

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

Hall of Justice
Rochester, New York

February 2, 1968
9:30 A. M.

PRESIDING:

HON. RICHARD J. BARTLETT, Chairman

PRESENT:

HON. BENJAMIN ALTMAN, Member of the Commission

HON. JOHN J. CONWAY, JR., Member of the Commission

HON. ARCHIBALD R. MURRAY, Member of the Commission

HON. EDWARD A. PANZARELLA, Member of the Commission

STAFF:

HELEN E. GORDON, Executive Secretary to the
Commission.

JUDGE CONWAY: As the resident member of the Commission, I am pleased to welcome my fellow commissioners to Rochester and you people to this hearing.

We have present the Chairman of our Commission, the distinguished former Assemblyman of Warren County, Mr. Richard Bartlett, and immediately next him, Assemblyman Benjamin Altman of the Bronx. On the left of Commissioner Bartlett is Edward Panzarella, the Chief of the Trial Bureau of Kings County District Attorney's Office. On the far left, Arch Murray, who is now the distinguished Counsel of the Governor's Council on what, Richard?

MR. BARTLETT: On crime.

JUDGE CONWAY: On Crime.

I'm delighted to have all of you here in Rochester and we might as well proceed with the hearing.

MR. BARTLETT: Thank you very much, Judge Conway. We're delighted to be in Rochester and to open our second hearing on the proposed Criminal Procedure Law.

We had held our first hearing yesterday

in Buffalo.

The proposed Criminal Procedure Law was prepared by the Temporary Commission on Revision of the Penal Law and Criminal Code and the first draft which we are concerned with today was circulated throughout the State during the past several months. Some 20,000-odd copies were distributed to those interested.

We propose following this series of hearings which will conclude on the 17th of February on Long Island, to again go over the draft, make such changes as appear to be desirable based on suggestions and criticisms given us at the hearings and, to be very frank about it, based on a self-criticism, a process we've been engaged in right along because we've already found things we surely want to change ourselves.

This draft will then be presented to the Legislature this year to be introduced as a study bill, not for passage. It will be again circulated. We will hold hearings again toward the end of 1968 and will make our final recommendations to the Legislature during the 1969 session. If the Legislature

sees fit to enact the new Criminal Procedure Law, we will recommend that it have an effective date of 1970, again to give opportunity to the bench, bar and law enforcement and the public to accustom themselves to a new procedural code for the State and also to give us further opportunity to detect any defects or gaps or problems with the new code.

The new Penal Law which went into effect in September, from all accounts, is operating well. The one area which has caused considerable controversy, that involving the justification article, use of force, especially by police officers, is in process of revision. The Commission made recommendations which have been introduced in the Legislature by Assemblyman Altman in the House and by Senators Dunne and Smith in the Senate. We are confident that the Legislature will resolve this satisfactorily at this session. It may not take precisely our recommendations but I'm sure they will come up with a satisfactory solution.

Let me say that for the Commission, we not only look forward to receiving critical comment on our proposal but it's absolutely essential that

we have it if we are properly to perform our function.

If I may, I'll conclude my opening remarks by reading from the report of the Field Commission which preceded us by some 100 years, when they offered their Code of Criminal Procedure to the Legislature about a hundred years ago, and they said at that time:

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

I'm sure that will be our petition a year from now.

We will open the hearing by hearing first from representatives of the Department of Public Safety of Rochester, and Mr. Robert Aulenbacher, Legal Adviser to the Police Bureau.

MR. AULENBACHER: Mr. Chairman.

MR. BARTLETT: I suggest that you speak

from the microphone,

JUDGE CONWAY: Bob, we have this set up if you'd like to speak from there.

MR. AULENBACHER: O.K., fine. This will be fine.

I would like to comment initially that I appear here not as a member of the police department or in such capacity. What I say is, of course, not representative of the police department's thinking, but rather in the capacity of an independent contractor with the department and as a citizen, so to speak.

Unfortunately, there has been a little misunderstanding in the Rochester Police Department about what would be the subject matter of comments here. As a result of information received, it was believed that the Committee was receptive to suggestions considering revision of the Penal Code in some particular areas, specifically the one you mentioned, use of force. These are going to be omitted now because I understand what you specifically mean.

First of all --

MR. BARTLETT: We would be happy,

however, to receive -- we would be happy, however, to have your comments on the specific bills that are before the Legislature and if I may, I suggest you get them through, you know, one of the members of the Senate or your Assemblyman, and we'd be delighted to have your various proposals on that specific area.

MR. AULENBACHER: Fine. How would it be then if we just submit it when we get the specific proposals?

MR. BARTLETT: Good, fine.

MR. AULENBACHER: First of all, I really would like to express the appreciation on the part of the citizens and the community as a whole, especially the police, for the excellent job that the Commission has already done in the Penal Law. It was a long overdue reform and I think you have every right to be very proud of what you have produced. I think we should be all indebted for it, for a tremendous amount of order out of what was a considerable amount of chaos.

I, frankly, have not had the opportunity to discuss and to review and to study the entire proposed Code of Criminal Procedure so I'm

going to limit my remarks to just a couple of areas.

Specifically, eavesdropping warrants: We all realize full well that grave constitutional questions have arisen in this area and certainly the proposed legislation has done an excellent job in complying with the objections which the Supreme Court recently made in the area specifically in different decisions. I'm sure the Committee has already felt a considerable amount of pressure and probably will in the future for the removal of that entire section.

MR. BARTLETT: Yes, our first witness yesterday addressed himself to that point of view.

JUDGE CONWAY: Head of the Civil Liberties Union in Buffalo.

MR. AULENBACHER: Well, I'm not at all surprised but I firmly believe that such legislation is not only desirable but, frankly, is a necessity to live in the society in the conditions in which we live now.

