

MINUTES OF PUBLIC HEARING OF  
TEMPORARY COMMISSION ON REVISION  
OF THE PENAL LAW AND CRIMINAL  
CODE, HELD AT THE STATE OFFICE  
BUILDING, SYRACUSE, NEW YORK

February 9, 1968 at 9:30 A.M.

Present:

Hon. Timothy N. Pfeiffer, Vice Chairman  
Hon. Edward A. Panzarella  
Hon. John J. Conway, Jr.,

Committee

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Richard G. Denzer, Executive Director

Jonathan Weinstein, Counsel

Helen Gordon, Administrative Assistant to the  
Chairman

- - - - -

Reported by:

Miss Marian Whitmore  
204 E. Jefferson St.  
Syracuse, N.Y.

MR. PFEIFFER: I think we will open the meeting.  
It is 9:30.

I will identify those up here. On my left is Judge Conway of Rochester; Mr. Denzer, Executive Director of the Commission. On my right is Mr. Panzarella, Assistant District Attorney of Kings County; Mr. Weinstein and Miss Gordon of the staff.

We are here to solicit comments on the proposed criminal procedure law. I assume, Mr. Gualtieri, you have a copy of it and the Chief probably has a copy of it and the Civil Liberties Union probably has a copy. We hope that you will give us the benefit of your study of the draft which will be presented with changes that might be suggested upon further work of the Commission as a result of these hearings around the state. This will be presented to the legislature at the end of this session for study during the coming year.

Mr. Gualtieri is here. We are very happy to welcome you here and will be happy to hear what opinion and views you have.

FRANK A. GUALTIERI, District Attorney, Onondaga County: Thank you.

I want to appear informally this morning and suggest to the Commission if I may that the State District Attorneys Association has met in New York yesterday and the day before and is meeting today dealing with the whole project of the revision as proposed. Consequently, I think

it would be better if Mike Dillon, when he appears before you on the 15th spoke for all of us. We did vote on each of the titles we have been through. The vote was not unanimous but was strong enough to get a very significant vote.

I am particularly concerned with the matter of the grand jury. We had some questions yesterday. I think Mr. Dillon had better bring these up.

I appreciate your coming to Syracuse.

I hope you realize when Mike speaks that he is speaking for me. Today my law man is down there representing me. It is a big job which in a way is different from the penal law. The criminal code is a management tool for us and we will be thankful for any help.

MR. PFEIFFER: Is there any special thing you want to call our attention to?

MR. GUALTIERI: I think the title in regard to grand juries. I have been through all of them but that is the one that concerns me.- the immunity approach. But Mike has them all in a frame of reference that speaks for all of us and I understand Mike will appear before you on the 15th in New York.

MR. PFEIFFER: I assure you, if you have further thoughts as the year goes along, present them to the Commission so we won't be caught with something afterwards.

MR. GUALTIERI: I think we did a disservice to the Commission in the matter of the Penal Law in that we did

not in depth communicate. We are trying to correct that now and you will find when Mr. Dillon does appear that- -

MR. DENZER: You are modest about the penal law. The District Attorneys Association did go through it - maybe not in the depth you desire. We are very happy you are doing such a thorough job this year and we will be happy to listen to Mr. Dillon.

MR. GUALTIERI: The session yesterday was very productive. We spent a good part of the day underscoring questions as to fundamentals but I won't get into all that or you will be bored.

MR. CONWAY: Have you had any particular problems with immunity?

MR. GUALTIERI: We haven't here but we follow the three-step approach -- the classic approach -- and we have not had trouble in Onondaga County in my experience.

I understand you get into certain crimes and conspiracy is often an element of the case and you use that as a bridge, etc. but we went over all that the day before yesterday and Mike took detailed notes. I think there were 35 or 40 DAs there and you will get a good cross section when he appears.

MR. CONWAY: Did you get into the testimony of children under 12 under oath?

MR. GUALTIERI: No. I am familiar with that proposal but they didn't discuss it when I was there.

MR. CONWAY: What is your reaction as to the ability of a child under 12 to be sworn?

MR. GUALTIERI: I think so often the child under 12 lacks maturity and I think it is a delicate area. I don't have a strong opinion but my experience with children under 12 in criminal transactions has never been very good.

MR. CONWAY: Thank you.

MR. GUALTIERI: Thank you very much.

MR. PFELFFER: Thank you, Mr. Gualtieri.

Chief O'Connor, Chief of Police, Syracuse, we will be glad to hear from you, sir.

JOHN F. O'CONNOR, Chief of Police, Syracuse, N.Y.:  
Mr. Chairman, Gentlemen:-

I appreciate the opportunity afforded me for the Syracuse Police Department to appear before you. I share with District Attorney Gualtieri the fact that perhaps a good deal of heat, if not light, on the penal code could have been avoided if communications had been established much sooner.

Our Department has studied the proposed New York Criminal Procedure Law with a rather parochial view and find it in general a great improvement over the Code of Criminal Procedure that it replaces.

We would miss the point entirely if we prepared to specify all the items with which we are in agreement. I presume that you are more interested in learning what, if any points we disagree with. Proceeding on that assumption, we are addressing ourselves to specific sections of the Code as follows:

Section 60.50 Warrant of Arrest; Where Executable.

Subdivision 1 allows a warrant of arrest issued by a District Court, the New York City Criminal Court or by a Superior Court Judge sitting as a local criminal court, to be executed anywhere in the State. Subdivision 2 states that a warrant of arrest issued by a City Court, Town Court or Village Court may be executed in the county of issuance or in any adjoining county or elsewhere in the State upon the written endorsement thereon of a local criminal court of the county in which the arrest is to be made.

In Syracuse almost all of your arrest warrants, other than those based upon an indictment, are signed by a City Court Judge. There have been occasions in the past when, due to time difficulties or other factors, we have been unable to have a new warrant issued by a superior court and were not able to apprehend an individual whom we had located outside of the central New York area. We respectfully suggest you consider amending this so that in cities of a population of over 100,000 people, the City Court Judges be given state-wide authority, as are the judges of the New York City Criminal Court.

MR. DENZER: May I interrupt you here? I agree with you entirely and I think the Commission does. There is no reason why the City Court should not have the same authority at least as the District Court of New York City or the Criminal Court as far as jurisdiction in warrants of arrest. The difficulty is a little Constitutional provision. The New York

State Constitution limits the process of the City Court as well as the Town and Village Courts to the same county or adjoining county and that is the reason for this distinction here. It is not because we want to limit the jurisdiction of the City Courts but somebody stuck that in a few years ago. We have tried to find out why. I don't know. There it is and that is the reason for this limitation.

MR. PFEIFFER: If you went to the County Judge, you wouldn't be faced with this problem. What is the problem?

CHIEF O'CONNOR: The problem is, if we have a warrant and go to pick someone up - or if it is at night and we have to go to pick someone up, we have to have it endorsed by a Judge in that jurisdiction and there can be delays in getting the proper execution on the warrant which lets the individual get away. It is not usual but it is something we could plug up with a simple amendment I think. If it is a constitutional amendment, then I understand the Assembly and the Senate have decided to take into consideration some of these things in amending the constitution and this might be an area that could be recommended.

MR. CONWAY: The origin of the provision is that, - I happened to have been a member of the legislature at the time this happened - a member from metropolitan New York became involved in a warrant of arrest for a traffic violation in northern New York and was incensed by the fact he was locked up in New York, having forgotten about the traffic violation

in northern New York and bail was set at \$500 and that was a bitter experience.

CHIEF O'CONNOR: I can understand that.

