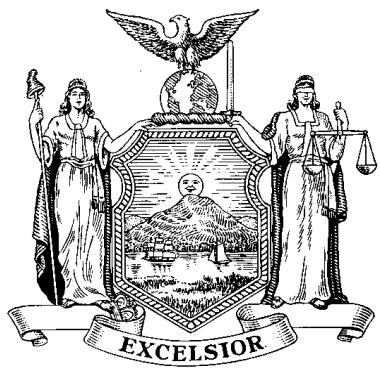
The Future of Sentencing in New York State:

Recommendations for Reform



New York State
Commission on Sentencing Reform

January 30, 2009

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Acknowledgments

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[*]The testimony from the Commission's public hearings is available at https://criminaljustice.state.ny.us/legalservices/sentencingreform.htm.

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EXECUTIVE SUMMARY

Executive Summary

I. Overview

New York's sentencing laws are rarely examined in a comprehensive manner and have not undergone a thorough revision in more than 40 years. The sentencing statutes have, however, been subjected to piecemeal and ad hoc revisions over the years, ranging from minor amendments to the revision of entire articles of law. The result today is an incredibly complex sentencing structure capable of confounding even the most experienced practitioners. Against this backdrop, the New York State Commission on Sentencing Reform was established by Executive Order on March 5, 2007, and charged with conducting a full review of the State's sentencing structure and practices and making recommendations for reform to all three branches of government.

Throughout its tenure, the Commission strived to gain an in-depth understanding of the myriad issues surrounding New York's sentencing laws, and to devise a series of recommendations, both experience-based and data-driven, to simplify, streamline and make more equitable the State's overly complicated system of sentencing. The Commission heard from state and national sentencing experts, and formed subcommittees to explore and make recommendations on sentencing policy, simplification of the current sentencing structure, re-entry, and supervision of offenders in the community. It organized focus groups and conducted public hearings throughout the State to obtain feedback on these issues from judges, sentencing experts, criminal justice professionals, elected officials, practitioners, crime victims, formerly incarcerated individuals, advocacy groups and others.

In the Commission's October 15, 2007 Preliminary Report, a substantial majority of members recommended the adoption of a mostly determinate sentencing structure for New York State and proposed other targeted reforms to help simplify the State's labyrinthine sentencing structure. The Report called for a comprehensive review of the State's mandatory drug sentencing laws

for certain non-violent felony offenders to determine whether further reforms would be appropriate and consistent with public safety, particularly with respect to the diversion of drug-addicted non-violent felony offenders from prison to community-based treatment. It also recommended the broader use of evidence-based sentencing and correctional strategies to reduce crime and enhance public safety, as well as the development of more efficient and cost-effective ways to use the State's limited correctional and community-supervision resources. In addition, it recommended streamlining and strengthening the State's statutory framework for crime victims and, finally, proposed the creation of a permanent sentencing commission for New York.

Relying on an extensive body of data, the Commission, in its Final Report, offers an expanded and more detailed series of proposals and recommendations for simplification of New York's sentencing structure, reform of the State's drug laws, implementation of evidence-based practices and other reforms in the areas of re-entry and community corrections.

Part One of the Report provides a detailed history of sentencing law in New York as an important focal point for understanding the critical role of sentencing in New York's criminal justice system and the influences that have shaped it over time.

Part Two of the Report calls for simplification of New York's sentencing structure by adoption of a primarily determinate sentencing system and offers extensive sentencing data to guide the State in establishing fair and workable sentencing ranges for more than 200 non-violent felony offenses that currently carry indeterminate sentences.

Part Three of the Report examines positions both for and against additional drug law reform, the disproportionate impact of drug sentencing on persons of color, the success of drug courts and drug diversion programs, and data regarding the availability of diversion programs throughout the State. The Commission provides recommendations for the future direction of drug law reform and offers a menu of options to expand the ability to divert prison-bound,

drug-addicted, non-violent felony offenders into treatment and to impose alternative, non-prison, sentences for certain first-time felony drug offenders.

Part Four reiterates the Commission's call for a more evidence-based approach to sentencing, inmate programming, re-entry planning and community supervision through the use of a common, validated, risk and needs assessment methodology. The Commission also recommends that Parole adopt a system of "graduated responses" for parole rule violators and that New York continue to expand recent re-entry initiatives designed to facilitate the seamless transition of formerly incarcerated persons from prison back to the community.

Part Five of the Report includes proposals to expand eligibility for the Department of Correctional Services' ("DOCS") successful and cost-effective Shock Incarceration and Merit Time programs, as well as recommendations to improve the program at the Willard Drug Treatment Campus.

Part Six offers several victim-related proposals, including recommendations designed to improve the ability of crime victims to meaningfully participate in sentencing-related matters and to enhance the collection of restitution from an offender when ordered by a court.

Finally, Part Seven urges the creation of a permanent sentencing commission to better respond to emerging sentencing trends in New York.

As was the case with the Commission's Preliminary Report, not every proposal and recommendation described in this Final Report enjoyed the support of all the Commissioners, but the members did reach unanimous, or near-unanimous, agreement on most proposals. The lack of unanimity in these instances reflects the weighty and complex nature of the subject matter and the deliberate approach taken by the Commission members to their charge.

II. Greater Simplicity in Sentencing

A. Adopting a Predominately Determinate Sentencing System: Determinate Ranges

Sentencing experts and practitioners alike stressed to the Commission the difficulties of navigating a system of sentencing that has not been comprehensively revised in more than four decades. Operating in a hybrid system where most violent, sex and drug offenses are punished by determinate sentences while hundreds of non-violent, non-sex, non-drug offenses are punished by indeterminate sentences makes sentencing in New York needlessly complex. Determinate sentencing has been the unmistakable trend in New York, with the Legislature recently adding all felony drug and sex offenses to the list of crimes carrying a determinate, rather than indeterminate, sentence.

As a step toward greater simplification in sentencing, the Commission, in its Preliminary Report, recommended converting from indeterminate to determinate the authorized prison sentences for more than 200 non-violent, non-sex, non-drug felony offenses**.** Supported by all but two members, the Commission's recommendation was based on the belief that, as compared to indeterminate sentencing, the determinate model promotes greater uniformity, fairness and "truth-in-sentencing." The determinate model facilitates more informed plea bargaining and allows the parties, the court, and the victim to have a clearer picture of the actual time the defendant is likely to spend under custody.

The challenge for the Commission was to arrive at a set of fair and workable sentencing ranges for these offenses. Most members agreed that, given the extremely diverse types of crimes included in this "catch-all" group of non-violent felony offenses, the Commission's proposed determinate ranges should preserve the fairly broad range of prison sanctions currently available to sentencing judges under the indeterminate structure, while taking into account the very different ways these two types of sentences are calculated. These Commissioners further believed that the new determinate ranges should be informed by time-served data for the various crimes so the

conversion to determinate sentences does not result in appreciably longer or shorter periods of incarceration than for offenders serving sentences under the existing indeterminate model.
In what may be the first such effort in the State's history, the Commission conducted a comprehensive review of DOCS' prison release data over a 23-year period (1985 to 2007) to determine the actual prison time served by offenders sentenced under the existing indeterminate scheme for each of the targeted Class B through Class E non-violent felony offenses.

The Commission examined three distinct models for establishing determinate ranges for these offenses:

- A Conditional Release-Based ("CR-based") model that establishes the maximum determinate sentence by matching, as closely as possible, the conditional release point of the proposed maximum determinate sentence to the conditional release point of the current maximum indeterminate sentence.

- A "Time-Served" (or "98%") model that uses time-served data for the 23-year DOCS' release group to determine the point at which 98% of all releasees in a given classification level (e.g., 98% of all Class B felons) had been released on their indeterminate sentences; that number is then used to fix the proposed maximum determinate sentence.

- A "Determinate Drug" model that adopts the same sentence ranges for these 200-plus non-violent felony offenses that were established by the Legislature when it converted prison sentences for all felony-level drug offenses from indeterminate to determinate in 2004.

Most Commissioners preferred the CR-based model because they agreed that it came closest to the stated goal of preserving the scope of prison sanctions available to judges under current law. Under this model, the minimum determinate term for Class B through Class E first-time felony offenders would be fixed at one year, and the maximum terms would be fixed at 16, 12, 5 ½ and 3 years,

respectively. For second felony offenders, the minimum terms for Class B through Class E felony offenses would be fixed at 5, 3½, 2 and 1½ years, respectively, and the maximum terms would be identical to those for first-time felony offenders. Both first and second-time felony offenders would be required to serve a post-release supervision period of one to three years as directed by the judge.

Although some of the proposed ranges under the time-served model were comparable to those of the CR-based model, the time-served proposal was rejected by most Commission members in part because it would call for the reclassification of one, and possibly two, more serious offenses to a higher felony classification level to avoid having to fix unduly long ranges for the remaining, less serious, crimes.

While two Commissioners strongly supported adoption of the determinate drug model, the remaining members felt that the drug ranges were simply not broad enough at the higher end of the sentencing spectrum to account for the wide variety and potential seriousness of the criminal conduct encompassed by the more than 200 offenses targeted for conversion. These members noted that the express purpose of the 2004 drug reform legislation was to substantially reduce prison sentences for drug offenders, not convert existing indeterminate drug ranges to comparable determinate ranges.

As a critical component of any system of criminal justice, a State's sentencing structure must be intelligible, honest and fair. The public, as well as the defendant and the victim, must have a clear understanding of the actual term of the sentence to be served. The Commission believes that the transition to a determinate sentencing structure in New York will provide more clarity and fairness in sentencing, and thereby further streamline New York's complex hybrid system of indeterminate and determinate State prison sentences.

B. Targeted Simplification of New York's Sentencing Laws

In addition to proposing determinate sentencing ranges for non-violent felony offenses, the Commission believes that adopting

additional targeted reforms would help to simplify and clarify New York's overly complicated sentencing laws. Accordingly, the Commission proposes amendments to existing law to: replace the sometimes misleading "violent felony offense" designation in Penal Law §70.02 with "aggravated felony offense" while retaining all sentencing and other statutory requirements pertaining to these crimes; replace the special indeterminate sentencing provision for domestic violence-induced first-time violent felony offenders with a comparable determinate sentencing provision; simplify the Penal Law §§70.25 and 70.30 rules regarding consecutive and concurrent sentences and the Penal Law §70.30 consecutive sentence "cap" provisions; move (or cross-reference) all "back-end" sentencing provisions such as those relating to good time, merit time and Shock Incarceration to a single article of law; provide for an exception to existing Criminal Procedure Law (CPL) plea bargaining restrictions where the court and parties agree; and address existing anomalies in the Penal Law and CPL.

III. A Measured Approach to Reforming New York's Drug Laws

A. The Rockefeller Drug Laws and the 2004 Drug Law Reform Act

In 1973, then-Governor Nelson Rockefeller, in response to a burgeoning heroin epidemic and a rising tide of substance abuse and drug-related crime, introduced and obtained passage of comprehensive legislation to overhaul the State's drug laws. The new laws required a minimum sentence of 15-years-to-life for a first-time conviction for selling one ounce, or possessing two ounces of a controlled substance, and mandated incarceration for all Class A, B and C drug felonies. Collectively, New York's "Rockefeller" drug laws were considered the toughest in the nation at the time of their enactment.

Amendments to the State's drug laws in 2004 and 2005 reflected the view of the Legislature and Governor that the lengthy mandatory minimum terms and long maximum prison sentences associated with the Rockefeller drug laws were unnecessarily harsh for many non-violent felony drug offenders. By converting sentences from indeterminate to determinate, fixing significantly shorter ranges

for most of these crimes, raising the minimum required weights for certain Class A felony drug possession offenses and allowing the resentencing of certain felony drug offenders serving life sentences, the 2004 Drug Law Reform Act (DLRA), and follow-up legislation in 2005, ameliorated some of the more onerous aspects of the decades-old drug statutes. Although these revisions were seen by many as a long overdue change in New York's drug sentencing policy, their enactment did not quell the drug reform debate. To the contrary, in public hearings, focus group sessions and Commission meetings, defense advocates and others argued that the reforms did not go far enough, while law enforcement officials voiced strong opposition to further reform of the drug laws.

B. Examining the Data: The Case For Reform

Consistent with its approach to sentencing reform generally, the Commission examined the emotionally and politically charged issue of drug law reform from a data-driven perspective. The Commission reviewed data to assess the impact of the DLRA and found that a growing number of drug offenders have benefitted from reduced sentences as a result of the 2004-2005 drug law changes. As of December 31, 2008, a total of 252 Class A-I felony drug offenders have been resentenced pursuant to the DLRA and released from DOCS' custody an average of 50 months prior to their previously calculated earliest release dates. A total of 232 Class A-II felony drug offenders have been resentenced and, on average, released 13 months prior to their previously calculated earliest release dates. Three years after the DLRA was enacted, the average minimum term for new drug commitments, as well as the average time served in custody, decreased by approximately six months. Significantly, this has been achieved without a detrimental impact on public safety: crime continued to fall to historic lows in 2006 and 2007.

The Commission focused, in particular, on data relating to the diversion of drug-addicted non-violent felony drug offenders from prison to community-based treatment, and questioned whether New York's broad network of existing diversion programs provided equal access to diversion for non-violent drug-addicted offenders in all parts of the State. The Commission began by conducting an in-depth

examination of the State's large and successful network of felony drug treatment courts and proven prosecutor-based diversion programs like the flagship Drug Treatment Alternative-to-Prison (DTAP) program in Kings County. It reviewed eligibility criteria, program characteristics, retention, completion and recidivism rates and other details of these established diversion models to learn how they operate and what makes them successful. The Commission came away with a strong appreciation of the effectiveness of these programs and their successful use of "legal coercion" to motivate non-violent felony offenders whose criminal behavior is precipitated by their addiction to enter and remain in long-term treatment.

To shed light on the question of equal access to diversion alternatives, the Commission compared data on the likelihood of receiving a State prison sentence on a felony drug indictment or superior court information in 18 counties around the State. It found that for similarly-situated offenders who were indicted following a Class B felony drug arrest, the chances of receiving a sentence to State prison could vary dramatically, in some cases by a factor of five or even seven, depending on the county where the case was prosecuted. The Commission also studied drug admission and "under custody" data from DOCS and, consistent with national data on admissions to prison for drug crimes, found disturbing racial and ethnic disparities. In each of the last five years, African Americans constituted a dramatically higher percentage of total DOCS' admissions for drug offenses than did whites. The DOCS' data show that, from 2003 to 2007, white offenders, on average, made up 10% of total drug admissions to DOCS, while African Americans made up 55%. During the same five-year period, Hispanic drug offenders constituted, on average, 34% of total DOCS' drug admissions. While African Americans and Hispanics comprised 32% of the State's population ages 16 and older in 2008, they accounted for nearly 90% of all offenders in DOCS custody for a drug offense that year.

Finally, the Commission noted well-documented disparities in the availability of substance abuse treatment providers, especially between rural and urban areas of the State, as well as in eligibility criteria for existing diversion programs. For example, while some upstate and suburban New York City jurisdictions operate substantial

second felony offender diversion programs similar to DTAP, many counties have only a limited program or no program at all for second felony offenders. While all but five counties in the State currently have a felony-level drug treatment court, many of these courts target primarily first-time felony offenders and some do not accept offenders charged with drug sale offenses. The result is what might best be characterized as a "patchwork" system for diverting drug-addicted non-violent felony offenders from prison into treatment.

C. Principles of Reform

Based on this data, and on information gathered from Commission meetings, focus groups and public hearings held around the State, the Commission reached near-unanimous agreement on several key principles in the area of drug law reform.

First, as noted in its Preliminary Report, "the judicious use of community-based treatment alternatives to incarceration to address an underlying drug, alcohol or other substance abuse problem can be an effective way to end the cycle of addiction and the criminal behavior that inevitably follows." Stated differently, community-based substance abuse treatment -- especially when applied in a "legally coerced" criminal justice setting where the addicted offender faces swift and certain punishment for failure in treatment -- *does work*, and should be a readily available option in every region of the State.

Second, New York's existing network of diversion programs and drug courts is well-established and effective for thousands of non-violent drug-addicted offenders who have seized the opportunity to turn their lives around by choosing treatment in lieu of prison. As such, the Commission believes that any uniform diversion model adopted in the State should supplement, not supplant, these proven models and must be carefully structured to avoid undermining or negatively impacting them.

Third, despite the availability of drug treatment courts and other diversion programs such as DTAP, there is evidence that a sizeable number of potentially eligible non-violent drug-addicted felony offenders may be "slipping through the cracks" of the existing

diversion network, ending up in prison instead of community-based treatment. As a matter of simple fairness, diversion options should be made available to drug-addicted, non-violent felony drug offenders regardless of the county or region of the State in which their case is prosecuted. Nearly all Commission members agree that by creating uniform standards for determining which offenders are drug addicted and would benefit from treatment, and giving courts additional authority to divert such offenders into treatment, fewer offenders who are otherwise suitable for diversion will be overlooked or denied the opportunity for treatment.

Fourth, the Commission recognizes that no drug diversion program exists in a vacuum. Unless the necessary treatment beds and other community-based resources are in place and adequately funded, no diversion model, no matter how well-designed or operated, can succeed. As such, the Commission reiterates its earlier call for a comprehensive plan to provide statewide access to treatment programs and eliminate identified gaps in treatment services.

Finally, the Commission believes that New York must continue to reserve costly prison resources for high-risk, violent offenders while making greater use of community-based alternatives to incarceration for non-violent felony drug offenders. Over the last decade, New York has made substantial progress in that direction. While many states continue to face exploding prison populations and increases in crime, New York enjoys the distinction of having significantly reduced its prison population and the percentage of non-violent drug offenders in DOCS' custody while simultaneously improving public safety. Against this backdrop, the Commission believes that while it is important to continue to reform New York's drug laws, such reforms should be carefully tailored so that the State's significant gains in public safety are not lost.

D. Proposals For Reform

To further the goal of establishing a uniform statewide model for diverting drug-addicted non-violent felony offenders from prison to treatment, the Commission examined a series of new and existing diversion proposals, including a "Court Approved Drug Abuse

Treatment" ("CADAT") model contained in a sweeping drug reform measure (A. 6663-A/S. 4352-A [2007]) which was introduced in the New York State Senate and passed by the State Assembly, and a Commission-devised proposal for "Judicial Diversion." It also reviewed two drug reform proposals for first-time Class B felony drug offenders that would allow imposition of a local jail or probation sentence in lieu of the current mandatory minimum one-year State prison sentence for these offenders without regard to whether the offender suffered from or was in need of treatment for drug addiction.

Although the Commission was unable to reach unanimous agreement on any one reform proposal, a majority of the Commissioners agreed that the Judicial Diversion model was the most promising in that it struck an appropriate balance between the need to give judges expanded authority to divert drug-addicted non-violent felony offenders into treatment and the need to ensure public safety. Even those supporting Judicial Diversion recognized, however, that there were certain drawbacks to the model and certain positive and negative features of the other models. In the end, it was agreed that the best approach, and the one most likely to advance the cause of real drug law reform in New York, was to provide a "menu" of options, laying out the specifics of the various models considered, together with a frank and informed discussion of the advantages and disadvantages of each, for the benefit of the Governor, Legislature and Judiciary.

1. Judicial Diversion

Under the Judicial Diversion proposal, certain drug-addicted, first-time and repeat non-violent felony offenders would be eligible for diversion provided the offender's criminal history does not include certain disqualifying offenses and he or she is found to be in need of treatment for substance dependency. Under this proposal, prosecutorial consent is not required. Both first-time and second felony offenders would be required to complete 12 to 24 months of drug treatment, with second felony offenders required to spend a minimum of six months in intensive residential treatment. First-time felons would be required to complete outpatient or residential treatment under the supervision of the local probation department as

part of an "interim probation" disposition. Second felony offenders would complete treatment as part of a five-year probation sentence or, at the discretion of the judge, would be supervised by the State Division of Parole as part of a newly created "interim parole supervision" disposition. Consistent with the drug court model, all offenders, during periods of outpatient treatment, would be required to appear regularly before the judge, who would use a system of graduated sanctions to respond to relapses or other negative behavior. Offenders who ultimately fail in treatment or violate another significant condition of supervision would face a sentence of imprisonment; those who successfully complete treatment and probation (or parole) supervision would avoid prison and have the case record sealed.

To measure the possible impact of the Judicial Diversion proposal, the Commission applied the proposal's legal eligibility criteria to a pool of felony drug offenders admitted to DOCS in 2006. Based on its analysis, the Commission estimated that as many as 3,000 additional felony offenders might be diverted from prison into treatment each year under the model. Notably, 89% of these potentially eligible offenders were African American or Hispanic. Further, the felony drug offenders in this potentially eligible pool of 3,000 represent nearly half (46%) of all felony drug admissions to DOCS in 2006.

Some prosecutors and drug court judges were concerned that implementation of Judicial Diversion could lead to "program shopping" by defense attorneys in search of the "best deal" for drug-addicted clients, and this could threaten the very existence of proven diversion options like DTAP and drug courts. Some Commissioners who were generally supportive of the Judicial Diversion proposal also were concerned that the State's existing network of intensive residential treatment and community residence beds is already strained and cannot accommodate the additional volume of offenders that would likely be diverted under the model. They noted that the situation almost certainly would be exacerbated by the State's economic crisis, which is likely to have an immediate and lasting impact on funding for probation departments and treatment programs. These members recommended that, as a matter of public safety,

Judicial Diversion for second felony offenders be deferred until more intensive residential treatment beds, halfway houses and other necessary treatment and supervision resources are in place throughout the State.

2. Judicial Diversion on Consent of the Parties

Consistent with the views of a majority of the State's prosecutors, one Commission member argued in favor of adopting the Judicial Diversion proposal for first-time and second felony offenders, but with the added requirement that diversion be permitted *only* where the prosecutor consents to the disposition. While agreeing that the concept of an additional, statewide, diversion model has merit, it was argued that the decision to divert a particular offender into treatment should be a shared decision, and should not be left to the judge alone. Although there are sound reasons for requiring that the court and the prosecutor both agree that a particular offender be diverted to drug treatment, a large majority of Commission members believe that, as reflected in the Judicial Diversion proposal, judges should make the final decision about whether an offender should be diverted.

3. Court Approved Drug Abuse Treatment

Under the CADAT model, certain first-time and repeat felony drug offenders would be eligible to apply to the court for a CADAT diversion order. Persons currently or previously convicted of a violent felony offense, sex offense or one of a number of other disqualifying crimes would be ineligible for CADAT. Upon application of an apparently eligible defendant, the court would order an alcohol and substance abuse assessment and adjourn the matter for 21 days to allow a prosecutor to make a determination as to the defendant's suitability for diversion. If it appears to the court that the defendant also may be a person with a mental illness, the court must order that the assessment include a mental health examination to be conducted by an examining physician or certified psychologist. The court would be authorized to issue a CADAT order for a period of not less than one nor more than two years, with possible additional periods of up to six months. In the court's discretion, a CADAT order could be issued either prior to the entry of a guilty plea -- in which case all discovery

requests, pre-trial motions and other proceedings in the case would be automatically stayed pending the offender's completion of treatment -- or following a guilty plea, in which case sentencing on the plea would automatically be deferred pending completion of treatment.

Upon ordering CADAT, a court would impose reasonable conditions related to supervision and treatment and direct that the local probation department or another entity supervise the defendant. Such treatment must include a period of residential treatment unless the court finds it unnecessary. As with Judicial Diversion, the court would be required to employ a system of graduated responses or sanctions designed to address inappropriate behaviors. A defendant sentenced for a conviction following a termination of CADAT could receive up to the maximum term that the court would have imposed had the defendant not participated in CADAT. Upon the defendant's successful completion of CADAT, the court would be required to comply with the terms and conditions it set for final disposition, which may include vacatur of any guilty plea entered prior to issuance of the CADAT order.

Those who preferred the CADAT model stressed that the proposal had fewer criminal history exclusions and would result in more diversions of qualified offenders from prison into treatment. They further noted that the proposal, as part of a much more comprehensive drug law reform measure that had already passed the Assembly, had been fully vetted through public hearings and legislative debate and was supported by many drug law reform advocates. Opponents of CADAT argued that, unlike the Judicial Diversion proposal, the model categorically excludes from diversion non-violent second felony offenders charged with *non*-drug felony offenses, and allows judges to divert offenders without first requiring a plea of guilty, thereby creating potential problems for prosecutors who, following a failure in treatment, may have to proceed to trial months or even years after the initial CADAT order was issued.

4. Eliminating the Mandatory Minimum Prison Sentence for First-Time Class B Felony Drug Possession and Sale Offenses

Two proposals considered by the Commission would allow judges, without regard to a defendant's addiction status or need for treatment, to sentence certain first-time Class B felony drug sale and possession offenders to a probation or local jail sentence in lieu of the current mandatory minimum prison sentence of one year.

Under the first proposal, dubbed the "aggravated sale and possession" model, a judge would be authorized to impose this alternative sentence upon a first-time felony offender convicted of the Class B felony of criminal sale of a controlled substance in the third degree or criminal possession of a controlled substance in the third degree. The proposal would, however, create new "aggravated" versions of these crimes that could be charged in cases where the defendant either sold drugs to a minor or, at the time of the sale or possession or the arrest thereon, possessed a loaded or unloaded firearm or other gun. Defendants convicted of the aggravated offense would be ineligible for the alternative, non-prison, sentence.

The second proposal would simply eliminate the mandatory minimum prison sentence for first-time Class B felony drug sale and possession offenders without creating "aggravated" versions of these crimes.

These proposals received only limited support among Commission members. Commissioners heard from drug court judges and prosecutors that enacting a non-prison sentencing alternative for first-time Class B felony drug offenders could have a detrimental impact on existing drug courts, which hold the promise of a non-prison disposition as the "carrot" to entice drug-addicted first-time felony offenders to undergo the rigors of long-term treatment. Moreover, because the proposals allow for a reduced sentence for felony drug offenders without requiring a dependency assessment of the defendant or treatment for those found to be drug dependent, many Commissioners felt that the proposals would do little to end the cycle of addiction and could result in an entirely new class of drug-addicted

predicate felons who, upon commission of a subsequent felony drug offense, would face a 3½-year mandatory minimum prison sentence.

5. Recommendation

Despite New York's established network of successful diversion programs and drug courts, evidence suggests that a significant number of non-violent felony offenders who could benefit from diversion to community-based treatment for substance dependence are not provided this potentially life-changing alternative to prison. A majority of Commissioners agree that establishing a uniform statewide diversion program for drug-addicted non-violent felony offenders would help close this gap in access to diversion and would benefit, in particular, those African American and Hispanic offenders whose non-violent criminal behavior is rooted in addiction. The Commission recognizes that this will require an investment in additional resources for evaluation, treatment, referrals and supervision of offenders and that finding these resources will be a challenge given New York's current fiscal crisis. The Commission believes, however, that in the long run this investment will result in substantial savings in judicial, law enforcement, correctional and supervision resources by reducing the costly cycle of addiction and recidivism. More importantly, it will offer much needed relief to those families and communities adversely impacted by disproportionate drug incarceration rates by transforming formerly drug-addicted offenders into productive family and community members.

IV. Using Evidence-Based Practices to Improve Offender Outcomes

New York is one of the few states in the nation that has continually reduced crime while simultaneously decreasing its prison population. While this is an impressive achievement, the State's criminal justice policymakers must continue to identify areas that can yield further gains in public safety while reducing reliance on costly prison resources.

Data show that more than one in three offenders (39%) who are released from incarceration in the State return to prison within three

years of release. While New York has taken significant steps to increase the likelihood of successful offender re-entry, more can be done. The Commission recommends, for example, that DOCS, the Division of Parole and the Division of Probation and Correctional Alternatives adopt a common risk and needs assessment methodology to help identify those who pose the greatest risk to public safety and are most likely to re-offend. The Commission further recommends that Parole and Probation concentrate their resources in the earliest stages of supervision and reserve intensive supervision for those offenders who pose the highest risk of re-offending. Adopting these policies will allow supervisory agencies to effectively allocate limited resources to the population of offenders most in need of those resources, and will focus resources on that initial period of supervision when offenders are most likely to recidivate.

Another area where New York can significantly improve the chances for successful re-entry and reduce recidivism is in the way it deals with parole rule violators. As the most expensive resource, prison should be reserved for those offenders who pose the greatest threat to public safety. In 2006, more than 12,000 parolees were returned to incarceration in New York State for violating a condition of parole (an 11% increase from 2005). More than 40% of those returns occurred in the absence of a new criminal charge.

The Commission was committed to finding an alternative to the all-or-nothing approach of responding to parole rule violators. With the assistance of the Division of Parole and the Vera Institute of Justice, the Commission examined New York State offender data pertaining to parolees returned to prison and reviewed how other states respond to such violations. The Commission determined that by creating a comprehensive system of graduated responses, parole officers throughout the State will be able to quickly and proportionately respond to parole violations. The application of graduated responses, such as curfews, electronic monitoring, and increased reporting, coupled with the use of a risk and needs assessment instrument, will allow parole officers to impose the appropriate community-based sanction, not based solely on the condition that was violated, but also on the assessed risk posed by the individual offender. These tools will help parole officers reserve

incarceration for those offenders who pose the highest risk, without unduly jeopardizing re-entry progress made by low-risk offenders. New York should implement these policies to make immediate gains in public safety and re-entry, while reducing reliance on expensive prison resources for low-risk offenders.

Finally, the Commission recommends expanding upon the recently established re-entry initiatives in New York State, such as the county re-entry task forces, the Orleans Re-entry Unit and the Edgecombe pilot program for parole violators in need of drug treatment.

V. Expanding Successful DOCS' Programs and Improving Willard

The Commission examined programs operated by DOCS that not only reduce the amount of time offenders are incarcerated and thereby reduce prison costs, but also prepare those same offenders for successful transition back into the community. DOCS' Shock Incarceration Program combines a rigorous regimen of physical activity, discipline and drug treatment within a structured, military-like environment. After applying the statutory eligibility criteria, DOCS screens each eligible inmate for program suitability. The recidivism rates for Shock participants have yielded better results than for comparison groups. Moreover, the program has saved the State an estimated $1.06 billion since the program began in 1987. The Commission believes that the State can further capitalize on DOCS' proven expertise in running this cost-effective program and its success in screening out inmates who are inappropriate for Shock participation. Accordingly, the Commission recommends extending the statutory age of eligibility for Shock participation to those who are under 50 years of age; currently inmates must be under 40 to enter Shock. Additionally, the Commission recommends expanding Shock eligibility criteria to allow inmates to be admitted who are otherwise eligible for the program but do not meet the current statutory requirement that they be within three years of their parole eligibility date (for indeterminate sentences) or conditional release date (for determinate sentences) at the time they are initially received at a DOCS' reception center. This proposal would, for the first time, allow DOCS to recruit suitable

Shock participants from general confinement into the program when they come within the three-year eligibility timeframe.

Similarly, DOCS' Merit Time Program aims to prepare eligible inmates serving sentences for non-violent felony offenses for successful re-entry through the opportunity to earn a one-sixth time allowance off the minimum period of their sentence (one-seventh for determinate drug sentences) by engaging in beneficial programming while incarcerated. The Commission believes that a flat six-month merit credit also should be made available to violent offenders (other than sex offenders), as well as certain Class A-I non-drug felony offenders, who demonstrate a likelihood of rehabilitation in prison and successfully complete specified enhanced DOCS' program requirements.

In its Preliminary Report, the Commission recommended that DOCS and OASAS work together to improve the quality of drug treatment within DOCS and, in particular, at the Willard Drug Treatment Campus in Seneca, New York. Since then, DOCS and OASAS have collaborated on key recommendations to improve Willard's 90-day intensive substance abuse treatment program. These include conducting smaller therapy groups of no more than 15 offenders, increased one-on-one counseling and updated curricula including a concentration on re-entry issues during the final 30 days of the program. The Commission supports these joint recommendations.

VI. Crime Victims and Sentencing

New York has enacted a number of statutes that reflect the critical role played by victims in the criminal justice process and, in particular, in sentencing-related matters. The Commission learned that in some instances there is a disconnect between the many rights granted crime victims under the law and the actual exercise of those rights by victims. The Commission believes that this is due, in part, to the sheer complexity of the numerous statutory provisions governing crime victims' rights and the absence of any effective means of enforcing those rights. In order to streamline and make more accessible to judges, lawyers and crime victims the multitude of statutory and regulatory provisions governing the rights of crime

victims in the State, the Commission recommends that these provisions be moved to a single article of law or that a cross-referencing chart or other similar resource tool be created and incorporated into the Criminal Procedure Law or Penal Law and be periodically updated so that crime victims, and the criminal bench and bar, can easily access a list of all victim-related statutes.

The Commission further recommends that the statutorily-required training of prosecutors and judges in the area of victims' rights be expanded and enhanced to ensure that they are made fully aware of their obligations with respect to victim notification and the substantive rights of crime victims. Of particular importance are the obligations that prosecutors and judges have in preserving the restitution-related rights of crime victims. The Commission also finds that certain existing rights, such as the right to seek and collect restitution or reparation from an offender, might be significantly advanced through relatively minor amendments to existing law, including the addition of a provision allowing offenders to pay restitution by credit card. Finally, the Commission finds that the existing statutes establishing the rights of crime victims in the area of sentencing may be unduly narrow and that expansion of those rights should be considered.

VII. Permanent Sentencing Commission

Based on testimony presented to the Commission by policymakers, practitioners, academics and advocates, it has become clear that criminal justice in general, and sentencing in particular, are areas where law, practice, research and policy are constantly evolving. There was a consensus among members of the Commission that the State should give serious consideration to the creation of a permanent body dedicated to the ongoing evaluation of relevant sentencing laws and policy. A permanent sentencing commission would serve as an advisory body to the legislative and executive branches of government and would review and comment on proposed sentencing legislation.

VIII. Conclusion

The sentencing function is arguably the most critical in any criminal prosecution. The judge's sentencing decision has immediate and often dramatic consequences for the offender and the victim and profound consequences for the community over the long term. The principal recommendations in the Commission's Final Report -- to clarify and streamline the sentencing laws and expand the ability of judges to divert drug-addicted non-violent felony offenders from prison into community-based treatment -- reflect these principles and are intended to improve a sentencing system that is overdue for reform.

The Commission recognizes that sentencing in the broadest sense does not end with the judge's pronouncement at the conclusion of a criminal case. In most instances, this pronouncement marks the beginning, rather than the end, of a lengthy journey toward successful reintegration of the offender as a productive and law-abiding member of society. In recommending further reforms aimed at expanding the use of proven programs and evidence-based methods to improve the transition of offenders from prison back into the community, the Commission believes New York can reduce its reliance on costly prison resources while enhancing public safety.

In fulfilling its broad mandate, the Commission has a historic opportunity to have a positive and lasting effect on criminal justice policy in the State. The Commission respectfully submits this Final Report to the Governor, Legislature and Judiciary with the expectation that it will serve as a roadmap for future sentencing reform and help make New York's sentencing system the standard by which all others are measured.

PART ONE

CRIMINAL SENTENCING IN NEW YORK: A HISTORICAL OVERVIEW

Part One

Criminal Sentencing in New York State: A Historical Overview

Two major themes reoccur throughout the history of sentencing in New York State. First, sentencing authority has generally been allocated in accordance with policymakers' beliefs about the appropriate purposes of the criminal sanction. The three main crime control purposes are rehabilitation, incapacitation and deterrence. Retribution, the fourth traditional purpose of punishment, does not try to control crime in the future; instead, retribution is simply the punishment deserved for the crime. The relative priority to which policymakers have accorded these four objectives of the criminal sanction has varied throughout history and, generally, that variation has been driven by changes in social perceptions about crime and punishment.

The second recurring theme is that sentencing laws rarely have been systematically and comprehensively revised. Instead, a pattern of piecemeal and ad hoc change characterizes the history of sentencing in New York. Today's sentencing laws are overly complex, but this is not surprising since it has been more than 40 years since the last comprehensive revision of the sentencing laws. During that time, opinions and policies also have shifted, and shifted back again, on whether a determinate or indeterminate sentencing structure best achieves whatever goals and objectives predominate at a particular time. New York currently has a hybrid system, employing both determinate and indeterminate sentences within the same code.

I. THE EARLY DAYS

Deterrence was the central objective of penal policy in colonial New York as well as during the early years of statehood. The severity of the criminal sanction was intended to frighten, and thereby deter, the would-be offender from committing a crime. Following the European tradition, punishment in New York consisted of a variety of sanctions: stocks, pillories, and other forms of public shaming; fines

and restitution orders; banishment from the jurisdiction; flogging, branding, and other types of corporal punishment; and the gallows.[1] Individuals were subject to the death penalty for more than 200 crimes, ranging from pick pocketing to horse stealing to murder.[2] The State was not in the business of incarcerating convicted felons; neither were the localities. County jails were reserved primarily for pre-trial detainees and debtors. Changing conceptions of the efficacy of extreme punishment culminated in the nineteenth century movement away from capital punishment and the creation of the "fortress" prison.[3]

The New York State Legislature adopted a new penal code in 1796. It abolished corporal punishment, reserved the gallows for murderers and traitors and established the State's prison system.[4] Sentences were determinate: offenders served their entire term unless released early by executive clemency or pardon. Determinate sentencing was thus adopted in New York for the first time but, unlike its later manifestations, this early version was designed primarily to achieve the crime control purpose of deterrence.

During the early days of the prison era (1823-1877), the crime control emphasis shifted from deterrence to reformation, the precursor to rehabilitation. Similar to the reform movement led by the Quakers in Pennsylvania, New York's new sentencing system was premised on the belief that crime was caused by the criminal's corrupt environment. The penitentiary, home of the "penitent," was perceived as the State's optimal response to criminal behavior. It was thought that by forcing offenders to conform to an orderly routine and by

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

[2] *See*, Executive Advisory Committee on Sentencing, *supra,* note 1; J. Goebel, Jr. and T.R. Naughton, *Law Enforcement in Colonial New York*: *A Study in Criminal Procedure (1664-1776)* (New York 1944).

[3] Rothman, *The Discovery of the Asylum, supra,* note 1.

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

isolating them from temptation -- and from each other -- the penitentiary would lead the way out of crime.

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

In practice, the operation of the prisons fell far short of the ideals that inspired their creation. Once prisoners became long-term residents, the problems of maintaining the silent system became painfully apparent. Guards enforced discipline with lashes and cat o'nine tails; hanging prisoners by their thumbs was routine, as were other bizarre and brutal punishments such as dunking them in the infamous water cribs.[5] It was again time for reform; the social climate was ripe for the emergence of a new approach.

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

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

[5] Rothman, *The Discovery of the Asylum, supra*, note 1; David J. Rothman, *Sentencing Reform in Historical Perspective,* Crime and Delinquency (October 1983), at 633.

sentencing judge could not predict when an offender would be rehabilitated. The reformers shared a basic trust in the state and a faith that criminal justice experts could be relied upon to benevolently exercise their unlimited discretion.[6]

The change sought by the reformers squared poorly with the existing determinate sentencing system. The new model required maximum flexibility; rules could not be made in advance. Because each case was different, each required a different response. The first application of indeterminate sentencing in the United States is traced to an experiment in 1877 at the Elmira Reformatory. First-time male offenders between the ages of 16 and 30 who, according to the sentencing judge, were likely candidates for rehabilitation were sentenced "until reformation, not exceeding five years."[7] With instructions in moral as well as academic subjects, inmates were rewarded for good behavior with early release. The Board of Managers at Elmira determined the release date and members of the New York Prison Association, a prestigious philanthropic society, provided services in the community to the releasees. The legacy of the progressive era's innovations in criminal justice is far-reaching: probation, parole, indeterminate sentencing, diversion and juvenile courts all rose to prominence under this model.

In time, release decisions shifted from prison authorities to parole authorities. By 1901, indeterminate sentencing and parole release were available in New York for first-time offenders with sentences of five years or less.[8] The indeterminate sentence was extended in 1907 to all first-time offenders, except murderers.[9] By 1922, 37 states had adopted some form of indeterminacy and 44 states had parole boards.[10]

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

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

[8] Laws of 1901, ch. 260.

[9] Laws of 1907, ch. 737.

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

A. The Model Penal Code Movement

In the 1950s and 1960s, the American Law Institute's (ALI) Model Penal Code inspired a national movement for reform of the criminal law. In 1955, Wisconsin became the first state to comprehensively revise its criminal laws based on the Model Penal Code; more than 30 states ultimately passed derivative criminal codes, including New York.[11]

Sentencing reform was an integral part of the national code revision effort and the rehabilitative ideal was the glue that tied the national reform movement together. The code revisionists were committed to the prevailing indeterminate sentencing philosophy. The Model Penal Code drafters allocated sentencing authority among the different criminal justice functionaries according to the "type of power and responsibility that each is best equipped to exercise, given the time when it must act, the nature of the judgments called for at that stage, and the type of information that will be available for judgment and the relative dangers of unfairness and abuse."[12]

B. The Bartlett Commission

The Temporary Commission on Revision of the Penal Law and Criminal Code ("the Bartlett Commission")[13] was a result of discussions undertaken in the early phases of Nelson A. Rockefeller's first term as governor.[14] The Bartlett Commission devoted its attention first to drafting a Penal Law, which was submitted as a study bill in 1964 and adopted by the Legislature in 1965, with an effective date of 1967. Thereafter, it drafted the Criminal Procedure Law, which took effect in 1971. A progeny of the ALI's Model Penal Code, New York's new code was deemed "the most sophisticated legislation

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[11] Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 Colum. L. Rev. 1428 (1968); Laws of 1965, ch. 1030.
[12] American Law Institute, *Model Penal Code, Tentative Draft No. 2,* at 24 (1954).
[13] Laws of 1961, ch. 346.
[14] Schwartz, *Criminal Law Revision Through a Legislative Commission: The New York Experience –An Interview with Richard Bartlett*, 18 Buff. L. Rev. 213 (1968).

yet achieved in the evolution of a twentieth century criminal code."[15] It might be said, however, that the State has rested on its laurels; not since 1967 has New York enacted a comprehensively revised sentencing code.

1. The Pre-1967 Penal Law

The Bartlett Commission confronted a penal code that had not been substantially revised in more than 50 years. The Field Commission, working in the 1860s and 1870s, had codified many of the State's criminal laws and, in 1881, its work was reflected in a new Penal Code and Code of Criminal Procedure.[16] Crimes were classified into broad categories (e.g., crimes against persons, crimes against property), and minimum and maximum prison terms were assigned to each crime category.

In 1909, the Penal Code was replaced with the Penal Law, with the most significant change being the abandonment of the categorical structure in favor of an alphabetical listing of crimes.[17] A multiplicity of separate crimes was created for each offense type, resulting in crimes dealing with similar subject matter rarely being located in the same place, which rendered charging decisions arbitrary and cumbersome. Continuous piecemeal amendments yielded a prolixity of narrow and highly specific offense definitions, many of which overlapped.

Labeling the 1909 restructuring "a hodgepodge conglomerate of amendment upon amendment,"[18] the Bartlett Commission observed that "[i]nstead of a modern set of guidelines to help effectuate the deterrence of crime and the segregation and reformation of criminals,

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[15] George, *A Comparative Analysis of the New Penal Laws of New York and Michigan*, 18 Buff. L. Rev 233 (1968).
[16] Laws of 1881, ch. 680.
[17] New York Temporary Commission on Revision of the Penal Law and Criminal Code, *Interim Report of the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code,* at 8 (1962); Laws of 1909, ch. 88.
[18] Schwartz, *supra*, note 14, at 213-214.

the State of New York has a modern procedure engrafted by amendments upon a structure designed for a retributive system."[19]

2. Focus on Sentencing

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

The Bartlett Commission acknowledged the lack of scientific evidence linking sentencing and crime control. Then, as now, it was relatively rare for social scientists to find statistically significant correlations between sentences and deterrence, incapacitation or rehabilitation. Nevertheless, the pragmatists on the Bartlett Commission reasoned that the best course was to "construct a system that allows adequate scope for the accomplishment of these objectives."[20] The Bartlett Commission endeavored to distribute authority consistent with the purposes of punishment sought by each component of the system. The Legislature would serve the retributive function by establishing the maximum sanction for broad classes of criminal conduct, reflecting society's view of the seriousness of that type of offense. Judges, as well as correctional and parole officials, would serve their "proper purpose and, within [their] special sphere of competence * * * fashion an appropriate sentence."[21]

The calculation of good time credit was changed by the Bartlett Commission to afford "a better distribution of control between the Department of Correctional Services ("DOCS") and the Division of

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

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

[21] *Id*. at 276-277.

Parole."[22] Under the pre-1967 law, a one-third good time allowance was deducted from the minimum term, lowering the offender's parole eligibility date. Also, pursuant to a 1962 amendment, an additional one-sixth good time allowance was deducted from the maximum term. The Bartlett Commission recommended that good time be deducted from the maximum sentence only. Good time and parole release would then function as part of an integrated plan, each to be employed at the proper place to effectuate the achievement of the overall goal. The Bartlett Commission's vision of the allocation of power led it to reason that while the minimum term was being served, the prisoner was working toward parole release. If the offender was denied parole release at the minimum term, good time off the maximum sentence would provide a continued incentive for good behavior in prison.

Mandatory sentences of any kind were antithetical to the rehabilitative ideal endorsed by the Bartlett Commission. Legislatures should deal with broad principles it said, and not prescribe mandatory sentences applicable to individual cases. With the exception of a one-year minimum prison term, which was viewed as an institutional necessity, the Bartlett Commission rejected mandatory sentences for all but the Class A felony offenses of murder and kidnapping. The Commission reasoned that if "the court is to be entrusted -- as it should be -- with authority to decide whether to impose a sanction, it can certainly be entrusted with authority to decide whether a minimum period of imprisonment in excess of one year is necessary."[23]

The Bartlett Commission applied the same logic to second felony offenders: no mandatory sentences. For persistent felony offenders, mandatory sentences could be imposed provided that strict sequentiality rules stemming from the rehabilitative ideal were followed. The Bartlett Commission explained that "only those who persist in committing serious crimes after repeated exposure to penal sanctions"[24] and their rehabilitative influence would be eligible for mandatory sentences. The pre-1967 law specified when concurrent and consecutive sentences could be imposed although, in practice,

[22] *Id.* at 299.
[23] *Id.* at 280.
[24] *Id.* at 285.

most multiple sentences were consecutive. The Bartlett Commission reversed that presumption: where the court failed to specify how multiple sentences were to be served, the sentences would run concurrently.

3. Passage of the New Penal Law

The Bartlett Commission's proposals were well received by the State Legislature. Only three areas of controversy were raised: the decriminalization of certain consensual crimes; the abolition of the death penalty; and gun control. The legislative opponents of these three provisions prevailed and the Bartlett Commission's proposal was amended accordingly.[25]

On approving chapters 1030 and 1031 of the Laws of 1965, which enacted the bulk of the Bartlett Commission's Penal Law proposals, then-Governor Nelson Rockefeller announced that "a new scheme of sentencing is provided affording ample scope for both the rehabilitation of offenders and the protection of society."[26] The statutory modernization of the rehabilitative model was coupled with changes in the post-conviction structure of the criminal justice system. Another commission, this one headed by Paul McGinnis, then Commissioner of DOCS, and Parole chairman Russell Oswald was established in 1966 and charged with the bureaucratic modernization of the indeterminate system. The McGinnis-Oswald Commission's recommendations[27] led to the merger of parole and corrections in 1970, but the blending of the two post-conviction bureaucracies was short-lived. Ironically, just as the refinement of the rehabilitative structure was being completed, the dominance of the reigning sentencing paradigm was challenged.

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[25] Schwartz, *supra*, note 14, at 255-256.
[26] Governor's Mem approving Laws of 1965, ch. 1030, 1965 NY Legis Ann at 2120.
[27] Preliminary Report of the Governor's Special Committee on Criminal Offenders (June 1968).

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

A. Introduction

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

The indeterminate model's threshold assumption, that everything that needed to be known about the offender could not be known at the time of sentencing, yielded the opposite assumption. Faith in the expertise and ability of government to do the right thing gave way to deep-seated suspicion of official actions. Rehabilitation was cast aside in favor of retribution and incapacitation as the most valid purposes of sentencing. Confidence in the provident exercise of discretion by criminal justice officials eroded as mandatory sentencing provisions proliferated.

Influential treatises such as the American Friends Service Committee's *Struggle for Justice,*[28] Judge Marvin Frankel's *Criminal Sentences: Law Without Order*,[29] Norval Morris' *The Future of Imprisonment*,[30] and the Committee for the Study of Incarceration's *Doing Justice*,[31] shaped opinions in New York and around the nation, arguing against indeterminate sentencing and discretionary parole release.

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[28] American Friends Service Committee. *Struggle for Justice* (New York: Hill and Wang, 1971).
[29] Marvin E. Frankel. *Criminal Sentences: Law Without Order* (New York: Hill and Wang, 1972).
[30] Norval Morris. *The Future of Imprisonment* (Chicago: University of Chicago Press, 1974).
[31] Andrew Von Hirsch. *Doing Justice: Report of the Committee for the Study of Incarceration* (New York: Hill and Wang, 1975).

The determinate ideal was based on two fundamental principles. First, punishment should be proportionate to the seriousness of the instant offense and the offender's prior conviction record. Similarly situated offenders should be treated alike to protect the public and to put an end to gross disparities in punishment. The second fundamental principle was that the sentence served should match the sentence imposed in court, minus limited good time.

1. A Move Toward Determinacy

Even before the national interest in determinate sentencing became widespread, new sentencing laws in New York had begun to chip away at the indeterminate structure. Under the so-called "Rockefeller drug laws," judges were no longer permitted to exercise discretion over whether to incarcerate or impose an alternative sanction for certain drug cases; mandatory incarceration was required for all Class A, B and C drug offenses.[32] The "Rockefeller" drug laws created three categories of Class A felonies based on the quantity of drugs sold or possessed: A-I, A-II and A-III. The maximum for all Class A felonies was life, and a variety of minimum minimums, maximum minimums, minimum maximums, and maximum maximums were prescribed for felony drug sentences.[33] Plea bargaining also was severely restricted by the "Rockefeller" drug laws.[34]

Also in 1973, mandatory second felony offender laws were grafted onto the indeterminate structure.[35] While much of the effect of the drug laws has been diluted by subsequent legislative amendments, the second felony offender laws, which passed virtually unnoticed in the furor surrounding the drug debate, continue to shape the State's sentencing policy. In 1978, a second group of mandatory sentences, the juvenile offender and the violent felony offender laws,[36] was added to what was rapidly evolving into a hybrid sentencing scheme.

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[32] Laws of 1973, ch. 276, §6 (amending Penal Law §60.05 [which has since been amended]).
[33] Laws of 1973, ch. 276, §§9, 10.
[34] Laws of 1973, ch. 276, §25.
[35] Laws of 1973, ch. 277, §9.
[36] Laws of 1978, ch. 481.

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

a. The McKay Commission

Forty-three people --32 inmates and 11 correctional personnel-- died in the prison riot at Attica Correctional Facility in September 1971. The Special Commission on Attica, also known as the McKay Commission, was formed in the immediate aftermath of the Attica riot and charged with reconstructing the events surrounding the riot. Although the Commission was not asked to make recommendations for sentencing reform, it felt obligated to speak out against the litany of problems it had uncovered. The McKay Commission questioned the quintessential features of the rehabilitative paradigm: indeterminate sentencing and parole release. The Commission denounced indeterminate sentencing and parole release as "unfair * * * inequitable and irrational."[37] The McKay Commission rejected the rehabilitationists' emphasis on individualized sentencing, and saw disparity as the central evil: "disparities in sentences imposed for identical offenses leave those who are convicted with a deep sense of disgust and betrayal." While stopping short of advocating for the overthrow of the indeterminate system, the McKay Commission nevertheless echoed what would become a growing national rejection of the rehabilitative system.

b. The Citizens' Inquiry on Parole and Criminal Justice

In 1975, the New York's Citizens' Inquiry on Parole and Criminal Justice (CIP), chaired by Ramsey Clark, former Attorney General under Lyndon Johnson, criticized New York's parole system, characterizing it as "oppressive and arbitrary"[38] and essentially beyond reform. The CIP endorsed the then-prevalent liberal ideology of

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[37] New York State Special Commission on Attica. *Attica: The Official Report of the New York State Special Committee on Attica* (New York: Bantam Books 1972), at xviii.

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

punishment: fewer and shorter prison sentences, more alternatives to incarceration and additional voluntary programs for inmates.

The CIP made both short and long-term recommendations for reform. The transitional recommendations included shifting the burden of proof in release decision-making to the Parole Board, requiring it to provide specific reasons why an inmate was denied release, and reducing parole supervision to one year. The long-term recommendations included abolishing parole release, enacting shorter sentences, increasing alternatives to incarceration, opening all sentencing procedures to public scrutiny and developing a wide range of programs for offenders.[39]

c. The Staff Report of the Assembly Codes Committee

While the recommendations of the McKay and Citizens' Commissions did not result in the abolition of parole release, their complaints may, nevertheless, have had an impact on lawmakers. An influential report in 1976 by the staff of the Assembly Codes Committee recommended an overhaul of parole release decision-making. The Staff Report made two primary recommendations, both of which were enacted the following year. First, it argued for an independent Division of Parole in the Executive Department. The logic was that prisons were concerned primarily with security and, thus, Parole's continued ties to corrections hindered the achievement of rehabilitation. Ironically, parole and corrections had been merged in 1970 to facilitate rehabilitation; later they were severed to facilitate rehabilitation.

The Staff Report's second recommendation resulted in the enactment of the Parole Reform Act of 1977,[40] which required the Board to adopt written guidelines for the exercise of its discretion in fixing minimum periods of incarceration and in making parole release decisions. By articulating release standards, the parole guidelines were intended to provide inmates and the public with a clearer understanding of the parole process.

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[39] *Id.* at 197.
[40] Laws of 1977, ch. 904.

With the help of outside advisors, including developers of the federal parole guidelines, the Board created a two-dimensional grid, with offenses arrayed according to severity on the vertical axis, and criminal history scores arrayed along the horizontal axis. In signing the Parole Reform Act, then-Governor Carey said that the legislation was aimed at eliminating disparity: "[T]he bill is intended primarily to reform the paroling process in this State to remove the inequities that numerous studies have cited * * * [and to ensure] that similarly-situated offenders are treated similarly."[41] The mandatory sentencing provisions of the Rockefeller drug, second felony offender, juvenile offender, and violent felony offender laws had law-and-order origins, while parole guidelines owed their creation to a more liberal view of punishment. Yet, each signaled a weakening of the rehabilitative idea.

d. The Executive Advisory Committee on Sentencing

Responding to national and local interest in determinate sentencing, then-Governor Hugh Carey created the Executive Advisory Committee on Sentencing in 1977 and appointed New York County District Attorney Robert M. Morgenthau as chair.[42] The Morgenthau Committee endorsed the mainstay of the liberal determinate ideal: the parsimony principle. Sentences should be "the *least severe sanction* necessary to achieve legitimate sentencing objectives."[43] Like many other anti-rehabilitationists, the members of the Morgenthau Committee elevated retributive purposes of sentencing over crime-control objectives. While rehabilitation had been widely accepted as the primary purpose of punishment in New York until the late 1960s, the Committee's report noted that the consensus behind it had crumbled in the 1970s. The Morgenthau Committee proclaimed indeterminacy a failure and parole release a charade. By using parole guidelines, the Parole Board had already abandoned rehabilitation since parole guidelines were based on the seriousness of the offense and the offender's prior record – facts having nothing to do with a behavioral change during incarceration.

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[41] McKinney's 1977 Session Laws of New York, Governor Memorandum, at 2538.
[42] Executive Advisory Committee on Sentencing, *supra*, note 1.
[43] *Id.* at 137 (emphasis in original).

The Morgenthau Committee recommended that the Legislature create a sentencing commission to devise a sentencing guidelines grid. The guidelines would specify a narrow range of sentences for each combination of offense and prior criminal record category, with the higher term not exceeding the lower term by more than 15%. Good time would be limited to 20% and all releasees would be subject to fixed periods of parole supervision. The guideline sentences were not mandatory: judges could depart and impose a different sentence if aggravating or mitigating factors were found. The Morgenthau Committee opposed unlimited departure, recommending that the sentencing commission establish a narrow range for departure sentences.

e. The Liman Commission

In his annual message to the Legislature in 1981,[44] then-Governor Carey endorsed the Morgenthau Committee's report, but instead of creating a sentencing guidelines commission, the Governor formed two more blue-ribbon study panels. The initial one, the Executive Advisory Commission on the Administration of Justice,[45] was headed by Arthur Liman, a prominent New York City attorney and member of both the McKay Commission and the Morgenthau Committee.

Growth in prison population was a direct result of sentencing policy, the Liman Commission reasoned. Sentencing policies had "vacillated between periods of tough, but unenforceable, mandatory sentencing laws and periods of nebulous indeterminate sentences. The present sentencing laws combine the worst aspects of each approach."[46] The Liman Commission criticized the lack of standards, without which, it said, sentencing decisions would remain idiosyncratic, oscillating with the predilections of individual judges.

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[44] 1981 State of the State Address.

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

[46] *Id.* at 7.

f. The McQuillan Commission

The second commission formed by Governor Carey, the Advisory Commission on Criminal Sanctions,[47] was chaired by Judge Peter McQuillan, former counsel to the Bartlett Commission. The Governor wanted the Commission to develop advisory sentencing standards for judges, but it refused, arguing that to provide such guidelines would be a purely normative exercise, based on "our collective but personal evaluations."[48] Rather than recommending guidelines, the McQuillan Commission recommended that judges apply their own perceptions of the appropriate sentence.

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

g. Committee on Sentencing Guidelines: 1983-1985

The Committee on Sentencing Guidelines ("COSG") was charged with recommending specific statutory changes necessary to implement a determinate sentencing structure; in other words, its task was to resolve the "devil in the details" and directly address the myriad issues that previous study commissions had not fully examined.[49] However, a variety of problems surfaced in trying to write specific language to convert the indeterminate structure to a determinate structure with the goal of achieving proportionality and "truth-in-sentencing." The COSG had 14 members, six appointed by then-

[47] Advisory Commission on Criminal Sanctions, *Report of the Advisory Commission on Criminal Sanctions* (1982).
[48] *Id.* at 97.
[49] Laws of 1983, ch. 711.

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

The final report of the COSG, which was riddled with dissenting opinions, was delivered on March 29, 1985.[50] Eight of the 14 members issued dissents to various parts of the report. Judges said the proposal took away their power; prosecutors said it gave judges too much power. The State's mayors and sheriffs were concerned about shifting the burden of housing more offenders to local jails. Governor Cuomo submitted a bill to the Legislature based on the report, but it received a negative reaction. The sentencing bill was never reported out of legislative committee.

IV. INCREASED CORRECTIONAL CONTROL OVER TIME SERVED: "BACK END" SENTENCING (1985-1995)

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

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

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

Shock incarceration was instituted in 1987 for inmates age 24 or under;[51] subsequent revisions extended the age to those under 40.[52] If selected by DOCS for participation in the six-month program, inmates were virtually guaranteed parole release. That same year, an "earned eligibility" program was created to increase the rate of release on parole at first eligibility.[53] In 1989, Comprehensive Alcohol and Substance Abuse Treatment ("CASAT") was established and allowed participants to be released from a conventional prison and placed in a community release facility up to 18 months before the expiration of their minimum sentences.[54]

Work release, while not new, was significantly expanded during this period. Between 1991 and 1992, while the State was experiencing severe fiscal shortfalls, work release grew by 43%.[55] Historically, work release inmates were free in the community for up to 14 hours each day and returned at night to community-based work release facilities. Beginning in 1990, in order to save money, work release beds were double encumbered; that is, one inmate slept in the bed for three nights and another for four nights. At the end of 1990, as part of the State's deficit reduction plan, day reporting was added. Selected inmates who had not yet served their minimum sentence were allowed to live at home every day, provided they reported regularly to a work release facility for drug testing and counseling.

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

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[51] Laws of 1987, chs. 261, 262 (enacting Correction Law Art. 26-A). The Shock Incarceration Program is described in greater detail in Part Five, *infra*, at 158-162.
[52] Laws of 1999, ch. 412, Pt. B, §1.
[53] 9 NYCRR §8002.1(b).
[54] Laws of 1989, ch. 338.
[55] New York State Department of Correctional Services, *Temporary Release Program: 1992 Annual Report* (1992).

V. WHERE WE ARE TODAY: THE CURRENT HYBRID SYSTEM

A. The Sentencing Reform Act of 1995

History shows that a change at the gubernatorial level can herald a change for sentencing policy. In his campaign for governor, George Pataki backed determinate sentencing and criticized discretionary parole release, as had Governor Mario Cuomo. Unlike the attempt during Governor Cuomo's tenure, however, during Governor Pataki's first year in office, the Sentencing Reform Act of 1995 ("the Act") was enacted. The Act instituted determinate sentences for second violent felony offenders and second felony offenders convicted of violent felonies.[56] This was not a sentencing guidelines type of determinacy, such as the guidelines used by the federal government. Nor was it designed to limit the discretion of prosecutors or judges or to provide guidance for limiting unwarranted disparities. Instead, the Act largely maintained the broad sentencing ranges used in the old indeterminate structure. The sentencing ranges left prosecutors with wide discretion in plea bargaining; in cases where a guilty verdict was rendered after trial, judges selected a specific determinate sentence from the broad range.

Offenders sentenced under the new determinate sentencing law would be required to serve slightly more than 85% of their court-imposed determinate term.[57] Discretionary parole release was abolished for these offenders.[58] The Act also doubled the minimum periods for persistent (third-time) violent felony offenders and increased the minimum period of the indeterminate sentence from one-third to one-half the maximum for first-time violent felony offenders.

The federal government provided additional incentives to New York and other states during this period through the Violent Crime Control and Law Enforcement Act of 1994, which authorized incentive grants to states that adopted "truth-in-sentencing" laws. The

[56] Laws of 1995, ch. 3, §§5; 7 (adding Penal Law §70.06[6]).
[57] Correction Law §803(1)(c), as amended by Laws of 1995, ch. 3, §27.
[58] Penal Law §70.40(1)(a)(ii), as amended by Laws of 1995, ch. 3, §18.

federal funds were earmarked for building or expanding prisons and jails to increase correctional capacity to accommodate longer sentences for violent offenders. Toward this end, New York received almost $25 million in 1996, and in excess of $28 million in 1997.[59]

B. More Layers of Determinacy Added

While the Act established determinate sentencing for certain second felony offenders and for second violent felony offenders, a 1998 law extended determinate sentencing to first-time violent felony offenders, with the caveat that certain cases involving domestic violence would remain indeterminate.[60] Also, the 1998 legislation added specific "post-release supervision" periods for offenders sentenced to a determinate term.[61] In 2000, sentences were enhanced for second child sexual assault felony offenders[62] and hate crimes.[63] In 2004, determinate sentencing was established for drug offenders[64] and, in 2007, determinate sentencing was authorized for those felony sex offenses classified as non-violent felonies.[65]

The result of these and other piecemeal changes is that today there is a separate indeterminate sentencing scheme for first-time non-violent, non-drug, non-sex felony offenders, generally with broad sentence ranges for each of the existing six felony classes (A-I, A-II, B, C, D and E).[66] A separate determinate sentencing scheme exists for first-time violent felony offenders,[67] with the exception of certain cases involving domestic violence which remain indeterminate.[68] A different set of rules applies when ascertaining the applicable

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[59] United States General Accounting Office, *Truth in Sentencing: Availability of Federal Grants Influenced Laws in Some States,* at 4 (1998). New York State received a total of $216 million for this initiative from 1996 through 2001.
[60] Laws of 1998, ch. 1 (amending Penal Law §70.00 [6] and adding Penal Law §60.12).
[61] Laws of 1998, ch. 1 §15 (adding Penal Law §70.45).
[62] Laws of 2000, ch. 1 (adding Penal Law §70.07).
[63] Laws of 2000, ch. 107 (adding Penal Law Article 485).
[64] Laws of 2004, ch. 738 (adding Penal Law §§70.70; 70.71).
[65] Laws of 2007, ch. 7 (adding Penal Law §70.80).
[66] Penal Law §70.00.
[67] Penal Law §70.02.
[68] Penal Law §60.12.

range for second non-violent felony offenders whose prior offense was also non-violent.[69] Likewise, another scheme, this one determinate, is used for second felony offenders whose present offense is violent and whose prior offense was non-violent, [70] as well as for second violent felony offenders whose prior and present offenses are violent.[71] Yet another set of sentencing rules, involving both determinate and indeterminate sentences, applies to second child sexual assault felony offenders.[72] Separate charts need to be consulted when sentencing non-violent felony sex offenders, again depending on whether they are first-time felony offenders, second felony offenders with a prior non-violent felony conviction, or second felony offenders with a prior violent felony conviction.[73] Felony drug offense sentences, which are determinate, also are differentiated by the number (i.e., no priors or one prior) and type (i.e., violent felony or non-violent felony) of prior felony convictions.[74] Finally, different indeterminate schemes are used for persistent felony offenders, persistent violent felony offenders and juvenile offenders.[75]

Today, New York's sentencing system is a mix of indeterminate and determinate punishments. It is difficult to articulate a rationale for these different approaches to the State's punishment policy. As the Honorable William C. Donnino has observed in his Practice Commentary to the Penal Law, the myriad amendments to the Penal Law over the last few decades "have been so substantial that the sentencing statutes have become a labyrinth not easily traversed by even the most experienced practitioner of the criminal law."[76] Indeed, the current structure is replete with anomalies and absurdities – a veritable object lesson in the law of seemingly unintended consequences.[77]

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[69] Penal Law §70.06.
[70] Penal Law §70.06(6).
[71] Penal Law §70.04.
[72] Penal Law §70.07.
[73] Penal Law §70.80.
[74] Penal Law §§70.70; 70.71.
[75] Penal Law §§70.10; 70.08; 70.05.
[76] Donnino, Practice Commentaries, McKinney's Cons. Laws of NY, Book 39, Penal Law Article 70.00, at 56.
[77] *See*, Part Two, *infra*, at 24.

