attorney, he is the prosecutor, and while many of his responsibilities may overlap into the enforcement field, these are really the exceptions, rather than the rule. For it is the Sheriff, and the Chief of Police, who are the foremost law enforcement officials in the area. These are the individuals who are held accountable to the people in the community for maintaining law

and order. These are the individuals who must answer to the rising crime, or to the misconduct of a police officer, or to the presence of organized crime, or to the presence of vice, whether it be gambling, prostitution, or what have you.

Since they are held accountable to the people, I say give them the tools of their trade. I say let the present eavesdropping legislation be changed to include the Sheriff and the Chief of Police, or the chief law enforcement officer in the particular area, perhaps in the major community, as the ones who apply for eavesdropping warrants.

Gentlemen, whether elected or appointed, if we can't trust the Sheriff or the Chief of Police, it is not good, and we better pack up our bags and go home.

That is all I have to offer.

ASSEMBLYMAN ALTMAN: You would change 372.37, to include the Chief of Police and the Sheriff?

COMMISSIONER TOUHEY: Yes, sir. If you wanted to restrict this, because we have chiefs of police in communities where there are two or three,

if you wanted to name names or communities -- well, Mr. Blair is from Buffalo, and Syracuse is a major community, and certainly Rochester is a major community, and certainly New York City and Nassau County --

ASSEMBLYMAN ALTMAN: Your objection to the District Attorney is a question of availability?

COMMISSIONER TOUHEY: I think that this is my major objection to it.

MR. DENZER: How about the federal act? Doesn't that limit it?

MR. MC QUILLAN: It would appear that the federal act which was signed by the President after -- just a week after the present eavesdropping statute in New York was signed by the Governor, the act plus the Senate Report accompanying it, making it rather clear that at the State level the chief Prosecuting attorney of the State, or the chief prosecuting attorney of the next larger political subdivision, only may apply.

COMMISSIONER TOUHEY: If that is true, sir, then I ask you if you can't make the changes, that you use the strength of your office to put this in

the proper perspective, and allow the chief law enforcement official in the major community to have that kind of right in applying for eavesdropping warrants.

Again I say that we are the ones that are held accountable to the public, not the District Attorney. No one asks the District Attorney whether we have an increase in crime: no one asks the District Attorney where the Cosa Nostra is, or whether organized crime is moving into his area. No, it is the chief law enforcement official. If he is going to be held accountable, give him the tools.

MR. MC QUILLIAN: The federal act would have to be amended first, before the State could be done.

COMMISSIONER TOUHEY: I wouldn't know. I know that the Omnibus Crime Bill gave the Federal Bureau of Investigation the right to become involved in the wiretapping legislation, again, eavesdropping, but unfortunately, the current Attorney General of the United States has sought it unfit to allow them to do the job, and I think that,

too, is not very good, and unfortunately I blame Mr. Clark very much for this.

VICE CHAIRMAN PFEIFFER: When you use the word "Sheriff" you mean only the sheriff, and not a deputy?

COMMISSIONER TOUHEY: No, I would say, sir, that it should be the chief law enforcement administrator, like in the County of Monroe where we have Chief Skinner, or in his absence, someone acting for him.

VICE CHAIRMAN PFEIFFER: Not every Deputy Sheriff?

COMMISSIONER TOUHEY: No, sir, the Chief of Police, or in his absence, someone acting for him.

Mr. Chairman, and gentlemen, thank you very much.

VICE CHAIRMAN PFEIFFER: Next we will hear from Captain Kenneth P. Kennedy.

CAPTAIN KENNETH P. KENNEDY: I am Captain Kenneth P. Kennedy and I am Commanding Officer in the Buffalo Police Department.

I know that your main concern here today is the revision of the Code of Criminal Procedure.

However, I would like to call to your attention a condition that exists in the City of Buffalo and at the present time in the State of New York, pertaining to the Penal Law, and the prostitution section that we have to work with, which is Section 230 of the Penal Law.

What we are running into in the City of Buffalo at present is because of the sentence being reduced from a maximum 3-year upon conviction, to a 15-day penalty, and also the law that has taken away the provision for probation, and that was very, very helpful to us, especially in dealing with youngsters, but gives nowhere near the power that the court did have previously to sentence these continued repeaters to a maximum of 90 days, or at least a year, that was very, very effective in deterring them.

I would like to respectfully submit to you gentlemen that you consider the possibility of restating the probation clause within the prostitution section. I have some statistics here concerning the arrest of prostitutes for the period from 1965 to

1967, and 1968, and it shows that in 1965 the average age was 27 years. In 1966, the average age was 25, and now it is down to 23. We are running into these youngsters, tender kids who have no business being involved in prostitution, 17 and 18 years of age, and the court is placed in a position where they simply tell them to get out of here and don't do it again. This is very, very bad for the entire community. It has led to a condition where I have talked to these young girls through the last several months, and I have asked them why they have come into prostitution, what inspired them or caused them to turn to prostitution and many of them have high school educations, and many have business training, and so on, and they have told me that they have been influenced by procurers who have told them it is only 15 days, and very easy to get away with.