Section 70.70, Subdivision 1 is substantially the same as the previous 180-A as indicated in your staff comment. We read it with the feeling that we are left dangling in the air if the conditions, as stated in Subdivision 2, are not present. In other words, Subdivision 1 concludes by saying, "and may demand of him his name, address and an explanation of his conduct." If the officer does not reasonably suspect that he is in any danger of physical injury, what happens if the individual chooses not to give his name, address and an explanation of his conduct? It is suggested that this serialization be completed. I don't have the answer but it is a frequent cause of friction and we are in a bit of a dilemma. I would suggest further staff study might resolve the dilemma.

Section 75.30 sets up a procedure whereby in lieu of just an appearance ticket issued by the officer, he can also require that the defendant furnish bail in any amount up to the maximum set forth in Section 395.20. The staff comments under Section 75.30 state that in some instances it may be noted that such a release in one form or another is mandatory. The basis of this statement appears to be Section 75.50, Subdivision 3. Perhaps I have a bad book but we can't find a Subdivision 3. This is nit-picking but- -

MR. DENZER: It should be probably 70.50.

CHIEF O'CONNOR: Then we classify it as a typographical error.

It is 70.50 and that says "if" (a) the arrest is for an offense other than a felony, and (b) 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, an appearance ticket must be served unconditionally upon the defendant or pre-arraignment bail fixed, as prescribed in subdivision 2." That is all.

MR. DENZER: In other words, this is a situation where you "must" do one of those two things, rather than "may" if there is no court available.

That is a typographical error.

CHIEF O'CONNOR: I would like to add a further note. I don't have the answer in smaller jurisdictions but in our reading of the proposed Code, we don't find any place where police bail is mandatory. I don't prefer making it mandatory. In fact, I prefer keeping them out of the bail area altogether. As I understand, it is "and/or".

MR. DENZER: If you can't find a court, you give him a ticket unconditionally with a date to come back or set bail. But you say you don't think there should be any such thing as station-house bail?

CHIEF O'CONNOR: Essentially, what I am saying - the idea would be to have members of the judiciary available when necessary.

MR. CONWAY: This is why the police are in the bail business.

CHIEF O'CONNOR: Exactly. I suggest that the dangers long inherent in police bail exist today and I am sure I don't have to call your attention to the problems and investigations we have had in connection with station-house bail.

I prefer - I think this should be vested in somebody else. Obviously, we should have ward judges or schedule it so judges are available.

MR. PFEIFFER: This is the problem we had yesterday,-- speeding by the Canadians.

CHIEF O'CONNOR: That is true.

I am given to understand the State Police won't make an arrest because they have had so many scoff-laws and I question if this is the kind of approach we should take. Their problem is that nobody is available to immediately arraign the individual and, if they do bail, the fellow doesn't come back and they are left with a lot of scoff-laws. I don't have the answer. The obvious answer is that some arrangement has to be worked out. I am talking about a case where you don't feel justified in letting him go on simply an appearance ticket. He has no roots in the community, etc.

Section 80.10 on Fingerprinting and Photographing. This section makes it mandatory that a police officer must take the photograph and fingerprint of the defendant for the stated offenses. It leaves unclear to us at any rate whether

the officer may take the fingerprints and any photograph for offenses other than those cited in this section. The intent of this section appears to be that fingerprints and photographs may not be taken for lesser offenses and indeed there is case law under the present Code which holds a police officer liable for taking photographs and fingerprints for offenses where the said taking is not mandatory. So we recommend that this be clarified. I submit it may be very clear to you but, if anything could be misinterpreted, rest assured it will be.

MR. DENZER: You mean it isn't clear whether they can fingerprint in other cases not listed here?

CHIEF O'CONNOR: Exactly.

MR. CONWAY: Do you think it should be?

CHIEF O'CONNOR: I think we should spell out precisely what we are talking about. With the experience available we ought to be able to indicate whether we should enlarge on the crimes for which we fingerprint or not. I am satisfied with what we have. I think it should be spelled out.

MR. DENZER: The big difference between this and the present law is category B. There are four categories of offenses for which fingerprinting is mandatory. Three are the same as the old law but one is different. In the old law 552 gives the misdemeanors that are fingerprinted. We don't have those. We have "any misdemeanor defined in the penal law". Do you think that is too broad?

CHIEF O'CONNOR: No, sir. I think the Penal Law

is exceptionally clear in defining it.

I would like to add also in connection with 80.10 the present Code of Criminal Procedure, in Section 940, entitles the police to take blood grouping tests, if necessary. This appears to be omitted from the new Code and there are cases where it would be helpful to have this right reinstated.

MR. PFEIFFER: Those are useful in what type of cases?

CHIEF O'CONNOR: In establishing the identification to the satisfaction of the court where there may be some attempt to smudge the fingerprints or make changes or if the question of identification rests on a mass of blood.

MR. PFEIFFER: Homicide cases?

CHIEF O'CONNOR: Yes.

MR. DENZER: That is in the present Code?

CHIEF O'CONNOR: Yes, sir - under 940.

MR. DENZER: We must have just missed it.

CHIEF O'CONNOR: In addition the present Code, in Section 944, sets forth the procedure for the return of the fingerprints and photographs if the person is found not guilty. Again we find this omitted in the new Code. It may be an over-simplification. I suggest it ought to be here.

MR. DENZER: That was deliberate for this reason. From what we gather, this return of fingerprints is a very unsatisfactory procedure. In the first place, as I understand the problem, the F.B.I. or others probably keep copies anyway

so I don't know that the return of the fingerprints does any good.

CHIEF O'CONNOR: You mean whether you actually expunge the total record. I don't know either. I presume some prudent law enforcement officer may attempt to circumvent the law but I think, if we are going to attempt to establish any procedure and feel they ought to be returned, we ought to spell out how they are returned.

MR. PFEIFFER: What is your practice now? Do you return them?

CHIEF O'CONNOR: No, sir - only on request.

MR. PFEIFFER: Are they asked for very often?

CHIEF O'CONNOR: Infrequently. It is not a great problem. Generally what happens is that the procedure is initiated by counsel for the person arrested. He cites the section of the law under which we return them. He asks that we return them. I see here - -

MR. CONWAY: You do it on the mere request without a court order?

CHIEF O'CONNOR: We don't require a court order. He cites the facts.

MR. CONWAY: Judges Gale and Orenstein have it easy. We have to sign an order.

CHIEF O'CONNOR: I will check again. I don't think we require an order.

MR. CONWAY: I don't think it is necessary.

CHIEF O'CONNOR: I think there are many aspects clogging the administration of criminal justice that we could clear out.

MR. CONWAY: It is refreshing to hear you say that.

CHIEF O'CONNOR: Finally, I address myself to Article 370. I am sure you have heard about it at length across the state from police officers.

I would like to insert parenthetically here that the almost unanimous concern of administrators and law enforcement officers in favor of control of wiretapping is not because we like being engaged in that "dirty business" but because we sincerely believe it is necessary. We feel also it would be easy to hide behind the possibility that we can't take proper action because we can't take a wiretap. Nowhere have I heard anyone bring out that we consider wiretapping a very effective deterrent. No one has touched on that. I would bring that to your attention.

MR. PFEIFFER: You mean among the police department?

CHIEF O'CONNOR: Police or any public officers.

MR. DENZER: What is your point?

CHIEF O'CONNOR: This is parenthetically pointing it out as an element of our security. We could sit back and say, "We can't get a wiretap so we can't do anything about it." On the other hand, we are greatly concerned in this area because it is a deterrent to internal corruption.

