1999 Legislative Review

by Al O'Connor*

Contents

Introduction

The 1999 Regular Session of the New York Legislature dragged on into the month of August, nearly breaking the record set in 1997 for the all-time latest budget agreement. The budget logjam in Albany this year was less issue-oriented, and more the result of legislative uncertainty about how to avoid a repeat of 1998, when the Governor unexpectedly vetoed nearly $1 billion in appropriations. For criminal justice legislation, 1999 was a relatively quiet year. Among the highlights was the partial refunding of Prisoners' Legal Services at $3.5 million. Regrettably, the revival of PLS came with a steep price tag for inmates: mandatory filing fees of $15–$50 for *pro se* civil lawsuits. The Legislature also passed a comprehensive stalking bill, extensively amended Megan's Law to comply with Judge Denny Chin's decision in *Doe v Pataki*, 3 F Supp2d 456 (SDNY 1998), and greatly expanded the reach and scope of the 1994 DNA databank law. Summarized below are the bills affecting public defense work that have already been signed into law by Governor Pataki, or that have passed both houses and will become law ***subject to the Governor's approval***. The complete text of each chapter law or bill can be found on the New York State Senate and Assembly web sites: (**www.senate.state.ny.us**) (**www.assembly.state.ny.us)**. These sites can also be accessed on the research links page of NYSDA's web site: (**www.nysda.org**).

[***Ed. Note:*** When this issue of the *REPORT* is viewed on NYSDA's web site, the underlined web addresses above act as links directly to those sites. The section of this article directly below (Megan's Law) was placed on our web site (under "Hot Topics") prior to its appearance in the *REPORT*. In that version, many of the laws cited are linked to their full text.]

* ***Al O'Connor*** *is a Backup Center Staff Attorney. He coordinates the Association's amicus and legislative work.*

Megan's Law

Chapter 452 (S.6100) (Megan's Law Amended to Comply with *Doe v Pataki*). Effective: January 1, 2000.

The Sex Offender Registration/Community Notification Act (Megan's Law) [Correction Law §168], commonly regarded as one of the most poorly drafted bills ever to have passed the Legislature, has been amended to plug the many procedural and substantive gaps strewn throughout the defective legislation enacted in 1995. Signed into law by Governor Pataki on September 2, 1999 (Chap. 453), the extensive amendments, which become effective on January 1, 2000, represent a mixed bag of changes that will benefit both the prosecution and defense. But the predominant and salutary purpose of the amendments is to bring New York's Megan's Law into compliance with the federal court litigation in *Doe v Pataki*, 940 FSupp 603 (SDNY 1996), *rev'd in part* 120 F3d 1263 (2d Cir. 1997), on remand 3 FSupp2d 456 (SDNY 1998), which, since 1996, has largely enjoined enforcement of the Act's community notification provisions. Chapter 453 now gives sex offenders a clear, unambiguous right to assigned counsel at risk classification proceedings, as well as the right to meaningful discovery before the risk assessment hearing. It also offers sex offenders the right to a civil appeal from the trial court's risk level determination, and the right to be represented by assigned counsel on such appeals. In fact, a sex offender's right to the assistance of appointed counsel will now extend beyond the direct appeal, and apply to post-judgment motions for downward modification of the risk level score, which sex offenders may now periodically seek on grounds of changed circumstances.

It should be stressed that the amendments are not retroactive. Therefore, sex offenders who already have been classified in constitutionally defective administrative and court proceedings must await further developments in the Legislature, or in the *Doe v Pataki* litigation itself. In the meantime, the State will continue to be enjoined from proceeding with community notification against sex offenders who were in prison, or on probation or parole, on the original effective date of Megan's Law (January 21, 1996).

Right to Court-Appointed Counsel

At risk classification hearings, the original legislation guaranteed sex offenders the awkwardly phrased right "to have counsel appointed, *if necessary*." [Correction Law §168-n (3)]. Since 1996, a handful of judges have seized upon this semantic ambiguity and refused to assign counsel to indigent sex offenders, reasoning that defense counsel is not "necessary" to safeguard the defendant's interests. The statute has now been amended to make clear that offenders who are "financially unable to retain counsel" have a right to counsel at risk classification hearings. In fact, courts must automatically assign lawyers to sex offenders who were previously represented by assigned counsel in their underlying criminal cases [Correction Law §168-n (3)]. Those who were initially represented by retained counsel, but have

since become indigent, may apply for assigned counsel in advance of the risk classification hearing. The 1995 legislation also failed to include a funding mechanism for assigned counsel. Chapter 453 now directs that all assignments be made pursuant to Article 18-B of the County Law, which, of course, includes representation by a legal aid bureau or society, a public defender or 18-B attorney.

Board of Examiners of Sex Offenders Risk Level Recommendation

The 1995 legislation authorized the Board of Examiners of Sex Offenders to collect information about offenders from "any state or local correctional facility, hospital or institution" as part of its review and recommendation process. The Board has now been additionally authorized to collect information from district attorneys, law enforcement agencies, probation departments, the Division of Parole, courts and child protective agencies. This additional information may include the "arrest file, prosecutor's file, probation or parole file, child protective file [and] court file." Since sex offenders now have broad discovery rights under the Act, any information considered by the Board will later be available to the defense at the risk classification hearing. Upon application of either party at the conclusion of the hearing, the court must seal "any portion of the Board's file . . . which contains material that is confidential under any federal or state law." But the sealed record will be available for review by the defense and prosecution in subsequent proceedings whenever the Board is required to provide the court with an updated recommendation [Correction Law §168-m].

Time and Manner of Risk Assessment Hearing

The Act requires the Board to issue its recommendation at least sixty days prior to a sex offender's scheduled release from prison, and the court must render a decision within thirty days of the release date [Correction Law §168-l (6), 168-n (2)]. These short time-frames have proven difficult to meet, especially when the defendant's production in court from state prison has been delayed for any reason. Although these deadlines have been retained in the Act, an amendment now requires courts to adjourn the hearing until after the offender's release date whenever necessary for proper adjudication of the issues:

> *Where a court is unable to make a determination prior to the date scheduled for a sex offender's [release], it shall adjourn the hearing until after the offender is discharged . . . and shall then expeditiously complete the hearing and issue its determination* [Correction Law §168-n (3)].

