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

Hearing Rooms 1 and 2
80 Centre Street
New York, New York

February 16, 1968
10:00 A. M.

PRESIDING:

HON. RICHARD J. BARTLETT, Chairman

PRESENT:

HON. BENJAMIN ALTMAN, Member of the Commission

HON. EDWARD A. PANZARELLA, Member of the Commission

HON. WHITMAN KNAPP, Member of the Commission

STAFF:

RICHARD G. DENZER, Executive Director

ARNOLD HECHTMAN, Assistant Counsel

HELEN E. GORDON, Executive Secretary to
the Commission

ALSO PRESENT:

ROBERT BENTLEY, appearing for Senator Anderson

P R O C E E D I N G S

CHAIRMAN BARTLETT: We will get under way, if we may.

This hearing is on the proposed Criminal Procedure Law which the Commission adopted tentatively about six months ago. The proposal has been circulated about the State since then.

Following this series of hearings, the Commission will again consider the proposal, make those changes which appear to be appropriate and submit the matter as a study bill to the Legislature before the end of the 1968 session.

We will hold further hearings on the study bill towards the end of 1968 and submit a bill amended again in all likelihood with the recommendation of passage to the 1969 Legislature.

We will conclude our hearings tomorrow in Mineola. I would think that we will probably have a study bill ready for the Legislature within two months, depending somewhat on their schedule.

Our first witness this morning from the Vera Institute of Criminal Justice is Harry

Subin.

Mr. Subin?

STATEMENT OF HARRY SUBIN,
ASSOCIATE DIRECTOR, VERA
INSTITUTE OF JUSTICE

MR. SUBIN: Mr. Chairman and members of the Commission: My name is Harry Subin and I am Associate Director of the Vera Institute of Justice. I am grateful for the opportunity to present our views on the vital subject of bail.

I have submitted in advance copies of my formal testimony along with a memorandum and some suggested bail legislation and a sectional analysis of the proposed code. I thought rather than go through my testimony I would just make a few brief comments and leave it at that.

CHAIRMAN BARTLETT: I think that would be useful. Your full statement will be in the record.

MR. KNAPP: I may say I read it.

CHAIRMAN BARTLETT: Mr. Knapp says he has already read it.

Your suggestion for bail reform legisla-

tion will be included in the record as well.

MR. SUBIN: Thank you.

It is hardly necessary to document before this body the unnecessary hardships which blind adherence to the money bail system has caused thousands of indigent defendants each year. It is equally unnecessary to belabor the point that there are feasible alternatives to money bail. Indeed, New York has led the nation in alleviating the source of abuses of our traditional bail system. The Manhattan Bail Project, in which all of the criminal justice agencies of the City and the Vera Institute participated, has served as a model for similar projects throughout the nation. I doubt that anyone here would, at this date, advocate a return to the bail system which operated before the project. Indeed, the ROR program now run by the Office of Probation, is an integral part in the administration of justice in the City. Today, in New York City, over half of all defendants are released on their own recognizance; and while pretrial detention is still common, particularly in felony cases,

the rate of pretrial release is higher than it ever was, and the reliance on money bail correspondingly reduced. All of this has been accomplished despite the anachronistic statutory law of bail so properly condemned by the drafters of the proposed Code.

I fear, however, that much-needed further progress will not occur without the legislative action. I fear also that the formulation in the proposed Code falls short of what is required to bring New York into the mainstream of modern thinking on bail.

The Code does give some recognition to the progress made toward a fairer system, by defining and specifically authorizing releases on recognizance, and by expanding and liberalizing the forms of money bail which the court can set. But for the most part, it perpetuates the traditional money bail system which has served the individual and society so poorly for so long. One weakness of this system is that it requires a largely indigent population to promise to pay a sum of money on default of an obligation.

The meaninglessness of this gesture is, of course, well known to judges - and thus I believe that the provisions in the Code which permit various forms of unsecured bail to be set will be rarely used, or, if used, will rarely free a defendant who would otherwise have been detained.

The net results of the proposed Code's bail provisions will, I believe, be a continuation of the present money-oriented system, in which the bail bondsman through his uncontrolled power to reject applicants for bond, and through his equally uncontrolled collateral practice, has the final word in virtually every case in which money bail is set. As Judge Seklly Wright has put it "...the effect of such a system is that... professional bondsmen hold the keys to the jail in their pockets...the bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees, remain in jail. The court (is) relegated to the relatively unimportant chore of fixing the amount of bail..."

Moreover, the Code leaves completely to the discretion of the judge the decision as to

when and under what circumstances conditions on release should be imposed; hence it condones the largely unfounded presumption that the defendant will flee; in addition, the Code imposes no obligations on the judge to give reasons for his decision thus rendering judicial review ineffective; it states no preference for one kind of release over another; and, finally, it fails to mention the possibility of non-financial conditions of release, such as those enumerated in the Federal Bail Reform Act.

In short, while the Code spruces up a dismal bail edifice it reflects little of what has been learned about bail in recent years. The Code is written almost as if much of the past decade's experience with bail reform had proven rather than disproven the efficacy of money bail as a predictive device. We still do not know why people jump bail, or why they commit crimes while on release; but we do know that the defendant's ability to post a bond provides little or no evidence as to his reliability.

In our view, a fresh approach to bail

legislation is needed. To this end, I have submitted in writing our suggestion for a legislative scheme which, we feel, would improve the proposed Code. The main features of our proposal are these:

First, it creates a presumption in favor of release on recognizance, a necessary corollary, we believe, to the presumption that a man is innocent until proven guilty.

Second, it authorizes a number of non-financial conditions of release in addition to the traditional money conditions, and requires the judge to consider the non-financial conditions before imposing money bail.

Third, and perhaps most important, our plan would place a greater responsibility on the judge in the bail-setting process. Specifically, the judge would

(1) have to determine the assets of the defendant before imposing money bail,

(2) state what collateral, if any, may be required by the surety,

(3) warn the defendant of the conse-

quences of default or non-compliance with conditions of release, and

(4) give written reasons for the imposition of conditions of release if, after the defendant is given an opportunity to procure his release, he is unable to do so.

In short, we hope to make the bail decision visible; to reduce the veto power which the bondsman, through collateral requirements, has over the judge's decision; and to create a reviewable record on which the bail-setting judge's decision can be tested.

Finally, our proposal would place a limit of 90 days on pretrial detention, requiring the release of the defendant, with or without conditions, if he had not been tried by that time. This length of time is more than the current average length of detention, but less than the period for which some defendants are detained.

Thus far I have commented upon the release features of the proposed Code and of our proposal. I would like now to turn briefly

to the subject of preventive detention.

The proposed Code gives a right to bail in non-felony cases, and makes bail discretionary in felony cases. It permits the imposition of high bail in either, or the denial of bail in felonies, if the court finds this is the "kind and degree of control necessary to assure the defendant's court appearance" or if it finds that there is "a likelihood that the defendant would be a danger to society or to himself if at liberty..." The standards set for determining this "likelihood" are the broad conventional ones, that is, his character, the crime he is charged with, and his prior record.

Article 390, in which these provisions are contained, goes further than any American jurisdiction has ever gone in authorizing preventive bail. While arguments can be made for drastic measures to control against bail jumping and to protect the community, we believe that on both constitutional and policy grounds the proposed Code's formulation is unsound.

The constitutionality of preventive

detention is today a much debated question. Sound arguments have been made on both sides, but the Supreme Court has never ruled directly on the point. It is not our purpose here to present a constitutional defense or attack on the concept. We must note, however, that the staff comment accompanying Article 390 provides too simple an answer to this highly complex issue. The staff notes that since the New York Constitution does not grant a right to bail, but only protects against "excessive bail", "any right to bail in this state is purely statutory."

I might note that the Federal Constitution contains no greater right to bail; but in none of the analyses of the constitutional problem have I seen the issue resolved by reference to this fact. Despite the vagueness of the "excessive bail" standard, crucial problems remain. First, how to predict who will commit crime or flee; and second, assuming the prediction constitutionally premissable, how to provide procedural safeguards against the abuse of the power to detain.

The legislation which we are submitting contains some measures designed to protect against flight or the commission of crimes, but it does not authorize preventive detention.

Basically, we propose the following:

First, that the court be permitted to consider dangerousness in imposing conditions of release. This will permit the judge to state frankly the reasons behind his actions instead of being forced to justify them on grounds of risk of flight; even when he perceives no such risk. This will promote the evolution of judicially tested standards of dangerousness which, at least until the behavioral sciences can give better data, will provide as much protection to the defendant as possible.

Second, we would define dangerousness in terms of a "substantial threat of physical harm", a much more precise standard than that in the proposed Code.

Third, we would permit revocation of bail, and detention, where there was probable cause to believe that the defendant had either

fled, attempted to flee, or committed a felony. While this raises many of the basic constitutional questions, it does extend the initial benefit of the doubt to the defendant.

Fourth, as I mentioned before, our proposal places a limit on the length of detention, thus minimizing at least to some extent the impact of it.

Finally, our proposal contains a comprehensive scheme for judicial review. As I have indicated, the court must give reasons in writing whenever it detains a defendant; and the defendant has the right to prompt evaluation, and appellate review.

I believe that, in view of the grave problems surrounding preventive detention, our more limited approach should be given a test. If, however, you feel that more coverage is needed, I believe you should consider creating procedural safeguards; providing a better definition of dangerousness; and limiting the length of detention. May I also suggest that if you adopt a preventive detention system, then the

setting of high bail is eliminated. A money bail provision which would limit the amount of a bond to that which the defendant can afford is a fair and proper corollary to a preventive detention system.

I would like to thank the Commission for the opportunity of giving our views on this vital feature of the Code of Criminal Procedure. I hope we have been of service.

In closing, I would like to comment briefly on the "ticket of appearance", or summons provisions of the proposed Code. I believe that Deputy Commissioner Dodds has endorsed the proposal on behalf of the Police Department. I would add our wholehearted support. As you know, we began the Manhattan Summons Project on a pilot basis in 1964. Today it is operated citywide by the Police Department. We have now experienced six months of this full operation, and it is clear from the data that the program is beneficial to the police, to the defendant, and to the courts. We would urge the Commission to extend authorization for tickets of appearance

to selected felony cases, along the lines suggested in our sectional analysis of the proposed Code, which I have submitted to you. Otherwise, we believe the ticket of appearance proposal to be excellent in all respects.

Bail Reform Legislation

The attached draft bill is designed to rationalize and liberalize New York's bail laws. Modeled upon the Federal Bail Reform Act of 1965, the statute seeks to accomplish the following:

1. Create a presumption in favor of release on recognizance, and other forms of non-financial release, to replace the irrational and unnecessary reliance on money bail.
2. Require the judge setting bail to justify his imposition of certain conditions of release or, where applicable, his denial of bail, and thereby decrease the power over the bail decision which the money bail system lodges in the professional bail bondsman.
3. Permit the judge, in setting conditions of release, to consider the dangerousness

of the accused, as well as the risk of flight he poses.

4. Provide for prompt appellate review of bail determinations which result in pretrial detention to the end of assuring that pretrial detention is kept at an absolute minimum.

5. Impose limits on the length of pre-trial detention in order to assure that the detained defendant will not suffer prolonged imprisonment simply because of the congestion and delay of the criminal justice system.

6. Give the court the power to detain persons charged with Class A felonies, persons on appeal, and persons who have abused the trust placed in them when released in order to provide maximum protection to society consistent with the rights of persons accused, but not convicted of crime.

7. Impose limits, in time and scope, on pretrail detention of material witnesses in order to provide badly needed protection to persons now subjected to lengthy periods of detention, even though they are not even charged

with crimes.

8. Impose sanctions for willful failure to appear.

A brief analysis of the sections of the proposed statute follows.

Section 1. Release in non-capital cases prior to trial.

Subsection (a)

This section was adopted from the Bail Reform Act. The major differences are that (1) it excludes persons charged with crimes punishable by death or life imprisonment, while the Bail Reform Act excludes only offenses punishable by death, and (2) it allows the judge to consider the dangerousness of the accused, as well as the risk of flight he poses. The purpose of the section is to create a presumption in favor of unconditional release, and to place the responsibility on the court for requiring conditions. A number of alternatives are opened to the court in imposing conditions, beginning with placing the defendant in the custody of a third person and running to the most severe con-

ditions, such as requiring a secured bond. The section also permits the court to order partial pretrial detention, that is, detention during the night, on weekends, et cetera.

Subsection (b)

This subsection is not found in the Bail Reform Act. It requires the court to determine the present assets of the accused before imposing money bail, and to state the amount of any collateral which a surety can require. One purpose of this subsection is to assure that the judge is aware at the time he imposes bail of the likelihood of the defendant being able to post it. The other purpose is to reduce the power of the bondsman over the bail decision. At present, the judges' assessment of the risk posed by the defendant can be effectively overruled by a bondsman who will go beyond the ordinary premium requirement for the bond by requiring full or partial collateral.

In connection with the conditions on collateral requirements, it should be noted that an amendment to the laws governing the conduct

of sureties will be required. The proposed statute does not deal with this subject. But it might be appropriate to make violations of the collateral rule an offense, or to give the right to double damages to a defendant who is required to post more than the amount stated by the court.

Subsection (c)

This subsection simply re-cites common factors which the judge should consider in determining whether the defendant will return for trial, or pose a substantial risk of physical harm.

Subsection (d)

This requires that the defendant be given a written statement of the conditions imposed, and that he be informed of the consequences of any default.

Subsections (e) and (f) are taken from the Federal Act and are self-explanatory.

Section 2. Release in cases involving a sentence of death, life imprisonment or after conviction.

This section continues traditional judicial authority to deny release to persons accused of crimes punishable by death or life imprisonment, and to defendants whose cases are on appeal. Like the provisions governing other defendants, the court is authorized in these cases to consider the defendant's danger to the community as well as his risk of flight.

Section 3. Release of material witnesses.

This section requires that material witnesses be released unless it is impossible to secure their testimony by conditional examination, or deposition. In addition, it places the same limits on the length of detention of material witnesses as on defendants.

Section 4. Revocation of release - order of detention.

This section permits the court not only to alter the conditions of release of persons who have either committed felonies or attempted to flee while released, but to revoke bail altogether and order the defendant detained.

If the defendant violates any other conditions of release, the court may impose new conditions, but may not issue an order of detention.

Section 5. Length of pretrial detention.

This section places a maximum of 90 days in detention for all persons who are either ordered detained (except in capital and appeal cases) or who fail to meet conditions of release. It should be noted that any time in detention which can be attributed to legal action on the part of the defendant or to any mental or physical disability need not be included in the limitation.

Section 6. Review of conditions of release.

This section provides for a comprehensive procedure for review of the decision to release or detain. It is applicable in all cases in which the defendant is in fact detained. Two stages of review are contemplated: an initial and immediate bail reevaluation, either by a judge of the court setting bail or by a Supreme

Court justice; and an appellate stage. The right to petition for writ of habeas corpus is preserved, and the obligations of the court in habeas cases is defined. A central feature of the review procedure is the requirement that the court which imposes or approves the conditions of release or detention provide written finding of fact in support thereof.

Section 7. Penalties for failure to appear.

This section makes it a crime not to appear as required. The maximum sentences are those to which the defendant is subjected pursuant to the charges for which he was arrested.

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The proposed legislative scheme should do much to improve pretrial release practices in the State. But a statutory plan is not completely self-executing. In jurisdictions where bail reform is most advanced, bail projects of various kinds have served a vital role.

It seems inappropriate in a state like New York, with its wide variety of local crime

problems, to design a statewide bail reform unit. It is, however, important that there be encouragement, in the form of money and information, from the State to local jurisdictions, to form bail projects. Hence, it would seem that as part of the overall legislative scheme, a State Bail Coordinator's Office might be established, possibly within the Judicial Conference. It would be his responsibility to maintain data on the progress of bail reform; to serve as a source of information and guidance to local communities desiring to begin bail reform projects; and to review requests for funding -- possibly on a matching grant basis -- of local or regional projects.

AN ACT

To revise existing bail practices in courts of New York, and for other purposes.

FINDINGS AND PURPOSE

(1) Existing bail practices in New York State permit persons to be deprived of their liberty prior to trial or sentence or during appeal solely because of their inability

to post bail;

(2) The detention of an accused person prior to trial substantially interferes with the preparation of his defense, which in turn interferes with the operation of our adversary system of justice;

(3) Our system of law and order is compromised when the attainment of liberty depends solely upon the financial status of an accused;

(4) Although our system of justice is founded on the basic tenet that a person is innocent until proven guilty by a court of law, an accused person who is detained suffers the penalties of persons proven guilty by being incarcerated and subjected to the effects of jail life, while his family is subjected to public contempt and suffers loss of support;

(5) The posting of bail may work an unnecessary financial hardship on an accused and his family;

(6) The unnecessary detention of an accused person, imposes an unwarranted financial

burden on the taxpayers, requiring the expenditure of public funds which could be better used for other governmental purposes.

(b) The purpose of this Act is to revise the practices relating to bail to assure that all persons, regardless of their financial status, will receive equal treatment and that no person admitted to bail will be detained unless the public interest requires such interest.

The purpose of this Act is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.

Section 1. Release prior to trial

(a) Any person charged with an offense, other than a Class A felony, or a person within the meaning of Section 70.10 of the Penal Law, shall, at his first appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of

of an unsecured bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required, or will not protect the community of another from a substantial threat of physical harm by the person. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or protect the community or another from a substantial threat of physical harm by the person, or if no single condition gives either or both assurances, any combination of the following conditions:

(1) place the person in the custody of a designated person or organization agreeing to supervise him or order the person to report periodically to a law enforcement agency or officer of the court;

(2) place restrictions on the travel,

association, or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the condition of release;

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu of thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person returned to custody after specified hours.

(b) Before the conditions authorized in paragraphs (3) or (4) of Subsection (a) of this section are imposed, the court shall, on the basis of the available evidence determine the present assets of the defendant. If the defendant is required to post a surety bond,

the court shall, in addition, state the amount of collateral, if any, which may be required of the defendant. No surety may receive or require any sum, or any property of any kind, in addition to that stated by the court.

(c) In determining which conditions of release will reasonably assure appearance or protect against the threat of physical harm, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character, and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings, past violation of parole, probation or pretrial release conditions.

(d) A judicial officer authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to

violations of the conditions of his release; and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.

(e) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

(f) Nothing contained in this section shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court, or the prosecution of the defendant for any crime, including failure to appear.

Section 2. Release in cases involving a sentence of death, life imprisonment or after conviction.

A person (1) who is charged with a Class A felony, or a person punishable under Section 70.10 of the Penal Code, or (2) who has been convicted of an offense and is either awaiting sentence or has filed an appeal in The Appellate

Division of the Supreme Court of the Court of Appeals, shall be released in accordance with provisions of Section 1 of this Chapter unless the court or judicial officer has reason to believe that the person will not flee or pose a substantial threat of physical harm to any other person or to community. If such a risk of flight or danger is found to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained.

Section 3. Release of material witnesses.

If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impractical to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to Section 1. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by conditional examination. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken, provided that no witness

shall be detained, as defined in Section 5 for more than 90 days, unless further detention is necessary to prevent a failure of justice.

Section 4. Revocation of release - order of detention.

Whenever the court finds, after a hearing, that there is probable cause to believe that a person released pursuant to the provisions of this Act:

- (1) has committed a felony; or
- (2) has fled or attempted to flee the jurisdiction;

the court may amend the order of release to impose additional or different conditions of release, or may order the person detained pending the trial.

If the court finds that the person has violated any other conditions of release, it may amend the order of release and impose additional or different conditions.

Section 5. Length or pretrial detention.

Except in cases described in Section 2 of this Chapter, no person shall be detained

prior to trial, whether under an order of detention pursuant to Section 4, or because of inability to meet any condition of release, for more than 90 days. Upon the 90th day of detention, the defendant will be returned to court, and ordered released by the judge, either on his own recognizance or on some condition of release which he can meet. In computing the period of detention, any period of time which is the result of legal action by the defendant, or of his mental or physical incapacity, need not be considered.

A person released on a condition which requires that he return to custody after specified hours shall be considered in detention for the purposes of this section, for those hours in which he is actually in detention.

Section 6. Review of conditions of release.

a. Reevaluation of conditions.

A person upon whom conditions of release are imposed and who is detained as a result of his inability to meet the conditions of release, or a person who is ordered detained, may, at any time

after the conditions are imposed, make oral application to a judicial officer of the court which imposed the conditions, or to a Supreme Court justice whether or not a Supreme Court justice initially imposed the condition, for reevaluation of said conditions.

In the event that no application for reevaluation is made pursuant to this subsection, a judicial officer of the court which imposed the conditions shall, not more than 48 hours from the time of the initial determination, reevaluate the determination.

Unless the conditions of release are amended upon reevaluation and the person is thereupon released on other conditions or without conditions, the judicial officer or justice shall set forth in writing the facts upon which his decision is based, and the reasons for continuing the original conditions.

Nothing in this subsection shall prevent a reapplication for reevaluation upon a showing that new evidence relating to the release determination can be presented.

(b) Review by appeal.

In any case where a person is detained after reevaluation pursuant to Subsection (a) of this section, review of the order of release or detention may be obtained by appeal or other appropriate remedy to a court, or judge or justice thereof, having jurisdiction. Such review shall be accelerated and determined promptly.

If the conditions of release or detention are supported by the proceedings below, the order of the court shall be affirmed. If the order is not so supported, the court may remand the case for a further hearing or may, with or without additional evidence, order the person released pursuant to Section 1.

(c) Review by Habeas Corpus.

Nothing contained in this Chapter shall interfere with or prevent the right of a person to petition for a writ of habeas corpus. In the event review by petition for writ of habeas corpus is sought, the reviewing court, or judge or justice, shall take evidence by oral testimony, affidavits, or other appropriate means and determine whether

such detention is justified. If the order of the court below is sustained, the reviewing court, or judge or justice thereof, shall state the reasons for such determination. If the order is not so supported, the court may, with or without additional evidence, order the persons released pursuant to conditions authorized in Section 1.

Section 7. Penalties for failure to appear.

Whoever, having been released pursuant to this chapter, willfully fails to appear before any court or judicial officer as required, shall incur a forfeiture of any security which was given or pledged for his release, and, in addition, shall be fined and/or imprisoned not more than the maximum fine or imprisonment provided for the crime in connection with which he was released. The willful failure of a material witness to appear shall be punishable by not more than one year in prison.

Thank you.

CHAIRMAN BARTLETT: Perhaps, Mr. Subin, it would be more useful for us if you would quickly identify the particulars of your bail scheme about

which you have criticism. Is it a matter of emphasis, primarily?

MR. SUBIN: Well, I would just start by saying that I agree wholeheartedly with the staff comment that these provisions of the proposed Code may well be the most archaic and poorly drawn and chaotic in the Code and I would also say that your proposed Code has done a lot to clarify and make that existing Code better.

I think I have a kind of fundamental problem, however, and that is that I am not sure that it's worth saving. The Code as it's redrawn here perpetuates the traditional money bail system. It has a few things to say on release on recognizance which I think I would agree with but apart from that and apart from adopting some variations on the money theme I think that it does not reflect as well as it might a lot that we have learned in the last decade about bail and about the efficacy of money bail and the abuses of money bail.

CHAIRMAN BARTLETT: Are you advocating the rough equivalent of the recent federal legislation in this area?

MR. SUBIN: Yes.

CHAIRMAN BARTLETT: Isn't that one of emphasis that before money bail can be demanded certain formalities have to be assumed? Isn't that the way it will operate?

MR. SUBIN: There is no mention in the proposed Code, for example, of any non-financial conditions of release. There is no mention of presumption in favor of release.

MR. DENZER: What do you mean non-financial?

MR. SUBIN: Our experience is that there are other things besides money that might be effective in making the person return.

MR. DENZER: Such as?

MR. SUBIN: Such as placing them in the hands of a third party.

MR. ALTMAN: Third party like whom?

MR. SUBIN: In the federal scheme it is left open but it could be a clergyman, a community organization, it could be a probation officer.

MR. DENZER: That's what bothers me about some of these modern schemes that have been

devised. They are very vague, put them in the custody of somebody. Who? Well, that can be worked out. We are dealing with a very realistic thing here. I have seen another one to the effect that the person must report every day. What good is that? If a person wants to skip he will skip and having the requirement that he report doesn't do any good.

MR. SUBIN: I might say that that certainly would obtain with the imposition of money bail, the person that wants to skip. He will skip regardless of the money condition. It seems to me that you lose a great deal by - there is great danger in the money system apart from that problem.

CHAIRMAN BARTLETT: Ideally, Mr. Subin, are we not to require that the court make a determination based on whatever data is available to it as to whether or not it's likely that this defendant will be amenable to the continuing jurisdiction of the court?

MR. SUBIN: Right.

CHAIRMAN BARTLETT: If the answer is yes, they turn him loose and if the answer is no, they

put him in jail.

MR. SUBIN: As a practical matter, this is the way it works, roughly, but there is this whole area in between where the judge says something so cryptic as \$1,000 bond. You don't know whether the judge thinks that man should be in or shouldn't be in. The only thing that determine whether he is in or not is whether he has the premium. So that there is a decision that the court makes now. If they really want a man in they will get him in by imposing impossibly high bail and the proposal we have would continue the power of the court to do that. If they don't want him in or if they don't know whether they want him in or not, it seems to me that there are other things they can do besides imposing bail. The court may say -- Why the court imposes money bail as it does I don't think anyone really knows. I think it's because they have always imposed bail that way.

MR. ALTMAN: Usually when it's not a first offender; that it's an individual who has been involved with the law before? I believe

that some of the judges have a heart although --

MR. SUBIN: No question about it. I might say that despite the current state of the law, the rate of release in New York and the rate of release on recognizance is a good deal higher than in 1960. It's not a question of the court having heart, it's a question of how this decision is made. It's the total discretion that the judge has to set bail.

If I may move to this, I think the basic part, perhaps the most important part of the proposal is that it makes the judge go on record as to why he is taking action. It gives the defendant an opportunity to test.

CHAIRMAN BARTLETT: Let's address ourselves to that.

MR. SUBIN: Right.

CHAIRMAN BARTLETT: As I understand your scheme, its only difference from the present law is in a reordering of the priority which the judge must observe.

MR. SUBIN: That's one aspect.

CHAIRMAN BARTLETT: Right. If he passes

priority one, ROR, he must state on the record why he has done so.

MR. SUBIN: No, sir, that's not precisely right. We are a little bit wary and we were when I was with the Department of Justice in framing the federal legislation of requiring or expecting the judge in a high volume situation like New York City, for example, to give written findings of fact in every bail case. What our proposal does is require the judge to give written findings of fact when his action results in detention.

CHAIRMAN BARTLETT: O.K.

MR. KNAPP: When you say written, you don't mean --

MR. SUBIN: On the record, something for the Appellate Court to look at.

CHAIRMAN BARTLETT: The guts of the system depends on the availability of immediate Appellate review, does it not?

MR. SUBIN: Yes.

CHAIRMAN BARTLETT: How can you possibly achieve that in the numbers situation we have in the New York City courts?

MR. SUBIN: Well, it's a hard question. We have experienced some of it with our bail re-evaluation project in which we got at least review of Criminal Court decisions very rapidly by a Supreme Court justice. These can be expedited appeals. The issue is very simple and it doesn't require extensive arguments.

MR. DENZER: Are you going to have briefs?

MR. SUBIN: No, I don't think so. It's really the determination - it's really to determine whether the bail-setting judge has exercised his discretion in a proper way when he sets bail in a particular case. Right now what does the defendant do. The judge says \$1,000.

