NEW YORK STATE
COMMISSION ON SENTENCING REFORM

Transcript of Meeting

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

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

Commissioners:

George Alexander
Chairman, New York State Board of Parole

Anthony Bergamo, Esq.

Hon. Juanita Bing Newton
Judge, Criminal Court of the City of New York

Denise E. O'Donnell
Division of Criminal Justice Services

Eric Schneiderman
NYS Senator

Tina Marie Stanford
Chair, Crime Victims Board

Cyrus Vance, Esq.
Also Present:

John Amodeo, Esq.
Committee Counsel

Anthony Annucci, Esq.
Department of Correctional Services

Gina Bianchi
Executive Director

Christina L. Dickinson, Esq.

Donna Hall

Wendy Lehman, Esq.
Monroe County District Attorney's Office
Representing Commissioner Michael C. Green

Simone Levine

Lillian Gordon
Court Reporter
### I N D E X

**Welcome and Opening Discussion**

Commissioner Denise E. O'Donnell

**Sentencing Commissions and Recent Innovations in Sentencing Policy: A National View.** Barbara Tombs

**Crime Victims and Sentencing: The Law and Its Impact.** John Amodeo, Janet Koupash

**Simplifying and Streamlining New York State's Sentencing Statutes: A Modest Proposal.** Anthony Girese

**Innovative Uses of Data in Sentencing Policy.** Steven Chanenson, Mark Bergstrom

**Research and Data Analysis Group:** Donna Hall

**Closing Discussion:** Proposed Subcommittee Staffing and Topics
PROCEEDINGS

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

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

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

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

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

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

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

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

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

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

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

Okay. You know, in starting a sentencing commission it's really important to look at the overall sentencing philosophy. And, I read your materials, and in New York, you are looking at, you know, retribution, rehabilitation. And also, you said that, you know, you see a lot of states now that are
also, kind of four basic things, why are you putting
people in prison in the state, and you're clearly
understanding that.

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

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

So, if you're kind of an offender who has,
for example, a long-term drug problem, and you say
"I'm going to send him to prison so we can tell if
he's rehabilitated," that is contrary to the sentence that would be for retribution.

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

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

If you were going to do it for incapacitation, as a threat to public safety, and he's a drug possessor, the threat to public safety is somewhat limited. So, you might give him, you know, six months, because he's really not -- he's hurting his family and himself more than he is public safety, if he's just using.
And, the other -- retribution, you know, how much harm has he done, whether you want to make an example out of him. You could give him probation under a retribution type of sentence.

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

So, I mean, it's really an important thing, and you might -- oftentimes, it's defined in the statute. Sometimes, it's in your working documents that you created as an agency or an organization. But, it's usually written down somewhere. And, it's always good to go back to that, when we want to say what are we doing here, and why are we doing it. Because sometimes, we have a tendency to go off a little bit and forget what the basic foundation is.
Oftentimes, states will use two approaches. You know, maybe incapacitation for violence offenders, and a different approach for property or non-violent offenders. You can have a single philosophy or a blended approach. But, know what it is.

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

Clearly define the purposes. It creates the scope of the work. And, you have a working document that has -- that you have in front of you now that's guiding this group. But I think, you know, the discussion by Eric here, earlier, about the scope of things -- because, you know, what are you doing, and what are you not doing. Because, you know, especially
in the limited time frame that you have, there are
certain things you can do, but it's easy to get
diverted off into paths, and then you end up with a
less than complete project.

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

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

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

Structure is critical. You need to have
representation from all of the key stakeholders. And
that is, you know, you look at the size and the
compositions of commissions across the United States and you see they vary from 11 people to as many as 35. It depends on the culture of your state, who is important and affected. But, if they're not members, they should be at least appearing before you. And, I heard from the discussion that you're going to have this approach.

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

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

But, making sure that all the key stakeholders are at the table, because it's important to listen to them. It's important to listen to what they're saying, and it's just as important to listen to what they're not saying.
And, I could tell you a prime example of this is when we did some drug reform sentencing in a state I worked at. We were going to have treatment for the drug offenders, so that they weren't recycling through the communities and so forth. And, we thought this was really great. However, our biggest opposition was a low-income, minority community group within the city. We never consulted them. They didn't want the people back on the street, whether they had treatment or not. They didn't want their kids walking past people using needles and so forth on the street. So, this was the population we were trying to help the most; however, we didn't get their input on how to define that reform, and it became a major obstacle for us.

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

Leadership is critical. I will tell you right now that the best sentencing commissions have
very strong chairs and very strong executive
directors. Those are the two critical things, because
the chair will set the policy agenda, but your
director will do a lot of the everyday, day-to-day
coordination, contact, the work that needs to be done.
And so, the really good commissions have very strong
people in those two positions.

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

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

But, you know, try to bring that
information. It's hard. And I think the more often
you meet, and the more you work together, you can
finally break down those barriers. We took -- we
took, actually took our commission one time to a retreat in the woods, where they had to climb this mountain, and they had to depend on each other. And, it was -- you know, that made the biggest difference. Because in groups of -- you know, we'd come in there, and all the judges would sit here, all the community people would sit here, and the prosecutors would sit over -- prosecutors and law enforcement would sit over there. And, they were very cordial to each other during the meetings, but they didn't actually work together.

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

You know, also, commissions should be viewed as independent, objective, and non-political or bi-partisan, however you want to say it. That's really hard to do, because, you know, of the nature of the commissions. But, that was one of the things that helped the good commissions. They will survive multiple administrations because they're dealing with
facts and not politics. Although you have to be aware of the politics, you're dealing with objective analysis.

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

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

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

COMMISSIONER O'DONNELL: So, Barbara, let me just ask you. Right now, our Sentencing Commission is really set up just for the time period of,
basically, issuing a report. In the sentencing
commissions that you've worked with, it sounds like
they've been ongoing sentencing commissions that are

MS. TOMBS: Some --

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

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

COMMISSIONER O'DONNELL: Um hmm.

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

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

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

doesn't really matter.

But, it helps you to address the multiple,

complex issues. Because, I mean, when you have --

just looking at the subcommittee names you have,

there's some really tough issues, and a very short
time period. It helps you address those.

It also gives you specific areas of

ergise not found in the commission. Again, it's

something you've already done. So you didn't probably

need me to come talk to you guys. You seem to have

this under control.

COMMISSIONER O'DONNELL: Well, we should

have had you the first week, but it's nice to know we

thought up these things --

MS. TOMBS: Yeah, you're on the right

length -- on the right path here. They would provide

the tools for the group's discussion. That's what

these subcommittees or standing committees do, do the

work, bring it back, and then the commission has the
discussion on it.

They should develop recommendations, meet

more frequently. But, the authority for the policy --

the policy changes always remains with the full

commission. And, I see that's what's happening here,
too, which is really good. It's good to have that
input, and so forth, but this is the owner of the
product. It should always remain back with this
group.

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

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

Authority means when you make
recommendations, then how do they -- how do they
impact policy change? And usually it's been -- I've
never really had that be a big issue, because I've
worked in three different states, and they have all
had different, one -- one or two there's an authority
issue. It never seemed like a commission. In
California, it is the major sticking point why we
can't move forward with changes in sentencing policy.

So, it is a big issue, I guess, for a state that's
looking at coming on board with a sentencing policy
forum. You know, it appears with some commissions.

But, on permanent commissions, you have --
if you make recommendations, they usually become policy or law in one of two ways. That means you make the recommendations and they're enacted with the approval of the legislature. So, you make a recommendation, it goes to the state legislature, they would vote on it, approve it and so forth, like that.

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

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

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

So, you know, it's kind of a battle on how
you want to do that. I worked in Minnesota and Kansas, and they had two separate models, but it never became an issue. No one even raised it at the time they were passed, or at the time they were enacted. In California, it's a major issue.

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

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

Responsibilities. They're different than a
purpose. What are you supposed to deliver? And again, your charging document for this commission here is pretty clear on what you're supposed to deliver. A report.

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

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

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

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

So, I mean, really understanding what people are trying to say. And I think that also helps to counteract some of the high visibility and publicity that comes along with high-profile cases. And, that's one of the biggest things we, you know, we're struggling with the sex offenders right now, and it's trying to get our hands around sex offenders. And, a lot of that is driven by the high-profile cases, which
are horrendous. I don't think anybody in the world
would not say those people are horrendous. But, is
that the typical case -- sex offense cases going
through our system, and so forth. So, using that data
to figure out.

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

However, you go back and look and you see
that three-fourths of your drug possessions are pleas
in drug trafficking. Then, you might have an issue
there. You might want to do a little bit more
looking, and see what's going on there. You know, are
those charges that were, you know, why are these
things happening? Is it just a function of the system
being overloaded, or what's happening here that will
-- you know, you're not really at a group of people
you think you're looking at. So, that becomes a
public safety issue. And so, you always want to keep
looking.
You know -- and we know that plea bargaining happens, but you just want to make sure the offenders you're looking at are what you think they are. Okay.

The validity and reliability of the data base. Okay, this is my thing. I love data bases.

Data -- data excites me, you know?

[Laughter]

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

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

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

That's a head going in. A bed is how long are they
actually sleeping in that bed, you're paying. And that's where you have to look at good time, you have to look at work releases. You have to look at all these different things that are changing how long a sentence is. So, you're really talking about a time served issue.

It's very important, especially when you have fragmented systems where you have mandatories going on, and you have some determinate sentences going on, and you have some indeterminate sentences going on. So, you're not having a consistent sentence to really figure out across the board what is the calculation for how long the people are serving in a bed.

And then, looking at where they go afterwards. Are they being discharged out? Are they going on parole? Are they being transferred, you know, on another pending charge? You know, are they going back to county jail, to serve other sentences?

So, all those things are important, because they all show you how your resources are being developed. So, I think that's -- you know, if you can answer that question, you're on your way to having a good understanding of your system.

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

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

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

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

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

The role of research. Again, research to me
is very important, because you have -- you're not
starting -- I mean, you're starting a commission and
you have to look at things, but you're not inventing
the wheel here. There's a lot of sentencing work
that's been done, best practices on what types of programs, what type of supervision works with what type of offenders. You know, I would really encourage you -- BJA has a lot of information on best practices. So look at that, and use as much as you can.

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

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

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

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

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

So now, we were paying, you know, huge
amounts of money to incarcerate people in a state prison, and we weren't stopping them from driving.

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

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

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

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

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

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

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

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

COMMISSIONER NEWTON: Okay.

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

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

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

So, you've got to give yourself enough lag
time to deal with those issues and really start
evaluating them. So sometimes, you know, three --
three years is not an unusual evaluation time to look
at something.

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

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

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

I talked earlier about Minnesota.

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

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

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

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

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

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

So, what they were trying to do was focus on the worst of the worst. You know, we want -- we want
to incarcerate, life sentences, and sentences of 25 years or more for the worst of the worst sex offenses. But, no one really coached down what worst of the worst was.

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

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

So, it wasn't -- the system wasn't -- you know, wasn't falling apart. We just had this issue. We developed a sentencing -- a separate sentencing
grid, in which we calculated these criminal histories differently than we did for the other crimes.

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

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

Well, the legislature was really afraid that sex offenders would slip through that, and they wouldn't have the aggravating factor hearings, and something would happen. So basically, what we were doing was putting a grid that allowed them to give
those aggravated sentences when appropriate, without changing the entire system.

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

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

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

And, that was really where we used -- we
used data strongly on that one, looking at, well, who was sentenced, why they were sentenced, what was their backgrounds, looking at that information, looking at what they wanted to impose for certain sex offenders.

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

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

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

So, that's the kind of thing a really good
commission will do. Yes?

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

MS. TOMBS: Um hmm.

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

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

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

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

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

MS. TOMBS: Yes.

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

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

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

MR. ANNUCCI: Yes.

COMMISSIONER NEWTON: That's my question.

MS. TOMBS: Yes.

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

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

COMMISSIONER NEWTON: Initially, the first crime.

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

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

MS. TOMBS: Yes.

COMMISSIONER NEWTON: -- this murder was
really his third.

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

COMMISSIONER NEWTON: Okay.

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

MS. TOMBS: Um hmm.

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

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

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

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

COMMISSIONER O'DONNELL: Um hmm.

MS. TOMBS: -- with just one crime, just
one kind of offense, and not the rest of the offenses.

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

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

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

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

    So, it's a felony, which would mean it would be a guideline sentence, but they have labeled it
non-grid. So, you don't lose the felony label on it. You're just not going to do your time in state prison. You're going to do your time in the county jail. So, the only way they could figure out how to do that was to label it non-grid, because it -- felonies were all grid crimes. So, you know, it's being creative, really.

Any other questions?

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

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

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

COMMISSIONER BERGAMO: Death sentence.

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

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

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

MS. TOMBS: Okay.

COMMISSIONER O'DONNELL: Um hmm.

COMMISSIONER BERGAMO: -- you know, now he's raped 15 women, or 20 women, 30 women, 5 boys, 10
boys, you pick a number.

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

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

MS. TOMBS: Yes.

COMMISSIONER O'DONNELL: Yeah.

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

COMMISSIONER BERGAMO: Thank you.

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

And, we had some low-level drug offenders who were possession people, who kept coming into our system, and they were given probation. They would violate their probation, They would come in and have
to do time in the state prison. And, their sentences were relatively short -- anywhere from 6 months to 24 months.

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

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

So, this was taking up a lot of resources, not only in the prison beds, but also just the time of the courts, time of probation officers, and so forth, like that. So, when we looked, we thought this was
population we felt we could do something with.

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

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

So, it was a very spirited debate in our commission at that time, as to how we address that. Because we didn't know how to -- how to really balance that. Because -- and, it was a very valid point. You know, it's happened that you could be smoking pot on your way to do a burglary, and you got picked up before you did the burglary, with the pot, you were going to get the drug treatment. If you commit the
burglary and we pick you up, then you're going to jail, to prison. So, you know, we were trying to figure out how to do this.

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

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

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

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

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

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

Also, we said they could not be revoked for using again. For pure -- if they got picked up again for pure possession, you weren't going to prison. We were going to increase your supervision. We were going to increase your treatment. But, we weren't
going to revoke you. Again, the concept of understanding what relapse was, okay? If that's all you were doing, if you weren't committing another crime, you weren't doing something, you were just caught with dirty urines, or you had pot on you again, it would be in that relapse prevention thing.

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

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

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

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

The one thing that we did throw in that was different from the other drug diversion programs is that if you were in drug treatment, and you got kicked out -- and, you could get kicked out. It wasn't that there was no way to get kicked out. If you committed a new felony, or you could, you know, the treatment people said you weren't -- or the team said you weren't working together, they could kick you out. But, if you were kicked out, you got no credit for all the time you were in treatment. You were going to go back and start your sentence on day one, and you had to do the whole sentence, which is different than what
was going on in California. Because in California, when they got kicked out of Prop 36, they were given credit for all the time they were in Prop 36. In fact, if they only had a few more -- you know, they had 30 days to do in county jail, they did it from day one.

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

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

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

MS. TOMBS: We -- it's a whole series. It's a continuum of treatment, from education, to individual, to inpatient, group therapy, I mean, depending on how they score out on the -- on the -- I think it was the SAFTI [phonetic] they were using, or
one of the drug tools. They would find what their
need was. You know, you have to remember, we're
talking about a state here that has more cows than
people. So, finding treatment providers also was an
issue. So, how do we come up with treatment
providers?

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

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

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

COMMISSIONER O'DONNELL: And what impact
would it have on the person sentenced? Did they --
are they still a convicted felon if they --

MS. TOMBS: Yes.

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

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

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

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

COMMISSIONER O'DONNELL: Are there
published research studies on this, or --

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

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

MS. TOMBS: The return rate.

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

MS. TOMBS: Yeah, --

COMMISSIONER BERGAMO: -- was recidivism any different?

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

COMMISSIONER BERGAMO: Improvement?

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

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

MS. TOMBS: Yeah. But, I would say we're not -- the amount of people admitted to prison at that lower level has decreased, which is what they wanted
to do. And, we projected out -- and we'll talk about this in a minute -- exactly how many prison beds they would do -- they would save. And, you know, giving -- giving them an 18-month lead in.

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

COMMISSIONER BERGAMO: What happens --

MS. TOMBS: -- people will fail.

COMMISSIONER BERGAMO: If it happens, it happens.

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

And, what I saw happen over that legislative session is we went from being a fiscal issue to being
this is the right thing to do. I can remember the president of the Senate being up on the floor the day that they were passing that, saying, you know, this is the right thing to do because, you know, we have people in this state that are just wasting their lives, going through this and not having the ability to get treatment.

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

MS. TOMBS: Yeah.

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

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

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

MS. LEVINE: Can I just ask a question?
Was --

MS. TOMBS: Yes?

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

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

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

MS. TOMBS: Yes.

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

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

MR. ANNUCCI: You're familiar with New York's DTAP program, I take it. Is this somewhat analogous to that?
MS. TOMBS: I don't know enough about the DTAP to say it, but I think it's -- you know, again, it's -- I can only tell you the devil is in the detail, because we went out and studied some of California -- you know, we liked the Prop 36 idea, and we thought this is not a bad thing. But, you look at the details on how it was implemented, how it was funded, who failed, who went into it, and so forth, like that, and that's where you run into problems.

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

And they have been -- they -- what they have been doing is modifying the annual allotment, based on the previous year's usage. So, at the end of the year, they look to see how many people were 123 people, what was the average cost, were they being diverted. Because, at some level, if you're getting the hard-core people, which is one of the things we
talked about the -- talked about the impact -- not in
the impact, but in the process evaluation, what we
thought we would get would be a little bit lower-level
people, and here we're probably getting some pretty
hard-core addicts. They were very good at avoiding
the system.

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

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

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

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

MR. ANNUCCI: Well, there's -- there's two
results. Usually, --
MS. TOMBS: That's a pretty standard --

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

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

MR. ANNUCCI: Oh, yeah.

MS. LEVINE: Oh, yeah, yeah.

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

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

MS. LEVINE: Um hmm.

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

MS. LEVINE: Yes.

COMMISSIONER O'DONNELL: Right.

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

MR. SCHNEIDERMAN: And Bridget Brennan's
speaking, isn't she?

COMMISSIONER O'DONNELL: Here.

MR. SCHNEIDERMAN: Yes.

COMMISSIONER O'DONNELL: Yeah.

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

COMMISSIONER O'DONNELL: Okay.

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

COMMISSIONER O'DONNELL: Um hmm.

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

COMMISSIONER BERGAMO: What is --

MR. ANNUCCI: Just one --

COMMISSIONER BERGAMO: I'm sorry.

MS. TOMBS: I'll give you --

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

COMMISSIONER O'DONNELL: Right.

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

MS. TOMBS: And it's statewide?

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

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

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

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

MR. ANNUCCI: Right.

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

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

COMMISSIONER O'DONNELL: I think we'll look into it.
MS. LEVINE: -- about that.

COMMISSIONER O'DONNELL: I think we need to --

COMMISSIONER BERGAMO: Okay.

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

COMMISSIONER BERGAMO: Okay, thank you.

COMMISSIONER O'DONNELL: -- and have somebody report to us on it.

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

COMMISSIONER NEWTON: All I know is that it's -- somebody said this is just -- it's --

COMMISSIONER BERGAMO: Pockets here and there.

COMMISSIONER NEWTON: -- at the prosecutor's discretion, --

COMMISSIONER BERGAMO: Yeah.