I think that the very limited problem is the question of the privacy of the individual on the one hand and the necessity of the citizens to live in an organized society where the laws are

effectively and efficiently enforced. It is really the old problem of the individual's rights and society's rights and I would just like to mention that I think it's rather accepted that the rights of neither are absolute in this area, that to have an unbalance in either direction would result in either a totalitarian form of government or chaos, both of which conditions are certainly abhorrent to our way of thinking.

The specific point is simply this, not whether or not penetration by the state or society into the individual should or should not be made but rather the degree of penetration. I'm sure that the indiscriminate, unreasonable and unnecessary penetration would not long be tolerated. However, reasonable penetration surrounded by appropriate safeguards to protect liberty and privacy and at the same time to allow the State to carry out its governmental functions is not only desirable but it's demanded by the great majority of the citizens.

As I understand the proposed eavesdropping legislation warrants, applications for this type of warrant are limited to the district attorney or the

Attorney General or one actually performing his specific function. I respectfully submit that I think the application for the identity of the applicant, for an eavesdropping warrant is not really important. What is important is the identity of the individual who is to decide whether or not a warrant shall issue.

The concept of placing an independent arbitrator, we will call him a judge, between the State and the citizen to insure the rights of both is an old and time-honored and a very effective way of administering criminal justice. The process by which ordinary warrants are issued, as you well know, uses this concept. As long as the proposed legislation inserts a competent judge between the State and the individual which I understand this proposed legislation does, then the rights of both are adequately protected.

I, therefore, suggest for the Committee's consideration that police agencies be equipped with the power to at least make an application.

MR. BARTLETT: Do you limit that to

the -- to some level of responsibility of the police, in the police field?

MR. AULENBACHER: Yes, yes.

MR. BARTLETT: To the chief or --

MR. AULENBACHER: Yes, I would limit the applicant as we did in 813 to a lieutenant or above. I actually do not think that the, we'll say the patrolman on the street should have the right to make this application. I think it should, the applicant should be reserved to at least a higher ranking officer, certainly of an administrative nature.

JUDGE CONWAY: Bob, what difficulty do you encounter in your mind if this were adopted, recognizing that it's one more effort to try to assure those who were screaming so loudly about any interference in the field?

MR. AULENBACHER: Oh, you mean what would be the effect?

JUDGE CONWAY: If this were adopted, what effect do you foresee?

MR. AULENBACHER: You mean a limit, this is adopted to limit the application?

JUDGE CONWAY: To the district attorney,

for all practical purposes, yes.

MR. AULENBACHER: Well, I think it would have a very delaying and very possibly a very deleterious effect on law enforcement and the protection of the individuals.

You see, before -- let's put it this way: If the application is limited to these two types of individuals, you are going to create a tremendous burden again, upon the district attorney. He then is going to have to engage in what in reality is a tremendous amount of law enforcement work. He's got to acquaint himself with all of the facts indicating probable cause upon which the warrant would issue.

JUDGE CONWAY: Isn't it, in essence -- doesn't it just put him in the same position as the Judge now is? The Judge now has to assume responsibility for issuing the order.

MR. AULENBACHER: Yes, yes, m-m h-m-m.

JUDGE CONWAY: He has to satisfy himself of the necessity of it by actually taking testimony or by the affidavits that are submitted.

MR. AULENBACHER: Oh, yes, m-m h-m-m.

JUDGE CONWAY: So that you're placing the same burden on the district attorney and that presumably I don't think anybody thought of this as taking some of the work away from the judges but now that I look at it in this light, I think it's a happy solution.

MR. AULENBACHER: Oh, no, I don't mean to indicate that it would take work away from the judges. I think it is necessary and most desirable that this judge be inserted between the officer --

JUDGE CONWAY: No, I mean only to the extent that the district attorney will now have to satisfy himself and he will be making application with his reputation and character at stake and that the judge presumably would be or would have that much more to base his findings on, the fact that this is the highest elected official in the field who is making application and that it takes some of the burden away from the judge, to the extent that he presumably could rely upon the representations of the district attorney.

MR. AULENBACHER: Upon the opinions and the judgment previously made by the district

attorney.

JUDGE CONWAY: Yes.

MR. AULENBACHER: Oh, I think if it were limited, the application were limited, just to the judge, just to the district attorney, I certainly think this would place it or perhaps make it easier for the judge to make a determination in this. I don't question that point a bit because certainly the district attorney is more learned than the average law enforcement officer is in this area.

MR. BARTLETT: I think the choice was made on a slightly different basis though, rather than just, you know, than his necessarily knowing more. It struck us that the thrust of Berger and indeed of Katz is that wiretap, eavesdropping generally, ought to be used only under the most significant circumstances.

MR. AULENBACHER: I certainly agree.

MR. BARTLETT: Where it's one thing essential to the prosecution and one where the prosecution is of significance to the community and because this does involve a policy judgment, it seemed to the Commission that the way to resolve this was to

make this decision to apply, put the decision to apply in the hands of a person who is responsible for policy-making and in law enforcement, I think we have to say that the district attorney has this responsibility in each of the counties and the Attorney General, to some extent, in the State.

Incidentally, the last draft does add the Chairman of the SIC as an applicant and I think I should mention at this point that on the wiretap portion of our proposal, it's very likely the Legislature will act this year. The Governor has indicated that he was going to recommend legislation this year and it will probably be patterned after our proposal, so it is safe to start from that draft for discussion purposes but as soon as that is printed, I would hope you would get a copy of the actual bill and let your legislators know how you feel about it.

MR. AULENBACHER: I sure will.

MR. BARTLETT: Because that's very likely to be acted upon this year.

MR. AULENBACHER: But I think the thrust of what I'm -- the point that I'm making here is that the judge traditionally has exercised his

power and he's done it very, very well. I realize that in view of the public pressure from some areas, somehow wiretapping legislation has become something separate and distinct and very different, but the problem is still there. It's really a search. For example, you allow an officer today, a patrolman, to apply for a warrant to search a man's very person. You already equip him with that idea and if he already has that, isn't it logical to let him at least apply for an invasion of a citizen's liberty which is of a much lower range than his very body. The important thing is who makes the decision, not who makes the request. That really is what the -- the only point that I have here.