Also, now we are running into these 18 or 19 year old girls who are -- one was telling the other that it is pretty easy, that you don't have to worry and it is only 15 days at the most, and that the courts are not giving you the 15 days for the first offense, and best of all, your parents, or

no one else knows about it, you just go before the court, and you are let back out on the street.

ACTING CHAIRMAN PFEIFFER: May I say that the Commission is fully aware of this kind of thing. We are trying to make a study, and we hope to take it up at the next meeting of the Commission, the whole problem of the sentences in connection with public intoxication and prostitution. This isn't an area that I think we have done a good job on. What a good job would be, I certainly don't know.

MR. DENZER: We have received complaints, as Mr. Pfeiffer says, and our attitude has been, all right, by all means if that is the situation, raise it to a Class B misdemeanor, and we have conferred with the Mayors' Committee, and New York City on this, and we agreed with them that we would help them if they wanted to put a bill in.

The next thing I knew was that a bill that would have raised it to a Class A misdemeanor was to be put in the Legislature, and nothing happened to it. Didn't that emanate from Buffalo?

COMMISSIONER TOUHEY: Yes, Assemblyman Hausbeck introduced that, I think.

MR. DENZER: The police never got behind it.

COMMISSIONER TOUHEY: That is possibly where we are lax in the previous amendment to it, but this time we have plenty of support from businessmen, and so on, and also we are going to different police organizations and trying to get their support. That would be a wonderful solution to the whole thing because if it was stepped up to a misdemeanor, it would also give us the power to enforce section 240.35, and subdivision 6, and we would be able to chase the girl off the corner again.

Now, there are perhaps 10 or 15 of them that we are convinced are prostitutes, and they are loitering on the corner, and we are powerless to do anything about it, unless we make direct cases and secure direct evidence. With the loitering section we could -- well, if it was a misdemeanor, we would be concerned that they are about to engage in a crime, or have engaged in a crime, and that would be a wonderful help to us, and it would reinstate the prohibition provision, too, and it would be a wonderful thing if we could do it.

MR. DENZER: We are not adverse to it, but I don't know what happened to this law.

COMMISSIONER TOUHEY: I think we will find a little more support for it this time.

Thank you very much.

MR. MC QUILLAN: We will have the next witness.

MR. JAMES ROBINSON: I am James Robinson, and I am a Town Justice, in the Town of Chili.

I am here at the request of our Magistrates Association to engage you in a little local fight. It is related, I suppose, to the area or the section now on appearance tickets. It is the feeling of our Magistrates Association that it doesn't serve any useful purpose, and may even be detrimental to have a defendant brought before us at 3 o'clock in the morning, especially in the cases of intoxication or something like that where you actually then become a witness to the offense, and then later on become a trier of the offense, which I think becomes detrimental to the defendant.

It is our request that some provision be put into this Code -- well, going a little

further on this appearance ticket, and you mention in there that if a Magistrate is unavailable, that then the specified officer shall either be given an appearance ticket, or accept bail.

Now, I don't notice in here the provision that is in the present Code saying that a Magistrate is unable during the hours of --

MR. DENZER: He didn't use the hours. It seemed hard to pin it down to hours.

MR. ROBINSON: We happen to like the particular hours. So far we haven't used them. I think I can say that we would like to see that retained in there, but what we really would like is two things: One, a direction that in the event that the defendant cannot post bail, or so on, that the Sheriff can be directed to retain him, and bring him before the Magistrate during the normal hours for arraignment. In other words, if he is arrested at 3 o'clock in the morning on this charge, the Deputy or the officer will set bail within the prescribed limitations, and if the man can't post bail, then he will be detained. In other words, the Sheriff's jail be used as a lock-up and I think

we would like an affirmative direction. At present, in this county, the idea is that a sheriff cannot detain a man overnight without a commitment from a Magistrate.

We feel that this is detrimental to both the Judge and to the defendant.

Secondly, on this, the Magistrates Association is a little more divided on this, and we would like the power to arraign outside of our town limits, in other words, a county-wide arrangement.

This is a feeling of a few others. There is a little less for that, but have it set up so that it could be possible that all of them could be arraigned, all of the defendants, and locked up during a given night, and arraigned at 8 o'clock in the courtroom in a Hall of Justice, rather than hauling them around the County.

MR. DENZER: Do you mean Morris Zweig?

MR. ROBINSON: No, this is just the Monroe County Association. We have tried to work through them, and I don't think the State Magistrates Association is in accordance with our position.

MR. DENZER: That is what I meant when I mentioned the limits on the arraignment.

MR. ROBINSON: Our specific problem is that we have to arraign, and I don't believe -- we would like an affirmative direction. If a man can't post bail, he can be put in a lock-up area, and I think this would require that the Correction Law also be changed to change the function of a jail. We don't have a lock-up, we don't have a County lock-up in the County of Monroe.

MR. DENZER: What happens here -- I don't know why you need any more. You have this man, at 3 o'clock in the morning, and the police officer says, "I am not going to give you an appearance ticket," and you let him go unconditionally, and you fix bail, and you fix the bail high in this case, \$200 or \$200 in cash, and the man can't raise it.