COMMISSIONER NEWTON: -- and this is something that -- that's statutory -- mandatory by statute, and that makes a huge difference.

COMMISSIONER BERGAMO: Big difference, yeah. I just -- I'm just curious. That's all.

MS. TOMBS: And that -- you know, that was one of the things. We wanted to make sure it was available to everybody. And, you know, that does --
it's a provider problem, with some of the rural areas, and so we had to struggle with that.

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

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

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

It's also good to use them on the front end, for people who may, you know, can be dealt with in the community. My only caution with doing that is if
you're going to divert someone from prison, make sure you have the options, have the programs and the supervision in place in the community or you are risking public safety. I mean, you know, that so often states do that. They try to divert people off and say, okay, our prison population is going down. But, if you don't put the resources, and the programs, and the supervision in those communities, you are hurting your state, because you are setting people who haven't -- you know, we're saying they're low risk, but they're still a risk.

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

And, Senate Bill 123, I told them "If you're going to pass this bill, and not fund it, I'm withdrawing the bill. You know, you're not going to fund it half way. You're going to fund it the whole way, and do it right. Because otherwise, all you're doing is delaying the entry of people into your system. You push them in the community, you don't give them the programs, you don't fund them adequately, you don't have the programs exist for the
necessary period of time for that offender, they will fail, and they'll come back." Because, you'll have a sharp drop in your prison population for a while, but it's going to come back up, and it's going to go up higher than it was before, because these people go out and, you know, they usually have to go through this program, fail, this program, fail, but they're coming back in. And really, you're using more resources.

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

Now, stop and think about a probation violator. They commit a crime, number one, that we said, on our sentencing system, was low risk enough that we weren't going to use a prison bed for them. Okay? So, we put them on probation. So, you know, the court's time, getting them on probation. You have the probation officer's time supervising them. They violate, because they're low risk, but not released. So they're going to have another hearing. They violate a second time, okay? Now, we revoke them and put them in prison. They do the prison sentence.
They go back on the back end out on parole, or supervised release. They violate again, and go back in there.

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

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

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

COMMISSIONER BERGAMO: Do you have a suggestion?

MS. TOMBS: Pardon me?

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

COMMISSIONER O'DONNELL: On how to deal
with it.

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

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

COMMISSIONER O'DONNELL: Put them what?

MS. TOMBS: Put the money into education.

COMMISSIONER NEWTON: Put the money in education.

COMMISSIONER STANFORD: Start even earlier in the process.

MS. TOMBS: Yeah.

COMMISSIONER NEWTON: Absolutely.

COMMISSIONER STANFORD: Like the behavior.

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

COMMISSIONER BERGAMO: Okay, I agree with
you, a hundred percent, politically and morally, on that issue.

MS. TOMBS: Okay.

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

Do you have a suggestion about that guy?

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

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

MS. TOMBS: Yes.

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

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

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

COMMISSIONER BERGAMO: I'm not -- I'm not
MS. TOMBS: Yeah. I think we can use punishment options that are less restrictive and less costly, whether that be revocation centers that are community-based, so that person is going out and working during the day, and maybe spending his evenings in that revocation center, you know, which can be operated, perhaps, maybe 15,000 or 12,000 a year, versus 28 or 30,000 for a prison bed, and where there are services available.

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

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

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

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

You need to be able to intervene with that person immediately, whether that's put them -- you know, instead of seeing your parole officer or
probation officer once a week, you're going to see him once a day now.

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

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

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

COMMISSIONER BERGAMO: Excuse me. That --

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

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

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

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

Maybe we want to take the 7 year prison
sentence and up that to 12 months -- or 12 years,
because of the violent nature of that offense. But,
to do that, you've got to be able to move these people
on the bottom out, so that you can maintain your prison population. Does that make sense?

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

MS. TOMBS: Um hmm.

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

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

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

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

MS. TOMBS: Yeah.

MR. SCHNEIDERMAN: -- you know, this is --
MS. TOMBS: That's true. Because if you look at all of the dollars that were going into those, it's not just criminal justice dollars. It's education, it's welfare, and so forth, like that.

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

So, I mean, looking at things like that, yes, you know, you look at where -- like Wichita. You were talking about Kansas. Wichita was the highest-risk area that we had. The north side of Kansas City was another high area. And, making sure that you have the needs -- because, if you have violent or semi-violent people, their needs are a little bit different than somebody who's doing credit card crime. I mean, you know, you have a different
type of supervision, different type of intervention
strategies, and so forth, like that.

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

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

MS. TOMBS: Yes, in Virginia.

MS. HALL: It was challenged?

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

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

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

MS. HALL: Okay.

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

Nebraska. Somebody asked me about the
guidelines system. Nebraska is a state that has a
very low crime rate, I mean, as a whole, but they have
-- they're having a meth problem. Most of the Midwest
is having a meth problem. So, it's the drug -- their
drug admissions went up real high, and they were
trying to figure out what they were going to do with
this -- with this increase all of a sudden in drug
offenses.

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

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

But again, looking at a very specific target
population, of who was coming in, why they were coming
in, and develop -- trying to provide sentencing. I
mean, you know, they're not soft on crime people.

We're not talking about real liberal states here.

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

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

Arkansas was a state where they had a huge
amount of meth manufacturing. And so, they had these
sentences that were passed because who can -- you
know, and believe me, I don't think anybody should
meth, but, you know, the pictures of meth wild thing,
the horrible things they showed, you know, can really
scare people. So, they were afraid of them. And so,
they put these sentences that were very equal to
manslaughter for manufacture of meth in very small
amounts. But, it was something they really felt very
strongly about.
But, what happened was, you know, you had, you know, 12 years for manufacturing meth, and 10 years for involuntary homicide. And, you know, there was manufacture of meth for personal use, and it wasn't for distribution, so you -- there would be -- it was horrible. So, but you couldn't stop the political -- the political train that was going on, you know, and we see this at certain times. Even the best of commissions sometimes cannot stop the high profile.

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

And, I had a state one time that actually, doing the piecemeal legislation, and they actually ended up inadvertently, without knowing it, giving a longer sentence for attempted murder than murder, and just by the way -- so, it's like they were going to punish you if you didn't kill the person? You got a longer sentence if you tried to kill them, than if you actually killed them.
And, you know, that's because, you know, you change this law over here, and you change this law over here, and you change that law, and sometimes, when you put them all together -- and, that's one thing we used to do at the end of every legislative session, just do a complete review, to see where things were. Those things could happen.

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

In North Carolina, I think is one of the states with a really good one. Virginia is one that is really good, because they require not only that the impact be done, but the state -- the legislator who is bringing the legislation must also identify where the money is going to come from. So, if it's going to cost you "$X" number of thousand dollars to implement
this bill, then where are you going to get the money from to cover the cost of that increase? So, Virginia is the only state that I know that requires the dollar signs to be attached.

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

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

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

So, okay. And, balancing resources and capacity. This is a really good thing. They have a
legislative mandate in Kansas that says when the prison population is projected to be at current capacity, the sentencing commission is required to bring forth to the legislature, by the second week in the session, options to reduce prison population.

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

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

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

MS. TOMBS: California --

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

MS. TOMBS: California, yes. I mean, you've got a state there that, you know, just has a
seven -- they have a $7 million dollar construction package or something like that before them. And, they have so many prisons now, they can't get people to work in them, because they're in such, you know, violent conditions.

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

MS. TOMBS: Um hmm.

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

MS. TOMBS: Yes, you have.

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

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

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

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

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

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

The same number might be coming into prison, but they're getting recycled out very, very quickly.
But, you also have things like DTAP for the alternatives that are diverting them, and Willard is a short, 90-day turnaround program.

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

MS. TOMBS: Yeah.

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

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

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

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

MS. TOMBS: States that have closed prisons.

COMMISSIONER O'DONNELL: -- it's something that we're interested in. Closed or converted them to
other types of facilities, like transitional facilities, or --

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

MS. TOMBS: Um hmm.

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

MS. TOMBS: Yeah.

COMMISSIONER NEWTON: And, amen for that.

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

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

COMMISSIONER NEWTON: -- as a vehicle?

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

COMMISSIONER NEWTON: And, what you're calling "juvenile," you say under the age of?
MS. TOMBS: 18.

COMMISSIONER NEWTON: Okay.

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

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

COMMISSIONER O'DONNELL: Yeah.

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

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

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

So again, it's for these kids that are high-risk juveniles who are on the borderline, and not
wanting to make them adults yet, say "We're giving you one last chance here." You've got these two sentences running simultaneously. And so, if you finish the juvenile sentence and there's no problems, the adult sentence goes away. But, if you screw up, there's no -- you know, we're taking you back to court in that case, and immediately you have a hearing, the sentence being imposed.

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

COMMISSIONER NEWTON: Um hmm.

MS. TOMBS: -- as far as understanding the consequences of what their actions are. So, looking at that, and that's a good thing when you look at prison populations. I mean, believe me, I'm -- my house was burglarized one time, at Christmastime. They took all my Christmas presents, everything. I wanted that guy to get a life sentence at that moment. But really, you know, when you sit back and think, you know, do I want to put my resources on that, you know? And, it was really sad, because I went to the
sentencing hearing and, you know, my daughter was in the home at the time. She was in the bathroom. And so he -- and she stayed in the bathroom. He burglarized the house, and took all this stuff, but never opened that bathroom door. So I had, you know, a residential burglary with a 16-year-old at home, which could have been very, very horrible if he had found her.

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

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

So, you know, the judge says, "Do you have anything to say, Ms. Tombs?" And I said, "You know, nobody wins here today. You know, I have a 16-year-old whose life is never going to be the same
because of going through that. The things that were
most precious to me, the videos, they're gone." He's
going away to prison, and there stands his mother and
father who, I'm sure, were good people, and you could
tell they were devastated. And, you know, he had a
little 4-year-old boy there, that was his son. I
mean, you know, it's like what are we doing here?
Nobody is coming out ahead on this at all.

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

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

   COMMISSIONER STANFORD: You raise an
interesting point. And since I'm hopefully part of
this Commission to bring the victim perspective, what
I've been thinking through a lot of presentations,
including your comment, is that oftentimes we
misinterpret what the victims at sentencing want.
Sometimes, you can start wanting a pound of flesh, --

MS. TOMBS:   Um hmm.

COMMISSIONER STANFORD:   -- and by the time
you go through the process, which takes months,
sometimes years, you feel differently at sentencing.
Or sometimes, the crime itself dictates that you might
want the offender to get help, versus jail.

So, while we consider all of this, we need
to explore what the victims, en masse, really want, by
the time they get to sentence.

MS. TOMBS:   I can -- I can remember
negotiations with defense counsel, and she said,
"Well, will you -- you know, would you accept a plea?"
I said, "If he gets me the videos, I don't care
whether he goes on probation or not." I said, "I'm --
you know, if you can find me the videos, fine, put him
on probation." That was what was important to me, not
whether he went to prison or not. So, I mean, you
know, it does make you stop and think about things.

And, I'm almost out of time, so I really
want to -- but, that's another way.

Okay. Final thoughts. These are -- if you
want to ask me -- when I finish up here, I'm going to
give you five or six things to read. These are my
final thoughts. So, you can tear the rest of the
presentation up and focus on these.

Use data as the basis of your decision and policy.

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

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

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

Equally important to know what is working as well as what isn't working. Don't assume. If you say we have great programs here. We've been using them for 25 years. Have you ever evaluated and seen what the completion rate is? What your recidivism rate is? I mean, you know, just because you've used it for 20 years doesn't mean it's working or can't be improved.
Equal attention and resources should be applied for offenders sentenced to prison and to the community punishment. Again, as I said, you know, that's just as important. Don't -- you know, we have a tendency to focus on corrections, and not on community. So, to me, they're just as important, and they're more cost-effective in the long run.

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

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

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

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

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

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

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

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

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

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

So, we don't have -- you know, we have very tight deadlines that I think make it difficult for us to delve into the juvenile issues to any great degree, but I think, as the issues come up in the subcommittees, we should, you know, address them, to the extent we can. It may be that our recommendation is that we need to go back and do a lot of what we're
doing for adults for juveniles, in another cycle of
the work of the Sentencing Commission. But, it's an
issue out there, and I'd love to, you know, I'd like
you to think about it and see how you want us to deal
with the issue.

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

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

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

[Off the record.]

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

Part of our mission in the Executive Order
is to look at all aspects of sentencing reform and the
implications it has on victims. We've spent time looking at how our parole system, how our corrections system works in New York State, the overall sentencing laws in the state, but we haven't focused on the sentencing laws and practices as they relate to victims.

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

MS. KOUPASH: Victim Services --

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

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

CRIME VICTIMS AND SENTENCING:

THE LAW AND ITS IMPACT

MR. AMODEO: Okay. Thank you, Commissioner.

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

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

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

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

So, if you follow the highlight, you could see that it's Subdivision 2, that this pamphlet that
is required by 646-a to be provided to the victim at the earliest possible time, has to include specific information with appropriate statutory references on the following.

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

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

So, if you look at this roadmap that I have, and look at Paragraph (b), so it says the pamphlet shall include specific information with appropriate statutory references on the rights of crime victims to routine notification of judicial proceedings relating
Paragraph (c), the rights of crime victims to be protected from intimidation and to have the court, where appropriate, issue protective orders. And then, it cites 530.12 and 530.13. These are orders of protection. And, I'm going to deal more specifically with each of these topics.

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

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

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

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

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

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

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

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

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

And, DCJS has complied with that statutory
mandate and has created standards in Title 9 of the
And, I have a copy of that if any of the Commissioners
want me to pass it around.

There's another general section that I did
not include in this handout, Section 645 of the Executive Law, which parallels many of the provisions that apply to the DAs with respect to crime victims.

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

So, those are the two -- Section 640 and 645 are sort of the umbrella sections of Article 23. And again, Section 641 appears at Page 5, and you can see that I've highlighted the very first sentence -- "The object of such fair treatment standards shall be to" -- and, if you look down at Sub 3 -- "ensure notification of victims, witnesses, relatives of those victims and witnesses who are minors, and relatives of homicide victims, if such persons provide the appropriate official with a current address and telephone number, either by phone or by mail, if possible, of judicial proceedings relating to their case, including" -- and, if you now jump down to (d) -- "proceedings in the prosecution of the accused, including entry of a plea of guilty, trial, sentencing, but prior to sentencing, specific information shall be provided regarding the right to
seek restitution and reparation, and where a term of
imprisonment is imposed, specific information shall be
provided regarding maximum and minimum terms of
imprisonment."

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

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

"Such fair treatment standards shall provide
that: 1. The victim of a violent felony offense, a
felony involving physical injury ..., a felony
involving property loss or damage in excess of two
hundred and fifty dollars, a felony involving
attempted or threatened physical injury or property
loss or damage in excess of two hundred and fifty
dollars or a felony involving larceny against the
person shall, unless he or she refuses or is unable to
cooperate, or his or her whereabouts are unknown, be
consulted by the district attorney in order to obtain
the views of the victim regarding disposition of the
criminal case by dismissal, plea of guilty or trial.
In addition, the district attorney shall consult and
obtain the views of the victim or family of the
victim, as appropriate, concerning the release of the
defendant pending judicial proceedings upon an
indictment, and concerning the availability of
sentencing alternatives such as community supervision
and restitution from the defendant."

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

Essentially, Section 647 repeats the
language that appears at Sub 1 here, in pertinent
part, and -- but, it applies to the courts. It
requires courts, for example, to consider the views of
the victim concerning the release of the defendant and
considering the availability of sentencing
alternatives, such as community supervision and
restitution.

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

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

"Upon the request of a victim of a crime, or
in any event in all cases in which the final
disposition includes a conviction of a violent felony
offense, the district attorney shall, within sixty
days of the final disposition of the case, inform the
victim by letter of such final disposition. If such
final disposition results in the commitment of the
defendant to the custody of DOCS for an indeterminate
sentence, the notice provided to the victim shall also
inform the victim of his or her right to submit a
written, audiotaped, or videotaped victim impact
statement to the division of parole or to meet
personally with a member of the state board of
parole."
So, here's a provision of the Criminal Procedure Law that is triggered by a request of the victim at the very beginning of the subdivision or, in all cases, automatically, where the disposition includes a violent felony or a felony defined in Article 125, which is the homicide article of the Penal Law.

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

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

I'm going to read through Subdivision 5, some relevant language:
Upon conviction of any crime or violation between spouses, parent and child, or between members of the same family or household, the court may in addition to any other disposition, including a conditional discharge or YO adjudication, enter an order of protection."

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

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

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

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

The interesting thing to note about this order -- this so-called final order of protection -- is that the legislature very, very recently increased the period of these final orders of protection. For
example, it used to be five years from the date of conviction. As you can see now in that small Roman numeral one, it's eight years from the date of the conviction. It used to be three years from the date of the expiration of the maximum term of the sentence. And now, it is -- I'm sorry. Did I say three years? It was five years from the date of the conviction, and it is now eight, and it's three years from the date of the expiration of the sentence -- it used to be three years. It is now eight years from date of expiration.

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

I would point out one little quirk that the Commission should be aware of, that even though the legislature has extended the permissible duration of a final order of protection to eight years, a defendant who gets a sentence of -- a sex offender gets a probation sentence on a felony is on probation for ten years. And so, if the judge says "I think I'll issue an order of protection for the full period that this
defendant is on probation," you know, the judge --
that order of protection will expire after eight
years, because that's what the statute says, you know.

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

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

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

Okay. Now, I'd like you to turn, if you
don't mind, to Page 22. And, I hope I'm not going too
fast. I don't have a lot of time, and I want to at least touch on each one of these provisions.

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

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

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

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

And then, in Paragraph (b) of that subdivision:
"The report shall also contain a victim impact statement, unless it appears that such information would be of no relevance to the recommendation or court disposition, which shall include an analysis of the victim's version of the offense, the extent of injury or economic loss and the actual out-of-pocket loss to the victim and the views of the victim relating to disposition including the amount of restitution and reparation sought after the victim has been informed of the right to seek restitution and reparation."

And then, the very last sentence:

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

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

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

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

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

If you turn to the next page, at Page 28,
this is the key provision that relates to the right of a victim to make a statement at the time of sentence.

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

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

And then, if you look at (c) where I've highlighted: "Any statement by the victim must precede any statement by counsel to the defendant or the defendant made pursuant to sub one of this section." And then, it says: "The defendant shall have the right to rebut any statement made by the victim."
If you turn to the next page, Sub 29, this is the -- and I'm not going to cover this in detail, but this Sub 4, where I've highlighted -- well, actually, I should -- if you look up at (f) toward the top of the page, I've highlighted: "If the victim does not appear to make a statement at the time of sentencing, the right to make a statement is waived." That's obviously an important statutory provision with regard to this victim right.

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

Anyway, I said I wasn't going to talk about it. I didn't. Janet will talk about it in more
At the next page, that's Page 30, this is -- this is the notice of petition for a name change. This is where the defendant files a petition to change his or her name, and -- and in certain cases, the victim is entitled to notice of that filing -- the filing of such a petition by a defendant.