MR. DENZER: Writ of habeas corpus.

MR. SUBIN: That's still open to him.

MR. DENZER: Yes.

MR. SUBIN: But what is to review? You don't know why the judge did what he did.

CHAIRMAN BARTLETT: Assuming for the moment that we thought your point was well taken that in detention cases something should be said as to why he did not release him, giving at least

some bare bone record to look at, is it really practical to talk about using the Appellate machinery we have in New York to review this in terms of a meaningful review for the defendant? This might work very well in the federal practice but we have to start out with the acknowledgment, I think, that we are dealing with an entirely different fact situation.

MR. SUBIN: Right. Well, I think that's true but I don't know what the alternative is. The alternative is to perpetuate the system where the judge has total uncontrolled discretion to pick a number out of the air or take the number that the District Attorney gave him out of the air and say that shall be the bail, "You are a \$1,000 risk." The judge doesn't have any idea but there is a certain area where he doesn't know whether that man is going to make bail or not. If it's \$25,000 he can be pretty sure.

CHAIRMAN BARTLETT: I think our problem is this: We recognize the irrationality of the present system. We are trying to find a rational solution for it.

MR. SUBIN: Let me backtrack just one more minute. Our scheme departs from the Federal Bail Reform Act in certain respects and one of them is that it allows the judge to consider and to consider on the record the dangerousness of the defendant as it's defined in there in setting bail.

MR. KNAPP: The Federal Act doesn't do that?

MR. SUBIN: No, sir.

One of the great problems today is, and I think many judges will practically admit, that they are setting bail because they think this guy is going to do something when he gets out other than run. As a matter of fact, one judge told me, "I would be delighted to let him out if I knew he would run but the problem is he is going to stay here and commit crime." That's what is behind a great deal of the bail setting that goes on in this city and every other city.

MR. ALTMAN: Is that wrong?

MR. SUBIN: No, sir. Our proposal would say to the judge, "If you think this man is dangerous as it's defined in here, say so and don't hide

behind this really phony standard of risk of flight."

MR. KNAPP: Your point being that the Appellate judge can review what has happened and not anything else?

MR. SUBIN: Yes.

MR. ALTMAN: So the judge would say, "Because of your past record I am afraid you will get out and commit other crimes."

MR. SUBIN: Right. When I talk about Appellate review it's extremely doubtful that every case is going to go through a complete Appellate procedure but we need standards today and we need legally announced standards as to what constitutes danger, what constitutes risk of flight.

CHAIRMAN BARTLETT: One of the constitutional problems, this troubled the Constitutional Convention greatly, is in trying to formulate the bail language in the bill of rights. Do you think it's constitutionally supportable now to have a statute read that if the judge thinks he is a danger to himself or to the community he can deny bail?

MR. SUBIN: Let me answer that in two steps. First of all, with respect to our Section 1 here which would allow the judge to consider dangerousness. This would allow him to consider dangerousness in release. It does not allow him to retain at this point. I think the constitutional question there is simply one --

CHAIRMAN BARTLETT: We are still fudging a little bit, aren't we?

MR. SUBIN: No, I'm getting to it. The only constitutional question we have is that traditionally, and history would indicate that the only purpose of bail has been to insure that the defendant will not flee. The question is can you also use bail to insure that the defendant will not commit crime and my own personal view is that you can do that. Just because it hasn't been used for that purpose in the past it doesn't mean that it can't be.

Now reaching the question that you posed, your provision, as I tried to make in my statement, is the broadest detention provision that I have ever seen proposed. Going back and forth in their

arguments and treatises and books on whether it's constitutional or not and I think the only answer that anyone can give is that no one knows because the Supreme Court has never ruled on it. I would say that surely if you go with an outright preventive detention scheme, one in which the judge could say, "This man is going to flee." This man is a danger to the community. No bail." In other words, like you do in capital cases. I think you ought to use a good deal more care in defining dangerousness in increasing what you have here in terms of the standard of proof that is required. I think you used the language of likelihood that he will be a danger to himself and others and I suggest that it be at the probable cause level of proof and I think you ought to surround it with as many procedural due process safeguards as you can. Again, this goes to whether you need to make it survive, if that's the way you want to go, whether you need a full scale review procedure, something that the courts can test.

CHAIRMAN BARTLETT: Don't you agree if we want to create some machinery for review we

can't utilize the present Appellate structure practically?

MR. SUBIN: I think that may be so in a very high volume place. There are other alternatives available and of course the habeas corpus route isn't excluded in our proposal. I'm not sure that it's a full formal access to the Appellate process, is the only way you can protect in a due process sense but I think something like that would have to be applied.

On this point of preventive detention, our proposal takes a kind of middle ground on this and it doesn't pretend to involve the constitutional problem but it doesn't go as far as your proposal does. What we would do is to allow the judge to revoke the bail and detain if the defendant, once released, had done any one of a number of things. One of them would be if there is probable cause again to believe that he has committed a felony, if he has been rearrested for a felony and held. Another is that if there is probable cause to believe that the defendant has fled and been captured or is attempting to flee. In those

situations what we would say is that it doesn't solve the constitutional question because you still have the question whether you can lock a man up before he's been convicted but it brings you closer, it seems to me, it narrows the power of the judge.

Under your proposal, I would submit, a judge might well find that a numbers writer is a danger to the community and I think an argument could be made for that and lock him up. As a matter of fact, there is some history in another jurisdiction of that where the judge said, "I will not allow this man out on bail," and this was pending appeal. It wasn't because he was afraid he was going to flee but he said, "I think numbers writing is serious and he shouldn't be out violating the law again."

I think your jails would be very full if you do it. I think what we are really interested in is protecting against the kind of danger of physical violence standards that we try to suggest in our proposal.

MR. DENZER: Isn't this largely semantics?

All that the proposal does there in this area is to candidly recognize that preventive detention is a factor; whether it's in there or not the judges are going to set bail, fix bail, on that basis?

MR. SUBIN: Right.

MR. DENZER: As a comment I will pose an illustration there of a man arrested for rape, forcible rape with a bad sex crime record. What judge is going to let that man out of the community?

MR. SUBIN: Right.

MR. DENZER: Whether you have the preventive detention cause there or not, he is going to set the bail so high he can't make it.

MR. SUBIN: Right. I don't think we are terribly far apart on that because our proposal would continue the power of the judge to set high bail in a case like that but at least what we would do, and I'm not trying to --

MR. KNAPP: Would it be more constitutional in your view if bail was denied altogether in this circumstance, at least that would not discriminate between the rich and the poor? I mean,

why should a rich man go around raping people and be out?

MR. SUBIN: Right. I think it would eliminate the equal protection problem.

Incidentally, as you may know about a case that came out of New York City which is now pending, People against Gonzales, which in many ways raises the question that you are dealing with and it raises the constitutional question.

CHAIRMAN BARTLETT: It was granted.

MR. SUBIN: No, sir. They haven't decided yet.

CHAIRMAN BARTLETT: How are you betting, Mr. Subin?

MR. SUBIN: Beg pardon?

CHAIRMAN BARTLETT: How are you betting?

MR. SUBIN: If they don't do it this time they will next time. I think they won't grant it this time but I think they should because we are in a quandry and just don't know.

In that case, we have a defendant who is charged with robbery and brutal beating of a police officer and the police officer was hos-

pitalized for many months. He's all right now but he was certainly, at the time bail was set, his condition was very grave. The defendant had no prior criminal record. He had employment, he had people to speak for him, he lived with his family. In other words, he had extensive community roots, ties with the community. As a matter of fact, for what it's worth, he would have scored extremely high on the point scale for ROR. As a matter of fact, he would have broken the bank as far as his reliability on the Probation Department and Vera standards. Bail was set at \$25,000 in that case and I think the reason is very obvious. I don't want to go into all that has gone on since then but I think --

CHAIRMAN BARTLETT: You think this does frame the question?

MR. SUBIN: Right. One of the attacks is on this -- Now by the way, the bail has been reduced through subsequent action to \$1,000 which we still can't post. If that man had the price of the premium or a friendly bondsman who would let him out on credit, he would be released under this

system. Now whether he should be or not I don't know. All the arguments before the court and the decision in the New York Court of Appeals goes to really, in my view, constructing a very artificial argument about the risk of flight that this defendant poses; that's not what anyone is interested in. If that man had been charged with simple assault or petty larceny he would have been released on recognizance.

CHAIRMAN BARTLETT: You do approve of our candor in recognizing this as one of the legitimate bases for detention?

MR. SUBIN: Yes, sir. My feeling is that we haven't tried preventive detention before in a full scale way and it might be advisable to go at it on a piecemeal or slow basis rather than to embark on a full scale preventive detention scheme. So I would limit it to the revocation procedure and an articulation by the judge that danger was a factor in his decision which it always is.

MR. KNAPP: On your section 5, which is the 90-day release, you say in computing the period of time which is the result of the legal

action by the defendant. What about illegal action? Suppose it can be proved that the defendant has made one of the people's witnesses to disappear?

MR. SUBIN: That's a good point. I don't see any reason why it shouldn't be.

CHAIRMAN BARTLETT: Mr. Subin, we have your statement. I would appreciate your giving further attention to your appeal recommendations.

MR. KNAPP: The mechanics.

CHAIRMAN BARTLETT: I don't think the work. I'm sympathetic that there ought to be some basis for rational review of a judge's decision where he detains but I don't think realistically we can talk about using our present machinery for that review if it's to have any meaning for the defendant in terms of time.

MR. ALTMAN: Ultimately I would gather that Vera would like to eliminate any bail?

MR. SUBIN: It might be a minor part of the system, I suppose. I suppose there are some people who would be induced to return because they will lose money if they don't return but I'm not

sure that those people wouldn't return anyhow. I think probably, yes, we would like to see it removed.

I had just two small things I wanted to add. One was with respect to this problem of collateral. We have suggested that the judge play a part in this decision of the bondsman to impose a collateral requirement on top of the requirement that the judge --

MR. KNAPP: Will that do any good, though, because the judge can't make a bondsman give bail.

MR. SUBIN: Right.

MR. KNAPP: It's obvious why this man that you referred to, no bondsman came up. Imposing conditions on that bondsman isn't going to make him put up bail.

MR. SUBIN: Right. We have an alternative. I would like the judge to know at least that the bail he is requiring has in addition the requirement of the bondsman that the man post collateral. Right now he may want the man released on \$500 bond and he may think he may be and what he doesn't know is that the bondsman is requiring \$500 collateral.

MR. KNAPP: My point is that the judge can't say you can't require \$500 collateral.

MR. ALTMAN: I think you underestimate our judges. They know generally what collateral is required.

MR. SUBIN: I hope you are right.

MR. KNAPP: Take that case of the \$1,000. Nothing is going to make him produce it.

MR. SUBIN: The one other thing was with respect to the summons. I would like to say, I'd like to commend the Commission for the summons provisions which I think are excellent and very well warranted by the facts and I don't know whether you have received the latest report we have on the result of the Police Department Summons Project. We have six months of figures on it. Your figures here were earlier dated and if you haven't received them and are interested, I would be happy to forward that to you.

CHAIRMAN BARTLETT: We owe a debt for inspiration, if nothing else, to Vera for our proposals in that area.

MR. KNAPP: I must say I have heard from

people who obviously would not speak for the record because of their position because the result of this has not been as rosy as it looks in the statistics. A lot of people just don't regard arrests as a serious problem.

MR. SUBIN: Well, to the best of our knowledge, the jump rate, the rate of default, is about five percent. There is one interesting minor statistic about that and that is that 10 percent of the people issued warrants are women and 50 percent of the jumpers are women and we may have just a sex problem here, I don't know.

CHAIRMAN BARTLETT: Thank you.

MR. SUBIN: Thank you, gentlemen.

CHAIRMAN BARTLETT: Mr. Frank? May I ask, Mr. Frank, do you have a written statement you want to submit as well?

MR. FRANK: We will submit following.

CHAIRMAN BARTLETT: O.K.

STATEMENT OF NORMAN FRANK ON
BEHALF OF THE NEW YORK CITY
PATROLMEN'S BENEVOLENT ASSOCIATION

MR. FRANK: Gentlemen, my name is Norman Frank representing the Patrolmen's Benevolent

Association of the City of New York.

I would like to thank the Commission for the opportunity to address it this morning and to note in advance that the comments which I will address to you are in a sense preliminary in that we are making a detailed analysis of the proposed Criminal Procedure Law and will submit a complete memorandum to the Commission within a reasonably short time.

I say a detailed analysis because we don't want to be in the same position that we found ourselves in with the Penal Law.

MR. ALTMAN: That would be helpful.

MR. FRANK: Thank you.

MR. KNAPP: And do cover everything.

MR. FRANK: We are sure going to try.

MR. KNAPP: And don't come out and say we hid anything, at least not on television.

MR. FRANK: The fact of the matter is that an awful lot of people either through their own fault, through ignorance or through a variety of other factors were not acutely aware of the principles or the interpretations.

MR. KNAPP: I understand that but they shouldn't have gone on television and said we hid it from them.

MR. FRANK: I don't think the word hid should have been used.

CHAIRMAN BARTLETT: H-i-d, Mr. Frank.

MR. FRANK: You have made your point. First of all, let me say that the PBA wholeheartedly agrees with the comments by the Commission in Section 1.20 that the status of the peace officer should be eliminated. The right to carry weapons at all times and to make reasonable cause arrests should be limited to public servants who actually have a genuine police function.

MR. ALTMAN: Would you include the fire marshals in that?

MR. FRANK: I heard that this morning, that the fire marshals were seeking a police officer status.

CHAIRMAN BARTLETT: They probably made the best case yesterday with the parole people for inclusion on the ground that they are the arson squad, really, in New York City.

MR. FRANK: Yes. I would certainly say, and in my comments to come I will make an observation in this general category.

MR. ALTMAN: O.K.

MR. FRANK: In general, however, the limitation of reasonable cause arrests to public servants actually having a police function is also a position identical with that which will be taken by the Combined Council of Law Enforcement Agencies. One of the things that we are faced with by the ever-expanding list of peace officers that has existed over a period of years is that it eliminates the necessary prerequisites of qualifications as a police officer who are circumvented by the peace officer designations and by the appointment of special patrolmen.

There was a case in Kings County Supreme Court in 1959, Kenla vs Murtaugh, which dealt with a sanitation policeman who had been designated as a special patrolman and issued a summons for disorderly conduct in which the court spoke quite vividly about the incursion upon the police function in so doing and the inadvisability of this

kind of role. However, we fully endorse the Commission's intent as expressed in the staff comment to amend the Penal Law so that the right to carry firearms will be preserved for those who specifically require weapons in the performance of their duty and notably correction officers, prison guards and the like.

CHAIRMAN BARTLETT: Unfortunately, 154 has been interpreted by too many groups. Their concern with 154 has been primarily with that of the right to carry arms; that ought not to be the consideration at all. It should be handled in the Sullivan Law.

MR. FRANK: That's precisely our feeling. I think there is also evidence that too much is brought under this so-called innocuous label that a peace officer with the right to carry a gun is the only demand being made. The incidence of felony arrests on reasonable cause by peace officers is so infinitesimal that I think they would be hard to find in the record as of now. However, under the description of a police officer we also recommend that Subdivision 15 get further

attention from the Commission as to who shall be designated as a police officer and that addresses itself to your comments perhaps on fire marshals or parole officers because certainly parole officers, if they run into any kind of a dangerous situation in the course of their employ, are in fact acting as law enforcement officers and fire marshals, as you point out, being an arson squad would seem to be a valid inclusion. However, when the Commission is prepared to make further statements with regard to Subdivision 15 we would appreciate the opportunity to comment at that time.

MR. KNAPP: Could I just ask you for a comment? Several of the other people, prison guards and so on, mentioned the fact that on several occasions they are in uniform off duty and the public considers them police officers and they should be so regarded and that their visibility traveling in subway trains, for example, in uniform is a deterrent. Assuming that, the validity of that observation for the time being, what would you think, and I am not speaking for the Commission, I am thinking about this myself, what would you

think of the provision that if any of these other groups were directed to wear uniform off duty, for example, if there was a lot of subway crime and it was decided to make everybody who had a uniform wear it in order to be visible, some provision to make them peace officers while they were under such - correction police officers while they were under such direction?

MR. FRANK: I think we face another problem. One of the things that has confronted, for example, the New York City Police Department has been a public confusion with a variety of uniforms that are virtually identical to those worn by the New York City policemen.

CHAIRMAN BARTLETT: Including a conductor on the train.

MR. FRANK: Yes. I think it's a dangerous practice because once you commence this, unless there are specific groups authorized under the law, what you are doing is creating an atmosphere in which so-called private police departments and various agencies and departments will be created and their responsibility to the overall authority

of the Police Commissioner is less than would be a desirable quantity. If you had special patrolmen in the Sanitation Department and the ability to act as a police officer in the Correction Department, you have splintered the law enforcement agencies without any unity of control and I think you would have to investigate that very carefully before you made any all-embracing provision to permit that. This has, incidentally, been the pattern through the guise of the peace officer or patrolman and yet it has not resulted in any noticeable effect on law enforcement.

CHAIRMAN BARTLETT: We were told yesterday that the correction officers had accounted for some 50 off-duty arrests in the years '66 and '67 combined.

MR. FRANK: I'm not aware of the figure but it's certainly a commendable one if it's true.

CHAIRMAN BARTLETT: It's still miniscule.

MR. FRANK: Miniscule in comparison to the arrests made by the Police Department itself.

Moving to Section 15.10, which covers the statute of limitations, we respectfully submit

that Subdivision 3(b) is totally discriminatory against the public servant. It provides no limitation whatsoever except for his length of public service and a period extending two years beyond that under which the public servant can be prosecuted even for the most minor infraction that occurred during his term of office.

CHAIRMAN BARTLETT: I think the rationale for that was, at least in part, Mr. Frank, the traditional view of the responsibility of the fiduciary.

MR. FRANK: But that's dealt with in another section.

CHAIRMAN BARTLETT: Yes. I think this was part of our feeling about that.

MR. KNAPP: Frankly, we didn't have the policeman in mind. We had in mind the man who had the power to conceal.

MR. FRANK: I understand.

MR. KNAPP: I think it has to be clarified.

MR. FRANK: You will note, gentlemen, if you will, that I used the phrase public servant rather than policeman because 3(b) is all-embracing.

CHAIRMAN BARTLETT: Would you have any objection to 3(b) if it were fleshed out to apply to those circumstances where the public servant is capable of concealing his misconduct by virtue of his office?

MR. FRANK: I think that I would have to withhold comment on that. I'd like to think about it because basically we believe that there should be an equal right extended under the statute of limitations to all people except, as you mentioned, to people in the fiduciary capacity where it can remain buried for a long period of time.

CHAIRMAN BARTLETT: This could apply to the police officers, couldn't it? Let's take the investigation going on right now. It's the kind of thing that would not be discoverable for some period of time unless someone chose to look at it?

MR. FRANK: I would say that in the question of fiduciary infraction that there is validity but that there is no validity, for example, where a police officer or other public servant may have been guilty of disorderly conduct and where the civilian offender in the same crime has a statute

of limitations applying for one year the public servant is liable to prosecution for 30 years or more.

MR. KNAPP: Speaking for myself, we have to clarify this. You have a point.

CHAIRMAN BARTLETT: Yes.

MR. FRANK: I think that there is a suggestion that if the section applying to fiduciary responsibility were expanded that the provisions of Subdivision 2(a) through 2(d) otherwise be made universally applicable not only to the citizen offender but to the public servant offender so that there would be a single statute of limitation equally applicable to all.

Under Section 16.60 we endorse the Commission's proposal to allow arrest by warrant at any hour of the day or night and we applaud the expansion of authority which provides that an officer need not identify or announce himself before entering a premises, provided the danger exists that the defendant will escape or life endangered or evidence might be destroyed. However, we believe that it is necessary to amend

Subdivision 3 of this section to provide authorization for the use of necessary force, including deadly physical force, in the event the officer is confronted with deadly force or the threat thereof.

CHAIRMAN BARTLETT: We think that's the case now but this point was raised by another police spokesman and he felt as apparently you do that this limited the force to non-deadly in every circumstance. Obviously, if he is confronted with the threat of deadly physical force he can respond, you know.

MR. FRANK: Well, in another section, Mr. Chairman, the Commission is very specific. Even in its staff comments where it says, and I will come to this later but make reference to it now, that he may not use his revolver but must call for reinforcements. This appears in another section of the proposed Code.

MR. DENZER: Search warrants.

MR. FRANK: But suppose even in a search warrant, suppose the police officer was confronted by a resident who confronted him with a pistol?

MR. DENZER: The basic provision there is that anyone may use deadly physical force when he is confronted with deadly physical force in order to repel it.

MR. FRANK: I think that with respect to that, this Code is inspecific on that point, especially in view of the staff comments that he may use a billy where reasonable but may not use a revolver.

MR. DENZER: The search warrant area is not specifically covered by the justification provisions of the Penal Law so we had to be a little bit more detailed there, a little more explicit when we came to search warrants and there is a different connotation there. When you are trying to serve a search warrant we don't think it justifies shooting to get in.

MR. FRANK: Doesn't it depend upon the degree of resistance?

MR. DENZER: Always, as I say.

CHAIRMAN BARTLETT: We think that the law is all right. You may have a valid point that the way it's put here, particularly in view of

the comments made on search warrants, that it's somewhat confusing.

MR. FRANK: We simply ask for clarification and even with the Commission's own recommendations on amendment of the existing Penal Law some changes would be indicated here to make the Criminal Code be consistent.

Under Section 70.20 dealing with the question of arrests without a warrant. It is our belief that the power to arrest under such circumstances should be granted to a designated police officer on a statewide basis; that outside of his own locality --

CHAIRMAN BARTLETT: That's 70.30?

MR. FRANK: It's covered in 70.20 and 70.30.

MR. DENZER: 70.20 is the private person.

MR. FRANK: But the staff comment again on Section 70.20 says this is particularly designed to make a police officer act as a private citizen outside his own jurisdiction.

MR. DENZER: Well, not particularly designed but its principal utility.

MR. FRANK: Right, which we frankly disagree with.

CHAIRMAN BARTLETT: There is a proposal pending in the Legislature to give statewide bailiwick to police officers.

MR. FRANK: Right.

CHAIRMAN BARTLETT: For felonies committed in their presence. Do you think this is desirable?

MR. FRANK: No, sir.

CHAIRMAN BARTLETT: You think for all purposes they should have it?

MR. FRANK: I think that the reasonable cause provision that is now applicable to police officers, either for felonies or misdemeanors, should vest him with the right to make an arrest on a statewide basis. You go further, again, in another section -- I have tried to take this chronologically so there would be no confusion -- you go in another case where a police officer in this jurisdiction can act as an agent for another police officer if he is so requested; that merely constitutes two men doing the job of one because

if the police officer was here out of his jurisdiction and is to make an arrest for something that occurred within his jurisdiction, it doesn't seem to follow logically that he should have to call upon the local police force to assist him and perhaps lose apprehension of a suspect.

CHAIRMAN BARTLETT: Our real problem, let's face it, is the question of tort liability. We can talk all we like about what the policeman ought or ought not to but the municipal tort liability question is the one that has really held up the resolution of this question for a long time in New York.

MR. FRANK: Yes, I think that is true.

MR. KNAPP: Do I understand that you only want the New York City policeman, for example, to have authority to arrest in Rochester for a crime committed in New York?

MR. FRANK: No, I would go further on that. Again I think that the police officer who has been designated as a police officer, and if you wish to impose qualifications, for example, that he be a city police officer, a state police

officer or a county police officer, I think they should have arrest powers throughout the State, not necessarily for crimes committed within their jurisdiction but crimes which they have reasonable cause to believe were committed wherever they may be at that time. I think you lose a fundamental ability to utilize police officers wherever they may be and their training to supplement the local law enforcement agency or just the fact that he is there and has reasonable cause to believe that a crime is committed; that he should be able to act as a police officer.

MR. DENZER: What would you say to a provision that gave any police officer power to make an arrest as a police officer anywhere in the State but limited to felonies committed in his presence? In other words, I don't think that even you would approve the idea of a New York City police -- Let's take a village police officer from upstate who comes down here and he suddenly decides he is going to investigate some crimes around here and he goes around on his own and investigating and finally makes an arrest. I don't think that

is desirable. If he happens to see a robbery committed in his presence, sure, you might say but just to give blanket authority to any peace officer, this makes everybody a State Trooper with complete statewide authority.

MR. FRANK: Well, perhaps that's so but may I cite a contrary example? Supposing a police officer were visiting in your home, a New York City police officer visiting in your home out of New York City and a neighbor of yours rushed in to announce that a crime had been committed next door. Should the police officer that is visiting your home who has been trained as a police officer be prohibited from acting in that matter?

CHAIRMAN BARTLETT: He is not prohibited now, of course. We are only talking whether or not his municipality is going to be responsible for his negligence in making an improper arrest.

MR. FRANK: That's under the present law but the proposed law would limit his ability to act in the situation I described.

CHAIRMAN BARTLETT: No.

MR. FRANK: Because the crime was not

committed in his presence and is outside his jurisdictional area.

MR. DENZER: That's a somewhat unusual situation.

CHAIRMAN BARTLETT: I think we can resolve this quickly. We have your point and we are going to consider it. Will you say if the circumstances you described took place in my community of Glens Falls, a New York City policeman who is vacationing there and did not respond properly that that ought to be the proper subject for departmental charges in New York City?

MR. FRANK: I certainly do.

CHAIRMAN BARTLETT: O.K.

MR. FRANK: That is precisely to the point I wanted to make. Recent laws enacted in the State of New York have permitted police officers to reside at some distance from the community in which they work. The staff cites an interesting example about Rockland County and the New York City police officer. We have several thousand police officers from New York City now living in Rockland County. In effect that's a tremendous reinforcement

during off-duty hours of the Rockland County police arm and we certainly see no reason that these people within residence distance of New York City should be prohibited from acting as police officers. This is true in Westchester, Suffolk, Orange and Putnam, all outside the jurisdictional area of the New York City Police Department.

MR. ALTMAN: Not directly on this point but I am just curious whether your comments are officially the PBA's and whether your comments have the approval of the rank and file of the police officers. My experience with the police officers is that when they go home they want to go home and not be police officers.

MR. FRANK: I think you are now addressing yourself to what Mr. Bartlett addressed himself earlier. In the parlance of the rules and procedures of the New York City Police Department, a member is on duty 24 hours a day; that means whether he is wearing his uniform or sitting in his living room. I think most police officers are ready, willing and able to assume that obligation. They would also like to have the fundamental protections of

tort liability if they did assume the obligation and that's the gray area that we have been faced with for a long time.

If you are discussing the emotional bent of the police officer as to whether or not he should have to do these things, that's something else but I say that he undertook the oath to perform in such manner when we joined the department and that's the fundamental responsibility.

MR. KNAPP: I don't want to prolong this.

CHAIRMAN BARTLETT: Do you know what the position of the Commissioner is on statewide jurisdiction?

MR. FRANK: No, I do not.

CHAIRMAN BARTLETT: We don't either. We will inquire.

Thank you.

MR. FRANK: If the statewide jurisdiction of the police officer were granted in this new Code it obviously would permit the deletion of Subdivision 3 of this particular section which is the police officer in a community acting as an agent for another police officer.

I just respectfully call that to the Committee's attention in the event that the prior comment gets any consideration.

Just finally, we believe that once you have inserted the close pursuit provisions in Subdivision 2(b) that you have given further evidence to the statement that we are making. If you can pursue across the line, why not act across the line in the first instance?