VI. RECOMMENDATIONS FOR REFORM

Despite the complicated and convoluted structure of New York's current "patchwork" sentencing scheme, and the need to simplify that structure to make it more fair, more transparent and more comprehensible to practitioners, judges, victims and defendants, New York's sentencing and correctional systems are "not in a state of absolute crisis [as are those of] so many other states."[78] Indeed, New York is the safest large state in the nation and the fourth safest overall.[79] While other states have experienced dramatic increases in their prison populations -- by as much as 11% in Ohio, 23% in Pennsylvania, and 38% in Florida -- New York is the only large state to see a consistent decrease in crime, offender recidivism and prison population over the last several years.[80]

In order to achieve even greater progress in those areas, a consensus of the Commission believes that the State's goal should be to implement additional sentencing reforms, including adoption of a predominately determinate sentencing structure;[81] simplification, correction, streamlining and compilation of sentencing statutes; correction of various anomalies in the existing law; and implementation of substantial drug law sentencing reforms. New York State also should place greater emphasis on the utilization of evidence-based practices, the use of graduated sanctions for probation and parole violations, and enhanced re-entry programs in order to continue its success in maintaining and enhancing public safety in the State.

Although not every proposal and recommendation in this Report enjoyed the support of all Commissioners, the members did reach unanimous, or near unanimous, agreement on most proposals. In instances in which it occurred, the lack of unanimity reflects the weighty and complex nature of the subject matter and the deliberate approach taken by the Commission members to their charge.

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[78] Commission on Sentencing Reform, Transcript of July 18, 2007 Meeting, at 183.
[79] U.S. Department of Justice, *Crime in the United States 2006* (Washington, D.C.: U.S. Department of Justice, Federal Bureau of Investigation 2006).
[80] Bureau of Justice Statistics, Prisoners in 2007. Since December 1999, the New York State prison population has been reduced by slightly more than 11,000.
[81] Two members of the Commission did not support this recommendation.

PART TWO

GREATER SIMPLICITY IN SENTENCING

Part Two

Greater Simplicity in Sentencing

I. ADOPTING A PREDOMINATELY DETERMINATE SENTENCING SYSTEM IN NEW YORK: DETERMINATE RANGES

The Commission recommends a series of targeted reforms aimed at simplifying, and making more comprehensible, New York's overly complicated felony sentencing structure. The most significant of these reforms is a proposal to replace the current hybrid system of indeterminate and determinate sentences with a mostly determinate sentencing structure. Noting that a number of "ad hoc and piecemeal" amendments to the State's sentencing statutes have resulted in a confusing "mix of determinate and indeterminate sentences * * * [that] adds to an already convoluted [sentencing] structure,"[82] the Commission, in its Preliminary Report, specifically recommended[83] converting from indeterminate to determinate the authorized prison sentences for more than 200 non-violent, non-sex, non-drug felony offenses currently subject to indeterminate sentencing,[84] while retaining indeterminate sentences only for certain persistent felony

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[82] *"The Future of Sentencing in New York State: A Preliminary Proposal for Reform," New York State Commission on Sentencing Reform, October 15, 2007* ("Preliminary Report"), at 15.

[83] Three members of the Commission withheld their support for this recommendation. One member rejected the determinate model outright in favor of the "rehabilitative ideal of indeterminate sentencing" (s*ee*, Preliminary Report, at 66). A second withheld support because the Commission had, at the time of the Preliminary Report, neither discussed nor agreed to specific determinate ranges for these 200-plus non-violent felony offenses, and a third member believed the proposal warranted further study (*see*, Preliminary Report, at 17, n. 106). Under current law, indeterminate sentences are reserved primarily for those Class B through Class E non-violent, non-sex, non-drug felony offenses listed in Appendix A, as well as Class A-I and Class A-II non-drug felonies, certain first-time violent felony offenders whose crimes are the product of domestic violence (Penal Law §60.12); juvenile offenders (Penal Law §70.05); persistent violent felony offenders (Penal Law §70.08); persistent felony offenders (Penal Law §70.10); and certain second child sexual assault felony offenders (Penal Law §70.07[4]).

[84] A list of these felony offenses is set forth in Appendix B.

offenders and a relatively small number of non-drug Class A felony offenses that now carry a life maximum.[85]

The Commission's recommendation to move toward a mostly determinate felony sentencing structure was based, in large part, on its belief that as compared to indeterminate sentencing, the determinate model promotes greater uniformity, fairness and "truth-in-sentencing." As explained in detail in the Preliminary Report, a person serving a determinate sentence typically will have no more than two potential release dates prior to the maximum expiration date of the sentence: a "conditional release" date when six-sevenths of the full determinate term has been served (assuming the inmate has not forfeited any portion of his or her one-seventh "good time" allowance),[86] and, for felony drug offenders, a "merit release" date when five-sevenths of the determinate term has been served (assuming the inmate has earned a one-seventh merit time[87] allowance and has not forfeited any "good time").[88]

A person serving an indeterminate sentence, on the other hand, may have as many as four potential release dates prior to the maximum expiration date of the sentence: a supplemental merit time date for most drug offenses when two-thirds of the minimum period has been served;[89] a merit eligibility date when five-sixths of the minimum period has been served; a parole eligibility date when the entire minimum period has been served; and a conditional release date when

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[85] *See*, Preliminary Report, at 17.
[86] *See*, Correction Law §803(1)(c).
[87] *See*, Correction Law §803(1)(d).
[88] *See*, Preliminary Report, at 15. Like the 1/3 "good time" allowance applied to the maximum term of an indeterminate sentence, the 1/7 "good time" allowance applied to the term of a determinate sentence can be forfeited, in increments, by an inmate for a poor disciplinary record or failure to perform adequately in an assigned program. In contrast, a merit time allowance cannot be earned, or forfeited, in increments. An inmate either earns the full 1/6 (indeterminate) or 1/7 (determinate) merit time allowance or gets no merit time allowance at all.
[89] Supplemental merit time applies only to certain inmates serving indeterminate sentences for felony drug or marihuana offenses committed prior to implementation of the Drug Law Reform Act of 2004 (Laws of 2004, ch. 738). As discussed *infra*, at 70-71, that Act created an exclusively *determinate* sentencing scheme for those offenses.

two-thirds of the maximum term has been served.[90] Thus, for example, under the indeterminate model, when a defendant is sentenced to 8⅓ to 25 years, everyone, including the defendant and the victim, is left to guess when the defendant will be released. "Assuming [the] inmate earns good time credit, it remains unknown whether he or she will serve 8⅓ years or 16⅔ years or somewhere in between. Determinate sentencing, on the other hand, allows the parties to leave the courtroom with a greater understanding of the length of the sentence. By providing a maximum good time allowance of only one-seventh of the full term rather than one-third (as in the indeterminate model), and by eliminating entirely the subjective assessments and release decisions of an intervening parole board, the determinate model necessarily reduces the possibility that like offenders will be treated differently with regard to time actually served, thereby promoting greater fairness and overall uniformity."[91]

Determinate sentencing also allows for more informed plea bargaining, with both the parties and the court having a clearer picture of the actual time the defendant is likely to spend under custody on the agreed-to sentence, and virtually eliminates the possibility that an inmate who has "followed the rules" and earned the maximum good time and merit time allowances while in custody will be inappropriately or inexplicably denied release by the Board of Parole. In short, determinate sentencing promotes greater "truth-in-sentencing," results in a more fair and predictable outcome for both victims and offenders, and sends a clear message to incarcerated offenders that complying with institutional rules and participating in beneficial programming has a direct effect on the length of confinement.

Finally, determinate sentencing has been the unmistakable trend in New York, with the Legislature recently adding all felony drug[92] and sex[93] offenses to the list of crimes carrying a determinate,

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[90] *See*, Preliminary Report, at 15-16.
[91] *Id.* at 16.
[92] *See,* Laws of 2004, ch. 738.
[93] *See*, Laws of 2007, ch. 7.

rather than indeterminate, sentence. This trend has, in turn, resulted in fewer and fewer "hybrid" sentencing situations, where a single offender serves a complicated mix of concurrent and consecutive determinate and indeterminate sentences. Calculating the aggregate maximum and potential release dates for these "hybrid" sentences can become a question of higher mathematics to accurately determine when an inmate serving multiple hybrid sentences is eligible or required to be released.

In sum, the Commission believes that as a matter of fairness, greater simplicity and sound criminal justice policy, it makes sense to continue this positive trend by moving even closer to an all determinate felony sentencing structure in New York.

II. THE NEED FOR "FAIR AND ACCEPTABLE" DETERMINATE RANGES

The Commission recognized in its Preliminary Report that the proposed conversion from indeterminate to determinate sentencing was "inextricably linked with the adoption of fair and acceptable [determinate] sentencing ranges"[94] for the more than 200 non-violent, non-sex, non-drug felony offenses targeted for conversion. Immediately following submission of the Report, the Commission began the process of devising appropriate determinate ranges for these crimes.

A. The Current Indeterminate Ranges

As a preliminary matter, the Commission considered the adequacy and appropriateness of the current indeterminate ranges for the targeted crimes. Except for some relatively minor amendments, these ranges, as set forth in Penal Law §70.00, have been the controlling ranges for this group of Class B through Class E non-violent felony offenses for more than 35 years. The Commission focused, in particular, on the considerable breadth of the existing ranges, especially at the higher (i.e., Class B and Class C) felony classification levels. Under current law, for example, a first-time felon

[94] Preliminary Report, at 17.

convicted of a Class B non-violent, non-sex, non-drug felony offense is subject to a minimum indeterminate sentence of 1 to 3 years and a maximum sentence of 8⅓ to 25 years, and a second felony offender convicted of a Class B felony in this category faces a minimum indeterminate sentence of 4½ to 9 years and a maximum sentence of 12½ to 25 years.[95] Similarly, a first-time felon convicted of a Class C non-violent, non-sex, non-drug felony offense is subject to a minimum indeterminate sentence of 1 to 3 years and a maximum of 5 to 15 years, and a second felony offender faces a minimum indeterminate sentence of 3 to 6 years and a maximum of 7½ to 15 years.[96]

The Commission believes that these comparatively broad indeterminate ranges serve an important sentencing function by allowing judges to appropriately address the multiplicity of crimes included in the equally broad, catch-all category of non-violent, non-sex, non-drug felony offenses. Included, for example, among the Class C felonies in this group are offenses as diverse as criminal possession of a forged instrument in the first degree[97] (uttering or possessing specified types of forged instruments with the intent to defraud, deceive or injure another); promoting prostitution in the second degree[98] (advancing prostitution of a person less than 16 or by compulsion through force or intimidation); manslaughter in the second degree[99] (recklessly causing the death of another person) and criminal

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[95] *See*, Penal Law §70.00(2) and (3).

[96] *Id.* While DOCS' sentencing data indicate that the overwhelming majority of indeterminate sentences imposed on first-time felony offenders have a minimum period that is fixed at exactly one-third of the maximum term, the law does not require it. Penal Law §70.00(3)(b) provides that, for a first-time felony offender, the minimum period of an indeterminate sentence must be "not less than one year *nor more than* one-third" of the maximum term imposed (Penal Law §70.00[3][b] [emphasis supplied]). Thus, for example, a first-time felony offender convicted of a Class B non-violent felony offense could, under current law, receive an indeterminate sentence with a minimum period of one year and a maximum term of up to 25 years. Similarly, a first-time felony offender convicted of a Class C non-violent felony offense could receive an indeterminate sentence with a minimum period of one year and a maximum term of up to 15 years.

[97] Penal Law §170.30.

[98] Penal Law §230.30.

[99] Penal Law §125.15.

sale of a firearm to a minor[100] (unlawfully selling or giving a firearm to a person who is or reasonably appears to be less than 19 years of age). Despite sharing the same Class C non-violent felony designation, each of these offenses targets dramatically different felony-level criminal conduct. Indeed, the Class C non-violent felony category alone includes 26 separate felony offenses drawn from 18 different articles of the Penal Law.[101]

This is in contrast to more homogeneous sentencing categories such as felony drug offenses[102] and felony sex offenses.[103] The former category includes primarily drug sale and possession offenses derived from Penal Law Articles 220 and 221 and the latter includes sex offenses defined primarily in a single article of the Penal Law, Article 130.[104] While it may be appropriate, given the common nature of the offenses, to have a relatively narrow range of prison sanctions for "felony sex offen[ses]" or "felony drug offense[s],"[105] the Commission believes that sentencing courts must -- under an indeterminate *or* determinate model -- have a sufficiently broad range of available

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[100] Penal Law §265.16.

[101] The class B felony category includes 15 separate non-violent felony offenses drawn from 12 different articles of the Penal Law.

[102] Penal Law §70.70(1)(a).

[103] Penal Law §70.80(1)(a).

[104] The recently created crime of "sexually motivated felony," though defined in Penal Law Article 130, incorporates a number of enumerated "specified offenses" from several different Penal Law articles, committed "in whole or substantial part" for the "direct sexual gratification" of the offender (*see*, Penal Law §130.91).

[105] The Legislature appears to have followed this logic when, in 2004, it converted all State prison sentences for "felony drug offenders" from indeterminate to determinate (*see*, Laws of 2004, ch. 738). For first felony drug offenders in particular, the determinate ranges the Legislature established were considerably narrower (and, in many instances, much less onerous) than the indeterminate ranges they replaced (*see*, Penal Law §§70.00 and 70.70[2]). Notably, however, in converting the similarly "homogeneous" group of non-violent felony sex offenses from indeterminate to determinate in 2007, the Legislature fixed fairly broad ranges (*see,* Laws of 2007, ch.7; *see also*, Penal Law §70.80). It can be argued, of course, that by carving out felony drug and non-violent felony sex offenses from the larger group of non-violent felony offenses subject to indeterminate sentencing and creating a separate, determinate, sentencing scheme for each offense type, the Legislature made even more complicated an already "Byzantine" sentencing structure (*see*, Preliminary Report, at 2-3, 12-13, 15-16).

prison sanctions to address the diverse collection of non-violent offenses targeted by this proposal.

Broad sentence ranges under the existing indeterminate model further a second important sentencing objective: they allow judges to impose a State prison sentence in a particular case that reflects the specific aggravating and mitigating circumstances of the crime and the criminal history of the offender. As an example, a sentencing judge might properly determine that the minimum State prison sentence of 1 to 3 years (or, perhaps, a non-incarceratory sentence) is appropriate for a first-time felony offender with no prior criminal record who commits the Class C non-violent felony of grand larceny in the second degree[106] by pocketing $60,000 of his employer's retail sales proceeds over an extended period. That same judge might determine that a sentence closer to the maximum (5 to 15 years) is appropriate where a first-time felon with a lengthy misdemeanor record for fraud-related theft offenses commits the same Class C felony offense by defrauding several elderly victims, through a "Ponzi scheme," of ten times that amount ($600,000), thereby depriving them of their entire life savings. Though both of these offenders stand convicted of the same statutory offense (i.e., grand larceny in the second degree), the sentencing judge is currently able to choose from a sufficiently broad range of prison sanctions to ensure that "the punishment fits the crime."

With regard to the adequacy of the current indeterminate ranges, it is worth noting that in the more than two decades since New York's Committee on Sentencing Guidelines issued its call for a radical new "guidelines" system of felony sentencing,[107] there has been no concerted effort -- legislative or otherwise -- to replace, or even substantially modify, the longstanding indeterminate ranges for this diverse group of crimes. Indeed, when the Legislature -- in 2004 and 2007, respectively -- made significant changes to prison sentences for non-violent felony drug and sex offenses by converting them from

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[106] Penal Law §155.40 provides, in relevant part, that a person is guilty of grand larceny in the second degree when he or she steals property and the value of the property exceeds fifty thousand dollars.

[107] *See*, New York State Committee on Sentencing Guidelines, *Determinate Sentencing: Report and Recommendations* (1985); *see also*, Preliminary Report, at 10.

indeterminate to determinate, it left the sentences (and ranges) for all the *remaining* non-violent felonies untouched. It is not surprising then that while several of the sentencing experts and advocates who addressed the Commission at its "information-gathering" sessions and public hearings argued against the existing scheme of "mandatory minimum" prison sentences for certain first-time and second non-violent felony offenders,[108] there was virtually no discussion or criticism of the existing ranges for these crimes.

After considering all of the above factors, the consensus view of the Commission was that the determinate ranges proposed should, to the greatest extent possible, preserve the existing scope of available prison sanctions.[109] Stated differently, the proposed ranges should enable the State's criminal courts to impose sentences that -- at both the low and high end of the sentencing spectrum -- result in roughly the same periods of imprisonment (or potential imprisonment) as under the existing indeterminate model.

B. The Importance of "Time-Served" Data

To obtain a more accurate picture of prison time actually served for the 200-plus non-violent felony offenses targeted for conversion, the Commission conducted a comprehensive examination of "time-served" data for these crimes. The Commission reviewed prison release data from DOCS showing, over a 23-year period (1985-2007), the amount of prison time served by offenders sentenced under the existing indeterminate scheme for each of the targeted Class B through Class E non-violent felony offenses. A summary of this time-

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[108] *See*, *e.g.*, Penal Law §60.05(4) (requiring the imposition of an indeterminate sentence of imprisonment for first-time felony offenders convicted of certain enumerated Class C non-violent felony offenses); Penal Law §70.06 (requiring the imposition of an indeterminate sentence of imprisonment for non-violent second felony offenders). A discussion of the Commission's proposals relating to the current "mandatory minimum" sentences for certain drug-addicted non-violent felony offenders in need of treatment appears in a separate section of this Report (*see*, *infra,* at 96-131).

[109] As discussed, *infra,* at 53-58, two members of the Commission were in favor of adopting what would amount to shorter available prison sanctions by applying the 2004 "determinate drug" ranges to the targeted group of non-violent felony offenses.

served data, divided into one-year increments by felony classification level and offender recidivist status, appears in three separate charts in Appendix C. The first chart ("Chart C-1A") summarizes the time-served data for the cohort of first-time felons and second felony offenders released from DOCS between January 1985 and December 2007 on indeterminate sentences for Class B, non-violent, non-sex, non-drug felony offenses. The second chart ("Chart C-1B") summarizes this release data for Class C felony offenders in that cohort. The third chart ("Chart C-2") summarizes the time-served data for the cohort of first-time felons and second felony offenders released during the same period on indeterminate sentences for Class D and Class E non-violent, non-sex, non-drug felony offenses.[110]

Charts C-1A and C-1B, for example, include the following relevant information regarding Class B and Class C felony offenders in the 1985-2007 release cohort:

- Of the 1,056 first-time Class B felony offenders in the cohort, 1,045 (99.0%) served less than 10 years, 99.5% served less than 13 years and 100% served less than 17 years.[111]

- Of the 178 Class B second felony offenders in the cohort, 68 offenders (38.2%) served at least three years and less than five

[110] Also included in Appendix C are four related charts (Charts C-3 through C-6), which, for Class B and Class C felonies only, display the time served data for this 1985-2007 DOCS release cohort by *length of sentence* served. Due to space restrictions, only the most frequently occurring sentence lengths are represented in these four additional charts. The shaded column headings in Charts C-1A through C-6 (e.g., "0/lt 1," "1/lt 2," "2/lt 3") refer to the time (in years) actually served prior to release. Thus, for example, "0/lt 1" refers to releasees in the cohort who served less than ("lt") one year, and "1/lt 2" refers to releasees in the cohort who served at least one year but less than two years.

[111] A total of 752 (71.2%) of the 1,056 first-time class B felony offenders in this release cohort were serving a sentence for the class B non-violent felony of conspiracy in the second degree. As defined in Penal Law §105.15, this crime includes, among other things, conspiracy to commit murder and conspiracy to commit any class A felony drug offense. Of the five offenders in that first felony offender cohort who served 14 years or more, four were serving a sentence for conspiracy in the second degree (*see*, Appendix C, Chart C-1A).

years, and all but three offenders (1.7%) served less than 15 years.[112]

- With regard to the 2,586 first-time Class C felony offenders in the cohort, 2,574 (99.5%) served less than 11 years, and only three of the remaining 12 offenders served 13 years or more.[113]

- Of the 727 Class C second felony offenders in the cohort, 263 offenders (36.2%) served at least two years and less than four years, and 719 (98.9%) served less than 12 years.[114]

With respect to the Class D and Class E felony offenders in the 1985-2007 release cohort, Chart C-2 shows that:

- Of the 14,481 first-time Class D felony offenders in the cohort, 14,407 (99.5%) served less than five years.[115]

- Of the 18,689 Class D second felony offenders in the cohort, 12,399 (66.3%) served at least one year and less than three years, and 18,526 (99.1%) served less than six years.[116]

- With regard to the 14,625 first-time Class E felony offenders in the cohort, 3,628 (24.8%) served less than one year,[117] 8,176

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[112] Of the 178 Class B second felony offenders in the release cohort, 123 offenders (69.1%) were serving a sentence for conspiracy in the second degree. Of the three offenders in this Class B second felony offender cohort who served 15 or more years, all three were serving a sentence for conspiracy in the second degree, and two of the three served at least 17 but less than 18 years.

[113] All three of these offenders were serving a sentence for manslaughter in the second degree under Penal Law §125.15.

[114] The remaining 1% (a total of eight offenders) who served 12 or more years were serving a sentence for manslaughter in the second degree.

[115] *See*, Appendix C, Chart C-2.

[116] *Id.*

[117] *Id.* Although the lowest permissible minimum period for an indeterminate sentence imposed on a first-time felony offender convicted of a Class B, C, D or E felony offense is one year, there are several "early release" mechanisms under existing law that can result in an offender's serving less than the statutory minimum period. These include, but are not limited to, early release under DOCS' Shock

(55.9%) served at least one year and less than two years, and all but 239 offenders (1.7%) served less than three years.

- Of the 31,054 Class E second felony offenders in the cohort, 27,694 (89.2%) served at least one year and less than three years, and 1,686 (5.4%) served at least three years and less than four years.[118]

In reviewing the raw data that formed the basis for these three summary charts, the Commission noted that offenders convicted of certain crimes, such as the Class B non-violent felony offense of conspiracy in the second degree (particularly where the charge was based on a conspiracy to commit the crime of murder) and the Class C non-violent felony of manslaughter in the second degree, tended to fall at the higher end of the time-served spectrum.[119] It also was noted that a relatively large percentage of the Class B first-time and second felony offender releasees in the 23-year cohort were serving a sentence for conspiracy in the second degree (71.2% and 69.1%, respectively).[120] It was suggested that, rather than propose unnecessarily broad determinate ranges for *all* Class B and Class C felony offenses in the targeted pool to accommodate the potential need for harsher sentences for these two crimes, the crimes themselves should simply be reclassified at a higher felony offense level.[121] As discussed in greater detail below, these "reclassification" proposals were ultimately rejected by the Commission.

C. Weighing the Options: The Three Determinate Models

In attempting to devise determinate ranges that take into account currently available prison sanctions and time actually served

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Incarceration Program, merit release and early release for deportation purposes (Executive Law §259-i(2)(d); Correction Law §§803; 807[4]).

[118] *See*, Appendix C, Chart C-2.

[119] *See*, Appendix C, Charts C-1A and C-1B.

[120] *See*, Appendix C, Chart C-1A.

[121] Specifically, the proposal was to reclassify conspiracy in the second degree (a Class B non-violent felony) as a Class C *violent* felony, and manslaughter in the second degree (a Class C non-violent felony) as a Class *B* non-violent felony, thereby subjecting each offense to a higher determinate sentence range.

for the more than 200 targeted non-violent felony offenses, the Commission reviewed three distinct determinate sentencing "models," weighing the pros and cons of each before recommending a single model for adoption.[122] As explained below, each of these models provides for a minimum determinate sentence of one year for all Class B through Class E first-time felony offenders who are sentenced to State prison. Because there was early agreement among the members on this proposed one-year minimum, most of the Commission's debate

[122] A series of charts (Charts D-1 through D-4) comparing each of the models to the existing indeterminate ranges appear in Appendix D of this Report. Chart D-1, which applies to first-time felony offenders only, compares the proposed minimum and maximum determinate terms for each of the three models with the existing indeterminate terms, and Chart D-2 provides comparable information for second felony offenders. Chart D-3, which applies to first felony offenders only, compares the proposed *maximum* determinate terms under the three models with the existing *maximum* indeterminate terms and presents additional time-served comparison data from the 1985-2007 DOCS release cohort. Chart D-4 contains comparable information for second felony offenders. To allow for a more meaningful comparison of the existing indeterminate and proposed determinate ranges, each of the four charts also includes a "release type" column. This column allows for a direct comparison of the "hypothetical" release point (in years) under the three most commonly applied early release mechanisms: "merit release," parole release (for indeterminate sentences only) and conditional release. For the current indeterminate model, the "merit" release point (designated "merit" on the charts) assumes the offender has earned a 1/6 merit time allowance, which is deducted from the minimum period of the sentence and, thus, allows the offender to be considered for release by the Board of Parole after he or she has served 5/6 of the minimum period. For the proposed determinate models, the "merit" release point assumes the offender has earned a 1/7 merit time allowance and a 1/7 "good time" allowance, both of which are deducted from the full determinate term. Thus, the "merit" release point for each determinate model reflects the offender's serving 5/7 of the full determinate term. The parole release point (designated "parole" on the charts) applies only to the current indeterminate model and occurs upon the offender's serving the minimum period of the sentence. This release point assumes the offender either did not earn a 1/6 merit time allowance, forfeited a previously earned merit allowance or earned the allowance and was simply denied release by the Board of Parole on the "merit" release date. The conditional release point (designated "CR" on the charts) for the current indeterminate model assumes the offender was denied release by the Board at the merit date, parole date and all subsequent dates, but has not forfeited the 1/3 "good time" allowance deducted from the maximum term of the sentence. The conditional release ("CR") point for the determinate model assumes the offender has not forfeited the 1/7 "good time" deduction and that the offender either did not earn a 1/7 merit time allowance or forfeited a previously earned merit allowance.

in this area focused on the question of the appropriate maximum determinate ranges for both first and second felony offenders. The following is an overview of the various range models discussed and a summary of the Commission's thoughts and conclusions with regard to each.

1. Prior "Conversion" Legislation

The Legislature has, on four prior occasions, converted entire categories of felony offenses from indeterminate to determinate sentences. On three of those four occasions,[123] the Legislature, in lieu of devising new maximum ranges for the determinate sentences, simply "borrowed" the existing indeterminate maximums and established those as the new determinate maximums for each corresponding felony classification level. This occurred in 1995 and 1998, respectively, when the Legislature converted prison sentences for all first and second-time violent felony offenders from indeterminate to determinate, and again in 2007 when it converted prison sentences for nearly all non-violent felony sex offenses from indeterminate to determinate. In each instance, the Legislature simply "grafted" the maximum terms under the existing indeterminate model onto the new determinate sentencing scheme. Thus, for example, where the permissible maximum indeterminate term for a first or second-time felon convicted of a Class B violent felony offense or a Class B non-violent felony sex offense had been 25 years, the new maximum determinate term became (and, with certain exceptions, still is) 25 years.[124]

The Commission rejected this conversion approach early on. It recognized that simply "borrowing" the existing indeterminate maximum terms and applying them as the new determinate maximum sentences for the targeted offenses could lead to longer time-served figures, especially for offenders sentenced at the higher end of the determinate spectrum. This is due primarily to fundamental

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[123] As discussed *infra,* at 53-54, the fourth such indeterminate-to-determinate "conversion" occurred in 2004 and applied to sentences for all felony-level drug offenses.

[124] *See*, Penal Law §§70.02, 70.04, 70.06(6) and 70.80.

differences in the way indeterminate and determinate sentences are structured. For example, unlike its indeterminate counterpart, a determinate sentence has no minimum or maximum term and lacks a discretionary parole release mechanism. While both models allow for "merit release" and "conditional release" under certain circumstances, the merit time and good time allowances underlying these early release mechanisms are applied and calculated quite differently for determinate and indeterminate sentences.

As an example, a first-time Class B non-violent felony offender serving the current maximum indeterminate sentence of 8⅓ to 25 years would be eligible for merit release by the Board of Parole after serving five-sixths of the 8⅓-year minimum period (i.e., 6.9 years), and, if denied merit release, would be eligible for discretionary release on parole after serving the full 8⅓-year minimum period. Even if denied both merit release and parole release, the offender would continue to be eligible for discretionary release by the Board and, if not released sooner, would be entitled to "conditional release" after serving two-thirds of the 25-year maximum term (i.e., 16.7 years).[125] In contrast, the same offender serving a 25-year *determinate* sentence would have no possibility of release on parole at any point in the sentence. Instead, the offender would be entitled to merit release, assuming he or she earns the available one-seventh merit time allowance, only after serving five-sevenths of the 25-year determinate term (i.e., 17.9 years). If the offender fails to earn a merit allowance, or forfeits a previously earned allowance, he or she would be required to be "conditionally released" after serving six-sevenths of the full determinate term (i.e., 21.4 years).

A review of the time-served data in Charts C-3 and C-4[126] suggests that the Commission's concerns with this conversion method are well founded. Chart C-3, for example, shows that of the 22 first-time Class B felony offenders in the 23-year DOCS' release cohort who were sentenced to the current maximum indeterminate sentence of 8⅓ to 25 years, 86.4% actually served less than 13 years. As noted,

[125] This assumes that the offender has not forfeited any of the one-third "good time" allowance.
[126] *See*, Appendix C.

if the Commission were to simply adopt the current indeterminate 25-year maximum as the new determinate maximum sentence for this category of offenders, 100% of the first-time Class B felony offenders sentenced to the maximum would be required to serve at least 17.9 years, and those offenders who failed to earn a one-seventh merit allowance would be required to serve at least 21.4 years.

Similarly, Chart C-5 shows that more than three-fourths (76.0%) of the 287 first-time Class C felony offenders in the release cohort who were sentenced to the current maximum indeterminate sentence of 5 to 15 years actually served less than 10 years. If the Commission were to adopt the current 15-year indeterminate maximum as the new determinate maximum sentence, 100% of those first-time felony offenders sentenced to the maximum would be required to serve at least 10.7 years, and those offenders who failed to earn a one-seventh merit allowance would be required to serve at least 12.9 years.

The Commission is aware that sentencing judges, under a determinate sentencing scheme with no Parole Board component, have a much greater say in the time actually served by a convicted offender. Thus, the concern that by adopting the current maximum indeterminate terms as the new determinate maximum sentences, more offenders will end up serving more time than under the existing sentencing scheme is, to some extent, a theoretical one. Stated differently, a sentencing judge under a new determinate sentencing model could simply impose a sentence that is less than the available maximum and thereby eliminate the possibility that an offender will serve more time than he or she would have under the comparable indeterminate maximum sentence. Nonetheless, the Commission believes that the better and more responsible approach is to fix determinate ranges for these non-violent felony offenses that take into account the significant differences between the indeterminate and determinate structures, thus making it less likely that the sentences imposed will be greater under the new determinate sentencing model.

2. The "Conditional Release-Based" Model

a. Proposed Ranges

The first of the three determinate range models considered, and the one supported by most of the Commissioners,[127] utilizes a theoretical approach to fixing determinate sentence lengths for the more than 200 non-violent, non-sex, non-drug felony offenses in the conversion pool. Under this Conditional Release-Based ("CR-based") model, maximum sentence length was determined by matching, as closely as possible, the conditional release point on the proposed maximum determinate sentence to the existing conditional release point of the current maximum indeterminate sentence.[128]

Under this model, for example, a first-time Class C felony offender would face a proposed maximum determinate term of 12 years. Assuming the offender forfeits none of his or her one-seventh good time allowance,[129] the offender would be entitled to conditional release after 10.3 years. This approximates the conditional release point of 10.0 years on the comparable maximum indeterminate sentence of 5 to 15 years. Similarly, under the model, a first-time Class D felony offender would face a proposed maximum determinate

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[127] Members could support more than one model.

[128] The sole exception is at the Class B felony level. For these offenders, the maximum term (for both first-time and second felony offenders) was fixed to yield a conditional release point slightly *lower* than the existing indeterminate conditional release point for that classification level. This was based on the Commission's analysis of time-served data for the 1985-2007 DOCS' release cohort, which reveals that only a very small number of offenders actually served more than the proposed, slightly lower, maximum term.

[129] As with the other two determinate sentencing models considered by the Commission (i.e., the "time-served" and "determinate drug" models), all offenders serving a determinate sentence under the proposed CR-based model would, subject to existing statutory restrictions governing eligibility and forfeiture, be permitted to earn a one-seventh merit time allowance, and would also be entitled to a one-seventh "good time" allowance, both of which would be deducted from the full term of the determinate sentence. The general provisions governing eligibility for merit time, and the earning and forfeiture of merit time allowances, are set forth in Correction Law §803. In a separate proposal in this Report, the Commission recommends expanding eligibility for merit time to include certain offenders currently ineligible to earn a merit allowance (*see, infra*, at 162-166).

sentence of 5½ years. Assuming no forfeiture of "good time," the offender would be entitled to conditional release after 4.7 years. This matches exactly the conditional release point of 4.7 years on the comparable maximum indeterminate sentence of 2⅓ to 7 years.[130]

The minimum determinate sentence for Class B through Class E first-time felony offenders under the CR-based model would be one year.[131] The minimum terms for second felony offenders would, with just one exception, be established by fixing the point of merit release and conditional release for the proposed minimum terms as closely as possible to the current indeterminate merit release and parole release points, respectively.[132] This approach ensures that for an offender sentenced to the minimum determinate term, the earliest possible release points on that sentence (i.e., the merit and conditional release points) will approximate the earliest possible release points for the comparable minimum sentence under the existing indeterminate model (i.e., the merit and parole release points).

For example, under the CR-based model, the proposed minimum determinate term for a Class B second felony offender is five years.[133] This term would yield a merit release point of 3.6 years, which is comparable to the 3.7-year merit release point on the minimum indeterminate Class B second felony offender sentence of 4½ to 9 years. Similarly, this five-year minimum determinate term would yield a conditional release point of 4.3 years, which is comparable to the 4.5-year parole release point on the current

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[130] The proposed minimum and maximum ranges for the CR-based model are set forth below and in comparison Charts D-1 through D-2, which appear in Appendix D.

[131] As noted, both the time-served and determinate drug models also propose a one-year minimum determinate sentence for first-time felony offenders.

[132] The sole exception is at the Class D felony level. For Class D second felony offenders, the Commission agreed to a slightly lower minimum sentence of two years rather than 2½ years. As reflected in Chart D-2, the 2½-year minimum sentence proposed for Class D second felony offenders under the competing time served model would yield both merit release and conditional release points that more closely approximate the merit and parole release points for the existing Class D second felony offender minimum indeterminate sentence of 2 to 4 years (*see*, Appendix D).

[133] *Id.,* Chart D-2.

minimum indeterminate sentence of 4½ to 9 years.[134] As with nearly all other determinate sentences, each determinate sentence under the proposed CR-based model would be required to be imposed in whole or half years.[135] Further, under the model, each sentence would include a mandatory period of post-release supervision (PRS) of from 1 to 3 years, the specific period to be determined by the judge at the time of sentencing.[136] The following charts set forth the proposed minimum and maximum determinate ranges under the CR-based model, and the current indeterminate ranges, for each felony classification level. As with Charts D-1 through D-4 in Appendix D, these charts also provide a comparison of the calculated "merit release" and "conditional release" points under the proposed determinate ranges, and the corresponding release points under the existing indeterminate model.

[134] *Id.* In comparing these hypothetical release dates under the two models, it is important to remember that under the current indeterminate model, the Board of Parole is the ultimate arbiter of whether an offender who has earned a one-sixth merit time allowance will be granted "merit release" to parole supervision after serving five-sixths of the minimum period or parole release after serving the full minimum period (*see generally*, Executive Law §259-i[2][c][A]). In contrast, the Board plays no role whatsoever in the release of the offender under the determinate model. Accordingly, an offender serving a determinate sentence who has earned a one-seventh merit time allowance and has forfeited neither that allowance nor the one-seventh "good time" allowance is not subject to Parole Board approval and, as a general rule, *must* be "merit released" after serving five-sevenths of the determinate term. If no merit allowance is earned, or an earned merit allowance is later forfeited, the offender would be entitled to "conditional release" after serving six-sevenths of the determinate term, provided the offender has forfeited none of his or her one-seventh "good time" allowance.

[135] *See*, *e.g.*, Penal Law §§70.02(2); 70.04(2); 70.70(2); 70.71(2); 70.80(3).

[136] *See*, PRS discussion, *infra*, at 47-49.

Chart 1

Conditional Release-Based Model: First-Felony Offenders

Felony Class	Range and Release Types	Current Indeterminate (in years)		Proposed Determinate (in years)[a]	
		Min	**Max**	**Min**	**Max**
B	**Sentence Range**	**1 – 3**	**8⅓ – 25**	**1**	**16**
	Earliest Release Range				
	■ Merit	0.8	6.9	0.7	11.4
	■ Parole	1.0	8.3	--	–
	■ CR	2.0	16.7	0.9	13.7
C	**Sentence Range**	**1 – 3**	**5 – 15**	**1**	**12**
	Earliest Release Range				
	■ Merit	0.8	4.2	0.7	8.6
	■ Parole	1.0	5.0	–	–
	■ CR	2.0	10.0	0.9	10.3
D	**Sentence Range**	**1 – 3**	**2⅓ – 7**	**1**	**5½**
	Earliest Release Range				
	■ Merit	0.8	1.9	0.7	3.9
	■ Parole	1.0	2.3	–	–
	■ CR	2.0	4.7	0.9	4.7
E	**Sentence Range**	**1 – 3**	**1⅓ – 4**	**1**	**3**
	Earliest Release Range				
	■ Merit	0.8	1.1	0.7	2.1
	■ Parole	1.0	1.3	–	–
	■ CR	2.0	2.7	0.9	2.6

[a] Note that under the proposed model, every determinate sentence would be followed by a post-release supervision period of 1-3 years to be specified by the judge at sentencing.

Chart 2

Conditional Release-Based Model: Second Felony Offenders

Felony Class	Range and Release Types	Current Indeterminate (in years)		Proposed Determinate (in years)[a]	
		Min	**Max**	**Min**	**Max**
B	**Sentence Range**	**4 ½ – 9**	**12 ½ – 25**	**5**	**16**
	Earliest Release Range				
	■ Merit	3.7	10.4	3.6	11.4
	■ Parole	4.5	12.5	–	–
	■ CR	6.0	16.7	4.3	13.7
C	**Sentence Range**	**3 – 6**	**7 ½ – 15**	**3½**	**12**
	Earliest Release Range				
	■ Merit	2.5	6.2	2.5	8.6
	■ Parole	3.0	7.5	–	–
	■ CR	4.0	10.0	3.0	10.3
D	**Sentence Range**	**2 – 4**	**3 ½ – 7**	**2**	**5½**
	Earliest Release Range				
	■ Merit	1.7	2.9	1.4	3.9
	■ Parole	2.0	3.5	–	–
	■ CR	2.7	4.7	1.7	4.7
E	**Sentence Range**	**1 ½ – 3**	**2 – 4**	**1½**	**3**
	Earliest Release Range				
	■ Merit	1.2	1.7	1.1	2.1
	■ Parole	1.5	2.0	–	–
	■ CR	2.0	2.7	1.3	2.6

[a] Note that under the proposed model, every determinate sentence would be followed by a post-release supervision period of 1-3 years to be specified by the judge at sentencing.

b. Rationale

In selecting the CR-Based model for this diverse pool of more than 200 non-violent, non-sex, non-drug felony offenses, the Commission, during its deliberations, pointed to several key aspects of the proposal. First, of the three models considered, the proposed minimum and maximum ranges of the CR-based model are, in the Commission's view, fair and reasonable, and will provide judges with maximum flexibility to impose terms of imprisonment that, at both the low and high end of the sentencing spectrum, are comparable to those of the existing indeterminate model.

Thus, where a sentencing judge under current law believes that a first-time Class C felony offender should receive the maximum indeterminate sentence of 5 to 15 years (pursuant to which the offender would be entitled to conditional release after serving 10 years), the judge, under the CR-based model, can mirror that result by imposing the proposed maximum determinate sentence of 12 years (which has a conditional release point of 10.3 years). On the other hand, a judge inclined to impose the lowest permissible prison sentence of 1 to 3 years on a first-time Class C felony offender under the existing indeterminate model can closely approximate that result by imposing a one-year determinate sentence under the CR-based model. As reflected in Charts 1 and 2,[137] the respective 0.7 and 0.9 merit and conditional release points on the one-year determinate sentence closely track the 0.9 and 1.0 respective merit and parole release points under the indeterminate model. Moreover, with the noted exception of first-time Class B felony offenders, a similar result is achieved under the CR-based model throughout the various offender classification levels and designations (i.e., first and second felony offenders).[138]

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[137] *See, supra*, at 43-44.

[138] The conditional release points for the proposed maximum determinate ranges under the time-served model also, at certain classification levels, come quite close to the comparable conditional release points under the current indeterminate model. As reflected in Charts D-3 and D-4, however, the time-served model is much less consistent in this regard (*see*, Appendix D). For example, the conditional release point of 6.8 years for the proposed maximum (8-year) determinate sentence for first-time Class C felony offenders under the time-served model is considerably *lower*

Second, although the CR-based model takes a more theoretical approach to fixing maximum ranges and, unlike the time-served model, is not based solely on an analysis of time-served data, the maximum ranges it proposes conform closely to that data at all four felony classification levels. Indeed, when the 1985-2007 DOCS' release cohort[139] is considered, with only one exception, no proposed maximum term under the CR-based model would "cover" less than 95% of the cohort releasees at that felony classification level, and several would cover a greater percentage.[140] As an example, the time-served data in Chart D-3[141] show that 99.5% of the 1,056 first-time Class B felony offenders in the DOCS' release cohort actually served 13.7 years or less, with 13.7 years representing the conditional release point on the proposed maximum (16-year) determinate sentence under the CR-based model. Similarly, 99.3% of the 2,586 first-time Class C felony offenders in the DOCS' release cohort actually served 10.3 years or less, with 10.3 years representing the conditional release point on the proposed maximum determinate sentence of 12 years. Finally, of the 14,481 first-time Class D felony offenders in the cohort, 99.3% served 4.7 years or less, with 4.7 years representing the conditional release point on the proposed maximum sentence of 5½ years.[142]

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than the 10-year conditional release point for the current maximum (5 to 15-year) indeterminate sentence. In contrast, the conditional release point of 5.1 years for the proposed maximum (6-year) determinate sentence for Class D second felony offenders under the time served model is slightly *higher* than the 4.7-year conditional release point for the current maximum (3½ to 7-year) indeterminate sentence.

[139] As noted, a summary of the time-served data for this 23-year release cohort appears in Charts C-1A, C-1B and C-2 of Appendix C.

[140] The exception relates to the proposed maximum term for Class E second felony offenders. The CR-based model fixes a maximum determinate sentence of three years for Class E second felony offenders, resulting in a conditional release point of 2.6 years. The time-served data in Chart D-4 show that 89.3% of the 31,054 Class E second felony offenders in the 1985-2007 release cohort actually served 2.6 years or less. Stated differently, nearly 11% of Class E second felony offenders in the cohort actually served more than the 2.6 years that would be required to be served under the proposed maximum determinate sentence of three years (*see*, Appendix D).

[141] *See*, Appendix D. The relevant time-served data in Charts D-3 and D-4 appear under the heading "All cases: % With Time Served Falling At or Below the Point of Proposed CR." This time-served data is based on the same 1985-2007 DOCS' release cohort that forms the basis of Charts C-1A and C-2 in Appendix C.

[142] *See*, Appendix D, Chart D-3.

Third, by fixing higher maximum sentences for first-time and second Class C felony offenders than are proposed under the time-served model (but still well below the high end of the indeterminate ranges currently in effect), the CR-based model would cover 99.3% of the first-time Class C felony offenders and 96.8% of the Class C second felony offenders in the DOCS' release cohort, thereby eliminating the need to reclassify the crime of manslaughter in the second degree as proposed under the time-served model.

Finally, by using a formula based on the conditional release points of the existing indeterminate scheme, the CR-based model results in identical proposed maximum terms for first and second felony offenders at each classification level. Under the model, for example, the proposed maximum determinate sentence for both first- and second-time Class B felony offenders is 16 years. This mirrors the current indeterminate scheme (which also fixes maximum terms at each felony classification level that are the same for first-time and second felony offenders), and would add a degree of simplicity that is lacking in the time-served and determinate drug models.

c. Post-Release Supervision Periods

As noted, under the CR-based model, every determinate sentence imposed on a conviction for a targeted offense would be followed by a mandatory period of post-release supervision ("PRS") of between one and three years. This would apply to both first and second felony offenders. At sentencing, the judge would be required to specify on the record the specific PRS period imposed. The provisions of Penal Law §70.45, governing the commencement, calculation, conditions, violation and revocation of PRS periods generally, would apply to any period of PRS imposed on a determinate sentence for a targeted offense.

In reviewing the options for a PRS model in these non-violent felony cases, the Commission closely examined the existing statutory provisions governing PRS.[143] For first violent felony offenders (other than sex offenders), the sentencing judge must select from a range of

[143] *See*, Penal Law §70.45.

available PRS periods (generally from 1½ to 5 years, depending on the classification level of the violent felony offense). All *second* violent felony offenders (other than sex offenders) must receive a PRS period of five years.[144] Pursuant to Penal Law §70.45, all felony sex offenders receiving a determinate sentence, including those convicted of an offense that is also classified as a violent felony offense under Penal Law §70.02, are subject to enhanced PRS periods. These periods range from 3 to 10 years for a first felony offender convicted of a non-violent Class E felony sex offense, to 10 to 25 years for a repeat felony offender convicted of a Class B (violent or non-violent) felony sex offense.[145]

All Class A felony drug offenders who receive a determinate sentence must serve a PRS period of five years. First felony offenders convicted of a Class D or Class E drug felony and sentenced to a determinate sentence must serve a one-year period of PRS. For all other felony drug offenders receiving a determinate sentence, the sentencing judge must select from a range of available PRS periods (generally from one to three years, depending on the classification level of the felony drug offense and whether the offender is a repeat felon).

The Commission's decision to allow the sentencing judge in these targeted non-violent felony cases to choose a specific PRS period from a relatively short range of available periods (i.e., one to three years) is based on three primary considerations. First, creating a PRS model with a single range, for both first and second felony offenders, to be applied to all felony classification levels, is simple and avoids further complicating an existing sentencing structure that has been aptly described as convoluted and labyrinthine.

Second, while simplicity is important, it is also important to avoid a "one size fits all" approach to PRS that would require the judge to impose a fixed (e.g., two-year) PRS period in every case. As previously discussed, the pool of more than 200 non-violent felony offenses targeted by this proposal covers a wide variety of criminal

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[144] *Id.*
[145] *Id.*

conduct defined in numerous articles of the Penal Law, and judges should have an appropriate menu of PRS options in imposing this critical supervisory portion of the determinate sentence. The proposed PRS model provides an appropriate balance between these two competing considerations. Though simple in application, it would allow the court in each of these cases to choose from a range of PRS periods the specific period that best suits the supervision needs of the offender and maximizes public safety.

Finally, and perhaps most important, research in the area of offender re-entry consistently shows that offenders returning to the community from prison are most likely to recidivate during the first 30 months following release, and that those who do *not* recidivate during that period pose a much lower risk of recidivating thereafter.[146] Accordingly, limiting the permissible PRS period to no more than three years for this group of non-violent felony offenses will, in the Commission's view, further the proper allocation of limited Parole resources in a manner that is consistent with public safety.

3. The "Time-Served" (98%) Model

The Commission also considered a second determinate sentencing model, dubbed the "time-served" (or "98%") model. This proposal uses time-served data for the 1985-2007 DOCS' release cohort to determine the cumulative point at which 98% of all releasees in a given classification level (e.g., 98% of all first-time Class B felons in the cohort) had been released on their sentences.[147] That point is

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[146] *See*, Figure 2, *infra*, at 143.

[147] Like the CR-based model, the time-served model would fix a one-year minimum determinate term for first-time felony offenders. It would fix the following maximum determinate terms for these offenders: 10 years for class B felonies; 8 years for Class C felonies; 5 years for Class D felonies and 3½ years for Class E felonies. The time-served model would fix the following minimum and maximum determinate sentences for second felony offenders: 5 to 17 years for Class B felonies; 3½ to 10½ years for Class C felonies; 2½ to 6 years for Class D felonies and 1½ to 3½ years for Class E felonies. Note that the proposed minimum determinate terms for second felony offenders under the time-served model are *not* based on an analysis of time-served data. As with the CR-based model, minimum terms were determined by setting the point of proposed merit release and conditional release as close as possible to the current indeterminate merit release and parole release points,

then used to fix the proposed conditional release ("CR") point of the new maximum determinate sentence for that classification level, and the maximum sentence itself is established by simply dividing the CR point by six-sevenths (.857).[148] Using this formula, the time-served model fixes maximum ranges for all four felony classification levels that reflect the actual time-served figures for roughly 98% of the releasees in the 23-year cohort.

For example, the time-served comparison data in Chart D-3[149] show that 98.5% of the 1,056 first-time Class B felony offenders in the 23-year release cohort actually served 8.6 years or less. By fixing a determinate maximum sentence of 10 years for first-time Class B felony offenders (thereby creating a conditional release point of 8.6 years), the "time-served" model reflects that no more than 1.5% of the 1,056 first-time Class B felony offenders in the cohort actually served more than they would have been required to serve (i.e., more than the conditional release point) under the proposed maximum determinate sentence.

The time-served data in Charts D-3 and D-4 further illustrate the rationale behind this model. Chart D-3, for example, shows that 97.9% of the 14,481 first-time Class D felony offenders in the release cohort actually served 4.3 years or less, with 4.3 years representing the conditional release point of the proposed maximum determinate sentence of 5 years for first-time Class D felons. Similarly, Chart D-3 shows that 98.6% of the 14,625 first-time Class E felony offenders in

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respectively. The proposed minimum and maximum ranges for the time-served model are also set forth in comparison Charts D-1 and D-2, which appear in Appendix D.

[148] As previously discussed, one-seventh is the potential amount of "good time" an offender serving a determinate sentence can obtain on that sentence. Thus, an offender who forfeits none of his or her good time is entitled to "conditional release" when he or she has served six-sevenths of the full determinate term. The formula underlying the time served model assumes that the overwhelming majority of offenders serving a determinate sentence will *not* lose their one-seventh "good time" allowance and will be released on or near their scheduled conditional release ("CR") date.

[149] This comparison data appear in Charts D-3 and D-4 in the column designated "All Cases: % With Time Served Falling At or Below the Point of Proposed CR" in Appendix D. The data are set forth in a monthly format in Charts D-5 through D-8.

the release cohort actually served 3.0 years or less, with 3.0 years representing the conditional release point of the proposed maximum determinate sentence of 3½ years for first-time Class E felons. The time-served data in Chart D-4 show a similar result for second felony offenders. According to that chart, 97.9% of the 18,689 Class D second felony offenders in the release cohort actually served 5.1 years or less, with 5.1 years representing the conditional release point of the proposed maximum determinate sentence of 6 years for Class D second felony offenders. Similarly, 97.7% of the 31,054 Class E second felony offenders in the release cohort actually served 3.0 years or less, with 3.0 years representing the conditional release point of the proposed maximum determinate sentence of 3½ years for Class E second felony offenders.

Due to the comparatively high time-served figures for the Class C non-violent felony offense of manslaughter in the second degree,[150] that offense would, under the time-served model, be *re-classified* as a Class B non-violent felony. This re-classification would raise the proposed determinate sentence ranges for this crime to 1 to 10 years for first-time felony offenders and 5 to 17 years for second felony offenders (i.e., the proposed ranges for Class B felony offenders under the time served model), and would render it ineligible for a probation or local jail sentence.[151]

The impetus for this proposed re-classification is clearly reflected in the time-served data for the 1985-2007 DOCS' release cohort. The data in Chart C-1B show, for example, that of the 2,586 first-time Class C felony offenders in the cohort, 2,574 (99.5%) served less than 11 years, and only three of the remaining 12 offenders served 13 or more years. All three were serving a sentence for manslaughter in the second degree.[152] Similarly, of the 727 Class C second felony offenders in the cohort, 719 (98.9%) served less than 12 years, and the remaining 1% (a total of 8 offenders) who served 12 or more years

[150] Penal Law §125.15.

[151] As with many other Class C non-violent, non-sex, non-drug felony offenses, a conviction for manslaughter in the second degree currently does not require the imposition of a State prison sentence (*see*, Penal Law §§60.01(2)(a); 60.04[4], 60.05[4]; 65.00).

[152] *See*, Appendix C, Chart C-1B.

were all serving a sentence for manslaughter in the second degree.[153] Further, of the 1,123 first-time Class C felony offenders in the release cohort serving a sentence for manslaughter in the second degree, only 77.4% were actually released at or prior to the proposed conditional release ("CR") point of 6.8 years (i.e., the CR point on the proposed Class C felony maximum sentence of 8 years).[154] When only those first-time felony offenders serving a sentence for a Class C felony offense other than manslaughter in the second degree are considered, 98.4% of those offenders were actually released at or prior to the proposed CR point of 6.8 years.[155]

Several members expressed concern with the portion of the time-served model that would require the reclassification of manslaughter in the second degree as a higher level (i.e., Class B non-violent) felony offense. In discussing the proposed reclassification, it was suggested that, as a way to further bolster the time served model, the existing Class B non-violent felony of conspiracy in the second degree also might be reclassified. Under this proposal, the current conspiracy offense would be divided into two separate crimes, with conspiracy to commit any Class A drug felony retaining its current "B non-violent" classification, and conspiracy to commit murder (or any similarly egregious Class A felony such as arson or kidnapping in the first degree) being reclassified as a separate offense at a level that would permit or require a harsher prison sanction than is currently available. One suggestion was to reclassify these latter conspiracy offenses as Class C violent felony offenses, thereby increasing the mandatory minimum determinate sentence for first-time felony offenders from one year (as proposed in the time-served model) to 3½

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[153] *Id.*

[154] *See*, Appendix D, Chart D-3.

[155] *Id.*, Chart D-4. The data for Class C second felony offenders reveals a similar disparity. Only 80.5% of the second felony offenders serving a sentence for manslaughter in the second degree were actually released at or prior to the proposed CR point of 9.0 years (i.e., the CR point on the proposed Class C felony maximum sentence of 10½ years). When only those second felony offenders serving a sentence for a Class C felony offense other than manslaughter in the second degree are considered, 97.6% of those offenders actually were released at or prior to the proposed CR point of 9.0 years.

years as required by the existing violent felony offender sentencing law.[156]

In the end, the consensus view of the Commission was that the more straightforward CR-based model was preferable to the time-served model because it establishes maximum determinate ranges that reflect currently available prison sanctions, and is consistent with the time-served data, without the need to reclassify one or more of the targeted felony offenses. For these reasons, there was strong support among Commission members for the CR-based model.

4. The "Determinate Drug" Model

The last of the three proposed determinate range models considered by the Commission would adopt the ranges established by the Legislature when it converted prison sentences for all felony-level drug offenses from indeterminate to determinate in 2004.[157] A response to the perceived harshness of the State's longstanding "Rockefeller" drug laws,[158] the 2004 legislation established maximum determinate ranges that, as previously noted, were considerably lower than the existing indeterminate maximum terms.

As a general rule, the new determinate maximum terms were fixed for first felony drug offenders at roughly one-third of the permissible maximum indeterminate terms, and, for second felony

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[156] *See*, Penal Law §70.02. The proposed reclassification of certain conspiracy in the second degree offenses as violent felony offenses also would have the effect of subjecting repeat offenders to the second violent felony offender and mandatory persistent violent felony offender sentencing statutes (*see generally*, Penal Law §§70.04; 70.08).

[157] *See*, Laws of 2004, ch. 738. The indeterminate sentence ranges that were the subject of the 2004 drug legislation were, for nearly all Class B through Class E felony drug offenses, *identical* to the existing indeterminate ranges for the 200-plus non-violent felony offenses that are the subject of this proposal.

[158] According to the New York State Assembly's Memorandum in Support of the 2004 drug legislation, the measure represented "an important first step towards reforming" New York's Rockefeller drug laws, which, according to the Memorandum, "provide inordinately harsh punishment for low level non-violent drug offenders," and "have been the subject of intense criticism for many years" (*see*, Sponsor's Mem, McKinney's 2004 Session Laws of NY, at 2179).

drug offenders, at roughly one-half of the permissible maximum indeterminate terms (i.e., at roughly the equivalent of the parole eligibility date for each category of offense). Thus, for example, where the permissible maximum indeterminate term for a first felony drug offender convicted of a Class B felony drug offense had, prior to 2004, been 25 years, the legislation fixed the new permissible determinate maximum term at 9 years, or roughly one-third of the indeterminate maximum. Similarly, where the permissible maximum indeterminate term for a second felony offender convicted of a Class B felony drug offense was 25 years, the Legislature fixed the permissible determinate maximum term at 12 years, or roughly one-half of the indeterminate maximum.[159] Except for certain schoolyard-related offenses, the new determinate minimum sentence for all Class B through Class E first felony drug offenders was fixed at one year.[160]

The specific proposal before the Commission would adopt the current "determinate drug" ranges for both first and second-time Class B through Class E felony drug offenders by applying these existing ranges to the corresponding Class B through Class E non-violent, non-sex, non-drug felony offenses targeted for conversion. Thus, under the proposal, first-time felony offenders would be subject to a one-year minimum determinate term and the following maximum determinate terms: 9 years for Class B felonies; 5½ years for Class C felonies; 2½ years for Class D felonies and 1½ years for Class E felonies. For second felony offenders, the determinate ranges would be as follows: 3½ to 12 years for Class B felonies; 2 to 8 years for Class C felonies;

[159] Higher terms were fixed for offenders whose prior conviction was for a violent felony offense. Under the prior, indeterminate, sentencing scheme for felony drug offenses, a first felony drug offender serving the maximum indeterminate sentence of 8⅓ to 25 years on a conviction for a Class B felony drug offense would be eligible for parole after serving 8⅓ years (i.e., exactly ⅓ of the maximum) (*see*, Penal Law §70.00[3][b]). A second felony drug offender serving the maximum indeterminate sentence of 12½ to 25 years on a conviction for a Class B felony drug offense would be eligible for parole after serving 12½ years (i.e., exactly ½ of the maximum) (s*ee*, Penal Law §70.06[4][b]).

[160] *See*, Penal Law §70.70(2). This one-year minimum determinate sentence replaced the prior 1 to 3-year minimum indeterminate sentence for these drug offenses.

1½ to 4 years for Class D felonies and 1½ to 2 years for Class E felonies.[161]

Two members of the Commission favored applying these 2004 determinate drug ranges to the targeted non-violent felony offenses. The Commission members supporting the model argued, in substance, that the vast majority of the 200-plus non-violent felony offenses targeted for conversion are, in terms of "moral reprehensibility" and relative risk to public safety, comparable to felony drug offenses. These non-violent offenses, they argued, should therefore be subject to the same determinate ranges as felony drug offenses. The proponents further claimed that, while certain of the non-violent felony offenses in the 1985-2007 DOCS' release cohort tended to skew the time-served numbers toward the higher end of the scale, the numbers for most offenders in the cohort are much closer to the middle and lower ranges of the available time-served spectrum. As such, it was argued, the maximum ranges under the determinate drug model are sufficient.

Those opposed to the proposal felt that the determinate drug ranges were simply not broad enough -- especially at the higher end of the sentencing spectrum -- to account for the wide variety and potential seriousness of the criminal conduct encompassed by the more than 200 non-violent felony offenses in the conversion pool. These members pointed to the fact that the express purpose of the 2004 drug legislation was to substantially reduce prison sentences for most felony drug offenders, not maintain the status quo by merely converting the existing indeterminate ranges to comparable determinate ranges. They argued that in the absence of evidence that the current indeterminate ranges for the targeted offenses tend to yield unduly harsh prison sentences, or sentences that are disproportionate to the crime committed, it would be inappropriate to dramatically reduce the available prison sanctions for these crimes.

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[161] *See*, Appendix D, Charts D-1 and D-2. Under the determinate drug model, the proposed ranges for second felony offenders would track the existing ranges for Class B through Class E second felony drug offenders whose prior conviction was for a *non*-violent felony offense (*see*, Penal Law §70.70[3]; *see also*, Penal Law §70.70[4] [establishing higher determinate ranges for Class B through Class E second felony drug offenders whose prior conviction was for a violent felony offense]).

The data in Charts D-3 and D-4[162] support the notion that, if adopted, the determinate drug ranges could result in a significant reduction in time actually served compared to the existing indeterminate model. Chart D-3 for example, shows that, if the proposed 5½ year maximum determinate sentence for a first-time Class C felony offender under the determinate drug model were adopted, it would yield a conditional release point of 4.7 years. This is the point at which an offender who has forfeited none of his or her one-seventh good time allowance would be required to be released. This contrasts with a conditional release point of 10 years for the comparable maximum sentence of 5 to 15 years under the existing indeterminate model.[163] More importantly, the time-served data in Chart D-3 show that, of the 2,586 first-time Class C felony offenders in the 1985-2007 DOCS release cohort, 76.4% were released at or before 4.7 years. That means that approximately 23.6% of the 2,586 first-time Class C felony offenders in the release cohort actually served more than the 4.7 years that would be required to be served on the proposed 5½-year maximum determinate sentence under the determinate drug model.

The result is similar for certain second felony offenders under the determinate drug model. Chart D-4, for example, shows that approximately 18.1% of the 18,689 Class D second felony offenders in the release cohort actually served more than the 3.4 years that would be required to be served on the proposed four year maximum sentence under the determinate drug model.[164] Similarly, more than half (51.7%) of the 31,054 Class E second felony offenders in the release cohort actually served more than the 1.7 years that would be required to be served on the proposed two year maximum sentence under the determinate drug model. These numbers offer a stark contrast to the CR-based model which, with the exception of Class E second felony

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[162] *See*, Appendix D.

[163] As also reflected in Chart D-3, a first-time Class C felony offender sentenced to the current maximum of 5 to 15 years would be eligible for merit release by the Board of Parole after serving 4.2 years, and, if denied merit release, would be eligible for release on parole after serving 5 years.

[164] *See,* Appendix D.

offenders, fixes proposed maximum sentences that capture no less than 95% of the DOCS' release cohort at every classification level.

Several Commission members were particularly concerned that the proposed maximum ranges would leave too many Class B felony offenders in the 1985-2007 DOCS' release cohort "uncovered." For example, adopting the proposed nine-year maximum determinate sentence for first-time Class B felony offenders under the determinate drug model would mean that 3.8% of the first-time Class B felony offenders in the release cohort actually served more than the calculated conditional release point of 7.7 years. Similarly, for Class B second felony offenders, 6.7% of those offenders in the release cohort actually served more than the calculated 10.3-year conditional release point under the determinate drug model's proposed 12-year maximum sentence. Although at the Class B felony level in particular, the raw number of offenders who make up these "uncovered" pools is concededly small, DOCS' inmate data reviewed by the Commission show that the often egregious crimes and criminal histories represented by this small pool of "outliers" make these offenders more than just "aberrations" on the time-served continuum. A number of these outliers, for example, were serving sentences for conspiracy in the second degree based on a conspiracy to commit murder or other similarly egregious crimes.

With regard to the proposed minimum determinate sentences for second felony offenders under the determinate drug model, all but two Commission members agreed that the ranges were simply too low to maintain the "status quo," especially at the Class B and Class C felony levels. As reflected in Chart D-2, for example, the proposed minimum sentence of 3½ years for a Class B second felony offender under the determinate drug model would result in a merit release point of 2.5 years. That is more than one full year earlier than the merit release point of 3.7 years on the current minimum indeterminate sentence of 4½ to 9 years. Moreover, the proposed 3½ year determinate sentence would yield a conditional release ("CR") point of 3 years, which is 1½ years earlier than the parole release point on the comparable 4½ to 9-year minimum indeterminate sentence. In effect, then, a Class B second felony offender sentenced to the minimum determinate term under the determinate drug model would be virtually

guaranteed release a full 1½ years earlier than a comparably sentenced Class B second felony offender would be eligible for release (on parole) under the existing indeterminate model.

