NEW YORK STATE SENATE

THE

STENOGRAPHIC RECORD

ALBANY, NEW YORK

April 27, 1999

3:04 p.m.

REGULAR SESSION

LT. GOVERNOR MARY O. DONOHUE, President

STEVEN M. BOGGESS, Secretary

P R O C E E D I N G S

THE PRESIDENT: The Senate will come to order.

I ask everyone present to please rise and repeat with me the Pledge of Allegiance.

(Whereupon, the assemblage recited the Pledge of Allegiance to the Flag.)

THE PRESIDENT: In the absence of clergy, may we all bow our heads in a moment of silence, please.

(Whereupon, the assemblage respected a moment of silence.)

THE PRESIDENT: Reading of the Journal.

THE SECRETARY: In Senate, Monday, April 26th, the Senate met pursuant to adjournment. The Journal of Sunday, April 25th, was read and approved. On motion, Senate adjourned.

THE PRESIDENT: Without objection, the Journal stands approved as read.

Presentation of petitions.

Messages from the Assembly.

Messages from the Governor.

Reports of standing committees.

The Secretary will read.

THE SECRETARY: Senator Lack, from the Committee on Judiciary, reports the following nomination:

As a judge of the Surrogate's Court of Chautauqua County, Stephen W. Cass, of Frewsburg.

THE PRESIDENT: Senator Lack.

SENATOR LACK: Thank you, Madam President. I rise to move the nomination of Stephen W. Cass, of Frewsburg, as a judge of the Surrogate's Court of Chautauqua County.

Judge Cass appeared before the Judiciary Committee this morning. His credentials have been examined by the staff of the committee, have been found to have been entirely in order. He spoke to the committee this morning, the committee was impressed, and by unanimous vote sent it to the floor of the Senate for confirmation this afternoon.

And I would most respectfully yield, for purposes of a second, to Senator McGee.

THE PRESIDENT: The question is on the confirmation.

Senator McGee.

SENATOR McGEE: Thank you, Madam President.

It gives me great pleasure to second the nomination of Stephen W. Cass to become the judge of the Surrogate Court of Chautauqua County. I've known Steve for several years, and I know him to be a fine young man, a leader in the community, and a fine attorney. He's well qualified to assume the important position of judge of the Surrogate Court.

A graduate of Albany Law School and president of his graduating class, Steve is no stranger to the Senate chamber. He is a former Senate staff person who worked in the office of the late Senator Jess Present while attending law school.

In addition to the practice of law, his background also includes service as a town justice, experience as a deputy in the Chautauqua County sheriff's navigation division, and work as an adjunct faculty

member at Jamestown Community College.

In becoming a judge, Steve is continuing a family tradition of public service. His father, Willard, recently retired from a long and distinguished career as a judge in Chautauqua County.

I congratulate Governor Pataki for his wisdom in making this appointment.

Steve, I congratulate you and your family -- your wife, Krista, and daughters, Caitlyn and McKenzie -- on this achievement, and I know you will do an outstanding job.

Accompanying Steve this afternoon of this very important day are his mother and father, Willard and Florence Cass, his mother-in-law, Mrs. June Fagerstrom, and of course his charming wife and two beautiful daughters -- his wife, Krista, and his daughters, Caitlyn and McKenzie.

And they are in the balcony.

So I congratulate you, Steve.

Thank you, Madam President.

THE PRESIDENT: Senator Rath.

SENATOR RATH: Thank you, Madam President.

I would like to add my words of congratulations and recommendation regarding Judge Cass. The Rath family and the Cass family have known each other for many years. Western New York is big in geography but rather close-knit when it comes to knowing the various people who are involved and active.

And I could not say words any better than Senator McGee has said. But let me just point out to those of you who are noting Judge Cass and his wife and young children, we have a gentleman here who will be in New York State for a long time, have a chance to serve with distinction for a long time, and act as a role model to other young people who we say things are going well in New York State, there is opportunity for young people -- not only, obviously, in the judiciary and the legal activities, but in a whole lot of places in New York State.

So congratulations, Judge Cass. I hope you serve for the next 75 years.

THE PRESIDENT: The question is on the confirmation of Stephen Cass of Frewsburg as judge of the Surrogate's Court of

Chautauqua County. All in favor signify by saying aye.

(Response of "Aye.")

THE PRESIDENT: Opposed, nay.

(No response.)

THE PRESIDENT: Stephen Cass is hereby confirmed as judge of the Surrogate's Court of Chautauqua County.

On behalf of the Senate and as its President, I extend to you all the courtesies and congratulations of this house to you and your beautiful family here with you today, and wish you every continued success in your new position, Judge.

(Applause.)

THE PRESIDENT: Reports of select committees.

Communications and reports from state officers.

Motions and resolutions.

Senator Bal -- Senator Skelos, first.

SENATOR SKELOS: Why don't we handle the motions first.

THE PRESIDENT: Fine, Senator.

Senator Balboni.

SENATOR BALBONI: Yes. Thank you, Madam President.

I'd like to call my bill, Print Number 1241, call it from the Assembly, which is now at the desk.

THE PRESIDENT: The Secretary will read.

THE SECRETARY: Calendar Number 80, by Senator Balboni, Senate Print 1241, an act to amend the Criminal Procedure Law.

SENATOR BALBONI: Madam President, I now ask that the -- I now move that we reconsider the vote by which this bill was passed.

THE PRESIDENT: The Secretary will call the roll on reconsideration.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 43.

SENATOR BALBONI: Madam President, I now offer -

THE PRESIDENT: Senator Balboni.

SENATOR BALBONI: -- the following amendment. Which should be at the desk.

THE PRESIDENT: The amendments are received, Senator.

SENATOR BALBONI: Thank you.

THE PRESIDENT: Senator Hevesi.

SENATOR HEVESI: Thank you, Madam President.

On behalf of Senator Markowitz, I move that the following bills be discharged from their respective committees and be recommitted, with instructions to strike the enacting clause: Senates 20, 27, and 41.

THE PRESIDENT: So ordered.

SENATOR HEVESI: Thank you, Madam President.

THE PRESIDENT: Senator Farley.

SENATOR FARLEY: Thank you, Madam President.

On behalf of Senator Saland, would you please place a sponsor's star on Calendar Number 645.

THE PRESIDENT: That bill will be starred, Senator Farley.

SENATOR FARLEY: Thank you, Madam President.

THE PRESIDENT: Senator Skelos,

we have substitutions?

SENATOR SKELOS: Yes, Madam President, I believe there are some substitutions. If we could make them at this time.

THE PRESIDENT: The Secretary will read.

THE SECRETARY: On page 4, Senator LaValle moves to discharge, from the Committee on Higher Education, Assembly Bill Number 6831 and substitute it for the identical Second Report Calendar Number, 677.

On page 10, Senator Spano moves to discharge, from the Committee on Labor, Assembly Bill Number 3517 and substitute it for the identical Third Reading Calendar, 149.

On page 10, Senator Meier moves to discharge, from the Committee on Veterans and Military Affairs, Assembly Bill 3085 and substitute it for the identical Third Reading Calendar, 162.

On page 12, Senator DeFrancisco moves to discharge, from the Committee on Commerce, Economic Development and Small Business, Assembly Bill Number 109 and

substitute it for the identical Third Reading Calendar, 244.

On page 24, Senator Bonacic moves to discharge, from the Committee on Housing, Construction and Community Development, Assembly Bill Number 7642 and substitute it for the identical Third Reading Calendar, 490.

And on page 27, Senator Volker moves to discharge, from the Committee on Codes, Assembly Bill Number 1540 and substitute it for the identical Third Reading Calendar, 539.

THE PRESIDENT: The substitutions are ordered.

Senator Skelos.

SENATOR SKELOS: Madam President, I believe -- at this time could we adopt the Resolution Calendar in its entirety, with the exception of Resolution 1102.

THE PRESIDENT: Senator DeFrancisco.

