

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

New York State Building
80 Center Street
New York, New York

December 13, 1968
10:00 A. M.

PRESIDING:

HON. RICHARD J. BARTLETT, Chairman

PRESENT:

HON. JOHN R. DUNNE, Member of the Commission

HON. WHITMAN KNAPP, Member of the Commission

HON. EDWARD A. PANZARELLA, Member of the Commission

HON. ROBERT BENTLEY, appearing in behalf of the
Chairman of the Senate
Finance Committee

RICHARD G. DENZER, Executive Director.

STAFF:

PETER J. MC QUILLAN, ESQ., Counsel to the Commission

ARNOLD HECHTMAN, ESQ., Ass't. Counsel to the
Commission

HELEN E. GORDON, Administrative Assistant to
the Chairman

[THE PUBLIC HEARING WAS CALLED TO ORDER AT
10:20 A. M. BY THE CHAIRMAN, RICHARD C.
BARTLETT.]

MR. BARTLETT: Good morning, ladies
and gentlemen. My opening remarks of
yesterday and today remind me of typical
Christmas correspondence. We all start off by
saying, "I am sorry I have not had a chance to
write." I promised to be on time this morning
and was late, as usual.

I won't review the
purpose of the hearing, except to say we are
here on the temporary revision of the Penal
Law and Penal Code, to hear your comments and
criticisms in regard to the proposed Criminal
Procedure Law which we presently plan to
submit to the Legislature at the 1969 Session
and urge its adoption with an effective date
of September 1, 1970.

Without anything
further than that, we will proceed now to hear
from those who have indicated they want to
appear as witnesses, and first, we will hear

from R. Harcourt Dodds, Deputy Police
Commissioner of the New York City Police
Department.

May the record
indicate that with me this morning is Senator
John Dunne, Commissioner Whitman Knapp, Mr.
Denzer and Mr. Bentley.

MR. DODDS: Mr. Bartlett and
members of the Commission: As a representative
of the Police Department of the City of New
York, I would like to sincerely thank you and
the members of this Commission, both
individually and collectively, for your
consistent efforts in the preparation of the
proposed Code.

You may recall that
I appeared before this Committee on
February 15, 1968, to make various
recommendations concerning the original 1967
draft of the proposed Criminal Procedure Law.
It is heartening to report that many of those
recommendations have been accepted by this
Commission.

Of course, this is not to say that any changes were necessarily made as a result of our recommendations, but only that the Commission, in its wisdom, has seen fit to make amendments.

However, the Department wishes to be heard again as there remain in the proposed Criminal Procedure Law certain sections which raise several questions as to their practical effect on day-to-day police activities.

Arrest Without a Warrant: Section 70.30 (3), the "agency" arrest provision, raises a number of such considerations. A police officer in this City apparently could not arrest for a felony committed elsewhere unless the "agency" theory in Section 70.30 (3) is invoked.

Moreover, in discussing Section 70.30 (3), questions arise as to who may make the request to arrest another, and what means would satisfy the requirement of the statute. For example, must

a particular police officer, or may a collective police agency make such a request?

May the request be made by means of a police teletype system or must the request be more personal?

Under the arrest provisions, as presently constituted in the proposed law, an officer patrolling in Queens County could not arrest a suspect who had committed a robbery-murder in Nassau County, if a civilian points out the suspect and tells the officer he saw the suspect shoot and kill a storeowner in Nassau and followed him into Queens. Since the officer had not been authorized to arrest under the "agency theory" of Section 70.30 (3), nor had the crime been committed in the officer's geographical area of employment, (70.30 1 and 2) he would be without authority to make an arrest as a police officer.

As we pointed out before, recently, in New York City, an officer was informed by a civilian in Times Square of

the presence of a person wanted for a homicide in Philadelphia and placed the suspect under arrest. Under the proposed law, the officer could take no action. Such situations can be avoided by removing the geographic limitation on an officer's ability to take action, or by allowing a police officer to make an arrest for a felony committed anywhere, when he has reasonable grounds to believe that the person arrested has committed such felony and that the circumstances are such that if the person were not then apprehended he would escape.

A question regarding the effect of Section 70.30 (4), upon the fiscal liabilities of the employing municipalities should be clarified. Section 70.30 (4) provides that any police officer may arrest a person for a felony anywhere in the State including any place not within the area of such officer's employment. Under this section, will the local municipality or will the State be liable to persons accidentally injured by an officer making an arrest under this provision?

MR. BARTLETT: You don't suggest that be clarified by the Code necessarily, but the General Municipal Law, itself, can take care of that.

MR. DODDS: There might be a way of doing that through a companion statute.

 Could this section be construed as making the State of New York liable for the extra-territorial arrest of all police officers in the State, and, in effect, making local police, State Officers?

 Warrants of Arrest:
Under the provisions of Sections 60.40 and 60.45, pertaining to the issuance of and execution of warrants of arrest, a question is raised as to what is necessary to delegate the authority to arrest a person under a warrant. Would an "all-points bulletin" or a teletype alarm be sufficient to create an agency relationship between police officers of different jurisdictions? Or is it necessary to have a specific request made to a particular Police Department or police officer to

effectuate an "agency relationship"?

Further questions arise in the situation where a warrant from Albany County, for example, is directed to the New York City Police and the defendant is subsequently found in Yonkers. If the New York Police transmit the information to the Yonkers Police Department, would this create the agency relationship required by Section 60.45 (2) empowering the Yonkers Police to take action?

There are also potential liability problems in the event that a police officer arrests a person on the basis of another jurisdiction's warrant and it is subsequently discovered that the warrant was voided between the time of issuance and the time of arrest.

Which locality would be liable for the arresting officer who acted under a "stale" warrant -- the issuing county or the employing county?

It is suggested that the receiving Police Department or individual

police officer not be liable for acting on the basis of a request, valid on its face, where it later appears that the warrant is, in fact, invalid or otherwise ineffective at the time of execution, and the agency or individual officer was not aware of the warrant's invalidity.

All of the above questions require further clarification.

While under the general area of warrants -- this is not part of the material we submitted for your consideration -- but some thought might be given by the Commission in the search warrant category to creating an area of inspectional search warrants, which are now required for health and various other services.

MR. BARTLETT: I can tell you that that question has been wrestled with with other groups than ours. We were very glad to have diverted them. It is a sticky area, as you know.

Mr. McQuillan, isn't

there some effort underway now to draft legislation in this area?

MR. MC QUILLAN: I think there is, yes.

MR. BARTLETT: I think it might very well be in this year.

MR. DODDS: Thank you.

Appearance Ticket:

Pursuant to Section 70.50 (4), formerly Section 70.50 (3), a defendant charged with a misdemeanor is required to be given an appearance ticket if the courts are closed. While we support the appearance ticket concept, we know from experience of many situations which arise where the service of an appearance ticket would be extremely undesirable. For instance, the issuance of an appearance ticket to a person charged with a crime which would become a felony if there is a previous conviction, as in the case of a weapons charge, or to one who has committed a serious class A misdemeanor, or to a person who cannot fend for himself, such as a drunk, or a narcotics addict under the influence of a drug, is not in the public

interest.

To mandate the issuance of an appearance ticket in these instances would be unwise and this provision should be amended.

It is recommended that the language in this section be permissive rather than mandatory to allow the police a degree of discretion that is needed for effective law enforcement.

It is further recommended that in circumstances where an appearance ticket must be issued under Section 70.50 (4), it should be made clear that a desk officer need not issue an appearance ticket or fix pre-arraignment bail until the prior criminal record of the defendant, if any, has been ascertained.

Rules of Evidence:

Admissibility of Statements of Defendants:

The wording of Section 30.80 raises several queries in regard to the admissibility of statements by defendants.

The question must again be raised as to whether the Commission, in attempting to codify situations which would cause statements to be "involuntarily made", has not created ambiguities which could cause difficulty at a later time. Should not the rules regarding the admissibility of statements of defendants be restricted to "custodial interrogation" situations?

As presently written, it is feared that Section 30.80 may have the effect of curtailing the use of undercover police agents. Statements obtained by undercover men in field operations when obtained by false statement (2b ii) or promises (2b i), would be precluded in evidence.

Unless it is the intention of the Commission to make such a sweeping provision with regard to all statements, some revision of the language in this section limiting its apparent scope will be helpful.

MR. BARTLETT:

I can tell you that,

as a matter of drafting intent, it was our purpose in 30.80 not to write a rule under the statute any more restrictive than the Supreme Court decision will allow, and if any of the language has that effect, we will certainly review it. That was our purpose, too.

Recognizing that there could well be changes in this, we wanted to keep it loose.

MR. DODDS: Speaking about public service law enforcement in that direction, we look upon it as being potentially encompassing for people who are acquiring information on all levels at all times.

MR. KNAPP: Are you afraid that the mere fact that he is under cover might be construed as a false statement of fact?

MR. DODDS: Not only is under cover status, but the role he is playing in holding himself out as a potential purchaser of narcotics and making a statement to defendants, leading him to believe he is a potential purchaser.

MR. KNAPP: You want him to

make statements obtained by a direct relevant lie rather than an existing fact?

MR. DODDS: Not at all. The language, as we read it, is broad enough to encompass that. The successful prosecution of cases such as narcotics, etc., will hinge on the undercover agent's ability to relate much of the evidence of the actual operation he is acquiring during the litigation.

MR. KNAPP: In your theory, the court might require the person to say, "I am an undercover agent. What do you want me to tell you?"

MR. DODDS: It is possible.

MR. KNAPP: I see your point.

Bail with Respect to Defendants in Criminal Actions: With regard to Section 285.30 (formerly 390.30), it is again necessary to point up what may prove to be a serious problem from a practical standpoint.

Under the bail provision of this section, a local criminal

court may not grant bail in felony cases until it has been furnished with a report from the New York State Identification and Intelligence System concerning the defendant's criminal record. If a delay occurs in the return of the report from NYSIIS, the court would not have the authority to grant bail. It is possible that valuable police manpower will be absorbed in any such arraignment delay with a resulting patrol loss which adversely affects other police functions. For this reason, consideration should be given to permitting in New York City a search of the fingerprint records of the New York City Police Department to suffice prior to the issuance of an order granting recognizance or bail.

I realize NYSIIS people are very diligently working to improve the system. I see Chief Colarilli present, and I hope he doesn't take our comment with any malice on the part of the Department. We do feel this is a potential area of difficulty.

MR. BARTLETT:

Let me ask you this,

Galletti?

Commissioner. What is the average response time now in your experience with NYSIIS?

MR. DODDS: I believe, the turn around time is two to four hours.

MR. BARTLETT: How long does it take your people to search your own records?

MR. DODDS: Well, the search, itself, can be done in less than an hour. We have other problems in New York; namely, the transportation.

MR. BARTLETT: It effects the transmission, too; wouldn't it?

MR. DODDS: You are bringing the prints into Manhattan and conducting the search here; but our search can be done in less than an hour's time.

MR. BARTLETT: Do we have a number of facsimile stations in New York City?

Gallati?
POLICE COMMISSIONER: Yes, sir, Mr. Chairman; we have a number and, also, I might point out, which Mr. Dodds points out, we are stationing facsimile stations in the courts. Our mean time, now, in the last analysis was

two hours twenty minutes.

Ultimately, in effect, our response would be as accurate and rapid as the New York City time and back.

Other than that eighteen minutes, there will not be any other discrepancy between the time it takes to search in Albany and the time it takes here.

MR. BARTLETT: The search time will be the same?

POLICE COMMISSIONER: Yes.

MR. BARTLETT: Are there any other questions for Commissioner Dodds? If not, thank you very much for your comments.

MR. DODDS: Thank you for your time, and again, I wish to congratulate you, on behalf of the Department, for your efforts.

MR. BARTLETT: Our next witness, speaking for the Bar of the City of New York, Mr. Irving Lang.

MR. LANG: As you know, Mr. Chairman, members of the Committee, the Criminal Courts Committee of the Association

of the Bar of the City of New York diligently, and at times not so diligently, is attempting to work with your Committee with respect to both the Penal Law and Criminal Code; and since this may very well be the last public hearing with respect to the Criminal Procedure Law, on behalf of the Bar, I would like to express the appreciation of the Association of the Bar of the City of New York for the splendid work of your Committee, Mr. Bartlett, and its staff. You have done a pecunious job with a minimum of employees.

I have some general comments, rather a specific comment with regard to the Title A and the applicability provision.

In Section 110.2, the Committee feels that Sub-Division 2 should be amended by deleting the phrase "provided that if application of such provisions in any particular case would not be feasible or working justice, the provisions of the Code of Criminal Procedure apply thereto," and inserting in its place, "if the Court shall determine that

application of such provisions in any case then on trial would deprive the defendant of a defense or of an objection to the admission of evidence which would have been available under the Code of Criminal Procedure, the provisions of the Code of Criminal Procedure shall apply."