This discrepancy is similar for Class C second felony offenders under the determinate drug model. As reflected in Chart D-2, a Class C second felony offender sentenced under the determinate drug model to the minimum determinate sentence of two years would be required to be "merit" released after 1.4 years and conditionally released (assuming he or she earns no merit allowance or forfeits a previously earned allowance) after 1.7 years. On the other hand, a Class C second felony offender sentenced to the current minimum indeterminate sentence of 3 to 6 years would merely be eligible for merit release by the Parole Board after 2.5 years and, if denied release, would be eligible for parole release after 3 years.

III. RECOMMENDATION

As a critical component of any system of criminal justice, a State's sentencing structure must be intelligible, honest and fair. The public, as well as the defendant and the victim, must have a clear understanding of the actual term of the sentence to be served. The Commission offers these new, conditional release-based, determinate sentence ranges as a way to provide more clarity and fairness in sentencing and thereby further streamline New York's complex hybrid system of indeterminate and determinate sentences. The ranges are the direct result of the Commission's in-depth and well-documented analysis of both the current sentencing structure and time actually served by offenders under that structure over a period spanning more than two decades. The Commission hopes that these recommendations and the extensive data supporting them will provide a solid framework for future legislative action.

IV. TARGETED SIMPLIFICATION OF NEW YORK'S SENTENCING LAWS

In addition to proposing a mostly determinate sentencing scheme for New York through the adoption of determinate sentencing ranges for hundreds of non-violent felony offenses, the Commission

believes that adopting the following additional reforms would help to further simplify and clarify New York's overly complex sentencing laws.

A. Creating a More Accurate Designation for "Violent Felony Offenses"

Penal Law §70.02(1) currently defines a "violent felony offense" by simply listing, by name and Penal Law section number, those offenses that are to carry the "violent felony" designation.[165] The legal impact of categorizing a crime as a "violent felony offense" is significant in that offenders charged with or convicted of these crimes are generally subjected to higher mandatory prison sentences, tighter plea bargaining restrictions, fewer alternatives to incarceration and more limited eligibility for DOCS' inmate programming and early release, to name just a few.

Notably, some of the crimes currently defined as "violent felony offenses" do not require the use, or even the threatened use, of actual violence or force. Falsely reporting an incident in the second degree,[166] for example, is a Class E violent felony, but does not require proof of actual violence or the threat of violence or force; nor does burglary in the second degree,[167] a Class C violent felony offense. The use of the "violent felony" designation for these offenses creates a perception that the crimes are inherently violent when they are not.

While the Commission fully agrees with the notion of having a separate category of particularly egregious crimes subject to enhanced sentences and more restrictive plea bargaining and other statutory requirements, it believes that the designation "violent felony offense" can be misleading in certain circumstances and should be changed. Accordingly, the Commission recommends changing the "violent felony offense" designation to "aggravated felony offense" in Penal Law §70.02 and in all other statutes where the term "violent felony offense" currently appears, while leaving all enhanced sentencing

[165] *See*, Penal Law §70.02(1).
[166] Penal Law §240.55.
[167] Penal Law §140.25.

requirements and other statutory provisions that currently apply to these offenses unchanged. With regard to future legislative additions to the list of "aggravated" offenses, the Commission further recommends that only those especially serious crimes that clearly warrant the kind of enhanced punishment and narrower plea restrictions currently reserved to "violent felony offenses" be considered.

B. Simplifying the Penal Law §60.12 "Domestic Violence" Sentencing Exception

As previously noted, the ever-increasing number of special sentencing categories and exceptions in New York law has contributed to an already complicated State sentencing structure. In 1998, when determinate sentences were authorized for first-time violent felony offenders, the Legislature created a special indeterminate sentencing scheme for defendants who were the victims of domestic violence and whose abuse was a factor in precipitating their crimes.[168] At the time, it was believed that the shift to determinate sentencing would mean harsher sentences, and these indeterminate sentences were intended to mitigate that harshness for domestic abuse victims. At present, however, no one is incarcerated on an indeterminate sentence under this domestic violence provision. This fact militates in favor of replacing that provision with a comparable ameliorative provision that would allow for the imposition of a less harsh, determinate, sentence in such cases. One possibility would be to replace this special indeterminate sentencing provision with a provision that would allow the judge, upon finding that the existing statutory criteria have been met, to sentence the offender as if he or she were convicted of a violent felony offense one classification level lower than the offense of conviction. This would eliminate the need for a special indeterminate sentencing chart for this category of "domestic violence-induced" first-time violent felony offenders, while still allowing judges to impose a less harsh prison sentence in cases where the offender is himself or herself a victim of past domestic violence.[169]

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[168] Penal Law §60.12.

[169] For offenders convicted of a Class E violent felony offense and sentenced in accordance with the proposal, the Legislature could create a lesser determinate

C. Updating Offense Descriptors

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

D. Sentence Cap Provisions

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

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

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sentence of, for example, 1 to 3 years to be imposed in lieu of the "regular" Class E violent felony determinate sentence of 1½ to 4 years.

deemed to be one-half of the aggregate maximum term as so reduced.[170]

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

E. Consecutive and Concurrent Sentences

New York's rules governing consecutive and concurrent sentences are also extremely complicated. Incidental references to concurrent sentencing appear in Articles 60 and 65 of the Penal Law, but the substantive rules are in Penal Law §§70.25 and 70.30.[171] The general rule is that a sentencing court has discretion to decide whether to make a sentence for a crime run consecutively or concurrently to another sentence imposed at the same time, or with an "undischarged" term imposed at an earlier time.[172] If the judge fails to speak on the matter, an indeterminate sentence or a determinate sentence will be deemed to run concurrently to all other terms and a definite sentence will be deemed to run concurrently with terms imposed at the same time, but consecutive to any other terms.[173] While the general rule grants discretion to sentencing courts, there are specified situations where a court cannot impose a sentence to run concurrently with another sentence. These include cases where a repeat felony offender is subject to an undischarged term of imprisonment imposed prior to the date on which the present crime was committed.[174]

For the past 30 years, if the sentencing court was silent, DOCS would calculate the sentences as running consecutively. A concurrent calculation would result in the new sentence being credited with the

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[170] Penal Law §70.30(1)(e)(i).
[171] *See, e.g.,* Penal Law §§60.01(2)(d); 65.15(1); 70.25(2); 70.30.
[172] Penal Law §70.25(1).
[173] Penal Law §70.25(1).
[174] *See*, Penal Law §70.25(2-a); *see also,* Penal Law §70.25(2-b), (2-c), (2-d), (5).

entire period that had been served at DOCS under the predicate sentence. In February 2008, however, the Appellate Division, Third Department ruled that when the sentencing court is silent, DOCS lacks the authority to calculate such sentences as running consecutively.[175] Shortly before this Report was printed, the New York State Court of Appeals heard oral arguments in the appeal of this case, which could impact the sentences of thousands of predicate felony offenders.[176] Regardless of the outcome of the Court of Appeals' decision, the Commission believes that these rules are needlessly complex, engender unnecessary litigation, and should be re-examined and simplified.

F. "Back-End" Sentencing Provisions

As discussed in other sections of this report, numerous "back-end" sentencing provisions that provide mechanisms for early release from State prison, such as "good time,"[177] "merit time,"[178] and "supplemental merit time,"[179] are currently defined outside the Penal Law. Other non-Penal Law provisions establish early release programs or mechanisms, including the temporary release program,[180] the presumptive release program for non-violent inmates,[181] "shock incarceration,"[182] early parole for deportation[183] and medical parole.[184] For example, a defendant convicted of a drug offense and sentenced to a determinate sentence of seven years is eligible for a good time reduction of one-seventh -- a provision that appears in the Correction Law -- and an additional one-seventh off in merit time for completing certain DOCS' programs -- a provision that also appears in the Correction Law.

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[175] *See*, *People ex rel Gill v. Greene*, 48 A.D.3d 1003 (3d Dept. 2008), *lv. granted* Third Department (June 26, 2008). This case was argued before the Court of Appeals on January 6, 2009.
[176] *Id.*
[177] Correction Law §803(1)(b), (c).
[178] Correction Law §803(1)(d).
[179] Laws of 2004, ch. 738, §30; Laws of 2005, ch. 644, §1.
[180] Correction Law §851 *et seq.*
[181] Correction Law §806.
[182] Correction Law §865 *et seq*.
[183] Executive Law §259-i(2)(d).
[184] Executive Law §259-r.

Although there are scattered references in various sections of the Penal Law to good time;[185] merit time;[186] medical parole;[187] early parole for deportation;[188] shock incarceration;[189] and presumptive release,[190] there are no references to any of these "back-end" release mechanisms in the substantive Penal Law sections that define the sentences for specific crimes. This structure makes it difficult for defendants, practitioners and victims to easily determine the actual length of a prison sentence. Particularly with regard to merit time and good time, an appreciation of these provisions is critical to determining the most likely length of a prison sentence. Accordingly, the Commission recommends that some or all of these non-Penal Law "back-end" sentencing provisions be merged into a single article of the Penal Law or be cross-referenced in a single section of Penal Law Article 70 ("Sentences of Imprisonment").

G. Plea Restrictions

The Criminal Procedure Law includes numerous, mostly post-indictment, restrictions that limit the parties' ability to negotiate plea bargains.[191] For example the Penal Law provides that "[w]here the indictment charges a * * * Class B violent felony offense which is also an armed felony offense then a plea of guilty must include at least a plea of guilty to a Class C violent felony offense."[192] None of these plea restrictions existed in 1971 when the Criminal Procedure Law was enacted, but they have proliferated ever since. When the parties and the court conclude that a plea agreement is in the interest of justice, it seems misguided that a categorical plea restriction should frustrate that outcome. Moreover, plea restrictions are easily evaded, either by plea bargaining before an indictment is returned or by dismissing the indictment (or certain charges contained therein) so that

[185] Penal Law §70.30(4).
[186] Penal Law §70.40(1)(a)(i).
[187] Penal Law §70.40(1)(a)(v).
[188] Penal Law §70.40(1)(a)(v).
[189] Penal Law §70.40(1)(a)(v).
[190] Penal Law §70.40(1)(c).
[191] CPL 220.10(5).
[192] CPL 220.10(5)(d)(i).

the restriction will no longer apply, and then proceeding under a different accusatory instrument.

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

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

H. Anomalies

New York's mostly ad hoc approach to amending its sentencing and penal statutes over the past four decades has resulted in a sentencing structure that lacks clarity and cohesiveness. Enlisting the help of experienced criminal practitioners, judges and sentencing experts, the Commission was able to identify a number of ambiguities and inconsistencies in the existing sentencing laws that are the inevitable -- and wholly unintended -- byproduct of this piecemeal approach. These include statutes that create higher permissible maximum sentences for first-time felony offenders than for repeat felons convicted of the same crime; sentencing options for certain non-violent felony offenses that allow for the imposition of a fine or probation on one hand and a 15-year State prison term on the other, but prohibit a more "middle ground" sentence of local jail; and plea restrictions for certain violent felony offenses that are apparently intended to prevent overly lenient dispositions but fall short of that

goal. A complete discussion of some of the most glaring anomalies in the existing sentencing statutes can be found in Appendix F.

PART THREE

A MEASURED APPROACH TO REFORMING NEW YORK'S DRUG LAWS

Part Three

A Measured Approach to Reforming New York's Drug Laws

Drug law reform is an emotionally and politically-charged issue in New York that raises a variety of public policy questions that impact public safety and public health.[193] Because of the importance of this issue, the Commission closely examined New York's drug laws, sentencing practices and enforcement policies and held public hearings around the State. It also formed "focus groups" to obtain feedback from prosecutors, judges, defense attorneys, sentencing experts and drug law reform advocates on the merits of revising the current drug laws. Although no one reform proposal was entirely acceptable to all members, [194] the Commission reached general consensus on certain core principles in the area of drug law reform. It recognized the importance of an evidence-based, data-driven approach and, thus, examined existing diversion programs, as well as outcome data, before discussing specific proposals for reform. The Commission ultimately concluded that the best approach was to memorialize the most promising proposals it studied, together with a discussion of the strengths and weaknesses of each, for the benefit of the Governor, Legislature and Judiciary.

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[193] The Commission made two recommendations regarding drug law sentencing reform in its 2007 Preliminary Report. First, the Commission recommended that New York's drug sentencing laws be modified to codify existing practice by expressly permitting courts to send non-violent drug-addicted felony offenders to community-based treatment in lieu of prison where the parties and the court agree that such is an appropriate resolution of the case. As noted in the Preliminary Report, there is nothing in the existing Penal Law or Criminal Procedure Law that expressly permits the parties and the court to agree to a non-incarceratory, community-based treatment alternative to an otherwise mandatory State prison sentence for a non-violent drug-addicted second felony offender. Second, the Commission found that in order to ensure the successful diversion of these offenders in a manner consistent with public safety, the State must improve both the quality and accessibility of substance abuse treatment and other community-based programming (*see*, Preliminary Report, at 23-26).

[194] *See, infra*, at 96-97.

I. A BRIEF HISTORY OF NEW YORK'S DRUG LAWS

A. The Rockefeller Drug Laws

In 1973, then-Governor Nelson Rockefeller, in response to a burgeoning heroin epidemic[195] and an "ever rising tide" of substance abuse and drug-related crime,[196] introduced and obtained passage of comprehensive legislation to overhaul the State's drug laws. The new laws required a sentence of 15-years-to-life for a first-time conviction for selling one ounce or possessing two ounces of a controlled substance, and mandated incarceration for all Class A, B and C drug felonies. In addition, three new categories of Class A drug felonies were created to reflect the quantity of drugs sold or possessed (A-I, A-II and A-III), with a maximum of life in prison for each, together with a variety of mandatory minimum sentences and various restrictions on plea bargaining.[197] Adopted as a companion measure to the drug laws, the "second felony offender" statutes eliminated the ability of judges to impose non-prison sentences for repeat felony offenders, and required the imposition of mandatory minimum sentences in all such cases.[198] Collectively, New York's "Rockefeller" drug laws were considered the toughest in the nation at the time of their enactment.[199]

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[195] *See*, *Confronting the Cycle of Addiction and Recidivism*: *A Report to Chief Judge Kaye by the New York State Commission on Drugs and the Courts* (June 2000), at 9.

[196] Griset, Pamala L. *Determinate Sentencing: The Promise and the Reality of Retributive Justice*, State University of New York Press (1991), at 63.

[197] Laws of 1973, ch. 276, §§9, 10, 25.

[198] Laws of 1973, ch. 277, §9. Under these laws, a person who commits a felony offense under the Penal Law (including a drug or other non-violent felony offense) within 10 years of being sentenced on a prior felony conviction must, with only a few narrow exceptions (*see*, *e.g.*, Penal Law §§70.06(7); 70.70[3][c]), receive a State prison sentence within the ranges established by the Legislature (*see generally*, Penal Law §§60.04[5]; 60.05[6]; *see also*, Griset, *Determinate Sentencing*, *supra*, note 196, at 66-67).

[199] Some of the effect of the original drug laws was diluted by subsequent legislative amendments. For example, the minimum required weights for Class A-I sales and possessions were doubled to two ounces and four ounces, respectively, in 1979. Other ameliorative changes were made at the same time, including raising the weights for conviction of the A-II possession and sale crimes, lowering the minimum sentence for an A-II felony conviction from six years to three years, and eliminating the "A-III" felony drug crimes. The original Rockefeller Drug Laws required the

Over the course of the next several decades, in the face of rising prison populations and shrinking revenue,[200] legislative efforts were undertaken to address the lengthy prison sentences that resulted from the Rockefeller drug laws. Programs such as Shock Incarceration and merit time[201] were introduced to provide "back-end" early release mechanisms for drug and other non-violent felony offenders.[202]

B. The Drug Law Reform Act

In order to ameliorate the harsher elements of the Rockefeller drug laws, the Legislature enacted the Drug Law Reform Act (DLRA) in 2004.[203] The DLRA eliminated life sentences for Class A felony drug offenses and doubled the weights for certain Class A felony drug possession crimes, while making all drug sentences determinate with generally shorter available ranges.[204] The DLRA also relaxed plea restrictions,[205] required a period of post-release supervision upon

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same sentences for sale and possession of certain amounts of marijuana, but those provisions also were repealed in 1979.

[200] *See*, Preliminary Report, at 10.

[201] Initially, A-I felony drug offenders serving indeterminate sentences under prior law were ineligible for merit time. This was changed in 2003 to allow such offenders to earn merit time in the amount of one-third, in contrast to all other drug offenders who could earn a one-sixth merit time reduction. DOCS reports that, as of December 31, 2008, there have been 116 Class A-I felony drug merit releases from State prison. These A-I drug offenders left prison an average of 38 months before their parole eligibility dates.

[202] Other such "back-end" early-release mechanism programs included Work Release and Comprehensive Alcohol and Substance Abuse Treatment ("CASAT").

[203] *See*, Laws of 2004, ch. 738.

[204] For example, the minimum sentence for an A-I felony drug offender with no prior felony convictions dropped from an indeterminate term of 15 years to life, to a determinate term of eight years. For first-time Class B felony drug offenders, a determinate term of 1 to 9 years replaced the prior indeterminate range of 1 to 3 years (minimum) up to 8⅓ to 25 years (maximum). The DLRA preserved the authority of sentencing courts to impose an alternate definite sentence of up to one year, or a non-jail sentence such as probation, for Class C, D and E first-felony drug offenders.

[205] Plea restrictions were modified to allow a defendant indicted for a Class A-I drug felony to plead down to a Class B felony (as opposed to a Class A-II felony). And, in those instances where an individual provides material assistance to a district attorney, the DLRA made available a 25-year term of probation (replacing the prior lifetime probation term) for first-time Class B felony drug offenders.

completion of the determinate sentence, and allowed newly sentenced felony drug offenders to earn an additional one-seventh merit time allowance.[206] The DLRA provided retroactive relief to inmates currently serving a 15-year-to-life or greater indeterminate sentence for a Class A-I felony drug offense by allowing such offenders to move for re-sentencing in accordance with the new determinate sentencing scheme, and allowed other felony drug offenders serving indeterminate sentences to be eligible for an additional one-sixth merit time allowance by accomplishing certain objective goals in prison.[207] In 2005, the Legislature extended re-sentencing opportunities to certain Class A-II felony drug offenders serving indeterminate sentences under the prior law.[208]

C. The Need for Further Drug Law Reform

Those seeking drug law reform repeatedly argued to the Commission that the 2004 and 2005 drug law changes did not go far enough in reversing the harsh effects of the Rockefeller drug laws. Specifically, the reform advocates noted that thousands of Class B drug felons serving lengthy sentences under the Rockefeller drug laws remain ineligible for re-sentencing under the DLRA.[209] They further

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[206] Merit time can be earned by accomplishing certain objective goals in prison (*e.g.*, earning a GED, engaging in vocational training or substance abuse treatment). This is in addition to the one-seventh good time credit authorized for all determinate sentences.

[207] This additional one-sixth merit time reduction, which is applied to the minimum term of the indeterminate sentence, enabled drug offenders to cut their minimum term by one-third. Through December 2008, supplemental merit time allowed a total of 2,686 Class A-II through Class E felony drug offenders serving indeterminate sentences to be released an average of 6.8 months prior to their merit eligibility dates.

[208] *See*, Laws of 2005, ch. 643.

[209] A 2005 report on the DLRA by the New York City Legal Aid Society called for adoption by the Legislature of retroactive resentencing for inmates serving long indeterminate sentences for class B felony drug offenses: "We should also adopt retroactive relief that would reduce sentences for those now serving B level drug offenses in state prison * * * [R]eform has allowed the A-I and some of the A-II offenders to apply to be re-sentenced. But the DLRA did not reach those serving B drug felonies. This has resulted in a disjointed system in which B felons sentenced for street sales under the old law are serving sentences as long as 8⅓ to 25 years for a first felony, while those serving time on the more serious A-I cases may now have

noted that the amendments left unchanged the requirement that nearly all first-time Class B and second felony drug offenders be sentenced to State prison.[210] The New York City Legal Aid Society strongly criticized the powerful role of prosecutors in drug cases, arguing that:

> Under the Rockefeller Drug Laws and continuing with the DLRA, the sentencing judge has very little independent authority to place a drug offender into treatment * * * * The prosecutor effectively determines who enters a treatment program and who does not. In our adversary system of justice a sentence mechanism as crucial as drug treatment * * * should be equally available to the judge, the one objective person involved in the criminal case.[211]

During public hearings and in focus groups, prosecutors and law enforcement officials voiced strong opposition to further reform of New York's drug laws. Prosecutors criticized the DLRA's lower sentencing ranges and repeated their opposition to altering the "mandatory minimum" and "second felony offender" laws by arguing that these laws have "played a vital role in providing * * * the framework which has led to the tremendous and historic reduction in crime we have [seen] since about 1993."[212] Reform advocates argued

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sentences as low as 8 years" (Legal Aid Society, *One Year Later: NewYork's Experience with Drug Law Reform*, December 14, 2005, at 13).

[210] Under current law, a first-time felony offender convicted of a Class B felony drug offense, such as criminal sale of a controlled substance in the third degree (Penal Law §220.39) or criminal possession of a controlled substance in the third degree (Penal Law §220.16) must -- unless the offender has provided or is providing "material assistance" to the prosecutor and receives a 25-year probation term in accordance with Penal Law §65.00(1) and (3) -- receive a determinate sentence of imprisonment of 1 to 9 years (or from 2 to 9 years if the drug sale occurred on a school bus or in or near school grounds) (*see*, Penal Law §70.70[2][a][i]). A definite or intermittent sentence of up to one year in local jail, "split sentence" of up to six months in local jail followed by a period of probation supervision, "straight" probation sentence or another non-incarceratory sentence such as a conditional discharge or fine are, except as noted above, not available for first-time Class B felony drug offenders.

[211] Legal Aid Society, *supra*, note 209, at 10-11.

[212] Commission on Sentencing Reform, Transcript of July 18, 2007 Meeting, at 135.

that inasmuch as the Rockefeller Drug Laws have been in place since the early 1970s, and were in effect during the same decades when drug crime in New York was at its peak, there is little correlation between the enactment of these laws and the decrease in crime rates.[213] Prosecutors stressed that the mandatory sentencing statutes encourage cooperation in the prosecution of higher-level drug traffickers and provide a strong incentive for non-violent drug-addicted offenders to participate in treatment programs. Both prosecutors and reform advocates voiced concerns that the additional resources for drug treatment and diversion anticipated as part of the DLRA were never fully funded.

Law enforcement officials took exception to the notion that drug reform efforts were directed toward low-level non-violent drug offenders. New York City Special Narcotics Prosecutor Bridget Brennan published a study which concluded that of the 65 inmates convicted by her Office of a Class A-I drug felony who had their sentences reduced under the DLRA, only one offender fit the profile of a "low-level" courier doing the bidding of a major trafficker -- an often-cited example of the underlying rationale for enactment of the DLRA.[214] Prosecutors also repeatedly highlighted the strong link between drug sales and violence, and the use of the drug laws to prosecute violent gang members. They argued that the consent of the District Attorney should be required for an offender to be diverted to drug treatment because prosecutors often have access to confidential informant information regarding drug organizations and are in the best position to decide which offenders can be diverted without a significant risk to public safety. Finally, they argued that it is important to consider the views of those who live in communities afflicted by drug dealers who repeatedly urge law enforcement to rid their neighborhoods of illegal drug markets.

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[213] New York State Commission on Sentencing Reform, Transcript of New York City Public Hearing (November 13, 2007), at 175-184.

[214] Office of the Special Narcotics Prosecutor for the City of New York, *The Law of Unintended Consequences: A Review of the Drug Law Reform Acts of 2004 and 2005* (June 27, 2006), at 5.

Cognizant of these divergent views on drug law reform, and in an effort to reach an evidence-based conclusion about the need for additional reform, the Commission decided to examine data regarding the impact of the DLRA. Contrary to public perception of the impact of the 2004 and 2005 drug law changes, the data indicate that the amendments have had a significant effect on drug sentencing policies in New York. Notably, a growing number of felony drug offenders have benefited from a reduction in the sentences imposed under the Rockefeller drug laws. As of December 31, 2008, a total of 252 Class A-I felony drug offenders have been resentenced pursuant to the DLRA and released from DOCS' custody an average of 50 months prior to their previously calculated earliest release dates.[215] A total of 232 Class A-II felony drug offenders have been resentenced and, on average, released 13 months prior to their previously calculated earliest release dates.[216] Through November 2008, the provision in the DLRA allowing an additional one-sixth supplemental merit time reduction for drug offenders allowed a total of 2,686 Class A-II through Class E felony drug offenders serving indeterminate sentences to be released an average of 6.9 months prior to their merit eligibility dates. Three years after the DLRA was enacted, the average minimum term for new drug commitments, as well as the average time served in custody, decreased by approximately six months.[217] Significantly, this has been achieved without a detrimental impact on public safety since crime continued to fall to historic lows in 2006 and 2007.[218]

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[215] A total of 377 inmates convicted of Class A-I felony drug offenses have been resentenced under the DLRA.

[216] As of December 31, 2008, a total of 360 inmates convicted of Class A-II felony drug offenses have been resentenced under the 2005 legislation.

[217] The average minimum term was reduced from 34.9 months to 29.0 months. Not surprisingly, the percentage of felony drug offenders entering DOCS with a determinate (as opposed to indeterminate) sentence has increased dramatically since enactment of the DLRA. DOCS reports that offenders with a determinate sentence made up 38% of new drug commitments in 2005, 82% of such commitments in 2006 and 91% in 2007. Sentences for first-felony drug commitments declined from an average of 30.2 months to 23.6 months and second-felony drug commitments declined from an average of 38.0 months to 33.2 months. For first-felony drug offenders, the average time served declined by approximately seven months. The average time served by second felony offenders committed for a drug offense decreased by approximately 4½ months.

[218] *See, infra,* note 280.

A review of the legislative history of the DLRA reveals that, at the time of enactment, it was viewed as a first step toward more comprehensive changes to New York's drug laws. In its memorandum in support,[219] the New York State Assembly articulated that the 2004 legislation "represents only the initial step towards reforming the drug laws. Several other reforms are urgently needed * * * [including giving] judges * * * the discretion to decide whether or not to send non-violent low level addicted offenders to drug treatment programs as an alternative to prison." The Assembly memorandum pointed out that "[d]rug treatment programs for criminal and non-criminal offenders should also be enhanced," emphasizing that numerous studies have shown that drug treatment is more effective than incarceration in eliminating substance abuse and its associated criminality.[220] A similar sentiment was echoed by the Senate Majority Leader presiding at the time of the DLRA debate.[221]

The Commission acknowledges the legitimate and compelling positions on both sides of the drug reform debate, but believes that in addition to the significant reforms of 2004 and 2005, further reforms should be enacted to ensure that drug-addicted non-violent felony offenders who are appropriate candidates for drug treatment are diverted from State prison. Additionally, while tough mandatory minimum sentences may well be appropriate and necessary for drug dealers and repeat and persistent offenders who are either not drug addicted or fail to take advantage of drug treatment, such sentences may be unduly harsh for first-time non-violent felony drug offenders. Careful consideration should be given to alternative sentences, including probation, "split" sentences and local jail sentences for first-time felony drug offenders, particularly when combined with conditions that include drug treatment.

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[219] Mem of NYS Assembly in Support of A. 11895 (2004).
[220] *Id.*
[221] Senate Debates, December 7, 2004, at 6309-6312.

II. RACIAL DISPARITY: THE DISPROPORTIONATE IMPACT OF NEW YORK'S DRUG SENTENCING LAWS

Between 1995 and 2003, the number of people in state and federal prisons incarcerated for drug offenses increased by 21%, from 280,182 to 337,872.[222] This growing rate of incarceration for drug crimes has not been borne equally by all members of society.[223] As of 2003, twice as many African Americans as whites were incarcerated for drug offenses in state prisons in the United States. African Americans made up 13% of the total U.S. population, but accounted for 53% of sentenced drug offenders in state prisons in 2003.[224]

A recent study by the Justice Policy Institute (JPI) of 2002 drug admissions to state prison from the nation's most populous counties showed that African Americans are far more likely than whites to be admitted for drug offenses at the county level. The 198 counties studied (including nine counties in New York State) have populations of 250,000 or more and account for more than half (51%) of the total U.S. population.[225] According to the JPI study, there were more than twice as many African Americans (62,087) as whites (28,314) admitted to prison for drug offenses from large-population counties in the U.S. in 2002. What's more, the rate of admission to prison for drug offenses was more than 10 times greater for African Americans (262.16 per 100,000) than for whites (24.85 per 100,000).[226]

Recent DOCS' admission and "under custody" data for felony drug offenders paint a disturbingly similar picture of racial disparity in New York. In each of the last five years, African Americans constituted a dramatically higher percentage of total DOCS' admissions for drug offenses than whites. The DOCS' data show that, from 2003 to 2007, white offenders, on average, made up 10% of total

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[222] Justice Policy Institute, *The Vortex: The Concentrated Racial Impact of Drug Imprisonment and the Characteristics of Punitive Counties* (December 2007), at 2.
[223] *Id.*
[224] *Id.*
[225] The 110,522 offenders admitted to state prisons for drug offenses in 2002 represented about 60% of the 175,000 drug admissions reported that year (*id.*, at 10).
[226] *Id.*

drug admissions to DOCS, while African Americans made up 55%. During the same five-year period, Hispanic drug offenders constituted, on average, 34% of total DOCS' drug admissions. Moreover, while African Americans and Hispanics comprised 32% of New York State's population ages 16 and older in 2008,[227] they accounted for nearly 90% of all offenders in DOCS custody for a drug offense that year.[228]

At public hearings and meetings, the Commission heard moving testimony from drug law reform advocates, criminal justice professionals and sentencing experts on the need to reduce racial and ethnic disparities in the State's criminal justice system in general, and particularly in drug cases. In a presentation to the Commission, noted Harvard professor and sociologist Bruce Western detailed the far-reaching social and economic consequences of imprisonment and its impact, in particular, on families and communities of color. These comments are captured in a recent article by Dr. Western:

> There are now 2.3 million people in U.S. prisons and jails, a fourfold increase in the incarceration rate since 1980. * * * Blacks are seven times more likely to be incarcerated than whites, and large racial disparities can be seen for all age groups and at different levels of education. One in nine black men in their twenties is now in prison or jail. Young black men today are more likely to do time in prison than serve in the military or graduate college with a bachelors degree. The large black-white disparity in incarceration is unmatched by most other social indicators. Racial disparities in unemployment (two to one), nonmarital childbearing (three to one), infant mortality (two to one), and wealth (one to five) are all significantly lower than the seven to one black-white ratio in incarceration rates.
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> * * *
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> The social penalties of imprisonment also spread through families. Though formerly incarcerated men

[227] Woods and Poole Economics, Inc.
[228] Department of Correctional Services, 2008 Under Custody File.

> are just as likely to have children as other men of the same age, they are less likely to get married. Those who are married will most likely divorce or separate. The family instability surrounding incarceration persists across generations. Among children born since 1990, 4 percent of whites and 25 percent of blacks will witness their father being sent to prison by their fourteenth birthday. Those children, too, are to some extent drawn into the prison nexus, riding the bus to far-flung correctional facilities and passing through metal detectors and pat-downs on visiting day. In short, those with prison records and their families are something less than full members of society. To be young, black, and unschooled today is to risk a felony conviction, prison time, and a life of second-class citizenship. In this sense, the prison boom has produced mass incarceration – a level of imprisonment so vast and concentrated that it forges the collective experience of an entire social group.[229]

The Commission is troubled by the data showing broad racial and ethnic disparities in the State's prison admissions for felony drug offenders, and is unanimous in its belief that racial and ethnic disparity can lead to public mistrust of the criminal justice system and impede the ability to promote public safety.[230] The members agree that if unwarranted racial disparities can be reduced, the justice system will gain credibility and be more effective in both preventing and responding to crime.[231] The Commission recognizes, however, that the causes of such disparities are myriad and complex and cannot be remedied through changes in sentencing policy alone. Racial disparities can infect a system of criminal justice at virtually any stage, from the very earliest point of initial police involvement in the arrest

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[229] Western, Bruce, *Reversing Mass Imprisonment*, Boston Review.net (July/August 2008), at 1-2.
[230] *See*, The Sentencing Project, *Reducing Racial Disparities in the Criminal Justice System: A Manual for Practitioners and Policymakers* (2d ed. 2008), at 1.
[231] *Id.*

and charging decision to the very latest point of post-sentence decision-making by a corrections, parole or probation official.

With respect to matters within the purview of the Commission, a majority of Commissioners agree that in the area of felony drug sentencing, establishing a uniform statewide diversion program for drug-addicted non-violent felony offenders would likely have a greater impact on African-American and Hispanic drug offenders. This is, in many ways, a matter of simple mathematics, since the overwhelming majority of drug offenders entering State prison in New York each year are persons of color. Providing courts with a new procedure in statute to divert more drug-addicted felony offenders from prison into treatment regardless of the quality of the offender's legal representation, socio-economic status or economic resources, would almost certainly help to reduce the "social penalties of imprisonment" described by Dr. Western and have a beneficial long-term impact on the families and communities of those African-American and Hispanic individuals who, through diversion to treatment, succeed in ending the cycle of addiction and crime.[232]

In examining options for a uniform diversion model, the Commission looked at several different proposals for possible inclusion in this Report, and took great care to assess their impact on existing drug diversion programs in the State. It is there that we begin our analysis.

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[232] Evidence of this benefit can be found in the Commission's analysis of the 2006 DOCS' admission pool of felony drug offenders that was used to estimate the number of additional offenders that might be eligible for diversion annually under its Judicial Diversion proposal. This analysis revealed that approximately 1,200 first-time felony offenders, and approximately 1,800 second felony offenders, admitted to DOCS in 2006 might have been eligible for diversion to community-based treatment under the proposal (*see*, "Projected Impact of the Judicial Diversion Model," *infra*, at 108-109). Notably, eighty-two percent of the 1,200 potentially eligible first-time felony offenders were African American or Hispanic and 17% were white. Of the 1,800 potentially eligible second felony offenders, 93% were African American or Hispanic and 6% were white. Overall, 89% of the 3,000 potentially eligible offenders in the 2006 admission pool were African American or Hispanic.

III. OVERVIEW OF EXISTING DIVERSION PROGRAMS

One of the often overlooked achievements in drug law policy in New York is the expansion and success of drug courts and other drug diversion programs. There are three principal models in the State to divert substance-abusing, non-violent felony offenders into community-based treatment: Drug Treatment Alternative-to-Prison (DTAP), Structured Treatment to Enhance Public Safety (STEPS) and Drug Treatment Courts. Because these programs target offenders facing mandatory prison sentences, all three generally require prosecutorial consent for diversion. Each program utilizes different eligibility criteria. Some, for example, accept primarily first felony offenders while others target predicate felons, and most, but not all, exclude offenders with current charges or histories of violent felonies or sex offenses. The length and type of required drug treatment -- residential, outpatient or a combination of both -- also varies depending on the program and the specific treatment needs of the offender.

Not all drug-addicted felony offenders receiving community-based treatment for substance abuse are participants in one of these three diversion programs. Pursuant to Penal Law §65.10(2)(e), any criminal court may require a defendant sentenced to probation to "participate in an alcohol or substance abuse program" as a condition of the sentence. Some drug treatment courts require drug-addicted first-time felony offenders to complete substance abuse treatment as part of a five-year probation sentence. Probation also is widely used by other courts (i.e., *non*-drug courts) as a vehicle for ensuring that these offenders receive and complete treatment. A recent review of data regarding individuals under probation supervision showed that more than 25% of felony probationers had participation in a drug treatment program required as a condition of probation.[233]

[233] Integrated Probation Registrant System as of January 18, 2009. This calculation excludes agencies that do not report conditions of probation.

A. Drug Treatment Alternative-to-Prison (DTAP)

Created in 1990 by the Kings County District Attorney, the DTAP drug treatment program[234] is recognized as one of the nation's most successful diversion models. The DTAP program targets non-violent, drug-addicted second felony offenders and employs several features that have been identified as proven attributes of effective treatment models, including: (1) using mandatory prison sentences as an incentive for success in treatment;[235] (2) lengthy residential treatment requirements; (3) re-admission to the program for "qualified failures;"[236] (4) the careful screening of offenders; and (5) an emphasis on employment counseling and job placement.[237]

To be considered for DTAP, a defendant must be at least 18 years of age, be charged with a felony-level offense, and have at least one prior felony conviction.[238] In addition, the defendant must be drug addicted and the crime must have been precipitated by that addiction.[239] Defendants initially identified as DTAP-eligible must undergo a screening process that includes a review of the defendant's criminal history and the facts of the case. Many defendants evaluated for DTAP commonly face charges for drug sale or possession, as well

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[234] All references to "DTAP" in this section are, unless otherwise noted, to the Kings County DTAP program.

[235] The effectiveness of "legal coercion" in improving treatment program retention rates is well documented (*see*, *e.g.*, Young, D., *Impacts of Perceived Legal Pressure on Retention in Drug Treatment*, Criminal Justice and Behavior 29, at 27-55 (2002); Young, D., and Belenko, S., *Program Retention and Perceived Coercion in Three Models of Mandatory Drug Treatment*, Journal of Drug Issues 32, at 297-328 (2002); *see also*, Kings County District Attorney's Office, *Drug Treatment Alternative-to-Prison, Seventeenth Annual Report* (May 2008), at 53.

[236] Under DTAP's "selective readmission" policy, defendants who relapse or experience setbacks in treatment are generally re-admitted to DTAP if they express a genuine desire to continue treatment and pose no threat to the treatment provider or the community (see, *id.*, at i).

[237] *Id.* at 6.

[238] Drug-addicted offenders in Kings County who are facing only a misdemeanor charge or a first felony charge, while not eligible for DTAP, may be eligible for diversion into treatment through one of Brooklyn's three court-run drug parts: Misdemeanor Brooklyn Treatment Court, Brooklyn Treatment Court and the Screening and Treatment Enhancement Part (*id.*, at 8, note 9).

[239] *Id.* at 7.

as theft-related charges, and those who are rejected for the program are typically believed to be major drug traffickers and/or have a significant history of violence.[240] Candidates who are not rejected following this "legal screening" then receive a clinical assessment by Treatment Alternatives for a Safer Community (TASC), a not-for-profit criminal justice case management organization, to verify the defendant's substance abuse history and match the defendant to the most appropriate treatment facility.[241]

Following TASC's assessment, DTAP's Warrant Enforcement Team conducts a field investigation of each candidate to determine whether there are factors that may make placement in the program inappropriate.[242] Those who exhibit violent tendencies, an unwillingness to participate in treatment or have no roots in the community are generally not diverted into treatment.[243] Another objective of the field investigation is to ensure that a defendant who absconds from treatment can be located quickly and returned to court.[244] In addition, by speaking directly to the addicted person's

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[240] *Id.* at 7-8.

[241] TASC also performs several case management-related functions in the Brooklyn DTAP model *after* a defendant is accepted into the program, including conducting site visits, clinical interventions for offenders who are not complying with treatment, drug testing and providing monthly reports to the court, prosecutor and defense attorney regarding the defendant's progress. Once the defendant successfully completes the residential portion of treatment, TASC is charged with monitoring the defendant's aftercare and re-entry, including employment, housing and maintaining a drug-free lifestyle (*id.,* at 8).

[242] *Id.* at 9.

[243] *Id.*

[244] DTAP reports that 90% of all program absconders have been returned to court in a median time of 21 days for imposition of the previously agreed-upon prison sentence. Because DTAP participants are made aware that the enforcement team has verified their contact information and is prepared to quickly return any absconders to court, the participants presumably feel increased pressure to remain in and complete the program (*id.).* Indeed, research conducted by the Vera Institute of Justice has shown that these enforcement efforts have been successful in instilling a fear of rearrest in DTAP participants, and that this perception is as important as actual enforcement capacity in increasing retention among DTAP participants *(see*, *Confronting the Cycle of Addiction and Recidivism, supra*, note 195, at 55).

friends and family, the DTAP investigator can enlist their support in convincing the defendant to enter and remain in treatment.[245]

Prior to being accepted into DTAP, defendants are required to plead guilty to a felony charge and have their sentence deferred while undergoing 15 to 24 months of intensive residential drug treatment and aftercare. The plea agreement includes a specific prison term to be imposed by the judge in the event of failure in treatment while individuals who successfully complete DTAP are able to withdraw the plea and have their charges dismissed. The judge and the District Attorney's Office closely monitor the offender's program compliance and the court, in consultation with the parties, applies sanctions and rewards to help modify the offender's behavior.[246] When an offender successfully completes the drug treatment plan and other criteria required for graduation, TASC, in consultation with the offender's treatment provider, will recommend to the Kings County District Attorney's Office that the offender be considered as having completed DTAP.

This "tough and compassionate" approach to the drug-addicted criminal population has yielded positive results.[247] In 2001, a five-year recidivism study revealed that drug offenders who completed DTAP were re-arrested at a rate of 30% compared to a 56% re-arrest rate for a comparison group of otherwise eligible drug offenders who served prison terms.[248] DTAP participants, who are typically long-time drug abusers, also remain in treatment for a median of 17.8 months, which is six times longer than the national average for the drug treatment population.[249] DTAP graduates are also three and one-

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[245] *See,* King County District Attorney's Office, *supra*, note 235.
[246] *Id*. at 10.
[247] *Id.*
[248] Research findings pertaining to the Kings County DTAP program discussed in this paragraph are based on research that examined the case outcomes of participants that entered this program during 1995-1996. It is important to note that, at that time, the DTAP program was a deferred-prosecution program. DTAP moved to its current deferred-sentencing program in 1998. Consequently, the criminal history and demographic profiles of offenders who entered DTAP in the mid-nineties may differ from those for offenders who have entered the program since 1998.
[249] National Center on Addiction and Substance Abuse (CASA) at Columbia University, *Crossing the Bridge: An Evaluation of the Drug Treatment Alternative-*

half times more likely to be employed than they were before entering DTAP.[250] Also, when compared to a similar non-DTAP group, DTAP graduates were less likely to return to prison than the matched comparison group two years after that group left prison.[251] Researchers further concluded that DTAP's results were achieved at approximately half the average cost of incarceration.[252]

Based on the recognized successes of the Kings County DTAP program, New York State allocated Federal Anti-Drug Abuse Act monies in fiscal year 1992-93 to support and replicate the program in other New York City jurisdictions.[253] While the Brooklyn DTAP program served as a model for these newer initiatives, eligibility criteria vary by county, as well as the process and structure of the programs. Moreover, not every program has access to the same level of treatment, housing, employment and other community-based resources. They all, however, are prosecutor-driven deferred-sentencing programs that generally require offenders to participate in 15 to 24-month treatment protocols with an initial nine to 12 months in a residential treatment facility. Although the retention and recidivism rates vary by county,[254] the evidence strongly suggests that program graduates are re-arrested at a lower rate than comparable groups of offenders who are not subjected to the "legally coerced" long-term treatment regimen that is the cornerstone of the DTAP model.[255]

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to-Prison (DTAP) Program, A CASA White Paper (2003), at ii. The overall completion rate for DTAP participants over the 17-year history of the program is approximately 50% (Kings County District Attorney's Office, *supra*, note 235, at 24).

[250] *Id.* at ii.

[251] *Id.*

[252] *Id.*

[253] *Id.* at 21. New York County and the New York City Special Narcotics Prosecutor established their own DTAP programs in 1992, followed by Queens County in 1993. The District Attorneys in Bronx and Richmond Counties established DTAP programs in 1998 and 1999, respectively.

[254] *See*, *Confronting the Cycle of Addiction and Recidivism*, *supra*, note 195, at 51-56.

[255] *Id.* at 56.

B. Structured Treatment to Enhance Public Safety (STEPS)

In an effort to expand the DTAP diversion model to counties outside New York City, the Division of Criminal Justice Services (DCJS) launched a prosecutor-based diversion program in 2003 known as "Road to Recovery." Later renamed "STEPS" (Structured Treatment to Enhance Public Safety),[256] the aim remained to divert both first-time and repeat non-violent drug-addicted felony offenders[257] into long-term substance abuse treatment as an alternative to incarceration.

Participating prosecutors can choose from three different STEPS treatment models, each of which requires minimum stays of either six or nine months in an "intensive residential" treatment setting, followed by three months at a community residence (i.e., a halfway house) where the participant continues in an outpatient treatment program followed by an additional three months of ongoing outpatient care.[258] Much like DTAP, the district attorney plays a

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[256] Though it specializes in drug cases and shares a similar acronym, the Screening Treatment Enhancement Part in Kings County is not affiliated with DCJS' STEPS program.

[257] A 2005 analysis of the STEPS program by DCJS showed that, at arrest, 40.9% of STEPS participants were charged with property offenses (burglary, 16.7%; larceny, 11.3%; forgery, 7.5%; and "other" property, 5.4%), 22.6% with DWI offenses, and 22.0% with drug offenses. Violent and other offenses accounted for only 5.9% and 3.8%, respectively, of top-charge arrest offenses. Criminal history statistics showed that 83.3% of participants had at least one prior felony arrest and 64.0% had at least one prior felony conviction. Furthermore, 71.0% of participants were previously sentenced to periods of incarceration -- 28.5% had served at least one prior prison sentence; 56.5% had served at least one prior jail sentence; and 33.9% had received at least one jail-probation (i.e., "split") sentence. Findings also revealed that 77.4% of the STEPS participants had prior drug and/or alcohol arrest or conviction charges. One-half (49.5%) of the participants had at least one prior arrest and/or conviction for a drug-related offense, and 47.8% had at least one prior arrest and/or conviction for a DWI-related offense. The program currently operates in 16 counties outside of New York City (Data provided by DCJS [2009]).

[258] The first option is a 15-month program that involves a "deferred sentence" disposition similar to DTAP, and the second option is shorter (12 month) version of that program. Under the third option, the defendant receives a parole supervision sentence that involves a three-month stay at the Willard Drug Treatment Campus

pivotal role throughout the entire process, from conducting the initial "legal screening" to determining suitability for diversion, as well as making the ultimate decision regarding individual success or program failure.

Several issues have plagued the STEPS program since its inception. Despite research indicating that STEPS has been effective in lowering recidivism rates among graduates,[259] there has been reluctance by some district attorneys to participate in the program. Additionally, the type of offender targeted for program participation varies greatly by county; some counties divert alcohol-addicted offenders but not felony drug offenders.[260] It is difficult to tell to what extent, if any, these issues have had an effect on program results. Despite efforts to expand the program, seven of the 16 district attorneys' offices that operate STEPS programs fell below their agreed-upon minimum diversion targets in 2007, and the 2009-2010 Executive Budget recommends that DCJS funding for STEPS be discontinued due to the State's current fiscal crisis. The Budget proposes that $4 million be added to the Office of Alcoholism and Substance Abuse Services' ("OASAS") budget to continue to support diversion for felony drug offenders in upstate and suburban New York City counties.

C. Drug Treatment Courts

Drug Treatment Courts are dedicated court parts that provide non-violent drug-addicted offenders an opportunity to reduce or avoid criminal sanctions if they are successful in treatment.[261] The drug

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(*see*, Part Five, *infra,* at 166-168) followed by 12 months of community-based treatment as a condition of parole.

[259] According to an April 2007 recidivism analysis of the STEPS program by DCJS, re-arrest rates for the one-year and two-year periods following program completion were 13.7% and 18.2%, respectively. These rates are comparable to those reported by the Kings County DTAP program for the same "at-risk" periods, 10% and 19%, respectively.

[260] As of April 2007, approximately 19% of all STEPS diversions involved DWI offenders.

[261] *See*, *Confronting the Cycle of Addiction and Recidivism*, *supra*, note 195, at 33. Adult drug treatment courts are part of the Judiciary's large network of "problem-solving" courts, which also include Family Treatment, Integrated Domestic Violence, Domestic Violence,

court model involves intensive judicial monitoring of the program participant, thus allowing the judge to react quickly to errant behavior or non-compliance and promptly acknowledge and reward positive behavior.

> For many [drug court] participants, the close attention paid to them by the [d]rug [c]ourt judge, and the positive reinforcement they obtain for succeeding, may be the first time that they have experienced this kind of enhancement of their self-esteem. The [d]rug [c]ourt judge becomes a single, reliable authority figure who will immediately hold participants accountable when they fail, and who will acknowledge their progress when they succeed. This undoubtedly puts a different face on the criminal justice system for most substance abusers, and it seems to play an important role in achieving positive results in treatment.[262]

In the most commonly used drug treatment court model, a guilty plea is accepted and sentencing is adjourned pending the outcome of drug treatment and the completion of other drug court program requirements.[263] Once a plea agreement is reached, a voluntary contract outlining specific outcomes for success and failure is entered into by the offender, defense counsel, the prosecutor and the court. Participants regularly report back to court, sometimes as often as once a week, to be drug tested and have their progress monitored by the judge.[264] If the offender remains drug-free and continues to make progress in treatment, the judge provides positive reinforcement and may permit the offender to progress to the next phase of the program.

Mental Health, Sex Offense, Youthful Offender Domestic Violence and Community Courts (*see*, http://www.courts.state.ny.us/courts/problem_solving/).

[262] *Confronting the Cycle of Addiction and Recidivism*, *supra*, note 195, at 40.

[263] In certain upstate drug treatment courts, sentencing is *not* deferred for first-time felony offenders. Instead, the offender is required to participate in drug court and successfully complete treatment as specific conditions of a five-year probation sentence. In these cases, the sentence is imposed "up front" (i.e., following entry of the guilty plea). If successful in treatment and in complying with all other conditions of probation, the offender − though burdened with a permanent felony conviction − avoids a violation of probation and any resulting jail or prison sanction.

[264] *Confronting the Cycle of Addiction and Recidivism*, *supra*, note 195.

Successful program completion usually results in a withdrawal of the felony guilty plea and dismissal of the charges or a plea to a non-felony offense.

With the help of a resource coordinator or case manager, drug treatment courts provide a broad range of services to participants, including access to education, job training, mental health services, public benefits, housing and other resources, and monitor the offender's progress in obtaining such services.[265] As with the DTAP model, graduation from drug court is contingent upon remaining drug-free for the prescribed period as well as compliance with requirements that encourage a drug-free lifestyle, such as maintaining employment or securing a G.E.D. or a vocational certificate.[266] While relapses are generally addressed with graduated sanctions, the ultimate sanction for non-compliance is dismissal from the program, along with the imposition of an incarceratory sentence.

A three-year recidivism study of six New York State adult drug courts by the Center for Court Innovation (CCI) found that drug court graduates were "far less likely" to recidivate than a comparison group of defendants who did not participate in drug court.[267] The study further found that drug court involvement led to a lower probability of recidivism three years after the initial arrest, with an average recidivism reduction of 29% relative to a comparison group of offenders who did not participate in drug court. Notably, a sizeable percentage of felony-level drug treatment courts in the State currently accept only first-time felony offenders. This reduces the number of offenders for whom drug court may be an available alternative.[268]

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[265] *Id.* at 39.

[266] *Id.*

[267] Center for Court Innovation, *The New York State Adult Drug Court Evaluation: Policies, Participants and Impacts*, at xi (October 2003). Note that of the six adult drug courts participating in this study, three also handled misdemeanor cases (*id.,* at 15).

[268] According to OCA, a total of 48,890 individuals have participated in drug treatment court programs since the first drug court was implemented in 1995 (*id.*, at 6) and 19,761 have graduated. The remaining 29,129 individuals include both program failures and those still in treatment. OCA reports that as of October 1, 2008 there were 171 drug treatment courts in the State (in all but five counties) and another 26 in the planning stages.

IV. EXPANDING THE AVAILABILITY OF DRUG DIVERSION IN NEW YORK: THE CASE FOR REFORM

While most counties have one or more proven diversion options available,[269] data examined by the Commission suggest that there are a substantial number of drug-addicted non-violent felony offenders being sentenced to State prison who could benefit from diversion options that include treatment without negatively impacting public safety.

A. Disparate Incarceration Rates for Drug Offenders Throughout the State

The Commission examined the likelihood of being sentenced to State prison following a Class B felony drug arrest that resulted in an indictment or superior court information.[270] The focus was limited to counties with a sufficient number of such cases for comparison purposes.[271] To ensure that only "similarly situated" drug offenders were being compared, the analysis took into account offenders' criminal histories, age and gender.[272] The likelihood that a prison sentence would be imposed in a given county was compared to that in

[269] Each of the five counties with DTAP programs, and all but one of the 16 counties with STEPS programs, also have felony and misdemeanor drug courts. The majority of the remaining 41counties have both felony and misdemeanor drug courts.

[270] This analysis examined all Class B felony sale (Penal Law §220.39) and possession (Penal Law §220.16) top-charge arrest cases disposed during the three-year period spanning from 2004 to 2006. It was limited to these two arrest charges because they accounted for more than 70% of the controlled substance arrests that resulted in prison sentences during the study period. The analysis was not limited to conviction cases only because a substantial number of arrests resulted in dismissal where offenders successfully completed treatment programs; the identification of such cases was not possible.

[271] As reflected in Charts 3 and 4, 18 counties were examined in this analysis (*see*, Appendix E, *infra*).

[272] The analysis controlled for indictment, conviction and underlying arrest charges that involved violent felony offenses or weapons charges; the legal seriousness of pending prior arrest cases; number and type of prior arrests; prior types of sentences; offender age at the time of case disposition or sentencing and county of disposition. A white paper describing the research methods used in the analysis was prepared by DCJS in January 2009.

Kings County because Kings has a long-established system of drug diversion programs – principally, drug courts and DTAP – that serve both first felony and second felony offenders.

The Commission found that there was substantial variation in the likelihood of a prison sentence across the counties examined. For example, Chart 3 shows that for first felony drug possession offenders in Bronx, Erie, Queens and Westchester Counties, the likelihood of a State prison sentence was approximately half that in Kings County, whereas the likelihood was almost five times as great in Albany and Oneida Counties.[273] For second felony drug possession offenders, the likelihood of a State prison sentence in Bronx County was only one-third that of Kings County, but was approximately twice as great in Broome, New York and Oneida Counties.

With respect to drug sale arrests, Chart 4 shows that the likelihood of a State prison sentence for first felony drug sale offenders in Nassau and Westchester Counties was roughly half that of Kings County, but twice as great in Onondaga County and more than seven times as great in Monroe and Schenectady Counties. For second felony drug sale offenders, the likelihood of a State prison sentence, as compared to Kings County, was two times as great in Onondaga County, almost three times as great in Albany and Rensselaer counties, five times as great in Orange County, and more than seven times as great in Suffolk County. The Commission was not able to determine through its analysis whether these dramatic differences in county prison rates were the result of a reluctance to divert Class B felony drug arrest cases to treatment programs, a shortage of treatment slots for such diversions, local plea bargaining practices or other factors. Nonetheless, the data suggest that for similarly situated indicted felony drug offenders, the likelihood of being diverted from prison can differ significantly depending on the county of prosecution.

[273] As reflected in Appendix E, it is important to note that, in some counties, the odds of receiving a prison or one-year felony jail sentence are lower than the odds for a prison sentence only.

Chart 3

Class B Felony Drug Possession (Penal Law §220.16) Arrests Involving Males Age 19 or Older That Resulted in Felony Indictments or Superior Court Informations, Disposed 2004-2006: Modeled Odds[a] of a Prison Sentence by County

First-Felony Offender (No Prior Felony Conviction)			Second-Felony Offender[b] (Any Prior Felony Conviction)		
Disposition County (Sorted by Prison Odds)	Odds of Prison[c] Compared to Kings	N of Cases	Disposition County (Sorted by Prison Odds)	Odds of Prison[c] Compared to Kings	N of Cases
■ Queens	0.4	417	■ Bronx (thru 10/31/04 only)	0.3	303 [d]
■ Bronx (thru 10/31/04 only)	0.5	319 [d]	■ Monroe	0.5	255
■ Westchester	0.5	230			
■ Erie	0.6	331	■ Erie	0.8	233
			■ Kings/Brooklyn	1.0	454
■ Suffolk	0.7	242	■ Nassau	1.3	184
■ Monroe	0.8	289	■ Queens	1.3	288
■ Nassau	0.9	184	■ Onondaga	1.4	219
■ Kings/Brooklyn	1.0	401	■ Westchester	1.4	180
■ New York/Manhattan	1.2	779			
			■ Suffolk	1.6	221
■ Broome	2.1	102	■ Albany	1.7	193
■ Onondaga	2.1	265	■ New York/Manhattan	1.9	819
■ Albany	4.7	143	■ Broome	1.9	113
■ Oneida	4.9	136	■ Oneida	2.0	103
■ Average Odds for All Other Counties[e]	3.4	932	■ Average Odds for All Other Counties[e]	2.0	751
Total		**4,770**	Total		**4,316**

[a] The binary logistic regression model used to estimate the modeled odds controlled for (1) any VFO or weapons charge (arrest, indictment, or conviction; top or underlying); (2) the most serious pending prior arrest charge (misdemeanor; VFO, felony drug, other felony); (3) the number of prior VFO, felony drug, and other felony arrests, as well as the number of prior misdemeanor drug arrests, (4) the most serious prior sentence, including number of prior jail or prison sentences; age at arrest; and county of case disposition.

[b] The "second-felony offender" category includes any case involving an offender with a prior felony conviction rather than only those defined as second-felony offenders in PL §70.06(1).

[c] Cases involving direct parole-supervision sentences that required placement in the DOCS Willard facility were counted as non-prison sentences. Logit odds for combined prison-Willard sentences are presented in Appendix E for second felony offenders, as are the logit odds for combined prison or one-year felony jail sentences for first-felony offenders.

[d] Excludes Bronx indicted/SCI arrest cases for which the court of disposition (criminal versus supreme) could not be determined.

[e] An individual county could have a much higher or lower "odds" of prison than the average for "all other counties."

Data Source: The New York State Division of Criminal Justices Services, Computerized Criminal History (CCH) System and the New York State Department of Correctional Services.

Chart 4

Class B Felony Drug Sale (Penal Law §220.39) Arrests Involving Males Age 19 or Older That Resulted in Felony Indictments or Superior Court Informations, Disposed 2004-2006: Modeled Odds[a] of a Prison Sentence by County

First-Felony Offender (No Prior Felony Conviction)			Second-Felony Offender[b] (Any Prior Felony Conviction)		
Disposition County (Sorted by Prison Odds)	Odds of Prison[c] Compared to Kings	N of Cases	Disposition County (Sorted by Prison Odds)	Odds of Prison[c] Compared to Kings	N of Cases
■ Westchester	0.4	117	■ Bronx (thru 10/31/04 only)	0.6	1,036 [d]
■ Nassau	0.5	323			
			■ Richmond	0.9	126
■ New York/Manhattan	0.9	1,485	■ Kings/Brooklyn	1.0	1,135
■ Queens	1.0	589	■ Broome	1.1	122
■ Kings/Brooklyn	1.0	914			
■ Suffolk	1.0	372	■ Queens	1.4	569
■ Richmond	1.2	108	■ Westchester	1.5	105
			■ Chautauqua	1.6	120
■ Chautauqua	1.5	121	■ Onondaga	2.1	92
■ Broome	1.7	94	■ New York/Manhattan	2.4	2,548
■ Bronx (thru 10/31/04 only)	1.7	814 [d]	■ Nassau	2.5	392
■ Onondaga	2.0	94	■ Monroe	2.5	91
■ Rensselaer	2.3	85	■ Rensselaer	2.8	128
■ Albany	3.3	150	■ Albany	2.9	226
■ Monroe	7.1	126	■ Schenectady	4.4	127
■ Schenectady	7.4	108	■ Orange	5.1	83
■ Orange	14.4	123	■ Suffolk	7.3	420
■ Average Odds for All Other Counties[e]	3.8	805	■ Average Odds for All Other Counties[e]	2.6	572
Total		**6,428**	Total		**7,892**

[a] The binary logistic regression model used to estimate the modeled odds controlled for (1) any VFO or weapons charge (arrest, indictment, or conviction; top or underlying); (2) the most serious pending prior arrest charge (misdemeanor; VFO, felony drug, other felony); (3) the number of prior VFO, felony drug, and other felony arrests, as well as the number of prior misdemeanor drug arrests, (4) the most serious prior sentence, including number of prior jail or prison sentences; age at arrest; and county of case disposition.

[b] The "second-felony offender" category includes any case involving an offender with a prior felony conviction rather than only those defined as second-felony offenders in PL §70.06(1).

[c] Cases involving direct parole-supervision sentences that required placement in the DOCS Willard facility were counted as non-prison sentences. Logit odds for combined prison-Willard sentences are presented in Appendix E for second felony offenders, as are the logit odds for combined prison or one-year felony jail sentences for first-felony offenders.

[d] Excludes Bronx indicted/SCI arrest cases for which the court of disposition (criminal versus supreme) could not be determined.

[e] An individual county could have a much higher or lower “odds" of prison than the average for "all other counties."

Data Source: The New York State Division of Criminal Justices Services, Computerized Criminal History (CCH) System and the New York State Department of Correctional Services.

B. Limited Program Options and Inconsistent Program Criteria

The Commission recognizes that there are well-documented disparities in the availability of substance abuse treatment providers, especially between rural and urban areas of the State, creating a "patchwork" system for diverting drug-addicted non-violent felony offenders from prison into treatment. Even in jurisdictions where community-based treatment programs are available, there still may be insufficient court or prosecutor-based diversion options for felony-level drug offenders. For example, while some upstate and suburban New York City jurisdictions operate substantial second felony offender diversion programs similar to DTAP, many counties have only a limited program or no program at all for second felony offenders. While all but five counties in the State currently have a felony-level drug treatment court,[274] many of these courts target primarily first-time felony offenders, and some do not accept offenders charged with drug sale offenses.[275]

The Commission believes that, as matter of simple fairness, diversion options should be made available to non-violent felony drug offenders regardless of the county in which a case is prosecuted. To further the goal of creating equal access to community-based treatment for addicted, non-violent offenders throughout the State, a statewide program for judicial diversion should be codified. The Commission strongly believes, however, that this requires a delicate balance to ensure that any such reforms supplement, rather than supplant, the State's large network of successful diversion programs. Indeed, it would be an unfortunate setback if, in an effort to reform the drug laws, we were to destroy the many successful programs that currently

[274] Information provided by the Office of Court Administration (January 2009).
[275] In its 2003 evaluation of 11 New York State drug treatment courts, the Center for Court Innovation concluded that there is no single drug court model, and that policies "vary widely" among the courts with regard to such factors as legal eligibility (e.g., felony vs. misdemeanor charges; drug vs. non-drug charges and permissible prior criminal history) and level of addiction (e.g., "casual" drug use; drug abuse or substance "dependence") (*see*, Center for Court Innovation, *supra*, note 267, at 285).

divert drug-addicted offenders from prison to community-based alternatives.

V. PRINCIPLES OF REFORM

Upon completing a review of the relevant data, hearing from "focus group" participants, and gaining a comprehensive understanding of the diversion programs currently operating in the State, the Commission reached near-unanimous agreement on five key principles in the area of drug law reform.

First, as noted in the Preliminary Report, "the judicious use of community-based treatment alternatives to incarceration to address an underlying drug, alcohol or other substance abuse problem can be an effective way to end the cycle of addiction and the criminal behavior that inevitably follows."[276] Stated differently, community-based substance abuse treatment -- especially when applied in a "legally coerced" criminal justice setting where the addicted offender faces swift and certain punishment for failure in treatment -- *does work*, and should be a readily available option in every region of the State.[277]

Second, New York's existing network of diversion programs is well-established and effective for thousands of non-violent drug-addicted offenders who have seized the opportunity to turn their lives around by choosing treatment in lieu of prison. As such, the Commission strongly urges that any additional diversion programs adopted in response to recommendations contained in this Report be carefully structured in such a way as to avoid undermining or negatively impacting existing programs.

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[276] Preliminary Report, at 26.

[277] Although the primary focus here is the diversion of felony-level drug offenders, it is worth noting that a significant number of first-time felony offenders entering State prison on felony drug convictions have a history of misdemeanor arrests and convictions. DCJS' data show, for example, that, on average, first-time felony drug offenders admitted to State prison in New York in 2006 had 3.7 prior misdemeanor arrests and 2.2 prior misdemeanor convictions leading up to their felony drug arrest. This data suggest a need to more closely examine the State's existing resources for screening and treating drug-addicted misdemeanor offenders.

Third, despite the availability of drug treatment courts and other diversion programs, there is evidence that a sizeable number of potentially eligible non-violent drug-addicted felony offenders may be "slipping through the cracks" of the existing diversion network, ending up in prison instead of community-based treatment. Nearly all Commission members agree that by creating uniform standards for determining which offenders are drug addicted and would benefit from treatment and giving courts additional authority to divert such offenders into treatment, fewer offenders who are otherwise suitable for diversion will be overlooked or denied the opportunity for treatment.