Now, if he can't raise it, then he has got to stay there --

MR. ROBINSON: If that was affirmatively stated -- we have the position now where we have a County Jail, but no lock-up. The City police

have a lock-up, and there they pick up a man for public intoxication or loitering, and so on, and they throw him in overnight, and he appears before the Judge the next morning. We don't have that. Under the position that the Correction Department and the Sheriff's office have taken in this county, it is that the jail is a jail as defined under the Correction Law, and one of the permitted uses is not detention, except by court order.

MR. DENZER: You have no lock-up?

MR. ROBINSON: We have no lock-up, and that is why the Magistrates Association, -- well, state-wide, I assume that that is one of the reasons that they haven't taken the interest in our problem, is because it is a local problem. We think with affirmative direction that this section, under the appearance ticket, together with a proper change in the Correction Law, that this would alleviate some of the problems.

JUDGE CONWAY: Commissioner Blair, do you know what is done in Erie? Do they roust out the J.P. in the morning?

COMMISSIONER BLAIR: The Town has a

lock-up.

JUDGE CONWAY: Do you have a lock-up?

COMMISSIONER BLAIR: One, but not many. They will not accept them without an order. We are trying to get that, in connection with our female prisoners.

JUDGE CONWAY: Is there any place else in the State where they have detention without a commitment?

MR. ROBINSON: We have been dealing with the County Legal Adviser here, and there apparently is -- at least, the Sheriff has used one as a lock-up, and there was a Court of Claims case and that stated it was used as a lock-up. I don't know of any Sheriff as such, that has a lock-up. I don't know the procedure state-wide. We feel, particularly in some of these cases where you are a witness, by arraigning the person at 3 o'clock you become a witness, and it makes it difficult.

JUDGE CONWAY: There is one that was provided for a lock-up and the Chief refused to get it approved, because he would rather wake the Judge up than put up with the prisoner all night.

Do we have another speaker?

MR. JOHN BERNSTEIN: Gentlemen, I am Jack Bernstein. I came prepared with a beautiful speech, which I would now have to pretty much scrap. In any event, my name is Jack Bernstein and I am the Regional Vice President of the New York State Parole Officers Association. I am a Senior Parole Officer in the Division of Parole, and I am a member of the bar, both State and Federal.

Our membership is approximately 400 parole officers, and senior parole officers, and we work in -- well, we are extremely concerned about the proposed criminal procedure law, particularly Section 1.20, Subdivision 32, dealing with police officers which we learned you have now amended, and I have had only time to look over this very quickly within the last five or six minutes, and so this may be a mutual education project, and I trust that you will grant me the time to enlighten me, and perhaps I could shed some light on some questions you may have.

I'd like to just go into, quickly, what parole officers of this State do. In the old

law, Section 154, you stated in your Blue Book that the number of peace officers bear little resemblance to police officers, and I agree with this. I do not agree with it in respect to State parole officers. The parole officers of this State are very specially educated and are highly trained, and even an elite group, the likes of which are not found in any other state in the union in regards to parole.

I think that we require, and the public interest requires some sort of special treatment for Parole Officers in the proposed Criminal Procedure Law, and possibly in new revisions, that they get this special treatment. I would say that they are more knowledgeable as to the actual criminal population, their haunts and patterns of conduct than any other criminal investigators in New York State.

We operate as field parole officers exclusively in a sea of crime, and pretty much there is no other agency in the country which operates as we do. Our contacts are with convicted criminals, their families and their friends, and their evil associates.

Because of this, our chances of becoming embroiled in any incident totally unrelated to our actual parole functions are multiplied enormously. We spend our days and nights in and around the centers of high delinquency, and most of these are places where you, as a private citizen -- and let me emphasize a private citizen -- would not go along because of the extreme likelihood of being set upon by lawless elements in the community. Those persons are not necessarily parolees.

Let me state that we do not work a 9 to 5 day. We are on duty 24 hours a day for seven days a week. We have no set shifts of work, and in the field we work any hours of the day or night, as the need arises. We must be constantly prepared to combat the criminals in our society at any time, any place, anywhere, and that means whether we are out on a family picnic on a Sunday, or otherwise.

Now, I say your lives are always in danger because of what conduct you have with these parolees and former parolees. We receive many threats, we are protected in part by the knowledge of the criminal that there is extremely swift retribution for the

taking of the law enforcement officer's life as well as by our own police powers, or let me amend that, our own peace officer powers.

We never know when or where we will be called upon to exercise our authority. I have believed that it would have been impossible for you to set forth in a separate law, as had been originally planned in the Blue Book, to set forth exactly when and where we could exercise our authority. I believe it was far wiser to classify us as police officers. The reason that I recommended this is that we are some akin to police officers, that we are looked upon by police agencies, both federal, state and local, as police officers. We make our own arrests, and often criminal associates of parolees and turn them over to local police. In fact, the federal parole officers make more arrests of serious criminals than the average patrolman of the metropolitan police force.