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

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

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

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

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

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

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

Turn to Page 36. This is the CPL provision that relates to the collection of restitution and reparation, as well as fines. And, if you look at the top, under Subdivision 1, where I've highlighted: "Where the court imposes restitution or reparation and requires that the defendant pay a designated surcharge" -- that's a designated surcharge of -- I
believe it's five percent, up to a ten percent
designated surcharge -- "of the total restitution
amount, the court shall designate the official or
organization other than the district attorney,
pursuant to sub eight of this section, to whom payment
is to be remitted."
So, when a court imposes restitution, it
requires that the defendant make restitution, the
court is supposed to designate a restitution to, in
effect, collect that restitution. Generally, that
ends up being the Probation Department of the county.
And, Bob Maccarone would certainly know more about
this, but I believe that in most counties it is the
Probation Department that ends up collecting
restitution and is considered the designated
restitution agency.
If you look at Paragraph (a), with respect
to restitution: "The court may direct (I) That the
defendant pay the entire amount" at the time of
sentence, (ii) pay the entire amount at some later
date, or at Roman numeral (iii): "pay a specified
portion at designated periodic intervals."
And, these next two paragraphs -- (b) and
(c) -- are important:
"When the court imposes both (I) a fine and
(ii) restitution and such designated surcharge and imposes a schedule of payments" -- in other words, allows the defendant to set up a payment plan, essentially -- "the court shall also direct that the payment of restitution and such designated surcharge take priority over the payment of the fine."

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

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

"When the court directs that the defendant be imprisoned until the fine, restitution or reparation be satisfied, it must specify a maximum period of imprisonment subject to the following limits: for a felony, not to exceed one year; and for a misdemeanor, not to exceed one-third of the maximum term."
Now, the court does not have to direct that a defendant go to jail for failing -- for failing to pay restitution, but where the court does so direct, this subdivision -- Subdivision 4 -- governs the period of time that that person can be put in jail for failing to pay.

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

And then, at the bottom of the highlighting:

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

Now this, essentially, is, as the title of the subdivision indicates, a civil proceeding for a collection. This order is supposed to be issued every time -- by a judge, every time the judge imposes
restitution or a fine. And, the order is supposed to be in writing, and it's supposed to direct the DA to file a copy of the order, which becomes a civil judgment. It's filed with the county clerk. And it becomes a civil judgment against the defendant.

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

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

This section was amended in 2005 to read like this. It used to be limited to -- where it says "fee," it used to say "crime victims assistance fee," and the legislature figured, well, let's expand that to any kind of fee, including the DNA data bank fee, sex offender registration fee, supplemental sex offender victim fee, which is $1,000, by changing "crime victims assistance fee" to simply the word "fee." All those -- all those fees can now be collected using a credit card, which obviously or
arguably, at least, makes it much easier to collect that money.

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

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

"The court shall, as a condition of the sentence, consider restitution or reparation and may, as a condition of the sentence, require that the defendant" —

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

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

So, this is the provision that allows restitution to be made a condition of a probation sentence, and requires the judge, when imposing any
probation sentence, to consider restitution to the victim.

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

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

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

There is -- there is a bill on the Governor's desk now that was proposed by DCJS that
will add a new Section 210.16 to the Criminal Procedure Law. It's related to HIV testing. It doesn't relate to sentencing, really, because I assume the Governor will sign this, and when he does, it will -- it will allow for HIV testing of defendants who have been indicted, or where the indictment has been filed. Upon request of the victim, the defendant can be tested for HIV early in the criminal process, prior to conviction, provided certain criteria that are in that statute are satisfied. And, that's Senate Bill 6357. Again, that's on the Governor's desk.

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

        Are there any questions now?

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

        MR. AMODEO: Yeah, that -- I mean, that's a -- that's, I think, a fair criticism of a lot of this
entire Article 23, because that's what -- that's what people have been asking me for years. What happens if the DA, the courts don't do what they're supposed to do under Article 23? And, there is -- there is tons of things they're supposed to do with respect to victims.

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

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

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

But, it may be that that language needs to include that clause, --
COMMISSIONER ALEXANDER: Right.

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

MR. AMODEO: Thank you.

COMMISSIONER BERGAMO: I have a question --

COMMISSIONER ALEXANDER: Thank you, John.

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

COMMISSIONER ALEXANDER: Yes.

MR. AMODEO: I think it is.

COMMISSIONER BERGAMO: It is, yes?

MS. KOUPASH: No, it's not automatic. What happens is, is depending -- there is nothing in the statute that requires the sentencing court to forward the victim impact statement to Parole. That's something that Felix Rosa and I have learned only just recently, after looking at the statute more carefully. So, what we've been doing is we've been going to the prosecuting district attorney offices and we're saying please let them know that if they have done a statement and they want it in the parole records, they need to either request the DA -- to instruct the court to forward it to Parole. The DA needs to forward it to Parole. Or, the victim has to
keep a copy and forward it to Parole themselves.

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

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

MS. KOUPIASH: They will send that --

COMMISSIONER ALEXANDER: -- that along as
an attachment.

MS. KOUPIASH: Yeah.

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

COMMISSIONER NEWTON: Well, shouldn't --

MS. KOUPIASH: Generally, when --

COMMISSIONER NEWTON: -- that go in the
probation report? Since that's the most -- single
most important document, that's one thing -- the only
thing I learned. I learned something. That's the
single most important document for DOCS. Why wouldn't
we automatically say if there's a written probation --
I mean, statement, that it has to go with the
probation report?
MS. KOUPASH: There is a concern that --
Probation offices that I have spoken with, there is a concern that the victim won't cooperate if they can't be assured that the statement will remain confidential, and the offender is not going to get a copy of it. It often contains their phone number, their home address, or something of that nature.

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

COMMISSIONER ALEXANDER: That's right.

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

COMMISSIONER NEWTON: Well, I think in my experience it's more likely that a person will give a statement to Probation than show up in court, if they're really that concerned. So, it seems to me, since that's the one document we know has to follow the defendant, that we should make that as complete a document as it can possibly be, rather than relying on the district attorneys. I mean, that's important, but that's -- the district attorney is not sentencing the
person. The judge's -- the minutes universally don't
go. There used to be a time we always sent --
indeterminate minutes were always transcribed and
sent. We discontinued that, and I'm not sure why. I
assume because of monetary reasons.

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

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

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

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

MS. KOUPASH: Yes.

MR. ANNUCCI: -- whether or not the victim
impact statement should automatically be part of the
pre-sentence report, but allow an exception to be made
for good cause shown. You will have certain victims
that just are very concerned, that they don't want a
piece of paper that's an official record.

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

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

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

MS. STANFORD: Yes.

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

The definition of restitution is for fruits
of his or her offense, or actual out-of-pocket loss,
which seems pretty restrictive. And we know, even
just listening to our last speaker, that it gets very
personal when you suffer some type of injury, whether
it's from a burglary or what have you.
And, it can be important for somebody -- a crime victim, in particular -- to feel that they are directly getting paid back, as part of this defendant's punishment. So, I think a fair question for one of the subcommittees is whether or not we should explore expanding the definition of restitution, what it could encompass. Should a defendant be required to make restitution for emotional distress caused? Or some type of physical injury? Things that the sentencing court could impose, as part of the criminal sentence.

COMMISSIONER O'DONNELL: A very good observation.

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

MR. ANNUCCI: Um hmm.

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

MS. KOUPASH: And I think, to follow up on
that, one of the things that has become apparent to me, as I'm speaking to victims, of course I speak to victims post-conviction. It could have been -- the conviction could have happened three years ago, seven years ago, nine years ago. Who knows how long ago this crime occurred, and how long ago the conviction occurred? How long until they finally reached somebody, either in my unit or in the Parole Victim Impact Unit.

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

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

So, there are some prosecutors who are looking to actually not only look at what is the
pocket -- out-of-pocket expense at the time of
sentencing, but they're now saying and what is the
anticipated out-of-pocket expense, and let's make sure
that the offender is held accountable for that
anticipated expense, as well.

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

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

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

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

MS. KOUPAH: I'm actually --

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

MS. KOUPAH: I'm actually going to just do
a real quick overview of those services that are
available to victims post-conviction, but them I'm
going to take some personal information and I'm going
to apply a specific case, based on the statutes, so
that you can see all the places where treatment of
victims differs significantly on very -- because of
very, very minute details.

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

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

And, one of the key things that happened
with the passage of Jenna's Law is those rights of
notification to crime victims were moved out of
Correction Law and placed in Criminal Procedure Law.
And, that was a great accomplishment, because the
prosecuting district attorney's office is the office
that has the obligation to provide information to the
victim or the surviving family members that they have
the right to notification of an offender's release
from custody. And, prosecuting district attorneys are
great with Criminal Procedure Law. That is their area
of expertise.
Corrections are great at Correction Law, so having that obligation, that mandate for the prosecutor to perform a function in Correction Law was not really so great a place for it, because that's not where the prosecutors are the expert. So, that was a great thing to move it into Criminal Procedure Law. That was a very important accomplishment.

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

We have a contract with a company in Kentucky called Appriss, and they are the provider of the VINE service -- Victim Information and Notification Everyday. There is two blue folders available to everybody -- one with the DCJS emblem on
it, and one that is just plain -- and there's a lot of information on VINE in the left-hand side of the plain blue folder, so I'm not going to go over it too much.

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

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

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

If you want to look at the written notification statistics, we actually have fewer
requests -- fewer demands forwarded to us for written notification. And again, written notification is limited to those offenders who have been convicted of violent felony offenses, where the VINE program is anybody, and it doesn't make any difference if it's a violent or a non-violent felony offense. You can register on that telephone notification service.

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

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

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

So, while we are in full compliance with the law, it is very clear that the victims who have asked
for this information, and they have filed the form
through the prosecuting district attorney's office,
they're not getting the information that they're --
that they're wanting.

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

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

My 18-year-old nephew was killed by a drunk
driver last April. This was a repeat drunk driver.
Had a history of many, many years -- more than a
decade of drunk driving, in a very rural community.
Fortunately or unfortunately, I don't know how to look
at it, for the majority of his drunk driving crashes,
he took out a fence, he ran off the road, he hit a --
you know, a pole or whatever. And, the only person
injured was himself.
There were two incidences where he actually was arrested for a DWI, and they both pled out to basically nothing. So, he had no convictions.

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

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

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

The person was originally indicted for murder second, manslaughter, and vehicular manslaughter. Despite the grand jury indictment on murder second, the judge made a decision to drop that
charge. So, he was only -- and, he took to trial. He would not accept a plea. So, the trial, basically, was going to decide whether this was going to be a manslaughter conviction or a vehicular manslaughter conviction.

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

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

That's only if he were convicted of manslaughter.

If, however, the jury came back with a vehicular manslaughter conviction, their rights were completely different. The same crime, the same dead child. But, their rights would be completely different, because in New York State, the sentencing
statute for vehicular manslaughter is not a violent felony offense.

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

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

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

So, the exact, same case, the exact, same death of this young man, would have resulted in very, very, very, very different rights for my family on
some very minute changes in the statute -- violent
versus non-violent felony offense, adjudication versus
conviction.

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

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

Parole is very generous with victims. Even
when it's a determinate sentence, that victim can
still submit victim impact statement, still -- either
written, videotaped, or audiotaped -- simply because
Parole may add special conditions on that offender's release. Stay-away conditions, anything like that, that if an order -- particularly if an order of protection was not issued at sentencing.

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

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

Restitution through State Corrections.

Restitution absolutely can be ordered even if that offender is going to state prison. It is not just ordered when the person is receiving a probation sentence.

We have very good policy and procedure on restitution collection and disbursement in State
Corrections. I'm actually quite proud of what State Corrections accomplishes with our restitution collection and disbursement.

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

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

So, we may encumber nine, but we're only collecting on two. We don't want to take all the offender's money. He still has a right to -- he or she still has a right to go to the commissary, and
shop in the L.L. Bean catalog, or whatever it is that they want to do with their money. So, we will encumber an inmate's account.

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

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

Well, how about restitution? Did you provide any information to the prosecuting district attorney's office about restitution? Did you tell Probation, when they did the pre-sentence report, that
you had receipts and you needed restitution?

And again, the answer is, oh, no, it was a plea agreement. I'm not entitled to any restitution. So, whatever is going on with the language and the application of the statute, when it's a plea agreement versus a trial is something that I'm hoping that the Commission can pay attention to, because clearly the victims are hearing, or are being instructed, or are being misinformed that when it's a plea agreement -- and you gave us statistics of 98 percent plea agreement -- that their rights somehow are different. That the rights, as John defined from the statutes, don't apply when it's a plea agreement. And, that's not the case at all, as the statutes are currently written.

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

Orders of protection. Similar to what we talked about earlier with victim impact statements not coming to us with pre-sentence reports. They also don't come to us when it's an order of protection.
So, even if the sentencing judge issues an order of protection, there is nothing in the statute that requires the sentencing court to forward it to us.

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

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

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

Similarly, Parole, if it's a non-family offense, may or may not be able to get their hands on an order of protection, and may or may not be able to
add that into a special condition of that offender's release.

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

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

Son of Sam. There were several changes in the Son of Sam statute several years ago that have really worked out very well for victims. Originally, the Son of Sam statute didn't afford the offender the ability to proceed from the fruits of his crime. He couldn't become famous or rich from books, or movies, or whatever. What we learned is that they access money from many, many ways, whether they're named in a will, or there's an old Allstate Insurance claim that finally came to fruition after they were in custody,
and now they're getting this $25,000 check from Allstate, et cetera.

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

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

So, what happens is, if it -- if it's an offender in custody, and I learn that this offender -- it's an automated printout that I get every day -- that this offender has access to $10,000 or more, or is about to receive a sum of money $10,000 or more, I notify Crime Victims Board. Their counsel goes ahead and -- and notifies the victim of their rights under the new and expanded Son of Sam law. The money gets
frozen, so that the inmate cannot disburse it pending resolution of the lawsuit, the victim’s civil suit.

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

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

So, in the majority of cases, the offenders are just kind of turning over the money, or turning --
if not all the money, then clearly the majority of the money. So, it's working out very well for victims to have this Son of Sam statute.

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

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

So, it's something to bear in mind when you're looking at your sentencing statutes, and walk in the shoes of somebody such as my sister-in-law in the death of her son, and see if you think the death of her son was less important, less impactful simply because the conviction was for a vehicular manslaughter instead of manslaughter.
So, those are all the things you really need to keep in mind as a Commission, as you're going over these things.

COMMISSIONER BERGAMO: I want to thank you for sharing the story. I'm sorry about the loss to your family, for sharing that story with us, because it really is a true example.

Is there any record -- on another subject related thereto -- for the people who make statements, and these things are registered, has there been any acts of retribution against those, by the convicted individual who finds out someone made a statement? The very issue he brought up, about people afraid to make statements. Are there statistics on that?

MS. KOUPASH: If -- I'm not aware of statistics. I can tell you you're looking at one-third of the Office of Victims Services. There is only three professional staff in my office.

COMMISSIONER BERGAMO: I didn't mean to --

MS. KOUPASH: And, out of the three professional staff in my office, we handle almost over 600 victim calls a month. Of those 600 victim calls a month, I could probably count on one hand how many people are --

COMMISSIONER BERGAMO: Okay, then, it
doesn't --

MS. KOUPASH: -- be threatened by retribution.

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

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

COMMISSIONER BERGAMO: It would reach you.

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

COMMISSIONER BERGAMO: Yeah, okay.

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

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

MS. BIANCHI: Thanks, Janet.

I just want to point out, in your packet, there is a Law Review article by Tony, published in the New York Law Review, and somebody had asked about that.
And, before we move on, I just want to introduce Commissioner Karen Carpenter-Palumbo, from the Office of Alcohol and Substance Abuse Services. And, OASAS is going to be assisting us with our Sentencing Commission work. So, she's here and I believe representatives from her office will assist us on the subcommittees.

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

SIMPLIFYING AND STREAMLINING NEW YORK STATE'S SENTENCING STATUTES: A MODEST PROPOSAL

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

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

The first slide says why should we care about simplifying sentences? And, I guess it's appropriate to start with that because, let's face it,
you've heard a lot about a lot of very complex
substantive stuff. And, you're probably going to hear
more.

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

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

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

(Pause)

MR. GIRESE: Okay. The entire thrust of
this presentation essentially is committed to three
points. And, they are:

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

Two, that has some real world consequences.
And three, this Commission has a great
opportunity to at least start addressing this problem.
And, we'll go over this. That's where you
see this is historically.

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

We did a very rough and unscientific survey
of the 1967 version. It was nine sections, took up
about six pages, 50 subsections, about 2,500 words.
And, the way that worked basically was you
took a substantive crime -- here is robbery in the
first degree. Most of you, I guess, are familiar with
this. And, you looked at the bottom of the
substantive crime, and it said "robbery in the first
degree is a Class B felony." And then, you opened to Penal Law Article 70, and you looked up one section, and what you came out with was the potential length you get on sentence, indeterminate sentence, and so on, and so forth. It was a fairly simple process.

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

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

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

Okay, back to the original.

And, by the way, this is not unique to
sentencing statutes. I've personally been involved in a little bit of this. When we created OCA, New York State RICO, we got into a dispute over forfeiture provisions, and I remember writing them on a napkin in the state cafeteria which, at the time, unfortunately, was experimenting with diversifying their menu, and had some Mexican food, which I tried. Neither the experiment nor the forfeiture provisions were particularly successful. I probably should have stuck with the hamburger.

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

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

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

This is the official version of the difficulty of interpreting those statutes. It's
practice commentary, "it's become a labyrinth not
easily traversed by even the most experienced
practitioner in criminal law." Those of you who know
Judge William Donnino know he tends to be very
discreet and formal. Here is the plain English
version: "From the merely cumbersome to
indecipherable gibberish." That's what they look
like.

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

Today's sentence -- well, actually, it's a
B Violent Felony, and it's a determinate sentence, but
domestic violence is a factor. So, we look to a
different part of the Penal Law to come out with an
indeterminate sentence. If it's a hate crime, again
the Penal Law. If it's a terrorism crime, the Penal
Law. If the victim was operating a vehicle for hire,
the CPL, another part of the Penal Law, and some
subdivisions are armed felonies, which now has
significance in plea bargaining.
Notice all the cross-references. They're scattered in various places.

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

[Laughter]

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

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

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

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

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

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

If you're doing something really
complicated, like doing research on the cap
provisions, frankly I -- and I would suspect a lot of
other people -- don't even bother any more. We just
call DOCS, and there are some very knowledgeable
experts, like Tony Annucci, or Rich DiSimone. If they
ever retire, we'll all be in a lot of trouble.

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

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

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

[Laughter]

MR. GIREESE: We do, however, have one subdivision of murder two, the last one added, which is murder committed in the course of a sex felony against a child, for which there is a specific mandated sentence. It just so happens if you commit
that as a hate crime, you get a lesser sentence than
if you just commit it as a straight crime, essentially
because it should have had a cross-reference.

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

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

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

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

If, for example, you decided that the State
should convert to something like the Federal
Guidelines -- not, in my view, a good idea -- but if
you decided that, in the process of simplification,
then essentially you would throw Article 70 in the
garbage, and re-write it from scratch. So, you have to bear that in mind.

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

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

On the basic structure, the most modest change of all would be to just update those 40-year old references, even if it said nothing more complicated than robbery in the first degree is a
Class B violent felonies, subdivisions 2 and 4 aren't felonies. In other words, different subdivisions of different statutes, and different subdivisions. That would at least clear away one small layer of confusion.

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

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

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

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

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

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

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

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

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

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

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

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

[Laughter]

MR. GIRESE: Lunch is on time.

