

**The Future of Sentencing in
New York State:**

A Preliminary Proposal for Reform

**New York State
Commission on Sentencing Reform**

October 15, 2007

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Table of Contents

	Page
Commission Members	iii
Commission Staff.....	iv
A Message from the Chair	v
Acknowledgments.....	vi
Speakers	vii
Subcommittee Members	ix
Executive Summary	I
Part One: Criminal Sentencing in New York: A Historical Overview	1
I. The Early Days	3
II. The Rise of the Rehabilitative Model: 1877 - 1970.....	4
III. The Origins of the Determinate Model: 1970 - Present.....	8
IV. Determinacy for Some, Indeterminacy for Others: Where We Are Today	11
V. A Blueprint for Reform.....	13
Part Two: A System in Need of Reform.....	14
I. Adopting a Predominately Determinate Sentencing Scheme in New York	15
II. Consideration of Further Drug Sentencing Reform and Review of Mandatory Minimum Sentences for Certain Drug and Other Non-Violent Felony Offenses	21
III. Improving the Quality and Accessibility of Substance Abuse Treatment and Other Community-Based and Institutional Programming	26
IV. Additional Policy Questions for Commission Consideration	29
Part Three: The Science of Crime Reduction: Using Evidence-Based Practices to Reduce Recidivism	33
I. Using Evidence-Based Practices to Guide Decision Making and Programming	34
II. Parole Rule Violators and the Revolving Door of Incarceration	40
III. Community Supervision: A Focus on High-Risk Offenders.....	43
IV. Reducing Recidivism Through Effective Re-entry	47

Table of Contents (continued)

Part Four:	Crime Victims and Sentencing	53
	I. Introduction	54
	II. Proposals for Reform	55
Part Five:	Planning for the Future: A Permanent Sentencing Commission for New York	58
Part Six:	Conclusion	61
Appendices:		
A:	Executive Order No. 10	63
B:	Statement from Commissioner George B. Alexander.....	66
C:	Anomalies	70
D:	List of Non-Violent Penal Law Felony Offenses	77

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Message from the Chair

New York's sentencing laws are rarely revised or reviewed on a comprehensive basis and, in fact, have not undergone a thorough revision in 40 years. The sentencing statutes have, however, endured repeated piecemeal and ad hoc alteration, ranging from minor tinkering to the revision of entire articles of law. The result today is an overly complex, Byzantine sentencing structure that is riddled with opportunities for injustice and, in some cases, is virtually unintelligible to prosecutors, defense attorneys, defendants and crime victims alike. Against that backdrop, Governor Eliot Spitzer issued Executive Order No. 10 on March 5, 2007 (see Appendix A). The Executive Order created the Commission on Sentencing Reform with the mandate that it conduct a full review of the State's sentencing structure and practices and make recommendations for reform to all three branches of government.

Shortly after the members were appointed, the Commission began a series of full day, information-gathering meetings. The Commission heard from a broad array of experts - both state and national - who provided invaluable insight into topics such as the complexity of New York's existing sentencing provisions, evidence-based correctional and sentencing practices, collateral consequences of criminal convictions, alternatives to incarceration, prisoner re-entry, the impact of sentencing on crime victims, and strategies for reducing prison populations and reinvesting in communities. The Commission also received input from representatives of the judicial, defense, prosecutorial and victim advocate communities. The information gleaned from those sessions provided a broad foundation as the Commission moved forward with its mission.

The Commission began its substantive work by creating four subcommittees: Sentencing Policy; Simplification; Incarceration and Re-entry; and Supervision in the Community, each supported by a central research and data team. The subcommittees met regularly to review data and deliberate on ideas for reform. Their findings were then presented to the full Commission, which carefully considered the recommendations of the subcommittees and voted on the proposals contained herein. Although the Commission reached a majority consensus on all of the recommendations in this Report, some of the recommendations received less than unanimous support. Accordingly, it should not be assumed that every recommendation in the Report reflects the views of every Commission member, nor should the absence of a formal dissent by a member of the Commission on a specific recommendation be deemed to reflect that Commissioner's support of such recommendation.

The Commission recognizes that its work is far from complete and submits this Report not as its final word on the matter, but as a starting point for further analysis, discussion and deliberation. We now look to the public and our partners in all three branches of government for further guidance. In the coming months, we intend to hold public hearings. We believe that the comments and suggestions that this Preliminary Report engenders, from both within and outside government, will assist the Commission as it further develops and refines the many proposals in the pages that follow. It is our hope that this Report, and the Commission's Final Report, will together provide a comprehensive blueprint for a dramatic and historic reform of New York's sentencing laws.

Denise E. O'Donnell, Chair

Acknowledgments

The Commission members and staff wish to thank all of the individuals who have so generously assisted us in this endeavor. While we have received assistance from sources too numerous to enumerate, we would like to publicly recognize those who appeared before and spoke directly to the Commission on various topics (see pages vii and viii). We also would like to recognize the subcommittee members who shared their knowledge in specific areas and disciplines, as well as the subcommittee chairs, who devoted significant time and energy to this project (see page ix).

Speakers

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EXECUTIVE SUMMARY

I. Overview

Governor Eliot Spitzer established the New York State Commission on Sentencing Reform pursuant to Executive Order No. 10 on March 5, 2007 to conduct a comprehensive review of New York’s “current sentencing structure, sentencing practices, community supervision, and the use of alternatives to incarceration” in order to provide the State with “crucial guidance to ensure the imposition of appropriate and just criminal sanctions, and to make the most efficient use of the correctional system and community resources.” Following its inaugural session, the Commission conducted a series of meetings where state and national sentencing experts provided an in-depth review of New York’s existing sentencing structure and practices, the many challenges facing the system and constructive proposals for reform.

In this Preliminary Report, the Commission concludes that while New York has made commendable progress in enhancing public safety through the combined use of limited correctional resources and a broad reliance on community-based alternatives to incarceration, there is tremendous opportunity for improvement. This Report focuses on six major areas for review and reform:

- Adopt targeted legislation to streamline, simplify and make more fair, both for offenders and victims, New York’s labyrinthine sentencing structure, which has not been comprehensively revised in four decades;
- Conduct a comprehensive and detailed review of the current mandatory sentencing laws for certain non-violent felony offenders with an eye toward determining whether further reforms are appropriate and would be consistent with public safety, particularly with respect to the diversion of certain first-time and repeat drug-addicted non-violent offenders from prison to community-based treatment;
- Implement the use of “evidence-based” sentencing and correctional strategies statewide to reduce crime and enhance public safety;
- Develop more efficient and cost-effective ways to use limited correctional and community supervision resources by examining alternatives for dealing with the thousands of parole rule violators who are returned to the Department of Correctional Services (“DOCS”) annually, re-allocating correctional resources from low-risk to high-risk offenders, and adopting targeted reforms to improve the likelihood of successful re-entry for the approximately 26,000 felony offenders who return from prison to New York’s communities each year;
- Strengthen the State’s statutory and regulatory schemes for crime victims; and
- Create a permanent sentencing commission in New York.

It is the Commission’s firm belief that by adopting these reforms, and the many related proposals outlined in this Report, New York State can vastly improve the fairness and effectiveness of its current sentencing and correctional systems and realize even further reductions in crime.

II. A System in Need of Reform

A. Simplifying and Streamlining An Overly Complex Sentencing Structure

In carrying out its mandate, the Commission conducted both a historical overview of how the State's current sentencing structure came to be, and an in-depth examination of the existing structure. It will come as no surprise to experienced practitioners of criminal law – nor to those defendants, victims and their families most directly impacted by our sentencing statutes – that after 40 years of piecemeal amendments arising more often from political than criminal justice policy considerations, New York's sentencing laws are a veritable object lesson in disorder and confusion.

The formulation of sentencing policy in the form of ad hoc and piecemeal amendments has resulted in a confusing mix of indeterminate and determinate sentencing, a complicated array of sentencing categories for both first and repeat felony offenders, complex rules governing concurrent and consecutive sentences, convoluted sentencing “caps” that, in effect, administratively shorten the aggregate length of certain consecutive felony sentences, and a series of “back-door” early release mechanisms that have the practical effect of reducing the actual time served in State prison by certain felony offenders.

The Commission believes that a sentencing structure must be intelligible, honest and fair. The public, as well as the defendant and the victim, should have a clear understanding of the actual term of the sentence to be served. To that end, the Commission recommends a series of reforms intended to simplify the existing structure and make it more comprehensible. Foremost among these is a recommendation to streamline the current hybrid system of indeterminate and determinate State prison sentences by creating new determinate sentences for the more than 200 non-violent felony offenses that now carry an indeterminate sentence, while reserving indeterminate sentences only for the most serious offenses that now carry a life maximum, as well as for certain persistent felony offenders.

B. Reviewing New York's Drug Sentencing Laws with an Eye Toward Further Reform

The Commission heard from judges, defense attorneys and prosecutors, as well as drug reform advocates, on the issue of further drug law reform. Despite the short timeframe and the need to deliberate further and review additional data before more comprehensive and specific recommendations can be advanced, the Commission was able to find consensus on two important points. First, New York's sentencing statutes should be modified to expressly permit courts to send certain non-violent drug-addicted felony offenders to community-based treatment in lieu of State prison where the judge, prosecutor and defendant all agree that such is a just and appropriate resolution of the case. Next, in order to ensure the successful diversion of drug-addicted offenders from prison in a manner consistent with public safety, New York must improve both the quality and accessibility of substance abuse treatment and other community-based programming. The Commission will study existing proposals for reform, consult with experts and advocates, and conduct public hearings to determine whether additional drug law-related reforms can be accomplished without jeopardizing public safety.

C. Using Evidence-Based Practices to Reduce Recidivism

Beginning at arraignment, throughout the period of incarceration and until an offender completes his or her term of community supervision, officials in the criminal justice system make critical decisions regarding the offender, often with inadequate information about the individual's actual risk of re-offending or the offender's treatment and other needs. Whether determining a defendant's pre-trial release status, the appropriate sentence to impose, the type of programming an offender should receive in prison, or the level and length of supervision the offender should receive once released, it is critical that the decision-making process be an informed one. Such decisions, both individually and collectively, have an enormous public safety and fiscal impact.

The Commission believes that great strides can be made in the area of public safety by utilizing evidence-based practices when assessing and making decisions affecting offenders in order to reduce recidivism. Stated simply, an "evidence-based" practice is one that is measurable and repeatedly has been shown, through high-quality research, to reduce offender recidivism. At the heart of evidence-based practices is the adoption of a validated "risk and needs" assessment instrument which can assist sentencing judges -- as well as prison, probation and parole authorities -- to more accurately estimate the actual risk posed by an offender, identify personal deficits that have contributed to the offender's past criminality and target those deficits most likely to lead to further criminal behavior.

For these reasons, the Commission recommends the statewide adoption of evidence-based sentencing and correctional practices to guide the decision-making process from an offender's initial arraignment and sentencing through his or her successful re-entry from prison back into the community. To ensure effectiveness throughout the criminal justice continuum, the Commission specifically recommends that sentencing courts, DOCS, the Division of Parole (Parole) and the Division of Probation and Correctional Alternatives (DPCA) all utilize a risk and needs assessment instrument.

D. Allocating Limited Correctional and Supervision Resources: A Smarter Approach

The Commission also focused on concrete ways to fulfill the express mandate of Executive Order No. 10 to "make the most efficient use of [New York's] correctional system and community resources." To be sure, the State has made great strides in this area. New York is currently the safest large state in the nation and the fifth safest state overall. While other large states have seen dramatic increases in their prison populations over the last 10 years -- by as much as 25% in Texas, 28% in California, and 41% in Florida -- New York has significantly reduced crime while simultaneously decreasing its prison population by 8%. Despite this impressive record of achievement, the Commission believes that much more can be done.

There are approximately 63,000 felony offenders currently housed in New York's prisons. Data indicates that of the roughly 26,000 inmates released into the community in 2003, 39% returned to prison within three years. A significant percentage of these offenders return to DOCS not because they have committed a new crime, but rather for parole rule violations. In 2006, approximately 10,000 parolees were returned to prison for one or more rule violations, an 11% increase from 2005 to 2006. With an average stay in DOCS of approximately four months, the typical parole rule violator is often unable to participate in longer-term DOCS programming

and returns to the community with the same substance abuse or alcohol addiction, mental illness, employment or housing problem that may have precipitated the rule violation in the first place.

Many states throughout the country are increasing the use of so-called “graduated sanctions” to deal with parole rule violators instead of the much more costly option of returning them directly to state prison. Applying immediate or graduated sanctions that respond appropriately to the level of harm done not only will reduce the fiscal burden on the State, but also will allow Parole and DOCS to focus their efforts on those offenders that pose the greatest risk of recidivism.

In examining the system’s current use of correctional resources, the Commission also focused on offender re-entry. Efforts to reduce recidivism through facilitating an offender’s successful re-entry into the community must begin at the earliest possible stage. Incarceration and community supervision offer an opportunity to provide an offender with the tools, values and skills necessary to make the transition into the community and live a productive and crime-free life, and such efforts must continue after the offender is released from incarceration. An offender’s ability to procure essential needs upon release, such as housing, employment and health services, requires coordination and cooperation among various State and local agencies and community provider networks. While the Commission was encouraged to find that New York has begun efforts to improve re-entry and has seen positive results from those efforts, much more needs to be done.

In this Report, the Commission makes a series of recommendations intended to improve the likelihood of successful offender re-entry including: exploring the possible expansion of work release eligibility to include additional categories of inmates; the increased use of “step-down” facilities such as the recently created “Orleans Re-entry Unit;” the expansion of prison-based educational and vocational training; the enhancement of employment and housing opportunities for offenders re-entering the community; and the use of re-entry courts which follow the successful model used by New York’s problem-solving courts.

E. Victims and Sentencing

After a review of the complex web of statutes and regulations relating to crime victims and sentencing, the Commission found that while New York has enacted a number of measures intended to give crime victims a meaningful voice in decisions relating to case disposition and parole release and several provisions intended to timely notify victims of those rights, many victims still have little or no knowledge of their rights under the law. The Commission also found that certain rights of crime victims might be significantly advanced through amendments to the existing statutes.

As a way to streamline and make more accessible the many provisions of New York law governing the rights of crime victims, the Commission recommends that these provisions be moved to a single article of law or, in the alternative, a cross-referencing chart be created and incorporated into the Criminal Procedure Law so that crime victims, judges and practitioners can readily find a list of all victim-related statutes. In addition, the Commission recommends that the existing training requirements for prosecutors and judges in the area of victims’ rights be enhanced, and that laws be enacted to further protect victim safety and enhance the ability of victims to collect restitution.

F. The Future of Sentencing and Corrections in New York: The Creation of a Permanent Sentencing Commission

The Commission is convinced that many of the problems facing the State's sentencing and correctional systems are the result of allowing four decades to pass without a systemic review and reorganization of New York's sentencing structure and laws. The Commission strongly believes that the State would benefit from the creation of a permanent sentencing commission with the authority to advise the Governor and the Legislature on matters relating to sentencing policy and structure, and to identify and make recommendations regarding emerging trends and "best practices" in sentencing and corrections. Since the Minnesota Legislature created the first sentencing commission in 1978, at least 20 states and the federal government have established permanent sentencing commissions. As succinctly stated by national expert on sentencing Professor Douglas Berman in his presentation to the Commission: "Just about every academic who looks at this field ultimately concludes that having a permanent sentencing commission, a body with the unique, distinctive and committed responsibility to monitor, assess and advise all of the sentencing players helps the system operate effectively long term."

III. Conclusion

The Commission recognizes that New York is a leader on many fronts, and its achievements in reducing crime and prison population are just two examples. But these are not the entire measure of what New York can achieve. More can be done to enhance public safety and bring even greater clarity and fairness to the State's sentencing and correctional systems.

In the next phase of its work, the Commission will address some of the more significant, and contentious, issues raised during its initial deliberations. The Commission will hold public hearings and consider in greater detail matters such as the appropriate sentencing ranges for the newly proposed determinate sentences, drug law and second felony offender reform and alternative sanctions for parole rule violators. The Commission welcomes this challenge and the unique opportunity to have a significant and lasting impact on the sentencing laws of New York.

PART ONE

**CRIMINAL SENTENCING IN NEW YORK:
A HISTORICAL OVERVIEW**

Part One

Criminal Sentencing in New York State: A Historical Overview

The Penal Law that took effect in 1967 was elegant in its simplicity, with five felony classifications, a single recidivist provision, no “violent felony offense” designation and a fairly straightforward, strictly indeterminate, structure for State prison sentences. In contrast, today’s Penal Law is an often disjointed jumble of determinate and indeterminate sentences with 11 different recidivist sentencing provisions, including separate provisions for persistent felony offenders,¹ persistent violent felony offenders,² second child sexual assault felony offenders,³ second felony offenders,⁴ second violent felony offenders,⁵ second felony drug offenders,⁶ second felony drug offenders previously convicted of a violent felony,⁷ predicate felony sex offenders previously convicted of a non-violent felony⁸ and predicate felony sex offenders previously convicted of a violent felony;⁹ separate sentencing schemes for first-time Class A felony drug offenders,¹⁰ first-time non-Class A felony drug offenders,¹¹ first-time non-violent felony sex offenders,¹² first time violent felony offenders,¹³ first time non-violent non-drug non-sex felony offenders,¹⁴ juvenile offenders,¹⁵ youthful offenders,¹⁶ offenders who commit hate crimes¹⁷ or crimes of terrorism,¹⁸ offenders who commit “certain” Class C or Class D felonies¹⁹ and offenders who sell drugs in or near school grounds or on a school bus;²⁰ and special sentences for certain firearm and other felony weapon offenses,²¹ certain crimes against peace officers or police officers²² and certain crimes against operators of “for hire” vehicles.²³ There are also numerous provisions governing definite (“local jail”) and “intermittent” jail sentences;²⁴ so-called “split” sentences of jail followed by probation;²⁵ non-incarceratory sentences, such as probation,²⁶ conditional discharges²⁷ and fines;²⁸ and various statutes governing restitution and

¹ Penal Law §70.10.

² Penal Law §70.08.

³ Penal Law §70.07.

⁴ Penal Law §70.06.

⁵ Penal Law §70.04.

⁶ Penal Law §§70.70(3); 70.71(3).

⁷ Penal Law §§70.70(4); 70.71(4).

⁸ Penal Law §70.80(5)(b).

⁹ Penal Law §70.80(5)(c).

¹⁰ Penal Law §70.71(2).

¹¹ Penal Law §70.70(2).

¹² Penal Law §70.80(4).

¹³ Penal Law §70.02.

¹⁴ Penal Law §70.00.

¹⁵ Penal Law §§60.10; 70.05.

¹⁶ Penal Law §60.02(2).

¹⁷ Penal Law §485.10.

¹⁸ Penal Law §490.25

¹⁹ Penal Law §60.05 (4), (5).

²⁰ Penal Law §70.70(2)(a)(i).

²¹ Penal Law §§70.02(2)(c); 70.02(4); 265.09(2).

²² Penal Law §§70.02(2)(b-1); 70.02(3)(a).

²³ Penal Law §60.07.

²⁴ Penal Law §70.15; Penal Law Article 85.

²⁵ Penal Law §60.01(2)(d).

²⁶ Penal Law §65.00.

²⁷ Penal Law §65.05.

²⁸ Penal Law Article 80.

reparation,²⁹ mandatory surcharges and various fees imposed at the time of sentence.³⁰ One commentator has described the current patchwork as “indecipherable gibberish.”³¹

Throughout history, policymakers in New York have attempted to balance four main objectives as they drafted and revised the State’s sentencing laws: deterrence; rehabilitation; incapacitation; and retribution. The relative priority of each of those objectives has shifted substantially over the years, driven generally by differing perceptions on crime and punishment and differing political agendas. Not surprisingly, opinions and policies also have shifted, and shifted back again, on whether a determinate or indeterminate sentencing structure best achieves whatever goals and objectives predominate at a particular time. As noted above, New York currently has a hybrid system, employing both determinate and indeterminate sentences within the same code.

I. THE EARLY DAYS

Deterrence was the central objective of penal policy in colonial New York as well as during the early years of statehood. The severity of the criminal sanction was intended to frighten, and thereby deter, the would-be offender from committing a crime. Following the European tradition, punishment in New York consisted of a variety of sanctions: stocks, pillories, and other forms of public shaming; fines and restitution orders; banishment from the jurisdiction; flogging, branding, and other types of corporal punishment; and the gallows.³² New Yorkers were subject to the death penalty for more than 200 crimes, ranging from pick-pocketing to horse stealing to murder.³³ The State was not in the business of incarcerating convicted felons; neither were the localities. County jails were reserved primarily for pre-trial detainees and debtors. Changing conceptions of the efficacy of extreme punishment culminated in the nineteenth century movement away from capital punishment and the creation of the “fortress” prison.³⁴

The New York State Legislature adopted a new penal code in 1796. It abolished corporal punishment, reserved the gallows for murderers and traitors and established the State’s prison system.³⁵ Sentences were determinate: offenders served their entire term unless released early by executive clemency or pardon.

²⁹ Penal Law §60.27.

³⁰ Penal Law §60.35.

³¹ Transcript of Commission on Sentencing Reform Meeting, July 11, 2007, at 162.

³² See generally, Executive Advisory Committee on Sentencing, *Crime and Punishment in New York: An Inquiry Into Sentencing and the Criminal Justice System* (March 1979); Orlando F. Lewis, *The Development of American Prisons and Prison Customs, 1776-1845* (Prison Association of New York 1922); David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Little, Brown & Co. 1971).

³³ See, Executive Advisory Committee on Sentencing, *supra*, note 32; J. Goebel, Jr. and T.R. Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)* (New York 1944).

³⁴ Rothman, *The Discovery of the Asylum*, *supra*, note 32.

³⁵ W. David Lewis, *From Newgate to Dannemora: The Rise of the Penitentiary in New York, 1796-1848* (Cornell University Press 1965).

Reform Through Routine: 1823-1877

During the early days of the prison era, the crime control emphasis shifted from deterrence to reformation, the precursor to rehabilitation. Similar to the reform movement led by the Quakers in Pennsylvania, New York's new sentencing system was premised on the belief that crime was caused by the criminal's corrupt environment. The penitentiary, home of the "penitent," was perceived as the State's optimal response to criminal behavior. It was thought that by forcing offenders to conform to an orderly routine and by isolating them from temptation -- and from each other -- the penitentiary would lead the way out of crime.

The New York State Penitentiary at Auburn was completed in 1823; two years later the prisoners from Auburn traveled down the Hudson River to build Sing Sing Prison in Ossining. Those two structures became early monuments to the reform paradigm. New York's penal institutions were run under the "silent system": prisoners slept alone in small cells at night and congregated silently during the day to work and eat. Forbidden to even glance at one another, inmates were expected to contemplate their wayward pasts, do penance and emerge reformed.

In practice, the operation of the prisons fell far short of the ideals that inspired their creation. Once prisoners became long-term residents, the problems of maintaining the silent system became painfully apparent. Guards enforced discipline with lashes and cat o' nine tails; hanging prisoners by their thumbs was routine, as were other bizarre and brutal punishments such as dunking them in the infamous water cribs.³⁶ It was again time for reform; the social climate was ripe for the emergence of a new approach.

II. THE RISE OF THE REHABILITATIVE MODEL: 1877-1970

From the late 1800s to the early 1970s, the emphasis moved toward crime control through rehabilitation. Policymakers in this era believed that their predecessors had been wrong in assuming that all offenders could be reformed through the ubiquitous prison routine. Simultaneously, there was a shift away from determinate sentencing and toward indeterminate sentencing. Progressive era reformers argued that a case-by-case approach to sentencing was best, with punishment tailored to the needs of each offender. A medical analogue was frequently invoked: just as the doctor could not predict the date on which the patient would be restored to health, the sentencing judge could not predict when an offender would be rehabilitated. The reformers shared a basic trust in the state and a faith that criminal justice experts could be relied upon to benevolently exercise their unlimited discretion.³⁷

The change sought by the reformers squared poorly with the existing determinate sentencing system. The new model required maximum flexibility; rules could not be made in advance. Because each case was different, each required a different response. The legacy of the progressive era's innovations in criminal justice is far-reaching: probation, parole, indeterminate sentencing, diversion and juvenile courts all rose to prominence under this model.

³⁶ Rothman, *The Discovery of the Asylum*, *supra*, note 32; David J. Rothman, *Sentencing Reform in Historical Perspective*, *Crime and Delinquency* (October 1983) at 633.

³⁷ David J. Rothman, *Conscience and Convenience: The Asylum and its Alternatives in Progressive America* (Little, Brown & Co. 1980).

The first application of indeterminate sentencing in the United States is traced to an experiment in 1877 at the Elmira Reformatory. Male first-time offenders between the ages of 16 and 30 who, according to the sentencing judge, were likely candidates for rehabilitation were sentenced “until reformation, not exceeding five years.”³⁸ With instructions in moral as well as academic subjects, inmates were rewarded for good behavior with early release. The Board of Managers of Elmira determined the release date and members of the New York Prison Association, a prestigious philanthropic society, provided services in the community to the releasees.

In time, release decisions shifted from prison authorities to parole authorities. By 1901, indeterminate sentencing and parole release were available in New York for first-time offenders with sentences of five years or less.³⁹ The indeterminate sentence was extended in 1907 to all first-time offenders, except murderers.⁴⁰ By 1922, 37 states had adopted some form of indeterminacy and 44 states had parole boards.⁴¹

A. The Model Penal Code Movement

In the 1950s and 1960s, the American Law Institute’s (ALI) Model Penal Code inspired a national movement for reform of the criminal law. In 1955, Wisconsin became the first state to comprehensively revise its criminal laws based on the Model Penal Code; more than 30 states ultimately passed derivative criminal codes, including New York.⁴²

Sentencing reform was an integral part of the national code revision effort and the rehabilitative ideal was the glue that tied the national reform movement together. The code revisionists clung tightly to the prevailing indeterminate sentencing philosophy. The Model Penal Code drafters allocated sentencing authority among the different criminal justice functionaries according to the “type of power and responsibility that each is best equipped to exercise, given the time when it must act, the nature of the judgments called for at that stage, and the type of information that will be available for judgment and the relative dangers of unfairness and abuse.”⁴³

B. The Bartlett Commission

Created by chapter 346 of the Laws of 1961, the Temporary Commission on Revision of the Penal Law and Criminal Code (“the Bartlett Commission”) was a result of discussions undertaken in the early phases of Nelson A. Rockefeller’s first term as governor.⁴⁴ The Bartlett Commission devoted its attention first to drafting a Penal Law, which was submitted as a study bill in 1964 and adopted by the Legislature in 1965, with an effective date of 1967. Thereafter, it drafted the Criminal Procedure Law, which took effect in 1971.

³⁸Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. Crim L. & Criminology 1 at 21 (1925); see also, Lawrence Travis, III and Vincent O’Leary, *Changes in Sentencing and Parole Decision Making: 1976-78* (National Parole Institute and Parole Policy Seminars 1979).

