

NEW YORK STATE
COMMISSION ON SENTENCING REFORM

Transcript of Meeting

Wednesday,
July 11, 2007
9:00 a.m.

Governor's Office
633 Third Avenue
38th Floor
New York, New York

1 IN ATTENDANCE:

2
3 Commissioners:

4
5 George Alexander

6 Chairman, New York State Board of Parole

7
8 Anthony Bergamo, Esq.

9
10 Hon. Juanita Bing Newton

11 Judge, Criminal Court of the City of New York

12
13 Denise E. O'Donnell

14 Division of Criminal Justice Services

15
16 Eric Schneiderman

17 NYS Senator

18
19 Tina Marie Stanford

20 Chair, Crime Victims Board

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22 Cyrus Vance, Esq.

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Also Present:

John Amodeo, Esq.

Committee Counsel

Anthony Annucci, Esq.

Department of Correctional Services

Gina Bianchi

Executive Director

Christina L. Dickinson, Esq.

Donna Hall

Wendy Lehman, Esq.

Monroe County District Attorney's Office

Representing Commissioner Michael C. Green

Simone Levine

Lillian Gordon

Court Reporter

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P R O C E E D I N G S

COMMISSIONER O'DONNELL: We are fortunate today to have Barbara Tombs with us. So, I'd ask you to come forward.

Barbara currently serves as the Director for the Center on Sentencing and Corrections at the Vera Institute here in New York City.

Barbara, you will be delighted to know, has really been part of or served either as a member, or staff person, or director of three different sentencing commissions in other states, which hopefully she will talk to us about. She is working very actively right now with the State of California, who is in the middle of sentencing commission and sentencing reform effort.

So, one area that we really haven't focused on to any extensive detail is what's going on in the rest of the country, what's going on with sentencing commissions, and I think Barbara can help us both from her vast experience on sentencing commissions and also focus a little bit on the process of sentencing commissions and how they function. That may be at a different time, but -- so, I'm very pleased that Barbara has joined us, and we'll just turn it over to you.

1 SENTENCING COMMISSIONS AND RECENT INNOVATIONS IN

2 SENTENCING POLICY: A NATIONAL VIEW

3 MS. TOMBS: Thank you. I'm glad to be
4 here, to probably give you an overview. As you said,
5 I've worked on several -- two sentencing commissions,
6 as either the director or staff. So, I intricately
7 understand how they operate.

8 But also, in just about 26 states now, on
9 any given day, have a sentencing commission, and about
10 four or five other states that are pending sentencing
11 commissions coming into effect. So, you have about 30
12 states across the United States.

13 You have some really good sentencing
14 commissions, which I say are premier, but there are
15 only a handful of them. And, you have some that are
16 mediocre. And then, you have some that are probably
17 less than -- I wouldn't even call them efficient work
18 effort.

19 And, there's reasons for that. So, what I
20 wanted to go through with you a little bit, as you're
21 going through this process you're doing right now, is
22 kind of go over what are the important characteristics
23 you find in good sentencing commissions. And, you'll
24 be hearing from Mark Bergstrom this afternoon, from
25 the Pennsylvania Sentencing Commission, which I'm

1 pleased to say is one of the good sentencing
2 commissions also.

3 But, they have several common
4 characteristics you're going to see in what makes them
5 effective in either policy developed, in doing
6 research, et cetera. So, the first part is a
7 presentation where I'm going to go over the things
8 that I see that are effective.

9 To be honest with you, I haven't followed a
10 whole lot in New York. I know that -- you know, I've
11 read some of your material. So, as I was listening to
12 your Chairperson, the Commissioner talk today, it was
13 very interesting, because some of the things that I've
14 already laid out, you've done, which is really good.

15 And then, we're going to talk a little bit
16 about the states, and some of the policies and changes
17 these different states have done, and why they did
18 them, and what effect it's had. So, I'll try of give
19 you a two-fold approach there.

20 Okay. You know, in starting a sentencing
21 commission it's really important to look at the
22 overall sentencing philosophy. And, I read your
23 materials, and in New York, you are looking at, you
24 know, retribution, rehabilitation. And also, you said
25 that, you know, you see a lot of states now that are

1 also, kind of four basic things, why are you putting
2 people in prison in the state, and you're clearly
3 understanding that.

4 It becomes important because down the road,
5 after you make policy changes, or you design a system,
6 the biggest thing -- and it's a very big hurdle to get
7 a system designed, you know, that is reasonable,
8 rationable, and cohesive. It's even a larger battle
9 to keep that system intact as time goes on, because
10 there's always piecemeal changes to it. There's
11 always, you know, new crimes being introduced, things
12 happen that you have to respond to, court cases and so
13 forth.

14 So, if you keep in mind what it is you're
15 doing, what's your basic purpose of how you're going
16 to use your correctional beds. For example, one state
17 I worked in said "The purpose of incarceration in this
18 state is for retribution. That's why we're sending
19 people to prison. Now, once they're sent to prison,
20 you believe that rehabilitation should be given to
21 them. But, that is not the purpose for sending them
22 to prison."

23 So, if you're kind of an offender who has,
24 for example, a long-term drug problem, and you say
25 "I'm going to send him to prison so we can tell if

1 he's rehabilitated," that is contrary to the sentence
2 that would be for retribution.

3 And, the differences in your sentence
4 lengths, depending on the four different philosophies,
5 is real important. For example, if you had a drug
6 offender, drug possession, okay? If you were going to
7 sentence them for deterrence, you might take a
8 Southeast Asia approach and say, "You're going to get
9 life for doing drugs." Use that as a deterrent.

10 If you were looking for the rehabilitation
11 model type of sentence, you might say it's an
12 indeterminate sentence of up to 20 years. That way,
13 the person can get the help they need while they're in
14 prison and, you know, it takes a long time sometimes
15 to address substance abuse. So, we're not going to
16 give him a determinate sentence. We're going to give
17 him a period of time in which we can provide services,
18 help him.

19 If you were going to do it for
20 incapacitation, as a threat to public safety, and he's
21 a drug possessor, the threat to public safety is
22 somewhat limited. So, you might give him, you know,
23 six months, because he's really not -- he's hurting
24 his family and himself more than he is public safety,
25 if he's just using.

1 And, the other -- retribution, you know, how
2 much harm has he done, whether you want to make an
3 example out of him. You could give him probation
4 under a retribution type of sentence.

5 So, the different philosophies you have of
6 what's important will also guide sort of how you
7 structure your sentencing. But it's real important
8 because, you know, oftentimes with the states that --
9 the older states, like Minnesota that I worked in,
10 it's had guidelines for 30-some years. So, whenever a
11 new crime would come up, and we would try to decide
12 how to punish that person, we'd go back to what is our
13 purpose. And their -- under their purpose, it was a
14 least restrictive means of punishment. So, some
15 crimes were given community-based services versus the
16 prison sentence.

17 So, I mean, it's really an important thing,
18 and you might -- oftentimes, it's defined in the
19 statute. Sometimes, it's in your working documents
20 that you created as an agency or an organization.
21 But, it's usually written down somewhere. And, it's
22 always good to go back to that, when we want to say
23 what are we doing here, and why are we doing it.
24 Because sometimes, we have a tendency to go off a
25 little bit and forget what the basic foundation is.

1 Oftentimes, states will use two approaches.
2 You know, maybe incapacitation for violence offenders,
3 and a different approach for property or non-violent
4 offenders. You can have a single philosophy or a
5 blended approach. But, know what it is.

6 I think, then, it's so important that you
7 understand who should go to prison and why. Because
8 if, you know, there are times that people say "Our
9 prison population is too high." And, that's not
10 necessarily true, if the people you're putting in are
11 the people you want to put in. If they are people
12 you've decided that need -- and, this is very much a
13 state-by-state decision. But, if it's who you really
14 want to, then maybe prison construction and expansion
15 is important. But if you're putting people in who you
16 did not intend to, then you need to go back to
17 policies. And, it also, as I said, serves as
18 guidance.

19 Clearly define the purposes. It creates the
20 scope of the work. And, you have a working document
21 that has -- that you have in front of you now that's
22 guiding this group. But I think, you know, the
23 discussion by Eric here, earlier, about the scope of
24 things -- because, you know, what are you doing, and
25 what are you not doing. Because, you know, especially

1 in the limited time frame that you have, there are
2 certain things you can do, but it's easy to get
3 diverted off into paths, and then you end up with a
4 less than complete project.

5 You know, some states take on a very
6 comprehensive approach, and other states it's just
7 with a certain crime. Like, there's a state in the
8 Midwest that's just doing drug sentencing reform, and
9 they're not touching the rest of the sentencing.

10 So, it can be very comprehensive, across
11 your system. Are you looking at felonies? Are you
12 look at misdemeanors? Are you looking at juveniles?
13 Are you looking at every -- or is -- or certain types
14 of offenders? Because it does become almost -- it
15 seems like it almost becomes unmanageable if you don't
16 put some structure at the beginning.

17 And, you may want to do it in stages. I
18 mean, Utah is a state that started out with adults,
19 and then went into juvenile. So, you know, that's one
20 of the two states that has both adults and juvenile
21 guidelines, but they did it in stages, and looked at
22 it very purposefully.

23 Structure is critical. You need to have
24 representation from all of the key stakeholders. And
25 that is, you know, you look at the size and the

1 compositions of commissions across the United States
2 and you see they vary from 11 people to as many as 35.
3 It depends on the culture of your state, who is
4 important and affected. But, if they're not members,
5 they should be at least appearing before you. And, I
6 heard from the discussion that you're going to have
7 this approach.

8 And, it's very funny because that would
9 depend on the state and who the players are. Some
10 states have academics on it, and some don't. Some --
11 I have a state now that has unions on it, you know.
12 We could never publish, you know, in a state like in
13 the Midwest. Who are the major players that have to
14 do with policy?

15 Some states have consolidated jail services,
16 so they need a representative maybe from one -- one
17 representative. Other people have split, you know,
18 community corrections, parole, probation. So, they
19 need to have three representatives. So, it depends on
20 how you're looking at that.

21 But, making sure that all the key
22 stakeholders are at the table, because it's important
23 to listen to them. It's important to listen to what
24 they're saying, and it's just as important to listen
25 to what they're not saying.

1 And, I could tell you a prime example of
2 this is when we did some drug reform sentencing in a
3 state I worked at. We were going to have treatment
4 for the drug offenders, so that they weren't recycling
5 through the communities and so forth. And, we thought
6 this was really great. However, our biggest
7 opposition was a low-income, minority community group
8 within the city. We never consulted them. They
9 didn't want the people back on the street, whether
10 they had treatment or not. They didn't want their
11 kids walking past people using needles and so forth on
12 the street. So, this was the population we were
13 trying to help the most; however, we didn't get their
14 input on how to define that reform, and it became a
15 major obstacle for us.

16 So, thinking you know what you know, it's
17 important to know what you don't know. And, that was
18 a major mistake that we made. We should have brought
19 them to the table. We should have heard their
20 concerns, and incorporated those things into it.
21 Subsequently, we did that, but it cost us a whole
22 legislative session because we didn't. So, that's
23 what's important about that.

24 Leadership is critical. I will tell you
25 right now that the best sentencing commissions have

1 very strong chairs and very strong executive
2 directors. Those are the two critical things, because
3 the chair will set the policy agenda, but your
4 director will do a lot of the everyday, day-to-day
5 coordination, contact, the work that needs to be done.
6 And so, the really good commissions have very strong
7 people in those two positions.

8 Also it's -- you know, I think, create an
9 environment that encourages people in conversation.
10 That's very hard at the very beginning, because people
11 are coming from different perspectives. You know,
12 oftentimes we see both prosecutors and defense
13 attorneys. You know, they have very strong
14 convictions about how things should be done.

15 But it's like, you know, putting all your
16 cards aside when you walk into a room, and trying to
17 listen to the other side. It doesn't mean you have to
18 agree all the time, but actually listen. And you'll
19 find that every once in a while as they say something
20 -- your arch enemy will say something and, you know,
21 they did have a point there.

22 But, you know, try to bring that
23 information. It's hard. And I think the more often
24 you meet, and the more you work together, you can
25 finally break down those barriers. We took -- we

1 took, actually took our commission one time to a
2 retreat in the woods, where they had to climb this
3 mountain, and they had to depend on each other. And,
4 it was -- you know, that made the biggest difference.
5 Because in groups of -- you know, we'd come in there,
6 and all the judges would sit here, all the community
7 people would sit here, and the prosecutors would sit
8 over -- prosecutors and law enforcement would sit over
9 there. And, they were very cordial to each other
10 during the meetings, but they didn't actually work
11 together.

12 But, when they were climbing that mountain,
13 and they needed that person to throw the rope down for
14 the next thing, you know, you broke down those
15 barriers. And it made the biggest difference, that
16 two-day mountain climbing experience, because they
17 became -- they knew each other as people, and not
18 positions. And that's sometimes very difficult.

19 You know, also, commissions should be viewed
20 as independent, objective, and non-political or
21 bi-partisan, however you want to say it. That's
22 really hard to do, because, you know, of the nature of
23 the commissions. But, that was one of the things that
24 helped the good commissions. They will survive
25 multiple administrations because they're dealing with

1 facts and not politics. Although you have to be aware
2 of the politics, you're dealing with objective
3 analysis.

4 So, you know, I know in Kansas they went
5 through several Democratic -- a Democratic Governor, a
6 Republican legislation, Republican Governor,
7 Democratic legislation, and so you went back and
8 forth. But the commission, itself, because of the
9 nature and how it was perceived, withstood all those
10 changes.

11 Allow for longevity. And, what I mean by
12 that is you need to have people on that can give you
13 history. You know, sometimes they should, you know --
14 and, you can do this different ways. In some states,
15 the reappointments can be done for a certain term, or
16 other times it's active -- it's the appointing body,
17 but it's not necessarily important.

18 I think it's important to have staggered
19 terms, so that you don't have all your people leaving
20 at one time, you know, whether you have some for three
21 years, some two years. It's how you do that, like
22 that, so --

23 COMMISSIONER O'DONNELL: So, Barbara, let
24 me just ask you. Right now, our Sentencing Commission
25 is really set up just for the time period of,

1 basically, issuing a report. In the sentencing
2 commissions that you've worked with, it sounds like
3 they've been ongoing sentencing commissions that are
4 --

5 MS. TOMBS: Some --

6 COMMISSIONER O'DONNELL: -- intended to
7 exist for a long period of time.

8 MS. TOMBS: That's true. And when I'm done
9 with this presentation, I'm sure you'll see why they
10 need to exist for a long time.

11 COMMISSIONER O'DONNELL: Um hmm.

12 MS. TOMBS: You know, a lot of times you
13 will have study committees. I mean, North Carolina
14 started out as a study committee, and it was evolved
15 into a permanent committee. Alabama started out as a
16 study commission, and was evolved into a permanent
17 condition -- committee.

18 So I think, you know, it's not unusual for
19 them to start out like that, as study commissions, and
20 then because of the nature of the work you do, evolve
21 into a permanent commission. And you'll see why here,
22 why long term.

23 Establish standing committees, which you are
24 doing with your subcommittees. This is very good,
25 because you need to be able to do that. You called

1 them subcommittees, standing committees, the name
2 doesn't really matter.

3 But, it helps you to address the multiple,
4 complex issues. Because, I mean, when you have --
5 just looking at the subcommittee names you have,
6 there's some really tough issues, and a very short
7 time period. It helps you address those.

8 It also gives you specific areas of
9 expertise not found in the commission. Again, it's
10 something you've already done. So you didn't probably
11 need me to come talk to you guys. You seem to have
12 this under control.

13 COMMISSIONER O'DONNELL: Well, we should
14 have had you the first week, but it's nice to know we
15 thought up these things --

16 MS. TOMBS: Yeah, you're on the right
17 length -- on the right path here. They would provide
18 the tools for the group's discussion. That's what
19 these subcommittees or standing committees do, do the
20 work, bring it back, and then the commission has the
21 discussion on it.

22 They should develop recommendations, meet
23 more frequently. But, the authority for the policy --
24 the policy changes always remains with the full
25 commission. And, I see that's what's happening here,

1 too, which is really good. It's good to have that
2 input, and so forth, but this is the owner of the
3 product. It should always remain back with this
4 group.

5 They should be chaired by a commission
6 member. And, you know, again, data, policy and
7 structure, probation, those types of committees, which
8 you are right on target on already.

9 Authority. You know, this is a very
10 interesting thing. You know, it may not precisely
11 affect this commission in the current form that it is,
12 but it's something you might want to think about.

13 Authority means when you make
14 recommendations, then how do they -- how do they
15 impact policy change? And usually it's been -- I've
16 never really had that be a big issue, because I've
17 worked in three different states, and they have all
18 had different, one -- one or two there's an authority
19 issue. It never seemed like a commission. In
20 California, it is the major sticking point why we
21 can't move forward with changes in sentencing policy.
22 So, it is a big issue, I guess, for a state that's
23 looking at coming on board with a sentencing policy
24 forum. You know, it appears with some commissions.

25 But, on permanent commissions, you have --

1 if you make recommendations, they usually become
2 policy or law in one of two ways. That means you make
3 the recommendations and they're enacted with the
4 approval of the legislature. So, you make a
5 recommendation, it goes to the state legislature, they
6 would vote on it, approve it and so forth, like that.

7 That is typically the model you see in many
8 sentencing commissions. They work like that. They
9 worked like that in Pennsylvania. They worked like
10 that in Kansas. It has pros and cons.

11 You can go in there with your wish list of
12 all the changes, and the legislatures will sometimes
13 pick and choose. So, what we'd often do is do
14 packages, which were sold as a package. So otherwise,
15 you can get, depending on the legislative nature,
16 increasingly, you know, legislators who wanted to
17 approve all the increases but not approve any of the
18 decreases in sentencing, or vice-versa. So, you're
19 trying to sell a package.

20 Minnesota, which was the first sentencing
21 commission, has authority where the recommendations
22 become law unless the legislature takes action to stop
23 them. Arkansas is like that. Several states are like
24 that.

25 So, you know, it's kind of a battle on how

1 you want to do that. I worked in Minnesota and
2 Kansas, and they had two separate models, but it never
3 became an issue. No one even raised it at the time
4 they were passed, or at the time they were enacted.
5 In California, it's a major issue.

6 And so, the -- if it becomes law unless the
7 legislature takes action contrary, that's not even
8 half the battle there. Sometimes, they want to take
9 it by a super majority vote of turning them down, or a
10 majority vote. So, even if you want that model, there
11 are still other issues to consider. So, it's just
12 something you'd want to think about that can become an
13 issue.

14 Requirements are defined. What are the
15 reporting requirements? And again, your document that
16 creates you sets that out pretty clearly. But, you
17 know, down the road, what are the requirements? You
18 know, time line for submission. Are you required to
19 have public hearings? Are they supposed to be
20 distributed and advertised, and so forth, ahead of
21 time. It's important that you put all that in the
22 implementing statute, so it's real clear that was is
23 expected of that commission. And, it gives it some
24 political insulation.

25 Responsibilities. They're different than a

1 purpose. What are you supposed to deliver? And
2 again, your charging document for this commission here
3 is pretty clear on what you're supposed to deliver. A
4 report.

5 But, if you go down the road further, you
6 will see that in enabling statutes for different
7 sentencing commissions, they have a list of things.
8 And, some of them are ongoing, and some of them are
9 one time. But again, very clearly putting that
10 information down, so that you know what is expected of
11 you. It can be modified.

12 But again, some examples. Like, you have
13 analyze and make recommendations regarding probation
14 violators. That can be an area. Or, develop a
15 simulation prison population projection model. And
16 so, those are types of things where you want to be
17 clear to what a commission will do.

18 And that -- it really varies drastically
19 across the country, what they're doing. Some
20 commissions are doing prison population projections.
21 Some are doing research, having a really strong
22 research arm, like Virginia. Virginia has a very
23 strong research arm in their commission. Other
24 commissions may have one research associate. So, it
25 depends on how you want to use your commission and

1 what you want it to do.

2 Data serves for decisions on policy. One of
3 the things that I cannot impress upon you enough is
4 data is your friend. You know, the better your data
5 collection, the better your data analysis, the better
6 your data availability, the more effective you are
7 going to be in understanding your system and making
8 the right changes. Because we hear so much of what we
9 think is going on in the system. And, you know, I
10 think with people -- I don't think people ever --
11 well, this may be exaggerating somewhat, but I don't
12 think people ever lie about what they think is going
13 on. But sometimes, you know, you may have several
14 things happen and you think, well, that happens all
15 the time. But, you look at the data and you see that
16 maybe happens, you know, intermittently, at certain
17 times, and it happens in certain locations.

18 So, I mean, really understanding what people
19 are trying to say. And I think that also helps to
20 counteract some of the high visibility and publicity
21 that comes along with high-profile cases. And, that's
22 one of the biggest things we, you know, we're
23 struggling with the sex offenders right now, and it's
24 trying to get our hands around sex offenders. And, a
25 lot of that is driven by the high-profile cases, which

1 are horrendous. I don't think anybody in the world
2 would not say those people are horrendous. But, is
3 that the typical case -- sex offense cases going
4 through our system, and so forth. So, using that data
5 to figure out.

6 Also, we know that looking at conviction
7 data is not enough, because then you don't know about
8 the plea bargaining. And, that becomes important if
9 you're going to change sentencing policy. Because if
10 you're looking at convictions for drug possessions, if
11 you say, okay, we have too many people in prison for
12 drug possession, and we can divert these people.
13 They're non-violent, low-level offenders.

14 However, you go back and look and you see
15 that three-fourths of your drug possessions are pleas
16 in drug trafficking. Then, you might have an issue
17 there. You might want to do a little bit more
18 looking, and see what's going on there. You know, are
19 those charges that were, you know, why are these
20 things happening? Is it just a function of the system
21 being overloaded, or what's happening here that will
22 -- you know, you're not really at a group of people
23 you think you're looking at. So, that becomes a
24 public safety issue. And so, you always want to keep
25 looking.

1 You know -- and we know that plea bargaining
2 happens, but you just want to make sure the offenders
3 you're looking at are what you think they are. Okay.

4 The validity and reliability of the data
5 base. Okay, this is my thing. I love data bases.
6 Data -- data excites me, you know?

7 [Laughter]

8 MS. TOMBS: Yeah, I know, you think it's
9 really strange. But, you know, the thing you've got
10 to know is who's going into your prisons? How long
11 are they staying? And where are they going
12 afterwards?

13 If you can't answer these questions in
14 detail, then you don't have enough data. When I say
15 who's going in, I'm not -- I want to know how many are
16 coming in on a direct court commit? How many are
17 coming in on probation violations, technical? How
18 many are coming in on a probation violation with a new
19 offense?

20 I mean, just looking at admissions will give
21 you a general sense, but it doesn't tell you what's
22 going on in the system. And then, how long are they
23 there? That's the other thing, when you look at
24 sentence, it doesn't tell you how long it's a bed.
25 That's a head going in. A bed is how long are they

1 critical. And no matter how much -- I mean, I think
2 we've made a big effort in the United States in
3 criminal justice over the last ten years to improve
4 our data system. I still think they're woefully
5 inadequate for us. You know, of time served data,
6 jail credit data, that kind of data is very spotty.

7 And it's hard, you know, when you're trying
8 to look at what's happening in your system, when you
9 don't have those things. And sometimes, you just have
10 to say the data is not available at this time, and
11 then try to collect it.

12 But, I mean, I think, you know, just -- we
13 had some jail credit data, which was important,
14 because if people are sitting in jail waiting, you
15 know, 180 days, or 220 days before they're
16 transferred, that they go to sentencing and before
17 they're transferred to a state prison, and those days
18 are deducted off of the sentence, that's a lot of
19 days. So, you know, trying to figure out how much
20 time they're actually spending in jail, pre-trial, and
21 then waiting for transfer and so forth, to see how
22 much time they're taking off of that prison bed is
23 important when there -- it's just kind of really
24 important whenever your system is near capacity, and
25 you're trying to project what's going to happen over

1 the next year.

2 Because, it takes about two to three years
3 to go and build a prison, you know, from the time you
4 go out there and to actually have a prison up and
5 running. So, if you're close to capacity, and you're
6 trying to figure out how you're going to shift
7 offenders around for the next 12 to 18 months, that
8 kind of information there is very important, that you
9 know how many beds you have.

10 Again, you know, data should provide
11 baseline for current practices and the basis for
12 changes, so that you know what's going on before you
13 change. And, it should replace the anecdotal that no
14 one ever goes to jail on a probation violation, that
15 no one ever goes to jail on first-time parole
16 violations. Is that true? Are they having several
17 violations before they actually are -- get revoked?
18 If you don't know -- I mean, you hear that, but your
19 data with either support that or show that there is an
20 issue there.

21 The role of research. Again, research to me
22 is very important, because you have -- you're not
23 starting -- I mean, you're starting a commission and
24 you have to look at things, but you're not inventing
25 the wheel here. There's a lot of sentencing work

1 that's been done, best practices on what types of
2 programs, what type of supervision works with what
3 type of offenders. You know, I would really encourage
4 you -- BJA has a lot of information on best practices.
5 So look at that, and use as much as you can.

6 One of the things that you want is really
7 what works with what types of offenders. Great
8 programs, but you put the wrong offender in them, and
9 you've got a disaster. We had a really good program
10 for heroin addicts. Great, I mean, you know, really a
11 high -- an intense program. It was hard, but the
12 recidivism rate leaving that program was around 30
13 percent over a five-year period, and that's really
14 good for drug offenders, for heroin addicts.

15 They started putting meth offenders in that
16 same program, thinking, well, we'll increase the --
17 we'll decrease the recidivism rate for meth offenders
18 if we put them in this program because it works so
19 well with heroin addicts. It's a different type of an
20 issue. There are two different types of issues going
21 on, two different types of offenders.

22 So, even though the program was good, we had
23 the wrong offenders in the program. And, the
24 recidivism rate shot up to, like, 74 percent. So, you
25 know, it's not only the program. It's matching the

1 program to the offender.

2 Also, whenever you do policy changes -- and
3 we'll be talking about, just like how the states with
4 different policies -- it's important to follow up, to
5 see whether they actually do what you thought they
6 were going to do. Example -- a fine example here. We
7 had a lot of people who were driving on suspended
8 licenses. You know, they had their license suspended
9 and they were driving. You know, so you would pick
10 them up, and it was -- it was a misdemeanor offense.
11 And, it kept happening over and over again.

12 So, we increased the offense from a
13 misdemeanor to a felony, because we were sick and
14 tired of these people not following the rules. But,
15 as a felony -- as a misdemeanor they could, you know,
16 go for -- spend some time in jail. As a felony, they
17 got probation. So, what happened was they got up,
18 they get convicted of a felony, get put on probation,
19 they would drive away from the courthouse on the --
20 you know, on their -- driving with a suspended
21 license. They would get picked up for a probation
22 violation, and they would do this repeatedly because
23 driving on a suspended license is a routine offense
24 type thing. They'd end up in our state prisons.

25 So now, we were paying, you know, huge

1 amounts of money to incarcerate people in a state
2 prison, and we weren't stopping them from driving.

3 You know, they -- the whole purpose, whether
4 it had more of an effect as a misdemeanor, when it
5 gives an immediate, you know, certain penalty of six
6 months in jail, or three months in jail. This time,
7 as a felony, it was just probation. They would have
8 to screw up on their probation several times before
9 they finally got revoked and sent to prison. And so
10 -- and, it was increasing the prison population. And,
11 there was no program in there to deal with driving on
12 a suspended license.

13 So, we had to end up eventually actually
14 move it back down to a misdemeanor, because there was
15 more impact, as far as public safety and stopping the
16 activity as a misdemeanor than it was raising it to a
17 felony.

18 So, that was a policy effect that we thought
19 was really good, but after we evaluated and saw what
20 went on for three years, we thought this has -- we
21 really messed this up bad in this case.

22 COMMISSIONER NEWTON: And so, what was the
23 philosophy in increasing this to a felony? Was it to
24 deter? Was it --

25 MS. TOMBS: Yeah.

1 COMMISSIONER NEWTON: And -- and yet, no
2 one just thought about how the deterrent factor would
3 -- would come about, with the felony. Is that what
4 you're saying?

5 MS. TOMBS: That's true. You know, I guess
6 -- you know, like this is, you know, where -- where
7 you need to have input from other people in your
8 commission, because, you know, we would -- most of us
9 would not drive without a license, because we would be
10 afraid of the repercussions. But, there's a certain
11 population that don't have insurance, they don't have
12 a license, you know, and think their license -- well,
13 it doesn't make any difference. I'm going to drive
14 anyway. And, those were the people who were recycling
15 consistently.

16 So again, it -- you know, it was not
17 something that was thought through, an unintended
18 consequence that we didn't mean to have happen, and it
19 wasn't effective.

20 COMMISSIONER NEWTON: And -- and just a
21 question. When you -- when you decided to make it a
22 felony, did anyone say, well -- and we want some
23 concrete DMV program that would assist in this? Or we
24 just thought that if it was a felony, people wouldn't
25 do it?

1 MS. TOMBS: It if was a felony, people
2 wouldn't do it.

3 COMMISSIONER NEWTON: Okay.

4 MS. TOMBS: So, when you do that, you want
5 to look at the desired outcome. And sometimes, you
6 have to modify it along the way. If you make a policy
7 change, then you evaluate it three to -- three years
8 down the road. Because you have to realize when you
9 make a policy change, whatever you do here will
10 probably not take effect until 12 to 18 months, unless
11 you make it retroactive and there's a whole lot of
12 issues with that.

13 Because, you're going to have to -- you
14 know, usually policy changes, whether they are to
15 increase sentences or stuff like that, or modify
16 sentences, begin on a certain date, and they go
17 forward. So, you have to have someone arrested,
18 convicted, sentenced, before that change becomes in
19 place.

20 And so, if you put something in effect
21 effective July 1, you're not going to have people
22 entering your system on July 2 for a conviction for
23 that offense. You're going to still have some lag
24 time on the old sentencing system.

25 So, you've got to give yourself enough lag

1 time to deal with those issues and really start
2 evaluating them. So sometimes, you know, three --
3 three years is not an unusual evaluation time to look
4 at something.

5 And, process and impact evaluation. Are --
6 you know, is the -- is the alternative sentencing
7 option operating as we intended it to? That's one
8 thing. We see this a lot with drug diversion
9 programs. When you talk about Prop 36 in California,
10 Prop 200 in Arizona, where sentencing alternatives,
11 they were trying to move low-level drug threat
12 offenders into treatment. However, they did not
13 properly think it through, and there was a lot of
14 issues on how they were implemented, and so forth,
15 like that.

16 So, you know, the impact actually didn't
17 occur in the reduction in population, or the increases
18 in arrests did not actually occur. So, you have two
19 things going on there that you have to evaluate when
20 you do policy changes.

21 Okay. So, the impact of sentencing
22 commissions. And we're going to talk about a couple
23 of really good examples here, I think, of what
24 sentencing commissions can do, what they need to think
25 about when they do it, and some of the obstacles you

1 encounter when you're doing it.

2 I talked earlier about Minnesota.

3 Minnesota, we're going to talk about sex offender
4 policy. And, as you know, as I mentioned before, sex
5 offender policy is something that -- the sentencing
6 policy is something that I think every state is
7 grasping with.

8 In fact, we're doing a study right now of 50
9 states, across the system, just to see how all 50
10 states are defining sex offenders, and how the
11 sentences compare, because there is such a wide
12 variety as you look across the nation on how they're
13 defining them, how they're sentencing them, what the
14 registration, and those types of criteria are. So,
15 it's really important to kind of get our hands around
16 that.

17 So anyhow, we have a very high-profile sex
18 offender. I'm not intending to give the girl's name.
19 It was a young college girl. She was going to college
20 in North Dakota. She was abducted outside of a
21 shopping mall, and she was raped and murdered, driven
22 across the state line into Minnesota. She was
23 originally from Minnesota, but was going to school in
24 North Dakota.

25 She -- the person arrested for the crime was

1 a previously convicted sex offender who had gotten
2 released, I believe, three months before the crime
3 occurred. He maxed out on his sentence, meaning that
4 he did all his prison time, plus the supervision time.
5 Because, in Minnesota you had a sentence and you did
6 two-thirds of the sentence in prison and one-third on
7 supervision, unless you violated the supervision, and
8 then you could be incarcerated for that remaining
9 third.

10 So, he had done close to twenty years, a
11 long period of time, maxed out on his sentence, and
12 walks out. He kills this girl. Of course, this was
13 just horrendous, and the legislature was upset, you
14 know. It was just one of the worst things. The
15 family, you know, the victim's family was very, you
16 know, active in this process also. And so, the
17 legislature responds by basically making life
18 sentences for most sex offenders, and increasing the
19 other sentences.

20 So, we looked at that, and what they had
21 proposed would cost the state between 7,000 and 15,000
22 new prison beds over a ten-year period, a significant
23 number of increase in beds.

24 So, what they were trying to do was focus on
25 the worst of the worst. You know, we want -- we want

1 to incarcerate, life sentences, and sentences of 25
2 years or more for the worst of the worst sex offenses.
3 But, no one really coached down what worst of the
4 worst was.

5 So, that was the process we went through
6 with them, looking at who was already convicted of sex
7 offenses, and pulling out their files, looking to see
8 what the criteria was that was involved in the crime,
9 and like that. So, you know, understanding what is a
10 worst of the worst sex offender. And, it took us four
11 months to do this, to actually get an idea.

12 And so then, we listed the criteria, saying,
13 you know, that you must have two of these present to
14 be a worst of the worst sex offender. Okay? Using
15 that, they developed a separate sentencing. Like I
16 said, Minnesota is a state that has had sentencing
17 guidelines since 1978. And dealing with this issue of
18 sex offenders, how do we deal with that, without
19 disrupting the entire system that had been working
20 very well? They have, I think, the next to the lowest
21 incarceration rate in the United States, next to
22 Maine.

23 So, it wasn't -- the system wasn't -- you
24 know, wasn't falling apart. We just had this issue.
25 We developed a sentencing -- a separate sentencing

1 grid, in which we calculated these criminal histories
2 differently than we did for the other crimes.

3 Sex offenses, prior sex offenses weighed
4 very heavily, you know, trying to capture that repeat
5 sex offender. Age at first offense, you know, we
6 factored in that. So, the grid was -- was designed to
7 deal with what we considered the strong predictors of
8 sexual violence.

9 And, what was interesting enough, when we
10 put all this information together and saw that the
11 sentences the judges were giving for sex offenses
12 already, before any changes in the legislation, were
13 very similar to the ones that they were to be giving
14 after the legislation. The issue we had run into, and
15 as many of you remember, was the Blakely decision,
16 where you could not depart upward on aggravating
17 factors, and that's what the law -- you know, having
18 to have a bifurcated hearing process, you know,
19 finding guilt, and then finding the aggravating
20 factors.

21 Well, the legislature was really afraid that
22 sex offenders would slip through that, and they
23 wouldn't have the aggravating factor hearings, and
24 something would happen. So basically, what we were
25 doing was putting a grid that allowed them to give

1 those aggravated sentences when appropriate, without
2 changing the entire system.

3 So -- and then, we also got the one key
4 factor, that judges could depart downward when they
5 felt it was necessary, and we had some criteria for
6 departing downward. So, you -- you gave that case
7 where you didn't -- you know, so often we make laws,
8 and we make them, and we get those cases where we
9 didn't intend for that person to get in there, but now
10 there's this 18-year-old who does this and this, and
11 now he's looking at a life sentence, and that really
12 wasn't what we were intending to do. This sentence
13 was for a very violent sex offender.

14 So, we gave the judiciary that -- that
15 option, you know, when other certain things were
16 present -- a first-time sex offense, blah, blah, blah,
17 like that -- they can also consider going downward.