What we are suggesting is, that the current language would leave a great deal of discretion in many, many instances to various courts throughout the State as to what the interests of justice were and when these proceedings would apply, and we think that our suggestion of applying it only to cases while on trial might have a salutary effect in that regard.

MR. BARTLETT: Let me ask, Mr. McQuillan, were we thinking, among other things, of the C.P.L.R. provisions for Habeas Corpus, for example? We tried to state flatly, first, that everything in the Criminal Proceedings, including post judgment proceedings, would be pursuant to the new act.

MR. MCQUILLAN: We did not have

Habeas Corpus under the C.P.L.R., specifically, in mind. This concept here in the proposal is borrowed from the C.P.L.R., the language is almost the same.

MR. BARTLETT: I agree, though, it is quite a big escape hatch.

MR. LANG: With respect to Title M, Proceedings on Judgment after Judgment, a member of our Committee, Mr. Kane, has prepared a forty page report going into a great deal of detail with respect to comments on those provisions. I think, perhaps, Mr. Chairman, that it might be in order for me to, perhaps, give you this report and have you and your staff look through it, unless you desire to have me read forty pages into the record.

MR. BARTLETT: Will you please convey to Mr. Kane our heartfelt thanks for his efforts, and tell him we didn't mean any slight at all in just receiving it as a hand in.

MR. LANG: With respect to the Committee discussing Mr. Kane's support which,

of course, is in his capacity as an individual and not as a member of the Committee, the Committee agreed with Mr. Kane's report except for one section, and that is with regard to Mr. Kane's proposal that the one year limitation on application for a new trial on newly discovered evidence be eliminated. He recommends that that be eliminated.

Feeling that the current coram nobis proceedings could cure any injustice, our Committee did not go along with that. However, we do recognize that under the provision as you have it, there is an automatic appeal to the Appellate Division from the denial of such a motion.

Of course, this would mean such things as printing of records and assignment of counsel, and the like, which would not be very helpful in terms of eliminating the congestion of Appellate Courts and final determining what legislation throughout the City of New York, a number of factors, adopting, for example, the Federal

Rule, which has a two year period or, perhaps, rather than having any limitation, do not provide for automatic appeal, but rather for leave to appeal, in those cases, which perhaps would cut down on the produced number of these post-conviction Appellate remedies.

But there are a number of other comments of Mr. Kane and some criticisms of the Section of Title M in the report, which we hope you will peruse and, perhaps, find helpful to you.

MR. BARTLETT: Thank you. That is the only particular on which the Committee differs with Mr. Kane.

MR. LANG: That is correct.

I would like to now skip around a bit and discuss one of the things that Commissioner Dodds discussed, and that is the whole problem of Section 30.80, Title D, I believe.

The Hong Kong Flu has prevented a number of Committeemen from submitting their reports on time, but we will

get them to you.

The Committee feels on 2B, with respect to public servant promises, that this should also apply to people who are not public servants, but involved in law enforcement activities, such as Security Officers, Store Detectives and the like.

It is the Committee's feeling that the same type of pressures, if you would call it that, would, perhaps, being of a coercive nature, would exist in a Store Detective's Office or, perhaps, even more than in some station house.

MR. BARTLETT: As you know, it was our intention not to either make the rule more restrictive or less than what the Supreme Court decision will allow, and we wanted to leave room for the possibility that the Supreme Court might change some of its present holdings in this area.

MR. LANG: That's what we assumed Sub-Division 3 was. At least, I explained it to the Committee when they asked

me about it, was if Miranda changes, so will this and the like.

With respect to Sub-Division B2 or II the Committee feels that whether the statement of fact, which creates a risk of a falsely incriminating statement is true or false, or whether it is a statement of fact, would be immaterial. The Committee feels that any statement which creates a substantial risk that a defendant might falsely incriminate himself, should be excluded. In other words, it wouldn't matter, Mr. Bartlett, whether or not the statement of fact by the police officer was false or true if what you are aiming at is the vice of possibility of producing a falsely incriminating statement.

MR. BARTLETT: What about a statement which, in fact, is wrong, which the person making it does not know to be wrong and which is not of the kind that creates a risk that he might falsely incriminate himself?

MR. LANG: Then, it would not matter. The key thing is whether or not the

statement risks a false conviction.

MR. KNAPP: How does a true statement create a risk of false conviction?

MR. LANG: Let me see if I can hypothecate. You might say, for example, your partner has confessed. We have promised him, although he could get thirty years on this charge, we promised him a misdemeanor; and that might be true and maybe you can get the same deal for yourself. The guy may have a long record and feel that this may be too good a deal to turn down, let's say.

MR. KNAPP: That would come under the first sub-division. I am trying to think of a real situation where it would apply to your criticism of the second.

MR. LANG: Perhaps, if you give me some time, I can think of some. I really think the section is geared as the vice of producing false incriminating statements. I don't want you to limit yourselves by saying that the statement which produces false incriminating statements is false, and even if

MR. KNAPP: How can a true statement produce a false one in response? Why should we assume that that is possible unless we can think of a situation in which it would be true?

MR. LANG: In the same manner of, let's say, your partner has confessed or didn't confess, if the substance of the confession was likely to produce a falsely incriminating statement, it wouldn't matter whether he did or didn't. Am I correct?

MR. KNAPP: If the substance of the confession was correct, it wouldn't likely produce a falsely incriminating statement.

MR. LANG: Supposing it was said your partner has confessed and he gave every detail of the crime and, in fact, he hadn't confessed. He had gotten this information independently. It would still produce the same thing.

I think it has to be related to what Commissioner Dodds said. I think the language here is much too all

encompassing, and it has to be related to your suppression proceeding which is Title U, I believe.

Now, Title U, 375.20 and 30 -- now, particularly 30, when you say "whenever the people intend to offer at a trial evidence which if unlawfully or improperly obtained would be suppressable upon motion of the defendant pursuant to Sub-Divisions 2 or 3 of Section 375.20, and three refers back to 30.80. This means that the people would have to produce every single statement made, whether it was res gestae, or pre-arrest or after arrest, and it would create, in effect, an automatic discovery proceeding which would require total handing over to the defendant of every statement made to him or by him in the course of an investigation, whether the police were involved or not in many instances; and I think that there has to be limiting action in this or, at least, something to require the defendant to come forward with something affirmative with respect to claiming that the

statement to the girl that he made -- let's say to the girlfriend -- was beaten out of him. Because, as you have the language here, it is extremely broad and not only applies to the license which you are attempting to say is unfair or coercive interrogation, but also such things as statements to undercover agents or undercover agents during the course or commission of the crime.

This would open up, the way it is drafted now, every single oral or, perhaps, written document that had to do with the case even before, and require the people to affirmatively present this to the defendant before the trial, or else they would be barred from using it.

I think the language here is extremely broad, and I agree with Commissioner Dodds' view of it. It is very, very broad.

Also, I think that --

MR. KNAPP:

[Interposing] Well, obviously, there is something wrong. You can't

respect to a number of important substantial changes you have made.

The Study Bill

establishes three accusatory instruments, the information, the misdemeanor complaint and the prosecutor's complaint. The information replaces the present misdemeanor complaint and is an instrument on which the defendant might be tried. The information must allege facts of an evidentiary character, whether upon personal knowledge or upon information and belief, which support or tend to support the offense or offenses charged. 50.15, Sub-Division 2 -- it is not clear, however, whether a hearsay allegation is sufficient.

The Study Bill provides

that the allegations of the factual part of the information would be sufficient only if they were "presented in the form of testimony at the trial on the information," they would "constitute legally sufficient evidence to support a conviction of the defendant for the offense charged."

This language is acceptable if the interpretation that hearsay allegations are sufficient, as is presently the rule. People vs. Tennison is the case. Such allegations would have been presented in the form of testimony by the direct witness. This interpretation, while I don't think it was intended, is also supported in that it might allege facts of an evidentiary character, Section 50.15. This applies that facts of an evidentiary character could include hearsay, and the ambiguity should be eliminated.

MR. DENZER: In the definition of legally sufficient evidence, 35.10, "legally sufficient evidence means evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof; except that such evidence is not legally sufficient when corroboration required by law is absent." This means evidence which, if accepted as true, etc., means competent evidence which were accepted as true.

MR. LANG: I think that would

clearly do it.

Now, with respect to the misdemeanor complaint, it performs the holding function of the present misdemeanor complaint, to merely establish reasonable cause rather than a prima facie case. If the misdemeanor complaint is not replaced by an information within five days, not including Sunday, the defendant must be released from custody.

Our Committee has disapproved this Section. We feel that, for example, to hold an individual for up to, let's say, five days upon a complaint by a Police Officer alleging that "I am informed by Miss X that the defendant slapped her," really would not be of the type that should require a holding for a period of five days.

In fact, under our current law, technically, on a felony complaint, you can only hold on a short affidavit for forty-eight hours, and here you have a five day holding on a misdemeanor complaint which

does not even establish a prima facie case. We don't really think that the potential dangers with respect to this are solved by requiring a release from custody after the five days. In fact, it is significant that it doesn't even require dismissal of the complaint, but merely a release under your own cognizance.

We disapprove that particular question.

MR. DENZER: How many days would you give?

MR. LANG: We don't think any days should be reasonable on a misdemeanor.

MR. DENZER: What should happen? You don't mean to dismiss the misdemeanor complaint idea?

MR. LANG: Yes, we do, if the misdemeanor complaint -- we don't feel should be established.

MR. DENZER: What are you going to do with a case such as those which I think you know, if you read in the White Book, for example, the narcotics case --

MR. LANG: [Interposing] Well, we discussed that. I tend to think that you could handle that by either a special rule with respect to where there is probable cause, that the evidence is contraband and is subject to police analysis, that you could hold on that thought, and I am sure that is what you were addressing yourselves to.

MR. DENZER: How about the automobile case where the owner who committed a misdemeanor, it is a joyriding case, and the owner is out of town and won't be back for five days or so, so the cop can't file a valid information. What are you going to do with a case like that?

MR. LANG: You might, of course, say that you just have to -- you could, perhaps, the Committee would approve something which would require the immediate release on recognizance, where there is no prima facie case able to be established.

MR. DENZER: Well, the whole purpose of the misdemeanor complaint is that

MR. DENZER: The defendant is getting out of a car and he starts to run. He is obviously the thief, and the fact that the owner is in California for a few days means that the cop can't do anything. He has to let the defendant go because, if he arrests him, he can't file any valid instrument.

MR. LANG: Why not give him an appearance ticket?

MR. DENZER: This man is a car thief.

MR. LANG: If this man is a car thief, he is not going to steal two hundred fifty dollars. I am sure you realize that the Committee is more concerned not in the area where you are waiting for a lab report or where you are the obvious victim of an unlawful entry or a car theft, where the owner is out of town; but in no situation where it is a misdemeanor where the defendant didn't show up and his complainant didn't show up, and the defendant is held for five days.

Two additional

functions of the prosecutor's information have been created. If a felony complaint is found insufficient to set forth a felony, the court may direct the District Attorney to supersede the felony complaint with a prosecutor's information, if there is a prima facie case of a misdemeanor.

Again, the Study Bill is unclear whether hearsay is sufficient. The Study Bill also fails to provide for waiver of the prosecutor's information by a defendant charged in a felony complaint who wishes to stand trial for a misdemeanor encompassed by the felony complaint. A provision for waiver, comparable to the waiver of an information after the filing of a misdemeanor complaint, would doubtless increase the efficiency of the New York City Criminal Court.

In the third function of the prosecutor's information, the District Attorney supersedes an information on his own initiative [50.45]. The prosecutor's information, in this instance, must rest on a

prima facie case set forth in the information. Again, it is not clear whether hearsay is sufficient.

Article 85. Now, the major change from the Code of Criminal Procedure, the Study Bill eliminates the preliminary hearing in misdemeanor cases. There was a great deal of discussion in our Committee, and by a closely divided vote, the Committee voted to disapprove this Section. I think all of the arguments were stated, including the obvious facts that New York City had the misdemeanor hearing because of the dual court system. This does not apply upstate and, in addition, there were discussions with respect to the tremendous amount of calendar delay that was created, the calendar congestion that was created by the preliminary hearings in misdemeanor cases, and those who are for disapproval of the Section recognized that the new and expanded discovery proceedings would permit the obtaining of much of the information basically sought in some of these misdemeanor

hearings. However, it was the feeling of the majority of the Committee that, considering the problem of obtaining a trial fairly quickly in the Criminal Court today, some of the members of the Committee felt that there is, perhaps -- it takes two or three months to get a trial even in a prison case when they want one -- and considering the fact that a large number of these complaints are dismissed upon a preliminary hearing -- somebody gave the figure of almost one-third. I don't know if that is true -- but in any event, apparently, it was the feeling of the Committee members that a substantial number of these misdemeanor cases are dismissed after a preliminary hearing and, in view of that, the majority of the Committee voted to disapprove the Section.