³⁹ Laws of 1901, ch. 260.

⁴⁰ Laws of 1907, ch. 737.

⁴¹ Malcolm Feely, *Court Reform on Trial*, at 116 (Basic Books 1983).

⁴² Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 Colum. L. Rev. 1428 (1968); Laws of 1965, ch. 1030.

⁴³ American Law Institute, *Model Penal Code, Tentative Draft No. 2* at 24 (1954).

⁴⁴ Herman Schwartz, *Criminal Law Revision Through a Legislative Commission: The New York Experience – An Interview with Richard Bartlett*, 18 Buff. L. Rev. 213 (1968).

A progeny of the ALI's Model Penal Code, New York's new code was deemed "the most sophisticated legislation yet achieved in the evolution of a twentieth century criminal code."⁴⁵ It might be said, however, that the State has rested on its laurels; not since 1967 has New York enacted a comprehensively revised sentencing code.

1. The Pre-1967 Penal Law

The Bartlett Commission confronted a penal code that had not been substantially revised in over 50 years. The Field Commission, working in the 1860s and 1870s, had codified many of the State's criminal laws and, in 1881, its work was reflected in a new Penal Code and Code of Criminal Procedure.⁴⁶ Crimes were classified into broad categories (e.g., crimes against persons, crimes against property), and a minimum and maximum prison term was assigned to each crime category.

In 1909, the Penal Code was replaced with the Penal Law, with the most significant change being the abandonment of the categorical structure in favor of an alphabetical listing of crimes.⁴⁷ A multiplicity of separate crimes was created for each offense type, with the result that crimes dealing with similar subject matter were rarely located in the same place, which rendered charging decisions arbitrary and cumbersome. Continuous piecemeal amendments yielded a prolixity of narrow and highly specific offense definitions, many of which overlapped.

Labeling the 1909 restructuring "a hodgepodge conglomerate of amendment upon amendment,"⁴⁸ the Bartlett Commission observed that "[i]nstead of a modern set of guidelines to help effectuate the deterrence of crime and the segregation and reformation of criminals, the State of New York has a modern procedure engrafted by amendments upon a structure designed for a retributive system."⁴⁹

2. Focus on Sentencing

Sentencing reform was high on the list of the Bartlett Commission's priorities. After re-examining the rehabilitative sentencing structure, the Bartlett Commission heartily endorsed the indeterminate model and parole release. Instead of the three offense categories recommended by the ALI's Model Penal Code, the New York drafters recommended five felony categories, A through E. Three misdemeanor categories and one category for violations were also recommended.

The Bartlett Commission acknowledged the lack of scientific evidence linking sentencing and crime control. Then, as now, it is relatively rare for social scientists to find statistically significant correlations between sentences and deterrence, incapacitation or rehabilitation.

⁴⁵ George, *A Comparative Analysis of the New Penal Laws of New York and Michigan*, 18 Buff. L. Rev 233 (1968).

⁴⁶ Laws of 1881, ch. 680.

⁴⁷ New York Temporary Commission on Revision of the Penal Law and Criminal Code, *Interim Report of the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code* at 8 (1962); Laws of 1909, ch. 88.

⁴⁸ Schwartz, *supra*, note 44, at 213-214.

⁴⁹ New York Temporary Commission on Revision of the Penal Law and Criminal Code, *Interim Report of the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code* at 27 (1963).

Nevertheless, the pragmatists on the Bartlett Commission reasoned that the best course was to “construct a system that allows adequate scope for the accomplishment of these objectives.”⁵⁰

The Bartlett Commission sought to distribute authority consistent with the purposes of punishment sought by each component of the system. The Legislature would serve the retributive function by establishing the maximum sanction for broad classes of criminal conduct, reflecting society’s view of the seriousness of that type of offense. Judges, as well as correctional and parole officials each would serve their “proper purpose and, within [their] special sphere of competence . . . fashion an appropriate sentence.”⁵¹

The calculation of good time credit was changed by the Bartlett Commission to afford “a better distribution of control between the Department of Correctional Services (“DOCS”) and the Division of Parole.”⁵² Under the pre-1967 law, a 1/3 good time allowance was deducted from the minimum term, lowering the offender’s parole eligibility date. Also, pursuant to a 1962 amendment, an additional 1/6 good time allowance was deducted from the maximum term. The Bartlett Commission recommended that good time be deducted from the maximum sentence only. Good time and parole release would then function as part of an integrated plan, each to be employed at the proper place to effectuate the achievement of the overall goal. The Bartlett Commission’s vision of the allocation of power led it to reason that while the minimum term was being served, the prisoner was working for parole release. If the offender was denied parole release at the minimum term, good time off the maximum sentence would provide a continued incentive for good behavior in prison.

Mandatory sentences of any kind were antithetical to the rehabilitative ideal endorsed by the Bartlett Commission. Legislatures should deal with broad principles it said, and not prescribe mandatory sentences applicable to individual cases. With the exception of a one-year minimum prison term, which was viewed as an institutional necessity, the Bartlett Commission rejected mandatory sentences for all but the Class A felony offenses of murder and kidnapping. The Commission reasoned that if “the court is to be entrusted – as it should be – with authority to decide whether to impose a sanction, it can certainly be entrusted with authority to decide whether a minimum period of imprisonment in excess of one year is necessary.”⁵³

The Bartlett Commission applied the same logic to second felony offenders: no mandatory sentences. For persistent felony offenders, mandatory sentences could be imposed provided that strict sequentiality rules stemming from the rehabilitative ideal were followed. The Bartlett Commission explained that “only those who persist in committing serious crimes after repeated exposure to penal sanctions”⁵⁴ and their rehabilitative influence would be eligible for mandatory sentences.

The pre-1967 law specified when concurrent and consecutive sentences could be imposed although, in practice, most multiple sentences were consecutive. The Bartlett Commission reversed that presumption: where the court failed to specify how multiple sentences were to be served, the sentences would run concurrently.

⁵⁰ New York Temporary Commission on Revision of the Penal Law and Criminal Code, *Proposed New York Penal Law* at 272 (1964).

⁵¹ *Id.* at 276-277.

⁵² *Id.* at 299.

⁵³ *Id.* at 280.

⁵⁴ *Id.* at 285.

3. Passage of the New Penal Law

The Bartlett Commission's proposals were well received by the State Legislature. Only three areas of controversy were raised: the decriminalization of certain consensual crimes; the abolition of the death penalty; and gun control. The legislative opponents of these three provisions prevailed, and the Bartlett Commission's proposal was amended accordingly.⁵⁵

On approving chapters 1030 and 1031 of the Laws of 1965, which enacted the bulk of the Bartlett Commission's Penal Law proposals, then-Governor Nelson Rockefeller announced that "a new scheme of sentencing is provided affording ample scope for both the rehabilitation of offenders and the protection of society."⁵⁶ Thus, the statutory modernization of the rehabilitative paradigm was complete.

III. THE ORIGINS OF THE DETERMINATE MODEL: 1970-PRESENT

A. Introduction

Pure indeterminacy did not last long in New York. Discontent with the "medical model" of sentencing spread rapidly and, within the span of a few years, a remarkable shift in social perceptions occurred. The determinate ideal of punishment captured the imagination of a generation of jurists, social activists, policymakers and academics. Liberals, conservatives, defense advocates and law-enforcement professionals all claimed that the rehabilitative philosophy was theoretically and empirically flawed.

The indeterminate model's threshold assumption, that everything that needed to be known about the offender could not be known at the time of judicial sentencing, yielded to the opposite assumption. Rehabilitation was cast aside in favor of retribution and incapacitation as the most valid purposes of sentencing. Confidence in the provident exercise of discretion by criminal justice officials eroded as mandatory sentencing provisions proliferated.

Under the so-called "Rockefeller drug laws," judges were no longer permitted to exercise discretion over whether to incarcerate or impose an alternative sanction for certain drug cases; mandatory incarceration was required for all Class A, B and C drug offenses.⁵⁷ The "Rockefeller" drug laws created three categories of Class A felonies based on the quantity of drugs sold or possessed: A-I, A-II and A-III. The maximum for all Class A felonies was life, and a variety of minimum minimums, maximum minimums, minimum maximums, and maximum maximums were prescribed for felony drug sentences.⁵⁸ Plea bargaining was also severely restricted by the "Rockefeller" drug laws.⁵⁹

Also in 1973, mandatory second felony offender laws were grafted onto the indeterminate structure.⁶⁰ While much of the effect of the drug laws has been diluted by subsequent legislative amendments, the second felony offender laws, which passed virtually

⁵⁵ Schwartz, *supra*, note 44, at 255-256.

⁵⁶ Governor's Mem approving Laws of 1965, ch. 1030, 1965 NY Legis Ann at 2120.

⁵⁷ Laws of 1973, ch. 276, §6 (amending Penal Law §60.05 [which has since been amended]).

⁵⁸ Laws of 1973, ch. 276, §§9, 10.

⁵⁹ Laws of 1973, ch. 276, §25.

⁶⁰ Laws of 1973, ch. 277, §9.

unnoticed in the furor surrounding the drug debate, continue to shape the State's sentencing policy. In 1978, a second group of mandatory sentences, the juvenile offender and the violent felony offender laws,⁶¹ was added to what was rapidly evolving into a hybrid sentencing scheme.

B. Several New York Commissions Call for an End to Indeterminacy

The Special Commission on Attica, also known as the McKay Commission, was formed in the immediate aftermath of the prison riot of September 1971. The McKay Commission denounced indeterminate sentencing and parole release as “unfair . . . inequitable and irrational.”⁶²

In 1975, New York's Citizens' Inquiry on Parole and Criminal Justice, chaired by Ramsey Clark, former Attorney General under Lyndon Johnson, criticized New York's parole system as “oppressive and arbitrary,”⁶³ and essentially beyond reform. It endorsed a different ideology of punishment: fewer and shorter prison sentences, more alternatives to incarceration and additional voluntary programs for inmates.

Responding to national and local interest in determinate sentencing, then Governor Hugh Carey created the Executive Advisory Committee on Sentencing in 1977 and appointed New York County District Attorney Robert M. Morgenthau as chair.⁶⁴ The Committee proclaimed indeterminacy and parole release a failure. The Morgenthau Committee recommended that the Legislature create a sentencing commission to devise a sentencing guidelines grid. The guidelines would specify a narrow range of sentences for each combination of offense and prior criminal record category, with the higher term not exceeding the lower term by 15%. Good time would be limited to 20% and all releasees would be subject to fixed periods of parole supervision.

In his annual message to the Legislature in 1981,⁶⁵ Governor Carey endorsed the Morgenthau Committee's report, but instead of creating a sentencing guidelines commission, the Governor formed two more blue-ribbon study panels. The initial one, the Executive Advisory Commission on the Administration of Justice,⁶⁶ headed by Arthur Liman, a prominent New York City attorney and member of both the McKay Commission and Morgenthau Committee, echoed the sentencing recommendations of the Morgenthau Committee. The Liman Commission went further than the Morgenthau Committee by also recommending that sentencing guidelines explicitly conform to correctional resources.

The second commission formed by Governor Carey, the Advisory Commission on Criminal Sanctions,⁶⁷ was chaired by Judge Peter McQuillan, former counsel to the Bartlett Commission. The McQuillan Commission attacked determinacy and supported judicial sentencing discretion. Nevertheless, it recommended a mixed indeterminate/determinate system,

⁶¹ Laws of 1978, ch. 481.

⁶² New York Special Commission on Attica, *Attica: The Official Report of the New York State Special Commission on Attica* at xviii (*sic*) (Bantam Books 1972).

⁶³ Citizens' Inquiry on Parole and Criminal Justice, *Report on New York Parole* at 290 (1974).

⁶⁴ Executive Advisory Committee on Sentencing, *supra*, note 32.

⁶⁵ 1981 State of the State Address.

⁶⁶ Executive Advisory Commission on the Administration of Justice, *Recommendations to Governor Hugh L. Carey Regarding Prison Overcrowding* (1982).

⁶⁷ Advisory Commission on Criminal Sanctions, *Report of the Advisory Commission on Criminal Sanctions, Parts I, II, and III* (1982).

with indeterminacy for sentences in excess of 5 years, and determinacy for sentences of 5 years or less.

During the remainder of Governor Carey's administration, the policy issue of determinate sentencing remained in limbo. It was not until the 1982 election of Governor Mario M. Cuomo that determinate sentencing was again on the policymakers' formal agenda. Shortly after his election, Governor Cuomo directed his staff to negotiate a sentencing guidelines commission bill with the Legislature. The result, chapter 711 of the Laws of 1983, was passed by an overwhelming margin in the Senate and Assembly and signed into law by the Governor.

C. Committee on Sentencing Guidelines: 1983-1985

The Committee on Sentencing Guidelines ("COSG"), created in 1983, was charged with recommending specific statutory changes necessary to implement a determinate sentencing structure; in other words, its task was to resolve the "devil in the details" and directly address the myriad issues that previous study commissions had not fully examined.⁶⁸ However, a variety of problems surfaced in trying to write specific language to convert the indeterminate structure to a determinate structure with the goal of achieving proportionality and "truth-in-sentencing."

The COSG had 14 members, six appointed by Governor Cuomo, six by legislative leaders and two by the Chief Judge of the New York State Court of Appeals. Committee members represented a wide spectrum of personal and professional interests and ideologies and included liberals and conservatives, Democrats and Republicans, prosecutors and defense attorneys, judges and academics, and politicians and administrators. Many members thought that the existing sentences were too severe; others thought they were too lenient. Some thought that judges should have more power; others thought that they should have less. These different perspectives proved irreconcilable when the COSG tried to agree on grid ranges, departure policy, re-classification of offenses, mandatory sentences, good time policy and many other issues related to sentencing guidelines.

The final report of the COSG, which was riddled with dissenting opinions, was delivered on March 29, 1985.⁶⁹ Eight of the 14 members issued dissents to various parts of the report. Judges said the proposal took away their power; prosecutors said it gave judges too much power. The State's mayors and sheriffs were concerned about shifting the burden of housing more offenders to local jails. Governor Cuomo submitted a bill to the Legislature based on the report, but it received a negative reaction. The sentencing bill was never reported out of legislative committee.

D. Increased Correctional Control Over Time Served: "Back End" Sentencing (1985-1995)

In the aftermath of the failure of the sentencing guidelines effort, several early-release programs were authorized that allowed DOCS to release many offenders before the expiration of their minimum sentences. With prison populations rising and revenues shrinking, an ad hoc approach to sentencing policy was developed. The politically difficult challenge of repealing

⁶⁸ Laws of 1983, ch. 711.

⁶⁹ New York State Committee on Sentencing Guidelines, *Determinate Sentencing: Report and Recommendations* (1985). A preliminary report was issued by the COSG in January 1985 for the purpose of public comment and, thereafter, public hearings were held in New York City, Albany and Buffalo.

mandatory sentencing largely fell by the wayside and the matter was handled through a series of incremental amendments.

Shock incarceration was instituted in 1987 for inmates age 24 or under;⁷⁰ subsequent revisions extended the age to those under 40.⁷¹ If selected by DOCS for participation in the six-month program, inmates were virtually guaranteed parole release. That same year, an “earned eligibility” program was created to increase the rate of release on parole at first eligibility.⁷² In 1989, CASAT (Comprehensive Alcohol and Substance Abuse Treatment) was established and allowed participants to be released from prison up to 18 months before the expiration of their minimum sentences.⁷³

Work release, while not new, was significantly expanded during this period. Between 1991 and 1992, while the State was experiencing severe fiscal shortfalls, work release grew by 43%.⁷⁴ Historically, work release inmates were free in the community for up to 14 hours each day and returned at night to community-based work release facilities. Beginning in 1990, in order to save money, work release beds were double encumbered; that is, one inmate slept in the bed for three nights and another for four nights. At the end of 1990, as part of the State’s deficit reduction plan, day reporting was added. Selected inmates who had not yet served their minimum sentence were allowed to live at home every day, provided they reported regularly to a work release facility for drug testing and counseling.

Decision making about all of these early release programs rested entirely with prison officials. While many of these treatment programs may have had positive impacts on offenders and saved money, they also represented a back-door approach to sentencing policy and, in some instances, raised serious public safety issues.

IV. DETERMINACY FOR SOME, INDETERMINACY FOR OTHERS: WHERE WE ARE TODAY

A. The Sentencing Reform Act of 1995

The Sentencing Reform Act of 1995 (“the Act”) instituted determinate sentences for second violent felony offenders and second felony offenders convicted of violent felonies.⁷⁵ This was not a sentencing guidelines type of determinacy, such as the guidelines used by the federal government. Nor was it designed to limit the discretion of prosecutors or judges or to provide guidance for limiting unwarranted disparities. Instead, the Act largely maintained the broad sentencing ranges used in the old indeterminate structure. The sentencing ranges left prosecutors with wide discretion in plea bargaining; in cases where a guilty verdict was rendered after trial, judges selected a specific determinate sentence from the broad range.

⁷⁰ Laws of 1987, chs. 261, 262 (enacting Correction Law Art. 26-A). The Shock Incarceration Program is described in greater detail in Part Three, *infra*.

⁷¹ Laws of 1999, ch. 412, Pt. B, §1.

⁷² 9 NYCRR §8002.1(b).

⁷³ Laws of 1989, ch. 338.

⁷⁴ New York State Department of Correctional Services, *Temporary Release Program: 1992 Annual Report* (1992).

⁷⁵ Laws of 1995, ch. 3, §§5; 7 (adding Penal Law §70.06[6]).

Offenders sentenced under the new determinate sentencing law would be required to serve slightly more than 85% of their court-imposed determinate term.⁷⁶ Discretionary parole release was abolished for these offenders.⁷⁷ The Act also doubled the minimum periods for persistent (third-time) violent felony offenders and increased the minimum period of the indeterminate sentence from 1/3 to 1/2 the maximum for first-time violent felony offenders.

The federal government provided additional incentives to New York and other states during this period through the Violent Crime Control and Law Enforcement Act of 1994, which authorized incentive grants to states that adopted “truth-in-sentencing” laws. The federal funds were earmarked for building or expanding prisons and jails to increase correctional capacity to accommodate longer sentences for violent offenders. Toward this end, New York received almost \$25 million in 1996 and in excess of \$28 million in 1997.⁷⁸

B. More Layers of Determinacy Added

While the Act established determinate sentencing for certain second felony offenders and for second violent felony offenders, a 1998 law extended determinate sentencing to first-time violent felony offenders, with the caveat that certain cases involving domestic violence would remain indeterminate.⁷⁹ Also, the 1998 legislation added specific “post-release supervision” periods for offenders sentenced to a determinate term.⁸⁰ In 2000, sentences were enhanced for second child sexual assault felony offenders⁸¹ and hate crimes.⁸² In 2004, determinate sentencing was established for drug offenders⁸³ and, in 2007, determinate sentencing was authorized for those felony sex offenses classified as non-violent felonies.⁸⁴

The result of these and other piecemeal changes is that today there is a separate indeterminate sentencing scheme for first-time non-violent, non-drug, non-sex felony offenders, generally with broad sentence ranges for each of the existing six felony classes (A-I, A-II, B, C, D and E).⁸⁵ A separate determinate sentencing scheme exists for first-time violent felony offenders,⁸⁶ with the exception of certain cases involving domestic violence which remain indeterminate.⁸⁷ A different set of rules applies when ascertaining the applicable indeterminate range for second non-violent felony offenders whose prior offense was also non-violent.⁸⁸ Likewise, another scheme, this one determinate, is used for second felony offenders whose present offense is violent and whose prior offense was non-violent,⁸⁹ as well as for second violent felony offenders whose prior and present offenses are violent.⁹⁰ Yet another set of

⁷⁶ Correction Law §803(1)(c), as amended by Laws of 1995, ch. 3, §27.

⁷⁷ Penal Law §70.40(1)(a)(ii), as amended by Laws of 1995, ch. 3, §18.

⁷⁸ United States General Accounting Office, *Truth in Sentencing: Availability of Federal Grants Influenced Laws in Some States* at 4 (1998). New York State received a total of \$216 million for this initiative from 1996 through 2001.

⁷⁹ Laws of 1998, ch. 1 (amending Penal Law §70.00 [6] and adding Penal Law §60.12).

⁸⁰ Laws of 1998, ch. 1 §15 (adding Penal Law §70.45).

⁸¹ Laws of 2000, ch. 1 (adding Penal Law §70.07).

⁸² Laws of 2000, ch. 107 (adding Penal Law Article 485).

⁸³ Laws of 2004, ch. 738 (adding Penal Law §§70.70; 70.71).

⁸⁴ Laws of 2007, ch. 7 (adding Penal Law §70.80).

⁸⁵ Penal Law §70.00.

⁸⁶ Penal Law §70.02.

⁸⁷ Penal Law §60.12.

⁸⁸ Penal Law §70.06.

⁸⁹ Penal Law §70.06(6).

⁹⁰ Penal Law §70.04.

sentencing rules, involving both determinate and indeterminate sentences, applies to second child sexual assault felony offenders.⁹¹ Separate charts need to be consulted when sentencing non-violent felony sex offenders, again depending on whether they are first-time felony offenders, second felony offenders with a prior non-violent felony conviction, or second felony offenders with a prior violent felony conviction.⁹² Felony drug offense sentences, which are determinate, also are differentiated by the number (i.e., no priors or one prior) and type (i.e., violent felony or non-violent felony) of prior felony convictions.⁹³ Finally, different indeterminate schemes are used for persistent felony offenders, persistent violent felony offenders and juvenile offenders.⁹⁴

As the Hon. William C. Donnino has observed in his Practice Commentary to the Penal Law, the myriad amendments to the Penal Law over the last few decades “have been so substantial that the sentencing statutes have become a labyrinth not easily traversed by even the most experienced practitioner of the criminal law.”⁹⁵ Indeed, the current structure is replete with anomalies and absurdities – a veritable object lesson in the law of seemingly unintended consequences.⁹⁶

V. A BLUEPRINT FOR REFORM

Despite the complicated and convoluted structure of New York’s current “patchwork” sentencing scheme, and the need to simplify that structure to make it more fair, more transparent and more comprehensible to practitioners, judges, victims and defendants, New York’s sentencing and correctional systems are “not in a state of absolute crisis [as are those of] so many other states.”⁹⁷ Indeed, New York is the safest large state in the nation and the fifth safest overall.⁹⁸ While other states have experienced dramatic increases in their prison populations - - by as much as 25% in Texas, 28% in California and 41% in Florida - - New York is the only large state to see a consistent decrease in crime, offender recidivism and prison population over the last several years.⁹⁹

The Commission believes, however, that even greater progress can be made through the adoption of targeted sentencing reforms and corresponding improvements in the management and supervision of offenders in the criminal justice system and during their transition back to the community. Accordingly, and with an eye toward preserving and building upon the gains the State has made in the areas of criminal justice and public safety, the Commission makes the following preliminary findings and recommendations.

⁹¹ Penal Law §70.07.

⁹² Penal Law §70.80.

⁹³ Penal Law §§70.70; 70.71.

⁹⁴ Penal Law §§70.10; 70.08; 70.05.

⁹⁵ Donnino, Practice Commentaries, McKinney’s Cons. Laws of NY, Book 39, Penal Law Article 70.00, at 56.

⁹⁶ A description of some of the most glaring anomalies in the existing sentencing statutes can be found in Appendix C.

⁹⁷ Commission on Sentencing Reform, Transcript of July 18, 2007 Meeting, at 183.

⁹⁸ U.S. Department of Justice, *Crime in the United States 2006* (Washington, D.C.: U.S. Department of Justice, Federal Bureau of Investigation 2006) <http://www.ihc.ca.gov/lhcdir/report185.html>.

⁹⁹ Harrison, P.M. and Beck, J., *Prisoners in 2005* (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Washington, DC 2006). Since December 1999, the New York State prison population has been reduced by slightly more than 8,000.

PART TWO

A SYSTEM IN NEED OF REFORM

Part Two

A System in Need of Reform

I. ADOPTING A PREDOMINANTLY DETERMINATE SENTENCING SCHEME IN NEW YORK

Based on the Commission's comprehensive evaluation of New York's current sentencing scheme, and as a step toward simplifying a system that all Commission members agree is needlessly complex, the Commission recommends that the State adopt a predominately determinate sentencing structure by converting virtually all non-violent first and second felony offenses that now carry an indeterminate sentence to determinate sentences, while maintaining indeterminate sentences for those non-drug Class A felony offenders and persistent felony offenders that are currently subject to indeterminate sentences.¹⁰⁰

As a result of the piecemeal adoption of determinate sentencing that took place from 1995 to 2007, indeterminate sentences generally apply now only to certain Class A and persistent felony offenders, juvenile offenders and a residual category of non-violent felony offenders.¹⁰¹ Maintaining this mix of determinate and indeterminate sentences adds to an already convoluted structure and, where an inmate is serving both types of sentences, significantly complicates the process of calculating the inmate's aggregate sentence and ultimate release date.

A person serving a determinate sentence of imprisonment, for example, is not eligible for parole. Instead, a determinate sentence utilizes two potential release dates: the first allows for "good time," not to exceed 1/7 of the term, which is credited against the full term of the determinate sentence.¹⁰² Unless forfeited by the inmate, either for a poor disciplinary record or the failure to perform adequately in an assigned program, good time will result in the inmate being "conditionally released" after 6/7 of the determinate term has been served. If the good time is forfeited, the inmate will serve the full term (i.e., until the maximum expiration date). Separately, under the Drug Law Reform Act of 2004, a drug offender may have an additional "merit" conditional release date after 5/7 of the full determinate term has been served.

In contrast, an inmate serving an indeterminate sentence may have up to five potential release dates: (1) a supplemental merit time date for most drug offenses when 2/3 of the minimum period has been served; (2) a merit eligibility date when 5/6 of the minimum period has been served; (3) a parole eligibility date when the entire minimum period has been served;

¹⁰⁰ A list of the approximately 200 non-violent, non-drug, non-sex Penal Law felony offenses that would be converted from indeterminate to determinate sentences under the Commission's proposal is set forth in Appendix D. Note that the Commission makes no recommendation with regard to those Class A felony offenses that currently carry a sentence of life imprisonment without parole, nor to the current indeterminate sentences for juvenile offenders.

¹⁰¹ Indeterminate sentences are principally reserved for those non-violent, non-drug, non-sex felony offenses listed in Appendix D, as well as Class A-I and Class A-II non-drug felonies, certain first-time violent felony offenders whose crimes are the product of domestic violence (Penal Law §60.12); juvenile offenders (Penal Law §70.05) persistent violent felony offenders (Penal Law §70.08); persistent felony offenders (Penal Law §70.10); and certain second child sexual assault felony offenders (Penal Law §70.07[4]).

¹⁰² Correction Law §803(1)(c).

