NEW YORK STATE SENATE

THE STENOGRAPHIC RECORD

ALBANY, NEW YORK

March 3, 2003

3:07 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 please 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 bow our heads in a moment of silence.

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

THE PRESIDENT: Reading of the Journal.

THE SECRETARY: In Senate, Sunday, March 2, the Senate met pursuant to adjournment. The Journal of Saturday, March 1, 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 Seward, from the Committee on Insurance, reports the following bills:

Senate Print 1447, by Senator Seward, an act to amend the Insurance Law and the Legislative Law;

2037, with amendments, by Senator Seward, an act to amend the Insurance Law;

2040, by Senator Seward, an act to amend the Insurance Law;

And Senate Print 2356, by Senator Seward, an act to amend the Insurance Law.

All bills ordered direct to third reading.

THE PRESIDENT: Without objection, the bills are reported direct to third reading.

Reports of select committees.

Communications and reports from state officers.

Motions and resolutions.

Senator Skelos.

SENATOR SKELOS: Madam President, there's a privileged resolution at the desk by Senator Brown. Could we have the title read and move for its immediate adoption.

THE PRESIDENT: The Secretary will read.

THE SECRETARY: By Senator Brown, Legislative Resolution Number 558, memorializing Governor George E. Pataki to proclaim March 3 through 7, 2003, as Athletic Training Week in New York State.

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, if we could go to the noncontroversial reading of the calendar.

THE PRESIDENT: The Secretary will read.

THE SECRETARY: Calendar Number 58, by Senator LaValle, Senate Print 296A, an act to amend the Education Law and the General Municipal Law, in relation to regulation of conduct.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 5. This act shall take effect on the first day of July.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 45.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 70, by Senator Balboni, Senate Print 513, an act to amend the Vehicle and Traffic Law, in relation to aggravated unlicensed operation.

SENATOR SCHNEIDERMAN: Lay it aside.

THE PRESIDENT: The bill is laid aside.

THE SECRETARY: Calendar Number 79, by Senator Marcellino, Senate Print 775,

an act to amend the Criminal Procedure Law, in relation to anonymous juries.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 4. This act shall take effect on the 30th day.

THE PRESIDENT: Senator Marcellino, to explain your vote.

SENATOR MARCELLINO: Yes, Madam President. I would like to get up and rise to explain my vote on this bill.

This is the eighth year that this bill will have passed this house unanimously, and it is also the eighth year -- well, I can't count that. Seven of the last -- the last seven years we have not had the bill out on the floor in the other chamber for a vote.

I can't call it a partisan issue; it certainly isn't. We get bipartisan support in this house. We simply cannot get it onto the floor in the other chamber.

This is one of a series of pieces of legislation we've discussed so far this year where the other house refuses to come to the plate with an alternative version if

they're not happy with the existing form.

We urge the other house, this is a good bill. We urge the other house to support this bill. I thank you for allowing me to speak on this bill. And of course I vote aye.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 46.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 91, by Member of the Assembly Weinstein, Assembly Print Number --

SENATOR SKELOS: Lay it aside for the day.

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

THE SECRETARY: Calendar Number 103, by Senator Skelos, Senate Print 1055, an act to amend the Penal Law, in relation to concurrent and consecutive terms of imprisonment.

SENATOR SCHNEIDERMAN: Lay it aside.

THE PRESIDENT: The bill is laid

aside.

THE SECRETARY: Calendar Number 112, by Senator Volker, Senate Print 1384, an act to amend the Criminal Procedure Law, in relation to proof of the commission of a previous sexual assault.

SENATOR SCHNEIDERMAN: Lay it aside.

THE PRESIDENT: The bill is laid aside.

THE SECRETARY: Calendar Number 113, by Senator Volker, Senate Print 1433, an act to amend the Penal Law, in relation to establishing a three-year period of probation.

SENATOR SCHNEIDERMAN: Lay it aside.

THE PRESIDENT: The bill is laid aside.

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

SENATOR SKELOS: Madam President, if we could then go to the controversial reading of the calendar.

THE PRESIDENT: The Secretary will read.

THE SECRETARY: Calendar Number 70, by Senator Balboni, Senate Print 513, an act to amend the Vehicle and Traffic Law, in relation to aggravated unlicensed operation of a motor vehicle.

SENATOR BALBONI: Does anyone want an explanation?

SENATOR SCHNEIDERMAN: Well, since Senator Balboni is obviously eager to do so, we will be very happy to have a persuasive explanation.

SENATOR BALBONI: I'm always ready and willing to provide information to --

THE PRESIDENT: Senator Balboni, you may continue or proceed, whichever is appropriate.