Now to stick to what we have!

As you know, Article 370 of the proposed Code sets forth a detailed procedure in regard to eavesdropping warrants. It appears cumbersome and involved. It is apparently the result of an attempt by the Commission to abide by the vague guidelines set forth by the Supreme Court in the Burger decision. However, in light of the recent decision of the Supreme Court in U.S. v Katz, this entire section should be rewritten. It may be you have this already under consideration and this is redundant. This article should not be drawn so tightly that it will have no practical effect or usefulness. It should be drawn as broadly as possible and still conform with the most recent Supreme Court cases. An illustration of this would be the notice provisions set forth in Section 370.50, the need for which is not seen in view of the language of Katz and of Lopez v. U. S.

I might insert that I can't help but feel when this was spelled out in the beginning it must have been done with judicial tongue in cheek. It had to be or otherwise we would hold the Supreme Court to be an ivory tower.

Attention is invited to Section 370.15, Subdivision 3-G which says, "A particular description of the nature of the conversation sought to be overheard." I note from the staff comments that this does not appear to be a problem. I submit that "particular" is unrealistic. Our dictionary defines "particular" as "detailed, minute, exacting." Obviously, it is impossible to furnish a detailed, minute, exacting description

of the nature of the conversation to be overheard. And, in the final analysis, it will not be our judgment or the staff comments, but the judgment of the case law as to what "particular" means. We suggest perhaps "particular" could be deleted and something else used.

MR. PFEIFFER: Do you mean - you are investigating gambling, say - in your description of the conversation to be overheard, if you merely said "related to gambling" that would not be enough - that it would have to be more detailed?

CHIEF O'CONNOR: I would say you would have to give the kind of gambling you would expect to overhear. I would say "conversations relating to laying off of bets on paramutuel racing, commonly known as policy." We would suspect this person was placing bets or receiving them. This is as much as we could say. The specifics or minutia we could not foresee.

MR. PFEIFFER: Dealing with the problem of corruption, what would you say? Bribery of police?

CHIEF O'CONNOR: In this connection - -

MR. PFEIFFER: I am trying to test out how detailed it should be.

CHIEF O'CONNOR: If we suspected there was involvement of public officials in the area of corruption, then I would feel we would be able to spell out the kind of corruption we were talking about. For instance, pay-off to overlook gambling infractions; or associations in which a kickback was received.

For instance, in New York City the Marcus case. If it were a cop deal, I would say we expected conversations that involved kickbacks but beyond that I don't think we could go.

The Supreme Court is apparently going to view eavesdropping in the same light as other search and seizure problems and the law should be drawn with this in mind. Therefore, if we are making a valid search under a valid search warrant and discover evidence or fruits of another crime or contraband, we can now legally seize them and we should be given the same right in regard to eavesdropping.

A further provision of the eavesdropping article, which we are strongly opposed to, is the requirement that only a District Attorney or the Attorney General can obtain an order. We feel this is a further step in emasculating the professional police department, which has the primary duty and obligation of enforcing the law. In its stead, it gives the right to officials whose primary obligation and duty is in the prosecution of offenders. We are against this for the following reasons:

The District Attorney, as a general rule, does not have the experienced personnel available to investigate cases where eavesdropping is necessary and install and service the equipment needed and, if he does get it, he will withdraw further from the police department and build up his own staff.

Secondly, most investigations are originated and carried on by police departments and the District Attorney would just be adding his name to the request.

Third, it appears to be an attempt to sugar-coat the allegedly bitter pill of wiretapping.

The chief of police of a city and the designated officials of the State Police should be given the authority to secure eavesdropping warrants. The Supreme Court does not put any requirement on law enforcement officials such as this restriction would place on them.

Justice Douglas in the Katz decision forcibly points out that it is neither the President nor the Attorney General -- and I might insert "nor the District Attorney" -- who is a magistrate; the responsibility for the screening of an eavesdropping warrant should rest with a magistrate and the allowing of a chief of police to apply for an eavesdropping warrant will still leave the ultimate decision in the hands of the magistrate where it properly belongs.

In 1965, a bill to require all eavesdropping orders to be filed in the office of the District Attorney was vetoed by Governor Rockefeller for what I believe were sound and cogent reasons, some of which are incorporated above, and we are not in favor of this provision of the Code.

I would finally address myself- -

MR. PFEIFFER: Would you limit it to the chief of police?

CHIEF O'CONNOR: Yes, sir.

MR. PFEIFFER: Not his deputy?

CHIEF O'CONNOR: I would say the chief of police

generally speaking. If you take New York City, there you have a unique situation.

MR. PFEIFFER: Eliminate that.

CHIEF O'CONNOR: Except for New York City, I see no reason why it should not be the chief of police with the staff people who have informed him of the substance of the investigation and having that made available to the magistrate.

MR. DENZER: Your comments hit the nail on the head. This was formulated after the Burger decision in an attempt to save something. You pointed out that the Katz decision came along and seemed to loosen things up. The article is being revised with that in mind but we don't want to wait until this may be passed at sometime in the future. A bill is being drafted to amend the present Code which will be introduced in the present session of the legislature, which I understand will loosen it up somewhat but not as much as you want, particularly on the point you just mentioned. I believe that the only addition to the applicants -- that is, the District Attorney and the Attorney General -- will be the chairman of the State Investigation Commission who happens to be Mr. Myles Lane. I think he is being added but that does not go anywhere near as far as you go.

CHIEF O'CONNOR: I presume the rationale making it the D.A. or Attorney General or Chairman of the Investigation Commission is so we can presume you have another responsible person in law enforcement to screen this - keeping in mind this

is the last resort and "dirty business", etc. and this, in turn, will have some effect on the magistrate when he signs it. I submit it should have no effect on the magistrate. So, regardless of whom we make the repository of the signature, the final analysis has to rest with the judge and I think every conscientious judge in the State of New York is mindful of the fact the Supreme Court decisions will view it on its merits and not on who makes it.

MR. CONWAY: Unfortunately for your position, with which I agree completely as a former D.A., the Katz decision was based on a case where the applicant was the District Attorney and certain stress was laid on that.

The recent Court of Appeals case with a split decision, Fuld dissenting, confirmed a conviction based on wire-tap where Tommy Mackell was the applicant. I don't think it adds validity. The theory is: here is an elected official, vulnerable to the pulse of the people, who can be removed quickly.

CHIEF O'CONNOR: True.

I hesitate to bring it up but I must - the District Attorney is to some extent - if he has a political axe to grind-- and I don't intend any labeling, but it is not beyond the realm of speculation at the same time - he is no more free of pressures than any local police chief. The suggestion is -- I don't know. If we suggest the DA is going to favorably influence the judge, I think we are out of step. He may take issue with the DA for applying but there is a determination whether there is sufficient grounds.

MR. PFEIFFER: Would you take it before a JP, many of whom are not lawyers?

CHIEF O'CONNOR: I don't believe in shopping around to find a favorable judge or member of the judiciary. In our case, unless it had to do with a very sensitive investigation within the City of Syracuse, I would not shop around but would go to one of our City Judges in Syracuse.

MR. DENZER: Of course, you are a city police department in a locality where you have City Judges, but in smaller counties you don't have a City Judge available and you will have Justices of the Peace being used and village policemen will be going to JP's. I suppose that was the basic purpose of going a little higher up.

MR. CONWAY: We have also had City Judges issue wiretaps. Have you had any difficulty?

CHIEF O'CONNOR: No, I thought the question was: Would I go to a JP who was not a lawyer.