Under Section 70.40 --

CHAIRMAN BARTLETT: Perhaps instead of asking you what the Commissioner thought about this, I might better have asked you what the Mayor and the City Council thought about it because this is primarily a problem in their realm as to whether or not the city is going to be responsible for the acts of a policeman while he is vacationing in Lake George or living in Rockland County.

MR. KNAPP: I think more important is the question of the people coming down from Oshkosh, coming down here and not making an arrest but having the man from New York make the arrest.

MR. FRANK: I think that might be a very valid question and having a police officer in another jurisdiction being mandated to first consult or check in with the local enforcement authority before so acting. When I say consult or check in I don't mean to go through a broad process but at least to determine a situation such as you described.

MR. DENZER: I recall the prior suggestion. Now about limiting it to cases of crimes, felonies perhaps, maybe crimes, committed in the presence of the officer under those circumstances? We don't want investigations by outsiders.

MR. FRANK: I understand. Again I say that that would be an improvement but I would like to study the consequences of the ensuing section.

CHAIRMAN BARTLETT: You can see where if the police here are trying to make a very important narcotics case --

MR. FRANK: It would be disastrous.

CHAIRMAN BARTLETT: And the deputy sheriff from Hamilton County stumbles into it and might blow your ball game for you.

MR. FRANK: Absolutely. That, however, is, I suggest, a technicality of procedure as to how the authority would be granted rather than whether authority is granted.

CHAIRMAN BARTLETT: We are going to take a good look at that question.

MR. FRANK: Under Section 70.40, which is the arrest without warrant, we again suggest that consistent with the earlier comment that this be examined for the inclusion of necessary force so that it be consistent with the existing or revised Penal Law. We favor strongly the inclusion of Section 70.70 which is very similar to the old Stop-and-Frisk Law and which it is believed among police officers has provided an added benefit in law enforcement, particularly in major metropolitan communities.

Under Article 75, the appearance ticket, we have no quarrel with the procedure but a question in reading the sections and the Section 65.40 which deals with summons. The question came up in our minds as to whether or not, unless otherwise described, a technicality could arise here where

a parking ticket would have to be personally served because despite the existence of other statutes under the Vehicle and Traffic Law the appearance ticket is very closely defined here.

MR. DENZER: We are studying that. There is something that has to be said on that subject.

MR. FRANK: I didn't want the comment to be facetious if it were already covered there.

CHAIRMAN BARTLETT: It's not.

MR. FRANK: You could have a tremendous upheaval where all parking tickets would be invalid for not having been personally served under the appearance ticket also.

CHAIRMAN BARTLETT: There are some of them that that would be a rather good idea.

MR. FRANK: I would say that among them would be counted the New York City police officer. It's probably the single greatest deterrent to a community police dialogue is the parking ticket.

Under the same section, or Article 75 of it, the appearance ticket, we fear that extremely broad powers may have been extended to a loosely defined "public servant" for the issuance of these

appearance tickets and we suggested the definition of public servant, the area of authority of that particular public servant and the offense to be covered by non-police officers requires much greater clarification.

MR. DENZER: Excuse me, Mr. Frank. Do you notice that says where specifically authorized by law?

MR. FRANK: Yes.

CHAIRMAN BARTLETT: We were thinking of the housing people.

MR. DENZER: Whether the Housing Authority or the Sanitary people.

MR. FRANK: Yes, sir.

MR. DENZER: That's a matter of a special statute, special provisions of law. We can't settle that in here. So as far as this is concerned it's not too vague. It simply says that when some other law authorizes a group of public servants to serve tickets, all right, we are not going to stand in the way of them.

MR. FRANK: Sir, wouldn't that be dependent upon restrictions that may be imposed within the

Criminal Code to prevent again, the broad designation of peace officers or special patrolmen or others in this particular vein? We merely suggest that this be examined because the phrase public servant appears several times.

CHAIRMAN BARTLETT: But the right to give a summons or appearance ticket directly relates to the problem you described in connection with the definition of 1.20.

MR. FRANK: Absolutely.

Under Section 95.40 we also suggest that further investigation be given to this section with regard to its impact on the public servant who can be dismissed now for refusal to sign a waiver of immunity but under the proposed Code would gain an automatic immunity and who despite a freedom from criminal prosecution would still be subjected to dismissal from public service as a consequence of the testimony he gave in this immunity. There may very well be an issue that is somewhat parallel to a Supreme Court case which will be heard shortly on the question of refusing to waive immunity and whether self-incrimination under immunity can

thereafter be ground for dismissal from employment.

MR. PANZARELLA: Wasn't that decided by the U. S. Supreme Court recently?

MR. FRANK: No, sir. This was a case involving a police officer in New York City.

CHAIRMAN BARTLETT: Certiorari hasn't been granted?

MR. FRANK: Certiorari has been granted.

CHAIRMAN BARTLETT: It has?

MR. PANZARELLA: I am referring to the New Jersey case where the man signed a waiver of immunity and admitted accepting a bribe and whatnot, and he was dismissed.

MR. FRANK: He was thereafter dismissed; that case has not gone up.

CHAIRMAN BARTLETT: The New Jersey case has gone up.

MR. FRANK: In the New York case, certiorari has been granted and probably will be heard this fall. The New Jersey case, combined with the New York case, suggests that this section on Grand Jury investigation meets very careful scrutiny before final draft because it could run

right down the middle of those two cases.

CHAIRMAN BARTLETT: Does your Association approve of the principle that there is an absolute obligation on the part of a public officer to testify concerning conduct in office?

MR. FRANK: I think an obligation to testify but there is serious question as to whether or not such testimony should be grounds for dismissal.

CHAIRMAN BARTLETT: What would you think about the provision that he may be dismissed upon a hearing upon the question as to whether or not his refusal to testify was a dereliction of duty justifying dismissal?

MR. FRANK: Mr. Bartlett, I find some problem with the question because under this particular proposed section there would be no ability to refuse to testify since immunity would be automatically granted. The section is so structured.

CHAIRMAN BARTLETT: This is for every witness.

MR. FRANK: This is for every witness.

MR. KNAPP: I don't see how this section raises your problem. This section merely says if you don't sign immunity, nobody asks you to sign immunity. If you testify you get immunity.

MR. FRANK: That's right; that's immunity from criminal prosecution. It is not immunity from dismissal which is the New Jersey case.

MR. DENZER: But that's not a question that the Penal Law deals with.

MR. FRANK: We are suggesting that it should in the case of the public servant since you have created the area of automatic immunity.

We believe you should also create consistent with the Supreme Court decisions an area excluding dismissal for testimony given.

MR. DENZER: We had immunity prior to 1953 and the Penal Law didn't decide that. The question of dismissal, that's not a penalty attached to a contempt proceeding or anything of that nature. It really doesn't belong in the Penal Law or the Code of Criminal Procedure, in my opinion. It belongs in some other body of law like the New York City Charter where it is now or the New York

Constitution. I don't regard that as a matter basically for the Criminal Law.

MR. FRANK: I would have to take the position of disagreement, respectful disagreement, because once you have created the category of automatic immunity -- and let us not go back to 1953.

MR. DENZER: It's the same idea.

MR. FRANK: I agree it's the same idea.

MR. DENZER: The only difference -- that is, the difference between the present system and the one proposed here -- is simply that under the present system you must claim your privilege in order to get immunity, whereas under the automatic system you don't have to.

MR. FRANK: That's right.

MR. DENZER: It's the same question whether the police officer goes in and claims his privilege or whether he refuses to sign a waiver of immunity. It's the same idea. The concept is that either one of those things, a refusal to sign a waiver or the raising of the privilege, depending upon the system that you have, results in dismissal.

MR. FRANK: Under present law it does,

that's correct.

CHAIRMAN BARTLETT: Not under the present Penal Law or the Code.

MR. FRANK: Under present other laws.

CHAIRMAN BARTLETT: Like the Constitution.

MR. FRANK: Yes, and the charter of the City of New York.

MR. DENZER: These would apply equally to these provisions. They would be superimposed on these provisions just as well.

CHAIRMAN BARTLETT: We do have your points and I think that battle is going to have to be fought in another forum because if the Supreme Court says there is anything left of our public officer testimony provisions in the State Constitution we might have to address ourselves to constitutional changes.

MR. FRANK: Of course, the question in this case that we cited earlier in which certiorari had been granted will have a definitive influence on that section of the State Constitution and the City Charter.

Section 205.20, which deals with the

procedure for persistent felony offenders, we must comment again consistent with our comment on 70.10 of the Penal Law our belief that repeater sentences should be mandatory and not discretionary. We have serious problems with the fact that the courts may be granted the discretion to give light sentences in the case of oftentime repeaters.

CHAIRMAN BARTLETT: Let me ask you this: You are aware, of course, that our persistent felony sentence requires two prior convictions instead of three under the old law but it requires that they have served sentence under both of the prior convictions. Under that statute you would see no difference in the appropriate sentence between the case of a fellow who had twice been convicted for armed robbery and sentenced and was back before the court within a period of five years, let's say, and the fellow who had two felony convictions at ages 17 and 20 and he was now 55 back before the same board for car theft?

MR. FRANK: If you refer to the present provisions, I would have to respond that the present provisions allow for automatic parole eligibility

after 30 days in an indeterminate sentence.

CHAIRMAN BARTLETT: What?

MR. FRANK: Automatic parole eligibility.

CHAIRMAN BARTLETT: Where do you get that idea?

MR. FRANK: In the present Penal Law.

CHAIRMAN BARTLETT: Oh, no, it's not true at all. For a felony? You had better read it.

MR. FRANK: Any indeterminate sentence.

MR. DENZER: Are you thinking of misdemeanor parole?

MR. FRANK: That's a fixed sentence.

It says in cases of indeterminate sentences, that eligibility for parole --

CHAIRMAN BARTLETT: It doesn't say that.

MR. FRANK: I wish I had the Penal Law with me.

MR. DENZER: Only after the minimum has been served is he eligible for parole.

CHAIRMAN BARTLETT: A sentence given to the persistent felony offender on his third, if the judge chooses to impose the persistent felony offender sentence, would not be eligible for parole

for 15 years minimum -- minimum.

MR. FRANK: Mr. Bartlett, I can only say at this moment, because I did not come prepared to address to the Penal Law, but we are submitting other memoranda to you with respect to this section.

CHAIRMAN BARTLETT: Check that out.

MR. FRANK: I think you are wrong. We really believe that there is a technical flaw in the language that would permit such a technical issue to be raised. However, it is nonetheless our position that the term for persistent offenders -- that a fixed term such as existed prior to the new Penal Law will act as a deterrent and prevent the courts from imposing too lenient sentences that impair the ability of police officers to generate respect for law and order.

CHAIRMAN BARTLETT: You know the old law resulted in inadequate sentences being imposed time and again because judges absolutely refuse to permit a felony conviction where it would result in a mandatory sentence and they ended going up to Rikers Island instead of to Sing Sing. The fact is that under this system the judge can make

a rational decision in the case and a persistent offender decision can be made and if not, he can be given the sentence for which he is convicted. We think that kind of flexibility is necessary.

MR. FRANK: We believe, Mr. Bartlett, that one of the problems that law enforcement has today comes as a consequence of too lenient sentences in the courts, too much imposition of the 'just one more chance' theory and the ability to bring both social and political pressures on a judge who has discretionary powers in these areas.

Now I agree with you on the reduction of sentence, I agree with you wholeheartedly. It is too often the practice even not in the persistent offender case just to clear a glutted calendar to permit a plea to a lesser charge in order to avoid the necessity of going through an extensive trial. That too is a problem for law enforcement because in each of these instances what is being treated with is a neighborhood hero that the police must thereafter contend with.

CHAIRMAN BARTLETT: But aren't you really addressing yourself to a different problem? Aren't

you concerned about the question of certainty of punishment rather than severity of punishment?

MR. FRANK: No, we believe that in the case of the persistent offender, and I would use a case different from yours because you spread 35 years in your example --

CHAIRMAN BARTLETT: That's what happens when you have had a mandatory rule, it has to fit everything.

MR. FRANK: I know but perhaps a revision of 70.10 of the Penal Law could provide for a structure in which the persistent offender category was thereafter utilized by the court. So that you would not span the 35 years. It's not that simple an answer, Mr. Bartlett. We really believe and would not state it with such vehemence if we did not think that the leniency, the reduction of sentences and the discretionary powers granted under various statutes are compounding the problem faced by law enforcement officers today.

MR. DENZER: This is basically a Penal Law problem because the first thing that would have to happen would be amendment of the Penal Law.

MR. FRANK: That is correct but it addresses itself to this particular section of your proposed Code because that too is an extension of the Penal Law, the procedures.

MR. DENZER: It merely implements the Penal Law.

MR. KNAPP: You are going on the very sound principle that every time you have a chance to raise the point you do.

MR. ALTMAN: I can't help but observe that political pressure was used in the prior Penal Law.

MR. FRANK: That of course is true because that is an area in law enforcement that I doubt you can have legislated out.

MR. ALTMAN: You made the observation and I am just returning it.

CHAIRMAN BARTLETT: O.K.

MR. FRANK: Under Section 355.50, in search warrants, this section I referred to earlier which authorizes the use of physical force and specifically other than deadly physical force.

CHAIRMAN BARTLETT: You want it very

clear that when deadly physical force is offered that the police officer has the right to go ahead?

MR. FRANK: Yes, sir. In such situations as the Penal Law now provides or may hereafter provide in the use of deadly physical force and just a parenthetical note, the necessity for an officer to call for reinforcements in a dangerous split-second instant.

CHAIRMAN BARTLETT: You agree in many situations it's the prudent thing to do?

MR. FRANK: If he could do it, but it does not provide for the split-second emergency under which he has no choice.

CHAIRMAN BARTLETT: Right.

MR. FRANK: Under Article 370, covering eavesdropping warrants, we again respectfully suggest that the limitations on application for eavesdropping warrants are much too restricted.

CHAIRMAN BARTLETT: Where would you draw the line, Mr. Frank?

MR. FRANK: We would certainly include the Police Department when the Police Commissioner himself, a Deputy Police Commission, or the Chief

Inspector, or those equivalent in other departments through the State make such application to the court.

CHAIRMAN BARTLETT: You don't think we ought to go back to the old thing above the grade of sergeant?

MR. FRANK: No, sir. We believe there should be limitations but that you must not exclude the Police Department's ability to apply, or the Police Department's ability to utilize the same emergency procedures that are provided in Section 370.20 where if they have reasonable cause to believe that a Class A, B or C has been, is being, or is about to be committed they can go forward with the eavesdropping.

CHAIRMAN BARTLETT: Of course the so-called emergency tap which is provided for in this is deemed highly questionable on a constitutional basis by a lot of people.

MR. FRANK: Yes.

CHAIRMAN BARTLETT: Maybe by the Supreme Court.

MR. FRANK: What we are saying here is

that if in the Commission's opinion, 370.20 is valid that it be expanded to include certain police officials.

CHAIRMAN BARTLETT: O.K., drastically restricted but not eliminating the Police Department.

MR. KNAPP: Do you have any form of statute in mind that would differentiate the New York City Police Department, which is one type of fish, between everything that goes on throughout all the State?

MR. FRANK: I think, sir, that you would have to categorize the authorization to the head of the department or his deputy head and certainly this would be applicable to the sheriff of a county and it would be equally applicable, I would think, to the chief of a village or town.

CHAIRMAN BARTLETT: The problem that when we do this is we have to make rules for the whole State.

MR. FRANK: Yes, sir.

CHAIRMAN BARTLETT: I would much rather have the desk sergeant in the New York City

Department make the decision than the Chief of Police in many towns of my character. They do not have the training that a police sergeant in New York City has.

MR. FRANK: This of course is difficult but since you have restricted only to the District Attorney or the Attorney General in 370 the ability to act must be broadened to include the police function and it becomes the responsibility of this Commission to find a definition that would make that possible.

MR. KNAPP: I thought you might help us.

MR. FRANK: We will be glad to assist and I will certainly take your question under advisement and come up with a response.

Gentlemen, you have been very patient. In conclusion, we would like to state that we believe that a great deal of good has been proposed in this revision of the Code. We urgently request very serious study of the objections that have been stated here to avoid placing further impediments in the path of law enforcement officers. I say to avoid, in many instances we wholeheartedly

agree that it is not a deliberate attempt to impede but by the structure of language it may impede nonetheless through interpretation. It is essential in our estimate that within the framework of civil liberties, we do not bend so far as to render protection for all the people virtually impossible. Constant suppression of police ability to act gives aid and encouragement to those who would flout the law and under certain conditions currently extant nothing could be more contrary to the public interest.

We thank you.

CHAIRMAN BARTLETT: Thank you.

MR. ALTMAN: I would like to return to the police officer question very briefly, Mr. Frank. I don't think I am any different from most Assemblymen with pressures. The police officer, in my opinion, the present statute has gone way afield.

MR. FRANK: Yes, sir.

MR. ALTMAN: I'm not being critical of your Association but I think that if your Association were more active at that level at the time legislation is proposed as a countermeasure you

perhaps would get more Assemblymen to be less flexible in their determination to have some rigid requirements which I think you would approve of, your organization would approve of.

MR. FRANK: Sir, may I comment on that?

MR. ALTMAN: Yes, please.

MR. FRANK: We have opposed every bill --

MR. ALTMAN: Yes, you have.

MR. FRANK: -- every bill encompassing every authority for police officers.

MR. ALTMAN: But there are two ways of doing it. When you send a memorandum and let it go at that our approach is that you are doing it as a pro forma approach.

MR. FRANK: No, sir. In the last three years I respectfully call your attention to the fact that not a single new piece of peace officer legislation has been adopted. Others have been renewed but no new ones have been adopted because we have done more than send a memorandum. We have opposed strongly the expansion in these areas and feel that the Commission has done an admirable job in delineating exactly the point of view that we

tried to reach in the Legislature.

CHAIRMAN BARTLETT: Keep leaning on that.

MR. ALTMAN: Especially this year.

CHAIRMAN BARTLETT: Thank you, Mr. Frank.

MR. FRANK: Thank you, gentlemen.

CHAIRMAN BARTLETT: We will now hear from the New York City Legal Aid Society, Mr. Edward Carr and Anthony F. Marra. I assume that's the order in which you wanted to be heard, Mr. Carr?

STATEMENT OF EDWARD Q. CARR, JR.
AND ANTHONY F. MARRA, THE LEGAL
AID SOCIETY, NEW YORK, NEW YORK

MR. CARR: Yes.

First of all, let me say that these suggestions and comments on the Code represent results of a study by virtually the entire staff of the Society working in the criminal courts in New York City and the number of suggestions we have to make does not reflect on our part at all any derogation of the fine job that's been done by the Commission and the staff in preparing this draft.

The following comments and suggestions on the proposed revision of New York's Code of Criminal Procedure are based on the experience of

the Legal Aid staff in the defense of criminal cases throughout New York City and in the light of our study of the draft law published last year by the Commission on Revision of the Penal Law and Criminal Code.

Our first comment is that the Commission and its staff have done a generally fine job in the tremendous task of revising our rules of criminal procedure. In some cases our recommendations are put in terms of general policy without specific suggestions on statutory language. In those cases we will get to the Commission within the next two weeks our suggestions for the revised provisions.

Article 15.

We do not see any necessity for the tolling of periods of limitation during a defendant's absence from the State or while his whereabouts are unknown (Section 15.10.4(a)). The provision might work real hardship on a potential defendant who is incarcerated in another state and whose defense to a charge of crime in New York may be severely hampered by the long potential delay in initiating the prosecution in

New York. We recommend the elimination of this provision.

Article 20.

Section 20.20.2(a) appears to us to express a good principle on the prosecution of a second offense "substantially the same in fact" as a charge previously prosecuted, especially in the light of the staff comment upon it. We would expect the same principle to apply in the fairly frequent cases where federal prosecutions involve substantially the same facts as a possible charge under New York law.

For instance, a federal prosecution for the interstate transportation of a stolen automobile by the alleged thief or under the tax provisions of the federal narcotics laws should preclude subsequent New York prosecutions for larceny of the auto or possession or sale of the narcotics. The comments and legislative history should make this clear.

To promote uniformity on the subject we recommend that Section 20.30.1(b) should follow the federal rule that a previous prosecution will

operate as a bar when the previous action had proceeded to the trial stage and the jury was sworn or, in the case of a non-jury trial, a witness was sworn.

Article 30.

We recommend that Section 30.20.3 clearly require that the corroborative evidence in a prosecution based on the unsworn testimony of a child less than twelve years old must be evidence other than the testimony of another child or children under twelve.

We believe that evidence of a prior inconsistent statement by a party's own witness who has given unfavorable testimony on trial (Section 30.50.1) should be admissible only upon a showing to the court that the unfavorable testimony was a surprise to that party in the light of an interview with the witness shortly before trial.

We believe that the Code should bar any proof of, or reference to, a previous conviction or wrongful conduct of a defendant or other witness (Section 30.60.1) unless the court rules that such proof or reference is relevant to the issue of his

credibility. We suggest that the Code follow on this question the principle laid down by the Court of Appeals for the District of Columbia in *Luck v. United States*, 348 F2d 763.

With respect to the testimony of an accomplice (Section 30.70) we believe that the law should require both corroboration to support a conviction, as in the present CCP Section 399, and the caution by the court as provided in Section 30.70.1.

With respect to the statement of a defendant we recommend that the terms "improper" and "undue" in Subdivision (c) of Section 30.80.2 and the term "falsely" in Subdivision (e) should be stricken as unduly restrictive of the safeguards against the use of the wrongfully obtained statements of an accused.

Articles 50, 85 and 90.

We have a number of related recommendations affecting Articles 50, 85 and 90 of the proposed Criminal Procedure Law and concerning the sufficiency of the instrument initiating a prosecution and the time within which a defendant

in detention is entitled to a hearing or trial.

First, an information or felony complaint should be subscribed and sworn to by a complainant having personal knowledge of facts supporting the offense charged. If it is necessary to provide for cases in which such a person is temporarily not available, a provision similar to Section 55 of the New York City Criminal Courts Act (arraignment on a short affidavit) might be included.

Second, a prosecutor's information for the prosecution of a charge of misdemeanor or violation should be allowed only at the direction of a Grand Jury or a local criminal court. A prosecutor's information should be required to be filed prior to the trial of any case of misdemeanor or violation to protect against the harm often resulting from the inclusion of unnecessary and prejudicial matter in the original complaint in an action.

Third, the Law should provide that a defendant may not be held in detention for more than ten days without the absolute assurance of a hearing and determination by the court that

there is a legally sufficient case against him, either by way of a trial on a charge of misdemeanor or violation or a preliminary hearing upon a felony complaint. The rules need not preclude further prosecution of the charge in a case where that requirement could not be met, but should assure the defendant's release from detention.

Our experience has convinced us that only such a firm rule will control the present practice of detaining many defendants for unduly long periods pending a trial or hearing. The writ of habeas corpus has proven largely ineffective as a remedy for a defendant in such a situation, as too often the determination upon the writ itself is delayed or postponed.

Article 70.

We recommend the amendment of the Stop-and-Frisk statute to incorporate the policy suggested by Judge Van Voorhis in *People v. Sibron*, 18 NY2d at p603, precluding the use in evidence of any article seized in a search under this statute except a weapon or instrument which was the object of the search.

Article 80.

There should be included in this article relating to fingerprints and photographs of a defendant a provision similar to the provision in the present Code Section 552-a for the delivery to a defendant of all copies of fingerprints and photographs upon the dismissal or acquittal of a charge.

The law should also provide for the return of all such prints and photographs that might have been transmitted to the New York State Identification and Intelligence System and the Department of Justice.

Article 85.

Section 85.05.2(b) should be amended to assure the right of a defendant in custody to communicate personally with the persons and for the purposes mentioned in the statute.

Section 85.40 should be amended to leave in the discretion of the court the question whether the procedural rules relating to a motion to dismiss an indictment, especially the requirement of notice in writing, should obtain on a motion to

dismiss an information or a prosecutor's information. There are many cases of misdemeanor or violation where such formalities will be unnecessary and unduly time consuming.

A provision should be added to Section 85.50 allowing a defendant to request a Grand Jury to consider a charge of misdemeanor pending against him, with a provision as in Section 85.50.2, concerning a prosecutor's presentation of a misdemeanor charge to a Grand Jury, to allow time for action on such a request.

Article 90.

When a defendant has waived a hearing upon a felony complaint and the court determines to hold a hearing nonetheless under Section 90.30.2, the defendant should be given 48 hours notice of the hearing.

Subdivision 3 of Section 90.40 should be changed to provide simply that after inquiry, and upon consent of the District Attorney if a hearing has not been held, the court may reduce a felony charge to a charge of a lesser offense. The additional requirements included in Subdivision 3

seem to us unnecessarily restrictive.

Section 90.50.8 should be amended to require that a court exclude the public from a hearing on a felony complaint on the request of the defendant.

Article 110.

We recommend the elimination of Section 110.30.6 so as to allow appeal from the denial of a motion to dismiss an indictment on the ground of insufficiency of the Grand Jury evidence. Review of such rulings is essential to the integrity of the indictment process.

Article 140.

The actions of the trial court authorized by Section 104.35.2 in carrying forward a trial after discovery by the court of a juror's unfitness or misconduct should be permissible only with the consent of the defendant.

Article 155.

Section 155.10.5 should be amended to require the court to rule prior to the summations upon any request to charge made prior to summation.

Article 160.

Section 160.20.2 should require that any list of offenses given by the court to the jury should be in a form approved by the defendant.

Article 170.

The term "probability" in Section 170.30.3 should be changed to "reasonable possibility."

Article 180.

Section 180.20 should require that a verdict of conviction by a three-judge bench be unanimous. Provision for a trial before a bench of three judges, rather than a jury, is a concession to the exigencies of life in New York City. It seems proper however to require the same unanimity of the bench that is required for a jury verdict of conviction.

Article 200.

Subdivisions (c) and (d) of Section 200.20 should be eliminated. There are many minor cases in which a presentence report should not be mandatory.

Section 200.50 should require that a presentence report be given to the attorney for a defendant, granting the court power in its

discretion to delete matter identifying any of the sources of information in the report. The latter proviso should assure against the potential difficulties urged as ground for the confidentiality of presentence reports. We have found that presentence reports are sometimes grossly unfair to defendants and leave the defense unable to controvert prejudicial material.

Article 205.

Section 205.10.3 should require a record of proceedings in a presentence conference.

Section 205.20 should include provision for the resentencing of all persons presently serving fourth-offender sentences under the Baumes Law. This section should also require a hearing in every case of a proposed sentence as a persistent felony offender, and Subdivision 4 should be eliminated.

Article 225.

Section 225.10.1(c) should be amended to add following the term "court" the term "or any official associated with the prosecution."

In Sections 225.10.1(g) and 5 the term "probability" should be replaced by "reasonable

possibility."

Subdivision (a) should be eliminated from Section 225.10.3.

Section 225.30.4 should be amended to provide that denial of a motion made by a defendant acting on his own behalf for failure to conform with the pleading requirements of the statute should be without prejudice to resubmission of the motion in a proper form.

Article 240.

In line with the practice in most other American jurisdictions Section 240.10 should be amended to provide that the conduct of the court or prosecutor on trial may present a question of law for review by the Court of Appeals, although no protest was made at the trial, if the conduct constitutes "plain error". With the discretionary jurisdiction of the Court of Appeal in criminal cases, such a provision would not increase the burdens of the court, but would allow review of the very occasional horrendous cases.

Article 350.

An application to examine a witness

conditionally should be made upon at least 48 hours notice to the other party so as to allow time to prepare for the examination.

Article 365.