18 So, doing all that, we actually revised the
19 prison bed need down to 1,200. And, they were still
20 getting the same sentences. I mean, we did not reduce
21 the sentences for sex offenders. We didn't reduce any
22 sentences for sex offenders. What we did was
23 restructured it so that it allowed to impose those
24 really heavy sentences for the worst of the worst.

25 And, that was really where we used -- we

1 used data strongly on that one, looking at, well, who
2 was sentenced, why they were sentenced, what was their
3 backgrounds, looking at that information, looking at
4 what they wanted to impose for certain sex offenders.

5 You know, they wanted to impose life
6 sentences. Well, we already -- we already had judges
7 who were giving sentences of 600 years. I mean, it's
8 not a life sentence, but 600 years is 600 years. So,
9 I mean, you know, the terminology.

10 But, what that allowed us to do was the
11 legislature walked away with a win-win. They were
12 looked as seeing the top one sex offenders. The
13 public safety was not compromised, because people were
14 still getting the sex offense, you know, sentence.
15 Allowing for the aggravated sentences. And, the
16 state's resources were directed at the very most
17 violent sex offenders.

18 So, it was a situation where everybody
19 worked together and came out with good policy. And
20 even though we had the high-profile case -- I mean,
21 there was a lot of pressure on that -- we were able to
22 come up with really sound policy that didn't use our
23 prison beds ineffectively. It protected public
24 safety, and targeted the worst violent sex offenders.

25 So, that's the kind of thing a really good

1 commission will do. Yes?

2 COMMISSIONER NEWTON: So, when you look at
3 -- at the end of the day, --

4 MS. TOMBS: Um hmm.

5 COMMISSIONER NEWTON: -- what you really
6 did was give the judge an opportunity to sentence
7 someone to a higher sentence? Is that really what you
8 did?

9 MS. TOMBS: We gave them the option if --

10 COMMISSIONER NEWTON: I'm trying to say
11 after -- after this review of the analysis -- the
12 analysis of the data, and the talking and everything,
13 what actually changed?

14 MS. TOMBS: That we allowed the imposition
15 of longer sentences when certain criteria was present,
16 without having to go through an aggravated sentencing
17 procedure.

18 MR. ANNUCCI: So, were they elements of the
19 crime, itself, that you now defined?

20 MS. TOMBS: Yes.

21 MR. ANNUCCI: So -- so if you have, like,
22 for example, rape in the first degree, the equivalent
23 in your state, and there's different ways to commit
24 it, but if these particular factors are now elements
25 of the crime of rape, and you're found guilty of that,

1 the judge can now sentence you to a much higher --

2 MS. TOMBS: And there were things like, you
3 know, torture, dismemberment, use of foreign objects,
4 leaving the victim in an isolated or unsafe place --

5 COMMISSIONER NEWTON: And that was made an
6 element of the crime? I guess that's your question.

7 MR. ANNUCCI: Yes.

8 COMMISSIONER NEWTON: That's my question.

9 MS. TOMBS: Yes.

10 COMMISSIONER NEWTON: And, did they see any
11 difference in the -- I guess I'm curious whether this
12 guy who committed this horrible crime, whether his
13 predicate crime would have caused him to have a longer
14 than that 20-year sentence.

15 MS. TOMBS: He would have had a longer,
16 because of what --

17 COMMISSIONER NEWTON: Initially, the first
18 crime.

19 MS. TOMBS: The first crime? He would have
20 had a longer sentence because he had a previous
21 sentence.

22 COMMISSIONER NEWTON: Okay. So, this was
23 his -- really his third, --

24 MS. TOMBS: Yes.

25 COMMISSIONER NEWTON: -- this murder was

1 really his third.

2 MS. TOMBS: Right. Because, you know, how
3 you weigh prior convictions. We had -- we were saying
4 we would weigh the prior felony person, prior felony
5 non-person type of convictions, and they had a weight
6 point on them. Sex offenses on the new grid were
7 given much higher weights. If you had one prior sex
8 offense, you were half-way over on the grid.

9 COMMISSIONER NEWTON: Okay.

10 COMMISSIONER O'DONNELL: So, is it -- but
11 Minnesota already has sentencing guidelines, --

12 MS. TOMBS: Um hmm.

13 COMMISSIONER O'DONNELL: -- right? So --
14 so, is this really an expansion of the guidelines? Or
15 --

16 MS. TOMBS: I think it's a -- it's a
17 modification of the guidelines, yes.

18 COMMISSIONER O'DONNELL: I mean, I guess
19 what I'm wondering is it possible to do this kind of
20 thing in a state that doesn't have detailed guidelines
21 for offenses anyway?

22 MS. TOMBS: We'll -- we'll talk about
23 Nebraska. Nebraska is doing something like that, --

24 COMMISSIONER O'DONNELL: Um hmm.

25 MS. TOMBS: -- with just one crime, just

1 one kind of offense, and not the rest of the offenses.

2 I think, you know, it's just -- it's easier
3 for us to -- you know, I think with guidelines -- I
4 mean, it's determinate sentencing. I mean, they have
5 -- they have the death penalty -- I mean, they don't
6 have the death penalty. They have some off-grid
7 crimes that aren't affected. Like murder is on the
8 grid.

9 There's a lot of states that really have
10 sentencing guidelines. They'll have guideline crimes,
11 they'll have non-grid crimes, and they'll have
12 off-grid crimes. So, they could have some
13 combinations of things, you know.

14 That's -- I mean, to me, that's where I
15 think you are in such a good place, because you are
16 designing a system, and you can design it whatever way
17 you want. There's no right or wrong.

18 Like, one state does not -- has -- has
19 felony DUI. I think the third offense of DUI is a
20 felony. However, you are not going to state prison.
21 They made a conscious decision that no felony DUI is
22 going to go to state prison. They were going to be
23 incarcerated in county jail.

24 So, it's a felony, which would mean it would
25 be a guideline sentence, but they have labeled it

1 non-grid. So, you don't lose the felony label on it.
2 You're just not going to do your time in state prison.
3 You're going to do your time in the county jail.

4 So, the only way they could figure out how
5 to do that was to label it non-grid, because it --
6 felonies were all grid crimes. So, you know, it's
7 being creative, really.

8 Any other questions?

9 COMMISSIONER BERGAMO: Just a question.
10 It's not my personal feeling. I'm just curious.

11 Do any states have a death sentence for
12 people who commit three, four, five, six of these --
13 you pick it, you know, these most horrible crimes?

14 MS. TOMBS: Um hmm. Do they have a
15 sentence for those?

16 COMMISSIONER BERGAMO: Death sentence.

17 MS. TOMBS: Kansas did. WE didn't --

18 COMMISSIONER O'DONNELL: Aside from a death
19 -- a homicide offense, you mean?

20 COMMISSIONER BERGAMO: Well, the sex
21 offenders, you know, --

22 MS. TOMBS: Okay.

23 COMMISSIONER O'DONNELL: Um hmm.

24 COMMISSIONER BERGAMO: -- you know, now
25 he's raped 15 women, or 20 women, 30 women, 5 boys, 10

1 boys, you pick a number.

2 MS. TOMBS: No, death penalty -- death
3 sentences are limited to murder. Now, Rodriguez could
4 have gotten murder -- could have gotten a death
5 penalty. And I think he -- he's being charged under
6 the Federal Guidelines, because he crossed state lines
7 when he brought her into Minnesota, come to think of
8 it. But, he would have -- it's my understanding that
9 --

10 COMMISSIONER BERGAMO: But he committed
11 murder, also. He also --

12 MS. TOMBS: Yes.

13 COMMISSIONER O'DONNELL: Yeah.

14 MS. TOMBS: No, death penalty cases are
15 only limited to murder, at this time.

16 COMMISSIONER BERGAMO: Thank you.

17 MS. TOMBS: Here, mandatory drug treatment
18 for felony drug offenders -- Senate Bill 123. This is
19 a bill where we looked at studying California's
20 Prop 36, and studying Arizona's Prop 200. We also
21 looked at our data.

22 And, we had some low-level drug offenders
23 who were possession people, who kept coming into our
24 system, and they were given probation. They would
25 violate their probation, They would come in and have

1 to do time in the state prison. And, their sentences
2 were relatively short -- anywhere from 6 months to 24
3 months.

4 So, you know, especially with our
5 lower-level months, these people were coming in. By
6 the time that they go through processing, and we fixed
7 their teeth, they got them their medicine, and got the
8 haircuts for them and so forth, it was time for them
9 to go back out. And we were seeing this a lot with
10 women who were having babies, too. They would come in
11 on the probation violation shortly before giving
12 birth, and then the state was -- was picking up the
13 money for the child.

14 And they -- you know, their time in prison
15 was so short that we weren't going to be giving them
16 any adequate drug treatment either. So, they were
17 actually coming back in, going into prison for this
18 period of time which was limited, not getting
19 effective drug treatment, sending them right back out,
20 and they were coming right back in again on a new
21 charge.

22 So, this was taking up a lot of resources,
23 not only in the prison beds, but also just the time of
24 the courts, time of probation officers, and so forth,
25 like that. So, when we looked, we thought this was

1 population we felt we could do something with.

2 So, what we decided to do, we looked at the
3 population and we knew very specifically who we had in
4 there. They had to be, you know, possession only, no
5 prior violent crimes, no prior drug selling,
6 trafficking. And, if there was a plea involved, we
7 would look to see what the previous charge was. So,
8 it was a very defined group.

9 There was a lot of discussion over this,
10 because we were -- we were focusing on drug
11 treatments, and the effectiveness of drug treatments
12 on offenders. The issue we struggled with was what do
13 we do with the people who are committing burglaries,
14 or committing thefts because they are drug addicts?
15 Are we giving them the same opportunity to change
16 their behavior and help them as we are the people who
17 just get picked up for possession?

18 So, it was a very spirited debate in our
19 commission at that time, as to how we address that.
20 Because we didn't know how to -- how to really balance
21 that. Because -- and, it was a very valid point. You
22 know, it's happened that you could be smoking pot on
23 your way to do a burglary, and you got picked up
24 before you did the burglary, with the pot, you were
25 going to get the drug treatment. If you commit the

1 burglary and we pick you up, then you're going to
2 jail, to prison. So, you know, we were trying to
3 figure out how to do this.

4 But we decided, for the time being, given
5 the political environment, and being that this was
6 very -- this was very -- a very conservative state,
7 you know, very Republican, very tough on crime, very
8 no-nonsense state in the Midwest that was trying to do
9 something that was -- that most people would see as
10 liberal and, you know, what they'd call a "hug-a-bug"
11 type thing.

12 So, we were trying not so much to do that as
13 to look at how we used our resources best. So, what
14 we decided to do is they would be diverted from prison
15 for up to a mandatory 18-month prison -- 18 months of
16 treatment.

17 And, I'm stepping back a little bit, to tell
18 you what's going on in the state. The state was at
19 capacity in prison population, or very near capacity.
20 So, we were going to have to make an investment, one
21 way or another. We were going to have to invest in
22 building a new prison, or we were going to have to
23 invest the dollars in funding adequate treatment. So,
24 it was not a "get out of jail card" for the state.
25 They were going to have to put in money one way or

1 another, and we're talking millions of dollars here.

2 So, it was a very conscious decision on
3 their part, you know. It wasn't that we would just
4 divert these people and it won't cost the state any
5 money. They were going to have to pay anyhow.

6 So, we developed a program that took these
7 people, and they were -- they were assessed for the
8 drug offense, and they were assessed for -- under the
9 LSIR, for future criminal behavior. And, we actually
10 made people work together in a team. It's the first
11 time it ever happened in the state.

12 We had supervision people and treatment
13 people having to work together. You could not revoke
14 somebody unless both people on the team agreed that
15 that person was going to fail. Because, we had this
16 issue with treatment saying, "Well, you know, they
17 always want to keep them out," and supervision saying
18 "They're not behaving and we need to revoke them."
19 And so, we were trying to change that difference
20 there.

21 Also, we said they could not be revoked for
22 using again. For pure -- if they got picked up again
23 for pure possession, you weren't going to prison. We
24 were going to increase your supervision. We were
25 going to increase your treatment. But, we weren't

1 going to revoke you. Again, the concept of
2 understanding what relapse was, okay? If that's all
3 you were doing, if you weren't committing another
4 crime, you weren't doing something, you were just
5 caught with dirty urines, or you had pot on you again,
6 it would be in that relapse prevention thing.

7 So, we also -- every person had aftercare,
8 so that we -- so it was real important for us to
9 understand. They were not only getting good
10 assessments, they were getting treatment, but they
11 were required to have aftercare. Instead of putting
12 them on probation -- I mean, parole, we actually made
13 them have aftercare.

14 So, you know, it was a long process, and it
15 was -- it wasn't -- you know, I think for some of the
16 offenders it was around 14,000 to 16,000 a year. And,
17 incarceration in Kansas was 21,000 a year.

18 But, what they were focusing on was that
19 repeating cycle, again. Now, not all people had to go
20 for the intensive, inpatient. Some just needed
21 education, depending on how they scored out on that.
22 But, you know, the legislature had to put in the
23 initial \$10 million to start this up, and then had to
24 keep funding it every year.

25 It took us a lot -- I mean, I spent a good

1 part of my life that year teaching -- I mean, I knew
2 nothing about drug addiction. I mean, I really didn't
3 know that much about it. I just figured when the
4 people, you know, got picked up for drugs, they should
5 stop using. I didn't understand. So, I had to learn
6 myself what addiction was. I had to learn why, you
7 know, what we were doing in the system wasn't working.
8 And then, I had to teach our legislators. So, you
9 know, that was a whole part -- making them understand
10 that we're not being soft on crime, that we are
11 holding these people accountable, but we're also
12 looking at long-term what the state is going to -- to
13 be doing with people.

14 The one thing that we did throw in that was
15 different from the other drug diversion programs is
16 that if you were in drug treatment, and you got kicked
17 out -- and, you could get kicked out. It wasn't that
18 there was no way to get kicked out. If you committed
19 a new felony, or you could, you know, the treatment
20 people said you weren't -- or the team said you
21 weren't working together, they could kick you out.
22 But, if you were kicked out, you got no credit for all
23 the time you were in treatment. You were going to go
24 back and start your sentence on day one, and you had
25 to do the whole sentence, which is different than what

1 was going on in California. Because in California,
2 when they got kicked out of Prop 36, they were given
3 credit for all the time they were in Prop 36. In
4 fact, if they only had a few more -- you know, they
5 had 30 days to do in county jail, they did it from day
6 one.

7 So, I think, you know, by putting that --
8 and that was, you know, that's something we worked
9 with the prosecutors coming on, you know, trying to
10 figure out how can we make this -- you know, we're
11 giving you a chance, but if you don't take that
12 chance, and you screw up, we're going to hammer you.

13 And so, you know, what has happened now,
14 when we've done a process evaluation, and there were
15 some things that needed to be corrected on that, and
16 they're doing that. They're in the middle of doing
17 the impact evaluation now. The prison population has
18 decreased, as they thought it would.

19 COMMISSIONER O'DONNELL: A couple of
20 questions. Is it inpatient treatment?

21 MS. TOMBS: We -- it's a whole series.
22 It's a continuum of treatment, from education, to
23 individual, to inpatient, group therapy, I mean,
24 depending on how they score out on the -- on the -- I
25 think it was the SAFTI [phonetic] they were using, or

1 one of the drug tools. They would find what their
2 need was. You know, you have to remember, we're
3 talking about a state here that has more cows than
4 people. So, finding treatment providers also was an
5 issue. So, how do we come up with treatment
6 providers?

7 Because, that was one thing we said to them.
8 If you're going to do this statewide, we have to have
9 the same resources in Kansas City that we have in
10 Dodge City. Because we can't put someone in prison
11 because there's no treatment provider out there.

12 So, what we did was we gave any treatment
13 provider the opportunity to come and go through the
14 cognitive behavioral skills training that the State
15 paid for, by the Department of Corrections, 40 hours
16 of that. Then, they were licensed, and they could be
17 paid directly from the State for taking on those
18 offenders.

19 So, we got private providers who in the past
20 wouldn't even touch these people, because they weren't
21 getting paid. And, we made the payment amount to
22 these private providers more than what they were
23 getting from welfare.

24 COMMISSIONER O'DONNELL: And what impact
25 would it have on the person sentenced? Did they --

1 are they still a convicted felon if they --

2 MS. TOMBS: Yes.

3 COMMISSIONER O'DONNELL: -- complete this
4 program? So, it had no -- the charges didn't go away
5 if they were successful or anything?

6 MS. TOMBS: Yeah. It was a discussion we
7 had, very much so, again with the prosecutors and so
8 forth, like that. And again, there was a lot of
9 debate whether if they finished the program, that
10 would go away.

11 Because, we still felt there was diversion.
12 There was straight diversion out there, you know. For
13 the first-time person, they could probably go straight
14 to diversion. Usually, if they're getting to the
15 point where they're at this point, they've gone
16 through a regular diversion somewhere along the line,
17 and they've been having some chances.

18 So, if you're looking at actually going to
19 prison, this isn't your first time hitting the system.
20 So, they wanted to give these people actually a chance
21 to get decent treatment and to change that cycle of
22 people coming through at the low level, so that we
23 could increase the sentences for the more serious
24 offenders.

25 COMMISSIONER O'DONNELL: Are there

1 published research studies on this, or --

2 MS. TOMBS: Yes. Like I said, the -- we're
3 just about finishing up the impact evaluation. And,
4 there was a process evaluation that I can go to the
5 Kansas Sentencing Commission Website, I believe, and
6 they have it.

7 COMMISSIONER BERGAMO: So, can you tell us
8 what was the impact on the return rate?

9 MS. TOMBS: The return rate.

10 COMMISSIONER BERGAMO: I mean, did it push
11 down the --

12 MS. TOMBS: Yeah, --

13 COMMISSIONER BERGAMO: -- was recidivism
14 any different?

15 MS. TOMBS: -- yeah, I mean, their -- their
16 prison population and stuff -- I can't keep their -- I
17 think it was, like, 21 percent, or --

18 COMMISSIONER BERGAMO: Improvement?

19 MS. TOMBS: Yes. I mean, there are still
20 people that fail.

21 COMMISSIONER BERGAMO: No, no, but it
22 improves -- the improvements --

23 MS. TOMBS: Yeah. But, I would say we're
24 not -- the amount of people admitted to prison at that
25 lower level has decreased, which is what they wanted

1 to do. And, we projected out -- and we'll talk about
2 this in a minute -- exactly how many prison beds they
3 would do -- they would save. And, you know, giving --
4 giving them an 18-month lead in.

5 And also, I think it was, like, maybe a 27
6 or 37 percent failure rate. And, we figured no matter
7 how good the treatment is, --

8 COMMISSIONER BERGAMO: What happens --

9 MS. TOMBS: -- people will fail.

10 COMMISSIONER BERGAMO: If it happens, it
11 happens.

12 MS. TOMBS: Yeah. So, you know, we were
13 really good in calculating that. And, it was a gamble
14 for the State because, I mean, you know, if this
15 didn't work, they just blew a year or two years in
16 which they need a prison. So, it was, you know, a
17 really -- to me it would have been the idea -- you
18 know, it's really interesting that we started this out
19 in the legislature that this is going to save prison
20 beds, you know. And this -- we're talking here about
21 Kansas, and they don't -- they don't like to spend
22 money on anything. So, this is a fiscal issue for
23 them.

24 And, what I saw happen over that legislative
25 session is we went from being a fiscal issue to being

1 this is the right thing to do. I can remember the
2 president of the Senate being up on the floor the day
3 that they were passing that, saying, you know, this is
4 the right thing to do because, you know, we have
5 people in this state that are just wasting their
6 lives, going through this and not having the ability
7 to get treatment.

8 COMMISSIONER O'DONNELL: Now, this is only
9 user quantity of drugs, you're saying, --

10 MS. TOMBS: Yeah.

11 COMMISSIONER O'DONNELL: -- not
12 distribution quantities of drugs, in terms of who
13 qualifies?

14 MS. TOMBS: Yes. And, you know -- again,
15 you know, we -- we were afraid that there was people
16 who may have possession with intent to sell, which is
17 a -- you know, it can go one way or the other.

18 What we saw with our prosecutors -- we
19 worked very closely with this -- if they -- if they
20 knew the person was a drug addict, and they had seen
21 him, they would charge him with the possession, to get
22 them in the program. So, we saw that going on, too.
23 So, there was the charge -- you know, the charging
24 going on like that.

25 MS. LEVINE: Can I just ask a question?

1 Was --

2 MS. TOMBS: Yes?

3 MS. LEVINE: -- were there any changes that
4 were made to the sentencing model as a result, the
5 realization that the police were charging people with
6 different crimes, in order to get them into the
7 treatment?

8 MS. TOMBS: No, what we -- we -- they're
9 evaluating that now, and they're looking to see -- and
10 that's something, again, that will take them -- it's
11 gone into effect in 2002, I think. But, you know, a
12 fairly new thing. But, it will take at least five
13 years of data to look to see whether those trends are
14 changing.

15 COMMISSIONER O'DONNELL: But, you made
16 changes -- they made changes in Kansas in the
17 sentencing laws to permit this, --

18 MS. TOMBS: Yes.

19 COMMISSIONER O'DONNELL: -- or was this --

20 MS. TOMBS: I mean, it went through the
21 legislature, and it was enacted by the legislature,
22 the recommendation was.

23 MR. ANNUCCI: You're familiar with New
24 York's DTAP program, I take it. Is this somewhat
25 analogous to that?

1 MS. TOMBS: I don't know enough about the
2 DTAP to say it, but I think it's -- you know, again,
3 it's -- I can only tell you the devil is in the
4 detail, because we went out and studied some of
5 California -- you know, we liked the Prop 36 idea, and
6 we thought this is not a bad thing. But, you look at
7 the details on how it was implemented, how it was
8 funded, who failed, who went into it, and so forth,
9 like that, and that's where you run into problems.

10 So, I think you can have a good concept, but
11 are you going to follow through? I mean, we actually
12 got down and figured out how much it was going to cost
13 a day to put the person in this type of program and
14 that type of program, looked at the number of people
15 we thought would be diverted in a year, calculated
16 that, and so we gave the legislature a really clear
17 picture of what -- of where the money was going and
18 how many we thought it could happen.

19 And they have been -- they -- what they have
20 been doing is modifying the annual allotment, based on
21 the previous year's usage. So, at the end of the
22 year, they look to see how many people were 123
23 people, what was the average cost, were they being
24 diverted. Because, at some level, if you're getting
25 the hard-core people, which is one of the things we

1 talked about the -- talked about the impact -- not in
2 the impact, but in the process evaluation, what we
3 thought we would get would be a little bit lower-level
4 people, and here we're probably getting some pretty
5 hard-core addicts. They were very good at avoiding
6 the system.

7 So, you know, when you have somebody who's
8 been an addict for seven, or eight, or ten years, it
9 takes a lot to get them to work through it. And so,
10 you know, even -- those were people who were more in
11 the higher 18 months, and the lower 2 or 3 months, you
12 get the recreational user.

13 COMMISSIONER O'DONNELL: Excuse me a
14 minute. Do you think it would be helpful if we had
15 somebody from DTAP come and talk to us? Is it -- is
16 it a pretty similar model?

17 MR. ANNUCCI: I don't know that much about
18 it. I think they're pretty close to 18 months.

19 MS. LEVINE: One of the -- one of the
20 changes, though, with DTAP was that somebody can get
21 their felony prosecution gone. I mean, if they
22 actually do complete their program, then they are no
23 longer considered a felony offender.

24 MR. ANNUCCI: Well, there's -- there's two
25 results. Usually, --

1 MS. TOMBS: That's a pretty standard --

2 MR. ANNUCCI: -- you're either -- they --
3 the person either pleads -- pleads guilty, subject to
4 completing the program. If they complete the program,
5 they can withdraw the plea and take a plea to a
6 misdemeanor, usually, or -- or maybe even an outright
7 dismissal. I think there are variations throughout --
8 throughout the state.

9 COMMISSIONER O'DONNELL: And, is -- is DTAP
10 operating elsewhere, besides Brooklyn?

11 MR. ANNUCCI: Oh, yeah.

12 MS. LEVINE: Oh, yeah, yeah.

13 MR. ANNUCCI: I think there's -- there's a
14 number of them.

15 COMMISSIONER O'DONNELL: It's all around
16 the state, at this point.

17 MS. LEVINE: Um hmm.

18 MR. ANNUCCI: In fact, I think Joe Hines in
19 Brooklyn is having an upcoming graduation celebration
20 --

21 MS. LEVINE: Yes.

22 COMMISSIONER O'DONNELL: Right.

23 MR. ANNUCCI: -- of it, next week or
24 something.

25 MR. SCHNEIDERMAN: And Bridget Brennan's

1 speaking, isn't she?

2 COMMISSIONER O'DONNELL: Here.

3 MR. SCHNEIDERMAN: Yes.

4 COMMISSIONER O'DONNELL: Yeah.

5 MR. SCHNEIDERMAN: And she'll be very
6 familiar with it.

7 COMMISSIONER O'DONNELL: Okay.

8 MS. TOMBS: And, this program here was in
9 conjunction with Drug Courts and those other things.
10 We didn't touch anything that was already there, you
11 know, the first-time drug diversion programs, the Drug
12 Courts, and so forth. What we were talking and
13 targeting on was people who have failed using all
14 those things, and finally end up ready to go into
15 prison.

16 COMMISSIONER O'DONNELL: Um hmm.

17 MS. TOMBS: Because, I think a large part
18 of those people can be -- you know, the low-level
19 users can be sorted out by Drug Court, by a first-time
20 diversion, something like that.

21 COMMISSIONER BERGAMO: What is --

22 MR. ANNUCCI: Just one --

23 COMMISSIONER BERGAMO: I'm sorry.

24 MS. TOMBS: I'll give you --

25 COMMISSIONER BERGAMO: Go ahead.

1 MR. ANNUCCI: I'm sorry. One interesting
2 footnote to DTAP is that this was initiated by
3 prosecutors, without any statutory authorization.
4 There's nothing in the CPL --

5 COMMISSIONER O'DONNELL: Right.

6 MR. ANNUCCI: -- whatsoever that allows
7 this process to go on, and describes how it works.
8 But, it happens. You have all the players that
9 participate in it -- the judge, the District Attorney,
10 the defense attorney -- and are happy with it. And,
11 it's -- it's a creative initiative that has spread.

12 MS. TOMBS: And it's statewide?

13 MR. ANNUCCI: Well, there are pockets of
14 it, --

15 MS. LEVINE: Yeah, it's up to --

16 MR. ANNUCCI: -- but -- but I --

17 MS. LEVINE: -- the discretion of the
18 District Attorney's office.

19 MR. ANNUCCI: Right.

20 COMMISSIONER BERGAMO: And what is the
21 success or failure rate of DTAP? I'm just curious.

22 MS. LEVINE: I don't know. I'll send you
23 Joe Hines's report --

24 COMMISSIONER O'DONNELL: I think we'll look
25 into it.

1 MS. LEVINE: -- about that.

2 COMMISSIONER O'DONNELL: I think we need to

3 --

4 COMMISSIONER BERGAMO: Okay.

5 COMMISSIONER O'DONNELL: -- look into it,

6 and --

7 COMMISSIONER BERGAMO: Okay, thank you.

8 COMMISSIONER O'DONNELL: -- and have

9 somebody report to us on it.

10 MS. TOMBS: Yeah, for a big part of --

11 COMMISSIONER NEWTON: All I know is that

12 it's -- somebody said this is just -- it's --

13 COMMISSIONER BERGAMO: Pockets here and

14 there.

15 COMMISSIONER NEWTON: -- at the

16 prosecutor's discretion, --

17 COMMISSIONER BERGAMO: Yeah.

18 COMMISSIONER NEWTON: -- and this is

19 something that -- that's statutory -- mandatory by

20 statute, and that makes a huge difference.

21 COMMISSIONER BERGAMO: Big difference,

22 yeah. I just -- I'm just curious. That's all.

23 MS. TOMBS: And that -- you know, that was

24 one of the things. We wanted to make sure it was

25 available to everybody. And, you know, that does --

1 it's a provider problem, with some of the rural areas,
2 and so we had to struggle with that.

3 Virginia has taken a look at diverting a
4 portion -- a portion of their non-violent offenders
5 from prison, so that they can avoid prison
6 construction. Oftentimes, when you're looking at
7 non-violent offenders, you look at your lower-level
8 offenders, or people considered to be, you know,
9 breaking and entering, you know, bad checks, something
10 that is non-violet, low-level.

11 Virginia took a different approach. They
12 actually started looking not by the offense type, but
13 also they have used a risk assessment tool. And, from
14 that risk assessment tool, they made their decisions,
15 which is, you know, different than what most states
16 are doing when they're dealing with that.

17 Now, there's a lot of controversy over that,
18 whether -- you know, risk assessment tools target
19 certain populations unfairly, depending on what your
20 risk factors are that you're looking at, and so forth.
21 But, it is a way to look at populations if you're
22 going to do releases on the back end with that.

23 It's also good to use them on the front end,
24 for people who may, you know, can be dealt with in the
25 community. My only caution with doing that is if

1 you're going to divert someone from prison, make sure
2 you have the options, have the programs and the
3 supervision in place in the community or you are
4 risking public safety. I mean, you know, that so
5 often states do that. They try to divert people off
6 and say, okay, our prison population is going down.
7 But, if you don't put the resources, and the programs,
8 and the supervision in those communities, you are
9 hurting your state, because you are setting people who
10 haven't -- you know, we're saying they're low risk,
11 but they're still a risk.

12 And, by not providing the services they need
13 to behave or to deal with their criminal behavior, you
14 can actually be increasing public safety issues,
15 rather than decreasing them. So, I'm a big proponent
16 of diverting only if you have adequate programs.

17 And, Senate Bill 123, I told them "If you're
18 going to pass this bill, and not fund it, I'm
19 withdrawing the bill. You know, you're not going to
20 fund it half way. You're going to fund it the whole
21 way, and do it right. Because otherwise, all you're
22 doing is delaying the entry of people into your
23 system. You push them in the community, you don't
24 give them the programs, you don't fund them
25 adequately, you don't have the programs exist for the

1 necessary period of time for that offender, they will
2 fail, and they'll come back." Because, you'll have a
3 sharp drop in your prison population for a while, but
4 it's going to come back up, and it's going to go up
5 higher than it was before, because these people go out
6 and, you know, they usually have to go through this
7 program, fail, this program, fail, but they're coming
8 back in. And really, you're using more resources.

9 Just stop and think. If you're sentencing
10 somebody to prison for armed robbery, okay? And, they
11 get 15 years, or 10 years, or 7 years. You calculate
12 the average cost per year of incarceration, and you
13 figure that's how much it cost you to put that person
14 in prison.

15 Now, stop and think about a probation
16 violator. They commit a crime, number one, that we
17 said, on our sentencing system, was low risk enough
18 that we weren't going to use a prison bed for them.
19 Okay? So, we put them on probation. So, you know,
20 the court's time, getting them on probation. You have
21 the probation officer's time supervising them. They
22 violate, because they're low risk, but not released.
23 So they're going to have another hearing. They
24 violate a second time, okay? Now, we revoke them and
25 put them in prison. They do the prison sentence.

1 They go back on the back end out on parole, or
2 supervised release. They violate again, and go back
3 in there.

4 If you calculate the dollars you spent on
5 that person, and compare it to the guy that you just
6 put away for 7 years for armed robbery, you spent more
7 money on that probation violator than you did on the
8 armed robbery person. And, you haven't changed his
9 behavior.

10 I mean, that's something you really need to
11 think about when you're looking at systems like that,
12 where do you want to put the people. And, I'm not
13 saying they shouldn't be punished. They should be
14 punished, but we need to find a way to make that
15 punishment effective.

16 And if you have, you know, these people who
17 are just draining our system over and over again,
18 there has to be more of, I think, a novel approach as
19 to how we deal with them.

20 COMMISSIONER BERGAMO: Do you have a
21 suggestion?

22 MS. TOMBS: Pardon me?

23 COMMISSIONER BERGAMO: I'm serious. Do you
24 have a suggestion? I'm not being --

25 COMMISSIONER O'DONNELL: On how to deal

1 with it.

2 COMMISSIONER BERGAMO: I know what you're
3 saying, but a suggestion.

4 MS. TOMBS: Yeah. I'm going to be honest
5 with you. If someone asked me how to solve this crime
6 problem? I'd say put the money into education.

7 COMMISSIONER O'DONNELL: Put them what?

8 MS. TOMBS: Put the money into education.

9 COMMISSIONER NEWTON: Put the money in
10 education.

11 COMMISSIONER STANFORD: Start even earlier
12 in the process.

13 MS. TOMBS: Yeah.

14 COMMISSIONER NEWTON: Absolutely.

15 COMMISSIONER STANFORD: Like the behavior.

16 MS. TOMBS: I would think that if you were
17 -- you know, while we're trying to deal with criminal
18 behavior on the back end, it's always going to be, you
19 know, a catch-up, because we can't -- you know, I just
20 think that we need to be, you know, getting to them a
21 lot earlier, because it's hard once -- you know, with
22 the juveniles, you still have some hope. Once they
23 get to the adult system, usually it's -- it's really
24 difficult.

25 COMMISSIONER BERGAMO: Okay, I agree with

1 you, a hundred percent, politically and morally, on
2 that issue.

3 MS. TOMBS: Okay.

4 COMMISSIONER BERGAMO: But, that's not the
5 issue we're discussing. We're discussing this guy who
6 is now 21, do we put him in jail, or we put him
7 through the system three times, like you say.

8 Do you have a suggestion about that guy?

9 MS. TOMBS: Well, are we putting him in
10 jail because we're afraid of him, or are we putting
11 him in jail because of that --

12 COMMISSIONER BERGAMO: No, no. You -- you
13 gave me your example.

14 MS. TOMBS: Yes.

15 COMMISSIONER BERGAMO: So, don't give me
16 the political stuff. I want to know. I respect you.
17 I need your help. I'm asking you for help. I agree
18 with the education point. Put that aside. That's
19 done.

20 He's now 21. Two people. One we put in
21 prison, like you said, for 7 years. One was violated
22 probation, violated probation, went to jail, violated
23 parole. Tell me. So, what's the solution?

24 MS. TOMBS: I think, you know, --

25 COMMISSIONER BERGAMO: I'm not -- I'm not

1 -- I'm asking for your help.

2 MS. TOMBS: Yeah. I think we can use
3 punishment options that are less restrictive and less
4 costly, whether that be revocation centers that are
5 community-based, so that person is going out and
6 working during the day, and maybe spending his
7 evenings in that revocation center, you know, which
8 can be operated, perhaps, maybe 15,000 or 12,000 a
9 year, versus 28 or 30,000 for a prison bed, and where
10 there are services available.

11 That's the one thing, if -- you know, if
12 we're not having the services, and it's really for a
13 Department of Corrections. I mean, they have a heck
14 of a duty -- a job to face. I mean, they're dealing
15 with all these people coming in. They have budget
16 resources. They have, you know, budget issues. They
17 have overcrowding. They have a whole lot of issues.
18 And whenever things are tight, what's the first thing
19 that goes? Programs. You can't not have guards. You
20 can't not have food. So, you know, as -- as budget
21 crises get harder, and populations swell, the programs
22 and the things that will help those offenders are on
23 the outside getting the boot.

24 COMMISSIONER BERGAMO: Thank you. I
25 appreciate it. Thank you.

1 COMMISSIONER NEWTON: Oh, I have a
2 question. I mean, I have to assume, when you talk
3 about this -- this 21-year-old who keeps going back
4 and forth, and you say it's sort of the same money,
5 what -- is that -- do you have a different outcome if
6 the probation program is a better program? And, how
7 should that probation program be better?