(4) a conditional release date when 2/3 of the maximum term has been served; and (5) a maximum expiration date when the entire maximum sentence has been served.¹⁰³

Merit time and conditional release dates for indeterminate sentences both depend upon the inmate earning credit toward the full term. An inmate who does not earn the full amount of good time still may be eligible for conditional release before the “maximum expiration” date. Merit time, however, cannot be earned in increments. Either an inmate earns the entire 1/6 credit toward the minimum period or none at all. Needless to say, when an inmate is serving both an indeterminate and determinate sentence, it can become a question of higher mathematics to calculate all of the inmate’s potential dates of release.

Because New York has consistently moved toward determinate sentencing during the last several years, it seems illogical to reverse this trend without a compelling reason to do so. And, while furthering an existing trend is not, by itself, sufficient reason to continue in that same direction, the Commission believes that determinate sentences are desirable for the same reasons the Legislature set forth in 1995: determinate sentences promote uniformity, fairness and “truth-in-sentencing.”

Under an indeterminate structure, when a defendant is sentenced to 8 1/3 to 25 years, everyone, including the defendant and the victim, is left to guess when the defendant will be released. Assuming an inmate earns good time credit, it remains unknown whether he or she will serve 8 1/3 years or 16 2/3 years or somewhere in between. Determinate sentencing, on the other hand, allows the parties to leave the courtroom with a greater understanding of the length of sentence. By providing a maximum good time allowance of only 1/7 of the full term rather than 1/3 (as in the indeterminate model), and by eliminating entirely the subjective assessments and release decisions of an intervening parole board, the determinate model necessarily reduces the possibility that like offenders will be treated differently with regard to time actually served, thereby promoting greater fairness and overall uniformity. Understandably, many defendants reportedly prefer the certainty of determinate sentences to the vagaries of the parole process. Assessing when an offender has been rehabilitated is a difficult task and the Board of Parole has achieved only mixed results in this regard, as reflected in the following DOCS’ statistic: for non-violent felony offenders released from DOCS in 2004, the percentage who returned to prison within 24 months (either as parole rule violators or on new felony convictions) was virtually the same for those released following their first parole hearing (38.2%) as those denied initial release and then released following their second or subsequent hearing (38.6%).

In Preliminary Draft No. 5 of the ALI’s *Model Penal Code: Sentencing*, the ALI rejects indeterminate sentencing in favor of a determinate (“sentencing guidelines”) model, and quotes Norval Morris: “[t]he blunt truth is that at the time of sentencing as good a prediction as to when the prisoner can be safely released can be made as at any later time during confinement.”¹⁰⁴ Inmates who behave and work hard because they view their parole eligibility date as an opportunity to make a convincing argument for early release often find themselves denied release based on the underlying conviction, a factor that, of course, cannot be changed.¹⁰⁵ That

¹⁰³ Correction Law §803.

¹⁰⁴ American Law Institute, *Model Penal Code: Sentencing (Preliminary Draft No. 5)* at 8 (August 12, 2007).

¹⁰⁵ In view of its recommendation that indeterminate sentencing be continued for at least some categories of offenses, the Commission will consider the implications of proposing an amendment to Parole’s discretionary release guidelines to require that less weight be given by the Board of Parole to the underlying offense and greater focus be given to the inmate’s behavior while in prison (see, Executive Law §259-i[2][c][A]). The Commission is

reality sends the wrong message to inmates who already may believe that following the rules is not advantageous. Finally, determinate sentences facilitate more informed plea bargaining because the parties can bargain over fixed terms.

While there is strong support on the Commission for the concept of determinate sentencing, all members acknowledge that the proposed move toward greater determinate sentencing is inextricably linked with the adoption of fair and acceptable sentencing ranges for the various offenses, a topic that will be a major focus of the Commission going forward. Still, three members of the Commission withheld their support for determinate sentencing.¹⁰⁶

Despite the benefits of moving to an all determinate structure, the Commission believes that indeterminate sentences should continue to apply to the most egregious offenses that now require maximum life sentences. Currently, New York has indeterminate sentences for most non-drug Class A-I and Class A-II felony offenses. The non-drug Class A-I felonies include crimes such as murder in the second degree,¹⁰⁷ conspiracy in the first degree,¹⁰⁸ kidnapping in the first degree,¹⁰⁹ and arson in the first degree.¹¹⁰ In general, the indeterminate sentences for these crimes carry a minimum of 15 years to life and a maximum of 25 years to life.¹¹¹ Non-drug crimes in the A-II category include predatory sexual assault,¹¹² predatory sexual assault against a child,¹¹³ and criminal use of a chemical or biological weapon.¹¹⁴

The Commission recommends that the foregoing offenses continue to carry indeterminate sentences for two reasons. First, there are some instances in which early release is appropriate even for these very serious crimes (e.g., where an inmate who is serving a life sentence for a crime committed at a young age is determined by the Board of Parole to no longer pose an actual danger to others). In such cases, an inmate should have the opportunity to go before the Board of Parole and present a case for release. Next, the possibility that an inmate serving a life sentence may be granted release on parole provides a strong incentive for good behavior. For these reasons, correction officials urged the Commission to retain indeterminate sentencing for those

in agreement that the Board's current guidelines should be made available to the public for the benefit of inmates, victims and other interested parties.

¹⁰⁶ One of the three members rejects the determinate sentencing model outright in favor of the rehabilitative ideal of indeterminate sentencing (See statement of Commission member George B. Alexander, at Appendix B, *infra*). A second member withheld support because no specific determinate sentencing ranges had been discussed or agreed to by the Commission, and the third believed that the determinate sentencing proposal warranted further study.

¹⁰⁷ Penal Law §125.25.

¹⁰⁸ Penal Law §105.17.

¹⁰⁹ Penal Law §135.25.

¹¹⁰ Penal Law §150.20.

¹¹¹ Defendants convicted of certain Class A-I felonies, such as murder in the second degree pursuant to Penal Law §125.25(5) only, criminal possession of a chemical or biological weapon in the first degree (Penal Law §490.45) or aggravated murder (Penal Law §125.26), must receive a sentence of life without parole, which is deemed to be an indeterminate sentence for certain purposes pursuant to Penal Law §70.00(5). For the Class A-I felony of murder in the first degree (Penal Law §125.27), the authorized sentence is either life imprisonment without parole or an indeterminate sentence of imprisonment with a minimum of 20 years to life and a maximum of 25 years to life (Penal Law §§60.06; 70.00; CPL 400.27). A sentence of death is also a statutorily authorized sentence for murder in the first degree (Penal Law §60.06), but the Court of Appeals' 2004 decision in *People v. LaValle* (3 N.Y.3d 88) currently precludes the imposition of that sentence.

¹¹² Penal Law §130.95.

¹¹³ Penal Law §130.96. In 2006 and the first six months of 2007, only one inmate was admitted to DOCS for predatory sexual assault and only one for predatory sexual assault against a child. Both provisions, however, are relatively new, having taken effect in June 2006.

¹¹⁴ Penal Law §490.50.

Class A-I, Class A-II and persistent felony offenders currently subject to indeterminate sentences.

A. Determinate Sentence Ranges

The Commission is reviewing data on the length of sentences currently being served for the relevant non-violent felony offenses under the existing indeterminate sentencing scheme and will use that information to make recommendations regarding determinate sentencing ranges for these offenses. The Commission recognizes that in converting indeterminate sentences to determinate, it is important to avoid ranges that are overly broad. Accordingly, in recommending sentencing ranges, the Commission will consider the time that defendants actually serve under the current indeterminate scheme rather than focusing solely on the maximum possible sentence a defendant could receive (e.g., 25 years for a Class B non-violent felony).

B. Simplification Through Reorganization

In order to simplify the existing sentencing structure and make it more comprehensible for practitioners, defendants and victims, the Commission is considering options for reducing the large number of separate sentencing categories in the Penal Law. Earlier this year, the Penal Law was amended to create distinct, determinate, sentencing provisions for sex offenses that are classified as non-violent felonies.¹¹⁵ The differences between the authorized determinate sentences for those non-violent sex offenses and the determinate sentences for violent felonies with the same classification level are slight. For example, a predicate felon whose prior offense was a violent felony faces a determinate sentence of between 5 and 7 years if he or she commits aggravated sexual abuse in the third degree (a Class D violent felony) and between 4 and 7 years if he or she commits rape in the second degree (a Class D non-violent felony). In most instances, the authorized sentences for violent felonies and non-violent felony sex offenses are the same. The Commission will examine whether, for the sake of simplification, non-violent felony sex offenses should be treated as violent felonies for sentencing purposes.¹¹⁶

Additionally, in 1998, when determinate sentences were authorized for first-time violent felony offenders, the Legislature created a special indeterminate sentencing scheme for defendants who were the victims of domestic violence and whose abuse was a factor in precipitating their crimes.¹¹⁷ At the time, it was believed that the shift to determinate sentencing would mean harsher sentences, and these indeterminate sentences were intended to mitigate that harshness for domestic abuse victims. At present, however, only one person is incarcerated on an indeterminate sentence under the domestic violence provision.¹¹⁸ This fact militates in favor of replacing that provision with a comparable ameliorative provision that would allow for the imposition of less harsh, determinate sentences in such cases.

¹¹⁵ Laws of 2007, ch. 7 (adding Penal Law §70.80).

¹¹⁶ While there may be some reluctance to label felonies as “violent” that have not borne that label before, the Commission may recommend use of different terminology. For instance, if Class B violent felonies were called Class “B-I” felonies or “aggravated” B felonies, it might be easier to achieve simplification in this area.

¹¹⁷ Penal Law §60.12.

¹¹⁸ The inmate is a man convicted of manslaughter in the first degree for shooting his father in the head following an argument. He received an indeterminate sentence of 6 to 12 years, a sentence that is actually longer than the minimum determinate term for the crime (5 years). Notably, the Board of Parole has twice denied this inmate release.

The Commission also will consider whether to simplify New York's current drug sentences which, as noted, were converted from indeterminate to determinate in 2004 when the Legislature created separate sentencing provisions for all drug felonies.¹¹⁹ Specifically, the Commission will examine whether to integrate drug and non-drug sentencing laws which will depend, in part, upon the determinate sentencing ranges that are fixed for non-violent, non-drug offenses.¹²⁰

Finally, the Commission recommends that consideration be given to moving all sections of law pertaining to fines, restitution, mandatory surcharges and other financial penalties into a single article of the Penal Law or providing a cross-reference therein. Although the provisions governing imposition of these penalties currently appear primarily in the Penal Law, the laws governing their collection, remission and deferral appear, among other places, in at least three separate articles of the Criminal Procedure Law.¹²¹

C. Updating Offense Descriptors

In the Penal Law, each substantive felony offense has a "descriptor" at the end of the offense definition that describes the classification level of the felony (e.g., "Robbery in the first degree is a Class B felony"). Many of these descriptors are now obsolete to the point that they are affirmatively misleading. The Commission recommends that they be updated to reflect, for example, whether the offense (or a particular subdivision thereof) is a violent or non-violent felony offense.

D. Sentence Cap Provisions

The "cap" provisions of Penal Law § 70.30, which regulate the actual maximum length of consecutive sentences, are particularly confusing and obtuse. The following is an example of the complexity:

Except as provided in subparagraph (ii), (iii), (iv), (v), (vi) or (vii) of this paragraph, the aggregate maximum term of consecutive sentences, all of which are indeterminate sentences or all of which are determinate sentences, imposed for two or more crimes, other than two or more crimes that include a class A felony, committed prior to the time the person was imprisoned under any of such sentences shall, if it exceeds twenty years, be deemed to be twenty years, unless one of the sentences imposed was for a class B felony, in which case the aggregate maximum term shall, if it exceeds thirty years, be deemed to be thirty years. Where the aggregate maximum term of two or more indeterminate consecutive sentences is reduced by calculation made pursuant to this paragraph, the aggregate minimum period of imprisonment, if it exceeds one-half of the aggregate maximum term as so reduced,

¹¹⁹ Penal Law §§70.70; 70.71.

¹²⁰ Integration may require reclassification of certain drug crimes. The current classifications -- e.g., the sale of any quantity of a narcotic drug (Penal Law §220.39) is a Class B felony -- are a remnant of the "Rockefeller" drug laws. Integration also will require consideration of how to treat what are now classified as A-II drug felonies.

¹²¹ See, e.g., Penal Law §§60.01(2)(c); 60.27; 60.35; 80.00; 80.05; 80.10; 80.15; CPL 400.30; 420.05; 420.05; 420.10; 420.20; 420.30; 420.35; 420.40; 430.20(5).

shall be deemed to be one-half of the aggregate maximum term as so reduced.¹²²

In fairness to the drafters, complexity here was somewhat inevitable. With each change in the structure of sentencing (e.g., the creation of determinate sentencing) it became necessary to create new provisions and exceptions to those provisions. Nevertheless, these cap provisions have become so complex that they are difficult to decipher and Penal Law §70.30 simply needs to be re-written.

E. Consecutive and Concurrent Sentences

New York's rules governing consecutive and concurrent sentences are also extremely complicated. Incidental references to concurrent sentencing appear in Articles 60 and 65 of the Penal Law,¹²³ but the substantive rules are in Penal Law §§70.25 and 70.30. The general rule is that a sentencing court has discretion to decide whether to make a sentence for a crime run consecutively or concurrently to another sentence imposed at the same time, or with an "undischarged" term imposed at an earlier time.¹²⁴ If the judge fails to speak on the matter, an indeterminate sentence or a determinate sentence will be deemed to run concurrently to all other terms and a definite sentence will be deemed to run concurrently with terms imposed at the same time, but consecutive to any other terms.¹²⁵

While the general rule grants discretion to sentencing courts, there are four situations where the court must order concurrent sentences:

1. Where more than one sentence is imposed "for two or more offenses committed through a single act or omission";¹²⁶
2. Where more than one sentence is imposed "for two or more offenses committed . . . through an act or omission which in itself constituted one of the offenses and was also a material element of the other";¹²⁷
3. A sentence for course of sexual conduct against a child with that for any sex offense committed by the defendant during the same period and against the same victim;¹²⁸ and
4. A sentence for unlawfully disposing of methamphetamine laboratory material with a sentence for manufacturing methamphetamine at the same laboratory.¹²⁹

These exceptions have frequently proved difficult to interpret. For example, the first exception often cannot be applied literally because few offenses are committed through one "act."¹³⁰ The exception will not apply simply because crimes are contemporaneous. Also, continuing

¹²² Penal Law §70.30(1)(e)(i).

¹²³ See, e.g., Penal Law §§60.01(2)(d); 65.15(1); Penal Law §70.25(2).

¹²⁴ Penal Law §70.25(1). The court must run such sentences consecutively when imposed pursuant to Penal Law §70.25(2-a) (see also, Penal Law §70.25[2-b], [2-c], [2-d], and [5]).

¹²⁵ Penal Law §70.25(1).

¹²⁶ Penal Law §70.25(2). Note that the requirement under Penal Law §70.25(2) that the sentences run concurrently does not apply where one or more of the sentences is for a violation of Penal Law §270.20 (unlawful wearing of body vest).

¹²⁷ Penal Law §70.25(2).

¹²⁸ Penal Law §70.25(2-e).

¹²⁹ Penal Law §70.25(2-g).

¹³⁰ Penal Law §15.00 (1) (defining "Act").

possessory offenses that overlap with one another, or with a non-possessory offense, have engendered substantial litigation. For example, if a defendant simultaneously possesses 20 weapons in a “stash,” he or she may be able to insist on concurrent sentences -- although the result may be different if the weapons are located in separate places. The Commission believes that these rules need to be re-examined and simplified.

F. “Back-End” Sentencing Provisions

Numerous “back end” sentencing provisions that provide mechanisms for early release from State prison, such as “good time,”¹³¹ “merit time,”¹³² and “supplemental merit time,”¹³³ are currently defined outside the Penal Law. Other non-Penal Law provisions establish early release programs or mechanisms, including the temporary release program,¹³⁴ the presumptive release program for non-violent inmates,¹³⁵ “shock incarceration,”¹³⁶ early parole for deportation¹³⁷ and medical parole.¹³⁸ For example, a defendant convicted of a drug offense and sentenced to a determinate sentence of 7 years is eligible for a good time reduction of 1/7 - - a provision that appears in the Correction Law - - and an additional 1/7 off in merit time for completing certain DOCS programs - - a provision that also appears in the Correction Law.

Although there are scattered references in various sections of the Penal Law to good time;¹³⁹ merit time;¹⁴⁰ medical parole;¹⁴¹ early parole for deportation;¹⁴² shock incarceration;¹⁴³ and presumptive release,¹⁴⁴ there are no references to any of these “back end” release mechanisms in the substantive Penal Law sections that define the sentences for specific crimes. This structure makes it difficult for defendants, practitioners and victims to easily determine the actual length of a prison sentence. Particularly with regard to merit time and good time, an appreciation of these provisions is critical to determining the most likely length of a prison sentence. Accordingly, the Commission recommends that some or all of these non-Penal Law back-end sentencing provisions be merged into a single article of the Penal Law or be cross-referenced in a single section of Penal Law Article 70 (“Sentences of Imprisonment”).

II. CONSIDERATION OF FURTHER DRUG SENTENCING REFORM AND REVIEW OF MANDATORY MINIMUM SENTENCES FOR CERTAIN DRUG AND OTHER NON-VIOLENT FELONY OFFENSES

The Commission has begun and will continue to study the data related to drug sentencing practices throughout the State, including the effects of the 2004 drug law reforms. Because of the short time frame, the breadth of sentencing issues to be studied and the need to collect and

¹³¹ Correction Law §803(1)(b), (c).

¹³² Correction Law §803(1)(d).

¹³³ Laws of 2004, ch. 738, §30; Laws of 2005, ch. 644, §1.

¹³⁴ Correction Law §851 *et seq.*

¹³⁵ Correction Law §806.

¹³⁶ Correction Law §865 *et seq.*

¹³⁷ Executive Law §259-i(2)(d).

¹³⁸ Executive Law §259-r.

¹³⁹ Penal Law §70.30(4).

¹⁴⁰ Penal Law §70.40(1)(a)(i).

¹⁴¹ Penal Law §70.40(1)(a)(v).

¹⁴² Penal Law §70.40(1)(a)(v).

¹⁴³ Penal Law §70.40(1)(a)(v).

¹⁴⁴ Penal Law §70.40(1)(c).

examine additional drug sentencing data, the Commission was unable to complete its review of these issues and fully debate the merits of the various arguments for and against additional drug law reform. As outlined below, the Commission is continuing to study this issue and will attempt to reach a consensus on whether additional changes to the drug laws are warranted.

The Commission has had preliminary discussions regarding the so-called “second felony offender” statutes and the “mandatory minimum” sentencing provisions, including those governing certain felony drug offenses. Under current law, a first-time felony offender convicted of a Class B felony drug offense, such as criminal sale of a controlled substance in the third degree¹⁴⁵ or criminal possession of a controlled substance in the third degree,¹⁴⁶ must -- unless the offender has provided or is providing “material assistance” to the prosecutor and receives a 25-year probation term in accordance with Penal Law § 65.00(1) and (3) -- receive a determinate sentence of imprisonment of from 1 to 9 years (or from 2 to 9 years if the drug sale occurred on a school bus or in or near school grounds).¹⁴⁷

Similarly, all non-violent second felony offenders and second felony drug offenders must be sentenced to State prison,¹⁴⁸ although, for “eligible defendants” convicted of a “specified offense,” as those terms are defined in CPL 410.91(2) and (5), the sentence may be executed as a “sentence of parole supervision” commencing with a 90-day placement at the State prison at Willard which has been designated by law as a “drug treatment campus.”¹⁴⁹ A definite or intermittent sentence of up to 1 year in local jail, “split sentence” of up to 6 months in local jail followed by a period of probation supervision, “straight” probation sentence or another non-incarceratory sentence such as a conditional discharge or fine are, except as noted above, not available for these categories of first and second felony offenders.

Although, as discussed in Part One of this Report, “mandatory minimums” have not always been a part of the sentencing laws of the State, they have been an important component of New York’s sentencing structure for many years. There has been little serious debate over the years regarding the propriety of requiring stiff minimum (and maximum) prison sentences for both first time and repeat offenders convicted of high-level violent felonies such as rape, burglary and assault, or Class A felonies such as murder, arson and kidnapping. There has,

¹⁴⁵ Penal Law §220.39.

¹⁴⁶ Penal Law §220.16.

¹⁴⁷ Penal Law §70.70(2)(a)(i). Note that, as with all determinate sentences, a determinate sentence imposed on a felony drug conviction includes, “as a part thereof,” a period of post-release supervision pursuant to Penal Law §70.45.

¹⁴⁸ The mandatory sentences for second felony offenders convicted of an offense other than a violent, drug or sex offense are indeterminate and are set forth in Penal Law §70.06 (3) and (4). Pursuant to those provisions, the mandatory minimum indeterminate sentence for a second felony offender convicted of a Class B non-violent felony is 4 ½ to 9 years (with a permissible maximum of up to 12 ½ to 25 years), and for a Class C non-violent felony is 3 to 6 years (with a permissible maximum of up to 7 ½ to 15 years). Where the second felony offender stands convicted of a violent felony and his or her predicate conviction was for a non-violent felony, the sentence must be a determinate sentence within the ranges set forth in Penal Law §70.06(6). For second felony drug offenders, the sentence must be a determinate sentence of imprisonment (*see*, Penal Law §§70.70; 70.71). A second felony drug offender convicted of a Class B drug felony must, for example (unless he or she provides “material assistance” and is sentenced to lifetime probation in accordance with Penal Law §65.00), receive a determinate sentence of not less than 3 ½ years nor more than 12 years (unless the offender’s prior conviction was for a violent felony offense, in which case the determinate sentence must be not less than 6 nor more than 15 years).

¹⁴⁹ Penal Law §70.06(2), (7); Penal Law §70.70; CPL 410.91. Note that, as discussed in Appendix C, *infra*, Penal Law §70.70(3)(d) specifically authorizes a parole supervision (“Willard”) sentence for certain second felony drug offenders sentenced to a determinate sentence, while CPL 410.91 refers to a sentence of parole supervision only as an indeterminate sentence.

however, been an ongoing, often heated, debate over the existing mandatory minimum sentencing scheme for certain first-time drug and second-time non-violent felony offenders.

With regard to drug offenses, the 2004 “Drug Law Reform Act”¹⁵⁰ -- which replaced the minimum 15-to-life indeterminate sentence for first-time Class A-I felony drug offenders with a mandatory minimum determinate sentence of 8 years, doubled the minimum drug weight requirements for prosecuting some of those crimes and replaced the mandatory minimum indeterminate sentences for first and second-time Class B felony drug offenders with, in certain instances, less onerous determinate sentence ranges -- represented the Legislature’s response to long-standing arguments that the “Rockefeller” drug laws were unduly harsh and should be tempered.

Notably, however, the 2004 Act left unchanged the requirement that first-time felons convicted of the Class B felony offense of criminal sale of a controlled substance in the third degree or of possessing any quantity of drugs “with intent to sell” (the Class B felony offense of criminal possession of a controlled substance in the third degree) be sentenced to State prison. Similarly, the Legislature left intact the requirement that non-violent second felony offenders and second felony drug offenders convicted of any level of non-violent felony offense within 10 years of a prior felony conviction receive a State prison sentence.¹⁵¹

The Commission heard many arguments on both sides of the debate as to whether to retain, eliminate or modify mandatory minimum sentences for certain first-time and repeat felony drug offenders. The Commission members heard forceful arguments from prosecutors that the mandatory minimum and second felony offender laws, including those for felony drug offenders, “played a vital role in providing us with the framework which has led to the tremendous and historic reduction in crime we have [seen] since about 1993.”¹⁵² Prosecutors maintained that these laws encourage cooperation in the prosecution of those higher up in drug organizations and provide a strong incentive for drug-addicted offenders to participate in DOCS treatment programs, such as Willard and CASAT, and community-based substance abuse treatment in lieu of prison.

Representatives from the defense community and other drug law reform advocates asserted that drug reform has not gone far enough and that, despite the enactment of two drug law reform measures, “the percentage of new admissions of drug offenders into State prison ha[s] actually risen in both of the last two years,”¹⁵³ and thousands of persons sentenced under the former drug laws are ineligible to seek re-sentencing. As stated by one defense representative:

[t]he District Attorneys control virtually every one of the alternative to prison options through their . . . control of both the initial sentence charge and the ability to plead down. The judge has very little authority to order an alternative, and defense counsel is virtually . . . powerless in that regard. We’ve got to return that discretion to the judges.¹⁵⁴

¹⁵⁰ Laws of 2004, ch. 738.

¹⁵¹ Penal Law §§60.04(5); 70.06.

¹⁵² Commission on Sentencing Reform, Transcript of July 18, 2007 Meeting, at 135.

¹⁵³ Commission on Sentencing Reform, Transcript of July 18, 2007 Meeting, at 79.

¹⁵⁴ Commission on Sentencing Reform, Transcript of July 18, 2007 Meeting, at 80.

In response, an argument was made by prosecutors that there is a clear nexus between violence and drug sales in the community and that District Attorneys should have the role of determining which offenders should be eligible for treatment because they are accountable to their communities for reducing drug dealing and violence:

[t]he voices you're not hearing are the voices of the people in the communities who are, day-in and day-out, complaining to the police department, and to their local District Attorney, [and asking] 'what are you doing about these people on my corner [because] I'm afraid to send my child around the corner to school because of the dealers' . . . The amount of violence that is around drug sales cannot be minimized . . . and [District Attorneys] have to be responsible to everyone in the community.¹⁵⁵

It will be challenging to reconcile these opposing views. There is, however, a recognition reflected in current practice that certain offenders, for example, drug-addicted or mentally ill offenders, facing mandatory State prison for non-violent drug offenses and other non-violent felonies should be allowed to pursue effective treatment options in lieu of prison when the judge, prosecutor and defendant are in agreement.

Indeed, the Commission heard consistent testimony from prosecution, defense and judicial representatives that proven treatment options such as the Kings County District Attorney's "Drug Treatment Alternatives to Prison" ("DTAP") program, and other community-based treatment alternatives available through the Judiciary's Drug Treatment and Mental Health Courts, can offer a cost-effective option to mandatory prison sentences by eliminating the underlying behavior that often leads to further involvement in the criminal justice system.¹⁵⁶

One speaker argued that the focus needs to shift from prison to treatment, especially:

[w]hen viewed in light of the hugely disproportionate representation of minorities in prison. If we were to invest resources [we should] bring drug treatment into the communities that most need them . . . [w]e know where the problem is most severe. We should put our resources into those communities.¹⁵⁷

While acknowledging the importance of drug treatment, another speaker cautioned that "[t]he key is putting the right people in the Drug Courts, and the drug treatment programs. If you put the wrong people in there, you're going to have a lack of success."¹⁵⁸

There are currently 196 drug treatment courts in operation (or in the planning stages) in the State.¹⁵⁹ The drug court model involves intensive judicial monitoring of the drug court

¹⁵⁵ Commission on Sentencing Reform, Transcript of July 18, 2007 Meeting, at 173-175, 179.