Section 365.15.1 is probably unconstitutionally, and in any event undesirably broad in providing for the search of "any person" in the premises to be searched. The statute might allow for direction to search designated persons, whose search then would be justified in the application for the warrant.

Article 390.

We read Section 390.50.2 as allowing the continuance of the same cash bail for a defendant released on bail at the time of his indictment. This will be a welcome change from the present practice in such cases to require a new deposit of cash bail with the Supreme Court, which works a hardship on many Legal Aid clients, who cannot for some time obtain the release of their original bail money.

Section 390.60 (and the related Section 235.40) should be amended to follow the federal

practice on intermediate appeals in allowing the trial judge to rule on the question of bail pending appeal informally and without the requirement of notice.

Article 400.

Section 400.05.2(b) should be amended to bar eligibility for youthful offender treatment only when a youth has previously been convicted of a felony.

Section 400.20 should be amended to prevent the practice followed by some courts in requiring a guilty plea to the criminal charge before allowing consideration for youthful offender treatment.

Section 400.35 should be amended to give the respondent on a youthful offender information the same right to a jury trial which he would have upon an indictment. The term "where appropriate" should be stricken from the second sentence of this section.

Section 400.60 should provide that proceedings upon a youthful offender information may be conducted in private only with the consent of

the respondent.

To save time I will not refer in my remarks to every one of our suggestions because I don't think it's necessary in every case but that shouldn't be taken to mean an abandonment of any written suggestion we made.

First of all, very briefly with respect to the suggestion on Section 15.10.4(a) proposing for the tolling during a defendant's absence from the State or while his whereabouts are unknown. There is one type of case that comes up in our experience fairly frequently in which that provision we think would work a real hardship and we don't see any need for that tolling. I think it may be a provision that kind of related to the notion in a civil action you have to have personal jurisdiction over somebody but you can start your criminal prosecution, speedy trial provisions will come into effect, and then the defendant, knowing of the case, can invoke his rights to be brought to the State and assert his defense or prepare his defense. But if he is not, you could have some real hardship cases.

CHAIRMAN BARTLETT: I think you have more than one sympathetic ear on your point there.

MR. CARR: Good.

Our second comment is with respect to Section 20.20.2(a) and it probably doesn't require any change in the draft. We would just like to make sure that some punctilious person doesn't say in the future that the purpose of the Dyer Act is substantially different than the purposes of grand larceny provisions relating to stealing an automobile or the purpose of the tax count in the federal narcotics prosecution is substantially different than the purpose of the New York City law against the unlawful possession of narcotics. I don't think those laws are substantially different but for the purpose of federal jurisdiction they technically seem to be different to the inexperienced eye.

MR. DENZER: I don't know how you can be any more precise in this area. It's difficult.

MR. CARR: You have a very good example in your comments now. If the legislative history could include one or two of the examples that we

cited, I think the matter would be clear enough to even the most punctilious of the statutory readers.

When we come to the first suggestion we have under Article 30 with respect to the corroboration required in a prosecution based on the unsworn testimony of a child less than twelve years old, I would read the statute so that it would not permit that corroboration to come from the testimony of another child or children under twelve years old. There was a question in the minds of some of us.

MR. KNAPP: Yesterday it was suggested that we change the child to children.

MR. CARR: Yes. Then with respect to the use in evidence of a prior inconsistent statement made by a party's witness who on trial has given testimony unfavorable to that party, we think that that should be admissible only upon a showing to the court that the unfavorable testimony was not a surprise to the party in the light of the witness shortly before trial.

MR. DENZER: Obviously it's going to be

a surprise to him or he wouldn't have questioned him.

MR. CARR: Well, that should be, I mean, if everybody is behaving quite properly but surprise comes up in trials from time to time and we think the court should have a chance.

MR. DENZER: The point here is that this distinguishes between the witness who is negative and says --

MR. KNAPP: The point is the District Attorney knows that that fellow is going to say that that fellow was not near.

MR. CARR: He puts him on the stand not for the purposes of credibility but for his prior statement.

MR. DENZER: Is the District Attorney ahead of the game?

MR. KNAPP: Sure he is.

MR. DENZER: He has elicited a damaging statement.

MR. CARR: That prior statement he may feel is needed. We are in agreement as to how it should be conducted and I think it would be helpful

to have the court rule on that.

MR. KNAPP: In other words, you want it committed to a preliminary hearing on whether the District Attorney was surprised?

MR. CARR: Right. You don't want a prosecutor to come in, not that he would, but he has been told by somebody, some detective or somebody, that the fellow who testified before the Grand Jury or gave a statement is going to recant and he says, "Well, I just won't talk to him. I will just call him." I don't think that is a proper way to prepare for trial but maybe we should assure --

MR. KNAPP: You are not suggesting that it has ever been done in New York County?

MR. CARR: No, we are not suggesting that it has been done.

MR. KNAPP: It might be.

MR. CARR: Actually I don't think the court would have occasion to make such ruling. The statute will assure that the process we have in mind is desirable.

Our next suggestion would extend somewhat

the provisions of Section 30.60.1, indeed it would extend them substantially because we suggest that the Code should bar any proof or any reference to a previous conviction or wrongful conduct of a defendant or other witness unless the court rules that such proof or reference is relevant to the issue of his credibility.

MR. DENZER: Which section are you speaking of now?

MR. CARR: 30.60.1.

MR. ALTMAN: Give us an example of that, Mr. Carr. A man is being tried for robbery. The fact that he has a prior conviction for robbery, would you say that that would damage his credibility?

MR. CARR: No. A court might, I suppose, but I would not.

MR. ALTMAN: What prior crime would in your opinion?

MR. CARR: I think prior convictions for crimes that reflect on his truth telling -- perjury, larceny - by trick or something like that.

MR. ALTMAN: Perjury and related crimes would actually be the only kind of crime that could

be brought out.

MR. CARR: No, I think a fellow who had a string of convictions for confidence game activities could expect that they might be referred to.

MR. PANZARELLA: So, Mr. Carr, a pure and simple burglar that has 10 or 15 convictions of simple burglary or because along the line he hasn't committed perjury or larceny of trick or device or deceit, you can't use the, say, 15 prior convictions for burglary?

MR. CARR: I don't think you are using them on the issue of credibility. Actually our suggestion comes out of an experience that sees such a man, 10 or 15 convictions is a lot of convictions. Let's take a fellow with two or three convictions and maybe some years ago, as Mr. Bartlett did. Very often that fellow is in an agonizing position when he has a defense to a pending charge of burglary.

MR. KNAPP: The reason he was arrested was his previous convictions rather than any evidence they have on this one.

MR. CARR: Could have been and might have

been in burglary cases, especially.

MR. DENZER: Let me call your attention to the fact that this section does not purport to set out the scope of cross examination in that nature.

MR. CARR: No.

MR. DENZER: It simply says in effect that when there has been a denial, presumably on cross examination, of a previous conviction then you can introduce the evidence of that conviction. It doesn't purport to say when you can ask him, what you can ask him about. It simply assumes a proper cross examination and a denial of a conviction and then says it can be repudiated by independent evidence. What we are requesting here is another provision.

MR. CARR: An explanation of this provision.

MR. DENZER: Delineating the scope of cross examination of this nature.

MR. CARR: Yes.

MR. KNAPP: You are not suggesting that the man be allowed to lie about the previous record?

This section only deals with it after he has lied about it.

MR. ALTMAN: Well, of course, he won't have an opportunity to lie if he is not asked.

MR. CARR: The use of the cross examination were limited and it were a proper question about a prior conviction, I think we would agree. If he lied about it, then he could introduce proof.

MR. KNAPP: So you are addressing yourself to a different section, or suggesting that we create a different section.

MR. DENZER: If the cross examination has been improper, the cross examination in which he lied about the prior conviction is improper --

MR. CARR: Yes. The major import of our suggestion has to do with cross examination and the very situation that was raised by the Commission's member, although it's pretty rare that you have a fellow with 15 prior convictions because he is usually locked up somewhere.

Then with respect to the testimony of an accomplice, we think the Commission should retain the procedure.

Then we have several drafting suggestions with respect to 30.80.2.

MR. ALTMAN: Excuse me, your agency does practice before the Federal Bar and we are trying in effect under 30.78 to conform to the federal practice. Have you found that the federal practice has hurt your defense?

MR. CARR: We don't like the federal rule.

MR. ALTMAN: Mr. Marra, have you found that it has hurt you?

MR. MARRA: It has.

MR. KNAPP: Obviously it's resulted in convictions.

MR. MARRA: Yes.

MR. KNAPP: In unjust convictions?

MR. MARRA: I think so when they have these paid undercover agents who are not narcotics agents but are drug addicts who are on the payroll. They may be accomplices and that testimony alone and the defendant is convicted.

MR. KNAPP: Do you think the testimony is unreliable?

MR. MARRA: I think so.

MR. CARR: In 30.80.2(c), and (e), we suggest that several terms be stricken. I think the statute really already carries in 30.80.2(c) sufficiently the notation that it must have been conduct that would improperly undermine a defendant's ability so that I would suggest to add improper conduct or undue pressure, it seems to us, makes the thing too stringent a test.

Then I think in (e) a false statement of fact, we think a false statement of fact that the defendant would simply incriminate himself is all that we should say.

MR. DENZER: You mean you don't like that?

MR. CARR: No.

MR. DENZER: Should every statement made by a police officer which might tend to make the defendant incriminate himself, should that be excluded?

MR. CARR: False statement.

MR. DENZER: Suppose a police officer tells the defendant, "Your mother is dying and the last thing she said was 'I hope to God my son tells the truth'"? Actually we find that the mother is

not dying and she didn't say that. So the defendant makes a confession. Would you outlaw that confession?

MR. CARR: Yes.

MR. DENZER: Why?

MR. CARR: Well, we just don't think that false statements should be used in an interrogation of this kind.

MR. DENZER: Remember, this is not a question of physical force or anything like that. Granted, it may be a little tricky but isn't the test here whether there is some risk that the statement made will tend to induce a false confession?

MR. CARR: Of course you would want to avoid that but I suppose there you might be worried about the statement that somebody else is going to hang if you don't 'fess up to this minor offense. Certainly you don't want conduct which would induce false incrimination but I think that the standard of interrogation should be, should preclude, false statements such as the one you gave.

MR. KNAPP: You mean suggesting, the more

common kind, the suggestion that somebody else told the story?

MR. CARR: Yes.

MR. KNAPP: That would seem to me to create no great risk of false incrimination but would create the risk of producing incrimination.

MR. DENZER: At any rate, that's the purpose of the word false in there.

MR. CARR: We understand that.

Then I come to a number of suggestions that we have with respect to the provisions of Article 50. They also bear on the provisions of Article 85 and 90. We have not made a series of specific suggestions but we have two or three general policy suggestions which in turn involve amendment of a number of sections of the Act and I think we make these as strongly as any suggestion we make because they relate to the situation that we see in the courts and in this city throughout the city every day of the week and that is a man being held far too long to answer charges without a hearing on the sufficiency of the charges against him.

MR. DENZER: Have you read the section, Mr. Carr, which requires that upon application of the defendant held for - who is charged with a felony in a lower court and who has been in jail for 48 hours without any hearing having been commenced, he must be released on his own recognizance?

MR. CARR: Where is that section?

MR. DENZER: That's 90.70. It says in effect if he is in there 48 hours in jail and no hearing has been commenced on the felony complaint he must be ROR'd unless it's he himself who requests it or it's with his consent and so on, good cause is shown why not. That is meant as a safeguard, at least in felony cases.

MR. CARR: Yes, we had read that. Of course, 90.70(c) would permit something to happen which does often happen on felony and misdemeanor charges today. People show good cause where the felony complaint could not be disposed of.

MR. DENZER: That's intended to jack that up as much as possible if you read the last sentence. "Such good cause must consist of some compelling fact or circumstance which precluded disposition

of the felony complaint within the prescribed period or rendered such action against the interest of justice."

MR. CARR: If it were in effect today how would this affect some of our clients simply because the judges cannot get to the calendar for hearing?

MR. DENZER: That wouldn't be good cause. Remember this doesn't involve the dismissal of the charge.

MR. CARR: No, no, we are not suggesting that the charge should be dismissed either. We took a longer period than 48 hours. Frankly, we were covering the misdemeanor situation too.

MR. DENZER: That's a question of speedy trial.

MR. CARR: Yes.

MR. DENZER: I don't think we can do anything with that very constructively. Once he is charged, then the question of when he is tried on it is a speedy trial question but this is prior to that. There is no indictment but he is simply arraigned on a felony complaint and there we say

he has to be ROR'd in 48 hours.

MR. CARR: Misdemeanor violation.

MR. DENZER: Are you going to set a definite time in which the trial has to be commenced after the filing of the accusatory instrument or the information? If you are, what is it going to be? All right, let's say a week just to take an arbitrary figure; that might be all right for some courts. It might be all right for justice courts upstate, I don't know. Would the same rules apply or should they apply to the New York City Criminal Court?

MR. CARR: It's not speedy trial, necessarily, it's the question of detention. It would be a limit on the amount of time the defendant could be held pending trial on a misdemeanor information.

MR. DENZER: I see.

MR. CARR: Actually there are many of us who feel that 10 days should be less time but this is the recommendation that we settled on to raise the question but that there should be some inflexible rules with respect to detention of defendants in this situation that cannot be obviated,

is the thing we say to you most strongly.

MR. ALTMAN: It had been suggested yesterday, talking about the hearing, that there should be mandatory hearings in felony cases. Does your organization believe in that?

MR. KNAPP: In other words, they don't like skipping felony court and going directly to Grand Jury.

MR. CARR: There are many, many cases in which a hearing is highly desirable. There are some cases in which there are difficulties raised by giving the defendant a hearing and I don't think an arbitrary rule -- I don't think we would recommend an arbitrary rule.

MR. MARRA: I agree with you.

MR. CARR: In some cases where the prosecutor conducted in getting the case on, really, that's in everybody's best interest, including the defendant's.

MR. KNAPP: Well, I suppose even the people that were arguing yesterday weren't suggesting the defendant couldn't wait.

MR. CARR: What?

MR. KNAPP: People who were urging this yesterday --

MR. CARR: You can't expect the defendant to waive it in those cases even though it may be in his interest.

In connection with this we want to emphasize in case anybody should think that a writ of habeas corpus is available for anyone being held, it's not. It may bring on a hearing sometimes but it rarely will affect the progress of the case very much at all.

Coming to Article 70 and Section 70.70 we recommend there the amendment of the Stop-and-Frisk Law.

MR. KNAPP: I have the greatest respect for Judge Van Voorhis but that seems to me like an asinine suggestion. What sense does it make?

MR. CARR: I think you proceed from the notion that this is an extension of police power with respect to an individual. It's justified on a narrow ground -- that is, the safety of the policeman.

MR. KNAPP: If you are doing a justified

act and you get evidence that this guy is the fellow that shot Kennedy, why the devil shouldn't you be able to use it?

MR. CARR: Well, the trouble is then the way the law is written that the justified act may be undertaken for a justified purpose. The frisk may be just a general search and it is in many cases. We are suggesting, Judge Van Voorhis suggested, that the statute be narrowly drawn in its scope to suit the purpose which we don't quarrel with, that the police should have the right to protect themselves.

MR. KNAPP: I see. It's designed to prevent subterfuge.

MR. CARR: Yes, and we think necessary for that reason. Maybe I have increased your respect for Judge Van Voorhis.

MR. KNAPP: You couldn't do that.

MR. CARR: Then in Article 80 with respect to fingerprints and photographs, we touch upon something that comes up later in the Code, again in the youthful offender provision, and that's what happens after a defendant has been acquitted and the charges have been

dismissed. We think there is a very healthy provision in the present Code and the fingerprints and photographs should be returned to him. However, we think it should be extended so that the State returns to him everything in its possession -- that is, fingerprints in Albany as well as fingerprints in New York City and Buffalo.

MR. BENTLEY: How are we going to build up our record of fingerprints?

MR. CARR: Well, I think if you recognize that something like this should be done after an acquittal or dismissal of the charges, you are saying that the record of this case is not necessary for building up our records.

MR. BENTLEY: Of course you know voluntary prints are filed too.

MR. CARR: I never met a defendant who would voluntarily --

MR. BENTLEY: Civilian people.

MR. CARR: I realize that. I don't necessarily quarrel with that.

Let me say here that the practical significance of this is not the whole story.

This symbolic business of delivering back to a man what you have taken and, remember, some of these, particularly in misdemeanor cases, are innocent cases charged by neighbors with this and that, and they are brought in and fingerprinted. To give it back to him and say, "All right, we have no record of this in the Police Department and you have been acquitted." It's very, very important; that really is almost as important as the practical effect.

MR. KNAPP: As a practical matter we can't get it back from Washington.

MR. CARR: There we suggest that we be given the state right to request them back. What we would be able to get with that I don't know. Building on this step and the New York Code of Criminal Procedure, we would obtain federal procedure. The federal government itself, many federal areas have shown a concern for this general problem of the fellow who has been acquitted and what do we do to make sure that he feels that he has been vindicated.

MR. DENZER: I think you agree that the

practical value of it is not very great, but it has, as you say, its symbolic value and emotional value.

MR. CARR: That's right, very important symbolic value.

MR. KNAPP: I agree with you.

MR. CARR: Then in Article 85 we make three suggestions and I will refer only to one -- that is, the question whether the procedural rules relating to a motion to dismiss an indictment, especially the requirement of notice in writing, should obtain on a motion to dismiss an information or a prosecutor's information. We think that should be left to the discretion of the court rather than required as it is under 85.40 as we read it because there are just so many cases where you should have to follow the more formal and drawn out procedures, especially written papers. Remember, there are disposed of in the New York courts hundreds of thousands literally of misdemeanor violation cases.

MR. DENZER: You think this procedure is too complicated for the lower courts here?

MR. CARR: The notice and the requirement of written papers for motion to dismiss an information, it would just add unnecessary and time-consuming work for all hands. But the court could require it. I mean, you might have an information that raises all the questions that really an indictment raises and you might want to have notice and so forth.

MR. DENZER: A good point.

MR. CARR: Article 90, when after a waiver of a preliminary hearing the court determines to hold a hearing, we think that the defendant should have at least 48 hours' notice because as a practical matter in many cases that's part of his trial and he should have time to prepare for it.

MR. KNAPP: Well, you wouldn't object to a provision waiving such notice where you have an emergency case like a witness is dying or something of that nature in the discretion of the court. The problem arises sometimes that the defendant waives and you have a witness on the point of death and you want to get his testimony. Obviously, you

shouldn't be able to do it --

MR. CARR: There isn't any requirement of notice in here at all now. You could bring him into court --

MR. KNAPP: I'm agreeing that there should be notice.

MR. CARR: I see the difficulty. I wouldn't want to have a 48-hour requirement and have the witness die while you were waiting for it. Still there should be some . . .

In connection with the statute governing the reduction of charges from the felony to a lesser offense, we think that the language of Section 33 Subdivision 7 of the New York City Criminal Courts Act at present is better than the language you have in this paragraph 3, frankly, because it gives the court more discretion and is less fixed in the requirements as to findings that have to be made.

Section 90.50.8 we think that the defendant should have the right to cause the public to be excluded rather than simply the right to request the court to do so. Yes, I think that provision

for a public trial or public hearing is really for the defendant's benefit primarily and he, in some cases, he is the one that has the greatest interest and I think we should recognize that.

MR. ALTMAN: So your theory is that since it's for his benefit that he should waive the public trial?

MR. CARR: That's right. There may be some cases where it's highly desirable for the defendant to do that and the court decides out of some reason that they wouldn't do it.

In Article 110 --

MR. ALTMAN: You are not going to be very popular with the newspapers.

MR. CARR: Well, maybe we can find some other way.

We think that the denial of a motion to dismiss on the grounds of insufficiency of the evidence before the Grand Jury should be appealable. We don't think that the situation described in the staff's comment arises sufficiently often to outweigh the desirability of having a real check on the integrity of the Grand Jury process.

MR. PANZARELLA: What are you going to go up on if you can't see the Grand Jury minutes?

MR. CARR: It's appealable today.

MR. KNAPP: What's the practical value of that? Assume that a defendant, the Grand Jury minutes were inadequate, let's assume that, because the District Attorney was a dope or for any other reason. Then there was a trial and it was proved beyond all doubt that the defendant was guilty, enough evidence. What is the practical justification for setting that judgment aside?

MR. CARR: Well, it has only to do with this safeguard which the motion is in itself.

MR. KNAPP: On the motion is a different thing.

MR. CARR: Here again, our experience on the federal side where the Grand Jury --

MR. KNAPP: But answer my question. What is the practical justification for setting that judgment aside?

MR. CARR: Because it was an improper indictment.

MR. KNAPP: All right, there was an

improper indictment. What is the practical injury done to that defendant? The District Attorney forgot to ask a proper question of the Grand Jury.

MR. CARR: Well, that could be a reason for it.

MR. KNAPP: All right. Supposing he forgot to call a witness. As a practical matter, how has that defendant been injured? Was he really injured?

MR. CARR: I don't say the defendant is injured.

MR. KNAPP: Who is?

MR. CARR: I say the process --

CHAIRMAN BARTLETT: You are concerned about maintaining the integrity of the system?

MR. CARR: Yes.

MR. DENZER: Remember that the Grand Jury is supposed to be a place where frivolous charges are sifted out before they are brought to trial; that's the foundation for it. Suppose that you don't have a prima facie case before the Grand Jury but you have a great deal of evidence and at the trial you have more evidence or the missing

link? Looking back at the purpose of the Grand Jury that couldn't have been a frivolous charge.

MR. CARR: I would assume that in 999 out of 1,000 such cases the judge would dismiss, reindict it, and the thing would go forward. Why do you have the motion to dismiss for insufficiency?

MR. KNAPP: Because pending the trial he shouldn't be in jail and if the Grand Jury minutes are insufficient, he should be on the street. The judge has made the mistake and he has been denied that. Had the judge acted properly, he would have been rearrested. You can't correct that mistake. What is the rationality, assuming he is a murderer, or car thief, what is the rationality at this point in putting the defendant to the expense and the people to the expense and in the Reles case letting a vicious murderer go free because the witness has died in the meantime? What is the sense of it?

MR. CARR: Well, the sense of the appeal, it seems to me, is with the denying of the motion.

MR. KNAPP: The sense of the motion makes a great deal of sense.

MR. CARR: Judges tend perhaps to rule

upon motions.

MR. KNAPP: You are assuming that judges are not conscientious --

MR. CARR: I am assuming that most such motions will be granted.

CHAIRMAN BARTLETT: Presumably the same point you make about appealability.

MR. KNAPP: You are not asking for an interlocutory appeal?

MR. CARR: If the Commission would consider an interlocutory appeal in a criminal matter of this kind --

MR. DENZER: We are against interlocutory appeals.

MR. CARR: Here there might be a reason for it. If you have an appeal why do you have an Appellate system anyway?

MR. KNAPP: To prevent injustice.

MR. CARR: Also to help insure the propriety of your trial court rules and decisions.

MR. KNAPP: You have an Appellate system to see that the wrong guy doesn't go to jail.

MR. CARR: That's the primary purpose

but there is another purpose.

CHAIRMAN BARTLETT: O.K., we have your point on 110.

MR. CARR: I think I will pass now to our discussion on Article 180 relating to 180.20 and there we think that a verdict of conviction should be unanimous. The three-judge bench in New York City is designed really as a convenience for the courts and the people and an alternative to jury trial and we think that the same rule should apply.

CHAIRMAN BARTLETT: I am inclined personally to be sympathetic to the principle that the same rule ought to apply but let me try it at a little different point. Recently there has been increased interest at least in the British non-unanimous verdict rule for other than capital cases. What is The Legal Aid Society's view on that?

MR. CARR: We would oppose that.

MR. MARRA: Certainly.

CHAIRMAN BARLETT: I can see that leading you to your proposition and I can understand it

but isn't it true that frequently retrials are required because of one holdout in one direction or another, either acquittal or conviction?

Aren't we getting --

MR. CARR: How frequent would you say that is?

MR. MARRA: They don't have them too frequently. In many instances, the District Attorney realizes he hasn't got a good case and if it's ten to two, he dismisses the indictment.

CHAIRMAN BARTLETT: If on acquittal?

MR. MARRA: That's right.

CHAIRMAN BARTLETT: Ten to two on conviction, too.

MR. MARRA: The defendant may get a lower plea.

MR. CARR: I think the British law has just turned away from the jury altogether whereas we have not. Certainly in some counties in New York City, the jury is a very healthy institution; that's our view.

CHAIRMAN BARTLETT: Your point is that whatever the rule there is no rationale for having

a different rule for three-judge courts?

MR. CARR: That's right. Actually, this may also be a suggestion of convenience because I think the question of having a three-judge bench try a misdemeanor charge is probably going to come up before the Appellate Courts. There has been an Appellate Court in New England that has already held that you have to try misdemeanor cases before a jury.

CHAIRMAN BARTLETT: Under the federal due process?

MR. CARR: No, under its own Constitution.

CHAIRMAN BARTLETT: There is no question that it would be required under our Constitution as it stands. This issue was hotly debated in the Constitutional Convention and the jury trial was inserted.

MR. CARR: I think this would make the institution of the three-judge trial a stronger institution.

MR. KNAPP: What would you suggest happens when there is a two to one conviction?

MR. CARR: Like a hung jury.

MR. KNAPP: Two to one for acquittal.

CHAIRMAN BARTLETT: O.K.

MR. CARR: I don't think there would be too many retried.

In Article 200 and 220 with respect to presentence report, we think the requirement of a presentence report, and it is covered by Subdivisions 2(c) and (d), is too stringent. It can always be requested by the court but there are many such cases where the sentence is only going to be five or six months, something like that, where you don't really need a presentence report.

Then on 250 we think that the Commission should face up to what has been a very unfair practice in New York and that is the confidentiality of presentence report with the result that oftentimes on sentence, a real injustice is done that might have been corrected by the defendant and his counsel.

CHAIRMAN BARTLETT: This proposal opens the door a little bit more than is present practice.

MR. CARR: That is true and we welcome that.

CHAIRMAN BARTLETT: It is a representation of facts by defense counsel which differs from the probation report. Really, I think it should require the judge to call a hearing, even in chambers. We don't want to make a full adversary proceeding out of sentencing either, do we?

MR. CARR: No. Frankly I liked the British system that was described in your office -- well, I guess maybe you weren't there -- by a group of British lawyers and judges a couple of years ago and they said that the judge was under an obligation as a judge to call to the attention of the defense counsel any adverse comments in the report.

CHAIRMAN BARTLETT: Could be done without handing the report to the defense counsel, could it not?

MR. CARR: That's the way it's done in England. We think it would be better to give him the report, deleting, if you will, any identification of sources of the material.

MR. KNAPP: Of course that's unrealistic.

MR. CARR: Is it?

MR. KNAPP: The defendant can tell the source from the context. It isn't because the Commission hasn't faced up to it.

MR. CARR: What you have done is a big step in the right direction. We are just urging a little bit more.

Then in Article 205 on the presentence conference we think that should be on the record. Of course, the parties can waive the record if they wish but otherwise we think it would be on the record.

Then in connection with Article 205.20 we make a suggestion which may or may not be appropriate for this Code but it certainly is appropriate for consideration by the Commission. We think that at some near point in time all persons serving fourth-offender sentences should be resentenced. This change --

MR. KNAPP: You mean brought up and made retroactive?

CHAIRMAN BARTLETT: You know, there are many fewer than I thought there were.

MR. CARR: Even if there is only one.

CHAIRMAN BARTLETT: That would be easy if there is only one. We could do that tomorrow.