8 MS. TOMBS: Again, I think, you know,
9 having a continuum of sanctions. Oftentimes, you
10 know, the probation or community-based programs, they
11 don't have a whole lot of options. They may have
12 regular probation. They may have ISP -- intensive
13 supervision.

14 But, you know, a person who is on probation,
15 just like a person who is on drugs and drug treatment,
16 you may be doing okay on regular probation for a
17 while, and then something in your life happens. Maybe
18 your girlfriend runs off, or, you know, you lose your
19 job or something. And then, so, you know, you start
20 doing things. You start, you know, running around
21 with people you shouldn't be running around with, you
22 start drinking, and so forth like that.

23 You need to be able to intervene with that
24 person immediately, whether that's put them -- you
25 know, instead of seeing your parole officer or

1 probation officer once a week, you're going to see him
2 once a day now.

3 But, to do that, you have to have the
4 resources available. And so, maybe after three weeks,
5 he's past the crisis period, you know, he hasn't
6 committed a crime, and now you can move him back down
7 to regular probation.

8 Or maybe he needs to go to a day reporting
9 center where, you know, if his behavior is becoming
10 very borderline and we think he's going to go over the
11 edge here, you know, send him to a day reporting
12 center. But, if you don't have a day reporting
13 center, what do you do?

14 So, you know, and -- and probation officers,
15 I mean, God bless them. They have caseloads that, you
16 know, are unbelievable. So, how often are they
17 talking to this person? Are they --

18 COMMISSIONER BERGAMO: Excuse me. That --

19 MS. TOMBS: -- being able to meet with him
20 enough to be able to pick up, okay, he's starting to
21 slip? If you only -- if you only see that person once
22 every six months, you're not going to be able to do
23 that.

24 So, I mean, you know, you need -- in North
25 Carolina, if you should have -- if you want to bring

1 somebody in to talk about good community corrections,
2 Robert Guy, from North Carolina, is wonderful. He has
3 -- he's got probably the best continuum of
4 community-based sanctions that I know of in the United
5 States. And, it's the ability to start people at a
6 certain level, move them up and down their continuum
7 as their behavior changes and their risk of
8 re-offending changes, thus you don't have to finally
9 put them in prison.

10 But, if you only have one or two options,
11 and the person has exhausted those options, for the
12 sake of the integrity of the system, eventually you
13 have to violate that person. I mean, you know, if
14 he's not showing up, and he has 75 dirty UAs, you've
15 got to do something, or we lose all integrity.

16 So, I'm just saying that sometimes instead
17 of expanding all of our needs or desires to build
18 prison beds, maybe we need to put the money into some
19 of these programs where we have solid options for them
20 on the outside. That's not to say that somebody else
21 shouldn't go away.

22 Maybe we want to take the 7 year prison
23 sentence and up that to 12 months -- or 12 years,
24 because of the violent nature of that offense. But,
25 to do that, you've got to be able to move these people

1 on the bottom out, so that you can maintain your
2 prison population. Does that make sense?

3 MR. SCHNEIDERMAN: We've been talking about
4 community programs. In Kansas, I believe they did
5 some looking at the communities people came from.

6 MS. TOMBS: Um hmm.

7 MR. SCHNEIDERMAN: And, I'm interested in
8 that. Because in New York, and we saw this in some of
9 our earlier speakers -- I think Jeremy Travis. Our
10 prisoners come from a very small number of
11 neighborhoods. I gather that's sort of a national
12 trend. And, we may have the ability to analyze that.

13 Part of the problem is, I think, as, you
14 know, representing a high -- some high-crime
15 districts, community programs are not just about the
16 prisoners, but they're about the communities those
17 prisoners come from. And, I'm interested in knowing
18 whether that factored into what you were doing in --

19 MS. TOMBS: You're talking about the
20 million dollar communities?

21 MR. SCHNEIDERMAN: Well, the million dollar
22 blocks here, or the high-stakes communities, I think
23 they were called in Kansas, that just --

24 MS. TOMBS: Yeah.

25 MR. SCHNEIDERMAN: -- you know, this is --

1 MS. TOMBS: That's true. Because if you
2 look at all of the dollars that were going into those,
3 it's not just criminal justice dollars. It's
4 education, it's welfare, and so forth, like that.

5 We're doing the very same thing. I'm
6 working in Cincinnati, Ohio, which is a city in -- a
7 county -- in Hamilton County, which is going through
8 much of this right now. They're doing it on the
9 county level, and trying to target certain high-risk
10 areas to develop programs. And, they started taking
11 the probation officers -- offices out of the main
12 courthouse, and they're putting them geographically in
13 these neighborhoods, so that the probation officer is
14 right in the high-crime area, so the probation
15 officers can have the -- people won't have to go to
16 the probation officer. He's right there.

17 So, I mean, looking at things like that,
18 yes, you know, you look at where -- like Wichita. You
19 were talking about Kansas. Wichita was the
20 highest-risk area that we had. The north side of
21 Kansas City was another high area. And, making sure
22 that you have the needs -- because, if you have
23 violent or semi-violent people, their needs are a
24 little bit different than somebody who's doing credit
25 card crime. I mean, you know, you have a different

1 type of supervision, different type of intervention
2 strategies, and so forth, like that.

3 So, again, know who -- know who's in your
4 system. Not only -- only in prison, but on probation.

5 MS. HALL: Was the risk assessment
6 challenged in the courts, the risk assessment for
7 sentencing purposes?

8 MS. TOMBS: Yes, in Virginia.

9 MS. HALL: It was challenged?

10 MS. TOMBS: Yes, it was challenged, and it
11 held up.

12 MS. HALL: Is there a statutory authority
13 for it?

14 MS. TOMBS: I'll tell you where you can
15 find that, in Virginia's -- in the Virginia
16 Commission's Website.

17 MS. HALL: Okay.

18 MS. TOMBS: They have that. But, they did
19 have a challenge and it held up. But, look at that
20 one. I'm going to hurry through that one, so you
21 might want to.

22 Nebraska. Somebody asked me about the
23 guidelines system. Nebraska is a state that has a
24 very low crime rate, I mean, as a whole, but they have
25 -- they're having a meth problem. Most of the Midwest

1 is having a meth problem. So, it's the drug -- their
2 drug admissions went up real high, and they were
3 trying to figure out what they were going to do with
4 this -- with this increase all of a sudden in drug
5 offenses.

6 And, you know, because it was a rural state
7 that didn't have guidelines, they had variations. We
8 had in the state one person getting 17 years over
9 here, and some person getting 7 months over there, for
10 the exact same crime. It was -- you know, it was in
11 the statutory range, but there was no kind of
12 consistency in what was going on, and a lot of it was
13 just, you know, the individual community values, and
14 who was going to prison, and who was getting
15 treatment.

16 So, they actually looked at felony -- at
17 sentencing guidelines just for the drug -- drug
18 offenses. And, they're not going through a
19 legislative process. They're going through the rule
20 process, where they will be enacted by the Supreme
21 Court versus the legislators. That's a very different
22 approach there.

23 But again, looking at a very specific target
24 population, of who was coming in, why they were coming
25 in, and develop -- trying to provide sentencing. I

1 mean, you know, they're not soft on crime people.

2 We're not talking about real liberal states here.

3 But, what was really concerning them was the
4 disparity in their sentencing and how it was so over
5 the board, you know, and it was taking up a lot of
6 resources, too. They were looking at that.

7 Arkansas. A lot of the time, sentencing
8 commissions are going to be looking for
9 proportionality in sentences, and that's a really hard
10 thing to do. Because, as I said, I talked before
11 about having a good system and then keeping it intact.
12 Because, you know, when you design a system, you
13 usually rank the crimes, and you make steps, and so
14 forth, like that.

15 Arkansas was a state where they had a huge
16 amount of meth manufacturing. And so, they had these
17 sentences that were passed because who can -- you
18 know, and believe me, I don't think anybody should
19 meth, but, you know, the pictures of meth wild thing,
20 the horrible things they showed, you know, can really
21 scare people. So, they were afraid of them. And so,
22 they put these sentences that were very equal to
23 manslaughter for manufacture of meth in very small
24 amounts. But, it was something they really felt very
25 strongly about.

1 But, what happened was, you know, you had,
2 you know, 12 years for manufacturing meth, and 10
3 years for involuntary homicide. And, you know, there
4 was manufacture of meth for personal use, and it
5 wasn't for distribution, so you -- there would be --
6 it was horrible. So, but you couldn't stop the
7 political -- the political train that was going on,
8 you know, and we see this at certain times. Even the
9 best of commissions sometimes cannot stop the high
10 profile.

11 So what happened was they actually put a
12 sunset provision, so that the increase would go into
13 place, but after five years, it sunsetted, and the
14 legislature didn't have to take any action to change
15 the sentencing. So, it gave them political cover, you
16 know, in the short term, but also then, they
17 reinstated the sentences afterwards.

18 And, I had a state one time that actually,
19 doing the piecemeal legislation, and they actually
20 ended up inadvertently, without knowing it, giving a
21 longer sentence for attempted murder than murder, and
22 just by the way -- so, it's like they were going to
23 punish you if you didn't kill the person? You got a
24 longer sentence if you tried to kill them, than if you
25 actually killed them.

1 And, you know, that's because, you know, you
2 change this law over here, and you change this law
3 over here, and you change that law, and sometimes,
4 when you put them all together -- and, that's one
5 thing we used to do at the end of every legislative
6 session, just do a complete review, to see where
7 things were. Those things could happen.

8 Legislative impact. I don't know how you
9 familiar you are with these, but these are processes
10 by -- every piece of legislation that is proposed to
11 increase sentencing -- a sentence, must go through a
12 commission and be analyzed. And, what it looks at is
13 how many more prison beds will this cost? How many
14 more probation officers will this take? How many
15 additional jail beds will be required for this, if it
16 goes into place? So that legislatures know, up front,
17 before they pass the bill, what the cost is going to
18 be.

19 In North Carolina, I think is one of the
20 states with a really good one. Virginia is one that
21 is really good, because they require not only that the
22 impact be done, but the state -- the legislator who is
23 bringing the legislation must also identify where the
24 money is going to come from. So, if it's going to
25 cost you "X" number of thousand dollars to implement

1 this bill, then where are you going to get the money
2 from to cover the cost of that increase? So, Virginia
3 is the only state that I know that requires the dollar
4 signs to be attached.

5 Now, there are states that have what they
6 call "bed-neutral" impacts. That means if you come in
7 with a bill that's going to increase prison beds for
8 one crime, they want to see where you're going to
9 reduce the prison beds for another crime. So, who are
10 you going to move out of prison if you're going to put
11 this bill in? Those are called "bed-neutral" impacts.

12 But, those are really good because, you
13 know, it's interesting because you'd see legislators
14 frantically trying to figure out which group of
15 people. And, they were prosecutors most of the time.
16 That's what amazes me. Okay, we want to increase this
17 to get some of these people in, so which group can we
18 move out that's not -- and so, they would actually
19 move out the same people that they just brought in
20 three years ago, in increased legislation.

21 So, this, you know -- but, it makes people
22 think that with every change you make, there is an
23 impact. It's a reminder to them.

24 So, okay. And, balancing resources and
25 capacity. This is a really good thing. They have a

1 legislative mandate in Kansas that says when the
2 prison population is projected to be at current
3 capacity, the sentencing commission is required to
4 bring forth to the legislature, by the second week in
5 the session, options to reduce prison population.

6 And, that was put in because the legislature
7 wanted political cover. This way, if somebody else
8 brings it forward, they can say, "Well, we're just
9 taking the advice of the professionals." Sometimes,
10 they take all the packages. Sometimes, they take
11 portions of it. And sometimes, they modify it.

12 But they are required by statute to bring
13 forth recommendations, and the legislature will then
14 review them and decide whether they're going to enact
15 them or not. But again, that's -- again, that's a
16 very active commission there.

17 COMMISSIONER O'DONNELL: Barbara, do you
18 have states like New York, where the legislature
19 really, essentially, fights prison closure because of
20 jobs and --

21 MS. TOMBS: California --

22 COMMISSIONER O'DONNELL: -- economic
23 development? I mean, that's really California?

24 MS. TOMBS: California, yes. I mean,
25 you've got a state there that, you know, just has a

1 seven -- they have a \$7 million dollar construction
2 package or something like that before them. And, they
3 have so many prisons now, they can't get people to
4 work in them, because they're in such, you know,
5 violent conditions.

6 MR. ANNUCCI: But, the difference there is
7 their population keeps growing. They don't have the
8 political wherewithal to change the laws to get
9 reductions in the prison population. We've done that.

10 MS. TOMBS: Um hmm.

11 MR. ANNUCCI: Our population has gone down
12 almost 8,000 --

13 MS. TOMBS: Yes, you have.

14 MR. ANNUCCI: -- in the last 7 or 8 years,
15 but we still have the problem that the legislature
16 doesn't want our prisons to close, or at least they
17 make it very difficult.

18 MS. TOMBS: Well, I think, you know, again,
19 you know, you can have reduced prison admissions and
20 still have an increase in prison population. You know
21 what I mean? Because, you know, if you -- it's like
22 when you increase the sentence, if you -- if the
23 sentence for burglary is five years, and I double that
24 to ten years, you won't see a change in your prison
25 population until year six, because they're only doing

1 five years.

2 So, what I think is you're really going to
3 see the problem is with some of these sex offense
4 legislations where the sentences were considerably
5 long to begin with, and now we've increased them. So,
6 if the sentence was 10 years, you're not going to see
7 it until year 11.

8 So, when we pass these pieces of
9 legislation, sometimes you don't see them right away.
10 So, you get to show, like, a decrease in admissions,
11 but your prison population is going to continue to
12 grow because no one ever leaves. So, you're going to
13 have less people going in, and you'll still have a
14 population problem if no one ever leaves.

15 COMMISSIONER O'DONNELL: But, you're
16 talking about people -- population versus admissions,
17 or not, in terms of the reduction?

18 MR. ANNUCCI: Yeah, I don't think we're
19 seeing increases in admissions in New York. We've
20 done a lot in New York with back door type of relief.
21 After they've gone in, we've created programs that can
22 get earlier releases, particularly for drug offenders.
23 And, we've seen a cumulative effect of that.

24 The same number might be coming into prison,
25 but they're getting recycled out very, very quickly.

1 But, you also have things like DTAP for the
2 alternatives that are diverting them, and Willard is a
3 short, 90-day turnaround program.

4 So, the actual number of drug offenders in
5 New York State, as a proportion of the under-custody
6 population, --

7 MS. TOMBS: Yeah.

8 MR. ANNUCCI: -- is significantly reduced
9 to where it was years ago.

10 COMMISSIONER O'DONNELL: And, have you
11 worked with any states that have reduced the number of
12 prisons or -- or converted prisons to other types of
13 facilities?

14 MS. TOMBS: I've worked with a couple of
15 states who have -- who had construction plans on the
16 books and pulled them off, and not build any more, and
17 find ways to do it. Closing prisons? I'm trying to
18 think. There was one state, and I'm drawing a blank
19 on that now.

20 COMMISSIONER O'DONNELL: Well anyway, if
21 you can look at it, it's --

22 MS. TOMBS: States that have closed
23 prisons.

24 COMMISSIONER O'DONNELL: -- it's something
25 that we're interested in. Closed or converted them to

1 other types of facilities, like transitional
2 facilities, or --

3 COMMISSIONER NEWTON: In that same vein, in
4 one of your comments you talked about how at the end
5 of all your study and your presentation, you actually
6 saw legislators standing up and saying --

7 MS. TOMBS: Um hmm.

8 COMMISSIONER NEWTON: -- "This reduced
9 sentence is wonderful because we are going to take
10 this new step that's actually changing peoples'
11 lives."

12 MS. TOMBS: Yeah.

13 COMMISSIONER NEWTON: And, amen for that.

14 Apart from the drug population, has there
15 ever been any study that says we can do this for other
16 groups of offenders -- young offenders, uneducated
17 offenders, poor offenders -- that was equally embraced
18 by legislative leaders --

19 MS. TOMBS: I think, you know, --

20 COMMISSIONER NEWTON: -- as a vehicle?

21 MS. TOMBS: Juvenile offenders is something
22 -- you know, people will work with juvenile offenders
23 on some --

24 COMMISSIONER NEWTON: And, what you're
25 calling "juvenile," you say under the age of?

1 MS. TOMBS: 18.

2 COMMISSIONER NEWTON: Okay.

3 MS. TOMBS: Or what -- a lot of states have
4 what I'll call extended juvenile jurisdiction with
5 kids. Are you aware of that?

6 COMMISSIONER NEWTON: We're adults in New
7 York at 16.

8 COMMISSIONER O'DONNELL: Yeah.

9 COMMISSIONER NEWTON: That's why I asked
10 what age you were talking about.

11 MS. TOMBS: All right. Well see, extended
12 juvenile jurisdiction -- Minnesota has this, Kansas
13 has this, a lot of people have this -- where they are
14 sentenced with an adult and juvenile sentence at the
15 same time. So, if you commit a crime and you're an
16 extended juvenile jurisdiction child, you get an adult
17 sentence and a juvenile sentence.

18 You start serving your juvenile sentence.
19 And, if you don't screw up, and you go through it, you
20 go and get your juvenile sentence done with, then
21 you're out. If you screw up, your adult system
22 sentence immediately kicks in, and you go into the
23 adult system.

24 So again, it's for these kids that are
25 high-risk juveniles who are on the borderline, and not

1 wanting to make them adults yet, say "We're giving you
2 one last chance here." You've got these two sentences
3 running simultaneously. And so, if you finish the
4 juvenile sentence and there's no problems, the adult
5 sentence goes away. But, if you screw up, there's no
6 -- you know, we're taking you back to court in that
7 case, and immediately you have a hearing, the sentence
8 being imposed.

9 So again, you know, time to deal with those
10 high-risk people, because I know those are difficult
11 people for you to deal with in your system, too.
12 They're very young. They don't have a thought --
13 they're not even mature in their thought process lots
14 of times, --

15 COMMISSIONER NEWTON: Um hmm.

16 MS. TOMBS: -- as far as understanding the
17 consequences of what their actions are. So, looking
18 at that, and that's a good thing when you look at
19 prison populations. I mean, believe me, I'm -- my
20 house was burglarized one time, at Christmastime.
21 They took all my Christmas presents, everything. I
22 wanted that guy to get a life sentence at that moment.
23 But really, you know, when you sit back and think, you
24 know, do I want to put my resources on that, you know?
25 And, it was really sad, because I went to the

1 sentencing hearing and, you know, my daughter was in
2 the home at the time. She was in the bathroom. And
3 so he -- and she stayed in the bathroom. He
4 burglarized the house, and took all this stuff, but
5 never opened that bathroom door. So I had, you know,
6 a residential burglary with a 16-year-old at home,
7 which could have been very, very horrible if he had
8 found her.

9 So, we go through the whole thing and we go
10 to the sentencing. And, it's very interesting
11 because, you know, I was very angry. But, I stood
12 there and I watched his -- he was an older man, maybe
13 38, a long-time drug user. He had been in and out of
14 the system. And, he had his parents there. They were
15 older people.

16 And, the one thing he took that really made
17 me angry is he took my kids' videos from their prom
18 and their, you know, sporting events, and things that,
19 you know, parents do. And, he destroyed them, so I
20 didn't get those back. That's the one thing that I
21 wanted back.

22 So, you know, the judge says, "Do you have
23 anything to say, Ms. Tombs?" And I said, "You know,
24 nobody wins here today. You know, I have a
25 16-year-old whose life is never going to be the same

1 because of going through that. The things that were
2 most precious to me, the videos, they're gone." He's
3 going away to prison, and there stands his mother and
4 father who, I'm sure, were good people, and you could
5 tell they were devastated. And, you know, he had a
6 little 4-year-old boy there, that was his son. I
7 mean, you know, it's like what are we doing here?
8 Nobody is coming out ahead on this at all.

9 I mean, to me, it was against -- personally,
10 it was a very telling moment about our system.
11 Because, you know, I should have been happy. He went
12 away for, like, 56 months, because he had some priors.
13 But, you know, I didn't feel any better. And the
14 things that were wrong weren't corrected.

15 And he was going to probably go there and
16 not get drug treatment again. And, it was going to
17 happen all over again. So, you know, it really makes
18 you stop and think sometimes what are we doing here,
19 and how do we approach this?

20 COMMISSIONER STANFORD: You raise an
21 interesting point. And since I'm hopefully part of
22 this Commission to bring the victim perspective, what
23 I've been thinking through a lot of presentations,
24 including your comment, is that oftentimes we
25 misinterpret what the victims at sentencing want.

1 Sometimes, you can start wanting a pound of flesh, --

2 MS. TOMBS: Um hmm.

3 COMMISSIONER STANFORD: -- and by the time

4 you go through the process, which takes months,

5 sometimes years, you feel differently at sentencing.

6 Or sometimes, the crime itself dictates that you might

7 want the offender to get help, versus jail.

8 So, while we consider all of this, we need

9 to explore what the victims, en masse, really want, by

10 the time they get to sentence.

11 MS. TOMBS: I can -- I can remember

12 negotiations with defense counsel, and she said,

13 "Well, will you -- you know, would you accept a plea?"

14 I said, "If he gets me the videos, I don't care

15 whether he goes on probation or not." I said, "I'm --

16 you know, if you can find me the videos, fine, put him

17 on probation." That was what was important to me, not

18 whether he went to prison or not. So, I mean, you

19 know, it does make you stop and think about things.

20 And, I'm almost out of time, so I really

21 want to -- but, that's another way.

22 Okay. Final thoughts. These are -- if you

23 want to ask me -- when I finish up here, I'm going to

24 give you five or six things to read. These are my

25 final thoughts. So, you can tear the rest of the

1 presentation up and focus on these.

2 Use data as the basis of your decision and
3 policy.

4 Remember -- and I can't tell you enough --
5 remember that good sentencing policy is for the
6 typical offense, not for the strange, or exaggerated,
7 or off the grids. We have a tendency to make our
8 policy on the extraordinary offenses and not the
9 typical.

10 Sentencing policy should be analyzed for
11 intended and unintended consequences. Always step
12 back and think. What have I not thought about here?
13 What could happen? Who could be caught up in this
14 that I don't want caught up in this?

15 Policy development is important, but policy
16 implementation is as important as policy development.
17 Follow through, in making sure that it's implemented
18 the way you want it to be implemented.

19 Equally important to know what is working as
20 well as what isn't working. Don't assume. If you say
21 we have great programs here. We've been using them
22 for 25 years. Have you ever evaluated and seen what
23 the completion rate is? What your recidivism rate is?
24 I mean, you know, just because you've used it for 20
25 years doesn't mean it's working or can't be improved.

1 Equal attention and resources should be
2 applied for offenders sentenced to prison and to the
3 community punishment. Again, as I said, you know,
4 that's just as important. Don't -- you know, we have
5 a tendency to focus on corrections, and not on
6 community. So, to me, they're just as important, and
7 they're more cost-effective in the long run.

8 Always be conscious of the political
9 environment. You can have great ideas, and the chair
10 of your appropriations committee or the chair of your
11 -- the president of your senate says, "This is not the
12 year, Barb. We can't run that," you back off, you
13 know, because they know, sometimes, what's going on,
14 which is totally different than what you're working
15 on. And, sometimes the timing of things? Like, the
16 direct bill, we wanted to run -- I wanted to run it
17 the year before. He said no, it's an election year.
18 We need to hold this off until next year. And, that's
19 when it won.

20 So, you know, even though they may not jump
21 on something immediately, they may have a good reason.
22 Not that they don't believe in it, but it just may --
23 you know, you need to communicate very closely with
24 them.

25 Consensus can sometimes mean I don't embrace

1 the change, but I can live with it. Sometimes, that
2 was the best we could get in our group, you know, when
3 you get a show of hands. You know, no, I don't like
4 this, but okay, I won't fight you on it. And, that's
5 consensus, in my book.

6 Good sentencing policy needs a continuing
7 monitoring. It's not a one time activity. So, you
8 know, as I said before, once you have something,
9 you've got to keep watching it, to see if it's doing
10 what you wanted it to do.

11 And, understand the problem before
12 developing the solution. You know, if people say we
13 have prison overcrowding and that's our problem,
14 that's not your problem. It's your policy that
15 contributed to that prison overcrowding. That's your
16 problem. So, it's stepping back and really trying to
17 understand what is going on in your system.

18 And, it's okay to say "I'm not going to act
19 on this, because I don't fully understand it at this
20 point." Because you can actually do something that
21 you think is going to help and make the situation
22 worse if you don't understand the problem.

23 COMMISSIONER O'DONNELL: Thank you, very
24 much. Any other questions?

25 [Applause]

1 COMMISSIONER O'DONNELL: Barbara, I hope
2 you'll be able to join us whenever you can. We would
3 appreciate your input into our work, as we proceed.

4 One issue that Barbara brought up that I've
5 -- that people have asked me about privately, but we
6 really haven't discussed in the Commission is how we
7 -- whether we are considering juvenile issues, you
8 know, within our mission or not. It wasn't
9 specifically mentioned.

10 I think the way we are set up in New York,
11 and I don't know if it's unique or not, but it takes
12 the juvenile issue out of the criminal justice realm,
13 to a large degree, even though all of us know that
14 it's very much interwoven with our whole criminal
15 justice system. So we that are in criminal justice in
16 New York sometimes ignore the juvenile problem, unless
17 juveniles come to us as being prosecuted as adults in
18 the system.

19 So, we don't have -- you know, we have very
20 tight deadlines that I think make it difficult for us
21 to delve into the juvenile issues to any great degree,
22 but I think, as the issues come up in the
23 subcommittees, we should, you know, address them, to
24 the extent we can. It may be that our recommendation
25 is that we need to go back and do a lot of what we're

1 doing for adults for juveniles, in another cycle of
2 the work of the Sentencing Commission. But, it's an
3 issue out there, and I'd love to, you know, I'd like
4 you to think about it and see how you want us to deal
5 with the issue.

6 I personally feel that it's an aspect of the
7 criminal justice system in New York that is very
8 broken, and it has wide-ranging ramifications because
9 of that. And so, I hate to say that we can't deal
10 with it, but -- but, in this time frame, certainly in
11 the next two months, it's going to be extremely
12 difficult.

13 So, think about it. If you have views you
14 want to discuss now, I'd be happy to hear them. But
15 otherwise, we can discuss it when we discuss things in
16 greater detail.

17 Okay. Do you want to take a five-minute
18 break, and then we'll get back to our next speaker?
19 Thanks -- speakers.

20 [Off the record.]

21 COMMISSIONER O'DONNELL: Our next speakers
22 are John Amodeo and Janet Koupash, who are speaking to
23 us on victim issues.

24 Part of our mission in the Executive Order
25 is to look at all aspects of sentencing reform and the

1 implications it has on victims. We've spent time
2 looking at how our parole system, how our corrections
3 system works in New York State, the overall sentencing
4 laws in the state, but we haven't focused on the
5 sentencing laws and practices as they relate to
6 victims.

7 And so, we're going to hear from John and
8 Janet. Janet is the Victim Assistance -- what's your
9 --

10 MS. KOUPASH: Victim Services --

11 COMMISSIONER O'DONNELL: -- Services
12 Director or Coordinator, at DOCS, and has a wealth of
13 experience in working on sentencing issues. And, I
14 asked John to focus for us on the law, with respect to
15 victims and victims' rights to be heard at various
16 aspects of sentencing.

17 So, I'll turn it over to both of you.

18 CRIME VICTIMS AND SENTENCING:

19 THE LAW AND ITS IMPACT

20 MR. AMODEO: Okay. Thank you,
21 Commissioner.

22 I have a handout that I would like to -- I'm
23 going to use very frequently during this presentation.
24 And, it's got victim and sentencing, key New York
25 State statutes, and so you'll need a copy of this

1 handout so you can, essentially, follow along.

2 And, what we've decided to do is I'm going
3 to try to very quickly cover the major statutes in New
4 York State that address the sentencing process, as it
5 relates to victims, including victims' rights at
6 sentencing, and related topics.

7 So, if you look at this handout and turn to
8 Page 2 of the handout, you'll see that this is
9 Executive Law Section 646-a, which describes a
10 pamphlet that the District Attorney is to provide the
11 victim, as you see on that very first line, at the
12 earliest possible time. And, this pamphlet is to
13 detail the rights of crime victims, to be prepared by
14 the Division of Criminal Justice Services, in
15 cooperation with CVB.

16 The reason I included this as the very first
17 part of this handout is because if you look at
18 Subdivision 2 -- and I've highlighted the key language
19 in all of these statutes, because some of these
20 statutes are very long, and I wanted the Commission
21 members to be able to just look at the highlighted
22 language, and that would give them the gist of the
23 statute with respect to victims and sentencing.

24 So, if you follow the highlight, you could
25 see that it's Subdivision 2, that this pamphlet that

1 is required by 646-a to be provided to the victim at
2 the earliest possible time, has to include specific
3 information with appropriate statutory references on
4 the following.

5 And now this -- if you look at Paragraphs
6 (b) through (f), these are really the -- this provides
7 a roadmap, I think, for the Commission. If you're
8 interested in quickly getting a list of the statutes
9 and provisions in New York Law that relate to victims
10 and sentencing, these provisions that I've highlighted
11 -- (b) through (f) -- I think provide a very good
12 roadmap to follow. And, that's why I put this
13 pamphlet handout in here.

14 And, I would note here that my part of this
15 presentation is really going to focus on the
16 sentencing and conviction stage of the criminal
17 process, and Janet is going to follow me and speak
18 more specifically about some of the latter stage of
19 the criminal process -- the DOCS and Parole stage --
20 as they relate to victims.

21 So, if you look at this roadmap that I have,
22 and look at Paragraph (b), so it says the pamphlet
23 shall include specific information with appropriate
24 statutory references on the rights of crime victims to
25 routine notification of judicial proceedings relating

1 to their case.

2 Paragraph (c), the rights of crime victims
3 to be protected from intimidation and to have the
4 court, where appropriate, issue protective orders.
5 And then, it cites 530.12 and 530.13. These are
6 orders of protection. And, I'm going to deal more
7 specifically with each of these topics.

8 Subdivision (d), the rights of crime victims
9 to submit, where appropriate, a victim impact
10 statement for the pre-sentencing report and the parole
11 hearing.

12 Sub (e), the rights of crime victims, where
13 a defendant is being sentenced for a felony, to
14 request -- request the right to make a statement at
15 the time of sentencing.

16 And (f), the rights of crime victims to
17 request restitution and have the DA present such
18 request to the court and assist the crime victim in
19 filing and collection of the restitution order.

20 Now, there's one -- now, I'm going to go
21 through each one of these pieces of this roadmap
22 individually, and just, essentially, highlight the
23 relevant law for you, so you'll be able to turn to it
24 when you want to.

25 There is one provision of this handout, on

1 the very end of the handout, that's really not
2 reflected in this pamphlet provision that I've
3 provided to you, and that is the victim's right to
4 request HIV testing of a defendant following a
5 conviction of certain crimes. And, that's at the very
6 end of this handout. I will talk about that briefly.

7 Okay. So, if you turn to Page 3, I just
8 wanted to point out some -- the latter -- the last
9 subdivision of this section of this pamphlet
10 provision. And, the reason I highlighted
11 Subdivision 4 is because this really is a brand-new
12 provision of this statute. And it's relevant, I
13 think, because it creates a new compliance
14 requirement, that requires every DA's office in the
15 state to, essentially, report with their compliance
16 with this pamphlet provision. And that, by the way,
17 this -- this compliance provision took effect on
18 January 1, '07, so it is brand-new.

19 If you turn to Page 4 of the handout, this
20 is the first step on this roadmap. It's the
21 notification of judicial proceedings. And, I've
22 included three statutes here that I think are relevant
23 -- 641 and 642 of the Executive Law, and CPL 440.50.

24 If you turn to Page 5, this is the Executive
25 Law Section 641, and it references the objectives of

1 fair treatment standards. Now, this Section 641 of
2 the Executive Law is the section contained in a larger
3 article of the Executive Law, Article 23, which is
4 entitled "Fair Treatment Standards for Crime Victims."
5 And, I did not include all of Article 23 in this
6 handout. It would have been a lot longer than it
7 already is if I did. I tried to just include key
8 sections, but there's a couple of sections in
9 Article 23 that I want to point out to you, and
10 they're sort of the general sections that set the tone
11 for the entire article.

12 Section 640 of the Executive Law, for
13 example, is part of Article 23. And, that provides
14 that DCJS, in consultation with the Crime Victims
15 Board, must, quote, "promulgate standards for the
16 treatment of the innocent victims of crime by the
17 agencies which comprise the criminal justice system of
18 the state." Again, that's Section 640 of the
19 Executive Law.

20 And, DCJS has complied with that statutory
21 mandate and has created standards in Title 9 of the
22 New York Code of Rules and Regulations, at Part 6170.
23 And, I have a copy of that if any of the Commissioners
24 want me to pass it around.

25 There's another general section that I did

1 not include in this handout, Section 645 of the
2 Executive Law, which parallels many of the provisions
3 that apply to the DAs with respect to crime victims.

4 Section 645 requires the courts -- in
5 effect, the Chief Administrative Judge -- in
6 consultation with DCJS and the CVB, to promulgate
7 standards for the treatment of innocent victims of
8 crime by the court system.

9 So, those are the two -- Section 640 and 645
10 are sort of the umbrella sections of Article 23. And
11 again, Section 641 appears at Page 5, and you can see
12 that I've highlighted the very first sentence -- "The
13 object of such fair treatment standards shall be to"
14 -- and, if you look down at Sub 3 -- "ensure
15 notification of victims, witnesses, relatives of those
16 victims and witnesses who are minors, and relatives of
17 homicide victims, if such persons provide the
18 appropriate official with a current address and
19 telephone number, either by phone or by mail, if
20 possible, of judicial proceedings relating to their
21 case, including" -- and, if you now jump down to (d)
22 -- "proceedings in the prosecution of the accused,
23 including entry of a plea of guilty, trial,
24 sentencing, but prior to sentencing, specific
25 information shall be provided regarding the right to

1 seek restitution and reparation, and where a term of
2 imprisonment is imposed, specific information shall be
3 provided regarding maximum and minimum terms of
4 imprisonment."

5 So, this provision of Section 641 is
6 mirrored in another section of this same article that
7 applies to the court system. Many of these are --
8 many of these provisions are duplicated for district
9 attorneys in Executive Law Article 23, the same sorts
10 of requirements imposed on the DAs, or parallel
11 requirements are imposed on the courts.

12 And, if you now turn to Page 7, this is
13 Section 642 of Article 23 of the Executive Law. And,
14 if you look at the Subdivision 1, "Such fair treatment
15 standards shall provide that" -- and, this is fairly
16 detailed. I'm just going to read this, because I
17 think the Commission should know some of the
18 limitations in the existing law, with respect to crime
19 victims and sentencing.

20 "Such fair treatment standards shall provide
21 that: 1. The victim of a violent felony offense, a
22 felony involving physical injury ..., a felony
23 involving property loss or damage in excess of two
24 hundred and fifty dollars, a felony involving
25 attempted or threatened physical injury or property

1 loss or damage in excess of two hundred and fifty
2 dollars or a felony involving larceny against the
3 person shall, unless he or she refuses or is unable to
4 cooperate, or his or her whereabouts are unknown, be
5 consulted by the district attorney in order to obtain
6 the views of the victim regarding disposition of the
7 criminal case by dismissal, plea of guilty or trial.
8 In addition, the district attorney shall consult and
9 obtain the views of the victim or family of the
10 victim, as appropriate, concerning the release of the
11 defendant pending judicial proceedings upon an
12 indictment, and concerning the availability of
13 sentencing alternatives such as community supervision
14 and restitution from the defendant."