I am sure we have had the same discussion with our Committee that you have had with your Committee.

MR. DENZER: I don't think we had any trouble with it.

MR. LANG: In any event, we had.

Article 90 -- Mr.

Denzer and Mr. Knapp, Senator -- Proceedings upon Felony Complaint from Arraignment Thereon through Disposition Thereof. We have a comment on that because there is, inexplicably, no provision for reducing a felony complaint to a charge of a misdemeanor or violation for pleading purposes, or to keep a technically sufficient felony charge off of the Grand Jury calendar. Indeed, such reduction would seem to be illegal if you look at 90.60 (2). This should be rectified.

MR. DENZER: What about 90.40, giving the judge authority to reduce the charges in a felony complaint and substitute a prosecutor's information?

MR. LANG: What Section is that?

MR. MC QUILLAN: Mr. Lang, are you talking about after a hearing?

MR. LANG: After a hearing, yes, only.

MR. DENZER: After a hearing is taken care of over in 90.60, in Sub-Division 2.

MR. LANG: I don't think it is. If you look at it, Mr. Denzer, you will see that. In other words, you may have technically-- if he has a technically sufficient felony case, in other words, after a hearing, if it only establishes a misdemeanor, it is all right; but if he has a technically sufficient case, there is no authority in law for the reduction of that case even though it is obviously going to wind up as a misdemeanor and everybody wants it to wind up as a misdemeanor.

MR. DENZER: The only alternative is, even if the court contends there is a felony involved, it still can reduce it to a misdemeanor, and that you don't want to put in black and white, I don't think.

MR. LANG: On the other hand, there won't be any legal possibility after a hearing for reducing a felony complaint to a misdemeanor if it was barely technically sufficient.

MR. DENZER: Well, couldn't the judge say that in his opinion -- and anybody

MR. LANG: It says "At the conclusion of the hearing, the court must dispose of the felony complaint as follows" -- I assume must is one of the strong words you have used in the Code.

MR. HECHTMAN: That that is final.

MR. KNAPP: We have got your point.

MR. LANG: At a hearing on a felony complaint, hearsay is to be admissable, the standard of sufficiency being reasonable cause to believe [90.50(7)]. This important provision should be approved. Accusation by a Grand Jury upon evidence admissable at a trial is sufficient protection against an unfounded felony charge. Moreover, the felony complaint is merely a holding instrument, not a trial accusation.

The Committee voted to disprove this Section. They feel that the current standard seems to be workable, doesn't create really any problems in this regard, and that a prima facie case does not mean you have

to put on all your witnesses, and the potential vices from the utilization of hearsay are, perhaps, too great to permit this change. This was the fairly unanimous feeling of the Committee. We felt that we really saw no real problems in terms of holding for the Grand Jury and requiring a prima facie case recognizing, of course, that in undercover sales cases, the practice of going to the record of the Grand Jury would, undoubtedly, continue, and the like, and that adjournments could be granted or the Grand Jury could intercede, if necessary.

MR. DENZER: One advantage of the new scheme, and here is the same thing we are discussing in connection with a misdemeanor case -- your car is now worth three thousand dollars, let us say, and the owner is out of town. What does the police officer do?

All right. Say he has a short affidavit system which we now have in only New York City and Buffalo anyway? The one thing that the felony complaint based on hearsay eliminates across the board, holding

officer -- for example, a lot of the cases that were mentioned or discussed in terms of the experience of some of the members of our Committee was an allegation of rape with a knife in which the allegations of the complaint were clearly sufficient and a police officer could testify, "Yes, the girl said the defendant took her up to the roof at knife point and assaulted her."

It turns out on a hearing that it is a boyfriend-girlfriend situation, that he never used a knife, that he didn't have a knife when he was arrested. Instead of being held for Grand Jury, which might act a month later and, undoubtedly, high bail would be set upon that incrimination, the Committee feels that the current system of requiring a prima facie case with liberal adjournments and the like should remain. It is the difference between what people tell police officers and what they testify to on the stand, and as you know from your own experience and that in these type of cases, such as your rapes

or statutory rapes and the like, the testimony often takes remarkable shifts.

MR. DENZER: You know, as far as I can gather, New York is about the only State that requires a prima facie case almost anywhere. You can go into other States, reasonable cause is enough for almost anything including the Grand Jury where they have it. Here in New York we have this very strange system where, apparently, right from the very outset, a prima facie case is necessary for a misdemeanor or a felony, or anything else.

MR. LANG: Well, the fact that New York has a higher standard of justice than other States should not be looked upon negatively.

Well, in any event, that is the feeling of the Committee, and that was a fairly unanimous feeling. There were a few of us who originally felt your way, but were persuaded by other members of the Committee.

The Code of Criminal Procedure authorizes arrest by Peace Officers

other than Police Officers upon probable cause that a felony has been committed. The Study Bill would eliminate this power, relegating Peace Officers to the role of private citizens to arrest at their peril. I think this was written, actually, before your latest revision.

MR. DENZER: I don't blame you for not being able to keep up with all of this.

MR. LANG: I have a couple of comments to make on Peace Officers. Under this new proposal, Peace Officers could arrest for felonies and misdemeanors upon reasonable cause, if the offense relates to the official duties and powers of the Peace Officer. For example, a Court Officer could arrest for an assault in the courtroom; a cigarette tax inspector could arrest for sale of untaxed cigarettes.

Authorizing arrests by Peace Officers for offenses relating to their specific functions, is a reasonable restriction on the present powers of Peace Officers to arrest for felonies, and a reasonable addition to the power of a Peace

Officer to arrest for a misdemeanor. No such arrest is presently authorized. However, the proposed addition to the Study Bill does not clearly specify the applicable powers of the Peace Officer. The definition provided includes amendments to those powers established by agency regulations or instructions from superiors. This uncertainty could lead to uncertainty as to the admissibility of evidence obtained incident to an arrest by a Peace Officer, since the underlying arrest would be in doubt.

In addition, a prosecution for resisting such an arrest or assaulting the Peace Officer who executes an arrest, could involve questions as to the validity of the arrest since that validity would be an element of the crime; hence questions as to vagueness might be raised. Similarly, the legality of the use of force by a Peace Officer executing an arrest might depend upon the meaning of unwritten instructions as to his duties, which would govern the lawfulness of the arrest. The establishment of clearer

provisions relating to the Peace Officer's duties is therefore necessary under the proposed addition to the Study Bill.

Let me say this:

That our Committee, I think, strongly favored your initial version with respect to Peace and Police Officers. We feel that there are entirely too many categories of Peace Officers and that it is fairly apparent that many of these categories have no real relationship to police work and to the primary concern of our Committee with respect to this, and that is the authority to possess guns.

Our Committee feels that entirely too many agencies and groups have an automatic license to possess a gun. We feel that guns should be possessed by Police Officers. They are the best experts, the best trained. They have the best instruction as to when and how to use it and why a court stenographer in Nassau County should be eligible to carry a gun seems to me -- I don't know if this young lady would be eligible under the statute --

seems to me to be particularly absurd, and the Committee feels that way.

Now, obviously, we understand that you have been inundated by all these various Peace Officer groups who have pointed out to you all the thousands of reasons why the dangerous nature of their job requires a gun, and you have decided to retain the current Peace Officer category with certain limitations with respect to arrest powers in connection with their official duties. I think that limitation -- we think that the limitation is good.

I am going to suggest a personal suggestion. I haven't discussed this with the Committee, but I think they would feel that way, too; that the Commission, in its legislation, also give, in addition to specifically limiting those areas where they can act as enforcement officers or make arrests or the like, but to give to the agency the authority to prescribe who and under what conditions that person should receive a gun.

I don't think that by virtue of the fact that the Penal Law gives Peace Officers the right to legally possess a gun without anything else, should be any bar to your Committee's giving the power to, let's say, the head of the State Department of Correction or the Parole Board, or the Narcotics Control Commission or the like, the authority to say, "You may say who in your organization, under what circumstances, may possess a gun and where it shall be kept." We think that might be a salutary limitation or, I think, it may well be.

MR. BARTLETT: The four hundred provisions of the Penal Law, to the delight of this Commission, have been pre-empted by the Crime Control Council, and I would be happy to convey to them your views. [LAUGHTER]

 It is a good point, though, instead of the blanket exception for all the enumerated categories in the law to provide --

MR. LANG: [Interposing] In other words, for example, in the Parole

Department, there are certain Parole Officers that don't go out in the field, who do most of their work in the facility or in the office. There is no reason why they should be authorized to have a gun or, if they have to go out in the field, maybe they could have a gun picked up at a check point rather than roaming around in the streets with a gun.

We had an unfortunate instance, which I am sure Mr. Denzer and Mr. McQuillan know about, where we tried a Court Officer in New York County who was out in the street at a social affair, and got involved in a brawl and shot somebody; and if there were at least a rule where Court Officers could only possess their guns and have their guns during their daylight working hours and only in the court, that unfortunate shooting might have been avoided.

MR. BARTLETT: One might wonder about a Civil Court Officer even on duty.

MR. LANG: Well, you know our position was your original position.

Okay. Let me see if I can speed things up a little.

The Study Bill would create an important new device for mandating appearance of a defendant in response to a charge of misdemeanor or violation -- the appearance ticket. In essence, this is a paper served by a Police Officer or other public servant directing the accused to appear in the local criminal court at a specific time in connection with his alleged commission of an offense other than a felony. The appearance ticket may be issued in cases where an arrest without warrant would be legal. It may be issued in lieu of arrest or after arrest, as an alternative to taking the defendant to court and filing an information or misdemeanor complaint (75.20). If served after arrest, the defendant may be required to post pre-arraignment bail at the Police Station (75.30). An appearance ticket must be issued if, "owing to unavailability of a local criminal court, the arresting police officer is unable to take

the defendant to such a court with reasonable promptness" [70.50 (4)].

The appearance ticket is a valuable addition to the procedures designed to improve the efficiency of the administration of criminal justice in the lower criminal courts, and to reduce unnecessary incarceration prior to the disposition of criminal charges.

Unfortunately, "reasonable promptness" is undefined; must an appearance ticket be issued, for example, in New York City if the arraignment court is closed between one a.m. and nine a.m.? Similarly, no criteria for the fixing of bail and the issuance of appearance tickets are set forth for the guidance of police officers.

It would appear that unlimited discretion is accorded the officer, without guide lines, thereby encouraging abuse in both the issuance and withholding of appearance tickets.

The Study Bill also

provides that failure to answer an appearance ticket is a violation, regardless of the underlying charge. It would be more desirable to grade the seriousness of the offense of failing to answer an appearance ticket in proportion to the seriousness of the underlying offense, as is done with respect to the offenses of jumping bail or parole.

I think this is a correlary to Commissioner Dodds' concern with respect to charges and the unavailability of a local court.

MR. DENZER: The highest crime would be a Class A Misdemeanor.

MR. LANG: Let's say, if the highest crime were a Class A Misdemeanor or were executed under misdemeanor, could be done under violation. Even done there, it might have some effect.

The Study Bill further provides that an information or misdemeanor complaint must be filed at or before the time the appearance ticket is returnable. The

unqualified mandate that an accusatory instrument be filed is unnecessary.

In many instances where an appearance ticket is served, investigation prior to the return date, initiated on the defendant's prompting or by the police or prosecutor, could disclose that the filing of an accusatory instrument would be unjustified.

Since one of the purposes of the Study Bill is to remove unnecessary procedures, it would seem preferable to provide that an accusatory instrument need not be filed if such an instrument would be unwarranted.

Article 80 -
Fingerprinting and Photographing of Defendant after Arrest: The Study Bill provides that persons arrested for any misdemeanor defined in the Penal Law shall be fingerprinted and photographed after arrest [80.10(1) (b)].

The Code of Criminal Procedure provides for fingerprinting only for

certain misdemeanors.

We approve this provision, and the Committee also approves the provision with respect to committing misdemeanor arrests based upon probable cause. It was a unanimous feeling it was a salutary and perfectly reasonable amendment.

Mr. Chairman, I have been talking a long time and as I indicated, some of the members of the Committee have not been diligent in sending in their report. With your permission, I will close now and submit written reports to you with respect to those things I haven't covered.

Mr. Walsh, Chairman of our Committee, last year testified at length before the Committee on all the provisions of the Code and some of our suggestions were incorporated, and we don't have anything to add to that. Thank you.