SENATOR SCHNEIDERMAN: We request an explanation of the statewide implications of the legislation.

SENATOR BALBONI: Madam President, this is a bill that has passed many times before. It addresses a situation actually coming out of New York City.

And unfortunately, all too often we read newspaper accounts again and again of

people who are involved in tragic vehicle accidents where lives are lost and then we find out that the individual who has committed the act has had several suspensions or in fact is driving with a revocation.

And it's an interesting note, I've tried to actually find out from the Department of Motor Vehicles whether or not there is actually a correlation between individuals who have unlicensed operations or have suspended licenses and the amount of accidents that they have. And there is in fact a correlation.

So what this bill essentially does is it amends paragraph A of subdivision 1 of Section 511 of the Vehicle and Traffic Law to establish a presumption that a person who has in effect three or more suspensions or revocations imposed on at least three separate dates knows that his or her license was suspended or revoked.

This is a common-sense application of the law. It helps traffic prosecutors in order to prevent people from driving with suspended or revoked licenses.

Thank you, Madam President.

THE PRESIDENT: Does any other member wish to be heard on this bill?

Then the debate is closed.

Read the last section.

THE SECRETARY: Section 2. This act shall take effect on the 90th day.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 53. Nays, 1. Senator Duane recorded in the negative.

THE PRESIDENT: The bill is passed.

The Secretary will read.

THE SECRETARY: Calendar Number 103, by Senator Skelos, Senate Print 1055, an act to amend the Penal Law, in relation to concurrent and consecutive terms of imprisonment.

THE PRESIDENT: Senator Duane.

SENATOR DUANE: Thank you, Madam President. If the sponsor would yield.

THE PRESIDENT: Senator Skelos, will you yield for a question?

SENATOR SKELOS: Yes, Senator Duane.

THE PRESIDENT: You may proceed, Senator Duane.

SENATOR DUANE: Thank you.

I'm wondering if, while we do these pieces of sexual assault legislation that aren't part of any kind of omnibus reform, if it's envisioned that we're going to deal with the issue of clergy abuse this year as part of the sexual assault reforms that we're looking at.

SENATOR SKELOS: Senator Duane, I'm dealing with this legislation. I note that it passed 60 to nothing in the year 2000; 59 to 1, with you dissenting, in the year 2001.

This is what -- this legislation strictly deals with sentencing in first-degree rape cases.

SENATOR DUANE: Madam President, on the bill.

THE PRESIDENT: You may proceed on the bill, Senator Duane.

SENATOR DUANE: Thank you.

I have a major concern that we do revisions to the state sexual assault laws in

a piecemeal fashion and that we don't do an omnibus piece of legislation which takes into account all of the reforms which various legislators think are important.

And I have to note that of all of the bills that have at least so far gone through committee, none of those bills have dealt with the issue of abuse of children on the part of clergy members, whether it be reporting, whether it be statute of limitations, among other issues. And I think that if we are going to change the state's laws on the issue of sexual abuse and sexual assault, we should do so in a comprehensive manner and not legislatively just piece by piece.

So it's my intention to vote no on this, even though I believe the merits of this particular bill are fine. But the way that we should deal with these issues are in a comprehensive fashion with an omnibus reform bill.

So I will be voting no on this bill in the hope that later on in the session, and soon in the session, we'll deal with a

comprehensive sexual assault reform package and also one that includes the issue, the terrible issue which New York State is really lagging in, of abuse on the part of members of the clergy.

Thank you, Madam President.

THE PRESIDENT: Does any other Senator wish to be heard on this bill?

Then the debate is closed.

Read the last section.

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

THE PRESIDENT: Senator DeFrancisco.

SENATOR DeFRANCISCO: I'd just like to explain my vote.

I read this bill carefully, and I just want to note for the record that this bill applies whether the offender is a clergy member or whether the offender has another occupation.

And, quite frankly, it's a bill that applies to everyone. And it's a good bill. That's why I'm voting yes.

THE PRESIDENT: Senator

DeFrancisco, you will be recorded as voting in the affirmative on this bill.

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, 58. Nays, 1. Senator Duane recorded in the negative.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 112, by Senator Volker, Senate Print 1384, an act to amend the Criminal Procedure Law, in relation to proof of the commission of a previous sexual assault.

SENATOR SCHNEIDERMAN: Explanation.

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

SENATOR VOLKER: Madam President, this is a bill that passed almost unanimously last year, except for 11 people.

(Laughter.)

SENATOR VOLKER: Well, you can't

have everything. What can I tell you.

Anyways, this -- actually, this is a bill that we lifted out of a Governor's program bill that passed here a couple of years ago. And these are the -- frankly, the provisions that didn't pass out of that bill.