MR. CARR: If there is only 100. Right now you have people being sentenced under both provisions right here in New York County and that isn't right. At some point the more prudent, and we disagree with the Police Department or the spokesman for the PBA on this, we think that the better law should be applied to everybody in prison.

CHAIRMAN BARTLETT: Is it not true, Mr. Carr, that the old four-time loser law did frequently result in an inadequate disposition of a charge simply because the --

MR. CARR: Yes, you had to have a misdemeanor and then you could do it.

I think I could pass on to Article 240 and here I must admit that we have not spelled out our suggestion in too great a detail and we did promise a further memorandum to the Commission and you will get it, especially on this subject, but we think there should be some provision for a little relaxation of the jurisdictional limitations on appeals.

MR. KNAPP: That's a constitutional problem.

MR. CARR: Well, if you are going to say that it's a question of law you would fit within the constitutional limitation, wouldn't you? All you have to do is define it as a question of law which is the way it's generally done, isn't it? As far as the practical problem is concerned, the court hears only those criminal cases that the judges want to hear.

MR. DENZER: It presents a question of law if there is an objection taken to it.

MR. CARR: Well, now we have shifted in this draft, which is good, to some kind of protest and actually we are saying that if that question of substantive propriety of the conduct is fairly presented and squarely presented by the record --

MR. KNAPP: You are assuming the situation where Legal Aid takes over the case after the conviction and the lawyer just didn't make any objections?

MR. CARR: We are assuming that the defendant's counsel was asleep at the trial and

we think there should be an opportunity, which exists in other states, and I think is coming to exist under the practices of the Supreme Court in this area now for review of the horrendous case.

CHAIRMAN BARTLETT: Isn't that the way it has to be? We can't just eliminate that counsel speak out.

MR. CARR: It should be there as a disciplinary.

MR. KNAPP: I would imagine that the court would take this horrendous case even now and find that as a matter of law there was no trial in the case you are describing.

MR. CARR: To follow a path that has been followed in other jurisdictions, and we will give you a memo on that, there you would be asking the judge to sort of strain things.

MR. DENZER: I don't think you are objecting to the general principle that the Court of Appeals can hear questions of law?

MR. CARR: We want this broadening of the concept.

MR. KNAPP: I would like to see your memorandum but I would doubt that the Constitution says you can only take up the question of law. The Legislature can amend that by --

CHAIRMAN BARTLETT: We could attempt to find it but in the end, the Court of Appeals is going to define it.

MR. CARR: It may be construed as a protest, not even an objection and exception. Certainly the substantive question is to the conduct.

MR. KNAPP: I think the Court of Appeals can do today anything that we have the power to do.

MR. CARR: If so, then our discussion is unnecessary. I would agree with that.

CHAIRMAN BARTLETT: O.K.

MR. CARR: Then in Article 390 we would like again, it's a question of construction of the draft, 390.50.2. There is a problem that comes up very frequently when a defendant is held on cash bail facing a felony charge in Criminal Court. He is later indicted and arraigned on the indictment and the judge there may fix a \$500 bail as

well as before and the poor guy is stuck with \$500 on deposit downstairs and until he gets that out and he hasn't any more money to put up in the Supreme Court, so he spends some time in jail when the intention of the court was to continue him on bail.

CHAIRMAN BARTLETT: This would permit that?

MR. CARR: This would permit just to have the same bail continued; that's good.

CHAIRMAN BARTLETT: Let's talk about your appeal question. You probably heard the exchange with Mr. Subin earlier this morning. He argued for the federal rule on intermediate appeal on bail. As a practical matter, can we really talk about using our present Appellate machinery for that purpose? I don't see how we can. We now review on habeas corpus, don't we? That's the mechanical route.

MR. CARR: We don't have any quarrel with that.

CHAIRMAN BARTLETT: I see your point here that they should be permitted to follow the

federal procedure.

MR. CARR: This would eliminate formalities if you apply to the trial judge who presumably knows the situation pretty well, as you can in the federal to continue bail.

CHAIRMAN BARTLETT: I'm sorry.

MR. CARR: You wouldn't have to make a motion on notice and so on and so forth. If you wanted to apply to another judge, as you would often want to do, you would have to get up papers that would inform that judge.

CHAIRMAN BARTLETT: I misread your point, Mr. Carr.

MR. CARR: We have a number of suggestions on the youthful-offender provisions, including one that didn't get included in here. First of all, with respect to eligibility for consideration for youthful-offender treatment, Section 400.05.2(b). We think that the bar should only be predicated on a prior felony conviction.

MR. DENZER: You read the comment, Mr. Carr, on that? The reason for that is that it goes on the premise that the main purpose of

youthful-offender treatment is to prevent the stigma of conviction for a crime, misdemeanor or felony. What's the use of invoking it if he has been convicted of a crime?

MR. CARR: Supposing he was convicted of stealing an apple. As a young boy in my community that has not been a very great stigma.

MR. DENZER: It's still a conviction for a crime.

MR. CARR: If he, God forbid, should come up for felony charges now I think he should be considered for youthful-offender treatment.

CHAIRMAN BARTLETT: I think you are probably aware that in the Legislature right now the attack on the part of more than a few is not to liberalize youthful offender but to eliminate it.

MR. ALTMAN: Unfortunately, that is true.

MR. CARR: That is unfortunate, very unfortunate.

CHAIRMAN BARTLETT: When I left the hearing for a few minutes I had to go back across the street to the office and we had a call from someone demanding to know why YO proceedings were

secret and why the records were sealed and society would be much better served if we kept a box score on page 1 of the newspaper every day.

MR. CARR: I disagree with that view as strongly as possible and it's based on our own experience. Actually the youthful-offender treatment is not --

MR. ALTMAN: It's certainly to keep from having the youthful offender from having a criminal record. If he has already a record, that's different.

MR. KNAPP: I see your point but I doubt that this is a good climate to raise it in.

MR. DENZER: Do you know that that is the only place in the old article in contrast with the old law? All the rest gives him something that he didn't have before.

MR. CARR: Yes, and I suppose I could be taxed with asking for even more.

CHAIRMAN BARTLETT: No, we didn't mean to suggest that.

MR. KNAPP: Anyway you would be in good company at these hearings.

MR. ATIMAN: Will you?

MR. CARR: If there is anything we can do to help change the climate we will. We have a good deal of experience in the field.

CHAIRMAN BARTLETT: Right.

MR. CARR: Section 400.20, I don't know just where the amendment would be made but there is a very unfortunate practice which has developed in some courts and that is a requirement by the judge that a defendant plead guilty to an indictment prior to even being considered for youthful-offender treatment and that should be precluded. It's inconsistent with the spirit of the thing.

CHAIRMAN BARTLETT: It's contrary to the statute, it seems to me.

MR. MARRA: And it goes on.

MR. DENZER: How can it? That's the end.

MR. MARRA: If the report turns out to be a good one, he withdraws the guilty plea.

CHAIRMAN BARTLETT: We agree that's bad and if we can find some way to say emphatically no, we will.

MR. CARR: It might have to do with the

timing for eligibility.

Then in Section 400.35 we suggest something which might be described as a move in the same direction as those who want the criminal process invoked here. We think a jury trial would be helpful on youthful-offender proceedings.

CHAIRMAN BARTLETT: Isn't the purpose of the YO treatment to eliminate the stigma of conviction and keep this matter a private one?

MR. CARR: Yes.

CHAIRMAN BARTLETT: Isn't that destroyed by a jury trial in open court?

MR. DENZER: Also to simplify the proceedings. We are not going to prosecute you criminally. Let's have the simple proceeding here and never mind the folderol --

CHAIRMAN BARTLETT: You are not referring to the jury trial as folderol?

MR. CARR: Section 400.60, we would say that it should be only with the consent of the respondent or defendant in youthful-offender proceedings that the proceedings be conducted in private. It's his protection and he should

be able to decide whether he wants a public hearing or not.

Then with respect to Section 400.65, which I didn't include in the memorandum, we would ask for, again, related to an earlier suggestion, a strengthening of the provisions on the confidentiality of the records and the identification data.

CHAIRMAN BARTLETT: Isn't that point really inconsistent with the one you just made?

MR. CARR: We think it should be up to the defendant whether he has a public or closed trial. The idea of a public trial is in some cases, it's desirable to have a community know who is being charged with what. The defendant may want this on a youthful-offender case.

MR. KNAPP: The community may think he is being charged with something much worse.

MR. CARR: There are various effects of having public trials. Sometimes people come forward and say, "Wait a minute, I saw what happened."

CHAIRMAN BARTLETT: O.K.

MR. CARR: On the confidentiality of the

record it seems to me that consistent with it, they would be there available to any institution to which he has been sent or for ruling by the court on any other application and we don't see why they should be sent to the B.C.I.

That's all we have unless you have some questions.

MR. MARRA: He said everything.

CHAIRMAN BARTLETT: Thank you very much. Your comments were very helpful as they always are.

We will now hear from the representatives of the Division of Parole. Mr. Grant and Mr. McCarthy, I don't know what order you want to appear in.

STATEMENT OF NATHAN GRANT ON
BEHALF OF THE NEW YORK STATE
DIVISION OF PAROLE

MR. GRANT: My name is Nathan Grant and I am a New York State parole officer, also President of the Parole Officers Association.

There are approximately 350 parole officers throughout the State of New York. The Association represents over 90 percent of all parole officers.

The position of the Association is one

in which the parole officer should maintain his status as a peace officer. In one year we supervise approximately 20,000 parolees. In one year we contact some 450,000 individuals -- that is, not only the parolee -- his family, the employer, other agencies and other interested parties.

Who are the individuals that we supervise? In the institutions today out of every 100, 95 will eventually be on parole. They have been judged as having committed a crime. This can be anywhere from robbery to larceny, burglary to robbery, sodomy to assault. Today the 20,000 parolees also include those people who should not have been on the street to begin with.

As of October 1, 1967 with the new statute, we released the mandatory released parolees. These were individuals that had not been approved by the Parole Board but were released with the understanding that they were given credit, a number of days per month of their sentence, while at the institution. Effective December 1, 1967 we also had the conditional release which included individuals that would be

under the supervision of the Division of Parole for a minimum of one year. We have now included in the supervision of parolees those from the local prisons, including Rikers Island. The mandatory release cases, the conditional release cases and those gentlemen that have been placed under parole are under supervision 24 hours a day. We in turn perform our job 24 hours a day.

MR. KNAPP: Aren't you talking to the right to bear arms?

MR. GRANT: We are but this is an important fact. We cannot be limited on the number of hours that we are a peace officer and then say the rest of the day we are not.

MR. KNAPP: Everything you said suggests to me that you think you are in danger of retaliation and you should be able to protect yourself by bearing arms; is that it?

MR. GRANT: That's part of the story.

MR. KNAPP: What else is there?

MR. GRANT: The point is that while performing our job there is the possibility of being assaulted because the point is that we should be

in a position to question other people that are not on parole. If a man associates with another individual and we do not have the power as a peace officer, we will not be in a position to question him.

MR. DENZER: You don't need to be a peace officer to question someone.

MR. GRANT: Well, on the grounds that he does not have to answer you and he still does not have to answer you but you can take some sort of action.

MR. KNAPP: What can you do? Why can't you question him as well as a police officer?

MR. GRANT: You can question him but once he understands that you are a police officer with those powers --

MR. KNAPP: What powers do you have?

MR. GRANT: They include the ones that you must reply to a question. When you are asking a man a question for a driver's license he doesn't have to give it to you but as a peace officer he does.

CHAIRMAN BARTLETT: Your point is that

you feel that they should have identical authority and responsibility?

MR. GRANT: As the policeman within the new category.

CHAIRMAN BARTLETT: Let me ask, if this were included, if this were so provided in the Code, in your opinion should a parole officer who fails to act during off-duty hours in circumstances where a policeman should have acted, would he be subject to departmental charges?

MR. GRANT: That's correct.

CHAIRMAN BARTLETT: O.K.

MR. GRANT: To carry on, I wanted to point out that the parole officer in performing his job does so in the last 10 years of supervision approximately 12.3 per 100 capita were returned as violators. Only 1.3 were returned to the institution with new convictions. In other words, the difference from the 1.3 to the 12.3 indicates that the man was a menace to the community and did not follow the rules governing parole and the parole officer, in the performance of his job, has submitted a report which was evaluated by the

Commissioners, the man was returned to the institution.

The point I am making is that it is very important that the parole officer continue to have his powers because if the parole officer cannot continue in the same fashion as he has done for many years, it will be necessary to hire additional people to do the same job.

CHAIRMAN BARTLETT: Mr. Grant, I think we have your point. Commissioner Oswald testified - Chairman Oswald testified - in Albany on the same point and I can assure you the Commission will give it serious consideration.

MR. GRANT: Thank you.

STATEMENT OF JOHN J. McCARTHY
ON BEHALF OF THE NEW YORK STATE
DIVISION OF PAROLE

MR. McCARTHY: Chairman Bartlett, I am John J. McCarthy of the New York State Division of Parole.

First, let me express the appreciation of the administration and of myself for the opportunity to be present here and express a few points.

In deference to members of the Commission

and the time and inasmuch as a good deal of our sentiments have already been articulated and are a matter of record, I will be deliberately brief and will deliberately avoid any statistics at this point.

CHAIRMAN BARTLETT: Excuse me, Mr. Grant, did you have a written statement you wanted to file with us?

MR. GRANT: No, we do not have a prepared statement.

CHAIRMAN BARTLETT: Proceed.

MR. McCARTHY: Gentlemen, in connection with parole obligations, it is also a fact that there exists a hard core of offenders who present a definite menace to the community. These are best described as the violence prone, criminal statistic and, frequently, the emotionally disturbed recidivists. Dealing with these individuals, supervising them and protecting the community from their depredations presents a constant problem to parole officers who in effectively dealing with this problem require police powers within the law.

The arrest, the apprehension on the spot

by the parole officer requires that he be vested with the right to carry firearms at all times. The only limitation, gentlemen, that I would suggest is actually an administrative provision which is basically that he be qualified in the first place and that assuming that what men learn they quickly forget or it becomes obsolete, that there be provisions for routine retraining. These are at the present time being implemented by the New York State Division of Parole, routine training in the use of firearms. I might add also, parenthetically, that in the course of the years of the agency's existence the right to bear firearms has never been abused.

MR. KNAPP: We agree with you on the bearing of firearms.

CHAIRMAN BARTLETT: I don't think there has been a question about that. The only question that has been raised, and Commissioner Oswald addressed himself to that, was the one on reasonable grounds.

MR. McCARTHY: I will elaborate further that the nature of our work is such that we do

a good deal of surveillance and often most frequent with out own people but oftentimes in cooperation with other agencies. In the course of this work it becomes necessary to identify with the subject. Many times they are individuals with extensive criminal records. Dealing with them, detaining them, interviewing them or at least endeavoring to find out who they are presents a problem and in all fairness to the parole officer, who incidentally is not in radio contact with his office, he should be vested with the most extensive of police powers.

I have a few cases here that I will be very brief with. In the recent past it happened to individuals which we apprehended with weapons. Some of these are in litigation and I will only refer to them by number. One is reported by United States District Justice Alexander Holtzoff under his article, "The Power of Probation and Parole Officers to Search and Seize." Here he makes reference to a case which was handled by the New York State Division of Parole exclusively and he says:

"In New York State there is an interesting and significant decision by the Supreme Court, which in New York is a trial court of original jurisdiction and in the People vs. Flangella, 214 NYS 2nd 802, decided four years ago. This case involved a parolee contacted by a parole officer, followed by a search of the parolee's automobile in which a firearm was found. Parolee . . . moved to suppress the government's evidence on the ground that it was obtained by illegal search and seizure. The court sustained the validity of the search."

It isn't quite accurate in the reporting. It wasn't one gun, it was six guns and the individual was a suspect in a homicide in another jurisdiction.

MR. ALTMAN: I'm not sure I understand what a parole officer is. Isn't a parole officer part of the court and not part of the police and isn't it his duty to help rehabilitate the parolees? In other words, what I am trying to stress here --

MR. MCCARTHY: I believe I can answer your question precisely. The parole officer has

been referred to as a case worker with a gun.

MR. ALTMAN: A case worker for whom?

MR. McCARTHY: A case worker for his agency, for the community, for the people. He was hired with the basic requirement that he has the ability to constructively influence human behavior.

MR. ALTMAN: But he is not hired as a policeman.

MR. McCARTHY: He is hired also - he has to agree to bear firearms in view of the nature, the complex nature of his duty. The Legislature, in their august duty saw fit to empower him with the powers of a police officer. In his office where he interviews the parolee, counsels him and ascertains certain facts, he is one individual. Only a certain percentage of his work is in the office. He is required under the law to supervise the man in the community. He has to verify the man's residence, he has to have a knowledge of his associates, he has to verify the man's employment.

MR. ALTMAN: What about the question of rehabilitation here? Isn't the parole officer

involved at all in trying to rehabilitate the parolee so that he becomes an asset to the community?

MR. McCARTHY: Of course. This is the core of the issue is his ability to constructively influence human behavior.

I go back to my opening statement, sir, that 70 percent, approximately, adjust and comply with the basic parole regulations. I also said that there is a hard core, a residue of recidivists. Mr. Grant made references to the fact that we have the additional responsibility of supervising those released mandatorily. These individuals were rejected by the Board of Parole.

MR. ALTMAN: I heard Mr. Grant's testimony. Thank you.

MR. GRANT: We have nothing to do with the courts. You asked if we work out of the courts.

CHAIRMAN BARTLETT: They are a part of the executive branch.

MR. McCARTHY: We are a part of the executive branch and have nothing to do with the courts.

MR. KNAPP: Speaking for myself and not for anybody else, it seems to me you may make a case as to power to arrest parolees or persons who have associated themselves with parolees. As a statutory matter would you be satisfied with the power confined to your job, namely, confined to arresting parolees or persons associating with parolees?

MR. McCARTHY: I would accept that as a basic premise.

CHAIRMAN BARTLETT: Let's put it a little differently. One of the problems we have in dealing with the whole list of the 154 category is the off-duty function. Mr. Grant did respond to my question that he felt the parole officer who failed to respond off duty where a policeman should, would be called up. Is it your view that they ought to be fully clothed with the authority and responsibility of police officer?

MR. McCARTHY: That is precisely my view. I might make notation of Mr. Norman Frank's comment in connection with a parole officer when he said they don't know what they are going to

encounter or what they are going to run across.

CHAIRMAN BARTLETT: I think we have the point. We are going to give careful consideration to it and speaking for myself, I am very sympathetic to it.

MR. McCARTHY: There are other cases where people have been arrested by parole officers and they had firearms. One which is unique in New York County, the man received the maximum of three years on possession of a firearm.

CHAIRMAN BARTLETT: I had occasion within the last two or three weeks to make a report concerning the function of the parole officer and I recall that I indicated that he had a curious combination of roles running the gamut from social worker, employment counselor, through and to the role of law enforcement agent.

MR. McCARTHY: Police officer, yes.

CHAIRMAN BARTLETT: Thank you very much.

MR. McCARTHY: Thank you, gentlemen.

CHAIRMAN BARTLETT: Mr. Richter, you indicated you would not be very long. We will take you before the break.

STATEMENT OF WILLIAM RICHTER,
ESQ., OVERSEAS PRESS CLUB,
54 WEST 40th STREET, NEW
YORK CITY

MR. RICHTER: My name is William Richter and I am an attorney. I don't represent any organization, association or any syndicate of defenders.

MR. ALTMAN: Where do you live?

MR. RICHTER: 400 - 149 Street.

MR. ALTMAN: Did you ever live up in the Bronx?

MR. RICHTER: No, sir.

I am particularly concerned about the right of the defendant to appear before the Grand Jury. We have Section 250 which refers to it but I think as the United States Supreme Court has acted in the past with a liberality in constructing the rights of defendants I think that unless this Commission does something about Section 250 I think it will be stricken as unconstitutional.

I should like to read the pertinent parts of the section which concerns me and I think should concern the Commission.

"Section 250" --

MR. DENZER: Section 250 what?

MR. RICHTER: Of the Code of Criminal Procedure.

MR. ALTMAN: Talking about the present Code?

MR. RICHTER: Yes. I have it here.

MR. KNAPP: What section is that in the new Code?

MR. RICHTER: You mean in your revised Code?

MR. KNAPP: Yes.

MR. RICHTER: I don't know.

CHAIRMAN BARTLETT: We understand what the present law is. This section is the one.

MR. RICHTER: The defendant may appear in his own behalf under certain circumstances.

CHAIRMAN BARTLETT: Why don't you address yourself to the changes you would advocate in Section 250?

MR. RICHTER: I should say that the section should give the defendant the unequivocal right to appear before the Grand Jury. You can't say, "You can appear before the Grand Jury if you

somehow determine or learn that we are investigating you." The way the law now reads if the defendant by some strange knowledge determines that the Grand Jury is investigating him, he may notify the foreman of the Grand Jury and the District Attorney and then he has the absolute right and he must be accorded the opportunity to appear before the Grand Jury and be allowed to testify in his own behalf. Of course, he has to sign a waiver of immunity. I don't quarrel with that fact. I quarrel with the fact that you say you have the right to appear but first you have to find out that we are investigating you. This to me is mumbo-jumbo. Either you say you have the right or you don't have the right. How is the defendant to know he is being investigated?

MR. DENZER: Have you read the section of the proposal that replaces? You will notice there that in one respect notice is required, in one situation, and that's where the case is pending down in the New York City lower court on a felony complaint which is not disposed of. You are familiar with the situation where the District

Attorney lifts the case out and puts it in the Grand Jury while it's still pending. In that situation you say that the defendant is entitled to notice?

MR. RICHTER: I appreciate that. I think that is in line with what Andy Tyler had proposed in the new Constitution which didn't come about. But I go beyond that. I say suppose he is never arrested, suppose he is never brought into court and the Grand Jury on its own in secret session indicts this man and he never hears of the fact that he is being investigated.

CHAIRMAN BARTLETT: You mean the case is commenced by indictment?

MR. RICHTER: Yes. I would say that to my experience I would say a majority of the cases are preceded by indictment without the defendant being arrested.

MR. DENZER: You say the majority of cases originate with an indictment?

MR. RICHTER: I would think so.

CHAIRMAN BARTLETT: It's a very small percentage.

MR. DENZER: It must be 99 percent in New York at least that come through felony court. Very rarely is a case presented in the first instance to the Grand Jury without the defendant ever having been in the court.

MR. RICHTER: Let's say in the majority of the important cases. I'm not talking about run-of-the-mill cases. We have had some very substantial indictments --

MR. DENZER: Rackets.

MR. RICHTER: We have had some very substantial cases where some very prominent people, without mentioning names, have been indicted by the initial Grand Jury proceedings.

CHAIRMAN BARTLETT: It's your point then that in the case commenced by a Grand Jury investigation that a potential defendant ought to be advised of the fact and have the right to appear?

MR. RICHTER: Yes, sir.

If I may make a few observations? As the law reads now it says, "When any person has reason to believe that a Grand Jury is investigating a charge that he has committed a crime,

such person may as a matter of right voluntarily file with the foreman of the Grand Jury and with the District Attorney of the county and request that he be heard in person before such Grand Jury with reference to such charge."

I say that is incongruous. He has a matter of right to appear if he hears about it or learns about it somehow.

MR. DENZER: You have these categories of cases, those which originate down in the lower court. No matter what their stage, if he is held for the Grand Jury he knows he is going to be held on a Grand Jury proceeding. Then you have the cases that originate by indictment and most of them he knows about it as a practical matter. Some he doesn't, it's true.

MR. RICHTER: Unless it's leaked to the newspapers, how will he hear about it? Are we going to equivocate and put the burden on the defendant by some strange procedure to find out that he is being investigated? How will he know about it unless it's in a column or released to the press? That is conjecture how he hears about it.

MR. DENZER: All I am saying is that in many cases as a practical matter they do know there is a Grand Jury investigation and some they don't.

MR. RICHTER: I'm talking about those that don't.

CHAIRMAN BARTLETT: O.K.

MR. RICHTER: We are not arguing whether the defendant has a constitutional right to appear before the Grand Jury. Some of the recent cases held that the fair administration of justice requires that he be notified of it and be given the right to appear.

CHAIRMAN BARTLETT: Reasonable effort made to notify him.

MR. RICHTER: Yes.

CHAIRMAN BARTLETT: It ought not be an absolute prerequisite. Suppose they cannot find him?

MR. RICHTER: If you attempt to subpoena a witness and you can't find him then you show you have made a reasonable effort.

CHAIRMAN BARTLETT: O.K.

MR. RICHTER: As one of the cases said:

"It is necessary that the defendant secure information of the Grand Jury proceeding on his own."

I say that is a very impractical, in all due respect to my friend here, determination that the Grand Jury, and we know by practice that the Grand Jury proceeding is secret or certainly it's supposed to be secret.

CHAIRMAN BARTLETT: O.K., sir. Fine.

We will consider that. It was discussed and considered before but we will look at it again.

Thank you.

MR. RICHTER: Thank you, gentlemen.

CHAIRMAN BARTLETT: Mr. Adams?

STATEMENT OF JOHN E. ADAMS,
DEPARTMENT OF CORRECTION,
CITY OF NEW YORK

MR. ADAMS: I just wanted to read some excerpts from the material I put up there. These are the most salient features.

I am a civilian employee in the Department of Correction. I have had more than 40 years of experience, 30 of them spent in prisons working there. I have nothing to gain or lose from this peace officer or police officer status.

On page 25, Section 15b of your proposed New York Criminal Procedure Law it is stated that sheriffs, under-sheriffs and deputy sheriffs are police officers. While the sheriffs, under-sheriffs and deputy sheriffs in counties outside of New York's five counties act as police officers and as jailers or prison guards, in the five counties of New York City these functions are divided between the New York City Police Department and the New York City Department of Correction.

Since the sheriffs, under-sheriffs and deputy sheriffs of New York City (five counties) in no manner function as police officers or jailers insofar as criminal process is concerned, as do their counterparts in the other counties of New York State, and since the New York City Department of Correction Officers function as jailers or prison guards and in doing so handle criminal proceedings there should either be a substitution or an addition to Subdivision 15b of Section 1.20 of your proposed Criminal Procedure Law which states who are police officers, to state "and officers of the New York City Department of

Correction.

This would then make meaningful Sub-division 16 of Section 1.20 which reads:

"Commitment to the custody of the sheriff, when referring to an order of a court located in a county or city which has established a Department of Correction, means commitment to the Commissioner of Correction of such county or city." Otherwise, the courts of New York City will be committing persons charged with criminal offenses to the custody of the Department of Correction and the correction officers will have no legal authority to hold anyone in detention and otherwise act in the execution of orders, commitments, warrants, writs and other legal mandates from the courts.

I feel that there is an urgency and necessity in having correction officers having police officer status not only to make them exempt from the firearm statutes but to give them the authority necessary to make arrests for misdemeanors and petty offenses as well as for felonies upon reasonable cause. This I consider necessary for there have been and will be in the future many

occasions when correction officers will be arresting and/or retaking into custody escapees both felons and misdemeanants and/or persons interfering in the arrest of such escapees.

Last, but far from the least, let me call your attention to the fact that without police officer status, which is greatly similar to the correction officers' present peace officer status there would be a significant loss of the psychological effect now in existence which aids the correction officer in maintaining discipline and good order in keeping those imprisoned in such detention with the least possible friction. Without the psychological effect the prevention of those in custody from emotional and physical eruption would be seriously damaged. In this connection let me call to your attention the fact that here in the Manhattan House of Detention for Men, we have approximately 240 inmates on a floor which is under the control of two correction officers who carry no weapons but must depend solely on their authority and psychological reasoning to maintain order and discipline. To

weaken such authority in any manner would most certainly be catastrophic.