15 So, this provision of Section 642, which
16 relates to the district attorney getting the views of
17 the victim in any of these cases -- in these
18 enumerated cases -- violent felonies, physical injury
19 -- this provision is replicated in Article 23 for the
20 court system. And, the court system has to do these
21 same kinds of things. That's in Section 647 of the
22 Executive Law.

23 Essentially, Section 647 repeats the
24 language that appears at Sub 1 here, in pertinent
25 part, and -- but, it applies to the courts. It

1 requires courts, for example, to consider the views of
2 the victim concerning the release of the defendant and
3 considering the availability of sentencing
4 alternatives, such as community supervision and
5 restitution.

6 So, these are the two, I think, relevant
7 parts -- relevant sections of Article 23.

8 And, if you look at Page 9 of the handout,
9 this in the Criminal Procedure Law now. And again,
10 there is some limiting language here. I'm just going
11 to read the relevant language.

12 "Upon the request of a victim of a crime, or
13 in any event in all cases in which the final
14 disposition includes a conviction of a violent felony
15 offense, the district attorney shall, within sixty
16 days of the final disposition of the case, inform the
17 victim by letter of such final disposition. If such
18 final disposition results in the commitment of the
19 defendant to the custody of DOCS for an indeterminate
20 sentence, the notice provided to the victim shall also
21 inform the victim of his or her right to submit a
22 written, audiotaped, or videotaped victim impact
23 statement to the division of parole or to meet
24 personally with a member of the state board of
25 parole."

1 So, here's a provision of the Criminal
2 Procedure Law that is triggered by a request of the
3 victim at the very beginning of the subdivision or, in
4 all cases, automatically, where the disposition
5 includes a violent felony or a felony defined in
6 Article 125, which is the homicide article of the
7 Penal Law.

8 Okay. Let me now turn to Page 10 of the
9 handout. This is the next step along the line of that
10 roadmap that was laid out by the pamphlet, and it
11 references final orders of protection. They were
12 actually called protective orders. But, with respect
13 to sentencing, it really is the so-called "final order
14 of protection" which is issued at sentencing. And,
15 you see I've cited two sections: CPL 530.12, and
16 530.13.

17 So, if you go to Page 14 of the handout,
18 this is CPL 530.12, which is orders of protection for
19 family offenses. And, at Page 14, Subdivision 5.
20 This is the so-called "final order of protection,"
21 which is issued at the time of conviction, although
22 many judges actually issue it at sentence. The
23 statute references the time of conviction.

24 I'm going to read through Subdivision 5,
25 some relevant language:

1 "Upon conviction of any crime or violation
2 between spouses, parent and child, or between members
3 of the same family or household, the court may in
4 addition to any other disposition, including a
5 conditional discharge or YO adjudication, enter an
6 order of protection."

7 If you look at the sentence that starts in
8 the middle of the paragraph:

9 "The duration of such an order shall be
10 fixed by the court and, in the case of a felony, shall
11 not exceed the greater of: (I) eight years from the
12 date of such conviction, or (ii) eight years from the
13 expiration of the maximum term of an indeterminate or
14 the term of a determinate sentence of actually
15 imposed."

16 And then, there's a period five years from
17 the date of conviction on a misdemeanor, if it's an A
18 misdemeanor, and two years for any other offense.

19 So, this is the final order of protection.
20 It obviously impacts victims very much so, especially
21 in domestic violence cases.

22 The interesting thing to note about this
23 order -- this so-called final order of protection --
24 is that the legislature very, very recently increased
25 the period of these final orders of protection. For

1 example, it used to be five years from the date of
2 conviction. As you can see now in that small Roman
3 numeral one, it's eight years from the date of the
4 conviction. It used to be three years from the date
5 of the expiration of the maximum term of the sentence.
6 And now, it is -- I'm sorry. Did I say three years?
7 It was five years from the date of the conviction, and
8 it is now eight, and it's three years from the date of
9 the expiration of the sentence -- it used to be three
10 years. It is now eight years from date of expiration.

11 So, they have significantly -- the
12 legislature has significantly extended the permissible
13 duration of a final order of protection. Judges still
14 have discretion to issue a final order of protection
15 that is much shorter than eight years, if they want.
16 But, they now have more discretion to issue a longer
17 final order of protection.

18 I would point out one little quirk that the
19 Commission should be aware of, that even though the
20 legislature has extended the permissible duration of a
21 final order of protection to eight years, a defendant
22 who gets a sentence of -- a sex offender gets a
23 probation sentence on a felony is on probation for ten
24 years. And so, if the judge says "I think I'll issue
25 an order of protection for the full period that this

1 defendant is on probation," you know, the judge --
2 that order of protection will expire after eight
3 years, because that's what the statute says, you know.

4 And, the legislature was aware of this
5 anomaly. In fact, I had drafted a bill in my prior
6 position at OCA, to correct it, and they came close.
7 They came to eight years, but there's still a two-year
8 gap for felony offenders who get -- felony sex
9 offenders who get probation.

10 If you would go to Page 19, this is a
11 parallel provision -- another order of protection
12 provision. If you look at the very top of the page,
13 this is for other than family offenses. The section
14 we just looked at was 530.12, which is orders of
15 protection for family offenses. This is other than
16 family offenses.

17 And, if you look at the bottom -- I'm not
18 going to go through this -- but it's the same
19 essential provision that appeared in the family
20 offense order, and with the same lengths of the final
21 order of protection. It's issued upon conviction of
22 any offense, et cetera, et cetera. You can see that
23 language at the bottom of Page 19.

24 Okay. Now, I'd like you to turn, if you
25 don't mind, to Page 22. And, I hope I'm not going too

1 fast. I don't have a lot of time, and I want to at
2 least touch on each one of these provisions.

3 On Page 22, this is the victim impact
4 statement, and it's referenced in Section 390.30 and
5 390.50 of the CPL.

6 If you turn to Page 23, this is the scope of
7 the pre-sentence investigation and report,
8 Section 390.30. If you look at the -- I haven't
9 highlighted this language, but it's Subdivision 1,
10 just the investigation. "The pre-sentence
11 investigation consists of the gathering of information
12 with respect to the circumstances attending the
13 commission of the offense, the defendant's history of
14 delinquency or criminality, and the defendant's social
15 history, employment history, family situation,
16 economic status, education, and personal habits."

17 If you go now down to Subdivision 3, this is
18 the victim impact statement.

19 "The report of the pre-sentence
20 investigation must contain an analysis of as much of
21 the information gathered in the investigation as the
22 agency that conducted the investigation deems relevant
23 to the question of sentence."

24 And then, in Paragraph (b) of that
25 subdivision:

1 "The report shall also contain a victim
2 impact statement, unless it appears that such
3 information would be of no relevance to the
4 recommendation or court disposition, which shall
5 include an analysis of the victim's version of the
6 offense, the extent of injury or economic loss and the
7 actual out-of-pocket loss to the victim and the views
8 of the victim relating to disposition including the
9 amount of restitution and reparation sought after the
10 victim has been informed of the right to seek
11 restitution and reparation."

12 And then, the very last sentence:

13 "The victim impact statement shall be made
14 available to the victim by the prosecutor pursuant to
15 subdivision two of 390.50" -- which we're going to
16 look at next. "Nothing contained in this section
17 shall be interpreted to require that a victim supply
18 information for the preparation of the victim impact
19 statement."

20 Now, if you go to Page 25, this is
21 Section 390.50 of the CPL, which relates to
22 confidentiality of the pre-sentence reports. And, if
23 you look at this -- this paragraph (b) that I've
24 highlighted, near the center of the page, relates to
25 victim access to impact statements. And it says, in

1 pertinent part:

2 "The victim impact statement prepared
3 pursuant to section 390.30 shall be made available by
4 the prosecutor prior to sentencing to the victim or
5 victim's family in accordance with" -- et cetera, et
6 cetera. "The district attorney shall also give at
7 least twenty-one days notice to the victim or victim's
8 family of the date of sentencing and of the rights of
9 the victim pursuant to sub two of section 380.50,
10 including the victim or victim's family's obligation
11 to inform the court of its intention, at least ten
12 days prior to sentencing, to make a statement at
13 sentencing." And, I'm going to talk about that next.

14 If you turn to Page 27, this is the victim's
15 statement at the time of sentencing. And, this is --
16 obviously, this is an important section. They key
17 provision here is CPL Section 380.50.

18 Now, I've put a couple of bullets under
19 this. You notice the notice of release or escape of
20 defendant is also contained in this Section 380.50, as
21 well as the notice -- this is to a victim -- of a
22 defendant's request for a name change. These two
23 additional provisions are in Section 380.50, as you'll
24 see.

25 If you turn to the next page, at Page 28,

1 this is the key provision that relates to the right of
2 a victim to make a statement at the time of sentence.

3 And, if you look at Sub 1: "At the time of
4 pronouncing sentence, the court must" -- and this is
5 not highlighted -- "must accord the prosecutor an
6 opportunity to make a statement with respect to any
7 matter relevant to sentence. The court must then
8 accord counsel for the defendant an opportunity to
9 speak on behalf of the defendant."

10 And now, if you go down to (b), where I've
11 highlighted: "If the defendant is being sentenced for
12 a felony the court, if requested at least ten days
13 prior to sentencing, shall accord the victim the right
14 to make a statement with regard to any matter relevant
15 to the question of sentence. The court shall notify
16 the defendant no less than seven days prior to
17 sentencing of the victim's intent to make a statement
18 at sentencing."

19 And then, if you look at (c) where I've
20 highlighted: "Any statement by the victim must
21 precede any statement by counsel to the defendant or
22 the defendant made pursuant to sub one of this
23 section." And then, it says: "The defendant shall
24 have the right to rebut any statement made by the
25 victim."

1 If you turn to the next page, Sub 29, this
2 is the -- and I'm not going to cover this in detail,
3 but this Sub 4, where I've highlighted -- well,
4 actually, I should -- if you look up at (f) toward the
5 top of the page, I've highlighted: "If the victim
6 does not appear to make a statement at the time of
7 sentencing, the right to make a statement is waived."
8 That's obviously an important statutory provision with
9 regard to this victim right.

10 Subdivision 4 that I've highlighted is -- I
11 think Janet's going to talk about this, so I will
12 refrain from doing so. But -- except to mention that
13 it is -- this is where the victim has the right to
14 request that the victim be notified of the release or
15 escape of a defendant. And, I think that it is --
16 where the defendant is committed to the custody of the
17 Department of Correctional Services upon a sentence
18 for a VFO, or a felony defined in Article 125, which
19 is the homicide article, or a sex offense as defined
20 in 10.03 of the Mental Hygiene Law. That's a
21 brand-new section, by the way, that was added by
22 Chapter 7. That's the so-called "involuntary
23 commitment" article of the Mental Hygiene Law.

24 Anyway, I said I wasn't going to talk about
25 it. I didn't. Janet will talk about it in more

1 detail.

2 At the next page, that's Page 30, this is --
3 this is the notice of petition for a name change.
4 This is where the defendant files a petition to change
5 his or her name, and -- and in certain cases, the
6 victim is entitled to notice of that filing -- the
7 filing of such a petition by a defendant.

8 On Page 31, I have listed the four states in
9 the CPL and Penal Law that are most relevant to the
10 issue of restitution.

11 If you turn to Page 32, this is where the
12 principal provision in the Penal Law relating to
13 restitution appears. At Subdivision 1, I'll just read
14 the very first sentence: "In addition to any of the
15 dispositions authorized by this article, the court
16 shall consider restitution or reparation to the victim
17 of the crime and may require restitution or reparation
18 as part of the sentence imposed upon a person
19 convicted of an offense."

20 If you look at the middle of that paragraph,
21 where I've highlighted: "The district attorney shall,
22 where appropriate, advise the court at or before
23 sentencing that the victim seeks restitution or
24 reparation, the extent of injury or economic loss or
25 damage of the victim, and the amount of restitution or

1 reparation sought."

2 And, if you look at the very last sentence
3 I've highlighted there: "In the event that
4 restitution or reparation are not ordered, the court
5 shall clearly state its reasons on the record."

6 So, it's clear that the legislature has been
7 or is -- is attempting here to prompt the judges -- or
8 really require judges to consider restitution in
9 virtually every sentence that they impose.

10 Let's see here. I am now going to jump --
11 if you look at Sub 3 at the bottom, this is just a
12 cross-reference to the provisions of 420.10, 420.20,
13 and 420.30 of the CPL shall apply to the collection
14 and remission of restitution and reparation.

15 Okay. On Page 33, I have the dollar amounts
16 of -- the maximum dollar amounts of restitution. I
17 won't go over those. I'll try to save a little bit of
18 time here.

19 Turn to Page 36. This is the CPL provision
20 that relates to the collection of restitution and
21 reparation, as well as fines. And, if you look at the
22 top, under Subdivision 1, where I've highlighted:
23 "Where the court imposes restitution or reparation and
24 requires that the defendant pay a designated
25 surcharge" -- that's a designated surcharge of -- I

1 believe it's five percent, up to a ten percent
2 designated surcharge -- "of the total restitution
3 amount, the court shall designate the official or
4 organization other than the district attorney,
5 pursuant to sub eight of this section, to whom payment
6 is to be remitted."

7 So, when a court imposes restitution, it
8 requires that the defendant make restitution, the
9 court is supposed to designate a restitution to, in
10 effect, collect that restitution. Generally, that
11 ends up being the Probation Department of the county.
12 And, Bob Maccarone would certainly know more about
13 this, but I believe that in most counties it is the
14 Probation Department that ends up collecting
15 restitution and is considered the designated
16 restitution agency.

17 If you look at Paragraph (a), with respect
18 to restitution: "The court may direct (I) That the
19 defendant pay the entire amount" at the time of
20 sentence, (ii) pay the entire amount at some later
21 date, or at Roman numeral (iii): "pay a specified
22 portion at designated periodic intervals."

23 And, these next two paragraphs -- (b) and
24 (c) -- are important:

25 "When the court imposes both (I) a fine and

1 (ii) restitution and such designated surcharge and
2 imposes a schedule of payments" -- in other words,
3 allows the defendant to set up a payment plan,
4 essentially -- "the court shall also direct that the
5 payment of restitution and such designated surcharge
6 take priority over the payment of the fine."

7 So clearly, the legislature has required
8 here that -- or indicated that restitution is, from
9 the legislature's perspective, more important.
10 Collecting that money for the victim is more important
11 than collecting the fine, because it takes priority.

12 Okay. On Page 37, just very briefly, you'll
13 see imprisonment for failure to pay at the top of the
14 page. And the reason I included this is because just
15 to let you know that if you don't pay restitution --
16 when the court imposes restitution and you don't pay
17 it, if you look at Sub 4 there, in the middle of the
18 page:

19 "When the court directs that the defendant
20 be imprisoned until the fine, restitution or
21 reparation be satisfied, it must specify a maximum
22 period of imprisonment subject to the following
23 limits: for a felony, not to exceed one year; and for
24 a misdemeanor, not to exceed one-third of the maximum
25 term."

1 Now, the court does not have to direct that
2 a defendant go to jail for failing -- for failing to
3 pay restitution, but where the court does so direct,
4 this subdivision -- Subdivision 4 -- governs the
5 period of time that that person can be put in jail for
6 failing to pay.

7 On Page 38, this is another provision
8 relating to restitution that I think I should point
9 out. And, this is entitled "civil proceeding for
10 collection." And essentially, when a restitution --
11 when a restitution order is issued by the court, it
12 says that the court -- that the order -- that
13 restitution "shall be imposed or directed by a written
14 order of the court containing the amount required to
15 be paid. The court's order shall also direct the
16 district attorney to file a certified copy of such
17 order with the county clerk."

18 And then, at the bottom of the highlighting:

19 "Such order shall be entered by the county
20 clerk in the same manner as a judgment in a civil
21 action in accordance with CPLR 5016(a)."

22 Now this, essentially, is, as the title of
23 the subdivision indicates, a civil proceeding for a
24 collection. This order is supposed to be issued every
25 time -- by a judge, every time the judge imposes

1 restitution or a fine. And, the order is supposed to
2 be in writing, and it's supposed to direct the DA to
3 file a copy of the order, which becomes a civil
4 judgment. It's filed with the county clerk. And it
5 becomes a civil judgment against the defendant.

6 I'm going to skip over Page 39, which is the
7 designation of the restitution agency, and go to
8 Page 41. This is CPL 420.05. Again, it relates to
9 restitution, or at least I think it does, because it
10 allows -- I'll just read the first sentence:

11 "When the court imposes a fine, mandatory
12 surcharge or fee upon an individual who stands
13 convicted of any offense, such individual may pay such
14 fine, mandatory surcharge or fee by credit card or
15 similar device."

16 This section was amended in 2005 to read
17 like this. It used to be limited to -- where it says
18 "fee," it used to say "crime victims assistance fee,"
19 and the legislature figured, well, let's expand that
20 to any kind of fee, including the DNA data bank fee,
21 sex offender registration fee, supplemental sex
22 offender victim fee, which is \$1,000, by changing
23 "crime victims assistance fee" to simply the word
24 "fee." All those -- all those fees can now be
25 collected using a credit card, which obviously or

1 arguably, at least, makes it much easier to collect
2 that money.

3 And, you'll note that there is no mention in
4 this section of collecting restitution by credit card,
5 and that's the reason why I put it in here. There
6 actually is a bill drafted that would add restitution
7 to the list of things that can be paid by credit card.
8 And so far, I have had no luck getting that enacted,
9 at least when I was at OCA.

10 At Page 42, this is the -- this is also
11 relating to restitution. It's Penal Law 65.10. And
12 essentially, this -- this is the statutory provision
13 that says that when someone gets probation -- gets
14 sentenced to probation, the court -- and if you look
15 at the top, where it's highlighted:

16 "The court shall, as a condition of the
17 sentence, consider restitution or reparation and may,
18 as a condition of the sentence, require that the
19 defendant" --

20 And, if you jump down to (g) at the bottom:

21 "Make restitution of the fruits of his or
22 her offense."

23 So, this is the provision that allows
24 restitution to be made a condition of a probation
25 sentence, and requires the judge, when imposing any

1 probation sentence, to consider restitution to the
2 victim.

3 Okay. I'm almost finished here. If you
4 turn to Page 46, this is the last -- this is the last
5 section. And again, this is the section that was not
6 included in that roadmap that I pointed out at the
7 very beginning, that pamphlet. This is the victim's
8 to request HIV testing in certain cases. It's set
9 forth in CPL Section 390.15, which appears on the next
10 page.

11 And, I'm just going to read from (a), up on
12 the top there:

13 "In any case where the defendant is
14 convicted of a felony offense enumerated in any
15 section of article 130" -- which is the sex offense
16 article -- "or any subdivision of section 130.20" --
17 which is a misdemeanor sexual misconduct -- "where an
18 act of 'sexual intercourse,' 'oral sexual conduct' or
19 'anal sexual conduct,' as those terms are defined, is
20 required as an essential element for the commission
21 thereof, the court must, upon a request of the victim,
22 order that the defendant submit to HIV related
23 testing."

24 There is -- there is a bill on the
25 Governor's desk now that was proposed by DCJS that

1 will add a new Section 210.16 to the Criminal
2 Procedure Law. It's related to HIV testing. It
3 doesn't relate to sentencing, really, because I assume
4 the Governor will sign this, and when he does, it will
5 -- it will allow for HIV testing of defendants who
6 have been indicted, or where the indictment has been
7 filed. Upon request of the victim, the defendant can
8 be tested for HIV early in the criminal process, prior
9 to conviction, provided certain criteria that are in
10 that statute are satisfied. And, that's Senate
11 Bill 6357. Again, that's on the Governor's desk.

12 I don't know how long that took me, but I
13 tried to go as quickly as I could. I hope I didn't go
14 too quickly. If you have any questions, you know, you
15 can refer to the handout or, of course, just ask me,
16 and I'd be happy to direct you.

17 Are there any questions now?

18 COMMISSIONER ALEXANDER: John, just
19 briefly. Go back to Page 7. This is 642. The last
20 sentence in the first paragraph seems to defeat the
21 whole purpose of the statute. It says that there is,
22 in effect, no penalty or anything, I think here, if
23 the victim isn't considered as part of the process.

24 MR. AMODEO: Yeah, that -- I mean, that's a
25 -- that's, I think, a fair criticism of a lot of this

1 entire Article 23, because that's what -- that's what
2 people have been asking me for years. What happens if
3 the DA, the courts don't do what they're supposed to
4 do under Article 23? And, there is -- there is tons
5 of things they're supposed to do with respect to
6 victims.

7 And the answer is what happens if they
8 don't? My answer is good question. You know, there
9 isn't anything in there that I know of that -- that,
10 you know, and that's something that I say both that
11 the Commission should consider --

12 COMMISSIONER STANFORD: May I say
13 something? Looking at this now with -- with a
14 different hat on, having been a former prosecutor, I
15 think the reason they may have included these clauses
16 is because sometimes victims disappear. Sometimes, we
17 just can find them, and they don't -- or they don't
18 want to be found. Say, unfortunately sometimes, in
19 family crimes against family members? They're not
20 cooperative.

21 So, I'm guessing they might have put this in
22 there to keep from delaying the process where -- in
23 cases where you don't have cooperative victims.

24 But, it may be that that language needs to
25 include that clause, --

1 COMMISSIONER ALEXANDER: Right.

2 COMMISSIONER STANFORD: -- if that's the
3 reason.

4 MR. AMODEO: Thank you.

5 COMMISSIONER BERGAMO: I have a question --

6 COMMISSIONER ALEXANDER: Thank you, John.

7 COMMISSIONER BERGAMO: -- sir. You know,
8 is the victim statement -- is the victim statement
9 available to the Parole Board?

10 COMMISSIONER ALEXANDER: Yes.

11 MR. AMODEO: I think it is.

12 COMMISSIONER BERGAMO: It is, yes?

13 MS. KOUPASH: No, it's not automatic. What
14 happens is, is depending -- there is nothing in the
15 statute that requires the sentencing court to forward
16 the victim impact statement to Parole. That's
17 something that Felix Rosa and I have learned only just
18 recently, after looking at the statute more carefully.

19 So, what we've been doing is we've been
20 going to the prosecuting district attorney offices and
21 we're saying please let them know that if they have
22 done a statement and they want it in the parole
23 records, they need to either request the DA -- to
24 instruct the court to forward it to Parole. The DA
25 needs to forward it to Parole. Or, the victim has to

1 keep a copy and forward it to Parole themselves.

2 But right now, the statute does not require
3 the victim impact statement at time of sentencing to
4 be forwarded to Parole, to be taken into consideration
5 by the Parole Commissioner.

6 COMMISSIONER ALEXANDER: There's no formal
7 requirement. But oftentimes, when we request the
8 comments from the prosecuting attorney, that they will
9 send --

10 MS. KOUPASH: They will send that --

11 COMMISSIONER ALEXANDER: -- that along as
12 an attachment.

13 MS. KOUPASH: Yeah.

14 COMMISSIONER BERGAMO: Okay, thank you,
15 both. I didn't -- I didn't know. Thank you.

16 COMMISSIONER NEWTON: Well, shouldn't --

17 MS. KOUPASH: Generally, when --

18 COMMISSIONER NEWTON: -- that go in the
19 probation report? Since that's the most -- single
20 most important document, that's one thing -- the only
21 thing I learned. I learned something. That's the
22 single most important document for DOCS. Why wouldn't
23 we automatically say if there's a written probation --
24 I mean, statement, that it has to go with the
25 probation report?

1 MS. KOUPASH: There is a concern that --
2 Probation offices that I have spoken with, there is a
3 concern that the victim won't cooperate if they can't
4 be assured that the statement will remain
5 confidential, and the offender is not going to get a
6 copy of it. It often contains their phone number,
7 their home address, or something of that nature.

8 So, some Probation offices have made it a
9 practice, just within their own county, to detach it
10 --

11 COMMISSIONER ALEXANDER: That's right.

12 MS. KOUPASH: -- before the pre-sentence
13 investigation is forwarded to Corrections. And,
14 that's a county-by-county policy decision. There is
15 no standard from one county to the other in that
16 matter.

17 COMMISSIONER NEWTON: Well, I think in my
18 experience it's more likely that a person will give a
19 statement to Probation than show up in court, if
20 they're really that concerned. So, it seems to me,
21 since that's the one document we know has to follow
22 the defendant, that we should make that as complete a
23 document as it can possibly be, rather than relying on
24 the district attorneys. I mean, that's important, but
25 that's -- the district attorney is not sentencing the

1 person. The judge's -- the minutes universally don't
2 go. There used to be a time we always sent --
3 indeterminate minutes were always transcribed and
4 sent. We discontinued that, and I'm not sure why. I
5 assume because of monetary reasons.

6 But, since we know this one document is
7 going, I think that we should encourage that that be
8 as complete a document, and as final a document as --
9 as it could possibly be.

10 COMMISSIONER ALEXANDER: And, you're right,
11 Judge. But oftentimes, what happens is that there's a
12 delay in reaching the victim, him or herself, and
13 there's some time elements, as you know, in terms of
14 getting that PSI from Probation to the courts,
15 themselves.

16 And so, because of those factors, sometimes
17 that victim statement isn't there, or isn't there in
18 its entirety.

19 MR. ANNUCCI: Perhaps that's a fair
20 question for a subcommittee to explore, --

21 MS. KOUPASH: Yes.

22 MR. ANNUCCI: -- whether or not the victim
23 impact statement should automatically be part of the
24 pre-sentence report, but allow an exception to be made
25 for good cause shown. You will have certain victims

1 that just are very concerned, that they don't want a
2 piece of paper that's an official record.

3 And I know your -- your unit that collects
4 victim statements from them also has to absolutely
5 assure anonymity. Because they're -- they're
6 concerned about retaliation aspects from -- from the
7 defendant, and various other issues.

8 So, that might be a fair way to -- a fair
9 question to explore, making it part of the
10 pre-sentence report, but allowing the judge to say
11 exceptions, based upon good cause shown. And that
12 way, we'd get it except in appropriate cases.

13 COMMISSIONER O'DONNELL: Okay. Tina, will
14 you make sure that we take that issue up in the
15 subcommittee?

16 MS. STANFORD: Yes.

17 MR. ANNUCCI: And, one other quick thing,
18 if I may? This is not a question, but perhaps a
19 suggestion for another evaluation for a subcommittee.

20 The definition of restitution is for fruits
21 of his or her offense, or actual out-of-pocket loss,
22 which seems pretty restrictive. And we know, even
23 just listening to our last speaker, that it gets very
24 personal when you suffer some type of injury, whether
25 it's from a burglary or what have you.

1 And, it can be important for somebody -- a
2 crime victim, in particular -- to feel that they are
3 directly getting paid back, as part of this
4 defendant's punishment. So, I think a fair question
5 for one of the subcommittees is whether or not we
6 should explore expanding the definition of
7 restitution, what it could encompass. Should a
8 defendant be required to make restitution for
9 emotional distress caused? Or some type of physical
10 injury? Things that the sentencing court could
11 impose, as part of the criminal sentence.

12 COMMISSIONER O'DONNELL: A very good
13 observation.

14 COMMISSIONER NEWTON: I think the less and
15 less objective it becomes, though, the more likely you
16 might have to have some kind of hearing, --

17 MR. ANNUCCI: Um hmm.

18 COMMISSIONER NEWTON: -- which is not
19 necessarily anything good for the victim, because
20 frequently you have plea bargain in 98 percent of the
21 cases, because the victims don't want to testify. So,
22 this -- just, in the subcommittee, you should look at
23 how that would be implemented. It's always an
24 important issue.

25 MS. KOUPASH: And I think, to follow up on

1 that, one of the things that has become apparent to
2 me, as I'm speaking to victims, of course I speak to
3 victims post-conviction. It could have been -- the
4 conviction could have happened three years ago, seven
5 years ago, nine years ago. Who knows how long ago
6 this crime occurred, and how long ago the conviction
7 occurred? How long until they finally reached
8 somebody, either in my unit or in the Parole Victim
9 Impact Unit.

10 What happens is the clock doesn't stop for
11 the victim simply because the sentence has occurred.
12 So, if the financial loss at the time of sentencing
13 was \$3,000 but that victim has subsequently had two
14 additional surgeries, and has, for one reason or
15 another, is not compensation eligible -- they weren't
16 participating or whatever -- that doesn't mean that
17 the out-of-pocket expense has stopped occurring.

18 So, there are -- some prosecutors have
19 become very good at getting statements from
20 psychologists, at getting statements from treating --
21 treating physicians, surgeons. You know, it's
22 anticipated that this person is going to need two more
23 surgeries, at a cost of \$12,000 of whatever.

24 So, there are some prosecutors who are
25 looking to actually not only look at what is the

1 pocket -- out-of-pocket expense at the time of
2 sentencing, but they're now saying and what is the
3 anticipated out-of-pocket expense, and let's make sure
4 that the offender is held accountable for that
5 anticipated expense, as well.

6 But, that is something that the subcommittee
7 may want to look at, as well.

8 COMMISSIONER O'DONNELL: Why don't we
9 switch places here, and John, I appreciate you putting
10 that together and -- and the thoroughness of your
11 presentation and materials.

12 And, we're now going to move to how things
13 really work. And, you know, as we heard from John's
14 presentation, DOCS has a critical role to play, in
15 terms of victim notification, and victim services.

16 And so, we're going to hear about, from
17 Janet, --

18 MS. KOUPASH: I'm actually --

19 COMMISSIONER O'DONNELL: -- how the program
20 works.

21 MS. KOUPASH: I'm actually going to just do
22 a real quick overview of those services that are
23 available to victims post-conviction, but then I'm
24 going to take some personal information and I'm going
25 to apply a specific case, based on the statutes, so

1 that you can see all the places where treatment of
2 victims differs significantly on very -- because of
3 very, very minute details.

4 What appears to be minute details in
5 sentencing statutes radically and drastically alters
6 what services can and can't be provided to victims.
7 So, I'm going to talk about that, as well.

8 Just to let you know, the Office of Victim
9 Services in State Corrections came into existence in
10 1998. It came into existence because of the passage
11 of Jenna's Law. For those of you who don't know,
12 Jenna was murdered in Albany by a repeat violent
13 felony offender on parole.

14 And, one of the key things that happened
15 with the passage of Jenna's Law is those rights of
16 notification to crime victims were moved out of
17 Correction Law and placed in Criminal Procedure Law.
18 And, that was a great accomplishment, because the
19 prosecuting district attorney's office is the office
20 that has the obligation to provide information to the
21 victim or the surviving family members that they have
22 the right to notification of an offender's release
23 from custody. And, prosecuting district attorneys are
24 great with Criminal Procedure Law. That is their area
25 of expertise.

1 Corrections are great at Correction Law, so
2 having that obligation, that mandate for the
3 prosecutor to perform a function in Correction Law was
4 not really so great a place for it, because that's not
5 where the prosecutors are the expert. So, that was a
6 great thing to move it into Criminal Procedure Law.
7 That was a very important accomplishment.

8 The other thing that Jenna's Law did is it
9 mandated the Department not just to provide written
10 notification to victims and surviving family members,
11 but also to provide telephone notification. The
12 difference being that written notification is provided
13 to those, based on surviving family members of violent
14 felony offenses. It is -- the telephone notification
15 program is open to any member of the public, any
16 member of the community. It doesn't make any
17 difference if you're the next-door neighbor, if you
18 are the first-grade teacher, if you're the victim,
19 whatever. You can register yourself with this
20 telephone notification program.

21 We have a contract with a company in
22 Kentucky called Appriss, and they are the provider of
23 the VINE service -- Victim Information and
24 Notification Everyday. There is two blue folders
25 available to everybody -- one with the DCJS emblem on

1 it, and one that is just plain -- and there's a lot of
2 information on VINE in the left-hand side of the plain
3 blue folder, so I'm not going to go over it too much.

4 But, just to let you know the type of
5 utilization that this telephone notification program
6 has, just in the year 2006, the last calendar year,
7 there were 2,389 new registrations on that VINE
8 telephone notification program for those offenders who
9 are in State Corrections. So, almost 2,500. There
10 were 1,670 successful notification calls placed when
11 an offender was released from custody.

12 In the first six months of this year, we
13 have 1,141 new registrations. So, we're right on key
14 to continue with the numbers. And, we've gotten 926
15 successful notification calls placed.

16 Now, I'm saying "successful notification
17 calls," because guess what? We all move, we change
18 our phone numbers, we change our cell numbers, or
19 whatever. So, there are plenty of times that the
20 notification calls are being placed, but it's -- it's
21 timing out and it's undeliverable because that phone
22 number no longer exists. So, it is a greatly utilized
23 service.

24 If you want to look at the written
25 notification statistics, we actually have fewer

1 requests -- fewer demands forwarded to us for written
2 notification. And again, written notification is
3 limited to those offenders who have been convicted of
4 violent felony offenses, where the VINE program is
5 anybody, and it doesn't make any difference if it's a
6 violent or a non-violent felony offense. You can
7 register on that telephone notification service.

8 So, while there were 2,389 new registrations
9 on VINE in 2006, and 1,670 notification calls, we
10 actually mailed out 2,850 certified letters in
11 calendar year 2006. That's how many violent felony
12 offenders had a victim registered against them,
13 resulting in notification to that victim.

14 Unfortunately, of those 2,850, only 45
15 percent of the letters were delivered -- we were
16 missing apartment numbers, we have incomplete
17 addresses, or whatever.

18 So, in the first six months of 2007, we have
19 sent out 1,506 certified letters to victims who were
20 wanting the information about the offender's release
21 from custody, and out of those 1,506, we've actually
22 only had 567 delivered, which is approximately 38
23 percent.

24 So, while we are in full compliance with the
25 law, it is very clear that the victims who have asked

1 for this information, and they have filed the form
2 through the prosecuting district attorney's office,
3 they're not getting the information that they're --
4 that they're wanting.

5 We do a due diligence. We try to find the
6 victims. We go back to the prosecuting district
7 attorney's office. We make calls to local service
8 providers, advocacy programs, et cetera, and we try to
9 find the victims. But, we unfortunately are not
10 always successful in our delivery of the mail
11 notifications.

12 To look at the language in Jenna's Law, the
13 victim of a violent felony offense. I'm going to real
14 quickly give you a quick case scenario and see how it
15 applied, or doesn't apply, or has completely changed
16 for this particular family.

17 My 18-year-old nephew was killed by a drunk
18 driver last April. This was a repeat drunk driver.
19 Had a history of many, many years -- more than a
20 decade of drunk driving, in a very rural community.
21 Fortunately or unfortunately, I don't know how to look
22 at it, for the majority of his drunk driving crashes,
23 he took out a fence, he ran off the road, he hit a --
24 you know, a pole or whatever. And, the only person
25 injured was himself.

1 There were two incidences where he actually
2 was arrested for a DWI, and they both pled out to
3 basically nothing. So, he had no convictions.

4 The night that he killed my nephew he -- my
5 nephew was the passenger in the front seat. His
6 girlfriend was driving. And, their friend was in the
7 back seat. Brandon was the only one who died.

8 Tilly, the driver, his girlfriend, has
9 severe hip damage from her seat belt, and it's
10 anticipated that it will require two years of physical
11 therapy for her to be able to walk normally again.

12 John, their buddy in the back seat, was in
13 intensive care. They didn't think he was going to
14 live. His parents had to sit vigil in the hospital
15 for four days before they even decided that he might
16 make it. He's had eight orthopedic surgeries. He's
17 anticipated to have probably another six. And, this
18 17-year-old young man is now unable to walk
19 unassisted. So, the amount of damage done to these
20 three young kids, and their families, and their
21 community is quite extensive.

