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MEMORANDUM CONCERNING FEASIBILITY OF A CODE OF CRIMINAL PROCEDURE APPLICABLE TO NEW YORK CITY CRIMINAL COURT

TO: MEMBERS OF THE COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE

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The New York City Criminal Court Act, enacted in 1962 as part of a general court reorganization plan, established the "New York City Criminal Court" and predicates various administrative and procedural rules for its operation. As do most of the lower or "local criminal courts" outside New York City (hereinafter termed "non-New York courts"), this court has preliminary jurisdiction of all offenses and trial jurisdiction of all offenses except felonies.

The non-New York courts are created and established by individual city acts, by the Town Law and by the Village Law, and are regulated by the Uniform City Court Act and the Uniform District Court Act. Procedure therein is governed chiefly by the Code of Criminal Procedure, although the two aforementioned Uniform Acts promulgate a few procedural rules, some of which are repetitious of and others in conflict with the Code of Criminal Procedure. (We hope to repeal those provisions and have all non-New York City lower court procedural provisions confined to the Code).

This memorandum deals with the question of whether it is feasible to have the new Code govern New York City as well as non-New York procedure (predicating variations between the two in certain instances); and, accordingly, to repeal most of the existing procedural provisions of the New York City Criminal Court Act. The gist of the problem is whether the structure and general operation of the New York court are sufficiently similar to those of the non-New York courts to render such "lumping" or meshing practical.

Upon this subject, some reference to the background and history of the New York City Criminal Court is pertinent. Its predecessor is a pair of courts created by the "New York City Inferior Criminal Courts Act" in 1910 -- the New York City Magistrates Court and the New York City Court of Special Sessions. Their functions are indicated by their titles in the light of the existing terminology which has a justice of the peace or other non-New York City local judge sometimes sitting as a "magistrate" (for purposes of preliminary proceedings) and sometimes as a "court of special sessions" (for trial pruposes). With respect to these two courts, the terms "Magistrate" and "Special Sessions" were far more than invisible hats donned and doffed by a judge at different stages of the proceedings. These were "courts" in every sense of the word, having separate personnel, quarters and functions. The Magistrates Court had exclusive trial jurisdiction of all offenses below misdemeanor grade (our "violations" and "traffic infractions") and vertually no other trial jurisdiction of any kind. Except for cases instituted by grand jury action, it had exclusive preliminary jurisdiction of all offenses, and all original informations or "complaints" for any crime whatever had to be lodged with the Magistrates Court. Like the non-New York courts, it conducted preliminary examinations in felony cases and held defendants for the action of the grand jury. Unlike the non-New York Courts, it also held preliminary hearings in misdemeanor cases, over which it had no trial jurisdiction. Affirmative action here was limited to holding the defendant for action by the Court of Special Sessions, which was quite a formal matter. All the papers, including the "information" or "complaint" (the deposition-like instrument) were sent to the district attorney; he drew a new and different kind of information (our "prosecutor's information") and filed that in the Court of Special Sessions; and the defendant was then newly arraigned upon that instrument in the latter court.

The Court of Special Sessions had trial jurisdiction of misdemeanors, no trial jurisdiction of any other offenses, either greater or lesser, and no preliminary jurisdiction whatever. There were no jury trials but in most cases the defendant had an option of being tried by a three-judge bench instead of by a single judge.

Pausing here, it seems apparent that, if the above described court structure prevailed in New York City today, the lumping or meshing project under consideration would be difficult almost to the point of impossibility from a practical standpoint. The changes wrought by the New York City Criminal Court Act of 1962, however, have, on paper at least, narrowed the structural gap between the New York and non-New York courts.

The principal feature of the Act is that, in effect, it combines the old Magistrates and Special Sessions courts into a single "New York City Criminal Court" (§20). The new court and all its judges, like the non-New York courts, now have the collective jurisdiction of the two old New York courts to sit both as "magistrates" and as "courts of special sessions" (§§30, 31). No longer is it necessary to shuttle a misdemeanor case from one court to another for plea and trial.

In actual operation, however, this change may be more semantic than real. The size of the court and the immense volume of cases handled by it require numerous "parts" with specific narrow functions. Thus, an information is initially lodged in what amounts to a "magistrates" part, comparable to the old Magistrates Court, and may eventually be transferred to another part of a "special sessions"nature. A judge sits, figuratively, as a "magistrate" or as a "court of special sessions" but seldom performs both functions in the same case.

