

by Al O'Connor*

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[**Ed. Note:** *The Legislative Review, summarizing New York legislative action relevant to criminal defense and related fields, appears annually in the REPORT. Copies of the feature dating from 1998 to the present can also be found on the NYSDA web site, www.nysda.org, under Hot Topics—Legislation NY. As noted below, a summary of the 2004 amendments to the Rockefeller Drug Laws was published in the last REPORT.*]

Penal Law

Chap. 738 (Rockefeller Drug Law Reform). Effective: Generally effective on January 13, 2005. Some provisions effective December 14th and 27th, 2004.

See, "A Summary of the Rockefeller Drug Law Reform Legislation" in the Backup Center REPORT, Vol XIX, No 4, pg. 15 (Sept–Dec 2004).

Chapter 459 (S.7488) (LWOP for certain cases of murder in the second degree). Effective: Applies to offenses committed on or after November 1, 2004.

This law adds a subdivision to the statute defining murder in the second degree, which applies to intentional murders committed during the course of certain sex crimes when the victim is less than 14 years-old and the actor is at least 18. The new crime is punishable by a mandatory sentence of life without parole:

Penal Law § 125.25 (Murder in the second degree)

A person is guilty of murder in the second degree when:

- (5) being eighteen years old or more, while in the course of committing rape in the first, second or third degree, criminal sexual act in the first, second or third degree, sexual abuse in the first degree, aggravated sexual abuse in the first, second, third or fourth degree, or incest as defined in section 255.25 of this chapter,

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against a person less than fourteen years old, he or she intentionally causes the death of such person.

Chap. 1 (A. 11723) (Anti-terrorism bill of 2004). Effective: July 23, 2004.

In the immediate aftermath of September 11, 2001, Governor Pataki introduced an ambitious bill that sought to enact state criminal penalties for acts of "terrorism," ones which, if serious, would almost certainly be prosecuted as federal crimes. In addition to criminalizing the possession and use of chemical and biological weapons, the bill proposed to abolish the statute of limitations, the exclusionary rule, and the accomplice corroboration rule in certain cases, and to authorize so-called "roving wire-taps." After the Assembly resisted passage for several sessions, the bill was stripped of many of its objectionable provisions and passed both houses in 2004. The bill criminalizes possession and/or use of chemical and biological weapons. The most serious of these new crimes are punishable by life without parole. It also enacts four felony degrees of money laundering in support of terrorism offenses (new Penal Law §§ 470.21, 470.22, 470.23, 470.24), which are defined by monetary amounts ranging from over \$1000 to \$75,000. The bill establishes an eight-year statute of limitations for terrorism prosecutions, but eliminates the limitations period entirely for terrorism crimes that "resulted in or created a foreseeable risk of death or serious physical injury." Finally, in response to the fake anthrax scares of several years ago, the bill adds "hazardous substance" to the laws criminalizing the placing of a false bomb (Penal Law §§ 240.61, 240.62 and 240.63).

Penal Law § 490.37 criminal possession of a chemical weapon or biological weapon in the third degree.

A person is guilty of criminal possession of a chemical weapon or biological weapon in the third degree when he or she possesses any select chemical agent or select biological agent under circumstances evincing an intent by the defendant to use such weapon to cause serious physical injury or death to another person.

(Class C violent felony)

Penal Law § 490.40 criminal possession of a chemical weapon or biological weapon in the second degree.

A person is guilty of criminal possession of a chemical weapon or biological weapon in the second degree when he or she possesses any chemical weapon or biological weapon with intent to use such weapon to:

- (a) cause serious physical injury to, or the death of, another person; and
- (b) (i) intimidate or coerce a civilian population;
- (ii) influence the policy of a unit of government by intimidation or coercion; or

- (iii) affect the conduct of a unit of government by murder, assassination, or kidnapping.
- 2. cause serious physical injury to, or the death of, more than two persons.

(Class B violent felony).