For defendants sentenced to probation, including "split sentences," as well as other non-incarcerative dispositions, the Act now clearly directs the sentencing court to conduct the risk classification process without referring the defendant's case to the Board of Examiners of Sex Offenders for a recommendation. In these cases, the district attorney must provide the court and the defense with a written statement detailing the level of notification and duration of registration sought by the state, as well as a statement of reasons in support thereof [Correction Law §168-d]. In every other respect, the hearing will be governed by the procedural rules of post-incarceration risk assessment hearings (see below).

Risk Level Assessment Hearing

Foremost among the 1995 omissions was the Legislature's failure to adopt procedural rules for risk classification hearings, an oversight so puzzling it caused many district attorneys to question whether prosecutors were intended to be parties to the proceedings. Under the amended statute, the role of the prosecutor as the state's representative is clearly defined. After both sides have received copies of the Board of Examiners of Sex Offenders' preliminary risk level recommendation and any statement of reasons in support of the recommendation, a hearing must be held at which the "district attorney, or his or her designee . . . shall bear the burden of proving the facts supporting the duration of registration and level of notification sought [by the state] by clear and convincing evidence." If the district attorney wishes to pursue a different risk level determination than the one recommended by the Board, he or she must provide notice and a statement of reasons in support of the alternative determination at least ten days before the hearing, and must satisfy the same clear and convincing evidence standard of proof.

When the parties disagree about the appropriate risk level determination, the court ***must*** adjourn the hearing to allow for discovery. Relevant discovery material will now be available — voluntarily or by subpoena *duces tecum* — from the Board of Examiners of Sex Offenders and "any state or local facility, hospital, institution, office, agency, department or division." When making its determination, the court must consider relevant materials and evidence, including reliable hearsay evidence, submitted by the parties, as well as the recommendation and any materials submitted by the Board. The court must also review a victim impact statement when one is available. Facts that "were previously proven at trial or elicited [as part of a guilty plea] shall be deemed established . . . and shall not be relitigated" at the hearing. The court must issue an order fixing the sex offender's risk level determination and duration of required registration, and set forth its findings of fact and conclusions of law [Correction Law §168-n (3), 168-d (3)].

Appeals and Post-Judgment Petitions

Addressing its major oversight on appellate review [*see People v Stevens*, 91 NY2d 270 (1998)], the Legislature has now granted sex offenders the right to a civil appeal from the trial court's risk level determination (CPLR Articles 55, 56 and 57). For good measure, the Legislature has also given the People a right to appeal these determinations. When counsel has been assigned to represent a sex offender at the trial court level, the assignment will continue through the direct appeal [Correction Law §168-n (3), 168-d (3)].

The right to assigned counsel has also been extended to post-judgment petitions for downward modification of the risk level assessment and/or the duration of the defendant's required registration as a sex offender. These downward modification applications may be brought by sex offenders as often as once a year, but the court will not be required to assign counsel to draft a petition because the right to counsel for indigent petitioners will not formally attach until after a petition has been filed. Sex offenders who have been registered for at least ten years may petition the court to be relieved of any further duty to register.

The People have also been granted limited authority to move for upward modification of a sex offender's risk level score and/or duration of registration. These prosecution-initiated petitions may be brought when (a) a sex offender has been convicted of a new crime, or has violated probation, parole, post-release supervision, or the terms of a conditional discharge, based upon the commission of a new crime, and (b) the nature of the new criminal conduct "indicates an increased risk of a repeat sex offense." Indigent sex offenders will have the right to assigned counsel whenever the People petition for upward modification.

Upon receipt of a petition by either party, the court must request an updated recommendation from the Board of Examiners of Sex Offenders. For upward modification petitions, the Board must notify the sex offender and his counsel at least thirty days before issuing a recommendation, and must give the defense an opportunity to submit relevant information in opposition. The court must forward copies of the Board's updated recommendation to the parties at least thirty days before the scheduled hearing. For both upward and downward modification petitions, the moving party will bear the burden of proving facts in support of the requested modification by clear and convincing evidence. The court must issue an order setting forth its determination, as well as its findings of fact and conclusions of law. These modification rulings may then result in a new round of appeals, as detailed below:

a) Defense Appeals

i) A sex offender has a right to appeal, and to assignment of counsel on appeal, from an order granting a prosecution-initiated petition for upward modification;

ii) Although a sex offender does not have a right to civilly appeal from the denial of a petition for downward modification, the statute does not preclude the possibility of an appeal by permission in these circumstances [*See* CPLR §5701(c)].

b) Prosecution Appeals

i) The People have a right to appeal from an order granting a sex offender's petition for downward modification;

ii) The People also have a right to appeal from the denial of a petition for upward modification of the risk level score or the duration of required registration.

An indigent sex offender will have a right to assigned counsel on both types of prosecution-initiated appeals [Correction Law §168-0].