The new Act, moreover, has retained certain vestiges of the old Act which appear to have existed in the latter only as essential ingredients of the old two-court system. For example, a defendant who has demanded a three-judge trial in a misdemeanor case is entitled to a preliminary examination of the charge of the sort to which he would be entitled in a felony case before being held for the action of a grand jury (§40[2]). This is a hangover from the old two-court system where the Magistrates Court had to examine a misdemeanor charge before holding the defendant for the Court of Special Sessions. The provision in question does not seem logical under a single court system, and in the non-New York courts a defendant is never entitled to a preliminary examination upon a so-called non-indictable misdemeanor charge.

It is difficult, and probably impossible, to ascertain how much of the Code of Criminal Procedure is incorporated by reference in the New York City Criminal Court Act and, hence, how much similarity there is or is supposed to be between the procedure and operation of the New York City Criminal Court and the non-New York courts.

On the subject of preliminary jurisdiction and procedure (the "magistrate" phase of the court), the New York City Act declares:

> "§30. Judges are magistrates. The judges of the court are magistrates and shall have and exercise all the jurisdiction and powers, not inconsistent with this act, which are conferred by law upon magistrates and police justices under the provisions of the code of criminal procedure and which were conferred by law upon city magistrates of the city of New York on the first day of April, nineteen hundred ten."

Broadly speaking, this seems to render applicable to the New York City court most of the Code provisions dealing with the filing of informations with magistrates (C.C.P. §§144, 145, 147-a, 147-g, 148), with the issuance by magistrates of warrants of arrest and summones based thereon (§§148-166), and with the subject of preliminary examination of felony charges by magistrates (§§188-221-b).

The New York City Act, however, contains some provisions in this area which are "inconsistent with" the Code. Among the variations is a significant difference in the procedure governing the issuance of summonses. Under the Code, the "information" filed with the magistrate must be a formal written instrument meeting certain specifications, and no warrant of arrest or summons may be issued except on the basis of such an instrument (C.C.P. §§144,145 148, 150). The New York City Act, while requiring a formal written "information" as a basis for ultimate prosecution (§41[1]), requires nothing written or formal for the issuance of a summons but authorizes the court to issue the same "when information, <u>oral</u> or written, is presented to a judge of the court sitting as a magistrate to the effect that a crime or offense has been committed . . . "(§57[1]). The statute than proceeds into some strange concepts and propositions. "Upon the return of the summons," it declares, "the judge shall inquire and investigate into the subject matter of the charge" (§57[6]).

In terms of actual operation, the meaning of all this is as follows: a separate "summons" part of the court has been established where complainants flock in great numbers; there, they orally tell their tales of woe to a clerk (not the judge); the clerk has a stack of summonses signed by the judge and issues one for the defendant's appearance to any complainant who has a semblance of a criminal case; when the parties appear

on the return date, the judge conducts a sort of informal investigation, which includes interrogation of the defendant, if the judge then feels that a respectable criminal charge can and should be formally lodged, he directs a formal written "information" to be drawn and filed, and the case is on its way.

When the dubious features of this procedure are pointed out to some judges of the court and some prosecutors, the defense often is that the volume and character of the complaints simply do not permit adoption of the normal Code or non-New York procedure in which the filing of a written information is a condition precedent to the issuance of a summons by the court; and that the peculiar make-shift system in vogue is necessary to avoid chaos in the court.

The foregoing is significant not so much because of this particular procedural difference between the Code and the New York City Act but because it constitutes one illustration of how varying conditions inside and outside of New York City may render it difficult and possibly inadvisable to establish uniform procedural legislation for New York City on the one hand and Black Mountain or Tompkins Creek on the other.

Concerning trial procedure, the New York City Act provides, inter alia (§41[1]):

> "All sections of the code of criminal procedure consistent with this act regulating and controlling the practice and procedure of the county courts shall apply, as far as may be, to the practice and procedure in the court, and in each of the parts thereof, and shall regulate and control the practice and procedure of the court, insofar as its jurisdiction and organization will permit".