Penal Law § 490.45 criminal possession of a chemical weapon or biological weapon in the first degree.

A person is guilty of criminal possession of a chemical weapon or biological weapon in the first degree when he or she possesses:

- 1. any select chemical agent, with intent to use such agent to:
 - (a) cause serious physical injury to, or the death of, another person; and
 - (b)(i) intimidate or coerce a civilian population;
 - (ii) influence the policy of a unit of government by intimidation or coercion; or
 - (iii) affect the conduct of a unit of government by murder, assassination, or kidnapping.
- 2. any select chemical agent, with intent to use such agent to cause serious physical injury to, or the death of, more than two other persons; or
- 3. any select biological agent, with intent to use such agent to cause serious physical injury to, or the death of, another person.

(Class A-I felony — punishable by mandatory sentence of life without parole)

Penal Law § 490.47 criminal use of a chemical weapon or biological weapon in the third degree.

A person is guilty of criminal use of a chemical weapon or biological weapon in the third degree when, under circumstances evincing a depraved indifference to human life, he or she uses, deploys, releases, or causes to be used, deployed, or released any select chemical agent or select biological agent, and thereby creates a grave risk of death or serious physical injury to another person not a participant in the crime.

(Class B violent felony)

Penal Law § 490.50 criminal use of a chemical weapon or biological weapon in the second degree.

A person is guilty of criminal use of a chemical weapon or biological weapon in the second degree when he or she uses, deploys, releases, or causes to be used, deployed, or released, any chemical weapon or biological weapon, with intent to:

- 1. cause serious physical injury to, or the death of, another person; and
- 2. (a) intimidate or coerce a civilian population;
- (b) influence the policy of a unit of government by intimidation or coercion; or

- (c) to affect the conduct of a unit of government by murder, assassination, or kidnapping.

(Class A-II felony)

Penal Law § 490.55 criminal use of a chemical weapon or biological weapon in the first degree.

A person is guilty of criminal use of a chemical weapon or biological weapon in the first degree when:

- 1. with intent to:
 - (a) cause serious physical injury to, or the death of, another person; and
 - (b)(i) intimidate or coerce a civilian population;
 - (ii) influence the policy of a unit of government by intimidation or coercion; or
 - (iii) affect the conduct of a unit of government by murder, assassination, or kidnapping;

he or she uses, deploys, releases, or causes to be used, deployed, or released any select chemical agent and thereby causes serious physical injury to, or the death of, another person who is not a participant in the crime.

- 2. with intent to cause serious physical injury to, or the death of, more than two persons, he or she uses, deploys, releases, or causes to be used, deployed, or released any select chemical agent and thereby causes serious physical injury to, or the death of, more than two persons who are not participants in the crime; or
- 3. with intent to cause serious physical injury to, or the death of, another person, he or she uses, deploys, releases, or causes to be used, deployed, or released any select biological agent and thereby causes serious physical injury to, or the death of, another person who is not a participant in the crime.

(Class A-I felony — punishable by a mandatory sentence of life without parole).

Penal Law § 490.70 limitations:

- 1. The provisions of sections 490.37, 490.40, 490.45, 490.47, 490.50, and 490.55 of this article shall not apply where the defendant possessed or used:
 - (a) any household product generally available for sale to consumers in this state in the quantity and concentration available for such sale;
 - (b) a self-defense spray device in accordance with the provisions of paragraph fourteen of subdivision a of section 265.20 of this chapter;
 - (c) a chemical weapon solely for a purpose not prohibited under this chapter, as long as the type and quantity is consistent with such a purpose; or
 - (d) a biological agent, toxin, or delivery system solely for prophylactic, protective, bona fide

research, or other peaceful purposes.

2. for the purposes of this section, the phrase “purposes not prohibited by this chapter” means the following:
 - (a) any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other peaceful activity;
 - (b) any purpose directly related to protection against toxic chemicals and to protection against chemical weapons;
 - (c) any military purpose of the United States that is not connected with the use of a chemical weapon or that is not dependent on the use of the toxic or poisonous properties of the chemical weapon to cause death or other harm; and
 - (d) any law enforcement purpose, including any domestic riot control purpose and including imposition of capital punishment.