Substantive Amendments

Definition of "sexually violent predator"

From the defense standpoint, the most significant substantive amendment is the Legislature's redefinition of a Level 3 "sexually violent predator." Under the 1995 Act, a "sexually violent predator" was defined as "a person who has been convicted of a sexually violent offense . . . *or* a sex offender who suffers from a mental abnormality that makes such person likely to engage in predatory sexual conduct" [Correction Law §168-a (7) (former)]. This definition seemed to permit an interpretation whereby all defendants convicted of the more serious "sexually violent offenses"[1] would be subject to classification as Level 3 "sexually violent predators" without regard to an individualized risk assessment review. The Board of Examiners of Sex Offenders acknowledged this possible interpretation of the statutory language, but rejected it, concluding that a "careful reading of the statute . . . supports the conclusion that the guidelines should eschew *per se* rules and that risk should be assessed on the basis of a review of all pertinent factors."[2]

Despite the Board's opinion, some judges have interpreted the Act as requiring a Level 3 designation whenever a defendant was convicted of a "sexually violent offense."[3] The statute has now been amended to codify the Board's interpretation, but the new definition also eliminates a limitation that applied to defendants convicted of less serious "sex offenses." Previously, such offenders could not have been classified under Level 3 unless they were found to be suffering from a "mental abnormality that makes [them] likely to engage in predatory sexual conduct." The amended definition eliminates this restriction:

> Section 168-a (7)
>
> *"Sexually violent predator" means a sex offender for whom the risk of repeat offense is high and there exists a threat to the public safety as determined by [the risk assessment guidelines].*

Thus, while defendants convicted of more serious crimes are now guaranteed an individualized review of their perceived risk of re-offending, there is no longer any meaningful distinction between "sex offenses" and "sexually violent offenses" under the Act. All sex offenders, even those

1. Under the original legislation, these crimes included rape in the first degree, sodomy in the first degree, aggravated sexual abuse in the first and second degrees, sexual abuse in the first degree, or attempts to commit these crimes.

2. "Sex Offender Registration Act — Risk Assessment Guidelines and Commentary," January 1996 at p. 2.

3. See, e.g. Judge Bellacosa's opinion in *People v Stevens*, 91 NY2d 270, 277 (1998).

convicted of misdemeanor offenses, now face the possibility of a Level 3 "sexually violent predator" designation by application of the guidelines alone.

New criminal offenses covered by Megan's Law

Three felony sex crimes that have been enacted since 1995 have been added to the list of "sexually violent offenses" under the Act: aggravated sexual abuse in the third degree (Penal Law §130.66) and course of sexual conduct against a child in the first and second degrees (Penal Law §§130.75, 130.80). Crimes relating to promoting or patronizing underage prostitution have also been added to the list of "sex offenses" covered by Megan's Law.[4] At the same time, parental kidnapping offenses have been removed from the list of sex offenses defined in the statute. Megan's Law has also been amended to correct a minor drafting error in the original legislation which would have excused lower level offenders sentenced to a conditional or unconditional discharge from having to register as sex offenders.

Out-of-State Convictions

Defendants with out-of-state sex offense convictions who relocate to New York now have a right to a court hearing and judicial determination of the appropriate risk level score. Previously, out-of-state sex offenders subject to Megan's Law were classified administratively by the Division of Parole or the Department of Probation and Correctional Alternatives. The rules for such hearings closely track the procedure for in-state convictions, including an initial recommendation by the Board of Examiners of Sex Offenders, followed by a court hearing in the offender's new county of residence. The right to court-appointed counsel and to appeal will also apply in these cases. The category of out-of-state convictions subject to Megan's Law, which was previously limited to crimes for which there is a New York felony sex offense counterpart, has been expanded to include any felony conviction which would require the defendant to register as a sex offender under the laws of the foreign jurisdiction [Correction Law §168-k].

Chapter 113 (A.7102) (Megan's Law — updates of sexually violent predator subdirectory). Effective: September 20, 1999.

Amends Correction Law §168-q to require the Division of Criminal Justice Services to distribute to local police departments monthly updates of the sexually violent predator subdirectory maintained under Megan's Law.

4. Penal Law §230.04 (Patronizing a prostitute in the third degree) (Class A misdemeanor); Penal Law §230.05 (Patronizing a prostitute in the second degree) (Class E felony); Penal Law §230.06 (Patronizing a prostitute in the first degree) (Class D felony); Penal Law §230.30 (2) (Promoting prostitution in the second degree) (Class C felony); Penal Law §230.32 (2) (Promoting prostitution in the first degree) (Class B felony), or attempts to commit any of these offenses. Note that for patronizing an underage prostitute, Chapter 453 requires that the person patronized *in fact* be less than 17. Therefore, in undercover police operation situations, Megan's Law will not apply, even though the defendant may be criminally liable for an attempt. *See People v Coleman*, 74 NY2d 381 (1989).

DNA Databank

Chapter 560 (A.9037-a) (DNA databank — new crimes added — retroactive application — CPL §440.30 [1-a] appeals). Effective: December 1, 1999.

In 1994, the Legislature passed a law requiring defendants convicted of certain violent felonies, sex offenses and escape offenses to give blood samples for forensic DNA testing and databanking (L. 1994, ch. 737). As originally enacted, the DNA databank law applied prospectively to defendants convicted on or after January 1, 1996. The law has now been expanded to apply to many new crimes, including non-violent ones, and to apply *retroactively* to offenders who are still serving sentences for certain designated crimes on December 1, 1999. The legislation eliminates the requirement that blood be drawn, allowing for the presumably less intrusive collection of a "sample appropriate for DNA testing," such as saliva or an oral swab.

The legislation also amends CPL §450.10 and 450.20 to provide the defendant and the prosecution a right to appeal from a trial court order which either denies or grants a post-judgment motion for DNA testing of evidence pursuant to CPL §440.30 (1-a). The defendant's right to appeal will apply retroactively to any motion for forensic DNA testing made and determined since CPL §440.30 (1-a) was enacted in 1994. [*See People v Rae Kellar*, 89 NY2d 948 (1997).]

