

By Al O'Connor\*

## Introduction

The 2002 session began with high expectations of Rockefeller Drug Law reform, and ended in December with our hopes dashed once again by the enormous political influence of prosecutors. Although Rockefeller reform was a front-burner issue throughout the session, prosecutors ultimately refused to give up their control over the diversion of low-level drug-addicted offenders from prison to treatment programs. Discussions eventually broke down over this issue. Under the Governor's proposal, prosecutors, not judges, would have been the real arbiters of which drug-addicted defendants would receive treatment, and which would be condemned to long prison sentences. The Governor's plan gave prosecutors license to devise their own standard-less diversion plans, and it stripped judges of authority to offer drug treatment to any defendant who declined to participate in even the most Draconian prosecution-sponsored program. The Assembly held firm to its position that judges must control the diversion process. Stay tuned in the 2003 session.

Although 2002 was an election-year session (which normally crackle with hair-raising schemes to increase our clients' suffering) the Legislature was relatively quiet on criminal justice matters this year. In March, it passed significant amendments to the Sex Offender Registration Act, but these changes were largely compelled by federal requirements for Byrne Formula grant funding. In a one-day post-election session in December, the Legislature amended the Vehicle and Traffic Law (VTL) to reduce the blood-alcohol level required for driving while intoxicated from .10% to .08%. This change was similarly dictated by Congressional grant funding requirements. At the same special session, the Legislature passed the Sexual Orientation Non-Discrimination Act (SONDA), a civil rights bill the Republican majority had long kept off the Senate floor.

In 2002, the Legislature also enacted new crimes relating to identity theft, and passed a small number of minor bills of possible interest to public defense lawyers. The complete text of these laws is available in McKinney's Session Law News and from the Backup Center.

## Penal Law

### Chap. 619 (A.4939) (Identity Theft).

Effective: November 1, 2002

Enacts comprehensive new provisions relating to identity theft and related offenses under Article 190 of the Penal Law:

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### ➤ Identity theft:

A person is guilty of identity theft in the third degree when he or she knowingly and with intent to defraud assumes the identity of another person by presenting himself or herself as that other person, or by acting as that other person or by using personal identifying information of that other person, and thereby:

#### In the third degree (Penal Law § 190.78)

1. Obtains goods, money, property or services or uses credit in the name of such other person or causes financial loss to such person or another person; or
2. Commits a Class A misdemeanor or higher level crime.

(Class A misdemeanor)

#### In the second degree (Penal Law § 190.79)

1. Obtains goods, money, property or services or uses credit in the name of such other person in an aggregate amount that exceeds five hundred dollars; or
2. Causes financial loss to such person or to another person or persons in an aggregate amount that exceeds five hundred dollars; or
3. Commits or attempts to commit a felony or acts as an accessory to the commission of a felony; or
4. Commits the crime of identity theft in the third degree as defined in section 190.78 of this article and has been previously convicted within the last five years of identity theft in the first, second or third degrees, unlawful possession of personal identification information in the first, second or third degrees, or grand larceny in the first, second, third or fourth degrees.

(Class E felony)

#### In the first degree (Penal Law § 190.80)

1. Obtains goods, money, property or services or uses credit in the name of such other person in an aggregate amount that exceeds two thousand dollars; or
2. Causes financial loss to such person or to another person or persons in an aggregate amount that exceeds two thousand dollars; or
3. Commits or attempts to commit a Class D felony or higher level crime or acts as an accessory in the commission of a class D or higher level felony; or
4. Commits the crime of identity theft in the second degree as defined in section 190.79 of this article and has been previously convicted within the last five years of identity theft in the first, second or third degrees or unlawful possession of personal identification information in the first, second or

third degrees, or grand larceny in the first, second or third degrees.

(Class D felony)

➤ **Unlawful possession of personal identification information**

**In the third degree (Penal Law § 190.81)**

A person is guilty of unlawful possession of personal identification information in the third degree when he or she knowingly possesses a person's financial services account number or code, savings account number or code, checking account number or code, brokerage account number or code, credit card account number or code, debit card number or code, automated teller machine number or code, personal identification number, mother's maiden name, computer system password, electronic signature or unique biometric data that is a fingerprint, voice print, retinal image or iris image of another person knowing such information is intended to be used in furtherance of the commission of a crime defined in this chapter.

(Class A misdemeanor)

**In the second degree (Penal Law § 190.82)**

A person is guilty of unlawful possession of personal identification information in the second degree when he or she knowingly possesses two hundred fifty or more items of personal identification information of the following nature (see list above) knowing such information is intended to be used in furtherance of the commission of a crime defined in this chapter.