And it relates really to three areas. The first area, which I know is the most controversial, relates to previous or prior bad acts of person who is charged in a sexual assault case. And it overrules the so-called Molineaux case, which says that you can't bring in prior bad acts.

What this would allow is to show a train of evidence or to show a -- or, rather, a train of problems involving sexual assault. You could bring in not only previous sexual offenses, but you could bring in previous arrests. However, the judge, of course, would have the right to determine whether the probative value would be outweighed by the danger of undue prejudice.

Probably the likelihood is that in many cases the judge would presumably make that kind of decision. So that the likelihood

is that you would probably never have anything but previous convictions allowed by a judge.

The second thing is that this bill would allow the district attorney to appeal what he considers unduly lenient sentences, just as a defendant can do now. And that, by the way, this applies not only to sex offenses but to any offense.

And, thirdly, it allows the state, meaning the district attorney, to apply to overturn unduly lenient bail determinations. Which is really something that has been a high priority for a lot of individuals as well as district attorneys, because there have been some instances, some pretty bad instances involving bail in this state.

Obviously, these three provisions are controversial. We debated this last year at some length. I would point out that we have, in the past, have had some discussion with the Assembly and continue to have some discussions with the Assembly.

And I'll be the first to admit to you the most likely is that if we do a reversal of the Molineaux rule, it probably

will be restricted just to previous convictions. And I'll be perfectly -- frankly admit that. I think there's little question that very few judges will allow previous bad acts to come into evidence except for convictions.

THE PRESIDENT: Senator Schneiderman.

SENATOR SCHNEIDERMAN: Madam President, if the sponsor would yield for a few brief questions.

THE PRESIDENT: Senator Volker, will you yield for a question?

SENATOR VOLKER: Yes.

SENATOR SCHNEIDERMAN: Through you, Madam President. The first section of this bill refers to the defendant's commission of another offense. And the specific language I'm citing provides for the admission of "evidence of the defendant's commission of another offense or offenses."

Is the term "commission" defined anywhere in the Penal Law? I'm not sure what that defines.

SENATOR VOLKER: Well, the

commission -- obviously, evidence of a commission would be either arrests or convictions.

By the way, this provision, it has been pointed out to me, could potentially have some impact on clergy situations. And because of the fact that the commission of prior acts, which would mean not just convictions but also arrests or something of that nature, could potentially be involved. I only point that out because it has been pointed out to me.

I'll give you the answer. Because it's not specifically defined, it could be determined to be previous arrests.

SENATOR SCHNEIDERMAN: Through you, Madam President, if the sponsor would continue to yield.

SENATOR VOLKER: Certainly. Sure.

THE PRESIDENT: Senator Volker yields for a question.

You may proceed, Senator.

SENATOR SCHNEIDERMAN: I think, as a good lawyer does, you try and anticipate the questions that are coming in advance, and

you've acknowledged that this bill would allow a court to admit evidence of an arrest even if the defendant was acquitted or if the charges were dropped.

My question here, though, is evidence of the defendant's commission, it sounds to me as though it can go far beyond that. One eyewitness's testimony, or purported eyewitness's testimony, is evidence of the commission. Is there anything to prevent an overenthusiastic court from even going beyond an arrest, under the language of this bill, and admitting other evidence of a defendant's commission of an offense?

SENATOR VOLKER: Well, last year -- and by the way, I just want to tell you that you're doing a very good job, as Senator Dollinger did last year. We debated this for about an hour last year. I'm not trying to . . .

That's probably true. But one of the things I think that we have to understand is it's almost inconceivable that a judge in this state would allow the evidence to go beyond certain limits. And of course since

the statute talks about the possibility of undue prejudice, if he allowed that, it probably would be a flag for an appeal down the line. I only point that out because I understand what you're getting to.

I guess maybe I'm bringing up the fact that in this case we are sort of allowing some more latitude to judges, which your conference has been asking for to a great extent in sentencing.

I think we have a lot of confidence that judges are not going to go beyond the -- this is not a district attorney making these decisions, this is a judge.

It seems to me when you're dealing with sexual assaults, you have to be a little bit creative here, because these are extremely dangerous areas. We have found that out not only in the areas involving women and children but, frankly, also to a certain extent in the clergy area, which is a very, very difficult area.

SENATOR SCHNEIDERMAN: Thank you.

Through you, Madam President, I wonder if the sponsor could explain in

practical terms how the appeal of a sentence as being unduly lenient would work. How would a prosecutor handle that, and what would the standards be by which the court would make such a determination?

