

FEW/lm

MINUTES OF PROCEEDINGS  
AT  
A PUBLIC HEARING OF THE  
NEW YORK STATE TEMPORARY COMMISSION  
ON  
REVISION OF THE PENAL LAW AND CRIMINAL CODE

December 6, 1968  
10:30 A. M.

Assembly Parlors  
The Capitol  
Albany, New York

PRESIDING:

HON. RICHARD J. BARTLETT, Chairman,  
Temporary Commission on Revision of the  
Penal Law and Criminal Code

PRESENT:

HON. EDWARD A. PANZARELLA, Member of the Commission

HON. JOHN R. DUNNE, Member of the Commission

HON. HOWARD A. JONES, Member of the Commission

ROBERT BENTLEY, ESQ., representing the Chairman,  
Senate Finance Committee

RICHARD G. DENZER, ESQ., Executive Director of the  
Commission

ARNOLD D. HECHTMAN, ESQ., Assistant Counsel to the  
Commission

JONATHAN A. WEINSTEIN, Associate Counsel to the  
Commission

HELEN E. GORDON, Administrative Assistant.

P R O C E E D I N G S

MR. BARTLETT: Good morning, ladies and gentlemen. We will begin the hearing now.

I am Richard Bartlett, Chairman of the Temporary Commission on Revision of the Penal Law and Criminal Code. The Commission is holding a hearing here in Albany today, part of a series on the proposed Criminal Procedure Law.

With me are Commissioners Howard Jones, Edward Panzarella, representing the Senate Finance Committee Robert Bentley; members of the staff, Executive Director Denzer, Mr. Counsel Hechtman and Associate Counsel Weinstein.

We are here to elicit the views, comments, criticisms, suggestions of those concerned with criminal justice in New York. Our focus today is on the proposed New York Criminal Procedure Law as it was introduced as a study bill at the 1968 session of the Legislature. A very quick account of the steps that brought us here this morning is probably in order.

The Commission, upon completing its initial work on the Penal Law in 1965, turned its

attention to the Code and at the 1968 -- prior to the 1968 session published and circulated a first draft of the proposed Criminal Procedure Law.

Hearings were held early in 1968, subsequent to which further refinements were made in the original draft and the study bill I've already referred to was introduced. It was subsequently printed by Edward Thompson and widely distributed.

It is substantially that proposal upon which we're asking comment this morning, with one notable exception.

One of the most controversial, I think it fair to call it, parts of our proposal has been that relating to the peace officer-police officer designation and the Commission gave further attention to that problem area in the past few months and recently adopted tentatively -- and all of our adoptions have been tentative to date, of course-- another formulation in connection with the designation of peace officers and police officers which is not part of the blue-covered publication circulated by Thompson. However, we did endeavor to distribute this to all of the groups and individuals from whom

we had heard about the peace officer-police officer problem and would hope that comments would be received related to that area of the Criminal Procedure Law which will be directed toward the latest formulation which the Commission has proposed.

Our procedure here is a simple one. We ask the witnesses to, whenever possible, make written submissions supplemented by their oral comments. We leave it to them within the usual limits of time and as to whether they will summarize their written submissions in oral testimony or prefer to make their full statement here. We have some seven or eight witnesses who have already indicated to us their desire to testify today. In general, you will be called upon in the order you have been heard from but a couple of our witnesses have indicated they have special problems today and we're going to try to accommodate them by hearing them first.

Well -- and I should mention that we have been joined by another valued member of the Commission, Senator John Dunne, from Nassau who sits third to my left.

We will hear first from Morris J. Zweig,

representing the Magistrates' Association from whom we have over the past six years had many valuable comments and suggestions.

Judge Zweig.

MR. ZWEIG: Thank you, Mr. Bartlett --  
Assemblyman Bartlett.

I did not receive your latest brochure on the police and peace officers. I wonder if you don't have an extra copy if you could possibly mail me a copy.

MR. BARTLETT: I, regrettably, Morris, have only my own but I'll see to it that you get one right away.

MR. ZWEIG: Mr. Denzer may probably have one.

MR. BARTLETT: Sure.

MR. ZWEIG: Members of the Commission, it's always an honor and a privilege to appear before you and I'm thankful for your invitation. I had the pleasure and privilege of working with some of the members of the Commission. Because of time and in fairness to other speakers, I will limit myself to a few of the vital issues which I think are

involved.

I want to commend the Commission because I see they have really remade this practically again. They, no doubt, will continue until they have a perfect document. I think that this is an opportunity -- perhaps they said this in 1888 -- but to prepare a Criminal Procedure Law which will go down in history and is for posterity and I hope so.

I would suggest or propose that my testimony here will be in the form of questions and the form of comment and I assure the Commission and the audience that it isn't -- it's constructive rather than destructive, or at least I intend it to be that.

Now, at the outset, I notice that you have in Section 50.05 of the proposed law defined the method in which a criminal prosecution is commenced and you say " \*\*\* by an information or a prosecutor's information", and I think the addition of a prosecutor's information is very good and very valuable and very necessary. This is a new matter and I think is needed.

Then you say, " \*\*\* a misdemeanor

complaint or a felony complaint". Now, this is my query: You must have some reason and some purpose and using both the misdemeanor complaint or the information because I notice as you progress you state that a Defendant has the right not to plead to a misdemeanor complaint and if he doesn't plead to the misdemeanor complaint then an information has to be filed. Is there some reason that the Commission had in mind to have the two -- the two documents, a complaint and an information? To me, an information and complaint has always been synonymous.

MR. DENZER: Let me explain our reasoning here, Morris.

MR. ZWEIG: Yes, yes.

MR. DENZER: When we had the information alone, you will see that an information requires allegations of legal sufficiency. You have to show a prima facie case.

MR. ZWEIG: Right, right.

MR. DENZER: Now, let's take a case of a car valued under \$250 and it's stolen, the cop sees the Defendant getting out of it, arrests him

and so forth. The owner is out of town. You can't make out a prima facie case there. He can't file an information but this misdemeanor complaint by -- like a felony complaint, requires only reasonable cause, can be filed so this permits him to file a valid instrument. Now, he can't be tried on that.

MR. ZWEIG: Can you issue a warrant on it?

MR. DENZER: He can issue a warrant on it, yes, but he can't be tried on it unless he waives prosecution information. It's like a short affidavit, that's what it amounts to, only across the board.

MR. BARTLETT: In general, I believe, Judge Zweig, that this is an effort on our part to extend to the whole state the short affidavit practice of New York City and Buffalo.

MR. DENZER: That's about it, yes.

MR. ZWEIG: All right.

I'm very pleased to see that, however, that you do not intend that a uniform traffic information or the uniform traffic complaint, is it called, is a basis for the issuance of a warrant.

Incidentally, until a few weeks ago, to my knowledge, there was no case, no case of any high court that had a ruling -- two weeks ago or last week, you may be interested, because it's not in the Advance Sheets yet, the Court of Appeals by Judge Keating writing the opinion -- there's some of the things here I don't agree with the good Judge but I'm sure he isn't concerned with whether I agree with him or not -- but two cases came down out of Herkimer County, People against Boback, B-o-b-a-c-k, and People against Marquart. Perhaps you've had some advance notice on it, and for the first time the Court of Appeals has said that a warrant cannot be issued on a uniform traffic complaint alone but needs a long form information. I think this is very important because I think it fits in with the scheme since you have spelled it out in your proposal, so the --

MR. BARTLETT: They're referring there to the bare summons, I take it?

MR. ZWEIG: The uniform traffic complaint, the short form.

MR. BARTLETT: Right, the short form.

MR. ZWEIG: Of course, there has been some practice in parts of the state where law-enforcement agencies have said to Magistrates for no reason in the world, why, you can't issue a warrant on a uniform traffic complaint and we've had our problems with it over the past, but this will end it once and for all by virtue of the Court of Appeals and, of course, when this law goes into effect, which I hope is soon, why, we will have it spelled out.

Now, you also state in Section 50.15 that an information and complaint shall be subscribed and verified or made upon knowledge or made upon information and belief and here is an area, gentlemen, which in my opinion is very serious. To me, over the years, the word "information" as I have always understood it, has some sanctity. An information under the present section, Section 145 of the Code of Criminal Procedure, says that it's an allegation made to a Magistrate that some person has been guilty of a designated offense and then we go on in 148 and 149, which says that when a witness appears before the Magistrate, he must take his testimony under

oath and subscribe to it and then if it's sufficient, issue a warrant. That's fine. You provide here and you permit here that an information can be made upon information and belief. That is true, that's been so for years. However, it has always been long standing that an information made solely upon information and belief was void. You have the old case way back, the Livingston against Wyatt case. I have always been impressed by the famous case that has never been overruled, the People against Grogan, decided in the 30's by Judge Crane in which he said, "An information is the basis for jurisdiction of a local criminal court as we now call it."

And incidentally, I'm very fond of the expression "local criminal court." I'm very much -- I think that we or that this is, if nothing else, this is all right because this "Court of Special Sessions" has always bothered me and the idea of the magistrate concept, who is a Magistrate, who isn't a Magistrate. Now, I think that we've really found or we have uniformity and it -- what shall I say, it jells very nicely with the Uniform Justice Court Act which, as you know, is now in effect.

Now, to come back to this, furthermore, Judge Crane in that case said that an information must contain facts sufficient to constitute the offense charged. If it's made upon information and belief solely, it's void.

This has been our concept in the law for years. However, if there is a deposition supporting the information then, as was held in another case, in the Matter ex rel. Bent decided or written by Judge Foster some years thereafter in the Appellate Division, then he said the deposition becomes the information.

Here we have a proposition in your proposed law that an information can be made on information and belief, fine. I subscribe to that but you go on to say that if it is coupled with a deposition that, too, can be made upon information and belief. Now, this leaves me with a thought that if you have an information on information and belief, what does it mean? Somebody told me something. It's hearsay. If you have a deposition coupled with this information, somebody told me, then you have two "somebody told me somethings"

and to me that is very disturbing, Mr. Denzer.

MR. DENZER: Well, we didn't intend it that way.

MR. ZWEIG: Well, am I right that it reads that way?

MR. DENZER: Well, if you look over in 50.35 where we set forth the requirements for a sufficient information, you see in subdivision one there that sufficient on its face when (a), (b) reasonable investigation, reasonable cause, (c) such allegations, meaning not the combination of those in the information, and any supporting depositions, such allegations would, if presented in the form of testimony at a trial of the information, constitute legally sufficient evidence to support a conviction of the Defendant for the offense charged.

Now, what we meant to say here over-all was that if in the complaint itself plus the supporting depositions that you must have a prima facie competent information evidence in there. In other words, hearsay is not -- is not good enough. Of course, the information can contain the hearsay so in the supporting deposition but in addition to that

that there must be legally sufficient evidence between them, that's what we meant to say.

MR. ZWEIG: I was wondering, Mr. Denzer, if you couldn't -- if that couldn't be spelled out because I think it leads people to erroneous conclusions, sir.

MR. DENZER: Probably correct.

MR. BARTLETT: You mean by making such a reference in 50.15?

MR. ZWEIG: Right, I think that's very important.

MR. BARTLETT: There's no question but the language in 50.35 would not permit hearsay plus hearsay equaling direct evidence.

MR. ZWEIG: Right. You see, we have a situation today with which I'm very much disturbed and I think the District Attorneys here and maybe perhaps the law-enforcement officers may not agree with me. You have a situation today with the uniform traffic ticket. Now, the uniform traffic package is a very important, a very important item in your life today with your automobiles. They are permitted not only for traffic infractions. They

are permitted for traffic misdemeanors and we have some serious traffic misdemeanors as we all know.

Now, I'm not being defense minded. I'm attempting to be practical here. Today, many times an officer will issue a uniform traffic ticket and complaint on a matter which he has never seen and he attempts to cure it by a bill of particulars. Of course, we -- these two very cases that just came down from the Court of Appeals disturb me no end because if we don't change that then we're going to have a situation where he issues a uniform traffic complaint on a misdemeanor. It's hearsay. Judge Keating says he doesn't have to say that it's hearsay or not. It's unnecessary. If he furnishes a bill of particulars, he falls back on the case of People against Weeks decided some years ago in 14 New York. The Weeks case, People read incorrectly. The Weeks case, it was a memorandum opinion. Unfortunately, the Court of Appeals said very little. They affirmed and merely said it's sufficient. In the Weeks case, you had a uniform traffic complaint on a radar case. It didn't involve a misdemeanor and there's one important distinction. A bill of

particulars -- it was signed by an officer who didn't see -- who didn't see the speed of the automobile. However, the radar operator later signed a bill of particulars but he verified it. He verified the bill of particulars and furnished it in the form of an information. Well, naturally, if he does that, he has cured all defects because it's the information that becomes the basis for the jurisdiction and the conviction would be legal but if we follow the latest ruling by the Court of Appeals, we're going to get, unless we correct it in this law, we're going to have a problem. You practicing lawyers know that today a person is involved in a one car accident. He goes off the road, regardless of the situation. I just completed a case for a very prominent man who used to damn the local courts until this case came along. He used to damn the lay justices. His son, on a stormy night, was driving his little Volkswagen with a narrow shoulder up in the northern part of the county. It was slippery, the car, the little wheel hit the shoulder. He went off, he hit a tree, no one was injured. The youngster had been taught to report

every accident. In the rain he walked a mile to call an officer. Now, this is no condemnation of the law-enforcement officers please, because I think very highly of that group, and he called the officer. The officer came to the scene, he spoke with the young man. He said, "I have to give you a ticket."

"For what?"

"For driving in a manner not careful and prudent. You drove too fast; otherwise you wouldn't have gone off the road."

He didn't see it; he knew nothing about it. Now, there that became the basis for the court's jurisdiction. It so happens I called the Magistrate and I said, "Do you entertain proceedings of this type?" He said, "I don't". He said, "I've been taught in your schools to the contrary." I said, "Well, regardless of what you've been taught, I want you to ascertain whether this officer saw the occurrence because what do you have before you?" He says, "All I have is the uniform traffic complaint". He said, "If I investigate this and this is true, I will dismiss the charge."

He did. Well, I gained one point. This man is no longer opposed to the local courts at least, because his son got out of this mess. It's the old story, do everything to everybody's children except my own.

Well, anyhow, now we have here a very serious situation today and I'm a little bit disturbed. If we are able to -- if an enforcement officer is able to issue a uniform traffic complaint which is subscribed because here there is no provision, and there is no provision in Section 147 (a), (b), (c) and (d) enacted in 1963 which gave us the basis for the short form information, before that we didn't have it, they provided and I think the language is very poor in 147, it says that upon the Justice must rest the duty to advise the Defendant he's entitled to a bill of particulars. Very good. He advises him and then if he wants one he must ask the officer to furnish it but nowhere is it said that a bill of particulars must be verified.