MR. PFEIFFER: Yes, because you stressed the point "somebody who understood the law" and free from political considerations.

CHIEF O'CONNOR: Yes, and I stress it again.

MR. PFEIFFER: The J.P. usually is not a lawyer.

CHIEF O'CONNOR: You are more familiar with that.

MR. PFEIFFER: It is changing rapidly.

MR. CONWAY: Can you imagine what the New York City legislators would say if the proposal was made that a JP could issue a wiretap order?

CHIEF O'CONNOR: I am not asking we change that. My point was that I was asked, "Would you shop around until you find somebody you could con into signing it?" And my answer is, "No".

MR. DENZER: Maybe the emphasis is in the wrong place -- not on the applicant but on the Court.

MR. PFEIFFER: That is the Chief's point.

CHIEF O'CONNOR: Exactly. As Harry Truman says, "The buck stops here."

I am going to conclude here . I have taken a good amount of time. It seems to me in the staff comments here -- and I feel the staff has done an outstanding job and hope this will not be misunderstood -- "Third," it says, "there must be no reasonable alternate means for the acquisition of such evidence for information. This last requirement is an example of the restrictions incorporated in the measure beyond those explicitly demanded by the majority opinion in Berger v. N.Y.

"It represents a recognition that eavesdropping is an extra technique entailing an invasion which can be justified only as a last recourse."

We clearly understand that this is a staff comment, but, by virtue of the authority vested in the Commission, it carries a unique impact. We respectfully suggest that this is an assumption which may very well be at variance with the majority opinion of United States citizens. Since the people should have the right to make the laws under which they are

governed, it would appear logical that doubts, assumptions, and comments of objectors to eavesdropping, however well intended, ought to be resolved in the arena of public decision. We suggest, while not appropriate to the consideration of the Code, that the cleavage of opinion over the question of eavesdropping ought to be submitted for determination by the people of the United States since it is, in many cases, their safety, their security, their national interest, which is at stake.

Thank you, gentlemen.

MR. CONWAY: Thank you.

MR. PFEIFFER: Thank you very much.

Is Mr. Alexander here of the Civil Liberties Union? --

Mr. John A. VanEtten, Defense Counsel for Onondaga County Assigned Counsel Program?

MR. VAN ETTEN: I am afraid I will have to be just a listener.

MR. PFEIFFER: We understood you wished to be heard.

MR. VAN ETTEN: I did but I have just not had time to study your proposal.

MR. PFEIFFER: Can you submit something in writing?

MR. VAN ETTEN: I would be happy to.

MR. PFEIFFER: We will appreciate it if you will.

MR. VAN ETTEN: Yes, I will.

MR. PFEIFFER: You have our address?

MR. VAN ETTEN: Yes.

MR. PFEIFFER: Do you wish to be heard?

VOICE: Yes.

MR. PFEIFFER: Come up here and give your name.

ARTHUR KEATOR: Arthur Keator.

MR. PFEIFFER: Do you represent any organization?

MR. KEATOR: I represent myself and the good of the public as much as I can. I am not representing any particular group.

MR. PFEIFFER: Go right ahead.

MR. KEATOR: I think if these officers need wiretaps to get these thugs and crooks, give it to them. The politicians can well take care of themselves in the political arena as far as that goes.

I don't know whether the gun subject is on your list or not or whether officers should be allowed to shoot, etc. Is that being taken up now?

MR. DENZER: That is part of the Penal Law. This is a proposed procedural code. Those sections you are referring to are in the Penal Law which has already been enacted into law so that is not on the agenda.

MR. CONWAY: Bills have been introduced to bring about what most people feel would be a solution to the problem.

MR. KEATOR: Would you like to hear my opinion?

MR. PFEIFFER: Surely.

MR. KEATOR: I think it is high time the police had their hands untied and that they be given bullets, not wax bullets and given an opportunity to swing clubs when necessary. I remember when the police told you to "move on", you moved on. I never had any disrespect me yet.

MR. CONWAY: Anything else you had in mind, Mr. Keator?

MR. KEATOR: That is the main issue because how else can you put the police on an equal or better footing than the criminal than by not standing back of your policeman and give him authority.

As far as the traffic situation is concerned, I also don't believe that the policeman should have the right to act as judge and jury in an accident case -- not that I have been involved in so many. My license has never had a mark on it.

MR. PFEIFFER: We have no jurisdiction over that.

MR. DENZER: I don't know what he is referring to. What do you mean "acting as judge and jury" in accident cases? In what way?

MR. KEATOR: Many times when they issue you a ticket in a case, that practically convicts the guy in a court of law.

MR. CONWAY: When he ~~shoots~~ them, it pretty well convicts them too.

MR. KEATOR: I think the policeman should have the right to shoot.

MR. CONWAY: Thank you very much.

MR. KEATOR: Do you have a copy of what you are talking about?

MR. CONWAY: I don't think so now.

MR. KEATOR: The first I heard about this was last night on the radio. It didn't give the time.

MR. DENZER: It has been in the newspaper.

MR. CONWAY: If you write to the office, we will try to supply you with one. As I imagine you know, our funds are in short supply. So our ability to print them is limited. Your local legislator could get a copy of the bills introduced for you.

Thank you.

MR. KEATOR: Thank you.

MR. PFEIFFER: Is there anyone who would like to be heard?

FRANCIS FINNĒGAN, Oneida County: My name is Francis FinnĒgan and I am Assistant Public Defender of Oneida County.

One thing I would like to perhaps have clarified in my mind is the YO Sections as to the proposed Code.

My thoughts are this, gentleman. As I understand it, lesser disadvantages accrue to a Youthful Offender than to an adult by reason of lack of mature judgment on the part of the youthful offender.

What I specifically have in mind is this: Under the new Code - I may be erroneous in my statements as to whether a youthful offender misdemeanant under the new Code is subject to the same treatment as the youthful offender with a felonious background.

What I am trying to say is this - having had the traumatic experience of representing a youthful offender on a small charge and proceeding to take advantage of the statutes and then finding a rather poor background - finding as he stands before the Court as a misdemeanant, if he were an adult the greatest penalty would be one year in the county institution. I am troubled if a youthful offender with a misdemeanant background could not be given a three year sentence at a Rehabilitation Center-for his good, I realize, but the period of incarceration "for his good" would exceed the period of incarceration of an adult. I wonder if some discussion could be made there?

MR. DENZER: I think the reformatory treatment to which the adult misdemeanant is subject is as long or longer.

MR. FINNEGAN: Maybe I misstated my position.

MR. CONWAY: I have your position. That is under the current law. We are hoping to achieve a correction by making the adult have the same potential treatment, if he be amenable to it. I feel as a sentencing Judge it is far better for a youthful offender to go to the reformatory for a potential three year period than be locked up in the county penitentiary for three years with absolutely no treatment, training or anything. Wouldn't you feel that way?

MR. FINNEGAN: No, sir.

MR. CONWAY: Why not?

MR. FINNEGAN: Having spoken to people who have enjoyed this period of rehabilitation and, being young, they think of it as time in getting out.

I am saying with two youthful offenders before the Court, one - because of an underlying felony and the other is an underlying misdemeanor, which probably didn't exceed \$12, - each with a potential of 3 years incarceration.

MR. DENZER: That is the present law.

MR. FINNEGAN: So the choice of the defense counsel is not to take advantage of the YO statute because to do so would place the defendant in danger of a potential 3 year incarceration.

MR. CONWAY: What would happen if he didn't.

MR. FINNEGAN: The most would be one year in the county jail.

MR. CONWAY: No, he goes to Elmira under 21 years. A YO goes to Elmira.