Fourth, the Commission recognizes that no drug diversion program exists in a vacuum. Unless the necessary treatment beds and other community-based resources are in place and adequately funded, no diversion model, no matter how well-designed or operated, can succeed or reach its full potential. As such, the Commission reiterates its earlier call for "a comprehensive plan to provide statewide access to treatment programs and eliminate identified gaps in treatment services."[278]

Finally, the Commission believes that New York must continue to reserve costly prison resources for high-risk violent offenders while making greater use of community-based alternatives to incarceration for non-violent felony drug offenders. Over the last decade, New York has begun to make substantial progress in that direction. Recent DOCS' "under custody" inmate population statistics show that, with the exception of a 0.9% increase from 2005 to 2006, the total DOCS' inmate population has declined steadily each year since 1999, falling from a record high of 71,538 inmates to 60,081 inmates at the end of 2008. Less than 20% of the DOCS' inmate population are drug offenders, the lowest proportion in over two decades. Significantly, between 1992 and 2008, the annual number of new drug commitments to DOCS declined by 54%.[279]

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[278] Preliminary Report, at 27.

[279] This decline is due, in part, to the substantial decrease in felony drug arrests during this period. Annual commitments to DOCS for drug offenses have decreased overall, but did increase slightly from 2004 to 2007 due to an increase in drug

As previously noted, while many states continue to face exploding prison populations and increases in crime, New York has become the safest large state in the nation and the fourth safest state overall.[280] New York enjoys the distinction of having significantly reduced its prison population and the percentage of non-violent drug offenders in DOCS' custody while simultaneously improving the public safety of its citizens. Against this backdrop, the Commission believes that, while it is important to continue to reform New York's drug laws, such reforms should be carefully tailored so that the State's significant public safety gains are not lost.

VI. PROPOSALS FOR DRUG LAW REFORM

The Commission identified and scrutinized new and existing proposals for reform, but was unable to reach unanimous agreement on any one proposal. The primary hurdle was that no one proposal captured all of the benefits associated with diversion without also

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commitments from counties outside New York City. In 2004, there were 5,657 new drug commitments, which rose to 5,835 new commitments in 2005, an increase of 178 inmates. In 2006, there were 6,039 new drug commitments, an increase of 204 inmates. In 2007, there were 6,148 drug commitments, an increase of 109 inmates. In 2008, however, new drug commitments to DOCS reached a 21-year low with 5,191 commitments. From 2004 to 2008, the total number of drug offenders *in custody* declined each year from 15,486 in 2004, to 14,249 in 2005, to 13,928 in 2006, to 13,427 in 2007, to 11,936 in 2008, a decrease of 3,550 inmates over the four-year period. DOCS reports that this is a result of shorter sentences imposed on drug offenders and the increased opportunities for early release.

[280] Over the past decade, the crime rate in New York has declined steadily. The rate of FBI-categorized "index" crimes (e.g., murder, forcible rape, robbery, aggravated assault, larceny, burglary and motor vehicle theft) per 100,000 residents in New York has declined 33% since 1998. More specifically, the rate of violent crimes (murder, rape, robbery and aggravated assault) fell 35%, and property crimes (burglary, larceny and motor vehicle theft) were down 33%. New York also has recorded a significant reduction in the actual number of crimes *reported*. Since 1998, the number of major crimes reported has fallen every year to the lowest levels recorded since statewide reporting began nearly 40 years ago. In 2007, there were 188,870 fewer crimes reported than in 1998, while the population of the State has increased by over one million since 1998. It must be noted, however, that while 63% of the State's violent crimes occurred in New York City in 2007 (down from 74% in 1998), that region reported a 41% drop in violent crimes since 1998, while the non-New York City counties reported a decline of just 2% (DCJS, *Crime in New York State, 2007 Final Data*, September 15, 2008).

presenting elements that could jeopardize public safety or prove too costly or unworkable. While this lack of consensus was initially cause for concern, the Commission ultimately concluded that offering several well-reasoned proposals for reform, along with a discussion of the virtues and vulnerabilities of each, could prove to be the most beneficial to those who will finally decide the scope and direction of further drug law reform in New York. This alternative to simply recommending a single proposal will allow criminal justice policymakers to evaluate the advantages and disadvantages of the various proposals before making a decision on future drug reform legislation.

While the Commission did not reach unanimous agreement, most Commission members agreed that the "Judicial Diversion" model outlined below strikes the most promising balance between the need to enhance the ability to divert drug-addicted non-violent felony offenders into community-based treatment and the overarching need to ensure public safety. The Commission offers four additional proposals that it believes should rightfully be part of the drug law reform discussion.

A. "Judicial Diversion" of Non-Violent Felony Offenders in Need of Treatment

Drug court judges and DTAP prosecutors emphasized to the Commission that many of their most successful diversion cases involve offenders with multiple prior felony convictions who, tired of years of a dysfunctional lifestyle on the streets and repeated stays in jail or prison, successfully complete the long and arduous process of recovery. A majority of members recognize the importance of including second felony offenders in any expanded statewide drug diversion program. As such, the "Judicial Diversion" proposal provides the possibility of diversion for both first-time non-violent Class B felony drug offenders and non-violent second felony offenders. The following are the principal components of the model:

1. First-Time Felony Offenders

Under the "Judicial Diversion" model, drug-addicted non-violent first-time felony offenders indicted for a Class B felony drug sale[281] or possession[282] offense would be eligible to be placed on "interim probation supervision"[283] following a plea of guilty to the drug charge. The defendant's successful completion of a long-term substance abuse treatment program would be made a condition of interim probation. Upon successful completion of treatment, the felony conviction would be sealed or the offender would be permitted to withdraw the felony guilty plea and either plead guilty to a lesser charge or have the charges dismissed outright.[284] This would represent a significant change to current law, which generally requires any defendant so convicted to receive a determinate State prison sentence of one to nine years.[285]

a. Eligibility

In order to be eligible for diversion under the Judicial Diversion model, a first-time felony drug offender must be indicted for a Class B felony drug sale or possession offense,[286] and must not have

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[281] Penal Law §220.39.

[282] Penal Law §220.16.

[283] *See*, CPL 390.30(6) (providing, in relevant part, "In any case where the court determines that a defendant is eligible for a sentence of probation, the court, after consultation with the prosecutor and upon the consent of the defendant, may adjourn the sentencing to a specified date and order that the defendant be placed on interim probation supervision. In no event may the sentencing be adjourned for a period exceeding one year from the date the conviction is entered. When ordering that the defendant be placed on interim probation supervision, the court shall impose all of the conditions relating to supervision specified in subdivision three of section 65.10 of the penal law and may impose any or all of the conditions relating to conduct and rehabilitation specified in subdivisions two, four and five of section 65.10 of such law * * * * The defendant's record of compliance with such conditions * * * shall be included in the presentence report * * * and the court must consider such record and information when pronouncing sentence" [*id.*]).

[284] In both instances, the record would be sealed.

[285] *See*, Penal Law §70.70(2)(a)(i).

[286] Under existing CPL plea restrictions, a defendant wishing to dispose of an indictment by guilty plea must, absent prosecutorial consent, plead guilty to every charge in the indictment (*see*, CPL 220.10[4]; *see also*, Penal Law §65.00[1]

been adjudicated a youthful offender (YO) in the preceding 10-year period[287] for: (1) a felony sex offense enumerated in Correction Law §168-a;[288] (2) a felony homicide offense defined in Penal Law Article 125; or (3) a "violent felony offense" as defined in Penal Law §70.02(1). These exclusion criteria reflect the majority view of the Commission that felony offenders with a history of violence pose too great a risk based on their prior criminal conduct to be diverted to community-based treatment in a non-secure setting. Some Commission members were strongly opposed to using prior YO adjudications as exclusion criteria. They argued that it is inappropriate and unfair to allow a prior sealed YO adjudication, which by law does not constitute a "conviction,"[289] to have a preclusive effect in determining eligibility for diversion to treatment.

b. Mandatory Assessment of Treatment Need

Upon application of an eligible offender, the court would be required to order a dependency assessment to be conducted by an OASAS-certified agency or treatment provider or by another court-approved entity or professional with expertise in the area of substance abuse assessment and treatment. In order to be eligible for diversion, the assessment must show that the offender is in need of, and would benefit from, treatment for substance dependency. A judge would be precluded from diverting any offender who is determined not to be in need of such treatment.

[providing that, except in cases involving imposition of a "split" sentence, a court shall not "impose a sentence of probation in any case where it sentences a defendant for more than one crime and imposes a sentence of imprisonment for any one of the crimes"]). As such, a defendant who also is indicted for a crime that requires a sentence to State prison upon conviction would, as a practical matter, be precluded from Judicial Diversion.

[287] As with the 10-year "look-back" currently used to determine an offender's status as a "second felony offender" or "second felony drug offender" under Penal Law §§70.06 and 70.70, respectively, the 10-year YO "look-back" would exclude any time the offender spent in jail or prison.

[288] Correction Law §168-a contains a list of the offenses requiring registration as a "sex offender" pursuant to Correction Law Article 6-C.

[289] *See*, CPL 720.20.

c. Required Court Findings

Following a determination that the offender is in need of treatment, the court would be required to make additional findings relating to the defendant's suitability for diversion and the possible impact a diversion disposition would have on public safety. These findings would be similar to those required under current law for a sentence of probation or a Willard "parole supervision" sentence.[290] Prior to making such findings on the record, both sides would have an opportunity to be heard and make a motion to adjourn the matter for a specified period, not to exceed 21 days, in order to present evidence in support of, or in opposition to, a drug diversion disposition.[291]

d. Interim Probation Supervision

Upon making the required findings, the court would be authorized, upon the defendant's entry of a plea of guilty,[292] to issue an order placing the defendant on "interim probation supervision" pursuant to CPL 390.30(6). Under the proposal, that section would be amended to require that the conditions of interim probation supervision in Judicial Diversion cases include the defendant's completion of a 12 to 24-month program of residential or outpatient

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[290] Under the proposal, the judge, having regard to the nature and circumstances of the crime and to the history, character and condition of the defendant, would be required to find that: (1) institutional confinement is not necessary for the protection of the public; (2) the defendant has a history of substance dependency that is a significant contributing factor to his/her criminal conduct; (3) the defendant is in need of long-term residential or outpatient treatment for substance dependency that can be effectively administered through interim probation supervision; and (4) placing the defendant on interim probation would not have an adverse effect on public confidence in the integrity of the criminal justice system (*see*, Penal Law §65.00[1]; CPL 410.91[3]).

[291] This adjournment provision is modeled after a similar "mandatory stay" provision in the Court Approved Drug Abuse Treatment ("CADAT") diversion proposal. Under the CADAT proposal, the court is generally prohibited from issuing a diversion order for a minimum period of 21 days from arraignment. This is intended to give the prosecutor an opportunity to investigate the circumstances of the alleged crime and the defendant's background to determine if he or she is an appropriate candidate for diversion (*see*, the CADAT model, *infra*, at 120-126).

[292] This presumably would include a plea not only to the Class B felony drug sale or possession charge, but also to any other probation-eligible charges in the indictment.

substance abuse treatment at an OASAS-certified program as specified by the court.[293] During this period of interim probation, the defendant would be under the direct supervision of the local probation department and, during any period of outpatient treatment, would be required to make regular appearances before the court in order to allow the judge to monitor his or her progress in treatment, as is currently the procedure in the State's drug courts. Requiring offenders in treatment to regularly come before the judge reinforces the need to comply with treatment and allows the judge to quickly respond to errant behavior, while providing rewards for reaching milestones in the program.

e. Disposition Options: Successful Completion vs. Failure in Treatment

i. Successful Completion

In first-time felony cases where the defendant is successful in treatment and satisfies all other conditions of interim probation, the court would permit the offender to withdraw his or her felony guilty plea and either: (1) accept a plea of guilty to a misdemeanor or violation and sentence the offender to a non-jail sentence such as a conditional or unconditional discharge; or (2) dismiss the case and seal the record. This disposition is similar to one currently used in drug courts, DTAP and STEPS programs around the State. In the alternative, the Legislature may consider creating an entirely new disposition option that would permit the court, following the offender's successful completion of treatment and interim probation, to sentence the offender on the felony drug conviction to an abbreviated period of probation supervision (e.g., from one to three years), a conditional or unconditional discharge[294] or "time-served,"[295]

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[293] CPL 390.30(6) also would be amended to extend the permissible maximum period of interim probation supervision in these drug diversion cases from the current one-year maximum to two years, and to eliminate the implicit requirement that offenders placed on interim probation be sentenced at the expiration of the interim supervision period.

[294] *See generally*, Penal Law §§65.05; 65.20.

[295] In this context, "time-served" refers to the total period of time a defendant may have served in local jail prior to entering a plea of guilty and during the period of interim probation supervision and treatment.

and permit the record of the case to be sealed upon successful completion of the sentence.[296] Another option would be to make the sealing conditional, so that if the defendant is re-arrested for a new offense in the future, the record of the drug diversion case would be unsealed pending final disposition of the new criminal case.[297]

ii. Failure in Treatment

If the defendant fails to complete treatment or violates a condition of interim probation, the court would be authorized to impose the agreed-upon sentence of imprisonment on the offender's Class B felony drug conviction. Under current law, the authorized State prison sentence for a first-time felony offender convicted of a Class B (non-schoolyard) drug sale or possession offense is a determinate sentence of one to nine years.

Those Commission members who favor the "Judicial Diversion" proposal agree that in order to provide sufficient impetus for drug-addicted offenders to remain in and successfully complete long-term treatment, there should be no alternative (e.g., local jail) sentence for offenders who ultimately fail in treatment or violate another condition of interim probation. The Commissioners recommend, however, that the existing law governing interim probation supervision be modified to allow judges, during the period of supervision, to use relatively short periods of local jail as one of a

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[296] If, upon the defendant's successful completion of interim probation, the court imposes a sentence, such as a conditional discharge or an abbreviated probation term, which requires the defendant's continued compliance with conditions fixed by the court, a violation of those conditions could result in the defendant's being resentenced to a term of imprisonment in accordance with the terms of the original plea agreement.

[297] The concept of sealing the record of a standing felony conviction and allowing for a "springback" of that sealed conviction under certain circumstances does not currently exist under New York law (*but see*, CPL 720.35[1], [4]). Under this "springback" alternative, the record of the drug case, once unsealed, would remain open and would be automatically resealed only where the new arrest case results in a disposition subject to sealing under existing law. If the new arrest results in a felony conviction, the previously sealed felony conviction could operate as a "predicate" felony for sentencing purposes pursuant to Penal Law §70.06.

series of "graduated sanctions" designed to address relapses or other negative conduct.

2. Second Felony Offenders

Under the "Judicial Diversion" proposal, certain drug-addicted, non-violent second felony offenders also would be eligible for diversion. [298] In the case of second felony offenders, the offender would be required to serve a term of intensive residential substance abuse treatment, under the supervision of the local probation department or the New York State Division of Parole ("Parole"), for a minimum of six months. By successfully completing treatment and complying with any other conditions imposed by the court, the offender could avoid a sentence to State prison. As with first felony offenders, this would constitute a significant reform of current law, which requires second felony offenders to receive a sentence to State prison.[299]

a. Eligibility

Under the Judicial Diversion proposal, second felony offenders indicted for a Class B, C, D or E felony drug[300] or marihuana[301] offense, or a Class D or Class E felony "Willard eligible"[302] offense, are eligible for diversion.[303] An offender whose status as a second

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[298] For purposes of this discussion, the term "second felony offender" includes second felony drug offenders as defined in Penal Law §70.70(1)(b).
[299] *See generally*, Penal Law §§60.04(5); 60.05(6).
[300] Penal Law Article 220.
[301] Penal Law Article 221.
[302] The list of Class D and Class E drug and non-violent felony "specified offenses," a conviction of which can result in a so-called "Willard" parole supervision sentence, is set forth in CPL 410.91(5). In addition to low-level drug offenses, the list includes primarily non-violent property and larceny-based crimes such as grand larceny, criminal possession of stolen property, criminal mischief and forgery.
[303] A defendant charged in the same or another pending indictment with any other felony offense would, unless the charge is reduced to a misdemeanor, dismissed, or otherwise disposed of under an existing provision of the Criminal Procedure Law, be ineligible for diversion. Under existing CPL plea and sentencing restrictions, a defendant seeking to dispose of a multi-count indictment by guilty plea must, unless the prosecutor consents, plead guilty to every charge in the indictment. A second

felony offender is the result of a predicate felony conviction for a violent felony offense, or for any offense other than one of the enumerated diversion-eligible crimes, would, by virtue of such prior conviction, be rendered ineligible for diversion under the proposal. As with first-time felony offenders, an otherwise eligible second felony offender who had been adjudicated a youthful offender in the preceding 10 years for a felony sex offense enumerated in Correction Law §168-a, a felony homicide offense or a "violent felony offense" as defined in Penal Law §70.02(1) would thereby be rendered ineligible for diversion.[304]

Like the eligibility criteria and exclusions for first-time felony offenders, the above criteria and criminal history-based exclusions reflect the view of the majority of Commission members that violent felony offenders are not appropriate candidates for diversion to non-secure community-based treatment programs, and their inclusion would jeopardize public safety.

b. Mandatory Assessment of Treatment Need

As with first-time felony offenders, upon application of an eligible second felony offender, the court would be required to order a dependency assessment by an OASAS-certified agency or treatment provider or by another court-approved entity or professional with expertise in the area of substance abuse assessment and treatment. For the offender to be eligible for diversion, the assessment must show that he or she is in need of, and would benefit from, treatment for substance dependency.

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felony offender facing an indictment containing any diversion ineligible felony offenses would be required to be sentenced to State prison if convicted, by guilty plea or otherwise, of those crimes.

[304] This 10-year YO "look-back" period would exclude any time the offender spent in jail or prison. As with the YO exclusion for first-time felony offenders, some Commission members were strongly opposed to using prior YO adjudications as exclusion criteria, even for second felony offenders.

c. Required Court Findings

The court would be required to make certain additional findings regarding the offender's overall suitability for diversion and the possible impact diversion would have on public safety. With one important exception, the procedures and required findings for second felony offenders would generally mirror those for first felony diversions.[305] The exception would require the court -- based on its own analysis of the facts and circumstances of the case, the offender's criminal and substance abuse history and the results of the assessment of treatment need -- to find that the offender "is in need of and would benefit from residential treatment including a minimum six-month period in an intensive residential treatment facility." Similar to Brooklyn's DTAP model, the focus here is on non-violent repeat felony offenders whose substance dependence has reached the point where it is, in effect, driving their criminal behavior and for whom intensive residential drug treatment is the only viable solution.

d. Sentence

Where a second felony offender satisfies the above criteria and has entered a plea of guilty to a diversion-eligible offense, he or she would be sentenced in accordance with the plea agreement to one of the following:

i. Five-Year Probation Term

Under this sentencing option, the court would impose a five-year probation sentence together with a mandatory condition that the offender successfully complete 12 to 24 months of substance abuse treatment which would include a minimum of six months in an OASAS-certified intensive residential treatment facility, followed by additional community-based drug treatment, education, counseling,

[305] For second felony offenders, for example, the court would be required to find, among other things, that imposing a five-year probation sentence (or imposing interim parole supervision followed by a parole supervision sentence) would not have an adverse effect on public confidence in the integrity of the criminal justice system.

vocational training or employment as directed by the court. Upon completion of residential treatment, the offender would be required to report regularly to the court to allow the judge to monitor progress in treatment. Upon successful completion of treatment, the record of the case would be sealed. As with successful first felony diversions, the Legislature might consider making the sealing conditional. If the defendant fails in treatment or violates another condition of probation, the court, following a violation of probation hearing,[306] would impose the sentence of imprisonment agreed to at the time of the plea. For relapses during treatment and other less serious violations of the terms of the sentence, the court would be authorized to impose a series of "graduated sanctions" that could include short periods of incarceration in local jail.

ii. Interim Parole Supervision

In order to avoid placing the responsibility of supervision on already strained local probation departments, another possible sentencing option would require the creation of a new parole-based version of interim probation supervision that would permit the court to defer sentencing and place the second felony offender on "interim parole supervision" for a period of up to two years, while the offender completes the 12 to 24-month treatment phase of the program. As with the five-year probation sentence, an offender placed on interim parole supervision would be required to spend a minimum of six months in intensive residential treatment. One advantage of this option is that the court could direct that the offender complete an initial stay of up to 90 days at the Willard Drug Treatment campus prior to commencing residential treatment in cases where there is no residential treatment bed available at the time of case disposition. Following residential treatment, the offender would be required to report regularly to the court to allow the judge to monitor his or her progress in outpatient treatment.

Upon failure to complete treatment or violating any other significant condition of interim parole supervision, the offender would face a determinate sentence of imprisonment imposed by the court.

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[306] *See*, CPL 410.70.

For relapses in treatment or other less serious violations, the court would be authorized to use graduated sanctions, including short periods of local jail time, to address the violation.

If the defendant successfully completes both residential and outpatient treatment and complies with the conditions of supervision, the court would terminate "interim supervision" and relinquish jurisdiction of the case to Parole by imposing a "regular" parole supervision sentence in accordance with the plea agreement.[307] Any future violations of supervision would then be addressed by Parole in accordance with existing law.[308] Upon successful completion of the parole supervision sentence, the record of the case would be subject to the same sealing requirement described above.

e. Deferring Enactment of Judicial Diversion for Second Felony Offenders

Some Commission members who generally were supportive of the Judicial Diversion proposal expressed concern that the State's existing network of intensive residential treatment and community residence beds is already strained and simply cannot accommodate the additional volume of offenders that would likely be diverted under that model.[309] This situation, they argued, will most certainly be exacerbated by the State's economic crisis, which is likely to have an immediate and lasting impact on funding for probation departments and treatment programs. They stressed that creating a mechanism for Judicial Diversion, especially for second felony offenders, without first ensuring that adequate treatment and supervision resources exist could pose a threat to public safety.

These thoughts were echoed by Kings County District Attorney Charles J. Hynes, the creator of the original DTAP diversion model. In a 2007 letter to the Commission, District Attorney Hynes cautioned that "unless high-quality treatment providers are adequately funded so that they can be easily and quickly accessed by offenders in both rural

[307] *See generally*, CPL 410.91.
[308] *See*, CPL 410.91(8).
[309] *See*, *infra,* at 109-113.

and urban jurisdictions, diversion will either not occur or, if it does occur, will not be effective in reducing substance abuse and criminal recidivism."[310]

In view of these concerns, several Commissioners recommended that only the first felony provisions of the model be adopted, and that enactment of Judicial Diversion for second felony offenders be deferred until more intensive residential treatment beds, halfway houses and other necessary treatment and supervision resources are in place throughout the State. It was noted that deferring the second felony offender proposal would provide an opportunity to monitor the effectiveness of the first felony diversion model, as well as its impact on public safety and community-based and corrections resources.

3. Projected Impact of the Judicial Diversion Model

a. Application of the Model to a 2006 DOCS Admission Pool

To estimate the number of additional offenders who might be diverted from prison to community-based treatment each year under the Judicial Diversion proposal, the Commission applied the eligibility criteria in the proposal to offenders newly admitted to DOCS for diversion-eligible crimes in 2006.[311] The Commission's analysis identified a pool of approximately 1,200 non-violent first-time felony drug offenders and approximately 1,800 non-violent second felony offenders admitted to DOCS in 2006 who might have been eligible for diversion to community-based treatment under criteria set forth in the proposal. Notably, the 2,778 felony drug offenders in this pool of 3,000 potentially eligible offenders represent nearly half (46%) of all felony drug admissions to DOCS in 2006.[312] Moreover, as previously

[310] Letter from Kings County District Attorney Charles J. Hynes to DCJS Commissioner Denise E. O'Donnell (October 11, 2007), at 1.
[311] *See*, Appendix G.
[312] This figure is based on DCJS' 2006 Crimestat Report which shows a total of 6,064 new admissions for felony drug offenses that year. Note that some of the 3,000 potentially eligible offenders in the 2006 pool were admitted for non-drug "specified" Willard-eligible offenses.

noted, 89% of the 3,000 potentially eligible offenders were African American or Hispanic. In view of state and national data indicating that a significant percentage of state prison inmates serving sentences for felony drug and property crimes have a substance abuse problem,[313] the Commission believes that the majority of the 3,000 "legally eligible" offenders in the 2006 DOCS' admission pool likely would have met the additional "addiction" criteria required for diversion under the proposal.[314]

b. Need for Additional Drug Treatment Resources

The Commission recognizes that overcoming drug addiction is extremely difficult, and typically requires multiple attempts to succeed. As previously noted, data provided by DCJS indicate that, on average, first-time felony drug offenders admitted to State prison in New York in 2006 had 3.7 prior misdemeanor arrests and 2.2 prior misdemeanor convictions leading up to their felony drug arrest.[315] Despite frequent involvement with the criminal justice system, repeated contacts with the courts, probation and treatment providers have proved to be ineffective for these offenders, who continue to use drugs and often commit crimes to support their addiction. Thus, a principal focus of the Commission has been how to end the cycle of addiction for these long-term drug-addicted offenders.

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[313] *See*, Mumola, Christopher J. and Karberg, Jennifer C. *Drug Use and Dependence, State and Federal Prisoners, 2004,* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Special Report, Revised 1/19/07; Belenko, Steven and Jordon Peugh. *Estimating Drug Treatment Needs Among State Prison Inmates*, Journal of Drug and Alcohol Dependence (2005), vol. 7, at 269-281.

[314] DOCS publishes an annual report on substance abuse among those under custody, which provides statistics on drug and alcohol use derived from inmate interviews and formal assessments involving standardized screening instruments. DOCS estimates that approximately 94% of the inmates admitted on felony drug convictions in 2006 were administratively classified as having substance abuse needs. According to the most recent DOCS' report, at the end of 2007 approximately 86% of those inmates for whom data were available had used or abused drugs or abused alcohol and the rate exceeded 95% for those committed for drug charges (*see*, Humphrey, Elaine. *Identified Substance Abuse 2007*, State of New York Department of Correctional Services, Executive Summary, at i). Only one-sixth of the 51,748 inmates identified as substance abusers in 2007 were classified in the "alcohol abuse only" category (*id*., at 4).

[315] *See*, *supra,* note 277.

As described above, the extensive experience of the State's drug courts and DTAP programs provides a rich source of information about what works for seriously drug-addicted offenders. It is clear from the data that the quality and length of the treatment component is critical to the success of these programs. The course of treatment also varies depending on the offender's history of addiction and the frequency and severity of the offender's criminal conduct. The vast majority of misdemeanor and first-time felony drug offenders are treated in non-residential settings, which is the least costly and restrictive mode of treatment. For those who fail in treatment and for second felony offenders who typically have longer histories of drug addiction and drug-related offenses, successful recovery more often depends on removing the offender from the community and addressing his or her underlying addiction in an intensive residential treatment setting. The success of these intensive programs lies in the ability to assist offenders in focusing on the underlying causes of their addiction, in severing negative community influences and contacts, and in teaching offenders new skills to enable them to succeed when they return to the community. While these treatment modalities work, they do not come without a cost. OASAS estimates that the "per-person" cost of treatment is approximately $26,300 per year for intensive residential programs, $30,700 per year for community residential programs and $13,900 per year for outpatient treatment.[316]

Although New York State now has one of the largest networks of drug treatment programs in the country, it is clear that adoption of the Judicial Diversion proposal, with its requirement of a minimum six-month stay in intensive residential treatment and follow-up care for second felony offenders, would create a need for a substantial number of additional intensive residential and community residence beds. As noted, it is estimated that as many as 1,800 second felony offenders might be diverted annually under the proposal, and all diverted second

[316] Data provided by OASAS (January 2009). The Commission recognizes that, in the long run, the State could achieve significant savings by diverting more non-violent drug-addicted offenders from prison to community-based treatment, provided a substantial number of offenders are diverted each year, the prison system is downsized accordingly, and a significant number of those offenders who are diverted are not ultimately returned to prison. These savings, however, would not be realized immediately.

felons would be required to serve a minimum of six months in intensive residential treatment. Many of these offenders would require follow-up care in a community residence ("halfway house")consistent with the continuity of care model practiced in STEPS/Road to Recovery, thereby creating increased demand for additional community residence beds.

Moreover, a portion of the State's existing intensive residential treatment capacity likely will be absorbed by some of the estimated 1,200 first-time felony offenders who might be diverted annually under the Judicial Diversion proposal. Although intensive residential treatment is not required for these offenders under the model, the Commission anticipates that, based on treatment-related data from drug courts,[317] New York City-based diversion programs[318] and the STEPS program,[319] a certain percentage of first-time felony offenders would likely be placed in that higher level of care (and/or in community residence beds) for at least a portion of the court-mandated treatment period.

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[317] *See*, Center for Court Innovation, *supra*, note 267, at 39, 54. According to the CCI report, the percentage of placements into residential treatment programs ranged from 12% to 53% across the four New York City-based felony drug courts studied. In the three upstate drug courts examined (Buffalo, Rochester and, Syracuse), where 20% to 24% of participants were facing felony charges, only 3% to 6% of all drug court participants began in residential treatment. The Suffolk County Drug Treatment Court had a somewhat higher proportion of felony cases (34%), but only 18% of all participants entered residential care. It was noted in the report that, among the 11 total misdemeanor and felony drug courts examined across the State, "over half of participants begin in an outpatient modality, in all but two courts. When clinically feasible, most [drug] courts prefer to begin participants in *outpatient* treatment and then upgrade to inpatient in response to relapses or other compliance problems. Characteristics generally indicating a higher probability of inpatient care are primary drug of choice (heroin), living situation (homeless), employment status (unemployed) and age (younger defendants)" (*id*., at xiv [emphasis in original]).

[318] E.A.C., Inc., Criminal Justice Division *New York City TASC: An Examination of Treatment Placements, January 1, 2007 – December 31, 2007* (April 2008), at 1, 4. In 2007, New York City TASC, which works closely with prosecutors in the four boroughs outside of Manhattan, facilitated 1,599 first-time felony and second felony offender treatment placements. Eighty percent of the second felons and 47% of the first-time felony offenders were initially placed in residential programs.

[319] Although DCJS' STEPS program primarily diverts second felony offenders, all first-time and second felony offenders participating in STEPS begin in intensive residential treatment.

OASAS reports that as of September 2008, intensive residential bed capacity was 8,034 and community residential ("halfway house") capacity was 1,992.[320] Intensive residential programs were operating at an average capacity of 88% and community residential programs were at 90% of capacity from July 2007 through June 2008.[321] The data suggest there is only limited room within the existing OASAS system to serve additional Judicial Diversion clients, and that enactment of the proposal could, absent an infusion of more residential treatment beds for these offenders, pose a significant strain on existing residential treatment resources.[322]

4. Critique of the Judicial Diversion Model

a. Need for Additional Prosecutorial and Court-Based Diversion Resources

The Commission recommends that any Judicial Diversion program replicate, to the extent feasible, practices and policies that have proven successful in DTAP programs and felony drug treatment courts. DTAP employs an intensive screening process to identify offenders who are motivated to participate in diversion. The Brooklyn DTAP program uses a Warrant Enforcement Team that conducts field investigations of DTAP candidates and is responsible for returning absconding offenders back to court.[323] Moreover, DTAP, through its affiliation with TASC, offers its participants a broad array of educational, vocational, mental health, employment and related resources to ensure that those who are able to succeed in treatment have the follow-up support they need to remain drug free.

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[320] Data provided by OASAS (December 2008).

[321] *Id.*

[322] A detailed analysis comparing potential diversions and available treatment resources by geographic region would likely be required for a more complete assessment of the Judicial Diversion proposal's projected impact on treatment resources.

[323] Young, Douglas and Belenko, Steven, *Program Retention and Perceived Coercion in Three Models of Mandatory Drug Treatment*, 32 J. Drug Issues 297, 321 (2002).

Many of the State's adult drug treatment courts share these same attributes and boast additional features such as specially trained judges, professional case managers and resource coordinators and, in most courts, on-site drug testing. Under the Judicial Diversion model, which requires courts to screen and select appropriate candidates for diversion, monitor their progress in treatment and provide case management and other services similar to those provided by drug courts, additional judicial resources would be required to accommodate new diversion cases.

The proposal would use the community supervision resources of probation and parole to supplement the resources available through the courts. By utilizing the existing probation and parole infrastructures, the Judicial Diversion model helps to ensure that offenders who abscond or otherwise violate the terms and conditions of treatment can be promptly returned to court. The Commission also recommends that if Judicial Diversion is adopted, the Office of Court Administration ("OCA") consider administering the model within its broad network of felony drug treatment courts, and that drug court resources continue to be expanded so that drug-addicted felony offenders -- particularly repeat offenders -- will have ready access to the critical resources that are the hallmark of these specialized courts.

The Commission also recognizes that DTAP and other successful drug diversion programs work, in part, because significant resources are available for investigators, attorneys and support staff necessary to properly screen, evaluate and monitor cases to ensure that treatment alternatives are offered to as many offenders as possible without jeopardizing public safety. Currently, there appears to be a wide disparity in the resources available for drug treatment diversion programs. Under the Judicial Diversion model, additional resources would have to be made available to ensure that all parties have the necessary tools to allow for meaningful participation and to minimize public safety risks.

b. Need for Additional Probation Resources

Commission members expressed additional concern that by requiring probation officers to supervise first and second-time felony offenders diverted from prison to community-based treatment, the Judicial Diversion model will place additional burdens on local probation departments already stretched thin due to high caseloads and shrinking resources. A 2007 Report of the Chief Judge's Task Force on the Future of Probation in New York State highlighted the perilous state of probation funding:

> [f]ew, if any, New York probation departments are funded adequately in terms of having reasonable caseload sizes for either adult or juvenile probationers. Many lack the necessary resources to pay for the essential community based services needed to prevent recidivism such as drug treatment, job and vocational training and placement, and mental health services. Again and again, the Task Force heard from probation directors and other experts that almost all probation departments constantly struggle to control caseload size and triage necessary services with little or no budget growth. Average caseloads for probation officers are frequently well over a hundred to one, far above any acceptable national standard. While this state of affairs is a national phenomenon, it is especially pronounced in New York State, where over the last two decades the State has systematically disinvested in probation.[324]

Many of the second felony offenders diverted to treatment under the proposal likely would require intensive probation supervision, thereby further straining limited probation resources. To address these concerns and ensure the success of Judicial Diversion, it was proposed that in implementing the model, additional State funding

[324] *See*, 2007 Report of the Task Force on the Future of Probation in New York State (Phase I), at 11.

be made available to local probation departments to allow them to address these increased resource needs.[325]

c. Impact on Existing Programs

At focus group sessions, public hearings and Commission meetings, prosecutors and judges repeatedly voiced concern that enacting a uniform statewide Judicial Diversion model could lead to a form of "program shopping" by defense attorneys in search of the "best deal" for drug-addicted clients which, they claimed, could eventually threaten the very existence of proven diversion programs like DTAP and drug courts. They cautioned that defendants would be inclined to select diversion programs with the shortest required period of residential treatment and post-treatment supervision, and may turn down offers from prosecutors in DTAP or drug court in the hope of securing a less onerous diversion option from the court.

Several prosecutors also argued that this "program shopping" problem is made even worse by the fact that the Judicial Diversion model sets no limit on the number of times an offender can be diverted from prison into treatment. Thus, it was noted, both offenders who successfully complete Judicial Diversion and those who fail and are sentenced to prison can return to court on subsequent arrests for diversion-eligible crimes and seek Judicial Diversion again and again.

It was suggested that the problem could be addressed, at least in part, by inserting a provision in the Judicial Diversion model that would preclude from diversion any defendant who, in a particular case, was offered and refused an opportunity to participate in an existing diversion program. The Commission failed to reach agreement on this proposed solution, which was criticized by some defense representatives as unworkable.

[325]The impact of the proposal on local probation departments would be reduced to the extent that judges elect to use the alternative, interim parole supervision sentencing option in second felony offender cases.

d. Other Concerns with the Judicial Diversion Model

One Commission member voiced concern that to the extent the Judicial Diversion proposal would allow a judge to vacate a defendant's plea entirely or vacate the plea and allow a plea to a lesser charge upon successful completion of the program, the proposal would single out participants of this program for significantly different treatment than other similarly situated defendants. For example, in some jurisdictions, drug-addicted defendants arrested for the Class B felony of Criminal Possession of a Controlled Substance in the Third Degree[326] who are not second felony offenders, are routinely offered the opportunity to plead guilty to a Class C, D, or E felony drug offense with a sentence of five years probation and drug treatment as a condition of probation. The defendant who successfully completes probation, including drug treatment, would not get the same consideration as the defendant who completes Judicial Diversion. The same argument could be made for drug-addicted offenders convicted of non-drug, non-violent felonies who successfully complete treatment as a condition of probation. It was argued that issues such as this, which ultimately relate to the collateral consequences of a felony or criminal conviction, should be dealt with separately and universally, instead of carving out small groups of offenders for disparate treatment.

This Commissioner also raised the concern that insofar as the proposal gives judges the power to offer a defendant a plea to a reduced charge after successful completion of drug treatment over the prosecutor's objection, it would alter the balance of power between prosecutors and judges by allowing the latter to exercise authority that, heretofore, has been within the province of the prosecutor.

The Commission recognizes that if the Legislature adopts this diversion model for first-time Class B felony drug offenders, it would presumably have to develop a comparable disposition option for drug-addicted first-time felony offenders charged with lesser (i.e., Class C, D and E) felony drug offenses. Although these lower level drug offenses differ from the Class B crimes in that they do not require

[326] Penal Law §220.16.

a State prison sentence upon conviction, it would be patently unfair to allow offenders charged with the higher (Class B) drug offense to obtain a plea to a lesser charge or outright dismissal upon successful completion of treatment while denying this same advantage to offenders charged with lesser felony drug crimes.

B. Judicial Diversion on Consent of the Parties

Echoing the concerns of a majority of the State's prosecutors, one Commission member argued in favor of adopting the Judicial Diversion proposal for first and second-time felony offenders, but with the added requirement that diversion be permitted only where the prosecutor consents to the disposition. While agreeing that the concept of an additional, statewide, diversion model is a sound one, it was argued that the decision to divert a particular offender into treatment should be a shared decision, and should not be left to the judge alone.

At focus group sessions and public hearings, law enforcement professionals stressed the integral role that prosecutors have played in successful diversion programs such as DTAP, STEPS and drug court. They argued that prosecutors often possess confidential information identifying gang members, or are aware of an offender's involvement in crimes of violence which make the offender unsuitable for diversion. They further argued that the historic reductions in crime in New York could be reversed if persistent drug dealers are not incarcerated and removed from the community. In testimony before the Commission, New York County District Attorney, and former Chair of the 1977 Executive Advisory Committee on Sentencing, Robert Morgenthau, summarized these concerns:

> Drug sentences have already been reduced as a result of the Drug Reform Act of 2004. Further reductions are likely to be counterproductive. As any resident of a drug-infested neighborhood can tell you, there is a link between illegal drug trafficking and unlawful behavior, including violent crimes. Significant mandatory sentences are still needed to ensure that serious offenses and repeat offenders receive appropriate punishment.

> They are also essential if we want to keep crime down. Mandatory sentences also provide a meaningful incentive for defendants to accept demanding long-term residential treatment as an alternative to prison.[327]

Although there are sound reasons for requiring that the court and the prosecutor both agree that a particular offender be diverted to drug treatment, a majority of Commission members believe that, as reflected in the Judicial Diversion model, judges should make the final decision about whether an offender should be diverted. They cite several reasons for this. First, the model uses objective criteria including drug screening by an outside expert to determine eligibility for the program. Second, the proposal excludes individuals with a past history of violence, and gives prosecutors an ability to be heard and to oppose diversion of offenders who pose a risk to public safety. Finally, they believe that courts are in the best position to oversee the diversion program, relying on the existing infrastructures of probation and parole, and the ability to integrate diversion of felony drug offenders into the existing network of drug treatment courts throughout the State.

C. Comprehensive Reform of the Drug Laws: A. 6663-A (Aubry) / S. 4352-A (Schneiderman) (2007-2008)

1. Background

Two members of the Commission, echoing the views of reform advocates, were in favor of broader drug law reform as embodied in a bill passed by the New York State Assembly and introduced in the New York State Senate.[328] In addition to creating in statute a new drug diversion option, Court Approved Drug Abuse Treatment ("CADAT"), the bill doubles the existing weight requirements for most Class A felony drug sale and possession crimes; makes first-time Class B felony drug offenders, other than those previously convicted

[327] New York State Commission on Sentencing Reform, Transcript of New York City Public Hearing (November 13, 2007), at 49-50.
[328] *See*, A. 6663-A (Aubry) / S. 4352-A (Schneiderman 2007).

of a "disqualifying" offense,[329] eligible for a sentence of probation or a local jail sentence of up to one year in lieu of State prison; and makes drug-addicted second felony drug offenders, other than those convicted of a Class A felony drug or "disqualifying" offense, found to have one-eighth ounce or less of a narcotic drug, eligible for a sentence of probation with a mandatory condition of drug treatment. Under a separate "judicially imposed" Shock incarceration provision, judges would be authorized to sentence certain drug-addicted first and second felony drug offenders directly to DOCS' Shock incarceration program, to be followed by mandatory drug abuse treatment upon release. Certain offenders serving indeterminate sentences for enumerated felony drug or drug-related conspiracy offenses would be eligible to apply for resentencing to a new determinate sentence consistent with the provisions of the bill and the 2004 DLRA. Offenders convicted of a "disqualifying" offense would be ineligible for resentencing.

The proposal also would significantly expand eligibility for Willard "parole supervision" sentences, and would require that all offenders sentenced to probation (or subject to parole, conditional release or post-release supervision) who have a documented substance abuse dependency undergo substance abuse treatment for at least one year or the balance of the supervision period. Mandatory substance abuse treatment also would be required for juveniles with substance abuse problems who are placed in Office of Children and Family Services' facilities.

The bill would enhance existing penalties for certain felony drug offenses by creating a new Class A-I felony "drug kingpin"

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[329] The following are among those considered disqualifying offenses under the bill: (1) a violent felony offense, except where the court finds the defendant was the victim of domestic abuse perpetrated by the victim of the violent felony offense and such abuse was a factor in the commission of such offense; (2) any other merit time ineligible offense, i.e., any A-I non-drug felony, manslaughter in the second degree, vehicular manslaughter in the first or second degree, criminally negligent homicide, a sex offense defined in Penal Law Article 130, incest, an offense defined in Penal Law Article 263 (sexual performance by a child), or aggravated harassment of an employee by an inmate; and (3) certain enumerated drug sales to minors committed on school grounds.

offense punishable by a mandatory prison term of up to 30 years to life; a new Class C violent felony of criminal possession of a weapon while selling or attempting to sell a controlled substance, punishable by an enhanced determinate sentence of 5 to 15 years (compared to 3½ to 15 years for most other Class C violent felonies) and a new Class B felony offense of criminal sale of a controlled substance to a child, which has the effect of increasing the available penalty for specified Class C drug sale offenses where the seller is over 21 and the buyer is less than 16 years of age.[330]

Finally, the bill requires the State Comptroller to certify, on an annual basis, the monetary savings generated by the enactment of the DLRA and this reform measure, both of which would yield expected decreases in inmate admissions and length of stay. This savings then would be used to fund drug treatment and criminal justice programs to reduce crime.

In addition to their strong support for diverting drug-addicted offenders to treatment, as embodied in the CADAT model described below, the Commission members supporting this measure also felt that it was important to bring the State's drug sentencing laws more in line with sentences for other crimes. They argued that New York's felony drug sentencing laws are among the harshest in the nation and should be more closely aligned with sentences for drug crimes in other states.

2. The CADAT Model

Many of the provisions of the CADAT diversion model in the legislative bill are similar to those of the Judicial Diversion proposal, but there are some notable differences. Under the CADAT model, first-time felony offenders charged with a Class B felony drug offense, and repeat felony offenders charged with a Class B, C, D or E felony drug or marihuana offense, may apply to the court for a CADAT

[330] Other significant provisions of the bill would: (1) create a new "transitional services program" in DOCS to help inmates prepare for successful reintegration into the community and (2) impose additional requirements on DOCS to enhance the provision of comprehensive alcohol and substance abuse treatment services to inmates in need of such treatment.

diversion order.[331] Persons currently or previously convicted of a "disqualifying offense," including any violent felony offense other than a violent felony found to have been committed by certain victims of domestic abuse, would be ineligible for CADAT.[332] Upon application of an apparently eligible defendant, the court would order an alcohol and substance abuse assessment[333] and adjourn the matter for 21 days to allow a prosecutor to make a non-binding determination as to the defendant's suitability for diversion.[334] If it appears to the court that the defendant also may be a person with a mental illness, the court must order that the assessment include a mental health examination to be conducted by an examining physician or certified psychologist.[335]

Prior to issuing a CADAT order, a court would be required to find that the defendant has a history of dependence on one or more controlled substances, and that participation in a drug abuse treatment regimen could effectively address such dependence, making it less likely that the defendant would commit a crime. Following its review of the substance abuse assessment and the prosecutor's suitability determination, the court would be authorized to issue a CADAT order for a period of not less than one nor more than two years, with possible additional periods of up to six months. In the court's discretion, a CADAT order could be issued either prior to the entry of a guilty plea -- in which case all discovery requests, pre-trial motions and other

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[331] With only a few exceptions, all of the eligibility requirements and other procedures governing CADAT dispositions appear in the bill in a proposed new CPL Article 218 ("Court Approved Drug Abuse Treatment").

[332] *See, supra,* note 329.

[333] The assessment must include: (1) an evaluation as to whether the defendant has a history of alcohol and/or substance abuse dependence (and, where so ordered, a mental illness) and the factual basis for such evaluation; (2) a recommendation as to whether the defendant's substance dependence and, if applicable, mental illness could be addressed by CADAT; and (3) a recommendation as to the types of treatment which could be effective.

[334] The provision in the Judicial Diversion proposal requiring a pre-diversion adjournment for up to 21 days if requested by either party is modeled after this "automatic stay" provision.

[335] Mental Hygiene Law §§1.03(8); 1.03(9).

proceedings in the case would be automatically stayed[336] pending the offender's completion of treatment -- or following a guilty plea, in which case sentencing on the plea would automatically be deferred pending completion of treatment.[337]

Upon ordering CADAT, a court would impose reasonable conditions related to supervision and treatment and direct that the local probation department or another entity, where appropriate, supervise the defendant during the period of drug abuse treatment. Such treatment must include a period of residential treatment unless the court finds it unnecessary. During the CADAT period, the court retains jurisdiction of the defendant and could, at any time, order the defendant to appear before the court. Failure to appear as ordered without reasonable cause would constitute a violation of the conditions of CADAT. The court would be required to employ a system of graduated and appropriate responses or sanctions designed to address inappropriate behaviors, protect public safety and facilitate, where possible, successful completion of the course of treatment. Where the court determines that the defendant has violated one or more conditions of the CADAT order, it may, after hearing from the defense, prosecution and treatment provider, modify the conditions, reconsider any order of recognizance or bail, or terminate CADAT and order the criminal action or proceeding restored to the calendar, in which case the action or proceeding must proceed. A defendant sentenced for a conviction following a termination of CADAT may be sentenced up to the maximum term that the court would have imposed upon the defendant if he or she had not participated in CADAT.

Upon the defendant's successful completion of CADAT, the court would be required to comply with the terms and conditions it set for final disposition, including vacatur of any guilty plea entered prior to issuance of the CADAT order. In cases where the court fails to set

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[336] The proposal would allow for the temporary lifting of the stay, on application of either party, where the court finds that the stay could result in irreparable harm to either party through the potential loss of evidence or unavailability of witnesses.

[337] The proposal requires that where a CADAT-eligible defendant is also charged with a CADAT-ineligible offense, "adjudication of such non-eligible offense shall proceed," notwithstanding the provisions of CPL Article 218 (the new CADAT article).

the terms and conditions for final disposition, the proposal requires the court either to dismiss the accusatory instrument with prejudice or order that the charges be reduced to a misdemeanor and allow the defendant to enter a plea to the reduced charge.[338]

3. Critique of the CADAT Proposal

During public hearings and in focus groups, calls for drug law reform focused overwhelmingly on those offenders serving mandatory State prison sentences for felony drug offenses who were largely bypassed by prior drug reform efforts. Based on repeated testimony from former drug offenders, their family members and drug reform advocates, those offenders whose crimes were committed to support, or as a result of, their addictions were considered by many Commissioners to be most deserving of relief from these mandatory sentences. Accordingly, in considering this drug reform bill, the major focus of the Commission's attention was on the CADAT proposal, which was recognized as a diversion model that shares many common features with the Judicial Diversion proposal. The substantial similarities between CADAT and Judicial Diversion suggest that there is "common ground" on many elements of a statewide diversion program. Both proposals, for example, are designed to divert prison-bound, non-violent, drug-addicted first-time and second felony offenders to treatment in lieu of State prison, and both categorically exclude offenders who, due to their criminal histories, are deemed inappropriate for diversion to community-based treatment.

Similarly, both models require an independent drug dependency assessment and permit diversion only after the prosecutor has had an opportunity to investigate and be heard on the offender's suitability for diversion. Both models also involve supervision of the offender by an independent agency, such as Probation or Parole, and

[338] Under the proposal, these "default" dispositions are triggered *only* where the court fails, at the time of the CADAT order, to set the terms of the final disposition. There is nothing in the proposal (or in the existing Criminal Procedure Law) that would expressly permit the court to dismiss the charge or accept a misdemeanor plea in a non-default context. The Commission assumes that this was inadvertent, and that the drafters intended to give judges the authority to dismiss the charge or accept a misdemeanor plea in *any* case where the defendant successfully completes CADAT.

require judges to use "graduated" sanctions to respond to drug relapses and similar negative behavior. Finally, both Judicial Diversion and CADAT require an offender to participate in a one to two-year period of community-based treatment, the successful completion of which would result in a dismissal, sealing or other disposition that would allow the offender to begin his or her reintegration into society without the stigma of a felony drug conviction.[339]

Despite these similarities, some Commission members were troubled by features of the CADAT model not found in the Judicial Diversion proposal. Under CADAT, for example, a judge, including a local criminal court judge,[340] could issue a diversion order without first requiring the entry of a guilty plea to the felony drug charge. Although the model does not preclude a judge in any given case from insisting on the entry of a guilty plea as a condition of participating in CADAT, these members were nonetheless concerned that, where no plea is entered and the defendant ultimately fails the program after several months (or even years) in treatment, the prosecutor might have difficulty locating witnesses or securing the evidence needed to proceed. This would have far reaching effects on the orderly prosecution of drug cases and could result in many felony drug cases being dismissed. Certain Commission members argued that CADAT's "deferred prosecution" approach is less effective than the "deferred sentencing" approach in the Judicial Diversion model because the certainty of a prison sentence upon program failure has been removed under the CADAT model, thereby lessening the offender's motivation to succeed in treatment. They noted that the Kings County DTAP

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[339] Although both models provide for sealing the case record where the ultimate disposition results in a dismissal of the charges, only the Judicial Diversion proposal allows for the sealing of a felony *conviction* where the offender is successful in treatment. As previously discussed, the Legislature could consider creating a mechanism to allow the sealed conviction to "spring back" in the event of a subsequent arrest (*see*, *supra,* note 297).

[340] Under the Judicial Diversion proposal, only a superior court judge could order diversion and only on a pending indictment (assuming there is no prosecutorial consent for a superior court information under CPL 195.10[1][c]). In contrast, the CADAT proposal would appear to allow the issuance of a "deferred prosecution" CADAT order on a pending felony complaint by a judge of a city court, district court or even a local "justice court," provided the latter court has been designated a "drug court" by the Office of Court Administration.

program reported significantly higher retention rates after switching from a "deferred prosecution" to a "deferred sentencing" approach in 1998, a result supported by research suggesting that "progressively higher levels of perceived legal pressure [on the part of treatment program participants] can increase treatment retention."[341]

Commissioners supporting the CADAT approach maintained that an addicted defendant should not have to give up the right to challenge the legality of a search and seizure or his or her constitutional right to a trial by pleading guilty in order to be afforded drug treatment instead of a State prison sentence. They further argued that giving a judge the opportunity to defer prosecution prior to entry of a guilty plea mitigates unintended immigration consequences that may follow a guilty plea -- even a plea that is later withdrawn.[342] They noted that a number of provisions are built into the CADAT model, such as an "automatic stay" of motions, discovery demands and other pre-trial proceedings, and a provision to preserve testimony or other evidence that might be lost during the period the defendant is in treatment, to enable the prosecution to proceed if there is a failure in treatment.

Another difference between the models is that, unlike Judicial Diversion, the CADAT proposal precludes second felony offenders charged with non-drug, non-violent property and theft offenses from participating in the program. Given that many drug-addicted offenders, and especially repeat offenders, frequently commit these non-violent offenses to feed their addiction, the Judicial Diversion model encompasses these offenders. Notably, sponsors of the CADAT bill who are members of the Commission were open to expanding the proposal to include these non-drug felony offenders.

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[341] Kings County District Attorney's Office, *supra*, note 235, at 53.

[342] *See generally, In re Roldan-Santoyo*, 22 I. and N. Dec. 512 (BIA), 1999 WL 126433 (US Board of Immigration Appeals, 1999) vacated on other grounds *sub nom*., *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000); *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000); *Chavez-Perez v. Ashcroft*, 386 F.3d 1284 (9th Cir. 2004); *Murillo-Espinoza v. Immigration and Naturalization Service*, 261 F.3d 771 (9th Cir. 2001); *Delatorre-Solis v. Mukasey*, 266 Fed. Appx. 628, 2008 WL 410368 (9th Cir. 2008).

There are a number of features in the Judicial Diversion model including screening requirements, different treatment modalities for first and second-time felony offenders, and new supervision and sentencing options which the majority of Commissioners believe make that model preferable.

D. The "Aggravated Sale and Possession" Model

Another drug reform proposal considered by the Commission would allow for a probation sentence for first-time felony offenders charged with the Class B felony offense of criminal sale of a controlled substance in the third degree or criminal possession of a controlled substance in the third degree.[343] This proposal offers a relatively simple "offense-based" approach to alternative sentencing for these Class B felony drug offenders.

1. Proposal

Many drug reform advocates urge that mandatory minimum sentences for felony drug offenders be repealed and that judges be given the discretion to sentence first-time felony offenders convicted of Class B felony sale or possession crimes to a probation sentence in lieu of State prison. There was limited support for this view on the Commission. Commissioners recognize, however, that there are certain aggravating circumstances where a mandatory or enhanced sentence is appropriate. For example, under current law, sale of a controlled substance on school grounds or a school bus is an

[343] *See*, Penal Law §§220.39; 220.16. The existing Class B felony offense of criminal sale of a controlled substance in the third degree can be committed in any one of nine different ways, each defined in a separate subdivision of Penal Law §220.39. The most commonly charged offense under Penal Law §220.39 is the knowing and unlawful sale of any amount of a "narcotic drug" under subdivision one. Similarly, the existing Class B felony offense of criminal possession of a controlled substance in the third degree can be committed in any one of 13 different ways, each defined in a separate subdivision of Penal Law §220.16. The most commonly charged offense under Penal Law §220.16 is the knowing and unlawful possession of any amount of a narcotic drug "with intent to sell it" under subdivision one. In general, a first-time felony offender convicted under either of these sections faces a mandatory prison sentence of one to nine years.

aggravating factor which carries a more serious sentence than that applied to regular (i.e., non-schoolyard) drug sales.[344]

Following that reasoning, the proposal calls for eliminating the mandatory minimum one-year State prison sentence for first-time felony drug offenders convicted of a Class B sale or possession offense under Penal Law §220.39 or 220.16, thereby allowing these offenders to be sentenced to a five-year probation sentence, local jail sentence of up to one year or a "split" sentence of jail followed by probation.[345] The proposal contains an additional recommendation, however, that the Legislature create new "aggravated" Class B sale and possession offenses in circumstances which pose a greater risk to public safety when: (1) the defendant possessed a loaded or unloaded firearm or other gun at the time of the drug sale or possession crime (or at the time of arrest on the drug offense);[346] or (2) the sale of drugs under Penal Law §220.39 was to a person under 21 years of age by a defendant who was at least 21 years old at the time of the sale.[347] Persons convicted of the new "aggravated" sale or possession crime would face a mandatory minimum one-year State prison sentence and could receive up to nine years in State prison.

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[344] Pursuant to Penal Law §220.44, a first-time felony offender who sells drugs in violation of specified subdivisions of Penal Law §220.39 while on school grounds, a school bus or the "grounds of a child day care or educational facility" is guilty of a separate Class B felony "schoolyard" sale offense and is subject to a two-year mandatory minimum determinate sentence instead of the one-year mandatory minimum determinate sentence that applies to non-schoolyard sales.

[345] The judge would retain the discretion to impose a State prison sentence of one to nine years in these cases.

[346] The possession of a loaded firearm outside a defendant's home or place of business is currently a Class C violent felony offense punishable, for first-time felony offenders, by a mandatory determinate State prison sentence of 3½ to 15 years. As such, the proposed "gun possession" aggravator under the proposal would likely be applied by prosecutors in drug sale and possession cases involving the possession of an unloaded firearm, a loaded firearm found in the defendant's home or place of business, or a loaded or unloaded rifle or shotgun.

[347] Penal Law §220.39(9) currently prohibits sale of a "narcotic preparation" to a person less than 21 years of age. As such, a person age 21 or older who commits a sale offense under that section could, in the discretion of the prosecutor, be charged under either the new aggravated or current non-aggravated statute.

This proposal would result in substantial drug reform for first-time Class B felony drug offenders and afford judges wide discretion in sentencing such offenders, while still providing a mandatory prison sentence in aggravated circumstances which pose a greater danger to public safety.[348]

2. Critique of the "Aggravated Sale and Possession" Proposal

The most prevalent concern with regard to the aggravated sale and possession model is its potential to negatively impact the operation of existing diversion programs, particularly drug courts. Both prosecutors and drug court judges voiced concern that allowing "non-aggravated" first-time Class B felony offenders to receive a straight five-year probation or local jail sentence in lieu of State prison would create a disincentive for addicted offenders to undergo the rigors of long-term substance abuse treatment in drug court. Some Commission members also were concerned that allowing drug-addicted Class B felony offenders to receive a probation sentence without participating in drug treatment would do little to end the offender's cycle of addiction, and could result in an entirely new class of drug-addicted future predicate felons who, upon commission of their next drug sale offense, would face a mandatory minimum sentence of 3½ years and up to 12 years in State prison.

To minimize a drug-addicted defendant's incentive to avoid a drug court disposition, it was suggested that the proposal be modified simply to eliminate the possibility of a local jail sentence. Addicted offenders would then be required to serve at least a five-year probation or "split" sentence, a condition of which could include successful

[348]As with existing Penal Law §220.44 "schoolyard" drug sales, under the proposal the penalty for a *second* felony offender convicted of the new aggravated sale or possession crime would be the same as for a second felony offender convicted of the non-aggravated crime (*see*, Penal Law §70.70[3] and [4]). Also, the proposal would have no impact on existing sentences for other Class B drug felonies in Penal Law Article 220 (*see*, *e.g.*, Penal Law §220.75 [unlawful manufacture of methamphetamine in the first degree]; Penal Law §220.44 [criminal sale of a controlled substance in or near school grounds]).

completion of drug treatment.[349] At least one Commission member strongly opposed this suggested modification on the grounds that it was both unworkable and unnecessary, especially given the fact that not all first-time felony drug offenders are drug addicted or otherwise appropriate candidates for a probation sentence, and that a local jail sentence may be the most appropriate sentence in those cases. As a way to implement this diversion model in larger counties with multiple felony-level court parts, it also was suggested that OCA could establish a mechanism to direct all felony drug cases before a single judge who could evaluate the case and the defendant's drug dependency status and determine whether transfer to the county drug court is warranted.[350]

E. Eliminating the Mandatory Minimum State Prison Sentence for First-Time Class B Felony Drug Sale and Possession Offenses

The final drug reform proposal considered by the Commission is based on the simple notion that the possession or sale of a relatively small quantity of drugs by a first-time felony offender should not require a State prison sentence.[351] Like the "aggravated sale and possession" model, this proposal would eliminate the existing one-year mandatory minimum State prison sentence for first-time felony offenders convicted of a Class B felony drug sale[352] or possession[353] crime. In lieu of prison, it would allow for an alternative five-year probation sentence, local jail sentence of up to one year, or a "split" sentence of up to six months in jail followed by probation. While it would create non-prison sentencing alternatives for these Class B felony drug offenses, the proposal differs from the "aggravated sale

[349] *See*, Penal Law §65.10(2)(e).
[350] Kings County reportedly employs a similar procedure in order to "universally screen" all felony drug defendants for addiction and steer these cases to the appropriate court part (e.g., to a DTAP or drug court part).
[351] Under existing law, sale by a first-time felony offender of less than one-half ounce of a narcotic drug or possession of less than four ounces of a narcotic drug are Class B felony offenses punishable by a State prison sentence of 1 to 9 years.
[352] *See*, Penal Law §220.39
[353] *See*, Penal Law §220.16.

and possession" model in that it would not establish "aggravated" versions of the two crimes.

Proponents of the model argued that in terms of "moral reprehensibility" and potential impact on public safety, possessing or selling relatively small quantities of drugs are far less serious offenses than crimes like manslaughter in the second degree, criminally negligent homicide and vehicular manslaughter in the first degree, all of which carry a possible sentence of probation or local jail for first-time felony offenders.[354] The model, they maintained, also recognizes that there may be reasons *other* than drug addiction that warrant imposition of a non-prison sentence in these cases.

Although this proposal provides a simple, straightforward approach to drug law reform, it has a number of drawbacks which kept it from receiving support from a majority of the Commission. It is recognized that while Class B possession and sale offenses typically involve small quantities of drugs, there is a well-documented culture of violence that permeates the illegal drug trade. Eliminating the "mandatory minimum" sentence for all low-level drug offenders, including those involved in violent aspects of the drug trade, could lead to an escalation in drug-related violence in our communities. Further, a majority of Commissioners prefer a diversion approach wherein drug-addicted non-violent felony offenders may receive a sentence that includes drug treatment in lieu of a sentence to State prison. This proposal lacks even a minimal drug screening or treatment component. Thus, while judges could sentence addicted offenders to complete drug treatment as a condition of a five-year probation sentence,[355] there is no formal mechanism for screening offenders and no requirement that addicted offenders sentenced to probation complete treatment as a condition of that sentence. Similarly, addicted offenders who receive a local jail sentence under the proposal may avoid any semblance of drug treatment and re-enter the system on their next felony arrest as an addicted predicate felon facing mandatory State prison.

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[354] Penal Law §§125.15; 125.10; 125.13.
[355] *See*, Penal Law §65.10(2)(e).

Finally, as noted, enacting a non-prison sentencing alternative for drug-addicted first-time Class B felony drug offenders could have a detrimental impact on existing drug courts, which hold the promise of a non-prison disposition as the "carrot" to entice addicted offenders to undergo the rigors of long-term treatment.

VII. RECOMMENDATION

For some non-violent felony drug offenders, incarceration in State prison is a costly and oftentimes unnecessary response to criminal behavior that is rooted in addiction. By addressing the underlying drug dependence that precipitates this behavior, greater gains can be made in reducing recidivism and improving public safety. While New York enjoys the benefit of an established network of drug diversion programs, the Commission recommends that the Legislature adopt a uniform, statewide drug diversion program to divert appropriate drug-addicted non-violent offenders from prison to community-based treatment where such diversion can be effected without jeopardizing public safety.

The Commission recognizes that this action will require an investment in additional resources for evaluation, treatment, referrals and supervision of offenders. It will be a challenge to find these resources given New York's current fiscal crisis. However, in the long run, this investment will result in substantial savings in judicial, law enforcement, correctional and supervision resources by significantly reducing the costly cycle of addiction and recidivism for the State's drug-addicted felony offenders. It also will offer much needed relief to families and communities adversely impacted by disproportionate incarceration rates by transforming formerly drug-addicted offenders into productive family and community members.

The three proposals described in sections A through C above provide well-considered options for a uniform statewide diversion model. In sections D and E, the Commission advances two alternative proposals which, though not directed toward drug-addicted offenders, merit further study. These latter proposals would allow judges to

sentence first-time Class B felony drug offenders to probation or local jail in lieu of a mandatory State prison sentence.[356]

The Commission is hopeful that its far-reaching efforts to examine the past, present and future direction of drug law reform in New York will prove to be a meaningful step forward for the State's criminal justice policymakers.

[356] These proposals are set forth, *supra*, at 126-131.

PART FOUR

USING EVIDENCE-BASED PRACTICES TO IMPROVE OFFENDER OUTCOMES

Part Four

Using Evidence-Based Practices to Improve Offender Outcomes

Approximately 250,000 offenders are either incarcerated or being supervised on parole or probation throughout New York State.[357] The time offenders spend in prison or under community supervision provides an opportunity, through effective programming, to correct deficiencies that lead to criminal behavior. Notwithstanding this fact, research reveals that 39% of offenders return to prison within three years of their release from incarceration.[358] This high rate of re-incarceration prompted the Commission to review the policies and practices of correctional and supervisory agencies in an attempt to identify ways to improve offender outcomes. In its Preliminary Report, the Commission proposed a number of recommendations to reduce recidivism, including an overarching recommendation to begin capitalizing on more than 30 years of research by introducing identified components of effective offender interventions, commonly referred to as evidence-based practices.[359]

States throughout the nation have utilized evidence-based practices to guide the development of correctional programming.[360] It

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

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

[359] An "evidence-based practice" implies that the practice is measurable and repeatedly has been shown, through high-quality research, to reduce offender recidivism. For a further discussion, *see*, Crime & Justice Institute, *Implementing Evidence-Based Practice in Community Corrections: The Principles of Effective Intervention* (Washington, DC: National Institute of Corrections, Community Corrections Division, U. S. Department of Justice [2004]); *see* also, Preliminary Report, at 34-40.