MR. BARTLETT: A good one too.

MR. AULENBACHER: As long as we have competent judges and we do exercise this discretion, a balance is established and it's the same balance that we have used and are using now in the ordinary search warrant. Frankly --

MR. BARTLETT: We have greatly limited, as you know, the courts to which application can be made as compared to the old 783.

MR. AULENBACHER: Oh, yes, I think that's excellent. An indiscriminate use or application for the insignificant purpose is not justified, I certainly agree.

The remainder of my comments except for just a few were devoted to the use of deadly physical force which we'll completely omit and submit at a later date. I'm sure that the proposed revision which perhaps the Committee has submitted probably takes care of the argument. There's nothing new, I'm sure. You've heard it many times.

I would like to make one comment in connection with the use of deadly physical force as somebody told me about it here in the proposed Code of Criminal Procedure, and that is in the execution of a warrant, deadly physical force shall not be used, am I correct in that interpretation?

MR. BARTLETT: Well, we discussed this yesterday, Judge Ostrowski in Buffalo raised this point and I think this draft is unclear in this respect. Obviously, if deadly physical force is offered against the officer, he has a duty to execute a search warrant, he's got a right to use deadly

physical force himself. There's no question about that, and I would agree that this draft does not make that clear.

MR. AULENBACHER: Yes.

MR. BARTLETT: It sounds as though there might be a limitation period.

MR. AULENBACHER: And there would be no exception even under the exception of justification in self defense under Article 35. I think it could stand clearing up.

MR. BARTLETT: Well, I have to say that when Judge Ostrowski raised it yesterday, we took one look at it and agreed that it was not clear and will have to be clarified and I appreciate your calling it to our attention too.

MR. AULENBACHER: Well, fine.

The other point is one that has been rather vexing both to the citizen and to the police officer in some areas and it's the area of the police officer not being equipped and I understand the officer is not equipped now to take statements under oath and to administer, administer oaths in some situations concerning the issuance of complaints and

informations and things of that nature.

Again I submit to the committee that it is not important as to who administers the oath but rather that the oath has been administered and that the person makes the allegation under oath. Very very frequently, the situation develops, we'll say at night, and the citizen is forced to come down the next morning to make his statement under oath and the law enforcement officer is not too perturbed about it even though he may have gotten off duty at six o'clock in the morning, to remain and do it. That's part of his job. I'm sure he wishes it were different but he's not perturbed about it but it does result, I think, in an imposition upon the citizen. He's got to forever be coming down.

Then there is the ultimate action to be taken in regard to assignments and preliminary hearings and somehow I think if the officer, a ranking officer and a responsible officer, were granted that authority to take the statement under oath, it would go some way in inconveniencing the citizens who have already been the victim of an unlawful act or alleged unlawful act.

MR. BARTLETT: Our counsel, Peter McQuillan, who unfortunately could not be with us here today, raised another aspect of the same problem to me last week. A good deal of what is signed in preparing a criminal charge is sworn to by an officer and he made the point that it might be appropriate by amendment of the Penal Law to provide that a statement submitted by an officer in support of an information or the information itself perhaps --

MR. AULENBACHER: M-m h-m-m, would be sufficient.

MR. BARTLETT: -- need not be sworn to at all but that the statute provide that such a statement submitted by a police officer have the same penalty for false statement as perjury. We do that with income taxes; we do it with a lot of things today where we attach the same penalty as though it were a falsely sworn statement.

MR. AULENBACHER: I think that's excellent.

MR. BARTLETT: Because it's made in an official --

MR. AULENBACHER: Official capacity.

MR. BARTLETT: Right, and I think it's an idea worth considering.

MR. AULENBACHER: I'm sure that you are well aware of the federal processes here. It's frankly very easy from a procedural standpoint to secure the issuance of federal process, in the absence of probable cause. They are just as severe in demanding that that exist as they do in local areas and well they should but in my experience as a special agent, when we had developed the investigation to the point where probable cause exists, we are allowed under the procedure to go up to the Commissioner's office after, as a policy matter which is first discussed with the United States Attorney whose burden is to prosecute, and if he agrees we get him to file the complaint and the warrant will issue. We just go to the issuing magistrate who is the United States Commissioner and make the complaint under oath and sign the complaint and that's all there is to it. There is no necessity for a complaining witness or anybody and I don't know whether, frankly, I think there's a lot to be said for it. I realize there's a lot to be said against it too. Perhaps the indis-

criminate use of it could create a burden but a police officer has no desire to do anything wrong. Really, he doesn't. He likes to make it as efficient within the law as possible and as simple as possible. Sometimes the officer gets so complicated in procedural matters that he's not enforcing the law.

I just suggest that one area that maybe I mean you would like to look into. There are many reasons for not doing it but it would effectively work in better procedures and, well, that's all the comments I had concerning procedure.

MR. BARTLETT: We're very grateful for the ones you did give us and you have raised some valid and interesting points about both wiretap and the question of physical force in execution of search warrants to take care of this and it is a gap and we'll think about the possibility of making it easier to affirm or swear to a statement, especially on the part of a police officer in connection with a complaint.

MR. AULENBACHER: This has nothing to do with the revision of the Penal Law but I was

thinking about this last night and I understand this is a temporary commission, is it not?

MR. BARTLETT: Well, it's like a lot of other temporary commissions.

MR. AULENBACHER: You know --

MR. BARTLETT: We've been temporary since 1961.