MR. FINNEGAN: Can he be given a period in excess of one year?

MR. CONWAY: Yes.

MR. FINNEGAN: Why should he be treated different from an adult?

MR. DENZER: You are objecting to this under the new law or the old law?

MR. FINNEGAN: I want to know if a youthful misdemeanor - as to the period of incarceration - if it will not exceed the period of incarceration of an adult?

MR. DENZER: Under the old law.

The reformatory incarceration and felony are the same - up to 4 years. It is not 3 and 5 years as the old law. It is up to 4 years. That is the penal law - the reformatory, the YO. He can receive a reformatory sentence the same as under the Penal Law. So, the sentence would be identical,-- assuming he were sent to the reformatory, -it would be identical for the YO and the person convicted under the Penal Law. It wouldn't be a longer sentence.

The advantage of the YO, of course, is that he has no conviction for a crime. The penalty would be the same, if the reformatory was given, but the stigma would be less. That is the way the new law reads.

MR. PFEIFFER: The question is: Supposing you have a youth and don't want to put him under YO for some reason.

MR. DENZER: Why not?

MR. CONWAY: You don't want to use it up on a lousy misdemeanor. You want to save it until he gets a felony.

MR. FINNEGAN: No, sir.

MR. PFEIFFER: What would be the sentence if he didn't plead as a YO? Would he still go to reformatory?

MR. DENZER: Yes.

MR. FINNEGAN: You get a young man with a very disturbed background and you know the probation report is

not going to be "laudatory", shall we say? So you proceed to plead him as a youthful offender and he can do up to three years. If we do not take advantage of the youthful offender, ~~we~~ say he stole a pair of pants with a value of \$3 and you plead him guilty to that. I fail to see a judge sending him away for an extended period of time.

MR. CONWAY: Why not?

MR. FINNĒGAN: You confine the issue to the fact he stole only \$50.

MR. DENZER: You mean he will get a Penal Law sentence and not a reformatory sentence?

MR. FINNĒGAN: That is right.

MR. DENZER: A new section has been added. He can be sentenced for a Class B. misdemeanor up to 3 months in the county jail if the judge wants to give it to him, so he would not have to be given the reformatory sentence. He could get a 3 months sentence or less just as he could under the regular criminal channels. That has been added to the YO section. You don't have that now but this is in the proposed law.

MR. FINNĒGAN: Once the process of a youthful offender is started, on his objection could it be withdrawn?

MR. CONWAY: I don't know what the statute provides but we have permitted it in our Court, not all the while, but it has been done twice in my experience. It would defeat the whole purpose if you didn't.

MR. DENZER: That is, until the youthful offender procedure is under way. If you have a trial started, I suppose

you'd have to go through with it. I see no reason the judge couldn't withdraw it up to the time he pleads to the youthful offender information.

MR. FINNEGAN: I have rights as a civil defendant. I think on the civil side they have taken cognizance of the fact that infants frequently change their minds and once you say you want him investigated as a youthful offender, - the next day he comes in and says he doesn't want it - and if it is a matter of right, it can be withdrawn -- that is if it is an adult or infant on the civil side and I wonder if the same consideration would be given on the criminal side.

MR. DENZER: The emphasis is that it is great to get the YO treatment. It is ideal if you can get it. Certainly, if you ask for it and then he says, "I don't want it", I am sure any judge would let him withdraw it.

MR. FINNEGAN: I wonder if the Code will contain it as a matter of right of the infant as it is in the civil side.

MR. CONWAY: I wouldn't think it would be necessary. Have you ever heard of it being refused?

MR. FINNEGAN: I have heard of difficulties in obtaining it.

If I may discuss one other thing, I don't want to take too much time -- we have found a problem with a person accused of an indictable crime in the month of May or June, but we don't have continuing Grand Juries. I wonder if there will

there will be some possibility of consideration being given to continuing the Grand Jury?

MR. DEZNER: There is.

Let me pose this to you. In some redrafting we have been doing, we have been considering new provisions to change this. We were aware of this and have been aware that a person who was arrested on a burglary charge in a small county languishes in jail between Grand Jury terms and can't get his case considered by the Grand Jury until it convenes in two or three months. Perhaps this would help somewhat -- a provision that, after a person has been held for the action of the Grand Jury, if he is held in jail for 45 days without Grand Jury action, then he must be released on his own recognizance if he applies. You can't hold him more than 45 days without the Grand Jury taking some action - either dismissal or indictment or something else. Maybe 45 days isn't right--but some arbitrary period -- maybe 30 days, what ever is appropriate. I think that might light a fire under some DA's to get Grand Juries convened in a shorter period so the defendants would not languish in jail. That is the kind of thing we are considering.

MR. PFEIFFER: Some counties go as long as six months.

MR. FINNEGAN: Some Courts of Special Session we have defendants possibly not in a position to appear before the Court in January and they get a trial date in May.

MR. CONWAY: In Justice Court?

MR. FINNEGAN: Possibly but to some extent Courts of Record.

MR. CONWAY: How could there possibly be a January to May delay in Justice Court barring a defense request?

MR. FINNEGAN: It may be without attempting to go into the specifics here that such condition does exist and I wonder if this Commission has been advised of it.

MR. DENZER: That is a "speedy trial" question and I would be surprised to hear that, without the defendant's consent, there were that kind of delays in Justice Court - particularly if the defendant were in jail. Probably you know more about the situation in your county.

MR. FINNEGAN: Not confining myself to the Justice Court, but possibly in some local Courts of record.

MR. CONWAY: How could you remedy it if the judge permits it?

MR. FINNEGAN: That is what I was wondering. You spoke of 45 days for Grand Juries. I am not saying it could be remedied but I wonder if a case is not called by the People "ready" in 30 days -- I know we have "People v Prosser" for failure to prosecute which appears at the felonious or higher levels, but I am thinking of the misdemeanor or vagabond or not wealthy traveler who goes about the state.

MR. DENZER: This is a very difficult area. This is the "speedy trial" area. You are not talking about the time arrested to the time charged with the offense and the ultimate

accusation. You are talking about a man charged and ready for trial. That is the "speedy trial" area and what makes it difficult is the number of different kinds of courts. You have the Supreme and County Courts where there is one kind of problem and the City Court and District Courts and the New York City Court with different problems and the Town and Village Courts and to try to establish a formula as to how many days after he is charged with a crime he must be brought to trial is almost impossible to do. That is the trouble. If you had just one court like the Federal District Court; you could lay down certain rules; but we are dealing with eight or nine different courts which makes a difference.

MR. FINNEGAN: Two other things -- the discovery procedure in the Grand Jury. Is consideration going to be given to easing the burden for cause shown?

MR. DENZER: Could you be more explicit?

MR. FINNEGAN: In criminal practice, insofar as my experience has been, you move for an inspection of the Grand Jury minutes and upon the trial of the action the People introduce John Smith and for the purpose of impeachment you are given the minutes and you ask the Court for a recess and then proceed to cross examine on the testimony you couldn't get before the trial.

MR. DENZER: You have People vs. Rosario which establishes that the defendant is entitled for purposes of examination of the People's witness to look at the Grand Jury

minutes of that witness' testimony. You have to give them the minutes and let them look at it for the purpose of cross examination which changed the prior rule. ~~It is~~ the law of New York.

MR. FINNEGAN: But I wonder, for simplification of trial procedure, if you could obtain the minutes before the trial.