The crimes now subject to the DNA databank law include the following offenses (newly added crimes are shown in *italics*):

Assault and Homicide

Assault 1st degree
Assault 2nd degree
Aggravated assault upon a police officer
Attempted aggravated assault upon a police officer
Gang assault 1st degree
Attempted gang assault 1st degree
Gang assault 2nd degree
Attempted gang assault 2nd degree
Assault on a peace officer, police officer etc. (Penal Law §120.08)
Attempted assault on a peace officer, police officer etc. (by plea)
Murder 1st degree
Murder 2nd degree
Attempted murder 1st degree
Attempted murder 2nd degree
Manslaughter 1st degree
Attempted manslaughter 1st degree (by plea)
Manslaughter 2nd degree

Sex Offenses

Rape/Sodomy 1st degree
Attempted rape/sodomy 1st degree
Rape/Sodomy 2nd degree
Rape/Sodomy 3rd degree
Aggravated sexual abuse 1st degree
Attempted aggravated sexual abuse 1st degree

Aggravated sexual abuse 2nd degree
Attempted aggravated sexual abuse 2nd degree
Aggravated sexual abuse 3rd degree
Sexual abuse 1st degree
Incest
Course of sexual conduct against a child in the 1st degree
Attempted course of sexual conduct against a child in the 1st degree
Course of sexual conduct against a child in the 2nd degree

Kidnapping/Stalking
Kidnapping 1st degree
Attempted kidnapping 1st degree
Kidnapping 2nd degree
Attempted kidnapping 2nd degree
Stalking 1st degree

Arson
Arson 1st degree
Attempted arson 1st degree
Arson 2nd degree
Attempted arson 2nd degree

Weapons Offenses
Criminal possession of a dangerous weapon 1st degree
Attempted criminal possession of a dangerous weapon 1st degree
Criminal use of a firearm 1st degree
Attempted criminal use of a firearm 1st degree
Criminal possession of a weapon 3rd degree [Penal Law §§265.02 (4)(5)(6)]
Attempted criminal possession of a weapon 3rd degree [Penal Law §§265.02 (4)(5)(6)]
Criminal sale of a firearm 1st degree
Attempted criminal sale of a firearm 1st degree
Criminal sale of a firearm 2nd degree
Attempted criminal sale of a firearm 2nd degree
Criminal sale of a firearm with the aid of a minor
Criminal use of a firearm 2nd degree
Attempted criminal use of a firearm 2nd degree

Burglary
Burglary 1st degree
Attempted burglary 1st degree
Burglary 2nd degree
Attempted burglary 2nd degree
Burglary 3rd degree
Attempted burglary 3rd degree

Robbery
Robbery 1st degree
Attempted robbery 1st degree
Robbery 2nd degree
Attempted robbery 2nd degree

Intimidating a Witness
Intimidating a victim or witness 1st degree
Attempted intimidating a victim or witness 1st degree
Intimidating a victim or witness 2nd degree

Escape and Absconding Offenses
Where the defendant has been convicted of any of the above crimes within the preceding five years:

Escape 1st degree
Escape 2nd degree
Absconding from temporary release 1st degree
Absconding from a community treatment facility

Drug Offenses/Larceny from the person
Non-retroactive — Defendants convicted of the following non-violent offenses *on or after December 1, 1999* must provide a sample for the DNA databank:

Criminal possession of a controlled substance in 1st degree
Criminal possession of a controlled substance 2nd degree
Criminal sale of a controlled substance (all degrees)
Grand larceny in the 1st, 2nd, 3rd and 4th degrees (when larceny is from person).

Stalking

Chapter ___ A.9036 (Establishes new crimes of stalking in the first through fourth degrees/criminal interference with health care services or religious worship in the first and second degrees). Effective: December 1, 1999.

Enacts the "Clinic Access and Anti-stalking Act of 1999," which establishes new crimes relating to stalking and criminal interference with access to reproductive health care services and religious worship.

➢ Penal Law §120.45 Stalking in the fourth degree.

A person is guilty of stalking in the fourth degree when he or she intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person, and knows or reasonably should know that such conduct:

1. is likely to cause reasonable fear of material harm to the physical health, safety or property of such person, a member of such person's immediate family or a third party with whom such person is acquainted; or

2. causes material harm to the mental or emotional health of such person, where such conduct consists of the following, telephoning or initiating communication or contact with such person, a member of such person's immediate family or a third party with whom such person is acquainted, and the actor was previously clearly informed to cease that conduct; or

3. is likely to cause such person to reasonably fear that his or her employment, business or career is threatened, where such conduct consists of appearing, telephoning or initiating communication or contact at such person's place of employment or business, and the actor was previously clearly informed to cease that conduct.

Stalking in the fourth degree is a Class B misdemeanor.

➢ Penal Law §120.50 Stalking in the third degree.

A person is guilty of stalking in the third degree when he or she:

1. commits the crime of stalking in the fourth degree in violation of section 120.45 of this article against three or more persons, in three or more separate transactions, for which the actor has not been previously convicted; or

2. commits the crime of stalking in the fourth degree in violation of section 120.45 of this article against any person, and has previously been convicted, within the preceding ten years of a specified predicate crime, as defined in subdivision five of section 120.40 of this article[5]*, and the victim of such specified predicate crime is the victim, or an immediate family member of the victim, of the present offense; or*

3. with intent to harass, annoy or alarm a specific person, intentionally engages in a course of conduct directed at such person which is likely to cause such person to reasonably fear physical injury or serious physical injury, the commission of a sex offense against, or the kidnapping, unlawful imprisonment or death of such person or a member of such person's immediate family; or

4. commits the crime of stalking in the fourth degree and has previously been convicted within the preceding ten years of stalking in the fourth degree.

Stalking in the third degree is a Class A misdemeanor.

➢ Penal Law §120.55 Stalking in the second degree.

A person is guilty of stalking in the second degree when he or she:

1. commits the crime of stalking in the third degree as defined in subdivision three of section 120.50 of this article and in the course of and in furtherance of the commission of such offense: (i) displays, or possesses and threatens the use of, a firearm, pistol, revolver, rifle, shotgun, machine gun, electronic dart gun, electronic stun gun, cane sword, billy, blackjack, bludgeon, metal knuckles, chuka stick, sandbag, sandclub, slingshot, slug shot, shirker, "kung fu star", dagger, dangerous knife, dirk, razor, stiletto, imitation pistol, dangerous instrument, deadly instrument or deadly weapon; or (ii) displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or

2. commits the crime of stalking in the third degree in violation of subdivision three of section 120.50 of this article against any person, and has previously been convicted, within the preceding five years, of a specified predicate crime as defined in subdivision five of section 120.40 of this article, and the victim of such specified predicate crime is the victim, or an immediate family member of the victim, of the present offense; or

3. commits the crime of stalking in the fourth degree and has previously been convicted of stalking in the third degree as defined in subdivision four of section 120.50 of this article against any person; or

4. being twenty-one years of age or older, repeatedly follows a person under the age of fourteen or engages in a course of conduct or repeatedly commits acts over a period of time intentionally placing or attempting to place such person who is under the age of fourteen in reasonable fear of physical injury, serious physical injury or death.