COMMISSIONER BERGAMO: Thank you, very much.

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

COMMISSIONER NEWTON: Don't go anywhere.

There may be --

COMMISSIONER BERGAMO: I might have --
yeah, I'm thinking of my question, too.

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

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

COMMISSIONER O'DONNELL: Um hmm.

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

MR. GIRES: Okay. You have deferred sentencing.

[Laughter]

MR. VANCE: Not enough.

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

[Laughter]

COMMISSIONER NEWTON: I have a question.

MR. GIRES: Go ahead.

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

MR. GIRES: Oh, boy. Well, again, this is --
COMMISSIONER NEWTON: Hard question.

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

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

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

MS. LEHMAN: No.

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

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

So, whether or not you need all of the recidivist categories, where there are 11 of them, they sort of end up in some places in the same -- with the same length sentence. Maybe that could be
Beyond that, you know, as the length of sentences -- were you to adjust that so that the discretionary categories got closer, obviously you're going to have fewer categories.

MR. VANCE: Question?

COMMISSIONER O'DONNELL: Um hmm.

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

MR. GIRESI: Right.

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

MR. GIRESI: With a massive effort, yes.

Is it worth it? I'm not sure.

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

The problem, I think, with bits and pieces of sentencing law outside the Penal Law is the way it affects Penal Law current sentences. We've got stuff in the Correction Law and in the Executive Law that maybe really should be in the Penal Law.
I mean, I think the basic goal is that it should all be in one place. So, if you're dealing with an Environmental Conservation crime, all right, it's not so bad to have the sentence for that crime expressed in the provision, or after the provision. But, you don't want to have a consequence or a Penal Law sentence expressed somewhere in the Correction Law, because people will miss it.

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

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

MR. GIRESE: My recommendation would be no. Leave it to a Bartlett Commission. There is enough to do here. But, you're right. I mean, the Vehicle and Traffic Law is an even bigger mess.

You know, the funny thing is, despite everything I've said, the Penal Law is a relatively modern sanction. It was created in '67, and it worked off the model penal code. When enacted, it was logical and coherent. It took a long time to do it.

So, when you deal with the Penal Law what you're really doing is pruning. When you deal with something like the VTL, what you're probably really doing is completely rewriting it.

COMMISSIONER NEWTON: Is there a prosecutorial benefit from having these -- I'll use your word -- enhancements kind of statutes? I mean, could you -- could you get to the same place without them? Apart from the political aspect.

MR. GIRESE: Well, it -- it really is a policy question. When you get increments in major felonies, the Class B and Class A felonies, not really.

I mean, one thing unique about New York is that even its determinate sentencing ranges are vast.
The determinate sentencing range for "B" here is -- what is it -- 6 to 25 years. So, the scope of sentencing under that scheme is pretty tough.

But, maybe what was a historical accident by writing it that way, New York managed to escape the entire Apprendi legally unconstitutionality problem. But, we don't see a lot of enhancement crimes.

Okay. Thank you.

COMMISSIONER BERGAMO: Thank you, sir.

COMMISSIONER O'DONNELL: Thank you.

[Applause]

MS. BIANCHI: We were going to take 15 minutes.

COMMISSIONER O'DONNELL: Yeah, okay. We -- I don't know if Gina talked about it before, but Paul Shechtman also had some ideas about streamlining sentencing. And, he has given them to Tony Annucci, and Tony is going to just briefly touch on those issues.

And, I just really want to thank Tony Girese. I think one of our important missions here is trying to streamline a very complex sentencing system. And, the fact that we have some very knowledgeable people who have given some thought to this is
extremely important to us.

So, for part of our mission, what Tony is offering, what Paul Shechtman is offering, and -- and maybe there are some other ideas out there -- are critical to our ability to try to address the complexity of the current sentencing law.

MR. ANNUCCI: Okay. Good afternoon, again. And, I'm violating a cardinal canon rule here, which is never be the last man standing in between a hungry audience and lunch.

COMMISSIONER BERGAMO: Think about it.

MR. ANNUCCI: I have no choice in this, and I apologize.

But, Paul Shechtman set down some very interesting thoughts into a very short kind of white paper article, with some provocative suggestions of what this Commission should consider. And, he asked me to present it on his part.

Originally, he sent me a draft of this article, and I noticed that he was saying some substantive things. And, I did have one suggestion for him, because Paul was the Director of Criminal Justice in '95 and '97. At that time, he was the key architect of the Sentencing Reform Act of '95 that created determinate sentencing, what we called "truth
in sentencing," and some of the other complex provisions which, as you read his article, he is quoting Bill Donnino, where he says they have become a very complex labyrinth, very Byzantine and controlling.

So I said, "Paul, since you were one of the architects, wouldn't this be a nice opportunity for you to have a 'Nixon goes to China' moment, and admit some responsibility for this Byzantine role you've had?" So, he grudgingly put in a little parentheses that you can see at the end of the first paragraph, where he says "As the State's Director of Criminal Justice from '95 to '97, I bear responsibility for some of the growth." So, that's his acknowledgment to his responsibility here.

But, he does a very good job of -- in his initial Page 1 of the article to just list all of the different permutations we currently have, between determinate and indeterminate sentencing, and what we have in terms of violence, and then in repeat violence, and the drug offenders, where instant is violent and past is non-violent, and second child sexual assault. There are so many permutations right now.

And, he's saying, "Look, it seems to us that
one of the goals of this Sentencing Commission is to try for simplification." So, he gives this background, and he says, "Where do you begin?" on Page 2.

And, the first question he asks is whether it makes sense to have all determinate and indeterminate sentences, and actually this is the biggest part of his presentation. I think it's really one of the most fundamental questions the committee has to grapple and come to a quick decision on, because that will drive so many other types of things we decide to write recommendations on.

And, he goes through the history of indeterminate sentencing. It was premised on models, et cetera, et cetera. And, that it's kind of lost favor. And that, in '95, we started with determinate sentences for repeat violence. Then, that spread in '98, with Jenna's Law, for -- for almost every single first-time violent.

Then, we expanded it further to all drug offenders, basically. And, as well as sex offenders, with the recent Sex Offender Management and Treatment Act.

So, what Paul says is we made such a commitment to determinate sentences, does it make
sense to continue to have indeterminate sentences for crimes such as bribery and grand larceny? And Paul basically says if the answer is no, it doesn't make sense to keep having this dichotomy, then New York should move to a fully determinate scheme.

But he'll come back, as he says at the bottom, to the issue of sentences for the most serious indeterminates, which are murder, terrorism, recidivists, sex offenders, and persistent felonies.

Then, on Page 3, he says, okay, then the second step toward simplification -- and, this is a pretty provocative suggestion. He goes through his explanation that we presently have 10 different classifications for felonies. And, we start with A-I, A-II, B through E, and then you add in the violent felonies -- B-violent, C-violent, D-violent, and E-violent. And he says 10 classifications is entirely too many.

Maybe we need to think about doing away entirely with the violent felony offender classification, which was created in '78, and simply take the approach of putting it into the right band, if that's what we want to do. In other words, if -- his example is robbery two is a "C" -- presently a C-violent. But, if we really think that the
punishment should be a little longer, we should simply make that a B felony, and then maybe make, you know, the current B-violents, like rob one, and, you know, assault one, A-II kind of offenses.

Now, my initial reaction is wow. That's a lot to ask for, because so much of our thinking, and our reaction, and what we do, and don't do, is -- is basically we have this pool of violent felony offenses that -- that drive whether you get merit time, whether you're eligible for Shock Incarceration, you know, if you have a prior violent, you can't go to Willard.

So, all of -- a lot of formulas rely on the violent felony offender classification. But, as I think about it more, I think there are ways that if we think this makes sense, at least for the practitioner, the DA, the defense attorney, and the judge, up front, to have a real more simplified set of formulas to work off of, there might be ways we can define elsewhere, at least use the term violent felony offender, go to excludeable offenses, put it in one section and say, if you're convicted of one of these offenses, then, you know, make all the appropriate cross-references to eligibility for Shock, and merit time, and victim notification, and those other things that Janet noted.

So, I would submit that my initial reaction
about what's tremendously significant, to depart from prior use of violent felony offenses as a categorization, we should at least be open minded about it. I think there might be -- might be an attractiveness to Paul's suggestion to just basically go back to these different classifications.

And then, he gives you potential grids. He said this is not, you know, anything fixed. But, he gives you proposed numbers and how -- how it might work. For example, for first-time felons, if you had Class A through A-II, to Class E, and used the determinate sentencing format.

He kind of just drops in this little note underneath this first chart there that -- that goes into drug offenses, and he says if we want to now meld this with drug offenses, we might have to significantly classify downward a lot of existing drug offenses, in order for them to get the same determinate sentences that they're now getting under the Rockefeller drug law. That's -- that's a pretty controversial suggestion as well, but it's something we can give a lot of thought to.

He does say that -- for example, he gives us the Class B felony sale in the third degree example, where you sell any amount of narcotics on the street.
That's currently a Class B. His suggestion is maybe we should think about classifying that type of offense down to a "D" or an "E." That's -- that's just his suggestion. I'm not saying it's good, bad, or wonderful, but that's -- that's Paul's basic suggestion on that.

And then, he goes through a table for second felony offenders, and what that chart might look like. And then, thereafter that, he goes back and he re-embraces the wisdom of having A-I felony sentences with minimums that range between 15 and 25, and maximum is life, and allowing those individuals to stay in prison until such time as a Parole Board, if ever, would make the release decision. He thinks that's good.

And then, his last two points there, on Page 4, spoke about all of the different boutique kind of exceptions to the general rules that are out there, because somebody reacted to a particular crime. So, we say if you sell drugs near a schoolyard, that -- you know, we depart from the normal sentencing scheme. Or, if you're of aggravated harassment of any employee, which is a Class E, instead of getting two to four, you can get two and a half to five. All of those things, he says, that are throughout the Penal
Law, I think we need to step back. And, I think that makes a lot of sense.

He basically says, "Look, come to a basic realization that if a crime warrants a stiffer sentence, it should be elevated to a higher felony class." So like, if you have, for example, a Class E drug offense, but you want to make it more serious because you're now doing that same crime and doing it -- you're selling drugs near a schoolyard, you should maybe elevate it to a Class B, as opposed to writing into these various provisions enhancements.

From the practitioner's point of view, I think it would be a lot easier. Whether we could actually ever do this, and wrestle with all of the nuances that are out there, I think that would make sense.

And, his last thing, perhaps, is the most provocative of all, and that is that we should give consideration to eliminating plea bargaining restrictions that proliferated since the appeal law was enacted. He says under current law, he gives the example of a Class B violent which is also an armed felony offense. The plea restriction says you can only go down one, to a Class C when it's a "B," that's also armed. It can't go down to the "D."
And he says these things unduly restrict the negotiations. They can be circumvented by a pre-indictment plea or a deal. He says wouldn’t it be better to have a rule that simply required the prosecutor to explain on the record her reasons for agreeing to a disposition that is two or more classes below the top charge.

So, for example, if you had a "B" and you wanted to agree to a plea to a "D," he’s simply saying allow that to happen. Don’t have a statute that says you can never go down to it. Just have the DA say on the record what his rationale is for going to a "D" for the Class B.

And, he ends it with there will be people that will find fault with this scheme, but it's only put forward as a starting point for discussion, and nothing more. But, he definitely ends with simplification should not be the only goal of the sentencing reform, but it is surely the best one to deal with the complexity of some of the law.

With that, I will --

COMMISSIONER O'DONNELL: Well, thank you. It's hard to present your own ideas, much less someone else's. So, I appreciate you doing that.

Paul will be involved in the Commission, and
can speak to these issues. But I think before we have our discussion next week about the overall work of the subcommittees and what we want to charge the subcommittees with, it's important that we at least conceptually have some proposals before us of ways that we might simplify the current law.

So, I appreciate you doing that.

Okay. We'll take a brief recess for lunch.

(Off the record.)

COMMISSIONER O'DONNELL: I know I frequently commented on our good fortune in having so many nationally-recognized experts come and speak to us on the Sentencing Commission. And one of them next week, Doug Berman, who is a very well-respected expert on sentencing policy, who couldn't be with us today, will join us next week.

But, he talked to us about the fact that there are two gentlemen that we really should invite to come and speak to us, who are very experienced on sentencing issues and on sentencing commissions.

And, our first speaker, Steve Chanenson, is a nationally-recognized expert on sentencing, and an Associate Professor of Law at Villanova. Don't hold that against him.

[Laughter]
COMMISSIONER O'DONNELL: But, it is important that we hear from law professors as we are going about our work.

And, he is also Chairman of the Commission -- the Pennsylvania Sentencing Commission's Research Committee, and a member of the Commission's Policy Committee, as well.

So Steve, I'll turn it over to you. And, thank you for coming to New York.

INNOVATIVE USES OF DATA IN SENTENCING POLICY

MR. CHANENSON: Wonderful. Thank you for having us. We're very happy to be here. You are certainly going to be in for a treat when Doug Comes by next week, and I'll have to send him that fruit basket for saying nice things about me.

Mark and I -- Mark is the Executive Director of the Pennsylvania Commission on Sentencing, and I understand the very logical suspicion of law professors. So, think of me more as a fellow Commission member. I am one of the Governor's appointees to the Pennsylvania Commission, although it was a kind of a inside deal. Pennsylvania's statute has a spot reserved for a law professor. So, the -- you know, the competition was a little thin.

But, we come here today to talk largely or
exclusively, really, about the role of sentencing and
data. And, we'll be talking about Pennsylvania as a
case study.

Now, we don't know a lot about how New York
handles sentencing data, although we learned a little
bit over the lunch just a few minutes ago. And, it
sounds as though you folks are really doing some
exciting things here yourself.

So, what we present to you today is some
ideas about the role that data can play, one example
of how it is playing out in Pennsylvania, and to
encourage you to continue the work, and perhaps even
expand the work that you're doing on using data to
inform sentencing policy.

As you go about your work -- and I read
Executive Order 10 just recently -- you have,
obviously, a very tall agenda, right? Commissioner
O'Donnell said you were working one full day a week,
which is hard work indeed for a Commission that is
just starting up. But, it really is a wonderful
opportunity.

It's an opportunity to re-think your entire
system, to look around the country, and pick and
choose the things that you think will work well for
New York, and say, "Oh, no, that doesn't look good to
us," or "this does look good."

And, I encourage you not only to think about how you want to organize your system, and I was interested to see the similarities, including the continued robust use of indeterminate sentencing, between New York and Pennsylvania. But also, to think about the ways in which you learn about your own system.

As I said, I'm getting the impression that New York is really well along the road in that department, but not every state is. Mark and I were out in California about a month ago, talking to California judges. And, as you may know, they have their own set of problems in California's size. And, they really don't know much about what's going on inside their own systems.

There are some handouts that we have brought with us, both the PowerPoint and also some articles. I warn you not to operate heavy machinery while reading those articles.

[Laughter]

MR. CHANENSON: There are a few things. Most of them are short. One is something that I wrote about data and sentencing. One is that Mark co-authored with our Commission's counsel, on
Pennsylvania's release policy, release of information, which is something I'll touch on. And article -- then, two articles from a special issue of the Stanford Law Review, all about sentencing, from about a year and a half ago -- one by law professors Mark Miller and Ron Wright, on the role of sentencing information systems. And finally, yet another one from me, talking a little bit about information, but also a bit about my suggestions on the related topic, which is how to harness the indeterminate system of sentencing in the world after the Supreme Court has redefined the Sixth Amendment. That's off the topic of what we're really going to focus on, but it's something that, as a law professor, I couldn't resist throwing in, as well.

I was very interested by the name of your Commission, right -- The New York State Commission on Sentencing Reform. It reminds me of a line from the legendary -- and it's a law professor again, sorry -- the legendary law professor and criminologist, Norville Morris, who once found an old English quote about reform. And he said: "Reform? Don't speak to me of reform. We're in enough trouble as it is." 

[Laughter]

MR. CHANENSON: And, I hope that that's not
what is going to happen here. I'm sure of it, looking
around this room. But, it's an opportunity, as well
as a danger.

And, what I want us to talk about now is the
role of sentencing and data together. Sentencing, as
you know, as well if not better than I, does not occur
in a vacuum. It's part of an immense and immensely
complex system of laws, and rules, and importantly,
discretionary decisions -- discretionary decisions by
many different actors.

Yet, oftentimes, to call the criminal
justice system a "system" is to torture the word
"system" beyond all recognition. Many jurisdictions
lack not only the internal coordination and cohesion
that you might think would go along with the idea of a
system, but they really lack a full understanding of
what is actually happening on the ground.

We cannot afford to take our systems for
granted. And, as I said, you aren't. But what I hope
that we'll talk about here over the next little bit of
time is some of the ways in which looking at the
system can then turn around and help the efficiency,
the efficacy, the fairness, and the justice of the
system.

The modern sentencing reform movement you
can trace back to New York in many ways, right? Judge Marvin Frankell, back in the 1970s, has focused on information, from the beginning. Sentencing information, in many ways, has been the linchpin of the modern sentencing reform movement.

If you look around the country to other sentencing commissions -- and I understand that Barbara Tombs was here speaking to you this morning, and she certainly has the perspective of running a number of different commissions -- you'll know that sentencing commissions have data collection and analysis as a large part of their statutory and functional mandates in almost every jurisdiction.

But simply saying that data is important to sentencing does not really help us understand how an improved sentencing information approach can move sentencing reform forward. And so, I want to spend a minute and just talk about the world as we find it in most jurisdictions that think about sentencing information at all.

Now, as I said, data could play the huge role in sentencing reform, but if we think about what I'd like to call our first generation of sentencing data, you can think about data as being a central component to guidelines, or some other form of
structured reform. Guidelines are often a dirty word, because we immediately think of the United States Sentencing Guidelines, widely disliked far and wide. But guidelines can take, as you know, any number of forms -- from the narrative guidelines in Ohio, to the more flexible guidelines in Pennsylvania, to the completely voluntary guidelines in Virginia.

So, the information, the data that is out there about what's been happening, plays a role there, of course. It plays a role in creating those guidelines, either with a formal link to prison capacity, something that's always of interest to members of a legislature, or without a link to prison capacity. And Minnesota, of course, has that link to prison capacity. Pennsylvania does not.

A critical element of data, and one of the things it can be very useful for, is ensuring the ongoing political viability of a sentencing commission. You have to make a decision, your legislature and governor have to make a decision as to whether an ongoing sentencing commission makes sense for New York, after this reform commission sunsets early next year.

If that's something you choose to go forward with, one of the things I think you may find is that
data can be vital to planning the system and to the continued role of a sentencing commission. The ability to predict prison capacity needs. The ability to look at a piece of legislation and give information to the legislature.

The legislature will do what it chooses to do, but to have an honest broker, with good information, saying "this bill will have this result, like, over the next five years." And again, Virginia is a classic example, probably the best example, of that use of data. They have a provision in their laws that says no bill that would increase prison capacity or corrections spending any way can pass without going not just through the Criminal Justice Committee, but then also through the, effectively, their Ways and Means Committee. And, the sponsor has to provide either some mechanism for funding, or some other mechanism for cutting expenses elsewhere. They have chosen to tie these decisions very closely with prison capacity.

You don't have to do that, but that's an ability that good information systems, often through a sentencing commission, can provide.

