Kentucky Law Journal

Volume 49 | Issue 4 Article 2

1961

Why No Revised Criminal Code?

Gardner Turner
Sturgill, Moreland and Turner

Why No Revised Criminal Code?

GARDNER TURNER*

At the request of the State Bar Association, the 1958 General Assembly directed that a comprehensive study be made of the Code of Practice in Criminal Cases and that recommendations be made to the 1960 session of the legislative body.[1] In accordance with this directive, a study of the Criminal Code and related statutes was made by sixteen attorneys, consisting of members of the Legislative Research Committee statute revision staff, a study group of consultants, and a committee of judges, defense attorneys, prosecutors and law school deans. Some of these worked continuously, others met more than sixty times to give joint consideration and review to proposals derived from background studies, and to compare and evaluate each provision of criminal procedure in the light of the best sources available.

As might be expected from such a formidable group, there evolved a modern code of criminal procedure with a set of minimum rules designed to provide an orderly method of dispensing justice in criminal cases. Also, as a strengthening feature, the power of amendment of this code, as is the case of the civil rules, is vested in the Court of Appeals in order that future revision may continuously reflect the needs of the judiciary and the legal profession. In general, the revised code permits a more effective administration of justice with no diminution of personal rights. It simplifies procedures and provides for more uniformity in the practice in different courts.

Certainly after such a flowery introduction of the elaborate mechanics of establishing a "revised" (as opposed to the offensive term, "new") code and the excellent results obtained, one uneducated to the ways of Kentucky politics might very well ask, "Is the revised code operating as smoothly as was predicted?" As is well known to most interested parties, particularly the

* Attorney at Law, member of the firm Sturgill, Moreland and Turner, Lexington, Kentucky.

[1] Ky. Rev. Stat. § 447.310.

Criminal Code Committee, this question is a moot one. After some 24 months and 60 meetings, the committee in March of 1960 saw its short-lived offspring die a normal death in the House Rules Committee, along with a hundred or so other bills and measures that were not among the favored few.

Since the whys and wherefores of the House Rules Committee are kept secret, the reasoning behind the failure of the code to reach the floor of the House must be left to imagination and conjecture. However, since many of the thirty-four-man committee are practicing attorneys, it can safely be assumed that the members understood the importance of the bill and were not unmindful of its effect on the outmoded present criminal procedure.

Regardless of the favorable introduction above and the committee's approval of its own work, it is believed that the Criminal Code Committee would readily admit that the revised code, as other procedural enactments, contains controversial provisions. The study group, of course, carefully weighed the pros and cons advanced in arguments in support of or against revision of the present code and studied them in the light of the Federal Code, the American Law Institute's Model Code of Criminal Procedure and the latest revised codes[2] in states that had recently recognized a need for revision. The final product was also benefitted by the suggestions of the practicing attorneys, both Commonwealth and defense, involved in the revision. In defense of the House Rules Committee, it is quite possible that members of the bar on the committee believed these controversial changes were too revolutionary in scope and would invite general lack of acceptance, criticism and displeasure among the bar associations. It is possible too that some doubts may have existed concerning the fairness of certain provisions.

Three provisions were the center of major controversy. They concern (1) the number of peremptory challenges allowed to each party, (2) severance or the right of co-defendants to separate trials, and (3) use of depositions by the Commonwealth.

These then are the provisions which may have prevented a new system of criminal procedure from being initiated in the Commonwealth on July 1, 1960, the proposed effective date. It is the

[2] La. Rev. Stat. tit. 15 (1950); Mo. Rev. Stat. tit. XXXVII (1959); Wis. Stat. tit. XLV (1957).

purpose of this article to acquaint the practitioner with these provisions and the attendant advantages and disadvantages of each with the hope that interest will not wane in the revision of the Criminal Code and that the possible objections of the past may be resolved before the revision is again aired in the House Rules Committee.

1. PEREMPTORY CHALLENGES

The pertinent sections of the present Criminal Code provide as follows:

> Section 203 PEREMPTORY CHALLENGES ALLOWED DEFENDANT. The defendant is entitled to fifteen peremptory challenges in prosecutions for felony, and to three in prosecutions for misdemeanor.
>
> Section 204 PEREMPTORY CHALLENGES ALLOWED COMMONWEALTH. The Commonwealth shall be entitled to five peremptory challenges in prosecutions for felony, and to three in prosecutions for misdemeanor.