SENATOR VOLKER: Oh, unduly lenient, I'm sorry. Well, I guess the question would be that the standards would be whether -- it stands for itself, "unduly lenient."

I suppose if an appellate judge said this is obviously not -- and given the evidence that was presented at the time of the decision, then the appellate judge would look at it from the same sort of standard that he would look at it when a defendant brought an action or appealed on the basis that it was unduly severe.

And the same thing would be true on bail. Which, as you know, you can do. You can go in and say: "This bail is way too high, and here's why."

And I think on a sentencing, if a DA believed that a sentence was unduly lenient, he would go in and say: "Here's the

evidence."

Now, we know that no district attorney has the right to retry a case. So the DA would have to show very specific reasons why that sentence would not fit under the sentencing structure of the case in point.

SENATOR SCHNEIDERMAN: Thank you, Madam President. On the bill.

THE PRESIDENT: You may proceed on the bill, Senator.

SENATOR SCHNEIDERMAN: I thank the sponsor for his responses to my questions.

I do find it really somewhat remarkable that we're proposing to introduce into the criminal law of the State of New York something that is as poorly defined as the first section of this bill. This would allow, potentially, the introduction of any sort of evidence of a defendant's commission of an offense of sexual assault.

There's no -- nothing limiting it to a conviction, there's nothing limiting it to an arrest, there's nothing limiting it to evidence that was introduced in a prior trial.

And while I do appreciate the

sudden, newfound respect for the judiciary, I think the whole basis of this legislation is a lack of trust of the judiciary. If we're so confident that judges will exercise discretion with regards to the application of Section 1 of the bill, then why are we so worried about the judges being so lenient and so prone to error in the other sections of the legislation?

I think that this is really a remarkable step past anything that has, as far as I'm aware, has ever been introduced in our criminal law. It goes beyond the federal case law that I'm familiar with.

And I do think that the balances between prosecutors and defendants is very delicate already. And the notion of introduction of evidence of a crime -- which may never have been charged, which someone may have been acquitted -- of sexual assault has such a powerful negative impact on many jurors that we're really playing here with fire.

And I would urge my colleagues to consider very carefully before voting to make such a change. I do think that there -- I

must say that I understand the basis for some of the other provisions in this legislation. I think they seem quite reasonable. I do think, though, that that is not just a smoking gun, that's a nuclear warhead. And I would urge my colleagues to vote no on that basis.

Thank you, Madam President.

THE PRESIDENT: Senator Sabini.

SENATOR SABINI: Madam President, would the sponsor yield for a question?

SENATOR VOLKER: Sure. Certainly.

SENATOR SABINI: Through you, Madam President, thank you.

Senator Volker, this is asked out of -- purely for informational and not for advocacy purposes, because I've admired from afar your work on criminal law in this state.

Section 8 of the bill, on the review of bail, is there any other place in the Criminal Procedure Law that that's allowed right now, under current law, for any other offense?

SENATOR VOLKER: No.

In fact, let me just say to you

that this provision was in a -- the sexual assault bill. In all honesty, it probably didn't belong there. Because this involves every case. This just doesn't involve sex cases. This involves any case in the Penal Law. So it is not limited just to sexual assault cases, whatever; it is an overall provision.

And it's one of the reasons, by the way, why initially we pulled it out of the other bill, which became law. Of course the other reason we pulled it out was the Assembly wouldn't pass it with that in there. But, you know.

SENATOR SABINI: So, Madam President, if the sponsor would yield for an additional question.

THE PRESIDENT: Senator Volker, will you yield for a question?

SENATOR VOLKER: Certainly.

THE PRESIDENT: You may proceed, Senator.

SENATOR SABINI: So this Section 8 of this bill applies to all offenses under the Criminal Procedure Law?

SENATOR VOLKER: Yes.

Remember, the defendant now has the unfettered right to appeal in any instance. What this bill would do is to give the prosecution the same ability -- that doesn't mean that it's going to happen, but give the prosecution the same ability to appeal as the defendant himself has. Or herself.

SENATOR SABINI: In all cases, up to 72 hours?

SENATOR VOLKER: Right.

SENATOR SABINI: Thank you.

Thank you, Madam President.

THE PRESIDENT: Senator Diaz.

SENATOR DIAZ: On the bill.

THE PRESIDENT: You may proceed on the bill, Senator.

SENATOR DIAZ: Thank you. Madam President, thank you very much. Madam President, I am taking this opportunity to speak on behalf of the bill.

And I think that -- I come from the Bronx, the Hispanic community. I have seen so many judges and so many sentences that have been so lenient to people that have committed

crimes against our community that this bill will, will, will give the DAs the opportunity to appeal those lenient sentences.