First of all, all in favor of adopting the Resolution Calendar, with the exception of Resolution 1102, please signify by saying aye.

(Response of "Aye.")

THE PRESIDENT: Opposed, nay.

(No response.)

THE PRESIDENT: The Resolution Calendar is adopted.

SENATOR SKELOS: Madam President.

THE PRESIDENT: Senator Skelos.

SENATOR SKELOS: At this time could we please take up Resolution Number 1102, by Senator DeFrancisco. May we have the title read and move for its immediate adoption.

THE PRESIDENT: The Secretary will read.

THE SECRETARY: By Senator DeFrancisco, Legislative Resolution 1102, honoring the members of the Technology Club at Camillus Middle School, Camillus, New York, for their participation in the 1999 49th Senate District "Good News! Good Kids!" Youth Responsibility Program.

THE PRESIDENT: Senator DeFrancisco.

SENATOR DeFRANCISCO: Thank you, Madam President.

THE PRESIDENT: You're welcome.

SENATOR DeFRANCISCO: As you know from prior discussions about this program, we honor three groups of students each year for doing good things in our community, to show the world that the bad things that happen that we hear about daily are far outweighed by the good things that young people do.

The winner in the elementary - excuse me, the middle-school class of competition for the "Good News! Good Kids!" Program in my district are the Camillus Middle School, the Technology Club of that school.

And it's very interesting that many of us have been in a canoe before, but how many have made a canoe? To actually make something with your hands, to show that you can actually do something constructive with your hands -- but even more so, to do it for a very good reason.

The Erie Canal is obviously a very historic fixture in our state. And there's an Erie Canal organization in the Town of Camillus to preserve the Erie Canal and to make use of the facilities in it and around

it. And they donated to that group this canoe that they made, and they raised $1500 in a raffle for preservation projects in our area for the Erie Canal.

So I wanted to salute publicly, in supporting this resolution, the Camillus Middle School, and their teachers who are here, and some of the parents, and congratulate them for being good kids. It's truly good news, and we're proud of all of you.

THE PRESIDENT: The question is on the resolution. All in favor signify by saying aye.

(Response of "Aye.")

THE PRESIDENT: Opposed, nay.

(No response.)

THE PRESIDENT: The resolution is adopted.

Senator Skelos.

SENATOR SKELOS: Madam President, before we go to the noncontroversial calendar, it's my pleasure, on behalf of Senator Bruno, to introduce the Honorable Syringa Marshall Burnett, who's the president of the Senate in

Jamaica. She's also senior lecturer and head of the Department of Advanced Nursing, University of the West Indies.

Ms. Marshall Burnett is a registered nurse, and she completed her undergraduate work at the University of Toronto and completed her graduate work at NYU in the early '70s.

She is in the States on a visit to NYU and is being inducted into the International Nursing Honor Society. She's also visiting Hartwick College School of Nursing in Oneonta. And students from Hartwick College School of Nursing are attending the New York State Nurses Association's Lobby Day, which is going on right now.

Ms. Marshall Burnett was first appointed to the Jamaican Senate in 1992 - the Senate elects its own leadership -- and in '93 was elected First Deputy President by a unanimous vote in the two-party system that exists. Upon the President of the Senate's resignation in 1995, Ms. Marshall Burnett became President of the Senate. And she has

been twice reelected to that position.

I know I had the pleasure of meeting you earlier in the day. You indicated how much you've enjoyed meeting the legislators. Let me assure you, it's a pleasure on our behalf to meet you and to welcome you to the Senate.

And as I mentioned to Senator Bruno when we were chatting with you, it would be great if you would invite us to Jamaica around January or February to visit you.

Welcome to the Senate chamber.

(Applause.)

THE PRESIDENT: Thank you, Senator.

And as one President of the Senate to another President, President Syringa Marshall Burnett, we're very happy and honored to have you here. I hope this is a positive comparison and experience for you.

We extend you every courtesy of this house and hope you'll visit us again.

Senator Skelos.

SENATOR SKELOS: Madam President, if we could take up the noncontroversial

calendar at this time.

THE PRESIDENT: The Secretary will read.

THE SECRETARY: Calendar Number 334, by Senator Bonacic, Senate Print 3664, an act to amend the Private Housing Finance Law, in relation to the powers of the New York State Housing Finance Agency.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 51.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 397, by Senator Maltese, Senate Print 1126, an act to amend the Executive Law, in relation to a crime victim's or crime victim's representative's statement.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 2. This

act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 51.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 405, by Senator Wright, Senate Print 3611, an act to amend the Education Law, in relation to county awards for health care professionals.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 51.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 406, by Senator Saland, Senate Print 718, an act to amend the Criminal Procedure Law and others, in relation -

SENATOR SMITH: Lay it aside, please.

THE PRESIDENT: The bill is laid aside.

THE SECRETARY: Calendar Number 426, by Senator Rath, Senate Print 2943, an act to amend the Penal Law and the Criminal Procedure Law, in relation to sentence for persistent misdemeanor offenders.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 3. This act shall take effect on the first day of November.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 50. Nays, 1. Senator Duane recorded in the negative.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 427, by Senator McGee, Senate Print 3337, an act to amend the Criminal Procedure Law, in relation to eligibility for youthful offender status.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 2. This act shall take effect on the first day of November.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 50. Nays, 1. Senator Duane recorded in the negative.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 536, by Senator Alesi, Senate Print 743, an act to amend the Penal Law, in relation to endangering the welfare of a child.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 2. This act shall take effect on the first day of November.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 52.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 538, by Senator Balboni, Senate Print 853A, an

act to amend the Civil Rights Law, in relation to confidentiality of victims' and witnesses' addresses.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 52.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 543, by Senator Johnson, Senate Print 1962A, an act to amend the Penal Law in relation to criminal use of public records.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 2. This act shall take effect on the first day of November.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 51. Nays, 1. Senator Duane recorded in the negative.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 545, by Senator Volker, Senate Print 2139, an act to -

SENATOR SMITH: Lay the bill aside, please.

THE PRESIDENT: The bill is laid aside.

THE SECRETARY: Calendar Number 546, by Senator Saland, Senate Print 2320, an act to amend the Criminal Procedure Law and the Family Court Act, in relation to access to records.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 5. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 51. Nays, 1. Senator Sampson recorded in the negative.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number

555, by Senator Volker, Senate Print 3181, an act to amend the Penal Law and the Criminal Procedure Law, in relation to the offenses of bail-jumping and failing to respond to an appearance ticket.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 16. This act shall take effect on the first day of November.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 52.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 559, by Senator Rath, Senate Print 3689, an act to amend the Civil Practice Law and Rules and the Executive Law, in relation to extending the statute of limitations.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 3. This act shall take effect on the first day of January.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 52.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 583, by Senator Johnson, Senate Print 1741A -

SENATOR SMITH: Lay the bill aside, please.

THE PRESIDENT: The bill is laid aside.

THE SECRETARY: Calendar Number 584, by the Assembly Committee on Rules, Assembly Print Number 2103, an act to amend the Tax Law, in relation to extending the sales and use tax -

SENATOR SMITH: Lay the bill aside, please.

THE PRESIDENT: The bill is laid aside.

THE SECRETARY: Calendar Number 632, by Senator Marcellino, Senate Print 4165, an act to amend the Town Law, in relation to the membership of volunteer fire companies.

THE PRESIDENT: Read the last

section.

THE SECRETARY: Section 2. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 54.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 661, by Senator Seward, Senate Print 4651, an act to amend the Insurance Law, in relation to homeowner's insurance catastrophe coverage.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 4. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 54.

THE PRESIDENT: The bill is passed.

Senator Skelos, that completes the reading of the noncontroversial calendar.

SENATOR SKELOS: Could we please take the controversial calendar up.

THE PRESIDENT: The Secretary will read.

