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NEW YORK STATE
DIVISION OF CRIMINAL JUSTICE SERVICES
NEW YORK STATE COMMISSION OF SENTENCING REFORM

Commission Meeting

DATE: June 6, 2007
TIME: 9:15 a.m. to 4:30 p.m.
LOCATION: New York State Capital Building
Blue Room
Albany, New York

1 Commission on Sentencing Reform - 6-6-2007
 2 COMMISSION MEMBERS:
 3 Commissioner Denise E. O'Donnell, Co-chair
 4 George B. Alexander
 5 Anthony Annucci, Esq.
 6 Anthony Bergamo, Esq.
 7 Michael C. Green, Esq.
 8 Assemblymember Joseph Lentol
 9 Michael P. McDermott, Esq.
 10 Judge Juanita Bing Newton
 11 Senator Eric T. Schneiderman
 12 Cyrus Vance, Jr. Esq.
 13 COMMISSION STAFF:
 14 John Amodeo, Esq.
 15 Michael Barrett, Esq.
 16 Gina L. Bianchi, Esq.
 17 Donna Hall, Ph.D.
 18 Patti Greco
 19 SPEAKERS:
 20 John Amodeo, Esq.
 21 Donna Hall, Ph.D.
 22 Paul Shechtman, Esq.
 23 Richard DeSimone, Esq.
 24 Pamala L. Griset, Ph.D.
 Governor Eliot Spitzer

ALSO PRESENT:

18 Amy Butt
 19 David Cohn
 20 Chris Dickenson
 21 Simone Levine
 22 Tina Sanford
 23 Lai Sun Yee
 24

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 2 (The meeting commenced at 9:15
 3 a.m.)
 4 COMMISSIONER O'DONNELL: All
 5 right. Good morning.
 6 FROM THE FLOOR: Good morning.
 7 COMMISSIONER O'DONNELL: And
 8 welcome to our first meeting. My name is Denise
 9 O'Donnell, I'm the commissioner for Criminal
 10 Justice Services in New York, and I'm very
 11 delighted that Governor Spitzer has asked me to
 12 chair this commission. I look forward to working
 13 with all of you if we begin this historic journey.
 14 It seems fitting that we should
 15 hold our inaugural session in this historic and
 16 legendary New York State capital. For the history
 17 buffs among -- among us, I'd like to point out a
 18 couple of the less obvious features. You happen to
 19 be sitting in a national historic landmark, which,
 20 when it was finally completed in 1899, at the cost
 21 of twenty-five million, or about a half a billion
 22 of current dollars, was the most expensive
 23 government building in the nation. And with all
 24 that money you would have thought that they'd put

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 2 on a dome, but they didn't -- we're only one of ten
 3 state capitals that doesn't have a dome.
 4 But regardless of what is or is
 5 not over our head, a number of luminaries, such as
 6 Theodore and Franklin Roosevelt, Thomas Dewey,
 7 Charles Evans Hughes, Alfred E. Smith, and now
 8 Eliot Spitzer, have toiled in this building. So,
 9 we are surrounded by history, and some pretty
 10 impressive ghosts, as we begin our task, even if we
 11 don't have a dome.
 12 As executive order number ten
 13 makes clear, we have a very broad mandate on the
 14 commission, and I want to assure you from the onset
 15 that neither Governor Spitzer nor I have any
 16 preconceived notions of the recommendations the
 17 commission will ultimately present. Our only
 18 agenda is to make a meaningful contribution to the
 19 discussion about reforming New York's sentencing
 20 structure, and offer sound recommendations to the
 21 governor, legislature and chief judge, which will
 22 result in positive change.
 23 It is our mission to undertake
 24 and I quote, "comprehensive review of New York's

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 2 current sentencing structure, sentencing practices,
 3 community supervision, and the use of alternatives
 4 to incarceration," end of quote.
 5 To that end, we are specifically
 6 directed to examine the current structure of New
 7 York's sentencing statutes, the uniformity it
 8 achieves, incentives and barriers to alternatives
 9 to incarceration, the impact of education and job
 10 training on recidivism, and future trends in
 11 sentencing. And along the way, we will, according
 12 to our mandate consider crime victims, their
 13 families, the community at large, and the fiscal
 14 impact of the various ideas and proposals that
 15 arise through our efforts.
 16 If I could add a word to the
 17 executive order, I think it would be, wow, what a
 18 responsibility, and what a chance to make a real
 19 difference. You know, it took four decades to
 20 build this capital, partially because there were
 21 endless disputes over architectural style and
 22 several replacements of architects. Given the
 23 scope of our mission, I'm afraid we'll have to work
 24 at somewhat -- a somewhat faster pace.

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 2 But I am very encouraged by the
 3 breadth and scope of experience, and the diversity
 4 of perspectives represented in this room, on the
 5 commission. And I'm confident that we are up to
 6 the task before us. Much of the charm and beauty
 7 of this building lies in the unusual blend of
 8 styles, Italian renaissance, Romanesque, and French
 9 renaissance. Not to mention the fact that some of
 10 the marble in this imposing edifice was cut by
 11 prisoners at Sing Sing. And I think the architects
 12 and stonemasons right here in this room, on the
 13 commission, can produce an equally monumental
 14 result.
 15 But before we roll up our sleeves
 16 and get to work, I would like to take a moment to
 17 welcome each of you, and introduce the members of
 18 the commission. Our ex-officio members, who serve
 19 by virtue of their offices, are Brian Fischer, the
 20 commissioner of correctional services, who
 21 unfortunately cannot be here today, but who has
 22 sent his able counsel, Tony Annucci, to represent
 23 him on the commission; George Alexander, chairman
 24 of the board of parole, and me.

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 2 Our appointed members are Senator
 3 Eric Schneiderman, deputy minority leader of the
 4 New York State Senate; Assemblyman Joseph Lentol,
 5 chair of the assembly codes committee; Judge
 6 Juanita Bing Newton -- Judge, who is the deputy
 7 chief administrative judge for justice initiatives,
 8 and holds many other titles; Monroe County District
 9 Attorney Michael Green; Michael McDermott of
 10 O'Connell and Aronowitz here in Albany; Cyrus
 11 Vance, Jr., who practices with Morvillo, Abramowitz
 12 in New York City; and Anthony Bergamo, special
 13 counsel to several law enforcement organizations,
 14 and chief executive officer of Niagara Falls
 15 redevelopment.
 16 I'd like to take a few moments to
 17 go around the room and ask the commissioners to
 18 introduce themselves, and talk a little bit about
 19 your interest in sentencing, and what you hope that
 20 the commission will be able to achieve.
 21 And I'd like to start with you,
 22 Assemblyman Lentol.
 23 ASSEMBLYMEMBER LENTOL: Thank
 24 you. It's always good to be first.

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 2 First of all, for those of you who
 3 don't know me, I've been here almost as long as the
 4 building. I'm a veteran state assemblyman; this is
 5 my thirty-fifth year of service in the New York
 6 State Assembly, and I've been privileged to serve
 7 on the codes committee, as its chairman, for the
 8 last twelve years. So, my interest in sentencing
 9 reform is indeed a very important one to me, and to
 10 the members of the assembly, and I guess that's why
 11 the speaker nominated me to serve on this
 12 commission.
 13 As all of you know, coming from
 14 different perspectives and different walks of life
 15 about the penal code and the sentencing in New York
 16 State, we know that our statutes are disjointed,
 17 confusing, and inconsistent, to say the least.
 18 Some sentences are based upon crime, others on the
 19 record of the offender, still others are based up
 20 on the status of the victim. And our judges are
 21 precluded from making the punishment fit the crime,
 22 also, due to a sentencing scheme that establishes
 23 one-size-fits-all mandatory-minimum prison
 24 sentences, even for first-time offenders. And

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 2 the -- once the offender gets to prison, the
 3 problem is compounded.
 4 We have good time, merit time,
 5 Willard, Shock, work-release, parole, conditional
 6 release, are available to certain inmates and not
 7 to others. No one, even those who practice in this
 8 area of law on a daily basis, are sure how our
 9 sentencing statutes will apply in a particular
 10 case.
 11 While the assembly has passed
 12 legislation that increased penalties for violent
 13 criminals in the past - that was Jenna's law
 14 several years ago, ten years ago - we just recently
 15 passed civil confinement, which is not really in
 16 the sentencing realm, but may come up in our
 17 discussion. We passed statutes of limitations
 18 elimination last year, regarding sexual predators
 19 for certain B felonies, but the assembly has
 20 historically championed, as you in this room know,
 21 mostly without legislative success, due to a lack
 22 of support from the other house, and from the
 23 governor's office, programs that would increase the
 24 availability of alternatives to incarceration. And

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2 I saw that, and I was very pleased to see, in some
3 of the executive order, that that was one of the
4 things that we are to look at.

5 And also educational programs in
6 prison has long been lacking over the past twelve
7 years, even though we had a good start, I thought,
8 when I first became chairman of codes, in that
9 regard.

10 I think that the governor should
11 be commented for seizing this opportunity to reform
12 our sentencing structure, to better utilize our
13 resources.

14 And you ought to be commended
15 also, Commissioner O'Donnell, for taking on this
16 task, because it is indeed a daunting one, and --
17 but in the end our task is to make our community
18 safe, stop recidivism, while at the same time
19 bringing -- bringing a sense of order to the
20 sentencing structure of the state.

21 COMMISSIONER O'DONNELL: Thank
22 you very much. I -- I -- I entirely agree with you
23 that the sentence -- sentencing structure is
24 exceedingly complex. And I know in -- in New York

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2 State when people finally need to really know what
3 the sentence is, the person they turn to is Tony
4 Annucci. So, the -- the authority in this state
5 to -- the -- the one person who can figure out a
6 sentence, is Tony, and we're delighted to have you
7 sitting in for Commissioner Fischer, and I'd like
8 to just ask you to say a few words.

9 MR. ANNUCCI: Thank you very
10 much, Commissioner, and I think you exaggerate a
11 little bit. I know a little bit, I -- I have lot
12 of people, particularly Rich DeSimone, who knows an
13 awful lot about sentencing.

14 To echo a little bit about
15 what -- what Assemblyman Lentol just said,
16 sentencing is -- is a bit confusing; in some ways
17 it's archaic. There are a lot of reasons why we
18 got to where we are, and there have been a lot of
19 philosophical differences over the years between
20 the senate and the assembly. And I was there for a
21 lot of the negotiations that ended up with
22 sentencing changes and the construction of new
23 prisons. So, I can fill in a lot of the details as
24 to why we ended up where we are.

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2 Background-wise, I spent four years
3 as a law secretary to two different judges in Kings
4 County Criminal Court, so I know the front end
5 somewhat, the interests of prosecutors and the
6 interests of defense attorneys and judges, and
7 clearly there is a desire to understand what
8 happens when somebody does receive a sentence, what
9 actually are the processes they go through, how
10 much time are they actually going to spend, what
11 kind of programs, what governs their releases.

12 And I started in corrections in
13 1984 as a deputy counsel, just when the first
14 sentencing-guidelines commission was finishing its
15 work, and I actually sat on one of the hearings.

16 Judge Newton, I believe you were
17 there.

18 And it was a lot of effort that
19 went into that project. I remember so many people
20 involved, I remember the hearing, and there was a
21 lot of controversy. There was, you know, defense
22 bar that felt it went one way too strongly, and
23 D.A.s that felt the other way, and judges. I
24 remember Mayor Koch at the time marching up to the

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2 podium and announcing with bravado that he didn't
3 think this was going anywhere, and said it was too
4 controversial, and there were so many different
5 things involved, and it -- it was unfortunate that
6 so much work went into that that did not lead to --
7 to something productive.

8 I've been, actually, counsel
9 to -- to this agency since 1989, and there are so
10 many different programs at play, that govern when
11 an inmate might be released, how long they're going
12 to stay in prison, and what I would hope to
13 contribute this -- to this -- to this group, is a
14 lot of the technical explanations as to how things
15 work, the Shock incarceration to CASAC to merit
16 time to supplemental merit time, and also give you
17 the background, as best I can, as a player that was
18 at least somewhat close to the process that
19 actually resulted in this legislation, what the
20 thinking was, and why we got to where we are, and
21 build on that, hopefully lead to some meaningful
22 changes and recommendations from this body.

23 COMMISSIONER O'DONNELL: Well,
24 thank you. That's expertise that we need, and

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2 we'll certainly utilize as we go forward with the
3 commission.

4 Mr. Bergamo.

5 MR. BERGAMO: Nice to be here. A
6 pleasure to welcome you. That's for the -- I said
7 that to Anthony, but he knows all the answers,
8 so -- I've had a foundation for twenty years,
9 operates in two hundred communities around the
10 country, the Federal Law Enforcement Foundation.
11 And we're working with about twenty police
12 organizations across.

13 And my interest is in seeing
14 sentences reduced severely for nonviolents, for
15 what is nonviolent. My group feels that way,
16 because if he wants narcotics, and someone's
17 standing there, some of them face incarceration,
18 that would be the best answer, but there should be
19 alternatives.

20 And I've been to enough police
21 funerals, as you all -- as you all have, you can't
22 get those people back. So, I'd like to find a way
23 and support it, that's a possibility. And since
24 I'm going to say severely, severely reduce the way

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2 we warehouse people. And if they have a gun, I can
3 see where we might have to severely increase it.

4 COMMISSIONER O'DONNELL: Thank
5 you.

6 Mike.

7 MR. GREEN: I'm Mike Green,
8 Monroe County District Attorney. And I've got
9 about twenty years experience as a prosecutor. And
10 hopefully I can bring some experience, I don't know
11 from the street, but from ground level, at least,
12 of the criminal justice system. I've handled every
13 type of case imaginable, from a misdemeanor case to
14 capital murder cases, and everything in between.
15 And I think that in my four years as district
16 attorney, if you ask someone from Monroe County
17 what -- what I've brought to that job, I think a
18 couple of things they'd tell you: One, I've been
19 very tough on violent crime. Before the
20 legislature enacted the changes in the gun law, I
21 enacted my own plea policy, that said we weren't
22 plea-bargaining with people who had loaded guns.
23 And we were asking for state prison sentences for
24 people who possessed loaded guns or used them to

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2 commit crimes.

3 On the other end of the spectrum,
4 I've been extremely supportive of drug court, and I
5 support mental health court, and I started a
6 program with the Boys and Girls Club, using
7 drug-forfeiture money to help young kids who were
8 at risk of joining gangs and winding up in the
9 system. And with the help of D.C.J.S. we started a
10 mentoring program with the department, the faith
11 community, the probation department, to work with
12 nonviolent offenders who otherwise would be looking
13 at prison for drug sales.

14 So, you know, I've tried, in my
15 work as district attorney, to take an approach that
16 I think fits the particular type of case and type
17 of offender we're dealing with. And I really hope
18 that I -- I can bring that perspective, and
19 hopefully, in some way, contribute to the results
20 that do just that.

21 And one of the things I've seen
22 is I've seen every type of result from the criminal
23 justice system. I've seen the great results. I've
24 watched people that probably didn't attend drug

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2 court graduation, and I've seen tremendous success
3 stories of people turn their lives around because
4 they were given an opportunity in drug court.

5 I've seen a young man, just two
6 weeks ago, I went to a college graduation where a
7 young man who grew up in one of the worst areas of
8 our city, with thirteen brothers and sisters, no
9 father or mother, who were -- and was there
10 graduating from college. And I've seen people
11 succeed against all odds, but I've also seen times
12 where, I think from an objective perspective,
13 people would say the system failed.

14 You -- you know, case about an
15 year ago that just jumps out, where a young man was
16 arrested for shooting a gun a car that was occupied
17 by a number of people. And over our objection, he
18 pled to the indictment and was put on probation.
19 Violated his probation by committing and being
20 convicted of a new crime. Received a short
21 sentence in the local jail for that, got out and
22 went on a spree where he kidnapped a family, locked
23 them in the trunk, drove them around the city;
24 robbed them; threatened to kill them; stuck a gun

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 2 in a baby's mouth; stuck a gun in a woman's mouth
 3 and threatened to kill her and sexually abused her.
 4 Just absolutely horrible, and you can't help but
 5 ask yourself there, you know, we had this guy on
 6 two prior occasion, and you know, couldn't we have
 7 done anything to prevent what happened?
 8 So, against that backdrop, my
 9 hope is that we do reform the statutes. There are
 10 many times now where prosecutors are put in
 11 situations where the law says someone should get a
 12 mandatory prison sentence. And then you -- we look
 13 to prosecutors to say why don't you somehow wink
 14 and not and make that go away? You do and end run
 15 around those laws so that we can get this person
 16 into the drug treatment they deserve. And then if
 17 it fails, they'll point back to the prosecutor and
 18 say gee, why did you do that?
 19 You know, we ought to have
 20 statutes if we feel certain people deserve to have
 21 the opportunity for drug treatment, then we should
 22 have laws and sentencing statutes that allow people
 23 to do that without, you know, the necessity of
 24 plea-bargaining or dismissing indictments, or

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 2 some agreement at the end that will try and take
 3 all of those view points into account, try and deal
 4 with the people on the one end that need to be
 5 dealt with severely to protect our community, and
 6 on the other end deal with those people who can and
 7 want to be helped.
 8 COMMISSIONER O'DONNELL: Thanks,
 9 Mike. And I'm -- I'm very pleased that you're on
 10 the commission, because you do have both the strong
 11 law enforcement side, and a side that believes that
 12 a lot needs to be done to prevent people from
 13 coming into the criminal justice system, and -- and
 14 protecting crime victims. So, I think it's a great
 15 perspective that you bring.
 16 Mike McDermott.
 17 MR. MCDERMOTT: Commissioner,
 18 thank you. Good morning, everyone. It's a
 19 pleasure to be here with you on this commission.
 20 Up until recently I was a
 21 prosecutor here in Albany County for a number of
 22 years. The thing that I found, as a -- as a
 23 prosecutor, to be most frustrating, was not -- in
 24 certain cases, not really knowing how much time a

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 2 taking pleas and then vacating pleas three years
 3 later. You -- you know, that -- to me, what kind
 4 of message does that send to the defendant, when,
 5 you know, you plead to one thing and then three
 6 years later you somehow magically undo that?
 7 That -- you know, I -- I agree, we've got, in some
 8 respects, a mess, in terms of the sentencing
 9 procedures we use. We have more of a mess when you
 10 look at how it is carried out actually in the
 11 courts.
 12 Historically I think prosecutors
 13 in many jurisdictions have been one of the leading
 14 forces behind drug courts, and be -- behind
 15 alternative courts. And the impact -- the feedback
 16 that I get from prosecutors around the state is
 17 that with the right cases and the right defendants,
 18 they're very much in favor of it. But at the same
 19 time we need to make sure that we take steps to
 20 protect the public from those violent criminals
 21 who, you know, like the example I just gave, you
 22 know, when released they just keep preying on ou
 23 citizens.
 24 So, hopefully, we can come to

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 2 defendant was going to end up serving as a result
 3 of either their conviction or their plea. And that
 4 was a very uncomfortable situation, especially when
 5 you're trying to speak to the family of a victim of
 6 a violent crime, or the -- the victim himself. It
 7 seems so ignorant that, you know, an attorney, a
 8 prosecutor, a judge is not able to tell either the
 9 defendant or the victim of the crime, with any
 10 certainty, exactly what that sentence is going to
 11 result in, as far as incarceration goes.
 12 I see Rich DeSimone's materials
 13 are here. I don't know if Rich is here. I've --
 14 I've never met him, but I've dealt with him over
 15 the phone many times, and he would be the only
 16 resource who could actually figure out, with any
 17 certainty, what the sentence was going to actually
 18 end up with. And that's an unfortunate situation.
 19 I hope that's a situation that, you know, we're
 20 able to make some inroads with here.
 21 The -- the other thought that I
 22 had, which has been already commented upon, is the
 23 need for more alternatives to incarceration, for
 24 more programs for offenders who actually deserve a

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2 break, who need help with an addiction, who have
3 mental health issues, young offenders, that are
4 productive programs, that hopefully, you know,
5 rehabilitate them, give them the skills that they
6 need to get back into society.

7 So, hopefully, those two, at
8 least, inroads will be dealt with during the course
9 of the hearing hearings of this commission. Thank
10 you.

11 COMMISSIONER O'DONNELL: Thank
12 you.

13 Judge Juanita Bing Newton was
14 actually counsel to the last sentencing committee,
15 back in 1985. So she bring continuity, as does
16 Tony, to the efforts that were undertaken -- very,
17 very serious efforts that were undertaken at that
18 time, and -- and also, can talk to us about lessons
19 learned from that experience.

20 Judge.

21 JUDGE BING NEWTON: I would be
22 happy, but I understand, Pam Griset is here, and
23 I'm going to -- you know, judges like to delegate,
24 so Pam can do that.

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2 the Criminal Court of the City of New York, which
3 is -- which is in itself a full-time job.

4 But I also have been working
5 justice initiatives on indigent defense matters,
6 and as you know from the chief judges' recent
7 commission on indigent defense, we have a lot of
8 very troubling and inflating issues, and it makes
9 -- that we're seeing at every level, including in
10 our town and village courts.

11 So, I think that the complexities
12 that lead this gray book to be multi-paged, when I
13 started as a prosecutor in -- in 1975, I think it
14 was a burden that got aside. So, some of the
15 things I hope we can accomplish is one, a degree of
16 clarity in -- in sentencing. It -- it's just
17 come -- become too complex when six people have
18 said so far no one knows what the defendant's
19 sentence is going to be, that -- that is prima
20 facie evidence, I submit, that we -- we have a
21 fundamental job to do.

22 As a judge, I think that we have
23 an outstanding judiciary and judicial discretion is
24 something that I think that we should have to look

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2 Good morning, and thank you,

3 Commissioner. It's a great pleasure to be here
4 in -- in a -- in a different role. Quite frankly,
5 in 1985, we thought we had solved all these
6 problems. So, alas, we were wrong, although I
7 would say, Tony, I think that it wasn't for naught.
8 I think many of the ideas that were contained in
9 that report ultimately became policy and/or laws
10 in -- in -- in our great state, so I think the
11 lesson is that we have to change with the times,
12 because the issues are ever evolving.

13 I come to this committee, I hope,
14 as a neutral magistrate, because that's actually
15 what judges ought to be and should be, but I think
16 I bring a discipline that comes from having served
17 as a prosecutor in Bronx County for eight plus
18 years, a history of working on the sentencing
19 commission, work that I do from an administrative
20 point of view, you know, and as was suggested,
21 sometimes that the business of sentencing someone
22 has an administrative component that we don't quite
23 comprehend when we're making changes in the law.
24 And certainly I bring that experience from managing

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2 very carefully at. Judges take their job very
3 seriously, and I think that the effort provide more
4 judicial discretion would be a goal for this
5 committee.

6 I think that -- I also want to
7 advocate though a process that looks more globally
8 at what is that we're doing in this effort. I
9 think that we should look beyond just maybe
10 tinkering with numbers and statues. Actually take
11 hard look at what it is we hope to achieve as an
12 institution, the government: We want public
13 safety, and -- and I want to be an advocate for
14 that, but also for public trust and confidence in
15 who we are and what we do. That's born out when we
16 have a process that's clearly understandable, not
17 only to victims, but to the community at large, and
18 to defendants and their families. And I think that
19 we want to have a sentencing structure that's more
20 focused, less complex, and -- and meets the ends of
21 the society. And I think we might even have some
22 interesting discussions about what those ends are.

23 And the National Center for State
24 Courts just completed a very interesting study on

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 2 what people think should be public policy with
 3 respect to crime. And I think sometimes we --
 4 we -- we underestimate what the public thinks is
 5 the best way for us to have public order restored
 6 in our community.

7 And lastly, I think that one of
 8 the most important, cutting-edge issues that we
 9 face today in society at large, are issues relating
 10 to reentry.

11 We have a tremendous number of
 12 people who are no longer beneficiary of the notion
 13 that the punishment should fit the crime, and once
 14 you've served your debt to society you can go forth
 15 and live a successful life. That's the issue of
 16 collateral consequences, and how they're affecting
 17 far too many people, particularly the young,
 18 particularly the poor, particularly minorities, is
 19 something directly related to sentencing policy.
 20 And I submit that we can have a successful public
 21 policy against crime and criminals and not forever
 22 hamper so many people who would end up as outcasts,
 23 because certainly to have a whole class of people
 24 who can't work -- who can't have housing, who can't

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 2 Cy Vance, we've heard that
 3 there's a lot of prosecutors and former prosecutors
 4 here, and Cy is one of those, but for a number of
 5 years he's also been serving as a criminal defense
 6 attorney, and also was a member of a sentencing
 7 commission in the state of Washington, so brings
 8 that perspective as well.

9 Cy.

10 MR. VANCE: Thank you, Denise.
 11 I -- I'm pleased not to go first so that I can
 12 borrow some of the many wise words that have
 13 already been said.

14 My experience as a former
 15 commissioner on a sentencing guidelines commission
 16 in Washington State for many years, was that people
 17 come into these -- to an organization like this
 18 with seemingly different backgrounds and seemingly
 19 different agenda, but that at the end, the public
 20 policy goals really tend to merge as both defense
 21 lawyers, judges, prosecutors, corrections and
 22 parole -- many of the goals ultimately end up being
 23 shared goals. And I think we see that already in
 24 the comments that have been made today. And I

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 2 have a normal life, is not any evidence that points
 3 to public safety; quite to the contrary. So,
 4 that's an issue that I hope will not be a footnote
 5 in our a debate and our discussion, Commissioner.

6 But it's a pleasure to be here,
 7 and to -- and to offer a different perspective, and
 8 I will say, as a final note, to the staff, my
 9 sympathies are with you, but that doesn't mean we
 10 won't ask you to do a lot more than you expect to
 11 do over the next short period of time.

12 Thank you.

13 COMMISSIONER O'DONNELL: Thank
 14 you, Judge. I -- I did meet with the judge
 15 previously, when I found out I was chair of this
 16 commission, just to get her ideas and insight into
 17 how we should proceed, particularly with the very
 18 stringent deadlines in the executive order, and she
 19 told me that we needed to be serious, we needed to
 20 have full-day meetings, we needed to roll up our
 21 shirt sleeves and -- and do a lot of work. And so,
 22 you -- you will see, as we go through the materials
 23 here, that I took her advice to heart.

24 But thank you very much, Judge.

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 2 think that, in my experience, is one of the most
 3 encouraging things, is that you have different
 4 parties to assist in coming together in a
 5 commission on dealing with something as sensitive
 6 and as powerful and as emotion-related as
 7 sentencing, the coming together from that process
 8 more than coming apart from that.

9 I'm a former prosecutor with the
 10 Manhattan D.A.'s office, where I handled everything
 11 from misdemeanors to homicides. And as a defense
 12 lawyer, I've handled everything from misdemeanors
 13 to homicides. In my -- I spent my -- my whole
 14 career, really, dealing with criminal justice
 15 issues and I am so pleased to be a part of this
 16 group. And if I, in trying to philosophically
 17 explain my approaches, whatever we do in the end, I
 18 think my goals -- my goal is that I hope we can
 19 achieve, in looking at the sentencing structure, a
 20 greater clarity and certainty, because I think,
 21 irrespective of where you come in at the start of
 22 this process, what we have now is neither clear nor
 23 certain for any party, and I think that that is a
 24 loss to the sentencing structure we currently have.

8 (Pages 26 to 29)

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 2 And I'm also very interested in
 3 our exploration of alternate sentencing structures
 4 as a means to reduce recidivism, as well as to
 5 effect cost savings, which I think is a -- which is
 6 a fact which this governor and this state and our
 7 institutions have to address going forward.

8 I'm very pleased, at least, to be
 9 here and really looking forward to it.

10 COMMISSIONER O'DONNELL: Well,
 11 we're very pleased to have you. And I'm delighted
 12 that one of the ex-officio members of the
 13 commission is Chairman George Alexander from
 14 parole. I know George brings a long history, both
 15 with parole and probation, and understands the
 16 impact that -- that parole has on sentencing, and
 17 also the important role that probation has as an
 18 alternative to sentencing.

19 So, George.

20 MR. ALEXANDER: Commissioner,
 21 thank you very much, and let me say good morning to
 22 everyone. It's certainly my privilege to serve
 23 with so many accomplished legal minds.

24 My expectations of what's going

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 2 sentencing, crack cocaine versus regular cocaine
 3 issues, and -- and trying to alleviate as many
 4 disparities and -- and creating some clarity in
 5 sentencing as much as we possibly can.

6 But I think, overall, to help to
 7 make some laws that create the public confidence
 8 in -- in the -- in our criminal justice system.

9 COMMISSIONER O'DONNELL: Thank
 10 you very much.

11 I'm also delighted that we have
 12 Senator Eric Schneiderman with us on the
 13 commission. I know Eric has a long history with
 14 criminal justice issues, and now, presently, is --
 15 is working on a number of criminal justice issues
 16 and legislation, and -- and particularly looking at
 17 the impact of firearms on the criminal justice
 18 system.

19 So, we're delighted to have you,
 20 Senator Schneiderman.

21 SENATOR SCHNEIDERMAN: Thank you.
 22 It's a pleasure and an honor to be here with you
 23 all. And I AM very, very pleased that the governor
 24 has convened this commission.

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 2 to come out of this is to create some laws that are
 3 just and appropriate, that allows for incentives
 4 for positive changes in behavior by our offender
 5 population, that will allow for consideration of
 6 victim issues, and is flexible enough that it will
 7 allow for the effective construct of a solid
 8 reentry planning, as the judge suggests,
 9 particularly for those who have been sent off to
 10 incarceration and are now coming back into our
 11 communities. And so, equipping them and so that
 12 they don't become part of that revolving-door
 13 process.

14 Looking forward to create a
 15 process that will allow for interest in alternative
 16 sentencing, be it probation, be it treatment
 17 programs, whatever the case might be, to
 18 appropriately deal with behaviors as opposed to
 19 taking a lock-'em-up mentality on each and every
 20 infraction.

21 Looking at some of the
 22 disparities in laws, and we know just recently the
 23 federal agencies have started looking at
 24 disparities in laws with regards to drug

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2 One thing we do not need is an
 3 effort to do a quick fix on the -- the complex
 4 problems that are posed to us by the executive
 5 order. I hope that we will be able to and -- you
 6 know, Joe and I are the politicians here, but I
 7 hope we'll be able to put politics aside and follow
 8 the facts, look at the overall empirical data, not
 9 get swept up in anecdotal evidence, and really do
 10 the kind of job that -- that I think the governor
 11 expects us to do.

12 I do have a long and unusual
 13 background in criminal justice. My first job
 14 after -- between college and law school was as a
 15 deputy sheriff in Massachusetts, working on setting
 16 up human services programs in a facility that had
 17 none. Among my accomplishments was an art program
 18 that was shut down when the -- they started
 19 producing ceramic guns that were extraordinarily
 20 realistic. But we also did set up the first drug
 21 and alcohol treatment program in the history of the
 22 facility.

23 I then went to law school and
 24 listened to my professors debate determinant versus

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 2 indeterminate sentencing, and it was remarkable
 3 how -- you know, the facts change, but the debate
 4 seems to stay the same.

5 And I was a law clerk in the
 6 federal court in New York, dealing with quite a few
 7 complex criminal matters, and then practiced law
 8 for twelve, thirteen years before I ran for the
 9 state senate, doing criminal defense work as well
 10 as civil litigation.

11 So, I've -- I've been in a lot of
 12 different sides of the system, and I must say,
 13 everything that's been said encourages me that we
 14 at least agree on the priorities. We have to deal
 15 with the fact that our sentencing structure is out
 16 of line with the rest of the country when it comes
 17 to nonviolent drug offenses. And I -- we have a
 18 report that was done by the Senate Democratic
 19 Conference in 2004 that documented the fact that
 20 New York was not just the harshest state, but was
 21 completely out of line with states that we think of
 22 as being much tougher, throughout the southern and
 23 western United States.

24 We have to deal with alternatives

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 2 produce something that changes the law, and that we
 3 don't produce a clever report that drops like a
 4 stone into the murky legislative sea in which
 5 Assemblyman Lentol and I ply our trade. It's
 6 the -- the best ideas do not necessarily prevail in
 7 Albany. The most clever proposals do not
 8 necessarily become law. So, I hope we will use
 9 this process to reach out to activists on all sides
 10 of these issues, and to try and get people invested
 11 in the process as we go, so that we can reach a
 12 consensus, not just among the people in this room,
 13 but something that we can carry through and enact
 14 into legislation.

15 COMMISSIONER O'DONNELL: Thank
 16 you.

17 Very briefly, I'm very pleased
 18 to -- to be on the commission with all of you. My
 19 background initially was as a social worker. I
 20 have an M.S.W. degree and worked in a number of the
 21 programs, or -- or similar programs, that I'm sure
 22 we'll be talking about, most notably in a drug
 23 treatment program for -- for several years, in
 24 community mental health organizations.

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 2 to incarceration. They're cheaper, they save
 3 lives, and particularly, having worked in the --
 4 in -- in -- I've noticed, and I've constantly been
 5 aware of this: There's a problem with prosecutors
 6 and judges being made aware of what alternatives
 7 are out there. We don't have a good flow of
 8 information about what's effective, what's not
 9 effective, and what's available.

10 We need to focus on reentry, as
 11 has been mentioned. I -- you know, prisoners get
 12 out and I think that it's unassailable that good
 13 reentry programs prevent recidivism.

14 And finally, we need to examine
 15 the operations of our parole board. I notice that
 16 the last sentencing commission called for the
 17 elimination of parole completely, which I -- I --
 18 I'm not convinced is -- is the right result, but it
 19 certainly is important for us to ensure that --
 20 that -- that parole is not used as a form of
 21 resentencing.

22 So, I -- I look forward to
 23 working with all of you. I do hope, if I can add
 24 one final point, that our goal is to actually

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 2 And after law school, clerked for
 3 an appellate division judge, and then went to work
 4 in the U.S. attorney's office. So, my experience
 5 is really with sentencing on the federal side. I
 6 worked in the office for a few years before
 7 adoption of the sentencing guidelines, and then for
 8 about fifteen or sixteen years under the federal
 9 sentencing guidelines. So, I bring that
 10 perspective, which is quite different from the --
 11 the New York sentencing structure, to the
 12 commission with its plus and minuses. But it's an
 13 interesting alternative to sentencing as it's taken
 14 place in New York.

15 I appreciate, Assemblyman Lentol,
 16 your compliments on my willingness to take on this
 17 role. I think I was maybe directed to -- to be
 18 chair of the commission, and I was wondering why
 19 until I realized that there was no appropriation
 20 for staff for the commission, and fortunately, at
 21 D.C.J.S., we are the policy advisors to the
 22 governor, and -- and really to the state on
 23 criminal justice issues. And I'm very fortunate to
 24 have a very rich staff at the agency, some of whom

10 (Pages 34 to 37)

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2 were involved in the last sentencing commission.

3 But we have a research staff
4 under Donna Hall, and Donna's agreed to serve as
5 research director here for the commission.

6 And we have a wonderful legal
7 counsel, Gina Bianchi, who's offered to serve as
8 executive director, to help us organizationally
9 conduct our work.

10 And then I -- I made a urgent
11 plea to the governor's office that we seriously
12 needed to attract a topnotch attorney with
13 experience with commissions on sentencing issues,
14 to be able to serve as executive -- or -- or as
15 legal counsel to the commission. And I searched to
16 O.C.A. and found John Amodeo, who is very
17 distinguished, very qualified for the position. We
18 did hire him at D.C.J.s specifically for this
19 position, to serve as legal counsel to the
20 commission. And --- and John brings both a very
21 neutral perspective, coming from the courts, but
22 also a wealth of experience, and I'm very, very
23 pleased to have him.

24 In addition, Michael Barrett, who

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2 see, knowing that -- that we had a very tight
3 schedule and a lot to accomplish, what we did is
4 come together and really try to identify experts
5 out there in the community who would be willing to
6 take their time and speak to the commission on a
7 number of the issues.

8 We're not going to forget
9 reentry, I agree it's a very important part of what
10 we're doing, alternatives to incarceration. But at
11 the very beginning I think it's important that all
12 of us be fully educated on the New York sentencing
13 laws and structure, and -- and how you compute
14 sentences at -- at DOCS, and the role of the parole
15 board, and the research that is out there and is
16 currently available.