This, to me, is an erroneous concept. Under the pleading, under the Civil Practice Law, under the rules, under the rules as we have known

them in civil practice and throughout our lives where the first pleading is verified, it always follows that all other papers should be verified. It strikes me that if a bill of particulars is going to have any significance then the bill of particulars should state facts sufficient so that the Defendant will know what he's charged with and how to prepare his defense and, furthermore, it should be verified.

Now, it isn't a problem to verify. We have various methods now under the law, short cutting the verification processes and you have provided for it, you've done a good job and the means of verification but, gentlemen, I beseech you that this bill of particulars situation particularly -- and this is when it applies in the uniform traffic cases -- of course, one District Court Judge has written recently, I think perhaps the gentleman in the District Attorney's office will remember the case, it came out in the District Court and since I, with all due respect to Senator Dunne, I am not so keen about District Courts, being an upstate boy but I think they do a pretty good job, but the District

Court Judge said it makes no difference short form, long form, you're entitled to a bill of particulars and he takes the position that a short form indictment, you're entitled to a bill of particulars which, of course, has been the law for many years.

Now, I say to you, please give this consideration. If you're going to have -- you provide in your proposal here for the uniform traffic complaint, you provide for a bill of particulars and that's fine. I also ask that the language be spelled out. You say that the Defendant is entitled to a bill of particulars and if he demands it then the Magistrate must see that the officer furnishes it. I think the language would be stronger if you said that in a uniform traffic complaint situation the Defendant is entitled to a bill of particulars and the Magistrate must advise him. The mere fact that the statute says he's entitled to it, that doesn't mean that the general public know anything about that and I think you'll agree with me that the language should be that the Magistrate must inform him and then if he -- then if he demands it, furnish him with a bill of particulars that should be

verified. I think it's significant because if you have something that is on hearsay and again you furnish a bill of particulars which is on hearsay, what do you have? I mean if the criminal machinery is put in motion, the liberties in civil cases which involves merely money damages, if it requires a bill of particulars in such case, do we not feel, is it not proper that we are dealing with the liberties and the property rights of an individual and today the Court of Appeals in *People ex rel. Moore against Fletcher* has held that a license is a property right, it's no longer a luxury, the right to have a license. I think it's very very important today.

Now, I am not -- I am in favor of law-enforcement, in favor of traffic safety, but I feel this, as Snuffy Smith in the comics says, "Give him a fair trial if you're going to hang him" and I think you will all -- all of the elements of a fair trial should be embodied in this. Now, this is not criticism, as I say, because I think it is a very important situation.

MR. BARTLETT: A good point.

MR. ZWEIG: Now, next, my next concern

is with reference to Section 50.40 and 50.45 where you permit amendments to informations and superseding informations. Now, that is perfectly proper. It's -- that isn't novel. However, you say that an information, a prosecutor's information on a misdemeanor complaint may be filed in the Town Court where the offense is committed and so forth. Then you permit amendments and superseding informations.

I feel that in those sections, it is not spelled out. The Defendant should have an opportunity for an adjournment to prepare to meet these changes. I am not opposed to the amendment, to the superseding information or to the amendments. I think those things are necessary because if somebody has the wrong date, defense lawyers now make a fuss. The information is defective and to me that's a lot of hogwash, if I may use the colloquial expression. I think that the officer or the prosecutor should have the right to amend it and it should be -- however, if it is amended, I think it is not spelled out. He should have an opportunity -- in other words, he comes in prepared to try a charge and he's all ready with his witnesses and then an amendment

is flashed upon him or a superseding information. I think it is only fair that the Defendant should have an opportunity to meet the issue and an adjournment for that purpose and I think or I feel it should be spelled out. Why I say this to you gentlemen, believe me, it's not criticism. I say that the more explicit -- the more explicitly a statute is drawn, the less number of appeals you will have. Let's, if you nip it in the bud, then you don't have the problems. In other words, you do away with a lot of interpretation by a lot of courts and with all due respect to our courts but interpretations sometimes bring about some bad law whereas if you spell it out in the statute, it leaves you no problem.

Now, in Section 50.50, I'm a little bit confused, gentlemen. You say that an information and --

MR. BARTLETT: Which section was that, Mr. Zweig?

MR. ZWEIG: 50.50. You say that an information and a prosecutor's information in a misdemeanor complaint may be filed in a town court

where the offense charged was allegedly committed. Now, if such town court is not available and that word "available" is going to slay us. If such town court is not available then it should be in the town court of an adjoining town of the county.

I take this that you mean the same county, am I right about that? You're not jumping counties?

MR. DENZER: Yes, that's right.

MR. ZWEIG: Perhaps a word, I'm a simple man and perhaps I think a word should say the same county and that would be important.

Now, I'd like to talk to that for a minute because this is the -- this reminds me of the old Section 164 and I think, Mr. Bartlett, you know that situation, taking a man to the nearest available Justice in any town in the county and then you don't know what happens after he gets him there.

MR. BARTLETT: You suggesting that that directive is a euphonism in the present day circumstances?

MR. ZWEIG: Now, actually, perhaps I'm narrow minded about this. Frankly, I do not see any

reason why he should have to take him to the adjoining county, to the adjoining county today, with the one court concept. However, there may be possibilities and I don't want to jump the gun so to speak.

May I make this suggestion, that if this occasion arises, if it is a case where a warrant is to be issued and he wants to file a complaint then I feel in a misdemeanor information a traffic complaint, it should be filed in the county, in the town in which the alleged -- or village in which the alleged offense was committed. Now, the case -- there may be a situation where he can't find the Village Judge at that particular time. Then under the Village Law, he has the right to go to the town court of the town in which the village is embraced. That's perfectly all right.

Now, let's assume he does that and the Town Judge isn't there. He goes to the next Town Judge and he isn't there. They all went to Florida, fine. Then I agree with you that he should be able to go to the adjoining town. However, that is not necessary when an arrest is made or where a Defendant is apprehended, say, on the Thruway and he wants

immediate service. Would it not be, and you did embrace this and this was my recommendation last year and you did embrace it to some extent but still I'm a little bit confused here but in this section, why can't we do it in one section and forget about it, let the Defendant be taken to the nearest available Magistrate, if I may use the term which will no longer be used, to the nearest available court of local criminal jurisdiction by road, as you say, from the place of apprehension for arraignment purposes only and the making of bail.

Now, you did a fine job on that bail, by the way, and I didn't think you were going to take me up on it but you did. Now, if, however -- now, here is some -- here is an expeditious matter and see if you don't agree with me. If he does and the Defendant says, "I'd like to dispose of this matter today, I don't want to come back from Buffalo", fine, then the Judge or the court should have the right to dispose of it. On the other hand, if he wishes to enter a plea of not guilty, let the Judge permit bail, a reasonable bail, and the case is transferred to the town in which the alleged offense

was committed.

Now, I have two purposes. One, you will all agree with me --

MR. BARTLETT: You would permit a waiver on the part of the Defendant?

MR. ZWEIG: Right. I think that's necessary for expediency.

MR. DENZER: Well, don't we do that here?

MR. ZWEIG: Not in this particular section.

MR. DENZER: No, not this one, but this is the one that's intended to control the arrest without a warrant situation.

MR. ZWEIG: That's right. Well, you can arrest for a traffic infraction without a warrant. There's no question about that if you saw it committed. You had it over in the other suggestions and what I'm suggesting, Mr. Denzer, combine the two and you'll do it all in one package.

MR. DENZER: Yes.

MR. ZWEIG: Now, let's -- there's a definite reason and I think I should have pointed it

out. I was torn apart on this very point when I appeared in the Constitutional Convention and, of course, Mr. Bartlett, you see the hectic days and this is what was said to me. You've just told us what wonderful schools the Judicial Conference has sponsored, and you've trained all these Justices. Tell me why this Justice in Town X had 50 cases but the Justice in Town Y had 3,000 cases. Haven't you taught the boys who had the 50 cases well enough that they could handle them? And you have no answer for that.

I am attempting to get away from the pernicious idea of picking Judges. Now, this is no accusation against any law enforcement officer. They are short handed and they want to dispose of the cases and they have to do it but we have a situation in the towns where one town builds up, it builds up a tremendous return from the Audit and Control and the other town doesn't. Now, we don't operate courts for revenue, I understand that, but let us please do away with whatever possibility of picking Judges there is.

MR. BARTLETT: What you're saying really

is that the rule that a Judge not being "available" and then permitting us to go to the nearest available court is a rule of convenience?

MR. ZWEIG: That's right.

MR. BARTLETT: But that rule of convenience is served simply by arraignment and setting of bail.

MR. ZWEIG: That's correct. I think it's very simple. If he wants to be tried right then and there, we dispose of the case; if he doesn't, go back to the proper town. Then nobody can be hurt and you don't have any idea of picking of Judges and I think it's gone too far. Of course, under the present Section 164 no one has ever explained it and I don't think anyone understands it. If you gentlemen do, you're geniuses because the courts haven't given any proper determination on it.

This will do away with that section and I think this is very very important that we -- this is the weakest link in our court, gentlemen. This is the weakest link and the most criticized link in the -- in the local court system and, incidentally,

it's been criticized and you will please the League of Women Voters too if you correct this because I have been condemned by them for this situation of taking, running all over, picking out Judges.

I'm so familiar with this thing that I don't want a reincarnation of Section 164. For once and all, I want to get rid of that section. You see, you run into another problem. Who determines availability? Who knows availability? We have the old case where the -- where the officer called the Judge. The Judge was out mowing his lawn and he came back and he said no answer so he took him to the other Judge. Later it was determined on the trial that the Judge was home but he didn't answer the phone because he was mowing the lawn. Now, the question is was he available or was he not available. You know, we had a situation in Saranac the other day that occurred and I said to the attorney, "I don't think that Judge has been to our school." An acting Village Judge who has worked out some type of a proposition with the regular Village Judge because he works nights so he sleeps days so, therefore, they've taken the position since he sleeps, he's not

available. Now, maybe he isn't, maybe he's entitled to his sleep but, gentlemen, we've got to cure this. We've got to cure this availability. I've always advised Justices on this availability, you're entitled to get an affidavit from someone to show just exactly what diligent search has been made so that you will know whether he's available or not.

Now, we've had the problem, Mr. Bartlett, of the Judge taking the case and he finds out it's a case he doesn't want to try. He says, "I want to ship it back to the other Judge. We've been having it right through the state.

MR. BARTLETT: Judge Zweig, if we were to follow your suggestion and limit the non-availability rule simply to arraignment and bail fixing --

MR. ZWEIG: You've done it.

MR. BARTLETT: Then it's up for how we define availability.

MR. ZWEIG: Right, I agree with you.

MR. DENZER: Incidentally, on this, when a Defendant is taken to another Judge I don't know just what they use for an information there. We've

tried to cover that.

JUDGE ZWEIG: Well, they lay an information. You mean if he's taken before the wrong Judge, so to speak?

MR. DENZER: Yes, on a warrant of arrest which has already been issued on the basis of an information and they can't find the Judge who issued the warrant so they take him to another one and there he's arraigned but on what. There's no piece of paper there.

MR. ZWEIG: There is no piece of paper, no.

MR. DENZER: And just a matter of interest, what happens in the case like that?

MR. ZWEIG: Well, they could get the information. They lay an information. If a person, an officer, applies for a warrant he has to lay an information, number one, right? Today this is the way it works. Now, the proper thing is to bring the man back to the same Judge. It doesn't happen so often. I'll tell you why, because arraignments are made and the schedule is arranged as to when they bring him back. Now, let's assume that he locates

the fellow in Nassau County so he has to bring him up. Now, under the present law and under your law, he has the right to go to the nearest Magistrate to make bail and then the bail is sent back to the proper Judge and the case is adjourned and the man appears before the proper court.

MR. DENZER: There's no information before that court.

MR. ZWEIG: There's no information for the purpose of making bail.

MR. BARTLETT: But the real problem is where they do not avail themselves of the local Magistrate rule for fixing bail in the area of arrest pursuant to law, he's brought back to the jurisdiction from which the warrant was issued and the Judge there is not available.

MR. ZWEIG: What does he do?

MR. BARTLETT: For arraignment? As a practical matter, I think we use the "Not Available" rule and take him to the next and, as Dick points out, there's no paper there upon which he can be arraigned.

MR. ZWEIG: Yes, that's been the present.

I think you can cure that, can you not?

MR. DENZER: Well, we tried to in here. We would change it even more by saying that the Judge who issued the warrant of arrest can attach to it a copy of the information.

MR. ZWEIG: Frankly, we're doing that now and that's a good idea. We're doing that now. Not only are we doing that for outside, out of the county cases, of course, you now have with the officer you've amended the law and the officer can go to the county, an adjoining county without endorsement. You couldn't make it statewide because, as I recall, there's a constitutional provision, am I right about that?

MR. DENZER: Yes.

MR. ZWEIG: You can't go statewide. I wish you could go statewide; it would avoid a lot of problems for the law-enforcement officer chasing around to get an endorsement. Now, you said that when you say for arraignment, that is the answer to our problem. I think that's a very excellent solution to the problem and I commend you for that.

Now, you've done something about which I

said I'm very pleased and that is you have now permitted the officers to take bail and so forth. Now, I ask you as a matter of practice perhaps, and perhaps District Attorneys may disagree, when you have bail set as a Class A Misdemeanor, \$500 I realize that it's punishable up to a year with the modern concept of bail. I think you gentlemen know better than I there's a study being made on bail and I'm afraid that would be today pretty soon and I'm not in favor of it, most bail provisions will go out because the high court isn't too fond of this bail situation. Do you not feel that even if it is a Class A Misdemeanor, to me the purpose of bail is not for the purpose of punishment, it's a punishment of assuring the return of the individual, that 200, a maximum of \$250 in a Class A Misdemeanor would be sufficient?

I say this to you as a matter of human -- a matter of human frailty, if you have bail at \$500 as a maximum, some people or somebody is going to say it's \$500. We've had a situation where the Judge set bail at \$90 or the \$100 and the Defendant, one of the most prominent men here in the City of Albany, said

I have 90 with me and you know even wealthy people don't carry sometimes even \$100 with them, so he says, "I have 90 with me and the Judge said "90 isn't 100" and out he went, he went to jail until somebody could bring in \$10.

MR. DENZER: It may be too high.

MR. ZWEIG: I think 250 for a Class A and 100 for Class B and unclassified, and as you know the unclassified are traffic misdemeanors and all others which are not specifically designated in the new Penal Law, I think if you had 100 in the Class B and in the petty offenses, I think 50 is sufficient, for example \$100 for a man arrested for a bald tire, Section 375-31, you know, there are a lot of bald tires on the road today. If you don't -- you look at the tire and you say that it's bald and it's -- I think 50, 100 and 250 is a realistic situation particularly since the modern idea of bail has been changed to some extent.