In this first generation, the users of sentencing information have largely been commissions
and other experts who try to design rules in sentencing. And, it's also been used to try and provide broad general reports for the legislature, for judges, and for the general public.

What you see often are these system-wide predictions of prison resource usage, or sometimes even larger correctional uses. I know — I think, at least, that in New York, somewhat similar to Pennsylvania, we have a good reliance, a substantial reliance on county jails. And, that difference between who goes to a county jail and who goes to a state prison, how that decision is made is something that's of enormous importance to our policy makers in Pennsylvania, both in the General Assembly and at the level of the County Commissions.

Other uses that I'm sure you're familiar with are certain special purpose impact-type studies, what's happening with a particular offense, or a particular offender. Are first offenders being treated one way, or another way?

Among the typical problems with this kind of first generation data is that it's often limited by technical complexity. To understand it, you often have to be an expert. You need to spend a lot of time sifting through the information that's out there, in
order to make it user-friendly for individuals who have to make policy decisions.

And, there is often a very serious time lag. In many situations in Pennsylvania, although we're making improvements, dramatic improvements, this has been an ongoing problem for us. The information that we're able to provide to the General Assembly can often be many years out of date. And, it's the most recent information available, and it's the best we have to work with, but often it suffers from those limitations.

So, some of these holes, as I've put it, in the first generation include two big ones. The use of data at the case level. The familiar stuff, the stuff we've seen in our first generation, is often at the system-wide level. Very important information, to be sure.

But data can also be used at the case level. When you start to use data at the case level, with individual judges, you start to see a more dynamic relationship. More users, greater feedback.

One of the things that the Pennsylvania Commission is in the middle of doing right now is amending our guidelines. We try to do that about every two years, along with our legislative cycle,
incorporating new offenses that our legislature has passed, changes in statutory penalties, things like that. And, what we're always looking for is feedback from the lawyers, from the judges, trying to find ways in which our guidelines are out of whack.

From my perspective, guidelines should be just that, guidelines. A starting point. The judge and the lawyers see the individual defendant. They know about the crime in a way that the Commission can never understand. But, maybe there's something where things don't make a lot of sense.

Before my time on the Commission, there was an issue with burglary. And when Mark and others looked at the burglary data, there were three spikes on the data that didn't make a whole lot of sense. They drilled down and tried to get a sense of what was going on. And it turned out that, in the courtroom, a difference was being imposed, or a difference was recognized by the players in that court culture, between the burglary of a home with a person present, the burglary of a home without a person present, and the burglary of something that wasn't a home.

Again, that isn't an example that can transfer seamlessly to any other jurisdiction. Your statutes are different, I'm sure. But, there was
feedback coming to us through the data. But, it was fairly rough feedback. We adjusted our guidelines such that now there are different guideline recommendations, if it's a burglary of a home with a person present or not. But, that's fairly coarse information. And, one of the things that we've been working on is trying to find finer, more granular, if you will, information about sentencing.

So, the other advantage of adding some of these case level users is not only to expand who is using this information and how, but it's to get more of this exchange. Not just top-down, or from the center out, but almost more of a market type of a conversation, where information is flowing back and forth from the folks who set the rules -- if you're to adopt a guideline-type system -- to the folks who are the consumers of those rules -- the judges and the lawyers. Think of it as the difference between capitalism and the old Soviet command and control economy.

Another important goal is sharing information with other jurisdictions. The opportunity exists for us to learn from each other, if we're able to capture our own information in a way that is sufficiently complete. We certainly share information...
now. You can look at various pieces of legislation that have recently gone through the Pennsylvania General Assembly, and they have "made in New York" stamped all over them. There are things where we, on at least an anecdotal basis, look to you. And, I'm sure that New York looks to other jurisdictions, as well.

But, most states, I think you could think of them as lone laboratories of democracy, to twist Justice Brandeis's famous line. This kind of smokestack or silo approach limits the ability to cross-pollinate and to advance our own systems. The second generation of information and data that sentencing can provide more detailed information that can be used to facilitate that kind of cross-pollination.

The idea of having greater case-specific information can open up a number of important possibilities. It can open up possibilities to allow us to answer fundamental questions, fundamental questions from the policy standpoint, but also fundamental questions from the individual case sample. Questions, perhaps, that judges want to know.

What have other judges done in cases involving similar crimes? Not just what do the
guidelines say, but what is actually being done, and why? What have other judges done in cases involving similar offenders? And, what about outcomes?

When you think about -- or at least when I think about your Executive Order, and talking about the importance of similar sanctions for similarly situated offenders, who can disagree with that? But, the question, of course, is what does "similar" mean?

All right. I can take care of any jurisdiction's uniformity problem just like that. Every burglar gets a mandatory five-year sentence. It seems pretty uniform to me. It's very similar. You're a burglar, you get five years. You're a burglar, you get five years.

But, we all know that that is a false sense of fairness. It is a false sense of uniformity because not all burglaries are the same, and not all burglars are the same.

So, by getting greater information down to the case level, judges can have the ability to gauge what else is going on. Not being forced to follow what their colleagues are doing, not necessarily, but being allowed the opportunity to understand more fully what's actually happening on the ground.

Another important possibility that this
second generation of sentencing information affords is
the opportunity to think about outcomes. Again, the
component of your Executive Order, and with good
reason, the connection between sentencing and
recidivism, I think, as the Governor phrased it. The
opportunity to think about is there a difference
between someone who is sentenced to one year, as
opposed to someone who is sentenced to two years, and
what happens to them three years after? That's a very
hard question to answer. That's a very hard question
to answer.

Let's just start with the question of what
do we mean by "recidivism"? Are we talking re-arrest,
re-conviction, re-commitment? One year, three year,
five years? It's a morass.

But here is your opportunity, re-thinking
your whole system. Build in as much as you can to
capture this kind of information as you move forward.
It won't make it easy, but it has the opportunity to
change what you can do with your criminal justice
system. The opportunity to literally change the
culture.

Whenever I think about sentencing and
outcomes, I'm always drawn to the work of Judge
Michael Marcus. I don't know if that name rings any
bells with you folks. He is a trial judge in Multnomah County, Oregon, Portland, Oregon, who has written extensively, and he has a Website that I should remember -- smart sentencing dot net.

And, Judge Marcus is a big believer in public safety as the driving force of the criminal justice system. You can agree with him, you can disagree with him. Most jurisdictions give you a laundry list of your purposes, right. When I talk about purposes to my sentencing students, their eyes glaze over, and they play solitaire a greater amount of time.

[Laughter]

MR. CHANENSON: But, Judge Marcus is focused on public safety. And, what he has done -- and there are certainly criticisms of it -- but it's -- he, himself, has described it as kind of a Kitty Hawk moment, right? We're able to go a couple of hundred yards in the plane, but no farther, not yet.

Focusing on public safety, and using a data warehouse in Oregon, particularly Multnomah County, he works hard with his probation officers to track the outcomes of various dispositions. And, he has a computer-assisted software program that will give him information. And, I can quibble as to how reliable
the information is, but information on outcomes based on prison, or this kind of a program, or that kind of a program, and it's flexible enough to change what you think the similar -- the similarities should be.

This is a burglary. Judge Marcus gets to know this individual, and says, "You know what? Yeah, it's a burglary. But, it's a drug-involved burglary. I want to see how a defendant who has drug convictions would stack up against the individual who is in front of me? And, what might best serve the aims of public safety? What might best lower recidivism?" It's a start.

What's most interesting about it to me is he reports the change in the behavior of his lawyers. His lawyers have access to the same database that he does, and they'll be making different recommendations to him because they know what matters to him.

So suddenly, you have a system where it used to be in the pre-sentence report you would find information about the individual's childhood, other social history things that are all important, but nobody really paid any attention to what might make sense for this offender, in terms of outcomes down the road. Focused on what's exclusively retributive concerns.
By bringing in this greater and richer dataset, he has allowed for a conversation about another goal of sentencing. You don't have to be as focused on the goal as he is to see that it is an opportunity to harness the power of data to the ends that we choose for a system.

COMMISSIONER O'DONNELL: Can I interrupt you there?

MR. CHANENSON: Of course.

COMMISSIONER O'DONNELL: We have -- we have heard from a number of individuals about the importance of using risk/needs assessment instruments, and have worked with Donna Hall, our lead researcher here, to develop a risk instrument that's just being used here in New York, in some re-entry task forces. It's the same sort of concept, looking at more a static risk factors.

But, you know, is it -- are any judges using those risk instruments to kind of look at recidivism of similarly situated individuals in deciding what an appropriate sentence should be?

MR. CHANENSON: Yes. And, I think probably the best example -- and I will turn to my colleague for a moment. Probably the best example would be Virginia. And, I'm sure you're familiar with what's
been going on. Have folks talked to you about Virginia, at all?

COMMISSIONER O'DONNELL: I don't -- a little bit, but --

MR. CHANENSON: Virginia has a guideline system. They have a full determinate system. They abolished parole in the early 1990s, as part of a truth in sentencing approach. But, they've also had concerns about capacity.

And, as a legislative mandate, the sentencing commission was told "see if you can identify some people who might be of sufficiently low risk that we can divert them from prison."

So, in a system of fully voluntary guidelines -- you know, ours are now, as of a month ago, pretty doggone voluntary, thanks to our Supreme Court. Is this on? Yes, --

[Laughter]

MR. CHANENSON: -- and, I like our Supreme Court. But, these are completely voluntary, no appellate review whatsoever.

And, they had an instrument that has a number of points and factors that are static and where the judge is recommended -- the judge can do whatever she pleases -- but, the judge is recommended to divert
certain people who have a score in a certain range. It includes some things that are problematic to some of us, including there are issues of age, there are issues of, you know, employment status, that are tremendous predictors, but also get wrapped up in a whole lot of other very important factors.

And, at this point, it's all a mitigation recommendation. I think it would be a little bit more controversial if it was an aggravation recommendation. You know, you can answer for yourself whether the glass is half-full or the glass is half-empty, and the difference is purely semantic. But yes, Virginia has really institutionalized that.

They have also done the same thing, but the flip side, with sex offenders. And, if sex offenders go through their -- and, it's really a risk assessment, by the way. It's not a needs assessment.

COMMISSIONER O'DONNELL: Right.

MR. BERGSTROM: And this is on the sex offenders.

MR. CHANENSON: On the sex offender side. But, even on the -- on the non-sex offender side, they don't do much with needs. It's mainly a risk assessment.

COMMISSIONER O'DONNELL: Risks, right.
MR. CHANENSON: The risk assessment, if you reach a certain level, the recommendation is to be treated more severely.

So, Virginia is probably doing the most with -- with that, certainly on a statewide -- on a statewide level.

When you start to bring in needs, there is a gentleman at the Treatment Research Institute which is loosely, at least, affiliated with the University of Pennsylvania, by the name of Doctor Doug Marlowe. He focuses on drug court work.

And, Doug is doing a pilot project now for Hennepin County, which is Minneapolis -- maybe it's Saint Paul -- it's somewhere in Minneapolis, or Saint Paul -- an instrument that he has designed called the "RANT" -- the Risk and Needs Triage. And, that's designed more as a case sorting mechanism. Who should go to straight diversion? Who should go to drug court? Who should go to the normal criminal justice system?

So, it's one -- it has -- certainly has sentencing implications.

COMMISSIONER O'DONNELL: Um hmm.

MR. CHANENSON: It's one step before that.

And again, the idea is to try and get the right people
into the right program. What's exciting about what --
what Doctor Marlowe is trying to do is that he really
very much so does bring in the needs component, as
well, in addition to looking at criminogenic factors.

MR. BERGSTROM: Steve?

MR. CHANENSON: Please.

MR. BERGSTROM: I've got a couple of
things. I think one thing that's important to think
about, if you're thinking about risk/needs is, you
know, what is the purpose for the sentence, and also
what is the structure of the sentencing?

Because, if your purpose is retribution, and
you're saying we want to punish these people with five
years of incarceration, then it doesn't matter risk or
need, because retribution is a different scale that
we're going to be using to look at that. If the
purpose is rehabilitation, you might have a different
scaling.

So, I think you have to think about how does
a risk assessment, or a risk/needs assessment sort of
fit into what purpose for you have for sentencing that
type of offender. And, that may determine whether you
do have it and, if you have it, how it's structured.

The other thing that I think is important,
especially in a state that has indeterminate
sentencing, or at least some indeterminate sentencing, is how do you -- how do you sort of distribute that risk and need information across the sentencing and parole basis? Pennsylvania is --

COMMISSIONER O'DONNELL: Right.

MR. BERGSTROM: -- almost exclusively indeterminate. And one of the things we think about is what are we doing at the sentencing part of the phase, and then what is the Parole Board doing at the paroling part of the phase?

Because, in all honesty, our sentencing guidelines primarily are thinking about retribution. What is the appropriate, proportional punishment that we think we should assign in these cases, at least primarily? You can think of another option, but -- but, let's start with that.

And then, when they come to a point that they're eligible for parole, we think it's very important that the Parole Board be thinking about risk/needs, because then it becomes a public safety issue. Is it appropriate to release that person at this point, or do we keep the person in? And, if we're going to release, you know, what kind of reentry stuff have we done to prepare that person for release, so that the harm to the community is reduced?
So, think that you have to sort of look at all of those kind of things. Risk/needs can be helpful with sentencing, to make that decision is this someone we incarcerate, or is this someone we think about community-based alternatives?

But, if we are incarcerating, and if our purpose is retribution, then risk/needs may isn't as important in that phase as it would be later in the system.

MR. CHANENSON: And, I can't --

COMMISSIONER O'DONNELL: Good point.

MR. CHANENSON: -- contain myself on this -- on this point, which is to the extent that you're interested in continuing with an indeterminate system, I think something that needs to be made clear, and maybe it is already, one of the -- my many weaknesses, that I don't know a lot about the New York system -- but one of the weaknesses in the Pennsylvania system is that there is not a clear division of authority, and certainly no coordination between our sentencing commission and our Parole Board.

So, you see our Parole Board -- and this can get into some historical things, where there were some high-profile tragedies, dealing with parolees. And, in response, our Parole Board made some very
understandable decisions to be less forgiving -- maybe that's not the right word. To be less liberal with their parole decisions. And, what you saw were some really, really dramatic changes in time served.

And, I touch on it in the article, but I couldn't resist concluding that because you guys are an indeterminate state, I think that there -- if you're going to have an indeterminate system, and I think there are many advantages to it, there needs to be coordination between the front end and the back end.

And, are you looking only at risk/needs at the back end, or are you also looking back at what the judge knew, in terms of the retributive component at the time of sentencing? My view is that should be handled by the judge, and if you're looking prospectively for things that have changed inside the institution and the behavior of the inmate while there, that's certainly appropriate for the Parole Board to know, but not to look back and say, you know what? Actually, I think that driving while bald is actually very serious offense, much more serious than that crazy sentencing commission thought. Whatever the decision, the two bodies need to work together. Because, if not, you're going to end up the result
and, oftentimes, a bill at the end of the day, that you didn't plan on.

COMMISSIONER O'DONNELL: Well, the Chairman of our Parole Commission is -- or Parole Board is here, so --

MR. CHANENSON: Wonderful.

COMMISSIONER O'DONNELL: -- we appreciate your recommendations.

MR. CHANENSON: Well, I think -- I think it's tremendous that you're here, because to think of these things as being independent of each other is a mistake. And, it's a mistake that we in Pennsylvania have -- have made for a long time. And, I think it's great to have this kind of conversation on the front and the back end.

As we think about this opportunity for the next generation of sentencing information, one key principle that, in my opinion, should drive a new information model, is transparency. Transparency -- the ability to recreate and assess individual sentences and systematic patterns and practices.

This has largely been missing from the first generation of sentencing and probation. In my opinion, this also includes judge-specific information. The practice at the federal level is to
keep that information confidential.

Now, as some of our rural judges in Pennsylvania will tell us, "It's no secret what I do, right? I'm the only judge in this county. So, when you give out county-based information, you're talking about me anyway." Or, "There are only two of us in this county. Everybody knows what we're doing." When you get into more populous areas, judges don't have that same concern.

Pennsylvania had had transparency with respect to judge-specific information since 1999. It was controversial at the time. There are still members of our Commission who are not particularly wild about it. In Pennsylvania, we elect our judges. They're elected to 10-year terms, with retention for an additional 10-year term after that.

And, there is certainly an opportunity here -- I don't want to sugar-coat this -- for misunderstanding, for misinterpretation, be it accidental or deliberate. But, I think that one of the important features and opportunities of an additional generation, an additional take on sentencing data, is the opportunity to more fully understand what's going on. And, this is not, as some folks have claimed, a pro-incarceration or an
anti-incarceration tactic.

It is not meant to single out judges who are perceived as being very lenient, or perceived as being very severe in their sentencing. It is, in my mind, at least, an issue of good process and fundamental fairness. We are, after all, talking about the exercise of the public trust. And, it's something that I think needs to be done openly.

COMMISSIONER O'DONNELL: So, this is really publishing the sentences that the individual judges give out, essentially?

MR. CHANENSON: It -- it is. But, of course, based on what is collected. We do not publish every sentencing transcript. And again, that's the ironic part about the feds, keeping all of this information, and it was a -- a deal struck between the Administrative Office of the U.S. Courts and the U.S. Sentencing Commission in the early days of the Federal Sentencing Guidelines, to keep judge-specific information quiet.

But if one was to have enough time, you could sit in any judge's courtroom, all day long, every day, and be able to write down what every judge does. However the information is collected -- and again, my advice is to collect as much information as
you possibly can -- whatever information is collected, it is then transmitted to the central aggregating agency -- be it the statistical analysis center, or the sentencing commission, or whomever -- to have that available for public view, both in the aggregate -- right. We have sentenced 500,000 burglaries, and the average sentence was a year and a half. But also, Judge Chanenson has -- God forbid -- has, you know, sentenced a hundred burglars and this is how the distribution plays out.

So that information, especially in a state that elects judges, can sometimes be difficult to deal with. There once -- really only once -- was a local newspaper that misunderstood, and I don't know whether it was intentional or not, how our sentencing system operates, and kind of gave a scorecard, right? Everyone's worst nightmare. Chanenson, the hanging judge. Bergstrom, the let 'em go judge.

The Commission tried to respond to that by holding media workshops, to explain to the reporters how our sentencing system works. Mark is forever on the phone with reporters, talking about how things go. And, we try to make as much information as the judge wants available, including reasons that the judge may want to give as to why the judge did certain things,
and also explanations. We have certain dockets, particularly in Philadelphia, in an effort to move a volume of cases, where frankly the expectation is if you come to the waiver court -- jury waiver court -- and have the judge decide this case, you are going to be treated more leniently. And, that's described.

The idea, though, is by opening up this information, by being able to understand more about what's going on, encourage broader participation in the entire sentencing enterprise, with a larger range of participants, the existing data system is able to capture more information with which the system can be continually improved.

If you build it -- right -- if you build it, benefits will come. The future, as we all know, is uncertain. But, knowing what's going on in your own system is bound to help. And, the more you know, the more it can help.

I was learning a little bit today about some of the things that I believe New York City is doing, in trying to capture information on its pre-sentence reports, a terrific wealth of information about the individuals who travel through the system.

Virginia, again, is another great example.