MR. BARTLETT: First of all, our thanks to you for your excellent presentation and please convey our thanks to all the members

of the Committee for bringing forth this analysis.

We will next hear from Mr. Henry DeVine, Nassau County District Attorney's Office.

MR. DE VINE: Mr. Chairman and members of the Commission, actually, there isn't much wrong with me this morning that being at 80 Center Street instead of sitting around at the Bar Association of the City of New York wouldn't cure. I do not have a speech to make, gentlemen. Rather, I would just like to talk and I would be grateful if you talked back to me.

I am appearing here not as a representative of the District Attorney's Office in Nassau County, nor am I appearing here as Chairman of the Criminal Law Committee of our Bar Association. I am appearing here personally and, although, I feel that the particular view that I reflect here is the concensus not only of our own office, but the Criminal Law Committee of the Bar

Association as well, and also more importantly, almost all of the trial judges that I worked before. I intend to address myself to Section 30.30 and 30.40 of the proposed bill. It has to do with our rules of evidence, identification by means of previous recognition.

Now, the first point which struck me immediately will be found in Section 30.30 (a), sub-heading 1. You say, with regard to the witness, that he must testify that he observed the Commission of such offense or an incident related thereto. I note that you used that test or standard for all identifying witnesses which you address yourself to in both of these sections, and I think that it is arbitrary. I think that it is unnecessary and I think that it is unreasonable because there are many identifying witnesses who do not, in fact, observe the commission of the offense and, as far as they are concerned, they do not observe any related incident; and I don't see the necessity --

MR. BARTLETT:

[Interposing] I

assume we meant by the latter, any identification that is relevant to the case. Surely, that test has to be met.

MR. DENZER: What is he going to identify -- with respect to what is he going to identify him?

MR. DE VINE: Well, he is, for example, returning home with his wife. He lives in the neighborhood and he is able to testify that he saw the defendant standing on the street corner maybe a block away or two blocks away from the burglary, or he is a bus driver --

MR. BARTLETT: [Interposing] At a time approximately connected with the crime?

MR. DE VINE: Approximately when the burglary took place.

MR. KNAPP: And his defense is that he was in California?

MR. DE VINE: Correct. The identifying witness doesn't know anything about the commission of the crime. He doesn't even know that a crime has taken place and, as

a matter of fact, merely standing on the street corner or getting on the bus, or sitting in a parked car, for example, outside of a bank --

MR. KNAPP: [Interposing] Well, if the defense was alibied, he could be just at home eating his dinner several hours after the crime.

MR. DE VINE: I understand that, but what I am concerned with is the competency of a witness called by the prosecution to testify relative to the identification of an accused.

MR. BARTLETT: I think we need better language.

MR. DE VINE: I understand what you mean there, but I think that it unnecessarily restricts us. It would subject the witness to considerable cross-examination and just open up a Pandora's box.

MR. BARTLETT: What language would you suggest?

MR. DE VINE: I don't think we need any qualifying language at all. If the witness is competent and if he could testify to an

identification, why should there be any limiting factors about whether he knew anything about the commission of the crime or he didn't know anything about it? Suppose he drives his wife to Roosevelt Field and parks the car and he can make an identification of someone who was sitting in an automobile right alongside of him? He doesn't know, for example, that inside there may be a stick up in Macy's. He knows nothing about that.

MR. BARTLETT: He doesn't have to
by this test.

MR. KNAPP: Your point is, the defendant may be having nothing to do with the crime whatever. He may just be having his lunch sometime either before or after the crime, and the issue may be whether he was in California?

MR. DE VINE: No. He is the wheelman in the stick-up.

MR. KNAPP: I am going further than you are going. The crime may have been committed at 8:00 A. M. on a certain day. At

MR. DE VINE:

Right.

One other point I would like to make, and I know this is awfully difficult, but throughout both of these statutes, you used the word "certain." You say that he must be certain of the identification. It is in Sub-Division 2, under Circumstances Prescribed in Sub-Division 1, such witness may testify at the criminal proceeding that he is certain that the person he observed and recognized on the second occasion is the same person.

In other words, I am addressing your attention to the standard which you have circumscribed by using the word "certain."

Now, I took the trouble to check, and I learned that by the word "certain" we mean exact, we mean precise, we mean incontrovertible, we mean unquestionably, we mean undeniably. Now, if any of you have ever labored with the problem of a witness --

MR. DENZER:

[Interposing] We mean

positive.

MR. DE VINE: I am, again,
arguing the issue of competency rather than a
way.

Now, the witness, in
all good faith, will take the stand and testify,
"I think this is the man that I saw. I believe
that is the man that I saw. This looks like
the man that I saw." But all you have to do on
cross-examination, "But are you certain this is
the man?" The witness says, "Well, I could be
mistaken." That's good for a jury. That's
what they are entitled to know, but it is a
rare bird that comes down the Pike today who is
going to get up on that witness stand and say,
"I observed the suspect. I saw him for, maybe,
a minute," or, "I saw him for two minutes and
it was daylight, and I got a look at him. There
was nothing unusual about his features and I
hadn't seen him again until that line up three
months later, and I tell you I am certain, I
am exact" -- any of those words. Can you get
a witness to say that? He is exact, he is

precise, he is undeniably certain this is the man.

MR. KNAPP: I go further than you. I say if he does say those things, the witness' testimony ought to be excused.

MR. DE VINE: Right. Exactly. In other words, I think that if the sum total of the identifying evidence does not reach the appropriate stand, which is, of course, proof beyond a reasonable doubt.

MR. BARTLETT: What language do you think we should use?

MR. DE VINE: I don't think we need a qualifying term.

MR. KNAPP: I agree with you.

MR. DE VINE: Now, I come to the point of my beginning and end, I suppose. If ever I have been haunted over the past nineteen years with anything in this business, it is the position which our Court of Appeals has taken with regard to a photograph. There is no point in going into the long history of our court with regard to the right or wrong of a witness to

take the stand and testify that at a prior occasion, "I identified the defendant." The position which our court took, of course, is that testimony was inadmissible, it was incompetent.

There was no other comparable jurisdiction in our country, so far as I know, which adhered to this doctrine and, accordingly, in '67, the Legislature enacted 393(b), I think it is, of the Code, hopefully, to cure this situation from my point of view and to bring us more in line with the position, the general rule, indeed, what seems to me to be the universal rule in this country, permit a witness to testify as to an out of court identification.

Now, immediately there was presented the problem of the photograph. May the witness testify to a prior identification based on a photograph? Our court has taken the position that breach of 393(b) was not that great, that it must be an in person identification rather than a photograph.

I am absolutely convinced that with the Wade decision, with the Stovall decision, with the Gilbert decision, the Supreme Court, whether we like it or not, has swept away the principle upon which our Court has rested their prior decisions.

What is really at stake in this whole business is not in the court identification but rather, the pre-trial identification and, today, we are concerned more and more on the trial level with pre-trial hearings, inquiry into the circumstances whereby the victim identified the defendant before trial.

Now, nothing is more unrealistic in my judgment. It is downright deceitful to walk into a courtroom before a judge or before a jury and put a witness on the stand, have him identify the defendant, have him testify with regard to a line-up, but heavens to be, don't let him say, that we had that line-up, that the defendant was arrested because the witness made an identification from

a photograph. We must hide that from a jury. I don't know the reasons for it. It seems to me that a judge or a jury has a right to weigh the pre-trial identification. They might conclude, after they looked at the photograph, that the identification testimony is not strong enough, that it might have been better if the pre-trial identification had taken place in person.

This goes to the weight which the trier of the fact may give to the witness' testimony.

I have made a short summary here for you. The Supreme Court of the United States, of course, has only recently addressed themselves to the problem of the photograph. They said that precisely the same basic due process provisions that apply with regard to the in person line-up should apply with regard to the photograph. In other words, we shouldn't just parade a suspect in before the witness in handcuffs and say to the victim, "Is this the man who assaulted you?" The same

thing with regard to the photograph. The court said we shouldn't just stick one picture under the face of the victim and say, "Is this the party who assaulted you?", but they certainly didn't tell us that the use of photographs was improper, and they didn't suggest to us that there is any prejudice to anyone if the identifying witness tells the truth and if he is candid with the judge and candid with the jury and said, "I looked at a hundred photographs," or "I looked at a thousand photographs, and finally I made this identification and that's why the suspect was then arrested; and there was a line-up. I picked him out of the line-up."

The Supreme Court of the United States, of course -- California, as is so often the case -- they are always generations ahead of us in this business, and Illinois, of course, has gotten even squarely into this picture, permit the in court testimony of a pre-trial identification both in person and from a photograph.

In my summary of the cases, I am only taking those cases that have addressed themselves to this basic problem recently: California, Illinois, New Jersey, Maryland; then we go down through some of the Southern States; Massachusetts -- it seems to me that every jurisdiction in this country that has a problem, a criminal law problem that might be similar to that which we have here in New York, having thought this problem out, said that it is not an issue of competency but, rather, it is purely a question of weight to be attached to the witness' testimony.

MR. DENZER: You are getting pretty far down the line here now, Henry. Now you are going to permit the witness to say, "Yes, I saw a couple of photographs in the police station. One of them looked like the man who held me up."

I mean, you don't demand certainty, now photographs.

MR. DE VINE: Well, on the basis of that testimony, the defendant gets arrested.

the validity of the areest.

MR. DE VINE: We are talking now about the competency of in court testimony. May a witness, in court, testify that they made a pre-trial identification.

New York has always been out of step with the entire country. They said, "No, this is a question of pulling yourself up by the boot straps and the more times you say the same thing, the more believable it becomes."

MR. DENZER: You say the witness should simply be able to testify that he made a pre-trial identification, that he made one in the station house? You notice the language here is a little different. He can't testify to that. He can say, "As I sit here on the witness stand, I am sure --" or whatever language you want -- "The man I saw in the police station was the same man that held me up." Not that I said at that time, but I say now I believe and I am sure that the man I saw in the police station is the same man that held me up.

Do you want to go farther than that?

MR. DE VINE: I don't quite understand.

MR. DENZER: This does not permit the witness to say, "A year ago, when this case occurred, I saw a man in the police station who was or looked like the man who held me up a few hours earlier." That he cannot testify to. The reason for this is, supposing -- I identified him at that time, he says, as the man who held me up. That he can't say. Suppose, in the meantime he had changed his mind. Suppose he thought something of the original case and he doesn't.

MR. DE VINE: That is all proper testimony for the trial.

MR. DENZER: The idea is his saying "As I sit here now, the man in the police station is the man I believe who held me up."

MR. DE VINE: I was under the impression you addressed yourself to too different situations. One is the witness, at

the time of the trial, was unable to make an in court identification.

MR. DENZER: That is the one we are talking about now.

MR. DE VINE: What can he then testify to?

MR. DENZER: That the man he saw in the police station was the same man he believes held him up.

MR. DE VINE: But he shouldn't tell the jury that the reason the man got arrested is because he looked at a thousand photographs and, as a result of an identification of the photographs, the police picked him up.

MR. DENZER: He simply testifies that the man he saw then, a year ago, is the man who held him up. Then he makes other evidence that the man he saw in the police station was the defendant.

MR. DE VINE: I still can't escape from the fact how do we get the suspect into the station house?

MR. KNAPP: You feel the jury is

entitled to know that fact?

MR. DE VINE: Exactly, and every good smart lawyer today that I am running into is going to make a point of it. We are here. There is no dispute about the fact that this victim walked up and pointed my client out in the line-up. The whole world knows that. In our precincts in Nassau County today -- and it is a good idea -- we have a polaroid camera. We take a picture of that line-up so we can have it available at the time of the trial or when we are conducting a hearing.

The whole point is how and why was the suspect arrested? He was arrested because, at least in part, the victim looked at a mug shot and made an identification.

MR. DENZER: What kind of relevant and competent relevance is that? The reason it is inadmissible is not because he was arrested on the basis of it. The only significant thing here is that he made this identification.

MR. DE VINE: I think that it goes to the weight of his in court identification.

When all is said and done, we are trying to evaluate, at the time of the trial, the true weight or value of an in court identification.

MR. BARTLETT: Out of court?

MR. DE VINE: No, in court. That, when all is said and done, counts. It makes no difference how many times someone makes an out of court identification.

MR. DENZER: Are you speaking of the situation where he identifies the defendant in the courtroom and says, "That is the man that did it?"

MR. DE VINE: The problem that I am addressing myself to is not determined by whether or not the witness, under oath, at the trial, can make an in court identification. I don't care whether he can or whether he can't.

MR. BARTLETT: 30.30 deals with the situation where he cannot and 30.40 is when he can.