MR. AULENBACHER: Well, good. It is, of course, by its very nature temporary. Temporary can be expanded to a greater degree of time but, frankly, I think the average individual and the law enforcement officer is so impressed with the work that the committee has done in this area and will do that I respectfully suggest that the committee give consideration to making itself permanent, for this reason. If you don't, there is a tremendous possibility that procedural -- criminal procedural processes and the law will, shall we say, become once again a patchwork and I think this committee will, if made permanent, or could well prevent that very thing from happening. In other words, the Penal Law and the procedure by which it's enforced could always be kept up to the demands of society and I just

suggest that maybe this is an excellent vehicle for doing just that. Thank you.

MR. BARTLETT: All right, we're flattered.

JUDGE CONWAY: An excellent suggestion.

MR. BARTLETT: I do agree with you that some agency of government, desirably I think a combination of executive and legislative people, ought to keep a continuing eye on a body of law as important as criminal law but I'm going to suggest that it be done through some other vehicle than a temporary commission. We hope to become --

MR. AULENBACHER: The point is not who does it but that it be done.

MR. BARTLETT: That it be done. Thank you very much.

ASSEMBLYMAN ALTMAN: By the way, the number of the Penal Law Commission Bill is A.3177 in case you want to --

MR. AULENBACHER: A.3177?

ASSEMBLYMAN ALTMAN: I don't happen to have the number but that's the Assembly number.

MR. AULENBACHER: That's the proposed

revisions that the committee has submitted?

ASSEMBLYMAN ALTMAN: As it stands, yes, sir.

MR. BARTLETT: Thank you very much.

MR. AULENBACHER: Thank you.

MR. BARTLETT: We'll now hear from Lieutenant Raymond Yockel, the Police Training Director for the Department of Public Safety of Rochester.

LIEUTENANT YOCKEL: I think, as Mr. Aulenbacher stated there, there was a misconception here and my remarks were with respect to the Penal Law.

MR. BARTLETT: Primarily with respect to the use of force, Lieutenant?

LIEUTENANT YOCKEL: Yes.

MR. BARTLETT: Fine. We again would be most anxious to have your observations but I think at this point they would be relevant only in connection with the proposals the Legislature has before it.

LIEUTENANT YOCKEL: Yes, sir.

MR. BARTLETT: I'll summarize quickly,

if you would like, the essentials of our proposal.

We have recommended a change in connection with use of force by the citizen in resisting a burglar, to make it perfectly clear the citizen may use deadly physical force not based just on the question of whether the danger is real that the burglar will cause physical harm to someone but that there is fear that he will cause physical harm. That's really what we meant in the first place. It's obvious we didn't say it very clearly but we have now used the words "in fear of". We do not think we ought to just have a complete open season statement of authority for use of deadly physical force because, obviously, there are circumstances where a healthy grown man encounters a scrawny kid who is obviously empty-handed and under those circumstances he wouldn't have a real fear we would mean. On the other hand, a shadow might, under certain circumstances and for certain people create a more genuine concern on the part of the private citizen than the appearance of the person itself, in not knowing who or what and whether armed or unarmed and so forth. That's the change we're recommending there.

As to the police officer, we are making a number of changes. First of all, in the burglary situation, we place him in the same category as the occupant and we extend the burglary situation beyond the dwelling to an occupied premise, office, store, that nature.

In terms of the use of deadly physical force in the apprehension of a felony suspect, we do not go back to the full fleeing felon rule, but the only thing we do not include in going back is the property premise crime. We include any crime which involved the use of or attempted use of or the threatened use of any force, any felony involving the use of any force. So for practical purposes, we again recommend to the Legislature that they reject that portion of the old fleeing felon rule which concerned or which gave authority to use deadly physical force in pure property crimes. Except for that, however, it's safe to say it would be restored with one important exception and that is that it's more liberal now from the law enforcement officer's point of view because it's based on a reasonable belief and the old law was not based on that except

as to the question of whether it was a felony or misdemeanor. We think this is an important change which we retain in our recommendation.

We also recommend that the "No sock" provision we advocated, this Commission advocated, in 1965 now be adopted, and it properly belongs in this bill because it's just a justification question and we are strongly recommending that when a citizen believes that he is being unlawfully arrested he ought to litigate that before the judge and not on the street corner with the cop because I've heard of very few citizens who won that litigation. They're the ones who usually end up in the hospital with the stitches and we think it highly desirable that they go peacefully with the officer and litigate the question of the legality of the arrest before a judge.

MR. AULENBACHER: I don't want to interrupt you, but may I suggest here that in view of the fact that the Committee has already made these recommendations that I tear up the rest of this and not even bother about it any more because it's rather interesting, in what I was going to say, to be very honest with you, it was on all fours with what the

committee has already recommended.

MR. BARTLETT: We are delighted.

Thank you very much.

MR. AULENBACHER: I am too. Thank you.

MR. BARTLETT: I'll just add one other point because it's interesting. Prior to September 1st, most citizens, if asked, I'm sure would say yes to the question does a private citizen have a right to shoot to kill to apprehend someone who has committed a serious crime in his presence. Answer: Under 1055, no, because it only talks about the private citizen being able to use deadly physical force to prevent or terminate a felony being committed in his presence, not to apprehend for the completed crime.

I got trapped on a TV show on this, to be honest about it, in New York and if I'd only known what the law was, I'd have saved myself ten minutes of scrambling, but we have recommended that for the crimes of murder, rape, Robbery I, a couple of others of that serious category, that the private citizen be authorized to use deadly physical force to apprehend if the crime is committed in his presence and if the felon is in immediate flight therefrom.

It's an important extension. Thank God it isn't needed too often, but you'll recall the case in New York recently where the fellow freed himself after having witnessed his wife being raped in his presence and did shoot the fellow on the fire escape. Under the old law or under the present law, technically, it would not be justifiable. We know perfectly well, of course, that grand juries are not inclined to indict in those circumstances. We think the law ought to state what the sense of society is on a question like that. That's our proposal. We're delighted to know that we're in tune with you and you with us and we hope that the Legislature will adopt them. Good.