In the late 1980s, largely for their own reasons,
before they had a sentencing commission, they started
to automate over 200 pieces of information on every
pre-sentence investigation report. Well, the
sentencing commission, now run by the same man who was
entirely engaged in that automation project, is now
able to look back at decades' worth of rich
information and provide more accurate predictions and
projections, and other types of information to policy
makers and at least not at the -- Virginia is not at
that point, but in my ideal world, they would be, the
individual case level deciders.

Data, really, truly, are power -- the power
to predict, the power to inform, and the power to
improve.

MR. BERGSTROM: Steve?

MR. CHANENSON: Sure.

MR. BERGSTROM: Just to make one point.

With a lot of the sentencing commissions, you'll hear
them talking about this sort of evolution of their
practices. A lot of sentencing commissions that first
are established spend a lot of time just trying to
figure out what it is that has happened in the state,
what is happening in sentencing. And usually, the
first set of guidelines or several sets of guidelines
are just descriptive guidelines. They're describing
what has been the practice. And, they're trying to
define sort of what is the going rate in this
jurisdiction with this kind of thing, with -- with I
think the hopes that you're bringing in the outliers.
You're just -- by just defining what that middle
ground is, you're sort of bringing people to the
middle.

As time goes on, though -- and we've had a
Commission for, you know, 25 years or more -- you see
a real move towards more proscriptive guidelines,
where you say, "Okay, we now know what's happening,
but we don't like some of these things. We think
these violent people should be in prison longer." Or.
"We think there is a real opportunity for treatment
here."

So, I think as you see commissions mature,
you see them move from understanding what's going on
to collecting data and trying to understand how to
move policy in a way that the legislature, the
governor, and others feel is the appropriate path.

MR. CHANENSON: Well, that brings me to a
case study, if you will, of Pennsylvania, where soon
enough I will shut up and Mark will come and actually
say something of interest. And, what he'll talk about
is the connection between our justice network system
and our sentencing guideline software as a Web application.

There have been some great advances in what we've been doing with respect to data in Pennsylvania, but is not, at least not yet, the academic ideal -- the academic ideal of a sentencing information system with complete capturing of information, and these kind of market-like interactions between the centralized policy makers and the diffuse consumers of that information in the courtroom.

But, within the broad collection of governmental information, generally, criminal justice specific information, a sentencing information system is an opportunity to focus on sentencing specifically. Not only how many cases are processed, how many prison admissions there are, but a more detailed understanding of who is being sentenced, for what, to what, why, and to what end. It's an opportunity to provide, if you will, a system within the system, within the coarser or vital system of criminal justice or other government information, the opportunity to drill down and provide a level of granularity about sentencing that can inform the sentencing world as well as the criminal justice world, and the larger governmental operations, as a whole.
So, from my perspective, this kind of granularity in sentencing information is key to policy coordination, information collection, exchange, and penalty integration.

With that, I will yield to my colleague to talk about JNET.

MR. BERGSTROM: Thank you. Well, good afternoon. As Steve said, this will be sort of a case study of Pennsylvania.

And, what I'd really like to do is focus on the sentencing information system we've established at the Sentencing Commission. But, I want to recognize at the start that it is, as Steve said, just part of a bigger system.

We have the criminal justice information system in Pennsylvania, and within that, we have a pretty sophisticated sentencing information system. And so -- so some of this information, some of these practices are probably already in place here. Some may be different, and some of those differences might just be because of the structure of government we have.

But, I do want to walk through those four key steps that Steve talked about, and sort of talk about how they apply to Pennsylvania -- policy
coordination, information collection, information exchange, and information integration.

So, the first is policy coordination. And, this is really at the criminal justice level. But, what -- what one of the key issues was in Pennsylvania, probably ten or twelve years ago, was what Steve described as the silos, or the stovepipe kind of approach. Every agency, every criminal justice agency, every entity had their own separate information system. And, the question was how do you bring this all together?

And fortunately, in the mid-'90s, when -- actually when Tom Ridge was elected Governor, one of the things he ran on was improving the criminal justice information system. That there wasn't a way of exchanging information readily across the system, and that was the public safety concern.

So, Pennsylvania had a special session on crime. We did all kinds of crime legislation, our own type of three strikes, and all the other good things. But, we also talked about how we can -- how we can improve this information system.

And, when I think about that whole process we went through to develop what we call JNET -- or the Justice Network -- I think about some of the key areas
that contributed to its success. We had executive sponsorship. We looked at things like governance structure. We had a strategic plan. And then, after we had all of that in place, we thought about what technology we needed to put this in place.

For pretty -- the -- sort of the governance issue, one of the things that was really important was to have the Governor at the top of the food chain, saying "This is important. We need to do this." Because we needed a means to get some very big, very independent agencies at the table, and someone over them to say, "Here is what we're going to do, kids. We're going to all get together on this. We're going to -- you're only going to get resources to do it this way, so that we can get everyone sort of on the same page."

One thing that I think is -- is typical of any jurisdiction, when you're trying to think how do you organize this effort, how do you coordinate this effort, is -- is what structure do you use? I think one common structure is a big warehouse system. Let's develop a new system. It's going to be out here. And everyone is going to feed information into that system, which means we have to have common codes, and everything else, so that we can all sort of talk to
each other within this big warehouse.

But, when we floated that idea in Pennsylvania, we thought that was just impossible. It wasn't going to work, because everyone had their own legacy systems, and their own codes, everything going their own way. And, it just wouldn't have been -- the timing would have been impossible, the costs would have been impossible, and there would have been all kinds of turf wars just trying to figure out what those rules were that governed that.

So, Pennsylvania decided to adopt a much more distributed system, where the understanding was each agency really controls its own data, and we're going to figure out ways to exchange information across systems in a more facilitative way, try to find ways to leverage the information that's all -- that's always -- that's already there, and then try incrementally to improve towards more consistent standards across the board.

We also recognized, at least in Pennsylvania, we rely on local governments. We rely on counties for our court system, for the most part, and on local police jurisdictions. Pennsylvania is not as large a state as New York, and certainly not the same size and population, has something like
3,000-some municipal government units, local
government units. We just really like the idea of
local government -- government near the people.

But that creates, of course, all kinds of
difficulties when you have, you know, hundreds of
part-time, you know, half-time police departments out
there that have to be in the mix somehow. How do you
coordinate all of this?

And, what Pennsylvania decided to do, as
part of this JNET effort, was to first look at the
state level, and say how can we get all of the big
gencies in the state to sort of get on the same page
and start sharing information? And then, let's move
down to the county levels. We have 67 counties.
Let's try to use counties as a point of contact.

Because, we needed to first develop some
organization and coordination within the counties,
across the various agencies -- county jails, and
probation, and parole, and others. And then, across
those 67 counties. And only then, can we really go
down to that municipal level. And what we should do
is try to use the counties as that sort of broker, so
that the municipal levels come up through the county,
work with the county. We'd have more coordination
locally, and then that's a coordination with the
I only give that kind of background because it was really important to sort of think through how are we going to make this happen. I mean, it's -- it's a huge task, so how do we do it? And, we did it very systematically that way.

What we also found was the reason it succeeded was not so much that there was an infusion of capital. That's always a good thing. But, it's because people were getting something out of it. People came to the table to give information because they knew they'd get information. Or, it may be better yet to say they wouldn't get information if they didn't give information.

So, everyone had a reason for being there. This wasn't let's be -- let's have, you know, good government. We're not at the top of the list of good government. We just got a budget recently, so we're not at the top of that list.

But -- but, everyone is looking out to make their own jobs easier, and to do their jobs better. And, I think our -- our approach was to make sure that there was something in it for someone. If they wanted to participate in this, they controlled their data, but they would only get information from that other
agency if -- if, in effect, they played along, if they -- if they were, like, a collaborating agency.

MS. LEVINE: Can you just give us, though, some tips? Some specific examples?

MR. BERGSTROM: Of?

MS. LEVINE: Of an agency that would give information, and what kind of information they would give, and --

MR. BERGSTROM: Sure.

MS. LEVINE: -- what kind of information they would receive?

MR. BERGSTROM: Let's say the -- well, probably the three largest players in the system were the Department of Corrections, the Administrative Office of our courts, and the Pennsylvania State Police, which has our criminal history repository. And, those three entities, I think, early on, were the key players. Because, remember, each of them had independent data systems, their own codes. Everything was independent.

There was a real benefit of having some type of coordinated information exchange between the courts, and the State Police, because the courts had to feed to the State Police information on dispositions following conviction -- conviction
information, and then dispositions for those convictions.

The State Police were the ones bringing these people in, and sort of getting them into the information system, fingerprint-based, all that kind of good stuff.

Each system had their own identifiers. The State Police, fingerprint-based, OTN, office tracking numbers. That was basically a body number.

The courts had what we call an OTN -- had -- I'm sorry. The Police had SID -- State I.D.. The courts had the OTN -- offense tracking number. So, you had a body number that attached to fingerprints, and you had a case number that attached to each and every case coming through the system. And, one of the difficulties was marrying the two of those up.

COMMISSIONER O'DONNELL: So, before we -- before we really go into a whole lot more detail, we do have similar systems in place in -- in New York State.

MR. BERGSTROM: Um hmm.

COMMISSIONER O'DONNELL: We do -- we're moving to a common portal system --

MR. BERGSTROM: Right.

COMMISSIONER O'DONNELL: -- for all the
criminal justice agencies. The agency that's not part of it is OCA, but we've set up separate protocols for exchange of information.

MR. BERGSTROM: But OCA is --

COMMISSIONER O'DONNELL: Is the courts.

COMMISSIONER NEWTON: Administrative Office of the Courts.

MR. BERGSTROM: Okay, the court, okay.

COMMISSIONER O'DONNELL: Administrative Office of the Courts.

MR. BERGSTROM: Right.

COMMISSIONER O'DONNELL: So, we exchange information.

MR. BERGSTROM: Okay.

COMMISSIONER O'DONNELL: But, we're moving toward -- I mean, it -- very, very shortly pretty much a one-stop system for all the criminal justice agencies, so it's --

MR. BERGSTROM: Then, it sounds like you had the same --

COMMISSIONER O'DONNELL: -- the State Police, DOCS, Parole, --

MR. BERGSTROM: -- type of experience where that was something that was a huge win-win, when you can both of those entities on the same page saying
here's how we'll do this, so that we're not having redundant activities, and we can, in fact, match offender to offense, that's really the key --

COMMISSIONER O'DONNELL: We also have --

MR. BERGSTROM: -- to supplying --

COMMISSIONER O'DONNELL: -- in New York a -- a Board made up of the major criminal justice agencies that do a unified budget, that do purchasing, by Board decision, so that we purchase --

MR. BERGSTROM: On the information technology side?

COMMISSIONER O'DONNELL: On the information technology side.

MR. BERGSTROM: Great, great.

COMMISSIONER O'DONNELL: So --

MR. BERGSTROM: Well then, that -- that is this infrastructure we're talking about. So, it --

COMMISSIONER O'DONNELL: Um hhm.

MR. BERGSTROM: -- sounds like there's a lot of similarities there. And what I'll do is move beyond this.

One thing we found, though, was it was very important to have policy coordination before you automatically went to technology solutions. Because all of a sudden it was, you know, here is the newest
trick that we can use to try to resolve this, and you haven't resolved the underlying problems between the agencies.

And so, as I said, we ended up with a very distributed system where, through technology, we connected all of the major state systems, and then we moved that down to the county level, and then we've been -- we've been continuing to move that down to the municipal level. So, there is coordination across that, for a flow of information.

Let me talk about the next step, because we really moved from that sort of high-level coordinating at the criminal justice level down to sentencing specific information, which is really the focus --

COMMISSIONER O'DONNELL: Um hmm.

MR. BERGSTROM: -- of this.

And, the first thing is how do you collect, or who collects that sentencing information, and how granular is it?

Some of the things Professor Chanenson mentioned, but let me reiterate some of those. One, this is a systems approach that we're talking about, the criminal -- the sentencing effort, the sentencing system with the broader criminal justice system. And one thing to think about is when does that person
first touch the system? Because, if you can start
gathering information at the point of arrest or
somewhere early in the system, and feed that
information through the system, it reduces redundancy,
but it also makes sure it's more accurate information,
that you're tracking the same kind of information.

There is a real importance of having detail
or granularity of the offense. To the degree
possible, again, as much information that can be
collected at any point in the system, and passing that
through, provides better information downstream for
any number of reasons. And, that's not only on the
offense. That's about the offender, and about the
victim.

One of the ways to make sure you see this as
a systems approach, or to use it as a system, is to
make sure you're utilizing common, and reliable, and
multiple identifiers. I mentioned State I.D. is
fingerprint-based, and OTN is a court-generated
identifier, and there certainly ought to be Social
Security number and things like that. So, try to take
in as many of those as possible, so that there is some
linkage for future use.

Also, on the information collection, trying
to think in terms of aggregating from the individual
level information.

Professor Chanenson talked about the need for as much robust information about the individual as you have, and the idea is using that as your baseline and building up, so that you're building aggregate information about offenders at that level of detail that you're pulling together at a county or statewide level.

Some of the things that we find that we have to keep in mind, at least from a sentencing commission's point of view as we're collecting information is how are we going to use this down the road. And so, there are important things like unit of analysis. We get a lot of requests from the General Assembly, regarding legislation moving through.

Sometimes there's interest in how many people have committed this kind of offense. You know, how many beds are we going to be taking up in the prison? This one person might have done 50 burglaries, but it's one person that we're thinking about right now. So -- so sometimes the unit analysis we're thinking about is a person level.

Sometimes, it's the offense level. How many burglaries were there?

Sometimes, it's the sentence level. How
many burglaries resulted in a prison sentence?

Then, there's also the level of analysis. Are we looking at all offenses? Are we looking at criminal incident? These are all the offenses this offender committed on this date.

Are we looking at a judicial proceeding? These are all the offenses this offender was sentenced on, on this date.

Because, there is just a lot of ways to cut it, and a lot of times we will get requests that it's really important to know unit of analysis and level of analysis to determine what answer or what question the person is really asking, what information they really need.

Information collection is important. And, for many years, we've been doing this information collection in a very paper-bound method. And what we have done over the last several years, probably most of the -- probably the last five or six years, is really moving towards an automated approach.

We're getting read to release four years of sentencing data. In fact, we'll be releasing our 2006 sentencing data probably in the next week or two because we've moved all of this to an automated method and because we can leverage other users in the system,
and we can pull in information from other parts of the system.

Just, again, the information flow, thinking about how your process works, and what are the earliest stages in the process where you can identify information that's useful to your system.

This is an example of a sentence guideline form that is -- has typically been used in Pennsylvania. There's a lot of offender information. On the left-hand side, and a lot of criminal history information -- prior convictions, prior juvenile adjudications. On the right-hand side, at the top, detailed information on that offense for which the person was convicted. And then, down below that, sentencing information on that specific offense.

Just to give you sort of some scale, Pennsylvania, I think that in 2006, I think we had about 135,000 or 140,000 individual sentences reported to us. That probably represents somewhere in the neighborhood of 90,000 offenders.

So, if you think about this as a paper process, that's very difficult, and it's very time consuming. But, what we've moved is the development of what we SGS Web -- Sentencing Guideline Software Web application. And so on line, importing
information from other parts of the system, we -- we obtain information from the counties on the individual offender, on that prior record score, that information about prior offenses and prior -- prior convictions and prior adjudications. We have specific information on offenses.

And -- and one of the things that we sentencing commissions tend to do is sub-categorize offenses, get into much more detail than may be even provided in the statute.

In Pennsylvania, under our drug offense statute, we have a drug offense called possession with intent to deliver, basically drug trafficking. The statute has, basically, two categories, based on some very low-level kind of requirements. I think we have in the neighborhood of 80 or 90 separate sub-categories, where we look at type of drug, weight of the drug, and so forth, as -- as ways of trying to understand better what judges are doing, or -- or to provide recommendations on sentencing. So, offense information on the specific conviction offense is important.

In Pennsylvania, because we have guidelines, this application calculates the guidelines, based on the information entered. It includes information on
sentence imposed. And, in here, we have a pull-down list on mandatory minimum sentencing provisions, or enhancements like for drug -- drugs in a school zone, or deadly weapons, so we're getting more and more detailed information on each offense and the sentence imposed.

And, with that kind of information, what we can do is, at the individual offender level, at the judge level, at the county level, and the state level, we can generate reports or make reports available for internal use in the counties, on the type of sentences for given offenses, conforming to the sentencing guidelines, when mandatory sentences are being used, place of confinement -- county jail versus state prison -- and then detailed reports that look at offense-specific information, offender-specific information, and county-specific or judge-specific information. And those --

COMMISSIONER O'DONNELL: Mark, just a quick question. Who is completing that? When you say it's coming from the counties, --

MR. BERGSTROM: It depends on the county.

COMMISSIONER O'DONNELL: -- is it the courts, or the --

MR. BERGSTROM: The court -- the local
court makes the determination about who in the county will do it. We build the application so it can be multiple users.

So, in some counties, it could be that the District Attorney's Office or the Probation Department may do the form prior to sentencing, putting in the information, calculating the sentence recommendations. And then, it could be the judge's law clerk or someone else goes in, after sentencing, and puts in the sentencing information. And then, that's automatically reported to us.

And, so some degree, the way that the system works is we do have a central -- a central application that all of that information from the state is going to, and, in effect, each county has a -- has a parcel of that. They have -- they can extract any information that they put have put into the system for, that relates to their county. But, it also allows them to find information on an offender in their county who has been sentenced in other counties.

And, at this point, we have information in the system from the year 2000 through present, with gaps on 2002 and 2003, because it's under an old system, and we're re-entering that information.

COMMISSIONER O'DONNELL: It's a -- it's
very impressive, but what's the hook? Is it mandated by law that the counties do it?

MR. BERGSTROM: Yes. There is a requirement that courts must consider the guidelines when sentencing, and must report the information to us.

In -- in the past, and this was why there was a time lag, they'd fill in one of those paper forms for each and every offense, eventually mail it to the Commission. We would try to read it. We'd enter it into our system. There would be errors if it's an illegal sentence. We'd mail it back. We went through that whole process for 140,000 offenses. And, it was very time consuming. This is online, and it requires use of --

MR. VANCE: Mark, is this available beyond the Commission, to a broader public?

MR. BERGSTROM: Indirectly. The Commission has a release of information policy, under which we have -- we make available any of the information we have in our system. The only things we extract from the information are confidential information like Social Security numbers, and reasons that are given for departure sentences that might be protected information -- health information, things like that.
Otherwise, the information is available.

The release policy helps us to sort of manage the workload of it, to make sure that we're not overwhelmed. But, in addition to creating reports that we can provide to people -- standard reports like this or custom reports, at a charge -- we also release datasets. So, a person can order from us a dataset -- 2000 sentences in Pennsylvania, 2000 sentences in Philadelphia -- and they can get that. And that's -- in fact, when we did the last release of information, a number of the major newspapers -- Philadelphia Inquirer and others -- purchased a dataset from us and hired a programmer to go through and play around with the data.

So, it gets to what Professor Chanenson was talking about, about transparency. It really puts the information out there. And, there are sometimes some downsides to that.

There was an instance, when we did the last release of information where one newspaper just, I think, misused the information. And, we did what we could to address that issue, but it was still an uncomfortable situation.