¹⁵⁶ *See generally*, Commission on Sentencing Reform, Transcript of July 18, 2007 Meeting.

¹⁵⁷ Commission on Sentencing Reform, Transcript of July 18, 2007 Meeting, at 79, 90.

¹⁵⁸ Commission on Sentencing Reform, Transcript of July 18, 2007 Meeting, at 148.

¹⁵⁹ These courts are part of the Judiciary's large network of "problem-solving" courts, which also include Integrated Domestic Violence Courts, Domestic Violence Courts, Mental Health Courts, Sex Offense Courts, Youthful Offender Domestic Violence Courts and Community Courts.

participant, which allows the judge to react quickly to misconduct or non-compliance. In the most commonly used drug treatment court model, a guilty plea is accepted and sentencing is adjourned pending the outcome of drug treatment and the completion of other drug court program requirements. Once a plea agreement is reached, a voluntary contract, which outlines specific outcomes for success and failure, is entered into by the offender, defense counsel, the assistant district attorney and the court. Relapses are addressed with graduated sanctions, the final and most severe resulting in termination from the program and the imposition of a sentence (usually to jail or prison).¹⁶⁰

Despite the benefits of using drug treatment alternatives for certain non-violent felony offenders, there is nothing in the existing Penal Law or Criminal Procedure Law that expressly permits the parties and the court to agree to a non-incarceratory, community-based treatment alternative to an otherwise mandatory State prison sentence. In practice, the parties sometimes fashion a disposition that avoids the mandatory minimum or second felony offender laws. In the DTAP model, for example, upon agreement of the parties and the court, an indicted offender facing a mandatory prison sentence enters a plea of guilty to a felony charge (or pleads to a felony offense contained in a superior court information) and the case is adjourned.¹⁶¹ The offender is promised that upon his or her successful completion of treatment -- and to avoid the prison sentence that, by law, must follow the guilty plea¹⁶² -- the offender will be permitted to withdraw his or her plea and the case will be dismissed.

In certain jurisdictions, the successful offender is permitted to withdraw his or her guilty plea and enter a plea to a non-felony (i.e., misdemeanor) charge in order to avoid the mandatory minimum laws. In still other jurisdictions -- presumably due, in part, to the absence of a statutory provision expressly sanctioning these dispositions -- drug addicted non-violent second felony offenders facing mandatory prison sentences are simply not allowed to enter into alternative dispositions that would subvert the clear intent of the mandatory prison laws.

The Commission believes that the law should expressly permit an alternative, non-incarceratory disposition where such disposition is consistent with public safety and the parties and the court all agree to that disposition for a non-violent felony offender who is in need of drug, alcohol, mental health or other community-based treatment and is facing mandatory prison upon conviction. Thus, for example, where the parties and the court choose to apply the DTAP model and agree to a dismissal of the case following the successful completion of treatment by a

¹⁶⁰ An evaluation of OCA's drug treatment courts showed that recidivism was reduced an average of 29% over the first three years following the arrest that led a participant to enter into the drug court and a 32% average decrease in recidivism during the first year following completion of drug treatment court (Center for Court Innovation, *The New York State Adult Drug Court Evaluation-Policies, Participants and Impacts* [October 2003]).

¹⁶¹ National Center on Addiction and Substance Abuse at Columbia University, *Crossing the Bridge: An Evaluation of the Drug Treatment Alternative-to-Prison (DTAP) Program* (New York, NY 2003). The first DTAP program was initiated in 1990 by the Kings County District Attorney. All New York City District Attorneys' Offices now utilize DTAP programs and a few counties outside New York City have established DTAP-like programs. Because these programs have developed independently of each other, they differ somewhat with respect to program eligibility criteria, process and structure. They all, however, are deferred-sentencing programs, and generally require offenders to participate in 18 to 24-month treatment programs that require the first nine to 12 months of treatment be spent in a residential treatment facility. Annual reports from the King's County District Attorney's DTAP program have shown that the program's graduation rate meets or exceeds estimated national rates (i.e., around 50%). Additionally, a 2003 recidivism study conducted by the National Center on Addiction and Substance Abuse found that the two-year re-arrest rates for DTAP participants who entered the program in 1995 and 1996 were 26% lower than those for the comparison group (43% vs. 58%, respectively).

¹⁶² Penal Law §§60.04(5); 60.05(6); 70.06(2); 70.70(3); 70.70(4).

non-violent second felony drug offender who otherwise would be required to receive a sentence to State prison, the law should expressly allow it without resort to extraordinary procedures designed to accomplish this. Similarly, where the parties and the court agree that a drug-addicted or mentally ill non-violent second felony drug offender facing mandatory State prison is an appropriate candidate for community-based treatment as part of a felony probation sentence (or even a “split” sentence of local jail followed by probation), the law should expressly allow that disposition as well.¹⁶³

The Commission believes that creating an express statutory exception to the mandatory sentencing statutes in these cases will send a clear message -- particularly to those jurisdictions that have been reluctant to aggressively pursue these alternatives for fear of running afoul of the mandatory sentencing statutes -- that the judicious use of community-based treatment alternatives to incarceration to address an underlying drug, alcohol or other substance abuse problem can be an effective way to end the cycle of addiction and the criminal behavior that inevitably follows.

The Commission, as previously noted, intends to study the impact of the Drug Law Reform Act of 2004 and the follow-up legislation enacted in 2005¹⁶⁴ and will consider whether elimination or further modification of the laws governing mandatory minimum sentences for certain drug and other non-violent felony offenses is warranted. A number of other drug law reform proposals are also before the Commission for consideration.

III. IMPROVING THE QUALITY AND ACCESSIBILITY OF SUBSTANCE ABUSE TREATMENT AND OTHER COMMUNITY-BASED AND INSTITUTIONAL PROGRAMMING

A. Statewide Access to Effective Treatment Programs and Other Community-Based Resources

It has long been recognized that community supervision is more effective in reducing recidivism when combined with treatment services¹⁶⁵ that address identified criminogenic needs. For many drug-addicted and certain other offenders, the combination of community supervision with appropriate treatment is more effective in reducing recidivism than applying similar treatment interventions in prison.¹⁶⁶ Successful diversion of offenders from prison to community supervision - - through DTAP, drug treatment courts, sentences to probation or early release from incarceration - - depends on the availability, accessibility and effectiveness of these treatment services.

¹⁶³ The State must ensure that there are properly resourced treatment programs, employing protocols with a proven record of success, available as an alternative to mandatory State prison terms or the Commission’s proposal to allow alternatives to mandatory minimum sentences, even with prosecutorial consent, could have a negative impact on public safety. This topic is addressed in greater detail in Section III of this Part and in Part Three, *infra*.

¹⁶⁴ Laws of 2005, ch. 644.

¹⁶⁵ Here “treatment” refers to a potentially wide range of services that address criminogenic needs and responsivity factors, including services such as substance abuse programs, mental health programs, and sex offender programs that traditionally have been viewed as “treatment,” as well as education and employment programs and cognitive-behavioral interventions that address criminal thinking and criminal personality, social skills, anger management, moral reasoning, family functioning, relationships with peers and role models, and motivation.

¹⁶⁶ Lipton, D., *The Effectiveness of Treatment for Drug Abusers Under Criminal Justice Supervision* (Washington, D.C.: National Institute of Justice 1995).

A preliminary survey of community-based substance abuse, mental health and sex offender services found substantial geographical gaps in the availability of these services statewide.¹⁶⁷ Information provided by the New York State Office of Alcoholism and Substance Abuse Services (“OASAS”) documents an array of programs that includes crisis intervention, residential and outpatient services with total annual admissions of 303,000, a third of whom have had involvement with the criminal justice system. However, there are significant disparities in the availability of service providers between rural areas and urban centers. According to information supplied by the Office of Mental Health (“OMH”), all counties have at least one mental health service provider and some counties have over 100 providers; nevertheless, there are several counties where no provider is available in either outpatient or residential programs. This disparity in program resources throughout the State impedes the ability and willingness of judges and prosecutors to use community-based treatment services as an alternative to incarceration in appropriate cases. As such, the Commission recommends developing a comprehensive plan to provide statewide access to treatment programs and eliminate identified gaps in treatment services.

B. Improving Willard

The Willard Drug Treatment Campus (“Willard”) is operated by DOCS in collaboration with Parole and OASAS.¹⁶⁸ It was created in 1995 as a sentencing option for low-level second felony drug and property offenders and as a revocation option for parole rule violators. It provides courts with the option of sentencing certain offenders to Willard for 90 days of drug treatment followed by parole supervision in the community for the balance of the indeterminate or determinate term.¹⁶⁹ In a limited number of cases, offenders sentenced to Willard are placed in the “extended Willard” program in which a three-month Willard stay is followed by six months of residential treatment in the community.

Courts currently have the authority to sentence certain second felony offenders convicted of either Class E felony drug offenses or enumerated non-violent Class E felony property offenses to Willard without prosecutorial approval.¹⁷⁰ In addition, courts, with prosecutorial approval, can sentence second felony offenders convicted of either Class D felony drug offenses or enumerated non-violent Class D felony property offenses to Willard. Because most felony drug arrests are for higher level offenses (e.g., Class B felony drug offenses), prosecutors retain significant control over which second felony offenders are sentenced to Willard. Fewer than 500 offenders enter Willard annually as direct sentences. Approximately 80% of the Willard population is parole revocation admissions.

¹⁶⁷ For instance, in a survey of sex offender treatment availability conducted in 2006, it was found that such resources are lacking in at least 10 jurisdictions in the State (Division of Probation and Correctional Alternatives, *Sex Offender Management Survey Report: Results and Recommendations* [March 23, 2007]).

¹⁶⁸ Willard operates as a 90-day intensive drug treatment program that focuses on recovery and decision-making skills in the context of a therapeutic community and is usually followed by outpatient treatment in the community.

¹⁶⁹ Pursuant to Penal Law §70.06(7) and CPL 410.91, a so-called “Willard” sentence is actually an indeterminate (or determinate) sentence that, at the court’s discretion, is executed as a “sentence of parole supervision” commencing with a 90-day placement at Willard.

¹⁷⁰ To be eligible, an offender cannot have previously been convicted of a violent felony offense or a Class A or B felony offense and cannot be subject to an undischarged sentence of imprisonment (CPL 410.91[2]).

Some of the reluctance of prosecutors and courts to use Willard appears to stem from the short length of program treatment. Research indicates that treatment of less than three months in length is not effective, and at least nine months of treatment is usually required to significantly control substance dependency and associated criminality.¹⁷¹ Many research studies have shown that prison-based drug treatment can effectively reduce offender recidivism when coupled with post-release treatment and relapse prevention services in the community.¹⁷²

DOCS research on Willard graduates who completed the program in 2001 and 2002 reveals that graduates who were admitted to the Willard program as parole violators returned to DOCS within three years at a rate of 53%. However, only 11% were commitments for new crimes, while 43% were parole rule violators. In comparison, judicially sentenced offenders who entered the regular Willard program were returned to DOCS at a rate of 43% within three years (32% were parole violators and 11% were commitments for new crimes). Return rates for those in “extended Willard” were similar (41% over three years); although “extended Willard” returns were less often associated with new convictions (6%).¹⁷³

The reluctance of courts and prosecutors to use the Willard program, the heavy usage of Willard for parole rule violators, and the high rates of return to DOCS following release from Willard all point to the need for a thorough review of the Willard model. The Commission’s recommendation for further study of the Willard program should not, however, be construed as an indication that the program is ineffective. The population served by Willard is one that is prone to relapse, whether treated in the community or through institutional placement. Moreover, while many Willard graduates are returned to DOCS, the vast majority of returns are for parole rule violations, which may or may not have underlying criminality. In sum, the challenges faced by the Willard program are significant and require in-depth study.

C. Enhancing Certification and Clinical Training Requirements for Treatment Providers

OASAS oversees the largest and most comprehensive chemical dependence treatment, prevention and recovery system in the nation and certifies providers of treatment services, yet it does not have specific regulations governing assessment and treatment in a correctional facility. Consequently, despite the fact that DOCS is the largest drug treatment provider in New York, its substance abuse programming is not certified by OASAS. A lack of coordination between DOCS and OASAS can adversely affect the quality of programming within DOCS and the continuity of treatment as offenders transition into the community and enter OASAS-regulated programming.

The precise means used to improve integration between OASAS and DOCS is appropriately left to the agencies involved. However, the desired results are clear and include the unified implementation of validated drug abuse screening and assessment instruments and the joint review and refinement of DOCS treatment models to ensure that they comport with “best

¹⁷¹ Knight, K. and Farabee, D., *Treating Addicted Offenders: A Continuum of Effective Practices* (Civic Research Institute: Kingston, New Jersey 2004); Wexler, H., Falkin, G. and Lipton, D., *Outcome Evaluation of a Prison Therapeutic Community for Substance Abuse Treatment*, 17 *Criminal Justice and Behavior* 1 at 71-72 (1990).

¹⁷² New York State Commission on Sentencing Reform, Working Paper: “*What Works*” in *Correctional Programming* (2007).

¹⁷³ Document prepared by the Office of Program, Planning and Research (New York State Department of Correctional Services 2007).

practices” in the area of substance abuse treatment. This process also should include the application of a validated risk and needs instrument during the screening process.¹⁷⁴

In addition, research has shown that the quality of implementation of treatment programs is a significant factor in determining the effectiveness of programs in reducing recidivism.¹⁷⁵ A critical component of treatment program quality is the degree to which clinical staff¹⁷⁶ have appropriate qualifications, are adequately trained and are effectively supervised. A survey conducted by DPCA in 2006 determined that it is unclear who is providing treatment to sex offenders and whether this treatment is in compliance with nationally recognized standards of the Association for the Treatment of Sexual Abusers. Similar questions can be raised concerning compliance with relevant standards in other disciplines and, in some cases, it is not clear what standards should be applied. This is particularly true for delivery of cognitive-behavioral interventions, because these interventions are relatively new.

Accordingly, State agencies and professional organizations should undertake efforts to determine what training standards are appropriate for clinical staff in each applicable discipline or function, and determine whether it is desirable and feasible to require that all treatment providers comply with those standards. Compliance could be ensured through State licensing requirements (such as the licensing of substance abuse treatment programs by OASAS) and the implementation of contractual requirements for providers who contract with DOCS, supervising agencies and OASAS.

IV. ADDITIONAL POLICY QUESTIONS FOR COMMISSION CONSIDERATION

A. Plea Restrictions

The Criminal Procedure Law includes numerous, mostly post-indictment, restrictions that limit the parties’ ability to negotiate plea bargains.¹⁷⁷ To take only one example, “[w]here the indictment charges a . . . Class B violent felony offense which is also an armed felony offense then a plea of guilty must include at least a plea of guilty to a Class C violent felony offense.”¹⁷⁸ None of these plea restrictions existed in 1971, when the Criminal Procedure Law was enacted, but they have proliferated ever since. When the parties and the court conclude that a plea agreement is in the interest of justice, it seems misguided that a categorical plea restriction should frustrate that outcome. Moreover, plea restrictions are easily evaded, either by plea bargaining before an indictment is returned or by dismissing the indictment (or certain charges contained therein) so that the restriction will no longer apply, and then proceeding under a different accusatory instrument.

Supporters of plea restrictions argue that such restrictions are necessary to limit the ability of the parties and the court to inappropriately plea serious offenses down to lesser

¹⁷⁴ A discussion of risk and needs instruments and their utility in the assessment process appears in Part Three, *infra*.

¹⁷⁵ Lowenkamp and Latessa, *Does Correctional Program Quality Really Matter: The Impact of Adhering to the Principles of Effective Intervention*, 5 *Criminology and Public Policy* 3 at 201-220 (2006).

¹⁷⁶ The phrase “clinical staff” is meant to be interpreted broadly to include not only staff who conduct individual or group counseling sessions, but also those who conduct offender assessments, develop case planning, and deliver or oversee delivery of program curricula.

¹⁷⁷ CPL 220.10(5).

¹⁷⁸ CPL 220.10(5)(d)(i).

offenses in response to heavy caseloads. However, experienced lawyers know their way around the plea restrictions and this results in defendants with less experienced or overburdened counsel being most disadvantaged by such restrictions. Other supporters argue that the elimination of the restrictions would discourage pre-indictment pleas. Notably, nothing prevents a District Attorney's office from establishing its own plea guidelines or from favoring defendants who resolve their cases expeditiously.

Accordingly, the Commission recommends creating an exception to the plea restriction provisions of the Criminal Procedure Law in cases in which the prosecutor puts on the record the reasons why, in the interest of justice, permitting a plea outside of the restrictions is appropriate in a particular case and the court makes a finding on the record that it is in the interest of justice to do so.

B. Youthful Offenders

New York's Youthful Offender ("YO") provisions are intended to give young offenders, in appropriate cases, the opportunity to avoid the lifetime stigma of a criminal conviction. To be eligible for youthful offender treatment, a defendant must have committed the charged crime "when he was at least sixteen years old and less than nineteen years old," and the crime must be other than a Class A-I or Class A-II felony.¹⁷⁹ If the crime is an armed felony or one of certain specified violent felonies, the defendant is an eligible youth only if the judge finds mitigating circumstances.¹⁸⁰ If the court determines that "the interest of justice would be served by relieving the eligible youth from the onus of a criminal record and by not imposing an indeterminate sentence of imprisonment of more than four years," it may find the defendant a youthful offender.¹⁸¹ As indicated, a youthful offender adjudication "is not a judgment of conviction for a crime or any other offense."¹⁸²

The Commission recognizes that there is nothing magical about the age of 18, which now separates eligible from ineligible youths. Surely, 19-year-olds are as capable of youthful mistakes as their juniors. At the same time, the Commission is cognizant of the fact that the number of young offenders involved in violent crime has escalated in recent years. If a young person commits a felony offense and receives YO status, and then commits the same or another felony one year later, the law treats him or her as a first felony offender because the prior felony YO adjudication is not considered a "conviction." Thus, current law can give a youthful offender what amounts to a free pass. It is one thing to relieve a young person of the burden of a criminal conviction if the offender learns his or her lesson and lives a law abiding life thereafter. It is something quite different to give a young offender a "free" felony if the offender walks out of the courtroom and returns to crime.

There is support among a majority of Commission members for extending youthful offender eligibility to at least some non-violent felony offenses committed by 19 and 20-year-olds *if* that extension is coupled with a "spring back" provision that would treat a YO adjudication as a predicate felony conviction should the defendant commit a second felony.

¹⁷⁹ CPL 720.10(1). In addition, a person who has previously been adjudicated a youthful offender for a felony offense, was adjudicated a juvenile delinquent in Family Court for a "designated felony," or was previously convicted and sentenced for a felony is not eligible for youthful offender treatment (CPL 720.10[2]).

¹⁸⁰ CPL 720.10(3).

¹⁸¹ CPL 720.20(1)(a).

¹⁸² CPL 720.35(1).

Such a measure could take many forms. YO eligibility could be extended to all 19 and 20-year-olds or only to 19 and 20-year-olds who commit non-violent felonies.¹⁸³ Or it could be extended to 19 and 20-year-olds upon a judicial finding that affording YO status would not deprecate respect for the law.

Similarly, the spring back provision could apply in all cases, so that a 17 or 18-year-old offender who is afforded YO status and who commits a second felony at age 19 would be treated as a second felony offender. Or it could apply only to those who are adjudicated youthful offenders at age 19 or 20. Finally, the spring back provision could be integrated into the existing second felony offender law, so that a YO adjudication would be subject to the same 10-year period delineated therein,¹⁸⁴ or the spring back period could be limited, say, to five years.¹⁸⁵ For now, the precise details of such a proposal are less important than is the recognition of the potential for reform in this area.

C. Expanding Merit Time

The Commission is considering whether DOCS' merit time program, which is currently not available to inmates serving a determinate sentence for a violent felony offense, should be expanded to allow certain of these offenders to earn merit time, perhaps with a cap on the total amount that could be earned. Under current law, only non-violent felony offenders are eligible for merit time¹⁸⁶ with the exception of those convicted of a non-drug A-I felony; manslaughter in the second degree;¹⁸⁷ vehicular manslaughter in the first and second degrees;¹⁸⁸ criminally negligent homicide;¹⁸⁹ any sex offense;¹⁹⁰ incest;¹⁹¹ sexual performance by a child;¹⁹² or aggravated harassment of an employee by an inmate.¹⁹³ An eligible inmate who completes one of four program criteria receives 1/6 off the minimum indeterminate term (or 1/7 off the sentence if serving a determinate term for a drug felony).¹⁹⁴ The four program criteria are: (i) obtaining a general equivalency diploma ("GED"); (ii) obtaining an alcohol and substance abuse treatment certificate; (iii) obtaining a vocational trade certificate after at least six months of vocational

¹⁸³ In 2006, there were approximately 1,200 19 and 20-year-olds admitted to DOCS who would have been eligible for YO treatment except for their age. Of those, 54% were admitted for non-violent felonies and 46% for violent felonies.

¹⁸⁴ Penal Law §70.06(1)(b)(iv).

¹⁸⁵ There is also the issue of the length of a YO sentence. Under current law, a youthful offender who is convicted of a felony receives the sentence "authorized to be imposed upon a person convicted of a Class E felony" -- a maximum of 1 1/3 to 4 years' imprisonment (*see*, Penal Law §60.02). If New York adopts a more fully determinate sentencing scheme, such sentences presumably would be determinate. The Commission will consider whether the maximum sentence should remain 4 years or should be somewhat longer. Here, too, there are various alternatives. For example, longer sentences could be authorized only for 19 and 20-year-olds or only for violent offenders.

¹⁸⁶ Correction Law §803(1)(d)(ii).

¹⁸⁷ Penal Law §125.15.

¹⁸⁸ Penal Law §§125.13; 125.12.

¹⁸⁹ Penal Law §125.10.

¹⁹⁰ Penal Law Article 130.

¹⁹¹ Penal Law §§255.25; 255.26; 255.27.

¹⁹² Penal Law Article 263.

¹⁹³ Penal Law §240.32.

¹⁹⁴ Under current law, a drug offender serving a determinate sentence can earn 1/7 off the sentence for good time and an additional 1/7 off for merit time. That means if the offender has a 3½-year determinate sentence, he or she can be released after serving 2½ years.

programming; or (iv) performing at least 400 hours of service as part of a community work crew.¹⁹⁵

Merit time encourages inmates to engage in beneficial programming that helps them prepare for successful re-entry into the community. An expanded merit time program that allowed certain inmates who are serving a determinate sentence for a violent felony to earn 1/7 (or even 1/6) off a sentence (perhaps capped at six months or one year) would have much to commend it.¹⁹⁶ That would mean that a defendant serving a seven-year sentence could earn a one-year reduction if the program criteria were met. If the Commission's separate proposal to adopt determinate sentencing for certain additional non-violent felonies were enacted, presumably those sentences could also be made eligible for merit time.

An expanded merit time program could take many forms. It could have the same program criteria for non-violent and violent offenders or it could have more demanding requirements for violent offenders. The program criteria could be expanded and inmates could be required to complete two programs as opposed to the current one, or only violent offenders could be required to complete more than one program. It is important that the criteria for earning merit time continue to be objective because utilizing subjective criteria would be comparable to early parole release and would defeat the purpose of moving more toward determinate sentencing. Additional program criteria might include working as an inmate program associate or an inmate hospice aid; earning two years of college credit; or successful completion of an anger management program. Most importantly, the criteria must not be makeweight; they must reflect successful completion of a meaningful program. The Commission is committed to studying all of these options in the next phase of its work.

D. Sentences for Firearm Offenses

Given the potential for violence and significant harm that can result from the illegal use, sale or possession of a firearm, the Commission will undertake a review of the sufficiency of the State's firearm laws. This comprehensive review will include an analysis of the adequacy of the sentences for firearm offenses, including the recently enhanced sentence for possessing a loaded firearm outside the home or place of business, committing a felony while in possession of a firearm and other issues.

¹⁹⁵ In addition, the inmate cannot have committed any serious disciplinary infraction or been found to have filed a frivolous lawsuit.

¹⁹⁶ Approximately 98% of non-violent felony offenders receive sentences of less than seven years, so that a one-year cap would not reduce their merit time. Without a cap, a violent offender sentenced to 21 years imprisonment could receive a three-year reduction. That seems a greater incentive for program participation than is needed or that the public would support. Alternatively, one could impose a cap on merit time for violent offenders but leave non-violent offenders uncapped.

PART THREE

THE SCIENCE OF CRIME REDUCTION: USING EVIDENCE-BASED PRACTICES TO REDUCE RECIDIVISM

Part Three

The Science of Crime Reduction: Using Evidence-Based Practices to Reduce Recidivism

I. USING EVIDENCE-BASED PRACTICES TO GUIDE DECISION MAKING AND PROGRAMMING

Approximately 274,000 offenders are under some type of correctional or community supervision in New York State. New York's correctional population is distributed across various levels of restriction: State prison (63,000); parole (42,000); local jail (30,000); probation (125,000); and other community supervision programs (14,000).¹⁹⁷ It is undisputed that placing offenders in a restrictive setting provides an opportunity, through effective programming, to correct deficiencies that lead to criminal behavior. Despite these opportunities, 39% of offenders return to prison within three years of their release.¹⁹⁸

Over the past 30 years, numerous research studies have identified critical components of effective correctional interventions and documented extraordinarily successful programs, which are commonly referred to as "evidence-based practices."¹⁹⁹ It is essential that New York's policymakers harness this growing body of knowledge of what works in corrections and infuse our institutional and community programming with scientifically validated, evidence-based practices. This should include adopting the principles of best practices of effective correctional programming as identified in this body of research, including: (1) using intensive intervention for offenders with the highest risk of recidivism (the "risk" principle); (2) targeting offender needs that are most closely tied to criminality (the "need" principle); (3) having a human services orientation; (4) enhancing intrinsic motivation; (5) utilizing "cognitive-behavioral" programming that focuses on attitudes, interpersonal skills, anger management, thinking style, moral reasoning and the link between thought and behavior; (6) delivering program content in a way that can be understood and will be accepted by the recipient (the "responsivity" principle); (7) implementing programming in a way that is consistent with the program design (the "fidelity principle"); (8) providing relapse prevention services for those completing the program; and (9) employing routine monitoring and quality control procedures.²⁰⁰

States throughout the nation have utilized evidence-based practices to guide the development of correctional programming. Indeed, some states, such as Oregon and Washington, have enacted laws requiring that programs and systems comport with the

¹⁹⁷ New York State Division of Criminal Justice Services, *New York State Criminal Justice Crimestat Report 2006* (Albany, NY 2007) <http://www.criminaljustice.state.ny.us/pio/annualreport/2006crimestatreport2-9-07.pdf>.

¹⁹⁸ New York State Department of Correctional Services, *2002 Releases: Three-Year Post Release Follow-up Report* (Albany, NY 2007).