MR. DE VINE: What I am addressing myself to is not determined by which of those

two sections we are dealing with.

MR. BARTLETT: Is the photograph identification you are talking about offered by the People as further evidence that the defendant committed the crime? The photograph identification?

MR. KNAPP: Your point is, the jury should have the whole story of how the defendant got there?

MR. DE VINE: Exactly. That's the point that I am making. It is part of that story. It is why the suspect has been arrested and it is a vital consideration for the jury to know when they are going to evaluate the in court testimony of the witness. That's what it really boils down to.

Now, every good defense lawyer today will start out by cross-examining an identifying witness. One of the first things he will probe is whether or not he was shown photographs, and if the answer is yes -- "Did you make an identification?" Then a demand for the photographs. It is a rare

case today where there is going to be a major trial, where identification is an issue, that a good defense lawyer is not going to probe to determine whether or not his client got arrested as a result of an identification made from a photograph shown to the witness by some of the police investigators.

MR. DENZER: I don't want to belabor this, but all you are really showing when you bring that phase of it in, is that he convinced the police this was the guy.

MR. KNAPP: No. The jury wants to know, in a sense, why the hell is the defendant here.

MR. DE VINE: Yes, it goes to the very heart of these cases.

MR. DENZER: The reason he is here wasn't the policeman convinced by the pre-trial identification made?

MR. KNAPP: No. That is not the question.

MR. DE VINE: The police aren't convinced of anything.

trial, "The man sitting at the end of the table is the defendant who assaulted me."

MR. KNAPP: I have gone blind in the meantime. I don't know who he is.

MR. DE VINE: Of course not. There would not be any prima facie case there.

MR. KNAPP: Yes there would under 30.30.

MR. DE VINE: Under 30.30, yes.

MR. KNAPP: You wouldn't establish a prima facie case under the photograph identification alone.

MR. DE VINE: I think it is possible. I don't know if I really would. I think that if someone was assaulted by Jackie Gleason and saw his picture, and made an identification, and they fell over here and hit their head and they were blind at the time of the trial, they may not be able to make an in court identification; but I think that everybody would have a right to say that they looked at Jackie every Saturday night and when they saw his photograph, they identified him.

MR. DENZER: This is not going to be Jackie Gleason.

MR. DE VINE: Then, it may not be a prima facie case. I am, of course, more concerned today with the procedure which we must follow at our pre-trial hearings.

Of course, the proposed bill is completely silent there. You have addressed yourselves only to the competency of an identifying witness at the trial and, of course, we now have or we now are obliged and are spending more of our time on the pre-trial hearing. Whether we would use the same guide lines, I suppose we would have to; but this is something I wish you really would read.

I have a great deal of respect for Judge Traynor, who is the Chief Judge of the California Supreme Court. He is a great man and he addressed himself to this situation in the two cases in the little memo I will give you. He, I thought, put the issue to rest.

He first addressed himself to the problem of in court identification based upon a pre-trial in person, that is, the line-up. Then he addressed himself to the problem of the photograph. I think that it makes good sense.

Gentlemen, I want to thank you for your attention.

MR. MC QUILLAN: Let me ask you one question. Putting aside photos for the moment, do you suggest that in every case people show why the defendant was initially arrested?

MR. DE VINE: Yes, was arrested.

MR. MC QUILLAN: What prompted the police arrest?

MR. DE VINE: We couldn't do that because that would bring in, frequently, much prejudicial -- or something of that nature. I don't think that is necessary.

What I am trying to do, frankly, is to be -- is to have you put me in a position where I can be candid with the judge and candid with the jury, and I am not

being candid with them when I hide from them the fact that the man was arrested, at least in part, on the basis of an identification made after the crime, from a photograph.

MR. MC QUILLAN: That's what I am saying, just with photos.

MR. KNAPP: You wouldn't want to tell the jury he was arrested because the stool pigeon turned him in?

MR. DE VINE: I am not talking about that.

MR. KNAPP: You want his identity in part, but not arrested because of a photograph?

MR. DE VINE: That's right. I wouldn't want that; not arrested, but identified. I wouldn't want to do that. I am just talking about the identification. That's all.

MR. KNAPP: You say that every experience the witness has that went into his testimony, that is relevant? And the first picture he saw is relevant and everything that followed that?

MR. DE VINE: It has to be relevant. For example, we are trying a robbery case where the photograph was observed by one of the witnesses on more than one occasion. We will say, on the third or fourth occasion, they make an identification. Now, that is vital to bring out to a jury. I am not going to hide from a jury. I am not going to put that witness on the stand and have him testify, "This is the man I saw working in the tailor shop with a cannon in his hand, and I will never forget his face."

She did forget his face because she looked at the photograph on three occasions. It was a reasonable likeness and she didn't make an identification, and if a smart lawyer doesn't bring it out under direct examination, the jury will never know it. Coram nobis, you want to bring in an affidavit that this was concealed by the prosecutor. He put a "witness on the stand who, on three different occasions was shown a photograph of the defendant and did not make an identification."

I don't want to be caught in the courtroom on that one.

MR. KNAPP: Your point under our rule --

MR. DE VINE: [Interposing] Under your rule, right now, within the past two weeks, the Appellate Division, Second Department for probably, the hundredth time, has said it was an error to permit a witness under direct examination to testify to an identification made from a photograph.

MR. KNAPP: So, in the case that you have exposed under our present rules, the defense counsel would be able to bring it out on cross-examination.

MR. DE VINE: They would bring it out.

MR. KNAPP: Then will be able to bring the fact that you concealed it under examination?

MR. DE VINE: That's exactly the point.

SENATOR DUNNE: Do I understand that

the jurisdictions which are reluctant to accept your proposal, their reluctance is based upon the fact that if there is testimony that the witness went through mug shots at the police station, leads to the inference that the accused has a prior criminal record. Now, would you address yourself to that?

MR. DE VINE: First of all, let me make this clear. I do not propose that a prosecutor be permitted to do, indirectly, what obviously he cannot do directly. I don't advocate that the prosecutor should be able to create the inference or the innuendo that the pictures which were shown to the defendant were pictures of people who have been arrested for prior crimes. This is a valid objection to this procedure, but it never has been a controlling objective, and the judge will instruct that the picture is over in police headquarters and all of you men sitting here --

"So, ladies and gentlemen of the jury, don't think that because the witness looked at a picture the police showed him, that the man

has any prior background.

MR. KNAPP: When the police could obviate this by having it a practice to show mug shots.

MR. DE VINE: They must be. Exactly, and they must be covered and they are not. In fact, always mug shots.

The case that the Supreme Court recently addressed itself to were not mug shots. They were pictures which someone in the family turned over to the F.B.I.

MR. KNAPP: I would suggest to Commissioner Dodds that the police adopt the rule that there be no showing of pictures without at least forty per cent being non-mug shots.

COMMISSIONER DODDS: Where are we going to get them?

MR. KNAPP: Take some yourself, go out and buy them.

MR. LANG: The Legislative Manual has pictures of all of the Assemblymen, etc.

MR. DE VINE: We stopped doing that when Jimmy Cardinale was in our office. He just passed away. He was our receptionist and, just as a joke, we threw him in the line-up and, you better believe it, they said, "There he is."

Let's be careful who else's pictures we show.

Those are my remarks, gentlemen, and I will conclude with that.

Thank you.

SENATOR DUNNE: Is Mr. Harry Subin here?

MR. SUBIN: Yes.

Gentlemen, I would like to thank you, on behalf of the Vera Institute of Justice for granting us a second.

SENATOR DUNNE: Excuse me. Do you have other than the copy from which you are reading? Do you have another copy?

MR. SUBIN: I have some that I was hoping were coming down and are providing.

Again, thank you for giving us a chance to express our views again

on the bail provisions of the revised draft. I feel that the draft is a significant improvement over the present bail law in several respects.

First, it broadens the range of financial release conditions. Second, it specifically recognizes the problem of dangerousness which, as every student of bail knows, has always been an important, though unarticulated factor in bail decisions; and third, it establishes beyond question the right of a detained defendant to a hearing on bail decision.

The draft also contains, however, some drawbacks, in my opinion.

First, I would oppose the enactment of the provisions of the proposed Code authorizing the judge to deny bail in felony cases as they are currently written. I believe that the judge has given too little guidance in determining danger and that, as a result, the Code may well result in the

detention of many persons who, in my view, should not be detained. I do feel that the Legislature should bear more of the burden in creating standards than is reflected in the proposed Code.

Under the Code, judges will have little to guide them in deciding who will be detained. The Code speaks of danger to society without defining dangerousness. It tells the judges to consider the character, habits, reputation of the defendant, but does not suggest in what respect these things are relevant to the bail decision.

It tells the court to consider the defendant's prior record without suggesting what in it should be considered as evidence of dangerousness or unreliability.

In my view, it is drastic power to obtain prior to trial and should be more closely defined.

In terms of danger to society, the proposed Code permits an outright denial of bail only in felony cases. I agree

with this distinction between felonies and misdemeanors, but I feel that it can be improved upon. We must, I feel, be extremely sensitive to the needs to balance individual liberties against society's protection. Thus, I would limit the power to deny bail to persons who are charged with felonies involving violence. This is clearly the kind of crime with which society is most concerned.

I would not allow detention, say, in a broad case even though some might legitimately argue that a person who has caused another to lose all of his savings is a dangerous man.

MR. DENZER: There is a semantic difference. You have a man charged with grand larceny, charged with stealing one hundred thousand dollars. You say "bail," you would have bail mandatory, the fixing of bail mandatory.

MR. SUBIN: Yes.

MR. DENZER: The judge knows this fellow, the minute he gets out, is going to

take off and is going to set bail so high he can't make it.

MR. SUBIN: I think that's right, and that gets to a point I would like to address myself to in a moment, if I may.

At this point, I was only talking about the question of what the Code talks about when it talks about a danger to society. I take it that that means, that it is the intention of, at least, in discussing it, was to keep from the streets the person who it is felt is going to commit some kind of crime if he is released, as opposed, for the moment, to the person who is going to flee if released. I will get to that, if I may, in a moment.

Further, I would require that the people show, at a full scale hearing, both that there is probable cause to believe the defendant guilty and that he will commit acts of violence if he is released. I realize that that is somewhat contrary to the thrust of the hearing provisions in the proposed

Code. In point of fact, there are no hearings in New York City, in any case today, that bail is set, or for that matter, in most cases at any time. I feel very strongly that before the judge exercises this very, very great power to deny a man his freedom before his guilt has been established, requires that a heavy burden of proof be shown that this man is both likely to be convicted and that he would commit acts of violence if he is released.

I would also require, in making this showing, that certain specific kinds of criteria of dangerousness are established rather than the broad language of looking at a person's character and habits, and so forth.

Thus, if a defendant had a prior record of conviction for a violent crime or if his mental condition suggests a substantial threat, or if there were independent evidence of threats made to others, I would think, in such cases, the judge would be justified in ordering detention.

Secondly, in terms of risk of flight, I would agree that most of the criteria enumerated in Section 275.30 are relevant, but I don't feel, again, the people should have a heavy burden of proving that the defendant is so great a risk of flight that he must be detained. The plain fact is, that we do not know much about the risk of flight in felony cases for the simple reason that, at present, a good percentage of all felony defendants are detained under the present system and never have the opportunity to flee.

Moreover, what we do know about bail jumping strongly indicates that most defendants return as required, and that the great majority of defendants who jump, are those charged with petty crimes.

The Vera Institute has been studying this problem for almost a year now, and while our final report is not quite completed, I can report that our sample of some nineteen thousand cases, including nearly two thousand bail jumpers, about

seventy-five per cent of the failures to appear on the part of defendants charged with minor misdemeanors and violations. I think this is a fact which is often lost sight of.

Specifically, I can name three categories of cases which account for almost all of the seventy-five per cent, narcotics, misdemeanor cases, prostitution cases and disorderly conduct cases.

Therefore, I believe that the Code should require that before a defendant can be detained because of his risk of flight, there should again be a hearing to assess the proof against him and his risk of flight and what his risk of flight is. Proof of flight should be either in the form of a record of prior failures to a procedure or a showing that the defendant has been engaged in a course of criminal conduct in which regular flight is a part, or some positive evidence that he intends to flee or, finally, a showing that his mental condition is such that he is not likely to return as required.

Again, I think that there is a need for specificity and a great need to shift the burden of proof in terms of flight to the person who wants the defendant detained and away from the defendant, because the facts, such as we have them today, do not support the proposition that the defendant, unless something is done, will flee. Point of fact supports exactly the other conclusion.