The most striking feature of the provisions is that in prosecutions involving felonies the Commonwealth is allowed only a third as many challenges as the defendant. The argument advanced in support of the sharp contrast in the number of challenges allowed to each party is based on the rather persuasive fact that it is the defendant who may be deprived of his liberty, his privilege of citizenship and possibly his life, and he should be given the advantage in the selection of the jury. Conceding the argument that the defendant in the more serious cases should have at his disposal more challenges than the prosecution, the next consideration concerns the proportions in which the challenges should be granted to each party. It might be mentioned at this point, however, that a number of the states do not concede the argument that the defendant should be entitled to more challenges than the prosecution and for this reason provide both parties the same number.[3] The prosecution's burden of proof and the necessity of a unanimous verdict can be cited as persuasive reasons for this view.

The Criminal Code Study Group suggested the following revised provision:

[3] A.L.I. Code of Criminal Procedure, Commentary to § 282 (1930).

> TRIAL JURY (TJ-7) PEREMPTORY CHALLENGES.[4]
> (1) If the offense charged is punishable by death or imprisonment for more than twenty-one years, the Commonwealth is entitled to five peremptory challenges and the defendant or defendants jointly to eleven peremptory challenges. If the offense charged is punishable by confinement for more than twelve months or as long as twenty-one years, the Commonwealth is entitled to four peremptory challenges and the defendant or defendants jointly to seven peremptory challenges. If the offense charged is punishable by confinement of twelve months or less or by fine, or both, each side is entitled to three peremptory challenges.
> (2) If one or two additional jurors are called each side is entitled to one additional peremptory challenge.
> (3) If more than one defendant is being tried, the court may allow additional peremptory challenges to each defendant and permit them to be exercised separately or jointly.

The most noticeable change in the rule is that it makes the number of challenges directly depend on the seriousness of the crime. There is no change in the revised rule with regard to challenges in prosecutions for misdemeanors. The foremost change is made in the felony category, and this change primarily at the expense of the defense rather than the State.

The majority opinion of the study group and the committee was expressed in favor of bringing the number of challenges of each party more in line with each other, that is, the groups thought that the ratio of three (3) to one (1) in favor of the defendant was too high. However, a ratio in favor of the defendant was thought to be the better rule. The next question was what, in terms of the number of challenges, should be the proper ratio.

The study group in examining other comparative provisions found that the federal rule[5] in cases involving the death penalty gave *each side* 20 challenges but in the "lesser" felony group, the defendant was favored ten to six. The American Law Institute's Model Code of Criminal Procedure[6] divided the cases into three

[4] The use of the words "Trial Jury" and the abreviation "TJ-7" was used merely as a reference guide for the committee as are the other similar titles and abreviations which preceed the wording of the particular section.
[5] Fed. R. Crim. P. 24.
[6] A.L.I. Code of Criminal Procedure § 282 (1930).

categories based on punishment with both parties receiving the same number in each of the categories, the maximum number being ten. It was also noted that the A.L.I. provision appeared to be a compromise provision as to the number of challenges allowed based on the A.L.I. study group's examination of the situation in all of the states.

After this thorough examination, it appeared that the trend of the law was toward an equal number of challenges for each side. There probably was no trend evidenced in regard to the actual number of challenges that should be allowed unless the A.L.I.'s action can be regarded as a trend rather than an *average* of the number of challenges of the states studied at the time of drafting the provision. After trying several combinations based on a wavering 2:1 ratio, the Kentucky group finally settled on the 11:5, 7:4 and 3:3 provision.

It is readily apparent that many different ratios, numbers and categories are possible and probably every advocate of a different combination could advance persuasive arguments in support of it. In a sense that is what took place in the Criminal Code Committee meetings. However, after much discussion and restudy, the Committee was of the opinion that section TJ-7 was the fairest and best rule. In the light of modern criminal practice, the rule, while not the ultimate in modernization appears to be in keeping with the trend toward equality in challenges. On the other hand, in the words of the defense upon summation it does not lose sight of the lone "persecuted" defendant who is up against all the investigative talent of the powerful state government and whose life and liberty are his most important possessions.

2. SEVERANCE

The consideration of severance in the revised code, more accurately stated as "the right to severance," refers to the situation in which more than one defendant has been charged with the same offense and these joint defendants for various reasons do not want to be tried together. The present situation in Kentucky is such that it is not necessary that any reason be advanced by a defendant who wishes to be tried separately, as severance is a matter of right as far as the defendant is concerned in felony cases. The present Criminal Code section is as follows:

> Section 237. JOINT DEFENDANTS, IN FELONY, ENTITLED TO SEPARATE TRIAL. If two or more defendants be jointly indicted for a felony any defendant is entitled to a separate trial.