(Class E felony)

**In the first degree (Penal Law §190.83)**

A person is guilty of unlawful possession of personal identification information in the first degree when he or she commits the crime of unlawful possession of personal identification information in the second degree and:

1. With intent to further the commission of identity theft in the second degree, he or she supervises more than three accomplices; or
2. He or she has been previously convicted within the last five years of identity theft in the first, second or third degrees, or unlawful possession of personal identification information in the first, second or third degrees or grand larceny in the first, second, third or fourth degrees.

(Class D felony)

**Affirmative Defenses (Penal Law § 190.84)**

In any prosecution for identity theft or unlawful possession of personal identification information pur-

suant to this article, it shall be an affirmative defense that the person charged with the offense:

1. Was less than twenty-one years of age at the time of committing the offense and the person used or possessed the personal identifying or identification information of another solely for the purpose of purchasing alcohol;
2. Was under eighteen years of age at the time of committing the offense and the person used or possessed the personal identifying or identification information of another solely for the purpose of purchasing tobacco products; or
3. Used or possessed the personal identifying or identification information of another person solely for the purpose of misrepresenting the person's age to gain access to a place the access to which is restricted based on age.

**Definitions:**

"Personal identifying information" means a person's name, address, telephone number, date of birth, drivers license number, social security number, place of employment, mother's maiden name, financial services account number or code, savings account number or code, checking account number or code, brokerage account number or code, credit card account number or code, debit card number or code, automated teller machine number or code, taxpayer identification number, computer system password, signature or copy of a signature, electronic signature, unique biometric data that is a fingerprint, voice print, retinal image or iris image of another person, telephone calling card number, mobile identification number or code, electronic serial number or personal identification number, or any other name, number, code or information that may be used alone or in conjunction with other such information to assume the identity of another person.

"Electronic signature" shall have the same meaning as defined in subdivision three of section one hundred two of the state technology law.

"Personal identification number" means any number or code, which may be used alone or in conjunction with any other information to assume the identity of another person or access financial resources or credit of another person.

**Miscellaneous Provisions**

The bill also adds these newly added identity theft felonies to the list of "specified offenses" that can support a terrorism prosecution under Penal Law Article 490. It also includes amendments to CPL § 20.40 to support broad geographic jurisdiction over identify theft prosecutions, which may be prosecuted i) in any

county in which the person who suffers financial loss resided at the time of the commission of the offense, or ii) in the county in which the person who suffers financial loss resided at the time of the commission of the offense, or iii) in the county where the person whose personal identification information resided at the time of the commission of the offense. Finally, the bill amends Penal Law § 60.27 to make clear that victims of identity theft offenses may be entitled to restitution and that compensation may be ordered for any “adverse action taken against them” as a result of an identity theft offense.

**Chap. 598 (Assault on bus and train employees).  
Effective: November 1, 2002**

Elevates simple assaults on train and bus operators, ticket inspectors, and conductors to assault in the second degree, a Class D violent felony (new subdivision 11 to Penal Law § 120.05.)

**Criminal Procedure Law**

**Chap. 498 (S.2835) (Writ of Error Coram Nobis—  
Applications for leave to appeal to Court of  
Appeals authorized).**

**Effective: November 1, 2002.**

In *People v. Bachert*, 69 N.Y.2d 593 (1987), the Court of Appeals noted that Appellate Division orders entered in connection with writs of error coram nobis alleging ineffective assistance of appellate counsel are not appealable. The Court invited the Legislature to authorize such review. Fifteen years later, the Legislature has finally done so. This legislation amends CPL § 450.90 to authorize a permissive appeal to the Court of Appeals from an order either “granting or denying a motion to set aside an order of an intermediate appellate court on the ground of ineffective assistance or wrongful deprivation of appellate counsel.”

**Chap. 588 (A.11194) (Verdict Sheets—Brief explanatory  
notations).**

**Effective: September 24, 2002.**

Amends CPL § 310.20 to allow brief explanatory notations on verdict sheets concerning dates, names of complainants or specific statutory language when a court submits two or more counts set forth in the same article of law. A 1996 amendment to CPL § 310.20 was limited to two or more counts defined in the same section of law.

**Chap. 462 (S.7479) (Domestic Violence—Orders of  
Protection).**

**Effective: November 18, 2002.**

Amends CPL § 530.13 (5) to require a court to “inquire as to the existence of any other orders of protection

between the defendant and the person or persons for whom the order of protection is sought;” requires that orders of protection plainly state an expiration date and specifies that orders of protection in domestic violence cases be printed on uniform statewide forms.

**Chap. 62 (A.9404) (Audio-Visual court appearances).**

**Effective: May 7, 2002.**

Amends CPL § 182.20 to add Erie 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.