22 The person was originally indicted for
23 murder second, manslaughter, and vehicular
24 manslaughter. Despite the grand jury indictment on
25 murder second, the judge made a decision to drop that

1 charge. So, he was only -- and, he took to trial. He
2 would not accept a plea. So, the trial, basically,
3 was going to decide whether this was going to be a
4 manslaughter conviction or a vehicular manslaughter
5 conviction.

6 If it were a manslaughter conviction, then
7 my family -- my sister-in-law, her two surviving boys,
8 they have the rights to notification of this
9 offender's release from custody, because manslaughter
10 is a violent felony offense. They had the right to a
11 face-to-face interview with a Parole Commissioner
12 prior to this offender's parole hearing because,
13 again, that right is afforded when it's a violent
14 felony offense.

15 Under the Son of Sam Law, manslaughter is a
16 specified crime. They would have the right to notice
17 if this offender had gotten access to \$10,000 more
18 money, and compensatory damages, et cetera.

19 That's only if he were convicted of
20 manslaughter.

21 If, however, the jury came back with a
22 vehicular manslaughter conviction, their rights were
23 completely different. The same crime, the same dead
24 child. But, their rights would be completely
25 different, because in New York State, the sentencing

1 statute for vehicular manslaughter is not a violent
2 felony offense.

3 Therefore, under Criminal Procedure
4 Law 380.50, they do not have the right to notice of
5 that offender's release from custody. They do not
6 have the right to a face-to-face meeting with a Parole
7 Commissioner prior to that offender's hearing. The
8 rights differ depending on the final charge.

9 Similarly, this happened to be an adult who
10 killed him. If however, this were a child driver, a
11 young driver, and this offender was adjudicated
12 youthful offender, their rights would be yet, again,
13 even more different. Because, when you're adjudicated
14 a youthful offender, you're not convicted of a crime.

15 Therefore, they wouldn't even be able to be
16 told if the offender was in State Corrections custody
17 or not, in an OCFS facility or not. Their rights for
18 information, even on the VINE notification service,
19 you can't register on the VINE telephone notification
20 service against a youthful offender, because they've
21 not been convicted of a crime, and the law says you
22 have to be convicted and in State Corrections custody.

23 So, the exact, same case, the exact, same
24 death of this young man, would have resulted in very,
25 very, very, very different rights for my family on

1 some very minute changes in the statute -- violent
2 versus non-violent felony offense, adjudication versus
3 conviction.

4 So, when you are looking at sentencing
5 reform, look at the impact on crime victims. Because
6 small wordings, small languages -- like she said with
7 Vera this morning, it's going to have a huge impact.
8 Just that violent versus non-violent felony completely
9 changes the rights of a crime victim to participate or
10 not to participate in the system. So, you need to be
11 aware of that.

12 Indeterminate versus determinate sentencing.
13 With a determinate sentence, there is no parole
14 hearing. Therefore, it's not a decision where a
15 Parole Commissioner would meet with a victim ahead of
16 time to get their victim impact statement, because
17 Parole doesn't have any say in the releaseability of
18 that offender. So, unfortunately, victims are under
19 the impression that, well, when it's a determinate
20 sentence, I have no right to participate in the Parole
21 Victim Impact process. Well, they do.

22 Parole is very generous with victims. Even
23 when it's a determinate sentence, that victim can
24 still submit victim impact statement, still -- either
25 written, videotaped, or audiotaped -- simply because

1 Parole may add special conditions on that offender's
2 release. Stay-away conditions, anything like that,
3 that if an order -- particularly if an order of
4 protection was not issued at sentencing.

5 So, when you are looking at the victim
6 impact with determinate sentences, please don't assume
7 that victims don't have rights to continue to
8 participate in the criminal justice process, because
9 they do. Unfortunately, that information is not out
10 in the community.

11 So, far too often, when there is a
12 determinate sentence and there is not going to be a
13 parole hearing, victims are kind of severed from that
14 criminal justice process, and that's an error that I
15 don't know if it can be corrected in some of your --
16 in some of your language that may be recommended, but
17 it is something to bear in mind and something to
18 consider.

19 Restitution through State Corrections.
20 Restitution absolutely can be ordered even if that
21 offender is going to state prison. It is not just
22 ordered when the person is receiving a probation
23 sentence.

24 We have very good policy and procedure on
25 restitution collection and disbursement in State

1 Corrections. I'm actually quite proud of what State
2 Corrections accomplishes with our restitution
3 collection and disbursement.

4 But, just to give you a quick summary, we
5 have written policy that allows us to encumber a
6 portion of an inmate's payroll account, which includes
7 deposits from an outside source. Mom shows up for a
8 visit, leaves him \$20 so he can buy extra chips in the
9 commissary or whatever. We can encumber those
10 deposits to the inmate's account for any one of a long
11 list of reasons -- mandatory surcharge, crime victim
12 assistance fee, restitution, sex offender registration
13 fee, all of those things that are court ordered, in
14 addition to child payments -- child support payments.

15 We will encumber as many as the court
16 orders. If they give us nine things that we're
17 supposed to -- nine fees, fines, penalties,
18 restitution -- we'll encumber all nine things that the
19 court instructs us on the commitment paper that the
20 offender has the obligation to pay. We'll collect on
21 two of those at a time.

22 So, we may encumber nine, but we're only
23 collecting on two. We don't want to take all the
24 offender's money. He still has a right to -- he or
25 she still has a right to go to the commissary, and

1 shop in the L.L. Bean catalog, or whatever it is that
2 they want to do with their money. So, we will
3 encumber an inmate's account.

4 To give you some information on how much
5 money was disbursed back to the crime -- to the
6 Probation Offices or the five boroughs of New York
7 City, and back to Safe Horizon, in calendar year 2006,
8 we disbursed \$226,670.59, so that that money can go
9 back to victims. In the first six months of calendar
10 year 2007, we have already disbursed \$113,188.46.

11 So, even when an offender goes to prison, it
12 is not a waste of time and effort to order
13 restitution. And that includes when it's a plea. I
14 will have victims call me and say, you know, he was
15 sentenced two years ago. And, I'll say, all right,
16 did you give a victim impact statement at sentencing?
17 Oh, no, it was a plea. I wasn't allowed to do that.
18 Well, yeah, even if it's a plea, because it's a felony
19 conviction, you still have the right to give a victim
20 impact statement at sentencing. They're being told
21 no, they don't.

22 Well, how about restitution? Did you
23 provide any information to the prosecuting district
24 attorney's office about restitution? Did you tell
25 Probation, when they did the pre-sentence report, that

1 you had receipts and you needed restitution?

2 And again, the answer is, oh, no, it was a
3 plea agreement. I'm not entitled to any restitution.

4 So, whatever is going on with the language
5 and the application of the statute, when it's a plea
6 agreement versus a trial is something that I'm hoping
7 that the Commission can pay attention to, because
8 clearly the victims are hearing, or are being
9 instructed, or are being misinformed that when it's a
10 plea agreement -- and you gave us statistics of 98
11 percent plea agreement -- that their rights somehow
12 are different. That the rights, as John defined from
13 the statutes, don't apply when it's a plea agreement.
14 And, that's not the case at all, as the statutes are
15 currently written.

16 I don't know if there's language that needs
17 to be taken up there, but clearly the victims are
18 being negatively impacted when it's a plea agreement,
19 because they're being told that their rights don't
20 apply to them, and that the services don't apply to
21 them.

22 Orders of protection. Similar to what we
23 talked about earlier with victim impact statements not
24 coming to us with pre-sentence reports. They also
25 don't come to us when it's an order of protection.

1 So, even if the sentencing judge issues an order of
2 protection, there is nothing in the statute that
3 requires the sentencing court to forward it to us.

4 The requirements that the sentencing court
5 has for forwarding documents to us are really very
6 small -- pre-sentence report, commitment paper,
7 fingerprint card. I mean, it's -- there's a minimal
8 amount of information that gets forwarded from the
9 sentencing court.

10 So, far too often what we're learning is the
11 offender has an order of protection. We in State
12 Corrections are not aware of it, especially if it's
13 not a family offense, because the family offenses at
14 least go in the registry. But, the non-family
15 offenses, they don't even go in the registry.

16 So, we're not aware of them. Therefore,
17 through this black hole in the sentencing guidelines,
18 we don't know to negate that person's correspondence
19 record. So, that person is being written who knows
20 what content of letter from behind the walls and
21 fences of our prisons simply because we're not aware
22 an order of protection exists.

23 Similarly, Parole, if it's a non-family
24 offense, may or may not be able to get their hands on
25 an order of protection, and may or may not be able to

1 add that into a special condition of that offender's
2 release.

3 If we are ignorant of the information
4 because it is not forwarded to us, then we are not
5 serving that victim well. If we have the information,
6 again, from Vera, she said we need the data. Well,
7 yeah, we need the document. We need to know what the
8 sentencing court instructed this offender.

9 We're not getting the sentencing minutes, as
10 you said. And, we're not getting the document.
11 Therefore, the victim is likely to continue to be
12 harassed, intimidated, contacted by that offender
13 because of this black hole that is created by the
14 weaknesses in the law. So, it's something else to
15 bear in mind.

16 Son of Sam. There were several changes in
17 the Son of Sam statute several years ago that have
18 really worked out very well for victims. Originally,
19 the Son of Sam statute didn't afford the offender the
20 ability to proceed from the fruits of his crime. He
21 couldn't become famous or rich from books, or movies,
22 or whatever. What we learned is that they access
23 money from many, many ways, whether they're named in a
24 will, or there's an old Allstate Insurance claim that
25 finally came to fruition after they were in custody,

1 and now they're getting this \$25,000 check from
2 Allstate, et cetera.

3 So, offenders have access to money from
4 many, many different ways. So, the changes in the Son
5 of Sam statute now kind of re-set the window of
6 opportunity for a victim to bring forward a civil
7 action.

8 Originally, regular civil law applied, and
9 there was a limited window of opportunity for that
10 victim to bring forward a civil claim against the
11 offender. Now, with the Son of Sam statute, it re-
12 opens the window. Yeah, that original window of
13 opportunity set by the civil law still exists. But
14 if, fourteen years later, that offender -- whether in
15 Corrections or on parole -- has access to money
16 \$10,000 or greater, it re-opens the window of
17 opportunity for the victim.

18 So, what happens is, if it -- if it's an
19 offender in custody, and I learn that this offender --
20 it's an automated printout that I get every day --
21 that this offender has access to \$10,000 or more, or
22 is about to receive a sum of money \$10,000 or more, I
23 notify Crime Victims Board. Their counsel goes ahead
24 and -- and notifies the victim of their rights under
25 the new and expanded Son of Sam law. The money gets

1 frozen, so that the inmate cannot disburse it pending
2 resolution of the lawsuit, the victim's civil suit.

3 And, what we've learned is, in the majority
4 of cases when the victim hires an attorney, under the
5 new Son of Sam statute, and says hey, look, you've got
6 access to \$25,000 right now because of this Allstate
7 claim that's been mailed into you from a car accident
8 six years before the instant offense, I want it. I'm
9 going to sue you for \$75,000 and you're not only going
10 to have to turn over that \$25,000 to me, but I'm going
11 to expect \$50,000 more, and I'm going to make sure
12 that this civil damage -- this civil award is -- is
13 against you for another ten years.

14 What we've seen is a pattern where the
15 inmates are kind of cleaning it out. They're saying,
16 well, you know, she's kind of got me, because I've
17 already been found guilty in criminal court, which has
18 a higher fact-finding than the civil court. So
19 really, the only thing that the civil court has to do
20 is not to decide whether this offender is accountable
21 for the behavior, has an obligation to this victim,
22 but the dollar amount that this offender has for that
23 victim.

24 So, in the majority of cases, the offenders
25 are just kind of turning over the money, or turning --

1 if not all the money, then clearly the majority of the
2 money. So, it's working out very well for victims to
3 have this Son of Sam statute.

4 But again, you have to be the victim of a
5 specified crime. Going back to the death of my
6 nephew, if the conviction had been for vehicular
7 manslaughter, my sister-in-law would not be eligible
8 under the Son of Sam statute, should that drunk driver
9 have access to money.

10 Fortunately for us, he was convicted of a
11 violent felony offense, and her rights are much more
12 extensive because of that. But, when you're looking
13 at the rights of crime victims in sentencing, you need
14 to be very, very aware of the violent felony versus
15 non-violent felony offense. It completely changes the
16 rights of a victim. Adult offender versus those
17 adjudicated youthful offender, it completely changes
18 the rights of the victims.

19 So, it's something to bear in mind when
20 you're looking at your sentencing statutes, and walk
21 in the shoes of somebody such as my sister-in-law in
22 the death of her son, and see if you think the death
23 of her son was less important, less impactful simply
24 because the conviction was for a vehicular
25 manslaughter instead of manslaughter.

1 doesn't --

2 MS. KOUPASH: -- be threatened by
3 retribution.

4 COMMISSIONER BERGAMO: -- exist, it doesn't
5 exist. Okay.

6 MS. KOUPASH: So, if there is retribution,
7 it's not information that's reaching me.

8 COMMISSIONER BERGAMO: It would reach you.

9 MS. KOUPASH: And, I speak to a lot a lot
10 of victims.

11 COMMISSIONER BERGAMO: Yeah, okay.

12 MS. KOUPASH: I don't know if Parole Victim
13 Impact, if they are hearing of victim retribution or
14 whatever, but that's not being reported to me. I
15 mean, we talk about the data versus anecdotal
16 information. Anecdotally, I can tell you no, I -- I'm
17 not hearing that at all.

18 COMMISSIONER BERGAMO: Well, if you don't
19 hear it, it probably doesn't exist, or it's de
20 minimis. Thank you.

21 MS. BIANCHI: Thanks, Janet.

22 I just want to point out, in your packet,
23 there is a Law Review article by Tony, published in
24 the New York Law Review, and somebody had asked about
25 that.

1 And, before we move on, I just want to
2 introduce Commissioner Karen Carpenter-Palumbo, from
3 the Office of Alcohol and Substance Abuse Services.
4 And, OASAS is going to be assisting us with our
5 Sentencing Commission work. So, she's here and I
6 believe representatives from her office will assist us
7 on the subcommittees.

8 And now, we're going to hear from Tony
9 Girese. Tony is counsel to Bronx District Attorney
10 Rob Johnson. He previously served in the Manhattan
11 DA's Office, and as Chief of Appeals in Nassau County.
12 And, he is a sentencing expert, and he is here to
13 provide us with some of his expertise to get us on our
14 way.

15 SIMPLIFYING AND STREAMLINING NEW YORK STATE'S

16 SENTENCING STATUTES: A MODEST PROPOSAL

17 MR. GIRESE: Actually, that introduction is
18 something of an exaggeration. As I hope I'm about to
19 demonstrate, nobody in the State of New York is a
20 sentencing expert.

21 Okay. Let's start, because I realize that
22 after this we have lunch.

23 The first slide says why should we care
24 about simplifying sentences? And, I guess it's
25 appropriate to start with that because, let's face it,

1 you've heard a lot about a lot of very complex
2 substantive stuff. And, you're probably going to hear
3 more.

4 And, an issue like simplifying sentences
5 probably strikes you more or less as a matter of form,
6 and you might be tempted to say, "Oh, come on, you
7 know, the lawyers can figure it out, particularly
8 those appellate-type lawyers who like to look in the
9 dusty books and mutter to themselves." I'm sorry,
10 Wendy. Wendy Lehman is the Chief of Appeals in a DA's
11 office. I've been a Chief of Appeals.

12 It's a position that requires you to be on
13 mission, because 50 times a week people will call you
14 up and say something like, "I'm in court and I need an
15 answer right now." And, if it's something simple
16 like, you know, interstate geographical jurisdiction,
17 or facial constitutionality or double jeopardy, you
18 just answer them.

19 But, if it's a sentencing issue, what I
20 usually do is say, "It's sort of a gray area. Let me
21 call you back. I'm getting another call." And then,
22 I frantically turn, you know --

23 (Pause)

24 MR. GIRESE: Okay. The entire thrust of
25 this presentation essentially is committed to three

1 points. And, they are:

2 One, owing to a process of legal evolution
3 in the course of, like, 40 years, and really through
4 no one's fault, the present structure of the New York
5 -- the New York sentencing statutes is an appalling
6 mess.

7 Two, that has some real world consequences.

8 And three, this Commission has a great
9 opportunity to at least start addressing this problem.

10 And, we'll go over this. That's where you
11 see this is historically.

12 The modern penal law was enacted in 1967.
13 And, at the time it was created, basically working off
14 the model penal plans, five felony categories were
15 created, lettered "A" through "E." And, the length of
16 sentences, the actual jail time you could get, was
17 contained entirely in Penal Law Article 70.

18 We did a very rough and unscientific survey
19 of the 1967 version. It was nine sections, took up
20 about six pages, 50 subsections, about 2,500 words.

21 And, the way that worked basically was you
22 took a substantive crime -- here is robbery in the
23 first degree. Most of you, I guess, are familiar with
24 this. And, you looked at the bottom of the
25 substantive crime, and it said "robbery in the first

1 degree is a Class B felony." And then, you opened to
2 Penal Law Article 70, and you looked up one section,
3 and what you came out with was the potential length
4 you get on sentence, indeterminate sentence, and so
5 on, and so forth. It was a fairly simple process.

6 Over the course of time -- 40 years, to be
7 exact -- there have been a cascading series of major
8 legislative revisions to this structure. These are
9 just -- this is four of the major ones, and many,
10 many, many minor ones.

11 Every time this happened, another layer of
12 complexity got added to the original structure,
13 usually in very complex language. Again, let me just
14 say this is not intended as a criticism. Some very
15 bright people worked on this over the course of time.
16 But, I suspect you all know how things work in Albany.

17 Basically, usually at the end of the
18 legislative session, you get an enormously complex
19 proposal, you have to modify it, you have to fit it
20 into an existing structure. When you do that, the
21 natural tendency is not to revise what's already on
22 the books. It's to stick it in as an exception. And,
23 that adds a certain complexity to the process.

24 Okay, back to the original.

25 And, by the way, this is not unique to

1 sentencing statutes. I've personally been involved in
2 a little bit of this. When we created OCA, New York
3 State RICO, we got into a dispute over forfeiture
4 provisions, and I remember writing them on a napkin in
5 the state cafeteria which, at the time, unfortunately,
6 was experimenting with diversifying their menu, and
7 had some Mexican food, which I tried. Neither the
8 experiment nor the forfeiture provisions were
9 particularly successful. I probably should have stuck
10 with the hamburger.

11 Okay. Where are we today, 40 years later?
12 Six categories haven't changed very much. "A" was
13 just split into two.

14 But, we also have special provisions for
15 violent felonies, "R" felonies, certain felonies. We
16 have indeterminate and determinate sentences. We have
17 special sentences for gun felonies, drug felonies,
18 hate crimes, terrorism, domestic violence, crimes
19 against police officers, child sexual assaults, and I
20 probably didn't get them all.

21 The present Article 70 is 17 sections, 250
22 subdivisions. I tried to count the words. I gave up.
23 With the annotations, it is 375 pages long.

24 This is the official version of the
25 difficulty of interpreting those statutes. It's

1 practice commentary, "it's become a labyrinth not
2 easily traversed by even the most experienced
3 practitioner in criminal law." Those of you who know
4 Judge William Donnino know he tends to be very
5 discreet and formal. Here is the plain English
6 version: "From the merely cumbersome to
7 indecipherable gibberish." That's what they look
8 like.

9 Here is the merely cumbersome. This is
10 robbery in the first degree, as it exists today. And,
11 if you notice, the substantive crime really hasn't
12 changed very much. We added a fourth subdivision.
13 The sentencing cross-reference hasn't changed at all
14 in 40 years. It still says robbery in the first
15 degree is a Class B Felony.

16 Today's sentence -- well, actually, it's a
17 B Violent Felony, and it's a determinate sentence, but
18 domestic violence is a factor. So, we look to a
19 different part of the Penal Law to come out with an
20 indeterminate sentence. If it's a hate crime, again
21 the Penal Law. If it's a terrorism crime, the Penal
22 Law. If the victim was operating a vehicle for hire,
23 the CPL, another part of the Penal Law, and some
24 subdivisions are armed felonies, which now has
25 significance in plea bargaining.

1 Notice all the cross-references. They're
2 scattered in various places.

3 Moving the gibberish. John, I really tried
4 to pick something you would know.

5 [Laughter]

6 MR. GIRESE: Did you have something -- did
7 he have something to do with this? He did. Call him
8 for it.

9 This is an illustration. This is one of the
10 subparagraphs of the paragraphs that determine how you
11 calculate the cap on consecutive sentences. Notice
12 the first line: "Except as provided in subparagraphs
13 2, 3, 4, 5, 6, or 7 of this paragraph." So, if you
14 want to figure it out, you first have to read those
15 seven subparagraphs. This is not the longest
16 subparagraph. Frankly, it's one of the ones I've
17 figured out could fit on the slide.

18 Again, this is the result of the process
19 whereby whoever did this, very blank, very
20 hardworking, had to stick in the provisions about
21 capping determinate and indeterminate sentences into
22 an existing structure. So naturally, what they did
23 was they put in a provision and put in exceptions for
24 all the other stuff.

25 This is your primary legal research tool in

1 doing sentencing research. Well, no, actually there
2 are two computer programs that I know of, on the Web,
3 created by David Goodman, who is sitting behind us
4 there, and Crime Time, created by the late George
5 Dentes. And, they are very good sources. And, of
6 course, large institutional litigants -- big city DA
7 Offices, Legal Aid Society, NCA, everybody creates
8 sentencing charts which are reasonably useful. Beyond
9 that, the sentencing chart called McKinney's, created
10 by Bill Donnino -- the sentencing chart, by the way,
11 McKinney's, is now 54 pages long.

12 If you are a member of the staff of a large
13 institutional litigant, you probably can figure out
14 the basic sentence most of the time, with a little
15 aggravation. At least there's somebody around to ask.

16 If you are somebody who doesn't really
17 practice a lot of New York criminal law, or you're in
18 a smaller jurisdiction that doesn't have these
19 resources, you're in a lot of trouble.

20 If you're doing something really
21 complicated, like doing research on the cap
22 provisions, frankly I -- and I would suspect a lot of
23 other people -- don't even bother any more. We just
24 call DOCS, and there are some very knowledgeable
25 experts, like Tony Annucci, or Rich DiSimone. If they

1 ever retire, we'll all be in a lot of trouble.

2 Okay. So, why simplify? Well, the most
3 basic reason is for the benefit of those people who
4 practice in the system and who go through the system,
5 as defendants who are involved in the system, so
6 everybody can get some idea of what the sentence
7 really is going to look like.

8 It is also a historic opportunity to correct
9 some anomalies. As you might expect -- and this is a
10 -- was a process described earlier on by Barbara
11 Tombs, I think regarding Virginia. And personally, I
12 take some satisfaction in knowing that it happened in
13 other states, as well. There are a great number of
14 anomalies as a result of the layering on of the
15 statutes here. Some of them are very highly
16 technical. I'll mention a couple of them in passing.

17 We don't yet have a longer sentence for
18 attempted murder than murder. I don't know how we
19 missed that.

20 [Laughter]

21 MR. GIRESE: We do, however, have one
22 subdivision of murder two, the last one added, which
23 is murder committed in the course of a sex felony
24 against a child, for which there is a specific
25 mandated sentence. It just so happens if you commit

1 that as a hate crime, you get a lesser sentence than
2 if you just commit it as a straight crime, essentially
3 because it should have had a cross-reference.

4 One of the crimes against police officers
5 statutes punishes a repeat offender less seriously
6 than it punishes a first offender.

7 For a Class C non-violent felony, you can
8 get probation or you can get state prison time. You
9 can't get a local jail sentence, although you can if
10 it's a drug felony. And, for one class of persistent
11 offender, we simply left out the sentence completely,
12 and the courts have been trying to make one up, with
13 sort of various answers.

14 So, this would be a chance to clear some of
15 that stuff away.

16 How are you going to do this? Well, okay,
17 the first -- the caveat, and it is an enormous caveat,
18 is obviously the form is driven by the substance. So,
19 simplification is really sort of the last thing that
20 you do.

21 If, for example, you decided that the State
22 should convert to something like the Federal
23 Guidelines -- not, in my view, a good idea -- but if
24 you decided that, in the process of simplification,
25 then essentially you would throw Article 70 in the

1 garbage, and re-write it from scratch. So, you have
2 to bear that in mind.

3 Any sentencing structure really contains
4 these sort of six concepts. The basic one, which is
5 just how do you express the different levels of
6 felonies -- I'm leaving out misdemeanors entirely
7 here. And two, recidivist sentencing. Three,
8 consecutive sentencing. The caps. Sentencing
9 provisions outside the Penal Law, which is getting to
10 be an increasing topic. Juvenile sentencing. And,
11 all the non-incarceratory aspects, ranging from the
12 sentence is a discharge, or probation, remanded for
13 the surcharges. All of that is wrapped up there.

14 And, it would be really nice to be able to
15 take a comprehensive look at everything and re-write
16 it all from scratch with a logical, coherent
17 structure. Unfortunately, my guess is that process
18 would take three to five years and require something
19 like the Bartlett Commission. So, there are some
20 things that can be done without making that much of a
21 commitment.

22 On the basic structure, the most modest
23 change of all would be to just update those 40-year
24 old references, even if it said nothing more
25 complicated than robbery in the first degree is a

1 Class B violent felonies, subdivisions 2 and 4 aren't
2 felonies. In other words, different subdivisions of
3 different statutes, and different subdivisions. That
4 would at least clear away one small layer of
5 confusion.

6 A more sweeping change in the basic
7 structure -- and these are all just tentative
8 thoughts, in other words, might be to re-classify, use
9 new letters or numbers. The Federal Sentencing
10 Guidelines have 43 classes of felonies.

11 So, you could decide, for example, that a
12 "B" non-violent is a Class 5 felony. And, a "B"
13 violent is a Class 7 felony. And, a "B" drug felony
14 is a Class 8 felony. And, if you did that, you could
15 then go back to Article 70 and have a structure which
16 would give you at least a little more guidance, and
17 maybe some fewer places to look.

18 The tough part of doing this are the
19 enhancement statutes like hate crime, terrorism,
20 crimes against for hire vehicle operators. And those,
21 you don't want to create different numbers for every
22 possible offense.

23 What you could do with that is maybe at
24 least consolidate them all into one provision, in
25 Article 60, or Article 70, so that you have one place

1 to look.

2 Another idea -- well, recidivist and
3 consecutive structure is very dented on substantive
4 changes. If we went to all determinate sentencing, it
5 would be a lot easier to express consecutive sentences
6 than it is today, but that's a policy change.

7 But, just as a modest change, it's probably
8 possible to re-write the cap provisions more clearly.
9 You know, instead of having all the subparagraphs and
10 all of the exceptions to the exceptions, maybe you
11 could sort of write them positively, by saying if you
12 did this, and then this, here is what happens. And,
13 if you did that, and then that, here is what happens.
14 And, in all other cases, here are the consequences.

15 Recidivism, we now have 11 sentencing
16 categories, up from one in 1967. And these are
17 defined all over the Penal Law.

18 Again, without making any substantive
19 changes -- and nothing I have suggested, by the way,
20 affects the length of any actual sentence. This is
21 all just the way it's written. But, what we might
22 want to do is bring them all together, in one place.

23 The goal, obviously, is clarity in
24 sentencing. Okay.

25 Conclusion. I don't want to minimize the

1 amount of work. There is a real danger in this
2 process, and that is you might make it worse, for much
3 the same reason that the original drafters of all the
4 amendments makes, which is there's a lot out there.
5 There are a lot of cross-references. It's not only in
6 the Penal Law. You're going to have to be very
7 careful that you have caught everything that's
8 applicable.

9 Also, even the modest change, even going
10 through every substantive crime in the Penal Law, to
11 making sure that that bottom line is accurately
12 updated, would be something of a major legislative
13 effort. And, I leave it to you to decide whether or
14 not it's worthwhile. I think it is.

15 Any questions? Well, it's always good to
16 intimidate an audience.

17 [Laughter]

18 MR. GIRESE: Lunch is on time.

19 COMMISSIONER BERGAMO: Thank you, very
20 much.

21 MS. BIANCHI: Actually, before we break for
22 lunch, --

23 COMMISSIONER NEWTON: Don't go anywhere.
24 There may be --

25 COMMISSIONER BERGAMO: I might have --

1 yeah, I'm thinking of my question, too.

2 COMMISSIONER O'DONNELL: Tony, that was
3 great. No, I'm sorry. Are there any questions for
4 Tony?

5 MR. VANCE: I think I have -- I think my
6 questions on this really relate to the discussions at
7 the end of the day, in terms of the work of the
8 subcommittees. I --

9 COMMISSIONER O'DONNELL: Um hmm.

10 MR. VANCE: -- and so, I guess I'd -- I
11 think I'd defer it until then.

12 MR. GIRESE: Okay. You have deferred
13 sentencing.

14 [Laughter]

15 MR. VANCE: Not enough.

16 COMMISSIONER BERGAMO: I'm writing an
17 appeal. Can I get your phone number?

18 [Laughter]

19 COMMISSIONER NEWTON: I have a question.

20 MR. GIRESE: Go ahead.

21 COMMISSIONER NEWTON: What in this would
22 you just throw out because it's not working, and it's
23 not worth the effort?

24 MR. GIRESE: Oh, boy. Well, again, this is

25 --

1 COMMISSIONER NEWTON: Hard question.

2 MR. GIRESE: Yeah. These are substantive
3 policy issues.

4 COMMISSIONER NEWTON: Yeah, so we're asking
5 your opinion.

6 MR. GIRESE: I mean, I personally have
7 never seen a prosecution on the for-hire vehicle
8 operator. Have you, Wendy? Has anybody else?

9 MS. LEHMAN: No.

10 MR. GIRESE: I don't know. There -- there
11 is a lot -- we have a tendency in New York to sort of
12 be the reverse from Barbara's recommendation. We
13 write minutia that covers everything, or tries to
14 cover everything. And, a lot of that tends to deal
15 with situations that maybe don't occur much, really.

16 Like, I mentioned the fact that this -- that
17 particular degree of murder gets a lesser sentence if
18 you prosecute it as a hate crime. That really doesn't
19 have a real world consequence, because if you're a
20 prosecutor, you're going to charge it as a non-hate
21 crime and a hate crime.

22 So, whether or not you need all of the
23 recidivist categories, where there are 11 of them,
24 they sort of end up in some places in the same -- with
25 the same length sentence. Maybe that could be

1 consolidated.

2 Beyond that, you know, as the length of
3 sentences -- were you to adjust that so that the
4 discretionary categories got closer, obviously you're
5 going to have fewer categories.

6 MR. VANCE: Question?

7 COMMISSIONER O'DONNELL: Um hmm.

8 MR. VANCE: The non-Penal Law felonies --

9 MR. GIRESE: Right.

10 MR. VANCE: -- scattered through a variety
11 of statutes. Is -- can one bring them into a
12 consolidated Penal Law effectively?

13 MR. GIRESE: With a massive effort, yes.
14 Is it worth it? I'm not sure.

15 The real problem with the non-Penal Law
16 stuff is not so much crimes defined outside the penal
17 law, but -- and the Environmental Conservation Law is
18 a crime -- a lot of times the penalties in those
19 crimes are completely obsolete and badly written.
20 But, where you put that is another issue.

21 The problem, I think, with bits and pieces
22 of sentencing law outside the Penal Law is the way it
23 affects Penal Law current sentences. We've got stuff
24 in the Correction Law and in the Executive Law that
25 maybe really should be in the Penal Law.

1 I mean, I think the basic goal is that it
2 should all be in one place. So, if you're dealing
3 with an Environmental Conservation crime, all right,
4 it's not so bad to have the sentence for that crime
5 expressed in the provision, or after the provision.
6 But, you don't want to have a consequence or a Penal
7 Law sentence expressed somewhere in the Correction
8 Law, because people will miss it.

9 MR. AMODEO: I just have one comment, and
10 that is that, as complicated and as confusing as the
11 Penal Law and CPL on sentencing -- and I know the
12 Commission hasn't really talked about this but the
13 subcommittee is going to have to talk about it -- and
14 that is whether the provisions of the Vehicle and
15 Traffic Law, which is one of the most complicated,
16 confusing, convoluted bodies of law I've ever seen in
17 my life, and much of it relates to sentencing,
18 including crimes, and -- and, you know, I mean,
19 there's some stuff that cross-references the Penal Law
20 for sentencing, but a lot of it is right in the VTL --
21 suspension of license.

22 And, the question of whether this Commission
23 is actually going to take that body of sentencing law
24 on, as part of this project, is something that has to
25 be dealt with. In my -- you know, I'm not going to

1 make a recommendation.

2 MR. GIRESE: My recommendation would be no.
3 Leave it to a Bartlett Commission. There is enough to
4 do here. But, you're right. I mean, the Vehicle and
5 Traffic Law is an even bigger mess.

6 You know, the funny thing is, despite
7 everything I've said, the Penal Law is a relatively
8 modern sanction. It was created in '67, and it worked
9 off the model penal code. When enacted, it was
10 logical and coherent. It took a long time to do it.

11 So, when you deal with the Penal Law what
12 you're really doing is pruning. When you deal with
13 something like the VTL, what you're probably really
14 doing is completely rewriting it.

15 COMMISSIONER NEWTON: Is there a
16 prosecutorial benefit from having these -- I'll use
17 your word -- enhancements kind of statutes? I mean,
18 could you -- could you get to the same place without
19 them? Apart from the political aspect.

20 MR. GIRESE: Well, it -- it really is a
21 policy question. When you get increments in major
22 felonies, the Class B and Class A felonies, not
23 really.

24 I mean, one thing unique about New York is
25 that even its determinate sentencing ranges are vast.

1 The determinate sentencing range for "B" here is --
2 what is it -- 6 to 25 years. So, the scope of
3 sentencing under that scheme is pretty tough.

4 But, maybe what was a historical accident by
5 writing it that way, New York managed to escape the
6 entire Apprendi legally unconstitutionality problem.

7 But, we don't see a lot of enhancement
8 crimes.

9 Okay. Thank you.

10 COMMISSIONER BERGAMO: Thank you, sir.

11 COMMISSIONER O'DONNELL: Thank you.

12 [Applause]

13 MS. BIANCHI: We were going to take 15
14 minutes.

15 COMMISSIONER O'DONNELL: Yeah, okay. We --
16 I don't know if Gina talked about it before, but Paul
17 Shechtman also had some ideas about streamlining
18 sentencing. And, he has given them to Tony Annucci,
19 and Tony is going to just briefly touch on those
20 issues.

21 And, I just really want to thank Tony
22 Girese. I think one of our important missions here is
23 trying to streamline a very complex sentencing system.
24 And, the fact that we have some very knowledgeable
25 people who have given some thought to this is

1 extremely important to us.

2 So, for part of our mission, what Tony is
3 offering, what Paul Shechtman is offering, and -- and
4 maybe there are some other ideas out there -- are
5 critical to our ability to try to address the
6 complexity of the current sentencing law.

7 MR. ANNUCCI: Okay. Good afternoon, again.
8 And, I'm violating a cardinal canon rule here, which
9 is never be the last man standing in between a hungry
10 audience and lunch.

11 COMMISSIONER BERGAMO: Think about it.

12 MR. ANNUCCI: I have no choice in this, and
13 I apologize.

14 But, Paul Shechtman set down some very
15 interesting thoughts into a very short kind of white
16 paper article, with some provocative suggestions of
17 what this Commission should consider. And, he asked
18 me to present it on his part.