A second shortcoming in the draft relates closely to my first point. It is the failure to require, in specific terms, that the judge give reasons for bail decision. Neither at the initial bail setting, nor even in the provision for a hearing on an application for bail is there specific requirement that the judge articulate, in some way, the factors upon which he either denied bail or set certain money conditions.

Again, I feel that the absence of such a provision would undermine the new Code. Anyone who has been observing the bail setting process knows that it is

usually impossible to determine why a judge set bail as he did. It strikes me as unfair that the defendants, by the thousands, are condemned before trial to weeks or even months in jail without knowing why or, for that matter, whether the judge determined that this be necessary. I am aware, that because of the uncertainties in the present law, judges are often reluctant to give their real reasons for opposing high bail. Again, the hidden factor dealing with the poor risk or dangerous defendant comes into play; but the proposed law allows judicial concern over poor risk defendant to be articulated by authorizing the judge to give his real reasons. The Code eliminates the need for silence. There is an even more important reason to require oral or written findings by the judge.

As I have noted, I feel that the factors delineated in 275.30, dealing with risk of flight and dangerousness are quite broad. Unless the Code is revised to reflect a kind of more specific standard,

as I have suggested, then it becomes essential to insure that uniform standards are developed by the courts. This, in turn, requires that on review, Appellate Courts have a way to assess the reasons behind the initial bail decisions; thereby enabling them to set limits on the discretion of the bail set by judges.

There will be difficult questions on the administration of the proposed Code with regard to establishing who can be considered dangerous or likely to flee.

The dangers can be increased if the judge states his reason for his decision. The lack of requirement for this also impairs the revocation section of the draft. Good cause, which is the standard used in that section, is the acceptance of many interpretations. It is essential the judges state what cause led to their decision to revoke.

A third shortcoming in the Code is that it perpetuates, in its

present form, the anachronistic money bail system.

There is, perhaps, one last serious argument which can be raised on the money bail system. That is, that money bail is necessary because it is the only power which the judge has to detain defendants charged with serious crimes, who he considers too dangerous or too likely to flee to be released. The proposed Code destroys that argument. By specifically authorizing detention in such cases, it permits the judge to directly do what he has had to do by indirection up to now. The issue of danger or of extensive risk of flight is brought out in the open. Why then should the judge be permitted to set bail beyond that which the defendant can pay?

This goes to an unacceptable practice of our Criminal Justice System. This, in my view -- the Code should be amended to provide that if the defendant, upon application, shows that the State bail is beyond his needs, either because he has no

discussion or nothing. He is rushed back into the detention pen. Suppose he wants to appeal? What is he going to appeal? He has no argument that the judge thought he was so dangerous that he had to be detained or he was such a risk of flight that he had to be detained.

All he can say is that the two thousand dollar bond is unreasonable and we know that the Constitution, in terms of the Eighth Amendment, has held and the judge is left in this strange position in determining whether the dollar amount of risk is a reasonable one or not. I don't know what it means. I contend no Appellate Court knows what it means, and I contend the right of the defendant actually to test whether his detention is justified or not is lost by perpetuation of this sytem.

I will give you an example. On one day last May there were two hundred young men between the ages of sixteen and twenty in the Brooklyn House of Detention

on bails of five hundred dollars or less. Now, I have no idea whether they were there simply because the judge miscalculated their ability to post a bond or whether the judge had the feeling that five hundred was enough to keep that man and so, that's all they set, or what. And I don't know how you can test it because any court in the land, if you look at a five hundred dollar bond -- because we are so hooked on the money bail system -- would say, "Well, a five hundred dollar bond is perfectly reasonable. It is a very reasonable bond."

That's not the issue.

The issue is whether this defendant should be in or out, and it seems to me that the judge should make the decision whether the defendant should be in or out. This is the kind of honesty, I feel, that should be brought into the bail system or we are going to be stuck with the chaos we have today.

A fourth shortcoming in the Code, and I think one that stands on its own and could be remedied quite independant

of any other changes, is its failure to establish limits on the length of pre-trial detention.

I am well aware of the fact that the Criminal Courts are congested and understaffed and that as a result, there is much delay in disposing of cases. I am also aware that the solution to these problems cannot be expected to emanate slowly from an improved Criminal Procedure Code, but I do feel that some way must and can be found to prevent lengthy pre-trial detention, particularly when the delay in going to trial is no fault of the defendant.

A number of judges remarked to me that they have had before them in sentencing defendants who have spent more time waiting for trial than they could have received in jail on sentencing of the arrest.

Pre-trial detention may be more damaging to the defendant than a prison sentence. When the fate of a man on bail hangs in the balance for many months, it

is a disgrace when that man is in jail.

I suggest that if the judge and prosecutor feel that a man is so poor risk or in so great a danger he cannot be let free before his guilt is determined, they ought to be placed under a heavy burden to have that man brought to trial. Accordingly, I would recommend that the defendant who was detained for thirty days in a misdemeanor or sixty days in a felony case, must be released on bail or recognizance if he is not brought to trial within that time. Provision must be made to adjust the time limits if the prosecution, for a good cause, had to seek further delay or if a delay was caused by dilatory practices of the defense.

I do agree it is feasible, in a majority of the cases, to give priority to cases so they might be disposed of. The time limitations I have suggested are not unreasonable. They are somewhat longer, in fact, than the average length of detention in the two categorized cases. They are far shorter,

however, than the detention time spent by many defendants under the present procedure.

I might add, that a number of States have adopted similar provisions and that the American Bar Association has called for all jurisdictions to do so.

There are, again -- this has always struck as kind of a shocking thing to suggest because everybody feels that the congestion in our courts is too intolerable to allow that -- but there are programs that have been going on in New York which have given expeditious consideration to these cases, and they have met with great success, especially in Brooklyn, in terms of eliminating lengthy pre-trial detention before trial.

MR. DENZER: How about in felony cases? You mentioned misdemeanors and petty offenses, I believe. Did you mention felonies, as well?

MR. KNAPP: Yes, he did.

MR. SUBIN: Sixty days for

felonies.

MR. DENZER: There is so much to do with the locality, it is very difficult. Sixty days in homicide cases in New York City is not realistic.

MR. SUBIN: Well, again, I would say that for the vast majority of cases, limits like this can be set. I would say, maybe homicide cases require something different, but they don't require the kinds of lengths of time that people spend, a year or more in jail before trial, simply because the system is too busy to get to them. There are about seven thousand people in pre-trial detention in New York right now, today. Many of them are there because Grand Juries aren't available fast enough to indict them.

It seems to me that something has to be done to attack that kind of quota. Many other people are in detention today because the system of managing the calendars in the Criminal Courts has broken down so badly that cases can't get before the

court. I don't think the defendant should be the victim of this kind of thing.

MR. DENZER: Now, in here, as you may have noticed, there is a provision that requires a defendant to be released on his own recognizance and is within forty-five days after he is held for the Grand Jury by a Magistrate; that is, unless a good cause is shown. Also, another one doesn't permit incarcerating him very long before a hearing on a felony can be held. That kind of thing. But when you get beyond those stages, the preliminary stages, it is awfully difficult to establish the length of time he should be kept in.

MR. SUBIN: I agree it isn't a simple problem. I suggest again, though, that the studies done by the Minimum Standards Committee of the American Bar Association suggested this kind of thing and that, in a number of things, Illinois and California, being two that I know of, they have developed these things. Actually, more stringent ones

in some respects because, I think, some of them say that if the defendant hasn't been brought to trial within, say, one hundred twenty days, the case will be dismissed against him.

All I am saying is, if he is that dangerous, if there is that much of a need to get that person tried, convicted and put in jail, then there are ways to give that case priority in this system, and it should be used.

MR. MC QUILLAN: Supposing the defendant asks for an adjournment?

MR. SUBIN: I think that there can be extensions if the defendant is the cause of the delay. I don't think that he should be victimized by the breakdown of the system and somewhere, some time, somebody is going to have to face that problem and not put off everything else because of it.

There are a few minor, relatively minor points that I will make in closing. One, in Section 280.10, I would suggest a catch all clause which would permit

the judge to impose reasonable non-financial conditions of release in addition to or as an alternative to money bail. Thus, a judge might require that a defendant deliver a certain deed to his residence, that he deposit his passport or not leave the jurisdiction without permission and so on. The language of Section 280.10 leaves the impression that that is eliminated.

I would amend Paragraph Three of Section 285.40, which provides that only one application for bail can be made. To take account of the situation where, after an initial application, new facts are developed, a judge, for example, might deny a bail reduction on the ground that the defendant had no place to live prior to trial. This situation developed a number of times during our Manhattan Bail Re-evaluation Project. Our staff was able to find residences acceptable to the court for several defendants who were, as a result, released.

If the paragraph

simply provided for a reapplication on the basis of newly discovered evidence, the problem would be solved.

MR. DENZER: This is where the local court has refused to fix bail or fixed excessive bail. Then, they go to the Supreme Court Judge and he does something. Now, no more appeals, so to speak, just one appeal. It doesn't prevent more than one application.

MR. SUBIN: Then, I misread it.

MR. KNAPP: Supposing he applied to Judge A and Judge A said, "You have got no place to live," and he appealed that and the other judge said, "Fine." Judge A was correct--

MR. DENZER: [Interposing] This is up in the Supreme Court?

MR. KNAPP: Then he finds a place to live and goes back to Judge A, and Judge A says, "That place is no good." Can he make that determination?

MR. SUBIN: What I am worried about is, if he goes back to Judge A with a perfect place to live and Judge A says, "I am

sorry, I can't consider your application."

MR. KNAPP: If he turns it down?

MR. DENZER: Maybe that would be termed as a renewal of the application.

MR. KNAPP: I think we ought to make sure we don't foreclose that.

MR. SUBIN: Finally, I would urge careful consideration, as Commissioner Dodds did, to the requirement for NYSIIS, of a fingerprint check before bail can be set. I am sure you know arraignment courts are being run in New York around sixteen hours a day now, and any defendant arrested as late as ten o'clock at night on a fingerprintable charge, can be arraigned the same day.

What I think that the result of the requiring the NYSIIS check might mean, that there would be a much earlier cut-off date in terms of same day arraignments, and one of the great advantages of the expansion in Night Court in New York would be lost, that is avoiding that terrible Monday morning and every morning congestion in the arraignment

parts. That has been eliminated, by and large, by the procedure, but it requires, rather as fast a fingerprint search operation as possible.

Now, I just don't know where Mr. Gulotti's system will buy the time, but if it doesn't, I think there should be some exception for New York City.

MR. DENZER: He is very optimistic, Mr. Subin.

MR. SUBIN: Thank you, very much.

SENATOR DUNNE: Is Harold Rothwax here?

MR. LANG: He is not. I called him yesterday and he had gone home sick. He might be ill.

SENATOR DUNNE: In light of the fact we have been running through since ten-thirty, we will recess now until two o'clock. Now, we have scheduled for this afternoon, Councilman Arculeo, Judge Rossback, Commissioner Forstadt, Harris Steinberg, Esquire, Ira Sive and Frank Prial.

If anybody else would

like to testify this afternoon, please come forward.

[WHEREUPON THE PUBLIC HEARING WAS THEN RECESSED FOR LUNCH AND RECONVENED AT 2:10 P. M.]

SENATOR DUNNE: Our first witness will be the Honorable J. Howard Rossback of the City Criminal Court.

JUDGE ROSSBACK: I want to say, first, I think you have done a magnificent job. I think it is a very interesting document and I am looking forward to getting my hands on it. I think the time has come when, aside from a few additional details, one of which I am going to suggest, I think we ought to try it out. Of course, there will be bugs in it. There are always bugs in new legislation, but I think we can iron them out rapidly.

Now, I would like to talk briefly, and will be brief, about an additional provision designed to keep the old D.O.R., discharge on a defendant's recognizance. We can't call it a D.O.R. any more because there are other discharges in the form of

sentences. So, I call it a conditional release.

I don't think it is necessary to read the provision. Do you or would you like me to?

MR. DENZER: Yes, if you will.

JUDGE ROSSBACK: It is addition 390.80,
Conditional Release of the Defendant.

"At any time prior to trial, a defendant charged with a misdemeanor or an offense, or being a youthful offender, may be given a conditional release by the court. On such event, the case shall be marked off the calendar, subject to restoration at any time upon demand of the District Attorney. The judge shall state, upon the record, the reasons for granting the conditional release and the conditions to be observed by the defendant. If the case is not restored to the calendar within one year from the granting of the conditional release, it shall be deemed dismissed provided, however, the judge can order an earlier period for dismissal. "

Now, in effect, this is the old D.O.R., which was generally

recognized before court consolidation, but because certain judges didn't like it and, I think, certain District Attorneys --

MR. DENZER: Yes.