THE SECRETARY: Calendar Number 406, by Senator Saland, Senate Print 718, an act to amend the Criminal Procedure Law and others, in relation to testing of certain criminal defendants.

SENATOR PATERSON: Explanation, please.

THE PRESIDENT: An explanation has been requested, Senator Saland.

SENATOR SALAND: Thank you, Madam President.

Madam President, this bill is a bill which this chamber has considered on prior occasions. And it's a bill which attempts to build upon the passage in the 1995 -- as part of the 1995 budget agreement, a provision which permitted, postconviction, somebody who had been the victim of a sexual assault to have his or her assailant tested to determine if that person in fact was HIV-positive.

This bill does a number of things, makes several changes, and in fact is somewhat

consistent with a bill which I had introduced prior to 1995. This bill would empower a victim of a sexual assault to have his or her assailant tested preconviction.

This bill would say that if you are the subject of an indictment or an information, that in fact creates the probable-cause nexus to permit a court to direct an order which would result in your assailant being tested and enable you to determine whether that assailant had a transmissible disease.

This bill adds to the 1995 chapter or law a number of additional crimes for which this testing could be required and maintains the requirement of confidentiality.

The bill certainly is constitutionally sound. I'm not sure if during the course of the prior couple of debates in which I've been engaged that any issue has ever been raised with regard to constitutionality. In fact, I think the law is clear that really, even in a preaccusatory stage, the law would permit testing such as we're proposing to do here. And again, we're

proposing postindictment or postinformation.

I would like to, Madam President, read from a recent United States Court of Appeals decision, the Third Circuit, the matter of United States versus Ward, a 1997 decision, which dealt with the federal Violence Against Women's Act. And in that case I believe the court had in effect remanded to a -- to the lower court because of certain of the findings that the court made at the appellate or Court of Appeals level.

And I'm reading from that case now. It reads as follows. "There is no doubt the government has a special need for requiring the test beyond the ordinary need for law enforcement in this case." And in this case, the court directed testing of a defendant who had sexually assaulted the petitioner.

And it goes on to say: "The special needs in this case are ensuring that the victims of sexual assaults are notified promptly whether or not their attackers carry HIV, and prevent a sexual assault victim from unwittingly transmitting the virus to others. Depending upon the results of the test,

notification either gives victims the peace of mind they are not infected with HIV or allows them to arrange for counseling and take early and aggressive medical treatment. The results also permit victims to modify their lifestyles accordingly, so as to avoid transmitting the disease. Testing the attacker is closely connected to the special need."

In another section, the court states: "There is no doubt that a compelled blood test like the one in this case is a body intrusion and a search within the meaning of the Fourth Amendment. It is difficult to see how a search of this type, conducted in accordance with the procedures outlined in the Act, could be unreasonable within the meaning of the Fourth Amendment. First, under the Act, a blood test is permissible only in certain limited circumstances: when the subject of the search is charged with a sexual assault that poses a risk of transmitting HIV, there has been a probable-cause determination that the subject of the search committed the assault, the victim requested the test, and the test would provide information necessary

for the victim's health. Second, the test is only permitted if the subject of the test receives notice that the victim has requested the test and is given an opportunity to contest the entry of the court's order. Finally, the test results should be kept confidential."

In effect, the federal court, without dealing with the text of our statute, have virtually highlighted all -- many of the salient features of our statute.

And, Madam President, I believe we have accommodated any and all constitutional requirements, accommodated confidentiality requirements, and we have empowered victims to have the choice to determine, with counseling -- because this bill requires counseling as part of the application -- as to whether or not they wish to have their assailant tested. And if so, we then enable that testing to occur, not postconviction but preconviction and postindictment or relaying of an information.

Thank you, Madam President.

SENATOR WALDON: Madam President.

THE PRESIDENT: Senator Waldon.

SENATOR WALDON: Thank you, Madam President. Would the gentleman yield to a question or two?

THE PRESIDENT: Senator, will you yield to a question from Senator Waldon?

SENATOR SALAND: Yes, Madam President.

THE PRESIDENT: Go ahead, Senator.

SENATOR WALDON: Thank you very much, Madam President.

Senator, out of curiosity, is there any proviso in this bill for testing the assailant if somehow it became known that the victim had HIV?

SENATOR SALAND: Senator, would you repeat that, please?

SENATOR WALDON: Is there any proviso in your proposal for testing the assailant if the victim was proven to have HIV?

SENATOR SALAND: No, this -- this bill permits the testing of an assailant, provides for self-testing of a victim, and

doesn't dwell at any great length upon the scenario which you have created. In fact, it doesn't dwell on it at all.

SENATOR WALDON: Madam President, would the gentleman yield to -

SENATOR SALAND: Are you alleging lack of equal protection?

SENATOR WALDON: No, no, I'm not. I'm just being intellectually curious, Senator.

THE PRESIDENT: Senator Saland, do you yield to an additional question?

SENATOR SALAND: Yes, Madam President.

THE PRESIDENT: Go ahead, Senator.

SENATOR WALDON: Thank you very much, Madam President.

Senator, in your preparation of this very important proposal for our consideration, did you have occasion to consult with the AIDS Advisory Council?

SENATOR SALAND: No, I have not.

SENATOR WALDON: Did you consult with any of the traditional agencies which

have been advocates for the AIDS crisis in our state?

SENATOR SALAND: Any of the what agencies?

SENATOR WALDON: Any of the agencies which have been advocates in regard to the AIDS crisis in our state.

SENATOR SALAND: I'm truly -- I'm having a difficult time hearing you, Senator Waldon, honestly. I don't know if it has something to do with what's going on over here, or the fact that your mike is not catching -

SENATOR WALDON: Senator, I believe that our side of the aisle, because of diminished numbers, is much quieter than your side.

(Laughter.)

SENATOR WALDON: Shall I repeat the question, Madam President?

THE PRESIDENT: Please.

SENATOR WALDON: Thank you, Madam President. The question was -- forget that question.

SENATOR SALAND: I heard the

first part of your question, about the advisory council. I didn't hear the second part.

SENATOR WALDON: I'm sorry?

SENATOR SALAND: I did not hear -

SENATOR WALDON: What part did you hear?

SENATOR SALAND: I'm sorry?

SENATOR WALDON: What part of the question did you hear?

SENATOR SALAND: I heard -

THE PRESIDENT: Senator, could you repeat the question?

SENATOR WALDON: I retract the question.

May I ask another question, Madam President?

THE PRESIDENT: Senator Saland, do you yield for an additional question?

SENATOR SALAND: Yes, Madam President.

THE PRESIDENT: Go ahead, Senator Waldon.

SENATOR WALDON: Thank you very

much, Madam President. I appreciate your intelligence as well.

Senator, you and I have discussed this at least two years prior, time and time again. Each year we have dealt with the thorny issue of the person who is being tested has not necessarily been found guilty of anything, nor even probable cause has become an issue.

Do you think that we are overreaching with requiring this testing, when a person may in fact not be guilty of the crime which would be the predicate crime, in an intellectual sense, in regard to what you're attempting to -

SENATOR SALAND: I would respectfully disagree with you, Senator Waldon. Because I think by definition, when the CPL defines indictment and defines information, they are effectively saying that that constitutes probable cause.

And again, I would point out, as I mentioned in my opening remarks -- and I would call your attention to the Smirva case, which is a U.S. Supreme Court case. The Court of

Appeals, I believe, in the matter of Abe A. has similarly -- both have similarly held that preaccusatory, before there's an information or before there is an indictment, the government has a legitimate interest in taking samples, whether they be hair samples, blood samples.

This is not anywhere near as restrictive as I think the Constitution would permit it. I cited you the U.S. Court of Appeals case in my opening comments. The case is a fairly recent case, a 1997 case. The court addressed many of the issues that you've raised and really found no reason to accept the arguments that you're raising.

I find nothing about this bill that compromises the right of an assailant. There is confidentiality. It can't be used in any proceeding, civil or criminal. It's the victim who has the opportunity to basically request of the court, should he or she choose, that his or her assailant be tested.