Unlike the situation facing the committee in the case of peremptory challenges, where many different combinations of provisions were suggested, the group basically had one question and that was whether or not to continue the absolute *right* of the defendant to severance.

Two examples, one in support of the right of the defendant to a separate trial and the other supporting the contrary position were immediately given by members of the study group. Unfortunately, from a standpoint of assisting the committee in making a decision, both examples were not uncommon and each represented a rather persuasive argument in support of its respective position.

The first example was cited in support of changing the law in regard to severance, that is not permitting it as a matter of right. One night near closing time two men, both convicted felons with long prison records, held up a liquor dispensary at gun point. The objecting proprietor was shot and killed. The gunmen were later captured and held for trial for murder in the circuit court. Each demanded and was granted a separate trial under section 237. The first one was tried and in his testimony blamed the murder on the other defendant. The jury believed that he did not commit the murder and found him not guilty. The second defendant was tried by a different jury and he also blamed his companion for the murder. His testimony in this respect was most convincing and the jury did not find him guilty of murder either. The result, of course, was that while the crime of murder had been committed, because of the separate trials and hence separate juries, neither was convicted of the more serious crime.[7]

The second example, cited in support of allowing severance as a matter of right merely changed the first example somewhat by making one of the men who held up the store a hardened criminal and his accomplice a boy, age 19, who had no record but had

[7] It is submitted that the example given may also represent a situation which presents grounds for the granting of separate trials for the two defendants, that is "antagonistic defenses."

been talked into participating in the robbery by the habitual offender. The older man was armed and did the shooting but both were charged with murder, since both denied the slaying. Would it not be greatly prejudicial to the younger man to try him with the hardened criminal? Certainly, it would be an influencing factor to bring out before the jury the previous convictions of the experienced criminal which, in turn, would have a detrimental effect upon the character and defense of the younger man. This situation, of course, would not arise under the present code.

After much deliberation and discussion of these examples and others, the study group made the following recommendation which was accepted by the committee:

> TRIAL GENERAL (TG-5) SEPARATE TRIALS. If it appears that a defendant or the Commonwealth is prejudiced by a joinder of offense or of defendants in an indictment or information or by joinder for trial, the court may order an election or separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires. A motion for such relief must be made before the jury is sworn, or, if there is no jury, before any evidence is received. No reference to either the motion or any statement made during the hearing thereof shall be made during the trial.

The defense attorney will quickly note that the above revised section takes away the defendant's absolute *right* to obtain a separate trial and will be inclined to vigorously oppose it. However, it must be borne in mind that the purpose of the revision was to favor neither the defense nor the Commonwealth but to develop the present code into an improved set of procedural rules which is fair to all concerned. Although the revised section does abolish the basolute right to separate trials, it permits as does the federal rule,[8] severance in the discretion of the trial judge.

Is it not illogical to require two and possibly more trials, depending on the number of defendants, involving the same crime, *when all defendants will receive a fair trial,* if tried together? Separate trials, in such an event, while not providing greater justice, would on the other hand invoke delays, and duplication

[8] Fed. R. Crim. P. 8.

of effort, all of which mean greater expense to the taxpayer. This does not take into account the time expended by the various witnesses, including law enforcement officers and possibly proprietors of businesses, who have sat all day to be called as a witness in the trial of the first defendant and who again must wait to be called in the trials of the additional defendants. The situation which now exists is most discouraging and many a victim of storehouse breaking has expressed his regret for obtaining a warrant for the defendants involved because of the time consuming "finagling of judges and lawyers." Additionally, the present provision also creates in the mind of the layman a generally poor opinion of court proceedings. In these days of crowded dockets and the present mounting tax burden on the public, it would appear that a provision alleviating these problems somewhat would be a most welcomed change.

As previously mentioned, while the new rule as written does not permit severance as a matter of right, neither does it abolish "the right to severance." In other words, the revised section still permits joint defendants to be tried separately. However, as a prerequisite to obtaining an order for separate trials, it must be shown that the party moving for severance will be "prejudiced" if the defendants are tried jointly. If a party will not obtain a fair trial by a joint trial, then that party is "prejudiced" by the joinder.