Stalking in the second degree is a Class E felony.

➢ Penal Law §120.60 Stalking in the first degree.

A person is guilty of stalking in the first degree when he or she commits the crime of stalking in the third degree as defined in subdivision three of section 120.50 of this article and, in the course and furtherance thereof, he or she:

1. intentionally or recklessly causes physical injury to such person; or

2. commits a Class A misdemeanor defined in article 130 of this chapter, or a Class E felony defined in section 130.25, 130.40 or 130.85 of this chapter, or a Class D felony described in section 130.30 or 130.45 of this chapter.

Stalking in the first degree is a Class D (violent) felony.

➢ Penal Law §240.70 Criminal interference with health care services or religious worship in the second degree.

1. a person is guilty of criminal interference with health services or religious worship in the second degree when:

(a) by force or threat of force or by physical obstruction, he or she intentionally injures, intimidates or interferes

5. "Specified predicate crime" means: a.) a violent felony offense; b.) a crime defined in section 130.20, 130.25, 130.30, 130.40, 130.45, 130.55, 130.60, 130.70 or 255.25; c.) assault in the third degree, as defined in section 120.00; menacing in the first degree, as defined in section 120.13; menacing in the second degree, as defined in section 120.14; coercion in the first degree, as defined in section 135.65; coercion in the second degree, as defined in section 135.60; aggravated harassment in the second degree, as defined in section 240.30; harassment in the first degree, as defined in section 240.25; menacing in the third degree, as defined in section 120.15; criminal mischief in the third degree, as defined in section 145.05; criminal mischief in the second degree, as defined in section 145.10, criminal mischief in the first degree, as defined in section 145.12; criminal tampering in the first degree, as defined in section 145.20; arson in the fourth degree, as defined in section 150.05; arson in the third degree, as defined in section 150.10; criminal contempt in the first degree, as defined in section 215.51; endangering the welfare of a child, as defined in section 260.10; or d.) stalking in the fourth degree, as defined in section 120.45; stalking in the third degree, as defined in section 120.50; stalking in the second degree, as defined in section 120.55; or e.) an offense in any other jurisdiction which includes all of the essential elements of any such crime for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed.

with, or attempts to injure, intimidate or interfere with, another person because such other person was or is obtaining or providing reproductive health services; or

(b) by force or threat of force or by physical obstruction, he or she intentionally injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with, another person in order to discourage such other person or any other person or persons from obtaining or providing reproductive health services; or

(c) by force or threat of force or by physical obstruction, he or she intentionally injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with, another person because such person was or is seeking to exercise the right of religious freedom at a place of religious worship; or

(d) he or she intentionally damages the property of a health care facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages the property of a place of religious worship.

2. a parent or legal guardian of a minor shall not be subject to prosecution for conduct otherwise prohibited by paragraph (a) or (b) of subdivision one of this section which is directed exclusively at such minor.

Criminal interference with health care services or religious worship in the second degree is a Class A misdemeanor.

➢ Penal Law §240.71 — Criminal interference with health care services or religious worship in the first degree.

A person is guilty of criminal interference with health care services or religious worship in the first degree when he or she commits the crime of criminal interference with health care services or religious worship in the second degree and has been previously convicted of the crime of criminal interference with health care services or religious worship in the first or second degree.

Criminal interference with health care services or religious worship in the first degree is a Class E felony.

The Act also makes numerous amendments to the Penal Law, the Criminal Procedure Law and the Family Court Act with respect to these new crimes, including the following:

a) it defines all degrees of stalking as "family offenses" subject to the concurrent jurisdiction of the Family Court and criminal courts pursuant to the Family Protection and Domestic Violence Intervention Act of 1994 [CPL §530.11 (1), FCA §812 (1)];
b) in connection with the issuance of a temporary order of protection, it requires a court to suspend the defendant's license to possess a firearm and order him or her to surrender any weapons when the court has good cause to believe the defendant has a prior conviction for a stalking offense; and ii) in connection with a violation of an order of protection, the Act requires a court to revoke a defendant's license to possess a firearm and order him or her to surrender any weapons when the violation entailed "behavior constituting" any degree of stalking;
c) it adds stalking in the first and second degrees to the list of "designated offenses" covered by New York's eavesdropping statute (Penal Law §700.05);
d) the Act adds stalking offenses to the to the list of crimes for which victims are eligible for monetary awards under Executive Law §631 (12);
e) the Act also provides that stalking offenses and criminal interference with health care services or religious worship do not apply to any activity that is otherwise lawful under the National Labor Relations Act or other federal labor laws, and that stalking "do[es] not bar any conduct, including, but not limited to, peaceful picketing or other peaceful demonstrations protected from legal prohibition by the federal and state constitutions" [amending Penal Law §5.10];
f) finally, the Act authorizes the Attorney General and local district attorneys to seek an injunction against any violation of the laws concerning access to health care facilities and places of religious worship [Civil Rights Law §79-m (new)].

New Crimes and Offenses

Chapter 118 (A.8338-a) (Establishes the new crime of aggravated cruelty to animals). Effective: November 1, 1999.

Amends the Agriculture and Markets Law to establish the new offense of aggravated cruelty to a "companion animal," an unclassified felony which carries a maximum sentence of a two year definite term in a local correctional facility. Exceptions are provided for hunting, trapping, fishing, the killing of diseased or dangerous animals, and use of animals in legitimate scientific testing:

➢ Agriculture and Markets Law section 353-a — Aggravated Cruelty to Animals

A person is guilty of aggravated cruelty to animals when, with no justifiable purpose, he or she intentionally kills or intentionally causes serious physical injury to a companion animal[6] with aggravated cruelty. For purposes of this section, "aggravated cruelty" shall mean conduct which: (i) is intended to cause extreme physical pain; or (ii) is done or carried out in an especially depraved or sadistic manner.