And then it's a question of empowering that person to make that choice, if that's what they wish to do, and in effect

giving them the opportunity to exercise choice. Something which I would assume generally, by nature, you are certainly -- you would certainly concur with.

SENATOR WALDON: Madam President, may I have the opportunity to ask perhaps two more questions?

THE PRESIDENT: Senator, will you yield for two additional questions?

SENATOR SALAND: Yes, Madam President.

SENATOR WALDON: Thank you, Madam President.

THE PRESIDENT: The Senator will yield.

SENATOR WALDON: Thank you very much, Madam President.

Senator, could you walk me through, just for edification purposes, the time frame within which the testing would occur, as you provide?

SENATOR SALAND: The bill provides for an application by the petitioner. It provides that as part of that application process, the applicant must state that he or

she has been offered counseling.

It goes on to provide a series of requirements -- and here I'm reading from page 4, starting with subsection (d), at line 29, and then goes on to state, in subsection (b), beginning at line 48: "In the case of an application to test a defendant pursuant to paragraph B of subdivision 2, the court shall consider such application on an expedited basis."

Then it goes on to say: "Any finding by a court pursuant to this paragraph shall be accompanied by written findings of fact, including medical findings." And I won't go on to read it at any greater length.

So there is a requirement for an expedited hearing, and would enable, in effect, the applicant to be before the court in a rather quick or, as by definition, expedited fashion.

SENATOR WALDON: Last question, if I may, Madam President.

THE PRESIDENT: Senator Saland, do you yield to one last question?

SENATOR SALAND: Yes, Madam

President.

THE PRESIDENT: Go ahead, Senator Waldon.

SENATOR WALDON: Thank you very much, Madam President.

Senator, the treatment component -

SENATOR SALAND: I'm sorry?

SENATOR WALDON: The treatment component, if one is discovered to be - meaning the assailant is discovered to be HIV-positive, that must also be in an expedited fashion.

And could you, just for those of us in the chamber who may not be aware, tell us how soon that must begin in order to be effective?

SENATOR SALAND: The bill doesn't talk in terms of when the treatment shall begin. But it does talk in terms of when the test shall -- based upon the court order, shall be given. And it talks in terms of the test being performed as soon as practicable, but no later than five days after the entry of the order.

I would assume that the provisions

for the test would similarly be as expeditious as possible.

SENATOR WALDON: Madam President, if I may, on the bill.

THE PRESIDENT: On the bill, Senator.

SENATOR WALDON: Thank you.

Senator, I am grateful for what you're attempting to do. This is a very complex and profound issue. It has -- meaning HIV has the potential to wreak havoc across the universe, not just here in New York State or on the Eastern Seacoast. So what you're doing is commendable.

However, I am reluctant, again, to support you in this effort, because I believe there's not a sufficient demarcation from when someone is accused to the point in time where they are actually the person who has committed the act.

And I also believe that in your preparation you've not been sensitive -- or whoever pulled this together, sensitive enough to the AIDS advocates across our state, in preparation. And I believe that somehow, even

unintentionally, that this will promote further prejudice against those who may be victimized by HIV.

And therefore I would encourage my colleagues to vote in the negative.

Thank you, Madam President.

THE PRESIDENT: Senator Paterson.

SENATOR PATERSON: Thank you, Madam President.

If Senator Saland would yield for a couple of questions.

SENATOR SALAND: Yes, Madam President.

THE PRESIDENT: Go ahead, Senator.

SENATOR PATERSON: Senator, I want you -- at first I just want you to feel that your effort on this issue, which I've noticed for a number of years, has not gone unrewarded.

I think you have convinced me, over the five years that you and I have debated this bill, that there are certain situations where even though a defendant who is presumed innocent, that that defendant would be tested

in a mandatory basis if we could establish that there was a substantive medical benefit from the actual testing.

So on the issue of whether or not we can establish mandatoriness, your persuasion and also the Ward decision of 1997 have convinced me.

What I'm still not convinced about, and what you might want to try to persuade me today, is that there's a substantive medical benefit to knowing the HIV status of the alleged assailant. The Center for Disease Control in Washington, D.C., does not prescribe this as part of their treatment protocol for HIV.

In addition, there seems, in my opinion, and particularly here with the number of crime victims visiting Albany this weekend -- it is Crime Victims' Week -- an encumbrance placed upon the victim that the victim might in some way be assuaged not to be tested, based on a negative result, a negative HIV testing of the alleged assailant.

And I wouldn't want anybody who was jeopardized in this type of a situation in any

way not to seek the proper medical care that they would aptly receive. Especially in a situation as grave as this, grave enough that in your legislation you're proposing a mandatory test.

SENATOR SALAND: I'll assume that the -- that there was a question, and I'll try and respond to it, Senator Paterson.

Let me start off by suggesting to you, if I might -- and I know we've -- we certainly have discussed this issue previously, as you've noted -- that this bill in effect, as a condition precedent to the application being brought, requires the applicant to state or recognize the importance of counseling.

He or she, as I read previously, must state that they've been offered counseling, they've been advised of the limitations of the information obtained through a blood test, and a host of other things that I referred to earlier in my response to Senator Waldon's earlier questioning.

I'm somewhat baffled, to be

perfectly honest with you, because I guess by nature, perhaps, I'm a bit more conservative than many of the members on your side of the aisle, and certainly I think with virtual unanimity your side of the aisle prides itself on issues of choice. And all we're saying here is that a victim has the right to make a choice. We're empowering victims.

Why would we assume that a victim, after being counseled and having medical information, why would we assume that they would have a false sense of security? Why wouldn't we assume that their God-given intelligence or ability to comprehend would say, "You know, that's not enough. I have to pursue this further"?

Wouldn't we assume that, given that power, they could appropriately exercise their choice? Or don't we believe that people who are provided with this wealth of information and have a basic human intelligence are capable of making those decisions?

I certainly do. I certainly do. And I see no reason why we should be afraid of it.

I find it astounding to believe that given the information that a victim would have, or an applicant or petitioner would have, that they would pause at the very onset, regardless of the result of the test performed on his or her assailant.

It wouldn't make sense, certainly in light of the counseling. It wouldn't make sense in light of the other information that they're required to acknowledge as part of the testing. Nor would it make sense in light of the court's order in effect requiring medical findings.

And I -- I'm truly puzzled that we could assume that people could be so lacking in basic -- in basic intelligence as to want to protect them from themselves by not enabling them to make a choice.

SENATOR PATERSON: Madam President, if the Senator -

THE PRESIDENT: Senator Paterson.

SENATOR PATERSON: -- would continue to yield.

THE PRESIDENT: Senator, do you -

SENATOR SALAND: Yes, Madam President.

THE PRESIDENT: All right. Go ahead, Senator Paterson.

SENATOR PATERSON: Senator, I'm not assuming anything about the victims. And one of the reasons I'm not assuming anything is I don't think this is a test of intelligence. And I don't think this is a test of a person's common sense, if you will.

When people are put in these types of situations -- and I think a person who is victimized in the fashion as set forth in your bill, who runs the risk of contracting the HIV virus from this source, is put in such a highly emotionally charged situation, that I don't want to assume anything about what they would do. Nor would I care to really give any kind of really secondhand judgment about their choice.

What I'm saying is that the factors that they are relying upon to make a choice must be those which are scrupulously fair to the victim. And certainly I would not blame any victim, as much as I would urge them to

the contrary, who would not be tested and figuring that because the assailant tested HIV-negative, that increases the possibility that they themselves have not been infected with the virus.

In other words, that is not an illogical assumption. I don't think it would the best course for the victim. But it is not a decision that I think any of us would actually challenge. It makes a certain amount of sense. It would probably not be the best decision for a person to make in that particular situation.