MR. CONWAY: I don't think it would validate your request to do it carte blanche at the time of trial. The only time they are available is to impeach the credibility of the witness. It is not a fishing expedition into the People's case. The way we work it out, - we have never had any difficulty with the D.A. giving to the defense counsel the Grand Jury testimony of the witness the night before, so he has ample opportunity to go over it -- not to find out what the people have but for the opportunity of cross examining the witness. If he has this chance, it overcomes the embarrassing delay in the trial of a half hour or more. This is our solution to it. Whether it can be made statutory or not, I don't know. I am sure under most circumstances the People can be appealed to with reason and that would be a solution.

MR. FINNEGAN: It is proper then to anticipate no change?

MR. CONWAY: Statutorily.

MR. FINNEGAN: Speaking statutorily, the understanding I have of the Criminal Law - and I am now speaking about the right of summation which is given to the People because they

supposedly have the burden of proof -- I wonder if we could go with the civil side where the plaintiff has the burden of proof. My point is, it seems grossly unfair that the person who stands to lose the most does not get the last crack to say the words he should say. You don't know what their theory is - -

MR. CONWAY: You have to know at the opening. That is an unfair comment.

MR. FINNEGAN: I am sorry.

MR. CONWAY: If the DA doesn't give the theory of the case at the opening, you move for dismissal.

MR. FINNEGAN: All right. The defendant, the person who stands to lose the most precious thing in life - liberty, should have the last right to speak on his own defense.

MR. DENZER: You might have a logical point. You get to the end of the trial why shouldn't the People be required to get up and state what they have shown and then the defendant state what they have not shown? Of course, traditionally, it has been the other way. But I can see your point.

MR. FINNEGAN; Can some consideration be given that?

MR. CONWAY: I doubt it. I never heard that suggestion in 20 years in this business.

MR. FINNEGAN: I traced it to the Convention in 1888 and they said it was not a conventional matter.

MR. CONWAY: I don't think it would work. Somebody has to wind up. The People have something to lose too.

MR. FINNEGAN: Thank you.

MR. CONWAY: Thank you for your thoughts.

MR. FREIFFER: Thank you.

Is there anyone else who would like to be heard?

DONALD L. AUSTIN, Public Defender, Oneida County:  
I am Donald Austin, Public Defender of Oneida County. I don't want to be repetitive but for the purpose of this hearing I would like to go on record encouraging the State of New York to adopt a rule not wholly lacking throughout the State of New York. There are other jurisdictions where the time for summations can be divided up and the defendant has an opportunity and there is also rebuttal. I submit the fact that there have been a few reversals in the Appellate Courts in criminal cases where cases have been reversed because of comments of the DA-- they are not always perfect and sometimes get carried away with their evidence -- I submit that might be resolved if he is given the right to rebut. Perhaps it could be worked out for both sides.

MR. CONWAY: Surrebutal?

MR. AUSTIN: Summation is a very important part of the trial, especially if it is a long trial.

MR. PFEIFFER: The D.A. purports to review the evidence and if he says something that isn't true, the defense counsel can interrupt him - even though it is not often done.

MR. AUSTIN: I submit the defense should have the right to rebut. It doesn't do any good to get a reversible error. We are trying to avoid that. The purpose of the trial is for a fair trial without errors.

I want to go on record -- I have a suspicion that it may become part of due process that the defendant have the right of due process to sum up. I assume as soon as 50% of the states permit the defendant to have the last word, it will be required.

I have one point partly on the YO. The usual practice in our county is to try to get YO treatment for everyone. If the charge is a misdemeanor, we apply to a court of special sessions and with great expedition I get the probation reports, etc and it gets taken care of within a month. The probation report is back in 3 weeks and we can work out the other details. I wonder if your law has in it, or if it could be put in, that if a felon is brought into Special Sessions before a magistrate and it is understood all the way around that he will be treated as a youthful offender, if there couldn't be some system then and there whereby he could apply for youthful offender treatment in the lower court and avoid the delay of the Grand Jury, etc.

As long as the result is going to be the same, let it be handled in Special Sessions.

We have had some problems in Oneida County whereby a person charged with a felony and the prosecution agrees eventually the disposition would be a misdemeanor - and then the DA has a difficult time getting the reduction in the lower court -- again so you don't have to go through the whole Grand Jury process.

MR. DENZER: Let me ask on that last statement, we were cognizant of that and have two provisions here that work like this: When a person is charged by what we term a felony complaint and is arraigned on that and that contemplates a hearing - or maybe the defendant will waive; but, whether he does or doesn't - the Court in effect can call all the parties up and say, "This looks more like a misdemeanor than a felony. Is everybody agreeable to reducing it?" And the D.A. and defense counsel and everybody else wants it, he can reduce it. There is a provision here that permits it.

MR. AUSTIN: Would it cover the YO?

MR. DENZER: That is a little different. If there is a hearing, after the hearing, the judge can reduce it at that point. He can say, "I gather this is more a misdemeanor than a felony. I will not send it to the Grand Jury. Let's have the information for a misdemeanor and we will keep it here."

On YO I don't see how you can get around the first stage. The defendant is brought in on a felony charge and a felony complaint is filed against him. He has to be arraigned on that. That is the original charge. If that is going to stay a felony, it has to go to the Grand Jury and there has to be an indictment and then the indictment may be replaced by the YO information after that. I don't see how you can get around that. Are you going to have the YO proceeding on the felony charge?

MR. AUSTIN: It would be a waiver of the Grand Jury and a consent to YO treatment.

MR. CONWAY: We have had a little criticism of the proposition that any defendant ought to be able to waive Grand Jury. Do you think that should be?

MR. AUSTIN: As defense counsel, with safe guards put around the waiver, I'd be in favor of it. I could see dangers if there were not safeguards. Sometimes lawyers don't get in soon enough.

MR. CONWAY: Your point, Mr. Austin, is based on whether the DA and everybody wants it but the magistrate. Is that when you are dealing with a J.P. in Oriskany Falls?

MR. AUSTIN: That is right. I suggest a DA be given the power to reduce the charge on his own motion because he is the prosecutor and is supposed to be in charge of seeing justice is done.

MR. DENZER: That is a little dangerous, isn't it?

I can visualize where a DA does a favor for a friend - "Sure, I'll reduce it."

MR. AUSTIN: The question arises on postponements. The DA is going to do it after indictment. As a rule judges don't quarrel if the DA doesn't want to prosecute on the felony.

MR. DENZER: That would require a constitutional amendment and we can't write that into a statute.

MR. AUSTIN: Sometimes we have a practice where there is a felony and, for the sake of convenience and because it is a better defendant - and I represent the less better defendants, most of them indigent - where the DA has a hearing -- under the old Penal Law, where the theft of an automobile was grand larceny, they left out the value of the '66 Cadillac and thereby it gets reduced from Grand Larceny. They do it fictitiously. It wasn't available to everybody. Some didn't get equal treatment.

For the sake of an expeditious trial, could it be written into the law that the Grand Jury minutes be available to defense counsel immediately?

MR. PFEIFFER: All minutes?

MR. AUSTIN: So the defendant has them available for his lawyer to determine whether or not the procedures of the Grand Jury are proper. Many appeals are where it has gone in long after it should go in. There is no sense going into the evidence before the Grand Jury after the trial. If the DA hasn't put in a good case before the Grand Jury, it should be

determined there.

The practice in Oneida County is that you make a motion to dismiss and the Judge says, "I will read the Grand Jury minutes" . Sometimes he comes back and says, "I have read it and find it is supported." Of course the DA has read it. So it is an ex parte proceeding. The defendant doesn't get a chance to inspect the Grand Jury minutes or find out if the indictment is supported on appeal.