**Chap. 57 (S.6465) (Audio-Visual court appearances).**

**Effective: May 7, 2002.**

Amends CPL § 182.20 to add Niagara 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.

**Chaps. (various) (Peace Officer status).**

**Effective: Upon Governor’s signature.**

Confers peace officer status on:

**Chap. 260** uniformed court officers of the Village Court of Quogue (A.6502) (July 30, 2002);

**Chap. 261** uniformed court officers of the Town of East Hampton (A.6504) (July 30, 2002);

**Chap. 623** officers and members of the fire investigation unit of the fire department of the city of Buffalo (October 2, 2002);

**VETOED** persons appointed as public safety officers by the commissioner of the Department of Public Safety of the Town of Hempstead (S.7400-a);

**Chap. 320** dog control officers of the Town of Clarence (August 6, 2002);

**Chap. 321** airport security guards, senior airport security guards, airport security supervisors, retired police officers, and supervisors of same, who are designated to provide security at Long Island MacArthur Airport (August 6, 2002).

**Chap. 92 (A.11419) (Federal law enforcement officers).**

**Effective: June 4, 2002.**

Amends CPL § 2.15 to add Federal Reserve Law Enforcement Officers to the list of federal officers who possesses limited authority to act as peace officers under New York law.

**Vehicle and Traffic Law**

**Chap. 3 (A.8429) (DWI – BAC reduced from .10% to  
.08%).**

**Effective: November 1, 2003.**

Amends VTL § 1192 (2) to provide that “no person shall operate a motor vehicle while such person has .08 of

one per centum or more by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine, or saliva" [reduced from .10%]. To accommodate the lower *per se* intoxication threshold, the *per se*—level II standard for drivers of commercial motor vehicles, which previously ranged from .07% to .09%, has been changed to .07% only [VTL § 1192 (6)], as has the *prima facie* evidence standard for driving while ability impaired [VTL § 1195 (2)(c)]. The suspension pending prosecution provisions of VTL § 1193 (2) have also been amended to reflect the lower .08% threshold.

## **Chap. 691 (A.8775) (DWI prior offenses – mandatory jail or community service).**

**Effective: September 30, 2003.**

Enacts a mandatory jail sentence of 5 days or, as an alternative, 30 days of community service for defendants who commit the crime of DWI [VTL § 1192 (2) or (3)] and have a prior DWI conviction within the preceding 5 years; and a mandatory jail sentence of 10 days or 60 days of community service for defendants who have been convicted on "two or more occasions" of DWI within the preceding 5 years.

## **Chap. 546 (A.8853) (Vehicle and Traffic Law – Use of both lap belts and shoulder harnesses required).**

**Effective: 60 days after Governor's signature.**

Amends VTL § 1229-c to provide that "except as otherwise provided for passengers under the age of four, it shall be a violation of this section if a person is seated in a seating position equipped with both a lap safety belt and a shoulder harness belt and such person is not restrained by both such lap safety and shoulder harness belt."

## **VETOED (S.5333) (Vehicle and Traffic Law—Parking violations—Time limit on application to dismiss notice of violation).**

**Effective: Upon Governor's signature.**

Amends VTL §238 (2-a)(b) to provide that an application to dismiss a parking ticket on the ground that it fails to contain required identifying information may be made "up to one year after a default judgment has been rendered on the violation."

## ***Corrections and Parole***

### **Chap. 11 (S.6263-a) (Sex Offender Registration Act – New crimes and diminished rights).**

**Effective: March 11, 2002**

[*Ed. note:* Much of the following information appeared in the May/June 2002 issue of the *REPORT* and is repeated here for completeness of the Legislative Review. The earlier issue included a "Quick Reference

Chart" not included here. That chart is available in the PDF version of the *REPORT* on our web site, or from the Backup Center.]

Several new offenses have been added to the list of crimes covered by the Sex Offender Registration Act (SORA, also known as Megan's Law), including the following:

- **Felonies** (including attempts): *Persistent sexual abuse* (Penal Law § 130.53); *Aggravated sexual abuse in the fourth degree* (Penal Law § 130.65-a); *Facilitating a sex offense with a controlled substance* (Penal Law § 30.90); and *Disseminating indecent material to minors in the first degree* (Penal Law § 235.22); or any SORA offense committed as a *hate crime* (Penal Law § 485.05) or as a *crime of terrorism* (Penal Law § 490.25).
- **Misdemeanors** (including attempts): *Sexual Misconduct* (Penal Law § 30.20); *Sexual abuse in the third degree* (Penal Law § 130.55); and where the victim is under age 18, or the defendant has a prior sex offense conviction: *Forcible touching* (Penal Law § 130.52); or any SORA offense committed as a *hate crime* (Penal Law § 485.05) or as a *crime of terrorism* (Penal Law § 490.25).