19 Originally, he sent me a draft of this
20 article, and I noticed that he was saying some
21 substantive things. And, I did have one suggestion
22 for him, because Paul was the Director of Criminal
23 Justice in '95 and '97. At that time, he was the key
24 architect of the Sentencing Reform Act of '95 that
25 created determinate sentencing, what we called "truth

1 in sentencing," and some of the other complex
2 provisions which, as you read his article, he is
3 quoting Bill Donnino, where he says they have become a
4 very complex labyrinth, very Byzantine and
5 controlling.

6 So I said, "Paul, since you were one of the
7 architects, wouldn't this be a nice opportunity for
8 you to have a 'Nixon goes to China' moment, and admit
9 some responsibility for this Byzantine role you've
10 had?" So, he grudgingly put in a little parentheses
11 that you can see at the end of the first paragraph,
12 where he says "As the State's Director of Criminal
13 Justice from '95 to '97, I bear responsibility for
14 some of the growth." So, that's his acknowledgment to
15 his responsibility here.

16 But, he does a very good job of -- in his
17 initial Page 1 of the article to just list all of the
18 different permutations we currently have, between
19 determinate and indeterminate sentencing, and what we
20 have in terms of violence, and then in repeat
21 violence, and the drug offenders, where instant is
22 violent and past is non-violent, and second child
23 sexual assault. There are so many permutations right
24 now.

25 And, he's saying, "Look, it seems to us that

1 one of the goals of this Sentencing Commission is to
2 try for simplification." So, he gives this
3 background, and he says, "Where do you begin?" on
4 Page 2.

5 And, the first question he asks is whether
6 it makes sense to have all determinate and
7 indeterminate sentences, and actually this is the
8 biggest part of his presentation. I think it's really
9 one of the most fundamental questions the committee
10 has to grapple and come to a quick decision on,
11 because that will drive so many other types of things
12 we decide to write recommendations on.

13 And, he goes through the history of
14 indeterminate sentencing. It was premised on models,
15 et cetera, et cetera. And, that it's kind of lost
16 favor. And that, in '95, we started with determinate
17 sentences for repeat violence. Then, that spread in
18 '98, with Jenna's Law, for -- for almost every single
19 first-time violent.

20 Then, we expanded it further to all drug
21 offenders, basically. And, as well as sex offenders,
22 with the recent Sex Offender Management and Treatment
23 Act.

24 So, what Paul says is we made such a
25 commitment to determinate sentences, does it make

1 sense to continue to have indeterminate sentences for
2 crimes such as bribery and grand larceny? And Paul
3 basically says if the answer is no, it doesn't make
4 sense to keep having this dichotomy, then New York
5 should move to a fully determinate scheme.

6 But he'll come back, as he says at the
7 bottom, to the issue of sentences for the most serious
8 indeterminates, which are murder, terrorism,
9 recidivists, sex offenders, and persistent felonies.

10 Then, on Page 3, he says, okay, then the
11 second step toward simplification -- and, this is a
12 pretty provocative suggestion. He goes through his
13 explanation that we presently have 10 different
14 classifications for felonies. And, we start with A-I,
15 A-II, B through E, and then you add in the violent
16 felonies -- B-violent, C-violent, D-violent, and
17 E-violent. And he says 10 classifications is entirely
18 too many.

19 Maybe we need to think about doing away
20 entirely with the violent felony offender
21 classification, which was created in '78, and simply
22 take the approach of putting it into the right band,
23 if that's what we want to do. In other words, if --
24 his example is robbery two is a "C" -- presently a
25 C-violent. But, if we really think that the

1 punishment should be a little longer, we should simply
2 make that a B felony, and then maybe make, you know,
3 the current B-violents, like rob one, and, you know,
4 assault one, A-II kind of offenses.

5 Now, my initial reaction is wow. That's a
6 lot to ask for, because so much of our thinking, and
7 our reaction, and what we do, and don't do, is -- is
8 basically we have this pool of violent felony offenses
9 that -- that drive whether you get merit time, whether
10 you're eligible for Shock Incarceration, you know, if
11 you have a prior violent, you can't go to Willard.

12 So, all of -- a lot of formulas rely on the
13 violent felony offender classification. But, as I
14 think about it more, I think there are ways that if we
15 think this makes sense, at least for the practitioner,
16 the DA, the defense attorney, and the judge, up front,
17 to have a real more simplified set of formulas to work
18 off of, there might be ways we can define elsewhere,
19 at least use the term violent felony offender, go to
20 excludeable offenses, put it in one section and say,
21 if you're convicted of one of these offenses, then,
22 you know, make all the appropriate cross-references to
23 eligibility for Shock, and merit time, and victim
24 notification, and those other things that Janet noted.

25 So, I would submit that my initial reaction

1 about what's tremendously significant, to depart from
2 prior use of violent felony offenses as a
3 categorization, we should at least be open minded
4 about it. I think there might be -- might be an
5 attractiveness to Paul's suggestion to just basically
6 go back to these different classifications.

7 And then, he gives you potential grids. He
8 said this is not, you know, anything fixed. But, he
9 gives you proposed numbers and how -- how it might
10 work. For example, for first-time felons, if you had
11 Class A through A-II, to Class E, and used the
12 determinate sentencing format.

13 He kind of just drops in this little note
14 underneath this first chart there that -- that goes
15 into drug offenses, and he says if we want to now meld
16 this with drug offenses, we might have to
17 significantly classify downward a lot of existing drug
18 offenses, in order for them to get the same
19 determinate sentences that they're now getting under
20 the Rockefeller drug law. That's -- that's a pretty
21 controversial suggestion as well, but it's something
22 we can give a lot of thought to.

23 He does say that -- for example, he gives us
24 the Class B felony sale in the third degree example,
25 where you sell any amount of narcotics on the street.

1 That's currently a Class B. His suggestion is maybe
2 we should think about classifying that type of offense
3 down to a "D" or an "E." That's -- that's just his
4 suggestion. I'm not saying it's good, bad, or
5 wonderful, but that's -- that's Paul's basic
6 suggestion on that.

7 And then, he goes through a table for second
8 felony offenders, and what that chart might look like.
9 And then, thereafter that, he goes back and he
10 re-embraces the wisdom of having A-I felony sentences
11 with minimums that range between 15 and 25, and
12 maximum is life, and allowing those individuals to
13 stay in prison until such time as a Parole Board, if
14 ever, would make the release decision. He thinks
15 that's good.

16 And then, his last two points there, on
17 Page 4, spoke about all of the different boutique kind
18 of exceptions to the general rules that are out there,
19 because somebody reacted to a particular crime. So,
20 we say if you sell drugs near a schoolyard, that --
21 you know, we depart from the normal sentencing scheme.
22 Or, if you're of aggravated harassment of any
23 employee, which is a Class E, instead of getting two
24 to four, you can get two and a half to five. All of
25 those things, he says, that are throughout the Penal

1 Law, I think we need to step back. And, I think that
2 makes a lot of sense.

3 He basically says, "Look, come to a basic
4 realization that if a crime warrants a stiffer
5 sentence, it should be elevated to a higher felony
6 class." So like, if you have, for example, a Class E
7 drug offense, but you want to make it more serious
8 because you're now doing that same crime and doing it
9 -- you're selling drugs near a schoolyard, you should
10 maybe elevate it to a Class B, as opposed to writing
11 into these various provisions enhancements.

12 From the practitioner's point of view, I
13 think it would be a lot easier. Whether we could
14 actually ever do this, and wrestle with all of the
15 nuances that are out there, I think that would make
16 sense.

17 And, his last thing, perhaps, is the most
18 provocative of all, and that is that we should give
19 consideration to eliminating plea bargaining
20 restrictions that proliferated since the appeal law
21 was enacted. He says under current law, he gives the
22 example of a Class B violent which is also an armed
23 felony offense. The plea restriction says you can
24 only go down one, to a Class C when it's a "B," that's
25 also armed. It can't go down to the "D."

1 And he says these things unduly restrict the
2 negotiations. They can be circumvented by a
3 pre-indictment plea or a deal. He says wouldn't it be
4 better to have a rule that simply required the
5 prosecutor to explain on the record her reasons for
6 agreeing to a disposition that is two or more classes
7 below the top charge.

8 So, for example, if you had a "B" and you
9 wanted to agree to a plea to a "D," he's simply saying
10 allow that to happen. Don't have a statute that says
11 you can never go down to it. Just have the DA say on
12 the record what his rationale is for going to a "D"
13 for the Class B.

14 And, he ends it with there will be people
15 that will find fault with this scheme, but it's only
16 put forward as a starting point for discussion, and
17 nothing more. But, he definitely ends with
18 simplification should not be the only goal of the
19 sentencing reform, but it is surely the best one to
20 deal with the complexity of some of the law.

21 With that, I will --

22 COMMISSIONER O'DONNELL: Well, thank you.
23 It's hard to present your own ideas, much less someone
24 else's. So, I appreciate you doing that.

25 Paul will be involved in the Commission, and

1 can speak to these issues. But I think before we have
2 our discussion next week about the overall work of the
3 subcommittees and what we want to charge the
4 subcommittees with, it's important that we at least
5 conceptually have some proposals before us of ways
6 that we might simplify the current law.

7 So, I appreciate you doing that.

8 Okay. We'll take a brief recess for lunch.

9 (Off the record.)

10 COMMISSIONER O'DONNELL: I know I
11 frequently commented on our good fortune in having so
12 many nationally-recognized experts come and speak to
13 us on the Sentencing Commission. And one of them next
14 week, Doug Berman, who is a very well-respected expert
15 on sentencing policy, who couldn't be with us today,
16 will join us next week.

17 But, he talked to us about the fact that
18 there are two gentlemen that we really should invite
19 to come and speak to us, who are very experienced on
20 sentencing issues and on sentencing commissions.

21 And, our first speaker, Steve Chanenson, is
22 a nationally-recognized expert on sentencing, and an
23 Associate Professor of Law at Villanova. Don't hold
24 that against him.

25 [Laughter]

1 COMMISSIONER O'DONNELL: But, it is
2 important that we hear from law professors as we are
3 going about our work.

4 And, he is also Chairman of the Commission
5 -- the Pennsylvania Sentencing Commission's Research
6 Committee, and a member of the Commission's Policy
7 Committee, as well.

8 So Steve, I'll turn it over to you. And,
9 thank you for coming to New York.

10 INNOVATIVE USES OF DATA IN SENTENCING POLICY

11 MR. CHANENSON: Wonderful. Thank you for
12 having us. We're very happy to be here. You are
13 certainly going to be in for a treat when Doug Comes
14 by next week, and I'll have to send him that fruit
15 basket for saying nice things about me.

16 Mark and I -- Mark is the Executive Director
17 of the Pennsylvania Commission on Sentencing, and I
18 understand the very logical suspicion of law
19 professors. So, think of me more as a fellow
20 Commission member. I am one of the Governor's
21 appointees to the Pennsylvania Commission, although it
22 was a kind of a inside deal. Pennsylvania's statute
23 has a spot reserved for a law professor. So, the --
24 you know, the competition was a little thin.

25 But, we come here today to talk largely or

1 exclusively, really, about the role of sentencing and
2 data. And, we'll be talking about Pennsylvania as a
3 case study.

4 Now, we don't know a lot about how New York
5 handles sentencing data, although we learned a little
6 bit over the lunch just a few minutes ago. And, it
7 sounds as though you folks are really doing some
8 exciting things here yourself.

9 So, what we present to you today is some
10 ideas about the role that data can play, one example
11 of how it is playing out in Pennsylvania, and to
12 encourage you to continue the work, and perhaps even
13 expand the work that you're doing on using data to
14 inform sentencing policy.

15 As you go about your work -- and I read
16 Executive Order 10 just recently -- you have,
17 obviously, a very tall agenda, right? Commissioner
18 O'Donnell said you were working one full day a week,
19 which is hard word indeed for a Commission that is
20 just starting up. But, it really is a wonderful
21 opportunity.

22 It's an opportunity to re-think your entire
23 system, to look around the country, and pick and
24 choose the things that you think will work well for
25 New York, and say, "Oh, no, that doesn't look good to

1 us," or "this does look good."

2 And, I encourage you not only to think about
3 how you want to organize your system, and I was
4 interested to see the similarities, including the
5 continued robust use of indeterminate sentencing,
6 between New York and Pennsylvania. But also, to think
7 about the ways in which you learn about your own
8 system.

9 As I said, I'm getting the impression that
10 New York is really well along the road in that
11 department, but not every state is. Mark and I were
12 out in California about a month ago, talking to
13 California judges. And, as you may know, they have
14 their own set of problems in California's size. And,
15 they really don't know much about what's going on
16 inside their own systems.

17 There are some handouts that we have brought
18 with us, both the PowerPoint and also some articles.
19 I warn you not to operate heavy machinery while
20 reading those articles.

21 [Laughter]

22 MR. CHANENSON: There are a few things.
23 Most of them are short. One is something that I wrote
24 about data and sentencing. One is that Mark
25 co-authored with our Commission's counsel, on

1 Pennsylvania's release policy, release of information,
2 which is something I'll touch on. And article --
3 then, two articles from a special issue of the
4 Stanford Law Review, all about sentencing, from about
5 a year and a half ago -- one by law professors Mark
6 Miller and Ron Wright, on the role of sentencing
7 information systems. And finally, yet another one
8 from me, talking a little bit about information, but
9 also a bit about my suggestions on the related topic,
10 which is how to harness the indeterminate system of
11 sentencing in the world after the Supreme Court has
12 redefined the Sixth Amendment. That's off the topic
13 of what we're really going to focus on, but it's
14 something that, as a law professor, I couldn't resist
15 throwing in, as well.

16 I was very interested by the name of your
17 Commission, right -- The New York State Commission on
18 Sentencing Reform. It reminds me of a line from the
19 legendary -- and it's a law professor again, sorry --
20 the legendary law professor and criminologist,
21 Norville Morris, who once found an old English quote
22 about reform. And he said: "Reform? Don't speak to
23 me of reform. We're in enough trouble as it is."

24 [Laughter]

25 MR. CHANENSON: And, I hope that that's not

1 what is going to happen here. I'm sure of it, looking
2 around this room. But, it's an opportunity, as well
3 as a danger.

4 And, what I want us to talk about now is the
5 role of sentencing and data together. Sentencing, as
6 you know, as well if not better than I, does not occur
7 in a vacuum. It's part of an immense and immensely
8 complex system of laws, and rules, and importantly,
9 discretionary decisions -- discretionary decisions by
10 many different actors.

11 Yet, oftentimes, to call the criminal
12 justice system a "system" is to torture the word
13 "system" beyond all recognition. Many jurisdictions
14 lack not only the internal coordination and cohesion
15 that you might think would go along with the idea of a
16 system, but they really lack a full understanding of
17 what is actually happening on the ground.

18 We cannot afford to take our systems for
19 granted. And, as I said, you aren't. But what I hope
20 that we'll talk about here over the next little bit of
21 time is some of the ways in which looking at the
22 system can then turn around and help the efficiency,
23 the efficacy, the fairness, and the justice of the
24 system.

25 The modern sentencing reform movement you

1 can trace back to New York in many ways, right? Judge
2 Marvin Frankell, back in the 1970s, has focused on
3 information, from the beginning. Sentencing
4 information, in many ways, has been the linchpin of
5 the modern sentencing reform movement.

6 If you look around the country to other
7 sentencing commissions -- and I understand that
8 Barbara Tombs was here speaking to you this morning,
9 and she certainly has the perspective of running a
10 number of different commissions -- you'll know that
11 sentencing commissions have data collection and
12 analysis as a large part of their statutory and
13 functional mandates in almost every jurisdiction.

14 But simply saying that data is important to
15 sentencing does not really help us understand how an
16 improved sentencing information approach can move
17 sentencing reform forward. And so, I want to spend a
18 minute and just talk about the world as we find it in
19 most jurisdictions that think about sentencing
20 information at all.

21 Now, as I said, data could play the huge
22 role in sentencing reform, but if we think about what
23 I'd like to call our first generation of sentencing
24 data, you can think about data as being a central
25 component to guidelines, or some other form of

1 structured reform. Guidelines are often a dirty word,
2 because we immediately think of the United States
3 Sentencing Guidelines, widely disliked far and wide.
4 But guidelines can take, as you know, any number of
5 forms -- from the narrative guidelines in Ohio, to the
6 more flexible guidelines in Pennsylvania, to the
7 completely voluntary guidelines in Virginia.

8 So, the information, the data that is out
9 there about what's been happening, plays a role there,
10 of course. It plays a role in creating those
11 guidelines, either with a formal link to prison
12 capacity, something that's always of interest to
13 members of a legislature, or without a link to prison
14 capacity. And Minnesota, of course, has that link to
15 prison capacity. Pennsylvania does not.

16 A critical element of data, and one of the
17 things it can be very useful for, is ensuring the
18 ongoing political viability of a sentencing
19 commission. You have to make a decision, your
20 legislature and governor have to make a decision as to
21 whether an ongoing sentencing commission makes sense
22 for New York, after this reform commission sunsets
23 early next year.

24 If that's something you choose to go forward
25 with, one of the things I think you may find is that

1 data can be vital to planning the system and to the
2 continued role of a sentencing commission. The
3 ability to predict prison capacity needs. The ability
4 to look at a piece of legislation and give information
5 to the legislature.

6 The legislature will do what it chooses to
7 do, but to have an honest broker, with good
8 information, saying "this bill will have this result,
9 like, over the next five years." And again, Virginia
10 is a classic example, probably the best example, of
11 that use of data. They have a provision in their laws
12 that says no bill that would increase prison capacity
13 or corrections spending any way can pass without going
14 not just through the Criminal Justice Committee, but
15 then also through the, effectively, their Ways and
16 Means Committee. And, the sponsor has to provide
17 either some mechanism for funding, or some other
18 mechanism for cutting expenses elsewhere. They have
19 chosen to tie these decisions very closely with prison
20 capacity.

21 You don't have to do that, but that's an
22 ability that good information systems, often through a
23 sentencing commission, can provide.

24 In this first generation, the users of
25 sentencing information have largely been commissions

1 and other experts who try to design rules in
2 sentencing. And, it's also been used to try and
3 provide broad general reports for the legislature, for
4 judges, and for the general public.

5 What you see often are these system-wide
6 predictions of prison resource usage, or sometimes
7 even larger correctional uses. I know -- I think, at
8 least, that in New York, somewhat similar to
9 Pennsylvania, we have a good reliance, a substantial
10 reliance on county jails. And, that difference
11 between who goes to a county jail and who goes to a
12 state prison, how that decision is made is something
13 that's of enormous importance to our policy makers in
14 Pennsylvania, both in the General Assembly and at the
15 level of the County Commissions.

16 Other uses that I'm sure you're familiar
17 with are certain special purpose impact-type studies,
18 what's happening with a particular offense, or a
19 particular offender. Are first offenders being
20 treated one way, or another way?

21 Among the typical problems with this kind of
22 first generation data is that it's often limited by
23 technical complexity. To understand it, you often
24 have to be an expert. You need to spend a lot of time
25 sifting through the information that's out there, in

1 order to make it user-friendly for individuals who
2 have to make policy decisions.

3 And, there is often a very serious time lag.
4 In many situations in Pennsylvania, although we're
5 making improvements, dramatic improvements, this has
6 been an ongoing problem for us. The information that
7 we're able to provide to the General Assembly can
8 often be many years out of date. And, it's the most
9 recent information available, and it's the best we
10 have to work with, but often it suffers from those
11 limitations.

12 So, some of these holes, as I've put it, in
13 the first generation include two big ones. The use of
14 data at the case level. The familiar stuff, the stuff
15 we've seen in our first generation, is often at the
16 system-wide level. Very important information, to be
17 sure.

18 But data can also be used at the case level.
19 When you start to use data at the case level, with
20 individual judges, you start to see a more dynamic
21 relationship. More users, greater feedback.

22 One of the things that the Pennsylvania
23 Commission is in the middle of doing right now is
24 amending our guidelines. We try to do that about
25 every two years, along with our legislative cycle,

1 incorporating new offenses that our legislature has
2 passed, changes in statutory penalties, things like
3 that. And, what we're always looking for is feedback
4 from the lawyers, from the judges, trying to find ways
5 in which our guidelines are out of whack.

6 From my perspective, guidelines should be
7 just that, guidelines. A starting point. The judge
8 and the lawyers see the individual defendant. They
9 know about the crime in a way that the Commission can
10 never understand. But, maybe there's something where
11 things don't make a lot of sense.

12 Before my time on the Commission, there was
13 an issue with burglary. And when Mark and others
14 looked at the burglary data, there were three spikes
15 on the data that didn't make a whole lot of sense.
16 They drilled down and tried to get a sense of what was
17 going on. And it turned out that, in the courtroom, a
18 difference was being imposed, or a difference was
19 recognized by the players in that court culture,
20 between the burglary of a home with a person present,
21 the burglary of a home without a person present, and
22 the burglary of something that wasn't a home.

23 Again, that isn't an example that can
24 transfer seamlessly to any other jurisdiction. Your
25 statutes are different, I'm sure. But, there was

1 feedback coming to us through the data. But, it was
2 fairly rough feedback. We adjusted our guidelines
3 such that now there are different guideline
4 recommendations, if it's a burglary of a home with a
5 person present or not. But, that's fairly coarse
6 information. And, one of the things that we've been
7 working on is trying to find finer, more granular, if
8 you will, information about sentencing.

9 So, the other advantage of adding some of
10 these case level users is not only to expand who is
11 using this information and how, but it's to get more
12 of this exchange. Not just top-down, or from the
13 center out, but almost more of a market type of a
14 conversation, where information is flowing back and
15 forth from the folks who set the rules -- if you're to
16 adopt a guideline-type system -- to the folks who are
17 the consumers of those rules -- the judges and the
18 lawyers. Think of it as the difference between
19 capitalism and the old Soviet command and control
20 economy.

21 Another important goal is sharing
22 information with other jurisdictions. The opportunity
23 exists for us to learn from each other, if we're able
24 to capture our own information in a way that is
25 sufficiently complete. We certainly share information

1 now. You can look at various pieces of legislation
2 that have recently gone through the Pennsylvania
3 General Assembly, and they have "made in New York"
4 stamped all over them. There are things where we, on
5 at least an anecdotal basis, look to you. And, I'm
6 sure that New York looks to other jurisdictions, as
7 well.

8 But, most states, I think you could think of
9 them as lone laboratories of democracy, to twist
10 Justice Brandeis's famous line. This kind of
11 smokestack or silo approach limits the ability to
12 cross-pollinate and to advance our own systems. The
13 second generation of information and data that
14 sentencing can provide more detailed information that
15 can be used to facilitate that kind of cross-
16 pollination.

17 The idea of having greater case-specific
18 information can open up a number of important
19 possibilities. It can open up possibilities to allow
20 us to answer fundamental questions, fundamental
21 questions from the policy standpoint, but also
22 fundamental questions from the individual case sample.
23 Questions, perhaps, that judges want to know.

24 What have other judges done in cases
25 involving similar crimes? Not just what do the

1 guidelines say, but what is actually being done, and
2 why? What have other judges done in cases involving
3 similar offenders? And, what about outcomes?

4 When you think about -- or at least when I
5 think about your Executive Order, and talking about
6 the importance of similar sanctions for similarly
7 situated offenders, who can disagree with that? But,
8 the question, of course, is what does "similar" mean?

9 All right. I can take care of any
10 jurisdiction's uniformity problem just like that.
11 Every burglar gets a mandatory five-year sentence. It
12 seems pretty uniform to me. It's very similar.
13 You're a burglar, you get five years. You're a
14 burglar, you get five years.

15 But, we all know that that is a false sense
16 of fairness. It is a false sense of uniformity
17 because not all burglaries are the same, and not all
18 burglars are the same.

19 So, by getting greater information down to
20 the case level, judges can have the ability to gauge
21 what else is going on. Not being forced to follow
22 what their colleagues are doing, not necessarily, but
23 being allowed the opportunity to understand more fully
24 what's actually happening on the ground.

25 Another important possibility that this

1 second generation of sentencing information affords is
2 the opportunity to think about outcomes. Again, the
3 component of your Executive Order, and with good
4 reason, the connection between sentencing and
5 recidivism, I think, as the Governor phrased it. The
6 opportunity to think about is there a difference
7 between someone who is sentenced to one year, as
8 opposed to someone who is sentenced to two years, and
9 what happens to them three years after? That's a very
10 hard question to answer. That's a very hard question
11 to answer.

12 Let's just start with the question of what
13 do we mean by "recidivism"? Are we talking re-arrest,
14 re-conviction, re-commitment? One year, three year,
15 five years? It's a morass.

16 But here is your opportunity, re-thinking
17 your whole system. Build in as much as you can to
18 capture this kind of information as you move forward.
19 It won't make it easy, but it has the opportunity to
20 change what you can do with your criminal justice
21 system. The opportunity to literally change the
22 culture.

23 Whenever I think about sentencing and
24 outcomes, I'm always drawn to the work of Judge
25 Michael Marcus. I don't know if that name rings any

1 bells with you folks. He is a trial judge in
2 Multnomah County, Oregon, Portland, Oregon, who has
3 written extensively, and he has a Website that I
4 should remember -- smart sentencing dot net.

5 And, Judge Marcus is a big believer in
6 public safety as the driving force of the criminal
7 justice system. You can agree with him, you can
8 disagree with him. Most jurisdictions give you a
9 laundry list of your purposes, right. When I talk
10 about purposes to my sentencing students, their eyes
11 glaze over, and they play solitaire a greater amount
12 of time.

13 [Laughter]

14 MR. CHANENSON: But, Judge Marcus is
15 focused on public safety. And, what he has done --
16 and there are certainly criticisms of it -- but it's
17 -- he, himself, has described it as kind of a Kitty
18 Hawk moment, right? We're able to go a couple of
19 hundred yards in the plane, but no farther, not yet.

20 Focusing on public safety, and using a data
21 warehouse in Oregon, particularly Multnomah County, he
22 works hard with his probation officers to track the
23 outcomes of various dispositions. And, he has a
24 computer-assisted software program that will give him
25 information. And, I can quibble as to how reliable

1 the information is, but information on outcomes based
2 on prison, or this kind of a program, or that kind of
3 a program, and it's flexible enough to change what you
4 think the similar -- the similarities should be.

5 This is a burglary. Judge Marcus gets to
6 know this individual, and says, "You know what? Yeah,
7 it's a burglary. But, it's a drug-involved burglary.
8 I want to see how a defendant who has drug convictions
9 would stack up against the individual who is in front
10 of me? And, what might best serve the aims of public
11 safety? What might best lower recidivism?" It's a
12 start.

13 What's most interesting about it to me is he
14 reports the change in the behavior of his lawyers.
15 His lawyers have access to the same database that he
16 does, and they'll be making different recommendations
17 to him because they know what matters to him.

18 So suddenly, you have a system where it used
19 to be in the pre-sentence report you would find
20 information about the individual's childhood, other
21 social history things that are all important, but
22 nobody really paid any attention to what might make
23 sense for this offender, in terms of outcomes down the
24 road. Focused on what's exclusively retributive
25 concerns.

1 By bringing in this greater and richer
2 dataset, he has allowed for a conversation about
3 another goal of sentencing. You don't have to be as
4 focused on the goal as he is to see that it is an
5 opportunity to harness the power of data to the ends
6 that we choose for a system.

7 COMMISSIONER O'DONNELL: Can I interrupt
8 you there?

9 MR. CHANENSON: Of course.

10 COMMISSIONER O'DONNELL: We have -- we have
11 heard from a number of individuals about the
12 importance of using risk/needs assessment instruments,
13 and have worked with Donna Hall, our lead researcher
14 here, to develop a risk instrument that's just being
15 used here in New York, in some re-entry task forces.
16 It's the same sort of concept, looking at more a
17 static risk factors.

18 But, you know, is it -- are any judges using
19 those risk instruments to kind of look at recidivism
20 of similarly situated individuals in deciding what an
21 appropriate sentence should be?

22 MR. CHANENSON: Yes. And, I think probably
23 the best example -- and I will turn to my colleague
24 for a moment. Probably the best example would be
25 Virginia. And, I'm sure you're familiar with what's

1 been going on. Have folks talked to you about
2 Virginia, at all?

3 COMMISSIONER O'DONNELL: I don't -- a
4 little bit, but --

5 MR. CHANENSON: Virginia has a guideline
6 system. They have a full determinate system. They
7 abolished parole in the early 1990s, as part of a
8 truth in sentencing approach. But, they've also had
9 concerns about capacity.

10 And, as a legislative mandate, the
11 sentencing commission was told "see if you can
12 identify some people who might be of sufficiently low
13 risk that we can divert them from prison."

14 So, in a system of fully voluntary
15 guidelines -- you know, ours are now, as of a month
16 ago, pretty doggone voluntary, thanks to our Supreme
17 Court. Is this on? Yes, --

18 [Laughter]

19 MR. CHANENSON: -- and, I like our Supreme
20 Court. But, these are completely voluntary, no
21 appellate review whatsoever.

22 And, they had an instrument that has a
23 number of points and factors that are static and where
24 the judge is recommended -- the judge can do whatever
25 she pleases -- but, the judge is recommended to divert

1 MR. CHANENSON: The risk assessment, if you
2 reach a certain level, the recommendation is to be
3 treated more severely.

4 So, Virginia is probably doing the most with
5 -- with that, certainly on a statewide -- on a
6 statewide level.

7 When you start to bring in needs, there is a
8 gentleman at the Treatment Research Institute which is
9 loosely, at least, affiliated with the University of
10 Pennsylvania, by the name of Doctor Doug Marlowe. He
11 focuses on drug court work.

12 And, Doug is doing a pilot project now for
13 Hennepin County, which is Minneapolis -- maybe it's
14 Saint Paul -- it's somewhere in Minneapolis, or Saint
15 Paul -- an instrument that he has designed called the
16 "RANT" -- the Risk and Needs Triage. And, that's
17 designed more as a case sorting mechanism. Who should
18 go to straight diversion? Who should go to drug
19 court? Who should go to the normal criminal justice
20 system?

21 So, it's one -- it has -- certainly has
22 sentencing implications.

23 COMMISSIONER O'DONNELL: Um hmm.

24 MR. CHANENSON: It's one step before that.
25 And again, the idea is to try and get the right people

1 into the right program. What's exciting about what --
2 what Doctor Marlowe is trying to do is that he really
3 very much so does bring in the needs component, as
4 well, in addition to looking at criminogenic factors.

5 MR. BERGSTROM: Steve?

6 MR. CHANENSON: Please.

7 MR. BERGSTROM: I've got a couple of
8 things. I think one thing that's important to think
9 about, if you're thinking about risk/needs is, you
10 know, what is the purpose for the sentence, and also
11 what is the structure of the sentencing?

12 Because, if your purpose is retribution, and
13 you're saying we want to punish these people with five
14 years of incarceration, then it doesn't matter risk or
15 need, because retribution is a different scale that
16 we're going to be using to look at that. If the
17 purpose is rehabilitation, you might have a different
18 scaling.

19 So, I think you have to think about how does
20 a risk assessment, or a risk/needs assessment sort of
21 fit into what purpose for you have for sentencing that
22 type of offender. And, that may determine whether you
23 do have it and, if you have it, how it's structured.

24 The other thing that I think is important,
25 especially in a state that has indeterminate

1 sentencing, or at least some indeterminate sentencing,
2 is how do you -- how do you sort of distribute that
3 risk and need information across the sentencing and
4 the parole basis? Pennsylvania is --

5 COMMISSIONER O'DONNELL: Right.

6 MR. BERGSTROM: -- almost exclusively
7 indeterminate. And one of the things we think about
8 is what are we doing at the sentencing part of the
9 phase, and then what is the Parole Board doing at the
10 paroling part of the phase?

11 Because, in all honesty, our sentencing
12 guidelines primarily are thinking about retribution.
13 What is the appropriate, proportional punishment that
14 we think we should assign in these cases, at least
15 primarily? You can think of another option, but --
16 but, let's start with that.

17 And then, when they come to a point that
18 they're eligible for parole, we think it's very
19 important that the Parole Board be thinking about
20 risk/needs, because then it becomes a public safety
21 issue. Is it appropriate to release that person at
22 this point, or do we keep the person in? And, if
23 we're going to release, you know, what kind of reentry
24 stuff have we done to prepare that person for release,
25 so that the harm to the community is reduced?

1 So, think that you have to sort of look at
2 all of those kind of things. Risk/needs can be
3 helpful with sentencing, to make that decision is this
4 someone we incarcerate, or is this someone we think
5 about community-based alternatives?

6 But, if we are incarcerating, and if our
7 purpose is retribution, then risk/needs may isn't as
8 important in that phase as it would be later in the
9 system.

10 MR. CHANENSON: And, I can't --

11 COMMISSIONER O'DONNELL: Good point.

12 MR. CHANENSON: -- contain myself on this
13 -- on this point, which is to the extent that you're
14 interested in continuing with an indeterminate system,
15 I think something that needs to be made clear, and
16 maybe it is already, one of the -- my many weaknesses,
17 that I don't know a lot about the New York system --
18 but one of the weaknesses in the Pennsylvania system
19 is that there is not a clear division of authority,
20 and certainly no coordination between our sentencing
21 commission and our Parole Board.

22 So, you see our Parole Board -- and this can
23 get into some historical things, where there were some
24 high-profile tragedies, dealing with parolees. And,
25 in response, our Parole Board made some very

1 understandable decisions to be less forgiving -- maybe
2 that's not the right word. To be less liberal with
3 their parole decisions. And, what you saw were some
4 really, really dramatic changes in time served.

5 And, I touch on it in the article, but I
6 couldn't resist concluding that because you guys are
7 an indeterminate state, I think that there -- if
8 you're going to have an indeterminate system, and I
9 think there are many advantages to it, there needs to
10 be coordination between the front end and the back
11 end.

12 And, are you looking only at risk/needs at
13 the back end, or are you also looking back at what the
14 judge knew, in terms of the retributive component at
15 the time of sentencing? My view is that should be
16 handled by the judge, and if you're looking
17 prospectively for things that have changed inside the
18 institution and the behavior of the inmate while
19 there, that's certainly appropriate for the Parole
20 Board to know, but not to look back and say, you know
21 what? Actually, I think that driving while bald is
22 actually very serious offense, much more serious than
23 that crazy sentencing commission thought. Whatever
24 the decision, the two bodies need to work together.
25 Because, if not, you're going to end up the result

1 and, oftentimes, a bill at the end of the day, that
2 you didn't plan on.

3 COMMISSIONER O'DONNELL: Well, the Chairman
4 of our Parole Commission is -- or Parole Board is
5 here, so --

6 MR. CHANENSON: Wonderful.

7 COMMISSIONER O'DONNELL: -- we appreciate
8 your recommendations.

9 MR. CHANENSON: Well, I think -- I think
10 it's tremendous that you're here, because to think of
11 these things as being independent of each other is a
12 mistake. And, it's a mistake that we in Pennsylvania
13 have -- have made for a long time. And, I think it's
14 great to have this kind of conversation on the front
15 and the back end.

16 As we think about this opportunity for the
17 next generation of sentencing information, one key
18 principle that, in my opinion, should drive a new
19 information model, is transparency. Transparency --
20 the ability to recreate and assess individual
21 sentences and systematic patterns and practices.

22 This has largely been missing from the first
23 generation of sentencing and probation. In my
24 opinion, this also includes judge-specific
25 information. The practice at the federal level is to

1 keep that information confidential.

2 Now, as some of our rural judges in
3 Pennsylvania will tell us, "It's no secret what I do,
4 right? I'm the only judge in this county. So, when
5 you give out county-based information, you're talking
6 about me anyway." Or, "There are only two of us in
7 this county. Everybody knows what we're doing." When
8 you get into more populous areas, judges don't have
9 that same concern.