17 And so, for the -- the -- the
18 first few weeks, what we are proposing is a
19 schedule that will bring in many of these speakers,
20 and we'll go over that after we finish our formal
21 presentation this morning and go into executive
22 session, where we can discuss the workings of the
23 commission.

24 I'd also like to take a few

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2 will serve as staff counsel to the commission.

3 Michael.

4 And Patti Greco, our paralegal at
5 D.C.J.S., who will provide paralegal assistance and
6 help coordinate. So, if you need help with -- with
7 your travel expenses or schedules or materials or
8 whatever, you can call Patti. We do have a list of
9 the staff people in your materials today. You'll
10 have their numbers. Like all of you, I have a day
11 job during the week, and so, if you need anything
12 and you can't get ahold of me, please reach out to
13 this very talented staff.

14 I -- I will say that we will be
15 reaching out to all of you. In the initial letter
16 I sent to you, I asked you for recommendations of
17 people that may be available to work on the
18 commission. I know DOCS certainly has come
19 through, with both Richard DeSimone and Tony
20 Annucci, and -- to make them available. Also help
21 on the research side with the DOCS research team,
22 we'll be asking parole. But we'll be asking all of
23 you as well. We're interested and have reached out
24 to some of the bar associations, and as you will

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2 moments to introduce several people in the
3 audience. Tina Sanford, who is here.

4 Tina, are you here? Thank you.

5 Tina's been nominated by the
6 governor to serve as chair of the crime victims
7 board, and upon confirmation of the senate, which I
8 hope will occur before the end of the session, will
9 serve as an ex-officio member of the commission.
10 So, I asked Tina to join us as an observer so that
11 she can keep up to -- to date on the workings of
12 the commission.

13 Lai Sun Yee is the assistant
14 deputy secretary for criminal justice.

15 And we may be joined, I don't see
16 him here right now, but they may be in and --
17 and -- or -- or out, Robin Forshaw and Steve
18 Krantz, who are deputy counsels to the
19 government -- governor for criminal justice issues,
20 who may join us from time to time and provide
21 advice or assistance if requested from the
22 commission. They're very knowledgeable in criminal
23 justice issues.

24 As you know, our time line is

11 (Pages 38 to 41)

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 2 very aggressive. And we have quite a bit to cover
 3 before submitting our preliminary report to the
 4 governor, the legislature, and the chief judge by
 5 September 1, 2007. Hopefully we'll all look back
 6 fondly on this summer as our summer day camp
 7 experience in New York sentencing reform here in
 8 Albany. But while many of you have -- have
 9 probably had thoughts and plans for a relaxing
 10 summer, I'm hopeful that you'll be -- be willing to
 11 make a commitment to set aside one full day a week
 12 during the summer months, so we can complete the
 13 first phase of our work, to produce a preliminary
 14 report to the governor and legislature and chief
 15 judge by the September 1 deadline, for several
 16 reasons.
 17 First, and -- and some of this
 18 has already been discussed as we went around the
 19 room, but if we are able to make concrete
 20 recommendations regarding some, if not all,
 21 sentencing issues, by September 1st, it will enable
 22 the governor and legislature to enact sentencing
 23 reforms in the 2008 legislative session, and make
 24 some meaningful changes to the sentencing laws in

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 2 the coming year.
 3 Second, I'm mindful of the fact,
 4 and -- and we have discussed this briefly, that the
 5 last sentencing commission in 1985 met for
 6 approximately eighteen months, produced a very
 7 scholarly and thoughtful report and recommendations
 8 for sentencing reform, but none of -- of what was
 9 proposed was enacted. Although, as the judge
 10 pointed out, eventually some of the good ideas did
 11 make its way into sentencing. But my hope, as has
 12 been reflected by many of -- of the commissioners
 13 remarks this morning, is that we will be able to
 14 achieve general consensus on some recommendations,
 15 which will provide a basis for real meaningful
 16 sentencing-reform legislation, recognizing that it
 17 may be impossible for us to achieve total consensus
 18 in every area.
 19 And if we work toward that goal
 20 over the next three months, in rather an intensive
 21 way, and incorporate our work into a preliminary
 22 report, as far as we can get, not in a rushed
 23 fashion, but in a deliberate fashion, we'll have
 24 the opportunity to receive impact -- feedback from

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 2 the legislature, various stakeholders in the
 3 community, and know whether there is consensus for
 4 the direction that the commission is headed, or
 5 whether we need to go back to the drawing board.
 6 I -- I intend, when we do go into
 7 executive session this morning, to have fully aired
 8 these issues, as well as our schedule, what is
 9 proposed, to get your input into all of our
 10 proposals, your suggestions on speakers and how we
 11 should proceed.
 12 But today, just so you know
 13 what -- what is in store for us later on, we have a
 14 very filled day today of tremendous speakers.
 15 We're fortunate to be joined by a number of real
 16 sentencing experts, who have generously given of
 17 their time. We're going to hear from Paul
 18 Shechtman, one of my illustrious predecessors at
 19 D.C.J.S., who will speak to us about current New
 20 York State sentencing structure.
 21 Donna Hall is going to -- our
 22 director of research, will address current trends
 23 and correctional practices in sentencing. We know,
 24 and fully expect, that as a commission there will

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 2 be research that we may want to have conducted for
 3 us. I think we're going to have to make those
 4 decisions very early on in order to take advantage
 5 of the research staff's capabilities to inform our
 6 decisions. But more importantly, we need to know
 7 what exists out there, and -- and to make sure
 8 that -- that -- that we are looking at all
 9 available data in --in the recommendations that we
 10 hope to -- to make in our report.
 11 We're also going to hear from
 12 Rich DeSimone, as everyone has recognized, the
 13 authority in the state for determining sentences
 14 within the correctional system. Rich will discuss
 15 some of the complications, which we've alluded to,
 16 in calculating sentences to state prison.
 17 And then we're very fortunate, as
 18 Judge Newton has said, to hear from Professor
 19 Pamala Griset of the University of Central Florida,
 20 who has written extensively about sentencing
 21 reform, and will present a historic overview of
 22 previous efforts at sentencing reform in New York.
 23 I hope to get your
 24 recommendations on speakers for future meetings.

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 2 So, at this point we're going to
 3 begin our -- our work, and I'd like to call on John
 4 Amodeo, our counsel to the commission, who is going
 5 to review executive order number ten, our mission
 6 and directives to the commission from the governor.

7 Thanks, John.
 8 ASSEMBLYMEMBER LENTOL: Madam
 9 Chair, while Mr. Amodeo is going to the podium, I
 10 just wanted to point out to you, in case you didn't
 11 know it, that his most notable achievement -- Mr.
 12 Amodeo's achievement was that he was the former
 13 counsel to codes.

14 COMMISSIONER O'DONNELL: Well,
 15 that -- that -- that will be duly noted. I also
 16 know that the legislature is in session, and I'm
 17 very apologetic that we have to start our work
 18 knowing that there's a lot going on in the
 19 legislature. So, I know that you will be in and
 20 out, and we fully appreciate that and apologize to
 21 you.

22 ASSEMBLYMEMBER LENTOL: And may I
 23 just -- and in -- in light of that, say that my
 24 counsel, David Cohn, as well as Simone Levine

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 2 (phonetic spellings), are here as my deputies in
 3 case I'm needed to be elsewhere, to fill in for me.

4 COMMISSIONER O'DONNELL: All
 5 right. Thank you very much.

6 MR. ANNUCCI: And -- and I have
 7 Amy Butt, and then our counsel, Chris Dickinson
 8 (phonetic spellings), will be assisting me as we go
 9 forward.

10 COMMISSIONER O'DONNELL: Thank
 11 you.

12 Okay, John.

13 MR. AMODEO: Okay. First of all
 14 I want to -- I'm not sure if this is on, hello.

15 First of all, I want to thank
 16 Commissioner O'Donnell for providing me with the
 17 opportunity and privilege to serve as chief counsel
 18 to this commission. I consider it both an honor
 19 and an awesome responsibility. I know that the
 20 commission has a great deal of work to do in a very
 21 short time, and I'm hoping that I'll be able to --
 22 that I'll be up to this task.

23 Commissioner O'Donnell has asked
 24 me basically to explain, or -- or go over the --

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 2 the principle provisions of executive order ten.
 3 And I've asked Donna Hall to help with me with the
 4 slideshow, because I -- I don't think I can do
 5 these two things -- I have enough trouble doing one
 6 thing at once, to do two is -- is going to be
 7 tough. So, Donna has agreed to just switch the
 8 slides for me as we go along. And there are only
 9 nine slides.

10 I'm going to begin actually by --
 11 I -- I want to make it clear to the members of the
 12 commission that -- that, with respect to this
 13 order, as -- in my prior life as assistant deputy
 14 counsel for criminal justice for the office of
 15 court administration, I was called upon often,
 16 when -- when the legislature passed significant
 17 criminal justice legislation, to prepare memos
 18 essentially explaining these criminal justice -- a
 19 lot of the sentencing provisions, the Drug Law
 20 Reform Act of 2004, the recent Civil Commitment
 21 Chapter Seven of '07, and -- and at O.C.A. my
 22 office always took the position that it was not our
 23 job to tell the judges what -- what these new
 24 statutes mean, but rather just to explain what --

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 2 what -- what -- what the statutes say. It really
 3 is the judge's job to decide what a new criminal
 4 statute means.

5 And I -- I -- I'm taking the same
 6 view here. I think it's appropriate, with respect
 7 to this commission, and this order, for me not to
 8 try to tell the commission what I think this order
 9 means. I think that the commissioners, you are
 10 perfectly capable, and it's appropriate for the
 11 commissioners to decide what this order means. So,
 12 I'm going to try to limit my remarks to what the
 13 order actually says. And that, believe me, is
 14 tough enough to do, as you will see. And
 15 unfortunately, unlike with -- with criminal
 16 legislation, we have no legislative history for
 17 this order; we have no floor debate. All we have
 18 are the four corners of the text.

19 Okay. So, the -- the order
 20 begins, and I'm going to go to the first slide,
 21 which is at page two, with a series of whereas
 22 clauses, or opening clauses, and I think it's
 23 important to --.

24 FROM THE FLOOR: John, we have a

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 2 copy of the order in the materials that we have.
 3 MR. AMODEO: Yes, thank you.
 4 Now, these whereas clauses -- oh,
 5 one of the point I want to make, with respect to
 6 the text you're going to see on these slides, I was
 7 very careful, or I tried to be as careful as I
 8 possibly could, not to paraphrase the text of the
 9 order, and so, virtually all of the text you're
 10 going to see on these slides, with some very, very
 11 minor insignificant exceptions, the text mirrors
 12 what is actually in the order.
 13 So, with respect to the whereas
 14 clauses, as you can see, the first one provides
 15 that "sentences in -- in New York should
 16 appropriately reflect the -- the seriousness of the
 17 offender's crime."
 18 The second whereas clause,
 19 "sentences should meet the multiple objectives of
 20 punishment, deterrence, rehabilitation,
 21 retribution, and isolation." Now, other word
 22 "isolation," I -- I said I'm not going to interpret
 23 any of this, but I just want to point out that some
 24 people who've reviewed the order have suggested to

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 2 out, and point out that recent amendment, very
 3 briefly, in case you want to use that as part of
 4 your discussion when you're discussing this order.
 5 Subdivision 4 of Section 1.05,
 6 which I don't have a slide for, but I'll read it
 7 quickly, says that "the general purposes of the
 8 penal law include to differentiate unreasonable
 9 grounds between serious and minor offenses, and
 10 to -- and to prescribe proportionate penalties
 11 therefore."
 12 Subdivision 5 of Section 1.05, a
 13 purpose of the penal law is "to provide for the --
 14 an appropriate public response to particular
 15 offenses, including consideration of the
 16 consequences of the offense for the victim,
 17 including the victim's family and the community."
 18 And you'll see some of that language repeated in
 19 this order.
 20 And finally, Subdivision 6, which
 21 is the -- is the subdivision that was amended
 22 effective one year ago tomorrow. And by the way,
 23 that amendment was the first time that this section
 24 of the penal law has been amended in almost

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 2 me that a synonym isolation might be
 3 incapacitation. I don't know what -- if that's
 4 what the drafters of the order intended. But I
 5 also want to point out one other thing with respect
 6 to this second whereas clause, and that is the
 7 multiple objectives set forth in this second
 8 clause.
 9 The commission may, when --
 10 when -- when you -- when you start discussing this
 11 order, you may want to look at a provision of the
 12 penal law, Section 1.05, which is in your gray
 13 books, and it is a very infrequently sighted
 14 provision of the penal law. It's actually the
 15 second section of the entire penal law. And that
 16 section was recently amended, actually, one year
 17 ago tomorrow this -- this amendment took effect.
 18 And I'm just -- I'd just want to point out to the
 19 commission that that Section 1.05, entitled general
 20 purposes of the penal law, it has six separate
 21 subdivisions, but three -- the last three
 22 subdivisions of Section 1.05 actually do speak to
 23 the purposes of -- of -- of the penal law, with
 24 respect to sentencing. And I want to point those

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 2 twenty-five years. So for some reason the
 3 legislature saw fit to add this language that I'll
 4 point out.
 5 Subdivision 6 states "to ensure
 6 that" -- that one of the purposes of the penal law
 7 is "to ensure the public safety by preventing the
 8 commission of offenses through the deterrent
 9 influence of the sentences authorized, the
 10 rehabilitation of those convicted," and this new --
 11 this clause was the clause added -- the following
 12 clause was added a year ago, "the promotion of
 13 their successful and productive reentry and
 14 reintegration into society -- society, and their
 15 confinement when required, in the interests of
 16 public protection."
 17 So, I just wanted to point that
 18 section out, again it's point -- 1.05, because I
 19 think it does relate to this second whereas clause.
 20 The next clause in the whereas
 21 part of this order states that "an equitable system
 22 of criminal justice must ensure that crimes of
 23 similar seriousness result in similar sanctions for
 24 similarly situated offenders."

14 (Pages 50 to 53)

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 2 And the -- the next slide, page
 3 three, this continues the -- the whereas clauses,
 4 "significant disparities in how similar crimes are
 5 treated diminish the public's trust and faith in
 6 the criminal justice system."
 7 The second to last whereas clause
 8 has already been referred to by almost every member
 9 of the commission today. "The system of criminal
 10 sanctions in New York has grown increasingly
 11 complex," if anything that may understate the case,
 12 but -- and -- and as you -- as you'll hear from
 13 Paul Shechtman and Richard DeSimone later, they
 14 will go into some specifics about how -- how
 15 complex the system really is
 16 And finally, "a comprehensive
 17 review of New York's sentencing structure will
 18 provide the state with guidance to ensure the
 19 imposition of appropriate and just sanctions, and
 20 to make the most efficient use of the correctional
 21 system and community resources."
 22 The next slide I've entitled
 23 duties of the commission, and what I did is I -- I
 24 went through the order and I tried to isolate what

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 2 this order says the commission must do or shall do.
 3 And I divided it into two subcategories. The first
 4 really is the comprehensive review, including
 5 review and evaluation. And the second, which I'll
 6 get to later is recommendations.
 7 With respect to the first, the
 8 order says "The commission shall conduct a
 9 comprehensive review of New York's existing
 10 sentencing structure, sentencing practices,
 11 community supervision, and the use of alternatives
 12 to -- to incarceration, including a review and
 13 evaluation of" and then they lists several things
 14 to be reviewed and evaluated, the first is
 15 "existing statutory provisions for sentencing
 16 offenders to, and releasing offenders from,
 17 incarceration." And then there's a laundry list of
 18 topics indeterminate/determinate sentences;
 19 definite sentences; parole supervision; merit time;
 20 supplemental merit time; Shock; temporary release;
 21 presumptive release; conditional release; and
 22 maximum expiration.
 23 The duties continue on the next
 24 slide, slide five. "The commission is to review

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 2 and evaluate existing sentencing provisions as to
 3 their uniformity, certainty, consistency, and
 4 adequacy." Now, these four factors are mentioned
 5 again in the recommendations portion of the order,
 6 which I'll get to in -- in just a minute.
 7 And finally, the next slide, with
 8 respect to review and evaluation: "The commission
 9 is to review and evaluate the impact of existing
 10 sentences upon the criminal justice system,
 11 including," again a laundry list, "state prison
 12 capacity, local jail capacity," which I would note
 13 includes Rikers Island in New York City, "community
 14 supervision resources, judicial operations, and law
 15 enforcement responsibilities."
 16 Number seven, "the commission
 17 shall review and evaluate the relation that a
 18 sentence or other criminal sanction has to public
 19 safety and the likelihood of recidivism."
 20 And finally, "The commission
 21 shall review and evaluate expected future trends in
 22 sentencing."
 23 Now, with respect to the
 24 recommendations that are contained in the order,

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 2 that is the -- the -- the order directs the
 3 commission to make certain recommendations. That's
 4 at slide seven and as -- as you can see "The
 5 commission shall make recommendations for
 6 amendments to state law that will maximize" and
 7 here -- here these four factors appear again,
 8 "uniformity, certainty, consistency and adequacy of
 9 a sentencing structure, so that the punishment is
 10 aligned with the seriousness of the offense, public
 11 safety is protected through the deterrent effect of
 12 the authorized sentences and the rehabilitation of
 13 offenders," and finally, "appropriate consideration
 14 is given to victims, their families, and the
 15 community."
 16 The next slide I -- I entitled
 17 powers of the commission. And again, I went
 18 through the order and tried to isolate what -- what
 19 authority this order appears to give this
 20 commission, and does give the commission, and I
 21 just set these forth in -- in a series of bullets.
 22 First of all, the commission has
 23 the authority to request documents under executive
 24 order ten; to conduct public hearings; to take the

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 2 testimony of witnesses; to require the cooperation
 3 of every agency, department, office, division or
 4 public authority of this state; to require such
 5 agencies, departments, offices, and divisions to
 6 furnish such information and assistance as the
 7 commission determines is reasonably necessary; and
 8 to take any other actions deemed necessary to carry
 9 out its functions.

10 Now, finally, the -- the last
 11 slide, number nine, I -- I -- again isolated the
 12 language of the report that talks about the -- the
 13 commissions reports. And the commission
 14 establishes, as you know, a time line. It says
 15 that the -- "the commission shall issue an initial
 16 report of its findings and recommendations on or
 17 before September 1, and issue a final report on or
 18 before March 01 of '08."

19 Finally, with respect to the
 20 language in the order relating to commission
 21 reports, there is actually only one specific clause
 22 that says exactly what the reports shall include,
 23 and that is at -- at the bottom of this last slide,
 24 "The report shall include, but not be limited to,

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 2 an evaluation of the impact of existing sentences
 3 on the length of incarceration; the impact of early
 4 release; the impact of existing sentences on the
 5 length of community supervision; recommended
 6 options for the use of alternatives to
 7 incarceration; and an analysis of the physical
 8 impact of recommendations."

9 Now, even though that last
 10 provision on this slide, which -- which relates to
 11 specific language in the order that says what
 12 the -- what the report shall -- the reports,
 13 plural, shall include, and it does use the plural
 14 when it -- when it lists these -- these factors,
 15 presumably, the other provisions of the order, that
 16 I -- that I spoke about earlier, also should be, or
 17 certainly may be included. All of those -- all of
 18 those recommendations that were cited in the -- in
 19 the order, and you know, the -- in the early part
 20 of the slide, the duties of the commission, the
 21 comprehensive review and the whole laundry list, my
 22 assumption is, and -- and I'll leave this, again,
 23 to the commission, is that the -- the order does
 24 not intend that those shall be left out of either

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 2 the preliminary or the final report.

3 So, that's pretty much it for
 4 what this order says in terms of the -- the -- the
 5 pertinent duties and objectives of the commission.

6 I'm now going to turn the floor
 7 back over to Commissioner O'Donnell so that she can
 8 entertain, or we can entertain, any questions
 9 that -- or comments that you might have, regarding
 10 the order.

11 Thank you.

12 COMMISSIONER O'DONNELL: Thanks
 13 John.

14 You know, one of the -- the
 15 outstanding features in John's background is his
 16 role in the chief administrative judges advisory
 17 committee on criminal law in the future, and also
 18 he is co-counsel to the chief justice, past work in
 19 the future of probation, and on the future of
 20 indigent defense services. So, John has a lot of
 21 experience serving as staff counsel to the
 22 commission. And I -- you know, ask all of you, if
 23 you have legal questions, if you have suggestions
 24 on how John can assist us in our work, you can just

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 2 ask me or John, and I'm sure he'll be glad to do
 3 that.

4 And at this point I'd like take
 5 just a five-minute break so that everybody can get
 6 a refill of their coffee. We are going to end the
 7 public portion of our meeting at this point, and go
 8 into the executive session to discuss the format,
 9 the workings of the commission.

10 I know you're going to have to
 11 leave, and I'd like to get as much of your time as
 12 we can, so that you can get some input into that
 13 discussion, before you leave. But we'll have that
 14 portion of our program, we will reopen again,
 15 publicly, for our speakers, who are beginning at
 16 one o'clock today, there are many members of the
 17 public or press that are interested in our meeting.

18 So, let's take five minutes and
 19 then come back and we'll get to work.

20 (Off-the-record discussion)

21 COMMISSIONER O'DONNELL: Yes, I
 22 think it's fine for everyone's staff --

23 FROM THE FLOOR: Okay.

24 COMMISSIONER O'DONNELL: --

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 2 people to can sit in, and that's actually on the
 3 agenda --
 4 FROM THE FLOOR: Okay.
 5 COMMISSIONER O'DONNELL: -- of
 6 what we want to do.
 7 FROM THE FLOOR: Okay.
 8 COMMISSIONER O'DONNELL: You
 9 know, I just want to start out by saying that I am
 10 a very democratic chairperson, and I believe that
 11 the commission needs to make all of the significant
 12 decisions about how we operate. But given the
 13 timeframe I did spend a lot of time, and after
 14 talking to Judge Newton about the fact that last
 15 time they got kind of hung up on details of
 16 procedure and -- and organization, I did try to do
 17 as much organizational work as I could as a
 18 proposal to all of you. So, if you don't like it,
 19 you want us to scratch it, you want us to -- to
 20 organize it differently, that is the prerogative of
 21 the commission. But I do want to go through what
 22 we did put together, how we did try to organize
 23 matters, and -- and -- and really enter into a
 24 meaningful discussion about it.

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 2 organizational details, how we want to function. I
 3 think, in the future when we have discussions, when
 4 we do deliberate, when we do our work of what's
 5 going to go into our report, my personal view is
 6 that it will be easier to do that if we have closed
 7 sessions.
 8 I know we've run into issues
 9 with -- for instance, members of the judiciary,
 10 some of whom might share candid views about
 11 sentencing laws with us in a closed environment,
 12 but certainly couldn't do it in a public
 13 environment, and that may be the case with other
 14 people as well. So, I would like to, you know, get
 15 your feelings on how it is that you would like us
 16 to proceed, and whether, you know, we think -- you
 17 think we should operate as a, you -- you know,
 18 closed hearings, overall; whether we should try to
 19 do both; whether we should entirely open the work
 20 of the commission.
 21 Any thoughts or discussions?
 22 Joe.
 23 ASSEMBLYMEMBER LENTOL: Well,
 24 I'll just say generally, having -- having done this

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 2 The first item I want to start
 3 with just is the agenda today, because this has a
 4 number of bullets of matters that I wanted to
 5 discuss with the commission in executive session,
 6 and have the commission make some deliberations and
 7 findings about it.
 8 And the first issue is how we
 9 conduct our business. The commission is not
 10 subject to the open-meeting law, as a matter of
 11 law. I am told that many commissions typically do
 12 not operate openly, because it can have an effect
 13 on the -- the candor of the deliberations. On the
 14 other hand there certainly is interest, by the
 15 media and by the public, in the work of the
 16 commission. So, there is a decision to be made
 17 about whether we operate in an open way; whether we
 18 do have closed meetings; whether, you know, we do
 19 both. I mean, there is a possibility here, and the
 20 way I've structured this today, without having the
 21 benefit of the commission's feelings on it, is to
 22 essentially have an open meeting with respect to
 23 our speakers, our opening remarks, but then go into
 24 executive session, so we can kind of hammer out our

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 2 all my life, in terms of trying to hammer out
 3 public versus private, conference versus on the
 4 floor of the assembly discussing issues, it's --
 5 it's not a new concept.
 6 COMMISSIONER O'DONNELL: Right.
 7 ASSEMBLYMEMBER LENTOL: And I
 8 believe that what we have -- what we really have to
 9 do is keep the public forum, the discussion, the
 10 speakers, public. However, if we're going to
 11 discuss sensitive matters with regard to how we're
 12 really going to hammer out an agreement with regard
 13 to very detailed sentencing changes, I think that
 14 it behooves us to be in executive session, at least
 15 to argue amongst ourselves without having the
 16 public around. As -- as harsh as that may seem,
 17 it's more productive to getting things done.
 18 COMMISSIONER O'DONNELL: Uh-huh.
 19 ASSEMBLYMEMBER LENTOL: That's
 20 just the general impression I have from what you
 21 said.
 22 COMMISSIONER O'DONNELL: Uh-huh.
 23 MR. ALEXANDER: I -- I concur. I
 24 think that there is certainly an opportunity for

17 (Pages 62 to 65)

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 2 the public to learn, through the media, you know,
 3 that we are addressing those concerns that are
 4 going to affect their daily lives. But as the
 5 senator suggests, having the cover of executive
 6 session to be able to discuss each of the -- those
 7 fields, and those ideas that go into trying to
 8 reform our sentencing processes. And so certainly
 9 we would need that in order to get a full, I think,
 10 expression of people's views and testaments with
 11 regard to what is that we're charged to do.
 12 COMMISSIONER O'DONNELL: Any
 13 other thoughts or views? Anyone feel that we
 14 should entirely close the proceedings? Or entirely
 15 open them?
 16 Okay. Well then, I -- I agree
 17 with you both. What I'll try to do is get you the
 18 agenda before the meeting. I'll mark the portions
 19 of it that are open to the public and the parts
 20 that will go into executive session or
 21 deliberations, and we'll notify the press
 22 accordingly. And so, if -- if people want to come
 23 they can. Staffing needs --
 24 JUDGE BING NEWTON: I just have

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 2 discussion about that issue in -- in public. And
 3 I'm not saying that you should -- we have to
 4 outline with that degree of specificity of the
 5 agenda that we will do in closed session, but I
 6 don't think we should take up a topic in closed
 7 session that we haven't at least discussed at some
 8 level in -- in open session. So, that the closed
 9 sessions don't take on the aura being secret
 10 sessions.
 11 ASSEMBLYMEMBER LENTOL: Yeah, I
 12 didn't flesh out my thoughts, but I think the Judge
 13 is right, and -- and that's exactly what I'm
 14 driving at, that we should have all of the public
 15 discussions you want with everybody in the room
 16 present, regarding our positions on -- our various
 17 positions on issues. But if -- when we're finally
 18 down to the wire, and we want to have a work
 19 product, everybody will know that we're discussing
 20 the issues that we discussed in public, with an
 21 effort to try and reach an agreement.
 22 COMMISSIONER O'DONNELL: Upon --
 23 ASSEMBLYMEMBER LENTOL: So that
 24 we've already had an opportunity to discuss it

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 2 one -- one --
 3 COMMISSIONER O'DONNELL: Yes.
 4 JUDGE BING NEWTON: -- I hope,
 5 refinement of that. That at the -- at the least we
 6 might want to consider letting the public know what
 7 we are going to be talking about in -- in -- in
 8 closed session. I think that -- so that there's at
 9 least an opportunity to have some public exchange
 10 of ideas on that issue, that we might then want to
 11 resolve in a private fashion.
 12 COMMISSIONER O'DONNELL: Okay.
 13 So, if there's an opportunity -- if there's an
 14 opportunity to do that, I could put that on the
 15 agenda that would go out, that we're in closed
 16 session and we're discussing reentry, or we're
 17 discussing whatever the topic might be or --.
 18 MR. ALEXANDER: It would be more
 19 like a summary of what was discussed?
 20 JUDGE BING NEWTON: Not so
 21 much -- I mean, I'm -- and I'm not looking for
 22 that. I'm just sort of saying that anytime we
 23 touch on something in closed session I think it
 24 might be a good policy if we could have some

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 2 fully in public. Just like we'll be doing in the
 3 legislature today with the various joint conference
 4 committees that we have, and -- but in the final
 5 analysis, the -- the conferees will probably have
 6 to get together in some kind of an informal way, to
 7 reach an agreement.
 8 COMMISSIONER O'DONNELL: Uh-huh.
 9 Well, I'll tell you the one concern I have, and --
 10 and this was more reading the commission report
 11 previously. Because I -- I guess I don't want to
 12 read -- read a running commentary on Assemblyman
 13 Lentol wants this, and Anthony Bergamo opposes
 14 that, and Judge Newton feels this way, and -- you
 15 know, I don't think that would be really helpful to
 16 us, given the time frame that we're working under.
 17 And so, that's my only concern is that I'd like
 18 the -- the freedom for us to have our discussions
 19 and air our views in private, quite frankly, to try
 20 to reach some consensus, not in secret, or that we
 21 don't want the public to know, but that I just
 22 think it would just be a distraction that wouldn't
 23 be particularly helpful to us.
 24 That's my view, but I don't know

18 (Pages 66 to 69)

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 2 how, you know, everybody else feels about it.
 3 MR. BERGAMO: Why -- why not
 4 simplify and take the best of both suggestions.
 5 COMMISSIONER O'DONNELL: Yes.
 6 MR. BERGAMO: And having a
 7 public -- this -- this is amount of time every
 8 meeting is allocated for members of the public who
 9 wants to speak, who's qualified to speak, and
 10 that's it. We don't have to go through -- tell
 11 them every detail we're going to discuss that
 12 today.
 13 COMMISSIONER O'DONNELL: Uh-huh.
 14 MR. BERGAMO: Essentially,
 15 it's -- it's one hour for the public to appear.
 16 COMMISSIONER O'DONNELL: I think
 17 that probably -- it -- it won't so much be the
 18 public appearing at this point, or hearings. It'll
 19 be, probably scheduled speakers that come to speak
 20 to us on particular issues. Whether we have public
 21 hearings, I think that's something that we'll take
 22 up after we have our preliminary report done. I
 23 would assume that there's a likelihood we probably
 24 would have public hearings, but I think that would

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 2 be after our August 30th deadline, when we get into
 3 that point.
 4 MR. BERGAMO: I agree. I'm just
 5 saying a compromise.
 6 COMMISSIONER O'DONNELL: Uh-huh.
 7 Okay. Well -- well, why don't we -- I think maybe
 8 we need to feel our way here a little bit, so why
 9 don't we do some agendas and let you, you know, get
 10 back to me on your views, if there's an issue with
 11 it, if you think we should proceed differently,
 12 then we can change it as we go forward.
 13 The second part of that
 14 discussion is a court reporter. I -- I did arrange
 15 for a court reporter to be present here today. I
 16 think it would be helpful, both for commissioners
 17 who can't be at meetings but would like to be able
 18 to read the transcript of what went on or what our
 19 presenters had to say, but also I think it would be
 20 particularly helpful in writing our report. Now,
 21 whether that is public or private, or you know, if
 22 it's FOIL-able or not, there -- there may be issues
 23 there.
 24 I -- I understand parts of it may

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 2 be FOIL-able, other parts may not be FOIL-able, but
 3 you know, again, we have the option, we can be on
 4 the record for our speakers, and -- and -- and
 5 certain deliberations. We can go off the record at
 6 other points in time, if that's appropriate, but
 7 are there, is there any objection, or a concern
 8 about having a transcript; is it a good idea, bad
 9 idea?
 10 SENATOR SCHNEIDERMAN: I -- I
 11 think it's a good idea. I -- I certainly am not
 12 going to be able to attend all the sessions and it
 13 would be very helpful if we, during the
 14 fact-gathering part of this, to --for us to all
 15 have the same information. I -- I think you said
 16 you wanted to go off the record for closed
 17 deliberations that -- you know, that's -- that
 18 produces other problems. I do -- would hope that
 19 everyone would understand that in this town, or
 20 this game, there's no such -- FOIL-able or not,
 21 these documents don't remain secret for long, so --
 22 so eventually everyone probably will get to see
 23 what we did.
 24 MR. GREEN: My personal feeling

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 2 is for the fact-gathering, for speakers, I see no
 3 problem in making a record. You're going to -- it
 4 doesn't make a lot of sense to me to close
 5 deliberations, then have a record of it. You know,
 6 either way, you're going to put certain people in a
 7 position of being very circumspect about what they
 8 say or what they discuss, because whether we have a
 9 record of it or whether you have the press here,
 10 and at -- at least for some of us who are elected,
 11 you know, some are in whole other positions, it
 12 creates issues that we need to consider before we
 13 voice an opinion. So, I -- I look for it to be
 14 considered, having the record for the fact-finding
 15 parts and when there's serious discussion of the
 16 group, really trying to bat some issues around --.
 17 SENATOR SCHNEIDERMAN: I agree
 18 with Mike.
 19 MR. VANCE: I -- I also agree
 20 with the last comment and I don't know how to
 21 accommodate the -- the point Eric expressed about
 22 making sure that if he or Joe have to be absent for
 23 a period that they are able to understand exactly
 24 what was done, but I -- I do think there's going to

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 2 be an exchange which at times may be humorous, but
 3 a record may not reflect --
 4 FROM THE FLOOR: Uh-huh.
 5 MR. VANCE: -- the intent behind
 6 a comment and it may be misinterpreted as something
 7 less than humorous, and I -- I think we need to
 8 maintain our senses of humor, as an example, as we
 9 go through this process. So, I -- I -- I think a
 10 closed session should -- I'd recommend that it be
 11 off the record.
 12 COMMISSIONER O'DONNELL: Okay.
 13 I -- I think -- I think the most important thing is
 14 that people can speak candidly and openly and not
 15 be constrained. And we have a lot of talent in
 16 this room and I'd like to take advantage of it and
 17 not have people guarded about their views. So,
 18 I -- I also agree with that.
 19 And if there is major
 20 disagreement we'll take a vote, but if there is the
 21 consensus that that's the way to proceed, we'll
 22 just go forward, and we'll go off the record.
 23 Right now.
 24 (Off-the-record discussion)

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 2 merit-time-release date that, again, applies to
 3 specific prisoners, and at that point there can be
 4 a release by the board of parole, or there can be a
 5 presumptive release by the commissioner of the --
 6 of DOCS.
 7 Moving forward, if not released
 8 at that point, or if merit time doesn't apply to
 9 that population, there may also be an initial
 10 parole eligibility date at which point, again,
 11 there is either a decision made by the parole, or
 12 there can be presumptive release by the
 13 commissioner under some conditions.
 14 If not released at that initial
 15 date, there will be -- there maybe a subsequent
 16 parole eligibility date. Eventually in
 17 indeterminate sentencing, they will hit what's
 18 called their C.R. date, meaning that have -- if
 19 they've earned good time, they -- they will be
 20 released at that point, and be released to the
 21 supervision of parole. When -- when released,
 22 either that way or through earlier stages, they're
 23 going to go to parole supervision, largely, and
 24 that -- there they'll either succeed or they'll be

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 2 (A PowerPoint presentation was
 3 given.)
 4 DR. HALL: As we look at some of
 5 the patterns and trends in sentencing, I suspect
 6 that, as the meetings go on, we'll be getting into
 7 other issues around parole and reentry. But right
 8 now this is going to largely focus on sentencing.
 9 We talked a little bit about
 10 time -- you know, the time spent in prison on a
 11 sentence, and in fact, if we look at this flow
 12 chart we can see that there's multiple decision
 13 points that are going to affect how much time
 14 somebody spends in prison. This is just a very
 15 generalized flow chart. It doesn't -- it's not
 16 specific to -- to indeterminate or determinate, and
 17 in fact, some of these stages won't apply to
 18 determinate sentencing.
 19 But we have first the minimum
 20 sentence that is given the offender, based --
 21 influenced heavily by the seriousness of the
 22 conviction offense and the prior criminal history,
 23 with the second felony law that we have in New York
 24 State. And the first release opportunity is a

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 2 revoked, and a bit of this process starts over
 3 again.
 4 If, in fact, they aren't
 5 released, they may max out. And that means that
 6 they've filled -- they've served their entire term
 7 in prison, either in one shot or because of parole
 8 revocations. I think about ten percent max out
 9 today, something in that area; about eighty percent
 10 of those have parole revocations. So, it's an
 11 important part of the process.
 12 Again, I'm just going to focus on
 13 the early piece of that chart for this
 14 presentation, and this is a trend in felony arrests
 15 between '84 and 2006. You can see that the drug
 16 arrests rose sharply, these are all felony, again.
 17 They rose sharply during the latter half of the
 18 '80s, that was with our crack cocaine epidemic.
 19 They started to tail off a bit, stayed stable,
 20 dropped quite significantly during the early part
 21 of the 2000s, and then have tailed up just a little
 22 bit since then.
 23 This line here the -- well, here
 24 it looks a little purplish, that is personal

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 2 violence, and that's essentially robbery, homicide,
 3 sexual assault, and assault as well, felony
 4 assault, and that also went up a bit during that
 5 early time period in the late '80s, and then began
 6 to tail off, and has actually dropped quite
 7 significantly over time. And again, these are
 8 arrests and you'll see that -- well, you won't see
 9 in this presentation, but some of this also trends
 10 crime in general.