We were not the group which, as quoted in the Blue Book, is quite vigorously opposed by the regular police. We in Rochester are proud of the cooperation which exists between the Division of Parole and the Rochester Police Bureau. The

Monroe County Sheriff's Department, the State Police, the F.B.I., and other police agencies, and the same is true of our other officers throughout the State. We have never been involved in false arrests or unwarranted shootings, or excessive use of authority. Our parole staff is composed of personnel having law degrees, Master's degrees in criminology, and social work. Some of our parole officers teach police science courses on a college level to police officers. Such men do not act irrationally, and do not abuse peace officer, or police power.

Now, I was going to urge upon you that you grant the parole officers, the police officer power. I thought that we fitted in the definition on page 16, which says, and this is Roman Number XVI in the Blue Book: "A city police officer, who is required to arrest for crime and to keep order at all times, whether he be on or off duty, obviously needs fulltime police authority."

I feel that this was just as true in regard to parole officers, since you cannot limit his duties to certain times or occasions.

MR. DENZER: Do you think that parole

officers have an obligation to make an arrest any time, or anywhere, where they have cause to believe that a crime was committed?

MR. BERNSTEIN: Let me say this: That if I saw a crime committed, I act. I saved one of the Assemblyman's --

MR. DENZER: You have an obligation?

MR. BERNSTEIN: I have an obligation, too.

MR. DENZER: I am talking about an official obligation. Police officers do, and that is part of their function, they must. For you, it is just may.

MR. BERNSTEIN: All right. Even if I may, I am still going to act, and any one of the parole officers will act if he sees a crime of violence committed in front of him. I saved one of Benjamin Altman's constituents down in the Bronx three weeks ago who was being attacked in an elevator. I acted. Now, I would hate to think that I am acting as a private citizen, that I am unable to use my side-arm in the event that I am confronted with force.

MR. DENZER: What we are trying to nail down here, which is an unpleasant job, is the difference between a police officer and the

non-police peace officer. There must be some difference.

The difference is that the police officers have the obligation, whereas the other police officer does not have the obligation. That seems to be the real distinction, and certain powers should go with obligations. These police powers are not accorded to other peace officers, are granted to the police, because they must act. It is their duty.

MR. BERNSTEIN: I understand that, and I understand that that was the thinking of the Counsellors. However, the fact remains that you do have parole officers walking the streets, driving their cars, living in neighborhoods, and they are armed, and if they see something happen, a crime of violence, I see no reason why they cannot act and be protected as peace officers, rather than a private citizen making an arrest. It is not a question of a blanket thing that has to be applied to everybody. I think it has to be looked at individually, it has to be looked at as to the qualifications for the individual, the training, and the experience that the individual group of peace officers have that you are considering.

I don't think that you can blanketly say that because someone is a court officer, or someone is a prison guard, or someone is a parole officer that you can all be placed in the same classified system.

MR. DENZER: What do you think of a provision that permitted a parole officer and some other peace officer comparable in making arrests for felonies committed within their presence, when they have this within their particular jurisdiction?

MR. BERNSTEIN: Our jurisdiction is state-wide.

MR. DENZER: That is right. That is all the police are given, outside of their bailiwick, really. That is the main thing. If a felony is committed in a police officer's presence, he can arrest, even if he is not in his bailiwick. What about an equivalent provision? Would that satisfy you?

MR. BERNSTEIN: The felony committed in the presence of a parole officer?

MR. DENZER: Yes.

MR. BERNSTEIN: Let me ask you this:

Suppose I am making an arrest of a parolee, and I

know that a person who is an associate of the parolee is wanted by the police, and I find such person in proximity to the parolee, as I am making the arrest. Can I then arrest the person in proximity that is wanted by the police, as a peace officer, or do I have to arrest him as a private citizen?

MR. DENZER: Like a private citizen. That would not be a part, strictly speaking, of your parole officer duties.

MR. BERNSTEIN: Now, even though the police would not wish to agree with you on something like this.

JUDGE CONWAY: We are in an unusual situation of being quite familiar with your field, and yours is the only organization which has come into this, concerning this. We have a charter member of the Commission who is a member of the Board of Parole, Howard Jones, and he kept telling us and impressing us of your task.

MR. BERNSTEIN: I know, but Commissioner Jones -- well, let me say this: That anyone that is based on the high and exalted level of Commissioner Jones, and I say this with respect,

because he is a man who does deserve a great deal of respect and admiration, he is an extremely learned man. However, the knowledge gained in the actual doing of field parole work cannot be transmitted in total to a Commissioner of the Board, or to a high Supervisory level person who has been out of it. Unless you, yourself, have walked down the streets and walked up tenement stairs and knocked on doors and opened them, and come upon the most bizarre situations, unexpectedly, and you have to react to those situations immediately, unless you have done that, you cannot tell the whole story of parole, because you have not had the experience.

ASSEMBLYMAN ALTMAN: Wouldn't that be covered in what Mr. Denzer just tried to frame in terms of what -- within the scope of what you are doing, in terms of reaction in your job? Isn't that what Mr. Denzer is trying to point out?

MR. BERNSTEIN: No, he said that I would be a private citizen.

MR. DENZER: That wouldn't be a felony committed in your presence.

MR. BERNSTEIN: But I would be a private

citizen, right?