In my third paragraph I mentioned that since the sheriffs, under-sheriffs and deputy sheriffs of New York City, the five counties, in no manner function as police officers or jailers insofar as criminal process is concerned as do their counterparts in the other counties in New York State, and since the New York City Department of Correction officers function as jailers or prison guards and in so doing handle criminal proceedings there should either be a substitution or an addition to Subdivision 15(b) of Section 1.20 of your proposed Criminal Procedure Law which states who are police officers to state "and officers of the New York City Department of Correction."

CHAIRMAN BARTLETT: Mr. Adams, your point then is that made yesterday by Mr. Marr and Mr. Prial that those who are now correction officers in the system should continue their police officer status?

MR. ADAMS: Definitely.

CHAIRMAN BARTLETT: You are not advocating

that any other group of employees in the Correction Department be granted that status?

MR. ADAMS: Definitely not.

CHAIRMAN BARTLETT: Than the correction officers.

MR. ADAMS: Only the correction officers. I feel there is an urgency and necessity in having correction officers have police officer status not only to make them exempt from the firearm statute but to give them authority necessary to make arrests for misdemeanors and petty offenses as well as for felonies upon reasonable cause.

I notice at the top of page 29 in your proposed law you say the police officer is growing in leaps and bounds. If so, how are we going to function? However, depriving these people of their status is not the answer.

CHAIRMAN BARTLETT: You approve then of our concern that it not be conferred willy-nilly?

MR. ADAMS: Definitely I do that. There are some people in Section 154 who I do not believe should carry firearms and should not have police officer status.

CHAIRMAN BARTLETT: Do you agree with the statement made yesterday by Mr. Marr and others that if the Correction Department has police officer status that they should be held accountable for his failure to act where a police officer should act?

MR. ADAMS: Definitely. In addition to that, they are also a deterrent because many of the criminal element know these people, having lived with them eight hours a day, and when they go into an area and the criminal element recognizes them, there is a good possibility they won't act criminally.

CHAIRMAN BARTLETT: Thank you very much.

MR. ADAMS: Thank you, gentlemen.

CHAIRMAN BARTLETT: We will adjourn at this time for lunch and reconvene at 2:15.

. . . Whereupon, at 1 p.m. the meeting was adjourned to reconvene at 2:15 p.m. of the same day . . .

AFTERNOON SESSION

CHAIRMAN BARTLETT: We will get under way again.

Mr. Wallace and Mr. McDivitt, are you both going to appear?

. . . Discussion off the record . . .

CHAIRMAN BARTLETT: I will be glad to hear from you now, Mr. Wallace.

STATEMENT OF JOHN A. WALLACE,
DIRECTOR, OFFICE OF PROBATION,
COURTS OF NEW YORK CITY

MR. WALLACE: I am John A. Wallace, Director of the Office of Probation for the Courts of New York City.

First I want to say that I appreciate the opportunity to appear before the Temporary Commission. I think it's through your efforts that New York State is bringing its statutes up to date in the area we are concerned with and we think you have made real strides forward.

There are two areas that I want to comment on first and thereafter I will proceed in sequential order on the other sections I wish to discuss.

Wayward Minor.

One of the gains is the elimination of the wayward minor provisions of the Code of Criminal Procedure, as set forth in Section 913a. We believe that such provisions and procedures have no place in the new Criminal Procedure Law.

CHAIRMAN BARTLETT: It's really a condition consideration, isn't it?

MR. WALLACE: Yes, and one of the things that troubles me and troubles some of my colleagues is that the provision of severance has a sanction in it that we don't like that the court can then move somebody into a correctional institution for having done something that is really not a breaking of a law and really not a crime.

CHAIRMAN BARTLETT: What would you think about an extension of the category in terms of age, especially the girls, because of the limitation we now have?

MR. WALLACE: There are two thoughts I have. First of all, service can be provided and I think services can be provided that have a non-judicial aspect to them. We do this in the Family Court with the adjustment process that is available

on the opinions and the delinquency and the neglected situation, including family offense. The difficulty that we have with the opinions, the older girls, is that there is a sanction that is available but the sanction is non-enforceable.

CHAIRMAN BARTLETT: Because of the lack of institutional facilities.

MR. WALLACE: Right, and the fact that the State Department of Social Services does not have to take that girl.

CHAIRMAN BARTLETT: That's what I meant by lack of institutional facility.

MR. WALLACE: So this is one of the things that troubles me and this is why I am struck with the fact that by taking this out we are really saying that we are going to have to provide the services in a non-judicial aspect and this means looking for other ways of doing it and I think we can find other ways if we are forced to do it.

Youthful Offender, Article 400.

With respect to Article 400 of the proposed new law, we support the concept of youthful offender treatment. Overall, the article on

youthful offender treatment is well defined and should create a basis for reasonable and equal justice for defendants between the ages of 16 and 19, but we suggest certain modifications in order to better accomplish the purpose of youthful offender treatment.

At present the criteria in law for YO treatment specify who is to be excluded. Beyond that, no guide is provided and little uniformity in thinking exists as to who should get YO treatment.

I can give you an illustration within our own agency. We tried some years ago, and so did the Criminal Court, to ask our staff and the judges who should get YO or who should be excluded from YO other than the statutory provision and the responses were exactly as if somebody took a shotgun and sprayed it on the wall. There was no consensus within either staff or the judges.

We think your provision for mandating YO treatment in Section 400.20 Subdivision 2 is a step forward. You have established criteria as to who will automatically be accorded YO treat-

ment, namely those charged with a misdemeanor and who have not previously been adjudged YO.

The staff comments on this point say on page 447:

"While statistics are not available, it may safely be stated that the indicated group constitutes an immense percentage of the totality eligible for youthful offender treatment."

That is correct. Two of our branches (in Manhattan and Brooklyn) did a survey last month (January 1968) to see what would have happened if the proposed YO law were in effect. We processed 142 cases in Manhattan and 164 in Brooklyn, or a total of 306 cases. We found that 258 of the 306 would have been accorded YO treatment automatically under the new law. This meant we would not have had to do 84 percent of those YO eligibility investigations. We could have thus used our probation staff to better advantage.

MR. KNAPP: I suppose you don't have figures as to how many did not get YO treatment at all?

MR. WALLACE: No, because sometimes we find it is as much as three or four times after we have made an investigation before the court finally comes down on a decision. It would be interesting if you want, and you are interested in it for a later point, I can ask to keep an eye on what happened with those 306 cases, or not the 306 but the 258 cases.

CHAIRMAN BARTLETT: We will be interested.

MR. DENZER: In fact, we will be interested in the statistics that you can get. As you can gather, we did not have the time to get the statistics on it and it was playing by ear but that was the consensus that we got from talking to people.

CHAIRMAN BARTLETT: We would be truly interested in that.

MR. WALLACE: I will follow it up. I think what you have done there is to establish criteria, and I want to turn now to Subdivision 3 of Section 400.20. Subdivision 3 troubles us because the lack of criteria is to be continued. We favor the mandating of the investigation in Subdivision 3. We urge the establishment of

criteria that would encourage the use of YO treatment.

CHAIRMAN BARTLETT: You mean that we spell out the basis for the selection?

MR. WALLACE: Yes.

One way to accomplish this is to require the judge to state in the record the rationale for denying YO treatment in those cases where a youth is either (a) charged with a felony but not previously adjudged a YO or (b) been previously adjudged a YO but not charged with a felony.

My concern now is that the investigation is mandated but if we had each of you as judges and each of you were given that same case would there be a 90 percent consensus, 50 percent consensus, 60, 40 or what kind of pattern would there be?

CHAIRMAN BARTLETT: You know, corrections to put something on the record are not always very effective.

MR. WALLACE: I realize.

CHAIRMAN BARTLETT: We have had on the statutes for a long time such a direction in con-

nection with the reduced plea.

MR. WALLACE: Yes.

CHAIRMAN BARTLETT: The District Attorney is to file a report, is he not, Mr. Denzer?

MR. DENZER: Yes.

CHAIRMAN BARTLETT: I defy you to find any. I get your point.

MR. WALLACE: One way I thought of was this and I know it's not the best way. I think that guidance is needed. I do not think that I am asking for, and I don't think there is a rationale for a guidance in your Subdivision 4. I think that my concern is that you have three different categories -- Subdivision 2, Subdivision 3 and Subdivision 4 -- but the criteria ought to be in a staggered basis exactly as you mandated or made it optional on investigations.

We further recommend that the proposed law spell out a requirement for two separate investigations and reports: (1) eligibility for youthful offender treatment; and, (2) disposition or sentencing by the court.

CHAIRMAN BARTLETT: For eligibility and

sentence?

MR. WALLACE: One for eligibility and one for sentence.

An investigation regarding eligibility for youthful offender treatment is not the same as a presentence investigation and should not be combined and done at the same time. We used to do that but changed our practice several years ago. For one thing, we were intruding on the rights of the defendant, talking to him about the crime before he had ever been tried and adjudicated or convicted. We now do two separate investigations and reports but believe other probation agencies throughout the State may still be combining them into one. This is why we are suggesting the spelling of it out in the language of the Act.

Lastly, we recommend a change in Section 400.50 regarding the length of sentence of probation or reformatory for those adjudicated youthful offenders. The pertinent provision of this section states that the period of the sentence is "governed by the Penal Law provisions in the case of a sentence for a felony." We recommend that the

sentence for a youthful offender be for not more than three years, irrespective of whether the original charge is a felony or misdemeanor. This would include a sentence to a reformatory or a sentence of probation. If the process of rehabilitation cannot be done in three years or less, then that defendant should not be accorded YO treatment.

CHAIRMAN BARTLETT: Let me ask about that, Mr. Wallace. As you know, the maximum or indeterminate sentence is four years rather than three years you suggest. Don't you agree that if your argument to reduce the maximum for reformatory sentence to three is valid, it ought to apply to sentences within or without YO adjudication?

MR. WALLACE: Maybe I approached this in a different way. I approached the youthful offender as a category of people irrespective of whether the original charge was misdemeanor or felony.

CHAIRMAN BARTLETT: That's what it is intended to do.

MR. WALLACE: Except one of the things that troubles me is that when this is governed by the sentence for a felony, then the youth who

is originally charged with a misdemeanor and now comes into the YO process, his period of probation, as I understand it, it would be five years as, namely, that for the felony.

MR. DENZER: Yes, that's so.

MR. WALLACE: Which means that for some persons as a youth it might be more desirable to take the sentence on a misdemeanor rather than on a youthful offender adjudication. Approaching it from the standpoint I did --

CHAIRMAN BARTLETT: We are almost asking him to trade. We are saying, "We will relieve you of the stigma of conviction but you have to be amenable to our supervision." Is that unreasonable? It seems to me a perfectly fair offer.

MR. WALLACE: Let me follow. I was taking the concept that the YO as a group is one in which we have selected to afford a special process. My rationale was that if we can't do it within a certain period of time we shouldn't have gotten them in there at all. Within the YO group I would look at it and suggest to you a three-year period of probation and three-year period of reformatory

if this group is desirous of coming into this treatment.

CHAIRMAN BARTLETT: The other side of that coin, though, is if institutional care is required at all after adjudication, then ought the institutional agency to be any more limited in its handling of a YO than someone sentenced directly upon conviction in terms of the options available to them. That is all we are talking about in terms of an indeterminate sentence. It seems to me that while he has been accorded special treatment and the guts of that selection is that he is spared the stigma of conviction, that if the court determines that he requires institutional treatment after that, we ought to leave the same flexibility to the parole authorities in terms of the length of that treatment as they have with someone who is sentenced upon conviction to the same institution, presumably, because he needs the same kind of care.

MR. WALLACE: All right, but then should he be stigmatized, and this is what troubles me, should he be stigmatized if it's a misdemeanor?

CHAIRMAN BARTLETT: He could have been sentenced for a misdemeanor without it for the same period of time.

MR. WALLACE: Let me struggle with this one.

CHAIRMAN BARTLETT: We would like to hear from you further on it.

MR. WALLACE: Minutes of Sentence, Section 19570.

The minutes of sentence of a person given an indeterminate sentence are to be furnished to a reformatory. The stated purpose under staff comment in the printed version of the proposed law is to give those who deal with the execution of the sentence the reasoning of the Court and the factors that were discussed at the time of sentence. The staff comments indicate this would give them the best understanding of what transpired at the time of sentence.

We are asking that a similar provision be made to furnish a copy of such minutes to the appropriate probation agency when a defendant is sentenced to probation. The same reasoning and

purposes set forth in the staff comments certainly apply to any probation agency having a defendant under its supervision.

CHAIRMAN BARTLETT: We agree.

MR. KNAPP: It should have been obvious to us.

MR. DENZER: I don't know whether you have given much thought to it but you will notice that we have added one sentence here to the youthful offender group and that is the sentence of imprisonment authorized for a Class B misdemeanor, in other words, giving the judge the option to put this boy in the county jail for three months if he wants to. I don't know, that's a little controversial perhaps and I don't know if you think it's a good or bad idea. The rationale would be general deterrents. To take a case in my community of 20,000 people, that receives widespread notoriety. Disposition becomes a matter of great public concern.

MR. WALLACE: I don't have any qualms with this because I think if the courts are to do an effective job there has to be a range of

alternatives and I don't think that every case going through the court is to be looked at as being one of rehabilitation.

CHAIRMAN BARTLETT: Right. There are other functions of sentencing.

MR. WALLACE: Yes. I think we are getting some people into probation who really should have been placed under a suspended sentence and I think we are getting some people into institutions that we should have gotten on probation. I think this is part of our concern, or part of my concern, in probation system that we have to have a conviction in saying to a judge that you can use the suspended sentence as effectively as you can that of probation. I think we are reluctant to buy this or try to sell this lesser option. We think of it as a lesser option but you don't.

CHAIRMAN BARTLETT: But there are a number of cases really where the judge intends, when he suspends them and puts them on probation, he wasn't interested in the facts of supervision. He did not want to impose the institutional

sentence.

MR. WALLACE: I'm not troubled with this business on the short sentence on a Class B misdemeanor.

Presentence Reports, Section 200.30.

We wish to commend the Commission with respect to the draft of Section 200.30, Subdivisions 1 and 3, regarding scope of presentence investigation and report. You have distinguished between the investigation and report, something that many people in probation have not done. We would also like to commend the proposed law in that it places on the agency, not the probation officer, the responsibility for the process of investigation and report.

CHAIRMAN BARTLETT: We had the feeling that John Wallace might have been influenced by Peter Pricer when he wrote this.

MR. WALLACE: We had some dialogues and this is one of the fun parts of this kind of thing. The thing I am saying to you is that you are setting forth as a matter of public policy and this is going to affect probation practice in a

way that no probation agency by itself can do. This is why I would like to say thank you for what you are doing.

CHAIRMAN BARTLETT: Civil Liberties yesterday, Legal Aid this morning and I don't recall whether Vera Foundation addressed themselves to it or not, at least two organizations have strongly attacked the confidentiality provisions of Article 200. I assume that your views are behind the importance of retaining the confidentiality?

MR. WALLACE: If you are assuming that I am a believer in the confidentiality I have to disillusion you.

CHAIRMAN BARTLETT: We are glad to hear a different point of view.

MR. WALLACE: I know that I differ from many of my colleagues in probation. I do not believe -- and 20 years ago or 10 years ago I would have been a strong adherent to the confidentiality -- but I think there are a number of changes coming into our criminal justice process.

CHAIRMAN BARTLETT: I noticed you bypassed

that point in your discussion.

MR. WALLACE: I did.

MR. BENTLEY: There is a bill right now on the Senate calendar on this.

MR. WALLACE: One of the reasons for my change in position is that the probation systems are expanding in this country tremendously and I am going to refer to a point on which I commended you on the presentence reports. You placed the responsibility on the agency and not on the probation officer as to what constitutes the report. When I came into probation a few years ago, really one man was a probation department and so you had a program of whatever it was was equated with that one person. When you brought two or three people in, you still got strong same values that were running through it. But as you begin to increase the size of the probation system, and I think this is needed in this country if we are to do a better justice job, we have to bring in people in larger quantities than we have done and immediately you begin to bring in varying levels over varying qualities of it and so for only one reason that

I would say as an administrator this is a means of my safeguarding what my staff is doing because with a large system it becomes more and more difficult to say that everybody has the same conscientious view as this man or that man or I have. This is one of my reasons for having changed my views is that I feel that probation systems need some kind of a monitor other than that which the probation administrator can do.

MR. KNAPP: You think that outweighs the danger? I take it you believe the report can be couched in terms that do not reveal?

MR. WALLACE: There are two parts to this. First off, when you go back to the reports there is not as much confidential information as people have been taught to believe. I served on the Advisory Committee to the NYSIIS system and we had a very interesting experience because they were attempting to evaluate what should go out of probation records and what should go in. Commissioner Oswald and I brought in probation and parole records and we turned them over to police and sheriffs throughout the State and they

went through to see what it was that they would like to have incorporated into the NYSIIS system that they didn't have. You know, the funny part about it was there wasn't a damn thing. They already have the basic kinds of things in their own records. They said that things that were subjective data it wasn't of any value to them. The only thing that came up was an IQ and it was decided not to put it in because it wasn't of much value because in many cases it was the Otis IQ and this has no validity to one administered by a psychologist.

The second point is that we are not using all of the resources that we used to use. For example, years ago we were heavy reliers, we had a great reliance on social agencies. Today we are not relying as much for information from social agencies as we are relying on information the sources of which are given to us at the time of the investigation. In other words, if I am doing the investigation on you and you give me information about a medical situation that's when I go into the medical circles and ask for that infor-

mation.

I would not be upset if the confidentiality issue were stricken but I will have to tell you that a lot of the other probation people will blow their stack.

CHAIRMAN BARTLETT: Very interesting, Mr. Wallace. An old friend of yours and an old friend of mine, Paul Bosse, has indicated to me that he did not share the traditional natural view of confidentiality and he thought it was an overworked theme.

MR. WALLACE: We respectfully call your attention to Subdivision 2 of Section 200.30 as we believe all of it is not a part of the process of presentence investigation or report. This subdivision states that if information is available about the defendant's physical or mental condition, the presentence investigation shall include the gathering of that information. We do not question this but rather the provision that in the case of a felony or a Class A misdemeanor, or in any case where a person under the age of 21 is convicted of a crime, the Court may order that the defendant

undergo a thorough physical or mental examination. We do not propose that this be removed from the law, but recommend that the substance thereof be treated as a separate subject under this article but not as a part of Section 200.30 (scope of presentence investigation and report).

CHAIRMAN BARTLETT: What's the reason for that?

MR. WALLACE: But not as a part of Section 200.30 because that deals with the presentence investigation and report.

CHAIRMAN BARTLETT: What's the virtue of treating it separately? It seemed to us that this was part and parcel of the judge's need to know data for sentencing purposes.

MR. WALLACE: I agree but my concern arises out of two kinds of experiences: One in Baltimore where I worked with Manfred Guttmacher and my experiences here in New York City. Where these two are related in the law it moves the judges more and more to use the psychiatric services at the same time that he is using the probation services and what we found by experience

is that when we can get judges to define the purposes for which they are making that examination they become more selective in its use and there is a better use of the facilities which are limited and moreover, there are times when they will use the psychiatric or medical services and not have to use the probation services, or they will use the probation services but not necessarily use the psychiatric services.

MR. KNAPP: You mean just psychologically it's better if they are separated?

MR. WALLACE: Yes.

CHAIRMAN BARTLETT: Make a suggestion to us, if you would, how you would handle that drafting-wise.

MR. WALLACE: I will.

CHAIRMAN BARTLETT: Good.

MR. WALLACE: We found that where we could sit down with the clinic and staff, or the judges were getting ready to go in, if we sat down with the clinic quite often they would say, "You know enough now that we are not going to be able to tell you. You don't have a psychotic individual,

you don't have a psychopath. You have this kind of a person and this is sufficient for your purposes." It was a consultation but what we got when we did put one in for examination, we got a better quality examination because we were required to tell the doctor what it was and why we were seeking it instead of come in with what the doctors call the bushel-basket treatment.

Confidentiality of Presentence Reports,
Section 200.50.

Subdivision 2 of this section allows a probation department to make available a copy of its presentence report and any medical, psychiatric or social agency report, to any state agency to which the defendant is subsequently placed or committed. Placement with the New York State Division for Youth and some other state agencies is subject to their acceptance of such persons, and they require prior submission of reports and related data in order to make a determination.

Under this section are we allowed to make our reports and related data available to the State Division for Youth or any other

prospective facility for placement in advance as part of the acceptance process? We have had different interpretations when we raise the question. From our viewpoint, it would be advisable to have such authorization set forth in the section or provided by legislative comment.

CHAIRMAN BARTLETT: I suppose if we had a department for rehabilitative services that would resolve it -- one possibility.

MR. WALLACE: That would be one possibility but the other part would be that supposing sometime in the future we can develop a resource which is not necessarily a state agency but a private resource which might come in?

CHAIRMAN BARTLETT: Perhaps we had best say to appropriate state agencies or to other agencies upon direction of the judge?

MR. WALLACE: Yes.

CHAIRMAN BARTLETT: This would be one solution.

MR. WALLACE: Yes.

CHAIRMAN BARTLETT: So it isn't uncontrolled because you might have a private placement.

MR. WALLACE: Yes. Where we have been troubled with the present provision is that we have to go back to the judge each time and ask to send the presentence report over to the State Division for Youth and we don't think we should have to do this.

Arrests of Probationers, Section 210.30.

Subdivision 3 of this section provides that a probation officer may arrest a probationer, without a warrant, and search his person when he has reasonable grounds to believe that the probationer has violated a condition of the sentence.

We appreciate the desire of the Commission to eliminate the status of peace officer and note that probation officers are not included in the group designated as "police officer" (Section 1.20). Is there any inconsistency between the provisions of Section 210.30 and Article 70, "Arrest without a warrant", and the groups designated as police officer (Section 1.20)?

CHAIRMAN BARTLETT: We intend to give you specific limited authority in connection with your own function. If the probation officers feel

they ought to have more then we would like to hear from them but it was not our understanding that you did feel you needed more.

MR. DENZER: The warrants spoken of here are different from warrants of arrest. You say a police officer can or must execute warrants of arrest; that's one thing but these are specific provisions and specific kinds of warrants that are only applicable to this particular situation.

CHAIRMAN BARTLETT: The difficulty is that in the probation area it is a warrant of arrest, actually, isn't it?

MR. DENZER: Arrest for what?

CHAIRMAN BARTLETT: For violation.

MR. WALLACE: The provision is here to be able to arrest without the warrant.

MR. KNAPP: You don't think your probation officer should have general police powers?

MR. WALLACE: At the present time they have a peace officer status which means that they do have authority to arrest. In the new Code, if it were to go through, they would not be in the groups designated as police officer. So what I

an asking is is there inconsistency between saying that they can make an arrest without a warrant and not being included in that group of police - that are defined as police officers, particularly looking at Article 7?

MR. KNAPP: Getting away from technicalities, all you want to be sure is that they have the power to arrest persons under their supervision.

MR. WALLACE: Yes, I think this is desirable. This is not something that we do. We don't practice it as a matter of custom primarily because we want to make a focus on the rehabilitation aspect and when you begin to put up the other you move yourself over into too much of a policing structure.

Hearing on Violation, Section 210.50.

We are fully in accord with the provision that entitles the defendant to be represented by counsel at all stages of the hearing on a violation of probation. We wish to point out there are two unresolved questions.

First, how shall the probation agency be represented by legal counsel? In our opinion the probation agencies will need legal counsel,

especially in view of many recent United States Supreme Court cases advancing the cause of extended legal protections to defendants in criminal proceedings.

We are not prepared at this time to make a definite recommendation as to whether or not a probation agency should furnish counsel in a violation proceeding or whether the probation agency should be represented at a hearing of the violation by the District Attorney. We are endeavoring to work out a rationale as to who should represent a probation agency and wanted you to be aware of the problem.

CHAIRMAN BARTLETT: Our reaction would be, I would think, that the people and you act in the name of the people when you recommend to the court that probation be revoked, represented by the District Attorney's office but if you come to a different view we would appreciate your giving us a memorandum on it.

MR. WALLACE: The reason I am raising this question is that we have been having this problem and we have been having to negotiate with

D.A.s as to whether they are going to assist us because this has not been the practice. So when you get the variation among District Attorneys as to what their role is once the conviction is done, it makes problems for the probation people.

CHAIRMAN BARTLETT: You think we ought to have a direction?

MR. WALLACE: I think it would be advisable to have a direction.

Secondly, does a probationer have the right in violation hearing, to refrain from taking the witness stand, remain silent and avoid self-incrimination? Again we have no answer but we think this question will confront us and the courts some day.

Transfer of Supervision of Probationers,
Section 210.70.

Subdivision 2 under this section provides that where supervision of a probationer is transferred, in the event the defendant resides in the City of New York, the Supreme Court for the county in which said defendant resides shall have all of the powers specified in Section 210.30, (notice

to appear, warrants, arrest, search) and the Supreme Court may file a declaration of delinquency in accordance with Section 210.40. The section then outlines the procedure to be followed by the Court, including that on violation of probation.

We wish to raise the question whether it is the intent of this section to give to the Supreme Court exclusive jurisdiction over all transferred cases in New York City including misdemeanor cases from courts with only misdemeanor jurisdiction. For example, what court has jurisdiction if Erie County wishes to transfer supervision of a misdemeanor case from a misdemeanor court to New York City, or vice versa?

I could ask another question. Could the Office of Probation accept supervision of a felony case from another county?

CHAIRMAN BARTLETT: We are delighted that you raised the question and you are not going to get an answer simply because I don't know what the answer is.

MR. KNAPP: Could you give us a memorandum

of what you think it ought to be?

MR. WALLACE: Yes.

Release on Recognizance, Section 380.10.

We approve the concept of release on recognizance as provided in the proposed Code. We suggest that consideration be given to language that would encourage judges and the courts to use recognizance or at least give serious consideration to the possibility of release on recognizance before setting bail. This is what the United States Congress did in passing the Bail Reform Act in the 89th Congress, Bill No. S.1357. The Act states under Section 3146, "Release in non-capital cases prior to trial" that first consideration is "release pending trial on personal recognizance." It gives the judge a legislative policy by which he can be guided on his actions.

CHAIRMAN BARTLETT: You did note, I hope, that for the first time in New York back in the arraignment provisions, the order of options is listed beginning with ROR?

MR. WALLACE: I did.

CHAIRMAN BARTLETT: We intended that to

convey a message but you may be right that we need to give it more emphasis.

MR. WALLACE: I would like to express my appreciation for the chance to appear before you. I made notes on the three memos that I will produce and send to you and I will get them to you.

CHAIRMAN BARTLETT: Thank you very much, Mr. Wallace. You have been very helpful to us and I know Mr. Pricer is not here today but will be in touch with you about the matter you raised.

MR. WALLACE: Thank you.

CHAIRMAN BARTLETT: We will now hear from Mr. Flatow.

STATEMENT OF MR. F. FLATOW,
APPEARING ON BEHALF OF PUBLIC
SERVICE MUTUAL INSURANCE COMPANY,
STUYVESANT INSURANCE COMPANY AND
PEERLESS INSURANCE COMPANY

MR. FLATOW: Mr. Chairman and members of the Committee: I would like to thank you on behalf of the Public Service Mutual Insurance Company, Stuyvesant Insurance Company and Peerless Insurance Company for the permission you have granted us to address you this afternoon on various proposed sections of the new Penal Law and Criminal

Code.

CHAIRMAN BARTLETT: Off the record.

. . . Discussion off the record . . .