11 Property crime, burglary, and
 12 other P.L. 140s and some other thefts is broken --
 13 is added to this; forgery would be there. That
 14 also rose a bit during the late '80s and then
 15 declined like the other two -- like personal, and
 16 also a bit like drugs.

17 And then the bottom line you see
 18 here, these are other kinds of felony arrests, and
 19 you see a bump post-'94, particularly between '94
 20 and '98, you see some stabilization thereafter. I
 21 haven't looked into that in great detail, but I
 22 suspect some of this is related to criminal
 23 contempt, and probably associated with violations
 24 of order protection and some of the domestic

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 2 makes them a mandatory -- were they to be convicted
 3 on the felony for which they were arrested, they
 4 would then be mandatory commitments to -- to DOCS.
 5 And we see that in '84, about seventeen percent had
 6 a prior felony conviction, and these are adults, so
 7 Y.O.s would be excluded here. By the time you're
 8 into the early '90s, it's up to about twenty-seven
 9 percent and -- and kind of lingers between
 10 twenty-seven, twenty-eight, twenty-nine percent for
 11 that remaining time period.

12 We -- we could look more at what
 13 caused this increase. We know that there were a
 14 lot of felony arrests and convictions going on
 15 during this time, but also the composition of these
 16 arrestees changed. That is, they became much more
 17 heavily drug arrestees and -- and drug arrestees,
 18 and I'll show that here, drug arrestees tend to
 19 carry longer -- or more prior felony convictions.
 20 They have longer criminal histories. And part of
 21 that is caused by the fact that they tend to be
 22 older. Our drug arrestees are more likely to be
 23 their late twenties, thirties, where some of the --
 24 violent crime in particular tends to be a

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 2 violence legislation that happened in the -- in the
 3 mid-'90s, but we'll have to take a closer look at
 4 that.

5 This is another graph that shows
 6 the number of felony arrests each year and the
 7 number of felony convictions. These are not
 8 convictions necessarily on those arrests, they're
 9 just convictions -- felony convictions that
 10 occurred during that same twelve-month period. And
 11 you can see this is beginning of our time period,
 12 '84 going up to 2005, again, this is the overall
 13 trend in arrests. This is driven largely by those
 14 drug cases. See some tailing off, and then, you
 15 know, it just jags a bit there.

16 The felony convictions increased
 17 during that same time period, and more -- it's more
 18 of a stable trend of a slight and slow decline
 19 through 2005. About one to three, one to four
 20 ratio between the convictions and the arrests here,
 21 and that's fairly stable.

22 Now, what I'm showing here is
 23 each year the percent of felony arrestees who have
 24 a prior felony conviction. In New York State that

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 2 young-person's crime, sixteen to twenty-one would
 3 be the peak years on some of those offenses.

4 So, when you look at controlled
 5 substance, these are P.L. 220s, you see over forty
 6 percent of the arrestees already have a prior
 7 felony conviction, setting them up for a mandatory
 8 prison sentence if they are to be convicted on this
 9 charge.

10 This is just a couple pie charts
 11 looking at felony arrests, convictions, and
 12 sentences all in the same year. Again, these are
 13 not necessarily the same populations. That is --
 14 these arrests occur in 2006; the convictions
 15 occurred 2006, but some of these convictions may
 16 have occurred in -- may -- may have result --
 17 stemmed from arrests that occurred in a prior year.

18 The basic purpose of -- of laying
 19 it out this way is to show you the kinds of
 20 offenses we're looking at. When we look at
 21 specific Penal Law sections, controlled substances,
 22 P.L. 220s should -- have the biggest piece of the
 23 pie at the arrest side, a bigger piece of the pie
 24 at the conviction side, and also at the sentences

21 (Pages 78 to 81)

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 2 to prison. Now, these are convictions and
 3 sentences to prison. These are not people; these
 4 are events. So, we have, for example, about
 5 eighteen thousand sentences to prison, but DOCS
 6 only has maybe sixteen five in terms of bodies,
 7 because some people might be -- have multiple
 8 convictions during that annual period.

9 MR. ANNUCCI: So Donna, if I
 10 could ask a quick question: If -- if I understand
 11 correctly, we haven't seen a dramatic reduction in
 12 the case processing, percentage-wise, of drug
 13 offenders, say, in the last few years. The same
 14 numbers of people are getting convicted of felony
 15 drug arrest. But what I'm looking at, in terms of
 16 the prison population, is the significant -- you
 17 take a snapshot, the number of drug offenders in
 18 prison is significant right now. What's going on,
 19 apparently, is that even though they're coming to
 20 prison, they're getting out a lot quicker, with all
 21 of these other early release programs.

22 DR. HALL: Yeah, and your
 23 admissions would help you to get at that, because
 24 you should see -- you shouldn't see a dramatic

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 2 160, about oh, thirty percent not convicted, and on
 3 and on. The --

4 COMMISSIONER O'DONNELL: Not
 5 convicted of that offense. They could have pled
 6 down --

7 DR. HALL: Not convicted of
 8 anything.

9 COMMISSIONER O'DONNELL: -- to
 10 something else, or whatever --.

11 DR. HALL: Of nothing. Yeah,
 12 they -- they -- they were either dismissed or
 13 acquitted.

14 The next, which is almost a red
 15 here on this screen, that is the convicted of a
 16 nonfelony, so that would be the proportion
 17 convicted of a nonfelony. These -- all -- all
 18 these bars add up to a hundred percent, so that
 19 would mean that somewhere -- well, this is sixty
 20 percent here, and it started at about twenty-five
 21 percent. So, if you do the math that's about
 22 thirty-five percent would fall into this category.
 23 That's how these bars should be read. So you can
 24 see that a fair number of the controlled substance

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 2 change in admissions, but a dramatic -- a more
 3 dramatic change in the under-custody population.

4 MR. ANNUCCI: Right. Okay.

5 DR. HALL: And we can dig into
 6 that a little more as we go on through the, you
 7 know, through the next couple months.

8 Now, we're -- I'm looking a bit
 9 at specific types, and these are most prevalent,
 10 most important of the arrest types. These are
 11 Class-B arrests, these are -- that were disposed in
 12 2006. And now, what I'm showing you here is the
 13 article, the top arrest offense. And you can see,
 14 Class-B arrests are predominantly
 15 controlled-substance arrests. They're the P.L.
 16 220s. Less so, but you know, a significant portion
 17 on robbery, assault, sex crimes, and then five
 18 percent is just everything else falls into that.

19 And now, here I'm looking at what
 20 are the outcomes of the arrests disposed in 2006 by
 21 the article of the top arrest charge? And we can
 22 see the blue at the bottom is the percent not
 23 convicted, and that -- this would be P.L. 220,
 24 about twenty-two percent were not convicted; P.L.

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 2 get convicted of a nonfelony offense. Robbery,
 3 that's less common. And assault, it's less common,
 4 as well as these sex crimes. The reason I've
 5 showed these particular charges is because they're
 6 the ones that appear more -- more -- most often for
 7 that class of offenses.

8 This next grouping here are the
 9 felony convictions, but they're not sentenced to
 10 prison, and the very top group -- and these colors
 11 are blending a bit on this screen, but this top
 12 group is felony convictions with sentences to
 13 prison.

14 MR. ANNUCCI: Donna, isn't
 15 there -- I remember some research a good some years
 16 ago, that when we were just looking at the whole
 17 world of -- of drug arrests, particularly the first
 18 time Bs versus seventh-degree possession,
 19 misdemeanor seems like there's where there's a lot
 20 of discretion as to whether you're actually going
 21 to charge somebody with a serious felony, or let it
 22 go as a -- as a seventh-degree misdemeanor charge.

23 DR. HALL: Yeah, and that might
 24 be -- that might be in part the distinction between

22 (Pages 82 to 85)

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 2 possession and possession with intent to sell,
 3 because those would be the same amount of drugs,
 4 but if they're getting hit with intent to sell, it
 5 becomes a B.

6 MR. ANNUCCI: Right. So -- so,
 7 that's the difference.

8 DR. HALL: Yeah.

9 MR. ANNUCCI: Class-B, if they
 10 can charge you with intent to sell --

11 DR. HALL: Exactly.

12 MR. ANNUCCI: -- or if it's just
 13 to straight possession -- possession, then it's
 14 a --

15 DR. HALL: Right.

16 MR. ANNUCCI: -- seventh degree,
 17 which is the A misdemeanor.

18 DR. HALL: Right.

19 FROM THE FLOOR: Depending on the
 20 amounts.

21 DR. HALL: Okay. This is the
 22 same thing on the class Cs, and here we're seeing
 23 robberies taking the biggest chunk of the class C
 24 arrests, followed by burglary, firearms, and

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 2 firearms is here at eleven percent, nine percent
 3 burglary, controlled substance at eight percent.
 4 Those are the D -- many of them are D sales, sale
 5 of a -- of a narcotic preparation, I guess it would
 6 be.

7 And this shows what happens to
 8 those cases. And here you start seeing a
 9 significant percent actually get convicted to a
 10 nonfelony, because it's fairly close, it's only a
 11 couple degrees down and you're into the nonfelony
 12 category in terms of plea-bargaining. And the
 13 probability of a prison sentence, given this arrest
 14 charge, becomes really, very, quite small in this
 15 situation, in part because of the -- the large
 16 nonfelony convictions.

17 Here what I'm showing is these
 18 are the types of -- of prison sentences in felony
 19 convictions, sentenced to prison in 2006. Right
 20 now, we're looking at a split of indeterminate
 21 about forty-one percent and determinates were about
 22 fifty-nine percent. This might differ slightly in
 23 terms of people actually admitted, because these
 24 are convictions and not people.

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 2 controlled substances is much a smaller piece of
 3 that. And these are the outcomes of those arrests,
 4 so here, on the robberies, about forty percent were
 5 not convicted of anything, another twenty-two
 6 percent were convicted of a nonfelony, and another,
 7 say, twenty percent were convicted of a felony, but
 8 not sent to prison. And then that last, perhaps,
 9 twelve percent or so, actually went to prison.

10 Okay. Now, that's not to say
 11 what they got convicted on, because this isn't
 12 arrest cohort, it's a disposed arrest cohort, so
 13 they might have gotten convicted for something
 14 other than a robbery, but it was convicted of a
 15 felony.

16 And so, again, we laid out the
 17 trends, and it's not that we need to digest all
 18 this today, but it's for reference purposes. If
 19 you're, you know, interested and you want to see
 20 what's happening to these cases, this gives you a
 21 good overview of it.

22 And finally, the last grouping we
 23 have are class Ds. And here assaults take the
 24 largest chunk of those, followed by forgery, and

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 2 Down below what I'm showing is a
 3 break down by V.F.O. as to the top charge, drugs,
 4 and other. And the reason I'm showing this is
 5 because eventually this group is the only group
 6 that should remain indeterminate, were this
 7 commission not to change that. It's larger up here
 8 because some of our drug offenses that are going
 9 and getting convicted and sentenced in 2006 are
 10 still carrying indeterminate terms because of the
 11 time at which that case began.

12 MR. ANNUCCI: And just so
 13 everybody's clear, with the recent changes in the
 14 law all drug offenders will now get determinate
 15 sentences, all violent felony offenders get
 16 determinate sentences, and all sex offenders now
 17 get determinate sentences.

18 DR. HALL: Here I'm looking at
 19 this top chart, shows the percent of P.L. 120, and
 20 these are largely assaults and assault-like cases,
 21 class-D arrests, resulting in a felony conviction.
 22 And these were arrests disposed over a five-year
 23 period -- six-year period. I -- I always get that
 24 confused, a six-year period in -- in New York, and

23 (Pages 86 to 89)

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 2 I've laid it out by county. I've excluded any
 3 county that had fewer than twenty cases over that
 4 six-year period for P.L. 120, you know, there were
 5 maybe a couple counties excluded. But this shows
 6 the present resulting in a felony conviction. So
 7 the -- the county with the greatest, the highest
 8 conviction rate had about fifty percent of these
 9 cases resulted in a felony conviction, and it
 10 goes -- drops down to -- to about two or three
 11 percent of these cases.

12 And I don't know how well you can
 13 see it here, but I put in red the New York City
 14 counties, which here are pretty much all grouped
 15 right there, and the reason I wanted to display
 16 this is a couple of reasons, actually, because I
 17 wanted to just give the sense of how much is going
 18 on prior to sentencing. You know, that there's a
 19 lot going on prior to sentencing, in terms of
 20 changing the value of this crime, or the -- what's
 21 going to happen at the sentencing stage, and also
 22 that if we do it -- you know, if we look by county,
 23 we can see there's a significant amount of
 24 differences across county and what's happening to

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 2 percent. The New York City counties this time are
 3 sort of falling a bit towards the middle of the
 4 range. Now, it's just important to remember that
 5 who -- you know, that -- that the New York City
 6 counties, or whatever county is at this end, these
 7 judges may not be seeing the same kind of cases as
 8 the counties that were at this end, because you
 9 know, these -- the -- in -- in situations where
 10 there's very low conviction rate to a -- conviction
 11 to a felony, these might be a rather select group
 12 of people who are getting convicted to a felony in
 13 those counties. So, it's not, you know, you need
 14 to look at these two pieces in conjunction.

15 MR. ANNUCCI: Donna -- sorry.

16 FROM THE FLOOR: (Off-mic).

17 DR. HALL: No, just prison.

18 MR. ANNUCCI: Is -- is there
 19 consensus that for all first time days, and I've to
 20 look at all the nuances, pretty much, that the
 21 judge does have the discretion to sentences other
 22 than prison, or is there any absolute mandatory
 23 first time D or E that has to go to state prison?

24 DR. HALL: There -- there --

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 2 these cases. And again, these are P.L. 120, class
 3 D assaults. All histories are included in here in
 4 terms of whether they're predicates or not -- or
 5 would be were they could be convicted.

6 Down below, I've done another
 7 chart that looks at the percent of P.L. 120 class D
 8 convictions resulting in a prison sentence. Now,
 9 here -- again, it's -- now we're talking about a
 10 conviction cohort, and they had to -- this is the
 11 percent that's resulting in a prison sentence, and
 12 I've limited it to first felons. And the reason I
 13 did that was because if they're second felons you
 14 should see, hopefully, something of a straight line
 15 here, which is pretty much a hundred percent,
 16 because they are second felons. And I don't think
 17 Willard's an -- well, that would -- will -- just to
 18 clarify too, Willard is included in here, there
 19 aren't many Willard sentences, but we collapse them
 20 because they don't -- they're not distinguished
 21 well on our database.

22 In any event, here the percent
 23 resulting in a prison sentence ranges from over
 24 sixty percent down to something close to ten

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2 FROM THE FLOOR: There are, yeah.

3 FROM THE FLOOR: Tony, I think
 4 they have discretion on all of them.

5 DR. HALL: Yeah, I -- I think so.
 6 I think so yeah.

7 MR. ANNUCCI: Unless there's like
 8 a sale near a school or something like that, I
 9 think for the most part everything is basically
 10 discretionary for first-timers.

11 FROM THE FLOOR: Sale near a
 12 school would be a B.

13 MR. ANNUCCI: Yeah. That's --
 14 that would be -- that would be a B or a C.
 15 (Off-the-record discussion)

16 FROM THE FLOOR: Not on a D. On
 17 a C, but not on a D down. From a C on, which a --
 18 possession of a loaded firearm, down to the B,
 19 violent --

20 MR. ANNUCCI: Right.

21 FROM THE FLOOR: You know, we're
 22 talking about violence here.

23 DR. HALL: These are P.L. 120,
 24 assaults.

24 (Pages 90 to 93)

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 2 FROM THE FLOOR: Oh, they're just
 3 assaults.
 4 DR. HALL: Yes, just assaults.
 5 COMMISSIONER O'DONNELL: No,
 6 but -- but Mike was saying there are some offenses,
 7 right, where first-time offenders have to go to
 8 jail.
 9 FROM THE FLOOR: I don't -- I'm
 10 not sure for D. Isn't there an out on any of the
 11 Ds for mitigating factors?
 12 DR. HALL: I believe there is and
 13 that's -- I -- I did look at that when I was doing
 14 this, and I believe that that is the out that they
 15 have, if there's mitigating factors, and you know,
 16 those things. I don't think I saw anywhere it was
 17 non -- completely nondiscretionary.
 18 COMMISSIONER O'DONNELL: so, what
 19 about for drug offenses? Are there offenses where
 20 first-time felons have to -- that there's mandatory
 21 prison?
 22 DR. HALL: Bs.
 23 FROM THE FLOOR: It starts at the
 24 B, yeah.

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 2 conviction charge, ranges from about fifty percent
 3 all the way down to, you know, something very close
 4 to zero, maybe one or two percent there, and the
 5 New York City counties are kind of interspersed
 6 throughout.
 7 And lastly -- I believe it's
 8 lastly, we've got robbery, P.L. 160 class D
 9 arrests. Again, the probability of a felony
 10 conviction results -- or ranges from about sixty
 11 percent down to something around ten percent. In
 12 the red again is the New York City counties.
 13 There's fewer counties here because more did not
 14 meet my requirement of having at least twenty cases
 15 in order to present the data.
 16 And then down below we have P.L.
 17 160 robbery class D convictions sentenced to
 18 prison, ranges from about fifty-eight percent down
 19 to around eighteen percent, with the New York
 20 counties in red. So you can see the variation. So
 21 the variation exists, to -- to a significant
 22 degree, in all of these categories. And again, I
 23 chose those crimes, and this one, because of their
 24 prevalence. They came from their original pie

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 2 FROM THE FLOOR: I think you've
 3 got some -- menacing a police officer Bs that are
 4 now mandatory sentences. I could be wrong, I think
 5 that Police Act may have required jail for -- for
 6 some D offenses.
 7 DR. HALL: Okay. So, again,
 8 there is a significant amount of variation that
 9 goes on.
 10 This is burglaries P.L. 1 --
 11 well, not just burglaries, all P.L. 140s. They're
 12 predominantly burglaries, last year arrests
 13 resulting in a felony conviction, it ranges from
 14 almost eighty percent down to something below, you
 15 know, around eighteen percent. And you can see
 16 some of the New York counties are gathered down
 17 here, and there's -- there's one there as well.
 18 I -- I don't know you -- if you can read the
 19 counties, and you probably can't on the handout and
 20 I guess that's not so important, as much as the
 21 variation is important to -- to recognize.
 22 Here we have P.L. 140 burglaries,
 23 class conviction -- Class D convictions. The
 24 probability of a prison sentence, given that

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 2 chart.
 3 And here we have the P.L. 220s,
 4 class C arrests resulting in felony convictions,
 5 again ranging from about sixty percent down to
 6 almost zero. The New York City is right there in
 7 that area, at the lower end, and the probability of
 8 a Class C conviction 220 getting a -- going to
 9 prison as a first felon, ranges from about sixty
 10 percent again down to close to zero, with New York
 11 City at that end. So again there's significant
 12 variation.
 13 Lastly, I -- I -- I'm only -- I
 14 presented the 220s separately, these are Class B
 15 arrests because they predominate, they predominate
 16 the Class B category, and the vast majority of all
 17 drug arrest are Class B arrests. It's any --
 18 the -- the sales, any amount of controlled
 19 substance, or possession with intent to sell.
 20 And you can see the same
 21 significant decline in what happens to those cases,
 22 whether they result in a felony conviction, ranging
 23 from about ninety percent, all the way down to
 24 something close to twenty percent, and the New York

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 2 City counties are here in the red.
 3 I didn't show the prison graph
 4 for that because they should all be getting prison,
 5 if the judges are sentencing appropriately.
 6 Last -- the last series of --
 7 of -- of graphs that I have here are actually
 8 difficult to see, again, on this, but this looks at
 9 nonpredicate determinate sentences for B felony
 10 convictions in these select Penal Law articles. So
 11 these would be assault Bs, and burglaries and
 12 robberies. They're all determinate here. They --
 13 they were made determinate back in the mid-'90s.
 14 And this shows the -- the -- the sentence that they
 15 were given, and with determinate it's just a fixed
 16 sentence, although, you know, they might be able to
 17 get some -- I don't know, these might not be
 18 merit-time eligible, but in other situations they
 19 can be.
 20 In any event, we're looking at
 21 sixty months is the lowest sentence here. It's a
 22 statutory lowest sentence and about thirty percent
 23 of the assault sentences were of that nature.
 24 Burglary, it's probably about, you know, thirty-two

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 2 not many falling into the
 3 seventy-two-to-a-hundred-and-twenty-month period,
 4 but having a slightly larger period -- larger
 5 groups into these higher-level sentence ranges.
 6 MR. ANNUCCI: Donna, have you
 7 done any comparisons of -- we didn't have that
 8 capability, of looking at comparable sentences for
 9 this cohort before the Sentencing Reform Act. In
 10 other words like, burglary --
 11 DR. HALL: Yeah.
 12 MR. ANNUCCI: -- one that, under
 13 the old law got four to twelve, does he now get a
 14 five-year determinate sentence? And what's the
 15 average time served, comparable sentences? Because
 16 I think it's gone down, under the determinate
 17 sentencing format.
 18 DR. HALL: Yeah, we -- we did
 19 look at some of that back in the late '90s, looking
 20 at the effect of the initial sentencing legislation
 21 that switched the second-time violent to
 22 determinate, back in '95 I think it was. And in
 23 fact, early on in that period of time, they were
 24 getting sentenced and our estimated time serves

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 2 percent, and -- and robbery about forty-two
 3 percent, were getting that sixty-month minimum.
 4 And the next category we -- we
 5 collapsed sixty-one to one hundred nineteen months,
 6 and you can see that another say thirty -- thirty,
 7 thirty-five percent got that sentence in -- in the
 8 assault category, and very similar percentages in
 9 the other two categories as well, ranging all the
 10 way up to two hundred and forty months or more.
 11 And these are nonpredicates,
 12 meaning this was their first felony. What we're
 13 not controlling for here is what they pled down
 14 from, and I'm sure that factors into that sentence
 15 as well.
 16 Here we have nonpredicate
 17 determinate sentences, class C felony convictions,
 18 for these same select types of cases. And you can
 19 see the forty-two minimum in this category, a
 20 larger -- you know, a larger portion get that
 21 somewhere between forty -- forty-five and -- and
 22 fifty percent, get the absolute minimum forty-two
 23 months. And then it starts to shift a bit and at
 24 the C level we're seeing, in the burglary category,

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 2 were showing slightly longer, because -- and that
 3 was for the second time violent, because the
 4 ranges, I believe, shifted upward a bit --
 5 MR. ANNUCCI: Uh-huh.
 6 DR. HALL: -- as I recall.
 7 MR. ANNUCCI: Uh-huh.
 8 DR. HALL: But for the first time
 9 violent, which is the '98 legislation, I think
 10 you're absolutely right. I think they -- the
 11 sentences actually went down a bit. And so, we
 12 have done some of that analysis. It was a while
 13 ago but well definitely drag it back out for this,
 14 and we have better follow-up period now, so we can
 15 work with your group to -- to look more closely at
 16 that.
 17 And there's other changes too.
 18 You know, other pieces of -- of laws have changed.
 19 Like, assault was reclassified --
 20 MR. ANNUCCI: Right.
 21 DR. HALL: -- and so, we probably
 22 want to do some of that.
 23 This is a nonpredicate
 24 indeterminate and determinate sentence for A two

26 (Pages 98 to 101)

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 2 felony, controlled-substance convictions. And the
 3 primary reason in showing this is really just to
 4 give you a sense of ways you can sort of display
 5 the data, to think about the data. These are not
 6 definitive comparison groups because the
 7 determinate sentence, drugs, this is a 2004 to 2006
 8 cohort. It's a little complicated to explain, but
 9 some of the indeterminate cases involve -- may
 10 involve cases that have been around a while, you
 11 know what I mean? So we're not -- these are not
 12 necessarily exactly comparable groups, but it's
 13 just giving you a sense of the kinds of sentences
 14 we saw before, the kinds of sentences we see now.
 15 Were we to do this in two more years when
 16 everything is played out, this might change a
 17 little bit in terms of what that looks like.
 18 Here we have nonpredicate
 19 indeterminate and determinate sentences for the B,
 20 C, D, and D felony controlled substance, the P.L.
 21 220s. And again, we're showing -- these are the
 22 indeterminate sentence, and these are the
 23 determinates. This is the minimum on the -- on the
 24 indeterminate, and obviously on the determinate it

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 2 process of completing a multi-site DTAP study,
 3 looking at the -- the outcomes of those diverted
 4 cases. And we've worked very closely with DOC
 5 staff, and we match our files all the time, so
 6 we're pretty prepared to answer a lot of research
 7 questions once this commission generates them, so
 8 we're looking forward to it.
 9 Thank you.
 10 MR. ANNUCCI: Thank you very
 11 much.
 12 (Off-the-record discussion)
 13 MR. VANCE: Is -- is up next?
 14 Paul, can I introduce you?
 15 MR. SHECHTMAN: Yes.
 16 MR. VANCE: Denise asked me to
 17 say a few words about you.
 18 I had just a few words about
 19 Paul, many of you probably know him or know of him.
 20 I had the privilege to work under Paul when he was
 21 with the district attorney's office, but I think
 22 it's safe to say that we are privileged to have him
 23 here. He is a guy of extraordinary
 24 accomplishments, in terms of his educational

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 2 is the flat sentence.
 3 Now, there's rules around good
 4 time and merit time we're going to have to discuss
 5 as we go on, that's going to affect the amount of
 6 time served in this, so this, again, is really more
 7 for reference as we talk and learn more about what
 8 those rules are, and we do this kind of analysis
 9 for time served instead of sentencing. I think it
 10 will provide clearer interpretation of what all
 11 this means. But we're seeing, you know, fair --
 12 fairly -- some fairly similar trends here, you
 13 know, at this particular -- at the lower -- lower
 14 level.
 15 And that's all we're -- we have
 16 for today. We will be doing presentations on a
 17 whole host of issues around -- you know, we've done
 18 a lot of research around reentry, following
 19 offenders from prison into the community; we've
 20 done a lot of recidivism studies; we're doing a
 21 Y.O. study right now.
 22 Mike, I know you might be
 23 interested in that.
 24 We've all -- we're also in the

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 2 background as a Rhodes scholar, and in terms of his
 3 commitment and work in public service, as chief of
 4 appeals at the U.S. attorney's office in the
 5 southern district; counsel to Mr. Morgenthau at the
 6 district attorney's office; chief of the criminal
 7 division at the U.S. attorney's office in the
 8 southern district; director of criminal justice for
 9 the state of New York; and chair of the state
 10 ethics commission, among many other things.
 11 Besides all those
 12 accomplishments, Paul is an exceptionally well-known
 13 and talented trial lawyer, an appellate lawyer, and
 14 a very good guy.
 15 MR. SHECHTMAN: Thank you very
 16 much. I'm going to hand -- give -- send two
 17 handouts around.
 18 And one says New York sentencing
 19 chart. And the other says modern history of New
 20 York sentencing law. That should help us get
 21 started. Okay. Let's see. Yeah, that's great.
 22 That's great. Can I move that up without -- how
 23 much trouble do I cause if I keep moving that?
 24 (Off-the-record discussion)

27 (Pages 102 to 105)

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 2 MR. SHECHTMAN: Okay. Okay.
 3 Good. Okay. Are we ready? Is Judge -- are we
 4 waiting for Judge Newton, or -- Juanita? No, I'm
 5 fine. There's -- there's Juanita, okay.
 6 So, everyone should have
 7 something that says Modern History New York
 8 Sentencing Law and a New York Sentencing Chart.
 9 And I'm going to try to use both of them as I talk
 10 to you. And what I want to do is talk about how we
 11 got from there to here, where the there is 1967 and
 12 the effective date of the Penal Law, and the -- the
 13 here is obviously today.
 14 My wife is quite fond of saying
 15 that when she would ask her father a question he
 16 answered it with what she called a historical
 17 approach, which began each sentence with "when I
 18 was a boy." And this presentation, as you will
 19 see, is the historical approach.
 20 So, if you look with me you will
 21 see, we start in 1967, and when the Penal Law
 22 becomes effective, there are only two crimes,
 23 murder and kidnapping, that carry mandatory prison
 24 terms, which means for all other crimes alternative

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 2 sentences, probation, definite sentences,
 3 conditional discharge and like, were available.
 4 All prison sentences were indeterminate, and the
 5 only recidivist provision, was -- is what is now
 6 the persistent-felony-offender provision.
 7 And I want to pause and just sort
 8 of -- this is -- apologetically, because -- there
 9 are people in this room who -- who know more about
 10 sentencing, more than I do, and it's -- it's sort
 11 of hard to know what level of knowledge to assume,
 12 so I'm going to say some things that are very
 13 basic, but seem to me to be worth saying.
 14 The first is to talk about
 15 indeterminate. What that means is that you -- and
 16 again, this is what all sentences were when we
 17 started in New York, you'd get sentenced to a
 18 range. So you get sentenced to three to nine.
 19 This was the prevailing sentencing philosophy in
 20 America throughout most of the 20th century. It
 21 was what people sometimes call a medical model of
 22 sentencing, and what I mean by that is the
 23 following: The working philosophy was a
 24 rehabilitative philosophy, and the notion was you

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 2 should be released when you rehabilitate. And that
 3 was something that the sentencing judge, by
 4 definition, couldn't determine. And so you needed
 5 someone to determine that along the way, hence
 6 parole authorities. And so we would sentence to a
 7 minimum and a maximum.
 8 In California where, to some
 9 extent, this started in its modern guise, you saw
 10 sentences of zero to twenty. And when one got out
 11 between zero and twenty was determined by parole
 12 authorities based on when you were healthy, hence
 13 the notion of this being a medical model.
 14 Richard DeSimone, who's in the
 15 room and will speak to you, and he is the most
 16 knowledgeable person in the world on New York
 17 sentences, reminded me yesterday that even though I
 18 think of New York sentences as being in thirds,
 19 that we all -- it's three to nine for nonviolents,
 20 that it literally can be one to nine, if you look
 21 at the way it's drafted, and that gives you some
 22 sense of this medical model, that you could
 23 properly sentence someone, still today, to one to
 24 nine, with the exact date determined by the parole

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 2 authorities.
 3 Now, that means -- our
 4 indeterminate sentences have a minimum term and
 5 they have a maximum term. What we also have,
 6 obviously, is good behavior. And that rule in New
 7 York has always been, on these indeterminate
 8 sentences, that it could take as much as a third
 9 off your sentence. So that if you were good
 10 you're -- then the parole authorities would be
 11 making a decision to release you sometime between
 12 three and six years, when you reach the point of --
 13 of being rehabilitated. So, you've got your good
 14 time in -- in here.
 15 Okay. Now, so that's the first
 16 thing to say about our -- where we start from. The
 17 second thing to say about where we start from is
 18 that we start from a world in which there are class
 19 A through E. That was a 1967 structure, and to
 20 a -- to a large extent, but I -- I'll talk about
 21 the changes, those are the same letter grades we
 22 continue to use today.
 23 One of the things that one has to
 24 think about, always, about sentencing is what

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 2 effect does recidivism have on -- on the sentencing
 3 code. Again, when we started in 1967 it had very
 4 little, unless you were a persistent and unless you
 5 were felon, felon, felon, a three-time offender,
 6 the -- the fact that you had a prior felony had no
 7 effect what so -- whatsoever. So, we didn't have
 8 what we now call our second-felony-offender law.
 9 And so, what we did have was 7010, and that's
 10 probably worth taking a minute and looking at with
 11 me, so that if you flip to 7010, which on that --
 12 the New York sentencing chart is page seven.

13 And that has not changed much
 14 since 1967. It is a provision that basically takes
 15 that third offender, all right, it's now -- it --
 16 it's now been modified because we have violent
 17 felony laws, but it basically takes that third
 18 offender, and if a judge makes a finding that the
 19 nature and circumstances of the crime, the
 20 character of the defendant, are such that he is
 21 truly persistent, and -- and a danger to the
 22 community, you sentence him as if he's an A one
 23 felony; you sentence him to terms of either fifteen
 24 to life or twenty-five to life.

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 2 robbery crime. You can -- if you're convicted of
 3 robbery and you have a tough enough judge, you can
 4 get to the maximum. For this provision, to get to
 5 the maximum, you need three felonies, but you also
 6 need the judge to make a finding, namely that your
 7 history, the -- the nature of the offense, are such
 8 that you warrant the -- the -- the A one sentence.
 9 And that, says Judge Gleason, in light of the
 10 supreme court precedents, is unconstitutional. He
 11 may be right. So, it's worth sort of keeping --
 12 keeping an eye on.

13 FROM THE FLOOR: A question.

14 MR. SHECHTMAN: Yeah.

15 MR. GREEN: A caveat to what you
 16 said, though, is that a finding of a felony
 17 conviction is an exception.

18 MR. SHECHTMAN: Yeah, and what --
 19 that's right. The -- the -- under Apprendi the
 20 conviction itself, the prior conviction itself
 21 doesn't have to be found by the jury, but the
 22 additional fact here of he's a very bad person,
 23 says Judge Gleason, is enough to -- to create an
 24 Apprendi problem.

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 2 I point it out to you for two
 3 reasons: One, so you appreciate that when we
 4 started how little of this code was affected by
 5 recidivism. But two, just so you know, we now have
 6 a decision in the eastern district of New York
 7 saying that this provision is unconstitutional.
 8 The -- our court of appeals held it constitutional
 9 in a case called Rivera (phonetic spelling) in
 10 2005. The -- Judge Gleason in the eastern district
 11 of New York held it unconstitutional in 2007. And
 12 one of the things that a sentencing commission has
 13 to keep in mind is that one of the things that has
 14 happened between 1967 and 2007 is a set of supreme
 15 court decisions that are Apprendi and Ring and
 16 Blakely and Booker and now Cunningham (phonetic
 17 spellings), all of which teach a simple lesson, a
 18 very sort of formulaic one, or formal one, which is
 19 that a statute is unconstitutional, a sentencing
 20 scheme is unconstitutional, if you can't get to the
 21 maximum sentence solely based on the jury's
 22 verdict, if the judge has to make some findings on
 23 top of what the jury finds.

24 So, you think of our typical

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 2 JUDGE BING NEWTON: What does
 3 Apprendi mean for sentencing within a range?
 4 MR. SHECHTMAN: Should mean
 5 nothing, Judge. I mean, the only -- there are --
 6 I'll point out one other place where I see this --
 7 our current law vulnerable to Apprendi challenge,
 8 but otherwise I think it's not an issue as to our
 9 current code. But if you get -- if you begin to
 10 think about a world of guidelines, which I don't
 11 encourage you to, immediately the Apprendi issues
 12 and Blakely and Booker are things that people have
 13 to think about, and things that other states are
 14 struggling with. So, that gets us --
 15 MR. ANNUCCI: Well, okay, but
 16 the -- but the practical implications if we lose
 17 7010 --

18 MR. SHECHTMAN: Right.

19 MR. ANNUCCI: -- and its
 20 nonviolent felony, so that's the only way they can
 21 become persistent, is that all such felonies will
 22 only be second-felony offense.