¹⁹⁹ An "evidence-based practice" implies that the practice is measurable and repeatedly has been shown, through high-quality research, to reduce offender recidivism. For a further discussion, see, Crime & Justice Institute, *Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention*. (Washington, DC: National Institute of Corrections, Community Corrections Division, U.S. Department of Justice 2004).

²⁰⁰ Crime and Justice Institute, *supra*, note 199; Andrews, A., Bonta, J. and Wormith, J., *The Recent Past and Near Future of Risk and/or Need Assessment*, 52 *Crime and Delinquency* 1, at 7-27; New York State Commission on Sentencing Reform, Working Paper: "What Works" in *Correctional Programming* (Albany, NY 2007).

aforementioned principles.²⁰¹ Although the Commission had only limited opportunity to compare current practices in New York with these evidence-based principles of effective intervention, certain deficits were so clear and well-substantiated that many recommendations can be offered without additional research. By adopting scientific principles at critical stages, criminal justice agencies will be able to better address the very offender characteristics that are responsible for criminal behavior and reduce recidivism as a result.

A. Use of a Risk and Needs Assessment Instrument

The cornerstone of evidence-based practices is the use of a validated risk and needs assessment instrument which can assist supervising agencies to accurately estimate the risk posed by an offender, identify the personal deficits that have contributed to an offender's criminality and capitalize on an offender's strengths during the re-entry process. The purpose of using such instruments is not to replace professional judgment but, rather, to maximize the effectiveness of programming and supervision and, thus, improve public safety. The Commission recommends that DOCS, Parole and Probation utilize a validated risk and needs assessment instrument to guide programming options and supervision practices.

Throughout the criminal justice continuum, important decisions are made concerning the offender, including: the type of sentence that should be imposed; where jail or prison is imposed, the length of incarceration; the intensity and type of programming an offender will receive while incarcerated; the type of preparatory and transitional programming that is needed to facilitate successful re-integration into the community; and the intensity and length of community supervision that will be most effective while the offender is on parole or probation. New York's criminal justice workforce remains dedicated to the goal of increasing public safety through offender programming. Criminal justice personnel, however, are routinely challenged by heavy workloads that require them to address the public safety risks posed by the large number of offenders under their supervision, while simultaneously helping those offenders become productive members of society by addressing their individual needs. A risk and needs instrument can help supervising agencies focus efforts on those who pose the highest risk.

The "risk" principle focuses on *who* should be targeted for intervention, and is based on predicting which offenders are going to recidivate absent intensive intervention. Pursuant to this principle, the most intensive correctional treatment and intervention programs should be reserved for higher risk offenders. Risk is largely assessed based on "static" characteristics that are associated with recidivism such as age, gender and criminal history. Risk assessment information does not tell a supervising agent how to reduce the risk of recidivism; it simply provides insight into the probability of recidivism.

Risk assessments guard against the use of intensive interventions with low-risk cases, which is critical because numerous studies have shown that intensive intervention in low-risk cases can actually increase recidivism.²⁰² While practitioners intuitively understand that the length and diversity of an offender's criminal history and characteristics such as age will affect

²⁰¹ See, ORS 182.525 (Oregon Senate Bill 267 [2003]); Offender Accountability Act (Washington State, ESB 5421 [1999]).

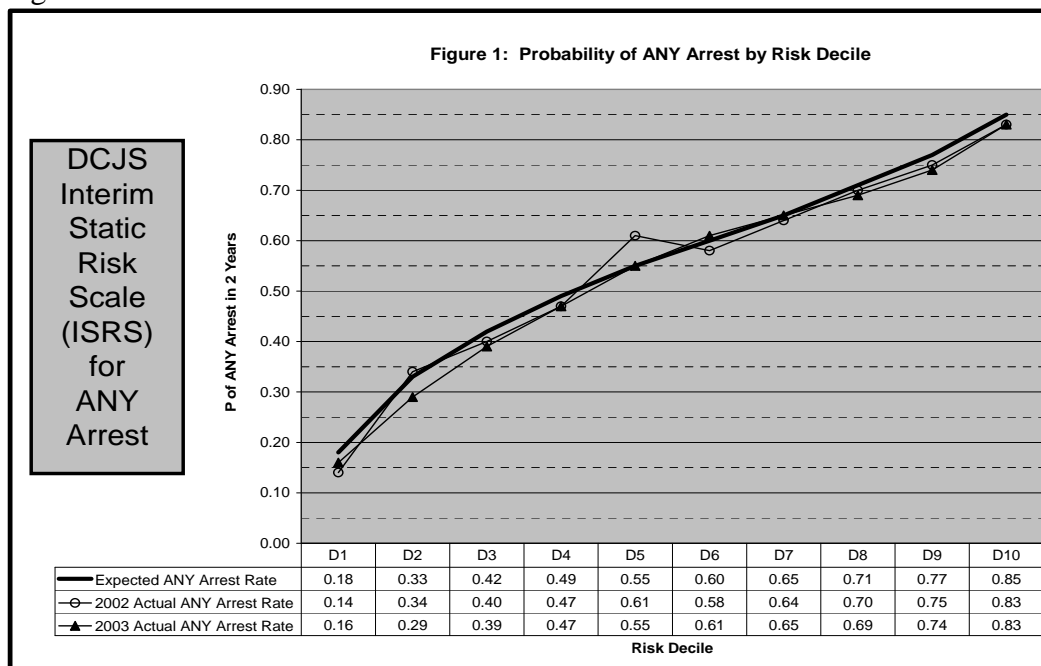
²⁰² Andrews and Bonta, *The Psychology of Criminal Conduct* (Cincinnati, Ohio: Anderson Publishing 2006); Lowenkamp and Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, *Topics in Community Corrections* at 3-8 (Washington DC: National Institute of Corrections 2004).

the offender’s likelihood of recidivism, risk instruments significantly improve upon the predictive accuracy of practitioners. That is, when practitioners use these instruments they are much more likely to accurately predict who will succeed and who will fail under regular supervision than if they rely upon professional judgment alone.

The Division of Criminal Justice Services (“DCJS”) developed a static risk assessment instrument, for use by local re-entry task forces funded by the agency. The DCJS instrument risk scores offenders leaving prison into deciles of risk ranging from one (lowest) to ten (highest). The instrument was developed based on a study of 26,000 offenders released from DOCS in 2002.

As can be seen in Figure 1 the predictive accuracy of the static risk assessment instrument is quite high. Each offender leaving prison in 2002 and 2003 was assigned a risk score based upon age, gender and criminal and correctional history. The thick, solid line on the graph shows the rate at which offenders at each level of risk were predicted to fail, and the other two lines represent the actual rates of failure, by risk level, for offenders released during the two years. According to the DCJS risk assessment, the probability of an arrest within two years of release is .18 for re-entering offenders who were predicted to be at the lowest level of risk (Level 1). This means that (in a “sufficiently large” sample) approximately 18% of the re-entering offenders who score at Level 1 are expected to be arrested for some criminal offense within two years of release. As shown in the chart, the actual re-arrest rates for those who scored at Level 1 were 14% for 2002 releases and 16% for 2003 releases. At the other end of the spectrum, those assessed as Level 10 (i.e., the highest) risk were expected to be rearrested at a rate of 85% within two years and were actually rearrested at a rate of 83%.²⁰³

Figure 1



²⁰³ The correlations between DCJS risk scores and subsequent re-arrest are comparable or slightly stronger than those typically produced by the leading risk assessment instruments used throughout the United States and Canada. For example, the instrument does slightly better than the widely used LSI-R risk assessment in terms of predicting re-arrest for any offense within two years of release.

While the DCJS risk scoring instrument provides important information regarding the likelihood of recidivism, it offers no guidance regarding the nature of an offender's deficits (or strengths) which tend to cause recidivism (or success). A large number of research studies have identified critical deficits causal of recidivism (also termed "criminogenic needs" or "dynamic risk factors"), including criminal personality traits such as impulsivity and aggressiveness; criminal attitudes, including resentment and rationalizations supportive of crime; absence of pro-social peers and mentors; low educational achievement; low employment; and substance abuse. Thus, the second principle of effective intervention is the accurate identification and targeting of individual deficits that are contributing to criminal behavior (the "needs principle"). While correctional personnel and supervising agents intuitively understand the importance of these factors to an offender's success, the use of scientific risk and needs instruments helps to ensure comprehensive assessments and supervision plans.

Risk and needs instruments are employed by correctional systems throughout the country. Many states (and counties) use these instruments to guide probation and parole supervision decisions. In Virginia, a risk instrument is used to guide sentencing decisions, while Kansas uses an instrument to guide programming in prison, and Pennsylvania employs such instruments to assist with parole board decisions.

A comprehensive risk and needs assessment conducted as part of the pre-sentence (or pre-plea) investigation can provide the sentencing judge with a clear picture of offender risk, deficits and strengths. The assessment made during the pre-sentence investigation also should be made at DOCS intake. Currently, DOCS uses a pre-sentence report prepared by the local probation department as its primary document to determine programming for an inmate. However, DOCS cannot control the sufficiency, accuracy or comprehensiveness of such a report and most pre-sentence reports are not sufficient to guide programming and other important decisions regarding an inmate. A validated risk and needs instrument can be an invaluable tool for conducting a comprehensive intake assessment which, in turn, should drive offender programming.

Parole should use the instrument to help determine, to the extent indeterminate sentencing is continued, which offenders are appropriate for release into the community and which continue to pose a significant threat to public safety. Parole and probation officials also should use it to help determine the type and intensity of offender programming, as well as the level of supervision that should be provided for any given offender while on parole or probation. Because "dynamic" factors routinely change, the instrument can be used to decrease or increase the level of supervision based upon offender progress or regress. Based on the foregoing, the Commission strongly recommends that the State adopt and utilize a validated risk and needs instrument throughout the criminal justice system.

B. Evaluating Alternative to Incarceration Programs

Alternative to incarceration programs are critical to the initial diversion of offenders from prison and the avoidance of re-incarceration after a parole rule violation. Community correction programs are staffed by dedicated service providers who work to prevent offenders from recidivating and help them reintegrate back into the community. Too often, however, the programs lack the resources or know-how to measure their own success and adjust their

programming to comport with evidence-based practices. As a result, the State continues to fund a number of programs even absent evidence of program success.

While various programs funded throughout the State no doubt have particular strengths, few have undergone comprehensive evaluation. Some programs are funded simply because they historically have been funded. Thus, it is likely that the State is not deriving full benefit from its expenditures in this area. Moreover, the absence of routine and reliable evaluations of such programs may contribute to the reluctance on the part of some courts, prosecutors and supervising agents to rely on community correction programs as an alternative to incarceration.

Although program evaluation can be expensive, costs can be controlled through a staged approach. Initially, programs should be assessed to determine whether they comport with evidence-based principles of effective intervention. Many jurisdictions across the country have initiated such assessments through the use of a well-validated assessment instrument known as the Correctional Program Assessment Inventory (“CPAI”). The CPAI, which can be executed after a few days of site visits and records review, positions program evaluators to answer the critical question of whether a program can be expected to produce positive change in offender behavior. Because research has shown that scores on the CPAI are correlated with actual program outcome, the instrument offers a means of providing initial assessments of many programs in an efficient manner.

Once programs are properly assessed, support for those programs that repeatedly fail to comport with the principles of evidence-based practices should be suspended. Effective programs should be supported and should undergo careful outcome evaluation, with the goal of replicating similar models across the State. The results of such evaluations will need to be compared to the evaluations of institutional programming in order to assess which option is most cost effective. Thus, while this recommendation largely speaks to the issue of evaluating community correction programs, institutional correction programs need to undergo the same type of evidence-based program evaluation. Finally, in order to ensure that judges, prosecutors and defense attorneys can make informed decisions when selecting a community correction program as a possible alternative to incarceration, it is important that the results of these evaluations also be made readily available to the larger criminal justice community.

C. Continuing and Improving the Shock Incarceration Program

DOCS’ Shock Incarceration Program²⁰⁴ (“Shock”), a six-month “boot camp” style program, is the largest of its kind in the nation with a capacity to house 1,290 male inmates, 120 female inmates and with 222 additional slots for orientation and screening. Shock was designed “to enable the State to protect the public safety by combining the surety of imprisonment with opportunities for the timely release of inmates who have demonstrated their readiness for return to society.”²⁰⁵ To be eligible for Shock, an inmate must be under the age of 40 when the instant offense is committed and must be sentenced to a term of imprisonment for which the inmate will become eligible for release on parole within three years. Inmates who have a prior felony

²⁰⁴ Laws of 1987, ch. 261 (adding Correction Law Article 26-A).

²⁰⁵ New York State Department of Correctional Services, *The Nineteenth Annual Shock Legislative Report 2007*, at 1 (Albany, NY 2007).

conviction for which they received a State prison sentence, as well as inmates convicted of certain enumerated felony offenses, are ineligible for Shock.²⁰⁶

Because Shock inmates are eligible to be released prior to serving their judicially mandated minimum sentences, both the Legislature and DOCS have tried to carefully restrict Shock eligibility. In addition to the legislatively mandated criteria for Shock eligibility, the statute allows DOCS to establish various suitability criteria that further restrict program participation. The suitability criteria impose restrictions based on, among other things, security classification or criminal histories of otherwise legally eligible inmates. These restrictions help ensure that those inmates who likely will benefit the most from the program can participate, while inmates who pose a risk to society are excluded. Over the last 20 years, the Shock program has saved the State \$1.1 billion in incarceration costs due to the reduction in the amount of time served in State prison by Shock graduates.

Outcome studies of the Shock program indicate that Shock graduates are re-committed to DOCS for a new offense at approximately the same rate as offenders who, though technically eligible for Shock Incarceration, refused participation or were deemed ineligible based upon the suitability criteria established by DOCS. The Commission believes that utilization of a risk and needs instrument in assessing candidates for Shock and modifying Shock programming to address the specific criminogenic needs of Shock participants may further reduce recidivism rates in Shock incarceration programs, resulting in increased public safety and further savings.

D. Expanded Use of Pre-Trial Services Programs

Published research shows a strong relationship between pre-trial incarceration and a subsequent conviction and sentence to incarceration.²⁰⁷ Defendants who are incarcerated pre-trial are less able to assist in their defense and have little or no opportunity to exhibit good behavior and maintain community ties between arraignment and final disposition of the case. Although pre-trial release programs have been shown to play a critical role in reducing reliance on pre-trial incarceration,²⁰⁸ and while incentive funding provided by the State for ATI programs has stimulated an expansion of pre-trial release programs and service options (e.g., release on recognizance, electronic monitoring, day reporting),²⁰⁹ there is currently a wide discrepancy across the State with respect to the types of programs and service options available to judges. Furthermore, there are eight counties where no pre-trial services are currently available.²¹⁰

The absence of pre-trial service programs in some counties and the variation in the number and type of available service options across the State, have negative consequences for

²⁰⁶ Those offenses include violent felony offenses as defined in Penal Law §70.02; A-I felony offenses; manslaughter in the second degree; vehicular manslaughter in the second degree; vehicular manslaughter in the first degree; criminally negligent homicide as defined in Article 125 of the Penal Law; rape in the second degree; rape in the third degree; criminal sexual act in the second degree; criminal sexual act in the third degree; attempted sexual abuse in the first degree; attempted rape in the second degree; and attempted criminal sexual act in the second degree as defined in Articles 110 and 130 of the Penal Law; any escape or absconding offense as defined in Article 205 of the Penal Law; and Class B second felony drug offenses.

²⁰⁷ Goldcamp, *The Effects of Detention on Judicial Decisions: A Closer Look*, 5 Justice Systems Journal 234 (1980); Hart and Reaves, *Felony Defendants in Large Urban Counties 1996* (Washington, DC: Bureau of Justice Statistics 1999); Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 28 Criminal Justice Review 2 at 299-316 (2003).

²⁰⁸ See, *infra*, note 211.

²⁰⁹ See, Executive Law Article 13-A.

²¹⁰ These counties include Chenango, Delaware, Greene, Hamilton, Livingston, Otsego, Putnam and Schoharie.

certain offenders and for the criminal justice system. The Commission plans to further study this issue to determine the benefits of implementing pre-trial services programs in all counties to bring greater consistency to the types of available service options statewide.²¹¹

II. PAROLE RULE VIOLATORS AND THE REVOLVING DOOR OF INCARCERATION

Approximately 26,000 inmates are released from New York State prisons back into the community each year.²¹² While data indicates that more than 10,000 (39%) of these offenders will return to prison within three years of release, a significant percentage will be returned not for committing a new crime but, instead, for violating other “technical” conditions of their parole.²¹³

New York has recently experienced an even greater number of parolees returned for technical rule violations despite the overall reduction in crime and new prison admissions. In 2006, 9,392 parolees were returned to prison for a rule violation and 2,889 parolees were sent to Willard, an 11% increase from 2005. A violation of parole may be brought for violating any one or a combination of conditions of parole. A parolee may, however, also be violated for conduct that constitutes new criminal behavior. In an effort to clarify the link between rule violations and re-arrests, DCJS researchers identified parolees returned to DOCS on rule violations in 2006 and determined the frequency with which those rule violations were preceded by an arrest for a misdemeanor or felony. The research shows that 25% of the rule violators who were returned to prison and 17% of the rule violators sent to Willard had a new felony arrest. Of the remaining returns, 32% of those returned to DOCS and 32% of those returned to Willard had a misdemeanor arrest prior to that return.²¹⁴ This analysis shows that more than 40% of rule violations occur independent of any new criminal behavior.

While it may be necessary for public safety reasons to return certain parole rule violators to State prison, a significant number of these violations could be addressed using alternative sanctions and community-based treatment options designed to promote public safety by reducing the risk of recidivism. In view of the tremendous annual cost to the State of incarcerating thousands of parole rule violators, and as a way to end this “revolving door” of incarceration, the Commission is committed to thoroughly examining current practices governing the return of parole rule violators to State prison.

Although the Division of Parole reports using a number of alternative sanctions to deal with rule violators, there is no agency-wide system or protocol for responding to those violations. Moreover, in responding to rule violators, parole officers often choose between two extremes: impose no punishment, or send the parolee to State prison or Willard. It is imperative that parole

²¹¹ The issue of expanding pre-trial services in the State also was addressed in the 2007 Report of the Task Force on the Future of Probation in New York State (*see*, 2007 Report of the Task Force on the Future of Probation in New York State at 28).

²¹² New York State Department of Correctional Services, *2002 Releases: Three-Year Post Release Follow-up Report* (Albany, NY 2007).

²¹³ *Id.*

²¹⁴ While one might expect many of these re-arrests to involve drug offenses, most arrests were unrelated to drug sale or possession. This research made no attempt to determine whether the re-arrest and the parole rule violation were actually linked or whether the re-arrest merely preceded but did not influence the parole rule violation decision.

officers use effective alternatives to an all-or-nothing response to parole rule violations. As described below, some alternatives may include: implementing a comprehensive system of graduated sanctions; reducing the number of conditions of parole for parolees found to be at a low risk of recidivating; utilizing a re-entry court model; and establishing revocation centers for returning offenders.

To accomplish this, parole officers need to have appropriate and effective options to reinforce positive behavior and to quickly address rule violations.²¹⁵ Experts in the field of correctional supervision advocate for the use of positive rewards as well as sanctions for non-compliance, and recommend that responses be immediate²¹⁶ and graduated to respond to the seriousness and frequency of the violation. Inherent in graduated sanctioning is the principle of providing swift and appropriate punishment based on the gravity of the offense and an assessment of the potential risk for re-offending.

Graduated sanctions may take a number of forms: increased use of curfews; home confinement; electronic monitoring; or weekend incarceration. Capitalizing on these alternatives will not only reduce the fiscal burden on the State, but also can avoid reversing any re-entry progress the offender has made to date, including obtaining meaningful employment or suitable housing. Simply stated, a parolee who has managed to find a good job and appropriate housing for himself and his family is not likely to have either after being returned to State prison for several months on a technical rule violation.

A first step in responding to parole rule violations may be to distinguish between purely technical violations and those that involve new criminal behavior. Washington State, for example, prosecutes crimes committed while the offender is on supervision as new crimes rather than as part of a parole violation. Separately, non-criminal or technical violations are met with a range of prescriptive sanctions, and parole officers are only allowed to return to custody high and moderate risk offenders who have committed violations directly related to their criminogenic needs.²¹⁷

Another method for reducing the number of parole violators being returned to prison is to re-examine the rule violation criteria. Logically, fewer rules provide less opportunity to return a parolee to prison on a rule violation. This is not to suggest that parolees should not be governed by a comprehensive set of rules. Rather, special rules should be tailored to the individual offender's risk and needs. As one example, a low-risk parolee who is subject to a curfew may be violated without posing any real threat to public safety. Along the same lines, an expert panel in California recommended "that California enact legislation that restricts the use of total confinement (i.e., prison) for rule violations to only those violations that are: (a) new felony

²¹⁵ Travis, Jeremy, *But They All Come Back: Facing the Challenges of Prisoner Reentry* (Washington, DC: The Urban Institute 2005); Burke, Peggy, *Parole Violations Revisited: A Handbook to Strengthen Parole Practices for Public Safety and Successful Offender Transition* (Washington, DC: National Institute of Corrections 2004); Petersilia, Joan, *Reforming Probation and Parole* (Lanham, MD: American Correctional Association 2002).

²¹⁶ The Commission heard testimony regarding reported delays in the scheduling and conducting of probation violation hearings and was told that without immediate sanctions for violating the terms of probation, probationers often continue exhibiting negative or even illegal conduct. Toward this end, the Commission will work with DPCA and OCA to further study the feasibility of reducing delays in violation of probation hearings (*see*, 2007 Report of the Task Force on the Future of Probation in New York State, *supra*, note 211, at 41).

²¹⁷ Offender Accountability Act, ESSB 5421 (Washington State 1999).

convictions; or (b) technical parole violations that are directly related to the offender's criminal behavior patterns, specific dynamic risk factors, and that also threaten public safety."²¹⁸

Additionally, the Commission will consider the increased use of re-entry courts for high-risk offenders released from prison. Re-entry courts are specialized courts that utilize many elements of the drug court model to reduce recidivism and improve public safety through the use of intensive judicial oversight. The responsibilities generally assigned to re-entry courts include: (1) reviewing offenders' re-entry progress and problems; (2) ordering offenders to participate in various treatment and reintegration programs; (3) using drug and alcohol testing and other checks to monitor compliance; (4) applying graduated sanctions to offenders who do not comply with treatment and other requirements; and (5) providing modest incentive rewards for sustained clean drug tests and other positive behaviors. A re-entry court can take various forms. Two examples include case-defined courts and stand alone re-entry courts.²¹⁹ The emergence of re-entry courts is a relatively new phenomenon. As a result, very little research exists to demonstrate the effectiveness of such courts.²²⁰

Another relatively new phenomenon is the use of revocation centers for parole violators. These centers, including Missouri's Community Supervision Centers, are designed to reduce the prison growth rate by working to insure that only chronic, violent and repeat offenders are incarcerated in state prison. They are designed to serve as transitional housing units where offenders are required to work, attend school, engage in treatment and fulfill other post-release conditions while benefiting from intensive supervision and treatment.

In the next phase of its deliberations, the Commission will conduct a comprehensive review of alternative responses to parole rule violators to determine whether there are viable options to returning these offenders to prison without compromising public safety. The Commission believes that it is essential that for appropriate and effective decisions to be made regarding parolees, parole officers have high quality information on the risk and needs of an offender as well as viable community-based program alternatives.

²¹⁸ California Department of Corrections and Rehabilitation Expert Panel on Adult Offender and Recidivism Reduction Programs, *Road Map for Effective Offender Programming in California* at 48 (Sacramento, California: California Department of Correction & Rehabilitation 2007).

²¹⁹ A case-defined re-entry court is where a sentencing judge retains jurisdiction over a case during the entire life of the sentence, including the parole supervision period. Alternatively, a re-entry court can be established as a stand-alone court where the court maintains an exclusive docket of re-entry cases.

²²⁰ One study of adult prisoners in the Harlem Parole Re-entry Court (HPRC) produced mixed findings (Farole, 2003). While not a true "court" in that it is presided over by an administrative law judge assigned by the Division of Parole, HPRC was established in 2001 in New York City as a pilot demonstration project in East Harlem. The program's purpose was to test the feasibility and effectiveness of a collaborative, community-based approach to managing prisoner re-entry. The preliminary evaluation of the HPRC, covering the first 20 months of operations (June 2001 through January 2003), found that overall re-conviction rates were not significantly reduced after one year. However, results indicate a significant reduction in convictions for non-drug related offenses.

III. COMMUNITY SUPERVISION: A FOCUS ON HIGH-RISK OFFENDERS

A. Align Parole and Probation Supervision With Level of Risk

Currently, all offenders released on parole supervision in New York who are not on a specialized caseload²²¹ are placed on “intensive supervision” for the first 12 months and supervised at a caseload of 1:40. After the successful completion of 12 months of intensive supervision, parolees are moved to “regular supervision” at a caseload of 1:100. Such an undifferentiated system of parole supervision demands tremendous resources without accounting for often dramatic differences in risk of re-offense among those being supervised.

A better approach would be to assign supervision resources so that they are aligned with the offender’s risk level.²²² A risk and needs assessment instrument can help determine which offenders are most in need of intensive supervision, thus permitting Parole to target offenders who pose the greatest risk of committing new crimes and who have the greatest needs. Such an instrument can also identify parolees for whom intensive supervision is less critical, thus eliminating inefficient, and perhaps even counterproductive, supervision requirements for low-risk offenders.²²³

Washington State offers one example of how to align parole supervision with level of risk with its Offender Accountability Act (OAA),²²⁴ which requires its Department of Corrections to use a validated risk and needs tool to determine on which parole population the state’s supervision resources should be concentrated. An instrument sorts parolees into four categories, with “A” representing parolees at the highest risk of re-offense and “D” representing the least risk. Overwhelmingly, parolees classified as “C” or “D” report to their parole officers electronically. In addition, offenders classified as “D” only receive active supervision if there is a violation of the conditions of release.²²⁵

Research clearly demonstrates that when low-risk offenders are placed into intensively structured programming, their failure rates often increase, reducing the effectiveness of the program. Placing low-risk offenders with higher-risk offenders serves to increase negative influences on the low-risk offenders. Further, placing low-risk offenders in intensive programming also tends to disrupt their pro-social networks, which are the very attributes (e.g., school, employment, family) that make them low risk.²²⁶

²²¹ A “specialized caseload” is used for a small portion of the parolee population, including sex offenders and domestic violence offenders.

²²² Lowenkamp, Latessa and Holsinger, *The Risk Principle in Action: What Have We Learned from 13,676 Offenders and 97 Correctional Programs?* 52 *Crime and Delinquency* 1, at 77-93 (2006); Burke, Peggy, *Parole Violations Revisited: A Handbook to Strengthen Parole Practices for Public Safety and Successful Offender Transition* (Washington DC: National Institute of Corrections 2004); Petersilia, Joan, *When Prisoners Come Home: Parole and Prisoner Reentry* (New York: Oxford University Press 2003); Petersilia, Joan, *Reforming Probation and Parole in the 21st Century* (Lanham, MD: American Correctional Association 2002); Andrews, D., Bonta, J. and Wormith, J., *supra*, note 200.