Now, myself, and two officers sitting in this room today made such an arrest for which we received a great deal of praise from the police, and I have a clipping here, and I do not want to mention the name, as the case is currently before this court, but --

JUDGE CONWAY: It happens to be currently before this particular part.

MR. BERNSTEIN: I believe so.

Now, we come across these situations, just the thing that happened in the Bronx. Now, I was visiting my family down there and a woman is screaming, and it is late at night, 1:30 at night, I put on my pants and my gun, and I put on my shield and I run down, and I am a heavy fellow, I make a lot of noise coming down the stairs, but the screams can be heard all over the place. The fellow who is attacking the woman runs when he hears me coming.

Once I am down there, then all of the rest of the neighbors come out, and they say that they weren't going to come out because they were afraid.

Now, if you were to put me in the position of a private citizen, maybe I wouldn't want to come out either at 1:30 in the morning. Maybe you could have another Genovese happening in the Bronx, three weeks ago.

MR. DENZER: If you were wounded, would the State pay for that?

MR. BERNSTEIN: I don't know.

MR. DENZER: That is one of the problems.

MR. BERNSTEIN: I don't know, but as the very learned Commissioner from Buffalo said, and he just spoke a little while ago -- well, let me say that I think that questions of public safety are -- they transcend the question of liability of the State. I think that the service that we do in preventing serious injury to our people, and apprehending criminals who maraud and make the streets unsafe, more than compensates for any funds that the State might have to pay out for an injured officer.

Let me say that there have been very few parole officers over the 30-odd years of existence who have been injured in the line of duty. We are

very careful, and we work very carefully, and cautiously. That is not saying that it cannot happen. I am sure eventually it will happen.

MR. DENZER: The only reason I mention it, is that the State would not reimburse you for those injuries, and probably they would not, and it would be because you were not acting within the scope of your employment. In other words, they would, the State would not regard you as having the power to do the kind of thing that you are advocating here.

MR. BERNSTEIN: This, I do not know.

JUDGE CONWAY: I can't say that the State would say it would be non-service, at this time.

Do you have anything else, Mr. Bernstein?

MR. BERNSTEIN: Yes. However, I will scrap the rest of this statement.

I just want to take up 70.51, arrests without a warrant by non-police peace officers, and it is pretty much what we have been saying. I do not think that this covers us for what we have been talking about today, and I think that Parole Officers should be covered for this. I would appreciate it if you gentlemen would reconsider this, and redraft

this in view of the comments that I have made today.

I am sure you will be hearing more from the Parole Officers Association in both Albany, and New York, where we will take up the rest of this, and I thank you for your time today, gentlemen.

JUDGE CONWAY: Thank you very much.

I am pleased to present to my fellow members of the Commission, my partner here, the newest Monroe County Judge, having been appointed last February, the Honorable John A. Mastrella.

JUDGE MASTRELLA: Members of the Commission, I would like to discuss that portion of Section 30.80 dealing with Subsection 3 of Article B. Apparently the Commission wishes to write into the law the Miranda decision making it mandatory that a defendant be advised of his rights before such statement can be admitted into evidence.

Now, hope springs eternal that a more conservative court may some day limit the Miranda decision, and if that does happen, of course, the effect of this portion of the statute would be to keep it in effect, and that is the warning that would have to be given, rather than to interpret

the Constitution to mean that a person shall not be compelled to testify against himself, rather that a person shall be advised of the law before he is permitted to testify against himself.

Now, many people seem to feel that the delay in the trial of cases in criminal courts are the results of the increase in the number of cases, or are increasing the number of crimes. Apparently that doesn't seem to be the problem here in Monroe County, and I don't believe it is the problem throughout the State.

Now, back in 1951 and 1952, which was the first year I was in the District Attorney's office, there was 300-some indictments returned by the Grand Jury. In 1967, which was the last year I was there, there were 619, just double.

But in 1952, we had two County Judges to handle it adequately, and in 1967 we have three, and of course, with the visiting Judges, at least one, and many times two, the ratio was at least equal to what it was in 1952, but in 1952 out of the

347 indictments, only 21 were moved for trial, and that was not an unusual year, because as late as 1960, there were only 15 cases tried that year. Then, in 1964, it jumped to 81, and in -- I mean in 1965 it was 81, and in 1966 it was 84, and in 1967, out of the 691 indictments 100 and some-odd of them were tried; in addition to that, they had 111 hearings, which of course were the result of these various decisions, including the Miranda decision.

The effect of these decisions is what has been causing the delay, because the defendants now know that if they plead -- whether they committed the crime or not -- if they plead, they are waiving many of these escape hatches that they have either at the present time or the future. We have had examples right here in Monroe County recently where two have been convicted of murder in the first degree, and they have been released, and that has happened throughout the State, and throughout the country.

The question on appeal no longer is whether the defendant committed the crime. That seems to be secondary, but whether or not a particular procedure was followed. They don't appeal or say

they didn't commit it, but it is on the grounds that this wasn't done properly, or that wasn't done properly. There is also a hope that with a more conservative court we may get rid of some of the effects concerning the *Matt* versus Ohio, and the *Miranda*, and the *Esposito*. If that happens -- of course, I would like not to see this section in the law where the *Warn* statement has to be given.