The key as to whether or not the moving party, which in most cases will be the defendant, obtains a separate trial lies in that nebulous phrase, "in the discretion of the court." Although this phrase is not contained in the statute revision, the court will logically grant the severance only *if in its discretion* it believes the moving party will be prejudiced by the joinder. This presents the same situation as does the federal rule and places the decision squarely on the trial judge. Accoring to defense attorneys, an order for severance in the federal courts, at least in Kentucky, is rather difficult to obtain from the trial judge. Apparently, the crowded docket situation often takes precedence over the merits of the motion for severance. This, of course, is one of the *known* factors and as all are aware, any time a decision rests in the discretion of one person, many unknown factors, wholly foreign to the basic issues may enter into the decision.

While this term, "in the discretion of the court," may be nebulous and may place a great deal of power in one individual, the exercise of *discretion* is subject to review by the higher court and is governed by precedent as this is not an unusual method of handling the problem. Again, as in the case of peremptory challenges, the trend is toward this change. While it may be argued that this vests too much authority in the judge, does not such an argument oppose the preponderance of procedure of the present day system of jurisprudence? For better or worse, the "judge" or "magistrate" is the dominate figure and our rules of civil and criminal procedure are geared to such a system; so until the day that decisions of boards of judicial committee decisions replace the lone judge, many important decisions must be entrusted to "the discretion of the court."

Until the day of the "judicial revolution," attorneys, it is hoped, will find that the vast majority of the judges will grant a severance on the merits of the argument presented. Undoubtedly there should be some valid reasons presented to require the expense and duplication of effort of holding two or more trials rather than the arbitrary rule of the present code: hence, the practicability of the revised code provision. It must be remembered that good rules of procedure can be legislated but that the same rules cannot contain provisions to insure that they are properly administered. If it is contended that the judges of the state are not capable of making the decisions as required by a set of revised modern rules, then it is obvious that the day of judicial reform is at hand. Again, it should be repeated, "drafters of statutes cannot draft good judges."

3. DEPOSITIONS BY COMMONWEALTH

The present Kentucky Criminal Code, section 153, provides for the taking of depositions by the defendant. Unlike the liberal procedure provided for the taking of depositions in civil cases, in the criminal prosecution it must first be shown by affidavit that certain conditions exist before an order can be obtained to permit the particular deposition to be taken. Presently the defendant must show by affidavit: (1) that the witness is about to leave the state without the procurement or consent of the defendant, or (2) that the witness is physically unable to attend

for examination in court, or (3) that the death of the witness is apprehended, or (4) that the witness is a non-resident of the state and beyond the reach of the process of the court. Continuing the rule of strictness, even though the court grants permission to the defendant to take a particular deposition, the deposition can only be used "if the witness be dead or is absent from the state, or physically unable to attend for examination in court *at the time of trial.*" (Emphasis added).

This then was the situation in regard to the taking of depositions in criminal cases that confronted the study group. The group accepted the proposition that some method should be provided for preserving or recording important testimony which might not otherwise be available at the trial. Generally the grounds as set forth in section 153 for taking depositions were incorporated also in the revised rules but with some improvement in the wording. The fundamental change and one of probable controversy was that the study group recommended that the Commonwealth also be permitted to take depositions upon the same grounds as the defendant.

This recommendation was accepted by the Criminal Code Committee and the six rules concerning depositions were adopted as part of the revised code.[9]

---

[9] These rules appear in the revision under the heading, Production of Evidence (PE). They are set out below:

PE 6. *Deposition by Commonwealth*

(1) The order authorizing the Commonwealth to take a deposition shall contain such specifications as will fully protect the rights of personal confrontation and cross-examination of the witness by defendant. Whenever it is practicable to do so, the court shall direct the desposition to be taken in the county where the criminal case is pending and shall compel any resident of the Commonwealth to appear and give his testimony.

(2) If a deposition is taken at the instance of the Commonwealth, the Commonwealth shall pay the reasonable expenses of travel and subsistence of the defendant and his attorney in attending such examination.

(3) If a defendant is in custody, he shall be produced at the examination and kept in the presence of the witness during the examination by the officer having the defendant in custody.

PE 7. *Notice of taking depositions*

The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

PE-8. *Defendant's counsel*

Upon the application for taking depositions if a defendant is with-

(Footnote continued on next page)

The section authorizing the taking of depositions and which sets forth the grounds required is basically the same as the present code section 15.3. It is as follows:

> PRODUCTION OF EVIDENCE (PE-5). (1) If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing or is or may become a non-resident of the Commonwealth, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the preliminary hearing or the filing of the indictment or the information may upon motion and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents, or tangible objects, not privileged, be produced at the same time and place.
> (2) If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken at the expense of the Commonwealth. After the deposition has been subscribed the court may discharge the witness.