[360] Indeed, some states, such as Oregon and Washington, have enacted laws requiring that programs and systems comport with the aforementioned principles (*see*, ORS 182.525 [2003]; Offender Accountability Act [Washington State, ESB 5421] [1999]).

is essential that New York's policymakers harness this growing body of knowledge of what works in corrections and infuse our institutional and community programming with scientifically validated, evidence-based practices, including the following principles of effective correctional programming: (1) using intensive intervention for offenders with the highest risk of recidivism (the "risk" principle); (2) targeting offender needs that are most closely tied to criminality (the "need" principle); (3) having a human services orientation; (4) enhancing intrinsic motivation; (5) utilizing "cognitive-behavioral" programming that focuses on attitudes, interpersonal skills, anger management, thinking style, moral reasoning and the link between thought and behavior; (6) delivering program content in a way that can be understood and will be accepted by the recipient (the "responsivity" principle); (7) implementing programming in a way that is consistent with the program design (the "fidelity principle"); (8) providing relapse prevention services for those completing the program; and (9) employing routine monitoring and quality control procedures.[361] By adopting scientific principles at critical stages, New York's criminal justice agencies will be able to better address the very offender characteristics that are responsible for criminal behavior and reduce recidivism as a result.

I. USE OF A RISK AND NEEDS ASSESSMENT INSTRUMENT

The cornerstone of evidence-based practices is the use of a validated risk and needs assessment instrument. Such an instrument can help supervising agencies accurately assess the risk posed by an offender, identify the personal deficits that have contributed to an offender's criminality, and capitalize on an offender's strengths during the re-entry process. The use of a risk and needs instrument is not meant to replace professional judgment but, rather, to maximize the effectiveness of programming and supervision and thus improve public safety.

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[361] Crime and Justice Institute, *supra*, note 359; Andrews, A., Bonta, J. and Wormith, J.*, The Recent Past and Near Future of Risk and/or Need Assessment*, 52 Crime and Delinquency 1, at 7-27 (2006); New York State Commission on Sentencing Reform, Working Paper*: "What Works" in Correctional Programming* (Albany, NY [2007]).

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

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

Risk assessments guard against the use of intensive interventions with low-risk cases, which is critical because numerous studies show that intensive intervention in low-risk cases can actually increase recidivism.[362] While practitioners intuitively understand that

[362] Andrews, D. and Bonta, J., *The Psychology of Criminal Conduct* (Cincinnati, Ohio: Anderson Publishing [2006]; Lowenkamp and Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk*

the length and diversity of an offender's criminal history and characteristics, such as age, will affect the offender's likelihood of recidivism, risk instruments significantly improve upon the predictive accuracy of that assessment. That is, when practitioners use these instruments they are much more likely to accurately predict who will succeed and who will fail under regular supervision than if they rely upon professional judgment alone.

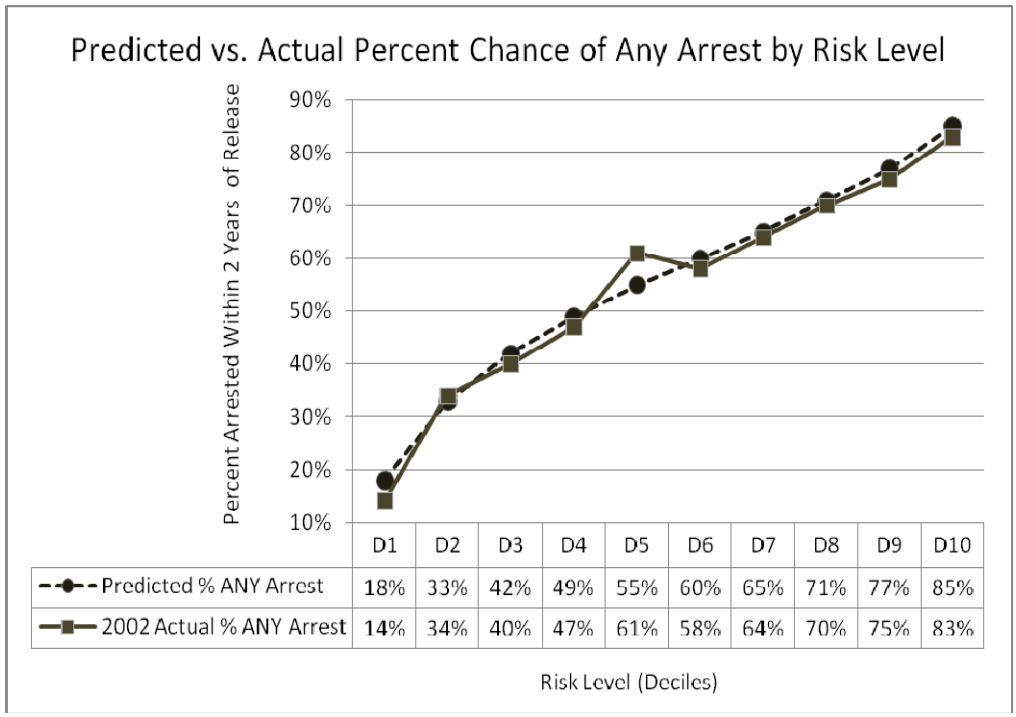
The Division of Criminal Justice Services ("DCJS") developed a static risk assessment methodology based on a study of 26,000 offenders released from DOCS in 2002. The DCJS risk methodology scores offenders leaving prison into deciles of risk, ranging from one (lowest) to ten (highest), based upon age, gender and criminal and correctional history. The methodology was developed to provide offender risk scores to local re-entry task forces funded by DCJS. The instrument calculates the probability of re-arrest within two years of release. The solid line on the graph in Figure 1 represents the rate at which offenders at each level of risk were re-arrested within two years of release, and the dotted line shows the predicted rate of re-arrest by risk level.

As indicated in Figure 1, the predictive accuracy of the static risk assessment instrument is quite high. For example, the rate of re-arrest for any crime within two years of release was 18% for released offenders who scored at the lowest level of risk (Level 1); the actual re-arrest rate for these same offenders was 14%. At the other end of the spectrum, those assessed as Level 10 (highest risk) were expected to be re-arrested at a rate of 85% within two years of release and actually were re-arrested at a rate of 83%.[363]

Offenders, Topics in Community Corrections, at 3-8 (Washington DC: National Institute of Corrections [2004]).

[363] The correlations between DCJS risk scores and subsequent re-arrest are comparable or slightly stronger than those typically produced by the leading risk assessment instruments used throughout the United States and Canada.

Figure 1



	D1	D2	D3	D4	D5	D6	D7	D8	D9	D10
Predicted % ANY Arrest	18%	33%	42%	49%	55%	60%	65%	71%	77%	85%
2002 Actual % ANY Arrest	14%	34%	40%	47%	61%	58%	64%	70%	75%	83%

While the DCJS risk scores provide important information regarding the likelihood of re-arrest, they offer no guidance regarding the nature of an offender's deficits (or strengths) which tend to cause failure (or success). A large number of research studies have identified critical deficits that can contribute to recidivism (also called "criminogenic needs" or "dynamic risk factors"), including criminal personality traits such as impulsivity and aggressiveness; criminal attitudes; absence of pro-social peers and mentors; low educational achievement; low employment; and substance abuse. Thus, the second principle of effective intervention is the accurate identification and targeting of individual deficits that contribute to criminal behavior (the "needs principle"). While correctional personnel and supervising agents intuitively understand the importance of these factors to an offender's success, the use of a scientific risk and needs instrument helps to ensure comprehensive assessments and supervision plans.

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

A comprehensive risk and needs assessment conducted as part of the pre-sentence (or pre-plea) investigation can provide the sentencing judge with a clear picture of offender risk, deficits and strengths. The assessment made during the pre-sentence investigation also should be made by DOCS during its intake process. Currently, DOCS uses a pre-sentence report prepared by the local probation department as its primary document to determine programming for an inmate. However, DOCS cannot control the sufficiency, accuracy or comprehensiveness of such a report and most pre-sentence reports are not sufficient to guide programming and other important decisions regarding an inmate. A validated risk and needs instrument can be an invaluable tool for conducting a comprehensive intake assessment which, in turn, should drive offender programming. To the extent indeterminate sentencing is continued in the State, the Division of Parole also should use a risk and needs instrument to help determine, which offenders are appropriate for release into the community and which offenders continue to pose a significant threat to public safety.[364] Based on the foregoing, the Commission strongly recommends that DOCS, Parole and the Division of Probation and Correctional Alternatives ("DPCA") adopt and utilize a common, validated, risk and needs assessment instrument throughout the criminal justice system.

Notably, DPCA has implemented the use of the COMPAS Risk/Needs instrument in probation departments across the State. Also, since the publication of the Commission's Preliminary Report, Parole has made substantial progress in implementing the use of a risk and needs instrument, recently completing a validation study for the

[364] This may require a change in the statute regarding how the Board of Parole is authorized to make release decisions.

COMPAS Risk/Needs instrument for New York's parolee population, an important first step in implementing a risk and needs assessment tool statewide.

A. Align Parole and Probation Supervision With Level of Risk

Currently, all offenders released on parole supervision in New York who are not on a specialized caseload[365] are placed on "intensive supervision" for the first 12 months and supervised at an average caseload ratio of 1:40. After the successful completion of 12 months of intensive supervision, parolees are moved to "regular supervision" at an average caseload ratio of 1:100. Such an undifferentiated system of supervision demands tremendous resources without accounting for often dramatic differences in risk of re-offense among those being supervised.

A better approach would be to assign probation and parole supervision resources so that they are aligned with the offender's predicted risk level.[366] A risk and needs assessment instrument can help determine which offenders are most in need of intensive supervision, thus permitting the supervising agency to target offenders who pose the greatest risk of committing new crimes and who have the greatest needs. Such an instrument also can identify parolees for whom intensive supervision is less critical, thus eliminating inefficient, and perhaps even counterproductive, supervision requirements for low-risk offenders. Washington State, for example, uses a validated risk and needs tool to determine where to concentrate the State's

[365] A "specialized caseload" is used for a small portion of the parolee population, including sex offenders, certain violent offenders, domestic violence offenders, and mentally ill offenders.

[366] Lowenkamp, Latessa and Holsinger, *The Risk Principle in Action: What Have We Learned from 13,676 Offenders and 97 Correctional Programs?* 52 Crime and Delinquency 1, at 77-93 (2006); Burke, Peggy, *Parole Violations Revisited: A Handbook to Strengthen Parole Practices for Public Safety and Successful Offender Transition* (Washington DC: National Institute of Corrections 2004); Petersilia, Joan, *When Prisoners Come Home: Parole and Prisoner Reentry* (New York: Oxford University Press 2003); Petersilia, Joan, *Reforming Probation and Parole in the 21st Century* (Lanham, MD: American Correctional Association, 2002); Andrews, D., Bonta, J. and Wormith, J., *supra,* note 361.

supervision resources by sorting individuals into four categories.[367] Those at the highest risk of re-offense are designated as "A," while those representing the lowest risk are classified as "D." Those classified as "C" or "D" report to their parole officers electronically and generally only receive active supervision if there is a violation of the conditions of release.

The New York City Department of Probation currently uses a "kiosk" reporting system for probationers who have been identified as low risk. Low-risk probationers are initially referred for a 90-day "stabilization" period during which a needs assessment is conducted to determine whether a referral to community-based services is necessary.[368] At the completion of this stabilization period, low-risk offenders are directed to report on a monthly basis to kiosks located in probation offices throughout the City. In 2008, approximately 30,000 New York City probationers (59% of the City's probation population) were reporting to kiosks each month. An empirical study assessing the impact of kiosk use for low-risk offenders in New York City showed that public safety was not adversely affected.[369] As a risk and needs assessment instrument becomes more widely implemented in New York State, Parole and DPCA should consider utilizing kiosk reporting in appropriate jurisdictions for low-risk offenders. Doing so will permit supervision resources to be focused on high-risk offenders and will minimize the impact of reporting on the re-integration of low-risk offenders back into the community.

Research demonstrates that placing low-risk offenders into structured programming with high-risk offenders can lead to an increase in failure rates because of the negative influences created by the high-risk offenders. Further, placing low-risk offenders in intensive programming tends to disrupt their pro-social networks, which are the very attributes (e.g., school, employment, family) that make them low risk.[370]

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[367] Offender Accountability Act, *supra*, note 360.
[368] *See, supra,* note 324, at 45.
[369] Wilson, J.A., Naro, W. and Austin, J.F. *"Innovations in Probation: Assessing New York City's Automated Reporting System"* (Washington, DC: The JFA Institute, 2007).
[370] Lowenkamp, Latessa and Holsinger, *supra,* note 366.

Because Parole has limited resources and not all parolees pose the same risk to public safety or have the same criminogenic, social and economic needs, there is a need to, in effect, "triage" the supervised population. Research demonstrates that correctional programs that target high risk offenders better reduce recidivism than programs that do not differentiate offenders based on risk level.[371] Because "dynamic" factors routinely change, parole and probation officials should use the risk and needs instrument to decrease or increase the level of supervision according to an offender's progress or regress.

B. Concentrate Resources During the First Year of Supervision

The Division of Parole appropriately provides more intensive supervision during the first year following release from prison because studies show that, for many offenders, the likelihood of failure is greatest during that period.[372] New York State offender data indicates that the risk of re-arrest is highest during the first few months after release, significantly declines between the sixth and twelfth months, and continues to decrease through to the thirtieth month following release.[373]

While parolees are in the greatest need of resources at the beginning of their re-integration process, data also indicate that the likelihood of failure at any point in time is highly affected by the offender's risk level at the time of release. Figure 2 shows the monthly risk of re-arrest after release from prison displayed by offender risk level at the time of release.[374] The monthly risk of re-arrest is presented in six-month segments and shows the percentage of offenders entering a given time period who were then re-arrested

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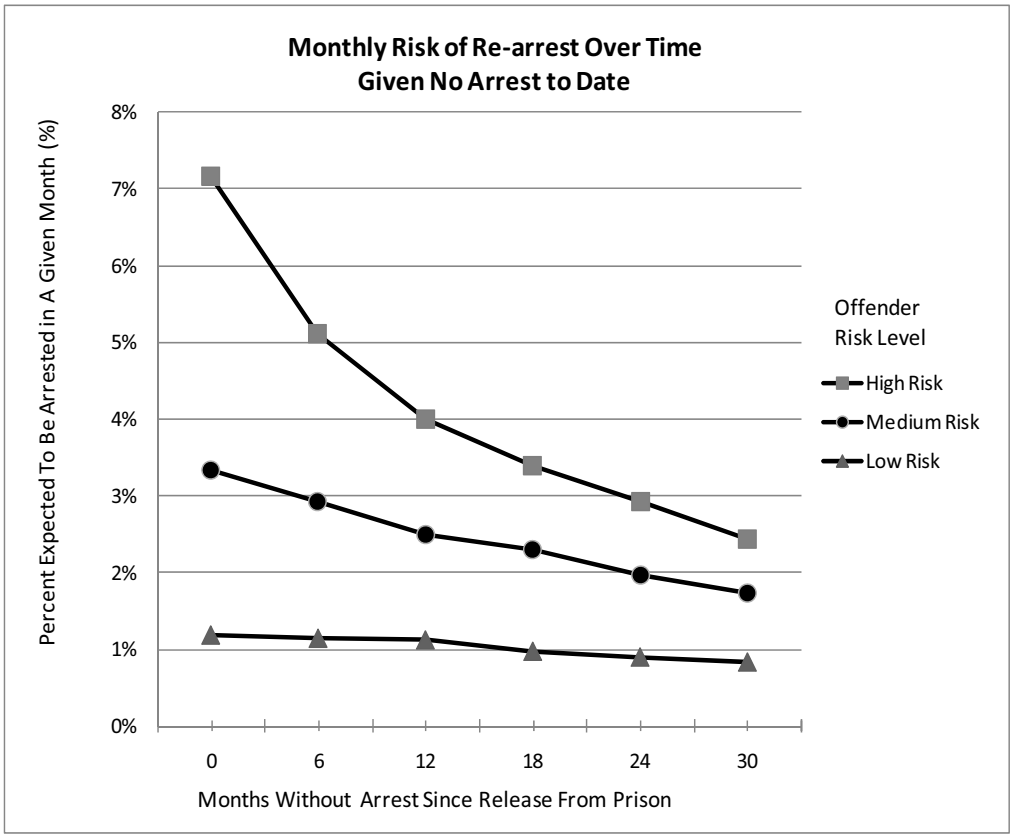
[371] *Id.*
[372] *See generally,* Travis, Jeremy. *But They All Come Back: Facing the Challenges of Prisoner Reentry* (Washington DC: The Urban Institute, 2005).
[373] *See* Figure 2, at 143.
[374] Data in Figure 2 was provided by DCJS' Office of Justice Research and Performance and represents the re-arrest activity of 53,000 offenders released from DOCS in 2004 and 2005.

during that time period. The data indicate that the risk level and "time on the street" both contribute to the likelihood of re-arrest.

Figure 2



The re-arrest rates in Figure 2 indicate that low-risk offenders should receive the least intensive supervision from the moment they are released from prison. These rates also show that high-risk offenders should receive more intensive supervision which should be reduced over time if the offender has remained arrest free. On balance, however, more weight should be given to risk level because high-risk offenders who remain arrest-free for more than two years are still more likely to be arrested than are lower-risk offenders who are

recently released from prison. By providing offenders with increased access to programs and services when it is most beneficial, they have the best opportunities for successful re-integration back into society. Accordingly, resources should be "frontloaded" to the first 12 months and both supervision and programming may be decreased after that time.

The same principles apply to probation supervision. Probation departments should assess individual risk and needs in order to effectively align their limited resources as well. Concentrating supervisory resources early in the supervision process, particularly for high-risk offenders, supports the dual purpose of promoting successful re-entry and reducing recidivism by simply re-allocating existing resources.

II. RESPONDING TO PAROLE RULE VIOLATIONS

The Commission, in its Preliminary Report, also recommended that the State examine alternatives for dealing with the thousands of parole rule violators who are returned to DOCS annually, and suggested that "parole officers use effective alternatives to an all-or-nothing response to parole rule violations."[375] Toward that end, Parole partnered with the Vera Institute of Justice ("Vera") to analyze agency practices, as well as New York State offender data, and worked with the Commission to make recommendations to reduce the number of parolees who are returned to State prison for technical parole violations.

Parole rule violators are a significant source of prison admissions. In 2006, 9,474 parolees were returned to DOCS' custody for rule violations, and 2,799 parolees were ordered to Willard.[376] Surprisingly, many of these returns occurred absent new criminal behavior by the parolee.[377] In light of this data, as well as other

[375] Preliminary Report, at 40-41.
[376] DCJS Crimestat Report (December 30, 2008).
[377] With respect to 2006 parole rule violators returned to prison, 25% had a new felony arrest and 24% had a new misdemeanor arrest. For those sent to Willard, 13% had a new felony arrest and 27% had a new misdemeanor arrest.

considerations, criminal justice policymakers have recognized that incarceration is a costly and oftentimes avoidable response to certain violations of parole.

This realization is by no means a criticism of the individual parole officer who continues to face the challenging decision of how to respond when a parolee violates a condition of supervision. Without the availability of realistic and effective alternatives, a parole officer has the option to do nothing or to commence a revocation proceeding for the purpose of returning a parolee to prison. Arguably, in most cases, neither option is satisfactory. Imposing no sanction at all would send a message that violating a condition of parole is acceptable. On the other hand, sending a parolee back to prison for a rule violation generally provides little or no benefit to public safety while being extremely costly to the State. Moreover, using incarceration to respond to a technical violation can have a detrimental effect on any successful re-integration made to date, including disrupting employment, housing and family re-unification.

A. Comprehensive System of Graduated Responses

During the course of its review, the Commission heard presentations from experts from Pennsylvania and Georgia, two states that currently utilize a comprehensive system of graduated responses. These experts described how their states, as well as others, have used a system of graduated responses to reduce the number of parolees who are returned to prison for technical violations, as well as to promote statewide consistency in responding to similar violations. While many parole officers do use a number of alternative sanctions in New York, the process for using graduated responses is not set forth in written procedures and guidelines and implementation varies throughout the State. Moreover, there is little guidance, other than a parole officer's individual judgment, as to when and under what circumstances a graduated response should be utilized and, in such cases, which response is appropriate. In order to improve uniformity throughout the State in responding to rule violations, the Commission recommends that Parole develop and implement a comprehensive formal scheme of graduated responses for use statewide.

The types of responses that are made available to parole officers vary among states that utilize a system of graduated responses. However, certain sanctions continue to appear as hallmarks of any comprehensive approach, including the imposition of a curfew, or a stricter curfew if one is already in place; increased reporting by the parolee; use of Global Positioning Systems or electronic monitoring; restrictions on travel and home confinement; as well as ordering the parolee to attend substance abuse treatment or increasing the intensity of existing treatment. Such an array of options will enable parole officers to assign a proportional response to errant behavior when incarceration is not appropriate, thus responding to the violation without reversing any re-entry gains made to date.

In addition to the use of sanctions for non-compliance with conditions of supervision, experts in the field of correctional supervision advocate for the use of positive rewards as a way of reinforcing good behavior and improving re-entry success. When a parole officer communicates to an offender that extended compliance with the rules of parole may result in a relaxed curfew or increased travel privileges, it creates a positive goal with a reward that the parolee can work toward as opposed to simply complying to avoid re-incarceration.[378] For these reasons, the Commission believes that parole officers should be equipped with various options to quickly and proportionately address violative behavior, as well as to positively reinforce compliance.[379]

Nearly half of the parole agencies throughout the country have developed some form of response "grid" as a way of consistently administering a formalized graduated sanctions policy. A grid provides a list of options available to a parole officer, and is designed to be proportional to the violative behavior in an effort to guide the officer's response.[380] A recent study by Ohio's Adult Paroling Authority found that its progressive sanctions grid was an important

[378] Rewards may also be given for success in drug treatment or maintaining full-time employment.
[379] *See generally,* Travis, Jeremy, *supra*, note 372; Burke, Peggy, *supra,* note 366; Petersilia, Joan, *supra,* note 366.
[380] Unpublished research by the Vera Institute of Justice, 2008.

and cost-effective tool for use in making revocation and incarceration decisions.[381] An effective grid typically takes into account the risks and needs of the offender; the past behavior of the individual while under supervision; the length of time on supervision; and the parole officer's individual judgment. It is important to emphasize that any such grid should operate to guide, rather than replace, the judgment of a well-trained and experienced parole officer. As such, the Commission recommends that an appropriate and effective behavior-response grid be designed in a way that preserves a parole officer's discretion to the greatest extent possible.

B. Graduated Responses Should Include the Use of a Risk/Needs Instrument

Building upon its earlier review of the benefits of evidence-based practices, the Commission recommends that any system of graduated responses incorporate the use of a risk and needs instrument. Indeed, all parolees do not pose the same risk to public safety, nor do they have the same criminogenic needs. Risk and needs assessments provide reliable means for differentiating high-risk offenders from low-risk offenders. An appropriate response to a parole violation should not depend solely on which condition was violated, but also should take into consideration the individual risk presented by a parolee. As an example, in Washington State, parole officers are asked to reserve incarceration for high and moderate risk offenders.[382] Utilizing risk to facilitate decision-making will help parole officers determine which offenders should be returned to incarceration for a rule violation and which offenders are more appropriately punished using a community-based sanction. Considering offender risk in all decision making will improve public safety while efficiently utilizing limited resources.

[381] Martine, B. and Van Dine, S. *Examining the Impact of Ohio's Progressive Sanctioning Grid* (Ohio Department of Rehabilitation and Correction, August 2008).
[382] Offender Accountability Act, *supra*, note 360.

C. Expeditious Response to Rule Violations

Another benefit that a system of graduated responses provides is the ability to respond quickly to violations of parole conditions. Currently, when a parole officer decides to violate a parolee, the parolee is immediately detained. However, the officer must then wait for a hearing, which often takes place at a time far removed from the date of the errant behavior. Such a system is an ineffective approach to correcting violative behavior and re-directing the parolee toward compliance.

Research has shown that swift and certain responses to violations of community supervision are most effective. When sanctions are immediate, the violation has an enhanced deterrent effect on future violations. For example, in relation to drug violations, a group of methamphetamine-using probationers in Hawaii with records of poor compliance were put on a drug-testing and swift-sanctions program. Overall, the rate of missed and positive drug tests went down by more than 80%. For the 685 probationers who were in the program for at least three months, the missed appointment rate fell from 13.3% to 2.6%, and positive drug tests fell from 49.3% to 6.5%.

There is also evidence that providing the supervising officer with the authority to issue swift responses increases accountability and effectiveness because the officer knows that certain immediate actions can be taken, thus decreasing the likelihood that violations will be accumulated before a warrant is ultimately issued. The availability of a system of graduated responses is not, in and of itself, going to improve outcomes; appropriate community-based responses must be implemented swiftly and competently in order for any non-incarceratory sanction to be effective. Accordingly, the Commission recommends that once a parole officer determines that a violation has occurred, action be taken as quickly as possible.

D. Conditions of Parole Should Be Correlated With Public Safety

Prior to release by the Parole Board or release to post-release supervision, an inmate receives certain "general conditions" of parole,

which are rules that must be followed while under supervision. These conditions are standard for every offender supervised by Parole and include limitations such as not leaving the State without permission and not fraternizing with anyone with a criminal record.[383] In addition to the "general conditions," there are also "special conditions" of supervision which may be imposed by a parole officer or the Parole Board based upon the parolee's specific situation. The special conditions may include rules such as complying with a curfew or not using alcohol. Parolees who violate any general or special conditions may face disciplinary action, including re-incarceration.

It is not uncommon for many parolees to have as many as 20 or more conditions of supervision. Arguably, by decreasing the sheer number of conditions under which a parolee is supervised, it immediately decreases the likelihood that the offender will be returned to prison for a technical violation. However, because parole conditions are meant to enhance public safety, no condition should be eliminated if the condition has been correlated with an increase in public safety. Also, to avoid the unnecessary imposition of additional conditions, the Commission believes that any special conditions imposed should be based on the risks and needs of the individual parolee. This will create greater consistency and effectiveness with respect to the use of special conditions.

It is also important to re-evaluate whether certain general or special conditions are unrealistic. As one example, the prohibition against having contact with other formerly incarcerated persons may be impractical for certain parolees who are returning to low-income, urban neighborhoods, or for those offenders who have a formerly incarcerated family member. Revising certain conditions may be an important measure in facilitating positive outcomes by improving a parolee's chances for a successful re-entry. Therefore, the Commission recommends that Parole regularly review its conditions by correlating each condition with its potential impact on public safety and eliminating those that are deemed unnecessary.

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[383] There are thirteen general conditions of parole in New York State (*see*, Appendix H, *infra*).

Similarly, parole revocation guidelines should be modified so that they incorporate an individual's level of risk. Currently, when an individual's parole is revoked, an Administrative Law Judge ("ALJ") follows response guidelines that are based primarily on the crime for which the offender is under supervision. While criminal history is certainly one component of an individual's risk of re-offending, it is not the only factor. Use of a risk assessment will enable ALJs to tailor revocation decisions to the risks and needs of the offender in order to judiciously utilize re-incarceration while responding to low-risk offenders who violate technical conditions of parole with a community-based sanction.

Together these recommendations provide the framework for the establishment and implementation of a comprehensive system of graduated responses to assist parole officers in responding to parolee conduct. If implemented correctly, this system can facilitate successful re-integration by providing a methodical approach that promotes uniformity, consistency and swift responses to both positive and negative behavior, taking into account the individual risk and needs of an offender.

III. REDUCING RECIDIVISM THROUGH EFFECTIVE RE-ENTRY

Each year approximately 26,000 offenders are released from prison to communities throughout New York State. As noted, more than one in three offenders are returned to prison within three years of release. The Commission recognizes that successful offender re-entry is a significant public safety initiative because it results in reduced crime and fewer victims. In its Preliminary Report, the Commission recommended a number of ways to improve the effective transition of formerly incarcerated persons back to the community.[384] A number of these recommendations have been implemented, while others are the subject of proposed legislation. Also, in the interim, Congress passed the Second Chance Act[385] to promote successful re-entry on a national level, and New York State has urged Federal funding for this effort as

[384] Preliminary Report, at 47-52.
[385] H.R. 1593 (110th Congress, 2007-2008).

one way of expanding ongoing re-entry efforts in light of the State's severe financial crisis.

A. Transition from Prison to Community Initiative

New York is one of eight states participating in a technical assistance program sponsored by the National Institute of Corrections ("NIC"), known as the Transition from Prison to Community Initiative ("TPCI"). The TPCI model is based on emerging research on effective interventions with offenders to reduce recidivism. It stresses collaboration among criminal justice and human services agencies, as well as the formation of strategic partnerships with local governments and not-for-profit agencies to integrate and coordinate re-entry policies and programs. In addition to the adoption of evidence-based practices, information sharing across agencies helps to facilitate comprehensive case management. A basic premise of the TPCI model is that funding should be targeted at high-risk offenders and programming should seek to alter the criminogenic thinking and behaviors of offenders. Through this initiative, the NIC and the Center for Effective Public Policy have brought experts from other states to share best practices with New York's re-entry partners.

B. Interagency Re-entry Task Force

New York's system-wide re-entry efforts are coordinated by the New York State Interagency Re-entry Task Force.[386] The Task Force consists of commissioners and directors from State agencies whose vision is to create "a safer New York resulting from the successful transition of offenders from prison to living law-abiding and productive lives in their communities."[387] To accomplish its

[386] The Task Force meets quarterly and meetings are webcast and available at http://criminaljustice.state.ny.us/.

[387] The members of the Task Force are the Division of Criminal Justice Services; Department of Correctional Services; Division of Parole; Board of Parole; Division of Probation and Correctional Alternatives; New York City Department of Corrections; Office of Mental Health; Office of Alcoholism and Substance Abuse Services; Department of Labor; Division of Housing and Community Renewal; Division of the Budget; Department of Health; Office of Temporary and Disability Assistance; Office of Mental Retardation and Developmental Disabilities; Office of

vision, the Task Force developed four working groups to implement re-entry programs: risk/needs assessment working group; transitional accountability planning group; implementation group for Medicaid suspension legislation;[388] and a group dedicated to removing barriers to successful re-entry.

C. County Re-entry Task Forces

DCJS coordinates and supports County Re-entry Task Forces (CRTFs) throughout the State to promote re-entry efforts consistent with national best practices and the TPCI model. The CRTFs seek to coordinate and strengthen community response by: (1) providing coordinated local services to address the needs of high-risk offenders; (2) collaborating with State criminal justice and human service agencies to develop transition plans for high-risk offenders; and (3) expanding the capacity of local jurisdictions to provide services. Currently, there are CRTFs in 13 of the 17 high-crime Operation IMPACT jurisdictions in New York.[389] Each task force is staffed with a re-entry coordinator and a CRTF chair. Since the establishment of the CRTFs, additional funding has been used to help support not-for-profit agencies expand re-entry programs and services in the participating counties.

D. New York State Re-entry Advisory Council

New York is home to many of the country's leading re-entry programs which provide transitional housing, vocational and educational programs, substance abuse treatment, mentoring, and

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Children and Family Services; Department of State; Division of Veterans Affairs; and Department of Education.

[388] In its Preliminary Report, the Commission urged DOCS and Parole to continue to work toward achieving a pre-release determination of benefits, including Medicaid (Preliminary Report, at 50-52). This recommendation was based, in large part, on the recent legislative change that merely suspended Medicaid benefits for incarcerated individuals and provided for the immediate reinstatement of such benefits upon release (Laws of 2007, ch. 355).

[389] The County Re-entry Task Forces are located in Albany, Dutchess, Erie, Monroe, Nassau, Niagara, Oneida, Onondaga, Orange, Rensselaer, Rockland, Suffolk and Westchester Counties. DCJS also provides funding for the Upper-Manhattan Re-entry Task Force.

parenting and family reintegration programs to formerly incarcerated persons. Some of these programs, such as the Fortune Society and the Osborne Society, are run primarily by formerly incarcerated persons. Others, like the Doe Fund and the Center for Employment Opportunities, provide subsidized employment and job skills training. Brooklyn's ComALERT Program is the first re-entry program in the country operated by a prosecutor's office.[390] In order to leverage the services provided by these not-for-profit re-entry programs, many of which have years of experience working with the returning offender population, New York established the Service Provider Advisory Council (SPAC) in 2008. SPAC is charged with reviewing New York's pilot re-entry programs and advising the State on re-entry policy.[391]

E. Re-entry Units

As part of New York's statewide plan, the transition process begins at DOCS' reception. However, the "nuts and bolts" of re-entry planning begins in the last three months of incarceration when an inmate enters the final phase of the State's transitional services program. This phase of transitional planning includes programming related to employment and job readiness, family re-integration and community preparedness. One of the difficulties that DOCS and Parole have experienced in implementing transitional planning is the

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[390] The Community and Law Enforcement Resources Together program (ComALERT) was created in 1999 by District Attorney Charles T. Hynes to assist formerly incarcerated individuals make a successful transition from prison to the community by providing drug treatment, mental health treatment and counseling, GEDs, housing and employment services.

[391] Those participating in the Service Provider Advisory Council (SPAC) include: Prisoners Are People Too, Inc.; Group Ministries, Inc.; Prison Families of New York, Inc.; Project Family Connect of CASA; The Osborne Association; The Thruway Alliance; Roots, Inc.; Women's Prison Association; Legal Action Center; The Fortune Society; Student Minister, The Nation of Islam Prison Reform Ministry; JJ College of Criminal Justice, CUNY; Prison Fellowship; CUNY Graduate Center; Medgar Evers College; The College Initiative; The Bronx Defenders; Kings Co. DA's Office – ComALERT; Center for Employment Opportunities; The Doe Fund, Inc.; New York Therapeutic Communities, Inc.; Center for Community Alternatives; NADAP, Inc.; and St. Joseph's Rehabilitation Center.

often significant distance between where transitioning inmates are incarcerated and the communities to which they are returning.

Accordingly, New York has introduced the concept of transitional facilities to improve re-entry outcomes. DOCS and Parole are currently piloting the Orleans Reentry Unit ("ORU"), which is a re-entry facility for offenders returning to Erie and Monroe Counties. While in the ORU, offenders have an opportunity to work with DOCS, Parole, and OASAS counselors, as well as community agencies, to design a re-entry plan addressing individual needs upon release. Individualized re-entry plans and skill sets provided at the ORU are designed to respond to each inmate's most pressing post-release needs which, in turn, will increase the likelihood that offenders will make a successful transition into the community. The ORU utilizes learning modules dedicated to practicing behavioral responses surrounding drug treatment, employment, and family reunification. Individualized progress is monitored and shared with Parole and community partners, and a number of benchmarks are established to determine whether goals have been met. Plans are underway to develop transitional programs similar to the ORU at the Hudson Correctional Facility for offenders returning to Rensselaer and Albany Counties; a transitional facility for women is being planned for the Bayview facility in Manhattan.

F. Edgecombe Pilot Program

The Edgecombe Parole Violator Facility ("Edgecombe") opened in 2008 and is operated jointly by Parole, DOCS and OASAS as a 30-day intensive inpatient drug treatment program for New York City-based parolees facing parole violations for drug use or failure to attend drug treatment. Edgecombe serves as an alternative to State prison, with an emphasis on re-entry services, particularly drug treatment with aftercare services. The program is in its early stages and the program's design is being carefully developed and monitored by participating agencies and DCJS.

IV. RECOMMENDATIONS FOR IMPROVED RE-ENTRY SUCCESS

New York State has made tremendous strides in re-entry over the past several years. The Commission strongly believes that more can be done to further reduce recidivism, including expanding educational and vocational training in New York State prisons. Such programs equip inmates with new skills and information to help them sustain employment upon release from prison. The limited research that exists on this topic shows that participation in vocational and educational programming in prison is associated with a 5% to 10% reduction in recidivism.[392] Moreover, the Commission believes that DOCS should be commended for its commitment ensuring that every inmate entering its facilities without a general equivalency diploma ("GED") or its equivalent either works toward, or receives, a GED prior to release. The Commission believes, however, that DOCS should provide more educational opportunities for those who enter with a GED or high school diploma. While obtaining a GED will realize modest reductions in recidivism, post-secondary educational programs have been shown to reduce recidivism by approximately 40%.[393]

The Commission recognizes that two of the key elements to successful re-entry are an offender's ability to secure housing and employment. The stigma of a criminal conviction, along with an employer's legitimate need to carefully screen applicants, often means that ex-offenders have difficulty obtaining lawful employment. While some barriers may be necessary to ensure public safety, others may not, and should be eliminated to pave the way toward gaining lawful employment. Additionally, those barriers to securing adequate housing that are not necessary to ensure public safety also should be removed because of the significant link between adequate housing and successful re-entry.

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[392] New York State Commission on Sentencing Reform, Working Paper: "*What Works" in Correctional Programming* (Albany, NY 2007).
[393] *Id.*

The Commission strongly urges policymakers to continue to expand upon these existing re-entry efforts, notwithstanding the State's daunting fiscal challenges. Doing so will assuredly result in fewer victims, lower recidivism rates, and the continuation of New York's role as a national leader in crime reduction efforts.

PART FIVE

EXPANDING SUCCESSFUL DEPARTMENT OF CORRECTIONAL SERVICES' PROGRAMS

Part Five

Expanding Successful Department of Correctional Services' Programs

Prison is an expensive resource. In 2008, the average estimated cost of confining an inmate in State prison in New York, including the costs related to fringe benefits and capital construction, is $50,000 per year. New York State taxpayers benefit when prison is reserved for offenders who pose the greatest risk to public safety. Successful programs that shorten prison terms, while simultaneously increasing the ability of offenders to succeed after release, should be expanded and replicated when practicable. Accordingly, the Commission is recommending that the Legislature expand two such programs: the Shock Incarceration Program and the Merit Time Program.[394]

I. EXPANDED ELIGIBILITY FOR SHOCK INCARCERATION

The Legislature created the Shock Incarceration Program in 1987 and directed DOCS to develop a rigorous scheme of physical activity, intensive regimentation, discipline, and drug rehabilitation at special facilities for young, non-violent felony offenders. In response, DOCS created a six-month intensive program emphasizing discipline, academic education, substance abuse treatment, and group and individual counseling, all within a military-like structure that has become the largest "boot-camp" style program for sentenced felony offenders in the nation.

Currently, in order to be eligible for Shock participation, inmates must be first-time commitments under the age of 40 who are sentenced to a term of imprisonment for which the inmate will become eligible for release on parole within three years.[395] Inmates who have

[394] Expansion of these programs was advanced in an Article VII bill as part of the 2009-2010 Executive Budget.

[395] The age limitation has been increased several times since inception of the program. Originally, Shock was available only to otherwise eligible inmates under

a prior felony conviction for which they received a prison sentence are not eligible for Shock; also, certain crimes of conviction, including all violent offenses, currently preclude eligibility.[396] In addition to the statutory criteria, the law requires DOCS to establish criteria that further restrict program participation. These suitability criteria impose restrictions based on the medical, mental health, security classification or criminal histories of otherwise legally eligible inmates. For example, those inmates who have outstanding warrants, disciplinary records or an alien status may create a security risk, which would preclude them from Shock participation. Similarly, information in an inmate's pre-sentence report, or other official documentation, may lead to disapproval.

The Shock Program has developed into a considerable success.[397] The National Institute of Justice published a report in 2003 that reflected a decade of research on correctional boot camps operating throughout the country and concluded that, unlike New York's Shock Program, many programs failed to meet the goals of reducing bed space demand and lowering recidivism. DOCS' Shock program incorporates all of the identified critical components for a successful boot-camp style program, including: (1) careful selection of participants by correctional officials after entry into prison; (2) commitment to high quality programs and services; (3) longer program

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24 years of age. In 1988, eligibility was expanded to those under 26 years of age, and a year later was raised to those under 30. In 1992, the program was again expanded to allow those under the age of 35 to apply for participation and, most recently, in 1999, the Legislature expanded eligibility to include inmates who are younger than 40 when they enter DOCS' reception.

[396] Offenses that are excluded from Shock eligibility include: a violent felony offense; an A-I felony offense; manslaughter in the second degree; vehicular manslaughter in the second degree; vehicular manslaughter in the first degree; criminally negligent homicide; rape in the second degree; rape in the third degree; criminal sexual act in the second degree; criminal sexual act in the third degree; attempted sexual abuse in the first degree; attempted rape in the second degree; attempted criminal sexual act in the second degree; any escape or absconding offense defined in Article 205 of the Penal Law; and a Class B second felony drug offense with a determine sentence of 3½ years or more (*see*, Correction Law §865[1]).

[397] Various members of the Commission went on a site visit to the Summit Shock Incarceration Facility in Schoharie County in order to get a firsthand understanding and appreciation for how Shock works. Members were impressed with the military-like structure of the program and the demeanor of inmates.

duration; and (4) intensified post-release supervision. These components, coupled with the incentive for an early release, create a prison environment that is conducive to positive change.[398]

A. Recidivism Rates for Shock Participants

Between July 1987 and September 2006, a total of 94,552 non-violent inmates were screened for participation in Shock. From this pool of candidates, a total of 51,522 inmates were sent to Shock facilities and 35,102 graduated and were granted early release to parole supervision.[399]

Research by DOCS found that Shock graduates are more likely than a comparison group of parolees to succeed on parole supervision despite remaining at risk for a longer period of time. A total of 32,492 Shock graduates were compared to 43,191 "eligible but not sent offenders" ("EBNS"). After one year, 92% of the Shock group remained in the community, compared to 84% of EBNS offenders. After two years, the Shock success rate (78%) was significantly higher than the EBNS group (68%). After three years, Shock graduates had a success rate of 69% compared to 60% for the EBNS offenders.[400]

B. Fiscal Analysis of the Shock Program

The Shock program is cost effective. On average, Shock graduates are released approximately one year prior to completion of their court-determined minimum period of incarceration. The 35,102 Shock releases through September 2006 would have spent an estimated average of 570 days in prison from the date they were admitted to DOCS until their parole eligibility date if the program did not exist. These releasees actually served an average of 225 days in DOCS' custody. Thus, for the average Shock graduate, there is a saving of 345 days -- or 11.3 months – which represents the period

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[398] Fewer misbehavior reports have been written at Shock facilities compared to minimum and medium security facilities.
[399] 2007 Shock Incarceration Report (Albany, NY: New York State Department of Correctional Services [2007]).
[400] *Id.*

from the actual date of release from Shock to what would have been the earliest eligible release date. For every 100 Shock releases, it is estimated that DOCS saves $3.01 million, which it otherwise would have spent for the care and custody of these inmates. Thus, for the 35,102 releases from the Shock program, there was an estimated savings of $1.06 billion.[401]

C. Recommendation to Expand Participation in the Shock Program

With more than 20 years experience operating and refining the Shock Program, DOCS has a solid record of successfully screening out unsuitable candidates. Because of the success of the program, the Legislature continues to extend the maximum age of eligibility for the Shock program. Each time the Legislature voted to extend the age eligibility criteria, the program continued to succeed with a greater number of offenders able to benefit from participating in the program. As such, the Commission recommends that the age limitation again be extended to individuals who are 49 years of age or younger. In the case of older inmates, DOCS' existing medical criteria should ensure that inmates approved for participation are physically capable of successfully completing the program.

The Commission also recommends allowing otherwise eligible inmates to be recruited from general confinement facilities when, in the case of an indeterminate sentence, they become eligible for release on parole within three years; or in the case of a determinate sentence, they become eligible for conditional release within three years.[402] Under current law, an inmate must be within the three-year window when received at a DOCS' reception center. For example, an inmate with a 4-to-12 year indeterminate sentence would not be eligible at reception, and could not thereafter become eligible. However, if this recommendation is adopted, such an inmate would become eligible for Shock after spending one year in general confinement.

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[401] These savings do not account for the cost of housing inmates who started Shock but did not complete the program.

[402] One member did not support this recommendation.

The Commission believes that allowing inmates to become eligible for Shock after they have served a portion of their sentence in general confinement will not undermine the fundamental tenets of the program or negatively affect its positive outcomes. At the same time, it will allow more inmates to benefit from the discipline and effective programs that Shock offers.

II. THE MERIT TIME PROGRAM

In its Preliminary Report, the Commission began to examine the concept of expansion of the merit time program within DOCS.[403] Merit time provides an opportunity for an inmate to earn time off of a sentence for engaging in certain beneficial programming that helps prepare an inmate for successful re-entry into the community.[404] Merit time is separate and distinct from good time, pursuant to which an inmate can be released prior to his or her maximum expiration date if the inmate's institutional record reflects positive behavior and a willingness to participate in assigned programs. The Commission carefully considered whether DOCS' merit time program, which currently is not available to inmates serving a determinate sentence for a violent felony offense, should be expanded to allow certain violent offenders, who demonstrate a likelihood of rehabilitation in prison and a willingness to obey institutional rules, to participate.

The Commission heard several presentations and reviewed a significant amount of data on the DOCS' merit time program. It was noted that nearly every correctional administrator in the country would attest to the fact that maintaining safe correctional institutions is directly related to the balanced ability to punish negative behavior and poor program participation and reward positive behavior and good program participation. A correctional system that disproportionately relies on one approach to the detriment of the other will not be nearly as safe or successful as a system that relies on a balanced approach.

[403] Preliminary Report, at 31-32.
[404] *See*, Correction Law §803.

A. The Existing Program

Under the current merit time system, qualified, non-violent offenders serving indeterminate sentences can earn a reduction of one-sixth from their minimum sentences. Class A-I drug offenders serving an indeterminate sentence, however, can earn a one-third reduction from the minimum period. In a similar fashion, all drug offenders serving determinate sentences can earn a one-seventh merit reduction from the fixed term. Current law does not provide a means by which offenders serving a determinate or indeterminate sentence for violent felony offenses, or offenders serving indeterminate sentences for non-drug Class A-I felony offenses, can earn *any* type of merit reduction from their sentences. As a general rule, many of these offenders tend to receive much longer sentences than the typical non-violent inmates who currently qualify for merit time. However, there is no institutional program to reward exceptional programming and efforts by these inmates.

Undeniably, many violent felony offenders have committed egregious criminal acts that would argue against eligibility for a merit time release. By the same token, DOCS' experts point out that a number of these offenders have demonstrated, over a span of many years, a deep sense of remorse, recognition of the harm they have caused, a strong determination to reform their lives and a desire to serve the common good by becoming law-abiding citizens. In some instances, these same offenders have made themselves available in peer counseling programs at DOCS to counsel young, at-risk individuals from making the same mistakes they made in their own lives.

As articulated in the seminal treatise on re-entry authored by the President of John Jay College of Criminal Justice, Dr. Jeremy Travis, regardless of the nature of the offense, and with few exceptions, "they all come back [to the community]."[405] On balance, the Commission finds that affording a merit time incentive to incarcerated offenders with a past history of violence for participation in programs likely to lead to a change in criminogenic attitudes and

[405] Travis, Jeremy, *supra*, note 372.

better prepare them to lead law-abiding lives after release is a positive public safety measure that should be implemented in New York. Furthermore, the merit criteria requiring that such offenders also refrain from any serious disciplinary infractions will help to foster a safer correctional environment for the more than 31,000 men and women who work within DOCS' facilities, as well as the under-custody population of more than 60,000 inmates.

B. Expansion of the Merit Program

The Commission believes that in order to achieve the desired public safety outcome, the requirements for an expanded merit time program for offenders with a history of violent behavior must be rigorous and designed to promote life-changing behaviors. In order for an inmate to be eligible for the contemplated benefit, the Commission recommends that the program criteria should be significantly more demanding than the present merit time criteria for non-violent offenders. Thus, only offenders participating in exceptional programming aimed at changing criminogenic behaviors would be eligible for merit time. This programming would include: two or more years of college,[406] a masters of professional studies degree,[407] service as an inmate program associate for no less than two years,[408] a certification from the State Department of Labor for

[406] A limited number of privately-funded or federally-funded college programs are available at 17 different correctional facilities within DOCS. To be eligible, an inmate must have a high school diploma or equivalency; other requirements vary depending on the on-campus policies of the college. In 2008, approximately 1,150 inmates per semester participated in a college program.

[407] This is a one-year program of graduate study delivered by the New York Theological Seminary at Sing Sing Correctional Facility. In 2007, 27 degrees were awarded.

[408] An Inmate Program Association (IPA) is a five-day-per-week paid assignment which involves providing assistance to Program Services' staff in the direct provision of services to inmates. To qualify, an inmate must: possess a high school diploma or the equivalent, successfully complete the training program and be willing to tutor other inmates. A supervisor of volunteer training selects inmates pursuant to standards in the IPA Policy and Procedure Manual in accordance with an inmate's interest, knowledge and skills. IPA programs exist at approximately 27 different correctional facilities.

successful completion of a job skills or apprenticeship program,[409] or service as an inmate hospice aid for a period of two or more years.[410] Like the existing merit time criteria, the Commission recognizes that maintenance of a positive disciplinary record should continue to be a requirement.

The Commission recommends that a merit time incentive of six months be afforded to offenders who participate in such beneficial programs. This will not substantially alter any sentence or minimize the seriousness of a violent felony offense, but will recognize the vital importance of effective programming for these offenders. Given the benefits of such a program, the Commission recommends that most, but not all, offenders who are currently ineligible for merit time be included. This includes all non-drug Class A-I felony offenders, with the exception of anyone convicted of murder in the first degree or an attempt or conspiracy to commit such offense.[411] It also would include

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[409] This program combines on-the-job experience with classroom instruction to ensure that every inmate who becomes a registered apprentice receives the skill and knowledge necessary to be an efficient journeyman; it leads to a Department of Labor certification in a particular trade or craft. The objective is to provide qualified inmates with trade skills suitable for obtaining gainful employment upon release. Vocational education, in conjunction with facility maintenance assignments, Division of Industries' experiences, and other DOCS' programs, enhances the abilities and aptitudes of qualified inmates. An apprenticeship program requires between two to five years of intensive full-time training for completion; they are offered in auto mechanics, computer repair, horticulture, printing, building maintenance, floor covering, electrical trades, small engine repair, cabinet making, drafting, food services, plumbing and welding.

[410] This program is designed to provide hospice/palliative care to inmates with a terminal diagnosis who are not expected to live beyond six months in order to ensure that no inmate ever dies alone. The program strives to address a terminally ill patient's comfort, psychosocial and spiritual needs by utilizing selected inmates to provide spiritual, emotional and supportive care to other inmates. Inmates are supervised by Security, Program Services and Health Services' staff.

[411] Because all Class A-I felony offenders are serving maximum life terms and cannot be conditionally released, the merit time benefit would be applied against the minimum period. For example, an individual with a 15-to-life sentence who qualifies would be able to be released to parole by the Board of Parole after serving 14½ years. For all other eligible offenders, the benefit would be applied against the conditional release period. For example, in the case of a person serving an indeterminate sentence of 7 to 21 years, if eligible, the offender could be merit conditionally released after 13½ years, which is six months sooner than the regular

any offender convicted of a violent felony offense defined in Penal Law §70.02, with the exception of those offenses which are sex offenses defined in Penal Law Article 130. Finally, in addition to covering those homicide offenses which are defined as violent felony offenses, it would apply to all other homicide offenses.[412]

The Commission believes that the creation of a limited, but meaningful, merit time program for the State's highest risk offenders will significantly enhance institutional safety in New York's prisons and improve the chances that eligible offenders will live as law-abiding citizens upon release to the community.

III. WILLARD DRUG TREATMENT

The Willard Drug Treatment Campus in Seneca County ("Willard") is operated by DOCS in collaboration with Parole and OASAS.[413] It was created in 1995 as a sentencing option for low-level second felony drug and property offenders and as a revocation option for parole rule violators. This unique DOCS-operated, OASAS-certified, co-ed, 916-bed intensive residential drug treatment center, is based on the Shock Incarceration model. It provides courts with the option of sentencing certain offenders to Willard for 90 days of drug treatment, followed by parole supervision in the community for the balance of the indeterminate or determinate term.[414] In a limited number of cases, offenders sentenced to Willard are placed in the

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conditional release date. Similarly, in the case of an eligible offender serving a determinate sentence of 21 years, such offender could be merit conditionally released after 17½ years--six months earlier than the conventional conditional release date.

[412] The recidivism rate for persons convicted of murder is extremely low. The most recent three-year follow-up study conducted by DOCS showed that 69 offenders convicted of murder were released in 2004. Of these, none were returned to prison for a new crime within three years of release.

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

[414] Pursuant to Penal Law §70.06(7) and CPL 410.91, a "Willard" sentence is actually a determinate or indeterminate sentence that, at the court's discretion, is executed as a "sentence of parole supervision" commencing with a 90-day placement at Willard.

"extended Willard" program in which a three-month Willard stay is followed by six months of residential treatment in the community.

Courts currently have the authority to sentence certain second felony offenders convicted of either Class E felony drug offenses or enumerated non-violent Class E felony property offenses to Willard without prosecutorial approval.[415] In addition, courts, with prosecutorial approval, can sentence second felony offenders convicted of either Class D felony drug offenses or enumerated non-violent Class D felony property offenses to Willard. Because most felony drug arrests are for higher level offenses (e.g., Class B felony drug offenses), prosecutors retain significant control over which second felony offenders are sentenced to Willard. Fewer than 500 offenders enter Willard annually as direct sentences; approximately 80% of Willard participants are parole revocation admissions.

Some of the reluctance of prosecutors and courts to use Willard appears to stem from the short length of program treatment. Research indicates that treatment of less than three months in length is not effective, and at least nine months of treatment is usually required to significantly control substance dependency and associated criminality.[416] Many research studies have shown that prison-based drug treatment can effectively reduce offender recidivism when coupled with post-release treatment and relapse prevention services in the community.[417]

DOCS' research on Willard graduates who completed the program in 2001 and 2002 reveals that graduates who were admitted to the Willard program as parole violators returned to DOCS within three

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

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

[417] New York State Commission on Sentencing Reform, Working Paper: *"What Works" in Correctional Programming* (2007).

years at a rate of 53%. However, only 11% were commitments for new crimes, while 43% were parole rule violators. In comparison, judicially-sentenced offenders who entered the regular Willard program were returned to DOCS at a rate of 43% within three years (32% were parole violators and 11% were commitments for new crimes). Return rates for those in "extended Willard" were similar (41% over three years), although "extended Willard" returns were less often associated with new convictions (6%).[418]

In its Preliminary Report, the Commission recommended that DOCS and OASAS work together to improve the quality of drug treatment within DOCS and, in particular, at Willard. Since then, DOCS and OASAS have collaborated on key recommendations to improve Willard's 90-day intensive substance abuse treatment program provided to parolees and certain parole violators with a history of alcohol or substance abuse dependence. The Willard program currently offers weekly evaluations and is followed by a Division of Parole-designed individualized Continuing Care Plan that involves intensive parole supervision and continuing treatment with OASAS-certified day treatment or outpatient providers. Extended Willard has proven to be an effective alternative to incarceration, reducing the rate of new felony convictions for those who complete that program by nearly half.[419]

DOCS and OASAS have recommended improvements to Willard to include smaller therapy groups no larger than 15 offenders, increased one-on-one counseling, updated curricula including a concentration on re-entry issues during the final 30 days of the program, new OASAS standards that reflect Willard program offerings, designation of an OASAS staff member as a liaison with Willard, and enhanced documentation of progress in treatment. The Commission fully supports these joint recommendations to improve Willard.

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[418] Document prepared by the Office of Program, Planning and Research (New York State Department of Correctional Services, 2007).
[419] Testimony of DOCS' Commissioner Brian Fischer on the Impact of the Rockefeller Drug Laws to the Assembly Codes, Judiciary, Correction, Health, Alcoholism and Drug Abuse, and Social Services Committees (May 8, 2008).

PART SIX

CRIME VICTIMS AND SENTENCING

Part Six

Crime Victims and Sentencing

I. INTRODUCTION

Executive Order No. 10 requires that the Commission ensure that appropriate consideration be given to the impact of New York's sentencing laws on crime victims, their families and the community. It is indisputable that with the possible exception of the defendant, no one has a more direct stake in the just outcome of a criminal case -- and the propriety of any sentence imposed -- than the crime victim. Accordingly, in order to fulfill the mandate required by the Order, the Commission closely examined the complex web of State statutes and regulations establishing the rights of crime victims during the criminal justice process. The Commission focused on those statutes and regulations giving crime victims in New York the right to be notified and consulted regarding certain judicial proceedings in the course of the criminal case; to provide a statement to the court at sentencing in certain cases (and to the Board of Parole prior to the offender's scheduled release); to receive restitution or reparation from the offender; and to have the court, where appropriate, issue a final order of protection at the time of conviction. The Commission received guidance from state and national experts on the rights of crime victims, as well as recommendations on how these rights in New York might be strengthened and better enforced.

New York has established a solid statutory foundation in the area of victim rights, a foundation that recognizes the critical role played by victims in the criminal justice process and, in particular, sentencing-related matters. There is, however, a troubling discrepancy between the many rights granted to crime victims under the law, and the actual exercise of those rights by victims. In testimony before the Commission and discussions at Subcommittee and Commission meetings, it became clear that despite the numerous provisions scattered throughout the Executive Law, Criminal Procedure Law ("CPL") and Penal Law designed to ensure that victims are made fully

aware of their rights, far too many crime victims remain uninformed and, as such, are never afforded a meaningful opportunity to participate in the criminal justice process. Thus, the Commission finds that while New York has enacted a number of laws and regulations intended to give crime victims a meaningful voice in decisions relating to case disposition (*e.g.*, plea and sentencing) and parole release, and has enacted a series of statutes intended to timely notify victims of those rights, many victims in this State still have little or no knowledge of their basic rights under the law.[420] The Commission concludes that this is due, at least in part, to the sheer complexity of the statutory scheme governing crime victims' rights and the absence of any effective means of enforcing those rights. The Commission further finds that certain rights, such as the right to seek and collect restitution or reparation from an offender, and the ability to have a final order of protection issued upon conviction made available to the appropriate law enforcement or correctional authorities, might be significantly advanced through relatively minor amendments to existing law. Finally, the Commission believes that the existing statutes establishing the rights of crime victims in the area of sentencing may be unduly narrow and that expansion of those rights should be considered.

II. PROPOSALS FOR REFORM

A. Consolidating Victim Statutes and Enhancing Training

As noted, part of the problem is the complexity of the State's statutory and regulatory scheme for crime victims. To effectively apply the existing laws governing the rights of crime victims in New

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

York, judges, prosecutors, victims and their advocates must, at a minimum, be familiar with all of Executive Law Article 23, including the "fair treatment" standards promulgated pursuant to Executive Law §§640 and 645, as well as several sections of the CPL and Penal Law scattered throughout no fewer than six articles of those chapters. In order to streamline and make more accessible to judges, lawyers and crime victims the multitude of provisions of New York law governing the rights of crime victims, the Commission recommends that these provisions be moved to a single article of law, preferably in the CPL or Penal Law. In the alternative, the Commission recommends that a cross-referencing chart (or other similar resource tool) be created and incorporated into the CPL or Penal Law and be regularly updated so that crime victims, and the criminal bench and bar, can easily find, in a single location, a list of all victim-related statutes.

In addition, the Commission recommends that the statutorily-required training of prosecutors and judges in the area of victims' rights be expanded and enhanced to ensure that they are made fully aware of their obligations with respect to victim notification and the substantive rights of crime victims.[421] Of particular importance are the obligations that prosecutors and judges have in preserving the restitution-related rights of crime victims. In addition to expanded training, restitution "desk-references" should be developed for use by prosecutors and the judiciary in criminal cases and restitution matters.

B. Orders of Protection

Victim advocates advised that one of the most serious obstacles to the enforcement of orders of protection was that in cases in which an offender is sentenced to State prison or jail and an order of protection is issued, it was not uncommon for that offender to be delivered to the appropriate prison or jail facility without a copy of the order. To promote victim safety and ensure that prison and jail officials charged with the custody and control of inmates subject to an order of protection are fully aware of the content of those orders, the Commission recommended that the law be amended to require that a copy of an order of protection issued by the court be attached to the

[421] *See, e.g.,* Executive Law §§642(5); 647(4).

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

Notably, in 2008 the Legislature adopted the changes suggested by the Commission.[422] Amendments were made to the Executive Law, the CPL, the Correction Law, and the Family Court Act, in relation to establishing a Witness Protection Program, and a copy of any order of protection or temporary order of protection must now accompany an offender to State prison and local jail. In addition, where the individual is under probation or parole supervision, the supervising entity also must receive a copy of such order.

The Legislature also enhanced statutory protections afforded to victims by expanding the definition of "members of the same family or household," for purposes of the issuance of orders of protection and temporary orders of protection, as well as the concurrent jurisdiction of family courts and criminal courts, to former spouses whether or not living together and unrelated persons who continually or at regular intervals reside in the same household or have done so in the past, and to persons who are or have been in a dating or intimate relationship whether or not they have ever lived together.[423]

C. Payment of Restitution by Credit Card

The Commission also recommends that a defendant ordered to pay restitution or reparation to a crime victim be able to satisfy that obligation directly with the court by use of a credit card.[424] This would simplify and expedite the collection of restitution by crime victims in those cases. Specifically, the Commission recommends that Judiciary Law §212 and CPL 420.05 and 420.10 be amended to authorize direct payment to the court by credit card of restitution or

[422] These changes were adopted in the 2008-2009 State Budget (Laws of 2008, ch. 56, Part D).
[423] Laws of 2008, ch. 326.
[424] This proposal appears in the 2007 Report of the Chief Administrative Judge's Advisory Committee on Criminal Law and Procedure. During the 2007-2008 Legislative Session, CVB Departmental Bill #8 was introduced in the New York State Senate (S. 4114). It passed the Senate in 2007 and 2008.

reparation imposed as part of a sentence in a criminal case.[425] In light of concerns that this proposed change in law could, at least in some cases, have significant adverse financial consequences for the families of certain offenders, the Commission further recommends that the Legislature consider imposing a reasonable "cap" on the amount of restitution that could be paid in a given case from a single credit card account.

D. Restitution Orders for Juvenile Delinquents Placed with a Family Member

In 2008, a Clinton County Family Court judge identified a "statutory void" in Family Court Act §353.6(2), which precludes a court from ordering that a juvenile delinquent pay restitution when placed with a relative; that is, a court may order restitution only when a juvenile delinquent is placed with an agency.[426] In order to preserve the right of restitution to all victims of crime, and to ensure that all crime victims are treated equally, it is recommended that this void be addressed. Appropriate amendments to the Family Court Act are necessary to permit courts to order restitution in instances when a juvenile delinquent is placed with a family member.

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

Certain laws governing the rights of crime victims in New York limit the duty of courts and prosecutors to provide notice, consult with, and consider the views of crime victims to only certain offenses. For example, the requirement in Executive Law §642(1) that the prosecutor consult with and obtain the views of the victim or the victim's family regarding disposition of the case by dismissal, plea or trial, and the parallel requirement in Executive Law §647(1) that the court consider the views of the victim or the victim's family concerning certain discretionary decisions and sentencing options,

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[425] Legislation permitting payment of restitution by credit card has been proposed in the 2009-2010 Executive Budget, which was introduced in the Legislature in the 2009 Legislative Session (S. 56 /A. 156).

[426] In the Matter of Dylan AA. (19 Misc. 3d 206, 849 N.Y.S.2d 770 [2008]).

apply only where the crime charged is: (1) a violent felony offense; (2) a felony involving physical injury to the victim; (3) a felony involving property loss or damage in excess of $250; or (4) a felony involving larceny against the person.

Similarly, the requirement in CPL 440.50(1) that the prosecutor inform the victim by letter of a final disposition within 60 days of that disposition applies (absent a specific victim request) only to cases where the disposition includes a conviction of a violent felony offense as defined in Penal Law §70.02 or an offense defined in Penal Law Article 125 (homicide and related offenses). Section 380.50(4) of the CPL, moreover, limits a victim's right to automatic notification of the defendant's subsequent release or escape from custody, to only those cases in which the defendant is committed to the custody of DOCS on a conviction for a violent felony offense or a Penal Law Article 125 offense.[427] Finally, the requirement in CPL 440.50(1) that the prosecutor notify the victim of his or her right to meet with, or submit a written or recorded victim impact statement to Parole applies, absent a specific victim request, only where the conviction is for a violent felony offense or a Penal Law Article 125 felony offense.

Provided such rights are not inconsistent with a defendant's rights under the State and Federal Constitutions, a crime victim's right to notification of proceedings and to have a meaningful voice in the criminal justice process should not depend on whether the defendant is accused or convicted of a violent or non-violent felony or a misdemeanor under a particular article of the Penal Law. Accordingly, the Commission supports an examination of the existing statutory scheme governing the rights of crime victims in New York to determine whether expansion of those rights is warranted.