So I think that this is a good bill, and I think that we all should support this bill. And I will vote for this bill.

THE PRESIDENT: Senator Krueger.

SENATOR KRUEGER: Thank you, Madam President. If, through you, the sponsor would yield for a question.

THE PRESIDENT: Senator Volker, will you yield for a question?

SENATOR VOLKER: Yes.

THE PRESIDENT: You may proceed, Senator Krueger.

SENATOR KRUEGER: Thank you, Madam President.

Senator Volker, the Section 3 -- Section 450.30 Criminal Procedure Law amendment which would grant prosecution the right to appeal sentences that are unduly lenient, is there precedent for that anywhere else in our criminal justice system, that a prosecutor could actually request an appeal of a decision by a court if they thought it was

too lenient?

THE PRESIDENT: Senator Krueger.

SENATOR VOLKER: I'm sorry --

THE PRESIDENT: Excuse me. First Senator Volker. You were going to respond.

SENATOR VOLKER: -- I was just inquiring.

The answer is yes, there are a lot of those, but not in -- well, this applies -- obviously, this is something new in New York. But the federal system has had that for some time. And there are a lot of states that have allowed this over the years. I can't tell you exactly what they are.

But this is unprecedented for New York law, yes.

SENATOR KRUEGER: Madam President, if, through you, the sponsor would continue to yield.

SENATOR VOLKER: Certainly, yes.

THE PRESIDENT: Senator Volker does yield. You may proceed, Senator Krueger.

SENATOR KRUEGER: Thank you.

And, Senator Volker, clearly you do have a long and respected history in criminal

law, which I respect. And I have almost no history in criminal law other than listening to debates on the floor here for the last year.

Could I ask you whether you think there are some risks to changing that precedent overall in our criminal justice system? Even though I heard Senator Diaz speaking of his concern that judges make bad decisions sometimes, and he sees that, and I think we could all give examples of that, I might argue that we should address that through court reform and through review of how we make decisions of the judges that we pick, rather than opening ourselves up to, as you stated, an unprecedented change in our criminal justice system.

And so I was wondering from the bigger picture, not necessarily just for this bill, how you see this as a precedent.

SENATOR VOLKER: Senator, I don't -- you know, I don't know if I agree that court reform -- I think court reform is a matter of process.

I don't, you know -- I mean, I

disagree with judges. And it was the disagreement with the way certain judges were handling drug cases back in the '70s -- for instance, there were studies that were made that clearly showed, and no one really denied it, that judges as a whole in New York City were sentencing drug offenders to about a third of what upstate judges were sentencing people to.

There were some judges -- in fact, there was one judge in his whole career never sentenced a drug person to jail, and bragged about it as he left. There was another judge that bragged about the fact that -- in fact, he had a name, and I won't get into it. But he was called "Let 'em out" whatever his name was. And I know the guy, but I won't mention his name.

And -- but I think -- yes, that's right. But, you know, I think the answer is that there is a lot of sense in having other judges review decisions made -- and let's remember, this is not really a jury decision, this is a judge's decision to sentence and a judge's decision to give bail. There's a lot

of sense to have another judge look at it. And this is the appellate division, basically, because the next step in most of these cases would be the appellate division, just to review them.

We know, by the way, that usually what happens, unless there's something really striking, the appellate division won't take much time in reviewing it unless there's something really bad. So the DA probably won't appeal very many, because it would be useless to do it.

But in certain cases that appear on their face to be a problem, I don't exactly see why the appellate court shouldn't be given the same privilege or the same decision-making as a defendant can do with the DA.

That, you know -- the real reason that this hasn't happened is because the defendant attorneys -- and I understand it, they just don't want to be bothered with anything after that. And they're just afraid that maybe somebody might find out that something sticks out, you know, like a sore thumb. And I understand that, I guess.

I guess I just think in this day and age, when we have such a -- and especially, I think, in the city. It has nothing to do with -- the matter of cases are run through so quickly, sometimes, that it wouldn't be a bad idea to at least have some way to take a review of them.

That's -- I mean, I don't think -- do I think a lot of cases will be turned over? Nah. Do I think a lot of bail will be turned over? Nope. But every once in a while, there may be one that appears to be unusually out of place. And that's what I think we're looking for.

SENATOR KRUEGER: Madam President, if, through you, the sponsor would continue to yield.

THE PRESIDENT: Senator Volker?

SENATOR VOLKER: Sure. Yes.

THE PRESIDENT: Go ahead, Senator Krueger.

SENATOR KRUEGER: Thank you, Senator.