23 MR. SHECHTMAN: That -- that's
 24 exactly right. You would revert back to your

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 2 second-felony provision.
 3 MR. ANNUCCI: But the persistent
 4 V.F.O. statute, which is -- doesn't require
 5 findings of bad guy, just --
 6 MR. SHECHTMAN: Constitutional.
 7 MR. ANNUCCI: -- the fact you do
 8 number three, then you still get the lifetime max
 9 and whatever the --
 10 MR. SHECHTMAN: Just --
 11 MR. ANNUCCI: -- number is on the
 12 particular grade.
 13 MR. SHECHTMAN: -- just right.
 14 FROM THE FLOOR: The only thing
 15 vulnerable here is -- is the -- is 7010. And I
 16 say -- I -- I think it's quite vulnerable.
 17 MR. SHECHTMAN: Okay. That's
 18 1967.
 19 1973, we had mandatory prison
 20 sentences for first-time felons, for the most
 21 serious felonies. So remember, we started out here
 22 with, but for murder and kidnapping, you could
 23 impose nonincarcerative sentences. That changes in
 24 '73. And what also happens in '73 are mandatory

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 2 prison sentences for all second-felony offenders.
 3 And that continues to be a centerpiece of New York
 4 sentencing law.
 5 And so, we can look at that
 6 together, if you go to page -- the first page of
 7 your sentencing chart again, right, which is to say
 8 right after the -- the title page. This -- this
 9 chart has not changed much since 1973, except for
 10 the fact that it now no longer applies to violent
 11 offenders; it now no longer applies to drug
 12 offenders; it now no longer applies to sex
 13 offenders.
 14 But as to the people it applies
 15 to, I -- I come up with five of them that are
 16 left -- no. As to the people that it applies to,
 17 which is to say grand larceny cases, bribery cases,
 18 and the like, this -- these numbers haven't moved
 19 much, I think, in probably the last twenty-five
 20 years. If you look at them with me what you learn
 21 is, if you look at Class B felonies, and you go
 22 across to alternatives, there is no ability to give
 23 a nonincarcerative sentence on that B; right? And
 24 that is the change that comes out of our 1973

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 2 legislation.
 3 Oddly, if you look at the C,
 4 there is an ability to give probation, I think with
 5 certain exceptions that I've never understood, so
 6 if you look down at very bottom you can't get it,
 7 if it's a prostitution offense or bribery or usury,
 8 I've no idea why those crimes are -- are -- are
 9 singled out.
 10 You -- if you -- if you look at
 11 our Ds, you can get probation and definite
 12 sentence, and that's a word worth -- worth saying
 13 to you, and that is basically a local jail
 14 sentence. It is a sentence of one year or less.
 15 To use the modern language it's determinate in that
 16 it's fixed, but it is a -- because it's less than a
 17 year, those -- those people will not come to DOCS;
 18 they'll serve there time on Rikers Island or
 19 whatever the local facility is.
 20 Oddly, you can get a definite
 21 sentence of one year or nine months on a D; you
 22 can't get it on a C; right? And again, Richie
 23 DeSimone assures me that I'm right on this, and
 24 that's good enough for me. And that's also sort of

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 2 a quirk that one ought to sort of rethink. There,
 3 there are -- if nothing else they're -- they're
 4 quirks in the sentencing code that have developed
 5 that probably are -- are -- are worthy of a -- of a
 6 fix.
 7 Okay. Now the second thing to
 8 look at to understand what happened in 1973 is to
 9 go to page three of that chart with me. And look
 10 at page three, look at chart A at the top. Now,
 11 again, the world has changed since '73 because we
 12 now have violent felonies. This chart only applies
 13 to nonviolent felonies, but you will see that -- if
 14 you look over the alternative column I've got none,
 15 none, none, the parole supervision sentence is a
 16 creature of the '90s. So that the end of -- at --
 17 at the end of 1973, if you had a prior felony you
 18 were ineligible for an alternative sentence, and
 19 as -- as the chart shows, except for parole
 20 supervision sentences, that remains a core
 21 principle of New York sentencing law; okay?
 22 So, we've now gotten past 9 --
 23 we're up to 1973. If you go back to your -- to
 24 your history, the second thing that happened in

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 2 1973 is the Rockefeller Drug Laws. And if you
 3 check that, and then go down to 1979 on your chart,
 4 you will see that ameliorative amendments were
 5 passed to the Rockefeller Drug Laws in '79. Given
 6 the harshness of the Rockefeller Drug Laws, it's
 7 hard to imagine that they were harsher between '73
 8 and '79. They were; right?

9 But by '79 the Rockefeller Drug
 10 Laws, as we knew them until 2004, were in place,
 11 okay. And what that meant was at the time if you
 12 sold between two ounce -- if you sold more than two
 13 ounces, possessed more than four, it was an A one
 14 felony; all right? And what that means was, it was
 15 the functional equivalent of murder; right? I
 16 think selling two ounces of drugs is a bad thing.
 17 I don't think it's murder; all right? But as you
 18 all know that's the regime we lived with on A ones
 19 until quite recently.

20 The other thing that came out of
 21 '79 -- '73/'79 Rockefeller Drug Laws was that the
 22 street sale of drugs was a B; all right? Which
 23 meant that selling of vial of crack was the
 24 functional equivalent of rape. Again, I'm not high

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 2 right? If you do determinate sentences you've
 3 taken the parole authority out of it, as we'll see;
 4 right?

5 But in New York a large part of
 6 the sentencing discretion is our prosecutors. And
 7 if I said to the -- those of you who are judges
 8 around the table, how many cases do you actually
 9 sentence in, you would say in a great number of the
 10 cases that come to me there was an agreed-upon
 11 sentence; right? I'm sentencing most often in the
 12 cases that are trial cases, not the cases that are
 13 coming to me on plea where there's an agreed-upon
 14 sentence.

15 Now, look at that -- that chart
 16 again at the top of page three, and you begin to
 17 see why the world works this way. And so, take the
 18 B, this is a predicate B. Now, go -- take yourself
 19 back before 2004, before we had the new drug laws,
 20 all right, our B was four and half to nine as a
 21 minimum indeterminate sentence; right? That meant
 22 that if you wanted to get two to four, which is
 23 what the -- what the minimum is for a D, you
 24 couldn't get there without the prosecutor's

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 2 on selling a vial of crack, it also doesn't seem to
 3 me, under most moral codes, that it's the same as
 4 rape; all right?

5 Now interestingly, we have
 6 kept -- we've moved A one numbers, so you now have
 7 to sell more than two ounces for it to be an A one,
 8 but the street sale remains a B, and that's one of
 9 the reasons in our new code we have a separate
 10 sentencing for -- for drug -- drug offenders,
 11 because we've come to a realization that they
 12 should be treated different than the rapist. If
 13 they're both Bs, you're going to need separate
 14 sentencing provisions; okay?

15 Next thing to say, one of the
 16 things one comes to appreciate when you talk about
 17 sentencing is that -- Juanita, you may know these
 18 numbers better than I do, but probably we're close
 19 to ninety-two, ninety-three percent of cases
 20 pleading, and being resolved by -- by pleas; right?
 21 Which means every sentencing system has to ask
 22 itself the question who has discretion to set
 23 sentences? And that discretion can be in this
 24 world of parole authority; right? And the judge;

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 2 consent, because the judge couldn't take you from a
 3 B to -- to a -- to a D; that required the
 4 prosecutor's consent. That meant that prosecutors
 5 had great control on what the sentences were in
 6 those cases. If you wanted it in your jurisdiction
 7 to be two and half to five, you simply announce two
 8 and half to five, and the alternative was to go to
 9 trial on the -- on -- on the B.

10 So, the result of that is, as
 11 long as you've got those sort of disparities
 12 between grades, right, it is what allows plea
 13 bargaining to work, for better or worse, and it is
 14 why judges -- it is why prosecutors do so much of
 15 the effective sentencing in our system. We
 16 probably have a lot of people in our prisons who
 17 are there for attempting to sell drugs. I don't
 18 know very many people who attempt to sell drugs,
 19 most people succeed at it, but that, of course,
 20 under our code, brings it down one grade and allows
 21 for the plea to be taken.

22 The last thing to say, while we
 23 talk about this, is one of the things that happens
 24 because plea bargaining drives so many sentencing,

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 2 is the legislature has resisted with plea
 3 restrictions. So, I think I'm right in saying, I
 4 think it's still the law, if you're at a B felony,
 5 you can't get -- on a drug offense, you can't get
 6 to any E. The legislature has said the lowest you
 7 can go is the D.

8 One of the things it seems to me
 9 a sentencing commission should ask itself is: Are
 10 those plea restrictions sensible? Because I -- I
 11 talked to Cyrus about this a minute before, one,
 12 they showed great distrust of the parties, which is
 13 to say prosecution presumably is happy with the
 14 sentence, the defense counsel is happy with the
 15 sentence, who's not happy with it? It has to be
 16 the answer the legislature, because they're the
 17 ones who are imposing the -- the plea restriction.

18 It also means that, if I can get
 19 in quick enough, as a defense counsel in my new
 20 role in life, before that indictment is returned, I
 21 can avoid the plea restriction, because I'm not
 22 locked into it yet. If you've got a good lawyer,
 23 if you've got a not-busy lawyer, you beat the --
 24 you beat the indictment, you can resolve the case.

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 2 and there's a lot of supreme court case law, United
 3 States Supreme Court, saying plea bargaining is a
 4 healthy thing; it's resolving cases.

5 Obviously, there's a fear that
 6 not only you're resolving them but you're selling
 7 them out cheap; right? There's that wonderful sort
 8 of -- Lenny Bruce used to say in the halls of
 9 justice, justice is done in the halls; right? And
 10 so there was this fear that it was all being done
 11 in the hallway, it was all being done between
 12 the -- the lawyers. The judge had very little
 13 ability to actually undo the bargain, very little
 14 incentive to undo the bargain, and I think it was
 15 some fear of that secret world, right, that -- that
 16 sort of courtroom that's not really the courtroom,
 17 that has caused all those things to be imposed.

18 But again, what I don't like
 19 about those plea restrictions, I -- I know that I'm
 20 a defense attorney now, is obviously the world
 21 changes and I'm going to have a prosecutor say to
 22 me, look, I didn't know that, what -- what you're
 23 telling me about that kid, when I indicted him.
 24 Now that I know, I wish I could go lower. I can't

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 2 If your lawyer is busier or -- or -- or not aware
 3 of the problem, and waits, you're -- you're locked
 4 into it.

5 So, one -- one, seems to me, hard
 6 question, is: How many of our plea restrictions
 7 are necessary in a just system; okay? We're now
 8 at -- we're now at -- at number four on our history
 9 list, and that is --

10 JUDGE BING NEWTON: A question.

11 MR. SHECHTMAN: Yeah.

12 JUDGE BING NEWTON: Are you going
 13 to opine as to why the legislature doesn't, to use
 14 your phrase, trust the parties in --?

15 MR. SHECHTMAN: I -- I think --
 16 you know, Juanita, it's funny, I don't have a great
 17 answer to that. I think -- I think plea -- our --
 18 our attitudes towards plea-bargaining are entirely
 19 schizophrenic; all right? On the one hand, it's
 20 obviously what keeps the system moving. If -- if
 21 you had to try everything we'd have a new
 22 commission for funding the -- the -- the courts;
 23 right? We -- as I say, on the federal side now,
 24 we're over ninety-five percent pleas. So -- and --

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 2 with the plea restriction. And then you start to
 3 try to play games: Do I dismiss the indictment and
 4 try to come back at it some other way? And I'm not
 5 sure that -- that it is necessary for a healthy
 6 system that have the restrictions.

7 George.

8 MR. ALEXANDER: I think one of
 9 the things -- it's -- it's a failure to account for
 10 the practical issues in the case, many times. I
 11 think the sex-abuse cases are a good example.
 12 There's discussion right now about whether we
 13 should impose plea restrictions for child sex
 14 abuse, for example. You know, and I think to some
 15 extent that argument is blind to the fact that
 16 eighty-five percent of those cases hinge on the
 17 testimony of the child alone. Sometimes a
 18 plea-bargain is the prosecutor's best friend,
 19 because they can walk out with nothing, or the -- I
 20 think to some extent it's -- it's a failure to
 21 account for the -- the realities of many of our
 22 case.

23 MR. SHECHTMAN: I -- I think
 24 that's right. And I -- and again, it's a -- it's a

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 2 very good example. In -- in those cases, if you
 3 impose plea restrictions, the result would not be
 4 shorter -- would not be longer jail sentences, it
 5 would be more dismissals, because you wouldn't have
 6 the testimony.

7 But anyway I pointed out that as
 8 we sort of go along, as to be sort of one issue
 9 that it seems to me a sentencing commission
 10 should -- should think about.

11 Now, if you go back to 9 -- to
 12 look at the second thing that happens in 1978, so
 13 this is number four on the list, you will see that
 14 in 1978 we have enhanced sentences for violent
 15 felonies. That phrase, "violent felonies," does
 16 not appear in our law until '78. And what happens
 17 is we add 7002 for first-time violent felons; 7004
 18 for -- for second-time violent felons, and 7008 for
 19 persistent violent felons. And in 7002 we have a
 20 laundry list of crimes that are violent felonies.

21 Now, I just -- the following.
 22 I'm a great believer in simplifying when you can,
 23 and one of my sentences about the current
 24 sentencing law is it is maddeningly complicated.

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 2 only state in which murder is not a violent crime,
 3 but we have violence for B, C, D, and E. So, we
 4 have -- we have nine categories plus the -- the A
 5 twos. So you've got a sentencing code that
 6 effectively has no longer the sort of five basic
 7 categories, it doubles it when you add violent
 8 felonies, because each one of those -- every -- is
 9 going to have to have a sentencing code, a chapter
 10 for nonviolent, a chapter for -- for violent. And
 11 that's one of the things that complicates our code.

12 And one question to ask ourselves
 13 is if we're really saying that this violent is the
 14 moral equivalent of this nonviolent, then maybe we
 15 just grade them the same, maybe we should just say,
 16 this is a B, this is a C, or these are both Bs.
 17 But by having the designation violent felony, we
 18 automatically begin to complicate our sentencing
 19 law. As I say, maybe for the better, but it's sort
 20 of -- I -- I point it out, just to keep it in -- in
 21 mind.

22 FROM THE FLOOR: Just two -- two
 23 quick comments, Paul. You -- you're absolutely
 24 correct, and it's complicated. But historically I

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 2 If you go back and look at Judge Denino's (phonetic
 3 spelling) commentaries in 1975, he talks about the
 4 law have -- being -- I -- I can never pronounce
 5 this adjective, labyrinthian, do I say it right?
 6 That was 1995, right? The world in 1995, and
 7 you'll see the world today, that labyrinth has
 8 gotten many more loops around it.

9 One of the things that has moved
 10 us away from simplification, it may be worthy of
 11 moving us away, is the fact that in '78 we added
 12 violent felonies, because -- appreciate, we started
 13 out with A through E as classes. With the
 14 Rockefeller Drug Laws we added A two. All right.
 15 Someone some day will tell me whether we really
 16 need life sentences for A two drug offenders. Now,
 17 we've now brought a few sex crimes in as A twos as
 18 well, but I think those are the only things we
 19 have. One ought to ask oneself is that a category
 20 that still makes sense.

21 But the other thing to appreciate
 22 is we go A, B, C, D, E, that's five; right? Now we
 23 make them -- well, now we have violent offenses, so
 24 we don't have violent As, New York is the only the

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 2 think there are several reasons why they went that
 3 way. Number one, when they did it the minimum had
 4 to be one third the max, before that, the min could
 5 be one to nine.

6 MR. SHECHTMAN: That's right.

7 MR. ANNUCCI: If it's a -- if

8 it's a V.F.O. it's three to nine. Then there were
 9 also a lot of implications with plea restrictions.
 10 For example, if you were indicted for a Class B
 11 V.F.O., you know, you have to plead at least guilty
 12 to class D, and if it's also an armed, then you
 13 have to plea, you know, at least to the C. And
 14 then the legislature obviously has built on that
 15 over the years, enormously, in terms of looking at
 16 that class of offenders --

17 MR. SHECHTMAN: Right.

18 MR. ANNUCCI: -- for eligibility
 19 or ineligibility for certain programs. So, while,
 20 you know, you're talking about practical things,
 21 the ramifications of potentially undoing the
 22 violent felony offender code or classification is
 23 very, very serious.

24 MR. SHECHTMAN: I -- I agree.

33 (Pages 126 to 129)

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 2 And I'm not -- I'm not here so much -- I'm not here
 3 to recommend it, Tony, I obviously -- particularly
 4 during my time in Albany, I -- I thought it was
 5 very important that if -- if -- that if you had
 6 limited prison capacity, violent people be there;
 7 right? It's just -- appreciate, it is the first
 8 significant step to really complicating the
 9 sentencing code, because instead of having one
 10 chart we now always have to have two, for -- for --
 11 for everything.

12 Okay. If you'll stay in your
 13 chronology, you'll see 1987. In 1987 we
 14 established Shock incarceration. And that is
 15 important, because it is the first of -- of several
 16 attempts to do what, for lack of a better word was
 17 sort of a back-door Rockefeller drug reform. It
 18 was an -- a sort of unwillingness to take on the
 19 fact that you had -- you were treating sale of a
 20 drug as the functional equivalent of rape. And the
 21 question was how can I shorten those sentences
 22 without, you know, things like announcing to the
 23 public that I was shortening those sentences? One
 24 answer was Shock incarceration. And so, you had

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 2 rules that said it was a boot camp. My -- my sense
 3 of Shock if you -- if you've been there is, one
 4 comes away enormously impressed. There are horror
 5 stories in other states. I -- I think we run as
 6 good a Shock incarceration program as anywhere in
 7 the country. My -- the other thing to say is -- I
 8 don't think the statistics turn out to be as
 9 encouraging as one would hope. People seem to
 10 leave Shock not only talking the talk, but walking
 11 the walk. And they really seem to leave with a
 12 commitment to being drug -- drug-free. Many of
 13 these people in Shock are there for drug-related
 14 crime; many of them have drug problems.

15 The -- the return rate to the
 16 prison is high, because it's much easier, I think,
 17 to stay clean in Shock than it is when you return
 18 to the -- to the street and the same environment.

19 But anyway for historical reasons
 20 it is important, it is six months in prison, the
 21 eligibility is that you can't have a prior -- have
 22 served a prior prison sentence. But it was the
 23 first time that we saw people getting out of prison
 24 prior to their minimum; okay?

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 2 We move forward. 1995, beginning
 3 of the Pataki administration, death penalty is
 4 promulgated for murder in the first degree. In
 5 addition in 1995 we have, for first time,
 6 determinate sentences. And again, if -- to state
 7 the obvious, three to nine is indeterminate because
 8 it requires a parole authority to tell you when
 9 you're getting out. So that isn't determinate;
 10 right? It says your sentence is seven years or
 11 with one -- one seventh, I think I'm right, Tony,
 12 for good time?

13 MR. ANNUCCI: Uh-huh.

14 MR. SHECHTMAN: Your sentence is
 15 actually six years; okay? Now, a couple of things
 16 to say about this. We started in New York State
 17 with determinate sentences for second violent
 18 offenders, people who had a prior felony. The
 19 impetus behind this was several.

20 Let me -- me back up and say the
 21 following: Some time in the 1980s, I think late
 22 '80s, the federal government went to determinate
 23 sentences. And they went to with the sentencing
 24 guidelines that I wouldn't recommend to anyone.

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 2 But they went to determinate sentences, and it was
 3 one of those remarkable moments in legal history,
 4 certainly in sentencing history, in that you had a
 5 confluence of forces at work. For liberals, the
 6 concern was to the extent there was discretion
 7 here, it was used in favor of the wealthy, it was
 8 misused, it was abused. And so, you had people
 9 like Ted Kennedy who were in favor of determinate
 10 sentences because they thought discretion, by
 11 definition, meant racial disparities and -- and the
 12 like.

13 For some people, conservatives,
 14 it was a sense of parole boards let people out
 15 early. And the best way to keep people longer is
 16 to get rid of parole boards.

17 For prisoner's rights groups, the
 18 concern was, take California, you go in for zero to
 19 twenty, you never know when you're getting out, and
 20 your release date is a function of the whim of the
 21 correction authorities, and it was actually thought
 22 that it was the cause of prison riot. People had
 23 no idea when they were getting out, and so prison
 24 reform groups preferred determinate sentences.

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 2 Victim's groups preferred
 3 determinate sentences because if you got three to
 4 twenty or three or whatever it was, you had no idea
 5 when that person was getting out. It sounded like
 6 a tough sentence; in practice it might not be.
 7 This was truth in sentencing.
 8 I know the minute I go in when
 9 I'm getting out, save for the good time credit. So
 10 both the defendant and the victim knew.
 11 That's a lot of forces coming
 12 together, pushing towards determinate sentencing.
 13 That's what happened on the federal side, and then
 14 the feds, in their wisdom, said what is good enough
 15 for the federal government must be good enough for
 16 the states. And so, in 1995, you had federal
 17 legislation that said if you go to determinate
 18 sentences for your second-time violent, repeat
 19 violent offenders, we will give you prison money.
 20 We'll give you money to build prisons; to maintain
 21 existing provisions; and our legislation in 1995,
 22 was actually a budget bill -- an Article 7 bill,
 23 because federal money was attached to it, and that
 24 made it much more palatable for people who

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 2 MR. SHECHTMAN: I don't -- my
 3 guess --
 4 FROM THE FLOOR: You can't answer
 5 that.
 6 MR. SHECHTMAN: -- my guess is
 7 we're not.
 8 Okay. So now -- now, if you
 9 would, look at the chart with me, go to page two,
 10 and we will see -- and you will see at the top what
 11 our -- the determinate sentences that -- that --
 12 oops. Let's see if I can get you in the right
 13 place. Hold on. No, I'm sorry. Go to page three,
 14 if you would.
 15 And three-C, all right, is a
 16 chart for violent felony offenders whose prior
 17 crime was a violent crime, and three-B is a chart
 18 for violent felony offenders whose prior crime is a
 19 nonviolent crime. You'll see these are determinate
 20 sentences. The range for -- for example for a
 21 Class B violent felon, whose prior conviction is
 22 nonviolent; right? That's -- that's the middle
 23 chart there, has to be a sentence between eight and
 24 twenty-five years. How did we get the numbers?

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 2 otherwise might not have wanted the change.
 3 And so, in '95 we go with
 4 determinate sentences for second-felony offenders.
 5 It was consistent with the governor, who had
 6 campaigned on a philosophy of abolishing parole;
 7 right? And so, we were abolishing parole; we were
 8 going here.
 9 Now, let me say the following to
 10 you: Parole has two meanings in sentencing. It is
 11 a parole authority that releases, but it is
 12 supervision when you get out. And I have enormous
 13 regard, as you know, for the prior governor. I'm
 14 not sure exactly what he meant about abolishing
 15 parole, which of those two he was speaking to or
 16 both; right?
 17 What this does is it abolishes
 18 parole boards. It still leaves open the question
 19 what do we do with this guy when he gets out, and
 20 I'll come back and talk about that in a -- in a
 21 second. But --.
 22 FROM THE FLOOR: Question: Are
 23 we still getting federal money, or -- or is that
 24 done?

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 2 Easy. You look up to the prior chart, A, which
 3 was -- which existing law; we took the maximums
 4 twenty-five, fifteen, seven, four; right? The --
 5 the -- the maximum of the -- of the indeterminate.
 6 And if you look down you will see twenty-five,
 7 fifteen, seven, four; all right?
 8 Now, we may have been wrong in
 9 doing it, because that twenty-five-year sentence,
 10 if the person was eligible for good time, was
 11 actually -- somebody said do the math, it would be
 12 like a seventeen-year sentence, sixteen-year
 13 sentence; right? So that's a -- that
 14 twenty-five-year sentence is going to turn out to
 15 be a twenty-one-year sentence if you take -- if you
 16 take six-sevenths of it.
 17 So, we -- actually the maximums
 18 probably increase under this; the minimums, the
 19 eight, the five, the three, the two, people thought
 20 about, and in typical Albany fashion, be -- because
 21 it was important it didn't get resolved till
 22 three-thirty in the morning, but they were just
 23 sort of political compromises. The maximums came
 24 from the maximum side, the minimums came from --

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 2 from the political process.
 3 Okay. Now, couple things to say:
 4 There were concerns about this from some judges at
 5 the time. One concern was that we were limiting
 6 judicial discretion, and I always thought that was
 7 misguided. So, again, if you stay on page three
 8 and look at B and C, those are very large ranges;
 9 right? It is eight to twenty-five, five to
 10 fifteen; right? They're -- they're not narrow
 11 ranges. There was a concern some people thought
 12 that this was sentencing guidelines. It wasn't.
 13 It was determinate, so that it was like the
 14 federal; right? But there were no guidelines at
 15 all. If you tried a case and your defendant was
 16 a -- was a predicate B violent; right? When it
 17 came to sentencing you could impose a sentence
 18 between eight and twenty-five years, and whether
 19 you pick eight or twenty-five depended on your
 20 views about the defendant and the crime and life;
 21 right? There was no guideline to say, you know,
 22 add two points for this, or this is particularly
 23 serious. So, it was broad discretion. And again,
 24 I'm not sure that discretion is zero some, but

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 2 guess is the statistics show that it doesn't.
 3 There was a concern that these
 4 sentences were harsh, and this goes to a point that
 5 Tony has raised, which is, at the upper end here,
 6 twenty-five is a big number; right? And
 7 twenty-five turns out to mean you're serving over
 8 twenty-one. What happened during the Pataki
 9 administration, and I'd -- I'd be surprised if
 10 it -- if it's different in this administration,
 11 except for the fact that we have so many fewer
 12 indeterminate sentences, is the parole boards got
 13 tough. So that if you had an indeterminate
 14 sentence, you were much more likely to go to that
 15 conditional release date if you were a sex
 16 offender. The limited statistics I saw were
 17 basically, you know, five percent, ten percent of
 18 sex offenders were getting out before their
 19 conditional release date. The basic rule was if
 20 you were a sex offender, you were a violent
 21 offender, you were held to your conditional release
 22 date. So that that meant the indeterminate
 23 sentences were quite long, and the -- I've always
 24 wondered Tony's question, which is: Are

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 2 remember you are taking away discretion from parole
 3 authorities to the extent that we think of
 4 discretion as zero some; it's got to go somewhere.
 5 And the only place that it can go in this system is
 6 to the judges or to the prosecutors.
 7 So, one concern was we were
 8 limiting judicial discretion, we weren't. Another
 9 concern was that this was guidelines, it wasn't.
 10 There was a concern that you would increase the
 11 number of trials. I'm quite confident that has not
 12 happened, and again, that -- what -- what gets you
 13 more or less trials is a function of the -- the
 14 disparities between the grades and the leverage
 15 that gives prosecutors.
 16 So, look at your -- at B again on
 17 page three; right? If I'm a class B violent, where
 18 my prior is a nonviolent, if I go to trial I'm
 19 looking at an eight-year minimum. If somebody is
 20 prepared to offer me a plea that gets me to five or
 21 if a -- if the plea restriction lets me get to
 22 three, I've got enough leverage to get -- to get a
 23 deal; right? So, I never saw any reason to think
 24 this would increase the number of trials and my

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 2 determinate sentences, in fact, longer or -- or --
 3 or shorter than the indeterminates? The real
 4 factor there is how tough is your parole board?
 5 Because if your parole board is taking people here,
 6 your indeterminates turn out to be quite harsh.
 7 FROM THE FLOOR: Just curious,
 8 for -- for the practitioners out there, because
 9 I've heard this anecdotally from judges, defendants
 10 now prefer determinate sentences. And in fact,
 11 somebody was telling me that under the sentencing
 12 scheme before the Rocky drug law, they were asking
 13 for determinate sentences and some judge would say,
 14 I'm sorry, I've to sentence you indeterminate. I
 15 was just curious if anybody has heard something
 16 similar, defendants are preferring to determinate
 17 sentences.
 18 JUDGE BING NEWTON: Absolutely
 19 true.
 20 MR. SHECHTMAN: Yeah. And my --.
 21 JUDGE BING NEWTON: Absolutely
 22 true. Defendants will take pleas now, and all they
 23 want to do is get rid of that fifteen to life.
 24 They don't want to go, have anything to do with the

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 2 parole board, they'll take twenty-five flat, even
 3 thirty flat, rather than have -- have -- than have
 4 a life or a parole type sentence.
 5 MR. SHECHTMAN: Yeah.
 6 FROM THE FLOOR: Interesting.
 7 MR. SHECHTMAN: Yeah, and -- and
 8 that's because if you think about any -- any
 9 bargaining that we all do in life; right?
 10 Certainly makes it easier to bargain. And if
 11 you're bargaining about indeterminate, you can't
 12 have the certainty because you don't know what the
 13 parole board is going to -- is going to do. If
 14 you're bargaining by determinants, I know if I get
 15 my client a six, he knows he's going to serve
 16 six-sevenths of it. And -- and -- and so, I've
 17 always thought the concern that this was going to
 18 generate more trials was false, and indeed, it's
 19 turned out to be that way.
 20 Go back to your 1995 chart there;
 21 okay? The second thing that happened in 1995 was
 22 the minimum term of indeterminate sentence doubled
 23 for persistent violent felons. So go -- this is
 24 7008, so if you flip with me to page seven of your

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 2 in those sentences, along -- along with the
 3 governor's philosophy that these were particularly
 4 bad people, they were three-time violent felons,
 5 which is hard to quarrel with.
 6 Go back to your history on 1995,
 7 the minimum term of the indeterminate sentences
 8 goes from one-third to one-half for first-time
 9 violent felons. So at the time, we kept sentences
 10 indeterminate for violent felons, no grant money
 11 there; right? But we moved the minimums consistent
 12 with the philosophy that these were the people who
 13 should be in prison.
 14 The last thing that happened in
 15 '95 was a parole supervision sentence for certain
 16 low-level drug-dependent second-felony offenders.
 17 This is the Willard sentence that one hears about.
 18 It required prosecutorial consent for the Ds; it
 19 didn't require it for the Es, but I think as a
 20 practical matter, it didn't matter very much,
 21 because you can't get to an E because of the plea
 22 restrictions, in -- in any event. So, basically
 23 you had a Willard sentence, but one that required
 24 prosecutorial consent to get there.

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 2 chart and look at B on page seven, you will see,
 3 those are your persistent-violent-felony-offender
 4 sentences. Prior to 1995, if it was a B it was ten
 5 to life; if it -- if it was a C it was eight to
 6 life. We doubled the minimums; right?
 7 Now, this actually turned out to
 8 be sort of interesting as a matter of -- of sort of
 9 dealing with the federal government, because
 10 remember their rule was you get prison grants if
 11 your sentences for repeat violent offenders are
 12 determinate. We couldn't make our sentences for
 13 persistent violent offenders determinate. Why?
 14 Because they're life sentences, and one of the
 15 things one knows about life is that it's
 16 indeterminate. And so, unless you were going to go
 17 to determinate here and if you went to determinate,
 18 your maximum would be shorter than life, and you
 19 would be announcing to the public, we have reduced
 20 the sentences for persistent felony offenders. So,
 21 to compromise here was to double the minimums, and
 22 to say to Washington we've done as good as we can,
 23 give us the grant money. And they -- and they did,
 24 but that, again, is what sort of drove the increase

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 2 Okay. That's 1995. Move with me
 3 to 1997. And what you see in 1997 is merit time
 4 enacted. It's been mentioned already this morning
 5 and this is -- other than Shock, this is the first
 6 time we are allowing release prior to the minimum.
 7 This was one-sixth off the minimum, so if your
 8 sentence was three it would come down to -- I don't
 9 know what that is, Tony, two and three -- two and
 10 three-quarters --
 11 MR. ANNUCCI: Two and a half.
 12 MR. SHECHTMAN: -- two and
 13 two-thirds, two and a half, whatever the math says.
 14 And so, and the merit time required you to get your
 15 G.E.D. if you didn't have it, a variety of -- of --
 16 of criteria. Again, the governor's philosophy at
 17 the time was let's try to -- we -- let's try to --
 18 try to avoid building new prisons. The people we
 19 want in prisons are the violent felons. If we're
 20 increasing those sentences for violent felons, we
 21 ought to find a way to reduce them for nonviolent,
 22 and this was a way of reducing them, because we
 23 were moving up -- up the minimum date.
 24 That's 1997. We're next at 1998.

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 2 Now, before we do this, it's worth saying the
 3 following: We talked about what the -- the parole
 4 supervision was, or -- or we didn't, but we ought
 5 to, for an indeterminate sentence. So, take that
 6 three to nine, and you're out -- let's assume you
 7 go to the parole board and you're out at three;
 8 right? The answer is, I'm on parole supervision, I
 9 think, for the rest of the term; right? And that
 10 is how parole supervision meshes with indeterminate
 11 sentences; right? So that if I come out on my
 12 conditional release date, if I come out at six,
 13 that's my parole supervision term. And of course,
 14 the madness of all of this is, if I'm the worst
 15 offender, right, who gets no good time, and I come
 16 out here, right, I get no supervision. Because my
 17 supervision is a function of what -- what remains
 18 of my sentence, once I'm released on parole.
 19 Now, do it for determinate
 20 sentences. So, I've got a seven-year sentence;
 21 right? One seventh of it is good time. That means
 22 I'm out at -- out at six; that means, in this
 23 world, I get one year of supervision. All right.
 24 Take the person who gets a three-and-a-half-year

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 2 sentence; right? If my math is right, the six off,
 3 will get him out a half year early, and he'll have
 4 a half-year of supervision.
 5 Because when we did this reform
 6 in 1995, we weren't sensitive to what we were doing
 7 to parole supervision, we were leaving very short
 8 terms of parole supervision for offenders, because
 9 the rule was your parole supervision is what is
 10 left over of your sentence; right? And so, what
 11 happened in '98 was the legislature adopted the
 12 federal model. Remember, this was the federal
 13 model, it was encouraged by federal grants, now the
 14 question is: What about parole supervision?
 15 And the answer was when you get
 16 out of a determinate sentence, you have a fixed
 17 term of parole supervision; okay? And I think I'm
 18 right in saying that the general rule was the fixed
 19 term was five years. We've made exceptions to it
 20 since then, shortened it for drug offenses,
 21 lengthened it for sex offenses, but the answer was
 22 this is a serious problem. If your parole
 23 supervision is your residual, you're not going to
 24 get parole supervision of any meaningful length.