Now, I'd like your explanation, if you please, in Section 85.02 where you have it on arraignment, the Subdivision 3 is very good but I don't quite understand this. The last part of this

section where you say that an attorney in a petty offense can appear in behalf of a Defendant and dispose of the case there, that's good, but if the case is not disposed of upon appearance of counsel, then you provide that the Defendant must be permitted to go on his own recognizance. You must have a reason for that, Dick. What's the reason?

MR. DENZER: Well, the idea was when we finally formulated that Subdivision 3, what happens when the Defendant isn't in there? How can he be arraigned? What's the order?

MR. ZWEIG: Right, he can't be.

MR. DENZER: You can't set fixed bail very well because I mean if he doesn't -- shouldn't post it then what happens? You can't commit him there.

MR. ZWEIG: Well, the only thing is, Dick, you permit the attorney to appear before the Judge, is that right?

MR. DENZER: Yes.

MR. ZWEIG: In his behalf. Then if the attorney has the right to appear under the statute and the attorney has the right to enter a plea of

guilty for him, has he not?

MR. DENZER: Yes.

MR. ZWEIG: And if he enters a plea of guilty, he disposes of the case and that's the end of it, correct?

MR. DENZER: Yes.

MR. ZWEIG: On the other hand, can't the attorney enter a plea of not guilty on his behalf? He can do it today by mail. If he enters a plea of not guilty cannot the Magistrate, by virtue of that, fix bail or place him in the custody of his attorney? Why should he go free?

MR. DENZER: Well, the theory here is --

MR. ZWEIG: Well, we have a couple D.A.'s here. What do you think about it, gentlemen?

MR. DENZER: Well, if this isn't a serious enough case, I mean it's that kind of a case where you don't require the Defendant to appear in person, let him appear by Counsel, then it's the kind of case where he should be recognized on his own recognizance.

MR. BARTLETT: The difficulty is though the special advantages accorded the Defendant here

who appears by Counsel as opposed to appearing himself, even your bald tire case.

MR. ZWEIG: Right, right.

MR. BARTLETT: If he appears himself, the Judge can fix bail, he's required to make bail.

MR. ZWEIG: That's correct.

MR. BARTLETT: On the other hand, his attorney appeared for him under Section 85.02 --

MR. ZWEIG: And he goes free.

MR. BARTLETT: And you obviate that requirement. I see.

MR. ZWEIG: Yes, that's what disturbs me. I think you ought to give this some thought.

MR. BARTLETT: We're giving a pretty big leg up to the guy who thinks ahead and sends his attorney.

MR. ZWEIG: That's right. You may disagree with me. You have a provision, I note that you have -- you have followed the statutory provision today which says when a person is arraigned in a uniform traffic case, you see, I've confined myself a little bit more to traffic because legally and truly, I think you'll agree with me that is the bulk.

of the work of the local courts, and I think it's very very important and I think the law enforcement agencies are very much interested.

Now, in an arraignment, you say that the person shall be given his rights and you go through the arraignment procedures as we now have it in 669 of the Code which is fine. Then you say a -- the printing of Section 335-a of the Code in bold red letters as they say on this ticket is sufficient to advise him that his license may be suspended, that in addition to a penalty his license is subject to suspension or revocation as prescribed by law.

I've always been opposed to that and I'm wondering if this is not a good place to change it. A Defendant comes into court, he is charged with a misdemeanor or he's charged with three speeding violations which are just as serious as a misdemeanor because it is a mandatory revocation and let us assume that we're having a lot of group arraignments which disturbs me today when I walk into a court and I see 35 Defendants arraigned and the Judge says, "Have you all read that ticket, the red stuff printed on that ticket, so you know what that means?"

Now, this to me is not a matter of arraignment and I must say this, I must give credit to the courts in New York City. When I appeared in 100 Centre Street one day and I saw 135 cases and I saw them arraigned and I saw them arraigned individually and I saw an interpreter brought in where the people didn't speak the language, if they can do that in a busy court in New York City then we should be able to do it in upstate New York and I do not feel that merely printing something on a ticket should be sufficient to advise the Defendant that his very livelihood is in jeopardy and that means his license.

Furthermore, if we're going to do that, we might as well print all the arraignment procedure on the ticket and bring in the ticket and say, "Have you read the ticket, Mister?" "O.K., how do you plead, guilty or not guilty?" Now, I feel that this is something that needs correcting today and I think this is the place to correct it. Let us do away with it. It is -- no harm is going to be created. If a man wants the job, the position, the honor as being a Justice, then let him be a Justice and this has been our thought, this has been our

thought, this has been our admonition to the Justices in the towns and villages whether they get \$300 or get \$10,000, that they're going to be Justices or we're going to abolish these courts and if they don't want to be Justices and advise the Defendant of his rights, I do not mean that a person attempt to whitewash anything. Let them be convicted when they should be properly convicted, then we won't have so many cases in the Court of Appeals. So I feel this is the time to do it, gentlemen, and I wish you would.

Now, you have -- I think I've discussed it with one of the gentlemen here. You have a provision, Section 90.25, proceedings in felony counts in local courts. Your provision is practically the same as we have today that a man can be apprehended and brought to a court, any court in the county, but you have Subdivision (b) and I'm asking this as a matter of information because I honestly do not understand your reason and undoubtedly you have a good reason and please afford me your expert knowledge. You say that if the matter is not reduced, you have a provision there which permits

the reduction of a felony and this has been needed a long long time because if I may use the distasteful phrase, we'll get rid of a lot garbage in County Court because many of the felonies that are brought into the local courts should have been disposed of in the first instance and the taxpayers and the District Attorneys should not have been burdened with presenting them and then having them, so to speak, fall out on them in the or before the Grand Jury so you have provided, you have made a provision which is good, that with the recommendation of the District Attorney the case can be reduced to a lower charge and disposed of, but you say in the event it is not disposed of, then you want it transferred back to the town or village court in which the offense was alleged to have been committed. Now, you have a reason for that. Would you tell me what that is?

MR. DENZER: Yes, I thought that's what you wanted.

MR. ZWEIG: Not in felony cases, I didn't want it.

MR. DENZER: No, you remember we

discussed, I thought your position was that the Judge should have the option here of either keeping the case or sending it back.

MR. ZWEIG: Is that your idea? Frankly, I'm in favor of it. I wanted your thought on it.

MR. DENZER: Well, that's it. He must either, (a) dispose of it himself or (b) send it back.

MR. ZWEIG: Let's see, Mr. Denzer, does it read that he must dispose of it? Maybe I've read it incorrectly. I thought that if it's not reduced, if he can dispose of it, all good and well. No, that is what I wanted but I wanted --

MR. BARTLETT: Such court must then either (a) or (b).

MR. DENZER: That reduction is just an ansillary to (a).

MR. ZWEIG: I see. All right, I stand corrected.

MR. DENZER: O.K.

MR. ZWEIG: I, frankly -- I did this a little late at night. Now, Section 185.10 deals with trial jury formation. Gentlemen, we have a

serious problem today with the jury situation. A few years ago, Sections 702, '3, '4 and '5 were repealed I think in the Code of Criminal Procedure. In the old days, we had a method of selecting, in the lower courts, of selecting a panel and then a venireman and then sending it out to the law enforcement officers for the trial of a criminal action in a local criminal court. Today by amendment it was taken out, the provision of the Code was repealed. It was all put into Articles 17 and 18 of the Judiciary Law and whenever a distinction with population of 100,000, population of 100,000, under 100,000, and frankly, Justices have written to me, Bill Bulger has been one who's been beseiged with it, as to how, where do we get this, how do we go about it? What do we know about the Judiciary Law? How do we get this panel? The Commissioner of Jurors has to furnish, under the law, he has to furnish every December 31st or by the 31st of September, to every Town Clerk of every town a list of the available jurors.

In the old days, we had provisions right in the Code. I attempted to do this by the rules

and the Uniform Justice Court Act. I felt that the rules in the Uniform Justice Court Act should spell out the method of acquiring a panel, not the selection of a petit jury but the method of acquiring a panel.

I'm wondering, gentlemen, whether the place is not -- I know you don't want to clutter up the Code of Criminal Procedure with a lot of unnecessary things if you can do them somewhere else but I'm just wondering if it shouldn't be put back in the Code and a simple provision as to how to obtain a panel and how to proceed with it? The same, maybe if you put-- if we take the sections that were repealed, I wish you'd give that a little thought and see if it doesn't make some sense rather than to relegate it to the Judiciary Law which is very very complicated. If you read the chapters, the articles, 17 and 18, it's a night's reading and it doesn't read like a novel.

MR. BARTLETT: Do you have any idea how the guardians of the Judiciary Law would feel about this, i.e., the Judicial Conference?

MR. ZWEIG: Well, yes, Mr. Bartlett, I

know how the guardians will feel because I remember appearing before the Family Court when they put in that Provision 813 to transfer all family assault cases to the Family Court and now they wish they hadn't done it. We wish to dispose of many of them in the local court and you never heard of them before. We'd settle disputes but now you can't do it because now the Judges are smart, we're not going to do anything, we just wait three days and ship it. And the same thing here, but I think that this is the place for it. I mean the Code of Criminal Procedure, the Criminal Procedure Law.

MR. DENZER: What's the matter with the Uniform Justice Court Act?

MR. ZWEIG: I knew you were going to say that, Mr. Denzer, and I've been attempting to get the rules to do it and I think that, frankly, it's either here or if you're going to say that it should be in the Uniform Justice Court Act and if you say that's a mandate, I will vote with you because maybe we'll get it done.

MR. DENZER: Well, you see the civil cases rather than criminal --

MR. BARTLETT: That might be the whole thing.

MR. ZWEIG: Yes.

Now, I'm almost to the end and I'll let you gentlemen go. I'd like to discuss one method of appeals because we have a serious situation in the law today.

Now, you provide two methods and I think it needs a little explanation. Mr. Denzer, you and I have discussed this. I do know this, that in the Second Department, am I right, in Dutchess County now, the appellate term is hearing appeals. I'm right about that. We have -- we -- so therefore, we now have provided in the Uniform Court Act that we have permitted the same method of appeal in criminal cases as existed under Section 756, 754, '55 and '56 of the Code of Criminal Procedure. We thought that it was a simple method. We do know now that in the Second Department, appeals are taken to the appellate term and then we made a provision in the Uniform Justice Court Act that where there is an appellate term then the method of appeal should be by filing a notice of appeal. That's perfectly all

right but I feel that in -- where there is not an appellate term, then we should permit the same procedure which is a simplified -- simple procedure, filing an affidavit of errors, serving it on the District Attorney within three days and the appeal is deemed to have been taken.

You've made a distinction here and this is what I take a little issue with. You say if there is a stenographic record, then a notice of appeal; if there is no stenographic record then by affidavit of errors. I think we're going to run into a little problem, going to run into confusion. First of all, it has been ruled by the highest court that the trial of every criminal action, there must be minutes of some type. This is today definite. There has to be minutes and you will find that stenographic records are taken in -- taken today in every -- in the trial of every case. I see no reason that there should be a difference of filing a notice of appeal if there is a stenographic record or an affidavit of errors if there is no stenographic record.

My recommendation would be this, that

in departments which have appellate terms there the taking of an appeal should be by a notice of appeal regardless of the record. In departments which do not have appellate terms, it should be by affidavit of errors. I think you simplify it.

Now, this is the \$64-question. We now have two cases inconsistent with each other. We have the People against Freeman case decided in upstate New York. It's a County Court decision, you'll find it in 44 Miscellaneous, which holds that in the return under Section 756 which was amended in 1961 and now since the '61 amendment it is required that the Judge file his return in triplicate with the one, the original in the County Clerk's Office, the copy to the District Attorney and the third to the attorney for the Defendant, but the minutes, the transcript of the testimony only once that is filed in the County Clerk's Office. We take the position that you file it in the County Clerk's Office, everybody has it available, they can make copies, you can do everything you want. Of course, we have a narrow situation with the indigent defendant law and by virtue of case ruling I'm afraid that if the

Defendant is indigent, a copy of the minutes has to be furnished to him free of charge. We have this as a problem and I would suggest, Mr. Denzer, that you leave as is, as it is in the Uniform Court Act. Notice of an appeal where there is an appellate term, affidavit of errors where it goes -- where there is no appellate term.

MR. DENZER: You say every case now is stenographically recorded?

MR. ZWEIG: It has to be recorded. You see, the statute provides and the case ruling provides -- the Court of Appeals has held either there be stenographic records or the Judge must take notes in long hand.

MR. DENZER: Yes, or --

MR. ZWEIG: Yes. Now, you will find that Judges are not taking them in long hand.

MR. BARTLETT: You know what variations you get from the second category.

MR. ZWEIG: Right. Now, they're not taking them in long hand, Mr. Bartlett, they're getting stenographers. As a matter of fact, they're attempting to get the law amended to permit tape

recording.

MR. DENZER: What do we need the affidavit of errors at all for then?

MR. ZWEIG: Well, the affidavit of errors so the court can appeal. Well, that's the basis of your appeal, what the Judge did that was wrong.

MR. BARTLETT: Well, if we have stenographic records in every situation, why don't we always move on notice?

MR. ZWEIG: You mean just abolish the affidavit of errors and serve notice of appeal? Well, that was the old days, you know, we always used the notice of appeal, never used the affidavit of errors. The affidavit of errors is a modern innovation. It might be a thought.

MR. BARTLETT: You see, if you have the record --

MR. ZWEIG: Yes, it might be a thought.

MR. BARTLETT: -- then that would seem to be the logical record.

MR. ZWEIG: Well, to assure that, of course, this is case law. Of course, it also is --

it's also in the Code of Criminal Procedure that it says that a Judge must keep a record of the transaction of all business. It must be entered and so forth. Courts have supplemented that by saying there must be sufficient minutes of the testimony so that the Appellate Court can know how to review it. Now, we -- perhaps we ought to, perhaps we should make it a little more stringent and put in here that here must be a record.

MR. DENZER: A stenographic record as it is now?

MR. BARTLETT: That's --

MR. ZWEIG: Right, and then perhaps some day they'll permit the use of the tape recorder. Of course, today if both parties consent you can use it. We have no problem and it will do away with the affidavit of errors, although the affidavit of errors has never disturbed me. I don't know how the District Attorneys feel about it, about the affidavit of errors. I know the Judges become concerned. They call you up in the middle of the night and say, "Do you know John Jones, the attorney?"

"Yeah."

"What kind of a fellow is he?"

"Nice fellow."

"I don't think so; do you know what he said about me?"

MR. BARTLETT: Under oath.

MR. ZWEIG: Well, this is the old, the idea of taking -- of a Judge taking offense.

MR. DENZER: You say this wouldn't go throwing a monkey wrench in the works by requiring that every case on appeal, that every case be stenographically recorded?

MR. ZWEIG: Frankly, I think the time has come, I think we ought to have it because the higher courts have said they've got to have something to review and otherwise they reverse it automatically on you.