6. Agriculture and Markets law section 350:
"Companion animal" or "pet" means {a} any dog or cat, and shall also mean any other domesticated animal normally maintained in or near the household of the owner or person who cares for such other domesticated animal. "Pet" or "companion animal" shall not include a "farm animal" as defined in this section.

Chapter 208 (A.1738-a) ("Canned shoots" of non-native big game animals). Effective: November 1, 1999.

Amends the Environmental Conservation Law to prohibit "canned shoots" of non-native big game animals (shooting of tethered or fenced-in animals) (Unclassified misdemeanor punishable by up to 1 year imprisonment and a maximum $5000 fine).

Chapter ___ (S.2188-b) (Criminal possession of a taximeter accelerating device). Effective: Upon Governor's signature.

Establishes the new crime of criminal possession of a taximeter accelerating device.

➢ Penal Law section 145.70 — Criminal possession of a taximeter accelerating device

A person is guilty of criminal possession of a taximeter accelerating device when he knowingly possesses, with intent to use unlawfully, a taximeter accelerating device. If such a device is knowingly possessed there is a rebuttable presumption that it is intended to be used unlawfully.

Class A misdemeanor

Penal Law

Chapter ___ (A.9038-a) (Placing a false bomb — falsely reporting an incident — on school grounds). Effective: December 1, 1999.

In 1996, the Legislature established the new crime of placing a false bomb (Penal Law §240.61). The offense has now been divided into two degrees. The existing offense has been reclassified as placing a false bomb in the second degree, and remains a Class A misdemeanor. The first degree crime, which applies to offenses committed on school grounds, is a Class E felony.

➢ Penal Law §240.62 — Placing a false bomb in the first degree

A person is guilty of placing a false bomb in the first degree when he or she places, or causes to be placed, upon school grounds any device or object that by its design, construction, content or characteristics appears to contain, a bomb, destructive device or explosive, but is, in fact, an inoperative facsimile or imitation of such a bomb, destructive device or explosive and which he or she knows, intends or reasonably believes will appear to be a bomb under circumstances in which it is likely to cause public alarm or inconvenience.

Placing a false bomb in the first degree is a Class E felony [which also carries a mandatory 1 year suspension of a driver's license upon conviction, or the defendant's adjudication as a juvenile delinquent or youthful offender — VTL §510 (2) (xii)].

The legislation also amends the crimes of falsely reporting an incident in first and second degrees (Penal Law §§240.55, 240.60) to apply to false reports about the release of a hazardous substance,[7] and adds a new subdivision to the first degree offense pertaining to false reports on school grounds:

➢ Penal Law §240.60 — Falsely reporting an incident in the first degree

A person is guilty of falsely reporting an incident in the first degree when he:

5. knowing the information reported, conveyed or circulated to be false or baseless and under circumstances in which it is likely public alarm or inconvenience will result, he or she initiates or circulates a report or warning of an alleged occurrence or an impending occurrence of a fire, an explosion, or the release of a hazardous substance upon school grounds and it is likely that persons are present on said grounds.

Class E felony [which now also carries a mandatory 1 year suspension of a driver's license upon conviction, or juvenile delinquency or youthful offender adjudication — VTL §510 (2) (xii)].

Chapter 160 (S.1982-a) (Mandatory Restitution payments). Effective: November 1, 1999.

Requires a court to order defendants convicted of harming an animal trained to aid a person with a disability in the first or second degrees (Penal §§195.11, 195.12) to pay restitution to the animal's owner (amending Penal Law §60.27).

Chapter 207 (A.1075-b) (Restitution — falsely reporting an incident). Effective: July 6, 1999.

Amends Penal Law §60.27 to define certain entities as "victims" of crimes relating to the false report of an incident for purposes of the court's restitution authority. When the defendant has been convicted of falsely reporting an incident in the first, second or third degrees, or falsely placing a bomb, the term victim "*shall also mean any school, municipality, fire district, fire company, fire corporation, ambulance association, ambulance corporation, or other legal or public entity engaged in providing emergency services which has expended funds for the purpose of responding to [the] false report.*"

Chapter 33 (A.5203) (Conforming Amendments — Criminal sale of a firearm). Effective: November 1, 1999.

In 1998, a series of one-level upgrades was enacted for crimes relating to criminal sale of a firearm (L. 1998, ch. 654). Chapter 33 makes conforming amendments to Penal Law §70.02 to define criminal sale of a firearm in the first degree as a Class B violent felony, and criminal sale of a firearm in

7. "Hazardous substance" shall mean any physical, chemical, microbiological or radiological substance or matter which, because of its quantity, concentration, or physical, chemical or infectious characteristics, may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness, or pose a substantial present or potential hazard to human health [Penal Law §240 (3)].

the second degree, and criminal sale of a firearm to a minor, as Class C violent felonies. The legislation also makes corresponding amendments to the plea-bargaining restrictions included in CPL §220.10.

Criminal Procedure Law

Chapter 66 (A.8225) (Witness list for deliberating juries). Effective: June 8, 1999.

Amends CPL §310.20 to permit courts to distribute a witness list to a deliberating jury:

➢ CPL §310.20 — Jury deliberation; use of exhibits and other material

Upon retiring to deliberate the jury may take with them:

(3) A written list prepared by the court containing the names of every witness whose testimony has been presented during the trial, if the jury requests such a list and the court, in its discretion, determines that such a list will assist the jury.

Chapter 216 (A.8235) (Terms and conditions of interim probation). Effective: October 4, 1999.

Amends CPL §390.30 (6) to expand the list of permissible conditions of interim probation supervision to include electronic monitoring and "any other reasonable condition the court may determine to be necessary and appropriate to ameliorate the conduct which gave rise to the offense or to prevent the incarceration of the defendant" [cross-referencing Penal Law §65.10 (4) (5)].