So when we use the term "substantial medical benefit," what I'm asking you is, what is the substantial medical benefit? If the agencies that regularly work in this area don't see this as being related to the protocol, then I want to know how you find it related to the choice.

In other words, no one is saying that the victim doesn't have a choice. What we're saying is the victim has a right to know this information. And I'm asking you, other than changing the variables in the equation,

what does this information give the defendant -- give, I'm sorry, the victim that the victim didn't have before the alleged assailant took the test?

SENATOR SALAND: Well, I appreciate you're certainly acknowledging, as I believe you have, that you don't object to the right of the victim having the ability to intelligently arrive at his or her decision and make a choice.

Let me suggest to you that the genesis of this bill, which I introduced probably some six or seven years ago in a prior form, came from events occurring in New York City reported in the media and in a law journal. And the genesis of it was where assailants had refused to cooperate in providing any kind of HIV testing unless the prosecutor or district attorney's office was willing to give them a better plea bargain.

That, to me, is not necessarily the way we want to meet the ends of justice.

While I understand your concern about medical-benefit tests, it's interesting to note that former Governor Cuomo had a task

force on rape, sexual assault and child sexual abuse which had a number of medical and health-related personnel on it -- physicians, registered nurses, psychologists, and other people similarly expert in the area -- that went on to recommend preconviction testing. In fact, they went on to recommend preindictment testing.

And permit me to, if I can, read from that report, which again is the report submitted to Governor Cuomo in April of 1990, a report which the Governor chose not to take any action on. It reads: "While the results alone may not be determinative, some victims, after consultation with their physician or an HIV counselor, may want to begin immediate treatment with prophylactic drugs. Where the assailant's first test is positive, the victim may want to begin immediate drug therapy even though she or he might not have been actually infected. Even if the offender's first test turns out to be negative, the victim may nevertheless want to proceed with drug therapy, since she or he may have been exposed.

"The question of how and when to test the alleged sex offender remains. The task force considered and rejected waiting until an accused is convicted. While a convicted defendant is no longer presumed innocent and has fewer procedural rights, there are two problems with waiting for conviction. One, extensive delay is inevitable, because it takes weeks for conviction by plea and months for conviction by verdict. And, two, there are a number of acquittals and dismissals where the defendant may have nevertheless infected the victim. In either case, conviction is not an adequate triggering event.

"For similar reasons, indictment is not a good marker. Indictments can be delayed, particularly when the defendant is at liberty. Furthermore, a prosecutor may be unable to obtain an indictment for reasons unrelated to whether the accused is the true perpetrator.

"The task force therefore suggests that an efficient process be developed in the civil court system to allow a victim to obtain

court-ordered tests to obtain an alleged offender's HIV status. Access to this process should be available to all victims regardless of their ability to afford the costs of testing or other court-related costs. Under this process, a victim might move for the court order immediately after the rape or sexual assault."

So I'm not alone. And certainly there are victims' groups that are supportive of this proposal. I'm sure, were we to quantify, there are probably as many victims' rights groups in support as you would recite in opposition.

The U.S. versus Ward case made one of the very points that I have made in debating with you, informally with Senator Leichter, about, really, the importance of the state of mind of the victim, the mental anguish the victim has had to endure. What do we do to put the victim, as best as we can, back in a situation in which she or he are more closely able to return to functioning as normal?

And again, it's part of that

empowerment process that I mentioned to you before, and the ability to give people choices and the ability for them, armed with appropriate relevant information, to make intelligent choices.

THE PRESIDENT: Senator Paterson.

SENATOR PATERSON: Madam President, if the Senator would continue to yield.

THE PRESIDENT: Senator, do you continue to yield?

SENATOR SALAND: Yes, Madam President.

THE PRESIDENT: Go ahead, Senator Paterson.

SENATOR PATERSON: Madam President, Senator Saland raises an issue which is really pretty outrageous. And it was the attempt of assailants, accused assailants, to barter their HIV test in exchange for a favorable disposition of their case; in other words, a favorable plea, maybe a reduction in the charge.

And having worked in law enforcement previously, I'm assured that what

Senator Saland is saying is absolutely right. This is something that defendants will do in situations to try to create a plea bargain that would be acceptable to the defendant.

It is -- it's absolutely wrong. It's something that should be condemned. And to whatever extent we can codify it, I think Senator Saland's raising it should be a message to all of us that perhaps some action should be taken on our part.

But in many ways, that might really be the catalyst for this type of legislation. There is -- it's such a human instinct, and it's certainly a permissible one, to really want to make it clear to individuals that would try to manipulate the criminal justice system in that way that it's not going to be tolerated. And I guess it's a certainly reasonable conclusion that the way to address it is just mandatorily to test them.

But what Senator Waldon was pointing out earlier is I think what we need to really understand. That in our anger at them and in our frustration at the almost inhuman contempt that they have for their own

victims or those that they were accused of victimizing that they actually go to this length.

But we have to make sure, as those of us that formulate policy in government, that we don't go too far in our reaction to them and establish a standard where they are mandatorily tested even though they're presumed to be innocent.

Now, the reason that the test is - that the point at which the test is -- it doesn't make a difference from a medical standpoint is that your opportunity to receive accuracy in the actual testing increases as time goes on.

Now, the reason we would want to conduct the test as soon as possible, as Senator Saland points out, is so that the victim can know as soon as possible. But that's exactly what I'm objecting to. I'm objecting to this test of the alleged assailant playing too much of a role in the decision-making process of the victim. At which point the victim is now, as Senator Saland used the term, empowered.

Now, what we can do to empower the victim psychologically is one thing. But if we -- in empowering victims psychologically, making them feel better in the situation, as overbearing as it is, in any way impacts upon their medical safety, I have to vote against it.

And so my final question to Senator Saland is, can you state with medical certainty that there is a significant medical benefit that, rising above the threshold of substantive, that now is -- is important that the victim know, other than the fact that it increases the odds that the victim will probably not have the HIV virus?

SENATOR SALAND: Well, let me say that I don't profess to be a physician and can't tell you with medical certainty -- and I do believe I've responded to that question - it's been phrased differently -- a couple of times previously.

And while I'm really reluctant to continue reading, I think it's important to read the bill. Some of us sometimes get away from that. And I certainly don't mean you,

Senator Paterson. And in my debate with Senator Waldon, for purposes of brevity I cited a couple of subsections and didn't read them in its entirety.

But permit me, if you would, on page 4, starting at line 29, to see if I can somehow or other -- hopefully at the very least to disabuse you of the notion that victims may be perhaps victimized by this process because they may have a false sense of confidence about whatever it is that is the end product of their application to the court.

I mentioned earlier -- and I'm going to take the liberty of reading several lines. And if anybody wants to follow, it's lines 29 to 43 at those pages.

"In all such applications for testing filed pursuant to this application, the applicant must also state that the applicant has been offered counseling by a public health officer and has been advised, one, of the limitations of the information to be obtained through a blood test on the proposed subject; two, current scientific assessments of the risks of transmission of a

disease from the exposure he or she may have experienced; three, the need for the applicant to undergo testing to definitively determine his or her status with regard to any disease; and, four, where the request is for a transmissible disease test of a defendant, the availability of prompt, readily accessible, and scientifically recognized laboratory testing of the applicant, including, where appropriate, polymerase chain reaction - PCR -- or other advanced testing technologies for the diagnosis of transmissible diseases at state expense, pursuant to subdivision 1(a) of this section."

And I would merely point out that in addition to this, there's also a provision on the last page of the bill for self-testing at state expense as well. And the bill provides for reimbursement by the state where possible and appropriate.

SENATOR PATERSON: Thank you, Madam President.

Thanks, Senator Saland.

Madam President, on the bill.

There is a lot to be said for the

work that Senator Saland has done on this particular issue. I've debated him on this issue a number of times in this chamber. I've talked to him outside the chamber about this bill. And every possible precaution that is being taken to make sure that the victim is given all relevant information is included in Senator Saland's bill.