JUDGE ROSSBACK: It fell in great disfavor. Now, I have written an article on the D.O.R. and anybody interested can have a copy. It was reprinted at least once, and here it is. If you need more, I have it.

Now, may I say -- I speak just as one Judge in the panel on the Criminal Courts. I don't speak for the judges of that court, although I have just been appointed the Chairman of the Judges' Committee to look at the whole new Criminal Procedure Law. I can say, with his permission, that the Assistant Administrative Judge, Vincent Massei favors the continuation of the D.O.R. Now, it applies -- I am going to quit this in about four minutes and you can dig me if I run over.

MR. KNAPP: Is this supposed to be an inscription on the Judge's bench?

[LAUGHTER]

JUDGE ROSSBACK: No. Actually, it was an inscription on a tombstone in Savannah, Georgia, and it is reported that one old man was driving a carriage by it and he said, "Boy, you sure ain't fooling anybody but yourself."

[LAUGHTER]

SENATOR DUNNE: For the record, the inscription referred to reads, "I am not dead, but sleeping."

JUDGE ROSSBACK: Now, we find in the Criminal Court, that there are certain cases which are not ripe for disposition but which there is no sense and, indeed, a hardship to carry on the calendar. Now, I will give you some quick examples. You have a hardship case, a mother, and you can't bring in the victim. She has moved or wants to drop the charges, she doesn't want to be bothered. What do you do with that case? It can't be presented to the Grand Jury and it is gradually reduced to misdemeanor, larceny, assault. What do you do with it then? The defendant has appeared four times. It has been marked "final" and still

you can't get in the complainant.

Now, I hate to see a defendant walk out of that court with a dismissal and a big sneer on his face. I would rather, in effect, mark it off the calendar, put him on unofficial probation to behave himself and if he doesn't, we are going to make renewed efforts to find the complainant; but you can't make the defendant and his lawyer come back to court time and time again when no accusation is pressed against him.

Then, the soft shell cases. A man and a woman have had a beautiful relationship during which they shared the same apartment, and it has gotten sour and he socks her, and all she wants is out, but he has got to get his clothes out of there and the argument over who really owns the TV and all that sort of stuff is going to take a little time. Now, at this point, I would rather say, "Settle your differences outside. If you have any more trouble with him, lady, we will take care of him." But there really is no basic

sense because in nine cases out of ten, they will settle them, to have them come back to court.

Then, there is the monetary settlement where somebody got sore and threw a garbage can through somebody else's window and they are willing to pay the twenty dollars, but they don't have the money. Now again, it seems a hardship to require all these people to come back to court. You fix the amount. I don't know how we stand to give a money judgment, but we sometimes suggest figures. But there again, a D.O.R. -- now, if you don't get paid by the defendant, you let us know and I will put a stop of sixty, ninety days -- it doesn't have to be a year.

Now, I do want to emphasize the real advantage of the D.O.R. because, actually, it is marking it off the calendar, but it enables people, both sides, to walk out of that court with dignity and the longer I am a judge, and I have been a judge now over fifteen years, the more important to

me in this scrambling, shambles of Criminal Courts, is the preservation of human dignity in every case.

Now, I will give you an illustration that happened in Queens last year. There had been a fight in a congregation and the Rabbi -- and there were charges of disorderly conduct on the basis of a few wild swings -- and the Rabbi of the congregation pressed the charges and twenty representing the other faction were going to contest it.

Now, from the practical and very basic point of view, it would have taken me about a week and a half to try the case, but beyond that, what would I have gained? I had the Rabbi and the lawyers in, because both sides were represented by lawyers, and I said, "Look, where you have respectful people on both sides of the case, how could any judge, even a Solomon, tell beyond a reasonable doubt that the A Group is at fault or the B Group is at fault. So, the chances are I will acquit and they will walk out sneering. On the

otherhand, suppose I convict. Then you, Rabbi, will have helped to convict part of your former flock of an offense. Now, do you want that?

Well, they didn't come back. We had a civil suit going. I suppose they settled it that way, but both sides left with dignity.

Now, I have been authorized by the Criminal Courts Committee of the Queens County Bar and of the Queens Criminal Court Bar Association to indicate their approval. I hope you will hear from the Bronx Bar and the Bronx Criminal Court Committee and from the New York Criminal Court Bar Association.

MR. DENZER: Judge, I notice you say here the case against the D.O.R. can be briefly stated. One, there is no legal basis for it under the new court structure. Well, I don't know. I put it the other way around. I don't see that there is any legal basis against it. That is, a D.O.R., as far as I can see is, simply, an adjournment without date on the understanding that if the judge doesn't hear

any more about the case and a motion for dismissal is made, he will dismiss, probably, in the interest of justice. That is the ultimate result, is it not?

JUDGE ROSSBACK: Yes.

MR. DENZER: So, it is an adjournment plus a release on his own recognizance.

JUDGE ROSSBACK: Plus, we usually get releases against the complainant at that point or a conditional release from civil liability.

MR. DENZER: But it really consists of three things: The adjournment without date, the release on his own recognizance and the ultimate dismissal in the interest of justice.

Now, the only reservation I have about the whole thing is, as I say, you don't really need it. All of those things you can do anyway. You don't need legal authorization for it, as far as I can see.

JUDGE ROSSBACK: Well, except that you often turn around and say, "Now, I am putting both sides on an unofficial probation to keep

away from each other. There are many people who are going to want to be your friend; never these people. Now, stay away from each other and if you don't, the thing comes back."

It gives a little more status. Really, it is, perhaps, a little bit of a deception, but I would like to see it as a method of conditionally not terminating, but marking it off the calendar.

MR. DENZER: So, you would like it codified. Now, what about felonies and what about the Supreme Court, D.O.R.'s in the Supreme Court?

JUDGE ROSSBACK: They do it all the time outside of New York.

MR. DENZER: You think whatever legislation might be necessary should apply to indictments as well as informations in the Criminal Court?

JUDGE ROSSBACK: They have it on off the calendar marking. You can't settle a felony as easily, although some of the cases we get -- we get nine-tenths of the felonies that are

reduced. I would see no objection to having it go to a felony. Often, they just mark it off the calendar and that's the end of it.

MR. KNAPP: As I remember, when we used to give D.O.R.'s, they were always on the consent of the District Attorney. Is that still the case?

JUDGE ROSSBACK: Now, you are getting to the gas in the case. There was a case in Brooklyn where Judge Troy, a very wonderful Judge, D.O.R.'ed over the objection of the District Attorney and what happened was this, the next day, Bennie Gasman happened to be sitting there and they moved to restore. He referred it to Judge Troy who refused, and it ended up with a mandate against Gasman; and I believe it was the Supreme Court -- it had never gone any higher -- said that the restoration of the case on request of the District Attorney is an administrative act and that the judge had no discretion to refuse it. I think that's right. I think the main real thrust was that it was used by some judges of lower caliber and the

JUDGE ROSSBACK: I would think so, yes.

MR. DENZER: Lack of speedy trial,
perhaps, if you don't.

JUDGE ROSSBACK: Yes. I would think
that might be a good way to put it because,
after all, the only time a defendant isn't
going to consent is if he has a suit for false
arrest in mind. I would accept that. If he
wants to go ahead and feels he has a better
chance with the case still alive, I wouldn't
deny him that.

MR. DENZER: Well, he could play
Prosimae, and the judge will say, "D.O.R. the
case," and the defendant says nothing; eight
months go by and, then, the District Attorney
decides he is going to put it back on the
calendar and the defendant then raises the
speedy trial question, and he probably prevails.

JUDGE ROSSBACK: I will now make a
confession. I have, on very rare occasions,
D.O R.'ed in absentia. I did it the other day.
There was a guy driving without a license or
something like that. The defendant had been

sentenced to fifteen years in State's Prison. That's the way I got rid of it, but whether I had any legal basis, I really don't know. I did it in any event.

SENATOR DUNNE: Thank you, Judge.

I will now call on Mr. Steinberg, Mr. Harris Steinberg. Mr. Steinberg, will you come forward?

MR. STEINBERG: Harris B. Steinberg;
25 Broad Street, New York.

I notice in the room many copies of the little pamphlet or leaflet which Judge Rossback wrote which is, as far as scholarship is concerned, my only source of learning aside from my own practical experience with the D.O.R. I would very much like to echo strongly what Judge Rossback says about the desirability of keeping this practice and making it available to everyone in the State and not letting it be a matter of choice with the District Attorney's Office whether, as a matter of policy, they want to go along with it or not.

I had not thought

through this question of consent, as to whether the District Attorney's Office should be required to consent or whether the defendant should be required to give consent. My view of the remedy is that you may, in a decent way, deal with a case in the circumstances where common sense would indicate that this is a good way to do it, and there is nothing final about it, there is nothing which is make or break about it because if a person who is accorded that treatment turns out not to deserve it, the case can be put back on the calendar and be processed again; but there is such a proliferation of cases -- there are thousands of cases every year -- that a device as simple as this, simply administered without the benefit of probation officers, without the kinds of controls which other methods have, is one which should be encouraged because, from my observation, it has worked very well.

Now, I see no reason why it shouldn't apply to felonies as well as to misdemeanors. Insofar as the actual

ingredients of this mysterious device, it is really just a use of a bail power and adjournment power. Both of those are known to us. There is no reason to be frightened of either one, and it is like the old story about the little boy who was psychopathically frightened of Kreplach. They are like Won Ton, but come from Jewish culture, and they are little pastries with chopped meat in it.

Every time this little boy saw a Kreplach, he would fly into a tizzy and hide under the bed. They took him to a psychiatrist and the psychiatrist said, "I will deal with this boy showing him there is nothing more than flour and water in Kreplach and telling him that he is not frightened of the flour and water." The psychiatrist showed the boy the flour and water and asked him if he was frightened of the flour and water. The little boy said no. Then he folded the meat in the pastry after chopping it up, and the boy said, "A, a, a Kreplach." And here you have a bail which is known to all of us, which is a very

simple thing to administer. You have the adjournment, which is known to all of us. I don't know why the combination of two innocent devices should present the horrendous prospect which was seen in it when it was done away with in New York County.

Most of the instances in which D.O.R.'s have been used have been eventuated as envisioned by the judge; to wit, a dismissal. It is virtually automatic without the creating of a lot of files and time. It means you are really leaving it to the discretion, expertise and discretion of the judge on the bench, his courage in using it or stupidity in not using it, or vice versa, and you have a very visible way of riding herd on it.

If a man has been put on D.O.R. and commits a crime, he is called back and has two crimes to answer for. Why should it make any difference whether this man is put on D.O.R. or held in five hundred dollars bail and then he can go out and do it

anyway? The answer is, there has been a decision by the powers, District Attorney's Office and the judge to the effect that this is probably the kind of case we shouldn't bother with. It is probably to the public interest to leave it alone. However, we have got to have a hold on the fellow so he doesn't think he can just walk in and walk out. It makes less fuss, less manpower and less offense. I think it would be tragic to take something which has grown up and proved itself in everyday use as valuable and useful, and throw it out just because it isn't in the statutes.

There are many things we have dealt with because they were needed; to wit, motion with respect to Grand Jury Minutes. You won't find that in the statute. There are many things which fit the needs of the little society which forms the world of the Criminal Courts, by common consent has evolved because they are necessary. If you don't have them, you have got to invent them, and this was one of the more beneficent

inventions that came forth.

I came in the middle of Judge Rossback's presentation. I am sure he gave you everything you wanted to know. I would be happy to answer any questions, and I would like to add my small voice to this because I think it would be tragic to deprive the public of it.

MR. DENZER: Just one thing. In bail, as I recall it, it is usually done just with a release on one's own recognizance.

MR. STEINBERG: I say, that's really a bail judgment because everyday we release people on their own recognizance on arrest without bail to come back to answer us later on. It is a well understood form of criminal means.

MR. DENZER: This wouldn't be combined with bail.

MR. STEINBERG: No, but may I point out that all the learning on bail in the last decade is moving more and more to the direction of less and less bail. I mean, whether we say so or not, bail is a way where the rich are

avored and the poor are hurt because a man who has enough money to put up what the judge thinks he ought to put up, enough money to pay a bondsman, consult with his lawyer, has a much better chance of getting through the criminal case than a man who was too poor to work on his case. The Federal Bail Studies, with which you are all familiar, the Minimum Standards Committee of the American Bar Association, have all advocated wider, more generous, more liberal use of bail and discharging in their own recognizance; D.O.R.'s in effect, everything but the requirement to put up money to do something in court.

MR. DENZER: I wasn't pushing for a bail application. As a matter of fact, if a person is deserving of this, he would be a kind of person you wouldn't want to fix bail for anyway.