MR. DENZER: When the *Miranda* decision came down, it came down while we were drafting this Code, and the question is what do we do about it?

The Supreme Court has said that the United States Constitution requires this, and an individual has to be advised of his rights to remain silent, and have a lawyer, and so on, and should we write this into the statute? The answer was no, we didn't want to freeze it in, because as you say, the Supreme Court might change its views. We put it in a general fashion, which said without first effectively advising --

JUDGE MASTRELLA: That is the word "advising."

MR. DENZER: Now, if the Supreme Court should retract, and say don't give him these warnings, then pursuant to this, you don't have to give him any warnings.

JUDGE MASTRELLA: He has the right to have an attorney, there is no question about that, but he is entitled to be advised of it. You don't say he is entitled to the protection of the Constitution. He is, there is no question about that, but the sole question here is, is he entitled to be advised, and that is the word "is entitled to be advised." He is entitled to all of the protection under the Constitution, no question about that. He was entitled to it before Miranda, and he will be entitled to it whether or not it is ever modified. But the question is, must he be advised, and that is the word.

MR. DENZER: I see. In other words, you would say that this would be cured, if we changed it without first giving the defendant such instructions as required to be given under the Constitution of the State?

JUDGE MASTRELLA: The Constitution of the

State doesn't require any.

MR. DENZER: Then if it didn't you wouldn't have to give him any instructions.

JUDGE MASTRELLA: Without first giving him the protection that he is entitled to under the Constitution of the State, or Federal government, without going into the question of instructions, or advice. Those are two things that I am opposed to, instructions and advice.

MR. DENZER: I see your point.

JUDGE MASTRELLA: I would like, also, to discuss the question of preliminary hearings, and of course the great number of preliminary hearings are taxing our lower courts to the point where they cannot effectively go about the rest of our business.

As I understand a preliminary hearing, the purpose is to determine whether or not a defendant should be held in custody pending the action of the Grand Jury. Under those circumstances, it would appear to me that whether a person is paroled or released on bail, that he is not entitled to a preliminary hearing. In fact, if you follow the law as it is today, I know it is done, but actually

there is no remedy. Today if a person who is out on bail is refused a preliminary hearing, his only remedy is a writ of habeas corpus. If he is out on bail, of course he cannot obtain a writ, because he is not in the custody of a sheriff. We are talking about felony cases.

Now, here, under the law, or under this particular Code, you are giving him hearing on felony cases whether or not they are in custody, and I think that is actually defeating the very purpose of a preliminary hearing, and that is to determine whether or not he should be held in custody pending the action of the Grand Jury. Having been released on bail, or paroled, he is not in custody under those circumstances.

What I would like to see written into the statute is something to the effect that anyone who is in custody after 72 hours is entitled to it, and I want to put a time limit on it, because until that is done, of course, they would either, if he is there the first day they would ask for a preliminary hearing, possibly.

ASSEMBLYMAN ALTMAN: If somebody is in

custody, there should be a mandatory provision for a hearing?

JUDGE MASTRELLA: That he is entitled to it, if he wishes. As it is now, he doesn't have to have a hearing under the present law, or under the laws as you have written it here. I think under the laws as you have it here, if he is out on bail, he is still entitled to a hearing, and that is the way it is being interpreted today, if he is out on bail he is entitled to a hearing. If the purpose of a preliminary hearing is to determine whether or not he should be held in custody pending action of the Grand Jury, and he is not in custody, why should we have a hearing, except to give evidence to the defendant, and the court has expressly stated time and time again that that is not the purpose of a preliminary hearing.

MR. DENZER: It was not to determine whether he should remain in custody, but held for the action of the Grand Jury?

JUDGE MASTRELLA: I think it was to remain in custody. As far as the action of the Grand Jury, that has no effect on him. If the evidence is

in the preliminary hearing, -- well, if it isn't, it won't be before the Grand Jury.

MR. DENZER: He is entitled to a hearing whether he is in jail or out of jail or anything. He is also entitled to a hearing to determine whether he should be held.

JUDGE MASTRELLA: What is the purpose of the hearing?

MR. DENZER: So that he can fight the case at that level. Maybe he can get the Judge to throw it out, not hold it for the Grand Jury.

JUDGE MASTRELLA: If the Judge were to throw it out, or hold it for the Grand Jury, how would that make any difference? It would be the same if the Judge throws it out, or holds it for the Grand Jury. Secondly, it is possible for the Grand Jury -- for the Judge to throw it out, and still go in the Grand Jury, so the purpose is not whether or not he should be -- whether or not he should be held pending the action of the Grand Jury, because the Magistrate may throw it out and the D.A. submit it to the Grand Jury anyway.

VICE-CHAIRMAN PFEIFFER: I thought the

purpose of a preliminary hearing was to determine whether there was a prima facie case before the person, and that it didn't have anything to do as to whether he was in jail, or custody, or not.

He could have been out on bail, or anything, but if the Magistrate determined that the prosecution didn't present a prima facie case, the Judge throws it out. That doesn't mean that it cannot be reopened by the Grand Jury. But isn't it primarily a purpose to determine whether there is a prima facie case against this particular person?