Chapter ___ (S.3427-a) (Order to reduce indictment — filing of reduced indictment upon expiration of 30 days). Effective: November 1, 1999.

Amends CPL §210.20 (6) to provide that when a court has ordered a count of an indictment reduced, and the prosecution has not resubmitted the case to another grand jury or appealed the court's order within thirty days, "the court's order shall take effect" and the People must file a reduced indictment. [Codifying the holding of *People v Jackson*, 87 NY2d 782 (1996)].

Chapter ___ (A.7664) (Designation of new jury foreperson upon discharge of first juror selected). Effective: Upon Governor's signature.

Amends CPL §270.35 to provide that the second juror whose name was drawn and called during jury selection shall become the foreperson of the jury upon the discharge of the original foreperson.

Chapter 428 (S.3898-a) (Geographic jurisdiction of local police officers working with state police). Effective: November 1, 1999.

Amends Executive Law §223 and CPL §1.20 to provide that local police officers designated to work with the state police on task forces and as part of cooperative investigations shall have state-wide geographic jurisdiction under the Criminal Procedure Law.

Chapter 125 (S.5677) (Criminal court jurisdiction of family offenses). Effective: June 29, 1999.

Amends CPL §530.11 and Family Court Act §812 (1) to expressly provide that a criminal court shall not be divested of jurisdiction in family offense matters when a complainant elects to proceed in Family Court.

Chapter ___ (A.8226) (Drug Courts — Transfer of actions in Suffolk and Tompkins Counties). Effective: November 1, 1999.

Amends CPL §170.15 (4) to authorize criminal courts in Suffolk and Tompkins counties to transfer cases, upon motion of the defendant and with the consent of the prosecution, to other local criminal courts in the same county that have been designated as drug courts.

Chapter 426 (S.3163) (Audio-Visual Court Appearances — St. Lawrence County). Effective: August 31, 1999.

Amends CPL §182.20 to add St. Lawrence County to the list of jurisdictions authorized to participate in the experimental program of audio-visual arraignments and court appearances via two-way closed-circuit television.

Chapter ___ (S.3964) (Peace Officer status — Nassau County fire inspectors). Effective: Upon Governor's signature.

Amends CPL §2.10 to confer peace officer status on full-time fire inspectors in Nassau County.

Chapter ___ (A.1540) (Peace Officer status — Canisus College security force). Effective: Upon Governor's signature.

Amends CPL §2.10 to confer peace officer status on Canisus college security force members.

Prisons/Prisoners

Chapter 412 (S.6107) (Filing fees for *pro se* inmate lawsuits). Effective: December 7, 1999.

Amends CPLR §1101 and the Court of Claims Act to require indigent state and local inmates who are ***serving sentences*** to pay a mandatory reduced filing fee in order to commence a *pro se* civil lawsuit, except an Article 78 proceeding concerning jail time credit. The new sliding-scale fee must range between $15 and $50 and will be established by the court based on a review of the inmate's trust account. Although courts will not be authorized to dismiss the lawsuit of a *pro se* inmate who cannot afford to pay the filing fee, the full amount of the fee will be collected by the Department of Correctional Services or local jail from the inmate's account over time. It should be noted that filing fees do not apply to indigent inmates who are represented by a legal aid attorney, public defender or 18-B assigned counsel. These inmates may continue to assert poor person status and file suit without payment of fees pursuant to CPLR §1101 (e).

Chapter 412 (S.6107) (Shock Incarceration Program — Age restriction increased to 40). Effective: August 9, 1999.

Amends Correction Law §865 to increase to 40 the upper age eligibility limit of the Shock Incarceration Program (as of the date of offense — increased from age 35).

Chapter 518 (S.6101) (Expands pool of state-ready inmates under contract to local correctional facilities). Effective: September 28, 1999.

The 1995 Sentencing Reform Act authorized the Department of Correctional Services to enter into contracts with local correctional facilities to house state-ready inmates for up to six months. The law was limited to inmates convicted of non-violent felonies. Chapter 518 now permits defendants convicted of violent felonies to be held under these contracts. However, a local warden or superintendent may insist that DOCS take immediate custody of inmates convicted of Class A-1, and B or C violent felonies.

Crime Victims

Chapter 40 (S.1126) (Parole — Confidentiality of crime victims' statements). Effective: May 10, 1999.

Directs the Board of Parole to keep confidential the statements of crime victims or their representatives concerning an inmate's application for parole release [amending Executive Law §259-i (2)].

Chapter 126 (A.6280) (Crime victims — Toll free number). Effective: June 29, 1999.

Requires the Division of Parole to maintain a toll free number for crime victims.

Chapter ___ (S.5539-a) (Right of Privacy — Victims of HIV related criminal offenses). Effective: Upon Governor's signature.

Amends §50-b of the Civil Rights Law to accord a right of privacy to victims of criminal offenses involving the transmission of HIV.

Chapter 427 (S.3776-b) (Crime Victim's Board — Awards to spouses and children of certain crime victims). Effective: August 31, 1999.

Amends Executive Law §624 to allow awards of compensation to the spouse, child or step-child of a crime victim "who has sustained personal injury as a direct result of a crime."

Family Court/Juvenile Delinquency

Chapter ___(S.3809) (Juvenile delinquency petitions - restoration of cases adjourned in contemplation of dismissal). Effective: 90 days after Governor's signature.

Specifies the procedure for restoration of a juvenile delinquency petition to the court's active calendar upon an alleged violation of the terms and condition of an adjournment in contemplation of dismissal.

Chapter 173 (S.3817) (Transfer of certain juvenile delinquency cases to juvenile's home county for dispositional hearing). Effective: October 4, 1999.

Amends Family Court §302.3 (4) to permit judges in New York City to transfer a case to a juvenile's home county for a dispositional hearing following a finding of guilt, except where the finding is entered upon a designated felony act.