MR. DENZER: Fine.

MR. ZWEIG: I think the District Attorneys are in favor of that, of having the record, aren't you?

MR. PANZARELLA: Sure.

MR. ZWEIG: Look, if we're going to operate these courts and make something out of them,

let's let them work the way they should work.

MR. DENZER: Well, we'd be happy to.

MR. ZWEIG: All right, and incidentally, I think this -- to continue, to continue the amendment of 756 of the return in triplicate, I think that -- I think that's all right. I think it should be made in triplicate. I think the District Attorney should have the information so he doesn't have to run around and get the information and so forth.

But as to the stenographic record, I think we're going to run into a problem. Here is the problem, you try a speeding case today for which the fine could be ten or 15 or 20 dollars. The minimum stenographer -- with all due respect to my girl friend, the minimum stenographic fees in the local court for one night would be \$25 for taking the minutes. Then to transcribe the minutes you run into about \$75. The Town or Village Court gets \$5 for that case. This is standard. You don't operate on a fee basis as we know, thank goodness, so you know what happens and you have to have minutes. I can tell you what happens. I know the press will publish it. The charge is reduced from

a three time speeder to failure to keep to the right, failing to keep to the right, because lawyers are wise to this thing and what will happen, they try every case and the first thing you know, you'll break the town and village and there you are. You have a problem. It's a very serious problem today.

MR. BENTLEY: Morris, one thing that disturbs me is that quite often a case like this, the Defendant's attorney will show up with a Reporter. Can that record taken by the Reporter be used?

MR. ZWEIG: I think if the Reporter is sworn and the record is sworn to, I don't see any objection to that. I've done that and I don't see any objection to it.

Well, gentlemen, you -- for my last remark I'd like -- I have to be fair to other people because they have just as many important things to say as I have.

The Youthful Offender Law. You use the word and in the copy which I received from your office, someone underlined it and I wondered, there must have been a reason, you use the word "conviction"

in place of adjudication and I know that they mean the same that you intend with adjudication. When you speak of Youthful Offenders, we always like to speak of the adjudication rather than conviction. Of course, in your definitions you say that the word "conviction" means adjudication. Is it necessary to have the word "conviction" there? I say this to you for this reason: A boy going into the service, they say in the application, have you ever been convicted and, of course, then it uses the word "crime" and so forth. Today the word "conviction" is not found in Section 913 (e) to (r), in the Youthful Offender Provision under the Code. Here we do find it "convicted as a Youthful Offender". Do you not feel that in keeping with the theory of the Youthful Offender Law that we should -- we should retain the phrase "adjudication" or "as adjudicated as a Youthful Offender" rather than convicted?

MR. BARTLETT: You think this may lead to some confusion?

MR. ZWEIG: I do.

MR. BARTLETT: Because by definition we say it's not a conviction.

MR. ZWEIG: I know, then you go on and say one means the same as the other.

MR. DENZER: We try to equate this to a verdict of guilty in a criminal charge. In other words, guilty is a conviction in the regular criminal charge. There is a sentence that completes the conviction. It's the same thing here, conviction as a YO, that brings it to judgment, that's an adjudication.

MR. ZWEIG: Well, Dick, what difference would it make if you said the Defendant has been adjudicated either by his plea or after a trial he's been adjudicated as a Youthful Offender? He can still be sentenced because he's been adjudicated. The word "adjudicated" means judged.

MR. BARTLETT: You're not suggesting change in concept, simply nomenclature.

MR. ZWEIG: Right. I think psychologically it has a very definite meaning. Of course, now you say that a Youthful Offender, we discussed this the last time and I'll only spend a minute on it. If you feel you have broadened it and I know you're going to be loved by the League of Women Voters for

this, you have broadened it, you say an eligible youth means youth eligible for Youthful Offender treatment and every youth is so entitled unless he's charged by indictment with a Class A felony, of course, or has a previous conviction for a felony and then you've made it more or less mandatory, have you not? You feel that that is the modern concept?

MR. BARTLETT: In that limited category.

MR. ZWEIG: Yes. In other words, if he -- he's eligible. He's eligible if he's not charged with a felony and has not been previously convicted of a crime or adjudged a Youthful Offender.

MR. BARTLETT: It's his first misdemeanor offense, right.

MR. ZWEIG: Yes. Now, that's the point here. You have to be a little bit careful and, gentlemen, give this a little thought. If he's been convicted of a misdemeanor, you know, there are unfortunately today, we have some categories of misdemeanors which are not -- they, of course, they don't have moral turpitude, I'm just thinking of a man driving a car in the old days, if he had -- if his emergency brake was bad he was guilty of a mis-

demeanor. We fortunately got that off the statute, removed that from the statute book but we do have some traffic misdemeanors which should not be but still are petty. Now, let's assume a fellow is convicted of a traffic misdemeanor, he comes in here, the word misdemeanor is broad and he can't, he's not eligible as a Youthful Offender.

MR. BARTLETT: Oh, yes, he is.

MR. ZWEIG: Except by the Judge's discretion, now, so you brought it back to, I think, maybe you've cured it.

MR. BARTLETT: You see, we felt really --

MR. ZWEIG: I think maybe you've cured it.

MR. BARTLETT: There may be misdemeanors that ought not to bar Youthful Offender treatment.

MR. ZWEIG: Right.

MR. BARTLETT: But we didn't believe we could begin that statutorily and that would be up to the Judge to sort out if he recognizes this is clearly the kind of misdemeanor to which no criminality really attaches.

MR. ZWEIG: He can still do it.

MR. BARTLETT: He can go ahead.

MR. ZWEIG: I think you have broadened it.

MR. BARTLETT: We didn't want to say he had to do it in that sort of circumstance.

MR. ZWEIG: Yes, I think you have broadened it and I, I am in favor of it so long as in some elements you have discretion, in other words, but you feel there that he should -- it should be mandatory that he have Youthful Offender treatment and if he falls into the proper category. In other words, if he's clean so to speak?

MR. BARTLETT: That narrow category, the charge is only a misdemeanor.

MR. ZWEIG: Yes, you actually feel that that is important rather than leave it to the discretion, in other words every youth --

MR. BARTLETT: You were just kind of suggesting the other way on misdemeanors of the type you described that perhaps we shouldn't leave that to the Judge's discretion.

MR. ZWEIG: I'm wondering.

MR. DENZER: Well, there are two advan-

tages of it.

MR. ZWEIG: I'm wondering.

MR. DENZER: For example, why shouldn't a youth who has a clean record and is charged only with a misdemeanor, why shouldn't he automatically get it?

MR. ZWEIG: In other words, you want to give him a chance in the first instance. Either he's going to be good or bad.

MR. BARTLETT: Let's be practical about this.

MR. ZWEIG: Right.

MR. BARTLETT: The fact today is that most of them get this treatment, the first bite. This obviates all the hanky-panky of the investigation and so forth, the Judge knowing full well when he gets through fooling around, he's going to give him YO.

MR. DENZER: Or maybe some hard-nosed Judge up here where there aren't many probation facilities available will just deny it arbitrarily whereas some other Judge in the city would grant it. I mean you get this disparity.

MR. BARTLETT: The awkwardness of getting a probation report --

MR. ZWEIG: Well, let me just say this, if the law enforcement agencies are in accord with that I certainly am in accord because I feel that perhaps it is a way of doing things which you could not do in another manner. I think I'm in favor of that.

Gentlemen, you might be interested, I'm not too proud of the authorship except I said it facetiously. I prepared a sample person chart and some commentaries on it which has been distributed in all our schools and I think every Justice in the state has it. The Bar Association has also distributed it. They asked me for it. Not only that, they even tried to sell it back to me at \$3.50 a copy. I don't think it's worth \$3.50.

MR. BARTLETT: Judge Zweig, thank you very much.

MR. ZWEIG: It's been an honor and a privilege.

MR. BARTLETT: Before you step down, may I ask if any of the Commissioners have any

comments or questions?

(No response.)

Thanks very much, your comments are very helpful to us.

We will now hear from the Director of the New York State Identification and Intelligence System, Doctor Robert Gallati.

DOCTOR ROBERT J. GALLATI: Commissioners, gentlemen, I want to thank you first for the opportunity to appear before this distinguished Commission and to make a statement concerning the proposed New York Criminal Procedure Law.

May I begin by commending the Commission not only for having performed this monumental task, but also for having incorporated in the revision of New York State's Code of Criminal Procedure so much that is vital to the best interests of ordered liberty in our state. On the one hand, procedures are improved so that the guilty may not escape justice; on the other hand, enlightened processes protect the civil liberties of all of us. Your revision takes cognizance of the contribution that the computer-based New York State Identification

and Intelligence System can make to the realization of these objectives, and we at NYSIIS wish to assure you that we will spare no effort to achieve these goals.

To begin with, we are heartily in favor of the proposed expansion of mandatory fingerprinting and photographing to include all crimes contained in the Penal Law as provided in Section 80.10 of the Proposed Criminal Procedure Law. We estimate that this will increase the volume of arrest fingerprints processed by NYSIIS to the extent of approximately 50 per cent. Thanks to increased automation of our identification process, we expect to be able to cope readily with this heavier work load.

It is submitted that this substantial broadening of our fingerprint identification data base will contribute to more effective administration of criminal justice in New York State since more will be known about the case history of criminal offenders. From a public safety standpoint, wanted persons, victims of homicides, offenders who have left their fingerprints at the scene of a crime, unknown suspects who have been seen by witnesses or the

victim, et cetera, will be more frequently identified. From the viewpoint of protecting civil liberties and providing for welfare of individuals, more amnesia victims and missing persons will be aided, more discrete processing of suspects and accused will be possible.

Some criticism of this section has been advanced on the ground that a few of the misdemeanors in the Penal Law amount only to "petty offenses." I believe that this is not a compelling argument for changing Section 80.10, although it might be considered in terms of the continued designation of such acts as crimes in the Penal Law. The inherent value to society of fingerprinting and photographing persons arrested for committing crimes contained in the Penal Law is dependent not only upon the gravity of crime, but upon the employment of the data thus generated to support more professional and scientific prevention, investigation, prosecution, judicial and rehabilitative processes.

A special problem relative to the submission of photographs to NYSIIS within 24 hours after arrest has been called to my attention. At

the present time it appears that this time constraint would pose difficulties for some of our smaller police departments which do not have the advanced photographic equipment available.

MR. DENZER: May I ask there?

DOCTOR GALLATI: Yes, Mr. Denzer.

MR. DENZER: We unofficially flagged that too the other day and we don't see any reason, at least the staff doesn't, for the 24 hour requirement. As promptly as practicable, something of that nature, is that what you have in mind?

DOCTOR GALLATI: Well, we have a suggestion, a specific suggestion on that, Mr. Denzer.

MR. DENZER: Yes, that's all right, I'm sorry.

DOCTOR GALLATI: Which I will come to immediately and perhaps this will satisfy the problem as it was raised.

MR. DENZER: All right.

DOCTOR GALLATI: I think until such time that better equipment is universally available, and certainly this is something which we all ardently

hope will occur, we suggest that Section 80.20 be amended to provide necessary flexibility by calling for the submission of photographs in accordance with NYSIIS administrative directives. And we have a specific amendment in the appendix to that effect.

The requirement of the proposed --

MR. BARTLETT: In other words, to afford some flexibility in recognizing the difficulties imposed on some police departments and obviating the need for legislative change on the number of hours within which photographs have to be sent, is that right?

DOCTOR GALLATI: That's precisely so, Mr. Chairman, and we are looking forward to the day when this will not be a burden about additional funds being made available for the Safe Streets Acts and other sources. We anticipate that the -- such things as photographic equipment will be available to most departments, if not all, and then perhaps get down to the point where we can expect to get it in 24 hours but at the present time this does present a problem and we can handle this, I think, with some flexibility in this fashion.

MR. BENTLEY: Well, look at it just the other way. How do we know that you wouldn't make unnecessary use of such provision? You think you should have in the Criminal Code this reference to administrative bodies?

DOCTOR GALLATI: In this case, yes, I do. I think that we have here an opportunity to provide that type of flexibility which can recognize the practical problems which perhaps should not exist but do exist today. And we have another case in which we also recommend this type of flexibility in terms of the difficulty of providing in the statute for description of exactly how a photograph, for example, should be submitted. We need this flexibility for a number of reasons. The first reason is that we don't know at this time precisely what type of photograph we would want to have submitted at the time this act becomes effective. We are now engaged in a study of this whole area supported by federal funds to develop an automated personal appearance processing system. It may well be that something somewhat different than anything we now have would be needed at this time. I can assure you, sir, that

the fact that we would be responsive to the needs in the field would not make it 12 hours if this was of impact in any way or a hardship on the department.

MR. BARTLETT: To put Mr. Bentley's concern at rest, would it be all right with you if we said 24 hours or longer as provided by the administrative regulations?

DOCTOR GALLATI: I'm sure that would be quite all right.

MR. BARTLETT: All right.

DOCTOR GALLATI: So the requirement of the Proposed Criminal Procedure Law, Section 200.10, that "Where a Defendant is convicted of an offense specified in Section 80.10 as one for which fingerprinting is required upon arrest, the court must not pronounce sentence until it has received a fingerprint report is one which will have substantial impact upon NYSIIS, particularly in respect to the so-called "forthwith sentencing procedures." Lest there be any doubts, let me assure you that NYSIIS, through its around-the-clock automated identification processes and its statewide facsimile transmission network, will provide the logistic support necessary

to assure the effectiveness of this provision.

Likewise the requirements of Sections 285.30, 285.40 and 285.50 will be adequately backed up by the rapid response capabilities of NYSIIS. The Proposed Criminal Procedure Law permits the judiciary power to order recognizance or bail in felony cases only after "the court has been furnished with a report of the New York State Identification and Intelligence System concerning the Defendant's criminal record, if any." At this time right now NYSIIS can routinely provide a Summary Case History in response to the submission of a set of arrest fingerprints from any location in New York State in a period of three hours. It is anticipated that additional management and systems improvements and more rapid facsimile transmission will reduce this response time even further. Parenthetically, a study of last month, November, 1968, we find our mean response time for facsimile submitted fingerprints was two hours and 20 minutes. We gladly accept the responsibility that this provision places upon our agency and pledge that NYSIIS electronic services will fully support this very vital provision.

of the Proposed Criminal Procedure Law.

Now, in addition to these major considerations which relate to the achievement of the high purposes of the Commission, there are a number of minor amendments I would like to recommend in order to clarify rather than alter certain provisions. Since these are deemed noncontroversial, they are submitted herewith as an appendix to this statement with a short explanation of the rationale for each suggested change in each wording. You gentlemen, I believe, have copies of that appendix and if there is any questions you have in mind, I'd gladly address myself to any or all of these suggested amendments in accordance with your wishes.