Now, may I suggest that we will now hear from a gentleman who has spent an important part of his adult life in law enforcement and who yesterday took on a new role in the processes of criminal justice by becoming a County Judge of the County of Monroe. We who have known and known about John Mastrella were proud of him as a first-rate district attorney and we know we're going to be very proud of him as a County Judge of the County of Monroe.

We're delighted to welcome you to your own courtroom this morning, Judge Mastrella.

HON. JOHN MASTRELLA: Thank you, Mr. Chairman.

Of course, it's natural, I believe, for people to speak from their own experiences and I would like to make some comments on the old Code or the Code as it now exists based on some of my experiences. It's possible that some of these changes have already been made or are contemplated. I have not had an opportunity to read the proposed Code in its entirety, but I have read some sections of it and I feel that a very worthwhile job is being done.

I would like to comment first on the changes that are being made with reference to the testimony of children. As the law now is, of course, a child under the age of 12 can be sworn if, in the opinion of the court, the child knows the nature of the oath.

Now, that section in the past has caused some problems in that when the child appears before the grand jury, it's possible that the grand jury felt that the child did recognize the nature of

the oath and felt that the child should be sworn and, of course, that then set up a prima facie case insofar as the grand jury was concerned, and then when we come into the courtroom with defense counsel there it's possible that under a different form of questioning that a determination was made that the child did not understand the nature of the oath and, as a result, of course, the child could not testify under oath. So I'm very happy to see that under the proposed statute that the child under 12 cannot be sworn under any circumstances, and I feel that that is a step forward both insofar as the prosecution is concerned and insofar as the defense.

Now, one of the greatest problems with me has been the picking of a jury. We've had several different methods of picking juries here in Monroe County. We've had the individual method where we take them one at a time and, on occasions, the courts have asked us to fill the box completely and then for the people to exercise their peremptory challenges and the defense counsel to follow suit and then fill the box again without the jurors being sworn and then we've gone into the third method where, after the

people exercise their challenges and the defense then exercises their peremptory challenges, the remaining jurors are sworn and that, I believe, is the method which is now proposed and I believe it is a good one.

Some years ago, we had a case here of People vs. Williams and after the people had exercised peremptory challenges, the court insisted that defense also exercise their challenges as to the remainder, and the jurors were not sworn at that time until the said jury was satisfactory. An appeal was taken from the conviction and the Fourth Department here held that in view of the fact that all the peremptory challenges had not been used by the defendants that it was not reversible error but, nevertheless, held that it was error for the court to require defendant to exercise any peremptory challenges until the People have said, "Jury satisfactory".

Now, if we were to follow that literally, it would be impossible to pick a jury one at a time. In the Third Department, we had a ruling also in People vs. Williams, which was a different case, and they held somewhat contrary and we tried to get the Court of Appeals to straighten it out and they

merely affirmed without opinion, so it left us exactly where we were and the rule in the Fourth Department now is that the defendant shall not exercise or shall not be compelled to exercise any challenges until the people have said, "Jury satisfactory".

Now, as a result of that, we had a case recently where in a Murder II, there were 20 challenges. The people had exercised 16 challenges before defense counsel was asked to exercise any challenge even though he was challenging only those jurors or would be required to challenge only those jurors which had been designated as satisfactory to the people and also we ran into the problem where defense counsel would then pick one juror, assuming the people have said jury satisfactory, having used up 16 challenges and he would now challenge juror number four and after juror number four was replaced, then challenge juror number six, so that by challenging one juror at a time we never knew exactly where we were, whether we had 11 jurors or whether we had no jury, and I think it's very time-consuming, certainly it is of no real advantage to the defense

counsel, and I think that the changes that are being contemplated by this Commission should be able to remedy that situation.

I notice also that the number of challenges has been changed. Under the present Code, in a capital case, we now have 30 challenges and in any case where the sentence is over ten years, there are 20 challenges, but then we drop down to five and we feel that 20 or 30 challenges is more than adequate in the capital case; 20 certainly would be sufficient as you now recommend and we feel that a low of ten as it is now recommended by the Commission certainly would be a step forward rather than to keep it at five as we now have it.

Now, on the question of search warrants, I feel there that there should be some changes made to the proposed changes. Now, as I understand Section 365.30, I believe that a search warrant must be executed in return -- a search warrant must be executed and returned within ten days. I feel that that is unfair both to the prosecution and to the defense and yet it lumps together the execution and the return which really should be two separate func-

tions, and it is possible under the law as you have recommended it that if the search warrant is executed on the first day that the police or the people would then have nine days in which to make a return which might be not to the best interests of the defense because of the fact that they might want to challenge the search warrant prior to that time.

ASSEMBLYMAN ALTMAN: Are you suggesting, Judge, that the time be extended?

JUDGE MASTRELLA: No, I suggest that the time be broken down.

Now, on the other hand, if the people were to wait until the tenth day to execute the search warrant, then it would be necessary for them to make a return on that same day. Otherwise it would be no good.

ASSEMBLYMAN ALTMAN: Don't you think there should be some burden on the people who have requested the search warrant?

JUDGE MASTRELLA: I think so, but if they cannot execute the warrant within ten days or until the tenth day, why should it now be necessary that they make the return immediately. In one case,

you give them nine days to make it and on the other hand, in the other case, you're saying that you must make it on the very same day that you execute it.

MR. BARTLETT: Well, we could handle this, could we not, by saying that it should be made within ten days of issuance and the return should be made within three days of execution?

JUDGE MASTRELLA: Or within a reasonable time, right. It would be fairer to both sides.

MR. BARTLETT: He ought to make the return within three days if it's executed the same day, you see.

JUDGE CONWAY: As soon as practicable after execution would be --

JUDGE PASTRELLA: As soon as practicable after it's executed but in one event you're giving them nine days to do it and in the other, you're giving them no time at all.