I just continue to have an objection to the use of information about the HIV status of the defendant, the accused assailant, in order to establish any presumption about the victim's HIV status.

Now, in most of this debate we've been assuming the possibility -- which used to be a reality, where it took a long time for the HIV virus to present itself in victims. We now have a much faster way of detecting this than we did ten years ago. Ten years ago, we would have had to have waited six months. Now, within a matter of days, it can pretty much be established that a person is infected with the HIV virus.

But there always is the chance that the victim's virus doesn't show up, and that

the -- I mean that the defendant's virus has not shown up yet, but the defendant does have the virus, and so does the victim, and, consequently, that hasn't shown up yet. That's, I think, one of the fears about this bill.

But before closing, Madam President, I just want to give an example of another way that the test could give a false indication. In the January New England Journal of Medicine, there's an article about HIV testing in Kenya. And it turns out that 75 percent of individuals in Kenya who are suffering from leprosy are testing HIV-positive. They don't have the HIV virus, but there's something about the leprosy virus that causes the false-positive test for HIV.

And therefore, what I'm saying is theoretically, even if the defendant tests positive for HIV, you still don't know what the status of the victim is going to be.

And my only argument on this point -- because the mandatoriness doesn't bother me, Senator Saland. And the issue of how the defendant feels about it frankly

doesn't bother me at all either. But what bothers me is what happens to the victims who, in this state of personal crisis, can have their feelings to some degree assuaged, or to some degree they can be excited by a prospect that may not be accurate and that more and more is not accurate.

And what I would just hate to see is someone that would make a decision based on information that, even with counseling, causes them to take a position that could prove later detrimental to them.

And that's the reason that I cannot support the bill, Madam President.

THE PRESIDENT: Senator Duane.

SENATOR DUANE: Thank you, Madam President. On the bill, if I may.

THE PRESIDENT: On the bill, Senator.

SENATOR DUANE: Thank you very much.

Rape is a terrible, terrible crime -- heinous, awful, deserves to be punished. I want to say, though, that as much focus as we put in this body on punitive

testing issues is time that we do not spend on actual prevention of HIV.

I'm very, very concerned about the -- giving the quality of predator to people with HIV. And, sadly, this kind of issue and this kind of debate I think adds to that generalization about people who carry the HIV virus.

You know, testing for HIV is not an effective crime-fighting tool, and forced testing is certainly not an effective public health tool. Test results of accused criminals tell us virtually nothing about the health or the mental health condition of someone who has been victimized by a sexual assault or a rape.

And in fact, if we really wanted to be immediately helpful, what we would do in the State of New York is find a way to immediately pay for prophylactic treatment for someone who's been victimized by sexual assault.

Crime victims' agencies across this state now struggle to find the money to pay for prophylactic treatments for rape victims.

It's very expensive. And there is nowhere in State government that prophylactic treatments are immediately paid for for the victim of a sexual assault.

So if we really want to do something, let's find a way to pay for prophylactic treatment, whether it's for rape victims or persons who may be incarcerated or those who are guarding people that are incarcerated or, for that matter, anyone who needs immediate prophylactic treatment in a sexual situation.

You know, I know that some of you think that I'm the one that makes HIV a political issue. But let's really look at what's happening here by raising this issue today -- how is it that HIV is really being made a political issue, and in what way.

Thank you.

THE PRESIDENT: Senator Goodman.

SENATOR GOODMAN: Madam President, I once again feel constrained to vote in the negative on this bill, and I'd like to recap quickly the reasons why.

Let's assume for the moment that

I'm standing on a street corner and all of a sudden an assailant comes up, demands my wallet, I raise my arm in defense, and he bites my arm. And now I'm concerned that he has HIV and I want to be protected.

I wanted to be protected. My protection as a victim of a crime is the predominant facet in this whole discussion.

The question is, what's the best way to protect me? Is it to mandate that the person who bit me have immediate testing so I can determine if he's HIV-positive? The answer is a dispositive no, it is clearly not the best way. There's only one way to protect me. That is to find out whether I have been exposed by testing me.

Now, the AIDS Advisory Council was created some years ago at my insistence. As some of you may remember, it was I who took the initiative in this whole matter, created the AIDS Advisory Council, which was supposed to consist of the best available medical experts who could give the public in general advice on this dread disease with its many complexities.

At the head of the AIDS Advisory Council is Dr. Rosenfield, who is at Columbia Presbyterian Medical Center. He is not gay. He is totally objective as a medical observer. And he has led this AIDS Advisory Council repeatedly in a series of, in my judgment, very sensible steps to try to acquaint the public with what must be done to prevent the spread of this disease.

Now, here I am the victim, I've got this wound on my arm, there's a possibility that my assailant was in fact HIV-positive. Now we test him we find out that he is HIV-positive. But we haven't tested me. Does this give me the assurance that I have HIV? No.

But let's reverse the circumstance and say that we test the gentleman who bit me and that he is not HIV-positive. Does that assure that I'm not HIV-positive? Not necessarily, because I might have come into exposure from some other aspect of this means of transmission.

The vectors of transmission are many and varied, and this is a complex medical

matter. We have the best possible available medical advice consulting with us in the AIDS Advisory Council. On a bill like this, we completely brush it aside and ignore it.

Colleagues, I insist this makes no sense. We are providing funds for the careful research which this group does, and they've given us a piece of advice which in substance is this.

If you have any reason to suspect that you are HIV-positive, then get yourself tested. Do it promptly. Do it within the first six hours, if possible, after the incident which you may have thought brought about exposure. Because there is every medical means of preventing your getting the disease if you do that.

That's the core thing, and anything else -- the mobs are cheering me from the outer chamber, but I don't want that to influence anybody's thinking.

The fact of the matter is, good friends, that we must try to understand what's really going on here, which is that it's a simple medical question. Do not be befuddled

and confused by the fact that a victim should be protected by going after the person who has exposed him. This is not a way to find out anything of any use to the victim, nor is it a way to do it timely.

So for that reason I shall once again vote no on this. This has nothing to do with one's philosophical view of issues relating to gays and lesbians. It has nothing to do with anything other than the best way to protect the person who's been exposed.

If you're ever exposed -- and I hope you won't be -- through any incident whatsoever, don't fiddle-faddle around. Get yourself to a clinic immediately and get yourself tested. And that's the only way you're going to know whether you need protection or not. All the rest of this stuff is irrelevant to that central fact.

That's my view, and I hope that you'll consider it very carefully.

Thank you.

THE PRESIDENT: Senator Schneiderman.

SENATOR SCHNEIDERMAN: Thank you,

Madam President. On the bill.

My thinking about this issue has evolved a lot in the last year or two. And I'm concerned that this well-intended piece of legislation actually will work a serious harm.

Because much of the language that we have in these memos and that I've heard from Senator Saland's detailed explanations refer to the victim's peace of mind. What I'm afraid is we're setting up a situation where people will have false peace of mind.

And as Senator Duane just pointed out, the prophylactic treatments -- which are the only thing you should do. Whether an assailant tests positive or negative, you should get the prophylactic treatment immediately, and you should test yourself regularly. They're expensive.

And I'm concerned that we're setting up a situation where we reinforce a stereotype and a prejudice that if the victim tests positive, you've probably got HIV - which is not true, because the odds of you getting it are actually very small -- or if the victim tests negative, you probably don't

have it, which is also false.

Medically we know what you should do. And the conduct should not change based on that test. And I'm concerned that we are going to have people in this state -- and I've dealt with many crime victims. And some of them are smart, and some of them are not so smart, and many of them are emotional. And I'm afraid we are going to encourage -- we're setting up a structure that will encourage bad decision-making.

What we should do is fund prophylactic treatment for every victim that wants it and ensure that they have testing easily available. We know medically that's the thing to do.