MR. STEINBERG: That's right. As you know, nobody knows better than the gentlemen sitting here on the dias, because I have a great respect for your experience and knowledge, and

I know you men are very well versed in this field, that enormous numbers of cases in Criminal Court are the kinds of cases -- such as shoplifting -- there is a punch in the nose, the kind of action which is certainly anti-social and undesirable, but it is not the end of the world. Somebody has been brought into court, the realization of the seriousness has been brought home, and the complainant shakes hands and the kind of things you would like human beings to do. We ought to help do that rather than throw obstacles in the way.

MR. HECHTMAN: Mr. Steinberg, perhaps you can answer a question for me that has been bothering me for many, many years.

MR. STEINBERG: I, doubt it, but I will try.

MR. HECHTMAN: What is the singular of Kreplach? [LAUGHTER]

MR. STEINBERG: You know, I don't even know what the singular of Won Ton is.

MR. HECHTMAN: I think they are related problems.

MR. STEINBERG: And Ravioli, I shouldn't leave out.

MR. KNAPP: Ravioli is a very serious omission. It is customary for witnesses to open their remarks with fulsome pleas.

MR. STEINBERG: Fulsome is a word which is a majority phrase, and I would never dare to do that to you gentlemen.

It goes without saying, as a spectator and consumer of your product, I have had unbounded admiration for the model Penal Law, which I think has made New York one of the most forward States in the United States as far as the administration of justice in what you gentlemen are accomplishing with the drafts I have seen in the Code of Criminal Procedure and, certainly, I think it was one of the great Chief Justices of the United States Supreme Court that said "The life of the Constitution lies in the Criminal Procedure," and by dealing with this thing, you are doing a great job toward helping everyone.

MR. KNAPP: You have adequately

purged yourself to this Commission.

MR. STEINBERG: I appreciate very much the opportunity to appear before you. I certainly hope in your deliberations you will give thought to the desirability of this remedy. The only thought I have against it, it wasn't in the statute, and it is your job to put it in.
[LAUGHTER]

SENATOR DUNNE: Commissioner Joseph Forstadt of the Department of Consumer Affairs will be our next speaker. Thank you, Mr. Steinberg.

MR. FORSTADT: Distinguished members of the Commission, Mr. Chairman, I am the Deputy Commissioner of the Department of Consumer Affairs and in my capacity as Deputy Commissioner, I am very pleased to appear here on behalf of the Inspectors for both the Markets and License Divisions.

The License Inspectors comprise the enforcement and investigatory division of a City regulatory agency, embracing more than one hundred five types of

businesses and services, under the Administrative Code of the City of New York. Inspectors are duly appointed Police Department - Special Patrolmen. The number of Inspectors is small but the great variety of activities touches the commercial, industrial and cultural life of the City. They therefore make a great impact on the residents and visitors to our City.

Public morals and safety and criminal code enforcement are areas of the continually expanding duties and responsibilities of License Inspectors.

Inspectors work three tours of duty and because of limited manpower are required to work alone in the high crime areas of the City and much of the work is very dangerous.

Their assignments include: Undercover investigations for compliance by Cabarets, Pool and Billiard Halls, Junk Shops and Junk Dealers, Bowling Alleys, Public Dances, Commercial Refuse Operators and many others. Referral of complaints emanate from the Federal, State and City law

enforcement agencies, the New York City Police Department, District Attorney staffs in all five boroughs of New York City, New York City Fire Department, Bureau of Narcotics, Immigration Service and the Treasury Department and others. Our Markets and Licenses Inspectors are equally concerned with false advertising, mislabeling, misbranding and adulteration of products.

Inspectors are assigned to work directly with the New York City Police Department Plainclothes Squads and Detective Divisions on related investigations.

The nature of this work involves personal risks to Inspectors such as assaults, robberies and muggings.

To better effectuate the enforcement of his responsibilities a field Inspector as a Peace Officer would command greater respect and can do a more meaningful job of enforcement.

He can do a more meaningful job of enforcement by having the

power to act in official capacity if an immediate arrest is necessary.

The Department of Consumer Affairs in our Division of Licenses has three hundred twenty Outstanding warrants which go unexecuted for various violations of the Administrative Code and General Business Law. All are misdemeanors. This is due to the inability of the Police Warrant Officers assigned to the various courts to fully execute our warrants. This results in loss to the Court of "Fines" and loss to the Department of Consumer Affairs of additional license revenues, and of course, effective compliance. With Peace Officer status, a Department Inspector could execute, at the direction of the Court, all warrants relating to our Department.

Assaults on Inspectors in the line of duty have increased yearly -- due to the many "High Crime Areas" in which they must investigate. Department statistics reveal that from 1965 to the present, it was necessary for Inspectors to call for Police assistance

three hundred thirty-one times to fully execute their duties. Unfortunately, the Police Department equally understaffed often has failed to respond to Inspectors calls for assistance.

Our Inspectors have in more instances assisted in arrests by the staff of the Commissioner of Investigations.

It is a matter of record that our Inspectors have rendered frequent assistance to Police Officers in making arrests. This assistance was given without recognized authority or responsibility and at great personal risk.

The men of the Department are of high caliber and many hold college degrees. Minimum requirements for the position of Inspector is a college degree and/or a high school diploma plus six years of investigation experience.

Our Inspectors receive eighty hours of intensive Police instructions in all phases of the law, investigation

procedures, the Penal Law, the laws of arrest, evidence, search and seizure, advance Police techniques and intergroup relations at the New York City Police Academy.

Investigators of the Waterfront Commission and Department of Taxation & Finance - Cigarette Tax Enforcement, are classified as "Peace Officers." The Inspectors of the Department of Consumer Affairs - Division of Licenses and Division of Markets - Weights & Measures, whose duties and areas of work are equally as dangerous, should be afforded similar Peace Officer status. You will note that Weights & Measures Inspectors are accorded Peace Officer status under the State Agriculture and Markets Law and now under §1.20 (subd. 32) of the proposed Criminal Procedure Law. The same status should certainly apply in the case of License and Markets Inspectors of the Department of Consumer Affairs of the City of New York.

And now, gentlemen,
I would be delighted to answer any questions

that you might have. That is my full statement.

MR. KNAPP: You elaborated what you said here in the typewritten statement?

MR. FORSTADT: Yes. The major point here, of course, is that if the State Inspectors and, certainly, in the Agriculture and Market fields are accorded the status of Peace Officers, it would be inconsistent to have the City Inspectors doing the very same function because we do have the jurisdiction in the City of New York under the State Agriculture and Markets Law. It would be inconsistent for them not to have the same Peace Officer status.

MR. MC QUILLAN: At any past legislative session, was a bill introduced by the City to make the Inspectors of your Department Peace Officers under the existing Code of Criminal Procedure?

MR. FORSTADT: Unfortunately, I can't answer your question. I do not know.

MR. MC QUILLAN: Because the Commissioner's proposal contains the current

list, simply a restatement of those Public Officers who are now designated as Peace Officers.

MR. FORSTADT: This is in addition. Now, we are speaking for recognition of the Department of Consumer Affairs Inspectors. This is a new Department, by the way. It is, of course, a merger of the Department of Licenses and the Department of Markets with much broader responsibilities than in the past.

MR. MC QUILLAN: Does the City contemplate sponsoring legislation in the next session amending the present Code of Criminal Procedures since this proposal, if enacted, would not be effective until late 1970?

MR. FORSTADT: I can speak on behalf of our Department, that we intend to urge the Mayor's Office to do such.

MR. MC QUILLAN: I dare say if that is enacted, our Commission would include those officers in the definition of Peace Officers.

MR. DENZER: We don't want to be saddled with the responsibility of determining

who should be Peace Officers. That is really not our field. That is for the Legislature to determine, itself.

MR. FORSTADT: Of course, in your proposing a new law, I suppose it is your field, and I don't know if you have accepted anyone from the list that has been there before.

MR. DENZER: We took the old list just for that reason. We don't want to be involved in controversial questions as to whether this one should be or this group should not be. Let the Legislature decide that on a case to case basis, so to speak.

MR. FORSTADT: We certainly would urge the Mayor's Office to introduce this into legislation, and we certainly urge you to include this in your job of preparing the Criminal Code Procedure Law.

SENATOR DUNNE: Thank you very much. The Honorable Angelo Arculeo could not be here, but I understand his Counsel, Mr. Eugene Gibilaro is here to represent the Minority Leader.

MR. GIBILARO: I am only here as a token appearance to apologize for his absence. The reason he is not here is, he is home ill. He wants to thank the Committee for the cooperation which has been extended by your Counsel, Mr. Peter McQuillan.

Mr. Arculeo has asked the Commission to file a written statement, which has to do with the status of Peace Officers. We will submit the statement in the next two or three days.

SENATOR DUNNE: Will you file that with our office, with Mr. Denzer and Mr. McQuillan?

MR. GIBILARO: We will.

SENATOR DUNNE: Thank you very much. Is Mr. Frank Prial here, Mr. Ira Sive?

That is the extent of the scheduled witnesses. Are there any other parties who would like to be heard?

Yes, sir?

MR. MELLON: My name is Mellon,

Legislative Chairman of the Captain's Association, Department of Correction. I have, at great length, discussed the many troubles in Police Officer and Peace Officer status with Mr. McQuillan and Mr. Bartlett. I realize the difficulties that you do have and we are aware, as you had said, to the Deputy Commissioner who had just spoke before us, about the assignment of such functions. The City should assign such a title and a function, and we agree that the City, itself, should take the responsibility to label certain groups to their status.

The only reason we have appealed to the Bartlett Commission to include us within the Police Officer status is the fact that for many, many years, the Department of Correction has done the work of the Sheriff for the City of New York and, in so doing, the old Code of Criminal Procedure or the present Code of Criminal Procedure, in more than thirty to forty sections, wherever the Sheriff is mentioned, there are the changes throughout many legislative sessions that within

the City of New York, the Commissioner of Correction and his agent, go along with that, a very important statute in there which gave us powers throughout the State that we could act as the Sheriff in New York and as the Sheriff of the City of New York in an escape or attempted escape where the citizen who was called upon to assist us would face the same penalties as if we were within our own City or Town.

I can't quote it verbatim, but generally it is to that effect.

MR. DENZER: Excuse me from saying so -- the Sheriff has at least two functions, one of which is jailer and the other is police officer. Now, he is not a police officer by virtue of the jailer function, and that is the one you are comparing your men to.

MR. MELLON: I want to get to this point, too, sir. We do patrol, doing, if you want to call this patrol duty. We have many areas in which our men patrol, not only the prison areas, we patrol around the areas, we control conveyances going to and from this area

MR. MELLON: No, it is not our duty as a Correction Officer. It is our duty as a Peace Officer. As the term applies today, the warrant is addressed to a Peace Officer.

MR. DENZER: There is no such thing as a duty as a Peace Officer. You only have your duties as a Correction Officer, a Parole Officer.

MR. MELLON: The warrant is addressed to Peace Officer.

MR. DENZER: That is immaterial. You do all these things you mention solely in your capacity as a Correction Officer. It is your duty as a Correction Officer to do certain things. That's why you do these things.

Now, being a Peace Officer, listed under the appropriate section, gives you all the authority that you need as far as I can see. You can act as a Police Officer, so to speak, in the course of your duties as a Correction Officer. That's all you need.

MR. MELLON: A Police Officer can also operate, on his duties, everyday in the

week, as a Peace Officer, too, a Police Officer.

MR. DENZER: Why do you want to be Police Officers? For what purpose?

MR. MELLON: First of all, we have been Police Officers.

MR. DENZER: I doubt it.

MR. MELLON: We have been Police Officers to every inmate in all those prisons.

MR. DENZER: You are not listed as Police Officers under the present Code.

MR. MELLON: No, we are not as such; but if a violation happens within the prison, if a misdemeanor happens within the prison and I have to investigate it and I place this man under arrest, not even seeing this thing, I can't bring a Police Officer into the jail and tell him this thing and that thing happened. These are brought to the attention by a Correction Officer that this and this was done.

MR. DENZER: It is part of your duties as a Peace Officer. You don't have to

bring a Police Officer in to carry out your duties.

MR. MELLON: We would have to eventually when this thing gets going.

Thank you very much.

SENATOR DUNNE: Thank you, Mr. Mellon. Are there any others who would like to testify this afternoon?

MR. DENZER: I guess that would conclude the hearing this afternoon.

SENATOR DUNNE: Gentlemen, we are very happy to have had the testimony given by the various speakers. We are sure it has been very helpful and we will go over it very carefully and give it very thorough consideration.

Thank you all for testifying.

[WHEREUPON THIS SESSION OF THE PUBLIC HEARING ON THE PROPOSED PENAL LAW AND CRIMINAL CODE WAS CONCLUDED AT 3:15 P. M.]

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