MR. BARTLETT: Two separate periods, that's right.

JUDGE CONWAY: The second one measured by as soon as practicable.

JUDGE MASTRELLA: After the connection.

MR. BARTLETT: All right.

JUDGE MASTRELLA: And I don't know what the Commission has recommended in the way of double jeopardy, but there again we have had problems where a crime can be committed in more than one way and a good example would be, of course, even though it no longer exists in this particular case would be any murder where you have a common law indictment, where you had a common law indictment and the proof would be either that it was committed by premeditation and deliberation or in the commission of a felony and where, at least in this department, the jury has found that the crime was committed while in the commission of a felony, on the reversal it was sent back with the notation by the Appellate Division that on a re-trial that the defendant could be tried only on a felony murder.

I feel that that is unfair to the prosecution and that if you have a case or a crime which may be committed in any one of three or four ways and a particular jury finds that it was committed in one way that the people then are prevented

on the re-trial or a jury is prevented from finding that it was committed in any way other than the way in which the first jury did find that it was committed, and I feel that on a re-trial that we should come back to where we were prior to the time of the trial.

Now, on the question of immunity, again I don't know what has been done in the way of the immunity of witnesses or suspects, but I feel that the immunity should be granted only by the court with the consent of the district attorney or by the district attorney or the Attorney-General. In other words, it should be done only by those who have the responsibility to prosecute.

MR. BARTLETT: We have two different rules, Judge, in our proposal, one relating to immunity for a grand jury witness and the other for other witnesses, like your witnesses in other proceedings, and we are recommending as to the grand jury witness that they go back to the old rule prior to 1953 that if he is called and he testifies he has immunity.

JUST MASTRELLA: He has immunity if

he's called.

MR. BARTLETT: The old automatic immunity system. We think that what's developed in an attempt to have a more sophisticated approach to this, the legislation passed since 1953 has only complicated it terrifically.

JUDGE MASTRELLA: Well, again I feel that that possibly is going a little too far because the grand jury is the only real investigative body in the county and if, in the process of investigating, they do not suspect a particular person but it so develops that even though he's been called as a witness that he is in some way connected with the crime, under that law, of course, he would then receive immunity for that crime and I feel, of course, that under those circumstances that it would be possibly going a little bit too far. So I would like to see it spelled out possibly a little more, maybe a little clearer, but at any rate where the grand jury does not have cause to believe that he is a defendant and that under those circumstances even if a person is subpoenaed before the court or grand jury he should not receive automatic immunity.

Now, on the question of the waiver before the grand jury, in this county we have not followed the Code insofar as the waiver is concerned. We have what is known as a waiver book. How that started, I don't know, but --

JUDGE CONWAY: It's very beautifully bound.

JUDGE MASTRELLA: But the waiver book, and the acknowledgement is taken by a notary and then the person going before the grand jury, and in the grand jury the prosecutor carefully goes over the crime with which the person is being charged at that time, asks him whether or not he understands the nature of a waiver and so forth. Now, whether or not it's legal, I really don't know. It's never been tested but I feel that the law as it now exists is certainly one which gives the defendant ample protection and at the same time doesn't give any loopholes to the defendant. I feel that every time either the police, the grand jury or anyone else, any law enforcement agency, takes a direct hand in it, there is always the question of an appeal as to whether or not force was used and, for that reason,

I feel that the law as it is now, as I understand it, that anyone who wishes to appear before the grand jury must first notify the foreman of the grand jury and the district attorney that he does wish to appear and that he is then notified when to appear before the grand jury or when the grand jury will hear him so that he will be heard only if a waiver is filed in the County Clerk's Office and a copy is served on the D.A.

Now, when the defendant files that waiver in the County Clerk's Office, that is his own actually. He can't thereafter claim that there was any mistake on his part, that he was coerced in any way. It is his own doing; it is his own request; it is his own paper and his own affidavit which is filed and for that reason, I feel that a waiver to appear before the grand jury should very closely follow the present Code.

JUDGE CONWAY: You wouldn't think that the present law be kept to the point where he's got to be personally served, got to personally serve it rather, would you, on the foreman of the grand jury?

JUDGE MASTRELLA: No, I don't believe it should be necessary to have it served on the foreman. I think service on the district attorney would certainly be sufficient.

Thank you.

MR. BARTLETT: Thank you very much, Judge. We appreciate your coming here this morning.

We'll take a break for just a couple of minutes. We have Mr. Kesselring, Mr. Leo Kesselring, here. We'll have you right after the break. Any others who wish to be heard this morning, if you would give your name and the organization which you represent, if any, to Miss Gordon, who is immediately in front of me here, we'll call you up after the break. We'll just be a couple of minutes.

(Whereupon, a short recess was taken.)

MR. BARTLETT: We'll get under way again, and we'll hear first from Mr. Leo Kesselring, Chairman of the Conservative Party of Monroe County.

JUDGE CONWAY: And a distinguished member of the Bar.

MR. LEO J. KESSELRING: Good morning, and thank you, Judge.

Gentlemen, it's unfortunate but true that I appear here this morning with a statement that was prepared with the same misunderstanding as that which the representatives of the Department of Public Safety had, so rather than spend any time on a subject which you men have already contended with, I'd like to leave with your stenographer a copy of our prepared statement and briefly summarize the attitude that we've had toward the 1965 Penal Law and the concerns which we've developed as a result of it. Our comments are directed more toward the policy than toward the specifics because neither I nor the others pretend to have any expertise in the field of the penal law itself.

We were concerned after the 1965 Penal Law was put into effect as were many other systems, that it would upset the balance to which Mr. Aulbacher previously referred, the balance between the rights of the citizens who are the victims of crime and the rights of those who are arrested and charged with the commission of crime.