So if I understand your answer to my last question, you would actually support

expansion of this precedent to other areas of criminal justice as well, and not exclusive to sexual assault law?

SENATOR VOLKER: Well, that's what this bill is.

SENATOR KRUEGER: This is --

SENATOR VOLKER: This bill goes to all areas.

SENATOR KRUEGER: It goes to all areas, not just to --

SENATOR VOLKER: I don't think it's necessarily -- I think, frankly, I think the sexual assault area -- my first step, my preference would be as a first step in sexual assault cases. Now, I'll be the first to admit that to you.

What we did here was just pull this out of the bill that the Governor had submitted to us, and that's what this bill is. If I were a betting man -- and I'm not -- but the likelihood is that when this happens, and I think it will happen, it probably will eventually at least start out with sexual assault rather than be as broad as this legislation is. I'm being perfectly honest

now.

SENATOR KRUEGER: Thank you, Madam President. Thank you.

THE PRESIDENT: Senator Stavisky is first.

SENATOR STAVISKY: I yield to my northern colleague.

THE PRESIDENT: Senator Hassell-Thompson.

SENATOR HASSELL-THOMPSON: Thank you, Madam President. And to my colleague, I thank you.

Just a couple of questions, if the Senator will yield.

SENATOR VOLKER: Certainly, I yield.

SENATOR HASSELL-THOMPSON: Since this bill does expand itself to include all kinds of cases, do you believe that if this bill was passed when the Diallo case was being tried against the police officers, that this would change the way in which the judiciary made the decision about those police officers?

SENATOR VOLKER: Boy, I've got to be honest with you, I don't know -- I really

don't know enough about that, to tell you the truth. I doubt it would, but then I don't know.

It's possible, I suppose, that it potentially could. But in specific cases, it's very difficult to determine. But I would tell you that more review always brings up the possibility that situations could -- could change on either side, by the way. And so I suppose it's possible.

SENATOR HASSELL-THOMPSON: The next question, through you, Madam President, if the Senator would yield.

THE PRESIDENT: Senator, will you yield?

SENATOR VOLKER: Yes.

THE PRESIDENT: You may proceed, Senator.

SENATOR HASSELL-THOMPSON: During this -- presuming, then, that the prosecutor has the right to overturn the appeal process, what would happen to the possible bail opportunities for the offender?

SENATOR VOLKER: I don't think it would have any -- let's understand here, this

doesn't overturn the defense possibilities. The defense remains exactly as it is now -- I mean, the right to appeal and the right to appeal bail and so forth.

This just applies to the other side, gives the prosecution the ability to also appeal bail, except on the other side, and say it's too lenient or it's too low and so forth.

I don't think it would have any impact at all on the defendant's side, because a judge right now knows that the defendant can appeal anyways. And the fact that the DA could appeal -- in fact, some would say that some judges might be inclined to in fact increase the bail, just to see whether the DA would appeal and try to get it reduced, and then that judge would be kind of off the hook. I don't mean to, you know -- but some might say that.

I think most likely this would only involve a very few cases. Because no DA in this state is going to want to appeal a case that he doesn't really believe stands out. He's not going to be bothered. You know, in

other words, these are busy courts in Erie County, Rochester, Monroe, New York, all around, and I don't think that they would even bother to appeal unless it was something that really stood out.

And there have been some that I think have kind of stood out occasionally. We've had a few cases where bail was posted at a low number, the person went out and then committed crimes, and then they came back in and of course raised the bail dramatically because of what happened while the person was out on bail. I mean, that you can do now.

What this would say basically is that you wouldn't need a crime or something else to force somebody to come in and change the bail.

SENATOR HASSELL-THOMPSON: Thank you, Senator.

Just quickly on the bill, through you, Madam President.

THE PRESIDENT: You may proceed on the bill, Senator.

SENATOR HASSELL-THOMPSON: I too, like Senator Krueger, if this were more

strictly related to sexual offenses, I think that I could wholeheartedly support this bill.

But I think that it is not -- it is not my sense that I sit here to make the job of the prosecutor easier. I think that part of what we need to experience is that prosecutors really need to do a better job in terms of how they try cases and the way they do their investigations.

So that I will be voting no on this bill. But I do thank Senator Volker for his continued raising of the issue, particularly as it pertains to sexual assaults.

THE PRESIDENT: Senator Stavisky.

SENATOR STAVISKY: Thank you.

I too join the Dale Volker fan club. We respect your long tradition both in law enforcement and in law making.

But I do have one question about the bill, Madam President, if the Senator would yield for a question.

SENATOR VOLKER: I will yield, yes.