As a matter of practice, we get them after conviction. If we attack them- -

MR. DENZER: You are not entitled to them then.

MR. AUSTIN: I'd like to say that any defendant is entitled to them.

MR. CONWAY: Would you give the DA sworn statements of all your witnesses?

MR. AUSTIN: I don't think the DA should have any secrets. These might be abused by unscrupulous defense counsel but that is a danger we will have to live with. I think the DA and counsel, by and large, are fair and serve the truth. Basically I think it should be the duty of the DA to divulge his case. It is the general idea of confrontation. I don't think the DA should be scared to show them.

MR. DENZER: You realize New York has probably gone farther than any other jurisdiction in this matter. Under the federal jurisdiction, you can't even make a motion to inspect and dismiss. There is no such thing but we have it here.

MR. AUSTIN: I read an article by District Attorney Hogan who said except in racketeer cases, he does divulge his entire case to the defense attorney, which expedites the whole procedure because everybody knows what is going on.

MR. CONWAY: I think Mr. Hogan was misquoted.

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

Give your name.

JOHN E FERRIS: My name is John A. Ferris and I am spokesman for the Onondaga Committee of the Conservative Party.

Mr. Chairman, Members of this Commission:-

I wish to thank you for the opportunity of placing our comments on the record.

We strongly urge this Commission to study the feasibility of establishing a statewide Probation Department to replace the approximately 74 locally controlled probation services now in existence. Perhaps such a statewide agency could be combined with the present Division of Parole or established as an entity, separate and apart from the Parole Department.

Such an agency would make the sentence of probation more meaningful to the offender and it would protect more adequately the interests of the community.

It is our contention that a statewide agency would insure a uniform system of case administration which would not only benefit the probationer but also society as well.

Over the years we have become a highly mobile population and a statewide agency would insure consistent treatment for the probationer, no matter where he located within our jurisdiction. The statewide agency would provide the necessary strict supervision to see that there was compliance with the terms and conditions of the probation sentence. Such agency could maintain sufficient control over the offender and yet emphasize rehabilitation which would prevent further criminal activity.

Certainly the supervision of the offender would be immensely improved because an agency of this proposed scope could recruit and retain a very high caliber professional staff. The statewide agency of its very nature could raise the professional standard of the probation officer by offering attractive salaries, scholarship programs and in-service training. It is our belief costly care in penal institutions could possibly be avoided by the availability of a well managed probation service. The individual would be allowed to remain in the community under sufficient restraint but at the same time he would have available to him a broadly based spectrum of social agencies offering various forms of therapy.

MR. DENZER: The point is well taken but it is not exactly our field.

You may have heard of the Governor's Committee on Criminal Offenders which is expiring in April. That is one of the chief points they are going to make -- the proliferation of probation departments is ridiculous and there should be a statewide probation system.

MR. FERRIS: I was aware of that Committee report.

I know locally we have a real problem in the probation department. The attrition rate is high and I have information which leads me to believe it will go higher. I think if a judge has a good probation service, he can take advantage of it.

Thank you for this opportunity to be heard.

JOHN VAN ETTEN, Defense Counsel for Onondaga County Assigned Counsel Program: I indicated I was not prepared. I would like to address some preliminary inquiry to the Commission.

I am John Van Etten. In addition to a private criminal practice, I am assistant administrator to the Assigned Counsel System in Onondaga County. I handle all the felony appeals from trial convictions.

MR. PFEIFFER: You mean for Assigned Counsel?

MR. VAN ETTEN: Yes.

In the civil field, because of the calendar problems, two devices have been developed recently. One is the examination before trial and the other is the pre-trial conference. I envision that we are fast coming to a point in our criminal court

where we are going to have to adopt some means apart from adding judges to the court to expedite the disposition of cases, particularly to expedite the disposal of cases without their going to trial. I am afraid at the present time the tendency is quite the reverse with the prevalence of the Assigned Counsel System.

Most assigned counsel feel a duty, particularly where the District Attorney is not amenable to reductions, to go to trial merely to protect his position as assigned counsel against the day when a coram nobis comes out of prison.

Therefore I predict our trial calendar -- and even in City Court a misdemeanor asked for a trial yesterday and the earliest date that could be given was April 24th, -- and I anticipate this will become worse, not better.

I talked to Judge Orenstein briefly yesterday.

I haven't had an opportunity to go through this but we discussed the preliminary examination. This seems to be what bothers everyone the most. I recognize you have attempted, at least in the case of the person incarcerated, to assure this preliminary examination takes place. And I recognize traditionally under our system that is purely to determine if the person should be held in jail.

We find ourselves struggling constantly to get information.

MR. DENZER: Not held in jail, held for action of the Grand Jury .

MR. VAN ETTEN: As I understand your proposal, a person must have this within 48 hours if incarcerated; if free on bail, there is no requirement for a preliminary examination.

MR. DENZER: If he doesn't get it in 48 hours, that doesn't mean the case is dismissed.

MR. VAN ETTEN: I know that.

I wonder if the Committee has given any thought -- I think we are going to have to go to this -- of there being a hearing on early confrontation of the case against the defendant? How many times is a case submitted to the Grand Jury and the DA admits subsequently, after witnesses are examined on cross examination, it never should have been submitted? Yet it sits on the calendar six months or a year. On pleas of guilty the judge very seldom knows what the case is about. If we had early confrontation and an early hearing -- I recognize there are difficulties according to the Court it is held in -- but it seems as in civil matters, there might be the possibility of a plea of guilty or a reduction or a motion, without the matter sitting on the calendar 6 months or a year and ultimately going to trial. I think if a hearing were held in every case, it would also do much to reduce the type and number of coram nobis proceedings we have.

Also I notice the defendant can still waive preliminary examination. I know what is going to happen in practice. The defendants are consistently going to waive preliminary examination and, when they are convicted, finally from Attica or Auburn will come a coram nobis and assigned counsel, because he has to appeal

as a matter of right, will have to appeal because his rights of a preliminary examination were non-existent. I don't know how many appeals we have in which essentially the complaint is "we lost the preliminary examination".

It seems in the old Code what they intended, although it is impractical, was that the magistrate, the country Justice, examine the people making the complaint and perhaps dispose of the matter there. Of course, he can't do that today.

MR. DENZER: Again you have your constitution. That is the trouble. You can't get started with a project like this as long as you have constitutional provisions that felonies may be prosecuted only by indictment.

MR. PFEIFFER: You think this should be automatic?

MR. VAN ETTEN: In every case there should be a hearing with some amount of cross examination to acquaint the court, the People themselves and the defense counsel with the weaknesses and strengths of the case. That could not be within 48 hours, probably.

MR. PFEIFFER: No. You take a lot of murders or homicides and the DA is in no position to do it. It may take him six months to assemble the evidence and to have a preliminary hearing such as you are speaking of here would be highly disadvantageous to the District Attorney, wouldn't it?

MR. VAN ETTEN: What is this danger that we are so afraid of? Are you talking about manufacturing evidence?

MR. PFEIFFER: No, I mean assembling evidence.

MR. VAN ETTEN: I'd be willing to give him 30 days.

MR. PANZARELLA: In Kings County we don't get a medical examiner's report for six months in homicide cases.

MR. VAN ETTEN: That is the tail wagging the dog. That is a problem. But I think this is a basic concept. I don't think it is appreciated how much in the dark the average defense counsel is as to the nature and strength of the case against him, which makes it difficult to dispose of the case.

MR. CONWAY: Won't the DA tell you what he has?