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 2 Now, one question that one ought
 3 to ask oneself is -- and I'll talk about this when
 4 we talk about probation too, is: Is five years the
 5 right number; right? My own sense is five years is
 6 a long time to supervise someone. I'm not a -- I
 7 don't count -- count as a parole authority, but
 8 what matters most is, obviously, those initial
 9 months of the return to the community, and probably
 10 that initial year or eighteen months. I'd be
 11 curious to know what supervision we're doing in the
 12 last three years at all. I think we've moved to
 13 ratios of caseloads that are very large for people
 14 who are three and four and five years out. And one
 15 question is, as a resource matter, as a practical
 16 matter, as just a matter of giving people liberty:
 17 Is five years the right number?
 18 That's the same issue in
 19 probation, because our probation terms are five
 20 years. Now, I say that because I think I'm right
 21 in saying that the federal period of parole
 22 supervision is three years; right? Now, again, one
 23 ought to have exceptions for sex offenders, there
 24 may be other crimes where you want exceptions. But

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 2 one thing to think about is: What is the
 3 presumptive term here? If someone really is out
 4 for three years and doesn't screw up, is it
 5 sensible to hold him on for the other -- for the
 6 other two, or should -- should we end it; okay?
 7 FROM THE FLOOR: Paul, is that
 8 mandatory or is it discretionary?
 9 MR. SHECHTMAN: I -- I don't know
 10 what the ability is to go back --
 11 FROM THE FLOOR: There -- both of
 12 these -- it's not set always at five years.
 13 There's -- there's ranges --
 14 MR. SHECHTMAN: Well, there are
 15 ranges on the drug ones, I know. But I'm not sure
 16 there are ranges on the -- on the others.
 17 FROM THE FLOOR: There aren't
 18 ranges on the V.F.O.s. But what happens is
 19 traditionally, those cases, they end up being what
 20 we call a packet caseload. Because caseloads are
 21 growing enormously, you know, if a person has
 22 demonstrated after eighteen months, twenty-four
 23 months, that he or she has abided by the conditions
 24 of their parole, there -- there's very little

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 2 attention paid; it's rather cursory
 3 MR. SHECHTMAN: Right.
 4 FROM THE FLOOR: And so, when you
 5 ask the question: Is five years too much; is it
 6 enough? After a certain demonstrated period of
 7 time, you know, you don't have as much focus on
 8 everything they do.
 9 MR. SHECHTMAN: Well, I agree. I
 10 just -- I just put it as a question.
 11 FROM THE FLOOR: Right.
 12 MR. SHECHTMAN: One of -- one of
 13 the things that -- one of the things that's always
 14 bothered me, as -- as someone who knows parole
 15 officers is, I -- let me put it differently.
 16 When I had the job that -- that
 17 the commissioner now has, you'd wake up in the
 18 morning and the headline would say parolee harms
 19 someone.
 20 COMMISSIONER O'DONNELL: Uh-huh.
 21 MR. SHECHTMAN: Right? You would
 22 look; it would say New Jersey parolee harms
 23 someone, and you would say I don't have to worry
 24 about that. And you turn to the next -- the next

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 2 page; right?
 3 But you do -- you do your parole
 4 officers a disservice when -- when you get beyond
 5 eighteen months, there's -- there's basically no
 6 supervision, and we know there's no supervision,
 7 and yet when that person screws up, the answer is
 8 he's a parolee and the problem is paroles.
 9 FROM THE FLOOR: Right.
 10 MR. SHECHTMAN: If we're not
 11 going to supervise them then we really ought to
 12 think about what -- what the right length of term
 13 is, and again, as I say, I think the rule on the
 14 federal side is -- is three years. It strikes me
 15 as not a crazy number.
 16 Go back to the chart with me.
 17 We're still in 1998. So, the first thing that
 18 happened in 1998 was, except for certain
 19 domestic-violence cases, those were cases in which,
 20 not that the defendant was involved in domestic
 21 violence, but the -- not the -- not the -- let me
 22 put it differently.
 23 Those are cases where -- where
 24 the defendant was a battered woman, for the most

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 2 part, and so we had indeterminate sentences there.
 3 Other than that, we went to determinate sentences
 4 for first-time violent felons. As I say, if you
 5 continue to look at the history, we added
 6 postrelease supervision; right? And we made
 7 indeterminate sentences for people whose violent
 8 crime was the result of domestic violence.
 9 Flip over to the next page of
 10 your -- of your history. 2000, we add a
 11 second-child-sexual-assault-felony offense. 2000,
 12 we also add hate-crime legislation. Now,
 13 hate-crime legislation winds up affecting the
 14 sentencing law, because basically what we do is we
 15 take a D and we make it a C, if -- if you have a
 16 hate motive. We take a C and we make it a B if you
 17 have a hate motive, and so forth. That suggests
 18 that it shouldn't affect the sentencing code. It's
 19 just a classification, but when -- if your hate
 20 crime is a B, then the question is: Where do I
 21 take it to? Do I take it to an A one? Do I take
 22 it to an A two? Do I really want life sentences
 23 for those people? Is it really -- is -- is a hate
 24 robbery, is that the same as a murder?

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 2 And so we wind up creating a
 3 separate sentence for B hate crimes, in order to
 4 avoid that -- in order to avoid the problem, so we
 5 impact the sentencing code there.
 6 2004, we revised sentences for
 7 drug crimes. And if you -- and make them
 8 determinate, and so if you go to page six of your
 9 chart, you will see what are now embodied in 7070,
 10 and those are the determinate drug sentences. And
 11 what happens, because we distinguish between
 12 violent and nonviolent, is we have a first-offender
 13 provision; we have a second-offender provision,
 14 where your predicate is nonviolent, so that is
 15 where I have D and V; and we have a second-felony
 16 provision where your predicate is violent. So, we
 17 wind up with three separate ranges.
 18 Again, what I'd be curious about
 19 is how -- how this is playing out in practice,
 20 because what I said to you earlier is in our state
 21 prosecutors do a lot of the sentencing. So now
 22 take yourself to a second time -- I -- I -- I'll do
 23 New York City for you for a second. If it's a
 24 first-felony drug offender, right, most of those

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 2 are Bs, that is what street sale is. If they're
 3 sending out an undercover, you are getting a B.
 4 It's one to nine is the range. My guess is most
 5 people in New York City are getting probation for
 6 that, maybe with a split sentence, but my guess is
 7 probably straight probation, okay. That's all our
 8 first offenders.
 9 Now we get to our second
 10 offenders. My guess is, most of these turn out to
 11 be nonviolent predicates. If you're a street
 12 seller, your prior is either a street sale, or some
 13 sort of larceny offense, so we're really talking
 14 about the second chart. Now, there my minimum for
 15 the B is three and a half to twelve. If I go to
 16 trial, no matter how lenient that judge may be, I'm
 17 not doing better than three and a half; all right?
 18 If I want to do better, I have to take a plea.
 19 What I would be curious to know
 20 is: What is the plea bargaining policy in
 21 Manhattan, Queens, Brooklyn? My guess is you come
 22 down to the C. But if that's the case, then you're
 23 seeing people coming into state prison with
 24 two-year determinates, would you take the

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 2 MR. SHECHTMAN: Yeah.
 3 MR. ANNUCCI: -- that there's not
 4 the incentive to go into Shock, work hard for six
 5 months --
 6 MR. SHECHTMAN: Yeah.
 7 MR. ANNUCCI: -- and get out
 8 early.
 9 MR. SHECHTMAN: And -- and -- and
 10 that's one of the points I was going to make. As
 11 you -- as you move this, the one question is --
 12 we've seen significant reform in 2004. One useful
 13 study would be how have the sentences changed?
 14 Have they changed appreciatively for the people
 15 coming in? A huge part of your prison population
 16 are -- are drug offenders, typically predicate drug
 17 offenders, at least in -- in the city. Upstate you
 18 can go to jail if you -- if you do it one time. In
 19 the city we have our simple rule that says you've
 20 got to do it twice.
 21 I -- I remember a state trooper
 22 coming down -- the state built that treatment
 23 plant, that the assemblyman knows, up on the -- up
 24 on the West Side Highway. It was state property;

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 2 one-seventh off of. But what it suggests is that,
 3 while we've had significant reform here at the top
 4 end, because it's no longer -- if you look at these
 5 sentences, for A one, it's no longer fifteen to
 6 life. It's still long sentences, right, but for
 7 first A's it's eight -- it -- it's determinate
 8 eight to twenty. So, those are shorter sentences
 9 than in the days in which we were seeing fifteen to
 10 life.
 11 But it may be that, given
 12 prosecutorial plea-bargaining policies, we're not
 13 seeing that much shorter sentences for the fellow
 14 who's arrested for selling crack on the street, who
 15 sold crack -- crack before. I'm not sure that,
 16 again, the one-seventh may make a difference
 17 because it's -- it's a good time. You have merit
 18 time for those people. I think --.
 19 MR. ANNUCCI: Yeah, one of -- one
 20 of the things we're seeing, and I haven't really
 21 broken it down by first and second felony, but
 22 we're seeing less interest in Shock incarceration,
 23 because they're coming in with such -- such shorter
 24 sentences --

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 2 the state troopers policed it. They were making
 3 arrests; they said they had a zero-tolerance
 4 policy. I remember saying to that trooper, this is
 5 New York City. We don't quite have a
 6 zero-tolerance policy. First time drug sellers we
 7 give probation.
 8 If that's the policy in New York,
 9 I think it probably still is, then the question is
 10 what is that second time person getting, because
 11 he's the person who is driving your capacity
 12 numbers in the -- in the prison. Is it getting
 13 less? And then it's Tony's question, remember so
 14 much of what we've seen up to now, Shock, the
 15 parole supervision sentences, were back-door
 16 Rockefeller reform provisions. And so, the
 17 question is: If you've gotten meaningful reform
 18 out of 2004, right, do you need the back door any
 19 more, or should the back door be changed? It may
 20 be that you haven't gotten meaningful reform, or
 21 maybe in New York City, if you sell drugs on the
 22 street corners twice, you're still getting two
 23 years, and Shock is -- is less. But that's worth
 24 looking at, because that's going to drive a large

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 2 part of your -- of your numbers.
 3 Okay. Back to the chart, 2004,
 4 the death penalty struck down. 2005, we add the
 5 Crimes Against Police Act. It had the effect of
 6 increasing the sentence for certain police
 7 officers -- crimes against police officers.
 8 2007, we have determinate
 9 sentences for nonviolent sex offenders; right? And
 10 Richard DeSimone has this wonderful story of
 11 getting a phone call that says how we make the
 12 sentences determinate for -- for a non -- for
 13 nonviolent sex offenders, and Richard's answer was
 14 we make them violent crimes. The answer was that's
 15 too simple. All right. Let's just have a separate
 16 section of the law for it. And so we do now, and
 17 if you have a nonviolent sex offense, of which
 18 there are some, which now have determinate
 19 sentences, but you go to 7080 to -- to find them.
 20 That's the history, and then what
 21 I want to do, now that you're educated, is just
 22 take the sentencing chart and we'll walk through it
 23 at rapid pace, now that you sort of know the --
 24 know the history. And you'll see what's left and

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 2 we'll see some questions that are worth asking and
 3 then I'm probably beyond my time, but I'll try to
 4 be -- be quick. Okay.
 5 COMMISSIONER O'DONNELL: No, you
 6 won't.
 7 MR. SHECHTMAN: Are we doing
 8 okay?
 9 COMMISSIONER O'DONNELL: You have
 10 lot of time.
 11 MR. SHECHTMAN: I've got a lot of
 12 time? You don't want to say that.
 13 Here we go. The first chart;
 14 right? This is right after the cover page, is now
 15 the chart in New York for first nonviolent,
 16 nondrug, nonsex felony offenders, and I say that
 17 because drugs have their own chart and are
 18 determinate, and sex has its own -- own chart.
 19 Either it's going to be a violent felony if it's a
 20 sex crime, and so that will get it out of this --
 21 this chart, or if it's a nonviolent felony it has
 22 its own -- own chart.
 23 One of the questions that
 24 commission should ask itself is: Does it make

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 2 sense to have indeterminate sentences at all? We
 3 have this hybrid now. It's a hybrid that came
 4 partly out of the fact that initially there was
 5 federal money here, it came partly out of a sense
 6 of token sentencing; right? But we now have a
 7 world in which I -- if I said to you, okay, here's
 8 your final exam question in a sentencing course,
 9 what philosophy of sentencing justifies
 10 indeterminate sentences for -- let's see if we can
 11 give examples here --
 12 FROM THE FLOOR: Grand larceny.
 13 MR. SHECHTMAN: -- grand larceny
 14 and bribery, but determinate sentences for
 15 kidnapping and drug dealing. You would say, I
 16 don't think I've a coherent philosophy that does
 17 that. And it is probably time to ask ourselves the
 18 question of, let's try to move as much as we can --
 19 if -- if determinates are what we think are right,
 20 because they give truth in sentencing, we now have
 21 parole supervision at the back -- back end of it,
 22 then should there be any indeterminate sentences?
 23 Now, the obvious exception to the
 24 rule is any time you have a life sentence you need

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 2 to have an indeterminate sentence. And that goes
 3 as a matter of logic, but it's also probably right
 4 as a matter of philosophy, because you say to
 5 yourself take the -- take the young kid who commits
 6 a murderer at age twenty-two; all right? If you're
 7 not prepared to say it's life and I'm throwing away
 8 the keys, if you're willing to sort of believe in
 9 redemption and -- and someone changing, then
 10 somebody has to make that decision along the way,
 11 and that sentence has to be indeterminate. Maybe
 12 if you kill a cop the answer is I'm sorry, it's --
 13 it's life without parole. But if you believe
 14 that -- that somebody ought be able to reduce that
 15 sentence because the -- it's a different fellow
 16 that -- than the teenager that went in, then you
 17 want those to be indeterminate. But I'm not sure
 18 why any B felony sentence should be indeterminate,
 19 and would just say I'm not sure why we still have
 20 this -- this chart. But that's the first of our --
 21 our charts.
 22 If you look down the bottom of
 23 it, the last few footnotes, you will see that for a
 24 hate crime, because the hate crime legislation, if

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 2 you're a B, that has to be one through six; right?
 3 So, we've -- we've moved that, because of the hate
 4 crime legislation.
 5 The second, the last footnote
 6 says that certain bribery, usury, prostitution
 7 offenses cannot get probation. I don't know, that
 8 may be the moral code of a different period, but
 9 I'm not sure why -- why usury is not a
 10 probation-eligible offense, and somebody ought
 11 to -- ought to ask that question.
 12 Okay. Now go to page two with
 13 me; okay? Now we have determinate sentences for
 14 first violent felony offenders, and those are the
 15 ranges; okay. As for the Ds and Es you can get a
 16 probation sentence, you can get a definite
 17 sentence; all right? Now, again, there's a non --
 18 look at the Ds. I can get a sentence of two;
 19 right? That's the minimum determinate. I can get
 20 a definite sentence. That means one. Try getting
 21 one and a half. I can't get a one -- one and half
 22 out of that. I don't know why that is, right? It
 23 just turns out that we set the minimum at two. So,
 24 you know, you can imagine somebody who is -- who is

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 2 I understand the politics of it; right? But it
 3 would be a horrible thing to learn that the parole
 4 board is keeping these people longer, with the
 5 result that we didn't get the reform we
 6 anticipated.
 7 Next page, page three. Well, let
 8 me just show you one other thing. Go back to page
 9 two for a second. You will see the next to the
 10 last footnote there; right? A range -- let me see
 11 where I find this. Look at the class D first
 12 violent, you know, at the top of the chart. For a
 13 D it's two to seven. If it's menacing a police
 14 officer we make it two to eight, right? And again,
 15 I understand the politics that go with that; right?
 16 But I would be curious to know if there's anyone
 17 who's getting between seven and eight, and there
 18 are a lot of judges who would prefer simplicity, if
 19 we could get -- if -- if we could get -- get
 20 simplicity.
 21 Okay. Page three. Now I have my
 22 second-felon provisions, and again there are three
 23 of them. There are nonviolent, which remain
 24 indeterminate. That seems to me to be open to

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 2 okay to get one, but I can't get one -- one and a
 3 half for him.
 4 6012 is that domestic violence
 5 legislation we talked about. That is carving out
 6 indeterminate sentences for the victims of domestic
 7 violence who commit crime. And one of the things
 8 that's worth asking is -- if one goal should be
 9 simplification, one of the things worth asking is,
 10 A, is there a logic to it; right? Is it really the
 11 case that we're saying that those people, and may
 12 be that they committed violent crimes; right? But
 13 they were the victim of -- of domestic violence and
 14 so we want some parole authority to decide when
 15 they're ready to get out.
 16 But I'd be curious to know, are
 17 we letting those people out at their minimum? If
 18 we're not letting those people out at their
 19 minimum, it is quite possible that what this reform
 20 has done is -- is created longer sentences for
 21 these people. I mean, I don't know the answer to
 22 that, but it -- one -- one thing worth asking is:
 23 Was this carve-out sensible as a matter of
 24 philosophy; is it sensible as a matter of practice?

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 2 question. There are violent/nonviolent; there --
 3 there are violent/violent. Okay. And we know
 4 where -- where they all sprang from.
 5 Next page are the
 6 second-child-abuse, sex-assault offense, and this
 7 is the only place in the code where we have both
 8 determinate and indeterminate sentencing. So we
 9 have the determinate for the A'. I said before,
 10 to -- to Judge Green, that I thought there was one
 11 other place in our law in which we had an Apprendi
 12 problem. If you look at the Bs here, the range is
 13 twelve to thirty, like determinate. But if you go
 14 down to the footnote, if the judge determines that
 15 more is warranted, he can impose, essentially, an A
 16 one sentence, fifteen to life, or twenty to life.
 17 That's probably unconstitutional, because you can't
 18 get there just by the judge's -- judge's verdict --
 19 or just by the jury's verdict, so that's
 20 probably -- runs afoul of Apprendi and -- and is a
 21 problem.
 22 On page five, these are the
 23 sentences of nonviolent felony sex offenses. So
 24 again, as soon as you say to yourself, I'm going to

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 2 have a separate scheme for this, you need three
 3 different codes under our current structure,
 4 because you need one for first offenses; you need
 5 one for sex, nonviolent; you need one for sex,
 6 violent. And that's what we have. And again, it
 7 is worth asking the question that Richie DeSimone
 8 asked, which is if what we're really saying is sex
 9 offenses are bad, then should we treat them all
 10 simply violent offenses; right?

11 And if you look with me, look at
 12 the first -- here is a first-time nonviolent sex
 13 offense. Now, put your finger in page five and go
 14 back to page two, and for first timers, look at the
 15 range. It goes five to twenty-five, five to
 16 twenty-five, three and a half to fifteen, three and
 17 a half to fifteen, two to seven, one and a half to
 18 four. So they're identical, such that if you
 19 decided to treat these nonviolent sex offenders as
 20 violent sex offenders, at least for the
 21 first-timers, the code -- the sentencing provisions
 22 would be the same.

23 Now, you get some variation when
 24 you go down the list the second time. I'm not

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 2 that. The only thing I would say to you is what
 3 remains a fixture in New York sentencing law is
 4 this notion that says second felony offenders are
 5 ineligible for alternatives. And there's no -- it
 6 may be the third rail sentencing policy, but it is
 7 certainly something that a commission needs to --
 8 needs to think about. It's been part of our law
 9 for the -- for twenty-five years now, but it takes
 10 away a great deal of discretion from judges,
 11 obviously, and the answer may be that's what --
 12 that's what we want. But when you look at those
 13 charts, except for parole supervision in that
 14 alternative column, any recidivist chart will say
 15 none, none, none. And that's -- that New York law.

16 And that's what I know about New
 17 York law and thank you for having me.

18 MR. ANNUCCI: Terrific.

19 COMMISSIONER O'DONNELL: Thank
 20 you. Paul, I missed the very first part of it, but
 21 I really want to thank you. It was brilliant. I
 22 hope that we can call on you particularly on, you
 23 know, as we grapple with if we can simplify, and --
 24 and follow up on some of these recommendations that

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 2 sure -- I -- I'm not sure -- you can do that
 3 together. So now -- now pick up page three and
 4 five at the same time and look at C on each of
 5 them. So I'm looking at violent/violent and I'm
 6 looking at sex violence. And we have -- it is --
 7 go down the minimum column, the maximums are the
 8 same twenty-five, fifteen, seven, four. The
 9 minimums are ten, seven, five, three. Is it really
 10 necessary to have those sort of subtle distinctions
 11 here, or -- or are we better saying, if we want to
 12 say it, that all sex crimes we're going to treat as
 13 violent crime, and then we get to have one table.

14 I realize getting rid of one
 15 table is not the only mission in life, but
 16 something had taken probably a good thing.

17 Those are our second times, go to
 18 page four. Like I said, those are the
 19 provisions -- five, we talked about sex offenses,
 20 six are our drug offenses. They are now
 21 determinate; right? And eight are two persistent
 22 offender provisions.

23 I -- I'm not going to talk about
 24 alternative sentences. I -- I -- I apologize for

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 2 you're making, if any others occur to you and you
 3 can pass them on, we'd really appreciate it.
 4 MR. SHECHTMAN: No, it's fine.
 5 I'd just say one other thing which is speaking
 6 after me is -- is Richie DeSimone, and the -- I
 7 learn -- what -- whatever I know about sentencing I
 8 learned from Richie DeSimone, so I get to do the
 9 introduction. But it's just to tell you one story.
 10 When -- when we negotiated in 1995, I -- I had
 11 was -- I had come to this as a federal prosecutor.
 12 I didn't know these laws as well as I should, and I
 13 leaned completely on Richie, once Tony introduced
 14 me to him. He is an extraordinary resource. And
 15 when we began negotiating one night, I said I'm
 16 bringing Richie DeSimone to the table with me
 17 because I don't want to screw up these laws too
 18 much, and somebody should be there who knows
 19 something. And I was told that's not the way we
 20 would do things, we try not to have people who know
 21 a great deal.

22 FROM THE FLOOR: I have no doubt.

23 MR. SHECHTMAN: And so I hid
 24 Richie across the hall and sort of ferried back and

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 2 forth. But in terms of the nuances of this law,
 3 when we created these determinate sentences, we
 4 created a problem because you've got a see what's
 5 indeterminate and determinate, and you've to add
 6 those, and that is adding apples to oranges, truly.

7 And we -- I think, we have a
 8 provision, it's mighty be complicated, but
 9 that's -- but that -- that works, and it works,
 10 again, because of Richie. So, I -- I was happy to
 11 come back for two reasons, one was to talk about
 12 something I care about, but two was to steal who's
 13 ever job it was to introduce Richie and to tell you
 14 what a resource he is for the state.

15 JUDGE BING NEWTON: Could I --?

16 MR. SHECHTMAN: Yeah.

17 JUDGE BING NEWTON: Do -- do I
 18 have a --?

19 COMMISSIONER O'DONNELL: Sure.

20 JUDGE BING NEWTON: What was
 21 fascinating to me about your presentation, which
 22 was quite brilliant, is that we look at 1967, maybe
 23 because I'm a child of the '60s and I want to go
 24 back to a better time, but I look at 1967, if you

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 2 and -- and that's -- that's my view, I don't -- I
 3 don't believe in the medical model, I -- I don't
 4 have that much confidence in parole authorities. I
 5 think it's good that victims and defendants know
 6 what they -- what they're getting.

7 So then the question becomes: Is
 8 there anything that should be indeterminate; right?
 9 The answer to that, that's obviously the life
 10 sentences, murder. Our terrorism offenses, we
 11 treat as the functional equivalent of murder, they
 12 should -- if -- if -- if there are going to be life
 13 sentences, they should have a parole board. It
 14 seems to me some of the sex offenses may be treated
 15 that way, because again, I can justify a life
 16 sentence, certainly if there's a repeat offender.
 17 But I'm open to the possibility that somebody could
 18 be rehabilitated, and I would trust their -- but
 19 our basic rule would be most of our sentences
 20 should be determinate, with the exception for that
 21 small group where we think a life sentence is -- is
 22 appropriate, that they're philosophically and
 23 morally functional equivalent of the age, that --
 24 that would be my first guiding principle.

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 2 don't have any of this -- these attachments, no
 3 appendages, where we had a simple system,
 4 indeterminate sentence with the medical model.
 5 Could we today have a different -- a determinate
 6 not a medical model, a determinate sentence,
 7 postrelease, and find some other mechanism, not
 8 guidelines, to account for all of the political or
 9 philosophical or whatever you want to call them
 10 categories that have gotten -- brought us from
 11 simple to complex? I'd just like to see a policy
 12 brought to that effect.

13 MR. SHECHTMAN: Juanita, I -- I,
 14 in -- in -- in preparing this, I -- I hadn't really
 15 appreciated how complicated this has gotten. And I
 16 think it is, I mean, I think it's really spun out
 17 of control in some -- in -- in some sense. One of
 18 the things to ask ones -- there -- I -- I think
 19 that really, if you're -- if one goal is
 20 simplification, there seem to me to be two things
 21 to keep in mind: One should ask oneself, are there
 22 any sentences that should -- if -- if -- if we
 23 agree that determinate sentences are -- are the --
 24 are -- are the right way to think about sentencing,

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2 My -- my second one would be to
 3 ask this question: We started out thinking that A
 4 to E was enough gradation to capture the world;
 5 right. We then, with the Rockefeller Drug Laws
 6 added A-two. It's always struck me as a crazy
 7 sentence, three to life, I mean, who actually --
 8 I -- I -- to say to a -- to a client, it's actually
 9 a great deal, it's three to life; right? Okay, but
 10 when am I getting now; right? Now what you used to
 11 say is I think we can get you into Shock, you'll be
 12 out in six months; right. But still it's a crazy
 13 range, and so one question is: Do we need A twos
 14 anymore?

15 The second thing to think about
 16 is: Can I accomplish, with some of this special
 17 litigation, what I want to accomplish just by
 18 raising the grade level; right? So what I mean by
 19 that is this: If I really think assault on a
 20 police officer is worse; right? Well, instead of
 21 it being a D, make it a C; all right? If I really
 22 think I hate crime is worse, raise it a grade. Do
 23 I really have to always go back in and monkey with
 24 the sentencing code? Could I get simplicity maybe

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 2 by adding an F; right but then have -- have grades.
 3 If -- if I -- if I -- if my view is that a C
 4 robbery, right, is the moral equivalent of a B
 5 grand larceny, right, the -- of a million-dollar
 6 grand larceny, whatever it may be, then raise the
 7 B -- raise the C to a -- to -- to a B, so that it
 8 may be the one way of simplifying a code, right, is
 9 to use your classification system to do it, not as
 10 much as it is to create separate sentencing codes
 11 for each one.
 12 And it -- it -- it's interesting
 13 to me to think, if we really had one more, F, and
 14 went in and sort of said to ourselves okay. Now
 15 I'm going to go through this code, I'm going to say
 16 to -- I'm going to do -- here's a D.C.J.S.
 17 exercise. Add a class, go through, put these
 18 crimes into moral equivalent categories; right?
 19 And we go back to two -- to two systems. We go
 20 back to -- we don't have violent/violent,
 21 nonviolent. We say here's our code for A, B, C, D,
 22 E, F. When you got the predicates, the judge might
 23 want to think that the actual -- you have a model
 24 of what a -- what a simplification might look like

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 2 can't be equal to rape; right? I mean, selling
 3 drugs is bad, but it's just not the moral
 4 equivalent of rape, those are both Bs. If you keep
 5 them both Bs you must have a separate sentencing
 6 schemes for drugs.
 7 If we grow up and say, look,
 8 selling drugs on a street corner is a D felony,
 9 it's the same as -- as -- morally, as other Ds;
 10 right? Then you could get away with a separate
 11 code, maybe, but -- so, I think simplification may
 12 come by rethinking your classifications. I mean
 13 basically what we said in 2004 is, you know, we
 14 don't think of these -- we don't think selling
 15 drugs is the same as rape, but we're not quite
 16 prepared to say it, so we'll continue to call them
 17 Bs, but we'll sentence them differently.
 18 And so, that's the -- that's the
 19 best I can do. And I -- I have the wonderful
 20 advantage of no longer having any sort of role in
 21 politics.
 22 COMMISSIONER O'DONNELL: Say do
 23 you think, that's great.
 24 George.

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 2 with that child second assault provision, because
 3 there we say if you've committed a B, and your
 4 prior is a B, you get one grade; if you've
 5 committed a B and your prior is a D, we treat you
 6 differently. And it may be that one could have one
 7 sentencing scheme for predicates which didn't look
 8 as to whether you were nonviolent or violent or
 9 violent this time a nonviolent last time, but ask
 10 yourself if you committed two Bs I'm going to treat
 11 you on this line; if you've committed, you know, or
 12 a B and -- B and your prior is a B and a C, I'll
 13 treat you this way, so it may be that we could get
 14 simplification, by going back to what was the logic
 15 of the model penal law, which was -- this is what
 16 was going to drive our sentencing system.
 17 It only half drives our
 18 sentencing system now, or a third drives it,
 19 because on top of it, we've laced
 20 violent/nonviolent, and on top of that we've laced,
 21 you know, all -- all sorts of other codes. I mean,
 22 I'll give you a perfect example of it. We are
 23 reluctant to say in New York that selling drugs on
 24 a street corner is an equal to rape; right? It

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 2 MR. ALEXANDER: Mr. Shechtman,
 3 when you talk about determinate sentencing aren't
 4 you presupposing, though, that everybody who's in a
 5 certain crime category are going to be
 6 rehabilitated at that same rate? And -- and
 7 secondly, with determinate sentencing, aren't we
 8 taking away the incentive for rehabilitation?
 9 MR. SHECHTMAN: Well, I guess I'd
 10 say a couple of things. One, I was going to tell
 11 this story, well, obviously one of the things we've
 12 done with determinate sentences actually is sort of
 13 shorten the amount of good-time credit. This isn't
 14 your -- your question, but you know, we've now got,
 15 instead of the three years here, we've got a seven.
 16 Now, I remember calling Phil
 17 Coons (phonetic spelling) and saying to him, "Can
 18 you live with shortened good-time credit?" And
 19 Phil Coons' answer was, "Look, I've got prisons on
 20 Canada -- on the border of Canada. I'm just going
 21 to tell people that they're bad on losers on the
 22 board of Canada. I don't need that much good-time
 23 credit." So, that was one thing that came with
 24 determinate sentences was less good time, but our

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 2 prisons haven't been affected by it.
 3 I'm not as confident as you may
 4 be, George, on the ability of parole authorities to
 5 decide who's been rehabilitated. I worry that the
 6 real con artists that I worry about have the
 7 ability to sort of be good citizens in prison,
 8 because it's part of being a sociopath, and get to
 9 the board and -- and -- and get out. So that I --
 10 I'm not, if you -- if you have that confidence, if
 11 you think that A, you believe in rehabilitation and
 12 you can determine it, you know, who has been
 13 rehabilitated, then there's no doubt that this --
 14 this should not be your sentencing philosophy.
 15 But if you think you're -- if
 16 you're less confident in the ability to
 17 rehabilitate, and in the ability to determine who's
 18 been rehabilitated, that pushes you in this
 19 direction. And my own feeling is that most -- I --
 20 I agree with what was said before, I think from the
 21 defendant's point of view the trade-off in
 22 certainty is worth the loss of the incentive to --
 23 to prove my way out. I think a lot of people
 24 think, jeez, you know, the guy next to me got out

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 2 at the county level.
 3 MR. SHECHTMAN: There was -- as
 4 we know, there was a day in the D.A.'s office where
 5 they wouldn't let me do felonies, and so I only had
 6 responsibility for the misdemeanor caseload. So,
 7 I've thought about those sentences. By and large
 8 our judges have pretty broad discretion on
 9 misdemeanors, anything up to a year, probation,
 10 conditional discharge, unconditional discharge.
 11 There are no second-misdemeanor provisions; right?
 12 When I was a prosecutor I railed against that,
 13 because we would see shoplifters come through with
 14 like, twenty shoplifts, right? And they would get
 15 thirty days and you'd say at a certain point, you
 16 know, I have a rule, twenty is enough; right? And
 17 so, I was trying to -- and -- and maybe if I could
 18 get the assemblymen one day to pass a sort of
 19 recidivist misdemeanor bill.
 20 COMMISSIONER O'DONNELL: There's
 21 no time, first, and --.
 22 MR. SHECHTMAN: But -- but he --
 23 but he may have had a good sense to resist me,
 24 but -- but I -- I think A, remember, in that role,

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 2 early because he fooled the corrections people; I
 3 didn't. But I haven't been on parole boards. I
 4 don't know what those records look like, I'm -- but
 5 I'm -- I -- my prejudice runs towards determinate
 6 sentences. That's just -- just the way I am.
 7 COMMISSIONER O'DONNELL: Did you
 8 have a question.
 9 FROM THE FLOOR: I do. It's --
 10 but it's not on felonies, and Denise, tell me if
 11 you think it should be delayed. It is: In your
 12 prior work in 1984, you didn't look at
 13 misdemeanors, consciously, as I recall.
 14 MR. SHECHTMAN: In '95.
 15 FROM THE FLOOR: Yes.
 16 MR. SHECHTMAN: Okay.
 17 FROM THE FLOOR: And even the '84
 18 report, I mean, it didn't look at misdemeanors.
 19 It strikes me that the
 20 misdemeanor -- the -- the cost for dealing with
 21 misdemeanors is a huge issue. And I -- I -- and my
 22 question to you is, have you considered charging
 23 slash sentencing misdemeanors using a different
 24 model, in order to affect large-scale cost savings

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 2 particularly, if you think of New York City, those
 3 cases are moving quickly, you are probably
 4 resolving -- Juanita you know better than I do --
 5 fifty percent of them of arraignments. Complicate
 6 that sentencing system, require somebody to look at
 7 a grid for sentencing those misdemeanors, and
 8 you've really slowed a train down that's moving
 9 very quickly.
 10 And what is important to me about
 11 misdemeanor sentencing is that there be, in every
 12 county, programs for community service, drug
 13 treatment courts, those kinds of alternatives,
 14 because judges have a lot of leverage; right? You
 15 have the ability to say, look, I'm sentencing you
 16 for over a year, all right? That's enough to get
 17 somebody into a good -- good drug court.
 18 So I -- I purposely stayed away
 19 from the misdemeanor side. I don't have great -- I
 20 don't have any sort of, you know, interesting ideas
 21 about it, other than to say when I came to
 22 Manhattan, I was surprised that there wasn't
 23 organized community-service sentencing. I mean, my
 24 view is jump the subway, you should clean the

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 2 subway for a day; right? I mean, it just -- that
 3 program should be available. And I don't know what
 4 happens throughout our counties with the ability to
 5 have those clients of -- of alternative sentences,
 6 but those, to me, are the most important things in
 7 the -- in the misdemeanor world, not complicating
 8 it with -- with battle lines and the -- and the
 9 like.

10 COMMISSIONER O'DONNELL: And
 11 certainly, by follow-up to that, without jumping in
 12 the bag, when -- when Donna and research folks
 13 started talking about reentry and supervision, I
 14 think there's a whole line of research that shows
 15 you can make people worse by supervising, than in
 16 the category of people who've made minor offenses
 17 and have a lot of strikes in their -- their life.
 18 And so, I think it would be interesting -- I mean,
 19 that's one area where we can look at are we
 20 supervising people on probation, and that -- that
 21 we are essentially making worse, by virtue of that
 22 amount of supervision.

23 MR. SHECHTMAN: Well, Denise, one
 24 things that I worried about, when I was here, and

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 2 up coming back to DOCS for two years; okay?
 3 Now, again, it's not that I don't
 4 worried about parolees, but there's something sort
 5 of disproportionate about that and the question
 6 should be asked, when do we bring someone back;
 7 right? When -- when is the treatment program
 8 enough; when are other alternatives enough. DOCS
 9 is a very expensive resource. It's an awfully
 10 expensive place to keep someone who has kept
 11 themselves out of trouble other than the fact that
 12 they've gone back to a drug problem; right?

13 And we're -- my guess is if you
 14 look at Tony's statistics as to who's coming back,
 15 you will see lots of people who are coming back
 16 simply because they couldn't manage their drug
 17 problem when they got back to their communities.
 18 I'm not saying those people get
 19 gold stars, but I -- I'm not sure they get -- they
 20 get DOCS. So, that issue of sort of what pulls
 21 people back in, that's where his numbers remain --
 22 remain surprisingly high.

23 MR. ANNUCCI: Paul, obviously
 24 Article 7 is extremely complex. That's where we

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 2 I -- I think Tony can talk to this, our prison
 3 population is down. You still have -- you still
 4 have a lot of people coming in, who are coming in,
 5 coming back to us, because they -- they violated.
 6 As I said before, I think one question is should --
 7 how long should the supervision period be?

8 I think in probation we make
 9 it -- it's five years for felonies. My sense of
 10 New York City is after a couple of years, you go
 11 off the -- off the -- off the roster. If you're
 12 going to go back to the court to do it, would be a
 13 better system to say it's three years but the
 14 probation officers can come back and lengthen it,
 15 so the presumption is that you're -- that
 16 they're -- they're shorter. Again, what matters is
 17 that first eighteen months, and you want to focus
 18 resources there.

19 The other thing is what we're
 20 thinking about is who should come back, so that --
 21 the great irony is, if you -- in New York City, if
 22 you smoke crack, you come into the criminal court
 23 and you get time served; if you smoke crack and
 24 you're -- and -- and you're a parolee, you can wind

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 2 look for sentences of imprisonment when that's
 3 required. If we want to look at plea-bargaining
 4 discretion, we're going to look at 220 of the
 5 C.P.L. Authorized dispositions is Article 60; it's
 6 another complicated section. Do you have any
 7 strong feelings about what we might want to look to
 8 there?