MR. FLATOW: There are two sections of the old Code of Criminal Procedure to which I would like to address you, the first being Section 598.

On behalf of the undersigned insurance companies, which are engaged in the bail bonding business in this State, reference is made to Section 598 of the Code of Criminal Procedure which provides, among other things, that a motion to vacate a bail bond forfeiture must be made within one year from the date thereof.

It is respectfully urged that the restriction of one year be removed from this section in order to more or less correspond and conform to the practice in all federal courts, as set forth in Rule 46(f) of the Federal Rules of Criminal Procedure, wherein an application for remission of a forfeiture is a matter in the discretion of the judge hearing the motion with no time limitation within which to make such application.

For a great number of years the surety companies operating in this State have contributed a great deal to the administration of criminal justice. In approximately 98 percent of bail bond forfeitures, the defendants are returned to the jurisdiction of the court by the surety companies. Within the past few years we have become aware of the fact that, notwithstanding this excellent record, a considerable number of persons charged with serious crimes have been released from custody on parole or low-cash bail. As a result thereof, there has been a staggering increase in the number of unexecuted warrants for defendants charged with crime. It is unfortunate, but true, that only a small percentage of warrants issued as a result of cash bail or parole violations will ever be executed. The surety companies, however, as heretofore stated, in almost every instance of bail bond forfeitures spare no expense and effort in an endeavor to return their bailed principals to custody.

In a recent article which appeared in the New York Law Journal on February 2, 1968, it

was disclosed through an inquiry conducted by the New York State Association of Trial Lawyers that "***the failure of defendants on low-cash bail or parole to return to court was eight times as great as in instances where high bail had been fixed." The report continued to disclose that apparently "***thousands of parole and low-cash bail jumpers are loose upon the city streets. While parole has its virtue, it must not be granted indiscriminately if we are to remain secure." And further in the report: "***the system of individual parole and legal aid may very well create a condition whereby those involved in street crimes as a business*** know there is no penalty they must face for their conduct. If arrested, they can be back in business in a matter of hours on parole or low-cash bail, and to cap the irony, they don't even have to pay for their lawyers."

The surety companies render an invaluable service to the People, true for a motivation of profit but, nevertheless, the function of the company is such that the taxpayers save a considerable amount of money due to such efforts on the

part of surety companies.

CHAIRMAN BARTLETT: Mr. Flatow, do you have any figures as to the number of bench warrants issued in the last six months, say, for violation of recognizance release and/or bail jumping?

MR. FLATOW: Mr. Chairman, we have attempted to obtain these figures and they are unobtainable to us. What I know is simply hearsay.

CHAIRMAN BARTLETT: We will get them.

MR. FLATOW: I understand it's tremendously high. Mr. Shapiro, who is here today from the Stuyvesant Insurance Company, has heard some figures in the corridors of courtrooms.

CHAIRMAN BARTLETT: I heard a figure today from, I would say, an informed source that it's in the thousands in the criminal courts for Manhattan in the last three or four months.

So it's your point that release on recognizance is an appropriate and proper option for the judge to consider but that it ought to be discriminately used?

MR. FLATOW: That's right. I attended the National Bail Conference on Bail and Criminal

Justice in the State Department Building in Washington in 1959, I believe it was.

CHAIRMAN BARTLETT: More recently than that.

MR. FLATOW: Was it '60?

CHAIRMAN BARTLETT: Would you believe it was in the spring of 1963?

MR. FLATOW: I happen to be involved in the bail bond business but I am an attorney and I realize that there are many problems on bail, taking people who are first offenders and keeping them in jail to languish with hardened criminals for several months and then giving them credit for time served on simply a suspended driving charge. I believe that low-cash bail is very encouraging to people whom a night or two in jail might not harm and let the parents go out and get the people in the neighborhood to put up some cash to bail the son out and perhaps he wouldn't be out in the street in a matter of hours to commit crimes. I think the system is being abused at this point.

The surety companies render an invaluable service to the People, true for a motivation of

profit but, nevertheless, the function of the company is such that the taxpayers save a considerable amount of money due to such efforts on the part of surety companies. This function results in the disposition of almost all criminal cases in which the surety companies are involved. In this respect, the surety companies perform quasi-judicial functions; that is, acting as an arm of the Court. To preclude and restrict the surety companies from making appropriate applications for relief in the cases of forfeited bail bonds stifles their initiative and incentive in the repatriation and apprehension of bailed defendants. Certainly there can be no harm to the People in enlarging that period of time during which the surety can apply for relief from a forfeited bail bond, inasmuch as to do so would likewise provide an even greater benefit to the State, as mentioned above.

In a decision of the Supreme Court of the State of New York, Appellate Division, First Department, September 1964, *People v. Peerless Insurance Company, et al*, 21AD2d 609, Mr. Justice

Breitel speaking for the Court wrote as follows:

"Professional sureties and the bail device perform a useful and humane social purpose in obvious ways. In addition, the possibility of remission in a proper case motivates the surety and others to incur expenses and engage in substantial efforts to procure the appearance of a defendant after forfeiture."

It is respectfully urged that this Committee consider the abrogation of the one-year limitation now imposed upon surety companies by Section 598 of the Code of Criminal Procedure and conform such relief to the practice in the federal courts, in order to make available to the People the useful function of surety companies on an unrestricted basis.

I am not aware of the correlative section in the proposed Code which would provide this relief to the surety companies.

CHAIRMAN BARTLETT: You didn't find one. That's not to say, after talking with you before we commended -- I did chat about it with Mr. Denzer and it was not an inadvertent oversight, it was an

advertent one. We didn't know whether this kind of provision should be in the Code or somewhere else in the law. We recognize that it has to be dealt with and well.

MR. FLATOW: Thank you very much.

At this time I would like Mr. Shapiro to speak once again in behalf of these three companies and necessarily the surety industry with respect to the old Section 590.

CHAIRMAN BARTLETT: Thank you.

Mr. Shapiro?

STATEMENT OF MICHAEL SHAPIRO
ON BEHALF OF PUBLIC SERVICE
MUTUAL INSURANCE COMPANY,
PEERLESS INSURANCE COMPANY
AND THE STUYVESANT INSURANCE
COMPANY

MR. SHAPIRO: Thank you for allowing me to appear here today.

I am talking about Section 590 of the Code of Criminal Procedure as it stands today. This is a section where the surety company is allowed to obtain a certified copy of the original bail bond and a serentis form, as we call it, to apprehend the defendant. This is something that

I understand is not in the proposed law.

CHAIRMAN BARTLETT: It's in the same category as the section that I just referred to in talking to Mr. Flatow. There isn't any provision for it. We don't know what to do with it, frankly. Shed some light on it if you can.

MR. SHAPIRO: Gentlemen, this is a serious situation. This is a case where before a bail forfeiture we are allowed to apprehend the defendant and surrender him if he has placed the bond in jeopardy. No surety company does it arbitrarily. They do it only when there is a problem. In many instances --

CHAIRMAN BARTLETT: Who makes the decision, Mr. Shapiro? Is it the individual bondsman?

MR. SHAPIRO: No, as a rule it is the indemnator. I was just coming to that.

CHAIRMAN BARTLETT: Good. That is the thing I am especially concerned about.

MR. SHAPIRO: In many instances we will have a hysterical mother or an indemnator, whether a cousin, brother or just a friend, call up and say, 'My son or my friend is packing his bag now.

Please pick him up and bring him in. I don't want to be responsible any more."

CHAIRMAN BARTLETT: My son, the bail jumper.

MR. SHAPIRO: So what are we in a position to do? "I'm sorry, there is nothing I can do because, number one, the court is closed and I could not go and get a certified copy of the bond." If it's something that happens after the bail forfeiture, then of course we don't have the warrant. I don't know if the Commission is aware of the fact that after 60 days, after a warrant is issued, 60 days after the warrant is issued in the Criminal Court only, the warrant is sent back to the Court, a mark of RTC, return to court, which means that it's filed with the papers and subsequently filed in the basement, case closed. Now what do we do when an indemnator comes to us and says, "I just saw the man. Come with me. I know exactly where he is." This happened only last week. A man came frantically to my office, he was an indemnator. The boy just came home. He's home. I spoke to a police officer. He doesn't want to arrest him

and he said, "Where is the warrant?"

I don't know, gentlemen, if you know how hard it is to obtain a warrant but it is extremely difficult to find a warrant officer. They are either out in the field or after hours and it can't be obtained, especially 60 days after the date of the forfeiture when the warrant is now in the basement of the courthouse. So it is practically impossible to get a warrant. What do we do in a case like that? We are in a serious predicament. If we go to the police station and say, "Lieutenant, this man is wanted." "Where is the warrant?" is the first question. So that we are now asking the Commission to take into consideration that this is something that is very necessary not only before the forfeiture but after the forfeiture.

If the Commission could see their way into issuing what -- I will say this: There are many discussions in this book about warrant of arrest. If the Commission could see fit to issue or insert in the Code a surety warrant of arrest which would allow the surety company at any time, whether it be before the forfeiture or after the

forfeiture, where the surety could sign this warrant of arrest and bring him to a police station and have this man booked and subsequently brought into court, it would alleviate the - quite a bit of problems.

MR. DENZER: What do you do when there is a bail bond outstanding and the action is proceeding and you know that the defendant is going to flee the jurisdiction? Can't you go and pick him up yourself?

MR. SHAPIRO: We have to pick him up ourselves. Yes, we do that, or we have bounty hunters that we pay to go out and apprehend this defendant. However, in a case like that if this man were to run away or is about to run away and it's after hours and we cannot get a certified copy of the bond, there is nothing we can do. I have seen him go in front of my eyes because I had no authority to apprehend this defendant.

CHAIRMAN BARTLETT: You think some special kind of device --

MR. KNAPP: A warrant that you are authorized to sign yourself?

MR. SHAPIRO: Yes, the surety company or its agent on signing on behalf of the surety company and the company would be totally responsible because we never apprehend anybody unless we know we have to.

CHAIRMAN BARTLETT: You know, outside the City of New York, in my county they are not used at all. It's all property surety. Would you leave that discretion to the individual property owner?

MR. SHAPIRO: I understand your problem but this is something where I am talking for surety companies. I don't know how you would cope with a mother or father putting up a home for a child.

CHAIRMAN BARTLETT: Which happens quite regularly upstate.

Mr. Flatow?

MR. FLATOW: I believe this would hold true with respect to a professional surety as well as an individual surety. After all, the principle of surety was started years ago by people putting up homes. They didn't have bail bond. This is a recent innovation. Mr. Shapiro refers to a

surety warrant. It should be a warrant that could be issued to anyone, whether commercial or an individual.

CHAIRMAN BARTLETT: Mr. Shapiro is suggesting, however, that such a warrant could emanate from the surety.

MR. FLATOW: Yes.

CHAIRMAN BARTLETT: While some consideration might be given to doing that with the company that is subject to regulation by the insurance department there is a question whether we want to give that option to the individual surety.

MR. SHAPIRO: Mr. Bartlett, how many real estate owners put up property for strangers? It's very rare unless they go to a surety company.

CHAIRMAN BARTLETT: It's rare.

MR. SHAPIRO: The only one they would put it up for is a son or a relative.

CHAIRMAN BARTLETT: We want to be sure that it isn't because they are mad at them. They may regret their initial commitment and decide that the way to get out of this is to have that son of a b. back in jail.

MR. SHAPIRO: True.

CHAIRMAN BARTLETT: Which is a situation you don't encounter but in the personal relationship contacts, it's a very real possibility.

MR. SHAPIRO: Unless there could be a stipulation that it applied to surety companies only.

CHAIRMAN BARTLETT: We will consider it and I see the problem.

MR. SHAPIRO: Thank you very much.

CHAIRMAN BARTLETT: Do you have any comment on the rate of issuance?

MR. SHAPIRO: A few weeks ago I spoke to a gentleman in the District Attorney's office in New York County and we discussed the amount of bail forfeitures there were and his figures at that time were 3,100 small cash-bail forfeitures.

CHAIRMAN BARTLETT: Since when?

MR. SHAPIRO: For the year 1967 compared to 561 company bail-bond forfeitures. This does not reflect --

MR. KNAPP: In what period?

MR. SHAPIRO: For the year 1967 in New

York County, 3,100 small cash-bail forfeitures; that would be in the category of \$25, \$50, \$100 in that area.

CHAIRMAN BARTLETT: And 561 bonds?

MR. SHAPIRO: Surety company bonds.

This does not reflect the amount of paroles and in our course of conversation we took a sort of rough figure of about 3,000.

CHAIRMAN BARTLETT: 3,000 paroles?

MR. SHAPIRO: Yes.

CHAIRMAN BARTLETT: You don't know how many warrants were issued to pick up a --

MR. SHAPIRO: Well, in each instance there would be a warrant.

CHAIRMAN BARTLETT: Right.

MR. SHAPIRO: It's a question --

CHAIRMAN BARTLETT: 3,000 warrants, you mean, for parole?

MR. SHAPIRO: Yes. This is not based on fact, this is just based on hearsay.

CHAIRMAN BARTLETT: You have excited our interest.

MR. JONES: Do you mean parole forfeiture?

MR. SHAPIRO: One, I am talking about where the judge said, "You are paroled under Section 60.94(b). You must appear," et cetera. For that we have a figure of about 3,000, hearsay. 3,100 cash-bail forfeitures in addition to this 3,000 which means that small cash bails have been forfeited where the defendant hadn't appeared. Now I could safely say, gentlemen of the Commission, that 70 percent of that 601 has never been or never will be apprehended.

MR. BENTLEY: Does that include traffic cases?

MR. SHAPIRO: I'm not talking about traffic cases. Traffic cases are other than the figures I am giving here.

CHAIRMAN BARTLETT: This is hearsay.

MR. SHAPIRO: 3,100 is conversation with someone in the District Attorney's office.

CHAIRMAN BARTLETT: In any case, you are suggesting that we ought to look into the forfeiture rate.

MR. SHAPIRO: I certainly do. Might I say that in bail-bond forfeitures, through the

efforts of the surety company only, over 90 percent are apprehended.

CHAIRMAN BARTLETT: This morning Mr. Subin was talking for Vera and gave us an interesting discussion from his point of view and indicated that the rate of forfeiture of those handled under the Vera Project was five percent. Obviously that cannot possibly be squared with the numbers you are talking about.

MR. SHAPIRO: No. I don't think that the figures I gave you have anything to do with Vera because 3,100 forfeitures would not have anything to do with Vera.

CHAIRMAN BARTLETT: The 3,000 figure would?

MR. SHAPIRO: But they might not be Vera also. Some of those might be in the Vera.

CHAIRMAN BARTLETT: Right.

MR. SHAPIRO: Most of them might have been paroled by the judge without consent of Vera. I will definitely look into the five percent of Vera also.

CHAIRMAN BARTLETT: Thank you very much.

MR. SHAPIRO: Thank you, gentlemen.

CHAIRMAN BARTLETT: Gentlemen, we are going to conclude this hearing at 4 o'clock so if you will keep that in mind out of courtesy to the others.

First we will have Captain Myer Rubin.

STATEMENT OF CAPTAIN MYER
RUBIN, SUPERVISING COURT
OFFICER, CIVIL COURT, NEW
YORK COUNTY

MR. RUBIN: Mr. Chairman and members of the Commission: Firstly I thank you for allowing me the time. As the Chairman said, we don't want to tax anybody and I don't want to take too much time.

Firstly, from the outset, if this question is answered it will cut down my discussion. From what I have heard during the hearings yesterday and today am I correct in assuming that the Commission agrees and finds it desirable that the court officer should have the power and authority of a police officer within their own "bailiwick"?

CHAIRMAN BARTLETT: Yes, and around the

courthouse I don't think there is a quarrel. The remaining question, as with the correction officers, is the off-duty status and I think that is the only remaining question.

MR. RUBIN: I am addressing myself to that particular question.

CHAIRMAN BARTLETT: O.K.

MR. RUBIN: Firstly, we find that we have a court officer or correction officer as a police officer during his duty hours and we find that he is in his own bailiwick empowered with the powers of a police officer. Now we have to now cut him off from being relieved of duty regardless of what his tour of duty is, his hours. He is now out in the street on his way home, he is now Mr. Citizen and he no longer has the powers. Primarily the court officer asks this one question: When the situation arises, something of an emergency nature, and I believe Mr. Denzer yesterday asked of Mr. John James, and I will pose the question -- perhaps I may not be verbatim -- that at 2 o'clock in the morning the officer is on his way home from his tour of duty and he is confronted by an

individual who says, "That man robbed me. I need help," or words to that effect. What would you do? Well, I have had that occasion, I have had that happen on many occasions and I have taken action. My actions in those cases and in the case of perhaps many other peace officers in our category have done the same thing. If the perpetrator was immediately available I, within the best of my ability, made the apprehension. I had my complainant and I brought this man in to the precinct within that area either on my own or with the assistance of the police. The fact is I had the occasion not too many years ago with respect to something in Mr. Panzarella's county which ultimately resulted in the arrest of 55 individuals in a forgery ring, motor vehicle forgery ring.

I myself am the holder of no less than 20 commendations in this City. Now the court officer asks if his police officer or peace officer status is cut off at a particular hour and he is on his way home and this situation arises, does he become Mr. Citizen and say to the individual who is seeking his help, "I'm sorry, Mister, at 4 p.m.

this afternoon I ceased being a peace officer. I would suggest you call the police."

CHAIRMAN BARTLETT: Mr. Rubin, just a minute. Don't you agree that every citizen has a responsibility apart from any peace officer status to assist in those circumstances?

MR. RUBIN: I certainly do agree but we can't overlook one thing, and we read it every day in the paper and we have the District Attorneys of the various counties and throughout the State, particularly here in the City of New York. The Police Commissioner is crying out to Mr. Citizen and Mrs. Citizen, "Please help us. Please do get involved because our citizenry do not get involved," and I am talking about that majority.

CHAIRMAN BARTLETT: I agree.

MR. RUBIN: They will not get involved. We have murders, rapes continuously. So I say rather than take X number of peace officers such as your correction officers, your court officers, who are well trained, there is no doubt in my mind that they are trained, take them off the streets where they in effect are perhaps in some

instances a deterrent to crime, a prevention to crime.

CHAIRMAN BARTLETT: Are your men in uniform?

MR. RUBIN: Yes, they are.

CHAIRMAN BARTLETT: When going to and from work?

MR. RUBIN: In some instances some of our men do travel in uniform.

CHAIRMAN BARTLETT: Some do not?

MR. RUBIN: Some do not.

CHAIRMAN BARTLETT: O.K.

MR. RUBIN: Most of our officers have come into the court system and in order to qualify had to have a minimum of three years as a law enforcement officer so they are well trained. I myself am a qualified police firearms instructor and an investigations officer as well as the supervising court officer.

CHAIRMAN BARTLETT: You will agree that the key point is not the proficiency in the use of firearms, it's understanding the proper arrest procedures and the law of arrest and the crime

for which they are arresting?

MR. RUBIN: That is correct. I don't have to point out, and I don't think we are to go into too much detail, that we find our court officers throughout the years of having been in the courts very well versed in procedure of arrest, what constitutes a crime, and in many instances and this is no reflection on the legal profession, lawyers have sought advice from court officers where they have been in the same court, Criminal Court, Family Court and Surrogate's Court. I think the men are capable, they are dedicated, courageous men and I might add as well the correction officers in the City of New York who every year have been down to City Hall and received medals for valor beyond the call of duty.

The court officers of the Civil Court, Family Court and Criminal Court in 1965 were presented with medals by Mayor Wagner. I am the recipient of four medals from City Hall myself.

Stripping us of our peace officer status or police officer status will create only one thing and I am certain of that. You will now take

X number of officers from the courts and we will say, roughly, 6- to 800 court officers and you will make them Mr. Citizen again and they will definitely get to the point where they say, "I will not get involved when I don't have the power and authority. I make that one mistake and I become liable to a tort action."

CHAIRMAN BARTLETT: You are satisfied, Mr. Rubin, that they genuinely do involve themselves now?

MR. RUBIN: The records will speak for themselves.

CHAIRMAN BARTLETT: O.K. Thank you very much.

MR. RUBIN: Thank you, gentlemen.

CHAIRMAN BARTLETT: Mr. Pitler?

STATEMENT OF ROBERT PITLER,
SPEAKING AS A CITIZEN

MR. PITLER: My name is Robert Pitler and I am speaking as a citizen.

CHAIRMAN BARTLETT: You are not speaking for any group?

MR. PITLER: No, I am not.

I graduated from Brooklyn Law School, cum laude, got my Doctor's and Master's from the University of Michigan. I teach criminal law in Indiana and I will be teaching next year in the University of Colorado.

CHAIRMAN BARTLETT: You want to speak to us on the eavesdropping?

MR. PITLER: Eavesdropping and wiretap.

First of all, some of it may be nit-picking and some not. I have written an article for the New York Law Journal and completed one for the Brooklyn Law Journal.

CHAIRMAN BARTLETT: We would appreciate the detailed commentary by way of a written submission after the hearing, if you would.

MR. PITLER: I can send you a copy of the article.

CHAIRMAN BARTLETT: That would be fine.

MR. PITLER: First of all, the most glaring defect of the statute as far as I am concerned is the failure of someone to find out whether he has been bugged or wiretapped. There is no provision for some kind of organization of

an indexing system. In other words, it seems as though it's an ad hoc basis and the District Attorney will inform someone that he intends to use wiretap materials or eavesdrop materials. If he doesn't intend to use it, he doesn't have to inform someone.

CHAIRMAN BARTLETT: Well, you do know we have a provision for notice in the statute?

MR. PITLER: Yes, I will get to that also.

Now it would seem to me that anybody who has been the subject of surveillance upon indictment must be notified to that effect. In other words, that a warrant has been issued against him. In other words, he was the person described or his premises were described and you have to be informed.

CHAIRMAN BARTLETT: You don't have to do that now in search warrants, do you?

MR. PITLER: I think this is a little bit different. When you are being searched --

CHAIRMAN BARTLETT: You do if they took anything but the search that does not result in

the removal of anything does not require notice of anything.

MR. PITLER: Unless you are going to say recording of conversations is not taking anything. I would take issue with that.

MR. DENZER: Are you talking about the motion to suppress? Notice there must be given to the defendant that wiretap evidence is going to be used.

MR. PITLER: I would challenge that it should be when he has been the subject of surveillance. Sam Dash did a study a number of years ago, a book called "The Eavesdroppers."

MR. PANZARELLA: Don't talk to me about Sam Dash because he was the D.A. of Philadelphia and didn't quote his own county but quoted New York County as having 60,000 wiretaps in one year and we refuted that.

MR. PITLER: What I am concerned with --

CHAIRMAN BARTLETT: We like Sam, understand that.

MR. PITLER: One of the prime purposes of eavesdropping and wiretapping is to get leads

to evidence. How does the District Attorney determine whether he intends to use the evidence? How far removed does he have to go? Where does he decide the point that he does not use it?

CHAIRMAN BARTLETT: Under 370.50 the only thing the court can do is defer delivery of notice.

MR. PITLER: 370.50 talks about notice. You don't have to tell the person recorded. You can tell the owner of the premises.

CHAIRMAN BARTLETT: Come on now, Mr. Pitler. We have to have a realistic mandate here. Are we going to require on an eavesdropping to have the policeman say, "Excuse me, sir, I didn't get your name"? I am being facetious, of course. To who else do you give the notice except the owner of the premises?

MR. PITLER: What I am saying, one talks about a defendant, one talks about the owner of the premises. I am focusing at least on the defendant for the present purposes. Say he wasn't the owner of the premises. He may never know that his conversation was bugged. In other

words, you can direct it against X or Y's premises and X may never know, correct?

CHAIRMAN BARTLETT: All you are suggesting is that 370.50 ought to be broadened?

MR. PITLER: Or 375 that the District Attorney should inform somebody whether he has been the object of the surveillance.

CHAIRMAN BARTLETT: Section 370.50 does not turn on use.

MR. PITLER: But it doesn't talk about defendant.

CHAIRMAN BARTLETT: Don't magnify your objection. All you want us to do is to include the object of the surveillance with the owner of the premises?

MR. PITLER: It should be both.

CHAIRMAN BARTLETT: I say, included with?

MR. PITLER: Also I might suggest that there is one part of the statute that is totally inadequate as far as the New York Court of Appeals goes. The thing about summarizing the testimony before the issuing justice. The statute doesn't say it but I assume the New York case law will

continue that you can support a totally defective affidavit by testimony that occurred in the ex parte hearing. I believe that People v. McCall - there are a number of cases. The statute doesn't specifically refer. When you allow that the testimony be summarized rather than a verbatim translation, I would suggest that that summarization could not be used to support a totally defective warrant because it would not be clear.

CHAIRMAN BARTLETT: I don't know what you are referring to. Are you referring to report?

MR. DENZER: Are you referring to the application for the eavesdropping warrant?

MR. PITLER: That's right.

MR. DENZER: In which the applicant - there may be a hearing on it and the applicant can give oral testimony or produce oral testimony?

MR. PITLER: Right, and the authorization is that it can either be recorded or summarized in writing. I would say that the summarized in writing should be deleted. This way you can always support the warrant but the recorded stuff I don't think you could support it.

CHAIRMAN BARTLETT: Of course, you understand that in New York we still have sentences up to four years in Elmira based on summarized records.

MR. PITLER: I would suggest that 370.20 is unconstitutional on its face.

CHAIRMAN BARTLETT: Emergency tap?

MR. PITLER: Yes. I think you must know about the Katz language which indicates that that would not be constitutional.

CHAIRMAN BARTLETT: This was written before Katz.

MR. PITLER: I know it was.

I would also suggest that possibly the stuff about notifying the owner of the premises may not be necessary either under Katz.

CHAIRMAN BARTLETT: That's probably so but we can leave it anyhow.

MR. PITLER: Another defect I find is that the number of judges that can issue this warrant. I suggest that it permits a tremendous deal of forum shopping, not that you have to tell the judge that you went to another judge.

CHAIRMAN BARTLETT: What limitation would you put on it?

MR. PITLER: I would probably make it -- I realize the problem -- only the presiding justice in each division. I would suggest that something has to be done about it because if you get a judge that constantly gives warrants, I mean, you can go to a certain judge and the District Attorneys know it and you can always get a search warrant.

CHAIRMAN BARTLETT: Don't you think if your argument is valid, you ought to be bringing this to the Judicial Conference on the competence of judges? How can we have a rule here bottomed on the premise that some judges don't exercise discretion as they should?

MR. PITLER: Put it in the statute.

CHAIRMAN BARTLETT: How would you suggest we limit it?

MR. PITLER: Presiding justice can designate that only certain justices --

CHAIRMAN BARTLETT: Are you suggesting that that will not reflect an attitude on who is designated?

Off the record.

. . . Discussion off the record . . .

CHAIRMAN BARTLETT: The Commission did not feel there was any practical way to limit the judges to which application can be made. All we could do is define the courts.

MR. PITLER: Why couldn't it be on a rotating system?

CHAIRMAN BARTLETT: Why should it be?

MR. PITLER: Because this way the District Attorney has to go to the judge that is available.

CHAIRMAN BARTLETT: Would you suggest that motions made by defendant should be on a rotating basis?

MR. PITLER: I should think that the motions made by the District Attorney, the District Attorney shouldn't be able to pick the judge. I would suggest that a system could be set up where you can completely rotate every time a motion came to a specific judge.

CHAIRMAN BARTLETT: My point is that you are not directing this to wiretapping but to the whole system of criminal justice.

MR. PITLER: Yes.

CHAIRMAN BARTLETT: I think your attack, if it's that valid, should be that broad.