Chap. 568 (S.6649) (Probation Term — Public Lewdness). Effective: Applies to offenses committed on or after November 1, 2004.

Extends the period of probation for the Class B misdemeanor of public lewdness (Penal Law § 245) from one year to “no less than one year and no more than three years.”

Chap. 393 (A.7201-b) (Nuclear facilities — use of force) Effective: August 17, 2004.

Amends Penal Law § 35.20 to add security personnel and employees of nuclear electric generating facilities to the list of persons authorized to use physical or deadly physical force in defense of premises or to prevent a burglary.

Chap. 40 (Technical Amendment — Oral Sexual Contact). Effective: April 20, 2004.

Technical amendment to Penal Law § 130.05 (2)(d) to replace the antiquated reference to “deviate sexual intercourse” with the terms of “oral sexual conduct” and “anal sexual conduct.”

Chaps. — various (Peace officer status). Effective: as indicated

Confers New York State peace officer status on:

Chap. 17 (A.9693) — Syracuse University peace officers appointed by the chief law enforcement officer of the city of Syracuse. Effective: March 23, 2004.

Chap. 347 (A.10015-a) — watershed protection and enforcement officers appointed by the city of Peekskill. Effective: August 10, 2004.

Chap. 235 (A.3980) — court security officers employed by the Wayne County sheriff’s office. Effective: July 27, 2004.

Chap. 241 (A.7993-a) — arson investigators and fire inspectors from the Department of State’s office of fire prevention and control. Effective: July 27, 2004.

Chap. 110 (A.9159) — federal police officers and police supervisors assigned to the United States Merchant Marine Academy in Kings Point. Effective: June 15, 2004.

By a separate chapter law (L. 2004, chap. 178) the authority conferred on Merchant Marine police officers was limited to duties performed “within the geographical area of their employment or within one hundred yards” thereof.

DNA Databank Law

Chap. 138 (S.7659) (DNA databank law — new offenses — Discovery for DNA-related 440.30 (1-a) motions). Effective: Signed July 6, 2004. DNA databank additions apply to offenses committed prior to that date where service of the sentence imposed upon conviction of the designated offense had not been completed prior to July 6, 2004.

This legislation adds many additional offenses to the DNA databank law (Executive Law § 995), including any sex crime (misdemeanor or felony) that is included in Megan’s Law (Correction Law § 168-a). The list of new offenses includes:

Any sex offenses or sexually violent offenses defined in Correction Law § 168-a (2)(a)(b) or (c)

Any of the following offenses, or attempts thereof where the attempt is a felony:

P.L. § 120.12 — Aggravated assault upon a person less than 11 years-old

P.L. § 120.13 — Menacing in the first degree

P.L. § 120.25 — Reckless endangerment in the first degree

P.L. § 120.55 — Stalking in the second degree

P.L. § 125.10 — Criminally negligent homicide

P.L. § 125.12 — Vehicular manslaughter in the second degree

P.L. § 125.13 — Vehicular manslaughter in the first degree

P.L. § 130.53 — Persistent sexual abuse

P.L. § 130.65-a — Aggravated sexual abuse in the fourth degree

P.L. § 130.85 — Female genital mutilation

P.L. § 130.90 — Facilitating a sex offense with a controlled substance

P.L. § 135.10 — Unlawful imprisonment in the first degree

P.L. § 135.50 — Custodial interference in the first degree

P.L. § 140.17 — Criminal trespass in the first degree

P.L. § 145.20 — Criminal tampering in the first degree

P.L. § 145.45 — Tampering with a consumer product in the first degree

P.L. § 160.05 — Robbery in the third degree

P.L. § 190.79 — Identity theft in the second degree

P.L. § 190.80 — Identity theft in the first degree

P.L. § 205.25 — Promoting prison contraband in the first degree

P.L. § 215.11 — Tampering with a witness in the third degree

P.L. § 215.12 — Tampering with a witness in the second degree

P.L. § 215.13 — Tampering with a witness in the first degree

P.L. § 215.51 (b)(c) and (d) — Criminal contempt in the first degree

P.L. § 215.52 — Aggravated criminal contempt

P.L. § 215.56 — Bail jumping in the second degree

P.L. § 215.57 — Bail jumping in the first degree

P.L. § 230.05 — Patronizing a prostitute in the second degree

P.L. § 230.06 — Patronizing a prostitute in the first degree

P.L. § 230.30 — Promoting prostitution in the second degree

P.L. § 230.32 — Promoting prostitution in the first degree

P.L. § 235.21 — Disseminating indecent materials to minor in the second degree

P.L. § 235.22 — Disseminating indecent materials to minor in the first degree

P.L. § 240.06 — Riot in the first degree

P.L. § 240.06 — Criminal anarchy

P.L. § 250.45 — Unlawful surveillance in the second degree

P.L. § 250.50 — Unlawful surveillance in the first degree

P.L. § 260.32 — Endangering the welfare of a vulnerable elderly person in the second degree

P.L. § 260.34 — Endangering the welfare of a vulnerable elderly person in the first degree

P.L. § 263.05 — Use of a child in a sexual performance

P.L. § 263.10 — Promoting an obscene sexual performance by a child

P.L. § 263.11 — Possessing an obscene sexual performance by a child

P.L. § 263.15 — Promoting a sexual performance by a child

P.L. § 263.16 — Possessing a sexual performance by a child

P.L. § 265.02 — Criminal possession of a weapon in the third degree

P.L. § 265.11 — Criminal sale of a firearm in the third degree

P.L. § 265.16 — Criminal sale of a firearm to a minor

P.L. § 485.05 — Hate crimes

P.L. § 490.25 — Crimes of terrorism

In an apparent trade-off, the legislation strengthens the law governing post-judgment motions for DNA testing. First, it eliminates the requirement that the conviction have been entered prior to January 1, 1996. All criminal convictions are now subject to a motion to vacate pursuant to CPL § 440.30 (1-a). Second, the legislation provides defendants with some means of discovering whether testable material still exists, or has been destroyed.

CPL § 440.30 (1-b) now provides:

In conjunction with the filing of a motion under this subdivision, the court may direct the people to provide the defendant with information in the possession of the people concerning the current physical location of the specified evidence and if the specified evidence no longer exists or the physical location of the specified evidence is unknown, a representation to that effect and information and documentary evidence in the possession of the people concerning the last known physical location of such specified evidence. If there is a finding by the court that the specified evidence no longer exists or the physical location of such specified evidence is unknown, such information in and of itself shall not be a factor from which any inference unfavorable to the people may be drawn by the court in deciding a motion under this section. The court, on motion of the defendant, may also issue a subpoena duces tecum directing a public or private hospital, laboratory or other entity to produce such specified evidence in its possession and/or information and documentary evidence in its possession concerning the location and status of such specified evidence.

Criminal Procedure Law

Chap. 518 (A.10803) (Order terminating charges contained in felony complaint). Effective: November 1, 2004.

This legislation finally provides a mechanism in the CPL to dispose of a felony complaint that has been outstanding for a long time without grand jury action. The elaborate new procedure (CPL § 180.85) authorizes the defendant, the People or a local criminal court or superior court (acting *sua sponte*) to move for termination of a felony complaint that has been outstanding for at least one year. The motion must be in writing and on at least 30 days notice. If the district attorney consents to termination or does not respond to the motion, the court must enter an order terminating the prosecution. If the district attorney opposes, the court may defer action on the motion for 45 days to allow the People an opportunity to present the matter to a grand jury. An additional 45 day deferral period is available for good cause. If the matter has not been resolved by a grand jury at the conclusion of the deferral period, the court may enter an order terminating the prosecution, from which the People may appeal as-of-right. The defendant need not appear in court as a prerequisite to relief. Nor is the time during which the motion is pending excludable for speedy trial purposes. Termination of the prosecution pursuant to this section does not foreclose the People from subsequently indicting the defendant and seeking to defend the indictment against dismissal under the speedy trial statute.