²²³ *Id.*

²²⁴ Offender Accountability Act, ESSB 5421 (Washington State 1999).

²²⁵ *Id.*

²²⁶ Lowenkamp, Latessa and Holsinger, *supra*, note 222.

Because Parole has limited resources and not all parolees pose the same risk to public safety or have the same criminogenic, social and economic needs, there is a need to, in effect, “triage” the supervised population. Research demonstrates that correctional programs that target high risk offenders better reduce recidivism than programs that do not differentiate offenders based on risk level.²²⁷ Because these same principles also apply to the supervision of probationers, probation departments throughout the State should align their limited resources according to the level of probationer risk. This recommendation, of course, presupposes the use of a validated risk and needs assessment instrument to differentiate between high and low risk parolees and probationers.

B. Concentrate Parole Resources During the First Year of Parole Supervision

The Division of Parole appropriately provides more intensive supervision during the first year following release because studies show that, for many offenders, the likelihood of failure is greatest during that period.²²⁸ New York State data indicates that the risk of re-arrest is highest during the first few months subsequent to release, significantly declines between the sixth and 12th months, and continues to decrease through to the 36th month following release.²²⁹

While parolees are in the greatest need of resources at the beginning of their re-integration process, the likelihood of failure at any point in time is highly affected by the offender’s risk level, as determined at the time of release. Figure 2, *infra*, shows “hazard rates” for re-arrest subsequent to release from prison displayed by offender risk level at the time of release.²³⁰ The hazard rates are presented in six-month segments and show the percentage of offenders entering a six-month period (without having been arrested between the time of release and the beginning of that six-month period) who then failed during that six-month period. The data indicates that the risk level and “time on the street” work together to explain the likelihood of failure.

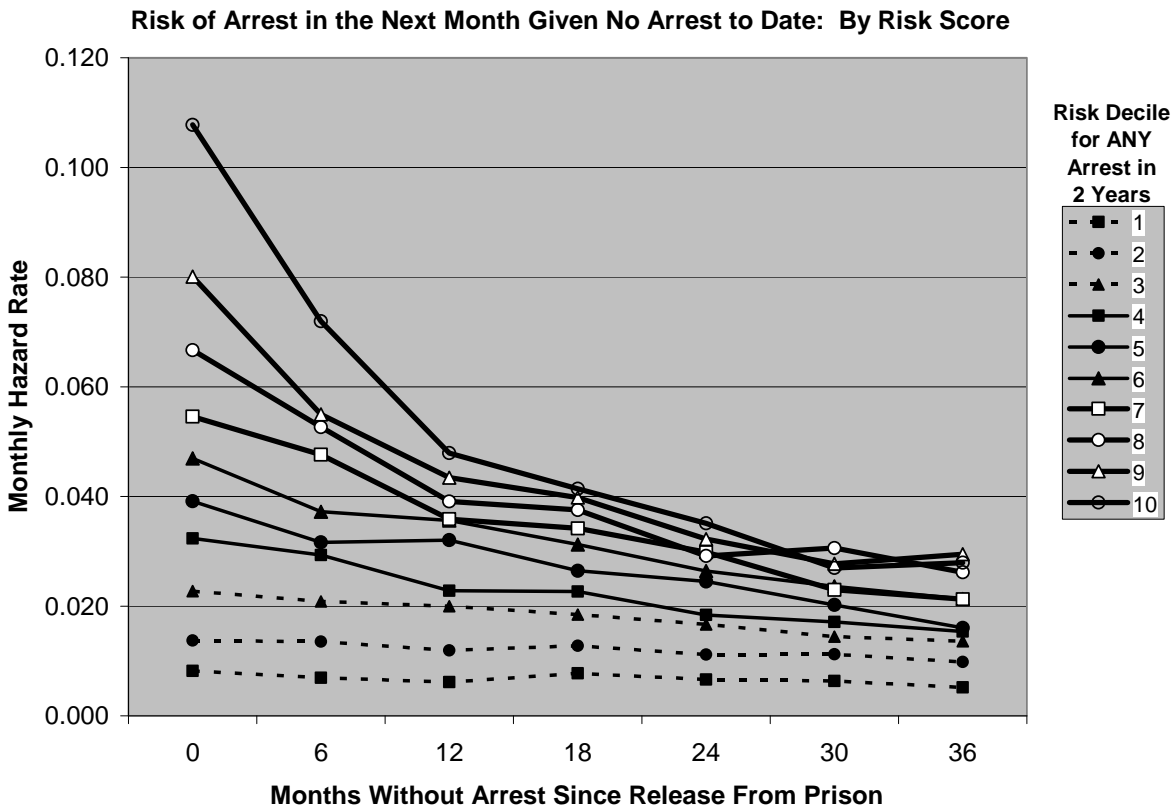
²²⁷ *Id.*

²²⁸ Travis, Jeremy, *But They All Come Back: Facing the Challenges of Prisoner Reentry* (Washington D.C.: The Urban Institute 2005); Langan P. and D. Levin, *Recidivism of Prisoners Released in 1994* (Washington, D.C.: Bureau of Justice Statistics Special Report, U.S. Department of Justice, Office of Justice Programs 2002).

²²⁹ See Figure 2.

²³⁰ Data in Figure 2 was provided by the DCJS Bureau of Justice Research and Innovation and represents the re-arrest activity of approximately 26,000 offenders released from DOCS in 2003.

Figure 2



While Figure 2 indicates that low-risk offenders should receive the least intensive supervision from the moment they are released from prison, it also shows that high-risk offenders should receive more intensive supervision which should be reduced over time if the offender has remained arrest free. On balance, however, more weight should be given to risk level because high-risk offenders who remain arrest-free for two to three years are still more likely to be arrested than are lower-risk offenders who are recently released from prison. By providing parolees with increased access to programs and services when it is most beneficial, they have the best opportunities for re-integration. Accordingly, resources should be “frontloaded” to the first 12 months and supervision and programming may be decreased after that time. Concentrating parole resources early in the parole process supports the dual purpose of promoting successful re-entry and reducing recidivism by simply re-allocating existing resources.

C. Kiosk Reporting for Low-Risk Offenders

While it is important to focus limited supervision resources on high-risk offenders, some resources must be directed to the supervision of medium and low-risk offenders. The New York City Department of Probation has made effective use of an electronic “kiosk” reporting system to manage an unusually high workload, and has approximately 20,000 to 21,000 probationers

reporting to kiosks each month.²³¹ The kiosk program targets probationers who have been identified by a validated risk assessment instrument to be at low risk of committing violent crimes. These low-risk offenders are then referred to probation officers for a 90-day “stabilization” period during which a needs assessment is conducted to determine whether a referral to community-based services is necessary. The maximum kiosk caseload is 500 cases and includes both misdemeanants and felons. At the completion of the initial 90-day period, certain low-risk offenders are directed to report to a kiosk on a monthly basis.

A recent study of New York City’s kiosk reporting system compared the probability of recidivism for high-risk and low-risk probationers prior and subsequent to the 2003 expansion of the kiosk system to all low-risk probationers.²³² It found a modest decline in the two-year recidivism rates for low-risk probationers (31% vs. 28%, respectively) and a more substantial decline in recidivism rates for high-risk probationers (55% vs. 47%, respectively).²³³ The report concluded that the expansion of the kiosk system to all low-risk offenders did not adversely affect public safety. Moreover, the realignment of probation supervision resources may have contributed to the more substantial reduction in two-year recidivism rates for high-risk offenders.

While New York City’s experience with kiosk reporting has generally been positive, the Commission believes that further study of New York City’s kiosk system and kiosk systems in other jurisdictions across the State is warranted. It is important to remember that kiosk technology was originally introduced as a tool for managing extraordinarily high probation caseloads and may not prove to be an appropriate substitute for direct probation officer supervision of low-risk offenders under more normal circumstances.

One limitation of the kiosk is that it focuses on probationer reporting; it is not a case management system. It is not designed to maintain specific information regarding all of the offender’s compliance with orders and conditions of probation or relevant achievements that could be used to initiate requests for early discharge from probation supervision. As a result, New York City has made very limited use of early discharge for this supervision level compared to other jurisdictions.

In the next phase of its deliberations, the Commission will collaborate with DPCA, DCJS, the New York City Department of Probation and other county probation departments using kiosk reporting regarding the appropriateness and feasibility of expanding kiosk reporting to other jurisdictions. Alternative approaches that combine more comprehensive risk and needs assessment with appropriate use of early discharge and/or expanded use of conditional discharge sentences also will be considered.

²³¹ Report of the New York City Probation Department’s Statistical Tracking Analysis and Reporting System for FY 2007.

²³² Wilson, J.A., Naro, W. and Austin, J.F., *Innovations in Probation: Assessing New York City’s Automated Reporting System* (Washington, DC: The JFA Institute 2007).

²³³ It is important to note, though, that for both risk groups these declines were largely attributable to declines in re-arrests for probationers with drug convictions. Pre- and post-expansion re-arrest rates remained largely unchanged for those with violent, property, and other non-drug offense convictions.

IV. REDUCING RECIDIVISM THROUGH EFFECTIVE RE-ENTRY

Each year approximately 26,000 offenders are released from State prison to communities throughout New York State. A returning offender's ability to adjust to life outside prison depends on success in addressing survival needs (e.g., procuring housing and health care services) and criminogenic needs. Offenders with the highest risk of recidivism usually have multiple needs which are often interrelated. Thus, the most effective interventions address multiple needs in a coordinated fashion.

Like many other states, New York recognizes that effective offender re-entry practices are directly linked to public safety. Simply put, successful re-entry reduces recidivism. In 2004, New York was selected as one of eight states to receive a technical assistance award from the National Institute of Corrections as part of the Transition from Prison to Community ("TPC") Initiative. The TPC model stresses: (1) collaboration among criminal justice and human services agencies; (2) formation of strategic partnerships to integrate and coordinate basic policies and seek more effective ways to allocate scarce resources; (3) information sharing across agencies to ensure comprehensive case management; (4) accurate performance measurement; and (5) the adoption of evidence-based practices. In order to develop and implement a coordinated re-entry system that seeks to address the multiple needs of returning offenders, New York State has convened an Interagency Re-entry Task Force. Its stated goal is to increase success rates for released offenders and reduce the shared costs of crime by promoting mutual ownership in a coordinated transition process among criminal justice and human service agencies.

New York State agencies have embraced the concept of successful re-entry. Programs such as the recently created County Re-entry Task Forces ("CRTFs") are being utilized in many jurisdictions throughout the State to coordinate local services for high-risk offenders returning to the community from prison.²³⁴ The CRTFs have identified many deficiencies in the system that serve as barriers to successful re-entry. The resolution of these barriers requires coordination across multiple systems at the State and local level, as well as the successful administration of various services within each system.

A. Expanding Work Release and Improving Inmate Release Procedures

Work release, which allows an inmate to leave a DOCS facility for a period not to exceed 14 hours on any given day for the purpose of on-the-job training or employment, is the most common form of temporary release program. Work release promotes prisoner re-integration by providing offenders with an opportunity to gain work experience before returning to the community. Another temporary release option, the DOCS furlough program, allows an inmate to leave the facility for a period not exceeding seven days for the purpose of seeking post-release housing. An inmate must be within two years or less of being eligible for release to parole or conditional release in order to participate in temporary release.²³⁵ In addition, a separate statutory provision specifies that an inmate must achieve a certain point score in order to

²³⁴ CRTFs are funded through DCJS to help develop and implement effective re-entry planning for high-risk/high-need offenders returning to 12 participating counties in New York State.

²³⁵ Correction Law §851 *et seq.* Pursuant to chapter 738 of the Laws of 2004, a new subdivision (2-b) was added to Correction Law §851 to clarify that an inmate's merit time parole release date would count as the inmate's parole eligibility date for purposes of determining temporary release eligibility.

participate in temporary release and must not have been convicted of an escape or absconding offense or aggravated harassment of an employee by an inmate.²³⁶

In 1995, the Legislature specifically conferred upon the Governor the authority to issue executive orders prohibiting or limiting the participation of any class of otherwise eligible inmates in temporary release.²³⁷ In response, then Governor George Pataki issued Executive Order No. 5.1, which specifies that no inmate may participate in temporary release if such inmate was convicted of a violent felony offense that involved the use or threatened use of a deadly weapon, dangerous instrument or the infliction of serious physical injury upon another; and Executive Order No. 17, which specifies that no inmate convicted of a homicide or sex offense may participate in temporary release. In 2007, Governor Eliot Spitzer issued Executive Order No. 9, which included all of the previously enumerated exclusions and added additional crimes to the list of those ineligible for temporary release.²³⁸ The Commission will closely examine recidivism rates for those classes of offenders currently ineligible for work release in an effort to determine whether work-release could be extended to additional categories of inmates without compromising public safety.

Another tool that can be used to facilitate successful re-entry is a so-called “step-down facility.” One of the difficulties that DOCS and Parole have experienced in carrying out transitional planning is the often significant distance between the facility that houses the transitioning inmates and the communities to which they are returning. Toward that end, DOCS and Parole are currently piloting the Orleans Reentry Unit (“ORU”), which is a program/process-oriented staging area for offenders returning to Erie County. While in the ORU, offenders will have an opportunity to work with DOCS, Parole and community agencies to design a re-entry plan addressing their individual needs upon release.

Individualized re-entry plans and skill sets provided at the ORU are designed to address each inmate’s most pressing post-release needs which, in turn, will increase the likelihood that offenders will make a successful transition into the community. The ORU utilizes learning modules dedicated to role-playing and practicing behavioral responses surrounding issues of employment and family reunification. Individualized progress is monitored and shared with Parole and community partners, and benchmarks will be established to determine whether goals have been met. The Commission believes that the ORU “step-down” model holds great promise and, if successful, should be replicated in other regions of the State.

Currently, step-down facilities are not available for most offenders, which makes individualized release planning even more integral to the successful re-integration of inmates into the community. While the transition process arguably begins at DOCS’ reception, where inmate programming is developed, the “nuts and bolts” of re-entry planning begins in the last three months of incarceration when inmates enter the final phase of the State’s transitional services program. The final phase of transitional planning includes programming related to employment and job readiness, family re-integration and community preparedness. The community preparation process undertaken by DOCS and facility parole officers needs to be

²³⁶ 7 NYCRR Part 1900.

²³⁷ Correction Law §851(2).

²³⁸ They include: an act of terrorism, an offense involving the sexual performance of a child as defined in Article 263 of the Penal Law and incest, as well as any person convicted of a violent felony offense that involved being armed with a deadly weapon or dangerous instrument, or possessing a deadly weapon or dangerous instrument with the intent to use the same unlawfully against another.

well-integrated with field operations. In addition, Parole should explore greater collaboration with other agencies and private organizations, especially in the areas of housing, job training, employment and health care, to promote improved access to resources for offenders at the time of release. It is critical that DOCS and Parole closely monitor program implementation and carefully measure outcomes to both assess the impact of the programming and identify areas that can be improved.

B. Expanding Educational and Vocational Training in New York State Prisons

DOCS vocational and educational programming serves multiple purposes in the prison system. Such programs equip inmates with new skills, keep them engaged in constructive activities and provide needed services that help support the institutions. The limited research that exists on this topic shows that participation in vocational and educational programming in prison is associated with a 5% to 10% reduction in recidivism.²³⁹ Although these effects are modest, even small reductions in recidivism can result in substantial cost savings, as well as increased public safety.

While DOCS deserves credit for its expressed commitment to ensuring that any inmate who enters a DOCS' facility without the equivalent of a high school diploma receives or works toward receiving a general equivalency diploma ("GED") prior to release, the Commission believes that DOCS should provide more educational opportunities for offenders who have completed their high school education or obtained a GED. While obtaining a GED will realize modest reductions in recidivism, post-secondary educational programs have been shown to reduce recidivism by approximately 40%.²⁴⁰

In 1994, offenders in State prison became ineligible for tuition assistance for college programming. As a result, the approximately 70 post-secondary prison programs that existed in DOCS in April 1994 were reduced to just four programs only a few months later. In 1991, 1,078 inmates earned college degrees. In 1999, only 70 earned college degrees and, in 2003, that number declined to 44 inmates.²⁴¹ To be sure, only a small number of inmates meet the educational qualifications for post-secondary education. Nevertheless, the positive effects of such programming on public safety prompt the Commission to recommend that qualified prisoners be provided assistance in obtaining a post-secondary education.

The State prison system also provides vocational training for the majority of non-Shock inmates prior to their release from prison. The Commission encourages DOCS to review current areas of vocational training to ensure that efforts are made to target vocational training in employment areas that are experiencing growth in the private sector.

C. Enhancing Employment and Housing Opportunities

The stigma of a criminal conviction, along with an employer's legitimate need to carefully screen applicants, often means that ex-offenders have difficulty obtaining lawful

²³⁹ New York State Commission on Sentencing Reform, "What Works" in Correctional Programming, *supra*, note 200.

²⁴⁰ *Id.*

²⁴¹ New York State Bar Association Special Committee on Collateral Consequences, *Re-Entry and Reintegration: The Road to Public Safety* (2006) <http://www.NYSBA.org>.

employment.²⁴² Employer concerns should not be trivialized; indeed, like the general population, not all ex-offenders are suited for all types of work. However, the achievement of employment marks an important milestone in the lives of ex-offenders. Multiple studies of the onset and cessation of criminal behavior indicate that employment is often a trigger for discontinuing such behavior.

While some barriers may be necessary to ensure public safety, others may not. A number of proposals have been advanced, including the creation of incentives to hire the formerly incarcerated; creating a statutory affirmative defense to negligent hiring claims if the employer can demonstrate compliance with Article 23-A of the Correction Law; and reviewing licensing laws and regulations to ensure that such prohibitions are consistent with that Article. While barriers are often viewed as external to offenders, the Commission will review both barriers caused by inadequate skills and barriers resulting from laws and regulations that affect access to employment.

Procuring stable housing is also a cornerstone of effective re-entry. Lack of housing can produce stress and destabilize an offender's ties to family and other social support systems. Offenders who lack a stable residence will have greater difficulty obtaining employment, applying for public benefits and keeping appointments with service providers. Similarly, supervising agents will have difficulty locating offenders who are without stable housing and will be burdened by the need to investigate the suitability of new housing as an offender moves from place to place.

Further review is needed of possible options for eliminating existing barriers to housing without jeopardizing public safety. Some areas for examination include reviewing current public housing restrictions that are based on non-criminal or misdemeanor convictions to determine if any of these restrictions can be modified or eliminated; reviewing eligibility periods for public housing to determine whether to shorten periods of ineligibility for offenders who successfully complete a period of supervision; screening offenders and their family members to consider only those convictions that pose a threat to others or involved criminal activity that took place in the housing authority. Consideration should be given to whether public housing bans could be relaxed to protect individuals seeking housing from unfair discrimination based on criminal justice system involvement that was resolved in favor of the applicant.

D. Procuring Identification, Medicaid and Other Benefits

Offenders need resources as soon as possible after release in order to address critical needs, such as access to health care. A recent change in the law mandates the suspension of Medicaid benefits for incarcerated individuals and provides for the immediate reinstatement of

²⁴²Correction Law §701 provides for the issuance of a certificate of relief from disabilities “to relieve an eligible offender of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offenses specified therein.” These certificates play an instrumental role in the re-entry process and, depending on the type of sentence imposed, may be issued by either the Board of Parole or by the sentencing court. In view of the important benefits derived from certificates of relief by offenders seeking employment, licensure or other benefits, it is critical that judges be fully informed on the applicable law. As such, the Commission recommends that all judges with criminal jurisdiction receive specific and appropriate training on the eligibility criteria and procedures governing the issuance of certificates of relief from disabilities.

such benefits upon release;²⁴³ however, this law only applies to inmates who were receiving Medicaid immediately prior to their incarceration.²⁴⁴

Research conducted by the State Department of Health in 2005 revealed that 65% of offenders released from prison in 2003 who received Medicaid within two years of their release were approved for those benefits within a month of release.²⁴⁵ Another 17% were approved within six months of release.²⁴⁶ While this data indicates that Medicaid approval is usually forthcoming within the first month of release, it also shows that many offenders go days, if not weeks, without having the benefit of treatment during a period of severe stress. This break in programming can cause offenders in need of treatment to decompensate, negating any gains made through treatment while incarcerated.

Ideally, Medicaid paperwork should be completed prior to release for prisoners who did not have coverage before incarceration so that enrollment can commence immediately upon release. This is especially important for prisoners with chronic and mental illnesses and substance dependence. One way to accomplish this goal is to fund local social service agencies in the areas where the larger prisons are located to complete documents for benefits and the required personal interview and then forward the documents for final approval to the locality where the inmate will be returning after release.

Other potential solutions include: (1) training DOCS transitional services personnel to assist inmates in the completion of Medicaid applications at least 45 days prior to release and arrange for an interview with the local social service office on the inmate's first day back into the community; (2) making Parole a separate social service district, thus giving facility parole officers the authority to approve Medicaid applications; and (3) transferring inmates closer to their home communities prior to release and arranging for county-level social services to screen for public benefits prior to release.

The Commission urges DOCS and Parole to continue to seek a resolution to this matter with the goal of acquiring a pre-release determination of public benefits. Similarly, for those who are eligible for other social welfare benefits, all assessments, including screening and eligibility tests, should take place 45 days before release so those benefits are available on the first day of re-entry. In order to accomplish this, DOCS would need to invite representatives of local social service districts to visit correctional facilities at regular intervals or establish a satellite office with Welfare Management System access to process applications directly.

Many programs and services that are essential to newly released offenders require presentation of adequate identification. There is an existing agreement between the Commissioners of DOCS and the Department of Motor Vehicles to provide non-driver's license identification cards to inmates prior to release. Provision of proper identification should exist system-wide and should be accompanied by the back-up documentation needed to secure community services and employment, such as social security cards and birth certificates.

²⁴³ Laws of 2007, ch. 355.

²⁴⁴ *Id.*

²⁴⁵ New York State Department of Health, *An Analysis of Medicaid Eligibility & Utilization for People Released from Prison in CY 2003* (Albany, New York: NYS Department of Health 2005).

²⁴⁶ Approvals that lagged many months may be attributable to the absence of an identified need at the time of release.

Finally, in addition to the issue of providing essential benefits to facilitate re-entry, the Commission discussed restoring the right to vote for persons on parole as a way to improve re-entry by fostering civic participation. Currently, convicted felons who are in prison are prohibited from voting and those under parole supervision, including those convicted of a felony in another state and residing in New York, are prohibited from voting absent the issuance of a certificate of relief from civil disabilities.²⁴⁷ However, at least twelve states and the District of Columbia restore the right to vote to felons at the time they are released from prison.²⁴⁸ A majority of the Commission members believe that parolees should be encouraged to fully participate in civic activities and the restoration of the right to vote is fundamental to that participation.

²⁴⁷ Correction Law §703(1)(b).

²⁴⁸ The states include Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, and Utah (*see, Love, M., Relief from Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* (Buffalo, New York: Hein & Company, Inc. [2006])).

PART FOUR

CRIME VICTIMS AND SENTENCING

Part Four

Crime Victims and Sentencing

I. INTRODUCTION

With the possible exception of the defendant, no one has a more direct stake in the just outcome of a criminal case -- and the propriety of any sentence imposed -- than the crime victim. In recognition of this fact, Executive Order No. 10 specifically requires that in recommending statutory amendments to maximize the “uniformity, certainty, consistency and adequacy” of the State’s sentencing structure, the Commission ensure that the resulting structure accords “appropriate consideration. . . to the victims of the offense, their families and the community.”

In fulfilling this mandate, and as part of the “comprehensive review” of New York’s current sentencing structure and practices required by the Order, the Commission closely examined the complex web of State statutes and administrative regulations establishing the rights of crime victims and governing their “fair treatment” during the criminal justice process. The Commission focused, in particular, on those statutes and regulations giving crime victims in New York the right to be notified of, and consulted regarding, certain judicial proceedings in the course of the criminal case; to provide a statement to the court at sentencing in certain cases (and to the Board of Parole prior to the offender’s scheduled release); to receive restitution or reparation from the offender; and to have the court, where appropriate, issue a final order of protection at the time of conviction. Finally, the Commission received guidance from state and national experts on the rights of crime victims, as well as recommendations on how these rights in New York might be strengthened and better enforced.

Based on its review to date, the Commission finds that while New York has enacted a number of laws and regulations intended to give crime victims a meaningful voice in decisions relating to case disposition (*e.g.*, plea and sentencing) and parole release, and has enacted a series of statutes intended to timely notify victims of those rights, many victims of crime in this State still have little or no knowledge of their basic rights under the law.²⁴⁹ The Commission concludes that this is due, at least in part, to the sheer complexity of the statutory scheme governing crime victims’ rights and the absence of any effective means of enforcing those rights. The Commission further finds that certain rights, such as the right to seek and collect restitution or reparation from an offender, and the ability to have a final order of protection issued upon conviction made available to the appropriate law enforcement or correctional authorities, might be significantly advanced through relatively minor amendments to existing law. Finally, the

²⁴⁹ See generally, Executive Law Article 23 (Fair Treatment Standards for Crime Victims); CPL 390.30 (right to submit victim impact statement prior to sentence); CPL 440.50(1) (right to notice of final case disposition); CPL 380.50(2) and 390.50(2)(b) (right to make statement at time of sentence); CPL 380.50(4), (6) (right to be notified of defendant’s release or escape from custody and of petition for name change); CPL 440.50(1) (right to meet with or submit written or recorded victim impact statement to Board of Parole); CPL 530.12(5) and 530.13(4) (right to have the court, where appropriate, issue a final order of protection upon conviction); and Penal Law §60.27 and CPL 420.10 (right to seek restitution or reparation); 9 NYCRR Part 6170; 22 NYCRR Part 129.

Commission finds that the existing statutes establishing the rights of crime victims in the area of sentencing may be unduly narrow and that expansion of those rights should be considered.

II. PROPOSALS FOR REFORM

New York has established a solid statutory foundation in the area of victim rights, a foundation that recognizes the critical role played by victims in the criminal justice process and, in particular, in sentencing-related matters. There is, however, a troubling discrepancy between the many rights granted to crime victims under the law, and the actual exercise of those rights by victims. In testimony before the Commission and discussions at subcommittee and Commission meetings, it became clear that despite the numerous provisions scattered throughout the Executive Law, Criminal Procedure Law and Penal Law designed to ensure that victims are made fully aware of their rights, far too many crime victims simply “fall through the cracks” and are never afforded a meaningful opportunity to participate in the criminal justice process.