On the other hand, the Philadelphia Inquirer did a very responsible job, and actually looked
through the information, identifying judges that may have under-reported sentences to us, and put that out. And the court, in a very responsive way, really tried to address those kind of missing cases. So, the public exposure of this actually helped to improve the quality of the information we were getting.

MR. CHANENSON: And actually, Mark, I think -- Mark, is that right by statute that it has been this way since 1979? Judges have to -- judges have the ultimate responsibility -- whether they do it, or delegate it to some extent is a different question -- to report the sentencing information. In my ideal world, as we interact with our office of -- the Courts Administrative Office of Pennsylvania Courts, I would love it if the court could not leave the judge's docket until it was --

COMMISSIONER O'DONNELL: You got the information --

MR. CHANENSON: -- checked off with ours. We don't have that. I think that would be helpful, because there is still some under-reporting, not a lot.

Because, of course, while it's required, we have no enforcement mechanism. Mark doesn't go and kick down doors and talk to people who don't fill out
their forms.

And then also, our statute only requires reasons if there is a deviation from our guidelines. And, our guidelines are pretty broad. There is a standard range, a mitigated range, and an aggravated range. Only if you are outside either the mitigated or the aggravated is it considered a true departure from our guidelines.

And, at this point at least, our Commission has refused to compel judges to provide reasons, even through a drop-down box, as to why they imposed the sentence that they did. To my admittedly academic perspective of what I'd like to see in the sentencing information system, I would like to see that compelled. But, I don't want War and Peace, and I know the judges have a lot to do, but providing even from a drop-down menu reasons as to why can be helpful.

Sometimes, we do get reasons. Sometimes, they're helpful. Sometimes, they're not so helpful. My favorite one is someone -- a judge who once wrote on a form as to why the sentence was imposed, "Because it's enough."

[Laughter]

MR. CHANENSON: And, while that may be
undoubtedly true, it doesn't do a lot for the
Commission in helping it to continually improve the
system.

MR. BERGSTROM: I should note that the
Commission on Sentencing is a legislative agency. And
one of these examples of working with the court is
this tremendous interface that we have in this system,
where we are, through this application, importing
information from their system.

So, a user goes into this application, just
types in the offense tracking number, and it pulls in
all the offender information and offense information
from -- basically, from the case as it was bound over
to our trial courts. Our Administrative Office of the
Courts has just upgraded and put in place a statewide
trial court system, information system, and that's
where we have this opportunity now to not only to pull
in the information from their system, but we're
pushing information back to them now.

So, when someone completes the information
in this system, that information goes back to the
courts, which is then forwarded from the courts on to
the State Police for the repository. So, we have much
more granular information in our criminal case for rap
sheets, based on information in this system.
But, it shows the coordination between our two agencies, and it also shows the opportunity for us to be able to get information down to the courts about conviction offenses that we didn't receive forms for, and to try to do a little bit more as an error check on that. So, I think as time goes on, we'll be having a much more seamless system.

Let me quickly move through some of these other things, and then we'll take some more of your questions.

Information exchange. Just the idea of trying to figure out ways to leverage an information system like the one you described here, to use information that's already out there, that you don't have to enter it again.

It's really important, I think -- at least we found it, in our experience -- that whoever is the owner of the information has to be able to control access to that information. We had -- for instance, one of the things that the State Police in Pennsylvania are very concerned about is whether certain information can make its way through to defense attorneys. Nothing against defense attorneys, but at least our State Police are very concerned about investigative information somehow making its way to
individuals that shouldn't have it.

And so, it's very important, at least in our protocols, that whoever owns the information really controls who can access it. And, we have rules and permissions, and other things like that, that are used to control that kind of access.

COMMISSIONER O'DONNELL: So, you also have crime data on the system that comes from the police agencies?

MR. BERGSTROM: Yeah. For instance, within this system -- a user in our system, through this JNET system, can get an almost instantaneous rap sheet on that person.

But also, within our own information, internal information system, a user can see any prior guideline form in the system on that offender. So, to some degree, you have two different means by which you can look at sort of the criminal history information that's relevant for sentencing.

And, that's really important for research purposes, to move it in the other direction, looking at information we have or individuals we have in our system, and say have these people been re-arrested in the next three years or so. And, I'll talk in a minute about a technology that really makes that
pretty wonderful.

So, we have protocols. We have -- I talked before about it -- common identifiers. What you'll find sometimes, though, is you don't have common identifiers. And so, we have a project where we are developing a crosswalk across all the criminal justice agencies. We call it a master charge code project.

But, it's basically an electronic matrix that really goes to the most granular offense listing that any agency has, and maps that across all of the agencies, as well with the federal codes -- UCR, and NIBRS, and others -- and also feeds in information from LexisNexis on any new statutes enacted, so that that's automatically brought into the system. And then, everyone that has data in the system is creating codes that match that.

So, this crosswalk is great to sort of, you know, looking back in time. It provides a mechanism to try to find current equivalents across the Fed system. And prospectively, it gets everyone sort of on the same page. As we're thinking about what code we're going to give to this offense, we now know what code is important to the State Police, or the Parole Board, or the Department of Corrections, and we're all sort of on the same page, as we're establishing new
codes. So, a very important way of helping to improve things moving forward.

And, I know we talked about technological solutions. I'm going to talk about -- I'm going to show you slides on these five things: flexible search, notifications, interface, and indexing. I guess that's four, but here's the first one.

Flexible search. Anyone who is a JNET user in Pennsylvania can go into this one screen -- and it's a secure network that we have -- and put in any kind of identifiers they have, and identify the sources that they want.

They can identify anything they want, but based on that person's security role, and the permissions that person has as part of their profile, they'll only receive back information from those agencies and those data sources that they're permitted to have access to. So, it's a sort of one-stop shopping. We call it a justice data flexible search. Put in information, get back any information you want on an offender.

So, it's a very discrete, one-to-one kind of thing. I want to know about this offender. Send me everything, or just send me the Department of Transportation records, or things like that. So, this
is the system for that.

This is something we call notifications. And what notifications does is use this technology we have in place to automatically contact people when some event occurs.

So, for instance, if I'm a probation officer, and I have a caseload of 200 people, I can post a listing of all the people on my caseload, and I can identify what type of trigger I'd like to have the system keep track of. Let's say I'm a P.O., and I want to be notified anyone on my -- when anyone on my caseload is arrested. So, I post my caseload and indicate arrest. Any time any person on that caseload is fingerprinted, a notice automatically goes to that person, saying "John Smith has just been arrested. He's in this police department. What should we do with him?"

So, notifications is a very nice way, a very public safety oriented way of quickly leveraging the information throughout the whole system to help you make decisions quickly.

One interesting way that the Commission -- that our Commission has been using this is for research. We're required under statute to do an evaluation of our state motivational boot camp. And,
one of the things we wanted to do or have been doing, and it's very labor-intensive, is checking on recidivism.

What we started to do was with every cohort of graduates -- every month, a new cohort comes out -- we add that cohort to our ongoing list of people who have graduated. And we, through notifications, indicate that we want to know if they're arrested. So any time anyone who's graduated from the boot camp is arrested we now know about it, and we use that as a means of tracking recidivism for that population.

Recently, the Department of Health in Pennsylvania was added to this service. We can now get death notices.

Well, here is the interesting thing. We've been doing research for a while on boot camps. Initially, we didn't find much of a difference with our boot camp. With a lot of programmatic changes, we started to actually see a significant difference, especially when aftercare was a key part of that boot camp program. On one year, we published the information. Statistically significant difference because of the boot camp -- because of the aftercare component.

The next year, we just started receiving
death notices. And, there were -- I forget if it was
eight or ten offenders had died. Well, we thought
they were successes. Maybe they were.

[Laughter]

MR. BERGSTROM: But, because of that
difference -- because of getting death notices, the
study was no longer statistically significant. So it
was, you know, it was still a pretty nice program, but
-- but just having death notices really improved the
quality of the research we were doing. And, it’s an
automated system.

So, it’s just little sort of tools like that
are really helpful in improving the use of information
in the system.

Here is the interface that I was talking
about. A user puts in an OTN. It goes out and grabs
information from other systems, populates our
application.

And finally, --

MR. CHANENSON: Mark, mention just briefly,
the DJS system, and again, this kind of reaching --
reaching down to the first contacts in our system.

MR. BERGSTROM: Right. In Pennsylvania, we
have two levels of courts, generally magisterial
district judges, magistrates for the initial hearings,
and then a Common Pleas Court. And, the Administrative Office of the Courts has those two systems, has an automated MDJ system, and an automated CPCMS system.

Initially, we were only pulling in the information from the MDJ system, because that was the only information available on the statewide level. We are now in the process of transitioning over to the Common Pleas -- the trial court system.

And, the way our system is going to work is it will first look for information in the Common Pleas, in the trial court, and pull in that information because it will be more current information, and it will be more in keeping with the status of the case. But, if that information isn't found, then it will go back and grab the initial court information, the Magistrate's Court information, and bring that into the system.

One of the things that Professor Chanenson has been a big fan of all along is making sure that we can track information back to that point of arrest, for that first hearing, the preliminary hearing or arraignment, so that we can start to look at those trends of what was this person arrested for versus what was the person convicted of, versus what was the
person sentenced for, and then what were the outcomes for whatever sentence was imposed. So, this provides a better opportunity to link all of that together.

MR. CHANENSON: The obvious connection is -- and I believe this is one of the things in your mandate -- is the impact of plea bargaining. As you begin to see the broader array of charges at the top end of the process to what goes down, and starting to be able to drill down as to why.

MR. BERGSTROM: And again, the final little tool that we have, and this is fairly new -- and, in fact, as we looked at a lot of work done in New York City regarding pre-sentence investigation reports and software for that -- but, we have an index in this system, where any time a court in Pennsylvania orders any type of report -- a pre-sentence investigation report, a sex offender assessment, a drug and alcohol assessment, a mental health assessment, any of those kind of reports -- it triggers a message through the system that populates this index.

And so, all of those -- all of the information on the offender and the type of report is in that index. And then any user -- a probation officer, or other -- can go in, put in the identifier information, and pull up information on any report
that has been ordered in the Commonwealth for that offender.

This only goes back, I think, a year and a half, so it's, you know, something that we'll build over time. And, at this point, we provide contact information, but there is still a need to contact that county, basically because of the Rules of Criminal Procedure, to get that report. But, the intent is to eventually automate this so that there is a link to that. If you have permission to see that, you have permission to obtain the report and --

COMMISSIONER O'DONNELL: But, the PSI, itself, is automated and part of the system now?

MR. BERGSTROM: Well, it's a county-by-county basis, because those services -- PSIs are generally done by County Probation or Parole. It depends on which county you're in, as to the level of automation.

Some counties are very automated. Most counties are using a database system for managing offender probation information. Some have automated that and feed it into a PSI boilerplate. Others have not. So, it's a real mixed-bag right now.

And, we're trying to move towards standardizing that a little bit. Our Administrative
Office of the Courts has been a little hesitant to be too heavy-handed in that area, but I think there's a movement towards some kind of standardization. And, it certainly fits in with this setup.

Let me just close by talking about, you know, now we have all of this information, very specific sentencing information, and we have it available within a broader context, where we can sort of crosswalk into other systems. So how can we use all of this information that we gathered?

And, here are some of the things that we do. We certainly have simulation models and projections. We have -- we use it to target people for specific programs, or look at how programs are operating. And, we use it for research and evaluation.

So, just as some examples, we have sentencing guidelines in place. They're automated. We can use a simulation model to change a given cell in the guidelines. Say, for this type of offender, and this type of criminal history, how about if we change the minimum sentence recommendation from 56 months up to 60 months? What's going to happen with our population or with sentences, if we do that?

So, at the sentencing level, we can look at what would happen with changes in the sentencing
guidelines, and how that would impact sentencing decisions.

We can then take that information, and all of the other agencies are doing the same thing. The Department of Corrections, the Parole Board, and others are looking at their systems, doing that same type of thing. And, at a policy level, we're pooling that information together.

We now are using information within our systems to tell us what has happened and sort of what the trend lines are, but we're also bringing everyone together to sort of look at the policy implications. You know, is the Parole Board going to be changing presumptions regarding release? Is the Sentencing Commission going to be increasing guidelines over the next whatever? Is the General Assembly looking to change our sentencing structure?

Those kind of things are brought in at a policy level, and we then come up with correction population projections.

As far as targeting, there's a lot of specialized programs in Pennsylvania that are available at the courts. Part of our job is to try to sort of look at what courts are doing, and then provide them with the information so they can decide
if it's better practices.

One thing that we found really helpful is just a very simple kind of pie chart system like this. In our sentencing guidelines, we have five levels of sentencing. Level 5, basically, being people who we were recommending exclusively for state prison sentences; and Level 1, people we were recommending for community treatment, for no incarceration. So, it's a continuum of those levels.

What we can do -- at the county level, at the judge level, at the statewide level -- is we can look at the distribution of sentences for each of those levels. Because, at Level 1, we're recommending across-the-board non-confinement, but if we're finding any substantial use of incarceration -- either county jails or state prison -- that really provides an opportunity to say what's happening here? Is there a reason why this is happening?

And maybe that's an opportunity. If it's a county jail and they're overcrowded, this is information that might be helpful in saying why don't we look at this population? Maybe there's something you can do.

Up at the other end, with state prison, if we're not seeing total use of state prison, you know,
we start looking at that and saying what is happening there? Are there certain offenders that do not require state prison? Or are there other things we should do?

So, this is just sort of a snapshot that helps to guide, at a very high level, policy discussions. But we can take this into a much more detailed level.

These are our sentencing guidelines. What we've done in this example is we plotted on our matrix every person that went to state prison in a given year that was eligible for other programs -- either for some kind of county program, or some kind of specialized program. And we said, okay, these people went to state prison, but they were eligible for something else. Why is that? What's happening?

And you're looking at, in a very detailed way, the specific offenses and prior record score history. So, once again, if we find programs being under-utilized, or counties or the state are looking for opportunities to try to change the mix or the distribution of sentences, this is really useful information in trying to inform those kinds of decisions.

And then, finally, as part of our research
partnership, the Commission is based at Penn State. Almost for our full life it has been there. And, we have a lot of research projects that we're responsible for, either statutorily, or the Commission has decided on. And really, these are the -- I think the culmination of collecting all of that information, having that kind of integration with other data users, that we can look at how we're doing things, but also how the programs are impacting offenders. So, recidivism and other things like that. So, --

MR. CHANENSON: And, this kind of a relationship is one that has allowed us to leverage our limited resources, to learn more about our own system, by being able to offer the data to researchers, either partial financial arrangement, or simply by encouraging researchers with their own funds to pursue things. It's the opportunity for us to know information that we wouldn't know otherwise.

MR. BERGSTROM: So, I think we're almost out of time, but we have some contact information here. You have the handouts. And, we'll probably have a copy of this, with more detail. But, we're willing to answer any questions you might have.

COMMISSIONER O'DONNELL: Okay. Thank you, very much. We can envision ourselves 20 years from
now, hopefully --

[Laughter]

COMMISSIONER O'DONNELL: Hopefully, it won't take us that long. But any other questions?

MR. ANNUCCI: Just a quick question, in terms of the data you get, the feedback you get, particularly in plea bargaining cases or what the judge may offer as the rationale for a particular sentence.

Some of the cases we're looking at in New York now we're focusing on because of our recent civil management statute with sex offenses. And, you look at the actual conviction in relation to the original description of what the acts were. And, there's a serious gap.

And, we can only assume that a lot of the reasons have to be with a conscious decision by the DA. Some conviction is better than nothing. I have no victim, one who's willing to testify, or it's a young child, or it's too traumatic.

Are you able to capture that kind of level of information? And, are people honestly reporting it?

MR. BERGSTROM: No. Well, first, our sentencing guidelines are based on conviction offense.
So, what we need is what Professor Chanenson had mentioned earlier, which is linking our sentencing information, our court information, back to the original charge information. We now have a mechanism in place that we can do that.

But, what I think you've pointed out, with sex offenders especially, that is -- even if we could do that, that's not enough. Because there is so information that you have to unpack, regarding why that happened.

We -- we have seen that in a sort of comparable area in Pennsylvania. We have a number of mandatory sentencing statutes, but they -- but almost all of them provide prosecutorial notice. So, if the DA doesn't give notice, the mandatory doesn't apply.

So, if you have someone picked up for five -- convicted for five grams of cocaine, the mandatory will only apply if the DA gives notice. If the DA doesn't give notice, then the guidelines apply. And, the issues around when notice is given or not given, and how that all works out, is it take -- it takes a lot of sophisticated analysis of that, because it's really easy to just say off the top, you know, something is going wrong here, or this isn't working right. And, I think we're always worried about trying
to come to a quick conclusion.

So, we have the tools in place to do it, but I think we've recognized that we really have to -- have to drill down, talk to a lot of people, try to figure out what's happening, and try to objectify that stuff.

MR. CHANENSON: And, to the extent that you're also interested in whether we can capture why this happened, the answer is no. I mean, we don't have -- our prosecutors, like yours, I'm sure, have vast discretion. And, that's something that is not on public display, often for good reasons, sometimes for frustrating -- leads to frustrating results.

And again, the judges and their decisions, and asking them for reasons, judges are in many ways the low-hanging fruit, right? They are the ones who operate the most in the public view to begin with. Candidly, they have less political power than the prosecutors do. And, the prosecutors could never prosecute every case of which they become aware.

So, there are areas that will be hidden from view, probably always, and oftentimes for good reasons. But, I think that one of the things you can begin to see, if the judges start to provide more reasons, is where you see deviations in sentences in
some of these kinds of cases. Once in a while you'll see, in a case that's been knocked down, a departure above. And, sometimes you'll see judges give reasons, sometimes not. That gets very delicate, in terms of whether the judge is or should be imposing a sentence more on what the judge believes happened, as opposed to what was the actual conviction. We can get small windows into that, but only on the judicial side of it.

MR. BERGSTROM: You know, --
COMMISSIONER O'DONNELL: Well, thank you --
MR. BERGSTROM: -- it kind of --
COMMISSIONER O'DONNELL: -- and I guess --

okay.

MR. BERGSTROM: Okay.
COMMISSIONER O'DONNELL: No, we can kind of sum up. I'm just going to try to keep us on schedule.
MR. BERGSTROM: Oh, sure, absolutely.
COMMISSIONER O'DONNELL: So, why don't you --

MR. BERGSTROM: I'll leave it at that.

[Laughter]
COMMISSIONER O'DONNELL: Okay. Than you, very much.

MR. BERGSTROM: You're welcome.
COMMISSIONER O’DONNELL: We really appreciate it.

[Applause]

COMMISSIONER O’DONNELL: We have one final speaker today, Donna Hall, since we're discussing research. And, I think we'll keep going if we can. If somebody needs to step out and take a quick break, please feel free to do so.

But, what we asked Donna to do, also kind of contemplating next week and moving forward into subcommittees and getting to work on our recommendations for our preliminary report, is to come up with a list of research projects that either she has kind of focused on, or our research group, because we really have an active research group -- thank you to all of you who are participating. And also, issues that have come up during our various discussions so far in the Commission.

This is not an exclusive list. This is out there to get the discussion going, have you all focus on, you know, are we leaving gaps in what we need to do? But, Donna is going to lead us in a discussion of that, and we may need to do some -- set some priorities. We may not be able to do everything. But, this is at least a place to start.
So, Donna?