The procedure is not available when the felony complaint includes a homicide charge (Penal Law Article 125).

Relief under section 180.85 constitutes a termination of the criminal action in favor of the accused subject to the sealing provisions of CPL section 160.50. Where, however, following the entry of a termination order, the People indicate their intention to seek an indictment, the court is required to stay sealing under CPL 160.50, for up to thirty days to allow the People to access to “official records and papers” needed to pursue an indictment.

For criminal cases commenced prior to November 1, 2004, the motion for termination may be made no earlier than 12 months from the date of arraignment or December 31, 2004, whichever is later.

Chap. 167 (S.6573) (Audio Visual Court Appearances — Warren County). Effective: July 20, 2004.

Amends CPL § 182.20 to add Warren 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. 172 (S.6653) (Sunset Extended — Audio-Visual Court Appearances). Effective: Sunset extended to December 31, 2006.

Extends the sunset provisions of CPL Article 182, which authorizes an experimental program of audio-visual arraignments and court appearances via two-way closed circuit television in certain counties, to December 31, 2006.

Chap. 107 (A.10974) (Not responsible pleas or verdicts — order of conditions). Effective: June 8, 2004.

In 2003, the Legislature expressly authorized courts to issue an order of protection in the context of an order of conditions issued to a person found not responsible by reason of mental disease or defect. This legislation directs that the stay away order be issued in a separate document and makes other technical amendments concerning enforcement of such orders.

Chap. 362 (S.556) (Age of “child witness” increased to 14). Effective: November 1, 2004.

Redefines a “child witness” eligible to testify by closed-circuit television pursuant to CPL Article 65 as a witness 14 years old or younger (from 12). [Amends CPL § 65 (1) and FCA § 343 (1)(4)]

Chap. 56 (pt. F, § 1) (S.6056-b) (Mandatory surcharge and crime victim assistance fee applicable to youthful offender adjudications). Effective: February 16, 2005.

Amends Penal Law § 60.35 to provide that mandatory surcharge and crime victim assistance fees (Penal Law § 60.35) “shall apply to a sentence imposed upon a youthful offender and the amount . . . which shall be levied at sentencing shall be equal to the amount specified in such section for the offense of conviction for which the youthful offender finding was substituted.”

Chap. 415 (S.7598) (Appearance Tickets — Local Zoning, Building and Sanitation Codes). Effective: August 24, 2004.

Amends CPL § 150.40 (2) to provide that, in contrast to all other non-parking related appearance tickets, which must be personally served, appearance tickets issued for alleged violations of local zoning, building and sanitation codes “may be served in any manner authorized for service under [section 308 of the CPLR].”

Sex Offender Legislation

Chap. 106 (A.9779) (Sex Offender Registration Act — False Notice). Effective: August 7, 2004.

In 2003, the Legislature passed a poorly drafted bill concerning false sex offender registration act notices. The 2003 legislation has been repealed (Correction Law § 168-v) and a new penal law offense has been enacted:

Penal Law § 240.48 disseminating a false registered sex offender notice.

A person is guilty of disseminating a false registered sex offender notice when, knowing the information he or she disseminates or causes to be disseminated to be false or baseless, such person disseminates or causes to be disseminated any notice which purports to be an official notice from a government agency or a law enforcement

agency and such notice asserts that an individual is a registered sex offender. (Class A misdemeanor)

Chap. 410 (A.11599) (Sex Offender Registration Act — Out-of-State offenders). Effective: November 15, 2004.