It will be noted that while paragraph (1) is basically the same as above mentioned, that paragraph (2) does introduce a new provision into the code in reference to a material witness who has been confined in order to assure his appearance and is

---

(Footnote continued from preceding page)

out counsel, the court shall advise him of his right thereto and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel.
PE-9. *Manner of taking depositions*
A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.
PE-10 *Use of depositions; objections*
(1) At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: that the witness is dead; or that the witness is out of the Commonwealth of Kentucky, unless it appears that the absence of the witness was produced by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.
(2) Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

unable to make bail. This provision merely gives him an opportunity to give his deposition rather than to remain in jail for a long period of time as has been the case in several instances. It is doubtful that this provision will give rise to any serious objection.

The principal objection to PE-5 is the granting of the right to the State to take a deposition. A provision of this nature is in violation of the Kentucky Constitution[10] unless some provision is made for the defendant to be confronted by the witness against him; otherwise, the provision would violate the right of confrontation.

The study group recognized this problem and handled it in the provisions following PE-5. By these provisions, the constitutional right is fully preserved and it was even provided that the State must pay the reasonable expenses of the defendant and his attorney in attending the taking of the depositions. If the defendant has no attorney and is unable to obtain counsel, provision is made to assign him an attorney so that the witness may be properly cross-examined. Even though these safeguards were taken in regard to the right of confrontation, an interesting argument is advanced to the effect that this right could *never* be satisfied in the case of a deposition taken by the State. This argument, which has some persuasive value, regards the right as something more than merely having the witness appear and give his testimony in front of the accused. The confrontation, according to this view, must be in open court where the jury may observe the witness, his demeanor and the way that he testifies. The reading of a deposition in open court naturally deprives the jury of observing the witness while he is making statements which are damaging to the defendant. There are many situations that come to mind whereby the reading of a deposition would be much more effective than having the witness testify in person.

The study group and the committee do not have the backing of the Federal Rules of Criminal Procedure in permitting the State to take depositions as the federal rule[11] refers to the making of the motion to take depositions by the *defendant,* no reference is made to the government. The American Law Institute Model

[10] Ky. Const. § 11.
[11] Fed. R. Crim. P. 15.

Code is also silent on the subject of depositions by the State. One of the more modern codes, which evidenced the trend in most of the procedure questions and which was used by the study group did adequately cover the subject. This code, the Missouri Criminal Code, section 25.13, provides a similar rule in permitting the State to take depositions.

While the right of confrontation is all important, should this one consideration override the many instances which parallel the grounds for taking a deposition: whereby an obviously guilty defendant is permitted to go free because of the inability of the State's witness to attend the trial? It must be remembered that the depositions required by PE-5 are not discovery depositions but are depositions which relate directly to the evidence that is to be presented upon the trial of the case. Moreover, definite grounds must exist before they are taken and again before they are read at the trial. Does this not sufficiently limit the use of such depositions so that they will only be offered in evidence in such cases where justice requires that they be presented? The answers to these questions and the criticism relative to confrontation plus the lack of widespread use of depositions by the government may well form the basis of a compromise rule which would limit their use by the government even to a greater extent than the proposed rule.

Again, the reader must bear in mind that it was the purpose of the rules to favor no one party but to strengthen the present procedure and if necessary to adjust any inequities where good judgment and justice would so demand.

SUMMARY AND CONCLUSION

The foregoing discussion is a brief history of the Revised Criminal Code. Familiarity with the present code, which is nearly a century old, gives one insight into the reasons for the establishment of the Criminal Code Committee, whose purpose it was to study this product by bygone frontier days and make recommendations for changing it. These recommendations became alive in the proposed revision entitled the Rules of Criminal Procedure. However, the newly made rules did not escape from the inner chambers of the House Rules Committee of the 1960 legislature and there died. The reasons for the "fall" of the re-

vised code are known only to the members of the House Rules Committee; others can only speculate as to why this product of two years' study was denied a vote.

After careful study of the major changes and an examination of the pros and cons of these changes, the speculations as to the failure of the revised code took the form of possible criticism regarding three rather controversial provisions, which more than all others may have contributed greatly to its demise. These as discussed are: (1) The number of peremptory challenges allowed each party; (2) severance of the right of co-defendants to separate trials; and (3) depositions by the Commonwealth.