JUDGE MASTRELLA: I don't believe that is the primary purpose. I think that is what the court makes the determination on, whether or not there is a prima facie case, that is true, but I think the purpose of it is -- well, I think basically to go back far enough, in any of these counties, you don't have a Grand Jury every month, and you may have a Grand Jury every four or five months, and under those circumstances it would be unfair to keep anyone in custody for four or five months, and then when a Grand Jury upholds a case to find that there is not a prima facie case, and he is released, and

for that reason they set up the preliminary hearings, preliminary to the action of the Grand Jury, but the Grand Jury actually is the only investigating body in the county, they are the ones that make the determination, and by having the preliminary hearing where a person is not in custody, I think is cluttering up our lower courts, and we are denying him nothing that he won't get before the Grand Jury. We are denying him none of his rights, none whatsoever, but we are making it a little easier for the lower courts to function without having hundreds of these cases to deal with.

MR. DENZER: In this county, do you have hearings for the Grand Jury where the defendant has never had a chance of a hearing at a lower court? I know the District Attorney can't, on his own, put it in the Grand Jury at any time, but apart from those cases, do you --

JUDGE MASTRELLIA: Many times what has happened in the past is that where a preliminary hearing is asked for, sometimes it isn't given, or the witnesses don't show up, and the case is dismissed either in City Court, or with a J.P.

Then later, it is submitted to the Grand Jury. In any event, it can be circumvented in that fashion. The only thing is he is not in custody at the time, or under any charges whatsoever. They can, if they wish, circumvent the law by merely not bringing in any witnesses at the time. The case then is dismissed, whether it be the City Court, or here in the Justice Court, and it is then submitted to the Grand Jury. Rather than to put up with that type of abuse, I think what they should do is set it down, when he is entitled to a hearing. If you say that the purpose is not to determine whether or not he should be held in custody pending action of the Grand Jury, then, of course, he would be entitled to a hearing.

MR. DENZER: We have a section that says he is held for -- I think it is 48 hours or 72 hours after he is arraigned, and there is no -- well, the case isn't disposed of, and no hearing, and he hasn't waived, then he is released on his own, after that period of time.

Now, it seems to me that that would take care of that aspect of it.

JUDGE MASTRELLA: The only thing I am concerned with is not cluttering up the lower courts with many hearings with the whole purpose being to determine what evidence the D.A. has in a particular case. They have many, many of them. I don't believe that the rights of the defendant are in any way affected by not giving him a hearing where he is not in custody. He certainly is going to have a fair shake before the Grand Jury, if we have any faith or any confidence at all in the Grand Jury. If the evidence isn't there, he is not going to be indicted. If the evidence is there, he will be indicted whether they refuse or circumvent a hearing in the lower court, or whether he was granted a hearing in the lower court.

If he is out on bail, or he is out on parole, certainly for all intents and purposes he is free, and the only one who is being affected by it now is the court, itself, and if the court does not have all of this additional work to do it will help.

MR. DENZER: When he is out on bail, what does the court do?

JUDGE MASTRELLA: He is held for the Grand Jury, and if he asks for a hearing, he is denied one. The hearing is denied, and he is held for the Grand Jury because he is out on bail, or he is paroled.

MR. ALTMAN: If the fellow is out on bail, he is not entitled to a hearing?

JUDGE MASTRELLA: That is right. I say that if the purpose of a hearing is to determine whether he should be held for the Grand Jury -- well, now, if the purpose for the hearing is for some other reason to affect his substantial rights or constitutional rights, then I agree with you. What is the purpose of the hearing? It doesn't determine whether he is guilty or innocent, so what is the purpose of the hearing?

MR. DENZER: You are speaking from the problems of this area. Now, down in New York, for example, hundreds of cases go through the lower court all of the time, and the only ones that get up to the Grand Jury for all intents and purposes are the ones that the Magistrate holds for the Grand Jury. Most of these defendants, or many of them, want to fight their case right there. They don't

want a case to go to the Grand Jury, and if the Magistrate doesn't hold, then it is not going to go there. The District Attorney won't come down and look through all of these papers to see if some of these cases should, or not, or should not be presented. The cases that go up there are determined by the Magistrates.

JUDGE MASTRELLA: If that is the case, then, I think the community as a whole is being shortchanged. Some of these cases, if the District Attorney is not going to go down and see whether or not they should be presented to the Grand Jury, it is possible that many of these should go to the Grand Jury and don't go to the Grand Jury.

MR. DENZER: The situations are such that you don't do it. You can't have the District Attorney examining all of these cases. That is what the Magistrate is supposed to do, and that is why you have the heaving.

Now, the situation may be different up here where you don't have so many cases, but that is one of the problems.

JUDGE MASTRELLA: In the third area I

would like to discuss, we find the admission of cases to the Grand Jury, and under the Code, as it is now, a case must be submitted to the next Grand Jury which is sitting, and in counties like Monroe, counties where we have a Grand Jury sitting every month, a new Grand Jury, of course the effect would be that anyone arraigned in October, his case, by law, should be submitted to the November Grand Jury, unless there is some good cause shown.