This legislation requires DCJS to notify offenders subject to New York's registration laws that registration requirements may continue if they relocate to another state or U.S. possession. In addition, the bill requires DCJS to regularly notify officials in all other states and territories of the duty to notify the Division of Criminal Justice Services when an offender who is subject to sex offender registration laws relocates to or establishes employment or attends school in New York State.

Chap. 361 (A.11590) (Sex Offender 900 telephone line free of charge). Effective: September 9, 2004.

The bill amends section 168-p of the correction law to eliminate charges for the "900" telephone number established for public inquiries about registered sex offenders. The bill also allows non-profit and not-for-profit youth service organizations to inquire about as many as 20 individuals in a single phone call.

Chapter 146 (S.4168) (Sex Offender Registration Act — out-of-state offenses). Effective: July 13, 2004.

Amends Correction Law § 168-a (2)(d)(i) to define a crime committed in another jurisdiction as a registerable offense when it includes all of the essential elements of forcible touching or sexual abuse in the third degree (Penal Law §130.52, §130.55) and the defendant otherwise would have been subject to the Sex Offender Registration Act had the offense been committed in New York State (In-state offenders are subject to Megan's Law for these crimes only when the victim was under age 18 or when the defendant has a prior sex offense conviction.)

Chap. 56 (pt. E, § 1) (S.6056-b) (Sex offender supplemental victim fee). Effective: Signed August 20, 2004. Purportedly applies to offenses committed on or after April 1, 2004, but may not be validly imposed for offenses committed before signature date.

Amends Penal Law § 60.35 to impose a supplemental fee of \$1000 on all persons convicted of a sex offense defined in Penal Law Articles 130 and 263, or incest, to be paid in addition to the mandatory surcharge and crime victim's assistance fee (also applies to youthful offender adjudications).

Vehicle and Traffic Law

Chap. 59 (pt. E, § 1) (§ 750 Driver Responsibility Assessment — VTL § 1199). Effective: Applies to offenses committed on or after November 18, 2004.

Requires DMV to impose a new \$750 driver responsibility financial assessment, payable in three annual installments of \$250, when a person is convicted of driving while impaired or intoxicated under VTL § 1192. The assessment also applies to chemical test refusals under VTL § 1194 "not arising out of the same incident as a conviction" under VTL § 1192. The assessment additionally applies to prosecutions under the navigation law for boating while intoxicated, and the parks, recreation and historic preservation law for snowmobiling while intoxicated. Nonpayment will result in a mandatory driver's license suspension.

Chap. 59 § 2 (part E) (Driver Responsibility Assessment). Effective: November 18, 2004.

Adds VTL § 503 (4) to require the Commissioner of Motor Vehicles to impose a driver responsibility assessment on "any person who accumulates six or more points on his or her driving record for acts committed within an eighteen month period." The assessment is \$100 per year for a three-year period for the first six points on a driver's record and an additional twenty-five dollars per year for each additional point on such driver's record. The penalty for non-payment is suspension of one's driver's license.

Chap. 515 (A.9265) (Vehicle and Traffic Law — Fine reimbursement). Effective: October 28, 2004.

Amends VTL § 242 to provide that a motorist shall have the right to a refund of any fine and/or penalty within 30 days of an order overturning the violation, less any amount owed by the motorist for other outstanding violations. Provides that the Parking Violations Bureau shall pay a late charge which shall "accrue at the same rate as that imposed for failure to make timely payment of a fine."

Chap. 672 (S.173) (Leaving the scene of an accident involving injury to certain animals — increased penalties). Effective: November 1, 2005.

Amends VTL § 601 to increase fines for leaving the scene of an accident involving injury to an animal when the animal is a guide dog, hearing dog or service dog: \$50-\$150 (first offense), \$150-\$300 (second or subsequent offense).

Chap. 673 (VTL § 511 (3) — Aggravated unlicensed operation of a motor vehicle in the first degree). Effective: November 1, 2005.