And I'm afraid that we're basing - some of the information here seems to be based on medical information and technology that is somewhat old. If the medical technology that was available five years ago was the state of the art, there are a lot of people who wouldn't be with us right now. It has changed. It's evolved. They do have these prophylactic treatments.

And I think we are really sending the wrong message to the public. And I'm afraid this will result in people declining to be tested and declining to take treatments they should.

And that's why I'm going to vote in the negative on this bill.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 8. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Those recorded in the negative on Calendar Number 406 are Senators Breslin, Connor, Duane, Gonzalez, Goodman, Markowitz, Montgomery, Nanula, Paterson, Rosado, Sampson, Santiago, Schneiderman, Smith, Stavisky, and Waldon.

Ayes, 44. Nays, 16.

THE PRESIDENT: The bill is passed.

Senator Montgomery.

SENATOR MONTGOMERY: Yes, Madam President. I would like unanimous consent to

be recorded in the negative on Calendars 426 and 546.

THE PRESIDENT: Senator Montgomery, you will be so recorded as voting in the negative on Calendars 426 and 546.

Senator Oppenheimer.

SENATOR OPPENHEIMER: I wish to be recorded in the negative on -- what was this last vote? On the last vote. 406.

THE PRESIDENT: 406, Senator.

You will so recorded, Senator Oppenheimer, as voting in the negative on Calendar 406.

The Secretary will read.

THE SECRETARY: Calendar Number 545, by Senator Volker, Senate Print 2139, an act to amend the Penal Law and the Criminal Procedure Law, in relation to term of imprisonment.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 5. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE PRESIDENT: Senator Waldon.

SENATOR WALDON: May I have a brief explanation, please?

THE PRESIDENT: Senator Volker, an explanation has been requested.

SENATOR VOLKER: Madam President, I thought I was going to sneak this one through.

Madam President, this is what's known as "three times and you're out," for - in fact, I was looking at last year's debate, and Senator Montgomery is really the only one in that debate that I believe is still here. Senator Gold, Senator Leichter -- in fact, the acting -- the acting president was Joe Holland, and he's gone too.

I don't know what this all means, but maybe it's an omen for me. I don't know.

(Laughter.)

SENATOR VOLKER: But anyways, this bill passed the Senate last year 50 to 10. What it really is is -- and let me be very honest with you. I was looking at the memo. The memo is obviously a few years old, because it talks about the rising crime rate

and -- and ever-rising. Of course, that's not true anymore. There's been a dramatic decline in violent crimes in particular. And thank God we've begun to get a handle on that.

But what this bill does is -- and it is still pertinent, despite Jenna's Law and some other things, because what it does is for people who are persistent, violent felony offenders -- in other words, this would be three times or more. And there's various ways where you could potentially have somebody that could have more than three times, although they probably would be a little up there in age. What it would mean is that they would be subject to 25 years to life in prison.

Now, very quickly -- and Senator Montgomery, since you asked me these questions last year, and I read last year's -- what it really does is for the offenses that are primarily involved, it would raise the minimum. There's already a life term, essentially, for the most serious of the violent offenders. What it would really do is move the minimum from 20 to 25 years.

Now, I'm not saying that this is in

all cases. But in the most serious cases, it would move the minimum from 20 years to life to 25 years to life. This is for three-time violent felony offenders.

And that's basically what this bill -- the other thing it does is it limits plea bargaining for a third-time violent felony offender. Although I have to admit to you it would be hard to plead out of that anyways. I mean, you'd have to plead to a pretty serious offense anyways.

But it really is -- what this was is it was sort of a middle ground between two times and you're out. We had this debate around here for years on "two times and you're out" mandatory sentencing and so forth. And this was a bill that actually, I think, Joe Lentol and I put in that was kind of a minimum ground at that time, which was three times and you're out.

SENATOR WALDON: Madam President, would the gentleman yield to a question or two.

THE PRESIDENT: Senator Volker, would you yield to a question?

SENATOR VOLKER: Certainly.

THE PRESIDENT: Go ahead, Senator Waldon.

SENATOR WALDON: Thank you very much, Madam President.

Senator, I've visited a number of prisons around this state, as I'm sure from time to time you have, and I've noticed that we have a growing population of senior citizens.

And at one prison we went to, with coverage by the TV media, we found a group of septuagenarians and octogenarians, 70 and 80 years of age. Some were so frail from a medical perspective that they could not fend for themselves. They had to have a nurse lift them from the bed, dress them, put the IVs in, put them in the wheelchair or on the cart and wheel them into the meeting.

Are we not creating a predicament for ourselves in terms of our prison system by putting these very heavy sentences automatically on everyone who falls short and becomes, as you said, the three-time violent felony offenders?

SENATOR VOLKER: No, I don't think so, Senator. And let me just tell you that -- yeah, in fact, I was -- some years ago I visited a number of prisons and actually went to meet with some of the very old prisoners, because we were researching the idea of doing medical parole.

And I remember what a big deal medical parole was around here. And we made an agreement with the Assembly. And medical parole passed, because of course the Governor -- as we pointed out at the time, then Governor Cuomo could actually have done it anyways. I mean, he could have -- there was a way to do it even short of legislation.

We passed medical parole. The number of people who have been paroled because of medical parole -- I forget. I had the numbers here someplace. It's like about 30 people or 40 people.

A big part of the reason was, when we went to a number of the prisons -- and I talked to one inmate, for instance, that was 85 years old. And I said to him -- a very nice man, although, unfortunately, he had

killed somebody when he was younger, and that's of course why.

But I said to him, "Would you like to get out?" And he said, "What would I do when I get out?" I said, well -- you know, I said, "You're -- you're ailing somewhat." And he said, "Look, my wife is dead, my friends are dead. I have nothing on the outside. My whole life is here in this prison."

The other thing that was interesting about it is that, as we found out, if we had let this fellow out, he would become a charge of the local county wherever he went, rather than of the State of New York, under the Medicaid rules.

It was amazing how many of the older inmates we found either didn't really want to get out or, for various reasons, it was very difficult to get them out. Frankly, the State of New York I think looks to some of these older inmates and is frankly looking for the possibility of getting some of these people out.

Most of these people are not in under our second violent felony offense, but

they're in because they were in for very serious offenses many years ago. They exhausted, in effect, their parole, for one reason or another. And very many of them just don't want to get out.

And the funny thing about the system is that the system is reluctant to force anybody out of the system who doesn't want to get out. Now, I'm not saying that that's so in every case.

But I will tell you, one thing you should remember is that when we're talking about people who are three-time violent felony offenders, these are pretty bad people. Because they've had a lot of chances, and now they have come to a point where they have been out, quite clearly, and they have done something extremely severe to get them into that position.

So I guess my answer is yeah, we don't want a lot of people in the prison system who are extremely old if we can avoid it. On the other hand, we don't want somebody who commits a violent offense running around society, in many cases despite their age.

SENATOR WALDON: Madam President.

THE PRESIDENT: Senator Waldon.

SENATOR WALDON: Would the gentleman yield again?

SENATOR VOLKER: Certainly.

THE PRESIDENT: Senator Waldon, go ahead.

SENATOR WALDON: Senator, I've read, as I'm sure you have, many of the reports, some from the Bureau and from other sources, which speak to the issue of aging and criminal behavior. And there comes a point in time -- as with drug addicts, if you reach around 40 years of age, people oftentimes, cold turkey, just stop using drugs. No one can explain why this happens, but we know it happens.

We also know, from the information over the years collected and reported, that when people reach the ages of 45, 50, 55, the likelihood of committing crime again, even of a violent nature, is tremendously diminished compared to when they were 18, 20, 25, 30.

So are we really accomplishing a great deal by sentencing them to a minimum of

25 to life versus 20 to life or 15 to life?

SENATOR VOLKER: Senator, let me remind you that what we're talking about here is someone who has already committed two violent felony offenses, clearly has spent an extended time in jail, now gets out again, and now commits another violent felony offense. Despite all those statistics, there are people that do it.