SENATOR STAVISKY: If you take a look at lines 4 and 5 on page 1, it talks

about evidence of the defendant's commission of another offense. And you use the word "commission" and not "conviction." Can you explain the distinction between "commission" and "conviction"?

SENATOR VOLKER: That's very astute. It really is. And using the word "commission" really means -- and very bluntly, it means that it is more than just a conviction. It could be, obviously, an arrest. And evidence -- and by the way, that's why we later on say that the judge has the right not to do that, because it might have undue influence, undue prejudice on the defendant.

But you are right, "commission" means more than a conviction. And that is, it could be an arrest.

As I said to Senator Dollinger and, recently, Senator Schneiderman, this is an issue -- "commission" is a word that means what it says. And that is that "commission" means that anything that would indicate that this person was involved in previous sexual assaults that could help indicate that this

person is a predator or is an offender.

And it would be the judge's decision to say whether it's something that should be included in the trial or in the evidence or should not. And my guess is, frankly, that other than convictions, most judges will probably not allow that in unless there's some specific reason why he would allow it in. Or he or she would allow it in.

SENATOR STAVISKY: One last question.

THE PRESIDENT: Senator Volker, will you yield?

SENATOR VOLKER: I yield.

THE PRESIDENT: You may proceed, Senator Stavisky.

SENATOR STAVISKY: In other words, the word "commission" could also include acquittal?

SENATOR VOLKER: Yeah, it could. But I got to tell you, the chances of that are virtually nil. And the reason is because it would involve an arrest.

But I think probably any judge that would allow -- one thing is the defendant, of

course, would come right back and say -- his attorney would say: Yeah, but it was an acquittal. He was not convicted, he was not -- and I doubt very much that any DA would want to put into evidence something where somebody was actually acquitted. I don't think it would go over very well with the jury.

But that would be a decision I think the judge -- that is, I personally wouldn't. I mean, if I'm -- it seems to me if I'm the prosecutor and you say this fellow has no convictions or whatever, but he had an acquittal, it's not exactly good evidence.

SENATOR STAVISKY: Thank you.

On the bill very briefly.

THE PRESIDENT: You may proceed on the bill, Senator.

SENATOR STAVISKY: That's the reason why I'm going to vote against this, measure.

You know, we feel sort of guilty because all of us are troubled by this whole area of sexual assault. And yet there is the possibility that somebody has been acquitted,

is innocent, was framed or whatever.

And, Madam President, I plan to vote no.

THE PRESIDENT: Senator Montgomery.

SENATOR MONTGOMERY: Yes, Madam President, just on the bill.

I find it somewhat troubling that we are debating legislation which would essentially go further and establish a precedent to reduce the authority of the judge to make decisions on bail and sentencing, but when we have before us, before our state a major issue regarding court reform, which I think is much broader and is extremely important. And unfortunately, it's one that we're not discussing.

I have in my district one of three community justice centers I believe in New York City -- one of them in Manhattan, one in the Bronx, and one in my district, fortunately. I'm very fortunate to have it. It's a court that is in the community. The judge is also part of the community. The district attorney is there. There are 14

agencies in the building. The judge has a lot of leeway in sentencing.

And the judge works with the district attorney, with the local police department, with the community. Sentencing is relevant. And also, there is alternative sentencing and so forth and so on.

It makes a lot of sense. It makes a huge difference. And the judge does know who and how much and to what extent sentencing and bail occurs, because he knows people from not just coming before him one time, but because very often people come back to that Judge many times because the sentencing requires them to reappear.

The drug court that we have works very well. Domestic violence court works very well. The -- there is a youth court within the community justice court.

We certainly understand very, very specifically, it's very reasonable that we should be looking at elevating the Family Court to the Supreme Court so that one case can be dealt with or one family can be dealt with, all of the issues in one case can be

within one court.

Why aren't we doing that? I don't understand why we don't discuss and why we don't have a bill from Senator Volker, Senator Seward, somebody -- why don't we have a bill this talks about court reform, and why aren't we looking at supporting what really works, what gives the maximum authority to the judge but creates a relationship with the judge and the DA and the whole process so that it doesn't break down, as Senator Volker is trying to fix here?

So, Madam President, I'm going to vote no for reasons that obviously I don't -- I would not wish to see the district attorney have the right to appeal a judge's decision on bail and sentencing. But also, I'm very disappointed that we have not risen to the need and the responsibility to talk about court reform, which is the major question in our state. I think if we did that, if we had legislation that did that, it would clarify and fix a lot of the issues that we try to fix piecemeal and create more problems than we actually resolve.

So I'm voting no on this bill as well.

THE PRESIDENT: Does any other member wish to be heard on this bill?

Then the debate is closed.

Read the last section.