MR. BARTLETT: They are primarily in the technical range, I take it, and if Director Denzer has any question about it I assume he can communicate directly with NYSIIS and discuss it with you?

DOCTOR GALLATI: Correct. In most cases it's the elimination of obsolete material.

MR. BARTLETT: Fine.

DOCTOR GALLATI: So I would like to conclude gentlemen, as I began by thanking the

Commission for the opportunity to discuss these matters at this public hearing. Inevitably, there will be some minor problems generated by the new requirements. However, from the viewpoint of the impact of the Proposed Criminal Procedure Law on NYSIIS related activities, it would appear that outmoded procedures and antiquated processes where they exist should be changed to meet the requirements of the new law rather than torture the statute to accommodate anachronism.

MR. BARTLETT: Thank you very much, Doctor Gallati.

Are there any comments or questions?

MR. JONES: Bob, it was passed over rather quickly but would that suggested amendment satisfy you with regard to the 24-hour fingerprinting?

DOCTOR GALLATI: Oh, yes, definitely.

MR. BARTLETT: Anything else, gentlemen?

MR. BENTLEY: Well, really it's not your problem, it's the local problem.

DOCTOR GALLATI: Right.

MR. BENTLEY: You can rise to it?

DOCTOR GALLATI: Oh, yes. Thank you.

MR. BARTLETT: Thank you very much, Doctor Gallati, I appreciate your helpful comments.

We will now hear from Albert Rosenblatt, the Chief Assistant District Attorney of Dutchess County.

MR. ALBERT ROSENBLATT: Thank you, Mr. Chairman and gentlemen, for the opportunity and the honor to appear here before you. My remarks are going to be quite brief. They pertain in the main to one rather narrow area of the proposed law and that is the area of immunity and insofar as it pertains to contempt.

I think it's difficult if not impossible to speak about immunity from a prosecutor's viewpoint without also considering contempt. I can't recall within memory any occasion which immunity issues arose unless it was tied in with contempts involving appearances of recalcitrant or hostile witnesses before the Grand Jury.

Right now, the procedures for compelling testimony from reluctant or hostile witnesses involved considerations of former 2447 now included in the Grand Jury provisions of the Criminal Procedure

Law. In addition to that, the Judiciary Law, 750 et seq. must be invoked and to some extent the appellate processes become involved because upon an adjudication of contempt frequently a Defendant will want a Certificate of Reasonable Doubt in order to stay the immediate incarceration upon a thirty-day mandate of the court so that we now have to look to three separate statutes, and I would suggest that the procedures for contempts be treated in some fashion in the Criminal Code, proposed Criminal Law itself, so that we know where we're going upon such applications.

For example, right now -- and I'm sure Mr. Denzer from his lengthy experience in these matters is aware what the procedure has been when a witness comes in to the Grand Jury and refuses to answer questions. He formerly was directed by the Grand Jury, by the Grand Jury Foreman to do so and then upon his refusal he was then ordered by the Grand Jury Foreman to answer and then upon his refusal, everybody would come up to court and the Stenographer reads what happens or what happened in the Grand Jury and the court would then sometimes

summarily hold a person in contempt and other times order a hearing to determine whether or not there were any mitigating circumstances. This is not really spelled out at all.

MR. BARTLETT: Are you suggesting that we invade that thicket and attempt to straighten it out statutorily?

MR. ROSENBLATT: I was going to suggest that until you spoke in connection with one of the previous witnesses about the guardians of the Judiciary Law, and I wasn't sensitive to that particular problem. I'm only sensitive to the problem insofar as it has involved complexities.

MR. BARTLETT: I said that at least partly in jest.

MR. ROSENBLATT: Well, O.K.

MR. DENZER: As I understand it, if the Defendant is brought before the court and is directed to answer and if he says, "I'm not going to answer", then that's a contempt in the presence of the court, in summary. If he says nothing and is brought back before the Grand Jury and just doesn't answer or is equivocal, that's not a summary contempt, that's

when out of the presence of the court and has to be --

MR. BARTLETT: There has to be a hearing.

MR. DENZER: Yes.

MR. ROSENBLATT: Well, respectfully, I really don't know that it's all that clear because then you get involved in what kind of language the Judge uses. I've heard the Judge say, "Well, would you answer if I sent you back down to the Grand Jury?" and that's kind of a contempt in futuro.

MR. DENZER: Well, what would you suggest, Al, that any unauthorized refusal to testify before the Grand Jury would be treated as a summary contempt?

MR. ROSENBLATT: If that would -- if that is a possible answer, except for the fact that the United States Supreme Court has held, I think that they've held this recently because there was a case called Harris against The United States, 86 Supreme Court 352, in which they said that hearings are necessary because a witness may feel intimidated by someone who is threatening them, as to why he's not answering and I think hearings should be indicated in these cases.

The courts have varied on whether or not a hearing is indicated or whether or not it is indeed a summary contempt or contempt which requires a hearing. My point is really not so much to make a suggestion, although I could be available to do that but that it should be spelled out in some fashion or other because whether it is a contempt committed in the presence of a court or a contempt in front of the Grand Jury leads to a consideration of whether it's reviewable on appeal. If it's a summary contempt in front of a court it's reviewable by an Article 78 Proceeding. If it's by -- if it's a contempt committed in front of the Grand Jury which gives rise to a hearing, then it's reviewable by appeal. That then invokes your appellate procedures of the Code and the Code, I notice, makes no mention of what contempt adjudication is appealable.

MR. IENZER: Well, that's a civil appeal. That's why all of this procedure comes down to the civil proceeding and unless you indict the person involved for contempt under the Penal Law which is, of course, satisfactory in a criminal case, all of

these summary and nonsummary civil proceedings are governed by the CPLR, at least that is the way I understand the subject.

MR. ROSENBLATT: Well, I know that has been your position because I chatted with you informally about it. Specifically, Dick, I think there's been a lot of confusion as to whether it's a civil or criminal proceeding because they call it criminal contempt and yet it's a civil proceeding.

MR. DENZER: Well, yes, I know but I think it's classified as a civil special proceeding and if you look at the appeal provisions under the CPLR, you note that those do control the appeal. At least that's the way it is treated or that's the authority for the appeal now. In other words, it's not a criminal case technically. It's a civil case.

MR. BARTLETT: Well, in any event, you're hopeful that the Commission would undertake a sharper definition than is now available as to the application of contempt and the remedies within the context.

MR. ROSENBLATT: Within the context of the Code, certainly some language, if they come right out and say it's a civil case, the contempt is

a civil situation, that would clear up some difficulty because on an appeal to the Court of Appeals, the difference would be whether or not one Judge would grant permission to appeal or whether the entire court would grant permission to appeal. To that extent, it makes some difference.

My main concern --

MR. BARTLETT: I don't even believe that's clear at this point.

MR. ROSENBLATT: Well, I don't know that it's clear. I had one of those appeal cases. We went to Judge Fuld, I opposing the application to appeal, and he wasn't certain whether or not it was civil or criminal at that point and then he said, "I don't see that I'm going to let this case up at all", and then he gave it to the entire Court, apparently thinking it was civil and they did let it up.

MR. BARTLETT: You could see why it might just be possible we would feel it necessary to do this by means of amendment to the Judiciary Law.

MR. ROSENBLATT: Well, I really -- I think it's immaterial where the amendments are

except that the prosecutors now, I think, are in a great morass as to exactly what procedure to use in order to gain a contempt conviction or adjudication if you like, that the procedure, this business about going up to the Judge and coming back down again, marching up and down the stairs, I think is cumbersome and in addition to that I've always wondered what happens if somebody doesn't want to go with you up before the Judge.

MR. BARTLETT: We've had that.

MR. ROSENBLATT: We haven't but it's always been in the back of my mind.

Now, the other problem is that Section 757 of the Judiciary Law says that it should be brought on by an order to show cause and in one case that we had that went up to the Court of Appeals, this argument was abandoned because I didn't bring it on by order to show cause. I just said, "Well, will you come with me to the Judge?" and, of course, they did and then I argued that they waived this provision for the order to show cause but I know that the practice in New York City is, and we have been following that in Dutchess County because the

experts, the contempt experts are down there, that an order to show cause is not used in order to bring the contemnor before the Judge, that it's done rather informally and I've always been a little bit wary of it so I just wanted to point that out to you for your consideration and thank you again for permitting me the opportunity.

MR. BARTLETT: Thank you very much for coming up, Al. We appreciate the comment and we'll see if there isn't some way to deal with that.

We'll take just a couple of minutes. May I ask, are there any others who wish to speak who have not given their names to the Commission, Mrs. Gordon? I have Chief Murphy, Captain Kennedy, Mr. McMahn and a name I can't read, I'm sorry, Abadinsky? Are there any others here who wish to be heard?

(No response.)

MR. BARTLETT: Then I think we'll endeavor to go through without a noon break but let's take five minutes now.

(Whereupon, a short recess was taken.)

MR. BARTLETT: Ladies and gentlemen, if

we may get underway again, it is our fond hope that we'll be able to wind up within an hour or so and by that I do not mean to limit any of the witnesses from whom we've not heard. You take the time you feel you need.

We'll next call on Chief George Murphy from Oneida who is representing the Association of Chiefs of Police of the State of New York. I take it you're not appearing in your capacity as Vice-President of the International Chiefs?

CHIEF GEORGE MURPHY: Not today.

Chairman Bartlett, members of the Commission: First of all, I'd like to take this opportunity to congratulate you on what we feel is a job well done. We have sent out 30 books asking for criticisms or suggestions. Every letter that I've received from every Chief has directed me to extend these congratulations to you.

We have some areas, I think more or less areas that we want to question, not maybe in a change of the law but for information and for that reason, I would like the opportunity to submit a memorandum within the next week.

I also would like the opportunity to be able to sit down within the next two weeks in New York with some members of your Commission or with Mr. Denzer.

MR. BARTLETT: Chief, as to your submitting a memorandum, we will be delighted to have it. As to your sitting down with us to discuss any points you might want to raise, again we'd be delighted to do it. I would suggest that to the extent possible, we try to arrange this fairly quickly. It is our hope that having concluded our hearings next week in New York, the 12th and 13th, that we'd be in a position to call a meeting of the full Commission within a month of that time so that we may, in a body, consider all of the points that have been raised and make determinations on them, so I just ask you, do you think it will be possible for us to arrange this between the -- during the holidays or early in January?

CHIEF MURPHY: No, it will be within the next two weeks.

MR. BARTLETT: Oh, fine.

CHIEF MURPHY: You're meeting next

Thursday and Friday in New York. We would like to meet the following week with you so that we're ready for our legislative season also.

MR. BARTLETT: Fine, if you can touch bases with Mr. Denzer on an agreeable date, I'll be glad to come down.

CHIEF MURPHY: We'll be in touch by phone, Dick, and get a date.

One other thing: We were one of the groups that questioned the 24 hours before the photographs and on the fingerprinting. I had looked over the amendments and suggestions made by Doctor Gallati and we're very delighted with them because we could see a problem not alone with the small departments about that but with others on a weekend arrest so once again, thank you for the opportunity of coming in.

MR. BARTLETT: Thank you very much and if you would think to, you might allude in your memorandum to those portions of Doctor Gallati's report with which you are in agreement just to call it to our attention again.

CHIEF MURPHY: We will, thank you.

MR. BARTLETT: Good. Thanks very much.

We'll now hear from Captain Kenneth Kennedy from the Buffalo Police Department, Bureau of Vice Enforcement. Happy to hear from you again, Captain.

CAPTAIN KENNETH KENNEDY: Yes, sir.

Mr. Bartlett, members of the Committee, I'd like to express my appreciation for being able to appear here this morning and what I would like to respectfully submit to the Committee for their consideration is that, in reviewing Article 80, Section 80.10 of the new Criminal Procedure Law recommended, I would respectfully call the attention of the Committee that I notice that they, under "Fingerprinting and Photographing of Suspects", that they have included felonies, misdemeanors and also, which I would like to commend the Committee on including the fingerprinting and photographing of prostitutes which is very very important to us in the law enforcement field. But, however, there is one section there that I would like to call to your attention and that is under the new Revised Penal Law, Section 240.35, Subdivision 3.

MR. BARTLETT: Loitering?

CAPTAIN KENNEDY: Yes, sir, pertains to loitering and, Mr. Bartlett, we, of course, know that was included in the revised Penal Law as being -- allowing the police to be able to photograph and fingerprint suspects in loitering, and this is the section that we are now using in investigations of the homosexuals on the street which, in our opinion, are the worst type and which are the aggressive homosexuals on the streets and in the playgrounds, in the theaters, in the bus depots and so on. It is the most troublesome as far as the public is concerned and that they also, this is the type that is involved in serious sexual assaults against youths of the community and I would like to respectfully submit that it is vitally important to us in law enforcement in the state that we have photographs and fingerprints of the suspects and in our files in the Buffalo Police Department, it has been very very useful to us in identifying persons in the past that have been involved in sexual assaults against youths.

Now, I know that it was formerly

covered under Section 940 of the Code of Criminal Procedure under the prostitution section but, of course, now that is no longer applying, and we used to use that in our homosexual investigation but now we do use Section 240.35 (3) and as the law stands at present, we have no provision there as far as I could see for fingerprinting and photographing these suspects.

And I would respectfully request that the Committee give consideration to that, putting that section in there is the same as the prostitution section was, and this is also the expressed opinion of my Police Commissioner of my department, Commissioner Frank N. Felicetta.

And another thing --

MR. BARTLETT: We certainly will give consideration to that. It would be my own personal view that I would favor it.

CAPTAIN KENNEDY: Yes, fine. Thank you, sir.

Another thing I would like to commend the Committee on is the new section that's being inserted on Article VII, the appearance ticket, and

that I can foresee that to us, in the vice enforcement field where we're constantly making arrests of businessmen, for instance tavern keepers and so on, at four, five o'clock in the morning and where they are businessmen that have been established in the community for a long time and sometimes years, and it's difficult to take them out of there 4:00 and 5 o'clock in the morning and arrest them and it's awfully difficult at that time and hour for them to obtain bail. In this -- and it also ties up our squad of police officers that are working in that and I can see that this will be a tremendous help to us if we can hand them one of these appearance tickets, especially in licensed premises where the violation of the ABC Law is concerned whether our tavern proprietors and employees that you know are going to be readily available the next day for appearance in court. And that's what I have to recommend.

MR. BARTLETT: Fine, thank you very much, Captain.

If I may put on my other hat for just a minute, I'm grateful to you for the cooperation you

gave the Crime Control Council in our study during the summer months and we should have recommendations based on that for the 1969 session of the Legislature.

CAPTAIN KENNEDY: Yes. Thank you, Mr. Bartlett. It was a pleasure to assist the members of the Council that were in Buffalo.

MR. BARTLETT: Thank you. Any questions from members of the Commission or Council?

(No response.)

Fine, thanks, Captain.