Next, while the VINE (Victim Information and Notification Everyday) system allows certain victims to be notified regarding offender escape, absconding, discharge, parole, conditional release or release to post-release supervision,[428] there are no similar notification rights available to a victim when an offender is under community

[427] Penal Law Article 125 includes homicide and related offenses.
[428] CPL 380.50 (4), (5).

supervision by a local probation department. Accordingly, the Commission recommends consideration of amendments to the law to include notification of an offender's early release from probation supervision obligations.

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

In that same vein, the Commission recommends that a review be undertaken of measures to enhance the ability of crime victims to collect restitution, including an examination of the Vermont restitution model where the victim is paid the first $10,000 of any restitution order through a revolving fund established by the State. A comprehensive, "all-agency" approach also should be examined to use the powers of the State (e.g., State income tax return intercept, wage garnishment, interception of lottery winnings, withholding of professional or recreational licenses) to enforce outstanding restitution payments. Finally, the Commission recommends studying options for expanding grievance procedures to provide an effective mechanism for victims to assert complaints when denied rights under the law.

While the Commission has made numerous suggestions for sentencing-related reforms, it would be remiss if it failed to note the great strides that have been made in the past two years with regard to enhancing the rights of, and services offered to, victims. The Safe Harbour for Exploited Children Act[429] requires local social service districts to provide crisis intervention services and community-based programming for sexually exploited youth. The law regarding Human

[429] Laws of 2008, ch. 569.

Trafficking,[430] in addition to creating new crimes, allows victims of human trafficking who were previously ineligible for social services to qualify for such assistance. Also, recently enacted legislation authorizes courts to order a defendant indicted for certain sexual assault crimes to submit to an HIV test, thus helping the victim of a sex crime deal with at least the physical trauma of such an assault in a more expeditious manner.[431] Recognizing the financial hardship that the parents or guardians of a child victim may suffer, the law was amended in 2008 to allow for the inclusion, in a crime victim award from the State Crime Victims Board, the loss of earnings experienced by parents or guardians while caring for a child victim due to injuries sustained as a direct result of a crime.[432] Finally, a court can now issue an order allowing for the termination of a residential lease of a domestic violence victim when there is sufficient cause to believe that the victim may be in danger.[433]

The Commission believes that the Legislature should continue to build upon these protections in an effort to continue to address the rights and needs of all crime victims.

[430] Laws of 2007, ch. 74.
[431] Laws of 2007, ch. 571.
[432] Laws of 2008, ch. 162.
[433] Laws of 2007, chs. 73, 616.

PART SEVEN

PLANNING FOR THE FUTURE: A PERMANENT SENTENCING COMMISSION FOR NEW YORK

Part Seven

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

Based on testimony presented to the Commission by policymakers, practitioners, academics and advocates, it has become clear that criminal justice in general, and sentencing in particular, are areas where law, practice, research and policy are constantly evolving. The Commission strongly believes that if the sentencing of offenders is to be thoughtfully and effectively addressed in the future, the State should give serious consideration to the creation of a permanent body dedicated to the ongoing evaluation of relevant sentencing laws and policy. A permanent sentencing commission would serve as an advisory body on sentencing policy to the legislative and executive branches of government.[434]

There are currently 23 active sentencing commissions nationwide.[435] Historically, many of these commissions were created to develop and implement sentencing guidelines. Over time, however,

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

[435] National Association of State Sentencing Commissions at http://www.ussc.gov/states.htm. The State of Minnesota created the nation's first sentencing commission in 1978. Since then, 21 states, the District of Columbia, and the federal government have established sentencing commissions.

the purview of such commissions has evolved to include all other issues pertaining to sentencing. The need for a permanent state sentencing commission was emphasized by several of the experts who addressed the Commission. As stated by Professor Douglas A. Berman, a national expert on sentencing issues:

> I think just about every academic who looks at this field ultimately concludes that having a permanent sentencing commission, a body with the unique, distinctive and committed responsibility to monitor, assess and advise all of the sentencing players helps the system operate effectively long term. No matter how effectively you put a model in place, things are going to change in a way that only a permanent body endeavoring to stay abreast of this and to help all other bodies involved is going to be in a position to work with it effectively.[436]

Additionally, Barbara Tombs, Senior Fellow at the Center on Sentencing and Corrections at the Vera Institute of Justice, indicated that it is not unusual for commissions that begin as temporary study commissions, as New York's has, to evolve into permanent sentencing commissions since "good sentencing policy needs continual monitoring" to respond to emerging trends.[437]

In order to continue the progress that New York State has made in crime reduction, all but one Commission member strongly recommends that New York join the growing number of states that benefit from the existence of a permanent sentencing commission.[438]

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[436] Commission on Sentencing Reform, Transcript of July 18, 2007 Meeting, at 183.
[437] Commission on Sentencing Reform, Transcript of July 11, 2007 Meeting, at 97.
[438] In light of the restrictions that the New York State Constitution imposes on, among other things, the appointment process for a permanent commission (NY Const art III, §1; art V, §§3, 4), it might be more advantageous to create a "temporary" state commission on sentencing, the continuation of which would be subject to legislative review.

PART EIGHT

CONCLUSION

Part Eight

CONCLUSION

The sentencing function is arguably the most critical in any criminal prosecution. The judge's sentencing decision has immediate and often dramatic consequences for the offender and the victim and profound consequences for the community over the long term. The principal recommendations in this Report -- to clarify and streamline the sentencing laws and expand the ability of judges to divert drug-addicted non-violent felony offenders from prison into community-based treatment -- reflect these principles and are intended to improve a sentencing system that is overdue for reform.

The Commission recognizes that sentencing in the broadest sense does not end with the judge's pronouncement at the conclusion of a criminal case. In most instances, this pronouncement marks the beginning, rather than the end, of a lengthy journey toward successful reintegration of the offender as a productive and law-abiding member of society. In recommending further reforms aimed at expanding the use of proven programs and evidence-based methods to improve the transition of offenders from prison back into the community, the Commission believes New York can reduce its reliance on costly prison resources while enhancing public safety.

In fulfilling its broad mandate, the Commission has a historic opportunity to have a positive and lasting effect on criminal justice policy in the State. The Commission respectfully submits this Final Report to the Governor, Legislature and Judiciary with the expectation that it will serve as a roadmap for future sentencing reform and help make New York's sentencing system the standard by which all others are measured.

APPENDIX A

EXECUTIVE ORDER NO. 10 (2007) & EXECUTIVE ORDER NO. 9 (2008)

EXECUTIVE ORDER

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

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

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

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

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

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

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

1. There is hereby established the New York State Commission on Sentencing Reform ("Commission").

2. The Commission shall consist of eleven members appointed by the Governor, including: (a) the Commissioner of the Department of Correctional Services, the Chairman of the Board of Parole, the Commissioner of the Division of Criminal Justice Services and the Chair of the Crime Victims Board, who shall serve ex officio; (b) four members appointed on the recommendation of the legislative leaders, one each by the Speaker of the Assembly, the Temporary President of the Senate, the Minority Leader of the Assembly, and the Minority Leader of the Senate; and (c) three additional members appointed by the Governor, including one judge or former judge with substantial experience presiding over courts of criminal jurisdiction, one member of the bar with significant experience in the prosecution of criminal actions, and one member of the bar with significant experience representing defendants in criminal actions.

3. The Governor shall select a Chair of the Commission from among the members. A majority of the members of the Commission shall constitute a quorum, and all recommendations of the Commission shall require approval of a majority of the total members of the Commission.

4. The Commission shall conduct a comprehensive review of New York's current sentencing structure, sentencing practices, community supervision, and the use of alternatives to incarceration, including a review and evaluation of:

(a) the existing statutory provisions by which an offender is sentenced to or can be released from incarceration, including but not limited to indeterminate sentences, determinate sentences, definite sentences, sentences of parole supervision, merit time, supplemental merit time, shock incarceration, temporary release, presumptive release, conditional release, and maximum expiration;

(b) the existing sentencing provisions as to their uniformity, certainty, consistency and adequacy;

(c) the lengths of incarceration and community supervision that result from the current sentence structure, and the incentives or barriers to the appropriate utilization of alternatives to incarceration;

(d) the extent to which education, job training and re-entry preparation programs can both facilitate the readiness of inmates to transition into the community, and reduce recidivism;

(e) the impact of existing sentences upon the state criminal justice system, including state prison capacity, local jail capacity, community supervision resources, judicial operations and law enforcement responsibilities;

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

(g) the expected future trends in sentencing.

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

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

sentences have had on length of incarceration, the impact of early release, the impact of existing sentences on the length of community supervision, recommended options for the use of alternatives to incarceration, and an analysis of the fiscal impact of the Commission's recommendations.

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

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

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

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

Eliot Spitzer, Governor

Richard Baum, Secretary to the Governor

EXECUTIVE ORDER

No 9: REVIEW, CONTINUATION AND EXPIRATION OF PRIOR EXECUTIVE ORDERS

WHEREAS, an initial review has been completed of those Executive Orders and amendments thereto that are in effect as of this date; and

WHEREAS, during the course of that review, it has been determined that certain Executive Orders are unnecessary, outdated, or otherwise should not be continued; and

WHEREAS, it also has been determined that other Executive Orders address ongoing issues and should be continued; and

WHEREAS, it is important to identify for the public those Executive Orders that remain in effect and those that are no longer valid;

NOW, THEREFORE, I, David Paterson, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and laws of the State of New York, do hereby order that upon due consideration, deliberation and review, all Executive Orders issued by previous Governors are hereby repealed, cancelled and revoked in their entirety, with the exception of the Executive Orders set forth below and any amendments thereto, which shall remain in full force and effect until otherwise revoked, superseded or modified; and IT IS FURTHER ORDERED that a review of prior Executive Orders shall continue to determine whether additional orders should be revoked, superseded or modified.

EXECUTIVE ORDERS BEING CONTINUED

A. Executive Orders of Governor Nelson A. Rockefeller

Executive Order No. 42, issued October 14, 1970 (Relating to procedures for submission and settlement of certain grievances of State employees).

B. Executive Orders of Governor Mario M. Cuomo

Executive Order No. 2, issued January 11, 1983 (Establishing the position of State Director of Criminal Justice);

Executive Order No. 5, issued February 16, 1983 (Establishing the Women's Division in the Executive Chamber);

Executive Order No. 6, issued February 18, 1983 (Assigning responsibilities of the State Department of Civil Service, and certain State agencies for insuring equal employment opportunity for minorities, women, disabled persons and Vietnam era veterans in State government and establishing the Governor's executive committee for affirmative action);

Executive Order No. 7, issued February 18, 1983 (Establishing a Governor's Advisory Committee for Hispanic Affairs);

Executive Order No. 8, issued February 25, 1983 (Directing State agencies to consider labor relations practices when awarding State contracts);

Executive Order No. 11, issued April 26, 1983 (Expanding the membership and powers of the Securities Coordinating Committee);

Executive Order No. 12, issued May 3, 1983 (Directing the State Office for the Aging to review and comment upon policies affecting the elderly);

Executive Order No. 17, issued May 31, 1983 (Establishing State Policy on Private Institutions which Discriminate);

Executive Order No. 19, issued May 31, 1983 (New York State Policy Statement on Sexual Harassment in the Workplace);

Executive Order No. 23, issued September 1, 1983 (Establishing the Office of New York State Ombudsman);

Executive Order No. 26, issued October 7, 1983 (Directing the State Office of Advocate for the Disabled to review comment upon policies affecting persons with disabilities);

Executive Order No. 34, issued January 13, 1984 (Establishing the New York State Human Rights Advisory Council);

Executive Order No. 46, issued August 28, 1984 (Naming the State Office Building Campus in Albany the Governor W. Averell Harriman Campus State Office Building Campus);

Executive Order No. 56, issued December 20, 1984 (Establishing the New York State Task Force on Life and the Law);

Executive Order No. 66, issued June 5, 1985 (Establishing a Governor's Advisory Committee for Black Affairs);

Executive Order No. 77, issued October 31, 1985 (Establishing membership of the Martin Luther King, Jr. Commission);

Executive Order No. 80, issued March 21, 1986 (Juvenile justice planning);

Executive Order No. 82, issued May 2, 1986 (Establishing the Governor's Office for Hispanic Affairs);

Executive Order No. 95, issued April 15, 1987 (Designating the Disaster Preparedness Commission as the State Emergency Response Commission);

Executive Order No. 96, issued April 27, 1987 (Promoting a New York State policy against age discrimination in the workplace);

Executive Order No. 97, issued April 27, 1987 (Designating the Governor's Traffic Safety Committee as the State Agency to coordinate and approve State highway safety programs);

Executive Order No. 98, issued May 13, 1987 (Establishing a new State Council on Graduate Medical Education);

Executive Order No. 100, issued August 31, 1987 (Naming the Watertown State Office Building the Dulles State Office Building);

Executive Order No. 111, issued August 11, 1988 (Directing the Attorney General to inquire into matters of bias-related crimes);

Executive Order No. 114, issued December 9, 1988 (Naming the Poughkeepsie State Office Building the Eleanor Roosevelt State Office Building);

Executive Order No. 125, issued May 22, 1989 (Establishing a council of contracting agencies);

Executive Order No. 130, issued December 4, 1989 (Creating a crime proceeds strike force to investigate and prosecute certain economic activities constituting penal, tax, and banking law violations relating to money laundering);

Executive Order No. 131, issued December 26, 1994 (Establishment of administrative adjudication plans);

Executive Order No. 135, issued February 27, 1990 (Prescribing Procedures to Allocate the State Low Income Housing Credit Under the Tax Reform Act of 1986 as amended);

Executive Order No. 147, issued July 31, 1991 (Establishing an Office of Indian Relations);

Executive Order No. 150, issued October 9, 1991 (New land use and development by State agencies within the Adirondack Park);

Executive Order No. 158, issued June 23, 1992 (Naming the New Scotland Avenue Laboratory Building the David Axelrod Institute for Public Health);

Executive Order No. 169, issued March 22, 1993 (Directing State Agencies to Act consistently with the Upper Delaware River Management Plan);

Executive Order No. 170, issued March 24, 1993 (Establishing Uniform Guidelines for Determining the Responsibility of Bidders);

Executive Order No. 170.1, issued June 23, 1993 (Establishing Uniform Guidelines for Determining the Responsibility of Bidders); and

Executive Order No. 179, issued December 30, 1993 (Establishing the New York State Commission on National and Community Service).

C. Executive Orders of Governor George E. Pataki

Executive Order No. 20, issued November 30, 1995 (Establishing the Position of State Director of Regulatory Reform);

Executive Order No. 26.1, issued September 28, 1996 (Incorporating the National Incident Management System as the Management System for Emergency Response);

Executive Order No. 40, issued July 26, 1996 (Ordering State Agencies to Register Emission Reduction Credits);

Executive Order No. 45, issued November 13, 1996 (Establishing the Position of State Director of Consumer Protection);

Executive Order No. 49, issued February 12, 1997 (Establishing Procedures to Consider, in its Proprietary Capacity, the utilization of One or More Project Labor Agreements);

Executive Order No. 50, issued October 1, 1996 (Establishing a Governmental Commission to Investigate the Recovery of Holocaust Victims' Assets);

Executive Order No. 51, issued May 20, 1997 (Activities of State Agencies Within the New York City Watershed);

Executive Order No. 57, issued October 23, 1997 (Establishing the New York City Watershed Protection and Partnership Council);

Executive Order No. 83, issued July 1, 1998 (Establishing the Jackie Robinson Empire State Freedom Medal and the Jackie Robinson Empire State Freedom Medal Commission);

Executive Order No. 86, issued August 19, 1998 (Establishing the New York City Watershed Inspector General);

Executive Order No. 109, issued May 9, 2001 (Establishing a Special Prosecutor to Investigate and Prosecute Criminal Acts Relating to Fraudulent Motor Vehicle Insurance claims);

Executive Order No. 111, issued June 10, 2001 (Directing State Agencies to be More Energy Efficient and Environmentally Aware: "Green and Clean State Buildings and Vehicles");

Executive Order No. 116, issued January 7, 2002 (Reconstituting the State Drought Management Task Force);

Executive Order No. 117, issued January 28, 2002 (Establishing the Position of Chief Information Officer (CIO) of the State of New York);

Executive Order No. 125, issued March 24, 2003 (Directing State Officials to Ensure that the Appropriate Protections and Benefits are Extended to Members of the Reserve Armed Forces of the United States and the Organized Militia of New York State);

Executive Order No. 128, issued June 16, 2003 (Designation of Lower Manhattan Development Corporation to Carry Out Environmental Impact Review and to Fulfill Requirements For Receipt of Federal Assistance in Connection With the Redevelopment of Lower Manhattan Following the Terrorist Attacks of September 11, 2001);

Executive Order No. 133, issued November 22, 2004 (Establishing the Lower Manhattan Construction Command Center);

Executive Order No. 142, issued November 21, 2005 (Directing State Agencies and Authorities to Diversify Transportation Fuel and Heating Oil Supplies Through the Use of Bio-Fuels in State Vehicles and Buildings); and

Executive Order No. 144, issued February 21, 2006 (Establishing the New York State Abraham Lincoln Bicentennial Commission).

D. Executive Orders of Governor Eliot L. Spitzer

Executive Order No. 3, issued January 1, 2007 (Promotion of Public Access to Government Decisionmaking);

Executive Order No. 8, issued February 18, 2007 (Establishing the MWBE Executive Leadership Council and the MWBE Corporate Roundtable);

Executive Order No. 9, issued March 5, 2007 (Ordering the Commissioner of the Department of Correctional Services to Bar Certain Offenders from Participating in Temporary Release Programs);

Executive Order No. 10, issued March 5, 2007 (Establishing the New York State Commission on Sentencing Reform);

Executive Order No. 11, issued April 23, 2007 (Establishing the New York State Commission on Local Government Efficiency and Competitiveness);

Executive Order No. 12, issued May 8, 2007 (Representation of Child Care Providers);

Executive Order No. 13, issued May 18, 2007 (Establishing the New York State Council on Food Policy);

Executive Order No. 15, issued May 29, 2007 (Establishing the New York State Commission to Modernize the Regulation of Financial Services);

Executive Order No. 16, issued June 12, 2007 (Establishing the Governor's Children's Cabinet);

Executive Order No. 17, issued September 5, 2007 (Establishing the Joint Enforcement Task Force on Employee Misclassification);

Executive Order No. 19, issued October 22, 2007 (Requiring the Adoption of Domestic Violence and the Workplace Policies);

Executive Order No. 20, issued December 4, 2007 (Establishing the Governor's Smart Growth Cabinet);

Executive Order No. 21, issued January 11, 2008 (Providing for Investigation Into the Deaths of Arlene Tankleff and Seymour Tankleff and Prosecution of Offenses in Connection Therewith); and

Executive Order No. 22, issued January 23, 2008 (Appointing the New York State Commission on Property Tax Relief).

GIVEN under my hand and the Privy Seal of the State in the City of Albany this eighteenth of June in the year two thousand eight.

David A. Paterson
Governor

Charles O'Byrne
Secretary to the Governor

APPENDIX B

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

NON-VIOLENT PENAL LAW FELONY OFFENSES THAT CURRENTLY CARRY AN INDETERMINATE SENTENCE[439]

CITATION	TITLE	OFFENSE LEVEL
PL 100.08	Criminal solicitation in the third degree	Class E felony
PL 100.10	Criminal solicitation in the second degree	Class D felony
PL 100.13	Criminal solicitation in the first degree	Class C felony
PL 105.10	Conspiracy in the fourth degree	Class E felony
PL 105.13	Conspiracy in the third degree	Class D felony
PL 105.15	Conspiracy in the second degree	Class B felony
PL 115.01	Criminal facilitation in the third degree	Class E felony
PL 115.05	Criminal facilitation in the second degree	Class C felony
PL 115.08	Criminal facilitation in the first degree	Class B felony
PL 120.01	Reckless assault of a child by a child day care provider	Class E felony
PL 120.03	Vehicular assault in the second degree	Class E felony
PL 120.04	Vehicular assault in the first degree	Class D felony
PL 120.04-a	Aggravated vehicular assault	Class C felony
PL 120.12	Aggravated assault upon a person less than eleven years old	Class E felony

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

CITATION	TITLE	OFFENSE LEVEL
PL 120.13	Menacing in the first degree	Class E felony
PL 120.25	Reckless endangerment in the first degree	Class D felony
PL 120.30	Promoting a suicide attempt	Class E felony
PL 120.55	Stalking in the second degree	Class E felony
PL 120.60 (2)	Stalking in the first degree	Class D felony
PL 120.70	Luring a child	Class E felony[440]
PL 125.10	Criminally negligent homicide	Class E felony
PL 125.12	Vehicular manslaughter in the second degree	Class D felony
PL 125.13	Vehicular manslaughter in the first degree	Class C felony
PL 125.14	Aggravated vehicular homicide	Class B felony
PL 125.15	Manslaughter in the second degree	Class C felony
PL 125.40	Abortion in the second degree	Class E felony
PL 125.45	Abortion in the first degree	Class D felony
PL 135.10	Unlawful imprisonment in the first degree	Class E felony
PL 135.35	Labor trafficking	Class D felony
PL 135.50	Custodial interference in the first degree	Class E felony

[440] It is a class E felony unless the underlying offense that the defendant intended to commit was a Class A felony, then the offense of luring a child shall be a Class C felony and if the underlying offense that the defendant intended to commit was a Class B felony, then the offense of luring a child shall be a Class D felony.

CITATION	TITLE	OFFENSE LEVEL
PL 135.55	Substitution of children	Class E felony
PL 135.65	Coercion in the first degree	Class D felony
PL 140.17	Criminal trespass in the first degree	Class D felony
PL 140.20	Burglary in the third degree	Class D felony
PL 145.05	Criminal mischief in the third degree	Class E felony
PL 145.10	Criminal mischief in the second degree	Class D felony
PL 145.12	Criminal mischief in the first degree	Class B felony
PL 145.20	Criminal tampering in the first degree	Class D felony
PL 145.23	Cemetery desecration in the first degree	Class E felony
PL 145.26	Aggravated cemetery desecration in the second degree	Class E felony
PL 145.27	Aggravated cemetery desecration in the first degree	Class D felony
PL 145.45	Tampering with a consumer product in the first degree	Class E felony
PL 150.05	Arson in the fourth degree	Class E felony
PL 150.10	Arson in the third degree	Class C felony
PL 155.30	Grand larceny in the fourth degree	Class E felony
PL 155.35	Grand larceny in the third degree	Class D felony
PL 155.40	Grand larceny in the second degree	Class C felony
PL 155.42	Grand larceny in the first degree	Class B felony

CITATION	TITLE	OFFENSE LEVEL
PL 156.10	Computer trespass	Class E felony
PL 156.25	Computer tampering in the third degree	Class E felony
PL 156.26	Computer tampering in the second degree	Class D felony
PL 156.27	Computer tampering in the first degree	Class C felony
PL 156.30	Unlawful duplication of computer related matter	Class E felony
PL 156.35	Criminal possession of computer related matter	Class E felony
PL 158.10	Welfare fraud in the fourth degree	Class E felony
PL 158.15	Welfare fraud in the third degree	Class D felony
PL 158.20	Welfare fraud in the second degree	Class C felony
PL 158.25	Welfare fraud in the first degree	Class B felony
PL 158.35	Criminal use of a public benefit card in the first degree	Class E felony
PL 158.40	Criminal possession of public benefit cards in the third degree	Class E felony
PL 158.45	Criminal possession of public benefit cards in the second degree	Class D felony
PL 158.50	Criminal possession of public benefit cards in the first degree	Class C felony
PL 160.05	Robbery in the third degree	Class D felony
PL 165.06	Unauthorized use of a vehicle in the second degree	Class E felony
PL 165.07	Unlawful use secret scientific material	Class E felony
PL 165.08	Unauthorized use of a vehicle in the first degree	Class D felony

CITATION	TITLE	OFFENSE LEVEL
PL 165.10	Auto stripping in the second degree	Class E felony
PL 165.11	Auto stripping in the first degree	Class D felony
PL 165.15	Theft of services (certain services only)	Class E felony
PL 165.45	Criminal possession of stolen property in the fourth degree	Class E felony
PL 165.50	Criminal possession of stolen property in the third degree	Class D felony
PL 165.52	Criminal possession of stolen property in the second degree	Class C felony
PL 165.54	Criminal possession of stolen property in the first degree	Class B felony
PL 165.72	Trademark counterfeiting in the second degree	Class E felony
PL 165.73	Trademark counterfeiting in the first degree	Class C felony
PL 170.10	Forgery in the second degree	Class D felony
PL 170.15	Forgery in the first degree	Class C felony
PL 170.25	Criminal possession of a forged instrument in the second degree	Class D felony
PL 170.30	Criminal possession of a forged instrument in the first degree	Class C felony
PL 170.40	Criminal possession of forgery devices	Class D felony
PL 170.60	Unlawfully using slugs in the first degree	Class E felony
PL 170.65	Forgery of a vehicle identification number	Class E felony
PL 170.70	Illegal possession of a vehicle identification number plate	Class E felony
PL 170.75	Fraudulent making of an electronic access device in the second degree	Class D felony

CITATION	TITLE	OFFENSE LEVEL
PL 175.10	Falsifying business records in the first degree	Class E felony
PL 175.25	Tampering with public records in the first degree	Class D felony
PL 175.35	Offering a false instrument for filing in the first degree	Class E felony
PL 175.40	Issuing a false certificate	Class E felony
PL 176.15	Insurance fraud in the fourth degree	Class E felony
PL 176.20	Insurance fraud in the third degree	Class D felony
PL 176.25	Insurance fraud in the second degree	Class C felony
PL 176.30	Insurance fraud in the first degree	Class B felony
PL 176.35	Aggravated insurance fraud	Class D felony
PL 177.10	Health care fraud in the fourth degree	Class E felony
PL 177.15	Health care fraud in the third degree	Class D felony
PL 177.20	Health care fraud in the second degree	Class C felony
PL 177.25	Health care fraud in the first degree	Class B felony
PL 178.15	Criminal diversion of prescription medications and prescriptions in the third degree	Class E felony
PL 178.20	Criminal diversion of prescription medications and prescriptions in the second degree	Class D felony
PL 178.25	Criminal diversion of prescription medications and prescriptions in the first degree	Class C felony
PL 180.03	Commercial bribing in the first degree	Class E felony
PL 180.08	Commercial bribe receiving in the first degree	Class E felony

CITATION	TITLE	OFFENSE LEVEL
PL 180.15	Bribing a labor official	Class D felony
PL 180.25	Bribe receiving by a labor official	Class D felony
PL 180.40	Sports bribing	Class D felony
PL 180.45	Sports bribe receiving	Class E felony
PL 180.51	Tampering with sports contest in the first degree	Class E felony
PL 180.52	Impairing the integrity of a pari-mutual betting system in the second degree	Class E felony
PL 180.53	Impairing the integrity of a pari-mutual betting system in the first degree	Class D felony
PL 180.57	Rent gouging in the first degree	Class E felony
PL 187.10	Residential mortgage fraud in the fourth degree	Class E felony
PL 187.15	Residential mortgage fraud in the third degree	Class D felony
PL 187.20	Residential mortgage fraud in the second degree	Class C felony
PL 187.25	Residential mortgage fraud in the first degree	Class B felony
PL 190.26	Criminal impersonation in the first degree	Class E felony
PL 190.30	Unlawfully concealing a will	Class E felony
PL 190.40	Criminal usury in the second degree	Class E felony
PL 190.42	Criminal usury in the first degree	Class C felony
PL 190.65	Scheme to defraud in the first degree	Class E felony
PL 190.76	Criminal use access device in the first degree	Class E felony

CITATION	TITLE	OFFENSE LEVEL
PL 190.79	Identity theft in the second degree	Class E felony
PL 190.80	Identity theft in the first degree	Class D felony
PL 190.80-a	Aggravated identity theft	Class D felony
PL 190.82	Unlawful possession of personal identification information in the second degree	Class E felony
PL 190.83	Unlawful possession of personal identification information in the first degree	Class D felony
PL 190.86	Unlawful possession of a skimmer device in the first degree	Class E felony
PL 195.07	Obstructing governmental administration the first degree	Class E felony
PL 195.08	Obstructing governmental administration by means of a self-defense spray device	Class D felony
PL 195.20	Defrauding the government	Class E felony
PL 200.00	Bribery in the third degree	Class D felony
PL 200.03	Bribery in the second degree	Class C felony
PL 200.04	Bribery in the first degree	Class B felony
PL 200.10	Bribe receiving in the third degree	Class D felony
PL 200.11	Bribe receiving in the second degree	Class C felony
PL 200.12	Bribe receiving in the first degree	Class B felony
PL 200.20	Rewarding official misconduct in the second degree	Class E felony
PL 200.22	Rewarding official misconduct in the first degree	Class C felony
PL 200.25	Receiving a reward for official misconduct in the second degree	Class E felony

CITATION	TITLE	OFFENSE LEVEL
PL 200.27	Receiving a reward for official misconduct in the first degree	Class C felony
PL 200.45	Bribe giving for public office	Class D felony
PL 200.50	Bribe receiving for public office	Class D felony
PL 200.55	Impairing the integrity of a government licensing examination	Class D felony
PL 205.10	Escape in the second degree	Class E felony
PL 205.15	Escape in the first degree	Class D felony
PL 205.17	Absconding from temporary release in the first degree	Class E felony
PL 205.19	Absconding from community treatment facility	Class E felony
PL 205.25	Promoting prison contraband in the first degree	Class D felony
PL 205.60	Hindering prosecution in the second degree	Class E felony
PL 205.65	Hindering prosecution in the first degree	Class D felony
PL 210.10	Perjury in the second degree	Class E felony
PL 210.15	Perjury in the first degree	Class D felony
PL 210.40	Making an apparently sworn false statement in the first degree	Class E felony
PL 215.00	Bribing a witness	Class D felony
PL 215.05	Bribing receiving by witness	Class D felony
PL 215.11	Tampering with a witness in the third degree	Class E felony
PL 215.12	Tampering with a witness in the second degree	Class D felony

CITATION	TITLE	OFFENSE LEVEL
PL 215.13	Tampering with a witness in the first degree	Class B felony
PL 215.15	Intimidating a victim or witness in the third degree	Class E felony
PL 215.19	Bribing a juror	Class D felony
PL 215.20	Bribing receiving by a juror	Class D felony
PL 215.40	Tampering with physical evidence	Class E felony
PL 215.51	Criminal contempt in the first degree	Class E felony
PL 215.52	Aggravated criminal contempt	Class D felony
PL 215.56	Bail jumping in the second degree	Class E felony
PL 215.57	Bail jumping in the first degree	Class D felony
PL 215.70	Unlawful grand jury disclosure	Class E felony
PL 225.10	Promoting gambling in the first degree	Class E felony
PL 225.20	Possession of gambling records in the first degree	Class E felony
PL 230.05	Patronizing a prostitute in the second degree	Class E felony
PL 230.25	Promoting prostitution in the third degree	Class D felony
PL 230.30	Promoting prostitution in the second degree	Class C felony
PL 230.32	Promoting prostitution in the first degree	Class B felony
PL 230.33	Compelling prostitution	Class B felony
PL 230.34	Sex trafficking	Class B felony

CITATION	TITLE	OFFENSE LEVEL
PL 235.06	Obscenity in the second degree	Class E felony
PL 235.07	Obscenity in the first degree	Class D felony
PL 235.21	Disseminating indecent material to minors in the second degree	Class E felony
PL 235.22	Disseminating indecent material to minors in the first degree	Class D felony
PL 240.06	Riot in the first degree	Class E felony
PL 240.15	Criminal anarchy	Class E felony
PL 240.31	Aggravated harassment in the first degree	Class E felony
PL 240.32	Aggravated harassment of an employee by an inmate	Class E felony
PL 240.46	Criminal nuisance in the first degree	Class E felony
PL 240.71	Criminal interference with health care services or religious worship in the first degree	Class E felony
PL 241.05	Harassment of a rent regulated tenant	Class E felony
PL 242.15	Harming a service animal in the first degree	Class E felony
PL 250.05	Eavesdropping	Class E felony
PL 250.45	Unlawful surveillance in the second degree	Class E felony
PL 250.50	Unlawful surveillance in the first degree	Class D felony
PL 250.60	Dissemination of an unlawful surveillance image in the first degree	Class E felony
PL 255.15	Bigamy	Class E felony
PL 255.25	Incest in the third degree	Class E felony

CITATION	TITLE	OFFENSE LEVEL
PL 260.00	Abandonment of a child	Class E felony
PL 260.06	Non-support of a child in the first degree	Class E felony
PL 260.32	Endangering the welfare of a vulnerable elderly person in the second degree	Class E felony
PL 260.34	Endangering the welfare of a vulnerable elderly person in the first degree	Class D felony
PL 263.05	Use of a child in sexual performance	Class C felony
PL 263.10	Promoting an obscene sexual performance by a child	Class D felony
PL 263.11	Possessing an obscene sexual performance by a child	Class E felony
PL 263.15	Promoting a sexual performance by a child	Class D felony
PL 263.16	Possessing a sexual performance by a child	Class E felony
PL 263.30	Facilitating a sexual performance by a child with a controlled substance or alcohol	Class B felony
PL 265.02(1), (2) and (3)	Criminal possession of a weapon in the third degree	Class D felony
PL 265.10	Manufacture, transport, disposition and defacement of weapons and dangerous instruments or appliances (certain weapons, dangerous instruments or appliances only)	Class D felony
PL 265.16	Criminal sale of a firearm to minor	Class C felony
PL 265.35(2)	Prohibited use of weapons	Class D or E felony
PL 270.00(2)(b)(iii)	Unlawfully dealing with fireworks and dangerous fireworks	Class E felony
PL 270.20	Unlawful wearing of a body vest	Class E felony
PL 270.30	Unlawful fleeing a police officer in a motor vehicle in the second degree	Class E felony

CITATION	TITLE	OFFENSE LEVEL
PL 270.35	Unlawful fleeing a police officer in a motor vehicle in the first degree	Class D felony
PL 275.10	Manufacture of unauthorized recordings in the first degree	Class E felony
PL 275.20	Manufacture or sale of an unauthorized recording of a performance in the second degree	Class E felony
PL 275.30	Advertisement or sale of unauthorized recordings in the first degree	Class E felony
PL 275.34	Unlawful operation of a recording device in a motion picture or live theater in the first degree	Class E felony
PL 275.40	Failure to disclose the origin of a recording in the first degree	Class E felony
PL 405.14	Unpermitted use of indoor pyrotechnics in the first degree	Class E felony
PL 405.16	Aggravated unpermitted use of indoor pyrotechnics in the second degree	Class E felony
PL 460.20	Enterprise corruption	Class B felony
PL 470.05	Money laundering in the fourth degree	Class E felony
PL 470.10	Money laundering in the third degree	Class D felony
PL 470.15	Money laundering in the second degree	Class C felony
PL 470.20	Money laundering in the first degree	Class B felony
PL 470.21	Money laundering support of terrorism in the fourth degree	Class E felony
PL 470.22	Money laundering support of terrorism in the third degree	Class D felony
PL 470.23	Money laundering support of terrorism in the second degree	Class C felony
PL 470.24	Money laundering support of terrorism in the first degree	Class B felony

APPENDIX C

TIME-SERVED DATA BY YEAR FOR NON-VIOLENT FELONY OFFENSES: OFFENDERS RELEASED JANUARY 1985 THROUGH DECEMBER 2007

Chart C-1A

Non-Violent Class B Felony Offenders With Non-Consecutive Sentences
Released January 1985 Through December 2007: Time Served by Crime Type

Time Served: Years	First-Felony Offenders			Time Served: Years	Second-Felony Offenders		
	Number of Cases	Percent Distribution	Cumulative Percent		Number of Cases	Percent Distribution	Cumulative Percent
All Offenses				**All Offenses**			
0 lt 1	181	17.1%	17.1%	0 lt 1	3	1.7%	1.7%
1 lt 2	364	34.5%	51.6%	1 lt 2	16	9.0%	10.7%
2 lt 3	201	19.0%	70.6%	2 lt 3	19	10.7%	21.3%
3 lt 4	127	12.0%	82.7%	3 lt 4	29	16.3%	37.6%
4 lt 5	57	5.4%	88.1%	4 lt 5	39	21.9%	59.6%
5 lt 6	60	5.7%	93.8%	5 lt 6	19	10.7%	70.2%
6 lt 7	22	2.1%	95.8%	6 lt 7	12	6.7%	77.0%
7 lt 8	13	1.2%	97.1%	7 lt 8	14	7.9%	84.8%
8 lt 9	16	1.5%	98.6%	8 lt 9	8	4.5%	89.3%
9 lt 10	4	0.4%	99.0%	9 lt 10	3	1.7%	91.0%
10 lt 11	3	0.3%	99.2%	10 lt 11	6	3.4%	94.4%
11 lt 12	2	0.2%	99.4%	11 lt 12	3	1.7%	96.1%
12 lt 13	1	0.1%	99.5%	12 lt 13	2	1.1%	97.2%
13 lt 14	0	0.0%	99.5%	13 lt 14	1	0.6%	97.8%
14 lt 15	2	0.2%	99.7%	14 lt 15	1	0.6%	98.3%
15 lt 16	1	0.1%	99.8%	15 lt 16	0	0.0%	98.3%
16 lt 17	2	0.2%	100.0%	16 lt 17	0	0.0%	98.3%
Total	**1,056**	**100.0%**		17 lt 18	2	1.1%	99.4%
				18 lt 19	0	0.0%	99.4%
				19 lt 20	0	0.0%	99.4%
				20 lt 21	0	0.0%	99.4%
				21 lt 22	0	0.0%	99.4%
				22 lt 23	0	0.0%	99.4%
				23 lt 24	0	0.0%	99.4%
				24 lt 25	1	0.6%	100.0%
				Total	**178**	**100.0%**	
Excluding Conspiracy 2nd				**Excluding Conspiracy 2nd**			
0 lt 1	64	21.1%	21.1%	0 lt 1	2	3.6%	3.6%
1 lt 2	120	39.5%	60.5%	1 lt 2	13	23.6%	27.3%
2 lt 3	59	19.4%	79.9%	2 lt 3	14	25.5%	52.7%
3 lt 4	23	7.6%	87.5%	3 lt 4	9	16.4%	69.1%
4 lt 5	14	4.6%	92.1%	4 lt 5	9	16.4%	85.5%
5 lt 6	15	4.9%	97.0%	5 lt 6	2	3.6%	89.1%
6 lt 7	2	0.7%	97.7%	6 lt 7	2	3.6%	92.7%
7 lt 8	1	0.3%	98.0%	7 lt 8	1	1.8%	94.5%
8 lt 9	2	0.7%	98.7%	8 lt 9	0	0.0%	94.5%
9 lt 10	0	0.0%	98.7%	9 lt 10	0	0.0%	94.5%
10 lt 11	1	0.3%	99.0%	10 lt 11	1	1.8%	96.4%
11 lt 12	2	0.7%	99.7%	11 lt 12	0	0.0%	96.4%
12 lt 13	0	0.0%	99.7%	12 lt 13	1	1.8%	98.2%
13 lt 14	0	0.0%	99.7%	13 lt 14	0	0.0%	98.2%
14 lt 15	1	0.3%	100.0%	14 lt 15	1	1.8%	100.0%
15 lt 16	0	0.0%	NA	15 lt 16	0	0.0%	NA
16 lt 17	0	0.0%	NA	16 lt 17	0	0.0%	NA
Total	**304**	**100.0%**		17 lt 18	0	0.0%	NA
				18 lt 19	0	0.0%	NA
				19 lt 20	0	0.0%	NA
				20 lt 21	0	0.0%	NA
				21 lt 22	0	0.0%	NA
				22 lt 23	0	0.0%	NA
				23 lt 24	0	0.0%	NA
				24 lt 25	0	0.0%	NA
				Total	**55**	**100.0%**	

Continued on next page.

Chart C-1A

Non-Violent Class B Felony Offenders With Non-Consecutive Sentences
Released January 1985 Through December 2007: Time Served by Crime Type

Time Served: Years	First-Felony Offenders			Time Served: Years	Second-Felony Offenders		
	Number of Cases	Percent Distribution	Cumulative Percent		Number of Cases	Percent Distribution	Cumulative Percent
Conspiracy 2nd Only				**Conspiracy 2nd Only**			
0 lt 1	117	15.6%	15.6%	0 lt 1	1	0.8%	0.8%
1 lt 2	244	32.4%	48.0%	1 lt 2	3	2.4%	3.3%
2 lt 3	142	18.9%	66.9%	2 lt 3	5	4.1%	7.3%
3 lt 4	104	13.8%	80.7%	3 lt 4	20	16.3%	23.6%
4 lt 5	43	5.7%	86.4%	4 lt 5	30	24.4%	48.0%
5 lt 6	45	6.0%	92.4%	5 lt 6	17	13.8%	61.8%
6 lt 7	20	2.7%	95.1%	6 lt 7	10	8.1%	69.9%
7 lt 8	12	1.6%	96.7%	7 lt 8	13	10.6%	80.5%
8 lt 9	14	1.9%	98.5%	8 lt 9	8	6.5%	87.0%
9 lt 10	4	0.5%	99.1%	9 lt 10	3	2.4%	89.4%
10 lt 11	2	0.3%	99.3%	10 lt 11	5	4.1%	93.5%
11 lt 12	0	0.0%	99.3%	11 lt 12	3	2.4%	95.9%
12 lt 13	1	0.1%	99.5%	12 lt 13	1	0.8%	96.7%
13 lt 14	0	0.0%	99.5%	13 lt 14	1	0.8%	97.6%
14 lt 15	1	0.1%	99.6%	14 lt 15	0	0.0%	97.6%
15 lt 16	1	0.1%	99.7%	15 lt 16	0	0.0%	97.6%
16 lt 17	2	0.3%	100.0%	16 lt 17	0	0.0%	97.6%
Total	**752**	**100.0%**		17 lt 18	2	1.6%	99.2%
				18 lt 19	0	0.0%	99.2%
				19 lt 20	0	0.0%	99.2%
				20 lt 21	0	0.0%	99.2%
				21 lt 22	0	0.0%	99.2%
				22 lt 23	0	0.0%	99.2%
				23 lt 24	0	0.0%	99.2%
				24 lt 25	1	0.8%	100.0%
				Total	**123**	**100.0%**	

Note: This table includes all inmates with only non-consecutive prison sentences and a top-offense (i.e., the offense with the longest sentence) other than a violent, sex or drug offense. Time served includes any local jail time served on a sentence prior to entering NYSDOCS and runs through an inmate's first release on that sentence from DOCS (i.e., it excludes any additional time served on a sentence by an inmate returned to prison on technical violations). There are also a certain percentage of inmates included in this table whose NYSDOCS sentence appears to have been credited with time served on concurrent sentences imposed by courts in other states or by federal courts; time served was not adjusted for these cases because the amount of time served in other jurisdictions is unknown. With respect to second felons, time served was capped at the maximum allowable sentence for those whose time served exceeded the maximum; among the reasons for this occurrence was time owed on prior NYSDOCS prison sentences.

Sources: NYS State Department of Correctional Services data; table prepared by the NYS Division of Criminal Justice Services.

Chart C-1B

Non-Violent Class C Felony Offenders With Non-Consecutive Sentences
Released January 1985 Through December 2007: Time Served by Crime Type

Time Served: Years	First-Felony Offenders			Time Served: Years	Second-Felony Offenders		
	Number of Cases	Percent Distribution	Cumulative Percent		Number of Cases	Percent Distribution	Cumulative Percent
All Offenses				**All Offenses**			
0 lt 1	314	12.1%	12.1%	0 lt 1	12	1.7%	1.7%
1 lt 2	767	29.7%	41.8%	1 lt 2	79	10.9%	12.5%
2 lt 3	446	17.2%	59.0%	2 lt 3	111	15.3%	27.8%
3 lt 4	331	12.8%	71.8%	3 lt 4	152	20.9%	48.7%
4 lt 5	207	8.0%	79.9%	4 lt 5	95	13.1%	61.8%
5 lt 6	174	6.7%	86.6%	5 lt 6	90	12.4%	74.1%
6 lt 7	86	3.3%	89.9%	6 lt 7	69	9.5%	83.6%
7 lt 8	60	2.3%	92.2%	7 lt 8	38	5.2%	88.9%
8 lt 9	43	1.7%	93.9%	8 lt 9	18	2.5%	91.3%
9 lt 10	83	3.2%	97.1%	9 lt 10	29	4.0%	95.3%
10 lt 11	63	2.4%	99.5%	10 lt 11	17	2.3%	97.7%
11 lt 12	8	0.3%	99.8%	11 lt 12	9	1.2%	98.9%
12 lt 13	1	0.0%	99.9%	12 lt 13	3	0.4%	99.3%
13 lt 14	1	0.0%	99.9%	13 lt 14	3	0.4%	99.7%
14 lt 15	1	0.0%	100.0%	14 lt 15	1	0.1%	99.9%
15 lt 16	1	0.0%	100.0%	15 lt 16	1	0.1%	100.0%
Total	**2,586**	**100.0%**		**Total**	**727**	**100.0%**	
Excluding Manslaughter 2nd				**Excluding Manslaughter 2nd**			
0 lt 1	294	20.1%	20.1%	0 lt 1	12	2.6%	2.6%
1 lt 2	612	41.8%	61.9%	1 lt 2	76	16.3%	18.9%
2 lt 3	271	18.5%	80.5%	2 lt 3	106	22.7%	41.6%
3 lt 4	143	9.8%	90.2%	3 lt 4	108	23.2%	64.8%
4 lt 5	62	4.2%	94.5%	4 lt 5	64	13.7%	78.5%
5 lt 6	45	3.1%	97.5%	5 lt 6	47	10.1%	88.6%
6 lt 7	13	0.9%	98.4%	6 lt 7	27	5.8%	94.4%
7 lt 8	6	0.4%	98.8%	7 lt 8	9	1.9%	96.4%
8 lt 9	10	0.7%	99.5%	8 lt 9	6	1.3%	97.6%
9 lt 10	3	0.2%	99.7%	9 lt 10	6	1.3%	98.9%
10 lt 11	4	0.3%	100.0%	10 lt 11	4	0.9%	99.8%
11 lt 12	0	0.0%	NA	11 lt 12	1	0.2%	100.0%
12 lt 13	0	0.0%	NA	12 lt 13	0	0.0%	NA
13 lt 14	0	0.0%	NA	13 lt 14	0	0.0%	NA
14 lt 15	0	0.0%	NA	14 lt 15	0	0.0%	NA
15 lt 16	0	0.0%	NA	15 lt 16	0	0.0%	NA
Total	**1,463**	**100.0%**		**Total**	**466**	**100.0%**	

Continued on next page.

Chart C-1B

Non-Violent Class C Felony Offenders With Non-Consecutive Sentences
Released January 1985 Through December 2007: Time Served by Crime Type

Time Served: Years	First-Felony Offenders			Time Served: Years	Second-Felony Offenders		
	Number of Cases	Percent Distribution	Cumulative Percent		Number of Cases	Percent Distribution	Cumulative Percent
Manslaughter 2nd Only				**Manslaughter 2nd Only**			
0 lt 1	20	1.8%	1.8%	0 lt 1	0	0.0%	0.0%
1 lt 2	155	13.8%	15.6%	1 lt 2	3	1.1%	1.1%
2 lt 3	175	15.6%	31.2%	2 lt 3	5	1.9%	3.1%
3 lt 4	188	16.7%	47.9%	3 lt 4	44	16.9%	19.9%
4 lt 5	145	12.9%	60.8%	4 lt 5	31	11.9%	31.8%
5 lt 6	129	11.5%	72.3%	5 lt 6	43	16.5%	48.3%
6 lt 7	73	6.5%	78.8%	6 lt 7	42	16.1%	64.4%
7 lt 8	54	4.8%	83.6%	7 lt 8	29	11.1%	75.5%
8 lt 9	33	2.9%	86.6%	8 lt 9	12	4.6%	80.1%
9 lt 10	80	7.1%	93.7%	9 lt 10	23	8.8%	88.9%
10 lt 11	59	5.3%	98.9%	10 lt 11	13	5.0%	93.9%
11 lt 12	8	0.7%	99.6%	11 lt 12	8	3.1%	96.9%
12 lt 13	1	0.1%	99.7%	12 lt 13	3	1.1%	98.1%
13 lt 14	1	0.1%	99.8%	13 lt 14	3	1.1%	99.2%
14 lt 15	1	0.1%	99.9%	14 lt 15	1	0.4%	99.6%
15 lt 16	1	0.1%	100.0%	15 lt 16	1	0.4%	100.0%
Total	**1,123**	**100.0%**		**Total**	**261**	**100.0%**	

Note: This table includes all inmates with only non-consecutive prison sentences and a top-offense (i.e., the offense with the longest sentence) other than a violent, sex or drug offense. Time served includes any local jail time served on a sentence prior to entering NYSDOCS and runs through an inmate's first release on that sentence from DOCS (i.e., it excludes any additional time served on a sentence by an inmate returned to prison on technical violations). There are also a certain percentage of inmates included in this table whose NYSDOCS sentence appears to have been credited with time served on concurrent sentences imposed by courts in other states or by federal courts; time served was not adjusted for these cases because the amount of time served in other jurisdictions is unknown. With respect to second felons, time served was capped at the maximum allowable sentence for those whose time served exceeded the maximum; among the reasons for this occurrence was time owed on prior NYSDOCS prison sentences.

Sources: NYS State Department of Correctional Services data; table prepared by the NYS Division of Criminal Justice Services.

Chart C-2

Non-Violent Class D and E Felony Offenders With Non-Consecutive Sentences Released January 1985 Through December 2007: Time Served by Offense Class

Time Served: Years	First-Felony Offenders			Time Served: Years	Second-Felony Offenders		
	Number of Cases	Percent Distribution	Cumulative Percent		Number of Cases	Percent Distribution	Cumulative Percent
Class D Felony				**Class D Felony**			
0 lt 1	3,868	26.7%	26.7%	0 lt 1	908	4.9%	4.9%
1 lt 2	7,228	49.9%	76.6%	1 lt 2	4,915	26.3%	31.2%
2 lt 3	2,288	15.8%	92.4%	2 lt 3	7,484	40.0%	71.2%
3 lt 4	667	4.6%	97.0%	3 lt 4	3,425	18.3%	89.5%
4 lt 5	356	2.5%	99.5%	4 lt 5	1,399	7.5%	97.0%
5 lt 6	50	0.3%	99.8%	5 lt 6	395	2.1%	99.1%
6 lt 7	19	0.1%	100.0%	6 lt 7	113	0.6%	99.7%
7 lt 8	5	0.0%	100.0%	7 lt 8	50	0.3%	100.0%
Total	**14,481**	**100.0%**		**Total**	**18,689**	**100.0%**	
Class E Felony				**Class E Felony**			
0 lt 1	3,628	24.8%	24.8%	0 lt 1	1,523	4.9%	4.9%
1 lt 2	8,176	55.9%	80.7%	1 lt 2	20,951	67.5%	72.4%
2 lt 3	2,582	17.7%	98.4%	2 lt 3	6,743	21.7%	94.1%
3 lt 4	213	1.5%	99.8%	3 lt 4	1,686	5.4%	99.5%
4 lt 5	26	0.2%	100.0%	4 lt 5	151	0.5%	100.0%
Total	**14,625**	**100.0%**		**Total**	**31,054**	**100.0%**	

Note: This table includes all inmates with only non-consecutive prison sentences and a top-offense (i.e., the offense with the longest sentence) other than a violent, sex or drug offense. Time served includes any local jail time served on a sentence prior to entering NYSDOCS and runs through an inmate's first release on that sentence from DOCS (i.e., it excludes any additional time served on a sentence by an inmate returned to prison on technical violations). There are also a certain percentage of inmates included in this table whose NYSDOCS sentence appears to have been credited with time served on concurrent sentences imposed by courts in other states or by federal courts; time served was not adjusted for these cases because the amount of time served in other jurisdictions is unknown. With respect to second felons, time served was capped at the maximum allowable sentence for those whose time served exceeded the maximum; among the reasons for this occurrence was time owed on prior NYSDOCS prison sentences.

Sources: NYS State Department of Correctional Services data; table prepared by the NYS Division of Criminal Justice Services.

Chart C-3

Class B First Felons - Sentence Length and Time Served For Non-Violent, Non-Drug, Non-Sex Offenses, 1985-2007 Releases

RELEASE TYPE	N	Percent	Frequency Distributions for Time Served (years)															
			0 / lt 1	1 / lt 2	2 / lt 3	3 / lt 4	4 / lt 5	5 / lt 6	6 / lt 7	7 / lt 8	8 /lt 9	9 /lt 10	10 /lt 11	11 /lt 12	12 /lt 13	13 /lt 14	14 /lt 15	15 /lt 16	16 /lt 17
Sentenced to 1-3																			
Shock	16	5.0%	15	1	0	0													
Merit	7	2.2%	7	0	0	0													
Parole	237	74.8%	112	124	1	0													
Conditional Release	56	17.7%	3	41	12	0													
Max Expiration	1	0.3%	0	0	0	1													
Total	**317**	**100.0%**	**137**	**166**	**13**	**1**													
Percent			**43.2%**	**52.4%**	**4.1%**	**0.3%**													
Cumulative Percent			**43.2%**	**95.6%**	**99.7%**	**100.0%**													
Sentenced to 2-6																			
Shock	27	13.0%	17	10	0	0	0	0											
Merit	36	17.3%	1	34	1	0	0	0											
Parole	131	63.0%	10	57	47	17	0	0											
Conditional Release	13	6.3%	0	0	0	8	4	1											
Max Expiration	1	0.5%	0	0	0	0	0	1											
Total	**208**	**100.0%**	**28**	**101**	**48**	**25**	**4**	**2**											
Percent			**13.5%**	**48.6%**	**23.1%**	**12.0%**	**1.9%**	**1.0%**											
Cumulative Percent			**13.5%**	**62.0%**	**85.1%**	**97.1%**	**99.0%**	**100.0%**											
Sentenced to 3-9																			
Shock	19	14.4%	5	13	1	0	0	0	0										
Merit	22	16.7%	0	0	21	0	1	0	0										
Parole	77	58.3%	0	1	34	32	5	5	0										
Conditional Release	14	10.6%	0	0	0	0	0	12	2										
Max Expiration	0	0.0%	0	0	0	0	0	0	0										
Total	**132**	**100.0%**	**5**	**14**	**56**	**32**	**6**	**17**	**2**										
Percent			**3.8%**	**10.6%**	**42.4%**	**24.2%**	**4.5%**	**12.9%**	**1.5%**										
Cumulative Percent			**3.8%**	**14.4%**	**56.8%**	**81.1%**	**85.6%**	**98.5%**	**100.0%**										
Sentenced to 4-12																			
Shock	1	1.4%	0	0	1	0	0	0	0	0	0								
Merit	19	26.4%	0	0	0	19	0	0	0	0	0								
Parole	47	65.3%	2	0	2	19	11	9	2	2	0								
Conditional Release	5	6.9%	0	0	0	0	0	0	0	4	1								
Max Expiration	0	0.0%	0	0	0	0	0	0	0	0	0								
Total	**72**	**100.0%**	**2**	**0**	**3**	**38**	**11**	**9**	**2**	**6**	**1**								
Percent			**2.8%**	**0.0%**	**4.2%**	**52.8%**	**15.3%**	**12.5%**	**2.8%**	**8.3%**	**1.4%**								
Cumulative Percent			**2.8%**	**2.8%**	**6.9%**	**59.7%**	**75.0%**	**87.5%**	**90.3%**	**98.6%**	**100.0%**								

Continued on next page.

Chart C-3

Class B First Felons - Sentence Length and Time Served For Non-Violent, Non-Drug, Non-Sex Offenses, 1985-2007 Releases

			Frequency Distributions for Time Served (years)																
RELEASE TYPE	**N**	**Percent**	**0 /lt 1**	**1 /lt 2**	**2 /lt 3**	**3 /lt 4**	**4 /lt 5**	**5 /lt 6**	**6 /lt 7**	**7 /lt 8**	**8 /lt 9**	**9 /lt 10**	**10 /lt 11**	**11 /lt 12**	**12 /lt 13**	**13 /lt 14**	**14 /lt 15**	**15 /lt 16**	**16 /lt 17**
Sentenced to 5-15																			
Shock	0	0.0%	0	0	0	0	0	0	0	0	0	0							
Merit	13	37.1%	0	0	0	0	13	0	0	0	0	0							
Parole	20	57.1%	0	0	1	0	6	11	2	0	0	0							
Conditional Release	2	5.7%	0	0	0	0	0	0	0	0	0	2							
Max Expiration	0	0.0%	0	0	0	0	0	0	0	0	0	0							
Total	**35**	**100.0%**	**0**	**0**	**1**	**0**	**19**	**11**	**2**	**0**	**0**	**2**							
Percent			**0.0%**	**0.0%**	**2.9%**	**0.0%**	**54.3%**	**31.4%**	**5.7%**	**0.0%**	**0.0%**	**5.7%**							
Cumulative Percent			**0.0%**	**0.0%**	**2.9%**	**2.9%**	**57.1%**	**88.6%**	**94.3%**	**94.3%**	**94.3%**	**100.0%**							
Sentenced to 6-18																			
Shock	0	0.0%	0	0	0	0	0	0	0	0	0	0	0	0					
Merit	5	38.5%	0	0	0	0	1	4	0	0	0	0	0	0					
Parole	7	53.8%	0	0	0	0	1	2	4	0	0	0	0	0					
Conditional Release	1	7.7%	0	0	0	0	0	0	0	0	0	0	0	1					
Max Expiration	0	0.0%	0	0	0	0	0	0	0	0	0	0	0	0					
Total	**13**	**100.0%**	**0**	**0**	**0**	**0**	**2**	**6**	**4**	**0**	**0**	**0**	**0**	**1**					
Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**15.4%**	**46.2%**	**30.8%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**7.7%**					
Cumulative Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**15.4%**	**61.5%**	**92.3%**	**92.3%**	**92.3%**	**92.3%**	**92.3%**	**100.0%**					
Sentenced to 7-21																			
Shock	0	0.0%	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0		
Merit	1	11.1%	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0		
Parole	7	77.8%	0	0	0	0	0	0	3	1	1	1	1	0	0	0	0		
Conditional Release	1	11.1%	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1		
Max Expiration	0	0.0%	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0		
Total	**9**	**100.0%**	**0**	**0**	**0**	**0**	**0**	**1**	**3**	**1**	**1**	**1**	**1**	**0**	**0**	**0**	**1**		
Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**11.1%**	**33.3%**	**11.1%**	**11.1%**	**11.1%**	**11.1%**	**0.0%**	**0.0%**	**0.0%**	**11.1%**		
Cumulative Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**11.1%**	**44.4%**	**55.6%**	**66.7%**	**77.8%**	**88.9%**	**88.9%**	**88.9%**	**88.9%**	**100.0%**		
Sentenced to 8 1/3-25																			
Shock	0	0.0%	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Merit	4	18.2%	0	0	0	0	0	0	3	1	0	0	0	0	0	0	0	0	0
Parole	16	72.7%	0	0	0	0	1	0	0	0	11	1	1	0	1	0	0	1	0
Conditional Release	2	9.1%	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
Max Expiration	0	0.0%	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total	**22**	**100.0%**	0	0	0	0	1	0	3	1	11	1	1	0	1	0	0	1	2
Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**4.5%**	**0.0%**	**13.6%**	**4.5%**	**50.0%**	**4.5%**	**4.5%**	**0.0%**	**4.5%**	**0.0%**	**0.0%**	**4.5%**	**9.1%**
Cumulative Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**4.5%**	**4.5%**	**18.2%**	**22.7%**	**72.7%**	**77.3%**	**81.8%**	**81.8%**	**86.4%**	**86.4%**	**86.4%**	**90.9%**	**100.0%**

Note: This table includes all inmates with only non-consecutive sentences and a top-offense (i.e., the offense with the longest sentence) other than a violent, sex or drug offense – with the following exceptions. It excludes inmates: (1) granted early release to the custody of Immigration and Customs Enforcement (ICE) prior to the completion of their minimum sentence for the purpose of deportation pursuant to Executive Law §259-i(2)(d); or (2) with time-served figures that appear to exceed the maximum allowable sentence. With respect to this latter exclusion factor, an examination of inmate files indicated that this often occurred because inmates owed time on prior NYSDOCS sentences. Time served includes any local jail time served on the sentence prior to entering NYSDOCS and runs through the inmate's first release on the sentence from NYSDOCS (i.e., it excludes additional time served on sentences by inmates returned to prison on technical violations). Also, there are a certain percentage of inmates included in this table whose NYSDOCS sentence appears to have been credited with time served on concurrent sentences imposed by courts in other states or by federal courts; time served was not adjusted for these cases because the amount of time served in other jurisdictions is unknown.

Source: NYS Department of Correctional Services data; table prepared by the NYS Division of Criminal Justice Services.

Chart C-4

Class B Second Felons - Sentence Length and Time Served For Non-Violent, Non-Drug, Non-Sex Offenses, 1985-2007 Releases

RELEASE TYPE	N	Percent	Frequency Distributions for Time Served (years)																				
			0 / lt 1	1 / lt 2	2 / lt 3	3 / lt 4	4 / lt 5	5 / lt 6	6 / lt 7	7 / lt 8	8 /lt 9	9 /lt 10	10 /lt 11	11 /lt 12	12 /lt 13	13 /lt 14	14 /lt 15	15 /lt 16	16 /lt 17	17 /lt 18	18 /lt 24	24
Sentenced to 4½-9																							
Shock	1	2.2%	0	1	0	0	0	0	0	0													
Merit	18	39.1%	0	1	0	16	1	0	0	0													
Parole	17	37.0%	0	0	0	0	16	0	1	0													
Conditional Release	10	21.7%	0	0	0	0	1	3	4	2													
Max Expiration	0	0.0%	0	0	0	0	0	0	0	0													
Total	46	**100.0%**	**0**	**2**	**0**	**16**	**18**	**3**	**5**	**2**													
Percent			**0.0%**	**4.3%**	**0.0%**	**34.8%**	**39.1%**	**6.5%**	**10.9%**	**4.3%**													
Cumulative Percent			**0.0%**	**4.3%**	**4.3%**	**39.1%**	**78.3%**	**84.8%**	**95.7%**	**100.0%**													
Sentenced to 5-10																							
Shock	0	0.0%	0	0	0	0	0	0	0	0													
Merit	11	44.0%	0	0	0	0	10	1	0	0													
Parole	11	44.0%	0	0	0	1	4	6	0	0													
Conditional Release	3	12.0%	0	0	0	0	0	0	2	1													
Max Expiration	0	0.0%	0	0	0	0	0	0	0	0													
Total	25	**100.0%**	**0**	**0**	**0**	**1**	**14**	**7**	**2**	**1**													
Percent			**0.0%**	**0.0%**	**0.0%**	**4.0%**	**56.0%**	**28.0%**	**8.0%**	**4.0%**													
Cumulative Percent			**0.0%**	**0.0%**	**0.0%**	**4.0%**	**60.0%**	**88.0%**	**96.0%**	**100.0%**													
Sentenced to 6-12																							
Shock	0	0.0%	0	0	0	0	0	0	0	0	0	0	0										
Merit	0	0.0%	0	0	0	0	0	0	0	0	0	0	0										
Parole	8	72.7%	0	0	0	0	0	4	1	3	0	0	0										
Conditional Release	3	27.3%	0	0	0	0	0	0	0	1	1	0	1										
Max Expiration	0	0.0%	0	0	0	0	0	0	0	0	0	0	0										
Total	11	**100.0%**	**0**	**0**	**0**	**0**	**0**	**4**	**1**	**4**	**1**	**0**	**1**										
Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**36.4%**	**9.1%**	**36.4%**	**9.1%**	**0.0%**	**9.1%**										
Cumulative Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**36.4%**	**45.5%**	**81.8%**	**90.9%**	**90.9%**	**100.0%**										
Sentenced to 8-16																							
Shock	0	0.0%	0	0	0	0	0	0	0	0	0	0	0										
Merit	1	14.3%	0	0	0	0	0	0	1	0	0	0	0										
Parole	5	71.4%	0	0	0	0	0	0	0	2	3	0	0										
Conditional Release	1	14.3%	0	0	0	0	0	0	0	0	0	0	1										
Max Expiration	0	0.0%	0	0	0	0	0	0	0	0	0	0	0										
Total	7	**100.0%**	**0**	**0**	**0**	**0**	**0**	**0**	**1**	**2**	**3**	**0**	**1**										
Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**14.3%**	**28.6%**	**42.9%**	**0.0%**	**14.3%**										
Cumulative Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**14.3%**	**42.9%**	**85.7%**	**85.7%**	**100.0%**										
Sentenced to 12½-25																							
Shock	0	0.0%	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Merit	1	10.0%	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0
Parole	7	70.0%	0	0	0	0	0	0	0	1	0	0	2	0	2	1	1	0	0	0	0	0	0
Conditional Release	2	20.0%	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	
Max Expiration	0	0.0%	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total	10	**100.0%**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**1**	**0**	**0**	**3**	**0**	**2**	**1**	**1**	**0**	**0**	**1**	**0**	**1**	
Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**10.0%**	**0.0%**	**0.0%**	**30.0%**	**0.0%**	**20.0%**	**10.0%**	**10.0%**	**0.0%**	**0.0%**	**10.0%**	**0.0%**	**10.0%**	
Cumulative Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**10.0%**	**10.0%**	**10.0%**	**40.0%**	**40.0%**	**60.0%**	**70.0%**	**80.0%**	**80.0%**	**80.0%**	**90.0%**	**90.0%**	**100.0%**	

Note: This table includes all inmates with only non-consecutive sentences and a top-offense (i.e., the offense with the longest sentence) other than a violent, sex or drug offense – with the following exceptions. It excludes inmates: (1) granted early release to the custody of Immigration and Customs Enforcement (ICE) prior to the completion of their minimum sentence for the purpose of deportation pursuant to Executive Law §259-i(2)(d); or (2) with time-served figures that appear to exceed the maximum allowable sentence. With respect to this latter exclusion factor, an examination of inmate files indicated that this often occurred because inmates owed time on prior NYSDOCS sentences. Time served includes any local jail time served on the sentence prior to entering NYSDOCS and runs through the inmate's first release on the sentence from NYSDOCS (i.e., it excludes additional time served on sentences by inmates returned to prison on technical violations). Also, there are a certain percentage of inmates included in this table whose NYSDOCS sentence appears to have been credited with time served on concurrent sentences imposed by courts in other states or by federal courts; time served was not adjusted for these cases because the amount of time served in other jurisdictions is unknown.