A. Consolidating Victim Statutes and Enhancing Training

The Commission believes that part of the problem is the sheer complexity of the State’s statutory and regulatory scheme for crime victims. To effectively apply the existing laws governing the rights of crime victims in New York, judges, prosecutors, victims and their advocates must, at a minimum, be familiar with all of Executive Law Article 23, including the “fair treatment” standards promulgated pursuant to Executive Law §§640 and 645, and several sections of the Criminal Procedure Law and Penal Law scattered throughout no fewer than six articles of those chapters. In order to streamline and make more accessible to judges, lawyers and crime victims the multitude of provisions of New York law governing the rights of crime victims, the Commission recommends that these provisions be moved to a single article of law, preferably in the Criminal Procedure Law or Penal Law. In the alternative, the Commission recommends that a cross-referencing chart (or other similar resource tool) be created and incorporated into the Criminal Procedure Law or Penal Law and be regularly updated so that crime victims and the criminal bench and bar can easily find, in a single location, a list of all victim-related statutes.

In addition, the Commission recommends that the statutorily required training of prosecutors and judges in the area of victims’ rights²⁵⁰ be expanded and enhanced to ensure that prosecutors and judges are made fully aware of their obligations with respect to victim notification and the substantive rights of crime victims.

B. Orders of Protection

During discussions and expert presentations at subcommittee and Commission meetings, the Commission learned that, in cases in which an offender is sentenced to State prison or jail and a final order of protection is issued, it is not uncommon for that offender to be delivered to the appropriate prison or jail facility without a copy of the order. To promote victim safety and ensure that prison and jail officials charged with the custody and control of inmates subject to an outstanding final order of protection are fully aware of the content of those orders, the Commission recommends that the Correction Law, Executive Law and Criminal Procedure Law be amended to require that a copy of the final order of protection issued by the court be attached

²⁵⁰ See, e.g., Executive Law §§642(5); 647(4).

to the commitment order and delivered with that order to the appropriate correctional facility and that DOCS be required to timely forward a copy of any final order of protection it receives to the Division of Parole.

C. Payment of Restitution by Credit Card

The Commission recommends that a defendant ordered to pay restitution or reparation to a crime victim be able to satisfy that obligation directly with the court through use of a credit card.²⁵¹ This would simplify the restitution payment process for defendants who possess a valid credit card and wish to satisfy that portion of the court's sentence and would expedite the collection of restitution by crime victims in those cases. Specifically, the Commission recommends that Judiciary Law §212 and CPL 420.05 and 420.10 be amended to authorize the direct payment to the court by credit card of restitution or reparation imposed as part of a sentence in a criminal case. In light of concerns raised that this proposed change in law could, at least in some cases, have significant adverse financial consequences for the families of certain offenders, the Commission further recommends that the Legislature consider imposing a reasonable "cap" on the amount of restitution that could be paid in a given case from a single credit card account.

D. Expanding the Rights of Victims in Sentencing and Related Matters

Certain laws governing the rights of crime victims in New York limit the duty of courts and prosecutors to provide notice, consult with, and consider the views of crime victims to only certain offenses. Thus, for example, the requirement in Executive Law §642(1) that the prosecutor consult with and obtain the views of the victim or the victim's family regarding disposition of the case by dismissal, plea or trial, and the parallel requirement in Executive Law §647(1) that the court consider the views of the victim or the victim's family concerning certain discretionary decisions and sentencing options, apply only where the crime charged is: (1) a violent felony offense; (2) a felony involving physical injury to the victim; (3) a felony involving property loss or damage in excess of \$250; or (4) a felony involving larceny against the person.

Similarly, the requirement in CPL 440.50(1) that the prosecutor inform the victim by letter of a final disposition within 60 days of that disposition applies (absent a specific victim request) only to cases where the disposition includes a conviction of a violent felony offense as defined in Penal Law §70.02 or an offense defined in Penal Law Article 125 (homicide and related offenses). Section 380.50(4) of the Criminal Procedure Law, moreover, limits a victim's right to automatic notification of the defendant's subsequent release or escape from custody, to only those cases in which the defendant is committed to the custody of DOCS on a conviction for a violent felony offense or a Penal Law Article 125 offense. Finally, the requirement in CPL 440.50(1) that the prosecutor notify the victim of his or her right to meet with or submit a written or recorded victim impact statement to Parole applies, absent a specific victim request, only where the conviction is for a violent felony offense or a Penal Law Article 125 felony offense.

Provided such rights are not inconsistent with a defendant's rights under the State and Federal Constitutions, a crime victim's right to notification of proceedings and to have a meaningful voice in the criminal justice process should not depend on whether the defendant is

²⁵¹ This proposal appears in the 2007 Report of the Chief Administrative Judge's Advisory Committee on Criminal Law and Procedure.

accused or convicted of a violent or non-violent felony or a felony under a particular article of the Penal Law. Accordingly, the Commission supports an examination of the existing statutory scheme governing the rights of crime victims in New York to determine whether expansion of those rights is warranted.

Finally, the Commission believes that further study of a number of victim-related issues is warranted, including whether CPL 420.10 and corresponding statutes should be amended to require that restitution to victims be paid first when multiple financial obligations (e.g., restitution, fine, mandatory surcharge, DNA databank fee, sex offender registration fee and supplemental sex offender victim fee) are ordered by the court at sentencing. Currently, the only statute that addresses priority of payment in restitution cases is CPL 420.10(1)(b), which provides that when the court imposes both restitution and a fine and "imposes a schedule of payments," the court must direct that payment of restitution "take priority over the payment of the fine."

In that same vein, the Commission recommends that a review be undertaken of measures to enhance the ability of crime victims to collect restitution, including an examination of the Vermont restitution model where the victim is paid the first \$10,000 of any restitution order through a revolving fund established by the State. Finally, the Commission recommends studying options for expanding grievance procedures to provide an effective mechanism for victims to assert complaints when denied their rights under the law.

PART FIVE

PLANNING FOR THE FUTURE:

**A PERMANENT SENTENCING COMMISSION
FOR NEW YORK**

Part Five

Planning for the Future: A Permanent Sentencing Commission for New York

Based on testimony presented to the Commission over the past several months by policymakers, practitioners, academics and advocates, it has become clear that while New York's sentencing system certainly is not in a state of crisis, the breadth and complexity of the sentencing issues facing the State cannot be adequately addressed within this Commission's short tenure.

Criminal justice and sentencing are areas where law, practice, research and policy are constantly evolving. The Commission strongly believes that if these matters are to be thoughtfully and effectively addressed in the future, the State should give serious consideration to the creation of a permanent body dedicated to the ongoing evaluation of laws and policy governing sentencing and corrections, including the effective use of prison resources, community corrections and other alternatives to incarceration when consistent with public safety. A permanent sentencing commission would serve as an advisory body to the legislative and executive branches of government and would, among other things, review and comment on all proposed sentencing and other criminal justice legislation prior to enactment.²⁵²

The need for a permanent state sentencing commission was emphasized by several of the experts who addressed the Commission. As stated by Professor Douglas A. Berman, a national expert on sentencing issues:

I think just about every academic who looks at this field ultimately concludes that having a permanent sentencing commission, a body with the unique, distinctive and committed responsibility to monitor, assess and advise all of the sentencing players helps the system operate effectively long term. No matter how effectively you put a model in place, things are going to change in a way that only a permanent body endeavoring to stay abreast of this and to help all other bodies involved is going to be in a position to work with it effectively.²⁵³

Additionally, Barbara Tombs, the Director of the Center on Sentencing and Corrections at the Vera Institute of Justice, indicated that it is not unusual for commissions that begin as temporary study commissions, as New York's has, to evolve into permanent sentencing commissions since "good sentencing policy needs continual monitoring" to respond to emerging

²⁵² In his Practice Commentary to the Penal Law, the Hon. William C. Donnino points out that in enacting the current Penal Law in 1965, the Legislature "excis[ed] from the Penal Law the hundreds of offenses (325 or 27% of the former Penal Law's sections) which were narrow, specialized, or regulatory in character and related to other bodies of the consolidated laws. Those offenses were transferred to the appropriate consolidated law. Thus, those offenses . . . became more readily identifiable to those concerned with the particular subject matter of each consolidated law and the Penal Law was more effectively organized to define the offenses of general application" (Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law §145.50, at 137-138). Chapter 1031 of the Laws of 1965 transferred all of those statutes, and a table of the statutes was published in 1967 in the first set of McKinney's Penal Law. The Commission believes that it would be valuable to have an authoritative and up-to-date list of the criminal offenses defined in non-Penal Law statutes, an undertaking that might best be suited to a permanent sentencing commission.

²⁵³ Commission on Sentencing Reform, Transcript of July 18, 2007 Meeting, at 183.

trends.²⁵⁴ The Minnesota Legislature created the first state sentencing commission in 1978; today, at least 20 states and the federal government have permanent sentencing commissions.²⁵⁵ Several of these commissions started out as temporary commissions. Thus, there is a large body of information that this Commission could draw upon for purposes of providing specific recommendations regarding the mandate of a permanent commission, appointment of membership and its scope of authority.

The Commission will conduct a thorough review of statutes governing other state sentencing commissions, as well as recommendations pertaining to sentencing commissions from the American Law Institute (ALI). Notably, the ALI's *Draft Model Penal Code: Sentencing* sets forth the authority, composition and scope of a model sentencing commission as recommended by the ALI after examination of over two dozen sentencing commissions. The text incorporates "features of commission design that have been associated with successful operation over extended periods of time and avoids features that have proven troublesome, self-defeating, or even fatal to some sentencing agencies."²⁵⁶

Finally, in proposing the creation of a permanent sentencing commission for New York, this Commission will consider whether, in view of certain State constitutional restrictions on, among other things, the appointment process for a permanent commission,²⁵⁷ it might be more advantageous to create a "temporary" state commission on sentencing, the continuation of which would be subject to legislative review.

²⁵⁴ Commission on Sentencing Reform, Transcript of July 11, 2007 Meeting, at 97.

²⁵⁵ Barkow and O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation* (New York University School of Law: New York University Public Law and Legal Theory Working Papers 2006); National Association of State Sentencing Commissions, <http://www.ussc.gov/states/NASCADDR.HTM>.

²⁵⁶ American Law Institute, *Model Penal Code: Sentencing. Tentative Draft No. 1* at 47 (April 9, 2007).

²⁵⁷ See generally, NY Const art III, §1; art V, §§3, 4.

PART SIX
CONCLUSION

Part Six

CONCLUSION

The breadth of the Commission's mandate pursuant to Executive Order No. 10 presents a historic opportunity to have a positive and lasting effect on criminal justice policy in New York State. During the past few months, the Commission confronted many significant issues with a thorough understanding of the State's previous attempts at sentencing reform, its successes in reducing crime and the State's prison population, and an acknowledgement that, perhaps more than any other issue, sentencing policy is the product of political compromise.

Tempered by these realities, and with only a limited time to complete its work, the Commission focused on specific, data-driven, solutions to New York's sentencing and correctional issues. Thus, while the recommendations in this Preliminary Report may not address all areas in need of reform, they represent a significant and realistic first step. Mindful of the tremendous scope of our charge and the potential for even greater reform, we welcome the opportunity to help make New York's sentencing system the standard by which all others are measured.

APPENDIX A
EXECUTIVE ORDER NO. 10

EXECUTIVE ORDER

No 10: ESTABLISHING THE NEW YORK STATE COMMISSION ON SENTENCING REFORM

WHEREAS, criminal sentences should appropriately reflect the seriousness of the offender's crime, and should meet the multiple objectives of punishment, deterrence, rehabilitation, retribution, and isolation; and

WHEREAS, an equitable system of criminal justice must ensure that crimes of similar seriousness result in similar sanctions for similarly situated offenders; and

WHEREAS, significant disparities in how similar crimes are treated diminishes the public's trust and faith in our criminal justice system; and

WHEREAS, the system of criminal sanctions in New York State has grown increasingly complex; and

WHEREAS, a comprehensive review of New York's sentencing structure will provide the State with crucial guidance to ensure the imposition of appropriate and just criminal sanctions, and to make the most efficient use of the correctional system and community resources;

NOW, THEREFORE, I, Eliot Spitzer, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and the Laws of the State of New York, do hereby order as follows:

1. There is hereby established the New York State Commission on Sentencing Reform ("Commission").
2. The Commission shall consist of eleven members appointed by the Governor, including: (a) the Commissioner of the Department of Correctional Services, the Chairman of the Board of Parole, the Commissioner of the Division of Criminal Justice Services and the Chair of the Crime Victims Board, who shall serve ex officio; (b) four members appointed on the recommendation of the legislative leaders, one each by the Speaker of the Assembly, the Temporary President of the Senate, the Minority Leader of the Assembly, and the Minority Leader of the Senate; and (c) three additional members appointed by the Governor, including one judge or former judge with substantial experience presiding over courts of criminal jurisdiction, one member of the bar with significant experience in the prosecution of criminal actions, and one member of the bar with significant experience representing defendants in criminal actions.
3. The Governor shall select a Chair of the Commission from among the members. A majority of the members of the Commission shall constitute a quorum, and all recommendations of the Commission shall require approval of a majority of the total members of the Commission.
4. The Commission shall conduct a comprehensive review of New York's current sentencing structure, sentencing practices, community supervision, and the use of alternatives to incarceration, including a review and evaluation of:
 - (a) the existing statutory provisions by which an offender is sentenced to or can be released from incarceration, including but not limited to indeterminate sentences, determinate sentences, definite sentences, sentences of parole supervision, merit time, supplemental merit time, shock incarceration, temporary release, presumptive release, conditional release, and maximum expiration;
 - (b) the existing sentencing provisions as to their uniformity, certainty, consistency and adequacy;
 - (c) the lengths of incarceration and community supervision that result from the current sentence structure, and the incentives or barriers to the appropriate utilization of alternatives to incarceration;
 - (d) the extent to which education, job training and re-entry preparation programs can both facilitate the readiness of inmates to transition into the community, and reduce recidivism;
 - (e) the impact of existing sentences upon the state criminal justice system, including state prison capacity, local jail capacity, community supervision resources, judicial operations and law enforcement responsibilities;

(f) the relation that a sentence or other criminal sanction has to public safety and the likelihood of recidivism; and

(g) the expected future trends in sentencing.

5. In undertaking its review, the Commission may request documents, conduct public hearings, hear the testimony of witnesses, and take any other actions it deems necessary to carry out its functions.

6. The Commission shall make recommendations for amendments to state law that will maximize uniformity, certainty, consistency and adequacy of a sentence structure such that: (a) the punishment is aligned with the seriousness of the offense; (b) public safety is protected through the deterrent effect of the sentences authorized and the rehabilitation of those that are convicted; and (c) appropriate consideration is accorded to the victims of the offense, their families, and the community. Reports of the Commission shall include, but not be limited to, an evaluation of the impact that existing sentences have had on length of incarceration, the impact of early release, the impact of existing sentences on the length of community supervision, recommended options for the use of alternatives to incarceration, and an analysis of the fiscal impact of the Commission's recommendations.

7. The Commission shall issue an initial report of its findings and recommendations on or before September 1, 2007, and a final report on or before March 1, 2008. All reports shall be submitted to the Governor, the Chief Judge of the Court of Appeals, the Temporary President of the Senate, the Speaker of the Assembly, the Minority Leader of the Senate, and the Minority Leader of the Assembly.

8. No member of the Commission shall be disqualified from holding any public office or employment, nor shall he or she forfeit any such office or employment by virtue of his or her appointment hereunder. Members of the Commission shall receive no compensation for their services but shall be allowed their actual and necessary expenses incurred in the performance of their functions hereunder. All members of the Commission shall serve at the pleasure of the Governor and vacancies shall be filled in the same manner as original appointments.

9. Every agency, department, office, division or public authority of this state shall cooperate with the Commission and furnish such information and assistance as the Commission determines is reasonably necessary to accomplish its purposes.

G I V E N under my hand and the Privy Seal of the State this fifth day of March in the year two thousand seven.

Eliot Spitzer, Governor

Richard Baum, Secretary to the Governor

APPENDIX B

STATEMENT FROM COMMISSIONER

GEORGE B. ALEXANDER

STATEMENT OF COMMISSION MEMBER GEORGE B. ALEXANDER

After hearing the testimony before this Committee from men and women who have devoted their lives to criminal justice and upon full consideration of the written material and statistical information that has been aptly presented to this Committee, I am compelled to apprise this esteemed Committee of my position regarding a critical component of New York's sentencing scheme, that being the role indeterminate sentencing can and does play for effecting an offender's successful re-entry into the community and affording crime victims the voice they deserve.

As we have learned over the past months, New York is a State that makes use of both determinate and indeterminate sentences. Starting with second violent felony offenders in 1995, we have seen this type of sentencing option extend to first time violent felony offenders, and most recently, to those convicted of offenses under Articles 220 and 221 of the Penal Law. Undoubtedly, determinate sentences when compared to indeterminate sentences, have afforded the offender, the Department of Correctional Services and the Division of Parole with an ability to forecast with greater certainty the date on which the inmate will leave State prison and commence their period of post release supervision. However, knowing that point in an inmate's sentence when he or she is scheduled to be released from State prison leaves unanswered the question that must be asked in today's climate of offender re-entry, and that is "Are we reasonably certain that the inmate is ready for release?"

In 2000, Michael Tonry, Sonosky Professor of Law and Public Policy at the University of Minnesota, noted that:

"Indeterminate sentencing views human beings as malleable and redeemable and, accordingly, allows maximum scope for effort to provide services to offenders and to expose them to opportunities for self-improvement and advancement. Recognizing rehabilitation as a goal aids institutional managers because it justifies public investment in a wide range of programs and services that keep prisoners active and maintain prisoner and staff morale."

"Reconsidering Indeterminate and Structured Sentencing" at 5, Sentencing & Corrections, Issues for the 21st Century, No. 2, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice (1999). I submit that beyond Professor Tonry's observation that the rehabilitative programs offered in a correctional setting against the backdrop of indeterminate sentencing "keep prisoners active", these programs can effect those changes within the offender that must necessarily occur if they are to be ready and prepared for their return to our communities.

Providing inmates with programs to keep them occupied on a daily basis undoubtedly has its worth to those who manage correctional institutions, but if those programs bear no connection to the inmate's ability to demonstrate his or her readiness for release, if they are not approached by the inmate as something that should and must be accomplished to demonstrate their readiness and earnest desire for release, I fear these programs risk achieving a stature among inmates that is little more than busy work. Simply put, if an inmate's programming bears little or no relation to his or her release, what motivation is there to have them participate in programs? The current

construct of subdivisions 1 and 2 of Executive Law §259-i address this very concern and bring into focus the role an inmate's institutional disciplinary record, programming accomplishments and release plans play when the Parole Board assesses their readiness for re-entering our communities. To abandon this dynamic of discretionary release will result, I fear, in the mechanistic release of felony offenders, many being violent felony offenders, whose only motivation to participate in programs was to get out of their cell or earn institutional privileges, such as participating in recreational programs. When a felony offender's possibility of release is tied to their successful participation in programs, I think we can all agree that when their release does occur, we as a State have cultivated and assessed key benchmarks that demonstrate an inmate's readiness to take on the myriad of responsibilities that attend their return to our communities and parole supervision.

While an inmate's readiness for release from State prison is an indispensable component of an effective statewide re-entry strategy, there are other components of the offender's release and re-entry that cannot be discounted if we are to say that our system of criminal justice is balanced and all encompassing. Of critical importance to this process are the rights afforded to crime victims under section 440.50 of the Criminal Procedure Law and how those rights impact the Parole Board and its release decisions.

Under subdivision 1 of this statute, the district attorney is to advise a crime victim of their right to be heard by the Parole Board in connection with an inmate's possible release to parole supervision when the offender is remanded to serve an indeterminate sentence. The statute requires that this notification of rights be in writing and afforded within 60 days from the final disposition in the criminal court. Moreover, the statute expressly provides crime victims a host of avenues for communicating with the Parole Board; they are: a written statement; a videotape or audiotape; or a personal meeting with a member of the Board. Recognizing the importance of crime victims and their vital role in the parole release process, Criminal Procedure Law §440.50 was amended in 1998 to afford crime victims the right to be heard in connection with an inmate's possible release every time they are considered by the Board under section 259-i of the Executive Law.

To date, the Crime Victim Unit of the New York State Board of Parole has 7,250 active cases where the crime victims have registered in order to be heard with respect to the possible release of indeterminately sentenced inmates who, as of this date, are in State custody. In just this year alone, the Victim Impact Unit opened 1,591 new cases, which results in an average of 175-200 new cases per month. For those crime victims who have written to the Board about an inmate's possible release, 956 such letters were received in 2006 and 928 have been received so far in 2007. Finally, the Parole Board personally met with 261 crime victims or their families in 2006, and for 2007, 212 such meetings have taken place. With the number of contacts between the Victim Impact Unit and crime victims, it cannot be said that the right and opportunity to be heard in this regard is taken lightly by those who have perhaps been most affected by the crimes committed within our communities. Consequently, "[w]hen States abolish or reduce the discretion of parole authorities, they replace a rational, controlled system of 'earned' release for selected inmates with 'automatic' release for nearly all inmates [and] [n]o-parole systems sound tough, but remove a gatekeeping role that can protect victims and communities." Petersilia, Joan, "When Prisoners return to the Community: Political Economic, and Social Consequences", Sentencing & Corrections, Issues for the 21st Century at 5, No. 9, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice (2000).

Through my years with the Division of Parole, I have seen personally the unique position held by the Board of Parole in the overall construct of this State's criminal justice framework. When determining whether it is appropriate for an inmate to be released, I was always impressed with the Board's ability to collect and consider a wide array of information about the offender, not the least of which was the information supplied by crime victims. I believe my observations and present day conclusions on this are best reflected by Joan Petersilia, Ph.D., Professor of Criminology, Law and Society at the University of California, Irvine, in her article "When Prisoners return to the Community: Political Economic, and Social Consequences" where she concludes:

Perhaps most important, when information about the offense and the offender has been gathered and prison behavior observed, Parole Boards can reconsider the tentative release date. More than 90% of offenders in the United States are sentenced because they plead guilty, not as the result of a trial. Without a trial there is little opportunity to fully air the circumstances of the crime or the risks posed by the offender. A Parole Board can revisit the case to discover how extensive the victim's injuries were and whether a gun was involved. The Board is able to do so even though the offense to which the offender pled, by definition, involved no weapon. As one observer commented on this power of the Parole Board, in a system which incorporates discretionary parole, the system gets a second chance to make sure it is doing the right thing. Again, this could make a difference for crime victims. Id. at 6.

Therefore, while having the utmost respect for what each member has brought to this committee through their personal and professional experience and expertise in order to fulfill our charge under Governor Spitzer's Executive Order #10, I must dissent from any recommendation that eliminates indeterminate sentences within this State and does away with the discretionary release authority of the New York State Board of Parole.

Respectfully yours,

George B. Alexander
Chairman

APPENDIX C
ANOMALIES

ANOMALIES

The Commission has reviewed the following anomalies in the Penal Law and Criminal Procedure Law and recommends that the Legislature address them. The Commission recognizes that the following is by no means an exhaustive or exclusive list and intends to continue its review in this area.

1. The persistent violent felony offender statute²⁵⁸ fails to specify the minimum period of incarceration for a persistent offender convicted of a Class E violent felony.

Following the Legislature's (presumably inadvertent) failure to set the minimum period of imprisonment for a Class E persistent violent felony offender under Penal Law §70.08 (3), the Court of Appeals determined, in *People v. Green* (68 NY2d 151 [1986]), that the minimum would be two years:

The rationale for that conclusion was that the minimum period of imprisonment of the indeterminate sentence to be imposed on a "second" violent felony offender convicted of a class E felony was, at the time *Green* was decided, two years, and thus the legislative intent for the "persistent" -- a third -- violent felony offender should be no less. In the words of the Court: "The *minimum* set forth in [the then governing second felony offender statute] should logically apply to persistent offenders...(*id.*, at 153 [emphasis supplied])."²⁵⁹

In 1995, the Legislature changed the sentence for a second violent felony offender from an indeterminate to a determinate sentence. "In the same legislation, the minimum periods of the indeterminate term of imprisonment for a persistent violent felony offender of a Class B, C and D felony were amended to double the low end of the required minimum period; but the Legislature chose not to amend the statute to specify any minimum for the Class E felony."²⁶⁰ Subsequently, in *People v. Tolbert* (93 NY2d 86, 88 [1999]), the Court of Appeals followed the rationale of *Green* and held that "the amended determinate sentence for Class E second violent felony offenders should also be applied as the minimum sentence for Class E persistent violent felony offenders."²⁶¹

2. The persistent felony offender (A-1 felony) sentencing provision is imprecisely written and should be clarified.

The persistent felony offender statute²⁶² applies to defendants who are convicted of a felony and who have "two prior judgments of conviction for a felony or for a foreign jurisdiction crime for which a sentence to a term of imprisonment in excess of one year or a sentence to

²⁵⁸ Penal Law §70.08 (3).

²⁵⁹ Donnino, Practice Commentaries, McKinney's Cons. Laws of NY, Book 39, Penal Law Article 70, at 72.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² Penal Law §70.10.

death was imposed.”²⁶³ Unlike the persistent violent felony offender and other Penal Law multiple felony offender statutes, pursuant to Penal Law §70.10:

the court is not required to find that the defendant is a persistent felony offender simply on the basis of the crime presently convicted of and the crimes previously committed. Those facts are the threshold determinations for persistent felony offender consideration. To impose the sentence mandated for a persistent felony offender, the court must also be of the “opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest.”²⁶⁴

The plain language of Penal Law §70.10(2) provides that where the court has found that the defendant is a “persistent felony offender” and is of the opinion that “extended incarceration and life-time supervision will best serve the public interest,” in lieu of imposing a sentence authorized by Penal Law §70.00 (sentence of imprisonment for a felony), §70.02 (violent felony offender), §70.04 (second violent offender) or §70.06 (second felony offender), the court may impose “the sentence of imprisonment *authorized by that section* for a Class A-1 felony.”²⁶⁵

The problem is that there is *no* sentence of imprisonment for a Class A-1 felony authorized by Penal Law §§70.02 or 70.04 or 70.06, since those sections generally refer only to Class B through E felonies. While Penal Law §70.00 *does* contain language relating to the sentence of imprisonment for a Class A-1 felony due to fairly recent amendments to subdivision (3)(a) of section 70.00, there are actually three *different* A-1 felony sentences referred to in that section. Stated simply, the aforementioned language of Penal Law §70.10 is inexplicably imprecise and, in view of the fact that implementation of this language can result in a sentence of life imprisonment, should be clarified.²⁶⁶

²⁶³ Donnino, Practice Commentaries, McKinney’s Cons. Laws of NY, Book 39, Penal Law Article 70, at 68.

²⁶⁴ *Id.*

²⁶⁵ Penal Law §70.10 (2) (emphasis supplied).