And the question is, when you have somebody who has had the opportunity, didn't take advantage of it, what exactly do we do with these people? Presumably they have had all sorts of treatment, because generally speaking that's true.

And if you're talking about drug offenders, they've probably been through programs and all sorts of things. They went to prison for a drug offense, they've - because that's true, that although drug offenses could be part of the initial offenses, very few people that are in age out for drug offenses, don't just come out. Even if they came out, they wouldn't be, under this law, considered to be violent felony

offenders. So they wouldn't be covered by this.

So the truth is you're talking about what would have to be considered a pretty bad person, even if they're in their 50s or early 60s. Because they have now - once they have two chances, they've now come out and committed a very bad crime that puts them back in there for a long period of time.

SENATOR WALDON: If I may, Madam President. Would the gentleman yield one more time.

THE PRESIDENT: Senator Volker, would you yield to an additional question?

SENATOR VOLKER: Yes.

THE PRESIDENT: Go ahead, Senator Waldon.

SENATOR WALDON: Senator Volker, permit me to tell you a true story. Then I'll ask a question.

I was a young cop working in Brooklyn, the Brownsville area, and I turn a corner and there's a huge crap game. I mean a huge crap game. All the local hustlers. Those are the guys who sell the numbers, who

do the little things that are criminal behavior but people somehow patronize them.

So you have the banker, you have the runners, you have the guys who run the Saturday night clubs, which are illegal. You have the local loan sharks. And they're having this huge crap game.

And so I, freshly out of the academy, foolishly bust everybody. And they were polite about my arresting them, but they made a request of me. And the request, which I couldn't give, was "We want you to let this guy go. We were having the crap game to celebrate his being released from Sing Sing today." Not smart; right? Not smart at all.

SENATOR VOLKER: No.

SENATOR WALDON: I say that to say this. Many of the guys that I'm sure you ran into and I ran into as police officers who got themselves into a violent felony situation -- not all, but some would come home on release and go to the bar, get into a drinking situation, and then some macho young tough would challenge them, or they would foolishly challenge someone. And what would

happen is you'd have a knock-down-drag-out fight, somebody gets hit with a bottle.

Now you have a violent felony offender which is a little different than the guy who actually sticks up the bank, the guy who murders someone, the guy who rapes and sodomizes someone.

Can you see any -- not saving grace, but any distinction between that kind of violent felony offender versus the guy who is an actual murderer, bank robber, you know, a vicious assault person, serial rapist?

SENATOR VOLKER: I think the problem, Senator, is -- and I understand what you're trying to say to me. You're trying to make a gradation of a violent felony offense.

In order to have a violent felony offense, you would have had to have really hurt this fellow, presumably committed manslaughter, almost. Because, as you know, in the assault area you've got to have a pretty severe assault before you get into a violent offense.

I think the answer is that's why I guess you have minimums and maximums. That's

why, by the way, despite the fact we limit plea bargaining, there is the potential for some plea bargaining.

I suppose there's always that possibility, which is something the DA, I think, would look into.

But primarily, if somebody is stupid enough or negligent enough to get into a situation where you're a two-time violent felony offender and you subject yourself to the possibility of a third violent felony offender, you're somebody who is most likely, if you ignore that, to get arrested again for another violent felony offender, it seems to me.

I think there is the possibility of what you're saying. And I think we do provide some limitation. But the problem is that the vast majority of these people -- it's like saying, by the way, that you can never plead in the Rockefeller drug law. We know that's not true. I mean, if a judge and a DA want to do something, they can do just about anything they want. I mean, the system doesn't work like that.

Nor does the system, even in violent felony offenders, work that way. And I suppose I could envision the possibility that somebody could fall into that category. But it would be a very, very rare case, it would seem to me.

And keeping in mind that we are not talking about minor offenders. These are very bad people who have repeatedly committed crimes. And if the numbers are correct, if they've been busted for two violent felony offenses, they've probably committed ten or twelve. Because, as you and I know, most people who are convicted of these offenses have committed other crimes that were never detected, they were never arrested for or whatever.

I think that's the difference between you're talking about the fairly minor offenders. History has shown, and the records very often show, that these people have been arrested dozens of times for offenses that could be considered to be fairly violent offenses, before they ever go to jail.

So I guess my answer is that we

could try to find gradations, but a person who is going to jail on the third violent felony offense has got to be considered somebody who's a pretty serious dude and a pretty serious offender.

SENATOR WALDON: Madam President, if I may, on the bill.

THE PRESIDENT: Senator Waldon, on the bill.

SENATOR WALDON: Thank you, Madam President.

Thank you very much, Senator Volker. I believe what you're attempting to do is somewhat meritorious. I just think it's a bit too heavy-handed. I think we can accomplish justice on behalf of the people in regard to those folks who are characterized by you, rightfully so, as violent felony offenders.

And I think that what we're creating is a problem in our prison system whereby we're going to have to set aside entire wings of prisons for those who are senior citizens and frail and elderly and who cannot do for themselves at all, and we should

not burden ourselves with that kind of heavy weight.

And I don't personally see a great difference in accomplishing your goal when the threshold is 20 versus 25 or even 15 versus 25. Because the persons who commit the violent felony offenses as you're speaking about are generally up in age. So we're not talking about someone who, as a rule, is 18 - and there are many of them who at 18 have committed three -- are committing their third violent felony offense.

But many of these people are at an age where putting 25 years on them will have them coming out of the prison when they are far beyond even our stately ages, Senator Volker. And I think that's a burden for the State.

I thank you very much for your dialogue.

Thank you, Madam President.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 5. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Those recorded in the negative on Calendar Number 545 are Senators Connor, Duane, Montgomery, Paterson, Santiago, Schneiderman, Smith, Stavisky, and Waldon. Ayes, 51. Nays, 9.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 583, by Senator Johnson, Senate Print 1741A, an act to amend the Civil Rights Law, in relation to the right of privacy.

SENATOR SKELOS: Lay it aside for the day.

THE PRESIDENT: The bill is laid aside for the day.

THE SECRETARY: Calendar Number 584, by the Assembly Committee on Rules, Assembly Print 2103, an act to amend the Tax Law, in relation to extending.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 3. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 59. Nays, 1. Senator Gentile recorded in the negative.

THE PRESIDENT: The bill is passed.

Senator Skelos.

SENATOR SKELOS: Madam President, if we could return to reports of standing committees, I believe there's a report of the Education Committee at the desk. I ask that it be read.

THE PRESIDENT: Return to the reports of standing committees. The Secretary will read.

THE SECRETARY: Senator Kuhl, from the Committee on Education, reports the following bill direct to third reading:

Senate Print 5535, by Senator Kuhl, an act to amend the Education Law.

THE PRESIDENT: Without objection, the bill is reported to third reading.

Senator Skelos.

SENATOR SKELOS: Madam President,

is there any housekeeping at the desk?

THE PRESIDENT: Senator Meier.

SENATOR MEIER: Thank you, Madam President.

On behalf of Senator DeFrancisco, I wish to call up his bill, Print Number 1153, recalled from the Assembly, which is now at the desk.

THE PRESIDENT: The Secretary will read.

THE SECRETARY: Calendar Number 137, by Senator DeFrancisco, Senate Print 1153, an act to amend the Parks, Recreation and Historic Preservation Law.

SENATOR MEIER: Madam President, I now move to reconsider the vote by which this bill was passed.

THE PRESIDENT: The Secretary will call the roll upon reconsideration.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 60.

SENATOR MEIER: Madam President, I now offer the following amendments.

THE PRESIDENT: The amendments are received.

Senator Skelos.

SENATOR SKELOS: Madam President, there being no further business, I move we adjourn until Wednesday, April 28, at 11:00 a.m.

THE PRESIDENT: On motion, the Senate stands adjourned until Wednesday, April 28, at 11:00 a.m.

(Whereupon, at 4:37 p.m., the Senate adjourned.)