THE SECRETARY: Section 11. 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 112 are Senators Breslin, Dilán, Duane, Hassell-Thompson, L. Krueger, Montgomery, Paterson, Schneiderman, A. Smith, and Stavisky. Ayes, 50. Nays, 10.

THE PRESIDENT: The bill is passed.

Senator Hassell-Thompson.

SENATOR HASSELL-THOMPSON: Yes, thank you, Madam President. I rise to request unanimous consent to be recorded in the negative on Calendar Number 70, Senate Print 513.

THE PRESIDENT: You will be so

recorded, without hearing any objection, as voting in the negative on that bill.

Senator Montgomery.

SENATOR MONTGOMERY: Yes, Madam President. I was attending the Finance Committee hearings last week, and a vote in this house, Calendar -- it's Senate Bill 851. Had I been in the chamber at the time that it was voted on, I would have voted no.

THE PRESIDENT: The record will so note, Senator Montgomery.

SENATOR MONTGOMERY: Thank you.

THE PRESIDENT: Senator Parker.

SENATOR PARKER: Yes, Madam President. I rise to request unanimous consent to be recorded in the negative on Calendar 112, Senate Print 1384.

THE PRESIDENT: You will be so recorded, Senator Parker, as voting in the negative on that bill.

Senator Andrews.

SENATOR ANDREWS: Madam President, I rise to be recorded in the negative -- request unanimous consent to be recorded in the negative on Calendar 112,

Bill 1384.

THE PRESIDENT: Hearing no objection, you will be so recorded as voting in the negative, Senator.

The Secretary will read.

THE SECRETARY: Calendar Number 113, by Senator Volker, Senate Print 1433, an act to amend the Penal Law, in relation to establishing a three-year period of probation.

THE PRESIDENT: Senator Duane.

SENATOR DUANE: Thank you, Madam President, on the bill.

THE PRESIDENT: You may proceed on the bill, Senator.

SENATOR DUANE: Thank you, Madam President.

And this is in part for the edification of the main perpetrator against me of the throw a comment and then leave the chamber, shockingly. The perp is still in the chamber.

I never said that either Calendar Number 103 and I'm not saying about Calendar Number 113 that they would not apply to priests. So hopefully in the future, before

someone hurls something across the chamber they'll actually listen to what I'm saying.

However, I do think that this is a very clumsy way to deal with the issue of reforming our sexual assault legislation. It should be done in a comprehensive fashion.

THE PRESIDENT: Senator Skelos. Excuse me, Senator Duane.

SENATOR SKELOS: Madam President, could I make a point of order.

I'm not exactly sure what Senator Duane is doing at this point. We're on the controversial reading of the calendar. We've completed one bill, and we're about to start another piece of legislation. So --

THE PRESIDENT: Senator Schneiderman.

SENATOR SCHNEIDERMAN: Madam President, I believe Senator Duane is speaking on the bill.

SENATOR DUANE: Yes, Madam President.

THE PRESIDENT: And you were recognized in order to speak on the bill. You may proceed. And please keep it germane,

Senator Duane, as I'm confident you will.

Speak on the bill.

SENATOR DUANE: Thank you, Madam President. My middle name is actually germane.

Anyway, I also think that we need in this session to deal with the issue of clergy abuse, particularly around the issues of statute of limitations and reporting.

So again, the reason I'm voting no on this is not because priests are not included in this -- I understand that they are, as they were in the previous piece of legislation during today's session -- but because I believe that we need to both look at the issue of sexual assault comprehensively and not in a piecemeal fashion, and that we also, sooner rather than later, need to deal with the issue of clergy abuse.

And I'll be voting no on this because it is piecemeal and not comprehensive.

Thank you, Madam President.

THE PRESIDENT: Does any other member wish to be heard on this bill?

Then the debate is closed.

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, 59. Nays, 1. Senator Duane recorded in the negative.

THE PRESIDENT: The bill is passed.

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

SENATOR SKELOS: Is there any housekeeping at the desk, Madam President?

THE PRESIDENT: No, there isn't, Senator Skelos.

SENATOR SKELOS: Madam President, on behalf of Senator Bruno, I hand up the following Majority committee assignment changes and ask that they be filed in the Journal.

THE PRESIDENT: The notice will be filed in the Journal. It has been received.

Senator Skelos.

SENATOR SKELOS: Madam President, there being no further business to come before the Senate, I move we stand adjourned until Tuesday, March 4th, at 3:00 p.m.

THE PRESIDENT: On motion, the Senate stands adjourned until Tuesday, March 4th, 3:00 p.m.

(Whereupon, at 4:00 p.m., the Senate adjourned.)