The area concerning deadly force was one area that we were especially disturbed about be-

cause of the possible effect it would have on the actions of law enforcement officers and we are very pleased to see that the recommendations which have already been set forth in the proposed legislation will to a great extent meet those objections.

Insofar as you are now considering possible changes in the criminal code itself, we merely reflect that same concern that there be an attempt to provide to our law enforcement officials the tools which they need to do an adequate job in deterring crime and apprehending criminals while, at the same time, respecting the rights of those in our society who are charged with these crimes and so we are glad to see that the steps are here that have been taken. We certainly hope that the Legislature will adopt the bill and will do everything within our power to bring it to the attention of the senators and assemblymen in our area to that end.

Thank you very much.

MR. BARTLETT: Thank you very much.

The business of maintaining this balance is very difficult and a delicate one. We proposed a number of changes here which might, considered by themselves,

be termed pro-prosecution changes and other changes that might be denominated pro-defendant changes. What we've tried to do to the extent it's humanly possible is to strike a fair balance in each of these areas but I'm sure, as is always the case in human endeavor at one point or another, the teeter-totter is never precisely horizontal and we would appreciate any comments you have on the specifics of the proposal when you've had a chance to go over it too.

MR. KESSELRING: Thank you very much.

MR. BARTLETT: Thank you very much.

JUDGE CONWAY: Thanks, Leo.

STATEMENT BY LEO J. KESSELRING, COUNTY CHAIRMAN OF THE CONSERVATIVE PARTY IN MONROE COUNTY, TO A HEARING CONDUCTED BY THE TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE IN ROCHESTER, N.Y. ON FEBRUARY 2, 1968.

"GENTLEMEN:

I appear before you this morning, as a spokesman for the Conservatives of Monroe County, because of our growing concern about the soaring crime rate in our community and in many other communities in this state. And because of our firm belief that much of this increase in crime can be attributed to the

detrimental effect of judicial decisions and Penal Law changes on our traditional processes of law enforcement.

"In a period of great affluence, we are witnessing a degeneration in respect for law order, and a sorry decline in the effectiveness of those public officials charged with the enforcement of our laws, and the maintenance of order.

"We believe that this decline in law enforcement has not been caused by the police officers and other public officials charged with these responsibilities, but rather, is chargeable to an unrealistic 'ivory tower' attitude towards these problems, adopted in recent years by jurists and legislators alike.

"In September of 1967, attorney Mason Hampton appeared before the State Senate Committee on Codes to detail the specific objections of the New York State Conservative Party to some of the sweeping changes made in the new Penal Law adopted in 1965. We are pleased to note that many of these objections, especially regarding limitations on the use of 'deadly force', have been met at least in part by

proposals which your Chairman has submitted to the 1967 Legislature. I refer in particular to the following: (1) proposed amendment to permit police officers to use deadly force to arrest a person who has committed a felony involving 'any force' (we would prefer to restore the old rule permitting the use of such force to apprehend any fleeing felon); (2) proposed amendment to permit police officers to use deadly force to prevent escape or resistance to arrest by any person who is 'armed'; and (3) proposed amendments to permit private citizens to use deadly force when 'in fear' of physical force from a burglar.

"The sections of the new Penal Code which have drawn the loudest outcry from informed observers (especially Sections 35.05; 35.15; 35.20; 35.25; and 35.30) are replete with requirements that the one confronted with an illegal use of force apply 'ordinary standards of intelligence and morality' and limit his response unless he 'reasonably believes' that certain legal prerequisites exist. Gentlemen, these standards are admirably suited to those who sit in legislative or judicial chambers, but consti-

tute an unreasonable burden on those who have the already heavy burden of law enforcement in our community, and who are required to make innumerable 'split second decisions' when face to face with an armed felon.

"The new Penal Law has, in our judgement gone too far in its solicitude for the safety of the criminal. We quite frankly are increasingly concerned about those forgotten Americans who obey our laws, and often end up as the victims of crime. The dangerous imbalance which now exists must be corrected as soon as possible. We appreciate the recommendations which recently have issued from this Commission, and acknowledge them as a step in the right direction. May you continue to move in this direction, and not only redress the imbalance brought about by the adoption of the new Penal Law in 1965, but endeavor to strengthen the forces of law and order, so that New Yorkers may once again feel reasonably safe on the streets, and totally safe in their homes."

MR. BARTLETT: Mr. Ralph Boryszewski, the President of the Police Locust Club, is that

correct?

MR. BORYSZEWSKI: That's correct, Mr. Bartlett. We meet again.

JUDGE CONWAY: Good morning, Ralph.

MR. RALPH BORYSZEWSKI: Now, I'm not going to go into the technicalities of the Penal Code because they're highly technical but there was reference here made to a grand jury and more tampering by our Legislature. Now, I say tampering. To go into the history of government and peoples, the grand jury was around a long time before our Constitution in this country was here and it's often referred to as the last bulwark against oppressive government and corrupt government and you and I know where there is plenty of corruption and oppression. People are denied and also the police, proper recourse. Now, we have two bodies that are close to the people, our legislative bodies and our grand juries. Now, when the legislative bodies aren't truly representative of the people, all hell breaks loose. Our bodies are controlled by 70 percent fraternities as you know and this is an abuse on the people.

MR. BARTLETT: What's the relevance of

this, Mr. Boryszewski, to the procedural law?

MR. BORYSZEWSKI: Well, you had procedures for grand juries that you're recommending.

MR. BARTLETT: Yes. Would you give us your view on that, please?

MR. BORYSZEWSKI: Well, I think that the grand jury should be left untampered by the legislative bodies. They were here before our country, before our Constitution.

MR. BARTLETT: But can you be specific? What about the proposals for grand jury in our Code? What do you disagree with?

MR. BORYSZEWSKI: I disagree about with everything you got in there. I think there's too much interference.