Source: NYS Department of Correctional Services data; table prepared by the NYS Division of Criminal Justice Services.

Chart C-5

Class C First Felons - Sentence Length and Time Served For Non-Violent, Non-Drug, Non-Sex Offenses, 1985-2007 Releases

			Frequency Distributions for Time Served														
RELEASE TYPE	**N**	**Percent**	**0 / lt 1**	**1 / lt 2**	**2 / lt 3**	**3 / lt 4**	**4 / lt 5**	**5 / lt 6**	**6 / lt 7**	**7 / lt 8**	**8 / lt 9**	**9 /lt 10**	**10 /lt 11**	**11 /lt 12**	**12 /lt 13**	**13 /lt 14**	**14 /lt 15**	**15 /t 16**
Sentenced to 1-3																		
Shock	28	4.2%	27	1	0													
Merit	19	2.8%	18	1	0													
Parole	423	62.9%	192	230	1													
Conditional Release	195	29.0%	2	164	29													
Max Expiration	7	1.0%	0	0	7													
Total	**672**	**100.0%**	**239**	**396**	**37**													
Percent			**35.6%**	**58.9%**	**5.5%**													
Cumulative Percent			**35.6%**	**94.5%**	**100.0%**													
Sentenced to 1½-4½																		
Shock	11	5.5%	5	6	0	0	0											
Merit	10	5.0%	0	10	0	0	0											
Parole	118	59.3%	0	97	20	1	0											
Conditional Release	59	29.6%	0	0	47	12	0											
Max Expiration	1	0.5%	0	0	0	0	1											
Total	**199**	**100.0%**	**5**	**113**	**67**	**13**	**1**											
Percent			**2.5%**	**56.8%**	**33.7%**	**6.5%**	**0.5%**											
Cumulative Percent			**2.5%**	**59.3%**	**93.0%**	**99.5%**	**100.0%**											
Sentenced to 2-6																		
Shock	23	5.1%	15	8	0	0	0	0	0									
Merit	48	10.6%	0	47	1	0	0	0	0									
Parole	255	56.3%	4	102	101	47	1	0	0									
Conditional Release	123	27.2%	0	1	4	92	23	3	0									
Max Expiration	4	0.9%	0	0	0	0	0	3	1									
Total	**453**	**100.0%**	**19**	**158**	**106**	**139**	**24**	**6**	**1**									
Percent			**4.2%**	**34.9%**	**23.4%**	**30.7%**	**5.3%**	**1.3%**	**0.2%**									
Cumulative Percent			**4.2%**	**39.1%**	**62.5%**	**93.2%**	**98.5%**	**99.8%**	**100.0%**									
Sentenced to 3-9																		
Shock	21	6.8%	15	5	1	0	0	0	0	0	0							
Merit	24	7.8%	0	0	23	1	0	0	0	0	0							
Parole	165	53.7%	2	1	73	57	22	10	0	0	0							
Conditional Release	96	31.3%	0	0	1	0	0	66	26	2	1							
Max Expiration	1	0.3%	0	0	0	0	0	0	0	0	1							
Total	**307**	**100.0%**	**17**	**6**	**98**	**58**	**22**	**76**	**26**	**2**	**2**							
Percent			**5.5%**	**2.0%**	**31.9%**	**18.9%**	**7.2%**	**24.8%**	**8.5%**	**0.7%**	**0.7%**							
Cumulative Percent			**5.5%**	**7.5%**	**39.4%**	**58.3%**	**65.5%**	**90.2%**	**98.7%**	**99.3%**	**100.0%**							

Continued on next page.

Chart C-5

Class C First Felons - Sentence Length and Time Served For Non-Violent, Non-Drug, Non-Sex Offenses, 1985-2007 Releases

			Frequency Distributions for Time Served															
RELEASE TYPE	**N**	**Percent**	**0 / lt 1**	**1 / lt 2**	**2 / lt 3**	**3 / lt 4**	**4 / lt 5**	**5 / lt 6**	**6 / lt 7**	**7 / lt 8**	**8 / lt 9**	**9 /lt 10**	**10 /lt 11**	**11 /lt 12**	**12 /lt 13**	**13 /lt 14**	**14 /lt 15**	**15 /lt 16**
Sentenced to 4-12																		
Shock	0	0.0%	0	0	0	0	0	0	0	0	0	0	0	0				
Merit	10	5.9%	0	0	0	10	0	0	0	0	0	0	0	0				
Parole	93	55.0%	1	1	3	34	29	17	3	5	0	0	0	0				
Conditional Release	64	37.9%	0	0	0	0	0	0	1	35	24	3	1	0				
Max Expiration	2	1.2%	0	0	0	0	0	0	0	0	0	0	0	2				
Total	**169**	**100.0%**	**1**	**1**	**3**	**44**	**29**	**17**	**4**	**40**	**24**	**3**	**1**	**2**				
Percent			**0.6%**	**0.6%**	**1.8%**	**26.0%**	**17.2%**	**10.1%**	**2.4%**	**23.7%**	**14.2%**	**1.8%**	**0.6%**	**1.2%**				
Cumulative Percent			**0.6%**	**1.2%**	**3.0%**	**29.0%**	**46.2%**	**56.2%**	**58.6%**	**82.2%**	**96.4%**	**98.2%**	**98.8%**	**100.0%**				
Sentenced to 5-15																		
Shock	0	0.0%	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Merit	8	2.8%	0	0	0	0	8	0	0	0	0	0	0	0	0	0	0	0
Parole	136	47.4%	1	0	0	0	35	51	22	9	15	3	0	0	0	0	0	0
Conditional Release	142	49.5%	0	0	0	0	0	1	1	0	0	72	61	6	0	1	0	0
Max Expiration	1	0.3%	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
Total	**287**	**100.0%**	**1**	**0**	**0**	**0**	**43**	**52**	**23**	**9**	**15**	**75**	**61**	**6**	**0**	**1**	**0**	**1**
Percent			**0.3%**	**0.0%**	**0.0%**	**0.0%**	**15.0%**	**18.1%**	**8.0%**	**3.1%**	**5.2%**	**26.1%**	**21.3%**	**2.1%**	**0.0%**	**0.3%**	**0.0%**	**0.3%**
Cumulative Percent			**0.3%**	**0.3%**	**0.3%**	**0.3%**	**15.3%**	**33.4%**	**41.5%**	**44.6%**	**49.8%**	**76.0%**	**97.2%**	**99.3%**	**99.3%**	**99.7%**	**99.7%**	**100.0%**

Note: This table includes all inmates with only non-consecutive sentences and a top-offense (i.e., the offense with the longest sentence) other than a violent, sex or drug offense – with the following exceptions. It excludes inmates: (1) granted early release to the custody of Immigration and Customs Enforcement (ICE) prior to the completion of their minimum sentence for the purpose of deportation pursuant to Executive Law §259-i(2)(d); or (2) with time-served figures that appear to exceed the maximum allowable sentence. With respect to this latter exclusion factor, an examination of inmate files indicated that this often occurred because inmates owed time on prior NYSDOCS sentences. Time served includes any local jail time served on the sentence prior to entering NYSDOCS and runs through the inmate's first release on the sentence from NYSDOCS (i.e., it excludes additional time served on sentences by inmates returned to prison on technical violations). Also, there are a certain percentage of inmates included in this table whose NYSDOCS sentence appears to have been credited with time served on concurrent sentences imposed by courts in other states or by federal courts; time served was not adjusted for these cases because the amount of time served in other jurisdictions is unknown.

Source: NYS Department of Correctional Services data; table prepared by the NYS Division of Criminal Justice Services.

Chart C-6

Class C Second Felons - Sentence Length and Time Served For Non-Violent, Non-Drug, Non-Sex Offenses, 1985-2007 Releases

RELEASE TYPE	N	Percent	Frequency Distributions for Time Served (years)														
			0 / lt 1	1 / lt 2	2 / lt 3	3 / lt 4	4 / lt 5	5 / lt 6	6 / lt 7	7 / lt 8	8 /lt 9	9 /lt 10	10 /lt 11	11 /lt 12	12 /lt 13	13 /lt 14	14 /lt 15	14 /lt 15
Sentenced to 3-6																		
Shock	16	6.2%	8	8	0	0	0	0	0									
Merit	30	11.6%	0	1	29	0	0	0	0									
Parole	101	39.1%	1	0	46	42	12	0	0									
Conditional Release	108	41.9%	1	1	1	66	29	8	2									
Max Expiration	3	1.2%	0	0	0	0	0	2	1									
Total	258	**100.0%**	**10**	**10**	**76**	**108**	**41**	**10**	**3**									
Percent			**3.9%**	**3.9%**	**29.5%**	**41.9%**	**15.9%**	**3.9%**	**1.2%**									
Cumulative Percent			**3.9%**	**7.8%**	**37.2%**	**79.1%**	**95.0%**	**98.8%**	**100.0%**									
Sentenced to 3½-7																		
Shock	5	12.5%	0	5	0	0	0	0										
Merit	3	7.5%	0	0	2	1	0	0										
Parole	17	42.5%	0	0	0	13	4	0										
Conditional Release	15	37.5%	0	1	0	0	12	2										
Max Expiration	0	0.0%	0	0	0	0	0	0										
Total	40	**100.0%**	**0**	**6**	**2**	**14**	**16**	**2**										
Percent			**0.0%**	**15.0%**	**5.0%**	**35.0%**	**40.0%**	**5.0%**										
Cumulative Percent			**0.0%**	**15.0%**	**20.0%**	**55.0%**	**95.0%**	**100.0%**										
Sentenced to 4-8																		
Shock	1	1.1%	0	1	0	0	0	0	0	0								
Merit	9	9.8%	0	0	0	9	0	0	0	0								
Parole	28	30.4%	0	0	0	14	12	1	1	0								
Conditional Release	52	56.5%	0	0	0	0	0	46	4	2								
Max Expiration	2	2.2%	0	0	0	0	0	0	0	2								
Total	92	**100.0%**	**0**	**1**	**0**	**23**	**12**	**47**	**5**	**4**								
Percent			**0.0%**	**1.1%**	**0.0%**	**25.0%**	**13.0%**	**51.1%**	**5.4%**	**4.3%**								
Cumulative Percent			**0.0%**	**1.1%**	**1.1%**	**26.1%**	**39.1%**	**90.2%**	**95.7%**	**100.0%**								
Sentenced to 4½-9																		
Shock	0	0.0%	0	0	0	0	0	0	0	0	0							
Merit	2	5.9%	0	0	0	2	0	0	0	0	0							
Parole	15	44.1%	0	0	0	0	9	4	1	0	1							
Conditional Release	16	47.1%	0	0	1	0	0	5	6	4	0							
Max Expiration	1	2.9%	0	0	0	0	0	0	0	0	1							
Total	34	**100.0%**	**0**	**0**	**1**	**2**	**9**	**9**	**7**	**4**	**2**							
Percent			**0.0%**	**0.0%**	**2.9%**	**5.9%**	**26.5%**	**26.5%**	**20.6%**	**11.8%**	**5.9%**							
Cumulative Percent			**0.0%**	**0.0%**	**2.9%**	**8.8%**	**35.3%**	**61.8%**	**82.4%**	**94.1%**	**100.0%**							

Continued on next page.

Chart C-6

Class C Second Felons - Sentence Length and Time Served For Non-Violent, Non-Drug, Non-Sex Offenses, 1985-2007 Releases

			Frequency Distributions for Time Served (years)															
RELEASE TYPE	**N**	**Percent**	**0 /lt 1**	**1 /lt 2**	**2 /lt 3**	**3 /lt 4**	**4 /lt 5**	**5 /lt 6**	**6 /lt 7**	**7 /lt 8**	**8 /lt 9**	**9 /lt 10**	**10 /lt 11**	**11 /lt 12**	**12 /lt 13**	**13 /lt 14**	**14 /lt 15**	**14 /lt 15**
Sentenced to 5-10																		
Shock	0	0.0%	0	0	0	0	0	0	0	0	0	0						
Merit	4	6.7%	0	0	0	0	4	0	0	0	0	0						
Parole	18	30.0%	0	0	0	0	7	5	6	0	0	0						
Conditional Release	38	63.3%	0	0	0	0	0	0	30	4	2	2						
Max Expiration	0	0.0%	0	0	0	0	0	0	0	0	0	0						
Total	60	**100.0%**	**0**	**0**	**0**	**0**	**11**	**5**	**36**	**4**	**2**	**2**						
Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**18.3%**	**8.3%**	**60.0%**	**6.7%**	**3.3%**	**3.3%**						
Cumulative Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**18.3%**	**26.7%**	**86.7%**	**93.3%**	**96.7%**	**100.0%**						
Sentenced to 6-12																		
Shock	0	0.0%	0	0	0	0	0	0	0	0	0	0	0	0	0			
Merit	4	9.8%	0	0	0	0	1	3	0	0	0	0	0	0	0			
Parole	21	51.2%	0	0	0	0	0	8	10	3	0	0	0	0	0			
Conditional Release	15	36.6%	0	0	0	0	0	0	0	6	6	2	0	1	0			
Max Expiration	1	2.4%	0	0	0	0	0	0	0	0	0	0	0	0	1			
Total	41	100.0%	0	0	0	0	1	11	10	9	6	2	0	1	1			
Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**2.4%**	**26.8%**	**24.4%**	**22.0%**	**14.6%**	**4.9%**	**0.0%**	**2.4%**	**2.4%**			
Cumulative Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**2.4%**	**29.3%**	**53.7%**	**75.6%**	**90.2%**	**95.1%**	**95.1%**	**97.6%**	**100.0%**			
Sentenced to 7½-15																		
Shock	0	0.0%	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
Merit	0	0.0%	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
Parole	18	31.6%	0	0	0	0	0	0	0	9	3	6	0	0	0	0	0	
Conditional Release	39	68.4%	0	0	0	0	0	0	0	0	0	14	13	6	2	3	1	
Max Expiration	0	0.0%	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
Total	57	100.0%	0	0	0	0	0	0	0	9	3	20	13	6	2	3	1	
Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**15.8%**	**5.3%**	**35.1%**	**22.8%**	**10.5%**	**3.5%**	**5.3%**	**1.8%**	
Cumulative Percent			**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**	**15.8%**	**21.1%**	**56.1%**	**78.9%**	**89.5%**	**93.0%**	**98.2%**	**100.0%**	

Note: This table includes all inmates with only non-consecutive sentences and a top-offense (i.e., the offense with the longest sentence) other than a violent, sex or drug offense – with the following exceptions. It excludes inmates: (1) granted early release to the custody of Immigration and Customs Enforcement (ICE) prior to the completion of their minimum sentence for the purpose of deportation pursuant to Executive Law §259-i(2)(d); or (2) with time-served figures that appear to exceed the maximum allowable sentence. With respect to this latter exclusion factor, an examination of inmate files indicated that this often occurred because inmates owed time on prior NYSDOCS sentences. Time served includes any local jail time served on the sentence prior to entering NYSDOCS and runs through the inmate's first release on the sentence from NYSDOCS (i.e., it excludes additional time served on sentences by inmates returned to prison on technical violations). Also, there are a certain percentage of inmates included in this table whose NYSDOCS sentence appears to have been credited with time served on concurrent sentences imposed by courts in other states or by federal courts; time served was not adjusted for these cases because the amount of time served in other jurisdictions is unknown.

Source: NYS Department of Correctional Services data; table prepared by the NYS Division of Criminal Justice Services.

APPENDIX D

COMPARISON OF PROPOSED DETERMINATE SENTENCE RANGES FOR NON-VIOLENT FELONY OFFENSES

Chart D-1
First-Felony Non-Violent, Non-Drug, Non-Sex Offender:
Current and Proposed Sentence Ranges

Felony Class	Range and Release Types	Current Indeterminate (in years)[a]		Proposed Determinate Sentence Models (in years)					
				Determinate Drug Model		Time-Served Model[b]		CR-Based Model[b]	
		Min	Max	Min	Max	Min	Max[c]	Min	Max[d]
	Sentence	**1 – 3**	**8⅓ – 25**	**1**	**9**	**1**	**10**	**1**	**16**
B	**Release Type**								
	■ Merit	0.8	6.9	0.7	6.4	–	7.1	–	11.4
	■ Parole	1.0	8.3	–	–	–	–	–	–
	■ CR	2.0	16.7	0.9	7.7	0.9	8.6	0.9	13.7
	Sentence	**1 – 3**	**5 – 15**	**1**	**5½**	**1**	**8[e]**	**1**	**12**
C	**Release Type**								
	■ Merit	0.8	4.2	0.7	3.9	–	5.7	–	8.6
	■ Parole	1.0	5.0	–	–	–	–	–	–
	■ CR	2.0	10.0	0.9	4.7	0.9	6.8	0.9	10.3
	Sentence	**1 – 3**	**2⅓ – 7**	**1**	**2½**	**1**	**5**	**1**	**5½**
D	**Release Type**								
	■ Merit	0.8	1.9	0.7	1.8	–	3.6	–	3.9
	■ Parole	1.0	2.3	–	–	–	–	–	–
	■ CR	2.0	4.7	0.9	2.1	0.9	4.3	0.9	4.7
	Sentence	**1 – 3**	**1⅓ – 4**	**1**	**1½**	**1**	**3½**	**1**	**3**
E	**Release Type**								
	■ Merit	0.8	1.1	0.7	1.1	–	2.5	–	2.1
	■ Parole	1.0	1.3	–	–	–	–	–	–
	■ CR	2.0	2.7	0.9	1.3	0.9	3.0	0.9	2.6

[a] When an inmate is released on parole or conditionally released on an indeterminate sentence, the inmate is under parole supervision until he or she reaches the maximum expiration date or receives a merit termination of sentence under Executive Law 259-j.

[b] Note that every determinate sentence would be followed by a post-release supervision period of 1-3 years to be specified by the judge at sentencing.

[c] Maximum sentence length was determined using time served data. Maximum sentence length was established by determining at what point in the range of monthly time-served data the cumulative percentage of cases reached 98%. This point was used to establish the proposed conditional (CR) point. The maximum sentence was determined by dividing that point by .857 – the point at which inmates become eligible for CR.

[d] Maximum sentence length was determined by setting the point of the proposed CR as close as possible to the indeterminate CR with one exception – the B felony maximum sentence was lowered because of the very small number of cases with time served greater than 16 years.

[e] Excludes the consideration of Manslaughter 2 cases.

Sources: NYS Department of Correctional Services data; table prepared by the NYS Division of Criminal Justice Services.

Chart D-2
Second-Felony Non-Violent, Non-Drug, Non-Sex Offender:
Current and Proposed Sentence Ranges

Felony Class	Range and Release Types	Current Indeterminate (in years)[a]		Proposed Determinate Sentence Models (in years)					
				Determinate Drug Model		Time-Served Model[b]		CR-Based Model[b]	
		Min	Max	Min	Max	Min[c]	Max[d]	Min	Max[e]
B	**Sentence**	**4 ½ – 9**	**12 ½ – 25**	**3½**	**12**	**5**	**17**	**5**	**16**
	Release Type								
	■ Merit	3.7	10.4	2.5	8.6	3.6	12.1	3.6	11.4
	■ Parole	4.5	12.5	–	–	–	–	–	–
	■ CR	6	16.7	3.0	10.3	4.3	14.6	4.3	13.7
C	**Sentence**	**3 – 6**	**7 ½ – 15**	**2**	**8**	**3½**	**10½[f]**	**3½**	**12**
	Release Type								
	■ Merit	2.5	6.2	1.4	5.8	2.5	7.5	2.5	8.6
	■ Parole	3.0	7.5	–	–	–	–	–	–
	■ CR	4.0	10.0	1.7	6.9	3.0	9.0	3.0	10.3
D	**Sentence**	**2 – 4**	**3 ½ – 7**	**1½**	**4**	**2½**	**6**	**2**	**5½**
	Release Type								
	■ Merit	1.7	2.9	1.1	2.8	1.8	4.3	1.4	3.9
	■ Parole	2.0	3.5	–	–	–	–	–	–
	■ CR	2.7	4.7	1.3	3.4	2.1	5.1	1.7	4.7
E	**Sentence**	**1½ – 3**	**2 – 4**	**1½**	**2**	**1½**	**3½**	**1½**	**3**
	Release Type								
	■ Merit	1.2	1.7	1.1	1.4	1.1	2.5	1.1	2.1
	■ Parole	1.5	2.0	–	–	–	–	–	–
	■ CR	2.0	2.7	1.3	1.7	1.3	3.0	1.3	2.6

[a] When an inmate is released on parole or conditionally released on an indeterminate sentence, the inmate is under parole supervision until he or she reaches the maximum expiration date or receives a merit termination of sentence under Executive Law 259-j.

[b] Note that every determinate sentence would be followed by a post-release supervision period of 1-3 years to be specified by the judge at sentencing.

[c] Minimum sentence length was determined by setting the point of the proposed merit release and CR as close as possible to the indeterminate merit release and parole release points, respectively.

[d] Maximum sentence length was determined using time served data. Maximum sentence length was established by determining at what point in the range of monthly time-served data the cumulative percentage of cases reached 98%. This point was used to establish the proposed conditional (CR) point. The maximum sentence was determined by dividing that point by .857 – the point at which inmates become eligible for CR.

[e] Maximum sentence length was determined by setting the point of the proposed CR as close as possible to the indeterminate CR with one exception – the B felony maximum sentence was lowered because of the very small number of cases with time served greater than 16 years.

[f] Excludes consideration of Manslaughter 2 cases.

Sources: NYS Department of Correctional Services data; table prepared by the NYS Division of Criminal Justice Services.

Chart D-3
First-Felony Non-Violent, Non-Drug, Non-Sex Offender:
Current and Proposed Maximum Sentences

Felony Class	Maximum Sentence and Release Type	Current Indeterminate Maximum Sentences and Release Points (in years)	Proposed Determinate Sentence Models: Maximum Sentence and Release Points (in years)		
			Determinate Drug Model	Time-Served Model[a]	CR-Based Model[b]
B	**Max Sentence**	**8⅓ – 25**	**9**	**10**	**16**
	Release Type				
	■ Merit	6.9	6.4	7.1	11.4
	■ Parole	8.3	–	–	–
	■ CR	16.7	7.7	8.6	13.7
C	**Max Sentence**	**5 – 15**	**5½**	**8[c]**	**12**
	Release Type				
	■ Merit	4.2	3.9	5.7	8.6
	■ Parole	5.0	–	–	–
	■ CR	10.0	4.7	6.8	10.3
D	**Max Sentence**	**2⅓ – 7**	**2½**	**5**	**5½**
	Release Type				
	■ Merit	1.9	1.8	3.6	3.9
	■ Parole	2.3	–	–	–
	■ CR	4.7	2.1	4.3	4.7
E	**Max Sentence**	**1⅓ – 4**	**1½**	**3½**	**3**
	Release Type				
	■ Merit	1.1	1.1	2.5	2.1
	■ Parole	1.3	–	–	–
	■ CR	2.7	1.3	3.0	2.6
All Cases: % With Time Served Falling At or Below the Point of Proposed CR					
■ B Felony: Overall (N=1,056)		–	96.2%	98.5%	99.5%
Excluding Consp. 2 (N=304)		–	97.7%	98.7%	99.7%
Conspiracy 2 Only (N=752)		–	95.6%	98.4%	99.5%
■ C Felony: Overall (N=2,586)		–	76.4%	89.3%	99.3%
Excluding Man. 2 (N=1,463)		–	93.2%	98.4%	99.9%
Manslaughter 2 (N=1,123)		–	54.5%	77.4%	98.3%
■ D Felony (N=14,481)		–	80.7%	97.9%	99.3%
■ E Felony (N=14,625)		–	49.2%	98.6%	95.6%
Cases With Maximum Sentences: % of Cohort That Served Less Than Proposed Determinate Merit Date					
■ B Felony: 8⅓ – 25 (N=22)		15.4%	15.4%	26.9%	84.6%
■ C Felony – Exc. Man 2: 5 – 15 (N=44)		22.7%	2.3%	65.9%	77.3%
■ D Felony: 2⅓ – 7 (N=1,034)		24.8%	25.5%	78.0%	78.7%
■ E Felony: 1⅓ – 4 (N=3,486)		12.4%	12.4%	62.4%	56.5%

[a] Maximum sentence length was determined using time served data. Maximum sentence length was established by determining at what point in the range of monthly time-served data the cumulative percentage of cases reached 98%. This point was used to establish the proposed conditional (CR) point. The maximum sentence was determined by dividing that point by .857 – the point at which inmates become eligible for CR.

[b] Maximum sentence length was determined by setting the point of the proposed CR as close as possible to the indeterminate CR with one exception – the B felony maximum sentence was lowered because of the very small number of cases with time served greater than 16 years.

[c] Excludes Manslaughter 2 cases.

Sources: NYS Department of Correctional Services data; table prepared by the NYS Division of Criminal Justice Services.

Chart D-4
Second-Felony Non-Violent, Non-Drug, Non-Sex Offender:
Current and Proposed Maximum Sentences

Felony Class	Maximum Sentence and Release Type	Current Indeterminate Maximum Sentences and Release Points (in years)	Proposed Determinate Sentence Models: Maximum Sentence and Release Points (in years)		
			Determinate Drug Model	Time-Served Model[a]	CR-Based Model[b]
B	**Max Sentence**	**12 ½ – 25**	**12**	**17**	**16**
	Release Type				
	■ Merit	10.4	8.6	12.1	11.4
	■ Parole	12.5	–	–	–
	■ CR	16.7	10.3	14.6	13.7
C	**Max Sentence**	**7½ – 15**	**8**	**10½[c]**	**12**
	Release Type				
	■ Merit	6.2	5.8	7.5	8.6
	■ Parole	7.5	–	–	–
	■ CR	10.0	6.9	9.0	10.3
D	**Max Sentence**	**3½ – 7**	**4**	**6**	**5½**
	Release Type				
	■ Merit	2.9	2.8	4.3	3.9
	■ Parole	3.5	–	–	–
	■ CR	4.7	3.4	5.1	4.7
E	**Max Sentence**	**2 – 4**	**2**	**3½**	**3**
	Release Type				
	■ Merit	1.7	1.4	2.5	2.1
	■ Parole	2.0	–	–	–
	■ CR	2.7	1.7	3.0	2.6
All Cases: % With Time Served Falling At or Below the Point of Proposed CR					
■ B Felony: Overall (N=178)		–	93.3%	98.3%	97.2%
	Excluding Consp. 2 (N=55)	–	96.4%	100.0%	98.2%
	Conspiracy 2 Only (N=123)	–	91.9%	97.6%	96.7%
■ C Felony: Overall (N=727)		–	83.4%	91.5%	96.8%
	Excluding Man. 2 (N=466)	–	94.4%	97.6%	99.6%
	Manslaughter 2 (N=261)	–	64.4%	80.5%	92.7%
■ D Felony (N=18,689)		–	81.9%	97.9%	96.0%
■ E Felony (N=31,054)		–	48.3%	97.7%	89.3%
Cases With Maximum Sentences: % of Cohort That Served Less Than Proposed Determinate Merit Date					
■ B Felony: 12½ – 25 (N=10)		30.0%	10.0%	40.0%	40.0%
■ C Felony – Exc. Man 2: 7½ – 15 (N=13)		0.0%	0.0%	23.1%	23.1%
■ D Felony: 3½ – 7 (N=1,588)		12.4%	3.5%	54.9%	63.2%
■ E Felony: 2 – 4 (N=5,257)		11.7%	5.4%	82.0%	50.1%

[a] Maximum sentence length was determined using time served data. Maximum sentence length was established by determining at what point in the range of monthly time-served data the cumulative percentage of cases reached 98%. This point was used to establish the proposed conditional (CR) point. The maximum sentence was determined by dividing that point by .857 – the point at which inmates become eligible for CR.

[b] Maximum sentence length was determined by setting the point of the proposed CR as close as possible to the indeterminate CR with one exception – the B felony maximum sentence was lowered because of the very small number of cases with time served greater than 16 years.

[c] Excludes Manslaughter 2 cases.

Sources: NYS Department of Correctional Services data; table prepared by the NYS Division of Criminal Justice Services.

Chart D-5 **Time-Served for Class-B Felony Offenses, DOCS 1985-2007 First-Release Cohort: Monthly and Cumulative Monthly Percent Distributions by Offender Status**

Class B First-Felony Offenders						Class B Second-Felony Offenders					
Time Served		N of	Percent Distri-	Cumulative	Model Maximum	Time Served		N of	Percent Distri-	Cumulative	Model Maximum
Years	Months	Cases	bution	Percent	CR Point*	Years	Months	Cases	bution	Percent	CR Point*
0.1	**1**	3	0.3%	0.3%		**0.8**	**9**	1	0.6%	0.6%	
0.2	**2**	10	0.9%	1.2%		**0.8**	**10**	1	0.6%	1.1%	
0.3	**3**	3	0.3%	1.5%		**0.9**	**11**	1	0.6%	1.7%	
0.3	**4**	2	0.2%	1.7%		**1.1**	**13**	2	1.1%	2.8%	
0.5	**6**	1	0.1%	1.8%		**1.2**	**14**	2	1.1%	3.9%	
0.6	**7**	10	0.9%	2.7%		**1.4**	**17**	3	1.7%	5.6%	
0.7	**8**	15	1.4%	4.2%		**1.5**	**18**	4	2.2%	7.9%	
0.8	**9**	10	0.9%	5.1%		**1.7**	**20**	1	0.6%	8.4%	
0.8	**10**	10	0.9%	6.1%		**1.8**	**22**	1	0.6%	9.0%	
0.9	**11**	117	11.1%	17.1%		**1.9**	**23**	3	1.7%	10.7%	
1.0	**12**	80	7.6%	24.7%		**2.0**	**24**	4	2.2%	12.9%	
1.1	**13**	16	1.5%	26.2%		**2.4**	**29**	4	2.2%	15.2%	
1.2	**14**	24	2.3%	28.5%		**2.5**	**30**	1	0.6%	15.7%	
1.3	**15**	16	1.5%	30.0%		**2.6**	**31**	3	1.7%	17.4%	
1.3	**16**	12	1.1%	31.2%		**2.8**	**33**	1	0.6%	18.0%	
1.4	**17**	40	3.8%	34.9%		**2.8**	**34**	2	1.1%	19.1%	
1.5	**18**	16	1.5%	36.5%		**2.9**	**35**	4	2.2%	21.3%	
1.6	**19**	31	2.9%	39.4%		**3.0**	**36**	3	1.7%	23.0%	
1.7	**20**	22	2.1%	41.5%		**3.1**	**37**	1	0.6%	23.6%	
1.8	**21**	8	0.8%	42.2%		**3.3**	**39**	2	1.1%	24.7%	
1.8	**22**	8	0.8%	43.0%		**3.3**	**40**	1	0.6%	25.3%	
1.9	**23**	91	8.6%	51.6%		**3.4**	**41**	2	1.1%	26.4%	
2.0	**24**	42	4.0%	55.6%		**3.7**	**44**	13	7.3%	33.7%	
2.1	**25**	5	0.5%	56.1%		**3.8**	**45**	2	1.1%	34.8%	
2.2	**26**	5	0.5%	56.5%		**3.8**	**46**	1	0.6%	35.4%	
2.3	**27**	11	1.0%	57.6%		**3.9**	**47**	4	2.2%	37.6%	
2.3	**28**	8	0.8%	58.3%		**4.0**	**48**	2	1.1%	38.8%	
2.4	**29**	34	3.2%	61.6%		**4.1**	**49**	8	4.5%	43.3%	
2.5	**30**	12	1.1%	62.7%		**4.2**	**50**	5	2.8%	46.1%	
2.6	**31**	9	0.9%	63.5%		**4.3**	**51**	1	0.6%	46.6%	
2.7	**32**	10	0.9%	64.5%		**4.3**	**52**	1	0.6%	47.2%	
2.8	**33**	14	1.3%	65.8%		**4.4**	**53**	13	7.3%	54.5%	
2.8	**34**	9	0.9%	66.7%		**4.5**	**54**	5	2.8%	57.3%	
2.9	**35**	42	4.0%	70.6%		**4.8**	**57**	1	0.6%	57.9%	
3.0	**36**	27	2.6%	73.2%		**4.9**	**59**	3	1.7%	59.6%	
3.1	**37**	6	0.6%	73.8%		**5.0**	**60**	7	3.9%	63.5%	
3.2	**38**	3	0.3%	74.1%		**5.3**	**63**	1	0.6%	64.0%	
3.3	**39**	25	2.4%	76.4%		**5.3**	**64**	1	0.6%	64.6%	
3.3	**40**	11	1.0%	77.5%		**5.4**	**65**	1	0.6%	65.2%	
3.4	**41**	6	0.6%	78.0%		**5.7**	**68**	1	0.6%	65.7%	
3.5	**42**	1	0.1%	78.1%		**5.8**	**69**	1	0.6%	66.3%	
3.6	**43**	7	0.7%	78.8%		**5.9**	**71**	7	3.9%	70.2%	
3.7	**44**	4	0.4%	79.2%		**6.0**	**72**	4	2.2%	72.5%	
3.8	**45**	3	0.3%	79.5%		**6.1**	**73**	1	0.6%	73.0%	
3.8	**46**	5	0.5%	79.9%		**6.3**	**75**	1	0.6%	73.6%	
3.9	**47**	29	2.7%	82.7%		**6.3**	**76**	1	0.6%	74.2%	
4.0	**48**	16	1.5%	84.2%		**6.4**	**77**	2	1.1%	75.3%	
4.1	**49**	13	1.2%	85.4%		**6.5**	**78**	1	0.6%	75.8%	
4.2	**50**	1	0.1%	85.5%		**6.6**	**79**	2	1.1%	77.0%	
4.3	**51**	5	0.5%	86.0%		**7.0**	**84**	2	1.1%	78.1%	
4.3	**52**	2	0.2%	86.2%		**7.1**	**85**	1	0.6%	78.7%	

Continued on next page

Chart D-5 **Time-Served for Class-B Felony Offenses, DOCS 1985-2007 First-Release Cohort: Monthly and Cumulative Monthly Percent Distributions by Offender Status**

Class B First-Felony Offenders

Time Served		N of	Percent Distri-	Cumulative	Model Maximum
Years	Months	Cases	bution	Percent	CR Point*
4.5	54	3	0.3%	86.5%	
4.6	55	3	0.3%	86.7%	
4.8	57	3	0.3%	87.0%	
4.8	58	3	0.3%	87.3%	
4.9	59	8	0.8%	88.1%	
5.0	60	15	1.4%	89.5%	
5.1	61	3	0.3%	89.8%	
5.2	62	1	0.1%	89.9%	
5.3	63	6	0.6%	90.4%	
5.4	65	2	0.2%	90.6%	
5.5	66	2	0.2%	90.8%	
5.6	67	1	0.1%	90.9%	
5.8	69	4	0.4%	91.3%	
5.8	70	4	0.4%	91.7%	
5.9	71	22	2.1%	93.8%	
6.0	72	7	0.7%	94.4%	
6.1	73	1	0.1%	94.5%	
6.2	74	1	0.1%	94.6%	
6.3	76	1	0.1%	94.7%	
6.4	77	1	0.1%	94.8%	
6.6	79	2	0.2%	95.0%	
6.7	80	1	0.1%	95.1%	
6.8	82	2	0.2%	95.3%	
6.9	83	6	0.6%	95.8%	
7.0	84	2	0.2%	96.0%	
7.3	88	1	0.1%	96.1%	
7.5	90	1	0.1%	96.2%	Determ. Drug
7.8	93	1	0.1%	96.3%	
7.9	95	8	0.8%	97.1%	
8.0	96	1	0.1%	97.2%	
8.3	99	3	0.3%	97.4%	
8.3	100	7	0.7%	98.1%	
8.4	101	2	0.2%	98.3%	
8.6	103	2	0.2%	98.5%	Time Served
8.9	107	1	0.1%	98.6%	
9.3	112	1	0.1%	98.7%	
9.6	115	1	0.1%	98.8%	
9.9	119	2	0.2%	99.0%	
10.3	124	1	0.1%	99.1%	
10.5	126	1	0.1%	99.1%	
10.8	130	1	0.1%	99.2%	
11.0	132	1	0.1%	99.3%	
11.9	143	1	0.1%	99.4%	
12.2	146	1	0.1%	99.5%	CR-Based
14.0	168	1	0.1%	99.6%	
14.9	179	1	0.1%	99.7%	
15.8	190	1	0.1%	99.8%	
16.6	199	1	0.1%	99.9%	
16.7	200	1	0.1%	100.0%	
Total		1,056	100.0%		

Class B Second-Felony Offenders

Time Served		N of	Percent Distri-	Cumulative	Model Maximum
Years	Months	Cases	bution	Percent	CR Point*
7.3	88	2	1.1%	79.8%	
7.4	89	1	0.6%	80.3%	
7.5	90	1	0.6%	80.9%	
7.8	93	1	0.6%	81.5%	
7.8	94	2	1.1%	82.6%	
7.9	95	4	2.2%	84.8%	
8.0	96	2	1.1%	86.0%	
8.1	97	2	1.1%	87.1%	
8.3	99	1	0.6%	87.6%	
8.3	100	1	0.6%	88.2%	
8.7	104	1	0.6%	88.8%	
8.9	107	1	0.6%	89.3%	
9.0	108	1	0.6%	89.9%	
9.3	112	1	0.6%	90.4%	
9.4	113	1	0.6%	91.0%	
10.0	120	1	0.6%	91.6%	
10.3	124	3	1.7%	93.3%	Determ. Drug
10.4	125	1	0.6%	93.8%	
10.7	128	1	0.6%	94.4%	
11.0	132	1	0.6%	94.9%	
11.1	133	1	0.6%	95.5%	
11.8	142	1	0.6%	96.1%	
12.5	150	1	0.6%	96.6%	
12.6	151	1	0.6%	97.2%	CR-Based
13.9	167	1	0.6%	97.8%	
14.4	173	1	0.6%	98.3%	Time Served
17.0	204	1	0.6%	98.9%	
17.4	209	1	0.6%	99.4%	
24.3	291	1	0.6%	100.0%	
Total		178	78.7%		

* See percent of time served falling at or below the point of proposed conditional release (CR) in Chart D-3 for first-felony offenders and Chart D-4 for second-felony offenders.

Sources: NYS Department of Correctional Services data; table prepared by the NYS Division of Criminal Justice Services.

Chart D-6 **Time-Served for Class-C Felony Offenses Other Than Manslaughter 2, DOCS 1985-2007**
First-Release Cohort: Monthly and Cumulative Monthly Percent Distributions by Offender Status

Class C First-Felony Offenders						Class C Second-Felony Offenders					
Time Served		N of	Percent Distri-	Cumulative	Model Maximum	Time Served		N of	Percent Distri-	Cumulative	Model Maximum
Years	Months	Cases	bution	Percent	CR Point*	Years	Months	Cases	bution	Percent	CR Point*
0.1	1	2	0.1%	0.1%		0.3	4	1	0.2%	0.2%	
0.2	2	2	0.1%	0.3%		0.6	7	1	0.2%	0.4%	
0.3	3	4	0.3%	0.5%		0.7	8	3	0.6%	1.1%	
0.3	4	3	0.2%	0.8%		0.8	9	2	0.4%	1.5%	
0.4	5	1	0.1%	0.8%		0.9	11	5	1.1%	2.6%	
0.5	6	4	0.3%	1.1%		1.1	13	5	1.1%	3.6%	
0.6	7	25	1.7%	2.8%		1.2	14	4	0.9%	4.5%	
0.7	8	14	1.0%	3.8%		1.3	15	4	0.9%	5.4%	
0.8	9	25	1.7%	5.5%		1.4	17	25	5.6%	10.9%	
0.8	10	15	1.0%	6.5%		1.5	18	8	1.7%	12.7%	
0.9	11	199	13.6%	20.1%		1.6	19	2	0.4%	13.1%	
1.0	12	123	8.4%	28.5%		1.7	20	4	0.9%	13.9%	
1.1	13	28	1.9%	30.4%		1.8	21	2	0.4%	14.4%	
1.2	14	25	1.7%	32.1%		1.9	23	21	4.5%	18.9%	
1.3	15	38	2.6%	34.7%		2.0	24	5	1.1%	20.0%	
1.3	16	24	1.6%	36.4%		2.1	25	2	0.4%	20.4%	
1.4	17	65	4.4%	40.8%		2.2	26	1	0.2%	20.6%	
1.5	18	33	2.3%	43.1%		2.3	27	2	0.4%	21.0%	
1.6	19	48	3.3%	46.3%		2.3	28	2	0.4%	21.5%	
1.7	20	19	1.3%	47.6%		2.4	29	28	6.0%	27.5%	
1.8	21	18	1.2%	48.9%		2.5	30	3	0.6%	28.1%	
1.8	22	12	0.8%	49.7%		2.6	31	12	2.6%	30.7%	
1.9	23	179	12.2%	61.9%		2.7	32	1	0.2%	30.9%	
2.0	24	69	4.7%	66.6%		2.8	33	3	0.6%	31.5%	
2.1	25	5	0.3%	67.0%		2.8	34	4	0.9%	32.4%	
2.2	26	7	0.5%	67.5%		2.9	35	43	9.2%	41.6%	
2.3	27	15	1.0%	68.5%		3.0	36	29	6.2%	47.9%	
2.3	28	10	0.7%	69.2%		3.1	37	3	0.6%	48.5%	
2.4	29	45	3.1%	72.2%		3.3	39	10	2.1%	50.6%	
2.5	30	11	0.8%	73.0%		3.3	40	2	0.4%	51.1%	
2.6	31	12	0.8%	73.8%		3.4	41	8	1.7%	52.8%	
2.7	32	2	0.1%	74.0%		3.5	42	0	0.0%	52.8%	
2.8	33	15	1.0%	75.0%		3.6	43	3	0.6%	53.4%	
2.8	34	12	0.8%	75.8%		3.7	44	5	1.1%	54.5%	
2.9	35	68	4.6%	80.5%		3.8	45	2	0.4%	54.9%	
3.0	36	24	1.6%	82.1%		3.9	47	46	9.9%	64.8%	
3.1	37	5	0.3%	82.4%		4.0	48	13	2.8%	67.6%	
3.2	38	2	0.1%	82.6%		4.1	49	8	1.7%	69.3%	
3.3	39	23	1.6%	84.1%		4.2	50	4	0.9%	70.2%	
3.3	40	8	0.5%	84.7%		4.3	52	2	0.4%	70.6%	
3.4	41	6	0.4%	85.1%		4.4	53	7	1.5%	72.1%	
3.5	42	2	0.1%	85.2%		4.5	54	2	0.4%	72.5%	
3.6	43	4	0.3%	85.5%		4.6	55	5	1.1%	73.6%	
3.7	44	3	0.2%	85.7%		4.7	56	1	0.2%	73.8%	
3.8	45	5	0.3%	86.1%		4.8	57	2	0.4%	74.2%	
3.8	46	7	0.5%	86.5%		4.8	58	8	1.7%	76.0%	
3.9	47	54	3.7%	90.2%		4.9	59	12	2.6%	78.5%	

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Chart D-6 **Time-Served for Class-C Felony Offenses Other Than Manslaughter 2, DOCS 1985-2007**
First-Release Cohort: Monthly and Cumulative Monthly Percent Distributions by Offender Status

Class C First-Felony Offenders						Class C Second-Felony Offenders					
Time Served		N of	Percent Distri-	Cumulative	Model Maximum	Time Served		N of	Percent Distri-	Cumulative	Model Maximum
Years	Months	Cases	bution	Percent	CR Point*	Years	Months	Cases	bution	Percent	CR Point*
4.0	**48**	15	1.0%	91.3%		**5.0**	**60**	5	1.1%	79.6%	
4.1	**49**	12	0.8%	92.1%		**5.1**	**61**	2	0.4%	80.0%	
4.2	**50**	1	0.1%	92.1%		**5.3**	**63**	17	3.6%	83.7%	
4.3	**51**	1	0.1%	92.2%		**5.3**	**64**	5	1.1%	84.8%	
4.3	**52**	1	0.1%	92.3%		**5.4**	**65**	3	0.6%	85.4%	
4.4	**53**	4	0.3%	92.5%		**5.5**	**66**	1	0.2%	85.6%	
4.5	**54**	0	0.0%	92.5%		**5.7**	**68**	2	0.4%	86.1%	
4.6	**55**	8	0.5%	93.1%		**5.8**	**69**	0	0.0%	86.1%	
4.7	**56**	1	0.1%	93.2%	Determ. Drug	**5.8**	**70**	1	0.2%	86.3%	
4.8	**57**	0	0.0%	93.2%		**5.9**	**71**	11	2.4%	88.6%	
4.8	**58**	3	0.2%	93.4%		**6.0**	**72**	13	2.8%	91.4%	
4.9	**59**	16	1.1%	94.5%		**6.1**	**73**	1	0.2%	91.6%	
5.0	**60**	10	0.7%	95.1%		**6.2**	**74**	0	0.0%	91.6%	
5.1	**61**	3	0.2%	95.4%		**6.3**	**75**	0	0.0%	91.6%	
5.2	**62**	3	0.2%	95.6%		**6.3**	**76**	1	0.2%	91.8%	
5.3	**63**	2	0.1%	95.7%		**6.4**	**77**	0	0.0%	91.8%	
5.3	**64**	0	0.0%	95.7%		**6.5**	**78**	2	0.4%	92.3%	
5.4	**65**	1	0.1%	95.8%		**6.6**	**79**	7	1.5%	93.8%	
5.5	**66**	0	0.0%	95.8%		**6.7**	**80**	1	0.2%	94.0%	
5.6	**67**	0	0.0%	95.8%		**6.8**	**81**	0	0.0%	94.0%	
5.7	**68**	1	0.1%	95.8%		**6.8**	**82**	1	0.2%	94.2%	
5.8	**69**	2	0.1%	96.0%		**6.9**	**83**	1	0.2%	94.4%	Determ. Drug
5.8	**70**	1	0.1%	96.0%		**7.0**	**84**	0	0.0%	94.4%	
5.9	**71**	22	1.5%	97.5%		**7.1**	**85**	1	0.2%	94.6%	
6.0	**72**	4	0.3%	97.8%		**7.3**	**87**	0	0.0%	94.6%	
6.1	**73**	0	0.0%	97.8%		**7.3**	**88**	1	0.2%	94.8%	
6.2	**74**	1	0.1%	97.9%		**7.4**	**89**	2	0.4%	95.3%	
6.3	**75**	0	0.0%	97.9%		**7.5**	**90**	0	0.0%	95.3%	
6.3	**76**	1	0.1%	97.9%		**7.6**	**91**	0	0.0%	95.3%	
6.4	**77**	0	0.0%	97.9%		**7.7**	**92**	1	0.2%	95.5%	
6.6	**79**	5	0.3%	98.3%		**7.8**	**93**	0	0.0%	95.5%	
6.7	**80**	0	0.0%	98.3%		**7.9**	**95**	4	0.9%	96.4%	
6.8	**81**	1	0.1%	98.4%		**8.0**	**96**	1	0.2%	96.6%	
6.8	**82**	0	0.0%	98.4%	Time Served	**8.1**	**97**	1	0.2%	96.8%	
6.9	**83**	1	0.1%	98.4%		**8.2**	**98**	0	0.0%	96.8%	
7.0	**84**	2	0.1%	98.6%		**8.3**	**99**	0	0.0%	96.8%	
7.3	**87**	0	0.0%	98.6%		**8.4**	**101**	1	0.2%	97.0%	
7.4	**89**	0	0.0%	98.6%		**8.5**	**102**	1	0.2%	97.2%	
7.5	**90**	0	0.0%	98.6%		**8.6**	**103**	1	0.2%	97.4%	
7.7	**92**	1	0.1%	98.6%		**8.7**	**104**	0	0.0%	97.4%	
7.8	**93**	0	0.0%	98.6%		**8.8**	**106**	0	0.0%	97.4%	
7.8	**94**	0	0.0%	98.6%		**8.9**	**107**	1	0.2%	97.6%	
7.9	**95**	3	0.2%	98.8%		**9.1**	**109**	1	0.2%	97.6%	Time Served

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Chart D-6 **Time-Served for Class-C Felony Offenses Other Than Manslaughter 2, DOCS 1985-2007**
First-Release Cohort: Monthly and Cumulative Monthly Percent Distributions by Offender Status

Class C First-Felony Offenders

Time Served		N of	Percent Distri-	Cumulative	Model Maximum
Years	Months	Cases	bution	Percent	CR Point*
8.0	**96**	3	0.2%	99.0%	
8.1	**97**	0	0.0%	99.0%	
8.2	**98**	1	0.1%	99.1%	
8.3	**99**	0	0.0%	99.1%	
8.3	**100**	0	0.0%	99.1%	
8.4	**101**	1	0.1%	99.2%	
8.6	**103**	1	0.1%	99.2%	
8.7	**104**	0	0.0%	99.2%	
8.8	**105**	1	0.1%	99.3%	
8.8	**106**	0	0.0%	99.3%	
8.9	**107**	3	0.2%	99.5%	
9.0	**108**	0	0.0%	99.5%	
9.1	**109**	0	0.0%	99.5%	
9.2	**110**	0	0.0%	99.5%	
9.5	**114**	0	0.0%	99.5%	
9.6	**115**	0	0.0%	99.5%	
9.8	**118**	0	0.0%	99.5%	
9.9	**119**	3	0.2%	99.7%	
10.0	**120**	3	0.2%	99.9%	
10.1	**121**	0	0.0%	99.9%	
10.2	**122**	0	0.0%	99.9%	
10.3	**123**	0	0.0%	99.9%	
10.3	**124**	0	0.0%	99.9%	CR-Based
10.4	**125**	0	0.0%	99.9%	
10.5	**126**	0	0.0%	99.9%	
10.7	**128**	1	0.1%	100.0%	
Total		**1,463**	**100.0%**		

Class C Second-Felony Offenders

Time Served		N of	Percent Distri-	Cumulative	Model Maximum
Years	Months	Cases	bution	Percent	CR Point*
9.3	**111**	2	0.4%	98.1%	
9.3	**112**	2	0.4%	98.5%	
9.4	**113**	2	0.4%	98.9%	
9.5	**114**	0	0.0%	98.9%	
9.9	**119**	0	0.0%	98.9%	
10.0	**120**	0	0.0%	98.9%	
10.1	**121**	0	0.0%	98.9%	
10.3	**123**	1	0.2%	99.1%	
10.3	**124**	2	0.4%	99.6%	CR-Based
10.5	**126**	0	0.0%	99.6%	
10.6	**127**	0	0.0%	99.6%	
10.7	**128**	1	0.2%	99.8%	
10.9	**131**	0	0.0%	99.8%	
11.0	**132**	0	0.0%	99.8%	
11.3	**135**	0	0.0%	99.8%	
11.5	**138**	1	0.2%	100.0%	
Total		**466**	**100.0%**		

* See percent of time served falling at or below the point of proposed conditional release (CR) in Chart D-3 for first-felony offenders and Chart D-4 for second-felony offenders.

Sources: NYS Department of Correctional Services data; table prepared by the NYS Division of Criminal Justice Services.

Chart D-7 **Time-Served for Class-D Felony Offenses, DOCS 1985-2007 First-Release Cohort: Monthly and Cumulative Monthly Percent Distributions by Offender Status**

Class D First-Felony Offenders						Class D Second-Felony Offenders					
Time Served		N of	Percent Distri-	Cumulative	Model Maximum	Time Served		N of	Percent Distri-	Cumulative	Model Maximum
Years	Months	Cases	bution	Percent	CR Point*	Years	Months	Cases	bution	Percent	CR Point*
0.0	0	2	0.0%	0.0%		0.0	0	1	0.0%	0.0%	
0.1	1	6	0.0%	0.1%		0.1	1	9	0.0%	0.1%	
0.2	2	13	0.1%	0.1%		0.2	2	5	0.0%	0.1%	
0.3	3	5	0.0%	0.2%		0.3	3	4	0.0%	0.1%	
0.3	4	9	0.1%	0.2%		0.3	4	6	0.0%	0.1%	
0.4	5	10	0.1%	0.3%		0.4	5	5	0.0%	0.2%	
0.5	6	30	0.2%	0.5%		0.5	6	11	0.1%	0.2%	
0.6	7	277	1.9%	2.4%		0.6	7	123	0.7%	0.9%	
0.7	8	425	2.9%	5.4%		0.7	8	186	1.0%	1.9%	
0.8	9	460	3.2%	8.5%		0.8	9	188	1.0%	2.9%	
0.8	10	453	3.1%	11.7%		0.8	10	174	0.9%	3.8%	
0.9	11	2,178	15.0%	26.7%		0.9	11	196	1.0%	4.9%	
1.0	12	1,469	10.1%	36.9%		1.0	12	165	0.9%	5.7%	
1.1	13	440	3.0%	39.9%		1.1	13	124	0.7%	6.4%	
1.2	14	345	2.4%	42.3%		1.2	14	120	0.6%	7.0%	
1.3	15	692	4.8%	47.1%		1.3	15	101	0.5%	7.6%	
1.3	16	438	3.0%	50.1%		1.3	16	71	0.4%	8.0%	
1.4	17	641	4.4%	54.5%		1.4	17	203	1.1%	9.1%	
1.5	18	372	2.6%	57.1%		1.5	18	120	0.6%	9.7%	
1.6	19	465	3.2%	60.3%		1.6	19	745	4.0%	13.7%	
1.7	20	224	1.5%	61.8%		1.7	20	207	1.1%	14.8%	
1.8	21	176	1.2%	63.0%		1.8	21	118	0.6%	15.4%	
1.8	22	150	1.0%	64.1%		1.8	22	90	0.5%	15.9%	
1.9	23	1,816	12.5%	76.6%		1.9	23	2851	15.3%	31.2%	
2.0	24	457	3.2%	79.8%		2.0	24	1653	8.8%	40.0%	
2.1	25	130	0.9%	80.7%	Determ. Drug	2.1	25	224	1.2%	41.2%	
2.2	26	109	0.8%	81.4%		2.2	26	179	1.0%	42.2%	
2.3	27	294	2.0%	83.5%		2.3	27	157	0.8%	43.0%	
2.3	28	197	1.4%	84.8%		2.3	28	180	1.0%	44.0%	
2.4	29	93	0.6%	85.5%		2.4	29	1101	5.9%	49.9%	
2.5	30	52	0.4%	85.8%		2.5	30	437	2.3%	52.2%	
2.6	31	419	2.9%	88.7%		2.6	31	1946	10.4%	62.6%	
2.7	32	57	0.4%	89.1%		2.7	32	244	1.3%	63.9%	
2.8	33	41	0.3%	89.4%		2.8	33	232	1.2%	65.2%	
2.8	34	82	0.6%	90.0%		2.8	34	429	2.3%	67.4%	
2.9	35	357	2.5%	92.4%		2.9	35	702	3.8%	71.2%	
3.0	36	59	0.4%	92.8%		3.0	36	408	2.2%	73.4%	
3.1	37	44	0.3%	93.1%		3.1	37	171	0.9%	74.3%	
3.2	38	50	0.3%	93.5%		3.2	38	108	0.6%	74.9%	
3.3	39	96	0.7%	94.1%		3.3	39	589	3.2%	78.0%	
3.3	40	32	0.2%	94.4%		3.3	40	184	1.0%	79.0%	
3.4	41	38	0.3%	94.6%		3.4	41	533	2.9%	81.9%	Determ. Drug
3.5	42	17	0.1%	94.7%		3.5	42	280	1.5%	83.4%	
3.6	43	11	0.1%	94.8%		3.6	43	126	0.7%	84.0%	
3.7	44	12	0.1%	94.9%		3.7	44	100	0.5%	84.6%	
3.8	45	22	0.2%	95.1%		3.8	45	139	0.7%	85.3%	
3.8	46	36	0.2%	95.3%		3.8	46	177	0.9%	86.3%	
3.9	47	250	1.7%	97.0%		3.9	47	610	3.3%	89.5%	

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Chart D-7 **Time-Served for Class-D Felony Offenses, DOCS 1985-2007 First-Release Cohort: Monthly and Cumulative Monthly Percent Distributions by Offender Status**

Class D First-Felony Offenders

Time Served		N of	Percent Distri-	Cumulative	Model Maximum
Years	Months	Cases	bution	Percent	CR Point*
4.0	**48**	54	0.4%	97.4%	
4.1	**49**	10	0.1%	97.5%	
4.2	**50**	33	0.2%	97.7%	
4.3	**51**	28	0.2%	97.9%	
4.3	**52**	7	0.0%	97.9%	Time Served
4.4	**53**	28	0.2%	98.1%	
4.5	**54**	5	0.0%	98.2%	
4.6	**55**	138	1.0%	99.1%	
4.7	**56**	25	0.2%	99.3%	CR-Based
4.8	**57**	6	0.0%	99.3%	
4.8	**58**	7	0.0%	99.4%	
4.9	**59**	15	0.1%	99.5%	
5.0	**60**	6	0.0%	99.5%	
5.1	**61**	3	0.0%	99.6%	
5.2	**62**	1	0.0%	99.6%	
5.3	**63**	3	0.0%	99.6%	
5.3	**64**	2	0.0%	99.6%	
5.4	**65**	6	0.0%	99.6%	
5.5	**66**	4	0.0%	99.7%	
5.7	**68**	5	0.0%	99.7%	
5.8	**69**	4	0.0%	99.7%	
5.8	**70**	2	0.0%	99.7%	
5.9	**71**	14	0.1%	99.8%	
6.0	**72**	2	0.0%	99.8%	
6.1	**73**	1	0.0%	99.9%	
6.2	**74**	4	0.0%	99.9%	
6.3	**75**	1	0.0%	99.9%	
6.3	**76**	1	0.0%	99.9%	
6.6	**79**	2	0.0%	99.9%	
6.8	**82**	1	0.0%	99.9%	
6.9	**83**	7	0.0%	100.0%	
7.0	**84**	5	0.0%	100.0%	
	Total	**14,481**	**100.0%**		

Class D Second-Felony Offenders

Time Served		N of	Percent Distri-	Cumulative	Model Maximum
Years	Months	Cases	bution	Percent	CR Point*
4.0	**48**	464	2.5%	92.0%	
4.1	**49**	48	0.3%	92.3%	
4.2	**50**	53	0.3%	92.6%	
4.3	**51**	79	0.4%	93.0%	
4.3	**52**	94	0.5%	93.5%	
4.4	**53**	93	0.5%	94.0%	
4.5	**54**	42	0.2%	94.2%	
4.6	**55**	280	1.5%	95.7%	
4.7	**56**	65	0.3%	96.0%	CR-Based
4.8	**57**	41	0.2%	96.3%	
4.8	**58**	53	0.3%	96.5%	
4.9	**59**	87	0.5%	97.0%	
5.0	**60**	147	0.8%	97.8%	
5.1	**61**	20	0.1%	97.9%	Time Served
5.2	**62**	19	0.1%	98.0%	
5.3	**63**	18	0.1%	98.1%	
5.3	**64**	31	0.2%	98.3%	
5.4	**65**	58	0.3%	98.6%	
5.5	**66**	15	0.1%	98.7%	
5.6	**67**	16	0.1%	98.7%	
5.7	**68**	10	0.1%	98.8%	
5.8	**69**	13	0.1%	98.9%	
5.8	**70**	12	0.1%	98.9%	
5.9	**71**	36	0.2%	99.1%	
6.0	**72**	52	0.3%	99.4%	
6.1	**73**	4	0.0%	99.4%	
6.2	**74**	7	0.0%	99.5%	
6.3	**75**	7	0.0%	99.5%	
6.3	**76**	2	0.0%	99.5%	
6.4	**77**	8	0.0%	99.6%	
6.5	**78**	3	0.0%	99.6%	
6.6	**79**	2	0.0%	99.6%	
6.7	**80**	1	0.0%	99.6%	
6.8	**81**	8	0.0%	99.6%	
6.8	**82**	5	0.0%	99.7%	
6.9	**83**	14	0.1%	99.7%	
7.0	**84**	50	0.3%	100.0%	
	Total	**18,689**	**100.0%**		

* See percent of time served falling at or below the point of proposed conditional release (CR) in Chart D-3 for first-felony offenders and Chart D-4 for second-felony offenders.

Chart D-8 **Time-Served for Class-E Felony Offenses, DOCS 1985-2007 First-Release Cohort: Monthly and Cumulative Monthly Percent Distributions by Offender Status**

Class E First-Felony Offenders						Class E Second-Felony Offenders					
Time Served		N of	Percent Distri-	Cumulative	Model Maximum	Time Served		N of	Percent Distri-	Cumulative	Model Maximum
Years	Months	Cases	bution	Percent	CR Point*	Years	Months	Cases	bution	Percent	CR Point*
0.0	0	1	0.0%	0.0%		0.0	0	3	0.0%	0.0%	
0.1	1	3	0.0%	0.0%		0.1	1	5	0.0%	0.0%	
0.2	2	8	0.1%	0.1%		0.2	2	16	0.1%	0.1%	
0.3	3	8	0.1%	0.1%		0.3	3	10	0.0%	0.1%	
0.3	4	6	0.0%	0.2%		0.3	4	10	0.0%	0.1%	
0.4	5	3	0.0%	0.2%		0.4	5	10	0.0%	0.2%	
0.5	6	17	0.1%	0.3%		0.5	6	23	0.1%	0.2%	
0.6	7	266	1.8%	2.1%		0.6	7	240	0.8%	1.0%	
0.7	8	334	2.3%	4.4%		0.7	8	319	1.0%	2.0%	
0.8	9	354	2.4%	6.8%		0.8	9	311	1.0%	3.0%	
0.8	10	306	2.1%	8.9%		0.8	10	272	0.9%	3.9%	
0.9	11	2322	15.9%	24.8%		0.9	11	304	1.0%	4.9%	
1.0	12	1481	10.1%	34.9%		1.0	12	233	0.8%	5.7%	
1.1	13	394	2.7%	37.6%		1.1	13	119	0.4%	6.0%	
1.2	14	258	1.8%	39.4%		1.2	14	1007	3.2%	9.3%	
1.3	15	924	6.3%	45.7%		1.3	15	486	1.6%	10.8%	
1.3	16	507	3.5%	49.2%	Determ. Drug	1.3	16	328	1.1%	11.9%	
1.4	17	346	2.4%	51.5%		1.4	17	6754	21.7%	33.7%	
1.5	18	296	2.0%	53.6%		1.5	18	3172	10.2%	43.9%	
1.6	19	242	1.7%	55.2%		1.6	19	832	2.7%	46.5%	
1.7	20	200	1.4%	56.6%		1.7	20	556	1.8%	48.3%	Determ. Drug
1.8	21	197	1.3%	57.9%		1.8	21	507	1.6%	50.0%	
1.8	22	173	1.2%	59.1%		1.8	22	374	1.2%	51.2%	
1.9	23	3158	21.6%	80.7%		1.9	23	6583	21.2%	72.4%	
2.0	24	424	2.9%	83.6%		2.0	24	1357	4.4%	76.7%	
2.1	25	153	1.0%	84.7%		2.1	25	408	1.3%	78.1%	
2.2	26	172	1.2%	85.8%		2.2	26	460	1.5%	79.5%	
2.3	27	84	0.6%	86.4%		2.3	27	517	1.7%	81.2%	
2.3	28	69	0.5%	86.9%		2.3	28	455	1.5%	82.7%	
2.4	29	85	0.6%	87.5%		2.4	29	388	1.2%	83.9%	
2.5	30	42	0.3%	87.7%		2.5	30	222	0.7%	84.6%	
2.6	31	1147	7.8%	95.6%	CR-Based	2.6	31	1446	4.7%	89.3%	CR-Based
2.7	32	121	0.8%	96.4%		2.7	32	291	0.9%	90.2%	
2.8	33	53	0.4%	96.8%		2.8	33	297	1.0%	91.2%	
2.8	34	44	0.3%	97.1%		2.8	34	296	1.0%	92.1%	
2.9	35	188	1.3%	98.4%		2.9	35	606	2.0%	94.1%	
3.0	36	27	0.2%	98.6%	Time Served	3.0	36	1117	3.6%	97.7%	Time Served
3.1	37	34	0.2%	98.8%		3.1	37	57	0.2%	97.9%	
3.2	38	18	0.1%	98.9%		3.2	38	43	0.1%	98.0%	
3.3	39	17	0.1%	99.0%		3.3	39	53	0.2%	98.2%	
3.3	40	11	0.1%	99.1%		3.3	40	39	0.1%	98.3%	
3.4	41	12	0.1%	99.2%		3.4	41	46	0.1%	98.4%	
3.5	42	6	0.0%	99.2%		3.5	42	45	0.1%	98.6%	
3.6	43	9	0.1%	99.3%		3.6	43	29	0.1%	98.7%	
3.7	44	5	0.0%	99.3%		3.7	44	29	0.1%	98.8%	
3.8	45	6	0.0%	99.4%		3.8	45	32	0.1%	98.9%	
3.8	46	3	0.0%	99.4%		3.8	46	45	0.1%	99.0%	
3.9	47	65	0.4%	99.8%		3.9	47	151	0.5%	99.5%	
4.0	48	26	0.2%	100.0%		4.0	48	151	0.5%	100.0%	
	Total	14,625	100.0%				Total	31,054	100.0%		

* See percent of time served falling at or below the point of proposed conditional release (CR) in Chart D-3 for first-felony offenders and Chart D-4 for second-felony offenders.