²⁶⁶ The Commission is aware that Penal Law §70.10 has been challenged on constitutional grounds in a series of recent state and federal cases. In *Washington v. Poole*, 2007 WL 2435166 (S.D.N.Y. 2007), for example, the court found that the statute’s enhanced sentencing scheme violated the Sixth Amendment right to a jury trial because under the evolving case law of the U.S. Supreme Court following *Apprendi v. New Jersey* (530 U.S. 466 [2000]) (see, *Ring v. Arizona*, 536 U.S. 534 [2002]; *Blakely v Washington*, 542 U.S. 296 [2004]); *United States v. Booker*, 543 U.S. 220 [2005]), a jury is required to find the facts that Penal Law §70.10 leaves to the judge. Two other cases decided by the United States District Court for the Southern District of New York determined that Penal Law §70.10 was not unconstitutional (see, *Phillips v. Artus*, 2006 WL 1867386 [S.D.N.Y. 2006] and *Morris v. Artus*, 2007 WL 2200699 [S.D.N.Y. 2007]). However, the United States District Court for the Eastern District of New York determined that New York’s persistent felony sentencing scheme violated the defendant’s Sixth Amendment right to a jury trial (see, *Portalatin v. Graham*, 478 F.Supp.2d. 385 [2007]). *Phillips v. Artus* is pending in the U.S. Court of Appeals for the Second Circuit. The New York Court of Appeals upheld the persistent felony offender statute in *People v. Rosen* (96 NY2d 329 [2001]) and, more recently, in *People v. Rivera* (5 NY3d 61 [2005]), holding, in both cases, that it did not violate the rule of *Apprendi, supra*.

3. The permissible maximum sentence for a multiple felony offender convicted of certain crimes against a police officer or peace officer is, in some instances, shorter than the permissible maximum for a first-time offender convicted of the same crime.

The Crimes Against Police Act²⁶⁷ increased sentences for certain first-time felony offenders convicted of menacing, assault or homicide crimes directed at police officers and peace officers. However, because no corresponding change was made to the applicable multiple felony offender statutes, there are now instances where the maximum multiple felony offender sentence for certain of these crimes is less than the maximum for a first-time offender convicted of the same crime. For example, a first-time felony offender convicted of aggravated first degree manslaughter²⁶⁸ faces a determinate sentence of up to 30 years. That same crime, prosecuted as a second violent felony offense, carries a determinate sentence of up to 25 years.

4. Certain CPL 220.10 plea bargaining restrictions can have anomalous consequences.

CPL 220.10 establishes a series of post-indictment restrictions on felony plea bargaining, some of which can lead to anomalous results. For example, a person who is charged with manslaughter in the first degree, a Class B violent felony offense, and chooses to plead guilty in satisfaction of that charge must plead to no less than a Class C violent or Class D violent felony offense.²⁶⁹ That rules out the possibility that the offender can plead to manslaughter in the second degree, a Class C *non*-violent felony. Manslaughter in the second degree, however, carries a potential indeterminate prison sentence with a maximum of up to 15 years, while a Class D violent felony offense carries a significantly less harsh maximum determinate sentence of up to seven years.

5. Under the Sex Offender Management and Treatment Act, certain less harsh sentencing options are available for Class D violent felony sex offenses that are not available for Class D non-violent felony sex offenses.

In 2007, the Legislature enacted the Sex Offender Management and Treatment Act.²⁷⁰ The Act authorizes civil confinement of sex offenders and also enacts significant changes in criminal sentencing of sex offenders. While it remains to be seen how some of the provisions of this new Act will be implemented, the law seemingly imposes a more stringent range of penalties for a Class D non-violent felony (such as burglary in the third degree),²⁷¹ committed as a “sexually motivated felony”²⁷² than for a Class D violent felony sex offense such as sexual abuse in the first degree.²⁷³ Specifically, for a Class D violent felony sex offense such as sexual abuse in the first degree, the available sentences appear to include: intermittent imprisonment for up to one year, a conditional discharge, a “split sentence” of jail plus probation (or conditional discharge), a fine (alone or in combination with the above), or even an unconditional discharge.²⁷⁴ In contrast, for the *non*-violent Class D felony of burglary in the third degree committed as a sexually motivated felony, the only authorized sentences are a determinate

²⁶⁷ Laws of 2005, ch. 765.

²⁶⁸ Penal Law §125.22.

²⁶⁹ CPL 220.10(5)(d)(ii).

²⁷⁰ Laws of 2007, ch. 7.

²⁷¹ Penal Law §140.20.

²⁷² Penal Law §130.91.

²⁷³ Penal Law §130.65.

²⁷⁴ Penal Law §70.02(2)(b).

sentence of at least 2 and not more than 7 years,²⁷⁵ plus post-release supervision of between 3 and 10 years,²⁷⁶ a local jail sentence of up to 1 year, or a term of 10 years probation.²⁷⁷ A conditional or unconditional discharge, split sentence or a fine (alone or in combination with another sentence) do not appear to be available sentences for this non-violent felony sex offense.²⁷⁸

6. A discrepancy in the way “time-served” credit is applied to indeterminate versus determinate sentences has the effect of providing a greater benefit to those offenders (including violent felony offenders) sentenced to determinate sentences.

Pursuant to Penal Law §70.30(1)(a), when two or more sentences of imprisonment run concurrently, the time served under imprisonment on any of the concurrent terms is to be credited against each of the remaining concurrent sentences. Currently, Penal Law §70.30(1)(a) applies the credit only to the minimum period of a concurrent indeterminate sentence. No credit is applied to the maximum term. When the concurrent sentence that is being credited is a determinate sentence, however, the credit is applied to the entire determinate term.

The consequence of this is as follows: If credit for time served on a particular sentence is applied only to the minimum portion of a concurrent indeterminate term (and not the maximum), the conditional release date, which is fixed at two-thirds of the maximum term, remains unchanged. However, when the same jail credit is applied under the direction of Penal Law §70.30(1)(a) to the term of a concurrent *determinate* sentence, the conditional release date is affected and the defendant benefits because the date for conditional release on a determinate sentence is calculated on the “term” of the sentence (i.e., six-sevenths of the determinate term).²⁷⁹

7. Defendants convicted of certain Class C non-violent felonies are subject to two extremes of sentencing – a relatively minor penalty such as a fine on one hand or a substantial State prison term on the other, but no option for a local jail sentence of one year or less.

An indeterminate sentence of imprisonment is mandatory for certain Class C non-violent felonies enumerated in Penal Law §60.05(4). These include criminal usury in the first degree,²⁸⁰ attempted bribe receiving in the first degree²⁸¹ and promoting prostitution in the second degree.²⁸² However, an offender who commits a non-violent Class C felony that is *not* enumerated in Penal Law §60.05(4) is not subject to a mandatory prison term.

Instead, he or she may be sentenced to straight probation, a conditional discharge, or simply a fine.²⁸³ Where, however, the court chooses to impose imprisonment for one of these

²⁷⁵ Penal Law §70.80(4)(a)(iii).

²⁷⁶ Penal Law §70.80 (9); §70.45 (2-a).

²⁷⁷ Penal Law §70.80 (4)(b), (c).

²⁷⁸ Penal Law §60.05 (1).

²⁷⁹ In its 2007 Report to the Chief Administrative Judge, OCA’s Advisory Committee on Criminal Law and Procedure offers legislative proposals to address this problem and the problems discussed in items 7 to 9, *infra*. The Commission has reviewed and supports the enactment by the Legislature of these four proposals.

²⁸⁰ Penal Law §190.42.

²⁸¹ Penal Law §§110.00/200.12.

²⁸² Penal Law §230.30.

²⁸³ Penal Law §§60.01(2), (3); 65.00(1)(a); 65.05(1)(a).

offenses rather than, for example, a conditional discharge or fine, the sentence of imprisonment *must* be an indeterminate sentence. Inexplicably, a local jail sentence of one year or less is simply not permitted.²⁸⁴

8. It is unclear whether a determinate sentence imposed for a drug felony conviction under Penal Law §70.70(3)(d) can be executed as a sentence of parole supervision.

As part of the Drug Law Reform Act of 2004,²⁸⁵ the Legislature added sections 60.04, 70.70 and 70.71 to the Penal Law to replace the existing indeterminate sentencing paradigm for felony drug offenses with a fully determinate sentencing scheme. Although newly added Penal Law §70.70(3)(d) clearly allows certain of these determinate sentences to be executed as a “sentence of parole supervision” (*i.e.*, a “Willard” sentence), the Legislature, in an apparent oversight, failed to amend CPL 410.91, which defines and establishes the procedures for imposing a sentence of parole supervision and appears to limit these sentences to *indeterminate* sentences.

9. A first-time felon convicted of certain Class D violent felony offenses may receive a definite sentence of one year or less (or a conditional discharge or a fine), but if sentenced to State prison must receive a determinate sentence of at least two years.

Where a defendant is not a multiple felony offender, a sentencing judge currently has the option of imposing, among other penalties, a definite sentence of one year or less for most Class D violent felony offenses.²⁸⁶ Where, however, the judge determines that a sentence of more than one year is warranted, he or she must impose a determinate sentence of not less than two years.²⁸⁷ Given that the current available sentencing options for these Class D violent felony offenders also include straight probation, a conditional discharge or a fine only, it makes no sense that a determinate sentence of 1½ years is not a permissible sentence in these cases.

10. Certain sentencing requirements and restrictions for felony “youthful offenders” are unclear or simply do not make sense.

In general, a “youthful offender” under New York law is a first-time offender who commits a crime (other than a Class A, armed or specified sex felony) when at least 16 and less than 19 years of age, and whose conviction for that offense has been replaced by the court with a “youthful offender finding.”²⁸⁸

The statutory scheme for sentencing youthful offenders states at the outset that a youthful offender adjudication is not a criminal “conviction,”²⁸⁹ and then requires that a sentence be imposed as if the individual *had* been convicted of a crime. Where the offense committed is a felony, in general, “the court must impose a sentence authorized to be imposed upon a person

²⁸⁴ Penal Law §70.00(1). In a similar vein, Penal Law §65.10(2)(h) prohibits the use of community service as a condition of probation for non-violent Class C felons. The Commission will study recidivism rates for this group of offenders (excluding sex offenders) to determine whether to expand the eligibility for community service to this population if all parties agree.

²⁸⁵ Laws of 2004, ch. 738.

²⁸⁶ Penal Law §70.02(2)(b).

²⁸⁷ Penal Law §70.02(3)(c).

²⁸⁸ CPL 720.10(4).

²⁸⁹ CPL 720.35(1).

convicted of a Class E felony.”²⁹⁰ Because there are now several *different* “authorized” sentences of imprisonment for Class E felonies (e.g., determinate sentences for violent Class E felonies,²⁹¹ indeterminate sentences for non-violent, non-drug, non-sex Class E felonies;²⁹² determinate sentences for Class E drug felonies²⁹³ and determinate sentences for Class E sex felonies),²⁹⁴ the law is not entirely clear as to which “authorized” Class E felony sentence should be taken as the template for a particular felony youthful offender sentence.

Further, a Class C, D or E drug felon is eligible to receive a conditional or unconditional discharge – but *not* if he or she was afforded youthful offender status,²⁹⁵ a sentencing restriction that makes no sense.

11. Certain unintended sentencing consequences may result from the “Hate Crimes” legislation.²⁹⁶

Pursuant to Penal Law §125.25(5) (murder in the second degree), when a person at least 18 years of age intentionally kills a person less than 14 years of age while committing any of several specified sex offenses, the statute provides for a mandatory sentence of life imprisonment without parole.²⁹⁷ However, if this Class A-I felony offense is prosecuted as a “hate crime” pursuant to Penal Law §485.05(1)(a), a separate statute provides that “notwithstanding any other provision of law,” the minimum period of the indeterminate sentence imposed on the “hate crime” conviction shall be “not less than twenty years.”²⁹⁸ Consequently, it appears that the mandated sentence for this particular “hate crime” is actually more lenient than the mandated sentence for the underlying crime.²⁹⁹

²⁹⁰ Penal Law §60.02(2).

²⁹¹ Penal Law §70.02.

²⁹² Penal Law §70.00 (2) and (3).

²⁹³ Penal Law §70.70 (2)(a)(iv).

²⁹⁴ Penal Law §70.80(4).

²⁹⁵ Penal Law §§60.02 (2); 60.04(4).

²⁹⁶ Laws of 2000, ch. 107.

²⁹⁷ Penal Law §§60.06; 70.00 (5).

²⁹⁸ Penal Law §485.10(4).

²⁹⁹ *See generally*, Penal Law §70.00(5)(providing that, “[f]or purposes of commitment and custody, other than parole and conditional release . . . [a sentence of life without parole] shall be deemed to be an indeterminate sentence”).

APPENDIX D

**NON-VIOLENT PENAL LAW FELONY OFFENSES
THAT CURRENTLY CARRY
AN INDETERMINATE SENTENCE**

**NON-VIOLENT PENAL LAW FELONY OFFENSES THAT CURRENTLY
CARRY AN INDETERMINATE SENTENCE³⁰⁰**

Citation	Title	Offense Level
PL 100.08	Criminal solicitation in the third degree	Class E felony
PL 100.10	Criminal solicitation in the second degree	Class D felony
PL 100.13	Criminal solicitation in the first degree	Class C felony
PL 105.10	Conspiracy in the fourth degree	Class E felony
PL 105.13	Conspiracy in the third degree	Class D felony
PL 105.15	Conspiracy in the second degree	Class B felony
PL 115.01	Criminal facilitation in the third degree	Class E felony
PL 115.05	Criminal facilitation in the second degree	Class C felony
PL 115.08	Criminal facilitation in the first degree	Class B felony
PL 120.01	Reckless assault of a child by a child day care provider	Class E felony
PL 120.03	Vehicular assault in the second degree	Class E felony
PL 120.04	Vehicular assault in the first degree	Class D felony
PL 120.12	Aggravated assault upon a person less than eleven years old	Class E felony
PL 120.13	Menacing in the first degree	Class E felony
PL 120.25	Reckless endangerment in the first degree	Class D felony
PL 120.30	Promoting a suicide attempt	Class E felony
PL 120.55	Stalking in the second degree	Class E felony
PL 120.60(2)	Stalking in the first degree	Class D felony
PL 125.10	Criminally negligent homicide	Class E felony
PL 125.12	Vehicular manslaughter in the second degree	Class D felony
PL 125.13	Vehicular manslaughter in the first degree	Class C felony
PL 125.15	Manslaughter in the second degree	Class C felony
PL 125.40	Abortion in the second degree	Class E felony
PL 125.45	Abortion in the first degree	Class D felony
PL 135.10	Unlawful imprisonment in the first degree	Class E felony
PL 135.50	Custodial interference in the first degree	Class E felony
PL 135.55	Substitution of children	Class E felony
PL 135.65	Coercion in the first degree	Class D felony
PL 140.17	Criminal trespass in the first degree	Class D felony
PL 140.20	Burglary in the third degree	Class D felony
PL 145.05	Criminal mischief in the third degree	Class E felony
PL 145.10	Criminal mischief in the second degree	Class D felony
PL 145.12	Criminal mischief in the first degree	Class B felony
PL 145.20	Criminal tampering in the first degree	Class D felony
PL 145.23	Cemetery desecration in the first degree	Class E felony
PL 145.45	Tampering with a consumer product in the first degree	Class E felony

³⁰⁰ This list excludes Class A felonies, as well as felony drug and sex offenses which are currently punishable by a determinate sentence. This list also excludes felony-level attempts to commit the listed crimes, as well as non-violent felony offenses defined outside the Penal Law.

PL 150.05	Arson in the fourth degree	Class E felony
PL 150.10	Arson in the third degree	Class C felony
PL 155.30	Grand larceny in the fourth degree	Class E felony
PL 155.35	Grand larceny in the third degree	Class D felony
PL 155.40	Grand larceny in the second degree	Class C felony
PL 155.42	Grand larceny in the first degree	Class B felony
PL 156.10	Computer trespass	Class E felony
PL 156.25	Computer tampering in the third degree	Class E felony
PL 156.26	Computer tampering in the second degree	Class D felony
PL 156.27	Computer tampering in the first degree	Class C felony
PL 156.30	Unlawful duplication of computer related matter	Class E felony
PL 156.35	Criminal possession of computer related matter	Class E felony
PL 158.10	Welfare fraud in the fourth degree	Class E felony
PL 158.15	Welfare fraud in the third degree	Class D felony
PL 158.20	Welfare fraud in the second degree	Class C felony
PL 158.25	Welfare fraud in the first degree	Class B felony
PL 158.35	Criminal use of a public benefit card in the first degree	Class E felony
PL 158.40	Criminal possession of public benefit cards in the third degree	Class E felony
PL 158.45	Criminal possession of public benefit cards in the second degree	Class D felony
PL 158.50	Criminal possession of public benefit cards in the first degree	Class C felony
PL 160.05	Robbery in the third degree	Class D felony
PL 165.06	Unauthorized use of a vehicle in the second degree	Class E felony
PL 165.07	Unlawful use secret scientific material	Class E felony
PL 165.08	Unauthorized use of a vehicle in the first degree	Class D felony
PL 165.10	Auto stripping in the second degree	Class E felony
PL 165.11	Auto stripping in the first degree	Class D felony
PL 165.15	Theft of services (certain services only)	Class E felony
PL 165.45	Criminal possession of stolen property in the fourth degree	Class E felony
PL 165.50	Criminal possession of stolen property in the third degree	Class D felony
PL 165.52	Criminal possession of stolen property in the second degree	Class C felony
PL 165.54	Criminal possession of stolen property in the first degree	Class B felony
PL 165.72	Trademark counterfeiting in the second degree	Class E felony
PL 165.73	Trademark counterfeiting in the first degree	Class C felony
PL 170.10	Forgery in the second degree	Class D felony
PL 170.15	Forgery in the first degree	Class C felony
PL 170.25	Criminal possession of a forged instrument in the second degree	Class D felony
PL 170.30	Criminal possession of a forged instrument in the first degree	Class C felony
PL 170.40	Criminal possession of forgery devices	Class D felony

PL 170.60	Unlawfully using slugs in the first degree	Class E felony
PL 170.65	Forgery of a vehicle identification number	Class E felony
PL 170.70	Illegal possession of a vehicle identification number plate	Class E felony
PL 170.75	Fraudulent making of an electronic access device in the second degree	Class D felony
PL 175.10	Falsifying business records in the first degree	Class E felony
PL 175.25	Tampering with public records in the first degree	Class D felony
PL 175.35	Offering a false instrument for filing in the first degree	Class E felony
PL 175.40	Issuing a false certificate	Class E felony
PL 176.15	Insurance fraud in the fourth degree	Class E felony
PL 176.20	Insurance fraud in the third degree	Class D felony
PL 176.25	Insurance fraud in the second degree	Class C felony
PL 176.30	Insurance fraud in the first degree	Class B felony
PL 176.35	Aggravated insurance fraud	Class D felony
PL 177.10	Health care fraud in the fourth degree	Class E felony
PL 177.15	Health care fraud in the third degree	Class D felony
PL 177.20	Health care fraud in the second degree	Class C felony
PL 177.25	Health care fraud in the first degree	Class B felony
PL 178.15	Criminal diversion of prescription medications and prescriptions in the third degree	Class E felony
PL 178.20	Criminal diversion of prescription medications and prescriptions in the second degree	Class D felony
PL 178.25	Criminal diversion of prescription medications and prescriptions in the first degree	Class C felony
PL 180.03	Commercial bribing in the first degree	Class E felony
PL 180.08	Commercial bribe receiving in the first degree	Class E felony
PL 180.15	Bribing a labor official	Class D felony
PL 180.25	Bribe receiving by a labor official	Class D felony
PL 180.40	Sports bribing	Class D felony
PL 180.45	Sports bribe receiving	Class E felony
PL 180.51	Tampering with sports contest in the first degree	Class E felony
PL 180.52	Impairing the integrity of a pari-mutual betting system in the second degree	Class E felony
PL 180.53	Impairing the integrity of a pari-mutual betting system in the first degree	Class D felony
PL 180.57	Rent gouging in the first degree	Class E felony
PL 190.26	Criminal impersonation in the first degree	Class E felony
PL 190.30	Unlawfully concealing a will	Class E felony
PL 190.40	Criminal usury in the second degree	Class E felony
PL 190.42	Criminal usury in the first degree	Class C felony
PL 190.65	Scheme to defraud in the first degree	Class E felony
PL 190.76	Criminal use access device in the first degree	Class E felony
PL 190.79	Identity theft in the second degree	Class E felony
PL 190.80	Identity theft in the first degree	Class D felony
PL 190.82	Unlawful possession of personal identification information in the second degree	Class E felony

PL 190.83	Unlawful possession of personal identification information in the first degree	Class D felony
PL 195.07	Obstructing governmental administration the first degree	Class E felony
PL 195.08	Obstructing governmental administration by means of a self-defense spray device	Class D felony
PL 195.20	Defrauding the government	Class E felony
PL 200.00	Bribery in the third degree	Class D felony
PL 200.03	Bribery in the second degree	Class C felony
PL 200.04	Bribery in the first degree	Class B felony
PL 200.10	Bribe receiving in the third degree	Class D felony
PL 200.11	Bribe receiving in the second degree	Class C felony
PL 200.12	Bribe receiving in the first degree	Class B felony
PL 200.20	Rewarding official misconduct in the second degree	Class E felony
PL 200.22	Rewarding official misconduct in the first degree	Class C felony
PL 200.25	Receiving a reward for official misconduct in the second degree	Class E felony
PL 200.27	Receiving a reward for official misconduct in the first degree	Class C felony
PL 200.45	Bribe giving for public office	Class D felony
PL 200.50	Bribe receiving for public office	Class D felony
PL 205.10	Escape in the second degree	Class E felony
PL 205.15	Escape in the first degree	Class D felony
PL 205.17	Absconding from temporary release in the first degree	Class E felony
PL 205.19	Absconding from community treatment facility	Class E felony
PL 205.25	Promoting prison contraband in the first degree	Class D felony
PL 205.60	Hindering prosecution in the second degree	Class E felony
PL 205.65	Hindering prosecution in the first degree	Class D felony
PL 210.10	Perjury in the second degree	Class E felony
PL 210.15	Perjury in the first degree	Class D felony
PL 210.40	Making an apparently sworn false statement in the first degree	Class E felony
PL 215.00	Bribing a witness	Class D felony
PL 215.05	Bribing receiving by witness	Class D felony
PL 215.11	Tampering with a witness in the third degree	Class E felony
PL 215.12	Tampering with a witness in the second degree	Class D felony
PL 215.13	Tampering with a witness in the first degree	
PL 215.15	Intimidating a victim or witness in the third degree	Class E felony
PL 215.19	Bribing a juror	Class D felony
PL 215.20	Bribing receiving by a juror	Class D felony
PL 215.40	Tampering with physical evidence	Class E felony
PL 215.51	Criminal contempt in the first degree	Class E felony
PL 215.52	Aggravated criminal contempt	Class D felony
PL 215.56	Bail jumping in the second degree	Class E felony
PL 215.57	Bail jumping in the first degree	Class D felony
PL 215.70	Unlawful grand jury disclosure	Class E felony
PL 225.10	Promoting gambling in the first degree	Class E felony

PL 225.20	Possession of gambling records in the first degree	Class E felony
PL 230.05	Patronizing a prostitute in the second degree	Class E felony
PL 230.25	Promoting prostitution in the third degree	Class D felony
PL 230.30	Promoting prostitution in the second degree	Class C felony
PL 230.32	Promoting prostitution in the first degree	Class B felony
PL 230.33	Compelling prostitution	Class B felony
PL 235.06	Obscenity in the second degree	Class E felony
PL 235.07	Obscenity in the first degree	Class D felony
PL 235.21	Disseminating indecent material to minors in the second degree	Class E felony
PL 235.22	Disseminating indecent material to minors in the first degree	Class D felony
PL 240.06	Riot in the first degree	Class E felony
PL 240.15	Criminal anarchy	Class E felony
PL 240.31	Aggravated harassment in the first degree	Class E felony
PL 240.32	Aggravated harassment of an employee by an inmate	Class E felony
PL 240.46	Criminal nuisance in the first degree	Class E felony
PL 240.71	Criminal interference with health care services or religious worship in the first degree	Class E felony
PL 241.05	Harassment of a rent regulated tenant	Class E felony
PL 250.05	Eavesdropping	Class E felony
PL 250.45	Unlawful surveillance in the second degree	Class E felony
PL 250.50	Unlawful surveillance in the first degree	Class D felony
PL 250.60	Dissemination of an unlawful surveillance image in the first degree	Class E felony
PL 255.15	Bigamy	Class E felony
PL 255.25	Incest in the third degree	Class E felony
PL 260.00	Abandonment of a child	Class E felony
PL 260.06	Non-support of a child in the first degree	Class E felony
PL 260.32	Endangering the welfare of a vulnerable elderly person in the second degree	Class E felony
PL 260.34	Endangering the welfare of a vulnerable elderly person in the first degree	Class D felony
PL 263.05	Use of a child in sexual performance	Class C felony
PL 263.10	Promoting an obscene sexual performance by a child	Class D felony
PL 263.11	Possessing an obscene sexual performance by a child	Class E felony
PL 263.15	Promoting a sexual performance by a child	Class D felony
PL 263.16	Possessing a sexual performance by a child	Class E felony
PL 265.02(1), (2) and (3)	Criminal possession of a weapon in the third degree	Class D felony
PL 265.10	Manufacture, transport, disposition and defacement of weapons and dangerous instruments or appliances (certain weapons, dangerous instruments or appliances only)	Class D felony
PL 265.16	Criminal sale of a firearm to minor	Class C felony

PL 265.35(2)	Prohibited use of weapons	Class D or E felony
PL 270.00(2)(b)(iii)	Unlawfully dealing with fireworks and dangerous fireworks	Class E felony
PL 270.20	Unlawful wearing of a body vest	Class E felony
PL 270.30	Unlawful fleeing a police officer in a motor vehicle in the second degree	Class E felony
PL 270.35	Unlawful fleeing a police officer in a motor vehicle in the first degree	Class D felony
PL 275.10	Manufacture of unauthorized recordings in the first degree	Class E felony
PL 275.20	Manufacture or sale of an unauthorized recording of a performance in the second degree	Class E felony
PL 275.30	Advertisement or sale of unauthorized recordings in the first degree	Class E felony
PL 275.40	Failure to disclose the origin of a recording in the first degree	Class E felony
PL 405.14	Unpermitted use of indoor pyrotechnics in the first degree	Class E felony
PL 405.16	Aggravated unpermitted use of indoor pyrotechnics in the second degree	Class E felony
PL 460.20	Enterprise corruption	Class B felony
PL 470.05	Money laundering in the fourth degree	Class E felony
PL 470.10	Money laundering in the third degree	Class D felony
PL 470.15	Money laundering in the second degree	Class C felony
PL 470.20	Money laundering in the first degree	Class B felony
PL 470.21	Money laundering support of terrorism in the fourth degree	Class E felony
PL 470.22	Money laundering support of terrorism in the third degree	Class D felony
PL 470.23	Money laundering support of terrorism in the second degree	Class C felony
PL 470.24	Money laundering support of terrorism in the first degree	Class B felony