Technical amendment to VTL § 511 (3)(a)(ii) to clarify that a person is guilty of aggravated unlicensed operation of a motor vehicle in the first degree when he or she "commits the offense of aggravated unlicensed operation of a motor vehicle in the third degree" and is "operating a motor vehicle while such person has in effect ten or more suspensions, imposed on at least ten separate dates for failure to answer, appear or pay a fine . . ."

Judiciary Law

Chap. 240 (A.7518) (Respite/incompetency period following jury service). Effective: July 27, 2004.

Amends Judiciary Law § 524 to increase the respite period following jury service to 6 years (from four) and, if the juror served more than 10 days, to eight years. A shorter respite period of two years or more is authorized if a juror served fewer than three days of jury service.

Correction Law

Chap. 553(S.5408) (Merit Time eligibility for sentences of 1–3 years). Effective: October 5, 2004.

When the merit time law was enacted in 1997, it inexplicably applied to sentences “in excess” of one year. Thus, inmates serving 1–3 year sentences were ineligible to earn merit time. Correction Law § 803 (1)(d) has now been amended to apply to sentences of “one year or more.”

Chap. 555 (S.5873) (Warren County Jail). Effective: October 5, 2004.

Amends Correction Law § 500-a to permit the Warren County Jail to be used for the detention of persons under arrest who are awaiting arraignment.

Chap. 559 (S.6065) (Putnam County Jail). Effective: October 5, 2004.

Amends Correction Law § 500-a to permit the Putnam County Jail to be used for the detention of persons under arrest who are awaiting arraignment.

Miscellaneous

Chap. 111 (A.10103) (CPLR — Confidential names and addresses). Effective: July 15, 2004.

Adds a new rule to the CPLR (§ 2103-a) to provide that any party in a civil proceeding may “keep his or her residential and business addresses and telephone numbers confidential from any party in any pleadings or other papers submitted to the court, where the court makes specific findings on the record supporting a conclusion that disclosure of such addresses or telephone numbers would pose an unreasonable risk to the health or safety of a party.”

Chap. 190 (A.8586-a) (Animal Fighting). Effective: July 20, 2004.

Amends Agriculture and Markets Law § 351 to prohibit the breeding, selling or offering to sell any animal under circumstances evincing an intent that such animal engage in animal fighting (Class E felony).

Chap. 514 (A.8636-c) (Tongue Splitting). Effective: November 1, 2004.

Adds a new section to the Public Health Law (§ 470) to prohibit the practice of tongue splitting except by physicians and dentists (first offense: Class A misdemeanor; second offense: Class E felony). ⚖

Immigration Practice Tips *(continued from p. 9)*

circuits that have found that—even if an individual has a prior drug conviction—a state drug possession offense should not be considered an “illicit trafficking” aggravated felony for federal immigration purposes if the conviction did not require the prosecution to allege and prove the prior conviction as is required under the federal Controlled Substances Act for a second possession offense to be treated as a felony. See 21 USC 851(a)(1) (“No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court . . . stating in writing the previous convictions to be relied upon”); *Steele v Blackman*, 236 F3d 130 (3d Cir. 2001)(finding that second New York drug conviction is not an aggravated felony because state criminal proceedings did not involve findings or a plea satisfying the prior conviction element of an offense under the Controlled Substances Act punishable by imprisonment for more than a year); *Oliveira-Ferreira v Ashcroft*, 382 F3d

1045 (9th Cir. 2004)(finding that second state possession conviction should not be treated as punishable by more than one year’s imprisonment and therefore a felony under federal law by virtue of a recidivist sentence enhancement). ⚖

[**Ed. Note:** See p. 23 for information on the approaching Apr. 26, 2005 deadline for reopening old immigration cases to seek 212(c) waivers of deportation for lawful permanent residents (LPRs) who have been ordered deported because of criminal convictions for crimes to which the LPRs agreed to plead guilty or no contest before Apr. 1, 1997.]

**For more information on
Immigration Law Relating to Criminal
Proceedings, Visit the IDP page,
under NYSDA Resources,
at www.nysda.org**