Sources: NYS Department of Correctional Services data; table prepared by the NYS Division of Criminal Justice Services.

APPENDIX E

DISPARATE INCARCERATION RATES FOR FELONY DRUG OFFENDERS: DESCRIPTIVE STATISTICS AND ESTIMATED ODDS OF INCARCERATION

Chart E-1

Class B Felony Drug Possession (Penal Law §220.16) Arrests Disposed 2004-2006 Involving Males Age 19 or Older With "No Prior" Felony Convictions: Systemwide Prison Rates and Disposition Outcomes for Indicted/SCI Arrest Cases

	All Arrest Cases			Arrest Cases Resulting in Indictments/SCIs: Disposition Outcomes						
County	N	% Prison	% Indict./ SCI	N	Total	% Prison	% Felony Jail 1-Year	% Other Jail	% Other Sentence[a]	Dismissed [a]
Statewide	**13,563**	**8%**	–	–	–	–			–	– [b]
■ Excluding Bronx	**11,246**	**10%**	**40%**	**4,451**	100%	**24%**	**10%**	**7%**	**47%**	**12%**
New York City										
Bronx	2,317	3%	NA	NA	NA	NA	NA	NA	NA	NA [b]
Kings	2,057	4%	19%	401	100%	18%	10%	7%	46%	18%
New York	2,363	6%	33%	779	100%	19%	15%	11%	46%	8%
Queens	1,439	2%	29%	417	100%	8%	12%	7%	39%	35%
Richmond	393	4%	18%	69	100%	20%	12%	7%	52%	9%
Suburban NYC										
Nassau	224	13%	82%	184	100%	15%	13%	6%	60%	6%
Rockland	122	26%	70%	86	100%	37%	7%	6%	48%	2%
Suffolk	453	7%	53%	242	100%	13%	9%	14%	63%	2%
Westchester	435	5%	53%	230	100%	10%	19%	7%	63%	1%
Upstate										
Albany	262	27%	55%	143	100%	50%	1%	0%	40%	9%
Allegany	9	22%	56%	5	100%	40%	0%	0%	60%	0%
Broome	146	21%	70%	102	100%	30%	9%	12%	41%	8%
Cattaraugus	9	67%	100%	9	100%	67%	0%	0%	22%	11%
Cayuga	13	23%	77%	10	100%	30%	10%	0%	50%	10%
Chautauqua	58	17%	67%	39	100%	26%	10%	10%	54%	0%
Chemung	69	17%	64%	44	100%	27%	7%	9%	14%	43%
Chenango	6	17%	33%	2	100%	50%	0%	0%	50%	0%
Clinton	14	21%	79%	11	100%	27%	0%	18%	45%	9%
Columbia	8	38%	38%	3	100%	100%	0%	0%	0%	0%
Cortland	5	60%	80%	4	100%	75%	0%	0%	25%	0%
Delaware	6	33%	67%	4	100%	50%	0%	0%	50%	0%
Dutchess	105	18%	61%	64	100%	30%	2%	0%	66%	3%
Erie	887	5%	37%	331	100%	14%	8%	5%	53%	21%
Essex	1	100%	100%	1	100%	100%	0%	0%	0%	0%
Franklin	1	100%	100%	1	100%	100%	0%	0%	0%	0%
Fulton	16	50%	100%	16	100%	50%	19%	6%	19%	6%
Genesee	13	31%	85%	11	100%	36%	0%	0%	45%	18%
Greene	8	25%	25%	2	100%	100%	0%	0%	0%	0%
Hamilton	2	50%	100%	2	100%	50%	0%	0%	50%	0%
Herkimer	8	75%	100%	8	100%	75%	0%	0%	25%	0%
Jefferson	40	18%	100%	40	100%	18%	3%	3%	70%	8%
Lewis	4	100%	100%	4	100%	100%	0%	0%	0%	0%
Livingston	5	40%	100%	5	100%	40%	0%	20%	40%	0%
Madison	12	8%	8%	1	100%	100%	0%	0%	0%	0%
Monroe	714	7%	40%	289	100%	17%	11%	9%	56%	7%
Montgomery	21	33%	67%	14	100%	50%	0%	0%	50%	0%
Niagara	95	14%	52%	49	100%	27%	6%	4%	39%	24%
Oneida	155	43%	88%	136	100%	49%	10%	7%	26%	8%
Onondaga	439	20%	60%	265	100%	34%	8%	2%	40%	16%
Ontario	27	74%	89%	24	100%	83%	13%	0%	4%	0%
Orange	154	21%	60%	93	100%	34%	5%	0%	57%	3%
Orleans	23	30%	70%	16	100%	44%	19%	6%	19%	13%
Oswego	14	0%	86%	12	100%	0%	8%	0%	75%	17%
Otsego	19	47%	74%	14	100%	64%	0%	7%	21%	7%
Putnam	13	8%	8%	1	100%	100%	0%	0%	0%	0%
Rensselaer	60	33%	87%	52	100%	38%	10%	2%	48%	2%
Saratoga	33	48%	67%	22	100%	73%	0%	5%	18%	5%
Schenectady	58	36%	60%	35	100%	60%	3%	3%	31%	3%
Schoharie	2	50%	50%	1	100%	100%	0%	0%	0%	0%
Schuyler	0	–	–	0	–	–	–	–	–	–
Seneca	4	25%	50%	2	100%	50%	0%	0%	0%	50%
St. Lawrence	3	0%	67%	2	100%	0%	0%	0%	100%	0%
Steuben	57	56%	81%	46	100%	70%	4%	0%	26%	0%
Sullivan	63	25%	63%	40	100%	40%	10%	0%	48%	3%
Tioga	7	71%	86%	6	100%	83%	0%	0%	17%	0%
Tompkins	14	57%	86%	12	100%	67%	0%	0%	33%	0%
Ulster	46	26%	59%	27	100%	44%	0%	4%	48%	4%
Warren	5	80%	100%	5	100%	80%	0%	0%	20%	0%
Washington	7	14%	57%	4	100%	25%	25%	0%	50%	0%
Wayne	13	38%	77%	10	100%	50%	10%	0%	20%	20%
Wyoming	6	17%	67%	4	100%	25%	0%	0%	75%	0%
Yates	1	0%	–	0	–	–	–	–	–	–

[a] Includes arrest cases that resulted in dismissals or "other sentences" because offenders successfully completed substance abuse diversion programs.

[b] Bronx County statistics for indicted/SCI cases are not presented because of a change in court practices in November 2004 that made it difficult to identify cases prosecuted in its superior courts.

Data Source: NYS Division of Criminal Justices Services, Computerized Criminal History (CCH) System.

Chart E-2

Class B Felony Drug Possession (Penal Law §220.16) Arrests Disposed 2004-2006 Involving Males Age 19 or Older With "Prior" Felony Convictions:[a] Systemwide Prison Rates and Disposition Outcomes for Indicted/SCI Arrest Cases

	All Arrest Cases			Arrest Cases Resulting in Indictments/SCIs: Disposition Outcomes							
County	N	% Prison [b]	% Indict./ SCI	N	Total	% Prison	% Willard	% Felony Jail 1-Yr.[c]	% Other Jail	% Other Sentence[d]	Dismissed [d]
Statewide	**11,097**	**26%**	–	–	–	–	–	–	–	–	– [e]
■ Excluding Bronx	**8,990**	**30%**	**45%**	**4,013**	100%	**67%**	**6%**	**2%**	**6%**	**10%**	**10%**
New York City											
Bronx	2,107	8%	NA	NA	NA	NA	NA	NA	NA	NA	NA [e]
Kings	1,770	15%	26%	454	100%	60%	0%	3%	12%	15%	10%
New York	2,065	28%	40%	819	100%	72%	3%	3%	4%	8%	9%
Queens	1,042	18%	28%	288	100%	64%	3%	5%	4%	12%	12%
Richmond	271	16%	27%	74	100%	58%	0%	4%	7%	22%	9%
Suburban NYC											
Nassau	219	56%	84%	184	100%	67%	4%	1%	7%	18%	3%
Rockland	67	57%	75%	50	100%	76%	0%	4%	2%	12%	6%
Suffolk	376	41%	59%	221	100%	70%	6%	1%	13%	7%	3%
Westchester	349	34%	52%	180	100%	66%	7%	6%	4%	16%	2%
Upstate											
Albany	335	43%	58%	193	100%	75%	4%	1%	4%	6%	11%
Allegany	1	100%	100%	1	100%	100%	0%	0%	0%	0%	0%
Broome	161	53%	70%	113	100%	75%	7%	1%	3%	2%	12%
Cattaraugus	5	100%	100%	5	100%	100%	0%	0%	0%	0%	0%
Cayuga	13	46%	92%	12	100%	50%	17%	0%	0%	8%	25%
Chautauqua	30	60%	83%	25	100%	72%	4%	4%	16%	0%	4%
Chemung	45	42%	78%	35	100%	54%	0%	0%	6%	3%	37%
Chenango	5	60%	80%	4	100%	75%	25%	0%	0%	0%	0%
Clinton	8	50%	63%	5	100%	80%	20%	0%	0%	0%	0%
Columbia	17	59%	71%	12	100%	83%	8%	8%	0%	0%	0%
Cortland	2	100%	100%	2	100%	100%	0%	0%	0%	0%	0%
Delaware	3	67%	67%	2	100%	100%	0%	0%	0%	0%	0%
Dutchess	109	39%	49%	53	100%	81%	2%	2%	0%	4%	11%
Erie	492	26%	47%	233	100%	55%	12%	3%	4%	5%	22%
Essex	0	–	–	0	–	–	–	–	–	–	–
Franklin	5	80%	100%	5	100%	80%	0%	0%	0%	20%	0%
Fulton	9	67%	100%	9	100%	67%	11%	11%	0%	0%	11%
Genesee	5	80%	100%	5	100%	80%	0%	0%	0%	0%	20%
Greene	8	75%	88%	7	100%	86%	14%	0%	0%	0%	0%
Hamilton	0	–	–	0	–	–	–	–	–	–	–
Herkimer	2	100%	100%	2	100%	100%	0%	0%	0%	0%	0%
Jefferson	30	70%	100%	30	100%	70%	3%	0%	7%	17%	3%
Lewis	0	–	–	0	–	–	–	–	–	–	–
Livingston	3	100%	100%	3	100%	100%	0%	0%	0%	0%	0%
Madison	1	0%	100%	1	100%	0%	100%	0%	0%	0%	0%
Monroe	525	20%	49%	255	100%	42%	18%	1%	13%	15%	11%
Montgomery	12	17%	42%	5	100%	40%	40%	0%	0%	0%	20%
Niagara	64	30%	44%	28	100%	68%	18%	0%	0%	4%	11%
Oneida	118	64%	87%	103	100%	74%	7%	0%	11%	8%	1%
Onondaga	317	46%	69%	219	100%	66%	5%	1%	4%	7%	17%
Ontario	27	81%	85%	23	100%	96%	0%	0%	0%	4%	0%
Orange	116	57%	70%	81	100%	81%	4%	1%	1%	10%	2%
Orleans	15	60%	93%	14	100%	64%	21%	0%	7%	0%	7%
Oswego	7	71%	86%	6	100%	83%	17%	0%	0%	0%	0%
Otsego	8	88%	88%	7	100%	100%	0%	0%	0%	0%	0%
Putnam	5	20%	40%	2	100%	50%	50%	0%	0%	0%	0%
Rensselaer	54	65%	78%	42	100%	83%	10%	0%	0%	0%	7%
Saratoga	23	70%	78%	18	100%	89%	11%	0%	0%	0%	0%
Schenectady	89	49%	64%	57	100%	77%	2%	2%	0%	11%	9%
Schoharie	0	–	–	0	–	–	–	–	–	–	–
Schuyler	1	100%	100%	1	100%	100%	0%	0%	0%	0%	0%
Seneca	3	33%	100%	3	100%	33%	0%	33%	0%	0%	33%
St. Lawrence	2	50%	100%	2	100%	50%	50%	0%	0%	0%	0%
Steuben	19	58%	84%	16	100%	69%	13%	0%	0%	6%	13%
Sullivan	46	63%	78%	36	100%	81%	6%	0%	0%	8%	6%
Tioga	3	67%	100%	3	100%	67%	0%	0%	0%	0%	33%
Tompkins	7	43%	57%	4	100%	75%	0%	0%	0%	0%	25%
Ulster	49	47%	65%	32	100%	72%	3%	0%	6%	16%	3%
Warren	10	70%	80%	8	100%	88%	13%	0%	0%	0%	0%
Washington	8	75%	100%	8	100%	75%	13%	0%	13%	0%	0%
Wayne	10	60%	90%	9	100%	67%	11%	0%	0%	0%	22%
Wyoming	4	100%	100%	4	100%	100%	0%	0%	0%	0%	0%
Yates	0	–	–	0	–	–	–	–	–	–	–

[a] Cases counted as involving one or more prior felony convictions include offenders legally defined as second-felony offenders, as well as offenders legally defined as first-felony offenders because their instant offenses were committed more than 10 years after the imposition of sentences for any of their previous felony convictions [see PL 70.06(1)].

[b] Cases involving direct parole-supervision sentences that required placement in the DOCS Willard facility were counted as non-prison sentences.

[c] A prison sentence is not mandatory for offenders with prior felony convictions who are legally classified as first-felony offenders; see footnote "a".

[d] Includes cases that resulted in dismissals or "other sentences" because offenders successfully completed substance abuse diversion programs.

[e] Bronx County statistics for indicted/SCI cases are not presented because of a change in court practices in November 2004 that made it difficult to identify cases prosecuted in its superior courts.

Data Source: NYS State Division of Criminal Justices Services, Computerized Criminal History (CCH) System.

Chart E-3

Class B Felony Drug Sale (Penal Law §220.39) Arrests Disposed 2004-2006 Involving Males Age 19 or Older With "No Prior" Felony Convictions: Systemwide Prison Rates and Disposition Outcomes for Indicted/SCI Arrest Cases

	All Arrest Cases			Arrest Cases Resulting in Indictments/SCIs: Disposition Outcomes						
County	N	% Prison	% Indict./ SCI	N	Total	% Prison	% Felony Jail 1-Year	% Other Jail	% Other Sentence[a]	Dismissed [a]
Statewide	**14,822**	**12%**	–	–	–	–	–	–	–	– [b]
Excluding Bronx	**11,819**	**12%**	**47%**	**5,614**	100%	**26%**	**13%**	**9%**	**43%**	**9%**
New York City										
Bronx	3,003	13%	NA	NA	NA	NA	NA	NA	NA	NA [b]
Kings	4,025	4%	23%	914	100%	19%	13%	11%	41%	17%
New York	3,344	7%	44%	1,485	100%	17%	20%	15%	41%	8%
Queens	1,228	8%	48%	589	100%	16%	15%	12%	36%	20%
Richmond	295	9%	37%	108	100%	25%	15%	16%	39%	6%
Suburban NYC										
Nassau	335	9%	96%	323	100%	10%	12%	9%	66%	3%
Rockland	87	38%	93%	81	100%	41%	4%	2%	49%	4%
Suffolk	425	16%	88%	372	100%	18%	17%	11%	54%	0%
Westchester	223	5%	52%	117	100%	9%	20%	4%	67%	0%
Upstate										
Albany	194	37%	77%	150	100%	47%	1%	0%	46%	5%
Allegany	9	11%	67%	6	100%	17%	0%	0%	50%	33%
Broome	105	26%	90%	94	100%	29%	12%	12%	34%	14%
Cattaraugus	8	50%	100%	8	100%	50%	0%	0%	13%	38%
Cayuga	38	74%	97%	37	100%	76%	5%	0%	16%	3%
Chautauqua	124	26%	98%	121	100%	26%	10%	2%	60%	2%
Chemung	6	67%	100%	6	100%	67%	0%	0%	0%	33%
Chenango	2	50%	100%	2	100%	50%	50%	0%	0%	0%
Clinton	26	38%	96%	25	100%	40%	8%	4%	44%	4%
Columbia	18	72%	83%	15	100%	87%	0%	0%	13%	0%
Cortland	16	44%	100%	16	100%	44%	6%	0%	50%	0%
Delaware	7	14%	100%	7	100%	14%	14%	0%	71%	0%
Dutchess	52	13%	83%	43	100%	16%	7%	0%	74%	2%
Erie	95	20%	80%	76	100%	25%	11%	0%	54%	11%
Essex	2	0%	100%	2	100%	0%	0%	0%	100%	0%
Franklin	12	25%	75%	9	100%	33%	11%	0%	44%	11%
Fulton	19	42%	100%	19	100%	42%	11%	0%	16%	32%
Genesee	18	72%	100%	18	100%	72%	0%	0%	28%	0%
Greene	8	88%	100%	8	100%	88%	0%	0%	13%	0%
Hamilton	0	–	–	0	–	–	–	–	–	–
Herkimer	4	25%	100%	4	100%	25%	0%	0%	75%	0%
Jefferson	19	16%	100%	19	100%	16%	16%	0%	63%	5%
Lewis	5	40%	100%	5	100%	40%	0%	0%	40%	20%
Livingston	4	100%	100%	4	100%	100%	0%	0%	0%	0%
Madison	1	100%	100%	1	100%	100%	0%	0%	0%	0%
Monroe	150	53%	84%	126	100%	63%	7%	2%	22%	6%
Montgomery	34	24%	74%	25	100%	32%	0%	4%	64%	0%
Niagara	56	25%	88%	49	100%	29%	14%	2%	53%	2%
Oneida	22	68%	95%	21	100%	71%	0%	14%	10%	5%
Onondaga	110	29%	85%	94	100%	34%	9%	3%	48%	6%
Ontario	14	71%	93%	13	100%	77%	8%	0%	15%	0%
Orange	137	68%	90%	123	100%	76%	2%	0%	17%	5%
Orleans	13	46%	100%	13	100%	46%	8%	0%	31%	15%
Oswego	12	8%	67%	8	100%	13%	13%	0%	50%	25%
Otsego	12	50%	92%	11	100%	55%	9%	0%	9%	27%
Putnam	41	17%	41%	17	100%	41%	12%	0%	41%	6%
Rensselaer	89	33%	96%	85	100%	34%	15%	0%	51%	0%
Saratoga	18	83%	100%	18	100%	83%	0%	0%	17%	0%
Schenectady	116	58%	93%	108	100%	62%	5%	1%	25%	7%
Schoharie	6	0%	67%	4	100%	0%	0%	0%	100%	0%
Schuyler	3	67%	100%	3	100%	67%	0%	0%	33%	0%
Seneca	4	0%	75%	3	100%	0%	0%	0%	100%	0%
St. Lawrence	26	0%	100%	26	100%	0%	12%	0%	77%	12%
Steuben	34	68%	94%	32	100%	72%	6%	0%	9%	13%
Sullivan	33	36%	82%	27	100%	44%	11%	0%	44%	0%
Tioga	1	0%	100%	1	100%	0%	0%	0%	100%	0%
Tompkins	8	63%	63%	5	100%	100%	0%	0%	0%	0%
Ulster	45	62%	91%	41	100%	68%	0%	5%	24%	2%
Warren	14	64%	100%	14	100%	64%	0%	0%	29%	7%
Washington	6	67%	83%	5	100%	80%	0%	20%	0%	0%
Wayne	51	41%	94%	48	100%	44%	8%	2%	46%	0%
Wyoming	10	40%	100%	10	100%	40%	0%	0%	60%	0%
Yates	0	–	–	0	–	–	–	–	–	–

[a] Includes arrest cases that resulted in dismissals or "other sentences" because offenders successfully completed substance abuse diversion programs.

[b] Bronx County statistics for indicted/SCI cases are not presented because of a change in court practices in November 2004 that made it difficult to identify cases prosecuted in its superior courts.

Data Source: NYS Division of Criminal Justices Services, Computerized Criminal History (CCH) System.

Chart E-4

Class B Felony Drug Sale (Penal Law §220.39) Arrests Disposed 2004-2006 Involving Males Age 19 or Older With "Prior" Felony Convictions:[a] Systemwide Prison Rates and Disposition Outcomes for Indicted/SCI Arrest Cases

	All Arrest Cases			Arrest Cases Resulting in Indictments/SCIs: Disposition Outcomes							
County	N	% Prison [b]	% Indict./ SCI	N	Total	% Prison	% Willard	% Felony Jail 1-Yr.[c]	% Other Jail	% Other Sentence[d]	Dismissed [d]
Statewide	**17,934**	**33%**	–	–	–	–				–	– [e]
■ Excluding Bronx	**13,749**	**37%**	**50%**	**6,856**	**100%**	**74%**	**3%**	**3%**	**5%**	**8%**	**7%**
New York City											
Bronx	4,185	22%	NA	NA	NA	NA	NA	NA	NA	NA	NA [e]
Kings	4,073	17%	28%	1,135	100%	59%	0%	2%	14%	14%	10%
New York	5,181	38%	49%	2,548	100%	77%	2%	3%	4%	6%	8%
Queens	1,260	30%	45%	569	100%	67%	3%	5%	8%	9%	9%
Richmond	328	23%	38%	126	100%	60%	0%	7%	2%	24%	8%
Subuarban NYC											
Nassau	423	72%	93%	392	100%	78%	2%	3%	4%	10%	3%
Rockland	30	97%	100%	30	100%	97%	0%	0%	3%	0%	0%
Suffolk	457	83%	92%	420	100%	91%	1%	3%	2%	2%	1%
Westchester	228	32%	46%	105	100%	70%	3%	5%	2%	19%	2%
Upstate											
Albany	285	66%	79%	226	100%	83%	4%	1%	1%	4%	7%
Allegany	1	0%	100%	1	100%	0%	0%	0%	0%	100%	0%
Broome	147	53%	83%	122	100%	64%	8%	1%	0%	2%	25%
Cattaraugus	6	67%	100%	6	100%	67%	0%	0%	0%	17%	17%
Cayuga	46	83%	96%	44	100%	86%	7%	5%	0%	2%	0%
Chautauqua	123	69%	98%	120	100%	71%	16%	3%	1%	7%	3%
Chemung	4	0%	75%	3	100%	0%	33%	33%	0%	33%	0%
Chenango	0	–	–	0	–	–	–	–	–	–	–
Clinton	13	62%	92%	12	100%	67%	8%	0%	0%	8%	17%
Columbia	7	57%	57%	4	100%	100%	0%	0%	0%	0%	0%
Cortland	6	83%	100%	6	100%	83%	0%	0%	0%	0%	17%
Delaware	3	67%	100%	3	100%	67%	0%	0%	0%	0%	33%
Dutchess	66	70%	82%	54	100%	85%	0%	0%	0%	7%	7%
Erie	49	61%	80%	39	100%	77%	13%	5%	3%	0%	3%
Essex	2	50%	100%	2	100%	50%	0%	0%	0%	50%	0%
Franklin	4	50%	100%	4	100%	50%	0%	0%	0%	25%	25%
Fulton	10	60%	100%	10	100%	60%	0%	10%	0%	0%	30%
Genesee	9	89%	100%	9	100%	89%	0%	0%	0%	11%	0%
Greene	9	67%	89%	8	100%	75%	25%	0%	0%	0%	0%
Hamilton	0	–	–	0	–	–	–	–	–	–	–
Herkimer	0	–	–	0	–	–	–	–	–	–	–
Jefferson	19	74%	100%	19	100%	74%	16%	5%	0%	5%	0%
Lewis	1	100%	100%	1	100%	100%	0%	0%	0%	0%	0%
Livingston	6	67%	100%	6	100%	67%	33%	0%	0%	0%	0%
Madison	1	100%	100%	1	100%	100%	0%	0%	0%	0%	0%
Monroe	130	54%	70%	91	100%	77%	9%	1%	5%	5%	2%
Montgomery	15	53%	80%	12	100%	67%	25%	0%	0%	0%	8%
Niagara	52	62%	90%	47	100%	68%	15%	2%	0%	0%	15%
Oneida	37	65%	89%	33	100%	73%	3%	6%	9%	3%	6%
Onondaga	104	67%	88%	92	100%	76%	5%	2%	1%	8%	8%
Ontario	12	92%	100%	12	100%	92%	0%	0%	0%	0%	8%
Orange	99	74%	84%	83	100%	88%	4%	1%	2%	5%	0%
Orleans	13	46%	100%	13	100%	46%	38%	0%	8%	0%	8%
Oswego	3	67%	100%	3	100%	67%	33%	0%	0%	0%	0%
Otsego	10	50%	100%	10	100%	50%	10%	0%	0%	0%	40%
Putnam	7	29%	71%	5	100%	40%	20%	0%	0%	0%	40%
Rensselaer	133	78%	96%	128	100%	81%	9%	2%	1%	3%	4%
Saratoga	8	75%	75%	6	100%	100%	0%	0%	0%	0%	0%
Schenectady	141	79%	90%	127	100%	87%	5%	0%	0%	4%	4%
Schoharie	0	–	–	0	–	–	–	–	–	–	–
Schuyler	2	100%	100%	2	100%	100%	0%	0%	0%	0%	0%
Seneca	2	50%	50%	1	100%	100%	0%	0%	0%	0%	0%
St. Lawrence	16	31%	81%	13	100%	38%	15%	0%	0%	15%	31%
Steuben	33	67%	94%	31	100%	71%	10%	0%	0%	3%	16%
Sullivan	31	74%	84%	26	100%	88%	12%	0%	0%	0%	0%
Tioga	1	100%	100%	1	100%	100%	0%	0%	0%	0%	0%
Tompkins	4	50%	50%	2	100%	100%	0%	0%	0%	0%	0%
Ulster	31	81%	84%	26	100%	96%	0%	0%	0%	0%	4%
Warren	10	90%	100%	10	100%	90%	0%	0%	10%	0%	0%
Washington	12	75%	100%	12	100%	75%	8%	0%	0%	8%	8%
Wayne	35	80%	97%	34	100%	82%	3%	0%	0%	3%	12%
Wyoming	7	86%	100%	7	100%	86%	0%	0%	0%	0%	14%
Yates	4	100%	100%	4	100%	100%	0%	0%	0%	0%	0%

[a] Cases counted as involving one or more prior felony convictions include offenders legally defined as second-felony offenders, as well as offenders legally defined as first-felony offenders because their instant offenses were committed more than 10 years after the imposition of sentences for any of their previous felony convictions [see PL 70.06(1)].

[b] Cases involving direct parole-supervision sentences that required placement in the DOCS Willard facility were counted as non-prison sentences.

[c] A prison sentence is not mandatory for offenders with prior felony convictions who are legally classified as first-felony offenders; see footnote "a".

[d] Includes cases that resulted in dismissals or "other sentences" because offenders successfully completed substance abuse diversion programs.

[e] Bronx County statistics for indicted/SCI cases are not presented because of a change in court practices in November 2004 that made it difficult to identify cases prosecuted in its superior courts.

Data Source: NYS State Division of Criminal Justices Services, Computerized Criminal History (CCH) System.

Chart E-5

Class B Felony Drug Possession and Sale Arrest Offense Cases Involving Males Age 19 or Older That Resulted in Felony Indictments or Superior Court Informations, Disposed 2004-2006

Variable					Mean/Percent Distribution			
					Possession		Sale	
		Range			(PL §220.16):	(PL §220.16):	(PL §220.39):	(PL §220.39):
Type and Description	Value	Min	Max	Max Cap[a]	No Pr Fel Conv	Pr Fel Conv	No Pr Fel Conv	Pr Fel Conv
					N=4,770	*N=4,316*	*N=6,428*	*N=7,892*
Dichotomous/Interval								
■ Prison Sentence[b]	–	0	1	–	0.23	0.64	0.26	0.71
■ Prison/One-Year Jail Sentence[b]	–	0	1	–	0.33	0.67	0.39	0.73
■ Prison/Direct Parol Supervison & Willard Diversion Sentence[b]	–	0	1	–	–	0.69	–	0.73
■ VFO Instant Offense[b]	–	0	1	–	0.06	0.07	0.01	0.01
■ Weapon Instant Offense[b]	–	0	1	–	0.10	0.10	0.01	0.01
■ Number of Prior Felony Drug Arrests	–	0	11	10	0.59	–	–	–
■ Number of Prior Misd. Drug Arrests	–	0	17	10	0.95	–	–	–
■ Number of Prior VFO Drug Arrests	–	0	10	10	0.45	–	–	–
■ Number of Other Prior Felony Arrests	–	0	13	10	0.49	–	–	–
■ Age at Case Disposition/Sentence	–	19	75	–	27.97	–	–	–
■ Number of Prior Felony Drug Arrests	–	0	38	10	–	2.68	–	–
■ Number of Prior Misd. Drug Arrests	–	0	50	10	–	1.80	–	–
■ Number of Prior VFO Drug Arrests	–	0	15	10	–	1.74	–	–
■ Number of Other Prior Felony Arrests	–	0	22	10	–	1.52	–	–
■ Age at Case Disposition/Sentence	–	19	80	–	–	32.65	–	–
■ Number of Prior Felony Drug Arrests	–	0	14	10	–	–	0.73	–
■ Number of Prior Misd. Drug Arrests	–	0	51	10	–	–	1.38	–
■ Number of Prior VFO Drug Arrests	–	0	9	10	–	–	0.50	–
■ Number of Other Prior Felony Arrests	–	0	13	10	–	–	0.54	–
■ Age at Case Disposition/Sentence	–	19	85	–	–	–	29.28	–
■ Number of Prior Felony Drug Arrests	–	0	29	10	–	–	–	3.25
■ Number of Prior Misd. Drug Arrests	–	0	66	10	–	–	–	2.78
■ Number of Prior VFO Drug Arrests	–	0	25	10	–	–	–	2.00
■ Number of Other Prior Felony Arrests	–	0	40	10	–	–	–	1.88
■ Age at Case Disposition/Sentence	–	19	77	–	–	–	–	35.54
Ordinal								
■ **Pending Cases Involving Arrest That Prior to the Instant Arrest: Most Serious Arrest Offense**					**100%**	**100%**	**100%**	**100%**
None	0	–	–	–	79%	81%	75%	80%
Misdemeanor Offense	1	–	–	–	10%	9%	11%	8%
Felony Non-VFO, Non-Drug Offense	2	–	–	–	2%	2%	2%	2%
VFO or VFO/Drug Offense	3	–	–	–	7%	7%	9%	8%
Felony Drug Offense	4	–	–	–	2%	2%	3%	2%
■ **Most Serious Prior Sentence: Cases With Prior Felony Convs.**					**100%**	**100%**	**100%**	**100%**
None of the Following Sentences	0	–	–	–	54%	2%	48%	1%
Time Served	1	–	–	–	6%	<1%	8%	<1%
Probation	2	–	–	–	13%	8%	11%	5%
One Jail Sentence	3	–	–	–	11%	6%	12%	5%
Two or More Jail Sentences	4	–	–	–	7%	8%	12%	10%
Jail-Probation	5	–	–	–	7%	16%	8%	13%
One Prison Sentence	6	–	–	–	2%	30%	2%	28%
Two Prison Sentences	7	–	–	–	<1%	18%	<1%	19%
Three or More Prison Sentences	8	–	–	–	<1%	13%	<1%	19%

[a] Values were capped at 10 for the logit analysis. In each data set each of these variables had less than 1% of cases with values exceeding 10.

[b] Range values: 0 = no and 1 = yes.

Data Source: NYS Division of Criminal Justices Services, Computerized Criminal History (CCH) System.

Chart E-6

Class B Felony Drug Possession (Penal Law §220.16) Arrests Involving Males Age 19 or Older That Resulted in Felony Indictments or Superior Court Informations, Disposed 2004-2006: Modeled Odds[a] for "Prison" and "Prison or Willard" Sentences by County

	First-Felony Offender (No Prior Felony Conv.)				Second-Felony Offender[b] (Any Prior Felony Conviction)			
Disposition County (Sorted by Odds)	Odds of Prison Compared to Kings		N of Cases	Disposition County (Sorted by Prison Odds)	Odds of Prison Compared to Kings	Odds of Prison/Willard Compared to Kings[c]		N of Cases
■ Queens	0.4	e	417	■ Bronx (thru 10/31/04 only)[d]	0.3	e	0.3	e 303
■ Bronx (thru 10/31/04 only)[d]	0.5	e	319	■ Monroe	0.5	e	0.9	255
■ Westchester	0.5	e	230					
■ Erie	0.6	e	331	■ Erie	0.8		1.4	233
				■ Kings (Brooklyn)	1.0		1.0	454
■ Suffolk	0.7		242	■ Nassau	1.3		1.5	e 184
■ Monroe	0.8		289	■ Queens	1.3		1.4	e 288
■ Nassau	0.9		184	■ Onondaga	1.4		1.7	e 219
■ Kings (Brooklyn)	1.0		401	■ Westchester	1.4		1.9	e 180
■ New York (Manhattan)	1.2		779					
				■ Suffolk	1.6	e	2.1	e 221
■ Broome	2.1	e	102	■ Albany	1.7	e	2.0	e 193
■ Onondaga	2.1	e	265	■ New York (Manhattan)	1.9	e	2.2	e 819
■ Albany	4.7	e	143	■ Broome	1.9	e	2.9	e 113
■ Oneida	4.9	e	136	■ Oneida	2.0	e	2.8	e 103
■ Average Odds for All Other Counties[f]	3.4	e	932	■ Average Odds for All Other Counties[f]	2.0	e	2.7	e 751
Total			**4,770**	Total				**4,316**
	Nagelkerke R² = .208				*Nagelkerke R² = .159*		*N R² = .156*	
	ROC = .751				*ROC = .702*		*ROC = .702*	

[a] The binary logistic regression model used to estimate the modeled odds controlled for (1) any VFO or weapons charge (arrest, indictment, or conviction; top or underlying); (2) the most serious pending prior arrest charge (misdemeanor; VFO, felony drug, other felony); (3) the number of prior VFO, felony drug, and other felony arrests, as well as the number of prior misdemeanor drug arrests, (4) the most serious prior sentence, including the number of prior jail or prison sentences; age at arrest; and county of case disposition.

[b] The "second-felony offender" category includes any case involving an offender with a prior felony conviction rather than only those defined as second-felony offenders in PL §70.06(1).

[c] Only second-felony offenders can receive a direct-parole-supervsion sentence that includes admission to Willard as a condition of sentence. The odds for "prison" and combined "prison-Willard" models can be compared because there were no cases admitted to Willard from Kings County. That is, the number of Kings cases coded as "1" (in dependent variables) was the same for both the prison and the prison-Willard models.

[d] Excludes Bronx indicted/SCI arrest cases for which felony indictment and SCI status could not be determined.

[e] Significance at p. <.05.

[f] An individual county could have a much higher or lower "odds" of prison than the average for "all other counties."

Data Source: The New York State Division of Criminal Justices Services, Computerized Criminal History (CCH) System.

Chart E-7

Class B Felony Drug Sale (Penal Law §220.39) Arrests Involving Males Age 19 or Older That Resulted in Felony Indictments or Superior Court Informations, Disposed 2004-2006: Modeled Odds[a] for "Prison" and "Prison or Willard" Sentences by County

	First-Felony Offender (No Prior Felony Conv.)			Second-Felony Offender[b] (Any Prior Felony Conviction)			
Disposition County (Sorted by Odds)	Odds of Prison Compared to Kings		N of Cases	Disposition County (Sorted by Prison Odds)	Odds of Prison Compared to Kings	Odds of Prison/Willard Compared to Kings[c]	N of Cases
■ Westchester	0.4 [e]		117	■ Bronx (thru 10/31/04 only)[d]	0.6 [e]	0.6 [e]	1,036
■ Nassau	0.5 [e]		323				
				■ Richmond	0.9	0.9	126
■ New York/Manhattan	0.9		1,485	■ Kings/Brooklyn	1.0	1.0	1,135
■ Queens	1.0		589	■ Broome	1.1	1.6 [e]	122
■ Kings/Brooklyn	1.0		914				
■ Suffolk	1.0		372	■ Queens	1.4 [e]	1.6 [e]	569
■ Richmond	1.2		108	■ Westchester	1.5	1.7 [e]	105
■ Chautauqua	1.5		121	■ Chautauqua	1.6 [e]	4.1 [e]	120
				■ Onondaga	2.1 [e]	2.9 [e]	92
■ Broome	1.7 [e]		94	■ New York/Manhattan	2.4 [e]	2.7 [e]	2,548
■ Bronx (thru 10/31/04 only)[d]	1.7 [e]		814	■ Nassau	2.5 [e]	2.8 [e]	392
■ Onondaga	2.0 [e]		94	■ Monroe	2.5 [e]	4.6 [e]	91
■ Rensselaer	2.3 [e]		85	■ Rensselaer	2.8 [e]	5.8 [e]	128
■ Albany	3.3 [e]		150	■ Albany	2.9 [e]	4.0 [e]	226
■ Monroe	7.1 [e]		126	■ Schenectady	4.4 [e]	7.5 [e]	127
■ Schenectady	7.4 [e]		108	■ Orange	5.1 [e]	7.6 [e]	83
■ Orange	14.4 [e]		123	■ Suffolk	7.3 [e]	8.0 [e]	420
■ Average Odds for All Other Counties[f]	3.8 [e]		805	■ Average Odds for All Other Counties[f]	2.6 [e]	4.2 [e]	572
Total			**5,988**	Total			**6,730**
	Nagelkerke R² = .206	*ROC = .742*			*Nagelkerke R² = .157*	*N R² = .175* *ROC = .727*	

[a] The binary logistic regression model used to estimate the modeled odds controlled for (1) any VFO or weapons charge (arrest, indictment, or conviction; top or underlying); (2) the most serious pending prior arrest charge (misdemeanor; VFO, felony drug, other felony); (3) the number of prior VFO, felony drug, and other felony arrests, as well as the number of prior misdemeanor drug arrests, (4) the most serious prior sentence, including the number of prior jail or prison sentences; age at arrest; and county of case disposition.

[b] The "second-felony offender" category includes any case involving an offender with a prior felony conviction rather than only those defined as second-felony offenders in PL §70.06(1).

[c] Only second-felony offenders can receive a direct-parole-supervsion sentence that includes admission to Willard as a condition of sentence. The odds for "prison" and combined "prison-Willard" models can be compared because there were no cases admitted to Willard from Kings County. That is, the number of Kings cases coded as "1" (in dependent variables) was the same for both the prison and the prison-Willard models.

[d] Excludes Bronx indicted/SCI arrest cases for which felony indictment and SCI status could not be determined.

[e] Significance at p. <.05.

[f] An individual county could have a much higher or lower "odds" of prison than the average for "all other counties."

Data Source: The New York State Division of Criminal Justices Services, Computerized Criminal History (CCH) System.

Chart E-8

Class B Felony Drug Arrests Involving Males Age 19 or Older Without Prior Felony Convictions That Resulted in Felony Indictments or Superior Court Informations, Disposed 2004-2006: Modeled Odds[a] of Either a Prison or One-Year Felony Jail Sentence by County and Offense

Possession (PL §220.16)			Sale (Penal Law §220.39)		
Disposition County (Sorted by Odds)	Odds of Prison or One-Year Jail Compared to Kings	N of Cases	Disposition County (Sorted by Odds)	Odds of Prison or One-Year Jail Compared to Kings	N of Cases
■ Bronx (thru 10/31/04 only)[b]	0.5 [c]	319	■ Nassau	0.6 [c]	323
■ Erie	0.5 [c]	331			
			■ Westchester	0.8	117
■ Suffolk	0.7	242	■ Kings (Brooklyn)	1.0	914
■ Queens	0.7	417	■ Queens	1.2	589
■ Monroe	0.9	289	■ Suffolk	1.2	372
■ Kings (Brooklyn)	1.0	401	■ Chautauqua	1.2	121
■ Westchester	1.0	230	■ Bronx (thru 10/31/04 only)[b]	1.3	814
■ Nassau	1.0	184	■ Richmond	1.3	108
■ New York (Manhattan)	1.6 [c]	779	■ New York (Manhattan)	1.4 [c]	1485
■ Onondaga	1.7 [c]	265	■ Broome	1.4	94
■ Broome	1.7 [c]	102	■ Onondaga	1.5	94
■ Albany	2.7 [c]	143	■ Albany	1.7 [c]	150
■ Oneida	4.3 [c]	136	■ Rensselaer	2.3 [c]	85
			■ Schenectady	4.4 [c]	108
			■ Monroe	4.9 [c]	126
			■ Orange	8.2 [c]	123
■ Average Odds for All Other Counties[d]	2.4 [e]	932	■ Average Odds for All Other Counties[d]	2.5 [c]	805
Total		**4,451**	Total		**6,105**
	Nagelkerke R² = .188			*Nagelkerke R² = .156*	
	ROC = .724			*ROC = .702*	

[a] The binary logistic regression model used to estimate the modeled odds controlled for (1) any VFO or weapons charge (arrest, indictment, or conviction; top or underlying); (2) the most serious pending prior arrest charge (misdemeanor; VFO, felony drug, other felony); (3) the number of prior VFO, felony drug, and other felony arrests, as well as the number of prior misdemeanor drug arrests, (4) the most serious prior sentence, including the number of prior jail or prison sentences; age at arrest; and county of case disposition.

[b] Excludes Bronx indicted/SCI arrest cases for which felony indictment and SCI status could not be determined.

[c] Significance at p. <.05.

[d] An individual county could have a much higher or lower "odds" of prison than the average for "all other counties."

Data Source: The New York State Division of Criminal Justices Services, Computerized Criminal History (CCH) System.

APPENDIX F

ANOMALIES

ANOMALIES

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

(1) The persistent violent felony offender statute[441] fails to specify the minimum period of incarceration for a persistent offender convicted of a Class E violent felony.

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

> The rationale for that conclusion was that the minimum period of imprisonment of the indeterminate sentence to be imposed on a "second" violent felony offender convicted of a class E felony was, at the time *Green* was decided, two years, and thus the legislative intent for the "persistent" -- a third -- violent felony offender should be no less. In the words of the Court: "The *minimum* set forth in [the then governing second felony offender statute] should logically apply to persistent offenders (*id.,* at 153 [emphasis supplied]).[442]

In 1995, the Legislature changed the sentence for a second violent felony offender from an indeterminate to a determinate sentence. "In the same legislation, the minimum periods of the indeterminate term of imprisonment for a persistent violent felony offender of a Class B, C and D felony were amended to double the low end of the required minimum period; but the Legislature chose not to

[441] Penal Law §70.08 (3).
[442] Donnino, Practice Commentaries, McKinney's Cons. Laws of NY, Book 39, Penal Law Article 70, at 72.

amend the statute to specify any minimum for the Class E felony."[443] Subsequently, in *People v. Tolbert* (93 NY2d 86, 88 [1999]), the Court of Appeals followed the rationale of *Green* and held that "the amended determinate sentence for Class E second violent felony offenders should also be applied as the minimum sentence for Class E persistent violent felony offenders."[444]

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

The persistent felony offender statute[445] applies to defendants who are convicted of a felony and who have "two prior judgments of conviction for a felony or for a foreign jurisdiction crime for which a sentence to a term of imprisonment in excess of one year or a sentence to death was imposed."[446] Unlike the persistent violent felony offender and other Penal Law multiple felony offender statutes, pursuant to Penal Law §70.10:

> the court is not required to find that the defendant is a persistent felony offender simply on the basis of the crime presently convicted of and the crimes previously committed. Those facts are the threshold determinations for persistent felony offender consideration. To impose the sentence mandated for a persistent felony offender, the court must also be of the "opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest."[447]

The plain language of Penal Law §70.10(2) provides that where the court has found that the defendant is a "persistent felony

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[443] *Id.*
[444] *Id.*
[445] Penal Law §70.10.
[446] Donnino, Practice Commentaries, McKinney's Cons. Laws of NY, Book 39, Penal Law Article 70, at 68.
[447] *Id.*

offender" and is of the opinion that "extended incarceration and life-time supervision will best serve the public interest," in lieu of imposing a sentence authorized by Penal Law §70.00 (sentence of imprisonment for a felony), §70.02 (violent felony offender), §70.04 (second violent offender) or §70.06 (second felony offender), the court may impose "the sentence of imprisonment authorized by that section for a Class A-1 felony."[448]

The problem is that there is no sentence of imprisonment for a Class A-1 felony authorized by Penal Law §§70.02 or 70.04 or 70.06, since those sections generally refer only to Class B through E felonies. While Penal Law §70.00 does contain language relating to the sentence of imprisonment for a Class A-1 felony due to fairly recent amendments to subdivision (3)(a) of section 70.00, there are actually three different A-1 felony sentences referred to in that section. Stated simply, the aforementioned language of Penal Law §70.10 is inexplicably imprecise and, in view of the fact that implementation of this language can result in a sentence of life imprisonment, should be clarified.[449]

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

The Crimes Against Police Act[450] increased sentences for certain first-time felony offenders convicted of menacing, assault or homicide crimes directed at police officers and peace officers. However, because no corresponding change was made to the

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[448] Penal Law §70.10 (2) (emphasis supplied).

[449] The Commission is aware that Penal Law §70.10 has been challenged on constitutional grounds in a series of state and federal cases. While the statute has been upheld by the New York State Court of Appeals (*see, People v. Rosen* (96 NY2d 329 [2001]; *People v. Rivera,* 5 NY3d 61 [2005]), its validity has been called into question by certain lower federal court rulings (*see, Washington v. Poole*, 507 F.Supp.2d 342 [S.D.N.Y. 2007]; *Portalatin v. Graham*, 478 F.Supp.2d. 385 [E.D.N.Y. 2007]).

[450] Laws of 2005, ch. 765.

homicide crimes directed at police officers and peace officers. However, because no corresponding change was made to the applicable multiple felony offender statutes, there are now instances where the maximum multiple felony offender sentence for certain of these crimes is less than the maximum for a first-time offender convicted of the same crime. For example, a first-time felony offender convicted of aggravated first degree manslaughter[451] faces a determinate sentence of up to 30 years. That same crime, prosecuted as a second violent felony offense, carries a determinate sentence of up to 25 years.

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

CPL 220.10 establishes a series of post-indictment restrictions on felony plea bargaining, some of which can lead to anomalous results. For example, a person who is charged with manslaughter in the first degree, a Class B violent felony offense, and chooses to plead guilty in satisfaction of that charge must plead to no less than a Class C violent or Class D violent felony offense.[452] That rules out the possibility that the offender can plead to manslaughter in the second degree, a Class C *non*-violent felony. Manslaughter in the second degree, however, carries a potential indeterminate prison sentence with a maximum of up to 15 years, while a Class D violent felony offense carries a significantly less harsh maximum determinate sentence of up to seven years.

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

In 2007, the Legislature enacted the Sex Offender Management and Treatment Act.[453] The Act authorizes civil confinement of sex offenders and also enacts significant changes in criminal sentencing of

[451] Penal Law §125.22.
[452] CPL 220.10(5)(d)(ii).
[453] Laws of 2007, ch. 7.

sex offenders. The law seemingly imposes a more stringent range of penalties for a Class D non-violent felony (such as burglary in the third degree),[454] committed as a "sexually motivated felony"[455] than for a Class D violent felony sex offense such as sexual abuse in the first degree.[456] Specifically, for a Class D violent felony sex offense such as sexual abuse in the first degree, the available sentences appear to include: intermittent imprisonment for up to one year, a conditional discharge, a "split sentence" of jail plus probation (or conditional discharge), a fine (alone or in combination with the above), or even an unconditional discharge.[457] In contrast, for the *non*-violent Class D felony of burglary in the third degree committed as a sexually motivated felony, the only authorized sentences are a determinate sentence of at least 2 and not more than 7 years,[458] plus post-release supervision of between 3 and 10 years,[459] a local jail sentence of up to 1 year, or a term of 10 years probation.[460] A conditional or unconditional discharge, split sentence or a fine (alone or in combination with another sentence) do not appear to be available sentences for this non-violent felony sex offense.[461]

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

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

[454] Penal Law §140.20.
[455] Penal Law §130.91.
[456] Penal Law §130.65.
[457] Penal Law §70.02(2)(b).
[458] Penal Law §70.80(4)(a)(iii).
[459] Penal Law §70.80 (9); §70.45 (2-a).
[460] Penal Law §70.80 (4)(b), (c).
[461] Penal Law §60.05 (1).

maximum term. When the concurrent sentence that is being credited is a determinate sentence, however, the credit is applied to the entire determinate term.

The consequence of this is as follows: if credit for time served on a particular sentence is applied only to the minimum portion of a concurrent indeterminate term (and not the maximum), the conditional release date, which is fixed at two-thirds of the maximum term, remains unchanged. However, when the same jail credit is applied under the direction of Penal Law §70.30(1)(a) to the term of a concurrent determinate sentence, the conditional release date is affected and the defendant benefits because the date for conditional release on a determinate sentence is calculated on the "term" of the sentence (i.e., six-sevenths of the determinate term).[462]

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

An indeterminate sentence of imprisonment is mandatory for certain Class C non-violent felonies enumerated in Penal Law §60.05(4). These include criminal usury in the first degree,[463] attempted bribe receiving in the first degree[464] and promoting prostitution in the second degree.[465] However, an offender who commits a non-violent Class C felony that is not enumerated in Penal Law §60.05(4) is not subject to a mandatory prison term.

Instead, he or she may be sentenced to straight probation, a conditional discharge, or simply a fine.[466] Where, however, the court

[462] In its 2007 Report to the Chief Administrative Judge, OCA's Advisory Committee on Criminal Law and Procedure offers legislative proposals to address this problem and the problems discussed in items 7 to 9, *infra*. The Commission has reviewed and supports the enactment by the Legislature of these four proposals.
[463] Penal Law §190.42.
[464] Penal Law §§110.00/200.12.
[465] Penal Law §230.30.
[466] Penal Law §§60.01(2), (3); 65.00(1)(a); 65.05(1)(a).

chooses to impose imprisonment for one of these offenses rather than, for example, a conditional discharge or fine, the sentence of imprisonment must be an indeterminate sentence. Inexplicably, a local jail sentence of one year or less is simply not permitted.[467]

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

As part of the Drug Law Reform Act of 2004,[468] the Legislature added sections 60.04, 70.70 and 70.71 to the Penal Law to replace the existing indeterminate sentencing paradigm for felony drug offenses with a fully determinate sentencing scheme. Although newly added Penal Law §70.70(3)(d) clearly allows certain of these determinate sentences to be executed as a "sentence of parole supervision" (*i.e.*, a "Willard" sentence), the Legislature, in an apparent oversight, failed to amend CPL 410.91, which defines and establishes the procedures for imposing a sentence of parole supervision and appears to limit these sentences to indeterminate sentences.

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

Where a defendant is not a multiple felony offender, a sentencing judge currently has the option of imposing, among other penalties, a definite sentence of one year or less for most Class D violent felony offenses.[469] Where, however, the judge determines that a sentence of more than one year is warranted, he or she must impose a

[467] Penal Law §70.00(1). In a similar vein, Penal Law §65.10(2)(h) prohibits the use of community service as a condition of probation for non-violent Class C felons.
[468] Laws of 2004, ch. 738.
[469] Penal Law §70.02(2)(b).

determinate sentence of not less than two years.[470] Given that the current available sentencing options for these Class D violent felony offenders also include straight probation, a conditional discharge or a fine only, it makes no sense that a determinate sentence of 1½ years is not a permissible sentence in these cases.

(10) Certain sentencing requirements and restrictions for felony "youthful offenders" are unclear or simply do not make sense.

In general, a "youthful offender" under New York law is a first-time offender who commits a crime (other than a Class A, armed or specified sex felony) when at least 16 and less than 19 years of age, and whose conviction for that offense has been replaced by the court with a "youthful offender finding."[471]

The statutory scheme for sentencing youthful offenders states at the outset that a youthful offender adjudication is not a criminal "conviction,"[472] and then requires that a sentence be imposed as if the individual had been convicted of a crime. Where the offense committed is a felony, in general, "the court must impose a sentence authorized to be imposed upon a person convicted of a Class E felony."[473] Because there are now several different "authorized" sentences of imprisonment for Class E felonies (e.g., determinate sentences for violent Class E felonies,[474] indeterminate sentences for non-violent, non-drug, non-sex Class E felonies;[475] determinate sentences for Class E drug felonies[476] and determinate sentences for Class E sex felonies),[477] the law is not entirely clear as to which "authorized" Class E felony sentence should be taken as the template for a particular felony youthful offender sentence.

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[470] Penal Law §70.02(3)(c).
[471] CPL 720.10(4).
[472] CPL 720.35(1).
[473] Penal Law §60.02(2).
[474] Penal Law §70.02.
[475] Penal Law §70.00 (2) and (3).
[476] Penal Law §70.70 (2)(a)(iv).
[477] Penal Law §70.80(4).

Further, a Class C, D or E drug felon is eligible to receive a conditional or unconditional discharge – but not if he or she was afforded youthful offender status,[478] a sentencing restriction that makes no sense.

(11) Certain unintended sentencing consequences may result from the "Hate Crimes" legislation.[479]

Pursuant to Penal Law §125.25(5) (murder in the second degree), when a person at least 18 years of age intentionally kills a person less than 14 years of age while committing any of several specified sex offenses, the statute provides for a mandatory sentence of life imprisonment without parole.[480] However, if this Class A-I felony offense is prosecuted as a "hate crime" pursuant to Penal Law §485.05(1)(a), a separate statute provides that "notwithstanding any other provision of law," the minimum period of the indeterminate sentence imposed on the "hate crime" conviction shall be "not less than twenty years."[481] Consequently, it appears that the mandated sentence for this particular "hate crime" is actually more lenient than the mandated sentence for the underlying crime.[482]

[478] Penal Law §§60.02 (2); 60.04(4).
[479] Laws of 2000, ch. 107.
[480] Penal Law §§60.06; 70.00 (5).
[481] Penal Law §485.10(4).
[482] *See generally*, Penal Law §70.00(5) (providing that, "[f]or purposes of commitment and custody, other than parole and conditional release * * * [a sentence of life without parole] shall be deemed to be an indeterminate sentence").

APPENDIX G

APPLICATION OF THE JUDICIAL DIVERSION MODEL TO A 2006 DOCS' ADMISSION POOL

Chart G-1

2006 DOCS First Admission[a] Drug Offense Cases Resulting From Class B Felony Drug Indictments: Estimated Number of First-Felony Offenders Potentially Eligible for Diversion Under the Judicial Diversion Proposal[b]

Eligibility Status	N of Cases
Total Drug Admissions Involving Class B Felony Drug Indictments	**1,957**
Estimated Number Eligible for Diversion	**1,211**
Conviction Offense Mix	
Drug Offense Only	1,177
Drug and Non-Drug Probation-Eligible Offenses	34
Shock Incarceration Status	
Not Eligible - Age 40 or Older at Admission	275
Not Eligible - Age 16-39 at Admission	250
Eligible, but did not enter Shock	300
Entered Shock	386
Estimated Number Ineligible for Diversion or Excluded for Reasons Specified Below	**746**
Excluded Cases by Exclusion Criteria	**746**
Instant Arrest Top Offense Class	
Class A Felony Arrest Offense	271
Instant Conviction Offense	
Non-Drug Probation Ineligible Offense	29
Pending Non-Drug Probation Ineligible Offense	46
Outstanding Immigration and Customs Enforcement (ICE) Warrant[c]	104
Prior YO Adjudication Within Preceding 10 Years[d] That Involved Excluded Felony Offenses (VFO, PL Article 125 or SOR felony offense)	97
Probation Violation or Failed Drug Treatment Diversion[e]	199

Note: Cases were removed from the "eligible" pool based on the order in which exclusion criteria are ranked in this table.

[a] This analysis includes only admissions following initial sentencing by the court. Thus, it does not include admissions resulting from violations of parole or post-release supervision.

[b] Under this proposal, a first-time felony drug offender must be indicted for a class B felony drug possession or sale offense (other than Penal Law §220.44) and must not have been adjudicated a youthful offender (YO) in the preceding 10-year period for: (1) a felony sex offense enumerated in Correction Law §168-a; (2) a felony homicide offense defined in Penal Law Article 125 or (3) a "violent felony offense" as defined in Penal Law §70.02(1).

[c] Although not expressly excluded from eligibility under the judicial diversion proposal, offenders with outstanding federal ICE warrants at the time of admission to DOCS were considered ineligible in this analysis due to their presumed unavailability for diversion to community-based treatment programs.

[d] The 10-year period excludes estimated time spent in prison or jail.

[e] It was assumed that cases with initial plea dates prior to 2005, indeterminate sentences for drug offenses, or initial sentences of parole supervision were failed drug treatment cases. Cases with initial sentences of straight probation or probation-jail were classified as probation violation cases.

Data Sources: NYS Division of Criminal Justice Services, Computerized Criminal History System, and NYS Department of Correctional Services admissions database.

Chart G-2

2006 DOCS First Admission[a] Class B, C, D and E Drug and "Specified" Willard Offenses: Estimated Number of Second-Felony Offenders Potentially Eligible for Diversion Under the Judicial Diversion Proposal[b]

Eligibility Status	N of Cases		
	Total	Drug	"Specified" Willard[c]
Total Class B, C, D and E Drug and "Specified" Willard Offense Admissions	**4,079**	**3,296**	**783**
Estimated Number Eligible for Diversion	**1,820**	**1,540**	**280**
Conviction Offense Mix			
Drug Offense Only	**1,536**	1,536	NA
Drug and Underlying Willard-Eligible Offenses	**4**	4	NA
"Specified" Willard Non-Drug Offense Only	**272**	NA	272
"Specified" Willard Non-Drug & Underlying Drug Offenses	**8**	NA	8
Shock Incarceration Status			
Not Eligible - Age 40 or Older at Admission	**664**	515	149
Not Eligible - Age 16-39 at Admission	**792**	715	77
Eligible, but did not enter Shock	**147**	118	29
Entered Shock	**217**	192	25
Estimated Number Ineligible for Diversion or Excluded for Reasons Specified Below	**2,259**	**1,756**	**503**
Excluded Cases by Exclusion Criteria	**2,259**	**1,756**	**503**
Instant Arrest Top Offense Class			
Class A Felony Arrest Offense	**139**	139	NA
Instant Conviction Offense			
Non-Drug or Non-Willard Offense	**118**	118	NA
Pending Indictment with Exclusion Offense	**103**	54	49
Outstanding Immigration and Customs Enforcement (ICE) Warrant[d]	**128**	97	31
Prior Felony Conviction Within Preceding 10 Years[c] That Involved Excluded Felony Offenses			
Prior Class A Felony Conviction	**37**	34	3
Prior VFO Conviction	**712**	565	147
Prior PL 125 Felony Conviction	**6**	4	2
Prior SOR Felony Conviction	**18**	11	7
Other Prior Non-Drug or Non-Willard Felony Conviction	**669**	416	253
Prior YO Adjudication Within Preceding 10 Years[e] That Involved Excluded Felony Offenses (VFO, PL Article 125 or SOR felony offense)	**43**	41	2
Failed Drug Treatment Diversion[f]	**286**	277	9

Note: Cases were removed from the "eligible" pool based on the order in which exclusion criteria are ranked in this table. The notation "NA" indicates that a category was not applicable.

[a] This analysis includes only admissions following initial sentencing by the court. Thus, it does not include admissions resulting from violations of parole or post-release supervision.

[b] Under this proposal, second felony offenders indicted for a class B, C, D or E felony drug (PL Article 220 sections other than PL §220.44) or marihuana (PL Article 221) offense, or a class D or E felony "specified" Willard [CPL §410.91(5)] offense would be eligible for judicial diversion. A defendant charged in the same or another pending indictment with any other felony offense would, unless the charge is reduced to a misdemeanor, dismissed or otherwise disposed of under an existing provision of the Criminal Procedure Law, be ineligible for diversion. Furthermore, the offender must not have been convicted of a non-diversion-eligible felony offense or adjudicated a youthful offender (YO) in the preceding 10-year period for: (1) a felony sex offense enumerated in Correction Law §168-a; (2) a felony homicide offense defined in PL Article 125 or (3) a “violent felony offense” as defined in PL §70.02(1).

[c] Admission cases counted as drug cases were excluded from the count of "specified" Willard cases.

[d] Although not expressly excluded from eligibility under the judicial diversion proposal, offenders with outstanding federal ICE warrants at the time of admission to DOCS were considered ineligible in this analysis due to their presumed unavailability for diversion to community-based treatment programs.

[e] The 10-year period excludes estimated time spent in prison or jail.

[f] For drug admissions, it was assumed that cases with initial plea dates prior to 2005, indeterminate sentences for drug offenses, or initial sentences of parole supervision were failed drug treatment cases. For "specified" Willard offense admissions, it was assumed that cases with time-lapses of three months or more between sentence and admission dates were failed drug treatment cases.

Data Sources: NYS Division of Criminal Justice Services, Computerized Criminal History System, and NYS Department of Correctional Services admissions database.

APPENDIX H

GENERAL CONDITIONS OF PAROLE

According to the New York State Parole Handbook, the general conditions of Parole release are:

(1) *I will proceed directly to the area to which I have been released and, within twenty-four hours of my release, make my arrival report to that office of the Division of Parole unless other instructions are designated on my release agreement.*

(2) *I will make office and/or written reports as directed.*

(3) *I will not leave the State of New York or any other state to which I am released or transferred, or any area defined in writing by my Parole Officer without permission.*

(4) *I will permit my Parole Officer to visit me at my residence and/or place of employment and I will permit the search and inspection of my person, residence, and property. I will discuss any proposed changes in my residence, employment, or program status with my Parole Officer. I understand that I have an immediate and continuing duty to notify my Parole Officer of any changes in my residence, employment, or program status when circumstances beyond my control make prior discussion impossible.*

(5) *I will reply promptly, fully, and truthfully to any inquiry of, or communication by, my Parole Officer or other representative of the Division of Parole.*

(6) *I will notify my Parole Officer immediately any time I am in contact with, or arrested by, any law enforcement agency. I understand that I have a continuing duty to notify my Parole Officer of such contact or arrest.*

(7) *I will not be in the company of, or fraternize with any person I know to have a criminal record or whom I know to have been adjudicated a Youthful Offender, except for accidental encounters in public places, work, school, or in any other instance with the permission of my Parole Officer.*

(8) *I will not behave in such manner as to violate the provisions of any law to which I am subject, which provides for a penalty of imprisonment, nor will my behavior threaten the safety or well-being of myself or others.*

(9) *I will not own, possess, or purchase any shotgun, rifle, or firearm of any type without the written permission of my Parole Officer. I will not own, possess, or purchase any deadly weapon as defined in the Penal Law or any dangerous knife, dirk, razor, stiletto, or imitation pistol. In addition, I will not own, possess or purchase any instrument readily capable of causing physical injury without a satisfactory explanation for ownership, possession or purchase.*

(10) *In the event that I leave the jurisdiction of the State of New York, I hereby waive my right to resist extradition to the State of New York from any state in the Union and from any territory or country outside the United States. This waiver shall be in full force and effect until I am discharged from Parole or Conditional Release. I fully understand that I have the right under the Constitution of the United States and under law to contest any effort to extradite me from another state and return me to New York, and I freely and knowingly waive this right as a condition of my Parole or Conditional Release.*

(11) *I will not use or possess any drug paraphernalia or use or possess any controlled substance without proper medical authorization.*

(12) *Special Conditions: (as specified by the Board of Parole, Parole Officer or other authorized representative).*

(13) *I will fully comply with the instructions of my Parole Officer and obey such special additional written conditions as he/she, a member of the Board of Parole, or an authorized representative of the Division of Parole, may impose.*