It is to be observed that what are being incorporated by reference here are the "consistent" Code provisions relating to procedure in the "county courts"- meaning, undoubtedly, what we term the "superior courts" (County Courts and the Supreme Court). In short, the quoted provision is merely a dragnet assertion that the rules of evidence, motion practice, etc., prescribed in the Code for the superior courts are applicable to the New York City Court unless inherent differences in jury and non-jury trial procedure or some other factor dictates the contrary in any particular instance.

The real significance for present purposes of the quoted clause (New York City Act §41[1]) is that it does not incorporate or refer to the Code sections governing the lower court trial procedure outside of New York City (C.C.P. §§699-740-d). This omission implies that New York and non-New York trial procedure are to be established and treated entirely separately. That implication becomes a certainty in the light of a Code provision expressly declaring that, with one inconsequential exception, the Code sections governing trial procedure in the so-called courts of special sessions outside of New York City "shall not be applicable to the proceedings in the criminal court of the City of New York" (C.C.P. §740-d).

Both the Code provisions and the New York City Act provisions of this area are so poorly drawn and organized that it is difficult to determine from examination of the statutes themselves whether the two procedural fields are on the whole "combinable" or, as the two Acts infer, irreconcilable. The greatest single point of difference between the two systems relates to jury trials. Outside of New York City, a defendant is entitled to a six-man jury trial in a misdemeanor case if he prefers it to a trial before a judge alone; and a substantial portion of the aforementioned Code sections are addressed to the formation of such a jury and the conduct of such a trial (§§702-716). There is no jury trial in the New York City court,

but in most misdemeanor cases the defendant may have a three-judge rather than a one-judge trial if he so desires. Most of the important procedural provisions of the New York City Act deal with the three-judge trial and its ramifications (§§40-42). Indeed, the Act contains very little else in the way of basic procedure.

The question of whether New York and non-New York lower court procedure can be uniform drafted and meshed in the Code cannot be answered by examining the existing Code and the New York City Criminal Court Act. The real issue is whether or not the problems and conditions attending the administration and operation of a lower criminal court in New York City are so different from those outside of New York City that substantially different procedural schemes are essential.

That question could be conclusively answered only by one having thoroughgoing, detailed knowledge of and experience with the operation of both the New York City court and all the non-New York courts. Unfortunately, no member of the Commission or its staff fits that description, and it is probable that no one else in the world does either. This dilemma might suggest a lengthy special staff study extending from one end of the state to the other. Again unfortunately, the Commission currently has neither the time nor the man power for such a project.

Nevertheless, sufficient information of sorts concerning the New York City Court is available to suggest that the ultimate answer to the "lumping" question would be in the negative. Both the court and its case load are fantastically large. Prosecutor and defense lawyers characterize this over-burdened court with its many thousands of cases annually as a "mad house" that tries the patience of a Saint. The scanty procedural provisions of the New York City Act do not begin to resolve the dozens of practical problems arising by reason of volume, and the court, left to its own devices in many respects, continually

improvises new techniques and questionable short-cuts in order to keep abreast of the calendars. What is really needed is a thorough and extensive study of the New York Court and its problems with a view to devising some comprehensive administrative and procedural legislation which would bring order out of chaos. If this were accomplished, it seems highly unlikely that the procedure devised for this unique situation would be of a sort that could or should be applied generally throughout the state.

In this setting, the following suggestions seem in order.

Work on the Code should continue under the premise that it does not apply to the New York City Criminal Court, or applies thereto only in so far as the New York City Act itself expressly adopts the Code provisions. The emphasis should be upon drafting logical and equitable procedure for lower courts in what may be loosely termed average communities; and an average community for these purposes is to be deemed any community outside of New York City.

Some time after the completion of the first draft of the new Code - or perhaps before that - the pertinent portions thereof should be given to New York City Criminal Court judges and prosecutors for extensive examination. The staff should meet with knowledgeable members of these groups and go over the lower court procedural provisions of the new Code section by section with a view to ascertaining which provisions would be workable in the City, which would not, and what would be needed to shore up the product in order to render it workable in New York.

From this, it should be possible to determine how much change, compromise and new drafting would be required for New York City purposes. If the conclusion should be that the necessary changes and additions could be made without excessive disruption of the new Code pattern, the meshing project could be accomplished.

Upon a conclusion of unfeasibility—the most likely one—both the new Code provisions and the New York City Act would be left alone, at least for the time being. In this connection, it may be suggested that, if such be our course of action, a complete study and revision of the New York City Act might logically be a project for this Commission in the future.