9 MR. SHECHTMAN: No, look, I think
 10 you have to -- I mean, you know, as -- as I say,
 11 there -- there are lot of different missions for --
 12 for -- for a commission. I do think that all
 13 practitioners could benefit just by some
 14 simplification. It used to be that you looked to
 15 Article 60 and it was your roadmap. And it said,
 16 okay, you can only get a prison sentence for this
 17 person, therefore go to Article 70 and see what
 18 prison sentence is available. So, it was like 60
 19 told you what sentence was available, 70 told you
 20 the length of it. 60 told you you could get
 21 probation, 65 told you the length of -- of
 22 probation.

23 It probably -- whoever drafted
 24 it, again it was sort of the generation of Judge

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 2 Denzer (phonetic spelling) and very smart people
 3 who were -- who were thinking cleanly. When --
 4 when the younger generation, me and DeSimone and
 5 other people got involved, we didn't always
 6 appreciate the logic of that structure. So we put
 7 the -- the provisions about who gets -- you know,
 8 can you get jail into 70 where they should have
 9 been in 60; you do the hate-crime legislation, the
 10 sentence is actually in whatever that provision in
 11 the Penal is; it's like in 280 or something like
 12 that.

13 And so, there is something to be
 14 said for somebody going back and saying, you know,
 15 is there just some simple way that if you're a
 16 lawyer, country lawyer, city lawyer, and you want
 17 to know, like, what can my client get for this;
 18 right? And it really matters, because you -- you
 19 just have this feeling that people are sort of, you
 20 know, like prisoners of the skills of their
 21 lawyers, and their ability to sort of, you know,
 22 weed through a code that now looks a little more
 23 complicated than the tax laws.

24 And it may be that one can get

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 2 reform at the time. We call a lot of stuff of
 3 reform now, we called reform then too. And -- and
 4 I just want to tell everybody that, at -- at least
 5 in my recollection, because we enacted the year,
 6 the Rockefeller Drug Law.

7 MR. SHECHTMAN: That's right.

8 ASSEMBLYMEMBER LENTOL: We had a
 9 chairman of codes that year who's name was Dominic
 10 DeCarlo (phonetic spelling), who was a very vocal
 11 opponent to what Mr. Rockefeller wanted to do
 12 with -- in terms of the Rockefeller Drug Laws, and
 13 he never thought that that was really the problem,
 14 in terms of what was wrong with the law, with
 15 respect to drug offenders or anybody else, and
 16 insisted that, in the end, when he finally gave up
 17 and decided to go along with Rockefeller's Drug Law
 18 reform, at the time, that we also do the -- what
 19 you referred to here as the third rail or -- I
 20 don't think you put it in here, but that --

21 MR. SHECHTMAN: Yeah, it's there.

22 ASSEMBLYMEMBER LENTOL: -- second
 23 felony offender reform --

24 MR. SHECHTMAN: Yeah. Should be

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 2 rid of Article 60 and just -- it, yes, it had a
 3 wonderful object to it, which is -- this told us
 4 you know, where to go, this told us what happened
 5 when we got there. But it may be that we ought to
 6 just say, okay. For this crime, here is the
 7 authorized disposition. If it's jail, these are
 8 the ranges; it's probation, whatever. And -- and
 9 just sort of put it all in one -- one provision,
 10 Tony, because I forget that there's an Article 60
 11 and it matters, it -- it's -- it's -- you know,
 12 it's actually possible.

13 Thank you.

14 ASSEMBLYMEMBER LENTOL: Can I
 15 just -- not yet.

16 COMMISSIONER O'DONNELL: Thank
 17 you.

18 ASSEMBLYMEMBER LENTOL: I -- I --
 19 I apologize that I missed a good deal of your
 20 presentation, but what I've heard was -- was
 21 excellent, and I just wanted to give you a little
 22 bit more historical perspective because I may be
 23 the only one in the room who was here in 1973 when
 24 we enacted the third rail of second felony offender

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 2 there.

3 ASSEMBLYMEMBER LENTOL: -- so we
 4 had mandatory prison sentences for the first time,
 5 and that's how we began this journey into the
 6 myriad of sentences that we have now.

7 And you are right about
 8 persistent misdemeanors, trying to get us into a
 9 myriad of sentencing morass for misdemeanors as
 10 well, but the assembly, so far, hasn't passed that
 11 bill, and we discussed that last week at the
 12 leaders meeting.

13 MR. SHECHTMAN: Yeah, I -- I -- I
 14 remember once trying to persuade you, but I'm not
 15 sure I'd go there again.

16 Anyway thanks.

17 COMMISSIONER O'DONNELL: Thank
 18 you very much.

19 ASSEMBLYMEMBER LENTOL: Thank
 20 you.

21 COMMISSIONER O'DONNELL: We
 22 really, really appreciate it.

23 So, do you want to take five
 24 minutes? It's going to be a long day, but I do

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 2 think we can have a short break before we start
 3 with Rich.
 4 (Off-the-record discussion)
 5 COMMISSIONER O'DONNELL: You
 6 know, you've heard it from Paul Shechtman, I've
 7 heard it, probably almost on a daily basis since
 8 I've been commissioner of D.C.J.S., that if you
 9 want to find out how sentencing works in New York,
 10 the one person that really knows is Rich DeSimone.
 11 And the other part of it, Rich,
 12 is that I hear it from the defense side; I hear it
 13 from the prosecutors; that you've always taken a
 14 very fair approach. People can approach you,
 15 you're -- you're helpful to anyone in the criminal
 16 justice system that seeks your advice, and people
 17 know that and they really appreciate it.
 18 So, I'm delighted that
 19 Commissioner Fischer, agreed with a little
 20 arm-twisting, to make you available to the
 21 commission, and I really appreciate you agreeing to
 22 speak to us today.
 23 MR. DESIMONE: Thank you,
 24 Commissioner. I really appreciate the honor of

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 2 being here with you today. I've never worked with
 3 any kind of legislative commission before, and I
 4 have say, having heard so many nice things about
 5 myself today, I'm -- I'm going to be in sign up for
 6 every commission I can possibly.
 7 I'd like to welcome you to the
 8 magical world of release-date calculations. And
 9 the -- the irony is it's really a lot easier than
 10 it looks, but the format is so complicated most
 11 people don't realize that. So, what I'd like to
 12 spend a few minutes today is just telling the plain
 13 English of how it all works.
 14 Today we're going to be using
 15 very nice, easy, divisible numbers, because when
 16 you deviate from the numbers on the board, the math
 17 gets very complicated, very quickly. But at least
 18 for understanding the principles -- if you
 19 understand the principles, the end result will be
 20 correct with whatever numbers you plug in.
 21 So, let's start with an
 22 indeterminate sentence of six to twelve, six is the
 23 minimum, twelve is the maximum. For each part of
 24 the sentence, some release dates are based upon the

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 2 minimum; some release dates are based upon the
 3 maximum. For some inmates their earliest release
 4 date is going to be the parole-eligibility date.
 5 That's the date as of which the full minimum period
 6 is completed. So, in our example we'll say, you've
 7 got a defendant who's not eligible to earn any of
 8 these subsequent reductions. The parole
 9 eligibility date is six, that will be the earliest
 10 date the inmate will be able to be released from
 11 state prison.
 12 Some inmates in our custody are
 13 eligible for presumptive release at that point.
 14 And presumptive release gives inmates -- certain
 15 inmates who are eligible for presumptive release --
 16 the applicable statute is Correction Law Section
 17 806. About five months before the six years are
 18 up, DOCS will decide, in their discretion, whether
 19 or not this inmate should be discharged from DOCS
 20 to supervision by division of parole. If DOCS says
 21 no, the inmate will appear before the parole board
 22 two months before the six years are up, as if
 23 presumptive release never happened. So, DOCS could
 24 say no, the inmates still sees the parole board, at

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 2 which point the board will say yes or no.
 3 The second date we generate for
 4 certain inmates is the merit-eligibility date.
 5 Merit time on indeterminates is one-sixth of the
 6 minimum period, with one exception, which is down
 7 here, A ones, A one drug felonies. We'll come back
 8 to that one in a minute.
 9 One-sixth of six years is one
 10 year; you subtract the one year of merit time from
 11 your parole-eligibility date, that gives you a
 12 merit-eligibility date of five. Same thing: If
 13 the defendant is eligible for presumptive release
 14 and earns merit time, about five months before the
 15 five years are up, DOCS will decide, in its
 16 discretion, whether or not to release the inmate.
 17 If DOCS says no, the inmate goes to the parole
 18 board. If the board says no at the five-year mark,
 19 the inmate will see the board again at the six-year
 20 mark, but the inmate will not be considered again
 21 by DOCS for presumptive release. It's a one-shot
 22 deal, either DOCS says yes at this point, or DOCS
 23 will not consider you again for presumptive
 24 release.

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 2 Everybody good so far?
 3 Drug indeterminate sentences,
 4 indeterminate sentences imposed for drug felonies,
 5 Penal Law Article 220 or 221, are eligible to earn
 6 yet one more reduction, it's called supplemental
 7 merit time. You get your supplemental-merit date -
 8 again it's one-sixth - you get your supplemental
 9 date by subtracting the supplemental merit from
 10 your merit-eligibility date. Well, one year is
 11 supplemental merit, you subtract it from five and
 12 it gives you four. This inmate has the
 13 supplemental-merit-eligibility date of four; merit
 14 date of five, parole-eligibility date of six.
 15 Everybody good with that?
 16 My biggest gripe about
 17 supplemental-merit eligibility is that it doesn't
 18 appear in any statute. If you want to look at the
 19 statute on merit time, how it's calculated, how you
 20 earn it, you look at the Correction Law, Correction
 21 Law Section 803, Subdivision 1-D, as in David. If
 22 you want to find out -- well, all right. What is
 23 the formula for calculating supplemental-merit
 24 time? Where does it say only drug indeterminates

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 2 is twenty. Good time on an indeterminate term,
 3 except for Class A felonies, is one-third of the
 4 maximum term. In our example, one-third of twelve
 5 is four, you subtract the possible good time from
 6 the maximum expiration date, you get an earliest
 7 conditional-release date of eight. So, this inmate
 8 has a total of five release dates. If this inmate
 9 is also subject to a determinate term, this inmate
 10 is going to have a sixth release date.
 11 Good time on the maximum can be
 12 earned in increments, so you can have an inmate who
 13 gets turned down by the parole board at four, down
 14 by five, says no at six. Eventually this inmate is
 15 going to reach their earliest possible
 16 conditional-release date. The only people who care
 17 about good time and conditional release are the
 18 people who keep getting turned down by the board,
 19 because if you get out at the four, five, or six
 20 mark you don't care about good time; you're on the
 21 street. But as I said, it gets real relevant to
 22 the people who, for whatever reason, get turned
 23 down by the board.
 24 Merit time and supplemental-merit

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 2 can earn it? You won't find it. It only appears
 3 in the session law that created it, Laws of 2004,
 4 Chapter 738. So, if nothing else, it might be a
 5 nice touch to have everything that involves the
 6 sentence-release dates, if you can't do one-stop
 7 shopping, where all of your applicable provisions
 8 are in, say, one penal law section, it might be
 9 nice to have everything at least within the Penal
 10 Law, or at the correct somewhere, so that if you
 11 don't have the session laws, and I suspect most
 12 practitioners don't, you could still be able to get
 13 your hands on it.
 14 Those are the three release dates
 15 that come off the minimum on an indeterminate.
 16 On your max you have two release
 17 dates, or sometimes one. The exception to that
 18 again is the hate felonies. We'll come back to
 19 that in a minute.
 20 Twelve represents the maximum
 21 expiration date. The maximum expiration date is
 22 the date as of which the full maximum term is
 23 completed. So, if you've got a three to six, your
 24 max is six; if you've got a ten to twenty, your max

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 2 time are an all-or-nothing proposition. You either
 3 earn the full amount authorized by statute, which
 4 is your one-sixth of the minimum, or you get
 5 nothing.
 6 Good time off the maximum is
 7 different. You can earn all of it; you could earn
 8 none of it; you could earn part of it. When
 9 somebody comes to our front door, we would generate
 10 these five release dates, if they came in with this
 11 six-to-twelve for a drug indeterminate. This
 12 represents the earliest possible
 13 conditional-release date, but it's not carved in
 14 stone. The presumption is not they're going out
 15 and the eight-year mark. The presumption is if
 16 they're still in our custody a few months before
 17 the eight years are up, we're going to look to see
 18 have they earned the full four years of good time.
 19 We look at that about four months
 20 before the earliest C.R. date, and we basically
 21 look to two big areas: What does your disciplinary
 22 record look like; what does your program
 23 participation look like? The Correction Law
 24 requires state prison to assign programs, identify

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 2 programs the inmates would benefit from, and if
 3 they say no thank you, they may do so, but when it
 4 comes -- if they're still in our custody at the
 5 eight-year mark DOCS may, in part, point to the
 6 refusal, or the declining, of participation in
 7 programs as a basis for withholding all or part of
 8 the good time.

9 Everybody okay on these five
 10 release dates?

11 Okay. Middle column, we have an
 12 example where we've got fifteen to life for a class
 13 A one felony. That's the shortest permissible
 14 sentence for a class A one felony. For our
 15 purposes, let's divide it into two subcategories:
 16 The inmate who's coming in with a fifteen-to-life
 17 for drugs, and the inmate who's coming in with a
 18 fifteen-to-life for murder.

19 The parole -- the minimum is
 20 fifteen, so the inmate's parole-eligibility date is
 21 going to be fifteen. That's the date as of which
 22 the fifteen years are up. If this is a drug
 23 indeterminate, because the crime was committed
 24 before the laws changed, this inmate is going to be

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 2 pushed back by six or eight or ten months. So, it
 3 comes as a horrible surprise to the inmate's
 4 attorney, and a much more horrible surprise to the
 5 inmate, who found out, no, I'm not going home in
 6 February; I'm going home in October.

7 Lots of things you've got to keep
 8 in the back of your mind, when you're dealing with
 9 any of this stuff.

10 Determinate terms -- yes, sir.

11 MR. BERGAMO: Is that inmate for
 12 the fifteen-to-lifetime on a drug also eligible for
 13 supplemental-merit time or not?

14 MR. DESIMONE: No, the reason --
 15 and again, I -- I don't really know or understand
 16 the political background to a lot of this, but I do
 17 know that, when -- when all is said and done on
 18 this indeterminates, this is two-thirds of the
 19 minimum; this is five-sixth of the minimum; this is
 20 the full minimum. With the A ones your merit time
 21 drops you to two-thirds. So, you're already at the
 22 point you would be if you had a non A one drug
 23 indeterminate. This amount is two-thirds of that;
 24 that amount is two-thirds of that. That's why

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 2 eligible to earn merit time off the minimum
 3 fifteen. On an A one indeterminate, the merit time
 4 is not one-sixth like it was over here, it's
 5 one-third. So, we take one-third of the minimum of
 6 fifteen, this inmate has a merit date of ten and
 7 the max date of fifteen. And what we've been
 8 finding is that some inmates -- we -- we've had,
 9 for about a year or two, the ability to
 10 resentence -- or the discretion to resentence
 11 certain inmates who have come to us on A one drug
 12 sentences. The earliest possible release date on
 13 an indeterminate A one for drugs is two-thirds of
 14 the minimum; that's about sixty-six percent.

15 When they get converted to drug
 16 determinates, because you're no longer using this
 17 formula, you're using the formula we'll get to in a
 18 minute, it pushed their earliest release date --
 19 date back further in time. So, we did have a few
 20 inmates who earned merit time, went out to court,
 21 got resentenced, were scheduled to be paroled
 22 before the resentence; they come back from out to
 23 Court, they've come back with one of these new drug
 24 determinate resences, their release date got

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 2 you're not going to get supplemental merit on an A
 3 one.

4 Yes, sir.

5 MR. BERGAMO: What -- what do you
 6 tell this inmate -- we'll follow your rules you set
 7 up. If we follow your rules, he's supposed to get
 8 out, resentence, he has ten more months. What have
 9 you done to him? Why shouldn't he kill somebody?
 10 He's so -- he's so crazed, what have -- what have
 11 you --?

12 MR. DESIMONE: I'm -- I'm sorry.
 13 I'm hard of hearing.

14 MR. BERGAMO: Let me start again.

15 COMMISSIONER O'DONNELL: This
 16 might be a question for Tony.

17 MR. BERGAMO: Under the rules
 18 that were set out, he's qualified for -- for
 19 release, but he also has this resentencing, as you
 20 explain, faces ten more months or eight more
 21 months.

22 MR. ANNUCCI: I -- I think --.

23 MR. BERGAMO: So, what happens --
 24 what happens -- it's -- it's --?

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 2 MR. ANNUCCI: That's a
 3 difficulty, but really that's between the inmate
 4 and the lawyer. Now, what we've done in advance,
 5 when the laws went into effect, I prepared a
 6 special explanation that was printed in every law
 7 library and every facility had it posted, so the
 8 inmates could read. And we basically explained to
 9 them: You need to carefully consider whether, you
 10 know, this is the right option for you, because if
 11 you're currently starting an A one, and you get
 12 qualified for merit time, you'll see the board and
 13 maybe get out at the end of ten years. If you get
 14 resentenced to a determinate sentence, then the
 15 benefit for merit time is less, but you would
 16 definitely get out without seeing a parole board,
 17 and you will need to discuss all of these things
 18 very carefully with your lawyer before you do it.
 19 In fact, the way the law was written, the -- the
 20 defendant, when he went to go for resentencing, you
 21 know, he had the opportunity. The judge said okay,
 22 here is what I'm going to sentence you to, and he
 23 could accept it or he could take it and still
 24 appeal it. I mean, he had a lot of due process

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 2 built into -- into the resentencing thing, which
 3 was kind of -- kind of extraordinary.
 4 But obviously there's always
 5 going to be those problems, whether it's
 6 resentencing or up front, where -- because it's so
 7 complicated, and the lawyer doesn't accurately
 8 explain it to the client, that he comes to prison
 9 and says, oh, I'm not eligible for temporary
 10 release, because I'm now a homicide offender, I'm
 11 going to C.R. or whatever. These are the things
 12 that, hopefully, what will come out of this
 13 commission, is defense lawyers being able to better
 14 understand, have more simplicity, to explain the
 15 bottom line to their clients. Because that's what
 16 they --
 17 COMMISSIONER O'DONNELL: But the
 18 other half of it is how does the lawyer, you
 19 know --
 20 MR. ANNUCCI: Yeah.
 21 COMMISSIONER O'DONNELL: -- keep
 22 from committing malpractice --
 23 MR. ANNUCCI: Right.
 24 COMMISSIONER O'DONNELL: -- in

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 2 these situations, because it's so complicated.
 3 It's, you know --
 4 MR. BERGAMO: Thank you.
 5 COMMISSIONER O'DONNELL: -- it's
 6 scary.
 7 JUDGE BING NEWTON: Is this
 8 all -- may I just make one point?
 9 MR. DESIMONE: What, your Honor?
 10 JUDGE BING NEWTON: Your
 11 suggestion that one of the things that should come
 12 out is that all of the information should be in one
 13 place, like with the supplemental merit is not --
 14 it's in the session law, so the -- the -- the
 15 example that you just gave, would that be readily
 16 available to an attorney who wanted to take a look
 17 at it?
 18 MR. DESIMONE: The session law?
 19 JUDGE BING NEWTON: Yes. No, no,
 20 no, the -- the -- this -- the -- the problems of
 21 resentencing. Would that have been in some place,
 22 had -- had an attorney wanted to, could he or she
 23 have avoided having a client who would have been
 24 better off not to ask for resentencing?

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 2 MR. DESIMONE: Well, I think if
 3 the attorney wanted to do their own research, as
 4 opposed to calling us, they would have had a heck
 5 of a research project, because the -- every single
 6 thing that you see on the board here, your Honor,
 7 comes from a different statute in a different
 8 section. And unless you know where to look --
 9 well, let -- let's take the example of somebody
 10 who -- who -- who's going to be sentenced for a sex
 11 offense.
 12 You start out by looking at Penal
 13 Law Section 60.05, which was traditionally where
 14 you looked -- where you started with, for
 15 permissible dispositions. When you look at 60.05
 16 it literally sends you to the brand new 60.13.
 17 Okay. When you read 60.13 it says look at 70.80.
 18 When you get to 70.80, if the sex crime is
 19 presently a V.F.O., defined as a V.F.O. in penal
 20 law 70.02, 70.80 says go back and look at the
 21 existing sentences that are authorized for V.F.O.s.
 22 So, you have gone from 60.05 to 60.13 to 70.80
 23 to -- and then either 70.02, .04, .08, .06. And
 24 from there you're still going to have to go way

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2 over here at 70.45, and figure out the postrelease
3 supervision.

4 This is what -- it's --it's no
5 place for the faint of heart, and it's no place for
6 somebody who doesn't have malpractice insurance.

7 COMMISSIONER O'DONNELL: And
8 Rich, what -- what is the procedure? Can any
9 defense attorney call up, and then you walk them
10 through it? Or do you -- that has to be terribly
11 burdensome also on you to --

12 MR. DESIMONE: Well --

13 COMMISSIONER O'DONNELL: --
14 provide it --.

15 MR. DESIMONE: -- one of the
16 reasons we were specifically set up, back in 1995,
17 was to help practitioners navigate this maze of --
18 we -- we don't do any late-night T.V. advertising,
19 so a lot of people don't know about us, but anybody
20 who does know about us, we're more than happy to
21 walk them through it.

22 COMMISSIONER O'DONNELL: Uh-huh.
23 And how do you -- how do you go about setting those
24 dates for each -- each -- each inmate? I mean, do

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2 getting -- having to serve more time in the end.
3 And -- and you pointed out that those -- those
4 supplemental-merit time, those -- the -- the things
5 that impacted that person's sentence are only in
6 unconsolidated law, in the session laws. But am I
7 correct that, because of the changes to determinate
8 sentencing for drug felonies, the changes that were
9 done in '04, the kinds of problems, like that
10 example you pointed out, will eventually disappear
11 without this commission doing anything about it,
12 because ultimately drug felons will have -- who --
13 who are committing crimes now, under the new
14 determinate sentencing scheme, will no longer be
15 subject to indeterminate sentences, generally
16 speaking. Is that correct?

17 MR. DESIMONE: Yes, that's
18 absolutely correct, that time will take care of a
19 lot of these problems.

20 MR. GREEN: Have most of the A
21 one drug felons who are eligible to be resentenced,
22 have most of them been resentenced already?

23 MR. DESIMONE: I'm not really
24 familiar with the statistics.

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2 you -- can you do it in a computer program, or
3 somebody has to sit there and actually calculate
4 them? Do you do every prisoner in the state prison
5 system?

6 MR. DESIMONE: Can I answer that
7 honestly, Tony?

8 MR. ANNUCCI: Ten words or less.

9 MR. DESIMONE: The computer knows
10 how to do most of these. It knows how to do all of
11 these. It knows how to do some of these
12 (indicating). It does not know how to do any
13 combinations; it does not know how to do any
14 returned violators. Those we literally do by hand,
15 with pencil and paper, then tap each number on a
16 computer screen.

17 We are tired.

18 COMMISSIONER O'DONNELL: Uh-huh.

19 MR. AMODEO: I have a question
20 Rich. I just -- I -- a point of clarification.
21 You gave an example of the inmate who applied for
22 resentence, was granted resentence, got a
23 determinate sentence instead of the indeterminate
24 they were serving for drug crime, ended up actually

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2 Do you have any idea, Tony?
3 MR. ANNUCCI: It's probably in my
4 book here someplace. I don't have it off the top
5 of my head. I know we keep track of how many there
6 were. Originally I think there were about, before
7 this -- the resentencing law went in, there were
8 about six hundred or so A ones serving drug
9 offenses in the system. And I know -- I think --
10 I'm -- I'm thinking of a number around one hundred
11 and fifty to two hundred that have been
12 resentenced. I'll -- I'll certainly get those
13 exact numbers for everybody, and I'll get the --
14 how -- how much time was -- was on the sentence,
15 because we do keep track of that.

16 MR. MCDERMOTT: I've got a
17 question. I don't know this is something in your
18 field, Rich, or not, but this whole
19 supplemental-merit time, and merit time, and good
20 time, are those provisions that take time away from
21 the sentence considered to be essential to, you
22 know, maintaining, you know, order in the prison
23 system? I mean, what's -- how valuable are those
24 from a DOCS perspective?

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 2 MR. ANNUCCI: Well, they're
 3 valuable in many ways. First of all, just look at
 4 the -- the -- the basic good-time principle.
 5 Good-time principle says, on an indeterminate you
 6 get one-third off the max; on a determinate you get
 7 one-seventh. It's an enormous incentive for
 8 inmates to follow rules. If they engage in -- in
 9 misbehavior they're going to get a sanction that
 10 says recommended loss of good time, that will keep
 11 them in prison longer. The overwhelming majority
 12 of inmates want to get out as soon as possible,
 13 even one day is -- is a difference that -- that --
 14 they'll write about. So, good time is a strong
 15 incentive for them to behave.
 16 And in the last eight to ten
 17 years or so, we've put a strong renewed emphasis on
 18 positive program participation. So that, for
 19 example, if you had been a sex offender who refused
 20 to go into the sex-offender-counseling program, now
 21 that's going to count against you. And you might,
 22 again, lose all of your good time for refusing to
 23 participate in that program. So, it serves as --
 24 as an enormous incentive for you to -- to follow

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 2 the rules and -- and participate in positive
 3 programming.
 4 Then, for the nonviolent inmates,
 5 where you have these additional incent --
 6 incentives to get time off the minimum, merit time,
 7 supplemental-merit time, for the --for the drug
 8 offenders, same principles are at work. Enormous
 9 incentives for them to do the regular program, and
 10 something more, like get their G.E.D.,
 11 drug-treatment certificate, voc. trade certificate,
 12 or community service. So, these are important
 13 tools from a -- for us. And -- and right now, for
 14 a lot of reasons -- but right now, the -- there are
 15 statistics in our system, on inmate-on-inmate
 16 assaults, inmate-on-staff assaults, are record
 17 lows.
 18 Obviously, we have the ability
 19 to -- to segregate the most disruptive inmates, but
 20 the positive rewards, you -- those are very, very
 21 important as well. And they help run a safe system
 22 for all the thirty-two thousand employees that are
 23 there.
 24 MR. AMODEO: So, from a DOCS

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 2 perspective, just at the time of sentencing, coming
 3 up with a number, and that's the number, and
 4 there's no reduction for your behavior in prison,
 5 is not a good idea?
 6 MR. ANNUCCI: Right. If you ever
 7 wanted -- if you ever wanted to consider a sentence
 8 that there would be no reduction whatsoever, that
 9 certainty is the fundamental, absolute goal, this
 10 is it, you get a six-year sentence, and then you
 11 get three years of postrelease supervision, no
 12 variation, I think, from my experience, that that
 13 would be a negative. There are certain attractions
 14 to it, but I think they would be outweighed by the
 15 removal of -- of the incentives to -- to behave.
 16 COMMISSIONER O'DONNELL: Now, is
 17 there other research showing whether the -- the --
 18 it works or doesn't work, other than the --?
 19 MR. ALEXANDER: There is national
 20 research, through the National Institute of
 21 Corrections, that shows this very thing we're
 22 talking, showing that there has to be a system
 23 that's based on some opportunity to give people
 24 some discretion, in terms of whether the people be

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 2 released prior to completion of their entire
 3 sentence. Other than that, there's no incentive
 4 for them to comply with institutional rules. If a
 5 person's serving a flat five years, knowing that he
 6 isn't going to be subject to the rules of good
 7 time, what incentive is there for him to walk the
 8 line in corrections?
 9 COMMISSIONER O'DONNELL: I
 10 agree --
 11 MR. ALEXANDER: And likewise,
 12 what is the incentive for us to --
 13 COMMISSIONER O'DONNELL: -- it's
 14 logical, I'm just --
 15 MR. ALEXANDER: -- release him
 16 onto parole supervision, and expect him or her to
 17 adhere to the rules of parole supervision?
 18 MR. AMODEO: Are -- now, are
 19 there any jurisdictions in the U.S. that don't have
 20 some kind of good time or merit time built into the
 21 correctional system?
 22 MR. ANNUCCI: I -- I am not aware
 23 of any state that has a completely flat sentencing
 24 structure, that doesn't allow any earning --

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2 COMMISSIONER O'DONNELL: Even the
3 federal system does, even though it's a lot less,
4 but they --.

5 JUDGE BING NEWTON: Is there any
6 information as to how small it can be? Because I
7 understand they have one-seventh, which is quite
8 small.

9 MR. ANNUCCI: Correct.

10 JUDGE BING NEWTON: I have a
11 concern that that was not enough time. Has that
12 proven to be sufficiently --?

13 MR. ANNUCCI: No, I -- I -- I
14 think it is enough time. That was one of my
15 concerns originally, whether -- whether it would be
16 insufficient, but as I said, inmates want to get
17 out as soon as possible, so the difference is
18 one-third and -- they still want to get out, but
19 there's a trade off. The guy that may have gotten
20 a three to nine on a B, now gets a
21 two-and-a-half-flat sentence is probably, you know,
22 getting out, earlier, than had he gotten that --
23 that three to nine, so --.

24 ASSEMBLYMEMBER LENTOL: Can I

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2 just ask Rich a different subject?

3 If -- you know, many of the folks
4 who are in prison are pretty savvy about their
5 sentences and what's going on, even better than
6 their lawyers. And don't -- don't they, or do
7 they, I guess, really is my question, trust the
8 knowledge that you or Tony or some of the people,
9 rather -- rather than consulting their lawyer,
10 to -- to make a determination as to whether or not
11 they should be resentenced under the new
12 Rockefeller Drug Law reform proposal, or continue
13 to serve the sentence -- the indeterminate sentence
14 that they had been serving? Wouldn't they be more
15 likely -- I guess my question boils down to:
16 Wouldn't they be more likely to not consult,
17 necessarily, with their attorneys about that, but
18 with somebody in the jailhouse who may know more
19 than even their attorneys do, about how the
20 sentencing will work?

21 MR. DESIMONE: We -- we get
22 letters; we get lots and lots of letters. But very
23 few of them, that I can recall in recent memory,
24 were from inmates saying I'm thinking about getting

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2 resentenced, if I -- if I go ahead and get a drug
3 determinate, what will my dates look like? Oh,
4 I've -- I've certainly got plenty of calls from
5 attorneys who knew that there might -- or who's gut
6 told them there might be a problem. But I -- I
7 honestly don't remember seeing any letters from
8 inmates saying gee, is this going to help me or
9 hurt me?

10 MR. ANNUCCI: Rich, do you
11 remember in the -- in the e-mail that we put out
12 for the inmates, did we actually give them an
13 example of the -- the fifteen-to-life guy, where if
14 you currently are eligible for merit time, you'll
15 get out at ten; if you get resentenced to a
16 fourteen-year determinate, and -- and you qualify
17 for the merits, you are going to get out at ten? I
18 thought we gave them the actual numbers, but just
19 as an example, just to get them thinking that, you
20 know, depending upon the exact mathematical
21 outcome, will determine whether they're better off
22 or not.

23 MR. DESIMONE: Because it's been
24 a few years, I don't really remember. In fact, I'm

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2 not really sure if I remember where I parked today.
3 But I -- I have that and I'll dig it out for us.

4 All right. Going on with our
5 example, our initial example where you see the
6 merit time of ten on the A one indeterminate,
7 you're not going to see that if this A one were
8 imposed for anything other than drugs. So, if this
9 were a kidnapping, murder, no. That's inmate's
10 earliest release date is going to be fifteen.

11 The correction law says you
12 cannot earn good time off a life-maximum term, for
13 a simply mathematical reason. If your good time
14 formula is one-third of a fixed number, with life
15 there is no fixed number, there's nothing to divide
16 by three. You cannot calculate a good-time release
17 date for the sentence of fifteen to life.

18 So, that's the basic theory
19 behind the indeterminates. Let's take a moment to
20 talk about determinates. As you've heard earlier
21 today, you've got three classes of defendants who
22 can receive a determinate, either for drugs, for
23 violent felonies, or for, now, sex crimes, as of
24 April of 2007. The release date all of them are

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 2 going to have is the maximum-expiration date. If
 3 the determinate term is seven, the
 4 maximum-expiration date is going to be the date as
 5 of which seven years were served.
 6 Good time on an -- on a
 7 determinate, regardless of what it's for, is
 8 one-seventh. So, if you get somebody coming in
 9 with a seven-year determinate for robbery, the good
 10 time is one-seventh. You've got them coming in
 11 seven-year determinate for drugs, the good time is
 12 one-seventh. What distinguishes the -- the
 13 violent from the nonviolent, and the nonsex
 14 crimes, on the determinates, is merit time.
 15 The drug determinates can get an
 16 additional one-seventh for merit time, again unlike
 17 the one-sixth or one-third we saw before. So, just
 18 to sum up, this drug determinate for seven -- this
 19 inmate has a max of seven, an earliest
 20 conditional-release date of six, and a merit date
 21 of five.
 22 Everybody okay before we go on to
 23 the combinations?
 24 MR. BERGAMO: I have a question.

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 2 MR. DESIMONE: Yes, sir.
 3 MR. BERGAMO: I guess it's more
 4 for Tony. I -- I agree with incentives to let them
 5 out early so they behave, to protect the C.O.s.
 6 So, in the fifteen-to-life case, would you -- would
 7 you propose that the -- that go against the minimum
 8 of fifteen, would -- to give them hope to get out
 9 early? Do you know what I'm trying to say?
 10 MR. ANNUCCI: No, in fact, we --
 11 we were the ones that -- that kind of lobbied
 12 behind the scenes originally, for the original
 13 merit time, at the time the decision was made to
 14 not include A ones, and then, when we were doing
 15 other sentence -- this is pre Rocky -- it was a
 16 part of the Rocky drug law reform, the A -- merit
 17 time off for the -- for the A one.
 18 MR. DESIMONE: No, that came in
 19 the 2003.
 20 MR. ANNUCCI: Yeah, So -- so
 21 the -- the -- the recommendation was to let them
 22 get one-third off, because their sentences were so
 23 long to begin with, that if they behaved for that
 24 long a period of time, that they would get the

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 2 better percentage-wise benefit than every other
 3 drug offender in the system. So, we certainly saw
 4 the wisdom in that, thought it was a good thing.
 5 MR. GREEN: With the homicides
 6 and the kidnappings and your others, the incentive
 7 is, in terms of the parole hearing; correct?
 8 That --?
 9 MR. ANNUCCI: Yeah. Their --
 10 their incentive is to try and have a clean record
 11 when they see the board and -- and --.
 12 MR. GREEN: Because their fifteen
 13 could be fifteen; it could be twenty; it could
 14 be --.
 15 MR. DESIMONE: So that's referred
 16 to us.
 17 MR. ANNUCCI: Yeah. That's --
 18 that -- that -- that is the -- nothing has changed
 19 there. They have to -- their only ticket out of
 20 prison is through the parole board, and nothing,
 21 good-time-wise, can guarantee their release.
 22 MR. GREEN: No, it doesn't
 23 guarantee it. It certainly a factor, they have
 24 incentive.

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 2 MR. ANNUCCI: Yeah, that's --
 3 that's the -- that's their incentive.
 4 MR. DESIMONE: Let's start off
 5 with a really easy combination where you have
 6 concurrent determinates and indeterminates. So
 7 we'll take the defendant who's got a
 8 three-to-six-year indeterminate, and a concurrent
 9 seven. Basically, whenever you've got concurrent
 10 combinations what you're really going to do, when
 11 you -- when you slice it all to plain English,
 12 you're going to calculate them separately, and
 13 you're going to pick the release dates that have
 14 the longer time to run.
 15 So on the three-to-six, where
 16 you'll have a -- actually, you know what? Make it
 17 a six-to-twelve. Six, five, four, twelve, eight,
 18 seven, six, five. Okay.
 19 We'll say they're both imposed
 20 for drugs so that they're eligible to earn merit
 21 time and supplemental-merit time. These are your
 22 release dates from the indeterminate; these are
 23 your released dates from the determinate.
 24 Start off with the

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 2 parole-eligibility date. We said before that on
 3 the indeterminate, the full minimum was your
 4 parole-eligibility date. The Penal Law says when
 5 you have got a combination of determinates and
 6 indeterminates that run concurrently, your
 7 parole-eligibility date is going to be six-sevenths
 8 of the determinate. So, when this stood by itself,
 9 six was the conditional-release date. When you
 10 throw it in the pot with a concurrent
 11 indeterminate, six becomes your parole-eligibility
 12 date.