In the failure to do that, of course, there is a motion that can be made to dismiss. I think under your new section here, or under the Code as it is written, if it isn't submitted in 45 days, then he is merely let out on his own. Of course, your 45 days, I believe, is awkward, to begin with, and it is an awkward time if your Grand Jury is sitting every month.

Secondly, it is possible for a person to be charged with a crime and his case never submitted to a Grand Jury. In other words, assuming that a person today is charged with a felony, in City Court, and now within 45 days it is not submitted to the Grand Jury under the laws as you have it here, there

is no compulsion that it be dismissed, that the charge be dismissed, merely that he is let out on parole. Possibly according to the section as I read it, the District Attorney could withhold prosecution or submission almost forever, and the charges remain.

MR. DENZER: He has to present it some time. Once it is held for the Grand Jury, the District Attorney must present it.

JUDGE MASTRELLA: I don't believe there is anything that says that it has to be presented. Merely that he will be released --

MR. DENZER: No, the decision in the Grand Jury section, one section says he must present any case held by a local criminal court.

JUDGE MASTRELLA: In what section?

MR. DENZER: That section doesn't say when, but the other section says that if he doesn't present it within 45 days, then the defendant must be released R.O.I.

I believe it is Section 95.55. That is 2A, and the District Attorney must present it to the Grand Jury -- and this is on the basis of a

felony complaint filed with the local Criminal Court of the County and it has to be held for the action of the Grand Jury.

JUDGE MASTRELLA: It doesn't say when. It could be six months, or any time. Now, some time ago I attempted to have the District Attorney of this County present the cases in accordance with the Code of Criminal Procedure, and that is that I wanted the cases, any one, say, held in the month of October, the cases to be presented in November, and I did that by asking him if he would not, prior to the empanelling of the Grand Jury, submit a list to the Grand Jury of everyone who had been arraigned in the County of Monroe the previous month. I asked that for two reasons: Number One, that the law as it is now, and as it is written, says that when a Grand Jury work is completed -- but nobody, nowhere does it say when or what work the Grand Jury has. What do you mean when you say the work of the Grand Jury is completed? If we follow the law as it exists today and in every case, everyone arraigned in October, his case should be submitted to the November Grand Jury, and then by giving him a list

of all arraigned in October, the Grand Jury would know if their work is completed. If, at the end of the month, there are five or six more cases, or ten cases not submitted, in that event, instead of releasing the Grand Jury, as it has been the custom, it would be extended two or three more days, and it would be then sitting for only a short time, but the result is that you have a backlog, and five, six or seven cases that don't go to the Grand Jury, and the same thing the following month, and the month after that, and then we have a Supreme Court Grand Jury because of the backlog of cases.

If it can be written into the Code that the Grand Jury be advised before they sit what work they have for that particular month, or for that particular term -- in other words, these are the cases that this particular Grand Jury should hear.

Now, I believe there are some laws to the effect that a District Attorney cannot pick his own Grand Jury, and unless you do tell the Grand Jury what cases are set up for a particular term, you are giving the District Attorney the right to determine what cases will be heard.

MR. DENZER: There is a turnover, and I don't know. I mean, they may hear a case near the end of a term, and the crime didn't occur until two weeks earlier.

JUDGE MASTRELLA: But if every felony committed in the month of October is going to be submitted to the November Grand Jury, certainly by the sixth, or seventh, or eighth of November you should have compiled the list of everyone who has been arraigned in the month of October, and the Grand Jury could, at that time, be advised that this is your work for the term, and when this work is completed you may rise. This is the work for this particular Grand Jury.

The District Attorney can withhold some cases from the Grand Jury, and I think you should have it that he doesn't have the right to pick his own Grand Jury. I think it would be a more orderly procedure, and make it possible for a Grand Jury -- or make it unnecessary in the average county for two grand juries to be sitting for any length of time at the same time. As we have it here now, in the month of September, we had both a Supreme

Court Grand Jury and a County Court Grand Jury, and that was because of the backlog of cases.

Under this system, every month a Grand Jury would begin fresh, because the previous Grand Jury, if they did not complete their work, could be held over for four or five days.

You would have two grand juries sitting for a very short time, it is true, but it would not tax, or stress or stretch the ability of the District Attorney's office to handle it.

VICE-CHAIRMAN PFEIFFER: Does anyone else wish to be heard?

If not, thank you very much, and the hearing is adjourned.

(Whereupon the hearing was adjourned at 1:15 p.m.)

I N D E X

	<u>Page</u>
Chief William Lombard . . . . . Chief of Police, City of Rochester	8
Detective Supervisor Richard Cutt. . . . .	22
Deputy Commissioner Thomas Blair . . . . . City of Buffalo Police Department	29
Commissioner Mark H. Touhey, . . . . . Commissioner of Public Safety, City of Rochester	64
Captain Kenneth P. Kennedy . . . . . Commanding Officer, Buffalo Police Department	71
James Robinson, Town Justice . . . . . Town of Chili	76
John Bernstein, Senior Parole Officer . . . . . Division of Parole	82
Hon. John A. Mastrella . . . . . County Judge, County of Monroe	95