We now have, speaking for the Division for Local Police, Mr. William McMahn. I gather from the indication, you're here representing Commissioner York, is that correct, Mr. McMahn?

MR. WILLIAM G. McMAHN: Yes, sir.

Chairman Bartlett, interested Legislators, esteemed members of the Commission: As a representative of Mr. Orrel A. York, Director of the Division for Local Police, I would like to thank you for the opportunity to testify here today.

Before I offer my testimony, the Division for Local Police would like to go on record as being appreciative of the inconceivable amount of

time, effort and trouble that the Temporary Commission and staff on the Revision of the Penal Law and Criminal Code spent in bringing about the enactment of the new and aggressive Penal Law and, hopefully, the enactment of the new Criminal Procedure Law.

Once again, New York State is leading the way. We have an obligation to the citizenry of the State of New York and to the people of the United States of America and it is with this Commission and with others like it that we are fulfilling this obligation.

Now, if I may, I would like to address myself to the comments that our staff has developed concerning the proposed New York Criminal Procedure Law.

Arrests in the new Criminal Procedure Law as in the old may be made either on the basis of an information, a felony or a misdemeanor complaint or, under specified circumstances, without a warrant. A police officer acting in good faith may make an arrest without a warrant at the scene of a crime, for example. In many instances, it turns out after arrest and prior to arraignment that the subject

arrested is not the guilty party. Under our present system, the subject must be taken before a Magistrate to be discharged.

We feel that the Commission should look into the possibility of including a section that would allow a police officer to release a subject after arrest and before arraignment when it is determined after investigation that no crime has been committed or that the subject did not commit the crime if one had been committed. This power should be given to police so that a subject would not have to suffer the embarrassment of going to court or of having a criminal record.

Another reason for possible inclusion of this law would be that it would show good faith on the part of the police officer.

MR. BARTLETT: Let me see if I got this straight, Mr. McMahn. You're talking about the situation where there's an arrest made and prior to his being admitted to station house bail or being brought before a Magistrate or indeed before he's given a summons in lieu of appearance -- or not summons, appearance ticket, excuse me, I have to be

careful about that.

MR. McMAHN: Correct.

MR. BARTLETT: I've been educated to the difference now.--- that the arresting officer determines that the charges are not well founded, you mean?

MR. McMAHN: Yes, sir.

MR. BARTLETT: And he just let's them go, period?

MR. McMAHN: Yes, sir.

MR. BARTLETT: As a practical matter, they do that, don't they? Are you suggesting that we spell that out?

MR. McMAHN: Yes, sir. This has been a very nebulous area. You don't know whether you're supposed to or you're not supposed to.

MR. BARTLETT: You don't think there's any provision for unarresting the person except by a Judge dismissing the charge?

MR. McMAHN: No statutory provision for it.'

MR. DENZER: Don't we say, in other words, under the arrest without a warrant, the

ordinary rule is that he must take him without unnecessary delay before a court and you construe that to mean that he can't change his mind once he arrests him, he can't change his mind? I mean if he does change his mind about the validity of the arrest, he can't let him go?

MR. McMAHN: Absolutely not. This would indicate to us that he's subject to a false arrest suit.

MR. DENZER: Yes.

MR. BARTLETT: Of course, there are certain hazards involved in such a provision. It might be an invitation to hanky-panky. I'm sure it wouldn't be the case with the vast majority of officers but it -- well, if you had a spelled out statutory provision that the policeman, after saying, "You're under arrest", has a right to change his mind and dismiss him, in effect, I would think it would be productive of a lot of interesting conversations in the squad car.

MR. McMAHN: We will get it from a point of view that this authority, used --

MR. BARTLETT: At least some very strong

effort on the part of the Defendant to convey something.

MR. McMAHN: Yes, but we feel that if this were abused, it would still show bad faith on the part of a police officer. Bad faith could be established for a civil action. Now, we realize that this is going to give police officers a lot of discretion but if the section is written with definite safeguards, it will alleviate a tremendous amount of law enforcement administrative problems. Now, by this I mean, and we would like to convey this if, for example, you do write a provision of this nature, that a police officer can't indiscriminately do this, he would have to get the authority of a Chief or an Acting Chief in the absence of the Chief, something of this nature, and this is what we're talking about.

MR. BARTLETT: Just plain "the officer in charge" perhaps in the station house?

MR. McMAHN: Yes, in many instances it might be.

MR. JONES: And would you make a distinction between an arrest made by police officers

for a crime committed in his presence as against a crime not committed in his presence where the arrest is made at the insistence of a third party civilian?

MR. McMAHN: Well, this is a different situation. Now, we don't want to infringe upon the courts, for example, like a warrant of arrest that he's executing or, as I pointed out, a felony or a misdemeanor complaint or based on an information. Now, or again as a third-party complainant. If you have a witness or someone that says, "I want him arrested", actually the police officer is not making the arrest, he's taking the person into custody for the citizen. We don't mean to infringe upon this ground or upon the judicial bounds.

MR. JONES: So you're talking then only about those situations where a police officer is himself the complainant?

MR. McMAHN: Yes, and this occurs many times. You get the call to the scene of the homicide. You get there and there's a likely suspect at this particular moment and someone makes a judgment, a value judgment, "I will arrest him for homicide".

Now, this man you find out ten minutes

later that he didn't commit the homicide but you have arrested him or maybe four hours later before the courts open the next morning. This man has to go to court and be -- have this charge dismissed which would mean he's got a criminal record that says it was dismissed.

MR. BARTLETT: I see what you mean.

MR. McMAHN: He's been arrested for homicide but the charge was dismissed.

MR. BARTLETT: How would this affect the municipal tort liability question of false arrest?

MR. McMAHN: Well, again we feel that obviously if it's abused, it's going to -- the municipality is still going to face the tort liability and we feel that this would show good faith on the part of the police officer, show that there was no malice which is necessary for a false arrest claim.

MR. DENZER: Why do you need anything other than a flat statement that after arresting him he can let him go?

MR. BARTLETT: That's all you're talking

about.

MR. McMAHN: That in essence is what we're talking about but I would like a statutory provision.

MR. BARTLETT: Something requiring the permission or authority of someone.

MR. DENZER: Well, why?

MR. McMAHN: The problem is, Mr. Denzer, for the patrolman on the street. He's confronted with a situation of this nature. He exercises his authority as a policeman; he makes the arrest and you find out again, as I say, that there's no grounds or basis in fact for it and then he's faced with a dilemma and he brings him to the Chief or whoever the case may be and he says, "Well, I'd like to let this guy go or I did let him go", acknowledging then --

MR. DENZER: Well, what's wrong with, I mean if you try to draft something that depends upon a superior police officer passing, you're in trouble. In other words, suppose you're out in a village in a rural area where there's only one officer, what happens?

MR. McMAHN: He's the officer in charge.

MR. DENZER: Well --

MR. McMAHN: Now again, we're talking about definite safeguards. We would like to see you give the police officer the authority but we realize that this may be -- there may be or it may be abused and we feel that in order for the Legislature to approve this aspect of the law that there would have to be some definite safeguards built into the provision. This is our only point.

MR. BARTLETT: We'll look into it. Sometimes I'm persuaded even though we know there's no express statutory authority for a recognized practice it's better to leave it that way but we'll look at this.

MR. McMAHN: Fine.

The next point, there is no definition of arrest from the criminal, the proposed Criminal Procedure Law as in Section 167 of the Code of Criminal Procedure. We are told when and how an arrest may be made but not when a person actually enters the arrest status.

The use of the stop and frisk by police

can and has raised questions of just where stopping for questioning becomes taking into custody or an arrest. The term "arrest" we feel should be defined.

There have been many judicial opinions under the present Code of Criminal Procedure Section 167 determining if a certain detention or questioning of an individual was, in fact, an arrest.

MR. BARTLETT: Wouldn't you agree, Mr. McMahn, that one of the hazards involved in your suggestion is drafting a sound definition of arrest that really didn't intrude to the stop and frisk area? You know it, you talk about, you know, in custody, and the courts have struggled with definitions as you know for generations. There's always some characteristic of custody, isn't there, requiring that a fellow stand there while you ask him questions and indeed while you pat him down if you have any reason to believe he may be armed, and isn't the distinction between that kind of custody limited as it might be and what we term arrest, important in terms of the consequences?

MR. McMAHN: Yes, but we look at it from the point of view of taking into custody as either

by submission or by using that amount of force that is reasonably necessary and then you're getting involved from our point of view that if we can delineate this, we can spell it out as it has been done in the old Code.

MR. BARTLETT: Of course, you wouldn't call that a wholly satisfactory definition, would you?

MR. McMAHN: Well, it gives us something to hang out hat on, a police officer something to hang his hat on.

MR. DENZER: Well, let's see, what is the definition in the old Code?

MR. McMAHN: Excuse me, I have the Code here at my desk.

MR. McGRAW: Taking of a person into custody that he may be held to answer for a crime.

MR. BARTLETT: Thank you very much, Mr. McGraw. I thought it was something like that, and that really isn't much of a resolution of our basic problem, is it, because we're substituting one undefined term for another. We now have to ponder what taking into custody is.

MR. McMAHN: No, we're well aware of what taking into custody is and it means one thing when it applies or it means the same thing when applied to a stop and frisk as it does to an arrest.

MR. BARTLETT: Would it satisfy you simply for us to simply indicate in here that by "arrest" we mean taking into custody?

MR. McMAHN: Yes, this is our point.

MR. BARTLETT: My only point was that this didn't really address itself to the gut issue here and that is when is a person in custody.

MR. HECHTMAN: May I ask Mr. McMahn, why are you concerned to the extent that you would like a definition of "arrest"? What is the problem?

MR. McMAHN: Well, again we look at it from the point of view of the stop and frisk aspect. Now, we can say that we've taken him into custody to get a good reasonable explanation of his activity and in certain circumstances to frisk or pat him down as was said in Herring versus Ohio, but we feel that you have to tell the police officer and I'm talking about not the administrator now, I'm talking about the police officer on the street in the day to

day activity, that at one point he is taking a person into custody so that he may be answerable for a crime and now he is arrested.

Now, if you go beyond your bounds or in the stop and frisk you're only limited, you can only go so far, but in this case, you can go the whole route so to speak.

MR. HECHTMAN: Well, aren't you creating possibly more problems than you will be solving? For example, on the New York Thruway there are four cars in a row that are speeding and a trooper pulls them over seriatum and while he's writing the ticket on the first one, the three of them are backed up behind him on the shoulder. What compels these guys to stand there? Are they arrested; are they in custody? Suppose he says to the trooper who has been standing there writing a ticket on the first guy two or three minutes, the fourth guy in line says, "Well, I've had enough, I'm leaving", what's to prevent him from leaving?

MR. McMAHN: Nothing at that point but they're only being detained. They're not arrested.

MR. HECHTMAN: So you see what I'm

saying is you're not creating a third layer, arrest, custody, detention, I don't think you're solving anything by attempting to delineate. In fact, I think you're really highlighting problems that are practically inexplicable in a broad sense and they have to be handled almost on a situation by situation basis.

MR. DENZER: Here is an area of difficulty. Some homicide investigation in New York City, detectives get a couple of fellows and they aren't defendants in their minds. You have to ask them, come on back to the station house, and they keep them there three or four hours and they question them and then they either do or don't get some information from them but they are not defended. Well, all right, they've certainly been taking into custody not in any realistic sense, not for the purpose of charging them with a crime perhaps. Is that an arrest, I mean if you define an arrest as the present Code does, that would not be an arrest.

MR. McMAHN: Correct.

MR. DENZER: But you try to get away with that in a constitutional decision of some kind

in the United States Supreme Court and they are going to say, "We don't care what you call it, that's an arrest from our standpoint".

MR. BARTLETT: Well, you've identified an area that we chose not to deal with by definition. We'll consider it again. We're a little chary of that, I must say, but we'll consider it.

MR. McMAHN: Fine.

My next point, and I realize that you have expanded upon the definition of police officer and peace officer. I'm not addressing myself to this aspect. Section 120, Subdivision 32 defines a police officer and the term in there, a member. There should be a further clarification of who is a member of a police department, we feel, and some jurisdictions because of a statutory definition where this could include civilian employees as well as sworn police officers.

MR. BARTLETT: Of course, I don't know that it's a term of art but I guess that all police use the terminology "sworn officer" as distinguished from a civilian employee, don't they?

MR. McMAHN: Right.

MR. BARTLETT: In some departments, the Commissioner is not a sworn officer, the top sworn officer is the Chief Inspector or whatever title he may have.

MR. McMAHN: In some areas of the Buffalo Police Department, the people that work in the Signs Division, they are members of the Buffalo Police Department but they are not police officers.

MR. BARTLETT: Would we be meeting your requirement if we just added the word "sworn"?

MR. McMAHN: Yes, I think it would.

MR. DENZER: Sworn officers?

MR. McMAHN: I think it might.

MR. BARTLETT: Might I just interrupt your testimony for a minute to ask the opinion of Chief Murphy, would that be helpful, Chief? The question is we define members of the police, we're talking about defining the police in, where is it, 120?

CHIEF MURPHY: 120.

MR. McMAHN: 120, Subdivision 32.

CHIEF MURPHY: I've been listening closely and I agree, I think there should be some-

thing definite in there to apply. Let me just give an example. Some of use police matrons. Now, we use this police matron while we're interrogating female suspects or female prisoners. She's not actually a sworn officer.

MR. BARTLETT: She may or may not be depending on how your department is organized.

CHIEF MURPHY: That's right, so I think sworn, even maybe go a little farther than that and say "delegated police powers" because we're using civilians more and more now. We're using them on desks to answers calls.

MR. BARTLETT: But sworn is a pretty well understood term of the art among or in the police community, is it not?

CHIEF MURPHY: Yes, yes, that's right.

MR. BARTLETT: That's usually the way you distinguish civilian from noncivilian personnel in the department?

CHIEF MURPHY: That's right, yes.

MR. BARTLETT: All right, O.K.

MR. McMAHN: To further illustrate this --

MR. BARTLETT: Thank you, George.

MR. McMAHN: -- Section 188 provides that, for example, Mayors, Trustees, Street Commissioners and Superintendents of Public Works are ex officio members of the Village Police Department and this is again another illustration of the problem of the dilemma that we're faced with.

MR. BARTLETT: Well, in the example you give, are you suggesting that the Mayor of a village is not a sworn officer?

MR. McMAHN: I'm asking the Commission now, was it the intended purpose that these village officials be classified as police officers by the proposed New York Criminal Procedure Law?

MR. BARTLETT: Well, however we might deal with it, the Village Law clearly defines the Mayor of a village as the -- in the absence of another arrangement as the Chief of the Police Department.

MR. McMAHN: Yes.

MR. BARTLETT: And I believe the Village Law gives him full arrest powers, does it not?

MR. McMAHN: Yes.

MR. DEZNER: How about a sworn officer,

Division of State Police, a sworn officer?