13 So, in our example I've got a
 14 parole date of six on this side of the board, I've
 15 got a six on that side of the board, they're both
 16 the same amount. This inmate's parole-eligibility
 17 date is six. Had one of these been larger, that
 18 one would have been the controlling
 19 parole-eligibility date.

20 Same thing with merit time. The
 21 merit date over here is five. The merit date over
 22 there is five. I would have taken whichever one
 23 were larger. In this case they're both the same
 24 amount. The merit date is five.

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 2 the determinate; twelve is the maximum of the
 3 indeterminate. This inmate has a controlling max
 4 date of twelve.

5 The conditional-release date of
 6 eight is larger than the conditional-release date
 7 of six; remember this is wearing two hats. So, the
 8 max date is twelve, the C.R. date is eight. This
 9 is what we do all day long.

10 Everybody okay with concurrent
 11 combinations?

12 Consecutive combinations. When
 13 you have got consecutive combinations, you're going
 14 to do a little bit of comparing; you're going to do
 15 a little bit of adding; and you've got to know when
 16 you should be comparing and not adding, and when
 17 you should be adding and not comparing.

18 The parole-eligibility date you
 19 get on a consecutive combination by adding the
 20 minimum of the indeterminate to six-sevenths of the
 21 determinate. Well, six-sevenths of seven is six;
 22 six plus six equals a P.E. of twelve.

23 When you get to your -- to figure
 24 out your maximum, it says step one is to look at

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 2 Because this is a drug
 3 indeterminate, this sentence also qualifies him to
 4 earn supplemental merit, and have a
 5 supplemental-merit date of four. He's got it; it
 6 doesn't do him any good. You have to look to see,
 7 on this side of the board, what's the earliest
 8 possible release date on the determinate. He can't
 9 get out before five. So, even though, yeah,
 10 statutorily eligible -- not even statutory, that
 11 crazy session law, you can earn supplemental over
 12 there, his earliest release date is here. So his
 13 dates are five, six; five, six.

14 Everybody good?

15 Yes, sir.

16 MR. GREEN: Now, that's only if
 17 they're concurrent sentences; correct?

18 MR. DESIMONE: Correct. We're
 19 going to do consecs after this. Then we're going
 20 to do the -- you don't know what job satisfaction
 21 means till you look at the reduction statute on the
 22 consecutive indeterminate and determinates.

23 All right. The maximums are the
 24 same thing. We said the seven is the maximum of

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 2 the maximum of the indeterminate by itself. Step
 3 two is to look at the determinate plus the minimum
 4 of the indeterminate, and take the larger of those
 5 two. So, what it's saying is the max of the
 6 indeterminate by itself is twelve, versus six plus
 7 seven equals thirteen. Thirteen is bigger. This
 8 inmate has a minimum of twelve and a max of
 9 thirteen.

10 Am I the only one that looks
 11 weird to? That his earliest -- again, depending
 12 upon whether or not he's eligible to earn merit
 13 time, you've got a one-year window between the
 14 parole date and the maximum-expiration date.

15 As for the good time, the
 16 correction law gives you a very elegant formula for
 17 figuring out good time on consecutive
 18 determinate/indeterminate combinations.
 19 Ninety-nine percent of the time that formula will
 20 give you a release date that winds up before the
 21 parole-eligibility date. For example, it says take
 22 one-seventh of your determinate, which is one;
 23 one-third of your indeterminate max, which is four.
 24 It gives you five years of good time. Subtract

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 2 five from thirteen and you get a C.R. date of
 3 eight. So, if that's where the statute ended you
 4 would have a minimum of twelve, a C.R. of eight,
 5 and a max of thirteen. They had to put in a
 6 provision into the Penal Law that said no.
 7 Whenever you get a C.R. date that comes before
 8 your -- the date you first see the parole board,
 9 ignore the results you get and slide it up to the
 10 parole date of twelve.
 11 So, the bottom line is you've got
 12 a parole date of twelve, a C.R. date of twelve, a
 13 max of thirteen, and this, people, is with the
 14 numbers being real nice. You should see some of
 15 the numbers we come up with when we're not dealing
 16 with things that are divisible by six or seven.
 17 So, this inmate is basically
 18 doing twelve, twelve, and thirteen.
 19 What happens in the real world?
 20 Well, four months before the twelve years are up
 21 DOCS decides whether or not the inmate's earned the
 22 year of good time. If the inmate has, the inmate
 23 will be C.R.'d at twelve. If DOCS determines the
 24 inmate hasn't earned the full year of good time,

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 2 the inmate will go before the parole board, at
 3 which point the board will say yes or no. So we
 4 could say no, you didn't get your good time, but
 5 parole could still grant the inmate discretionary
 6 release and have him go out at twelve.
 7 If -- if he doesn't earn good
 8 time and the board says no, he stays with us till
 9 he maxes out at thirteen.
 10 Everybody good on that?
 11 Yes, ma'am.
 12 JUDGE BING NEWTON: This -- this
 13 is just an aside: Can you just -- can you just
 14 talk about what goes into discretionary release,
 15 when DOCS decides to grant it to the inmate?
 16 MR. DESIMONE: On presumptive
 17 release?
 18 JUDGE BING NEWTON: Right.
 19 FROM THE FLOOR: Discretionary,
 20 she said.
 21 FROM THE FLOOR: Discretionary,
 22 for parole.
 23 JUDGE BING NEWTON: Discretionary
 24 release that DOCS grants to the inmate, before the

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 2 good time actually is --
 3 MR. AMODEO: Well, she'd like to
 4 know what -- what goes into the decision-making.
 5 How do you -- how do you decide that, was the
 6 question.
 7 MR. ANNUCCI: John, I think
 8 you're referring to the time-allowance committee --
 9 JUDGE BING NEWTON: Right,
 10 that -- that DOCS has --
 11 MR. ANNUCCI: -- that -- that
 12 reviews an inmate's records prior -- prior to the
 13 C.R. date, to determine whether --?
 14 JUDGE BING NEWTON: Yeah.
 15 MR. ANNUCCI: Okay.
 16 MR. DESIMONE: Tony, do you want
 17 to --?
 18 MR. ANNUCCI: As I -- as I said
 19 earlier, there are two things you will -- the
 20 time-allowance committee looks at: His
 21 disciplinary record, and his program record. As a
 22 part of his disciplinary record we have infractions
 23 that are classified as tier one, two, or three,
 24 tier three being the most serious. For example

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 2 assault on another inmate, contraband drugs,
 3 weapon -- all -- all of those things. When you are
 4 found guilty of one of those offenses, and a
 5 hearing officer imposes a penalty, he could
 6 sentence you to S.H.U., he could say keeplock, and
 7 he could also say in addition, I'm imposing a
 8 recommended loss of good time in the amount of
 9 eight months, for example. So, if that's the only
 10 disciplinary infraction, when the time allowance
 11 committee meets, four months prior to the C.R.
 12 date -- in an example I'll give you, let's say,
 13 it's an eight-to-twenty-four-year sentence, and so
 14 he's been in our -- on a robbery that the parole
 15 board did not grant him release. He comes to year
 16 sixteen, that's his C.R. date. Four months prior
 17 the time-allowance committee meets. They review
 18 his disciplinary record and they say, okay, you do
 19 have this one infraction, but that was ten years
 20 ago, and we notice that you have not had any
 21 disciplinary infractions since then, so since you
 22 had maintained a very good disciplinary record, and
 23 you've also done the assigned programs, you know,
 24 you have been in academic education,

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 2 vocational-trade training, we're going to grant you
 3 all of your good time. We're not going to hold
 4 that recommended loss of eight months. And they
 5 would let him go out at the C.R. date.

6 And obviously that was, you know,
 7 on the one extreme. The other extreme, of course,
 8 is the -- the individual who keeps getting
 9 disciplinary infraction after disciplinary
 10 infraction, and as has lost well more than, you
 11 know, eight years of good time, and then shown
 12 no -- no ability to conform, then the
 13 time-allowance committee would probably say we are
 14 withholding all of your good time.

15 Now another example could be,
 16 same inmate, who has behaved well
 17 disciplinary-wise, and he's been a sex offender
 18 that has refused to go into sex-offender
 19 counseling. Well, the -- the committee might say
 20 okay, you -- we are withholding all of your good
 21 time until you complete the program. And then the
 22 inmate might finally say, okay, I'll go into the
 23 program and then I -- I'll complete it, in which
 24 case then the time-allowance committee will meet

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 2 time-allowance committee is instructed if, for any
 3 reason, no fault of the inmate, he was in, you
 4 know, an outside hospital for years and couldn't
 5 get to programs --

6 COMMISSIONER O'DONNELL: Or
 7 there's a waiting list.

8 MR. ANNUCCI: -- is you can't
 9 hold that against him. If, through no fault of the
 10 inmate, he couldn't participate in program, that
 11 can't be held against him. But otherwise the
 12 time-allowance committee will -- will make their
 13 decision. And the inmate can appeal it to central
 14 office. And we have an individual who looks at
 15 these things very carefully, because we understand,
 16 first and foremost, you have to run a fair system.
 17 The inmates have to believe in it, to be a safe
 18 system.

19 COMMISSIONER O'DONNELL: Okay.
 20 Tony and Rich, could you wrap up in about the next
 21 ten minutes? And I know, at least you're local and
 22 you'll be working with the commission, and I'm sure
 23 that this isn't going to be first and only time
 24 that we're going to address these very complicated

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 2 again, and then grant him the rest of -- of the --
 3 of the good time. So, in -- in that scenario, when
 4 you're sixteen, if two years later he finally
 5 agrees and completes his -- his -- his
 6 sex-offender-counseling program, and he hasn't
 7 misbehaved, they would then grant him the remainder
 8 of his good time, which is why, as Rich explained
 9 earlier, you can earn it and -- the whole thing or
 10 in parts, depending up on the circumstances.

11 So, there's a lot of different
 12 scenarios --

13 COMMISSIONER O'DONNELL: It's
 14 pretty objective.

15 MR. ANNUCCI: It's somewhat
 16 objective, yeah, but I mean, they're -- the -- the
 17 inmates know up front. When they come into the
 18 system they know up front what their program needs
 19 are. Someone will look at the background of the
 20 offender and say okay, the program needs are
 21 academic education, alternatives to violence. And
 22 it's up to the inmate to participate in those
 23 programs.

24 The only thing is -- the

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 2 areas.

3 Pam is here from Florida; I want
 4 to make sure that we all hear from her. And I know
 5 I'm starting to get tired, so if you could do it,
 6 I'd really appreciate it.

7 MR. DESIMONE: All right. I'll
 8 just wrap up with one relatively simple example of
 9 why practitioners in the field would never be able
 10 to come up with the math we do.

11 Look at the inmate who's got a
 12 three-to-six, and a consecutive
 13 seven-and-a-half-to-fifteen. Two crimes, one of
 14 which is eligible to earn merit time, the other is
 15 not, but the other one doesn't knock him out of
 16 the -- it doesn't render him ineligible to earn
 17 merit on the other one, it's just that by statute
 18 it's not eligible to earn merit time.

19 You add them together, you get
 20 ten and a half to twenty-one. There's something on
 21 the books we call colloquially the reduction
 22 statute that will reduce the terms of certain
 23 indeterminate or determinate terms when they
 24 aggregate to more than a higher amount. This

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2 sentence falls into that category, the
3 ten-to-twenty -- well, the
4 ten-and-a-half-to-twenty-one becomes a
5 ten-to-twenty.

6 We have to figure out what
7 percentage -- we have to figure out the ratio
8 between this and this, because in our example the
9 three-year term was eligible to earn supplemental
10 merit, and this one wasn't. So, let's say this was
11 a drug crime, and that was a grand larceny. So,
12 first we have to do some -- we figure out, all
13 right, this is twenty-eight point fifty-seven
14 percent of the total. We have to multiply that by
15 the number of years, and we get two point eight
16 five seven years. We convert that into the number
17 of days, that becomes one zero four six days. We
18 divide that by six to get the supplemental-merit
19 time, equals one hundred seventy-four days.

20 So, to get the supplemental-merit
21 time, we would take one-sixth of that the -- the
22 merit date would be five-sixths of that; the
23 supplemental-merit date would be five-sixths minus
24 a hundred and seventy-four days. And again, if

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2 you're not a whiz with decimals and fractions and
3 dividing by seven, you're never going to get the
4 right answer. And again this is a relatively
5 simple combination. So, just keep in the back of
6 your mind that whatever formula come -- that you
7 come up with it would be nice if people in the
8 field could actually be able to employ it with
9 confidence, and realize all right, if I plead this
10 is what I'm going to get.

11 And I'm out of time, and I'd like
12 to thank you again for the opportunity.

13 MR. ANNUCCI: Can I just ask one
14 question, Richard? As a general matter, because
15 these combinations are so complicated, with the
16 different formulas, one-seventh, one-third -- is
17 your life is going to be easier if we move, as much
18 as possible, from the remaining indeterminates to
19 the determinate sentencing format?

20 MR. DESIMONE: Going to a mostly
21 determinate system, in the short run, won't help
22 us, because you're still going to have thousands of
23 inmate in the pipeline who have got indeterminates
24 as well, but you're right, eventually, like the

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2 problem with the A one resentences, eventually time
3 will take away that problem.

4 MR. ANNUCCI: So, if we're -- we
5 are already committed to determinate, ultimately it
6 will be easier if we move as much as the remainder
7 to determinate as possible.

8 MR. DESIMONE: Correct.

9 MR. ANNUCCI: Okay.

10 COMMISSIONER O'DONNELL: Do you
11 have other ideas how to streamline this process?

12 MR. DESIMONE: I -- I --.

13 COMMISSIONER O'DONNELL: If we,
14 you know, started to put together a subcommittee to
15 really work on this aspect of it?

16 MR. DESIMONE: I've always been
17 fond of the one-stop-shopping concept. You've got
18 it was some statutes, but not with a lot of them.
19 For example, if you want to know whether sentences
20 can run concurrently or must run consecutively,
21 Penal Law 7025, that's pretty much where you have
22 to look. 7025 is a disaster, but at least you
23 know, all right, I'm going to be looking there or
24 not at all. Same thing with postrelease

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2 supervision, 70.45, you don't have to look
3 elsewhere to get all the rules. Again, once you
4 get the 70.45 you want to pull your hair out, but
5 at least you know, all right, if it has to do with
6 P.R.S. I'm looking in 70.45. So at least taking --
7 pulling provisions out from the C.P.L., out of the
8 Correction Law, and just plopping them in one
9 central location.

10 COMMISSIONER O'DONNELL: So, if
11 we got someone to work with you, could we start
12 that process?

13 MR. DESIMONE: Sure.

14 COMMISSIONER O'DONNELL: George.

15 MR. ALEXANDER: Just going to ask
16 just the opposite question, barring the
17 determinates that you have in the system now, if we
18 did purely indeterminate, what would that do?

19 MR. DESIMONE: Again, it -- it --
20 it would simplify the math -- just having all
21 indeterminates would be simple; just having all
22 determinates would be simple. But because we've
23 had determinates on the books now for twelve,
24 thirteen years, for some time to come you're going

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 2 to have the -- the -- these crazy combinations, but
 3 yes if you went to all one kind, it would simplify
 4 the math.
 5 Thank you.
 6 COMMISSIONER O'DONNELL: Thank
 7 you very much. And I know we'll call on you often,
 8 so I really appreciate that. Can we plug ahead, or
 9 do we need to take a five-minute break? Keep
 10 going?
 11 FROM THE FLOOR: Yeah, yeah.
 12 COMMISSIONER O'DONNELL: Keep
 13 going. Okay. Pam Griset, I appreciate so much you
 14 coming here from Florida. I know when we first
 15 started sitting down and talking about this, Pam,
 16 came up immediately as someone who was pivotal to
 17 the last effort on the sentencing committee, but
 18 also has gone on to carefully study the sentencing
 19 law in New York, sentencing law from a policy
 20 perspective, teaches it in -- in -- in Florida, in
 21 law school, and has really studied the system and
 22 the policy implications of it. And so, I'm
 23 delighted that you agreed to come here, and hope
 24 we'll be able to tap into your expertise as the

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 2 commission continues its work.
 3 And I'll just turn it over to
 4 you, Pam.
 5 DR. GRISET: Thank you very much.
 6 I really appreciate this opportunity to come to
 7 speak to you. There isn't much I find more
 8 fascinating than the history of sentencing in New
 9 York.
 10 Now I have to kind of start --.
 11 COMMISSIONER O'DONNELL: I think
 12 we're going to need you at the microphone,
 13 because --
 14 DR. GRISET: I have this --.
 15 COMMISSIONER O'DONNELL: I -- I
 16 think it's the acoustics in the room --
 17 DR. GRISET: Okay.
 18 COMMISSIONER O'DONNELL: -- as
 19 much as anything else, because it's such a huge
 20 room, so --.
 21 DR. GRISET: Let me just start
 22 with the caveat: History cannot tell you what to
 23 do. History cannot tell this commission how to
 24 restructure its important recommendations. But

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 2 history can give you some ideas, and hopefully
 3 spark some thoughts that you might not have had
 4 previously, and give you, perhaps, some inspiration
 5 for what you -- what you should do.
 6 I have put this presentation into
 7 four sections, and let's see if I can play with
 8 this toy. All right.
 9 COMMISSIONER O'DONNELL: Do you
 10 want somebody else to do that for you?
 11 DR. GRISET: No, it's okay.
 12 COMMISSIONER O'DONNELL: Okay.
 13 DR. GRISET: Parallels, which by
 14 that I mean, times in our past history where New
 15 York State has faced very similar kinds of
 16 screwed-up, mixed-up sentencing systems.
 17 Predecessors, here I won't do all
 18 of the predecessor commissions, it would be way too
 19 much, but I just picked six of them, and I'll only
 20 focused on a couple of them.
 21 Pitfalls -- as you can see, I
 22 like alliteration. Pitfalls, I will mostly talk
 23 about the pitfalls that the previous
 24 sentencing-guidelines commission, faced. And if

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 2 you don't do sentencing guidelines that's fine,
 3 because some of the same issues, you will face.
 4 You'll face it in a different format than the
 5 '83-85 commission did, but the same issues are
 6 here.
 7 And finally possibilities and --
 8 not answers; I don't have them, but possibilities:
 9 Some things you could hope to achieve, perhaps,
 10 with this commission.
 11 So, let me begin with parallels:
 12 1796, that was the state prison was established in
 13 New York. Before 1796, there was capital
 14 punishment for over two hundred crimes in New York,
 15 also corporal punishment. Corporal punishment was
 16 abolished and death penalty was reserved for
 17 murderers and traitors. Guess what? Determinate
 18 sentencing. They didn't use that word, but that's
 19 what they had. Fixed terms of incarceration were
 20 set by judges, and inmates served their entire
 21 sentence. I'll -- I think it was 1817 that good
 22 time started, so there wasn't any good time, but
 23 there was quite extensive executive clemency or
 24 pardon.

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 2 The first prison -- well,
 3 actually it started off as a jail, but in 1796, it
 4 took the first seventy prisoners that were admitted
 5 for long-term residency in New York, and it was
 6 named after the famous Newgate in England. It was
 7 in Greenwich Village. And I do not believe it's
 8 still there any longer. But that was the first
 9 one. The first one -- what we really think as the
 10 first one is the state prison in Auburn, New York.
 11 That was really the -- the prison that most people,
 12 when they say what's the first prison in New York,
 13 they say Auburn. And actually it was 1816 that
 14 Auburn was authorized, but in 1823 it started to
 15 taking inmates.
 16 And it's kind of interesting to
 17 go to Auburn. Even today there's a big wall around
 18 the city, so it's kind of interesting.
 19 And a few years later inmates
 20 from Auburn took the Erie Canal down to Sing -- to
 21 Ossining, and built Sing Sing. That's few years
 22 later.
 23 The rhetoric versus the reality.
 24 The ideology of forcing inmates to conform to

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 2 orderly routine, and isolating them from
 3 temptation, would lead the way out of crime, that
 4 was the belief; that was the rhetoric, if you
 5 would. That was the rhetoric that was the
 6 philosophy driving this early-sentencing system.
 7 In reality, once we started
 8 having prisoners as long-term residents, as -- as
 9 opposed to just sitting there waiting to get
 10 executed, or sitting just short-term, once they
 11 became long-term residents, overcrowding,
 12 corruption, brutal and bizarre punishments became
 13 routine. I've just few pictures to give you some
 14 of the -- I -- I couldn't resist this picture. I
 15 believe it was Sing -- it -- it was Auburn, 1820.
 16 I don't if you can really see, but the inmates had
 17 to walk with their hand on the shoulder of the
 18 other inmate, as part -- and they weren't allowed
 19 speak to each other, supposedly.
 20 I love this woodcut from 1840,
 21 and you can see the striped uniforms, which in some
 22 places have come back.
 23 Here's an example of one of the
 24 horrible tortures. It doesn't look it, you think

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 2 it looks just the guy's taking a nice shower, but I
 3 don't know if you can see, but his hands are
 4 shackled, and so he -- he gets the feeling that
 5 he's drowning, because the water is coming right
 6 down, and there's -- that's just an example of some
 7 of the bizarre and brutal punishments that were the
 8 norm. They were the norm.
 9 So, I'm moving quickly through
 10 the decades. In 1881 there was a new penal code, a
 11 previous commission, the Field Commission, had
 12 operated in the 1860s and 1870s. And this time the
 13 D, determinate sentencing, was replaced with
 14 indeterminate, the I, and with minimum and
 15 maximums, just as you're familiar with today. And
 16 back then crimes were classified into just very
 17 big, broad, wide categories: Crimes against
 18 persons; crimes against property; and there was a
 19 few other categories. And what we started to see
 20 in New York in 1881, which continued right until
 21 really early '70s was -- early 1970s, excuse me --
 22 was the influence of progressive-era ideology on
 23 criminal justice and on punishment.
 24 As I'll discuss, as we go through

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 2 some of these, the -- whatever the larger social
 3 forces, criminal justice is never immune, and
 4 criminal justice usually rides along on the larger
 5 waves of social policy.
 6 In 1909 the -- we got rid of the
 7 penal code, and we have a -- had a Penal Law. And
 8 instead of the broad crime categories, alphabetical
 9 listings crimes. It sounds logical, but it was a
 10 mess; separate crimes were created for each offense
 11 type. The intent of it was to keep degrees of
 12 crime mutually exclusive so they wouldn't be
 13 overlapping. But the truth was, the result was,
 14 crimes dealing with similar subject matters were
 15 not located together, and charging decisions were
 16 very difficult; charging decisions were arbitrary
 17 and cumbersome.
 18 So, that brings us up to 19 -- as
 19 again -- I'm not the -- give -- doing justice to
 20 history here. I realize that taking history in
 21 these broad bands of time can only be suggestive
 22 and illustrative; they cannot be determinative of
 23 what really was.
 24 Now here we have 1961, the penal

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 2 code revision, and I'm only going to talk about
 3 sentencing -- sentencing -- there was lot more to
 4 it, there were C.P.L. changes as well as penal code
 5 changes, but the Bartlett Commission began its work
 6 in 1961. And at that time the penal -- according
 7 to Judge Bartlett -- and actually I had the
 8 privilege of interviewing Judge Bartlett in the
 9 '80s, and he was reminiscing with me about his
 10 experiences, and I have some quotes from things
 11 that he said. He said when he got there in 1961
 12 sentencing in New York, he felt, was a hodgepodge
 13 conglomeration of amendment upon amendment.
 14 Doesn't that sound familiar?
 15 Narrow and highly specific,
 16 overlapping offense definitions. Well, you know
 17 what problems overlapping offense definitions can
 18 cause. Here's just an example. Back then the --
 19 the crime of malicious injury to property was
 20 covered by twenty-five different sections and
 21 numerous subsections. So, it was a little
 22 confusing. And there were thirteen different
 23 maximum sentences for felonies. Hmm, that sounds
 24 familiar too.

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 2 this when I made my presentation, now I'm
 3 convinced, after listening today, that current
 4 sentencing is, clearly, a crazy-quilt mishmash.
 5 The sentencing system today is, again, complex;
 6 it's riddled with opportunities for disparities and
 7 discrimination; different sentencing rules apply to
 8 different subsections of the same crime.
 9 And this is just one example I
 10 found, and I'm sure that there are -- I could have
 11 found more, but for class D felonies, there are ten
 12 different categories, depending -- and I think it's
 13 actually closer to fifteen, depending on age, prior
 14 record, and crime.
 15 So, what are the lessons that you
 16 can learn from -- that we could learn from the
 17 parallels, from history? Well, one lesson is that
 18 sentencing-reform movements come in cycles.
 19 Another lesson is that determinate and
 20 indeterminate systems also come in cycles. I
 21 really haven't talked about this yet, and I will
 22 later, but reform movements can, one hopes, force
 23 attention on the allocation of power. Who are you
 24 going to give power to, for what reason, in what

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 2 Misdemeanors? Talk about
 3 disparity, misdemeanors were often punished more
 4 severely than felonies, just because of this kind
 5 of crazy system of amendment upon amendment, and no
 6 refinement or evening out -- evening out -- I --
 7 this isn't really very substantive, but I love
 8 these kind of funny things, so I had to -- I had to
 9 add this one: This was one of the archaic
 10 provisions in the law that Judge Bartlett found,
 11 and I -- you -- you couldn't -- it was against the
 12 law to sell or give away baby chicks, ducklings, or
 13 other fowl, under two months of age, in any
 14 quantity less than six. The point -- and I
 15 don't -- I -- you know, I think a lot of those
 16 archaic provisions have been cleaned up. You may
 17 stumble on something that you still have to think
 18 about. Times change; social issues change.
 19 Felonies, and this is still what
 20 we were -- what Paul Shechtman was talking about
 21 earlier, felonies were -- this was the first time,
 22 where they were classified A through E.
 23 Now, I'm going up to where we are
 24 today, and it does seem -- I was fairly sure of

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 2 situations? And you're really forced to think
 3 about that when you start to think about reforming
 4 the Penal Law.
 5 And this isn't a very elegant
 6 sentence, but it -- it -- it -- no matter what
 7 happens, this is something that has to have
 8 periodic attention. The sentencing guidelines
 9 commission I was on, the plan was that it would
 10 continue to exist. Well, the plan was that they
 11 would pass sentencing guidelines, and then the
 12 commission would continue to exist, to continue to
 13 keep the law clean. And so, that might be a
 14 recommendation that, regardless of whatever you
 15 ultimately come up with, that there might be some
 16 continued role for some body, whether it's this
 17 commission or some other, to kind of keep
 18 everything consistent over -- as time goes on.
 19 And it's clearly time to start to
 20 reform cycle again in New York. There doesn't seem
 21 to -- it seems like hats off to the governor for
 22 realizing, for -- for going forward. So, those are
 23 the parallels that I wanted to talk about.
 24 Now let me talk very -- a little

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 2 bit about the predecessors, and by that I mean some
 3 of the other commissions. And I really limited --
 4 limited it, because I -- there are -- there are
 5 dozens and dozens. I'm just going to talk about
 6 six, and I'm not going to talk about them too much.

7 This is, as I said, not -- not an
 8 inclusive list. The Bartlett Commission, I've
 9 already mentioned a little bit. This is a
 10 commission you might not know too much about,
 11 McGuinness-Oswald Committee, I'll talk a little bit
 12 about that. The Morgenthau Committee; the Liman
 13 Commission; the McQuillan Commission, and the one I
 14 worked on, which for, I'm just taking the names of
 15 the chairmen, first it was Judge Bellacosa, and
 16 then Ken Feinberg. So I'm just taking the names of
 17 the commissioner to -- to designate them.

18 I will be talk -- when I talk
 19 about pitfalls, I'll be talking about the '83 to
 20 '85 effort, but I just want to set the stage by
 21 talking very briefly about some of the other
 22 predecessors.

23 So, the Bartlett Commission, I'd
 24 like to start -- and I realize that we've had some

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 2 rehabilitate you in prison. It's a lot more than
 3 that. It's -- it's a whole theory and way of
 4 thinking about things. Today we have the
 5 determinate ideal, which is also a whole series and
 6 way of thinking about things.

7 Well, under the rehabilitative
 8 ideal, and I must tell you that -- that this
 9 picture, that's not a ship, that's a pencil. And
 10 the I.D. -- and pencil would be representing
 11 education and rehabilitation. And under the
 12 rehabilitative model the key to success, for that
 13 inmate to succeed, they would have to be educated
 14 and do whatever it is that -- to improve their
 15 chances upon reentry.

16 The Bartlett Commission, I'm
 17 going to go very quickly here, because you know
 18 this, you've heard this already: A, B, C, D, E,
 19 with the rules where I don't really need to go into
 20 them now, parole release after the minimum
 21 possible -- possibility, and back -- and good time
 22 was deducted from the maximum, that's already been
 23 discussed. So -- oh, this hasn't been discussed
 24 much yet.

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 2 discussion already of the Bartlett Commission, I'm
 3 going to talk more, not so much about the specifics
 4 of what they did, but about their theories, and
 5 their philosophy, because I think you can't -- you
 6 have to consider all that. There's no way to
 7 separate theory from sentencing practice.

8 This was all inspired by the
 9 A.L.I.'s model penal code movement, which swept the
 10 nation. And New York, like every other state, got
 11 interest -- got interested in changing and fixing
 12 its -- its codes. And they're in, not necessarily,
 13 lock-step with the model penal-code movement, but
 14 taking a lot of the clues from what other -- what
 15 the A. -- A.L.I. had recommended.

16 And the rehabilitative ideal was
 17 the glue that held the movement together, as
 18 pertains to sentencing. Now, there are lot of
 19 other things, in C.P.L. and so forth, that had
 20 nothing to do with rehabilitation. But it was
 21 that -- and when I -- it's not just rehabilitation.
 22 I call it the rehabilitation ideal, because it's a
 23 whole philosophy; it's a whole set of -- of things
 24 that -- it's not just, oh, I'm going to

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 2 Rejected mandatory sentences,
 3 I'll talk about that more, but the concept of
 4 mandatory sentencing would be anathema to an
 5 indeterminate rehabilitative ideal, absolutely
 6 would make -- it would be impossible, they don't
 7 fit in a -- in a rehabilitative, indeterminate
 8 system.

9 And what the Bartlett Commission
 10 did was, and this is just illustrative, but it
 11 really went through the exercise of saying who are
 12 the players, and what are the reasons for giving
 13 them power? It matched purpose -- the purpose of
 14 punishment, what they were trying to achieve, in
 15 that case, with who -- with what actors were the
 16 ones that properly should get that power.

17 And I'll just give one example
 18 here, in the Bartlett Commission days, they
 19 believed the legislature should only serve a
 20 retributive function, boundary setting, maximums,
 21 but other actors in the -- in the system had
 22 deterrents and incapacitation.

23 I -- yeah, I guess, John, when
 24 you said isolation today, I think it's -- it --

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2 probably incapacitation -- your -- your guess, you
3 know, that -- that's probably what it means.

4 And I don't need to go through a
5 whole litany of explanations of what these are.
6 And that's just illustrative. And it's not easy --
7 it's not easy to match purpose with power, and it
8 won't be a perfect exercise. But it might get you
9 thinking about who do you want to give this power
10 to? I mean, you're not going to reduce the amount
11 of power, you're just going to distribute it. Who
12 you want to distribute it to, and why, and at what
13 stage?

14 Here are some quotes that I just
15 thought were interesting, from my own interviews
16 with Judge Bartlett. "We assume the essential
17 validity of indeterminate sentencing." His
18 commission's work was very easy in that sense,
19 there wasn't a commissioner who disagreed with that
20 general concept. So, their work was a lot easier.
21 He said "Responsibility should be distributed among
22 judges, penal, and parole authorities, and the
23 executive." The assumption that judge -- judges
24 could not know, at the time of sentencing, how the

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2 offender ought to be treated in the future, so,
3 obviously a judge could not determine time served.
4 There was no way. The judge didn't have that
5 information. Only the correctional officials,
6 working at a later time, could tell whether the
7 treatment had worked.

8 The legislative reaction to the
9 Bartlett Commission's work was extremely positive.
10 They really didn't make much changes in the
11 Bartlett Commission's proposal. It was passed in
12 1965, with an effective date of January 1st, 1967.
13 Governor Rockefeller, who was inspirational in
14 getting this movement, this commission started, he
15 said there was -- that he praised the commission's
16 work, and he said there was ample scope for both
17 the rehabilitation of offenders and the protection
18 of the public.

19 And in my way of thinking about
20 it, the statutory modernization of the
21 rehabilitative paradigm was complete at that point.
22 However, in the last -- oh, let me go one more.

23 This was a commission short -- it
24 started in started in 1966, Russ Oswald and Paul

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2 McGuinness, DOCS Commissioner Paul McGuinness and
3 Parole Chief Russ Oswald were co-chairs, and again,
4 everything was rehabilitation; everything was
5 indeterminate sentencing; and they even went as far
6 as to try to match the rehabilitative theory with
7 the operations of the entire criminal justice
8 system. They introduced a concept called
9 continuous custody. It's a great concept, never
10 went any place, but it was a great concept instead
11 of treating offenders, as oh, this crime, this
12 crime, this crime, you think of their long-term
13 exposure to the system, and at each level the
14 history, the case history goes with them -- and
15 it's -- it was even more. It was very, very much
16 tied to the concept of rehabilitation.

17 And back in 1970 they
18 recommended -- well, I guess it actually happened,
19 prison and paroles -- it didn't last long: Prison
20 and parole services were combined in a single
21 agency, and again the concept was, though, you were
22 trying to make criminal justice system operate in a
23 rehabilitative fashion. That didn't last long, and
24 the reason I think it didn't last long was -- had

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2 nothing to do with indeterminate sentencing, had
3 nothing to do with -- with rehabilitation -- not
4 primarily. I think what the problem was, the times
5 were changing, the social conditions were changing.
6 And it wasn't just sentencing; it was a lot of
7 things. This new -- this is determinate sentencing
8 was ascending.

9 Well, what happened? How did --
10 why did this happen? How could something that
11 people believed in this state, from the late 1800s
12 all the way to 1970s, how could something that was
13 so prevalent and so much part of the system of
14 thought and -- and philosophy, how could that have
15 been so kind of turned on its head? Well, I have
16 to attribute it to other areas of social policy
17 change. There's a Vietnam War protester.

18 Indeterminate sentencing was
19 threatened; changes in separate areas of public
20 policy; manifestations of larger social phenomenon.
21 And here's just few other things that were going on
22 then: Vietnam War, racial and student militancy,
23 urban riots, Kent State massacre, Watergate fiasco,
24 all of these things had an impact on us in criminal

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 2 justice. All of these things -- you know, none of
 3 them were about criminal justice, and certainly
 4 none of them were about sentencing, but it totally
 5 changed.

6 And here is a great quotes from
 7 the historian David Rothman, on -- I've kind of
 8 shorten the quote, but what he said was that
 9 "College presidents, teachers, husbands and
 10 parents, psychiatrists, doctors, research
 11 scientists, prison wardens, social workers, all
 12 suffered decline in the legitimacy of their
 13 discretionary authority."

14 Well, indeterminate sentencing is
 15 based on discretion, and if discretion is not going
 16 to be considered to be a noble and -- and
 17 appropriate function of government, then we've got
 18 problems in sentencing. So, there's a paradigm
 19 shift, and it's interesting because it was -- all
 20 of these things that I'm going to mention, they're
 21 really polar opposites. It's not like you just
 22 kind of chipped away a little at this or modified
 23 this a little bit. It just reversed it, took the
 24 complete opposite position.