10 Pennsylvania had had transparency with
11 respect to judge-specific information since 1999. It
12 was controversial at the time. There are still
13 members of our Commission who are not particularly
14 wild about it. In Pennsylvania, we elect our judges.
15 They're elected to 10-year terms, with retention for
16 an additional 10-year term after that.

17 And, there is certainly an opportunity here
18 -- I don't want to sugar-coat this -- for
19 misunderstanding, for misinterpretation, be it
20 accidental or deliberate. But, I think that one of
21 the important features and opportunities of an
22 additional generation, an additional take on
23 sentencing data, is the opportunity to more fully
24 understand what's going on. And, this is not, as some
25 folks have claimed, a pro-incarceration or an

1 anti-incarceration tactic.

2 It is not meant to single out judges who are
3 perceived as being very lenient, or perceived as being
4 very severe in their sentencing. It is, in my mind,
5 at least, an issue of good process and fundamental
6 fairness. We are, after all, talking about the
7 exercise of the public trust. And, it's something
8 that I think needs to be done openly.

9 COMMISSIONER O'DONNELL: So, this is really
10 publishing the sentences that the individual judges
11 give out, essentially?

12 MR. CHANENSON: It -- it is. But, of
13 course, based on what is collected. We do not publish
14 every sentencing transcript. And again, that's the
15 ironic part about the feds, keeping all of this
16 information, and it was a -- a deal struck between the
17 Administrative Office of the U.S. Courts and the
18 U.S. Sentencing Commission in the early days of the
19 Federal Sentencing Guidelines, to keep judge-specific
20 information quiet.

21 But if one was to have enough time, you
22 could sit in any judge's courtroom, all day long,
23 every day, and be able to write down what every judge
24 does. However the information is collected -- and
25 again, my advice is to collect as much information as

1 you possibly can -- whatever information is collected,
2 it is then transmitted to the central aggregating
3 agency -- be it the statistical analysis center, or
4 the sentencing commission, or whomever -- to have that
5 available for public view, both in the aggregate --
6 right. We have sentenced 500,000 burglaries, and the
7 average sentence was a year and a half. But also,
8 Judge Chanenson has -- God forbid -- has, you know,
9 sentenced a hundred burglars and this is how the
10 distribution plays out.

11 So that information, especially in a state
12 that elects judges, can sometimes be difficult to deal
13 with. There once -- really only once -- was a local
14 newspaper that misunderstood, and I don't know whether
15 it was intentional or not, how our sentencing system
16 operates, and kind of gave a scorecard, right?
17 Everyone's worst nightmare. Chanenson, the hanging
18 judge. Bergstrom, the let 'em go judge.

19 The Commission tried to respond to that by
20 holding media workshops, to explain to the reporters
21 how our sentencing system works. Mark is forever on
22 the phone with reporters, talking about how things go.
23 And, we try to make as much information as the judge
24 wants available, including reasons that the judge may
25 want to give as to why the judge did certain things,

1 and also explanations. We have certain dockets,
2 particularly in Philadelphia, in an effort to move a
3 volume of cases, where frankly the expectation is if
4 you come to the waiver court -- jury waiver court --
5 and have the judge decide this case, you are going to
6 be treated more leniently. And, that's described.

7 The idea, though, is by opening up this
8 information, by being able to understand more about
9 what's going on, encourage broader participation in
10 the entire sentencing enterprise, with a larger range
11 of participants, the existing data system is able to
12 capture more information with which the system can be
13 continually improved.

14 If you build it -- right -- if you build it,
15 benefits will come. The future, as we all know, is
16 uncertain. But, knowing what's going on in your own
17 system is bound to help. And, the more you know, the
18 more it can help.

19 I was learning a little bit today about some
20 of the things that I believe New York City is doing,
21 in trying to capture information on its pre-sentence
22 reports, a terrific wealth of information about the
23 individuals who travel through the system.

24 Virginia, again, is another great example.
25 In the late 1980s, largely for their own reasons,

1 before they had a sentencing commission, they started
2 to automate over 200 pieces of information on every
3 pre-sentence investigation report. Well, the
4 sentencing commission, now run by the same man who was
5 entirely engaged in that automation project, is now
6 able to look back at decades' worth of rich
7 information and provide more accurate predictions and
8 projections, and other types of information to policy
9 makers and at least not at the -- Virginia is not at
10 that point, but in my ideal world, they would be, the
11 individual case level deciders.

12 Data, really, truly, are power -- the power
13 to predict, the power to inform, and the power to
14 improve.

15 MR. BERGSTROM: Steve?

16 MR. CHANENSON: Sure.

17 MR. BERGSTROM: Just to make one point.

18 With a lot of the sentencing commissions, you'll hear
19 them talking about this sort of evolution of their
20 practices. A lot of sentencing commissions that first
21 are established spend a lot of time just trying to
22 figure out what it is that has happened in the state,
23 what is happening in sentencing. And usually, the
24 first set of guidelines or several sets of guidelines
25 are just descriptive guidelines. They're describing

1 what has been the practice. And, they're trying to
2 define sort of what is the going rate in this
3 jurisdiction with this kind of thing, with -- with I
4 think the hopes that you're bringing in the outliers.
5 You're just -- by just defining what that middle
6 ground is, you're sort of bringing people to the
7 middle.

8 As time goes on, though -- and we've had a
9 Commission for, you know, 25 years or more -- you see
10 a real move towards more proscriptive guidelines,
11 where you say, "Okay, we now know what's happening,
12 but we don't like some of these things. We think
13 these violent people should be in prison longer." Or.
14 "We think there is a real opportunity for treatment
15 here."

16 So, I think as you see commissions mature,
17 you see them move from understanding what's going on
18 to collecting data and trying to understand how to
19 move policy in a way that the legislature, the
20 governor, and others feel is the appropriate path.

21 MR. CHANENSON: Well, that brings me to a
22 case study, if you will, of Pennsylvania, where soon
23 enough I will shut up and Mark will come and actually
24 say something of interest. And, what he'll talk about
25 is the connection between our justice network system

1 and our sentencing guideline software as a Web
2 application.

3 There have been some great advances in what
4 we've been doing with respect to data in Pennsylvania,
5 but is not, at least not yet, the academic ideal --
6 the academic ideal of a sentencing information system
7 with complete capturing of information, and these kind
8 of market-like interactions between the centralized
9 policy makers and the diffuse consumers of that
10 information in the courtroom.

11 But, within the broad collection of
12 governmental information, generally, criminal justice
13 specific information, a sentencing information system
14 is an opportunity to focus on sentencing specifically.
15 Not only how many cases are processed, how many prison
16 admissions there are, but a more detailed
17 understanding of who is being sentenced, for what, to
18 what, why, and to what end. It's an opportunity to
19 provide, if you will, a system within the system,
20 within the coarser or vital system of criminal justice
21 or other government information, the opportunity to
22 drill down and provide a level of granularity about
23 sentencing that can inform the sentencing world as
24 well as the criminal justice world, and the larger
25 governmental operations, as a whole.

1 So, from my perspective, this kind of
2 granularity in sentencing information is key to policy
3 coordination, information collection, exchange, and
4 penalty integration.

5 With that, I will yield to my colleague to
6 talk about JNET.

7 MR. BERGSTROM: Thank you. Well, good
8 afternoon. As Steve said, this will be sort of a case
9 study of Pennsylvania.

10 And, what I'd really like to do is focus on
11 the sentencing information system we've established at
12 the Sentencing Commission. But, I want to recognize
13 at the start that it is, as Steve said, just part of a
14 bigger system.

15 We have the criminal justice information
16 system in Pennsylvania, and within that, we have a
17 pretty sophisticated sentencing information system.
18 And so -- so some of this information, some of these
19 practices are probably already in place here. Some
20 may be different, and some of those differences might
21 just be because of the structure of government we
22 have.

23 But, I do want to walk through those four
24 key steps that Steve talked about, and sort of talk
25 about how they apply to Pennsylvania -- policy

1 coordination, information collection, information
2 exchange, and information integration.

3 So, the first is policy coordination. And,
4 this is really at the criminal justice level. But,
5 what -- what one of the key issues was in
6 Pennsylvania, probably ten or twelve years ago, was
7 what Steve described as the silos, or the stovepipe
8 kind of approach. Every agency, every criminal
9 justice agency, every entity had their own separate
10 information system. And, the question was how do you
11 bring this all together?

12 And fortunately, in the mid-'90s, when --
13 actually when Tom Ridge was elected Governor, one of
14 the things he ran on was improving the criminal
15 justice information system. That there wasn't a way
16 of exchanging information readily across the system,
17 and that was the public safety concern.

18 So, Pennsylvania had a special session on
19 crime. We did all kinds of crime legislation, our own
20 type of three strikes, and all the other good things.
21 But, we also talked about how we can -- how we can
22 improve this information system.

23 And, when I think about that whole process
24 we went through to develop what we call JNET -- or the
25 Justice Network -- I think about some of the key areas

1 that contributed to its success. We had executive
2 sponsorship. We looked at things like governance
3 structure. We had a strategic plan. And then, after
4 we had all of that in place, we thought about what
5 technology we needed to put this in place.

6 For pretty -- the -- sort of the governance
7 issue, one of the things that was really important was
8 to have the Governor at the top of the food chain,
9 saying "This is important. We need to do this."

10 Because we needed a means to get some very big, very
11 independent agencies at the table, and someone over
12 them to say, "Here is what we're going to do, kids.
13 We're going to all get together on this. We're going
14 to -- you're only going to get resources to do it this
15 way, so that we can get everyone sort of on the same
16 page."

17 One thing that I think is -- is typical of
18 any jurisdiction, when you're trying to think how do
19 you organize this effort, how do you coordinate this
20 effort, is -- is what structure do you use? I think
21 one common structure is a big warehouse system. Let's
22 develop a new system. It's going to be out here. And
23 everyone is going to feed information into that
24 system, which means we have to have common codes, and
25 everything else, so that we can all sort of talk to

1 each other within this big warehouse.

2 But, when we floated that idea in
3 Pennsylvania, we thought that was just impossible. It
4 wasn't going to work, because everyone had their own
5 legacy systems, and their own codes, everything going
6 their own way. And, it just wouldn't have been -- the
7 timing would have been impossible, the costs would
8 have been impossible, and there would have been all
9 kinds of turf wars just trying to figure out what
10 those rules were that governed that.

11 So, Pennsylvania decided to adopt a much
12 more distributed system, where the understanding was
13 each agency really controls its own data, and we're
14 going to figure out ways to exchange information
15 across systems in a more facilitative way, try to find
16 ways to leverage the information that's all -- that's
17 always -- that's already there, and then try
18 incrementally to improve towards more consistent
19 standards across the board.

20 We also recognized, at least in
21 Pennsylvania, we rely on local governments. We rely
22 on counties for our court system, for the most part,
23 and on local police jurisdictions. Pennsylvania is
24 not as large a state as New York, and certainly not
25 the same size and population, has something like

1 3,000-some municipal government units, local
2 government units. We just really like the idea of
3 local government -- government near the people.

4 But that creates, of course, all kinds of
5 difficulties when you have, you know, hundreds of
6 part-time, you know, half-time police departments out
7 there that have to be in the mix somehow. How do you
8 coordinate all of this?

9 And, what Pennsylvania decided to do, as
10 part of this JNET effort, was to first look at the
11 state level, and say how can we get all of the big
12 agencies in the state to sort of get on the same page
13 and start sharing information? And then, let's move
14 down to the county levels. We have 67 counties.
15 Let's try to use counties as a point of contact.

16 Because, we needed to first develop some
17 organization and coordination within the counties,
18 across the various agencies -- county jails, and
19 probation, and parole, and others. And then, across
20 those 67 counties. And only then, can we really go
21 down to that municipal level. And what we should do
22 is try to use the counties as that sort of broker, so
23 that the municipal levels come up through the county,
24 work with the county. We'd have more coordination
25 locally, and then that's a coordination with the

1 state.

2 I only give that kind of background because
3 it was really important to sort of think through how
4 are we going to make this happen. I mean, it's --
5 it's a huge task, so how do we do it? And, we did it
6 very systematically that way.

7 What we also found was the reason it
8 succeeded was not so much that there was an infusion
9 of capital. That's always a good thing. But, it's
10 because people were getting something out of it.
11 People came to the table to give information because
12 they knew they'd get information. Or, it may be
13 better yet to say they wouldn't get information if
14 they didn't give information.

15 So, everyone had a reason for being there.
16 This wasn't let's be -- let's have, you know, good
17 government. We're not at the top of the list of good
18 government. We just got a budget recently, so we're
19 not at the top of that list.

20 But -- but, everyone is looking out to make
21 their own jobs easier, and to do their jobs better.
22 And, I think our -- our approach was to make sure that
23 there was something in it for someone. If they wanted
24 to participate in this, they controlled their data,
25 but they would only get information from that other

1 agency if -- if, in effect, they played along, if they
2 -- if they were, like, a collaborating agency.

3 MS. LEVINE: Can you just give us, though,
4 some tips? Some specific examples?

5 MR. BERGSTROM: Of?

6 MS. LEVINE: Of an agency that would give
7 information, and what kind of information they would
8 give, and --

9 MR. BERGSTROM: Sure.

10 MS. LEVINE: -- what kind of information
11 they would receive?

12 MR. BERGSTROM: Let's say the -- well,
13 probably the three largest players in the system were
14 the Department of Corrections, the Administrative
15 Office of our courts, and the Pennsylvania State
16 Police, which has our criminal history repository.
17 And, those three entities, I think, early on, were the
18 key players. Because, remember, each of them had
19 independent data systems, their own codes. Everything
20 was independent.

21 There was a real benefit of having some type
22 of coordinated information exchange between the
23 courts, and the State Police, because the courts had
24 to feed to the State Police information on
25 dispositions following conviction -- conviction

1 information, and then dispositions for those
2 convictions.

3 The State Police were the ones bringing
4 these people in, and sort of getting them into the
5 information system, fingerprint-based, all that kind
6 of good stuff.

7 Each system had their own identifiers. The
8 State Police, fingerprint-based, OTN, office tracking
9 numbers. That was basically a body number.

10 The courts had what we call an OTN -- had --
11 I'm sorry. The Police had SID -- State I.D.. The
12 courts had the OTN -- offense tracking number. So,
13 you had a body number that attached to fingerprints,
14 and you had a case number that attached to each and
15 every case coming through the system. And, one of the
16 difficulties was marrying the two of those up.

17 COMMISSIONER O'DONNELL: So, before we --
18 before we really go into a whole lot more detail, we
19 do have similar systems in place in -- in New York
20 State.

21 MR. BERGSTROM: Um hmm.

22 COMMISSIONER O'DONNELL: We do -- we're
23 moving to a common portal system --

24 MR. BERGSTROM: Right.

25 COMMISSIONER O'DONNELL: -- for all the

1 criminal justice agencies. The agency that's not part
2 of it is OCA, but we've set up separate protocols for
3 exchange of information.

4 MR. BERGSTROM: But OCA is --

5 COMMISSIONER O'DONNELL: Is the courts.

6 COMMISSIONER NEWTON: Administrative Office
7 of the Courts.

8 MR. BERGSTROM: Okay, the court, okay.

9 COMMISSIONER O'DONNELL: Administrative
10 Office of the Courts.

11 MR. BERGSTROM: Right.

12 COMMISSIONER O'DONNELL: So, we exchange
13 information.

14 MR. BERGSTROM: Okay.

15 COMMISSIONER O'DONNELL: But, we're moving
16 toward -- I mean, it -- very, very shortly pretty much
17 a one-stop system for all the criminal justice
18 agencies, so it's --

19 MR. BERGSTROM: Then, it sounds like you
20 had the same --

21 COMMISSIONER O'DONNELL: -- the State
22 Police, DOCS, Parole, --

23 MR. BERGSTROM: -- type of experience where
24 that was something that was a huge win-win, when you
25 can both of those entities on the same page saying

1 here's how we'll do this, so that we're not having
2 redundant activities, and we can, in fact, match
3 offender to offense, that's really the key --

4 COMMISSIONER O'DONNELL: We also have --

5 MR. BERGSTROM: -- to supplying --

6 COMMISSIONER O'DONNELL: -- in New York a
7 -- a Board made up of the major criminal justice
8 agencies that do a unified budget, that do purchasing,
9 by Board decision, so that we purchase --

10 MR. BERGSTROM: On the information
11 technology side?

12 COMMISSIONER O'DONNELL: On the information
13 technology side.

14 MR. BERGSTROM: Great, great.

15 COMMISSIONER O'DONNELL: So --

16 MR. BERGSTROM: Well then, that -- that is
17 this infrastructure we're talking about. So, it --

18 COMMISSIONER O'DONNELL: Um hmm.

19 MR. BERGSTROM: -- sounds like there's a
20 lot of similarities there. And what I'll do is move
21 beyond this.

22 One thing we found, though, was it was very
23 important to have policy coordination before you
24 automatically went to technology solutions. Because
25 all of a sudden it was, you know, here is the newest

1 trick that we can use to try to resolve this, and you
2 haven't resolved the underlying problems between the
3 agencies.

4 And so, as I said, we ended up with a very
5 distributed system where, through technology, we
6 connected all of the major state systems, and then we
7 moved that down to the county level, and then we've
8 been -- we've been continuing to move that down to the
9 municipal level. So, there is coordination across
10 that, for a flow of information.

11 Let me talk about the next step, because we
12 really moved from that sort of high-level coordinating
13 at the criminal justice level down to sentencing
14 specific information, which is really the focus --

15 COMMISSIONER O'DONNELL: Um hmm.

16 MR. BERGSTROM: -- of this.

17 And, the first thing is how do you collect,
18 or who collects that sentencing information, and how
19 granular is it?

20 Some of the things Professor Chanenson
21 mentioned, but let me reiterate some of those. One,
22 this is a systems approach that we're talking about,
23 the criminal -- the sentencing effort, the sentencing
24 system with the broader criminal justice system. And
25 one thing to think about is when does that person

1 first touch the system? Because, if you can start
2 gathering information at the point of arrest or
3 somewhere early in the system, and feed that
4 information through the system, it reduces redundancy,
5 but it also makes sure it's more accurate information,
6 that you're tracking the same kind of information.

7 There is a real importance of having detail
8 or granularity of the offense. To the degree
9 possible, again, as much information that can be
10 collected at any point in the system, and passing that
11 through, provides better information downstream for
12 any number of reasons. And, that's not only on the
13 offense. That's about the offender, and about the
14 victim.

15 One of the ways to make sure you see this as
16 a systems approach, or to use it as a system, is to
17 make sure you're utilizing common, and reliable, and
18 multiple identifiers. I mentioned State I.D. is
19 fingerprint-based, and OTN is a court-generated
20 identifier, and there certainly ought to be Social
21 Security number and things like that. So, try to take
22 in as many of those as possible, so that there is some
23 linkage for future use.

24 Also, on the information collection, trying
25 to think in terms of aggregating from the individual

1 level information.

2 Professor Chanenson talked about the need
3 for as much robust information about the individual as
4 you have, and the idea is using that as your baseline
5 and building up, so that you're building aggregate
6 information about offenders at that level of detail
7 that you're pulling together at a county or statewide
8 level.

9 Some of the things that we find that we have
10 to keep in mind, at least from a sentencing
11 commission's point of view as we're collecting
12 information is how are we going to use this down the
13 road. And so, there are important things like unit of
14 analysis. We get a lot of requests from the General
15 Assembly, regarding legislation moving through.

16 Sometimes there's interest in how many
17 people have committed this kind of offense. You know,
18 how many beds are we going to be taking up in the
19 prison? This one person might have done 50
20 burglaries, but it's one person that we're thinking
21 about right now. So -- so sometimes the unit analysis
22 we're thinking about is a person level.

23 Sometimes, it's the offense level. How many
24 burglaries were there?

25 Sometimes, it's the sentence level. How

1 many burglaries resulted in a prison sentence?

2 Then, there's also the level of analysis.
3 Are we looking at all offenses? Are we looking at
4 criminal incident? These are all the offenses this
5 offender committed on this date.

6 Are we looking at a judicial proceeding?
7 These are all the offenses this offender was sentenced
8 on, on this date.

9 Because, there is just a lot of ways to cut
10 it, and a lot of times we will get requests that it's
11 really important to know unit of analysis and level of
12 analysis to determine what answer or what question the
13 person is really asking, what information they really
14 need.

15 Information collection is important. And,
16 for many years, we've been doing this information
17 collection in a very paper-bound method. And what we
18 have done over the last several years, probably most
19 of the -- probably the last five or six years, is
20 really moving towards an automated approach.

21 We're getting read to release four years of
22 sentencing data. In fact, we'll be releasing our 2006
23 sentencing data probably in the next week or two
24 because we've moved all of this to an automated method
25 and because we can leverage other users in the system,

1 and we can pull in information from other parts of the
2 system.

3 Just, again, the information flow, thinking
4 about how your process works, and what are the
5 earliest stages in the process where you can identify
6 information that's useful to your system.

7 This is an example of a sentence guideline
8 form that is -- has typically been used in
9 Pennsylvania. There's a lot of offender information.
10 On the left-hand side, and a lot of criminal history
11 information -- prior convictions, prior juvenile
12 adjudications. On the right-hand side, at the top,
13 detailed information on that offense for which the
14 person was convicted. And then, down below that,
15 sentencing information on that specific offense.

16 Just to give you sort of some scale,
17 Pennsylvania, I think that in 2006, I think we had
18 about 135,000 or 140,000 individual sentences reported
19 to us. That probably represents somewhere in the
20 neighborhood of 90,000 offenders.

21 So, if you think about this as a paper
22 process, that's very difficult, and it's very time
23 consuming. But, what we've moved is the development
24 of what we SGS Web -- Sentencing Guideline Software
25 Web application. And so on line, importing

1 information from other parts of the system, we -- we
2 obtain information from the counties on the individual
3 offender, on that prior record score, that information
4 about prior offenses and prior -- prior convictions
5 and prior adjudications. We have specific information
6 on offenses.

7 And -- and one of the things that we
8 sentencing commissions tend to do is sub-categorize
9 offenses, get into much more detail than may be even
10 provided in the statute.

11 In Pennsylvania, under our drug offense
12 statute, we have a drug offense called possession with
13 intent to deliver, basically drug trafficking. The
14 statute has, basically, two categories, based on some
15 very low-level kind of requirements. I think we have
16 in the neighborhood of 80 or 90 separate
17 sub-categories, where we look at type of drug, weight
18 of the drug, and so forth, as -- as ways of trying to
19 understand better what judges are doing, or -- or to
20 provide recommendations on sentencing. So, offense
21 information on the specific conviction offense is
22 important.

23 In Pennsylvania, because we have guidelines,
24 this application calculates the guidelines, based on
25 the information entered. It includes information on

1 sentence imposed. And, in here, we have a pull-down
2 list on mandatory minimum sentencing provisions, or
3 enhancements like for drug -- drugs in a school zone,
4 or deadly weapons, so we're getting more and more
5 detailed information on each offense and the sentence
6 imposed.

7 And, with that kind of information, what we
8 can do is, at the individual offender level, at the
9 judge level, at the county level, and the state level,
10 we can generate reports or make reports available for
11 internal use in the counties, on the type of sentences
12 for given offenses, conforming to the sentencing
13 guidelines, when mandatory sentences are being used,
14 place of confinement -- county jail versus state
15 prison -- and then detailed reports that look at
16 offense-specific information, offender-specific
17 information, and county-specific or judge-specific
18 information. And those --

19 COMMISSIONER O'DONNELL: Mark, just a quick
20 question. Who is completing that? When you say it's
21 coming from the counties, --

22 MR. BERGSTROM: It depends on the county.

23 COMMISSIONER O'DONNELL: -- is it the
24 courts, or the --

25 MR. BERGSTROM: The court -- the local

1 court makes the determination about who in the county
2 will do it. We build the application so it can be
3 multiple users.

4 So, in some counties, it could be that the
5 District Attorney's Office or the Probation Department
6 may do the form prior to sentencing, putting in the
7 information, calculating the sentence recommendations.
8 And then, it could be the judge's law clerk or someone
9 else goes in, after sentencing, and puts in the
10 sentencing information. And then, that's
11 automatically reported to us.

12 And, so some degree, the way that the system
13 works is we do have a central -- a central application
14 that all of that information from the state is going
15 to, and, in effect, each county has a -- has a parcel
16 of that. They have -- they can extract any
17 information that they put have put into the system
18 for, that relates to their county. But, it also
19 allows them to find information on an offender in
20 their county who has been sentenced in other counties.

21 And, at this point, we have information in
22 the system from the year 2000 through present, with
23 gaps on 2002 and 2003, because it's under an old
24 system, and we're re-entering that information.

25 COMMISSIONER O'DONNELL: It's a -- it's

1 very impressive, but what's the hook? Is it mandated
2 by law that the counties do it?

3 MR. BERGSTROM: Yes. There is a
4 requirement that courts must consider the guidelines
5 when sentencing, and must report the information to
6 us.

7 In -- in the past, and this was why there
8 was a time lag, they'd fill in one of those paper
9 forms for each and every offense, eventually mail it
10 to the Commission. We would try to read it. We'd
11 enter it into our system. There would be errors if
12 it's an illegal sentence. We'd mail it back. We went
13 through that whole process for 140,000 offenses. And,
14 it was very time consuming. This is online, and it
15 requires use of --

16 MR. VANCE: Mark, is this available beyond
17 the Commission, to a broader public?

18 MR. BERGSTROM: Indirectly. The Commission
19 has a release of information policy, under which we
20 have -- we make available any of the information we
21 have in our system. The only things we extract from
22 the information are confidential information like
23 Social Security numbers, and reasons that are given
24 for departure sentences that might be protected
25 information -- health information, things like that.

1 Otherwise, the information is available.

2 The release policy helps us to sort of
3 manage the workload of it, to make sure that we're not
4 overwhelmed. But, in addition to creating reports
5 that we can provide to people -- standard reports like
6 this or custom reports, at a charge -- we also release
7 datasets. So, a person can order from us a dataset --
8 2000 sentences in Pennsylvania, 2000 sentences in
9 Philadelphia -- and they can get that. And that's --
10 in fact, when we did the last release of information,
11 a number of the major newspapers -- Philadelphia
12 Inquirer and others -- purchased a dataset from us and
13 hired a programmer to go through and play around with
14 the data.

15 So, it gets to what Professor Chanenson was
16 talking about, about transparency. It really puts the
17 information out there. And, there are sometimes some
18 downsides to that.

19 There was an instance, when we did the last
20 release of information where one newspaper just, I
21 think, misused the information. And, we did what we
22 could to address that issue, but it was still an
23 uncomfortable situation.

24 On the other hand, the Philadelphia Inquirer
25 did a very responsible job, and actually looked

1 through the information, identifying judges that may
2 have under-reported sentences to us, and put that out.
3 And the court, in a very responsive way, really tried
4 to address those kind of missing cases. So, the
5 public exposure of this actually helped to improve the
6 quality of the information we were getting.

7 MR. CHANENSON: And actually, Mark, I think
8 -- Mark, is that right by statute that it has been
9 this way since 1979? Judges have to -- judges have
10 the ultimate responsibility -- whether they do it, or
11 delegate it to some extent is a different question --
12 to report the sentencing information. In my ideal
13 world, as we interact with our office of -- the Courts
14 Administrative Office of Pennsylvania Courts, I would
15 love it if the court could not leave the judge's
16 docket until it was --

17 COMMISSIONER O'DONNELL: You got the
18 information --

19 MR. CHANENSON: -- checked off with ours.
20 We don't have that. I think that would be helpful,
21 because there is still some under-reporting, not a
22 lot.

23 Because, of course, while it's required, we
24 have no enforcement mechanism. Mark doesn't go and
25 kick down doors and talk to people who don't fill out

1 their forms.

2 And then also, our statute only requires
3 reasons if there is a deviation from our guidelines.
4 And, our guidelines are pretty broad. There is a
5 standard range, a mitigated range, and an aggravated
6 range. Only if you are outside either the mitigated
7 or the aggravated is it considered a true departure
8 from our guidelines.

9 And, at this point at least, our Commission
10 has refused to compel judges to provide reasons, even
11 through a drop-down box, as to why they imposed the
12 sentence that they did. To my admittedly academic
13 perspective of what I'd like to see in the sentencing
14 information system, I would like to see that
15 compelled. But, I don't want War and Peace, and I
16 know the judges have a lot to do, but providing even
17 from a drop-down menu reasons as to why can be
18 helpful.

19 Sometimes, we do get reasons. Sometimes,
20 they're helpful. Sometimes, they're not so helpful.
21 My favorite one is someone -- a judge who once wrote
22 on a form as to why the sentence was imposed, "Because
23 it's enough."

24 [Laughter]

25 MR. CHANENSON: And, while that may be

1 undoubtedly true, it doesn't do a lot for the
2 Commission in helping it to continually improve the
3 system.

4 MR. BERGSTROM: I should note that the
5 Commission on Sentencing is a legislative agency. And
6 one of these examples of working with the court is
7 this tremendous interface that we have in this system,
8 where we are, through this application, importing
9 information from their system.

10 So, a user goes into this application, just
11 types in the offense tracking number, and it pulls in
12 all the offender information and offense information
13 from -- basically, from the case as it was bound over
14 to our trial courts. Our Administrative Office of the
15 Courts has just upgraded and put in place a statewide
16 trial court system, information system, and that's
17 where we have this opportunity now to not only to pull
18 in the information from their system, but we're
19 pushing information back to them now.

20 So, when someone completes the information
21 in this system, that information goes back to the
22 courts, which is then forwarded from the courts on to
23 the State Police for the repository. So, we have much
24 more granular information in our criminal case for rap
25 sheets, based on information in this system.

1 But, it shows the coordination between our
2 two agencies, and it also shows the opportunity for us
3 to be able to get information down to the courts about
4 conviction offenses that we didn't receive forms for,
5 and to try to do a little bit more as an error check
6 on that. So, I think as time goes on, we'll be having
7 a much more seamless system.

8 Let me quickly move through some of these
9 other things, and then we'll take some more of your
10 questions.

11 Information exchange. Just the idea of
12 trying to figure out ways to leverage an information
13 system like the one you described here, to use
14 information that's already out there, that you don't
15 have to enter it again.

16 It's really important, I think -- at least
17 we found it, in our experience -- that whoever is the
18 owner of the information has to be able to control
19 access to that information. We had -- for instance,
20 one of the things that the State Police in
21 Pennsylvania are very concerned about is whether
22 certain information can make its way through to
23 defense attorneys. Nothing against defense attorneys,
24 but at least our State Police are very concerned about
25 investigative information somehow making its way to

1 individuals that shouldn't have it.

2 And so, it's very important, at least in our
3 protocols, that whoever owns the information really
4 controls who can access it. And, we have rules and
5 permissions, and other things like that, that are used
6 to control that kind of access.

7 COMMISSIONER O'DONNELL: So, you also have
8 crime data on the system that comes from the police
9 agencies?

10 MR. BERGSTROM: Yeah. For instance, within
11 this system -- a user in our system, through this JNET
12 system, can get an almost instantaneous rap sheet on
13 that person.

14 But also, within our own information,
15 internal information system, a user can see any prior
16 guideline form in the system on that offender. So, to
17 some degree, you have two different means by which you
18 can look at sort of the criminal history information
19 that's relevant for sentencing.

20 And, that's really important for research
21 purposes, to move it in the other direction, looking
22 at information we have on individuals we have in our
23 system, and say have these people been re-arrested in
24 the next three years or so. And, I'll talk in a
25 minute about a technology that really makes that

1 pretty wonderful.

2 So, we have protocols. We have -- I talked
3 before about it -- common identifiers. What you'll
4 find sometimes, though, is you don't have common
5 identifiers. And so, we have a project where we are
6 developing a crosswalk across all the criminal justice
7 agencies. We call it a master charge code project.

8 But, it's basically an electronic matrix
9 that really goes to the most granular offense listing
10 that any agency has, and maps that across all of the
11 agencies, as well with the federal codes -- UCR, and
12 NIBRS, and others -- and also feeds in information
13 from LexisNexis on any new statutes enacted, so that
14 that's automatically brought into the system. And
15 then, everyone that has data in the system is creating
16 codes that match that.

17 So, this crosswalk is great to sort of, you
18 know, looking back in time. It provides a mechanism
19 to try to find current equivalents across the Fed
20 system. And prospectively, it gets everyone sort of
21 on the same page. As we're thinking about what code
22 we're going to give to this offense, we now know what
23 code is important to the State Police, or the Parole
24 Board, or the Department of Corrections, and we're all
25 sort of on the same page, as we're establishing new

1 codes. So, a very important way of helping to improve
2 things moving forward.

3 And, I know we talked about technological
4 solutions. I'm going to talk about -- I'm going to
5 show you slides on these five things: flexible
6 search, notifications, interface, and indexing. I
7 guess that's four, but here's the first one.

8 Flexible search. Anyone who is a JNET user
9 in Pennsylvania can go into this one screen -- and
10 it's a secure network that we have -- and put in any
11 kind of identifiers they have, and identify the
12 sources that they want.

13 They can identify anything they want, but
14 based on that person's security role, and the
15 permissions that person has as part of their profile,
16 they'll only receive back information from those
17 agencies and those data sources that they're permitted
18 to have access to. So, it's a sort of one-stop
19 shopping. We call it a justice data flexible search.
20 Put in information, get back any information you want
21 on an offender.

22 So, it's a very discrete, one-to-one kind of
23 thing. I want to know about this offender. Send me
24 everything, or just send me the Department of
25 Transportation records, or things like that. So, this

1 is the system for that.

2 This is something we call notifications.
3 And what notifications does is use this technology we
4 have in place to automatically contact people when
5 some event occurs.

6 So, for instance, if I'm a probation
7 officer, and I have a caseload of 200 people, I can
8 post a listing of all the people on my caseload, and I
9 can identify what type of trigger I'd like to have the
10 system keep track of. Let's say I'm a P.O., and I
11 want to be notified anyone on my -- when anyone on my
12 caseload is arrested. So, I post my caseload and
13 indicate arrest. Any time any person on that caseload
14 is fingerprinted, a notice automatically goes to that
15 person, saying "John Smith has just been arrested.
16 He's in this police department. What should we do
17 with him?"

18 So, notifications is a very nice way, a very
19 public safety oriented way of quickly leveraging the
20 information throughout the whole system to help you
21 make decisions quickly.

22 One interesting way that the Commission --
23 that our Commission has been using this is for
24 research. We're required under statute to do an
25 evaluation of our state motivational boot camp. And,

1 death notices. And, there were -- I forget if it was
2 eight or ten offenders had died. Well, we thought
3 they were successes. Maybe they were.

4 [Laughter]

5 MR. BERGSTROM: But, because of that
6 difference -- because of getting death notices, the
7 study was no longer statistically significant. So it
8 was, you know, it was still a pretty nice program, but
9 -- but just having death notices really improved the
10 quality of the research we were doing. And, it's an
11 automated system.

12 So, it's just little sort of tools like that
13 are really helpful in improving the use of information
14 in the system.

15 Here is the interface that I was talking
16 about. A user puts in an OTN. It goes out and grabs
17 information from other systems, populates our
18 application.

19 And finally, --

20 MR. CHANENSON: Mark, mention just briefly,
21 the DJS system, and again, this kind of reaching --
22 reaching down to the first contacts in our system.

23 MR. BERGSTROM: Right. In Pennsylvania, we
24 have two levels of courts, generally magisterial
25 district judges, magistrates for the initial hearings,

1 and then a Common Pleas Court. And, the
2 Administrative Office of the Courts has those two
3 systems, has an automated MDJ system, and an automated
4 CPCMS system.

5 Initially, we were only pulling in the
6 information from the MDJ system, because that was the
7 only information available on the statewide level. We
8 are now in the process of transitioning over to the
9 Common Pleas -- the trial court system.