MR. BARTLETT: Rather than member, you mean?

MR. McMAHN: In that case, the New York State Police refer to members and nonmembers of the State Police. A member is a trooper or an investigator or a sworn police officer.

MR. DENZER: Yes.

MR. McMAHN: And a nonmember is the civilian personnel that support this.

MR. BARTLETT: Well, Bill, nobody had any trouble with the State Police applying the term sworn officer.

MR. McMAHN: No, no question about it.

MR. BARTLETT: As far as their department or applying it to their department.

MR. McMAHN: No.

Point four, Sections 70.30, Subdivision 2 talks about the power to make an arrest without a warrant for a crime. We feel that this should not be restricted by the size of a police agency. All police officers, whether from a county, city, town or village, are now trained on a uniform curriculum

mandated by the state. They each take an oath of office to uphold the Constitution of the State of New York and to enforce its laws.

MR. BARTLETT: Can I just interrupt for a moment, Bill, to ask what you're referring to precisely?

MR. McMAHN: I'm talking about the powers.

MR. BARTLETT: Yeah, what part of it though?

MR. McMAHN: Subdivision 2. 70.30, Subdivision 2.

MR. BARTLETT: M-m h-m-m. What's this got to do with the size?

MR. McMAHN: He's restricted --

MR. DENZER: Are you looking at the white book or the blue one? Oh, the blue one?

MR. McMAHN: Now, maybe I -- I did originally take my comments from the white book. Maybe it has been changed in the blue one.

MR. BARTLETT: That's why we raised the question.

MR. DENZER: Well, maybe it would be --

let me just be sure, 2-A is what you're referring to there, 2-A?

MR. BARTLETT: Oh, I see, wait a minute.  
O.K.

MR. McMAHN: They talk about city and county police officers, 2-A, this is the one I'm speaking of.

MR. BARTLETT: You're talking about anywhere in the state if it's a felony, if his geographical area of employment involves either the entire county in which the felony was, I see.

MR. McMAHN: Yes, we feel there is an implication here that the village police officer is less capable or efficient than his city counterpart, for example.

MR. DENZER: Well, I don't know, that's the idea of this, that a village police officer from St. Lawrence County should not be able to go down to --

MR. BARTLETT: 42nd and Broadway.

MR. McMAHN: Yes, our point, Mr. Denzer, is again that the state mandates the same training for all police officers in the State of New York and

they all have to take the same oath of office. Therefore, we feel they should have the same power.

MR. BARTLETT: Well, we'll consider that. On that same point, Mr. McMahn, what's the Division's attitude toward those people now designated as peace officers under the present statute who are not required to take the training you described?

MR. McMAHN: Well, this again wouldn't enter into it.

MR. BARTLETT: Court officers, correctional officers, what is the feeling of the Division as to the scope of arrest powers that these individuals ought to have?

MR. McMAHN: To be quite frank, we felt it was without our jurisdiction. We didn't even want to make a statement concerning them.

MR. BARTLETT: O.K.

MR. McMAHN: And again in this regard, we realize that the present Code of Criminal Procedure was amended by the laws of 1968, Chapter 684, which added a new Section 182 (b) authorizing a police officer as defined by the Code of Criminal Procedure

Section 154 (a) to make felony arrests outside of the geographical area or confines of employment within a municipality of the State of New York.

MR. BARTLETT: That was a proposal of the Commission too.

MR. McMAHN: Oh, good. We do know, however, if you're going to have a saving clause to bring this over or if you intend to add this to your new proposed Code --

MR. DENZER: It's in here now.

MR. McMAHN: Thank you.

MR. DENZER: Subdivision 4 of the same Section 70.30.

MR. McMAHN: Point five, Section 70.40, Subdivision 2, speaks of arrest without a warrant when and how made by a police officer.

The question is raised as to why the phrase "except when the person arrested is in the actual commission of offense as is presently stated in the Code of Criminal Procedure Section 180". Why was this deleted? This would expressly provide when a police officer does not have to inform a Defendant that he is being arrested. Otherwise the police

officer-- commission of an offense" and leaving in this other p MR. BARTLETT: ac What's the virtue of the old language from your point of view?

MR. McMAHN: We felt that it was giving the officer an opportunity to make arrests in many situations without getting over extended, without jeopardizing his life, for example to commend you and your ste

MR. BARTLETT: All we're saying is that he has to say he's arrested. y important area of law

MR. McMAHN: But then you talk about, if he would have to determine if this would come under other factors rendering such procedure impractical. In other words, you're giving the for judgment to the police officer again. If he goes in and says, well, I told him or I didn't tell him he was arrested, then again we get to the point when did you arrest, when didn't you arrest and when does the law apply? DLNCKX: Yes.

MR. BARTLETT: I was going to say we're in that kind of morass with the present language.

Good to see MR. McMAHN: We feel that both of these things, if they were put in, would overcome this, to just adding "except when the person arrested is in

the actual commission of an offense" and leaving in this other point, other factors rendering such procedure impractical.

MR. BARTLETT: We'll consider that, O.K.?

MR. McMAHN: Gentlemen, that's all I have to say.

Once again, I would like to commend you and your staff for the outstanding job you have done in this serious and very important area of law and thank you for allowing me to voice the opinion of the Division for Local Police of the State of New York.

MR. BARTLETT: Thank you very much for coming, Mr. McMahn, we appreciate it. And we have one final witness speaking for the New York State Parole Officers' Association, Howard Abadinsky, is it?

MR. ABADINSKY: Yes.

MR. BARTLETT: Fine. I know you, I just didn't know how to pronounce your last name. Good to see you.

MR. ABADINSKY: We started getting into the topic that I'm going to be talking on and I see

you started to maneuver into it anyway.

The Parole Officers' Association represents over 400 parole officers and senior parole officers of the New York State Division of Parole and we're concerned with the proposed revision of the Criminal Procedure Law.

Mr. Denzer, the Executive Director of this Commission, stated in a memorandum that the non-police peace officer should possess authority to make arrests only when he is acting pursuant to his special duties. In the case of parole officers, so limiting his power appears to us unnecessary and ill advised. While some or many of the categories listed as police officers have little or no training in law enforcement, this is not true of parole officers.

A parole officer is trained in the techniques of law enforcement.

MR. BARTLETT: We can establish right away you're not defending the present laundry list in the Code of peace officers?

MR. ABADINSKY: No, no.

MR. BARTLETT: You feel that parole

officers can be distinguished from --

MR. ABADINSKY: Yes.

MR. BARTLETT: O.K.

MR. ABADINSKY: Yes. A parole officer is trained in techniques of law enforcement, investigation and apprehension. Before a parole officer is permitted to carry a weapon, he must qualify by proving his proficiency at a range before qualified range officers of the Division of Parole. Furthermore, in order to retain his weapon, he must continue to qualify every six months so long as he remains with the Division. The Division of Parole issues personal weapons to parole officers. For some or many of the categories included as police officers under the law, the new status may be sufficient. If a parole officer's primary law enforcement function took place in his office or other predetermined setting, the limit on his status might be justifiable. However, the parole officer is out in the street day or night in the community making his visits on such a regular basis that he is often called mistakenly a patrol officer.

The parole officer goes into areas of

high crime because it is here that most of the men under his supervision live and work. His very presence is a deterrent to crime. Mr. Denzer stated that the peace officer will not be authorized to "go off on a tangent of his own" to act as a regular policeman during this off-duty hours. A policeman as a rule does not go policing on his off-duty hours.

MR. BARTLETT: Oh, indeed they're required to, are they not?

MR. ABADINSKY: Except, if I can finish, except if they come across a crime.

MR. BARTLETT: Well, when else would you want them to?

MR. ABADINSKY: Well, that's why I didn't understand this "going off on a tangent". It appeared the same as we think when would you want a parole officer to go off?

MR. BARTLETT: Can't we reduce this to this? We talked about authority and we have got to relate it to responsibility, haven't we? It seems to be the view of what I will term the regular police community that they have a 24-hour a day

obligation on duty, off duty, to make arrests for crimes. What we've been trying to ascertain and properly, according to other than regular policemen, the kind of authority they need, what kind of responsibility they feel they have.

MR. ABADINSKY: That's another part of my speech. Maybe I can jump to it.

MR. BARTLETT: Let's see if we can get to it quickly now.

MR. ABADINSKY: O.K. Yes.

MR. BARTLETT: Let me ask a question now. Is it your view and your representation that a parole officer believes that he is on 24-hour duty and that he not only has the right to but is required to make arrests for any crimes committed in his presence?

MR. ABADINSKY: Definitely, and furthermore --

MR. BARTLETT: Whether or not related to his function as a parole officer?

MR. ABADINSKY: Yes, very definitely and, in fact -- and I mention in here that I think that any parole officer that does not take such action of responsibility that we feel we should have and

presently do have should be brought up on disciplinary charges.

MR. BARTLETT: All right, is this a matter of agency directive at this point?

MR. ABADINSKY: I cannot speak for the Division, maybe Commissioner Jones would.

MR. BARTLETT: No, you're the one who would get the directive.

MR. ABADINSKY: Well --

MR. BARTLETT: Are you under directive now to make arrests when off duty and you encounter the commission of a crime?

MR. ABADINSKY: I could only interpret the rules as they were given by the Division of Parole, I would say yes, as I interpret them.

MR. BARTLETT: As you read them?

MR. ABADINSKY: Right, I would feel we're under obligation.

MR. DENZER: However, if a woman comes up to you when you're on your way home and says, "My home has been burglarized a couple of blocks down here; will you come and see what you can do about it?" or "I've been robbed", do you or do the

people in your Division feel that they have an obligation and duty to go out and investigate that crime?

MR. ABADINSKY: Well, the circumstances of a crime having been committed if -- I believe if there was a chance of the apprehending of the perpetrator for the particular offense by an immediate investigation, by taking some immediate action, I think it definitely, yes, but that person should take action. If the burglary took place and say, oh, yes, I saw him flee in a car --

MR. JONES: That wasn't the question, Howard. The question was, are you required to and therein lies the --

MR. ABADINSKY: I think you would be required to take appropriate action, if you are --

MR. BARTLETT: Which might be directing her to the nearest pay phone.

MR. ABADINSKY: If you're going to get down to specifics, it may be the taking of certain facts and aiding the police in the investigation since the investigation will be turned over to the police and, in fact, not the partolman but the

detectives, the investigative force of the police department.

MR. JONES: Well, I think a proper answer to the question would have to be no, for several obvious reasons, and one of them in this regard, I want to caution you against overstating your case. The parole officer that you seem to be talking about for the most part is the fellow who has got a case load and he's actually supervising parolees out in the street.

Now, you and I know that not all parole officers are in that category. As a matter of fact, not all of them are armed and, as a matter of fact further, there are several parole officers who for years were not required to handle fire arms or have any familiarity with them.

MR. ABADINSKY: I would suggest that this is also the case as far as I'm concerned with the New York City Police Department. There are officers who do not carry weapons and there are many involved in not direct law enforcement. In fact, I would say a goodly percentage are involved in strictly clerical details.

MR. BARTLETT: In what department?

MR. ABADINSKY: At least with the New York City Police Department with which I'm familiar.

MR. BARTLETT: I think Commissioner Leary would give you a little tussel on that one.

MR. ABADINSKY: Well, many are involved in duties that are not directly where -- where they don't need a gun at the time when they're working.

MR. DENZER: They all have guns, don't they?

MR. ABADINSKY: Yes, but what I'm saying is when they're actually performing their duty they have no need for a weapon.

MR. BARTLETT: Howard, aren't we --

MR. DENZER: No, but you're doing stenographic work and he's carrying a gun and when he goes home and somebody screams that there's a robbery he's supposed to act, he has a duty to act and I don't care whether he's working with a typewriter during the day or otherwise.

MR. ABADINSKY: Well, as I explained, we are willing to accept the responsibility that's incumbent upon a person given an increased status,

given the status, for instance of a police officer in the case that Commissioner Jones discussed. Then it would be incumbent upon the Division of Parole to see that men do -- are trained in weapons and do carry them.

MR. BARTLETT: Do you view yourself as primarily a cop?

MR. ABADINSKY: Pardon me?

MR. BARTLETT: Do you view yourselves as primarily cops?

MR. ABADINSKY: I don't think we're primarily cops any more than we're primarily social workers. It's a dual role and I think they're inseparable.

MR. BARTLETT: It's more than dual.

MR. ABADINSKY: Well, you can go into a third role with District Attorneys sometimes.

MR. BARTLETT: No, but you're an employment counsellor, you're all kinds of things and this is as it should be. I'm not quarreling with it, but I really wonder whether most parole officers would agree with you that they have a duty as distinguished from a right, that they have a duty to investigate

and make arrests for crimes that are called to their attention, not related, not related to their function as a parole officer.

MR. ABADINSKY: Well, we represent approximately 80-some-odd percent of the parole officers throughout the state and senior parole officers throughout the state.

MR. BARTLETT: Have you specifically discussed the question of obligation to arrest as distinguished from right to arrest?

MR. ABADINSKY: Yes. As a matter of fact, I believe you -- I think it was you that brought this up with Mr. Grant last year when the hearings were in New York.

MR. BARTLETT: Yes.

MR. ABADINSKY: And we had discussed it at that time and, of course, since that time since you asked the question are you willing to accept the obligation that goes with these duties, and the membership -- and I can't give you a detailed, you know, how many opposed it to how many, but I would say the concensus of our membership which is 80 per cent of the parole officers, and I would even feel

in this particular instance free to speak for those who are not members of the Association that yes, they would be -- they would expect the added obligation.

MR. BARTLETT: Is that consistent with your role?

MR. ABADINSKY: I see no inconsistency with it. I think that we are, as has been described, we are doing a casework function in an authoritarian setting. We need certain powers, we certainly utilize these powers.

MR. BARTLETT: Well, but in terms of need related to employment, do you have any quarrel with the language of the proposed section?

MR. ABADINSKY: Yes.

MR. BARTLETT: And what is your quarrel?

MR. ABADINSKY: Yes, I -- perhaps I can -- can I get back to this and then go on and then maybe backtrack a little bit?

MR. BARTLETT: All right.

MR. ABADINSKY: O.K. A parole officer, like a policeman, is out on the street and during his off-duty hours does not go off on a tangent of his own to act as a policeman except as has happened

when he comes across a crime.

The parole officer, like a policeman, because of his training and experience becomes more aware of the activities about him whether on duty or off duty. He is knowledgeable on crime and criminal activity and also knows first hand the individuals who have committed crimes and who are likely to commit crimes again. While off duty, he will see former parolees who are no longer under his jurisdiction as a parole officer but who would be subject to his actions as a law enforcement officer if the situation called for action.

MR. BARTLETT: May I interrupt for just one minute? What training is required of parole officers now as to the misdemeanor provisions of the Penal Law? Are you all required to familiarize yourselves with the definitions of the misdemeanors in the Penal Law?