MR. BARTLETT: Well, I fail --

MR. BORYSZEWSKI: Every bill I've read --

MR. BARTLETT: I fail to get the thrust of your position at all.

MR. BORYSZEWSKI: Well, for one thing, there's only one body that has the authority of handing up indictments and dismissals, isn't this true?

MR. BARTLETT: Oh, yes.

MR. BORYSZEWSKI: The grand jury is the only body that can indict, isn't that right?

MR. BARTLETT: Right.

MR. BORYSZEWSKI: Nobody else has that authority, do they?

MR. BARTLETT: And we retain that right.

MR. BORYSZEWSKI: Well, under 671 of your Code of Criminal Procedure, they give the court the procedure to dismiss indictments. They have to file a public record; it's quite difficult to get this public record.

MR. BARTLETT: Let me get your point. Is it your point that once a grand jury has indicted that the indictment should not be dismissed by a court for any reason?

MR. BORYSZEWSKI: Exactly, unless it goes back to a grand jury where the power belongs. That's something that's basic.

MR. BARTLETT: And the only way that the matter can be disposed of then is by a plea or a trial, is that right?

MR. BORYSZEWSKI: Exactly.

MR. BARTLETT: I see.

MR. BORYSZEWSKI: I'd also call for reduction into the degree. If there wants to be -- if there must be a reduction, it should go back to again a grand jury and my recommendation is a continuing body grand jury so that there can't be too much hanky-panky by our courts and by the legal profession. May I ask a question?

MR. BARTLETT: You may if it's pertinent.

MR. BORYSZEWSKI: Well, this is pertinent. I believe it is. Are there any members of your Commission that are police officers, working police officers?

MR. BARTLETT: There are not.

MR. BORYSZEWSKI: Well, this in itself, is not truly representative. We have to live and die under your rules and you make a profit on us in the courts. Is this proper?

MR. BARTLETT: Well, Mr. Boryszewski, I think you're getting a little bit off track here.

MR. BORYSZEWSKI: Well, I may be

getting off.

MR. BARTLETT: Just a minute, just a minute, as to your point that there are no working police officers on the Commission, you are correct. The Commission is composed of legislators, members of the judiciary, prosecutors.

ASSEMBLYMAN ALTMAN: I think a couple of our people are former policemen.

MR. BARTLETT: Yes, we have some people who are former policemen but the point I want to make is this: We make proposals. We don't make the law. We have these hearings, we are holding hearings such as this one this morning precisely for the purpose of eliciting and soliciting the view of law enforcement officers and anyone else who has an interest or concern for our work. It's by this avenue of communication that we are informed of the views of these working police officers. I assume that's why you're here this morning.

MR. BORYSZEWSKI: Exactly.

MR. BARTLETT: Right.

MR. BORYSZEWSKI: And don't you think it would be a lot better if our fathers of our State

government would see that there was better representation by policemen? We have to live under these laws, more so than the legal profession. You may have district attorneys. We are still basically members of the judiciary. We want members of the executive body, enforcement body, representative here for a truly representative body.

MR. BARTLETT: I see.

MR. BORYSZEWSKI: I think I have a valid complaint here. /

MR. BARTLETT: Well, you're in the wrong forum. Write your senator or assemblyman if you think that the Commission isn't constituted properly.

MR. BORYSZEWSKI: Well, I've been doing this right along.

MR. BARTLETT: I see.

MR. BORYSZEWSKI: And basically then I'm asking that the grand juries be left untampered with. This is our last hope for the people.

MR. BARTLETT: If you have any specific comments as to portions of the proposed Code which you feel unduly hamper grand juries, we'd

like to hear about it.

MR. BORYSZEWSKI: Well, one of the things I would say that the only one who can grant immunity to anyone testifying is a grand jury. It's an erroneous idea that the judge has this power. He does not have the power, only the grand jurors can dismiss or indict. Nobody's to infringe or impair that power. No other body should be set up. In other words, even your State Investigation Commission is not authorized. There should be a State Grand Jury because it's always told that it's out of their jurisdiction. We have county and we have federal grand juries. We have made proposals before your honored bodies, the Bill of Rights Committee of the Constitutional Convention, but nothing was done in this matter.

MR. BARTLETT: Yes, that's where you and I first met.

MR. BORYSZEWSKI: That's exactly right. I thought you spotted me when I come in this room.

MR. BARTLETT: I couldn't miss you, Mr. Boryszewski.

MR. BORYSZEWSKI: I figured that.

ASSEMBLYMAN ALTMAN: Is there anything else?

MR. BORYSZEWSKI: Well, I would say that my advice before the people become outraged is hands off our grand juries.

Thank you.

MR. BARTLETT: Thank you, sir.

Is there anyone else who wishes to be heard this morning?

(No response.)

We are very grateful to those of you who have expressed your views to the Commission this morning and to those of you who have simply attended to hear what took place. We will, at the conclusion of these hearings, again go over the proposed Criminal Procedure Law. As I indicated, it will be submitted to the Legislature this year for study purposes only but that does afford an opportunity for a printing of the bill and its distribution of the bill so that the bench, the bar, the law enforcement and the public will have an opportunity again to look at it. We will hold hearings again before the end of 1968, perhaps early in 1969 but within the

year, on the study bill and we will undoubtedly make changes again in view of suggestions we receive and make our final recommendation to the Legislature during the 1969 session.

We hope by then to have refined our proposal to the point where it can receive the support of the Legislature as an improvement over the present Code of Criminal Procedure which had its origin in a Commission like ours over a hundred years ago. We solicit the continuing comment of those concerned with criminal justice in one aspect or another. We ask, if we discover something in the course of the coming year that concerns you or about which you have a question, please do communicate with the Commission. Unless we have that kind of dialogue, we're not going to be able to do our job as it ought to be done.

Thank you again, thank all of you again, for coming. The hearing is concluded.

(Whereupon, at 11:17 A. M. the hearing was concluded.)