MR. VAN ETTEN: That depends on the nature and behavior of the particular district attorney at the time. There are times you can go in and they all but open the files and you can discuss it; but it also happens they sometimes will not disclose anything. It seems that in the weakest cases, disclosures are the hardest to get at.

I had an occasion involving a vice ring of sorts and a girl accused of sodomy. The girl swore up and down she had nothing to do with this. She was arrested in August and alleged to have committed the act of sodomy in January, January 17th if I remember correctly. The DA's office, down to the point where I made my motion to inspect and dismiss kept offering reduced charges and finally got down to disorderly conduct as an offense and I decided they couldn't have anything. We went in with the motion and it turned out they had nothing at all. That is one example. But it consumed a great amount of time which was totally unnecessary.

A confrontation within thirty days would have disposed of that completely.

That is not even a good example I suppose.

I would like to submit something in writing.

MR. PFEIFFER: Was she out on bail?

MR. VAN ETTEN: She was.

MR. DENZER: They have, or are developing - I think I have heard - in California some similar arrangement.

MR. VAN ETTEN: There are problems.

One immediate problem is that you have the inferior lower court decide suppression and line-up matters you might hope to dispose of. I see no reason why this couldn't be held in a superior court.

MR. PFEIFFER: You are entitled to a jury trial and you can't waive it.

MR. VAN ETTEN: I would gather this is not even something that has been under consideration.

MR. CONWAY: Of course, it has been under consideration.

MR. DENZER: It has been suggested. I am well aware of that trend and many defense lawyers have advanced that: "Let's get together at an early stage and see what is what and what motions you plan to make and maybe over the table, we can agree on the whole case."

MR. VAN ETTEN: I visualize it a little more of an informal discussion. I think often where the case dissipates on the People's side is where complainants come in and make

a sworn statement that is taken down and sounds fine on paper, but a preliminary examination develops all sorts of holes. This may not happen in 50% of the cases but even if it did in 20% of the cases- -

MR. CONWAY: As Mr. Austin pointed out, theoretically we are involved in a search for the truth. Theoretically, shouldn't the defendant come in and disclose his evidence?

MR. VAN ETTEN: I know you have adopted that position-that the people in criminal cases, unlike civil cases, have the entire burden of proving the case. I don't think it is necessary and I don't think you are giving an unfair advantage to the defense counsel. We have few enough advantages.

MR. CONWAY: There are those who dispute that.

MR. VAN ETTEN: I don't think anybody could seriously equate it - certainly in the Assigned Counsel system we can't get investigators appointed unless it is manslaughter or higher and when we do it is \$300 and you can't accomplish a great deal. I think quite objectively with the secrecy of the proceeding and the staff the DA has and his contact with the police and the facilities of the laboratories, etc. - I don't think this would be any unfair type of advantages offered to the defense attorney.

MR. CONWAY: Thank you very much.

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

GEORGE MURPHY, New York State Police Chiefs: I am George Murphy, Chief of Police, Oneida, N.Y. representing the New York State Police Chiefs.

Gentlemen:-

I am unprepared because I have been unable to get my committee to meet. They will meet the 26th and 27th in Albany and I would like an opportunity to file a brief from the Police Chiefs with your permission.

I would also like to state we would like to discuss some sections of the Penal Law, particularly I think 80.10 to 80.50 on sentencing. As a Police Chief, I am experiencing concern about concurrent sentencing. I don't think it is quite clear.

Let me give you an example.

Last night at 11:50 one of the patrolmen observed a car traveling 110 miles an hour and followed the car to another jurisdiction where the car made a 180° turn and rammed my car head on. The driver was arrested in Oneida County for leaving the scene of an accident because he did and he was arrested afterwards and now we are bringing him in. They will take him into Oneida County and sentence or fine him ahead of us, and we are unable to do anything in our jurisdiction because it is a continued act.

MR. DENZER: This is a problem not indigenous to the proposed Code. It is a problem you have always had. What counts or crimes can you sentence consecutively and what concurrently?

It is bound up with double jeopardy.

MR. MURPHY: But these happened in different counties.

MR. DENZER: Then you would have to get different charges - one in one county and one in another - but you'd have the same problem of double jeopardy. I think you have that problem under the present Code as well as this.

MR. MURPHY: I think we should explore it a little further.

I would like to call your attention to 50.25 - Simplified traffic information - form and content, bill of particulars. I notice in the new Code you are limiting the use of this simplified traffic information to traffic infractions. We have been able to use this for certain misdemeanors like a violation of registration or driving without an operator's license. I would like to recommend that be looked at again to see if you could not expand it back to where it is now.

MR. DENZER: That point was raised by the President of the Magistrates Association in Albany yesterday. He suggested we not confine it to traffic infractions but include misdemeanors involving traffic. That is probably a good point.

MR. CONWAY: One of the most disturbing police involvements I ever came in contact with was precisely what you talked about that happened last night -- the 100 mile an hour chase is never justified. You endanger everybody on the highway.

MR. MURPHY: I agree but there is another problem. To begin with, if you don't ascertain who the driver is, you can't get a warrant. I have tried for years to get legislation for the presumption that the owner is the operator. We prefer not to lose men. We would abide by that.

MR. CONWAY: The danger to police is high.

MR. MURPHY: Yes, but you have certain hot rods that try to test the police. They pull up in front or beside them and pull away, etc.

Secondly, you never know if you have a stolen car or he is an escaped convict, or what have you. So you have a certain obligation.

MR. CONWAY: Inevitably it turns out to be a pack of kids.

MR. MURPHY: No, last night these men were 28 and 34 years old.

I agree with you because we are losing men and equipment and exposing our municipality to liability in high speed chases but I think if we could get something in the Code where we could at least bring in the owner and examine him as to whether he was the operator or that he should produce the operator- -

MR. PFEIFFER: How could you find out the ownership unless you chased and stopped him? That doesn't do away with the chase.

MR. MURPHY: By ascertaining the license number.

Once you develop the license number, there would be no sense chasing them.

When the red light goes on and the siren starts to blow, then the chase starts to begin.

MR. PFEIFFER: On the Thruway you won't find out.

MR. CONWAY: He is not worried about the Thruway.

MR. MURPHY: Between 70 and 80 you can ascertain the number.

We have several other things I would like to discuss with my committee and present to you.

MR. PFEIFFER: Please do give us a memorandum reasonably soon.

MR. MURPHY: It will be within two weeks.

One other point I would like to clear up. As Chairman of the Combined Law Enforcement Council I have been advised that last week the Times carried an article criticizing Dick Bartlett and saying we had a very heated session in Albany. I want to set the record straight. It was not a heated session. It was a very amiable session. Your commission was well represented by Pete Mc Quillan and Bartlett and we got along fine.

There was one small point we differed on and Dick agreed to meet with us and any report other than that is entirely erroneous.

MR. DENZER: Whenever we read anything like that we know it was the newspaper's interpretation.

MR. MURPHY: It was disturbing to us.

MR. PFEIFFER: Is there anybody else who wants to be heard?

Thank you very much.

MR. KEATOR: I would like to make a comment about the officer's suggestion of getting the license number. For years it has been in my mind and I don't know why it isn't possible to have continuous radar on fast roads.

MR. CONWAY: That is in the process of being developed now.

MR. KEATOR: They get the license number and the speed and the whole thing.

These men are definitely risking their lives to an extent they should not do it.

MR. PFEIFFER: That is being studied right now.

If no one else wishes to be heard, the Hearing is adjourned.

Thank you very much.

(Whereupon the hearing was adjourned at 11:30 A.M.)

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