MR. ABADINSKY: No.

MR. BARTLETT: Well, isn't that an extremely important part of when an officer ought to make an arrest or not? Or whether he ought to make an arrest or not?

MR. ABADINSKY: I would again suggest that any of the increased functions that are given a parole officer, and certainly Mr. Jones is a member of this Commission could and also is a member of the Board of Parole and could act on this, that he should be trained in this added -- added function and --

MR. BARTLETT: Well, what you're really saying that you ought to be dual purpose and that you ought to be cops in every since of the word in addition to your parole officer duties, is that right?

MR. ABADINSKY: Well, except for the specific part that you spoke of, of the misdemeanor, it seems to me that now presently, before -- you know, before the proposed change, this is indeed what we are and how we're functioning.

MR. BARTLETT: Just one last question before you go on. You have been telling the Commission that you do believe parole officers do equate responsibility with power and authority.

MR. ABADINSKY: Yes.

MR. BARTLETT: Is it your view that the

parole officer believes he has an obligation when he witnesses an automobile accident to go over and determine whether or not either of the parties is drunk?

MR. ABADINSKY: I wish you could say that again, at least the obligation part.

MR. BARTLETT: Would you read it back, Miss Williman?

(The record was read by the Reporter.)

MR. BARTLETT: Either of the operators, I meant to say.

MR. ABADINSKY: I would say no.

MR. BARTLETT: And yet we have clearly the question before the Commission of a misdemeanor and perhaps the Commission of a felony. Aren't you really talking, Howard, about your witnessing what is obviously a stickup, a mugging, a felonious assault and your being able to act, having the authority to make an arrest?

MR. ABADINSKY: I think it's more than that, it's more than only the witnessing. It's even of a second-hand witness saying there was a crime committed. As it stands now, the law -- and I

know that, you know, it just seems open to interpretation, this case law seems to be what evolves rather than the way the statute was written, I guess that's why you're changing some of this.

MR. BARTLETT: But you would agree that if an off-duty member of the New York State Police or a city police department witnessed an accident and didn't at least make that kind of inquiry, he might be up on charges, right?

MR. ABADINSKY: Didn't make an inquiry of what kind?

MR. BARTLETT: The inquiry I suggested that I made an inquiry about, as to whether either of them was drunk, he might well be up on charges, right?

MR. ABADINSKY: I must plead ignorance, you know, on what -- and perhaps this is the problem you're getting at -- ignorance on this particular point. I don't know what the officer can determine at the scene of the accident.

MR. DENZER: No, but the point is the police officer, when he comes across a scene like that, has a duty to investigate, determine what the

cause of the accident was, whether there's any criminality involved, drunkenness or so on. A parole officer, I think we must all admit, has no such duty. He can go right on, pass right by and go on home and nobody is going to admonish him for doing that.

MR. BARTLETT: And that's really the guts of the problem. We're not trying to deprive the parole officer of any authority he ought to have in carrying out his functions as a parole officer. If our attempt at speaking out the difference between the one situation and the other hasn't been artfully accomplished, we would hope you would make suggestions as to a better way to do it, but it seems clear from what you've told us, that you really don't view yourselves as police officers because you don't believe that you have the same 24-hour obligation of a sworn member of the regular police department, that he clearly has in this state, and that is really at the heart of our difficulty.

MR. ABADINSKY: Well, I would see members, for instance, we have at least in New York City in which I'm a bit more familiar with, we have

Transit Authority Policemen, we have Port Authority Policemen, we have Housing Authority Policemen, all -- I don't know all of them, I really can't speak for them but I would say that they would have some difficulty also in answering some of these questions, yet they are authorized police officers. They deal --

MR. BARTLETT: No, they aren't. We're trying to unravel that right now. That's one of the difficulties.

MR. ABADINSKY: Maybe I shouldn't travel into that area.

MR. BARTLETT: Trying to sort the toll takers from the cops.

MR. ABADINSKY: Maybe I can summarize this. What we felt is that the -- the way we interpreted the peace officer status under the old -- under the existing law, that we had sufficient power to carry out whatever functions we had to although there were grey areas that still remained to be defined as to whether or not we could stop, to give an example, whether or not we could stop an automobile when a parolee wasn't driving although

somebody was in there with the parolee. Whether we could stop them for questioning, there were grey areas.

MR. BARTLETT: Is there any question under our proposed formulation that you could make such an inquiry if it was just connected with your trying to locate a parolee?

MR. ABADINSKY: I don't know whether it's -- I don't know. It was unclear under the old and it remains unclear. In other words, the change in law has done nothing.

MR. DENZER: There's nothing under the old one. We're not changing anything. The old Code doesn't say anything under this particular area. We feel an obligation to struggle, to show the distinction between the duties of a regular police officer and another peace officer.

MR. ABADINSKY: Well, let me get down to the nitty-gritty of what we see the major difficulty to be, this idea of when we're not working. We're not looking to hand out summonses for passing red lights, we're not looking to investigate drunken driving. We're looking to perform what we feel is a

public service. We're out in the streets, we're in the community whether we're working on duty or off duty. We feel that we have been trained to enforce law; we feel that we do have adequate training. We feel that we can be a boon to all communities which can never get enough law enforcement in this day and age and perhaps in the past and we feel that if we are relegated only to perform in our own small sphere of parole, that we are short-changing the public and I think that the law would be short-changing the public if it restricted us in that area.

MR. DENZER: Not restricting you, you're just the same, the same position as we are, or any other person. If somebody comes up to you in the street and asks your help or something, you can give it as a private citizen.

MR. ABADINSKY: But why should we have to do this as a private citizen when we've gotten the law enforcement training, we've been issued a weapon.

MR. BARTLETT: You haven't got law enforcement training. You just got through telling me you have no idea of what the definition of

misdemeanors are and that comprises the vast bulk of arrests in this state or any other state in the nation.

MR. ABADINSKY: Well, I would get back to the -- well, then let me say it again, the more serious crimes in which the public is concerned --

MR. BARTLETT: And there's no question but that in 99 per cent of the circumstances in which you presently act, you could act under this, isn't that so, in serious crimes?

MR. ABADINSKY: I don't know, I don't know.

MR. BARTLETT: Well, I -- may I ask this? Do you have -- can you give us any idea of how many times in the last 12 months parole officers in the State of New York have made arrests for felonies, which, one, were not related to their working as parole officers, that is the fact of arrest?

MR. ABADINSKY: I can't.

MR. BARTLETT: And two -- and two, were not viewed by the parole officer but were reported to him, they have to meet both of those tests.

MR. ABADINSKY: No, I couldn't, I

couldn't give you any specifics but I still don't understand why this should preclude us from getting involved in a situation like that.

MR. DENZER: It doesn't preclude you; you can get involved just as any other citizen.

MR. ABADINSKY: As any citizen but I don't see why we shouldn't have the coverage under the law.

MR. DENZER: It seems to me the burden is on you to show us why you should.

MR. ABADINSKY: Well, because I -- because we don't -- because the situations don't come up within the last 12 months or 24 months. We're a very small group. We're scattered throughout the state. I admit that the tremendous --

MR. BARTLETT: You are 400, right?

MR. ABADINSKY: Yes.

MR. BARTLETT: Then you're about the fourth largest force in the State of New York.

MR. ABADINSKY: Yeah, but we're scattered throughout the entire state.

MR. BARTLETT: So is the second largest.

MR. ABADINSKY: Pardon?

MR. BARTLETT: I said so is the second largest, the State Police, but anyhow I think we're getting a little picky here.

MR. ABADINSKY: I think you could ask a State Trooper the same question and wind up with the same statistics, you know, if you want to get down to that.

MR. BARTLETT: I'm sure you couldn't, I'm sure you couldn't.

MR. ABADINSKY: How many arrests he made?

MR. BARTLETT: I think our difficulty here is this: We did feel an obligation to fill the huge void that exists in the present Code so that officers have some idea of what they are authorized to do and what they are not authorized to do. It's a terribly grey area. Bailiwick, for example, isn't spelled out in the present Code at all. We've attempted to grapple with it. We may have had a mistake, maybe we should leave things grey, I don't know, but it does seem to us that there is a valid distinction to be made between the man whose function it is to be a policeman and the man who may have some aspects of that function related to another

primary duty and we've tried to accord to the person in the second category that much of the authority of the first category as he needs and no more, and that's what our effort has been.

I take it that the parole people would not be satisfied with less than being defined precisely the same as the policemen of the City of New York Police Department?

MR. ABADINSKY: No, let me say this: Before this -- before this change was made we had no -- we did not seek to remedy anything in the law. We were satisfied with how --

MR. BARTLETT: Even though you didn't have the slightest idea what you did?

MR. ABADINSKY: Right. Well, you know, the interpretation of it, but nobody else knew what we had either.

MR. DENZER: Yes, you mean your interpretation?

MR. ABADINSKY: Our interpretation of what was -- what we felt existed any way at the time appeared to be sufficient for our needs.

It now appears that our interpretation

under the new law was wrong or else didn't exist, I don't know, you know, I don't know which. Apparently you're changing it because perhaps our interpretation was wrong, you're clarifying either what did exist or what should exist. What we're saying is that we're different than whole -- than many of the --

MR. BARTLETT: Are you different from probation officers?

MR. ABADINSKY: Pardon me?

MR. BARTLETT: Are you different from probation officers?

MR. ABADINSKY: Certainly.

MR. BARTLETT: Why?

MR. ABADINSKY: Because of what we do, because of our functions.

MR. BARTLETT: How is your function different?

MR. ABADINSKY: We handle our own delinquency work, we do our own law enforcement and we're trained to do that.

MR. BARTLETT: Well, probation officers, are they not, under the or in the last item if I'm not mistaken -- yes, "t", Subdivision (t),

probation officer is a peace officer under the present law. A probation officer deals with convicted offenders, is that not so?

MR. ABADINSKY: Yes.

MR. BARTLETT: Of every category except murder and kidnapping. They're the only two that don't get probation, right? And they work in areas of high crime rate, do they not?

MR. ABADINSKY: Right.

MR. BARTLETT: And so in what respect are you different?

MR. ABADINSKY: As you know, Commissioner Jones will attest, we are issued weapons; parole officers are issued weapons. We don't have to purchase them. The Division of Parole comes in, gives you a pair of handcuffs, a shield.

MR. BARTLETT: What's that got to do -- let's not get off the track. I'm not talking about your hardware, I'm talking about how your function differs from a probation officer.

MR. ABADINSKY: I think the hardware is an important aspect of how your function differs. You are told that you are to use these instruments,

you are to use these tools, if a man violates his parole it is your job, it is your duty and your obligation to apprehend him.

MR. DENZER: Yes, within the scope of your particular duties if he violates his parole but some other matter in connection with parole but not given directions, I assume to use them on anybody whom you have reasonable cause to believe has committed a crime and whom you may happen to run across on the street or on your way home or in a restaurant or a bar.

MR. ABADINSKY: Well, we had felt under the law the way it exists now that we did have that obligation, yes.

MR. DENZER: Do you think that the State of New York would foot the bill if one of your men were wounded in a restaurant trying to stop a fight when he saw one and got involved in one? Do you think that the State of New York would foot the bill there if one of your men steps in and takes charge of the whole affair, grabs one of the contestants, gets shot, so on?

MR. ABADINSKY: Do I think the state

would or should?

MR. DENZER: Would.

MR. BARTLETT: Either one, give us either one.

MR. ABADINSKY: Would, I don't know. I assume or I had assumed up to this time before reading that there was a great -- I'm not a lawyer, I'm not an attorney -- after reading that there is a great deal of grey matters involved in this peace officer status, I assumed that they would, yes. I assumed when he acted that he was acting in the name of the state.

MR. DENZER: In the name of the state.

MR. BARTLETT: Whether or not he was on duty?

MR. ABADINSKY: Whether or not he was on duty, that he did have a right to intercede.

MR. BARTLETT: Well, for example, if he were New York based and might be on vacation in Lake Placid?

MR. ABADINSKY: Yes, yes.

MR. JONES: You know, it seems to me that in terms of what you're trying to accomplish, you

were much better off under our original formulation. Do you agree with that or not?

MR. ABADINSKY: I'm afraid that the -- I haven't, I'm not -- I'm not too keen on the various different changes. I know we went over it at that meeting we had in Albany but I'm still not too -- perhaps we would have been, I can't really say.

MR. JONES: Well, you're darned right you would have been because it seems to me that under our original formulation all that would have been required would be for the Division of Parole to rewrite its rules so as to require you fellows to do this and that. You remember the original language that this Commission proposed with regard to peace officer and in words or substance, it had to do with a duty enjoined either by law or by rule of the agency by which you were employed.

MR. ABADINSKY: Yes.

MR. JONES: And that was a very simple matter, it seemed to me, at the time for each law enforcement agency or officer that would be affected by this.

MR. ABADINSKY: We didn't oppose this.

MR. BARTLETT: Oh, yes, you did, I think Mr. Green came up here.

MR. JONES: Oh, yes, and as a matter of fact, the POA opposed it so vigorously that the Commission went back and took another look at it.

MR. ABADINSKY: It may have been, you know, my lack of knowledge. It might have been also a lack of -- it may have been a matter of interpretation and wrong interpretation.

MR. BARTLETT: I have an idea we've exhausted useful discussion on this issue. May I ask you to do this, if you would, go back and consult with your people, have a look at the earlier version, look again at this one and see if it's possible for you to indicate to us what you feel would be appropriate short of your having precisely the same status of the regular policeman. If, on reviewing this, you find that nothing else will suit you, you can simply indicate that to us. I have to say for myself that up to this point, I'm not persuaded.

MR. ABADINSKY: All right, fine, I'll ask Commissioner Jones again.

MR. BARTLETT: You understand that our role is only to make recommendations to the Legislature and from there it's in their hands.

MR. ABADINSKY: I'll ask Commissioner Jones if he would be so kind to meet with us at his convenience and we could perhaps, with his knowledge, be helpful in formulating our position. All right, thank you.

MR. BARTLETT: Thank you.

Is there anyone else who wishes to be heard? Chief Murphy?

CHIEF MURPHY: Ed Dillon, head of the Sheriffs, left here thinking that you were going to return for lunch and come back this afternoon. He had a statement prepared. I know that he has sent out, as I did, information to a number of Sheriffs asking for criticisms. May I impose enough to say that I'd like to bring him to New York for a meeting and get both Associations together?

MR. BARTLETT: Excellent, if you know where Dillon is having lunch, we'll join him but I'm sorry for that confusion but, of course, if he wishes to submit something in writing, we'll certainly make

it a part of the record.

CHIEF MURPHY: I think he would rather come to New York.

MR. BARTLETT: Thank you very much and thank you all for coming. I declare the hearing concluded.

(Whereupon, at 1:10 p.m. the hearing was concluded.)