Of the three, it appears that the revised provision which leaves severance to the discretion of the trial judge is the most controversial and admittedly, excellent arguments are propounded on each side of the question. However, since severance may be granted by the trial judge under the revised code, the change is not as major as the arguments against the change may indicate. The key to the revision in being equitable to all lies in the ability of the trial judge to exercise sound discretion in granting severance. However, considering the provision from all angles, which include expenses and delays, it may very well be the greatest advancement in the code and for this reason should definitely remain a part of the revision.

The peremptory challenge change merely represents an attempt to equalize more nearly the number of challenges between the State and the defendant. Yet, depending on the seriousness of the charge, the new provision gives the defendant the advantage in selection of the jury. In keeping with the trend of the more modern codes to grant each side the same number of challenges but yet avoiding too radical a change of the present situation, it is believed that the "middle of the road" provision is satisfactory. A certainty is that because of the numerous combinations that could be promulgated by basing the number of challenges on the seriousness of the crime, many compromise rules could be drafted, one of which may be more satisfactory to all concerned.

The third point of controversy is the right under the revised code of the State to take depositions. The present section 153 which permits the defendant to take depositions is basically re-

tained with the exception that the right is not limited to the defendant. These are not discovery depositions but depositions that require the existence of certain grounds before an order permitting their taking is granted. As a guard against the promiscuous use of depositions, it must be shown that these same grounds required to permit their taking still exist at the time of trial or they cannot be read in evidence.

The main point of concern in permitting the State to take a deposition in a criminal case is the right of the defendant to be confronted by his accuser. While this can be taken care of at the time of taking the deposition by having the defendant present as provided in the revised code, the jurors are still deprived of observing the demeanor of the Commonwealth's witness, a most helpful element in weighing testimony. Considering this and the additional factor that the Commonwealth has a statute at its disposal whereby witnesses can be brought in from other states, it would appear that in order to avoid excessive use of Commonwealth depositions to the possible detriment of the accused, their use should be restricted to the defendant. In order to avoid a miscarriage of justice in the unusual situation, possibly the use of such depositions by the Commonwealth could be limited to the situation involving the death of the proposed witness.

In conclusion, it should be noted that while the changes discussed are major, they are not representative of the entire revised code. The revised code is a *revision* of the former code and is not a "new" code with all the intricacy and disfavor that word denotes. Basically, it is the present code modernized. It was not the thinking of the Committee that the present code is a poor code but on the other hand all members agreed that it should be thoroughly revised. The resulting thorough revision naturally invoked criticism; however, as a backhand compliment to the revision, it has been referred to as both a "Commonwealth Attorneys' Code" and a "Defense Attorneys' Code,"—an indication that both parties were fairly represented in the revision.

It may be significant that all the points of controversy mentioned above represent restrictions on the defense and enlargement of the rights of the prosecution. Without further knowledge of the revision defense attorneys may argue that the defense was not

quite as well represented on points of major change as was the Commonwealth. If this be an argument of the defense attorneys, it might well be the key to the inaction taken by the House Rules Committee since the very number of defense attorneys plus a very vital interest could be most impressive if many contacted the Committee members when the bill was being considered. However, it should not be lost sight of that the revision was not an attempt to favor either party and the members of the committee, both defense attorneys and State attorneys, were very impartial in making decisions in the furtherance of justice rather in support of their personal interest. In support of this impartiality, it should be noted that many changes were made in favor of the accused, such as, the defendant is given the right to examine documents, including confessions, seized from him; a formal complaint becomes the charging instrument rather than the warrant which is an arresting instrument and which provides no permanent record; transcripts of testimony taken at the preliminary hearing and before the grand jury are more readily available to defendant; and the need to take formal exceptions to the judge's rulings are eliminated, to name but a few.

An encouraging note is that although the 1960 General Assembly did not act upon the revised code, it did pass a resolution by which the Criminal Code Committee was to be maintained to guide the future of the code. This may mean that this committee will again submit the proposed revision to the meeting of the legislature in 1962 with or without additional changes but in any event it does mean that interest will again be shown in the Criminal Code in January 1962. In the interest of the more effective administration of criminal justice in Kentucky, it is hoped that those interested enough to read this article will continue their interest to the point of taking an active part in either assisting the passage in 1962 of the revised code as promulgated or as changed as a result of further interested study between now and January 1962.