Some federal crimes have also been designated as Megan's Law offenses\* and more foreign convictions will now be covered by the Act, which now applies to out-of-state misdemeanors as well as felonies with New York statutory counterparts, or any out-of-state crime that requires registration in the foreign jurisdiction. The law also includes registration requirements for persons in New York State to attend college or for employment purposes.

- **Effective date:** Registration requirements will apply prospectively to offenses committed on or after Mar. 11, 2002. However, in some limited circumstances the amendments will apply retroactively if the defendant was convicted of a newly added felony offense (including designated federal offenses) and was still serving the sentence on Mar. 11, 2002.
- **New Reporting Requirements:** The SORA now requires lifetime registration for three new categories of offenders (in addition to Risk Level 3). Regardless of a defendant's risk level assessment,

\* *Sexual exploitation of children* (18 USC § 2251); *Selling or buying children* (18 USC § 2251A); *Certain activities relating to material involving the sexual exploitation of minors* (18 USC §2252); *Certain activities relating to material constituting or containing child pornography* (18 USC § 2252-A); *Production of sexually explicit depictions of a minor for importation into the United States* (18 USC § 2260)

lifetime registration will be required for **sexual predators, sexually violent offenders, and predicate sex offenders**. Sexual predators will also be required to personally verify their addresses every 90 days for life. A “sexual predator” is a person who stands convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes him or her likely to engage in predatory sexually violent acts. A “sexually violent offender” is a sex offender who stands convicted of a sexually violent offense [Correction Law § 168-a (3)]. A “predicate sex offender” is a person convicted of a sex offense or a sexually violent offense who has a previous conviction for one or more of such crimes.

- **Effective date for new categories:** These three new categories will apply at risk level assessment hearings conducted on or after Mar. 11, 2002. However, the new categories will not apply to hearings conducted after Mar. 11, 2002 if the defendant was previously classified in an administrative or judicial risk level assessment proceeding conducted prior to Jan. 1, 2000, or was included in the plaintiff class in *Doe v Pataki*, 3 FSupp 2d 456 (SDNY 1998). Offenders classified after Mar. 11, 2002 as a sexual predator, sexually violent offender, predicate sex offender or Level 3 sex offender will be permanently ineligible to petition the court for relief from the duty to register pursuant to Correction Law § 168-0. Level 3 sex offenders who were classified prior to Mar. 11, 2002 may petition for such relief after 13 years.

**Chap. 251 (S.7581) (Work Release eligibility—Victims of Domestic Violence).**

**Effective: July 30, 2002.**

In 2000, Governor Pataki vetoed a bill that would have authorized the granting of work release to otherwise ineligible inmates convicted of homicide or assault offenses when domestic violence was a substantial contributing factor to their criminal conduct. The Governor cited the lack of a provision in the bill requiring the Department of Correctional Services to consult with prosecutors before granting work release in these cases.

The bill has now been amended to address the Governor’s concern. It authorizes DOCS to grant temporary release (including work release) to an inmate convicted of a homicide or assault offense when: a) the victim was a member of the inmate’s immediate family as that term is defined in Penal Law § 120.40 or the inmate and victim had a child in common; b) “the inmate was subjected to substantial physical, sexual or psychological abuse committed by the victim of such homicide or assault; and c) such abuse was a substantial factor in causing the inmate to commit” the crime. An inmate’s claim of

domestic violence must be corroborated in some manner and the Commissioner must “request and *take into consideration* the opinion of the district attorney . . . and the sentencing court.” [Amends Correction Law § 851]

**Chap. 137 (S.3781) (Confidential personnel records—Parole officers).**

**Effective: July 23, 2002.**

Adds peace officers employed by the Division of Parole to the list of employees whose personnel records are confidential under Civil Rights Law § 50-a.

**Chap. 413 (A.11521) (Erie County Holding Center).**

**Effective: August 13, 2002.**

Amends Correction Law § 500-a to permit the Erie County Holding Center and the Erie County Correctional Facility to be used for the detention of persons under arrest who are awaiting arraignment.

**Chap. 535 (A6038) (NYC Dept. of Correction—private jails prohibited).**

**Effective: September 17, 2002.**

Amends the New York City Administrative Code to provide that “[t]he duty of maintaining the custody and supervision of persons detained or confined by the Department of Correction shall be performed solely by members of the uniformed force and shall not be delegated, transferred or assigned in whole or in part to private persons or entities.”