MR. PITLER: I think wiretapping and eavesdropping are a great infringement.

I would also like to mention in connection with 370.15 that Justice Stewart, who wrote Katz, and that is concurrence in Berger, he indicated that he would hold a higher standard of probable cause for eavesdropping and wiretapping on a situation because of what is involved. I would suggest --

CHAIRMAN BARTLETT: Than for what?

MR. PITLER: Than for ordinary search warrants. His concurrence in Berger clearly stated that.

I would suggest that I am opposed to it. You can impeach me. I am opposed to the nameless informer generally. As far as wiretapping, I would still argue that it's a greater infringement. At least the Commission should meet the challenge of it in eavesdropping and wiretapping. It seems to me that a District Attorney can establish

probable cause at least under the laws of this State. All he has to say is that an informer who has been previously reliable has told me that this and this - he has seen this.

CHAIRMAN BARTLETT: I think we have your point.

MR. PITLER: I think that under eavesdropping and wiretapping --

MR. PANZARELLA: Have you looked at any of the orders of wiretapping submitted?

MR. PITLER: I have seen some of them. I have seen one with a nameless informer. I have seen some prior to decisions -- I work for Henry B. Rothblatt in the Bronx. I have seen where a wiretap was --

CHAIRMAN BARTLETT: O.K.

MR. PITLER: I can't stress this notice to a defendant that he has been the subject of a tap.

CHAIRMAN BARTLETT: We have your point.

MR. PITLER: I would just like to point out a couple of other things. What do you do after the judge finds the wiretap order is illegal?

The statute is completely reticent on that.

CHAIRMAN BARTLETT: What do you mean?

MR. PITLER: In other words, he suppresses. What does he suppress, just the recording? What about the links and leads?

MR. DENZER: There is a provision in the motion to suppress for that. When the motion is made then you have a hearing and the whole thing is gone into.

MR. PITLER: Let me pose my hypothetical to the Commission. Say two years prior there has been a tap or bug of an individual and he is finally indicted and he finally finds out about it and the prosecution says, "We are not going to introduce any recordings." You may use them. He wants to attack the warrant. He attacks the warrant and he is successful. How do you determine what is going to be used and what is not going to be used?

CHAIRMAN BARTLETT: What do you suggest we do?

MR. PITLER: I suggest that if the wiretap is held illegal, he be entitled to the

transcript of what was recorded and to be able to compare that transcript with the evidence that is going to be introduced at the trial to determine whether any information has been used. I know we are not really interested in cases but Judge Hand in *Coplin v. The United States*, I think 185 Fed. 2nd, indicated that once you establish the illegal nature of the wiretap order you are entitled to the log to determine and see what evidence the District Attorney is going to use.

CHAIRMAN BARTLETT: I'm asking you for a practical solution as to how you are going to identify.

MR. PITLER: There are two possible ones. Of course, you can work it on a standard. One, if the warrant was invalid on its face, you might give more rights to the defendant. If there was no warrant at all you might give him a little more.

CHAIRMAN BARTLETT: There is no giving a little bit more. It was either legally procured evidence or it wasn't.

MR. PITLER: No, I would suggest that if disclosure isn't constitutional --

CHAIRMAN BARTLETT: You mean as to what is done with it?

MR. PITLER: No, how it's a tap. Again I would suggest there is absolutely no provision. If you want to leave it for the courts, that's fine but I think you should leave it open for the courts.

Talk about return. I also would like to mention something about this return. What is required to be returned here? Are you just required to return to the judge the result of the tap? I would suggest the transcript of the hearing that authorized the tap and combine it all in some kind of index system so you have it all and you present it to the suspect.

CHAIRMAN BARTLETT: Present it to the suspect?

MR. PITLER: To the defendant after he is indicted. We had the warrant and the warrant was clearly defective on its face and we didn't know until we walked into court that, lo and behold, here was the transcript of what was said to the justice. I think the defendant should have that

in advance of his motion to suppress or at least prior to going into court. It certainly would facilitate matters.

That's it.

CHAIRMAN BARTLETT: Thank you, Mr. Pitler. I take it that your criticisms are to those aspects of the eavesdropping article that you addressed yourself to. Am I to infer that you do believe that a system of eavesdropping under judicial scrutiny is constitutionally permissible?

MR. PITLER: I think Katz clearly says that. It's not for me to say. The court has said it.

CHAIRMAN BARTLETT: Thank you.

MR. PITLER: Thank you, Mr. Chairman.

CHAIRMAN BARTLETT: Mr. Gordon?

STATEMENT OF REUBEN R. GORDON,
MEMBER, THE NATIONAL COUNCIL
ON CRIME AND DELINQUENCY

MR. GORDON: Chairman Bartlett, Commissioners: My name is Reuben Gordon. I am a retired teacher and a member of the National Council on Crime and Delinquency, as well as of

the Associated Teachers Against Corruption.

I note that the previous speakers have begun by establishing qualifications to express an informed opinion on the revision of the Penal Law, which is the responsibility of this Commission. I have some rather unique qualifications. I have a criminal record, having been arrested three times on the premises of my school for the crimes of trespass under Section 22 (b) of the old law.

CHAIRMAN BARTLETT: How would you stand under the new Penal Law? Have you checked it out?

MR. GORDON: I don't know. On my first arrest I was brought before Judge Schor who is now under indictment for perjuring himself.

CHAIRMAN BARTLETT: Mr. Gordon, we really admire your candor but we don't need the details of your encounters with the law. Tell us what you think about the Code.

MR. GORDON: Very well. I mentioned the above details in order to establish my bona fide for expression of my opinions.

CHAIRMAN BARTLETT: Your credentials

are accepted.

MR. GORDON: I appeared before you previously in connection with the use of deadly force and apprehension of criminals. I believe it important to mention that as a result of that effort of this Commission to obtain the reaction and views of police and District Attorneys on that proposed law, no criticism of this law was made until nearly a year had elapsed. Then there came a flood of criticism from public officials and law enforcement agencies. As a result of these protests this Commission has undertaken to make a revision in the law applying to the use of deadly force.

I wish to address myself first to a specific area of the revised Code which has opened the door to organized labor racketeers, once again, to seize control of the waterfront unions. I refer to Section 8 of the old Penal Law which stated in effect that any crime for which no specific penalty was provided in the law itself should be classed as a misdemeanor. This section has been omitted in the revised

Code.

MR. DENZER: You mean in the revised Penal Law?

MR. GORDON: In the revised Penal Law.

CHAIRMAN BARTLETT: Not exactly. It provides that any - it classifies any offense outside the Penal Law by sentence.

MR. DENZER: Which section are you referring to?

MR. GORDON: Section 8, I believe it was of the old Penal Law.

MR. DENZER: Was it 43 and 27?

CHAIRMAN BARTLETT: We know the section.

MR. DENZER: You mean anything that is - any violation of any provision?

MR. GORDON: Any law which does not specifically attach in that -- felony, misdemeanor.

MR. DENZER: It doesn't say that.

MR. GORDON: That happens to be what I learned from reading Judge Rinaldi.

MR. DENZER: It doesn't quite say that.

MR. GORDON: Perhaps you can correct Judge Rinaldi. I am only quoting what I read of

his opinion in the Law Journal.

CHAIRMAN BARTLETT: We like Judge Rinaldi too but let's see what the law says.

MR. DENZER: Section 29 is what you are referring to. "Where the performance of any act is prohibited by a statute and no penalty for the violation of such statute is proposed in the statute the doing of such act is a misdemeanor where the performance of the act is prohibited." It may say that a clerk may not file a paper in such and such a place and if he does file it, it's a misdemeanor.

MR. GORDON: I stand corrected. I may be wrong on the section but I'd like to give you the effect of the court decision that has been made.

This section in the revised Penal Code, the addition of which has had the effect of striking from the hands of the New York Waterfront Commission its chief weapon against the takeover of the union in the Port of New York by convicted felons who have heretofore been banned by statute from holding office in these unions.

A recent decision of Judge Dominic Rinaldi dismissed a charge brought by the Waterfront Commission against a union official who was a convicted felon.

MR. DENZER: Excuse me, we are cognizant of that case and we have talked to the Waterfront Commission about it. The gist of the whole thing is that this statute is so vague probably it's unconstitutional. If the Waterfront Commission wants a penal statute directed to a particular kind of act, all they have to do is to say it's a misdemeanor.

CHAIRMAN BARTLETT: And they have asked for it.

MR. GORDON: Let me make sure you understand. I do not represent the Waterfront Commission.

CHAIRMAN BARTLETT: We are glad to have you point out the problem but it has been called to our attention and I believe the Waterfront Commission has itself requested legislation.

MR. DENZER: Yes.

MR. GORDON: I would like to find out

something else which I believe is a defect in the procedure under the Code. The judge reasoned that it was the intention of this Commission to attach no penalty whatever to the employment by a union of a convicted felon for the purposes of collecting union dues. Judge Rinaldi further raised the question of the constitutionality of Section 8 of the old Penal Law as an invasion of civil rights. It would be appropriate to mention, I believe, that the indictment against the union and its official was brought before enactment of the new Penal Law. Judge Rinaldi's decision, therefore, seems to have had ex post facto effect since the action complained of, which was a misdemeanor at the time of the indictment, may not be punishable under the revised Code, particularly if he makes the point of its unconstitutionality.

MR. DENZER: This occurred before September 1, 1967; is that right?

MR. GORDON: The original filing --

MR. DENZER: Then the old law applies.

MR. GORDON: Then the old law applies.

No action was taken until the revised Penal Code

was apparently in effect and then Judge Rinaldi pointed out that since the new law did not include the old section --

MR. DENZER: It's too bad. Then they are going to have to revise those statutes. Anybody who wants a particular violation to be a crime is going to have to get a bill specifically making it that.

CHAIRMAN BARTLETT: Mr. Gordon, wouldn't you agree that if it's the will of the Legislature to make the violation of a particular prohibition a crime it ought to say so?

MR. GORDON: I think so and I believe --

CHAIRMAN BARTLETT: Because the way this reads if it was as Mr. Denzer pointed out, if it were literally enforced, a requirement that the County Clerk file papers in a certain way, just that bare statement, would make his failure to do so a crime which I'm sure we didn't intend.

MR. GORDON: You said to let the punishment fit the crime and let the punishment be part of the law on the statute. I believe that District Attorney Kootas' office, some six months ago, filed

notice of appeal on that decision. I have, however, seen no further mention of the matter and I assume that convicted felons continue to carry out the function of collecting dues on the waterfront.

CHAIRMAN BARTLETT: We have no evidence.

MR. GORDON: I have no evidence to the contrary.

In the meantime, we are being bombarded from all government levels, city, state and federal, with a barrage of statements against the mounting danger of crime in the streets. I submit that it is of the utmost importance to all citizens and all union members that your Commission close the tremendous breach in the wall erected under the old Code against Cosa Nostra takeover of the waterfront unions.

MR. DENZER: Doing what?

MR. GORDON: By doing promptly and without waiting for an appeal to straighten that out once and for all so that some judge, whatever his name is, may not subvert the law by an opinion which goes in the face of the intent of the law.

MR. DENZER: I don't understand what you

want us to do.

MR. GORDON: I would like to see that this so-called appeal by the District Attorney's office is supposed to have been filed and taken action on --

MR. DENZER: You mean Section 29 as I read it placed in the Penal Law again?

MR. GORDON: Yes.

MR. DENZER: The answer is no. I can tell you that.

MR. GORDON: Somebody should draft that law very quickly and make sure that it's on the statute books.

CHAIRMAN BARTLETT: I think that is being looked after, Mr. Gordon, insofar as it affects the Waterfront Commission. We talked to them about it.

MR. GORDON: The point I am getting at is while these things are being litigated in the court the actions of these organized criminal syndicates are being continued.

CHAIRMAN BARTLETT: Mr. Gordon, you are going to have to direct yourself to reference to the Code.

MR. GORDON: I thought this section was part of the Code.

CHAIRMAN BARTLETT: This is on the Criminal Procedure Law. Do you have any comments on the Criminal Procedure Law?

MR. GORDON: I must apologize because of my lack of the niceties. I thought it was part of the same thing.

I would like to make some other points. The matter of printing of the record was mentioned. At the present state of the game the printing of stenographic records at state expense is already mandated by law for poor defendants.

CHAIRMAN BARTLETT: Yes.

MR. GORDON: In the present posture of the law only the rich can appeal a conviction or the indigent for whom the State provides counsel and transcript of trial proceedings. These two groups are in these respects equal before the law in their ability to file appeals. The man of medium income is taxed to insure the legal rights of the indigent. When he himself runs afoul of the courts he is bled white for attorneys

and costs, and certain officials taking advantage of that fact have used the law to harass innocent people and have carried that harassment to the Appellate Court.

CHAIRMAN BARTLETT: Let me ask you two question: Number one, is it your point that records should be furnished free of charge to all defendants?

MR. GORDON: Exactly.

CHAIRMAN BARTLETT: Number two, is it your point that counsel should be provided to all defendants regardless of means?

MR. GORDON: I would like to make this distinction. Indigents are entitled to counsel. Gentlemen of the syndicate and other well-heeled people find no trouble in finding counsel. However, the person who is not in one of those categories, in my case, I spent \$9,000 to carry an appeal through the Appellate Division and when it was found in my favor unanimously ordering me restored to duty with two and a half years back pay, one year's salary went to my attorney. I don't believe I was made whole by the Appellate

Division.

CHAIRMAN BARTLETT: I understand, Mr. Gordon, but that is really not the concern of the Commission.

MR. GORDON: I believe somebody should be concerned with it.

CHAIRMAN BARTLETT: We are. As a matter of fact, you have discussed this with me before.

MR. GORDON: Very possible.

CHAIRMAN BARTLETT: December 15, I believe.

MR. GORDON: I should like to make it clear that as part of the favorable decision, which was frivolous at the outset, and there are precedents for that, the court should also assess a reasonable counsel's fee for the successful defendant.

CHAIRMAN BARTLETT: You are being exercised about it but it's not the subject matter that we are concerned with here.

MR. GORDON: I am trying to get other people exercised about it but, apparently, not successfully.

I would like to advert to a few other

matters. I was very interested in the testimony of Commissioner McGrath because I have gone through the presentence business and the psychiatric stage and the whole bit. One of the things I believe is unconstitutional is the presentence probation reports and psychiatric reports too are not made available to the defendant and I believe that is an infringement of due process because if the judge is in camera to base his sentence on these privileged reports and the defendant has no way of knowing what is in them, he is being deprived of due process. I believe that in spite of all the crocodile tears that the courts shed about not stigmatizing the defendant I don't give a hoot that I have been arrested and brought before Judge Schor. I'm proud of it. I'd like to see that the particular court documents on the basis of which I and other defendants have been railroaded should be made available to the defendant so that he shall have his rights guaranteed to him.

CHAIRMAN BARTLETT: You know, on the constitutional question this has been ruled upon in the Williams case. It held that due process

does not require, one, a hearing or, two, the defendant receiving the probation report.

MR. GORDON: Ruled upon by what court?

CHAIRMAN BARTLETT: The Supreme Court of the United States.

MR. GORDON: I think they should reverse their ruling. I think I have the information on which they should base their reversal because I believe that in a minority report one of the justices says, "What are we going to do about the judge who makes himself available for rail-roading a defendant and who flies in the face of due process deliberately because he has been fixed to do that very thing?"

CHAIRMAN BARTLETT: Thank you very much for your comments.

MR. GORDON: Thank you very much.

CHAIRMAN BARTLETT: Gentlemen from the Correction Department, I'm 10 minutes late right now. I ask you to try to have one spokesman, if you would. Can you agree on one spokesman?

Mr. Chaston, I'm not trying to deprive you of an opportunity to be heard.

Off the record.

. . . Discussion off the record . . .

STATEMENT OF HAROLD BROWN,
DEPARTMENT OF CORRECTION

MR. BROWN: I am Harold Brown of the
Department of Correction.

Regarding shields the officers carry?

CHAIRMAN BARTLETT: Yes.

MR. BROWN: I want to state that we carry
a shield which is almost similar to that of the
police and we also carry an ID card for purposes
of identification.

CHAIRMAN BARTLETT: O.K.

MR. BROWN: Now there was something about
statistics as far as arrests are concerned by
officers while off duty. I think our Commissioner
gave you a figure something like 27 but he did not
state at the outset, if I remember correctly, these
were commendations given by the Department of Cor-
rection.

CHAIRMAN BARTLETT: During 1967?

MR. BROWN: Right, and the Correction
Officers Benevolent Association, who also on

Correction Officers Day down at the City Hall, who give out awards, I think are far in excess of that particular number.

CHAIRMAN BARTLETT: Do you have any idea what the number of arrests off duty?

MR. BROWN: I would say off the top of my head better than 130-some-odd arrests. This is for a particular year. You must also understand that I am speaking for myself alone. I have been involved where I turned it over to the police officer. We have many such arrests made by correction officers here. There are arrests --

CHAIRMAN BARTLETT: Are these crimes you witnessed?

MR. BROWN: Absolutely, crimes I witnessed.

CHAIRMAN BARTLETT: I assume when you say you turned them over to the police that that didn't end your involvement?

MR. BROWN: All I had to do there was to make a statement at the precinct regarding what I saw of the particular incident and the cop handled it from there on.

As far as witnesses are concerned, I'm sorry I wasn't here to hear Mr. Frank's remarks but I understand there were some remarks about arrests being made. I feel that off-duty arrests are being made and that the correction officer has, over the years, as long as there has been a Correction Department, tried to function in this capacity of doing a job in the community where he lives.

I think you have heard all the arguments necessary in this area but what I would like to state as of now and today with crime what it is, and I think you have heard this more times than necessary to repeat, but I would like to add to that that most of us, as I think was brought out here yesterday, live in areas where we are associated during our day's work with the criminal element of the City of New York. Therefore, when we go out to shop in our supermarkets, when we go to the theater or when we go to the local tavern we are running into these people who have a pent-up feeling since they are recidivists and by the bare fact that they are in and out of the jail and their main line of work is some type of

clerk, have a resentment against the law enforcement agency regardless of who they are. I am only saying this, that I do hope this Committee and this body will see fit in all fairness to allow the correction officers to continue to function in the line of the job that they have been doing in the past as peace officers or police officers, however you see fit, and I may add if I left out a point, Mr. Frank this morning stated that many of the police officers have moved out of the City of New York or out of the boundaries of the City of New York and are living in Rockland County but I am sure that the correction officers who stay in the City are filling that void.

Thank you.

CHAIRMAN BARTLETT: Thank you, Mr. Brown.

Now, Mr. Chaston?

STATEMENT OF PETER CHASTON,
CORRECTION OFFICER, CITY OF
NEW YORK

CHAIRMAN BARTLETT: You are a correction officer?

MR. CHASTON: My name is Peter Chaston, Correction Officer, City of New York. I am also

a member and a delegate of the Correction Officers Benevolent Association.

I would like first of all to state that I feel honored that the Commission has listened to Commissioner McGrath as the first speaker on the opening of this session. I am also honored and I believe my colleagues are also honored to conclude this testimony with correction officers being present here.

CHAIRMAN BARTLETT: You can fairly state that you fellows opened and closed the New York City hearings.

MR. CHASTON: Exactly that.

Gentlemen, before I begin my testimony I first must compliment the Commission on the magnificent job you have performed in the revision of the Penal Law and the proposed Criminal Code Law but like all good machines, a few bugs have come up as can be attested to by the revised Penal Law. One of these bugs seems to exist in the proposed Criminal Law so I appeal to you, gentlemen, after all the testimony is concluded, to let your reasoning be your guide and proper directions

made.

I am here to testify on one bug only and I guess you are familiar with that bug. I may be repetitious in some of my statements but I believe anything repetitious is a case worthwhile repeating.

I am here again to testify on why the New York City correction officer should be included under 1.20 Subdivision 15, police officer status, as proposed in the revised Criminal Code Law. It is my purpose to add to your study of the proposed law by the committee which represents more than two years of your intensive revisional efforts by your professional staff and which includes for your estimate and mine many important changes. The changes I shall speak on and present some reasons and ask you to act on is again peace officer status for correction officers. I assume you have received the brochure issued by the Correction Officers. I have also copies of the Commissioner's presentation to the Commission and I have extra copies and if you care to have them, I will be glad to supply them.

CHAIRMAN BARTLETT: Are you the fellows

that paid for that full-page ad in the Daily News?

MR. CHASTON: I am partly responsible.

CHAIRMAN BARTLETT: You want to know something? None of us could individually have afforded that publicity.

MR. CHASTON: I will cut down the rest and go down into the main testimony.

As you know, gentlemen, crime is rising in the nation, in the city, town and village. President Johnson declares crime is on the rampage and places crime as number three on the priority list. Governor Rockefeller increases his State Troopers to combat crime in New York City. Mayor Lindsay of New York places crime as number one on his priority list. Senator Bookson urges a \$250 million state bond issue to enable citizens to have more cops for their war on crime. Mayor Lindsay and Police Commissioner Howard Leary announced that the City is launching a new program against crime in the streets through a major overhaul in the Police Department aimed at making the most effective use of the concept of patrol forces. Noting that the war on street

crime is the number one priority for our City, Lindsay said: "We are taking immediate action to provide the maximum increase in street patrol at the lowest possible cost. Even so the City will have to cut costs in other vital areas to put more police into the war on street crime. The City hired the Rand Corporation to study four agencies and one of the agencies is the Police Department." The Mayor listed as one of the problems the Rand Corporation will study is police communication and deployment of police manpower. "Mayor hires civilians to replace cops for street duties; proposals made to pay auxiliary police \$2.25 an hour. State and City Legislature up in arms over crime in the street. Persons afraid to venture into the streets after dark."

Now you may ask: What has all this to do with my testifying here today? I say this: A major issue in controversy is the Bartlett proposal to eliminate completely the status of "peace officer."

Section 154 --

CHAIRMAN BARTLETT: You don't care whether we change the name, do you?

MR. CHASTON: Change --

CHAIRMAN BARTLETT: From peace officer to police officer?

MR. CHASTON: No.

CHAIRMAN BARTLETT: You are concerned about whether you are in the group or not?

MR. CHASTON: Yes.

Presently, Section 154 of the Code of Criminal Procedure grants this status to employees in 20 or more categories, thus enabling them to carry firearms and to make reasonable cause arrests without a warrant in felony cases.

Section 154(a) of the present Code sets up a separate category of "police officer," which, in addition, permits "reasonable cause" arrest for misdemeanors and petty offenses. Police officer status would be retained under the Bartlett Plan. It would be limited generally to members of duly organized police departments, as at present. As of this date, no present peace officers have been suggested for inclusion as police officers.

Among the peace officer group that is incensed at the proposal is the New York City correction officer. Our controversy with the Bartlett Commission centers around our need for police officer status, number one, on the job and, number two, off the job.

CHAIRMAN BARTLETT: You haven't got any controversy with us because, as you know, we have made a tentative proposal and we haven't received any decision as to whether you will be in or out. Controversy is when two people have different points of view and we don't have one yet.

MR. CHASTON: We are looking for police officer status both on the job and off the job. The Commission plans, as revealed by Peter McQuillan, its counsel, are to draft legislation which would give correction officers the same on-the-job powers they now have. Undecided is whether amendments for this purpose should be made in the new Criminal Procedure Law or in statutes such as the Correction Law or the Judiciary Law.

Correction officers want police officer

status provided in the Criminal Procedure Law. The hearings held yesterday and today will develop arguments in favor of police officer status off-the-job. The Commission, it is reported, has an open mind and is willing to listen to reason. It has questioned, however, whether present police and peace officers have any powers -- other than as private citizens -- outside their bailiwick.

Present court decisions, it indicates, limit city policemen to the geographical confines of New York City in the exercise of their police powers. Likewise, Transit policemen to situations in and about Transit facilities and Housing policemen to those in and about Housing projects. This same reasoning, if correct, would mean correction officers have special powers only at correction facilities and when escorting prisoners. Whether the Commission is right or wrong in its interpretation, the more immediate question is whether correction officers as well as Transit and Housing police should have off-the-job police powers at least throughout New York City.

Quite apart from the need in situations

which flow from their job -- as meeting ex-inmates in the streets -- it is short-sighted to ignore the advantages of the community to have over 2,300 well-trained armed officers in the City and to immobilize them by withholding police officer status except in connection with their job.

Crime statistics released about a month ago by Police Commissioner Leary tell the story and should give the Commission its answer. Crimes in the City for the last six months of 1967 are up 14.4 percent over the same period in 1966. For the entire year 1967 the City shows 22.7 percent increase over 1966, reflecting in part, a revision in crime reporting procedures instituted in March 1966. The Police Department has been doing an excellent job but it needs more men. Meanwhile, over 2,300 correction officers in the uniform force of the Department of Correction are available and should be used in this war on crime.

Correction officers have worked closely with the Police Department in regards to sending our officers and vehicles to many disturbances that arise around our City. The average citizen

accepts us as another branch of police law enforcement officers and so I appeal to you learned gentlemen to include correction officers in the police officer status under Section 1.20 Subdivision 15 so that we can enjoy citywide police officer status in both on-the-job and off-the-job situations, and thus better to serve the City and the general public.

It should also be noted that correction officers have made many arrests off-the-job, as can be attested to by the Police and Correction Departments. Many of our officers have received medals and citations for excellent duty and good arrests. We are not looking to be glorified cops but we will not stand by and let crime be committed without taking action. We will and must protect the public. Would you help us to perform our crime fighting? I believe yes. So grant us the police officer status and allow us to do the job we are sworn by law to uphold.

It cannot be overlooked that correction officers come in contact with a tremendous amount of persons who commit crime and the mere presence

of us in and about the City helps to act as a deterrent to crime. I would hate to think what an ex-inmate would think or do if he knew we were without the powers of arrest when we are confronted by them.

CHAIRMAN BARTLETT: Let's focus on the problem. The problem is whether or not correction officers should have off-duty police officer status?

MR. CHASTON: Right.

CHAIRMAN BARTLETT: I will ask you the questions we put yesterday and I think the answers you give are really what bear on the issue. Do you agree that the police function is a professional one and that the training of the correction officer, if he is to have equivalent powers and responsibilities, should be roughly equivalent in the appropriate areas to that of the policeman?

MR. CHASTON: Yes, I believe that our Commissioner, if I'm not mistaken, has made that statement. If we are put into police powers he will set up procedures where we have additional training to function as such.

CHAIRMAN BARTLETT: O.K. Number two:

You believe, I take it, and this has been the answer given, that in the event that you are confronted with a situation that calls for police intervention off duty that your failure to do so would subject you to departmental charges; is that right?

MR. CHASTON: Yes.

CHAIRMAN BARTLETT: Of course you understand, I'm sure, Mr. Chaston, that even if the City stands behind you, it doesn't prevent you from being sued for false arrest?

MR. CHASTON: Yes.

CHAIRMAN BARTLETT: Another major concern of yours, I take it, is that the municipality have tort liability for your acts off duty as well as on?

MR. CHASTON: Yes.

CHAIRMAN BARTLETT: I don't mean to cut you short but I do think we have your major points. Is there anything you want to add to that? I assure all of the correction officers that are here that we will give careful consideration to this question. We have a good deal of time, as

you know, and we are not going to make a recommendation to the Legislature until January 1969 but I don't want to say that we will keep you waiting until then as to what our view is.

MR. CHASTON: Thank you, gentlemen.

CHAIRMAN BARTLETT: O.K., Mr. Chaston.
Thank you all for appearing.

Constantine Mellon will submit a statement to be appended to the record later on behalf of the Correction Captains Association.

. . . Whereupon, at 4:30 p.m. the Commission adjourned . . .