Chapter 506 (Law Guardian assignments in foster care review proceedings). Effective: September 28, 1999.

Mandates assignment of a law guardian for every child in a foster care review proceeding (amending FCA §249).

Chapter 378 (S.4665-a) (Order of visitation or custody prohibited in favor of a person convicted of murder of a child's siblings). Effective: July 27, 1999.

In 1998, legislation was enacted to prohibit, with certain exceptions, a court from ordering visitation or custody to a person who has been convicted of murder of the parent, legal custodian, or legal guardian of the child who is the subject of the proceeding (L. 1998, ch. 150). The legislation has now been extended to include murder of a child's sibling, half-sibling or step-sibling.

Sunset Clause Extended

Chap. 452 (S.5911) (Omnibus Sunset Extender to September 1, 2001)

Extends the sunset clauses of the following provisions from September 1, 1999 to September 1, 2001:

- Correction Law Article 22-A (§630 et seq.) — Parole release from a definite sentence
- Correction Law §805 — Earned Eligibility Program
- Correction Law §2 (18) — Pertaining to ASAT
- Correction Law Article 26 (§851 et seq.) — Temporary Release Programs
- Penal Law §70.30 — Absconding from temporary release
- Penal Law §205.19 — Absconding from a community treatment facility
- Penal Law §60.35 — No waiver of mandatory surcharge
- Correction Law Article 12 (§270 et seq.) — Local Conditional Release Commissions
- Executive Law §259-c — Probation Administrative Fees
- Correction Law Article 20 (§500 et. seq.) — Pertaining to Local Correctional Facilities

Chapter 452 also extends the mandatory surcharge and crime victims' fee provisions of VTL §1809 to offenses committed on or before October 31, 2001.

(Continued on page 23)

Fourth Department *continued*

photographs of the victim's body was not error because, while gruesome, the relevance of the pictures to material issues at trial outweighed their prejudice. *See People v Pobliner*, 32 NY2d 356, 369-370 *rearg den* 33 NY2d 657 *cert den* 416 US 905. While an indigent defendant has a rights to funds for retaining expert witnesses upon the proper showing, the award is discretionary. *See People v Lane*, 195 AD2d 876, 878 *lv den* 82 NY2d 850. This defendant received $1,150 to retain an odontologist at his prior trial (*see People v Koberstein*, 204 AD2d 1016), who did not testify at that trial. The court denied the initial request for funds in this case, but when the amount requested was lowered to $3,000, the court indicated it was "receptive" to the request and told the defense to confer with the court before making any expenditures. The issue was not raised again. There was no error here, nor in the court's refusal to allocate funds for further examination of the defendant by a psychologist who had already examined him.

Other issues raised are also without merit, including a brief mention—inextricably interwoven with the testimony of the witness who said it—of a prior crime committed by the defendant. *See People v Till*, 87 NY2d 835, 836-837. Admission of an audiotape of a conversation between the defendant and his friends did not deny him a fair trial. There was no abuse of discretion is admitting expert testimony comparing pattern injuries on the body with markings on the defendant's ring. Judgment affirmed. (County Ct, Oneida Co [Brunetti, J]) ⚖

Defender News *continued from page 1*

to adult behavior might not come to light. One of the study subjects above had been run over by a vehicle at age 15 months and appeared to recover fully within days. No behavioral abnormalities were observed until the age of three years, and the child was not especially disruptive in school or at home. However, her behavior became progressively disruptive; by age 14, she required placement in the first of several treatment facilities. In the often chaotic lives of public defense clients charged with serious offenses, the relationship between a similar early injury and later developmental problems could well go unnoted.

It is not news that early childhood injuries and experiences can be a source of mitigation in capital murder and other serious cases. National guidelines have long urged defense counsel to consider in preparation for a penalty phase hearing information "relating to the client's life and development, from birth to the time of sentencing" that would, *inter alia*, explain the offense, and to consider the need for expert witnesses who could "provide medical, psychological, sociological or other explanations for the offense(s) . . ." (*Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, American Bar Association [1989] Guideline 11.8.3[f][1] and [2].)

Mitigation Specialists Are Vital in Death Penalty Work

Capital litigators depend on mitigation specialists to assist them in compiling and analyzing a client's life-history to find a key to saving the client's life. This means—get everything. Head injuries are not the only source of explanation for a client's developmental problems. Seemingly unrelated information such as dental records may lead to unexpected discoveries, such as that clients were so neglected in childhood that their teeth had rotted from malnutrition and poor hygiene requiring emergency treatment. (See training materials from NYSDA's 32nd Annual Meeting and Conference, announced in the *Backup Center REPORT* Vol. XIV, No. 6.)

The New York Capital Defender Office recognizes the importance of including experienced mitigation specialists on capital defense teams. (See p. 3.) And the National Legal Aid and Defender Association (NLADA) recently announced the availabilty of an affidavit in support of funding for a mitigation specialist in a capital case. For more information, contact: Scott Wallace, Defender Legal Services Director, 1625 K St. NW, Suite 800, Washington DC 20006-1604. tel (202) 452-0620; fax (202)872-1031; e-mail info@nlada.org ⚖

1999 Legislative Review *continued from page 13*

Chapter 140 (A.7699) (Sunset Extender — VTL — suspension of driver's license for failure to pay child support).

In 1995, legislation was enacted to mandate suspension of a parent's driver's license for failure to pay four or more months or child support (L. 1995, ch. 81). The sunset clause of this legislation has been extended from June 30, 1999 to June 30, 2001.

Chapter 135 (S.4754) (Sunset Extended — VTL — DWI Ignition Interlock Program).

Extends the sunset clause of VTL §1198, which established a pilot ignition interlock program in certain counties, from July 1, 1999 to July 1, 2001.

Chapter 60 (A.8394) (Sunset Extender — Arts and Cultural Affairs — Scalping).

Extends the sunset clause on New York's scalping laws (Arts and Cultural Affairs Law Art. 25) from June 1, 1999 to June 1, 2000. ⚖