10 And, the way our system is going to work is
11 it will first look for information in the Common
12 Pleas, in the trial court, and pull in that
13 information because it will be more current
14 information, and it will be more in keeping with the
15 status of the case. But, if that information isn't
16 found, then it will go back and grab the initial court
17 information, the Magistrate's Court information, and
18 bring that into the system.

19 One of the things that Professor Chanenson
20 has been a big fan of all along is making sure that we
21 can track information back to that point of arrest,
22 for that first hearing, the preliminary hearing or
23 arraignment, so that we can start to look at those
24 trends of what was this person arrested for versus
25 what was the person convicted of, versus what was the

1 person sentenced for, and then what were the outcomes
2 for whatever sentence was imposed. So, this provides
3 a better opportunity to link all of that together.

4 MR. CHANENSON: The obvious connection is
5 -- and I believe this is one of the things in your
6 mandate -- is the impact of plea bargaining. As you
7 begin to see the broader array of charges at the top
8 end of the process to what goes down, and starting to
9 be able to drill down as to why.

10 MR. BERGSTROM: And again, the final little
11 tool that we have, and this is fairly new -- and, in
12 fact, as we looked at a lot of work done in New York
13 City regarding pre-sentence investigation reports and
14 software for that -- but, we have an index in this
15 system, where any time a court in Pennsylvania orders
16 any type of report -- a pre-sentence investigation
17 report, a sex offender assessment, a drug and alcohol
18 assessment, a mental health assessment, any of those
19 kind of reports -- it triggers a message through the
20 system that populates this index.

21 And so, all of those -- all of the
22 information on the offender and the type of report is
23 in that index. And then any user -- a probation
24 officer, or other -- can go in, put in the identifier
25 information, and pull up information on any report

1 that has been ordered in the Commonwealth for that
2 offender.

3 This only goes back, I think, a year and a
4 half, so it's, you know, something that we'll build
5 over time. And, at this point, we provide contact
6 information, but there is still a need to contact that
7 county, basically because of the Rules of Criminal
8 Procedure, to get that report. But, the intent is to
9 eventually automate this so that there is a link to
10 that. If you have permission to see that, you have
11 permission to obtain the report and --

12 COMMISSIONER O'DONNELL: But, the PSI,
13 itself, is automated and part of the system now?

14 MR. BERGSTROM: Well, it's a
15 county-by-county basis, because those services -- PSIs
16 are generally done by County Probation or Parole. It
17 depends on which county you're in, as to the level of
18 automation.

19 Some counties are very automated. Most
20 counties are using a database system for managing
21 offender probation information. Some have automated
22 that and feed it into a PSI boilerplate. Others have
23 not. So, it's a real mixed-bag right now.

24 And, we're trying to move towards
25 standardizing that a little bit. Our Administrative

1 Office of the Courts has been a little hesitant to be
2 too heavy-handed in that area, but I think there's a
3 movement towards some kind of standardization. And,
4 it certainly fits in with this setup.

5 Let me just close by talking about, you
6 know, now we have all of this information, very
7 specific sentencing information, and we have it
8 available within a broader context, where we can sort
9 of crosswalk into other systems. So how can we use
10 all of this information that we gathered?

11 And, here are some of the things that we do.
12 We certainly have simulation models and projections.
13 We have -- we use it to target people for specific
14 programs, or look at how programs are operating. And,
15 we use it for research and evaluation.

16 So, just as some examples, we have
17 sentencing guidelines in place. They're automated.
18 We can use a simulation model to change a given cell
19 in the guidelines. Say, for this type of offender,
20 and this type of criminal history, how about if we
21 change the minimum sentence recommendation from 56
22 months up to 60 months? What's going to happen with
23 our population or with sentences, if we do that?

24 So, at the sentencing level, we can look at
25 what would happen with changes in the sentencing

1 guidelines, and how that would impact sentencing
2 decisions.

3 We can then take that information, and all
4 of the other agencies are doing the same thing. The
5 Department of Corrections, the Parole Board, and
6 others are looking at their systems, doing that same
7 type of thing. And, at a policy level, we're pooling
8 that information together.

9 We now are using information within our
10 systems to tell us what has happened and sort of what
11 the trend lines are, but we're also bringing everyone
12 together to sort of look at the policy implications.
13 You know, is the Parole Board going to be changing
14 presumptions regarding release? Is the Sentencing
15 Commission going to be increasing guidelines over the
16 next whatever? Is the General Assembly looking to
17 change our sentencing structure?

18 Those kind of things are brought in at a
19 policy level, and we then come up with correction
20 population projections.

21 As far as targeting, there's a lot of
22 specialized programs in Pennsylvania that are
23 available at the courts. Part of our job is to try to
24 sort of look at what courts are doing, and then
25 provide them with the information so they can decide

1 if it's better practices.

2 One thing that we found really helpful is
3 just a very simple kind of pie chart system like this.
4 In our sentencing guidelines, we have five levels of
5 sentencing. Level 5, basically, being people who we
6 were recommending exclusively for state prison
7 sentences; and Level 1, people we were recommending
8 for community treatment, for no incarceration. So,
9 it's a continuum of those levels.

10 What we can do -- at the county level, at
11 the judge level, at the statewide level -- is we can
12 look at the distribution of sentences for each of
13 those levels. Because, at Level 1, we're recommending
14 across-the-board non-confinement, but if we're finding
15 any substantial use of incarceration -- either county
16 jails or state prison -- that really provides an
17 opportunity to say what's happening here? Is there a
18 reason why this is happening?

19 And maybe that's an opportunity. If it's a
20 county jail and they're overcrowded, this is
21 information that might be helpful in saying why don't
22 we look at this population? Maybe there's something
23 you can do.

24 Up at the other end, with state prison, if
25 we're not seeing total use of state prison, you know,

1 we start looking at that and saying what is happening
2 there? Are there certain offenders that do not
3 require state prison? Or are there other things we
4 should do?

5 So, this is just sort of a snapshot that
6 helps to guide, at a very high level, policy
7 discussions. But we can take this into a much more
8 detailed level.

9 These are our sentencing guidelines. What
10 we've done in this example is we plotted on our matrix
11 every person that went to state prison in a given year
12 that was eligible for other programs -- either for
13 some kind of county program, or some kind of
14 specialized program. And we said, okay, these people
15 went to state prison, but they were eligible for
16 something else. Why is that? What's happening?

17 And you're looking at, in a very detailed
18 way, the specific offenses and prior record score
19 history. So, once again, if we find programs being
20 under-utilized, or counties or the state are looking
21 for opportunities to try to change the mix or the
22 distribution of sentences, this is really useful
23 information in trying to inform those kinds of
24 decisions.

25 And then, finally, as part of our research

1 partnership, the Commission is based at Penn State.
2 Almost for our full life it has been there. And, we
3 have a lot of research projects that we're responsible
4 for, either statutorily, or the Commission has decided
5 on. And really, these are the -- I think the
6 culmination of collecting all of that information,
7 having that kind of integration with other data users,
8 that we can look at how we're doing things, but also
9 how the programs are impacting offenders. So,
10 recidivism and other things like that. So, --

11 MR. CHANENSON: And, this kind of a
12 relationship is one that has allowed us to leverage
13 our limited resources, to learn more about our own
14 system, by being able to offer the data to
15 researchers, either partial financial arrangement, or
16 simply by encouraging researchers with their own funds
17 to pursue things. It's the opportunity for us to know
18 information that we wouldn't know otherwise.

19 MR. BERGSTROM: So, I think we're almost
20 out of time, but we have some contact information
21 here. You have the handouts. And, we'll probably
22 have a copy of this, with more detail. But, we're
23 willing to answer any questions you might have.

24 COMMISSIONER O'DONNELL: Okay. Thank you,
25 very much. We can envision ourselves 20 years from

1 now, hopefully --

2 [Laughter]

3 COMMISSIONER O'DONNELL: Hopefully, it
4 won't take us that long. But any other questions?

5 MR. ANNUCCI: Just a quick question, in
6 terms of the data you get, the feedback you get,
7 particularly in plea bargaining cases or what the
8 judge may offer as the rationale for a particular
9 sentence.

10 Some of the cases we're looking at in New
11 York now we're focusing on because of our recent civil
12 management statute with sex offenses. And, you look
13 at the actual conviction in relation to the original
14 description of what the acts were. And, there's a
15 serious gap.

16 And, we can only assume that a lot of the
17 reasons have to be with a conscious decision by the
18 DA. Some conviction is better than nothing. I have
19 no victim, one who's willing to testify, or it's a
20 young child, or it's too traumatic.

21 Are you able to capture that kind of level
22 of information? And, are people honestly reporting
23 it?

24 MR. BERGSTROM: No. Well, first, our
25 sentencing guidelines are based on conviction offense.

1 So, what we need is what Professor Chanenson had
2 mentioned earlier, which is linking our sentencing
3 information, our court information, back to the
4 original charge information. We now have a mechanism
5 in place that we can do that.

6 But, what I think you've pointed out, with
7 sex offenders especially, that is -- even if we could
8 do that, that's not enough. Because there is so
9 information that you have to unpack, regarding why
10 that happened.

11 We -- we have seen that in a sort of
12 comparable area in Pennsylvania. We have a number of
13 mandatory sentencing statutes, but they -- but almost
14 all of them provide prosecutorial notice. So, if the
15 DA doesn't give notice, the mandatory doesn't apply.

16 So, if you have someone picked up for five
17 -- convicted for five grams of cocaine, the mandatory
18 will only apply if the DA gives notice. If the DA
19 doesn't give notice, then the guidelines apply. And,
20 the issues around when notice is given or not given,
21 and how that all works out, is it take -- it takes a
22 lot of sophisticated analysis of that, because it's
23 really easy to just say off the top, you know,
24 something is going wrong here, or this isn't working
25 right. And, I think we're always worried about trying

1 to come to a quick conclusion.

2 So, we have the tools in place to do it, but
3 I think we've recognized that we really have to --
4 have to drill down, talk to a lot of people, try to
5 figure out what's happening, and try to objectify that
6 stuff.

7 MR. CHANENSON: And, to the extent that
8 you're also interested in whether we can capture why
9 this happened, the answer is no. I mean, we don't
10 have -- our prosecutors, like yours, I'm sure, have
11 vast discretion. And, that's something that is not on
12 public display, often for good reasons, sometimes for
13 frustrating -- leads to frustrating results.

14 And again, the judges and their decisions,
15 and asking them for reasons, judges are in many ways
16 the low-hanging fruit, right? They are the ones who
17 operate the most in the public view to begin with.
18 Candidly, they have less political power than the
19 prosecutors do. And, the prosecutors could never
20 prosecute every case of which they become aware.

21 So, there are areas that will be hidden from
22 view, probably always, and oftentimes for good
23 reasons. But, I think that one of the things you can
24 begin to see, if the judges start to provide more
25 reasons, is where you see deviations in sentences in

1 some of these kinds of cases. Once in a while you'll
2 see, in a case that's been knocked down, a departure
3 above. And, sometimes you'll see judges give reasons,
4 sometimes not. That gets very delicate, in terms of
5 whether the judge is or should be imposing a sentence
6 more on what the judge believes happened, as opposed
7 to what was the actual conviction. We can get small
8 windows into that, but only on the judicial side of
9 it.

10 MR. BERGSTROM: You know, --

11 COMMISSIONER O'DONNELL: Well, thank you --

12 MR. BERGSTROM: -- it kind of --

13 COMMISSIONER O'DONNELL: -- and I guess --

14 okay.

15 MR. BERGSTROM: Okay.

16 COMMISSIONER O'DONNELL: No, we can kind of
17 sum up. I'm just going to try to keep us on schedule.

18 MR. BERGSTROM: Oh, sure, absolutely.

19 COMMISSIONER O'DONNELL: So, why don't you

20 --

21 MR. BERGSTROM: I'll leave it at that.

22 [Laughter]

23 COMMISSIONER O'DONNELL: Okay. Than you,
24 very much.

25 MR. BERGSTROM: You're welcome.

1 COMMISSIONER O'DONNELL: We really
2 appreciate it.

3 [Applause]

4 COMMISSIONER O'DONNELL: We have one final
5 speaker today, Donna Hall, since we're discussing
6 research. And, I think we'll keep going if we can.
7 If somebody needs to step out and take a quick break,
8 please feel free to do so.

9 But, what we asked Donna to do, also kind of
10 contemplating next week and moving forward into
11 subcommittees and getting to work on our
12 recommendations for our preliminary report, is to come
13 up with a list of research projects that either she
14 has kind of focused on, or our research group, because
15 we really have an active research group -- thank you
16 to all of you who are participating. And also, issues
17 that have come up during our various discussions so
18 far in the Commission.

19 This is not an exclusive list. This is out
20 there to get the discussion going, have you all focus
21 on, you know, are we leaving gaps in what we need to
22 do? But, Donna is going to lead us in a discussion of
23 that, and we may need to do some -- set some
24 priorities. We may not be able to do everything.
25 But, this is at least a place to start.

1 So, Donna?

2 RESEARCH AND DATA ANALYSIS GROUP: PROPOSED PRODUCTS

3 MS. HALL: Okay. I think that before I
4 give you the products that we're discussing, I want to
5 take a minute just to describe a little bit about the
6 databases that we do have. And, I'll --

7 COMMISSIONER O'DONNELL: Yeah, that would
8 be helpful.

9 MS. HALL: -- just go through --

10 COMMISSIONER O'DONNELL: I wrote a note
11 about that.

12 MS. HALL: You know, the problem has been
13 you understanding what we can ask for, and what we can
14 produce easily, what would be more difficult.

15 DCJS has a criminal history database that
16 will be used heavily for this research. And the
17 criminal history database is kind of -- is initiated
18 at the arrest stage. So, it includes any
19 fingerprinted arrest in New York State. And that
20 would be any misdemeanor or felony, and a long number
21 of violations related to prosecution.

22 Once there is an arrest made and the
23 fingerprinting is done, we get a record that shows all
24 the charges related to that arrest offense.

25 As that person proceeds through the court,

1 they're arraigned in lower court. We then link to
2 OCA's database, and they shoot us all the information
3 related to arraignment -- what the charge is, if
4 there's any dismissals.

5 We pick it up again at indictment. We get
6 information on what they were actually indicted on.
7 And then, through dispositions. We get information of
8 what the disposition of the case was, and what the
9 sentence will be for them.

10 So, we actually have the database that links
11 from arrest through sentencing. And also, that links
12 various records of a single individual. So, if you
13 ask me, you know, I want to know everything this
14 person has ever been arrested for, that's all readily
15 available in this database.

16 The database also links to probation
17 admission records. It links to DOCS admission
18 records. It's going to be linking to jail admission
19 records, only at this point, to my knowledge, it
20 doesn't. We might, in the future, have that database.

21 So basically, we can -- you know, we can
22 identify all the charges in an offense. We know every
23 charge that anyone has ever been arrested for. We
24 know exactly what happened to the charges, what
25 sentence did we have.

1 What this allows us to do is not just to
2 look at an individual's history, but we can cut --
3 place a period of time, and see what happened
4 subsequent to that period of time. So, I can say, if
5 you ask me, for example, tell me everybody who was
6 sentenced to jail in 2002, and what happened to them
7 over the next three years, you know, we just built the
8 database to do exactly that a couple of days ago.

9 And, we can do that for jail. We can do it
10 for prison. We can do it for conditional discharges.
11 We can do it for drug offenders. We can do it for
12 robbery offenses. We can do it for people with these
13 kinds of histories, or those kinds of histories, and
14 all kinds of combinations of those.

15 So I think that, you know, in terms of
16 understanding who our populations are, and what
17 happens to those people in the future, we have a very
18 rich database to do this with.

19 In addition, what we do is link to DOCS
20 database, and we have Probation's database, and we
21 also have linked, at times, with Parole's database.
22 And, we pull these in and integrate them.

23 So that, for example, when people leave
24 DOCS, we routinely look at what happened when they're
25 out -- two years out, and three years out -- in terms

1 of re-arrest. Not just whether they were and how long
2 it took, but what they were re-arrested for. So,
3 these databases all mesh pretty easily, and we can do
4 that routinely as well. That data will be available
5 for use.

6 So, for example, if we want to know what
7 happened to Shock people, and we want to compare that
8 with other people, we have the history. All that kind
9 of analysis is just readily available.

10 For us, it's just a -- you know, in some
11 ways, a flick of a switch. It's actually kind of more
12 complicated to define the question, and make sure that
13 we're analyzing it right, than it is to actually
14 produce the answers, because much of it is on the --

15 COMMISSIONER O'DONNELL: Donna, do you get
16 much sentencing information? Do we get, like,
17 judge-specific sentencing information?

18 MS. HALL: Well, that's an interesting
19 question, because I started thinking about that as
20 they were saying it. We do -- we obviously get down
21 to the county. In our analytical database, we don't
22 include information on who the judge was. I believe
23 OCA has that information. I don't know if we -- we do
24 get it Sharon?

25 Okay. So, we have it available on our

1 database, but we don't routinely put it --

2 COMMISSIONER O'DONNELL: Report it, or --

3 UNIDENTIFIED: We've been uncertain about
4 the quality of the data.

5 COMMISSIONER O'DONNELL: Um hmm.

6 UNIDENTIFIED: I think -- I think there is
7 also missing data.

8 MS. HALL: Okay. So -- so, yeah. We --
9 you know, we can drill down through it pretty far, in
10 these -- in these situations. So, that's the kind of
11 data that we have available.

12 Now, one of the -- we wanted to try to
13 jump-start the process a little bit by helping the
14 groups identify potential research products that might
15 be of use.

16 We have a research support group that's
17 attached to this Commission. It includes folks from
18 DCJS, from Parole, DOCS, OASAS, Division of Budget.
19 And now, OMH is going to be joining this group, as
20 well. Those will probably be the core agencies at the
21 State level. We may also be incorporating some of the
22 local research groups into this process.

23 COMMISSIONER O'DONNELL: And perhaps OCA?

24 MS. HALL: Perhaps OCA, Center for Court
25 Innovation, and CJA, we'll be inviting into this.

1 And so, as we -- as the subcommittees start
2 working, I believe that you will be identifying many
3 research questions that you'll want answered, and
4 we'll need to prioritize those questions.

5 We will have research people sitting in on
6 each of the subcommittee meetings. And, they will
7 keep track of the questions as they come up. They
8 will work with the Chairs and the committees to
9 prioritize those questions. And, they will bring it
10 back to the research group, so that can divvy up the
11 work, get a time frame for producing the results, get
12 that right back to the committee Chairs, so that they
13 understand fully how long it will take. Most things
14 shouldn't take too long. And then, you know, again,
15 go through, use the products, and we'll have to make
16 decisions about which agency will take the lead,
17 depending on what the research question is.

18 I think that, in general, there's a certain
19 series of questions, I believe, that all the
20 committees will be asking and -- whether you're
21 talking about sentencing, or incarceration, or
22 community supervision -- and that is things like what
23 are the characteristics of the population that we're
24 dealing with in these various areas? How do we
25 currently handle these cases?

1 And that gets into issues about what rules
2 bound our decisions, what resources influence the
3 decisions, and what norms, community norms and
4 policies guide the decisions.

5 And, what are the outcomes, in terms of the
6 criteria that are referenced in the Executive Order?
7 And, those criteria include things like uniformity and
8 fairness, public safety, rehabilitation,
9 incapacitation, support of victims, cost
10 effectiveness, and transparency of the system. So, we
11 can play all of this out through the data.

12 And then, what does research within and
13 outside New York tell us about what works, to maximize
14 these various things? To maximize fairness, public
15 safety, victim support? We want to be able to compare
16 what we see in New York with what the best practice
17 is, and make those decisions about where things can
18 get improved, and then identify ways of implementing
19 improvements through programs, policies, rules and
20 regulations, and watch agents.

21 So, I think that's kind of the process from
22 the research side that the groups will be going
23 through.

24 We wanted to take a look at potential
25 products. And I have a document, just a short memo

1 that I put together, that kind of identifies some
2 products that groups might be interested in. And this
3 is, as we said, largely from the information that
4 people have asked about, and things that speakers have
5 spoken about. So, I'll just kind of quickly go over
6 those. And, I think what you'll want to do pretty
7 early on in the process is identify for your
8 subcommittees what your most critical products are.
9 Some of these might fall off the table. Some of them,
10 they might be desired products.

11 One of them is a working paper describing
12 long-term trends in dispositions, types and length of
13 sentences, and time served inside, and the composition
14 of the correctional population in New York. I think
15 that kind of paper is critical to setting the stage,
16 and also will be important to an internal report. We
17 need to have that baseline information.

18 Another working paper describing trends in
19 utilization of back end early release programs in New
20 York State, what Shock is system-wide, what Willard
21 is, CASAT, what the populations are. DOCS produces a
22 lot of these reports. And, I think what we're
23 envisioning here is just a real concise summary of
24 that material, or bringing it together in one spot, so
25 we all know what the criteria for admission are, what

1 the characteristics of the populations are, what is
2 the rate of acceptance and completion of these
3 programs, and time reduction off the minimums
4 associated with these programs. All that type of
5 information will be pulled together in a single
6 report.

7 Another product that we are proposing
8 potentially is a working paper describing trends in
9 release by Parole, at first appearance. And,
10 controlling for changes in the mix of people who come
11 before the Parole Board. And, I think that's a
12 critical point that we haven't spent a lot of time on.
13 But as we discuss changes in how Parole has released
14 people over time, the rates of release, we have to
15 appreciate that people coming before the Parole Board
16 has changed over time for multiple reasons.
17 Determinate sentencing has, you know, the back end
18 release mechanism changes who comes before the Parole
19 Board.

20 We might want to do something about looking
21 at the reasons for refusal. And, we're not that
22 familiar with the Parole Board's data, so we have to
23 look at it, to see what might be available and
24 successful. And, maybe do some kinds of analysis of
25 release rates by offender risk, or whatever else the

1 -- you know, the committee might be interested in.

2 Another product is a working paper
3 describing trends in terms of parole and probation
4 revocation. And, I think this is definitely something
5 that a number of people have discussed, particularly
6 in relation to parole and, to some degree, with
7 probation.

8 But, we're envisioning a report that
9 attempts to quantify the reasons for revocation. And,
10 these can be very complicated, because often
11 revocation is a process that builds. They may have
12 two, or three, or four incidents that then leads to a
13 revocation. So, we'll have to try to sort that out.
14 And some of that will come from Parole databases.

15 The one thing -- another piece that
16 contributes to revocation is re-arrest, you know,
17 coming -- many, many offenders that come back into
18 DOCS on technical violations have intervening
19 re-arrests, and so that technical might be sort of
20 confounded by some new criminal behavior. And, we
21 want to be able to sort that out, so that people
22 understand, you know, how many of these cases are
23 truly potentially purely technicals, and how many
24 might be part of a larger plea process, where they
25 might have decided, well, we'll revoke the guy, rather

1 than going forward with a conviction. So, we know
2 that happens all the time.

3 This is particularly important, I think,
4 because when you talk about changes -- for example,
5 there was some discussion at one of the meetings
6 previously about restricting the reasons people can be
7 technically violated, you know, to -- to not allow for
8 a technical violation unless there's a conviction, a
9 new felony conviction.

10 The problem, the potential problem, or the
11 unintended consequence of something like that could be
12 that if we're having trade-offs currently going on,
13 such that folks are getting technically violated
14 rather than getting fully prosecuted, then if we
15 eliminate the opportunity for technical violations, we
16 could change those prosecution patterns, and we might
17 end up with a bigger prison population. So, we need
18 to keep in mind unintended consequences in all that we
19 do, and we're trying to, you know, kind of play some
20 of that out, by looking closely at these revocations.

21 And, looking at probation revocations, which
22 we haven't done much with. You guys may have done
23 more. We don't see many people entering prison on
24 probation revocations. But, perhaps, jail. So, we
25 need to see if that's something we may want to look

1 at.

2 And then, a working paper examining
3 recidivism across sentence types and correctional
4 programs. And, that would include looking at not just
5 the prevalence, but the timing of recidivism by type
6 of sentence -- probation, ATI, conditional discharges,
7 prison -- and controlling for offender risk factors --
8 prior histories, perhaps our risk scores will be used
9 as controls.

10 And, to the extent possible, we want to
11 compare our recidivism with what we can find in other
12 states. Because, I think that question keeps coming
13 up, you know, how well do we do. And, I think we can
14 begin to measure some of that.

15 And also, to look at recidivism results with
16 specific correctional interventions. So, looking at
17 recidivism associated with Willard, and Shock, CASAT,
18 and DTAP. And a lot of this, again, has been done to
19 some degree. So, in some of those we're pulling --
20 you know, pulling the information together. But
21 others will be original analyses, so we're going to
22 add to what's currently out there.

23 Another product we're proposing is a working
24 paper -- and these next three are more of
25 literature-type working papers. Again, I think

1 they're important to the background for the
2 committees.

3 A working paper on national trends in
4 sentencing commissions, and sentencing oversight
5 bodies. And, I think we've got a good start on that
6 just by the information that was presented today.

7 A working paper on what works in
8 correctional programs, Ed Latessa's material, which is
9 a big boost in that regard. And because we have a
10 separate reentry initiative going, that we've had
11 going for a few years, we have a significant amount of
12 research in that area to get into, so we'll bring that
13 to bear on, you know, these questions.

14 And, a working paper on the cost of
15 corrections in New York State. And that, for us, is
16 new. We don't do much with the costs, but Travis
17 Franti, from Budget, sitting in the back, we're going
18 to rely on him heavily to help guide us in that work,
19 to be able to really drill down on how much we do
20 spend in these various areas, and what cost savings
21 might occur if we made some kinds of shifts in the way
22 we sentence, or the way we release, or program costs.

23 So, those are the general overview working
24 papers that we are proposing to open up for
25 discussion. And again, I think the committees will

1 arrive, probably pretty quickly, at what their
2 critical -- you know, their critical questions are for
3 their area. And, they may be here, and they may not
4 in these things. So, there might -- you know, I'm
5 sure there's going to be much more to be done.

6 I guess, before I pause and ask for
7 questions, I just want to mention that we do have the
8 research group in place. A number of agencies have
9 come together already. We've had meetings. We're
10 going to be meeting every other week. The meeting is
11 going to follow this meeting, a day later, and start
12 divvying up the work and, you know, making
13 assignments, given what comes out of the
14 subcommittees.

15 We will be recording all the questions that
16 come from the subcommittees. Again, we'll be playing
17 that back to the Chairs, so they know exactly what
18 we're going to be working on, and if we're not working
19 on the right things, we just need to know, and we'll
20 make a shift.

21 And, we'll try to get this stuff done just
22 at a real quick pace, at least preliminary findings.
23 If you want real in-depth analysis, it can take
24 longer. But, you know, sometimes we can do this stuff
25 in stages, so that we're not leaving people in the

1 dark as they need to know.

2 And then, we've been talking about if -- if,
3 in fact, it comes to discussions about some changes in
4 sentencing then, you know, we can play those out. We
5 can model those changes.

6 One more point, I think, as I was listening
7 to these guys speak, there's a couple of other points
8 that I want to make.

9 In some ways, some of the criticisms of our
10 Penal Law regarding its kind of excessive detail has
11 been a blessing for research. Because, we have a
12 significant amount of information built into
13 subsections of our Penal Law. So, we can tell is
14 there a weapon, was -- you know, and some --
15 sometimes, was there injury? Was there a child victim
16 in the case? And, in certain situations, we can
17 identify that.

18 So, you know, the type -- in some
19 situations, we can identify the type of drugs that
20 were used. So, the detail of our Penal Law actually
21 benefits us, in terms of research. And, we'll -- you
22 know, we'll bring that to bear on this process, as
23 well, you know, to say about what these cases look
24 like at different points in time.

25 COMMISSIONER O'DONNELL: So -- so, our work

1 is going to be changing from sitting here and soaking
2 up what people are giving out to us, to having to
3 produce it ourselves. And everyone's homework
4 assignment is really to go through this and think
5 about where we have gaps, what it is that we should be
6 looking at.

7 Because, you know, I do think it's critical
8 that our recommendations can be supported by data.
9 And, we need to make sure we have the data at our
10 exposure. So, for our subcommittee Chairs, but for
11 each and every one of us, or people who have been
12 participating, please take a look at this, and send us
13 your thoughts and suggestions for research projects.
14 And, I know it will evolve, but we really need to
15 focus now on what we need to do the most.

16 So, any questions for Donna?

17 MR. ANNUCCI: Donna, I may have even asked
18 this earlier, but I'm always interested in if there's
19 a way to compare time served data for old
20 indeterminates for a particular crime, and after the
21 Sentencing Reform Act, the same comparable crime under
22 determinate sentencing.

23 Do we have that capability? Have they been
24 in the system long enough? Because, in '95
25 determinates went into effect for repeat violent

1 felons. So, for argument's sake, if you looked at all
2 '96 DINS for rob one, compared time served for them,
3 with all '90 DINS for rob one, what -- what would that
4 tell us? And, is that a legitimate, reliable, valid
5 measure, in that we might still have rob ones still
6 serving set time, who I assume you wouldn't capture,
7 because time served means they've been released, and
8 that's --

9 MS. HALL: Right. Most of those early
10 commitments have been released. We do keep track of
11 them, because we're looking at them for recidivism
12 purposes, particularly since there's a cohort of them
13 that did not get parole supervision. And so, for
14 three years. So, we're looking at those. We actually
15 have some comparisons.

16 But, yeah, we can do that. We have done
17 some of that. We did put together a report that was
18 reported by the legislature, back in the early 2000s,
19 making some of those comparisons. And now, they -- it
20 would be even stronger, because we have a larger
21 portion that are already completed and are out.

22 Basically, what we found with the initial
23 S.R. 95, which was the second VFO predicates, that the
24 time served under determinate was longer than it had
25 been prior to '95, but as -- as -- with the new

1 administration in '95, the Parole Board changed its
2 practices, so it began to hold people longer anyway,
3 as indeterminates. And so, the two were washing out a
4 big. Do you know what I mean? Because the
5 indeterminate sentence shifts, depending on Parole
6 practices, so -- so they were starting to look more
7 alike, the indeterminates and the determinates,
8 because of the Parole Board changing its behaviors.

9 And the '98 change, with the first felons, I
10 believe the sentences actually shrunk a bit.

11 MR. ANNUCCI: Sentences, or time served, or
12 both?

13 MS. HALL: This -- at that point, we were
14 just looking at sentences, because it was too early to
15 --

16 MR. ANNUCCI: So, how do you compare a
17 sentence? Let's say, under the old law, you got three
18 to nine. And, under the new law, you got a seven.

19 MS. HALL: Yeah.

20 MR. ANNUCCI: Do you consider that a
21 shorter sentence, or --

22 MS. HALL: No. We had a formula. We were
23 assuming, you know, a certain rate of release, and we
24 felt, you know, a certain amount of good time. Paul
25 Korotkin developed formulas --

1 MR. ANNUCCI: Okay.

2 MS. HALL: -- and we've done those before.

3 But we -- we had done some of that, but I
4 don't think we have actually looked at time served on
5 the -- on the first VFOs, because it was too early.

6 But yeah, we can do that.

7 MR. ANNUCCI: But at least the research
8 you've done to date seems to indicate slightly shorter
9 sentences under determinates for the comparable
10 offense.

11 MS. HALL: On the first determinate --

12 MR. ANNUCCI: On the first.

13 MS. HALL: -- yeah, it looked like it was
14 going shorter.

15 COMMISSIONER O'DONNELL: But it sounds like
16 this type of research would help us with this question
17 that gets raised repeatedly, as should we go to a
18 completely determinate sentence, maybe with, you know,
19 some exceptions for life sentences and that sort of
20 thing.

21 MS. HALL: Yeah.

22 COMMISSIONER O'DONNELL: So, if we could
23 look and see if it seems like the sentences would be
24 relatively the same, whether they'd decrease, whether
25 they'd increase, it -- it would be helpful for us --

1 MS. HALL: Okay.

2 COMMISSIONER O'DONNELL: -- to make that
3 determination, I think, as a Commission.

4 MS. HALL: Good.

5 COMMISSIONER ALEXANDER: I don't know if
6 you have some of the data for both of those new
7 department rates of recidivism, as well.

8 MS. HALL: For the indeterminate and
9 determinate --

10 COMMISSIONER ALEXANDER: Indeterminate
11 versus determinate.

12 MS. HALL: Yeah. We can do that, and
13 that's an -- that's an easy, fairly easy lift. And,
14 of course there, you have that confounding factor that
15 you eliminated parole for three years, --

16 COMMISSIONER ALEXANDER: Right.

17 MS. HALL: -- which -- which is unique, and
18 it's kind of a unique experiment that New York engaged
19 in.

20 COMMISSIONER O'DONNELL: So, that's a
21 group, I take it, you can study --

22 MS. HALL: Yeah.

23 COMMISSIONER O'DONNELL: -- to -- to look
24 at the effectiveness of parole?

25 MS. HALL: Yes. We -- well, to look --

1 yeah, to see whether it made a difference. Now, this
2 is for a narrow population of people that would be
3 involved, but it's certainly something we have to look
4 at, because it's so unusual to have that kind of
5 switch for a period of time.

6 And, the other thing is, you know, the
7 shortening of parole terms, I mean, with -- with the
8 drug offenders. Now, this is a little early for that,
9 but that's going to be another thing for us to look
10 at.

11 We're also going to be looking at exactly
12 when people begin -- when people fail. Because, you
13 know, a number of people have raised the issue that we
14 ought to, you know, reduce the parole terms, reduce
15 the probation terms. And so, we're going to the
16 survival analyses and see is there a point in that
17 term where it gets -- the probability of a failure
18 gets so low that it's not, you know, it just doesn't
19 happen, so it makes sense to continue that, you know,
20 that term. We're going to at least identify the
21 points where they drop off.

22 COMMISSIONER ALEXANDER: Now, given what
23 you say that there was a change in the Parole Board's
24 practices, can we still measure rates of recidivism
25 for groups that were conditionally released, as

1 opposed to those who were discretionarily released?

2 MS. HALL: Oh, yes, yeah. In fact, we did
3 some of that already, the CRs, and the -- yeah, and
4 the discretionary release. And actually, CRs do a
5 little worse, you know? But in part because those CR
6 -- well, I won't say that. The MEs do the worst, and
7 that's because they come back so many times.

8 COMMISSIONER ALEXANDER: Right.

9 MS. HALL: But, the CRs tend to do a little
10 worse in parole.

11 COMMISSIONER O'DONNELL: Well, once again,
12 thank you. I want to especially thank the staff --
13 Gina, and John, and Patty -- for their efforts in
14 putting this all together. And, thank all of you for
15 your enthusiastic participation. I hope you can all
16 make it next week. It's going to be a very important
17 meeting.

18 And, please continue to give us all your
19 suggestions, and information. For those who didn't
20 know ahead of time, we were invited to a lobsterfest
21 at the Federal Law Enforcement Council at the
22 University Club. I think that's at -- what time does
23 it start? Six. I'm sure we could probably add a few
24 people on, if anyone is going to be around and wants
25 to participate in that, by letting Anthony Bergamo

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know.

We have checked with the Ethics Commission, to ensure that we could attend. It's a widely attended event. So, we -- we can attend, those of us who are in the Executive branch. I assume it's the same for others. So, we'll see some of you there.

And, thanks a lot for your participation.

[Time noted: 4:05 p.m.]

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C E R T I F I C A T E

I, June Accornero, do hereby certify that I typed the preceding transcript of the proceedings of the New York State Commission on Sentencing Reform, held on Wednesday, July 11, 2007, at Governor's Office, 633 Third Avenue, New York, New York, and that this is an accurate transcript of what happened at that time and place, to the best of my ability.

June Accornero

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