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 2 parole guidelines, which I think were a -- were a
 3 great innovation, but you know, who knows the
 4 parole board? They're nameless; they're faceless;
 5 we don't know them; you don't know them; public
 6 doesn't know them. They're easy to blame. They're
 7 easy to blame.

8 So parole boards were blamed, and
 9 judges were blamed too. Judicial discretion was
 10 portrayed as wicked, and contrary to the rule of
 11 law, which is, to me, a ridiculous concept, but
 12 nevertheless that was the prevalent theory. And in
 13 New York the rehabilitative ideal certainly
 14 suffered a huge hit with the Rockefeller Drug Laws,
 15 second-felony-offender laws, juvenile-offender
 16 laws, violent offender -- violent-felony-offender
 17 laws in the '70s. Paul Shechtman talked about a
 18 lot of those. But clearly it really
 19 destabilized -- those things really destabilized
 20 the indeterminate ideal in New York.

21 I want to talk to you a minute
 22 about this extremely influential work of Judge --
 23 Federal Judge Marvin Frankel. In 1972 he wrote a
 24 book that was tremendously influential, "Criminal

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2 Faith in criminal justice
 3 officials gave way to deep-seated suspicion of
 4 criminal justice officials. Confidence in a
 5 sentencing system based on discretion, he wrote it:
 6 "The assumption that everything could not be known
 7 at the time of sentencing, yielded to the opposite
 8 assumption." Everything changed, completely.
 9 Offenders were not sick, but even if they were, the
 10 criminal justice system wasn't capable of
 11 administering a cure. And that really became a
 12 very prevalent philosophy.

13 Well, who were the whipping boys?
 14 Parole board was definitely blamed, parole was kind
 15 of like this, it's kind of -- he's got -- I assume
 16 this guy has a two of spades, I assume all the
 17 cards in the deck of the parole board are meant to
 18 be two of spades, and you can see, in this cartoon,
 19 that the inmate has community support, a resume, a
 20 family album, but you can guess which pile he's
 21 probably going to go into, parole denied.

22 And I've heard many -- I've
 23 talked to many previous parole commissioners, and
 24 parole at that time really was experimenting with

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 2 Sentences, Law Without Order, Pun Intended."

3 And Judge -- I'm just going to
 4 have couple of quotes from Judge Frankel's work.
 5 It was a very, very powerful piece of work, and I
 6 just took a couple quotes, because they were so
 7 good.

8 "What is disagreeable," he said,
 9 "and vicious, is to cage prisoners for
 10 indeterminate stretches, while we set about the
 11 rehabilitation, not knowing what to do for them,
 12 really -- or really, whether we can do anything
 13 useful for them at all." Just let me catch up with
 14 myself here.

15 The other quote I have from
 16 Marvin Frankel, and I think this definitely applies
 17 to the situation in New York today, with your
 18 determinate sentences, and his statement was, "What
 19 would require" -- someone had said - let me give
 20 you some context - someone who said, how do you
 21 know if there's disparity? How do you know judges
 22 give different sentences? How do you know that
 23 stuff? And this is what Frankel said, what he said
 24 was, "Well, we don't know, we don't have the data,

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 2 but what would require proof of a weighty kind, and
 3 something astonishing in the way of theoretical
 4 explanation would be the suggestion that assorted
 5 judges, subject to little more than their own
 6 unfettered wills, could be expected to impose
 7 consistent sentences." Eight to twenty-five, no
 8 guidance between eight to twenty-five, that's what
 9 you get.

10 And basically what Frankel was
 11 saying, and please excuse the -- the game-show
 12 corruption there, but basically what he was saying
 13 was that criminal justice sentencing was a
 14 crapshoot, was a spin-the-wheel; spin the wheel,
 15 you'll be innocent/guilty. If you're guilty you
 16 could get life or you could get five years or well,
 17 you could get six years, you could get twenty
 18 years. Because there were no rules on judges. And
 19 one of the reason it was so powerful, his
 20 arguments, was because he was a judge. He's a
 21 federal judge, and a very well respected federal
 22 judge, and very much out on the talk circuit, and
 23 so people listened to him.

24 And -- and thus began the

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 2 must just as caveat, it's not my topic to talk
 3 about federal sentencing guidelines, but the state
 4 systems are nothing like the federal system. They
 5 really are lot less complex, a lot less obtuse.
 6 And the state's systems, if you'll excuse the word,
 7 tend to be more elegant, more simple. And I know
 8 that there'll be a lot of problems if you do decide
 9 to go to a sentencing guideline system, but just
 10 don't confuse it with what the feds have done,
 11 because they're totally different.

12 Okay. Going on with
 13 predecessors, District Attorney Morgenthau had a
 14 committee in 1977. He endorsed the determinate
 15 philosophy. His committee rejected rehabilitation
 16 as a legitimate purpose of punishment, and this --
 17 these words you hear today still, like offenders
 18 should receive like punishments; proportionality of
 19 punishment. He recommended -- his -- his committee
 20 recommended an independent sentencing commission to
 21 develop a grid based on instant, you know,
 22 conviction, seriousness of offense, and prior
 23 offenses. He recommended a system with narrow
 24 sentencing ranges, with very limited departure,

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 2 national movement for determinate sentencing, which
 3 we still have with us today, and I see no -- I see
 4 no movement away from it at the moment.
 5 1975 to 1985 all fifty states and
 6 Washington D.C., the District of Columbia,
 7 considered -- either enacted or considered, in New
 8 York it was only considered, some kind of
 9 determinate sentencing.

10 And there were two main types
 11 that were developed. Maine pioneered what is
 12 similar to what you have here in New York now,
 13 although it was for all crimes, not just some
 14 crimes, where it was -- and I say legislative,
 15 although in this case has come from a commission,
 16 but wide ranges, and judges imposed a definite
 17 determinate sentence in California, follow -- the
 18 next year. Many states did what New York tried
 19 unsuccessfully to do, which was to develop
 20 sentencing guidelines. Right now we've got about
 21 fifteen states, I believe, that are using
 22 sentencing guidelines. And over the years some of
 23 them have had to alter them and monkey with them
 24 and change them, but -- and they're are nothing. I

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 2 with appellate review of all departure sentences,
 3 both for the defendant and the prosecution, abolish
 4 parole release, which you have to abolish parole
 5 release in a true determinate sentencing system. I
 6 mean, it's the lynch pin of a determinate ideal.
 7 There's no discretionary parole release, not to
 8 confuse with parole supervision, you can have
 9 parole supervision under any system. And at that
 10 time, good time, they recommended twenty percent.

11 Arthur Liman, a couple years
 12 later, chaired another commission, another kind of
 13 study commission, not a -- not a doing commission
 14 but a studying commission. He pretty much echoed
 15 Morgenthau Commission report and recommendations,
 16 said that the guidelines would bring clarity,
 17 rationality, and stability to sentencing.

18 And this is something -- this is
 19 the only place where I noticed that the Liman
 20 Commission deviated from Morgenthau's Commission,
 21 in that Mr. Liman recommend -- his commission
 22 recommended that explicitly matching sentences and
 23 prison resources. This is not a topic I've heard
 24 discussed today yet, but it's a big one. It's a

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 2 huge one. How are you going to do this explicitly,
 3 are you going to -- what's your decision? Are you
 4 going to try not to increase the prison population?
 5 Are you going to try to increase it only by the
 6 amount it would increase, projections under the
 7 current law? Are you going to try to decrease it?
 8 What are you going to try to do? So he -- he -- he
 9 wanted people to be very explicit about that.
 10 1981 we have another commission,
 11 you may not have heard about, I don't want to spend
 12 it -- much time on this. This is Judge Peter
 13 McQuillan's commission. He advocated a little bit
 14 like what you have today, a dual track, a D. and
 15 I., determinate and indeterminate, but he was just
 16 kidding, because when I went to speak with him --
 17 I'll really show you how it was, but I went to
 18 speak with him about -- well, what was the
 19 rationale for that, why was that hybrid system a
 20 good way to go, he basically told me, oh, they
 21 didn't really want to do it; they really wanted to
 22 keep indeterminate sentencing, but they felt they
 23 had to appease the social movement for determinate
 24 sentencing. So, we were unanimous in not favoring

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 2 determinate sentencing, the dual track was
 3 concession.
 4 So, it wasn't that they had some
 5 great ideas about how you could have both an I. and
 6 a D. in the same -- and work together,
 7 indeterminate and determinate. It was a
 8 recommendation, but it was just facing a political
 9 reality.
 10 Bellacosa-Feinberg Committee,
 11 1983. This is the committee that I had the good
 12 fortune to work for. Again, it was created in 1983
 13 as one of Governor Cuomo's very first initiatives,
 14 and of course, with the legislator's help it was
 15 a -- it was a chapter law. It wasn't -- you know,
 16 it was something that the legislature approved, and
 17 it had -- a little different than yours. It had
 18 fourteen members; six appointed by the governor,
 19 six by the legislature, and two by the chief judge.
 20 They held twenty all day meetings, including two-,
 21 three-, and four-day retreats between November 1983
 22 and September 1985. They did get an extension.
 23 They had got -- had a -- they had an extension,
 24 both for the preliminary -- well, because for

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 2 the -- what happened was by the time we were ready
 3 to do the preliminary report it was realized that
 4 we hadn't figured in public hearings, and so we
 5 needed more time for that, and so we got everything
 6 extended out.
 7 Okay. So, those are
 8 predecessors. Now, I -- oh, five days of public
 9 hearings, I'm sorry. New York City, Albany, and
 10 Buffalo. We had two days in Albany, two days in
 11 New York City and one day in Buffalo. Someone
 12 mentioned a list of organizations. We used that
 13 list in part to notify everybody about these
 14 hearings, and to get people to sign up to come in
 15 and speak, and we had over a hundred people coming
 16 to talk, you know, about our proposal, these five
 17 different days of public hearings.
 18 Pitfalls, or another way of
 19 saying this is what went wrong. You know the
 20 sentencing commission failed. You know the
 21 sentencing guidelines commission did not succeed in
 22 getting legislative approval. So, what happened?
 23 What went wrong? I'm just going to talk about some
 24 of the major issues, some of the major problems

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 2 that the commission had. These may not be the
 3 specific ones you will be dealing with, if you
 4 don't do sentencing guidelines per se, but I think
 5 it might be worth your while to just listen to a
 6 few of the pitfalls from the effort twenty-some
 7 years ago, because some of the issues are still
 8 relevant, no matter what kind of a system you end
 9 up devising.
 10 Well, and again, I'm just talking
 11 here about the Bellacosa-Feinberg Committee. And
 12 there were a lot of ideological differences. And
 13 you know, times have changed. This was twenty-two,
 14 twenty-three years ago. The -- this group, this
 15 commission, may have come -- may have a lot less
 16 ideological concerns, because the -- the
 17 determinate concept is --.
 18 COMMISSIONER O'DONNELL: Oh.
 19 Pam, could we interrupt you --
 20 DR. GRISET: Oh, please.
 21 COMMISSIONER O'DONNELL: -- for a
 22 moment? Since the governor is here to say hello,
 23 which I appreciate very much.
 24 Thank you for stopping by,

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 2 Governor.
 3 GOVERNOR SPITZER: How are you?
 4 I just want to say thank you for
 5 not only coming up today, but all of the hard work
 6 that -- and -- and the final product, because this
 7 is an enormously important issue. I know a lot of
 8 you around this room work in this area. Thank you
 9 all, and I happen to know how significant it is to
 10 undertake this sort topic, a lot of review of what
 11 we have done, asking fundamental questions about
 12 what the approach should be. And it's not going to
 13 be easy to get closure and consensus on these
 14 things, but we hope to heighten a lot of the
 15 conversation within the capital, in terms of the
 16 creation of the new penal law elements and
 17 violations and felonies, but also how we want to
 18 impose those things on, those in courts and -- it's
 19 a tough thing to be debated around here without a
 20 foundation of the clear thinking you guys will
 21 provide us. I appreciate that.
 22 And I want Martha gave me two
 23 minutes out to -- before they drag me back into
 24 something else. We just sat for two hours with all

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 2 the leaders. These a big -- bigger problems; we're
 3 all on a mission today, so, I appreciate it.
 4 COMMISSIONER O'DONNELL: Well, we
 5 appreciate you stopping by. This commission is
 6 going to work very hard --.
 7 (Off-the-record discussion)
 8 FROM THE FLOOR: Very limited
 9 budget.
 10 GOVERNOR SPITZER: We -- we're
 11 parsimonious, because the legislature won't give us
 12 the executive doctrine.
 13 COMMISSIONER O'DONNELL: Thank
 14 you very much.
 15 GOVERNOR SPITZER: Thanks, it's
 16 good seeing you.
 17 (Off-the-record discussion)
 18 DR. GRISET: I guess it was okay
 19 if I stopped.
 20 So he does know that we're
 21 working hard, if we're still here at four o'clock
 22 in the afternoon.
 23 I guess what I was trying to say
 24 was that some of these problems may not be problems

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 2 you have to face. But back then, let me tell you
 3 what problems we -- we had to face. Now, not while
 4 I was a member of the commission, but later on, I
 5 was -- I was staff. Not when I was staff to the
 6 commission but later on, into my only research, I
 7 did a content analysis of all the transcripts of
 8 all the committee meetings, and all the public
 9 hearings, and everything else, the subcommittee
 10 meetings and everything, and anyway, I was able
 11 to -- although this was rough, I was able to
 12 categorize people by what they said and how they
 13 voted specifically, and -- into two broad, very
 14 broad categories of defense-oriented and
 15 prosecutor -- prosecutorial or law enforcement
 16 oriented, and these are obviously broad.
 17 But, as you can see, nine members
 18 of the Bellacosa-Feinberg Committee generally spoke
 19 in favor of defense, you know, broadly. That's
 20 very broad. You could take me to task for any of
 21 that, because to put people into these two
 22 categories is a little simplistic, and I admit
 23 that. And four definitely aligned themselves with
 24 prosecutorial positions. And one, it depended.

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 2 I think another problem was, at
 3 that time, in 1985, '83 to '85, the determinate
 4 ideal was still not fully explicated. What we had
 5 had in this country was a reaction against
 6 indeterminacy, but not a clear idea of what
 7 determinacy was. Things have changed, and I think
 8 perhaps the experience in many states now has
 9 helped to make the ideal a little less vague.
 10 Initially everybody said they loved it, determinate
 11 sentencing, until, you know, the devil's in the
 12 detail. And until some of the details were written
 13 down, and then all of the sudden nobody liked it.
 14 I want to just talk about some
 15 areas - and I will go quick - that we have -- some
 16 of the more contentious areas, and some of these
 17 you may not at all face, and so, I won't, you know,
 18 spend any time on -- on -- on most of them, but
 19 some of them you definitely are going to face.
 20 So these were areas: How are the
 21 guidelines going to impact resources? I already
 22 mentioned that. It's a huge issue. Our staff --
 23 our initial staff director, at that time, on the
 24 commission, advised the committee not to set

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 2 sentences based on its impact on prisons or jails
 3 or community programs, but instead to do it
 4 normatively. Bad idea. Bad idea. We wasted a lot
 5 of time doing that. We really messed up the
 6 research opportunities. Ultimately, the committee
 7 realized that it was not a good idea, and they
 8 voted for descriptive guidelines that were trying
 9 to fairly well replicate, in most cases, the amount
 10 of punishment that was currently existing.

11 They went ahead and made a few
 12 minor adjustments to reflect their own normative
 13 judgments, particularly, I think in the area of sex
 14 crimes, they didn't feel -- but basically, this was
 15 done as a -- actually, what it was done was the
 16 idea that here's what DOCS projections were, with
 17 no change. Let's make our system mirror that. So
 18 population will still go up, but no more than it
 19 would they gone up if we hadn't made the change.

20 Well, research, sometimes people
 21 think it's just so easy. Okay. Change this,
 22 change that. But -- but it -- it -- it does take
 23 some time to do some of this research. And in
 24 our -- in our commission the research effort was

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 2 sentencing, or the fed -- the feds used the term
 3 "relevant-conduct." I think it's about the same
 4 thing. But ultimately, it was rejected because of
 5 constitutional concerns, fear of excessive
 6 fact-finding and sentencing hearings, and worries
 7 about double-counting elements of the crime, and
 8 grid-scoring factors, and of course, now, in light
 9 of Apprendi, Blakely, Booker and the other cases,
 10 this is huge. I mean, this issue between
 11 sentencing out elements of the crime, and
 12 sentencing factors, I mean, you have to be really
 13 careful now how you approach that.

14 Well, the Bellacosa-Feinberg
 15 Committee adopted a twelve-offense severity levels,
 16 and -- I just made a three of the twelve grid
 17 cells. So, I can just -- we have bands one through
 18 twelve, and I must say band one, the most severe
 19 was not murder one. We made a decision as -- the
 20 commission made a decision, the first meeting, not
 21 to deal with murder one. It was too much of a
 22 lightning rod; it was too sensitive.

23 Times have changed. I mean, we
 24 certainly have a different structure now, but -- so

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 2 delayed for six months - we didn't have six months
 3 to delay; you certainly don't - because of
 4 uncertainty of how the guidelines would be
 5 constructed. If the researchers are not told
 6 whether it's descriptive or prescriptive
 7 guidelines, then they're not have any idea how to
 8 do an impact assessment. And what we had, we had
 9 this dynamic where lack of research led to a
 10 postponement of all major decisions. And even if
 11 there was a vote, it was tentative and could be
 12 retracted when the research came in. So, we were
 13 kind of in a bad, ugly cycle.

14 Designing the grid. Well,
 15 obviously, this is what has to be balanced, level
 16 of offense and criminal history. And whether
 17 you -- you use a grid or not, I mean, it's still
 18 that you have to balance. That hasn't changed.

19 Fact-based sentencing. I think
 20 probably with new supreme court cases from a
 21 Apprendi on, there's absolutely no reason to even
 22 think it would be constitutional to do fact-based
 23 sentencing. We wasted a lot of time in this
 24 commission talking about doing fact-based

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 2 we started with murder two as being our most
 3 severe, and we were going to just leave it to the
 4 legislature what to do with murder one. And so,
 5 basically, just visually, it doesn't matter what --
 6 what these numbers are. But crimes, this is the
 7 offense severity, this is prior record. We had
 8 five categories of prior record. And then the
 9 actual punishment would be found at the
 10 intersection. If you were a robbery one and you
 11 were first offender, it would be three point seven
 12 five years to seven point five o. A much narrower
 13 range than what -- your eight to twenty-five.

14 The offense-severity axis, that's
 15 going this way. I -- I don't know what to advise
 16 you on this, but I know Paul -- Paul Shechtman was
 17 talking was about may be having an F or E -- G, or
 18 other things. Well, you're going to get into this
 19 issue of reclassification if you do this. And
 20 reclassification may be necessary, but it's a bear.
 21 And it's a bear for researchers particularly. In
 22 indeterminate sentencing it doesn't matter. You
 23 can have the crimes of completely different
 24 severity lumped together for sentencing purposes,

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 2 because the parole board can even it out with their
 3 own parole guidelines, so it doesn't matter. But
 4 with -- well, their -- they could even out
 5 disparities.

6 With determinate sentencing
 7 guidelines, to ensure offenses of equivalent
 8 severity receive similar punishments, we need to
 9 reassign and reclassify offenses. We made a
 10 decision on our committee just to pick a few
 11 high-volume crimes: Robbery, burglary, rape, few
 12 sex crimes, a few other things. Because it was --
 13 if you look at rob one, there's tremendous
 14 variation and you could have -- you could, you
 15 know, harm somebody for rob one. Or you could also
 16 have a gun, but no one even sees it, it's not even
 17 shown, it's not even used, it still -- I assume it
 18 still is rob one, so I mean, we have tremendous
 19 variation in -- in rob one -- in robbery one and so
 20 forth.

21 So, the offense reclassification,
 22 as I said, was a very difficult thing for data
 23 collection, particularly because one week -- well,
 24 for two reasons, one is current law determined how

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 2 subsections were changed and the research problem
 3 became more and more complicated.

4 Prior-record access, I'm not
 5 going to spend any time on this, just the -- did
 6 want to mention that we did not score prior
 7 misdemeanors, not because we didn't want to, but
 8 because of the bad data available, or the lack of
 9 data. And hopefully that's changed a lot on rap
 10 sheets here in New York, I don't know.

11 The issue of departure. If you
 12 have guidelines, then you'd have some judicial
 13 discretion left. You have to have some room for a
 14 departure sentence, and it's definitely the
 15 toughest issue facing the commission. It was
 16 mostly hotly contested, because it really did
 17 determine the balance of power in the courtroom.
 18 If you balance -- the balance is -- balancing
 19 judicial discretion against disparity reduction;
 20 balancing uniformity with individualization. We
 21 want all these things, but how do you achieve them
 22 all when they're opposites? So you have to balance
 23 them.

24 If you have unlimited departure

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 2 data was collected, and so if you can change how
 3 crimes are define -- where crimes are, then you
 4 might not have the data. And subsection
 5 information, we found out, was not -- I don't know
 6 if this has changed, but it was not routinely
 7 recorded in the state's databases.

8 So, if you want to take rob one,
 9 before subsections, and put them in different bands
 10 on the grid, how do you know what the people used
 11 to get for punishment? You don't know. And if you
 12 want a descriptive system that doesn't -- that has
 13 no major impact on prisons then -- well, what we
 14 had to do was we had actually to do time-consuming
 15 research into case files in New York City. We
 16 actually sent about thirty people into the -- into
 17 New York City to -- to actually try to see the
 18 subsections and what the punishments were. And so
 19 the research problems continually were changed,
 20 Commissioner O'Donnell, I believe, earlier made the
 21 comment that all decisions, for the city make them,
 22 the better it is for research. And this is
 23 definitely what we experienced. And we'd have
 24 committee meetings where all of the sudden

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 2 from a grid cell, you have too much discretion; if
 3 you have limited departure, you have too little
 4 discretion. So how do you create that balance?

5 And then we also had many, many
 6 complex issues relating to waivers of departure;
 7 percentage of departure; all that kind of stuff.
 8 And just to -- pictorially, there's one type of
 9 cell, which unfortunately, you're all -- we're all
 10 very familiar with, and then there's another type
 11 of cell, and this is the type of cell, that's a
 12 cell -- that's a type of cell that sentencing
 13 guidelines, a really good, elegant system, would
 14 allow.

15 Departure in width of cell range.
 16 The wider the range of that cell, the less the need
 17 for departure. It's so wide. You can handle all
 18 the cases, and individualize. The narrower the
 19 range, the more departure, to fit the individual
 20 case. If you only have a few months difference in
 21 a cell then you're going to have to depart. Very
 22 much concern, trials would increase with narrow
 23 ranges, because there wouldn't be any incentive to
 24 plead guilty, and of course, concern about charge

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2 bargaining. With narrow ranges, prosecutor will
3 pick the -- the -- the cell, and that would be it.

4 We had a departure compromise,
5 which no one liked; everybody voted against it, but
6 they voted for. And it was very weird, and it
7 was -- the -- the trial court could depart fifty
8 percent either way, aggravation or mitigation, and
9 if they wanted to do more in mitigation the
10 appellate division of the supreme court would take
11 the case after. It was a totally cumbersome, no,
12 everybody said, well, here's our compromise, and we
13 all hate it.

14 Mandatory sentences are also tied
15 to the width of the range. The wider the range the
16 less need for mandatories. In essence, the
17 mandatories are folded into the wide range.
18 District Attorney Morgenthau warned the committee
19 that abandoning mandatories would be seen by the
20 legislature as a suicide wish. Ultimately, the
21 committee voted to fold all mandatories into a grid
22 with fairly wide ranges.

23 This is something we didn't
24 really -- weren't able, really, to deal with too

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2 much let DOCS help us and guide us as to what -- to
3 what they needed, which was very sensible.

4 We issued a report and it was
5 riddled with dissenting opinions, not in an
6 appendix, but throughout the report. And it was
7 very hard to distinguish who was saying what,
8 whether the commissioners were saying this, or
9 whether it was a dissenting opinion. It was kind
10 of a disaster, actually. For the writer, me, it
11 was horrible, because at the last commission
12 meeting there was a vote, the report had to come
13 out in a week or a couple of days or whatever, and
14 there was a vote that everybody could file dissents
15 and all night long, you know, on the fax, I was
16 getting these dissenting opinions, that were --
17 some of which were not too legible, and trying to
18 turn them into English, and also to try to find
19 some way to meld it. It was -- it was a disaster.

20 There were numerous separate
21 dissents from defense and prosecutorial interests,
22 even alternate grids -- the committee's report had
23 like, four grids. I mean, who would -- how could
24 you tell which was the right one? You -- a bill

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2 well, prosecutorial discretion. Determinate theory
3 has been largely silent on the shift of power from
4 judges and parole boards to prosecutors. District
5 Attorney Morgenthau had recommended, initially,
6 plea-bargaining guidelines; I've never seen them.
7 But he had recommended it would be a good idea to
8 have charging and plea-bargaining.

9 And our commission did something
10 called inspect and reduce. It wasn't very popular,
11 but they went ahead and did it because was in the
12 enabling legislation, we were empowered to do it,
13 where judges were given the power to reduce the
14 indictment to conform to the evidence presented to
15 the grand jury. Now, some of these things may
16 actually be law now, I'm not sure.

17 Good time, and I'll just go
18 really quick here. This was before the current era
19 of truth in sentencing. You can call it
20 six-sevenths, eight-five percent, whatever you want
21 to call it. That was before the -- we voted for
22 twenty-five percent, the question of vesting, and
23 the question of restoration, I won't go into that.
24 We changed our vote a thousand times, and we pretty

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2 sent -- was -- was sent to the legislature, it was
3 never reported out of commission, out of the -- out
4 of the -- out of committee. The response was
5 uniformly negative. Judges said it took away too
6 much of their power; prosecutors said it gave
7 judges too much power; mayors and sheriffs,
8 actually they filed a lawsuit, concerned about
9 shifting burden to local jails; the black and
10 Puerto Rican caucus offered their own grid.

11 And my former boss, Larry
12 Curlander (phonetic spelling), who always had a
13 good way with words, what he said was -- and I
14 interviewed him on this, he said everybody is for
15 determinate sentencing in concept, but when the
16 reality became apparent, the entire western world
17 rebelled. That was pretty true. We had a
18 hundred -- we had a hundred people, roughly, at the
19 public hearings, and one of them liked our report.
20 And I don't know if somebody paid him or what.

21 And finally, my last and final
22 section, and it's weak, because I don't really know
23 what you should do, but possibilities. Perhaps you
24 could achieve, which no one really has done, the

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 2 triple crown of determinate sentencing: Reduce
 3 disparity by increasing proportionality between
 4 crimes and sanctions, you don't have that now;
 5 create a reasonable balance between uniformity and
 6 individualization, you have that and the judges can
 7 do that now, but there's no standard for it; and
 8 this you already do have, ensure that the sentence
 9 served matches the sentence imposed, the truth in
 10 sentencing, you've done that one. You've got that
 11 part of it. You're still missing some really big
 12 parts.

13 Obviously, you're going to have
 14 to compromise on it, always like Roscoe Pound's
 15 picture, so I had to find a way to put it in there.
 16 Basically he's telling -- saying that in all
 17 criminal you're going to -- just going to have to
 18 compromise. That's -- that's how it's done.
 19 That's the only way to deal with everybody's
 20 individual ideologies.

21 I don't have to tell you that the
 22 power to deprive people of their liberty, or even
 23 to sent them to community programs, is the most
 24 awesome power given to government, at least to

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 2 makes it easier to distribute power to
 3 legislatures, prosecutors, judges, prison and
 4 parole officers, and of course, we have no evidence
 5 that any of those purposes can be achieved. There
 6 is no research evidence that shows you that you can
 7 deter; that you can -- well, sure you can
 8 incapacitate, if it's just a -- or that you're
 9 going to let them out. We have no research
 10 evidence, but that doesn't mean you sit back and do
 11 nothing. Just because we can't prove deterrence
 12 works, just because we can't prove that you can
 13 rehabilitate, just because you can't prove these
 14 things, it -- you still have to move forward with
 15 these ideas.

16 My recommendation for your
 17 report, if you're going to, and let's hope you
 18 don't, but if you do have dissenting opinions,
 19 please put them in an appendix. Please do not
 20 allow it to be throughout your report. It would
 21 make it a mess. And if descriptive guidelines are
 22 pursued, start your data collection immediately.
 23 I'm sure you already -- you have and you will. If
 24 crimes -- crimes are to be reclassified according

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 2 state government. We don't wage wars. You have an
 3 opportunity here to enhance fairness in punishment
 4 policy without sacrificing public safety. That may
 5 be rhetoric, but I -- I -- I think it's possible.

6 You have a broad mandate, and I
 7 would really urge you to think about that broad
 8 mandate, because there are multiple actors. Don't
 9 wait, I would recommend. I don't think you're
 10 going to wait, because I saw your agenda, and
 11 you're going to be covering all of this in the next
 12 few weeks. But don't wait till the end of the
 13 process to consider the other components of
 14 sentencing.

15 Rules governing -- more rules
 16 governing only one actor, in this case the judge,
 17 in one part of a complex, multi-actor system, will
 18 not produce real reductions in unwarranted
 19 disparity. It may look on paper that it does, but
 20 in reality it won't.

21 Power and purpose, it's
 22 impossible to eliminate discretion, but you can
 23 control its allocation. We talked about that
 24 early. Matching power with purpose of punishment

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 2 to their seriousness, make decisions early on and
 3 then don't change them, or you'll never get the
 4 research done.

5 And to conclude with a couple of
 6 pictures. Sentencing can't solve all the problems
 7 that inmates face upon release. But it sure can
 8 make it worse. Maybe you can make some positive
 9 benefits too, but don't make it worse. A past to
 10 live down, scarcity of employment, out-of-step with
 11 social progress, public opinion, broken-home,
 12 yada-yada. I urge you to be modest. Obviously
 13 you're not going to be able to solve all social
 14 problems. But don't make them worse, or think
 15 about them.

16 In today, out tomorrow. We have
 17 a tremendous reentry crisis that has already
 18 started. And we will be seeing more of this
 19 with -- we incapacitate, we lock them up, and we
 20 keep them in longer, they still come out. Average
 21 time served in this country used to be one point
 22 seven years, now I have -- in the nation, I'm not
 23 talking about New York. Now it's two point five
 24 years, so we're getting more punitive, but we're

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 2 still letting them out. And we're letting them out
 3 with pretty much just like this. You know, dump
 4 them on the heap. So, I just urge you to think
 5 about that as you do your important work.
 6 And in conclusion, wow, you've
 7 got a lot of work to do, and I applaud you for
 8 taking on the challenge. I hope you find it
 9 interesting, fascinating, and fruitful, and please
 10 let me know if there's anything I can do to help
 11 your progress at all.
 12 Thank you very much for your
 13 attention.
 14 COMMISSIONER O'DONNELL: Thank
 15 you.
 16 I think that was fascinating, it
 17 was extremely helpful, and I really appreciate it.
 18 One sort of concrete suggestion
 19 is I am going to ask Donna to reach out to you and
 20 talk about your ideas about research, based on what
 21 you did previously, so you can help us kind of hone
 22 in on that area. I think it would be very helpful.
 23 We will be calling you and I -- I really appreciate
 24 your coming here.

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 2 going to take the liberty of scheduling speakers
 3 and finding them, if I don't hear from you. As you
 4 can see from today's presentation, we're -- we're
 5 making a painstaking effort to find not only the
 6 best and -- and -- and the most knowledgeable
 7 people in the area, but finding people who are very
 8 objective. So, we -- we'll make an effort to do
 9 that. But obviously your suggestions of people
 10 that you know and that you think we should hear
 11 from will be invaluable to us. But we need to get
 12 them and get them early, so that we can get
 13 organized and get them committed.
 14 Gina, you had a couple of
 15 housekeeping duties, if you could just quickly go
 16 over them?
 17 MS. BIANCHI: Okay. If you're
 18 going to designate someone to appear on your
 19 behalf, if you could just give me a call and then
 20 fax me something, and let me know who that designee
 21 will be, twenty-four hours ahead --.
 22 COMMISSIONER O'DONNELL: And if
 23 you have a standing person that you're designating,
 24 you can just put it here on the record --

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 2 DR. GRISET: And if anyone wants
 3 a copy of my presentation, I've brought copies,
 4 so --.
 5 COMMISSIONER O'DONNELL: Oh, that
 6 would be terrific.
 7 I am not going to drag us -- drag
 8 this out till five o'clock. I know that it's been
 9 very intense, we've worked very hard, we had very
 10 little breaks. There's just some housekeeping
 11 things I just want to go over very quickly with
 12 you.
 13 You have your forms about
 14 committee selection, if you can give it to me
 15 today, great, if you can get it to me shortly, if
 16 you can't make up your mind today, I would really
 17 appreciate it. And I am -- I don't know if we can
 18 accommodate everybody. I'm already seeing a lot of
 19 ones, twos, and threes here, but I'll do my best.
 20 When I -- I'm going to back to you next week with
 21 proposals on this. We can still tinker with it to
 22 try to give people an area to work that they've --
 23 they are interested in. So, I'll do my best.
 24 The same with speakers. I am

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 2 MS. BIANCHI: Today.
 3 COMMISSIONER O'DONNELL: -- and
 4 we'll have it. But if you want to do it, you know,
 5 based on individual meetings, give it to us in
 6 writing.
 7 MS. BIANCHI: And please let me
 8 know if they're going to be able to vote, or if
 9 they should abstain from voting on your behalf.
 10 And then I'll revise the schedule
 11 with the commissioner, and come up with a revised
 12 schedule, hopefully by Monday, that I'll send to
 13 you. And if you have any comments, or else we can
 14 discuss it at the next meeting.
 15 And if you have anything you'd
 16 like to put on the agenda for the next meeting, or
 17 any future meetings, if you can let me know by
 18 Monday at noon, the week or the couple of days
 19 before the meeting, that would be helpful.
 20 That's it.
 21 COMMISSIONER O'DONNELL: Okay.
 22 Anything else, anything else from the commissioners
 23 at this point?
 24 So, we will be meeting next week,

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 2 and we will be meeting at D.C.J.S.; right? Not
 3 here?
 4 MS. BIANCHI: Actually, we --
 5 COMMISSIONER O'DONNELL: If it's
 6 available.
 7 MS. BIANCHI: -- this is
 8 available --
 9 COMMISSIONER O'DONNELL: Okay.
 10 MS. BIANCHI: --so we should be
 11 meeting here. So then it would --.
 12 COMMISSIONER O'DONNELL: So,
 13 we'll be meeting here. We don't need the
 14 teleconferencing, I don't think, next week. I
 15 don't -- it's not available from this room. So, if
 16 everybody --.
 17 MS. BIANCHI: I think it is
 18 available in this room.
 19 COMMISSIONER O'DONNELL: It is?
 20 Oh, okay. All right. If you let Gina know if you
 21 need to participate by teleconference --
 22 MS. BIANCHI: Or by -- yeah.
 23 COMMISSIONER O'DONNELL: -- or by
 24 phone conference or whatever, I'll make sure that

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 2 we make the arrangements to do that, but otherwise
 3 we will be meeting here next week, same time, same
 4 place.
 5 We -- we will not be meeting the
 6 week after, and then we'll adjust the schedule
 7 accordingly.
 8 So, thank you very much for
 9 putting in this time.
 10 Thank you to our speakers. You
 11 were magnificent, I really appreciate it.
 12 (The meeting concluded at
 13 4:30p.m.)
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 2 I, Gary T. McGloine, do hereby certify that the
 3 foregoing was taken by me, in the cause, at the time
 4 and place, and in the presence of counsel, as stated
 5 in the caption hereto, at Page 1 hereof; that before
 6 giving testimony said witness(es) was (were) duly
 7 sworn to testify the truth, the whole truth and
 8 nothing but the truth; that the foregoing typewritten
 9 transcription, consisting of pages number 1 to 295,
 10 inclusive, is a true record prepared by me and
 11 completed by Associated Reporters Int'l., Inc. from
 12 materials provided by me.

13 _____
 14 Gary T. McGloine, Reporter
 15 _____ Date

16
 17 rgtm/tbc/plal
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 24

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