**Family Court Practice**

**VETOED (S.3434) (Domestic Relations Law – Basic child support obligation).**

Domestic Relations Law § 240 (1-b)(d) establishes a \$25 basic child support obligation when any higher amount would reduce a non-custodial parent’s income below the poverty guidelines for a single person. This legislation authorizes a court to find that the \$25 basic support obligation is “unjust or inappropriate” and to order the non-custodial parent to pay an amount the court finds “just and appropriate.”

**Chap. 219 (S.6176-B) (Family Court Orders of Protection—Judicial Hearing Officer Pilot Program).**

**Effective: July 30, 2002; scheduled to sunset 3 years after effective date.**

In 2001, the Judiciary Law was amended to give Family Court judges the authority to refer certain applications for orders of protection brought after 5 p.m. to referees for determination. This legislation authorizes a judicial hearing officer pilot program within the 7th and 8th judicial districts (western New York) that would permit

referral of such applications to judicial hearing officers regardless of the hour of day.

### Miscellaneous

#### Chap. 302 (S.6508) (Town and Village Courts—Juror Allowances).

**Effective: Applies to jury service on or after April 1, 2003.**

Provides that the state shall pay juror allowances in Town and Village courts at a rate of \$10 per day beginning on April 1, 2003 and rising to \$15 in 2004 and \$25 in 2005.

#### **VETOED (S.6165) (Tax Law—*Miranda* warnings).**

Requires government employees conducting tax law investigations to recite *Miranda*-like warnings to taxpayer interviewees [Tax Law § 3006-a; NYC Administrative Code § 11-4023].

#### Chap. 524 (S.7340) (Expungement of DNA samples and records).

**Effective: September 17, 2002.**

Amends Executive Law § 995-c to provide a mechanism for expungement of DNA samples and records where a defendant is acquitted, or where a conviction is

reversed or vacated and the defendant will not be retried, or where a suspect is not criminally charged after providing a DNA sample.

### Sunset Clauses

#### Chap. 46 (A.9628) (Statewide Child Abuse Register—Expungement of unfounded reports—Sunset Clause Eliminated).

**Effective: April 30, 2002.**

Eliminates the sunset clause and thereby makes permanent Chapter 555 of the Laws of 2000. This law amended Social Services Law § 422 (5) to permit expungement of an unfounded report from the statewide central register of child abuse when the person who made the report has been convicted of falsely reporting an incident in connection with the matter, or when the “subject of the report presents clear and convincing evidence that affirmatively refutes the allegation of abuse and mistreatment.”

#### Chap. 163 (S.7124) (Sunset Extended—Closed-Circuit testimony of child witnesses).

**Sunset extended to September 1, 2003.**

Extends the sunset clause of CPL Article 65 relating to closed-circuit testimony of certain child witnesses to September 1, 2003. ♪

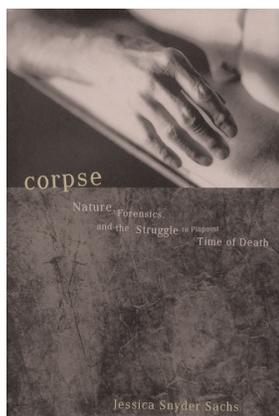
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## Book Review

(continued from page 8)

We learn that, at the moment, flies and their young (maggots) are the best indicators of the time of death. Certain flies will alight and begin to lay eggs within minutes of death. By judging the maturity of the maggots, one can tell how long someone has been dead. Ah, but still not simple. There are many different species of flies; some like a fresh corpse and some like one that has aged a bit. Unfortunately, the maggots all look pretty much the same, even to experts.

Hairy Maggot does stand out from the horde. It also happens to eat other maggots, which again can screw up a good estimate. Furthermore, the time of year, the location in the world, or the area or state or county,



determines not only what flies are called to the feast but even at what time the dinner bell rings for each. The first to chow down in one place may arrive fashionably late in another location.

To find out all this stuff, scientist have been scattering dead pigs around and watching what happens. But pigs are not people, and there is some argument that they may decompose differently from humans—so human volunteers are used as well. The bodies are placed in different positions, at different times of year, with different clothing or lack of, buried or submerged or left in the open, all to find out what happens to our bodies when we die. The “Body Farm” in Tennessee must be quite a sight.

The book is not all about maggots, although they are by far the most interesting part. It covers time of death estimates by using plants and bacteria, as well as other more familiar methods. It is a must read for anyone needing to prove or refute a time-of-death estimate. It is also a very good read even if you have no need of the information. A much used phrase normally applied to other genres—“Once you start you won’t be able to put it down”—is perfect for this book. ♪