RESEARCH AND DATA ANALYSIS GROUP: PROPOSED PRODUCTS

    MS. HALL: Okay. I think that before I give you the products that we're discussing, I want to take a minute just to describe a little bit about the databases that we do have. And, I'll --

    COMMISSIONER O'DONNELL: Yeah, that would be helpful.

    MS. HALL: -- just go through --

    COMMISSIONER O'DONNELL: I wrote a note about that.

    MS. HALL: You know, the problem has been you understanding what we can ask for, and what we can produce easily, what would be more difficult.

    DCJS has a criminal history database that will be used heavily for this research. And the criminal history database is kind of -- is initiated at the arrest stage. So, it includes any fingerprinted arrest in New York State. And that would be any misdemeanor or felony, and a long number of violations related to prosecution.

    Once there is an arrest made and the fingerprinting is done, we get a record that shows all the charges related to that arrest offense.

    As that person proceeds through the court,
they're arraigned in lower court. We then link to OCA's database, and they shoot us all the information related to arraignment -- what the charge is, if there's any dismissals.

We pick it up again at indictment. We get information on what they were actually indicted on. And then, through dispositions. We get information of what the disposition of the case was, and what the sentence will be for them.

So, we actually have the database that links from arrest through sentencing. And also, that links various records of a single individual. So, if you ask me, you know, I want to know everything this person has ever been arrested for, that's all readily available in this database.

The database also links to probation admission records. It links to DOCS admission records. It's going to be linking to jail admission records, only at this point, to my knowledge, it doesn't. We might, in the future, have that database.

So basically, we can -- you know, we can identify all the charges in an offense. We know every charge that anyone has ever been arrested for. We know exactly what happened to the charges, what sentence did we have.
What this allows us to do is not just to look at an individual's history, but we can cut -- place a period of time, and see what happened subsequent to that period of time. So, I can say, if you ask me, for example, tell me everybody who was sentenced to jail in 2002, and what happened to them over the next three years, you know, we just built the database to do exactly that a couple of days ago.

And, we can do that for jail. We can do it for prison. We can do it for conditional discharges. We can it for drug offenders. We can do it for robbery offenses. We can do it for people with these kinds of histories, or those kinds of histories, and all kinds of combinations of those.

So I think that, you know, in terms of understanding who our populations are, and what happens to those people in the future, we have a very rich database to do this with.

In addition, what we do is link to DOCS database, and we have Probation's database, and we also have linked, at times, with Parole's database. And, we pull these in and integrate them.

So that, for example, when people leave DOCS, we routinely look at what happened when they're out -- two years out, and three years out -- in terms
of re-arrest. Not just whether they were and how long
it took, but what they were re-arrested for. So,
these databases all mesh pretty easily, and we can do
that routinely as well. That data will be available
for use.

So, for example, if we want to know what
happened to Shock people, and we want to compare that
with other people, we have the history. All that kind
of analysis is just readily available.

For us, it's just a -- you know, in some
ways, a flick of a switch. It's actually kind of more
complicated to define the question, and make sure that
we're analyzing it right, than it is to actually
produce the answers, because much of it is on the --

COMMISSIONER O'DONNELL: Donna, do you get
much sentencing information? Do we get, like,
judge-specific sentencing information?

MS. HALL: Well, that's an interesting
question, because I started thinking about that as
they were saying it. We do -- we obviously get down
to the county. In our analytical database, we don't
include information on who the judge was. I believe
OCA has that information. I don't know if we -- we do
get it Sharon?

Okay. So, we have it available on our
database, but we don't routinely put it --

COMMISSIONER O'DONNELL: Report it, or --

UNIDENTIFIED: We've been uncertain about

the quality of the data.

COMMISSIONER O'DONNELL: Um hmm.

UNIDENTIFIED: I think -- I think there is

also missing data.

MS. HALL: Okay. So -- so, yeah. We --
you know, we can drill down through it pretty far, in
these -- in these situations. So, that's the kind of
data that we have available.

Now, one of the -- we wanted to try to
jump-start the process a little bit by helping the
groups identify potential research products that might
be of use.

We have a research support group that's
attached to this Commission. It includes folks from
DCJS, from Parole, DOCS, OASAS, Division of Budget.
And now, OMH is going to be joining this group, as
well. Those will probably be the core agencies at the
State level. We may also be incorporating some of the
local research groups into this process.

COMMISSIONER O'DONNELL: And perhaps OCA?

MS. HALL: Perhaps OCA, Center for Court
Innovation, and CJA, we'll be inviting into this.
And so, as we -- as the subcommittees start working, I believe that you will be identifying many research questions that you'll want answered, and we'll need to prioritize those questions.

We will have research people sitting in on each of the subcommittee meetings. And, they will keep track of the questions as they come up. They will work with the Chairs and the committees to prioritize those questions. And, they will bring it back to the research group, so that can divvy up the work, get a time frame for producing the results, get that right back to the committee Chairs, so that they understand fully how long it will take. Most things shouldn't take too long. And then, you know, again, go through, use the products, and we'll have to make decisions about which agency will take the lead, depending on what the research question is.

I think that, in general, there's a certain series of questions, I believe, that all the committees will be asking and -- whether you're talking about sentencing, or incarceration, or community supervision -- and that is things like what are the characteristics of the population that we're dealing with in these various areas? How do we currently handle these cases?
And that gets into issues about what rules bound our decisions, what resources influence the decisions, and what norms, community norms and policies guide the decisions.

And, what are the outcomes, in terms of the criteria that are referenced in the Executive Order? And, those criteria include things like uniformity and fairness, public safety, rehabilitation, incapacitation, support of victims, cost effectiveness, and transparency of the system. So, we can play all of this out through the data.

And then, what does research within and outside New York tell us about what works, to maximize these various things? To maximize fairness, public safety, victim support? We want to be able to compare what we see in New York with what the best practice is, and make those decisions about where things can get improved, and then identify ways of implementing improvements through programs, policies, rules and regulations, and watch agents.

So, I think that's kind of the process from the research side that the groups will be going through.

We wanted to take a look at potential products. And I have a document, just a short memo
that I put together, that kind of identifies some products that groups might be interested in. And this is, as we said, largely from the information that people have asked about, and things that speakers have spoken about. So, I'll just kind of quickly go over those. And, I think what you'll want to do pretty early on in the process is identify for your subcommittees what your most critical products are. Some of these might fall off the table. Some of them, they might be desired products.

One of them is a working paper describing long-term trends in dispositions, types and length of sentences, and time served inside, and the composition of the correctional population in New York. I think that kind of paper is critical to setting the stage, and also will be important to an internal report. We need to have that baseline information.

Another working paper describing trends in utilization of back end early release programs in New York State, what Shock is system-wide, what Willard is, CASAT, what the populations are. DOCS produces a lot of these reports. And, I think what we're envisioning here is just a real concise summary of that material, or bringing it together in one spot, so we all know what the criteria for admission are, what
the characteristics of the populations are, what is the rate of acceptance and completion of these programs, and time reduction off the minimums associated with these programs. All that type of information will be pulled together in a single report.

Another product that we are proposing potentially is a working paper describing trends in release by Parole, at first appearance. And, controlling for changes in the mix of people who come before the Parole Board. And, I think that's a critical point that we haven't spent a lot of time on. But as we discuss changes in how Parole has released people over time, the rates of release, we have to appreciate that people coming before the Parole Board has changed over time for multiple reasons. Determinate sentencing has, you know, the back end release mechanism changes who comes before the Parole Board.

We might want to do something about looking at the reasons for refusal. And, we're not that familiar with the Parole Board's data, so we have to look at it, to see what might be available and successful. And, maybe do some kinds of analysis of release rates by offender risk, or whatever else the
Another product is a working paper describing trends in terms of parole and probation revocation. And, I think this is definitely something that a number of people have discussed, particularly in relation to parole and, to some degree, with probation.

But, we're envisioning a report that attempts to quantify the reasons for revocation. And, these can be very complicated, because often revocation is a process that builds. They may have two, or three, or four incidents that then leads to a revocation. So, we'll have to try to sort that out. And some of that will come from Parole databases.

The one thing -- another piece that contributes to revocation is re-arrest, you know, coming -- many, many offenders that come back into DOCS on technical violations have intervening re-arrests, and so that technical might be sort of confounded by some new criminal behavior. And, we want to be able to sort that out, so that people understand, you know, how many of these cases are truly potentially purely technicals, and how many might be part of a larger plea process, where they might have decided, well, we'll revoke the guy, rather
than going forward with a conviction. So, we know
that happens all the time.

This is particularly important, I think, because when you talk about changes -- for example, there was some discussion at one of the meetings previously about restricting the reasons people can be technically violated, you know, to -- to not allow for a technical violation unless there's a conviction, a new felony conviction.

The problem, the potential problem, or the unintended consequence of something like that could be that if we're having trade-offs currently going on, such that folks are getting technically violated rather than getting fully prosecuted, then if we eliminate the opportunity for technical violations, we could change those prosecution patterns, and we might end up with a bigger prison population. So, we need to keep in mind unintended consequences in all that we do, and we're trying to, you know, kind of play some of that out, by looking closely at these revocations.

And, looking at probation revocations, which we haven't done much with. You guys may have done more. We don't see many people entering prison on probation revocations. But, perhaps, jail. So, we need to see if that's something we may want to look
And then, a working paper examining recidivism across sentence types and correctional programs. And, that would include looking at not just the prevalence, but the timing of recidivism by type of sentence -- probation, ATI, conditional discharges, prison -- and controlling for offender risk factors -- prior histories, perhaps our risk scores will be used as controls.

And, to the extent possible, we want to compare our recidivism with what we can find in other states. Because, I think that question keeps coming up, you know, how well do we do. And, I think we can begin to measure some of that.

And also, to look at recidivism results with specific correctional interventions. So, looking at recidivism associated with Willard, and Shock, CASAT, and DTAP. And a lot of this, again, has been done to some degree. So, in some of those we're pulling -- you know, pulling the information together. But others will be original analyses, so we're going to add to what's currently out there.

Another product we're proposing is a working paper -- and these next three are more of literature-type working papers. Again, I think
they're important to the background for the committees.

A working paper on national trends in sentencing commissions, and sentencing oversight bodies. And, I think we've got a good start on that just by the information that was presented today.

A working paper on what works in correctional programs, Ed Latessa's material, which is a big boost in that regard. And because we have a separate reentry initiative going, that we've had going for a few years, we have a significant amount of research in that area to get into, so we'll bring that to bear on, you know, these questions.

And, a working paper on the cost of corrections in New York State. And that, for us, is new. We don't do much with the costs, but Travis Franti, from Budget, sitting in the back, we're going to rely on him heavily to help guide us in that work, to be able to really drill down on how much we do spend in these various areas, and what cost savings might occur if we made some kinds of shifts in the way we sentence, or the way we release, or program costs.

So, those are the general overview working papers that we are proposing to open up for discussion. And again, I think the committees will
arrive, probably pretty quickly, at what their
critical -- you know, their critical questions are for
their area. And, they may be here, and they may not
in these things. So, there might -- you know, I'm
sure there's going to be much more to be done.

I guess, before I pause and ask for
questions, I just want to mention that we do have the
research group in place. A number of agencies have
come together already. We've had meetings. We're
going to be meeting every other week. The meeting is
going to follow this meeting, a day later, and start
divvying up the work and, you know, making
assignments, given what comes out of the
subcommittees.

We will be recording all the questions that
come from the subcommittees. Again, we'll be playing
that back to the Chairs, so they know exactly what
we're going to be working on, and if we're not working
on the right things, we just need to know, and we'll
make a shift.

And, we'll try to get this stuff done just
at a real quick pace, at least preliminary findings.
If you want real in-depth analysis, it can take
longer. But, you know, sometimes we can do this stuff
in stages, so that we're not leaving people in the
dark as they need to know.

   And then, we've been talking about if -- if, in fact, it comes to discussions about some changes in sentencing then, you know, we can play those out. We can model those changes.

   One more point, I think, as I was listening to these guys speak, there's a couple of other points that I want to make.

   In some ways, some of the criticisms of our Penal Law regarding its kind of excessive detail has been a blessing for research. Because, we have a significant amount of information built into subsections of our Penal Law. So, we can tell is there a weapon, was -- you know, and some -- sometimes, was there injury? Was there a child victim in the case? And, in certain situations, we can identify that.

   So, you know, the type -- in some situations, we can identify the type of drugs that were used. So, the detail of our Penal Law actually benefits us, in terms of research. And, we'll -- you know, we'll bring that to bear on this process, as well, you know, to say about what these cases look like at different points in time.

   COMMISSIONER O'DONNELL: So -- so, our work
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1. is going to be changing from sitting here and soaking up what people are giving out to us, to having to produce it ourselves. And everyone's homework assignment is really to go through this and think about where we have gaps, what it is that we should be looking at.

   Because, you know, I do think it's critical that our recommendations can be supported by data. And, we need to make sure we have the data at our exposure. So, for our subcommittee Chairs, but for each and every one of us, or people who have been participating, please take a look at this, and send us your thoughts and suggestions for research projects. And, I know it will evolve, but we really need to focus now on what we need to do the most.

   So, any questions for Donna?

   MR. ANNUCCI: Donna, I may have even asked this earlier, but I'm always interested in if there's a way to compare time served data for old indeterminates for a particular crime, and after the Sentencing Reform Act, the same comparable crime under determinate sentencing.

   Do we have that capability? Have they been in the system long enough? Because, in '95 determinates went into effect for repeat violent
felons. So, for argument's sake, if you looked at all '96 DINS for rob one, compared time served for them, with all '90 DINS for rob one, what -- what would that tell us? And, is that a legitimate, reliable, valid measure, in that we might still have rob ones still serving set time, who I assume you wouldn't capture, because time served means they've been released, and that's --

MS. HALL: Right. Most of those early commitments have been released. We do keep track of them, because we're looking at them for recidivism purposes, particularly since there's a cohort of them that did not get parole supervision. And so, for three years. So, we're looking at those. We actually have some comparisons.

But, yeah, we can do that. We have done some of that. We did put together a report that was reported by the legislature, back in the early 2000s, making some of those comparisons. And now, they -- it would be even stronger, because we have a larger portion that are already completed and are out.

Basically, what we found with the initial S.R. 95, which was the second VFO predicates, that the time served under determinate was longer than it had been prior to '95, but as -- as -- with the new
administration in '95, the Parole Board changed its practices, so it began to hold people longer anyway, as indeterminates. And so, the two were washing out a big. Do you know what I mean? Because the indeterminate sentence shifts, depending on Parole practices, so -- so they were starting to look more alike, the indeterminates and the determinates, because of the Parole Board changing its behaviors.

And the '98 change, with the first felons, I believe the sentences actually shrunk a bit.

MR. ANNUCCI: Sentences, or time served, or both?

MS. HALL: This -- at that point, we were just looking at sentences, because it was too early to --

MR. ANNUCCI: So, how do you compare a sentence? Let's say, under the old law, you got three to nine. And, under the new law, you got a seven.

MS. HALL: Yeah.

MR. ANNUCCI: Do you consider that a shorter sentence, or --

MS. HALL: No. We had a formula. We were assuming, you know, a certain rate of release, and we felt, you know, a certain amount of good time. Paul Korotkin developed formulas --
MR. ANNUCCI: Okay.

MS. HALL: -- and we've done those before. But we -- we had done some of that, but I don't think we have actually looked at time served on the -- on the first VFDs, because it was too early. But yeah, we can do that.

MR. ANNUCCI: But at least the research you've done to date seems to indicate slightly shorter sentences under determinates for the comparable offense.

MS. HALL: On the first determinate --

MR. ANNUCCI: On the first.

MS. HALL: -- yeah, it looked like it was going shorter.

COMMISSIONER O'DONNELL: But it sounds like this type of research would help us with this question that gets raised repeatedly, as should we go to a completely determinate sentence, maybe with, you know, some exceptions for life sentences and that sort of thing.

MS. HALL: Yeah.

COMMISSIONER O'DONNELL: So, if we could look and see if it seems like the sentences would be relatively the same, whether they'd decrease, whether they'd increase, it -- it would be helpful for us --
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MS. HALL: Okay.

COMMISSIONER O’DONNELL: -- to make that determination, I think, as a Commission.

MS. HALL: Good.

COMMISSIONER ALEXANDER: I don't know if you have some of the data for both of those new department rates of recidivism, as well.

MS. HALL: For the indeterminate and determinate --

COMMISSIONER ALEXANDER: Indeterminate versus determinate.

MS. HALL: Yeah. We can do that, and that's an -- that's an easy, fairly easy lift. And, of course there, you have that confounding factor that you eliminated parole for three years, --

COMMISSIONER ALEXANDER: Right.

MS. HALL: -- which -- which is unique, and it's kind of a unique experiment that New York engaged in.

COMMISSIONER O’DONNELL: So, that's a group, I take it, you can study --

MS. HALL: Yeah.

COMMISSIONER O’DONNELL: -- to -- to look at the effectiveness of parole?

MS. HALL: Yes. We -- well, to look --
yeah, to see whether it made a difference. Now, this is for a narrow population of people that would be involved, but it's certainly something we have to look at, because it's so unusual to have that kind of switch for a period of time.

And, the other thing is, you know, the shortening of parole terms, I mean, with -- with the drug offenders. Now, this is a little early for that, but that's going to be another thing for us to look at.

We're also going to be looking at exactly when people begin -- when people fail. Because, you know, a number of people have raised the issue that we ought to, you know, reduce the parole terms, reduce the probation terms. And so, we're going to the survival analyses and see is there a point in that term where it gets -- the probability of a failure gets so low that it's not, you know, it just doesn't happen, so it makes sense to continue that, you know, that term. We're going to at least identify the points where they drop off.

COMMISSIONER ALEXANDER: Now, given what you say that there was a change in the Parole Board's practices, can we still measure rates of recidivism for groups that were conditionally released, as
opposed to those who were discretionarily released?

MS. HALL: Oh, yes, yeah. In fact, we did some of that already, the CRs, and the -- yeah, and the discretionary release. And actually, CRs do a little worse, you know? But in part because those CR -- well, I won't say that. The MEs do the worst, and that's because they come back so many times.

COMMISSIONER ALEXANDER: Right.

MS. HALL: But, the CRs tend to do a little worse in parole.

COMMISSIONER O'DONNELL: Well, once again, thank you. I want to especially thank the staff -- Gina, and John, and Patty -- for their efforts in putting this all together. And, thank all of you for your enthusiastic participation. I hope you can all make it next week. It's going to be a very important meeting.

And, please continue to give us all your suggestions, and information. For those who didn't know ahead of time, we were invited to a lobsterfest at the Federal Law Enforcement Council at the University Club. I think that's at -- what time does it start? Six. I'm sure we could probably add a few people on, if anyone is going to be around and wants to participate in that, by letting Anthony Bergamo
know.

We have checked with the Ethics Commission, to ensure that we could attend. It's a widely attended event. So, we -- we can attend, those of us who are in the Executive branch. I assume it's the same for others. So, we'll see some of you there.

And, thanks a lot for your participation.

[Time noted: 4:05 p.m.]

* * * * *
I, June Accornero, do hereby certify that I typed the preceding transcript of the proceedings of the New York State Commission on Sentencing Reform, held on Wednesday, July 11, 2007, at Governor's Office, 633 Third Avenue, New York, New York, and that this is an accurate transcript of what happened at that time and place, to the best of my ability.

June Accornero