

2006 Legislative Review

By Al O'Connor*

New Crimes

►Chap. 765 L.2005 (Crimes Against Police Act). Effective: December 21, 2005.

In December 2005, following several police shootings, the New York City tabloids goaded the Legislature back into session to pass the so-called "Hero's Law," aimed at violent crimes against police officers. At the same Extraordinary Session, the Legislature enacted new penalties for illegal possession and sale of firearms (see Guns/Firearms below).

Chapter 765 creates a new series of crimes relating to violent acts directed at police and peace officers. For the new crime of aggravated murder of a police or peace officer the sentence must be life imprisonment without parole. Convictions for attempted murder in the first degree where the intended victim was a police, peace or correction officer, and for attempted aggravated murder, the sentence range is life imprisonment with a minimum term ranging from 20 to 40 years.

Penal Law § 125.26 Aggravated murder

A person is guilty of aggravated murder when:

1. With intent to cause the death of another person, he or she causes the death of such person, or of a third person who was a person described in subparagraph (i), (ii) or (iii) of paragraph (a) of this subdivision engaged at the time of the killing in the course of performing his or her official duties; and

(a) Either:

(i) the intended victim was a police officer as defined in subdivision thirty-four of section 1.20 of the criminal procedure law who was at the time of the killing engaged in the course of performing his or her official duties, and the defendant knew or reasonably should have known that the victim was a police officer; or

(ii) the intended victim was a peace officer as defined in paragraph a of subdivision twenty-one, subdivision twenty-three, twenty-four or sixty-two (employees of the division for youth) of section 2.10 of the criminal procedure law who was at the time of the killing engaged in the course of performing his or her official duties, and the defendant knew or reasonably should have known that the victim was such a uniformed court officer, parole officer, probation officer, or employee of the division for youth; or

(iii) the intended victim was an employee of a state correctional institution or was an employee of a local correctional facility as defined in subdivision two of section

forty of the correction law, who was at the time of the killing engaged in the course of performing his or her official duties, and the defendant knew or reasonably should have known that the victim was an employee of a state correctional institution or a local correctional facility; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime.

2. In any prosecution under subdivision one of this section, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, aggravated manslaughter in the first degree, manslaughter in the first degree or any other crime except murder in the second degree; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, aggravated manslaughter in the second degree, manslaughter in the second degree or any other crime except murder in the second degree.

(Class A-I felony with a mandatory sentence of life imprisonment without parole)

The bill also enacts the following new crimes:

Penal Law § 125.22 Aggravated manslaughter in the first degree

(Class B felony, punishable by determinate term of 10-30 years plus PRS)

Penal Law § 125.21 Aggravated manslaughter in the second degree

(Class C felony, punishable by determinate term of 7-21 years plus PRS)

Penal Law § 125.11 Aggravated criminally negligent homicide

(Class C felony, punishable by determinate term of 3½-20 years plus PRS)

Penal Law § 120.18 Menacing a police or peace officer

(Class D felony, punishable by determinate term of 2-8 years plus PRS).

Chap. 765 also increases the minimum sentence for the Class B felony of aggravated assault upon a police officer (Penal Law § 120.11) to a determinate term of 10-30 years, plus post-release supervision.

* Al O'Connor is the Backup Center Senior Staff Attorney. He coordinates the Association's amicus and legislative work and annually summarizes legislation relevant to criminal defense.

➤**Chap. 738 (S.8445) (Unlawful fleeing a police officer).**
Effective: November 1, 2006.

Creates the new crime of unlawful fleeing a police officer in a marked motor vehicle, a Class A misdemeanor, and higher grade offenses when serious physical injury (Class E felony) or death (Class D felony) results.

Penal Law § 270.25 Unlawful fleeing a police officer in a motor vehicle in the third degree.

A person is guilty of unlawful fleeing a police officer in a motor vehicle in the third degree when, knowing that he or she has been directed to stop his or her motor vehicle by a uniformed police officer or a marked police vehicle by the activation of either the lights or the lights and siren of such vehicle, he or she thereafter attempts to flee such officer or such vehicle by driving at speeds which equal or exceed twenty-five miles per hour above the speed limit or engaging in reckless driving as defined by section twelve hundred twelve of the vehicle and traffic law.

(Class A misdemeanor)

Penal Law § 270.30 Unlawful fleeing a police officer in a motor vehicle in the second degree.

A person is guilty of unlawful fleeing a police officer in a motor vehicle in the second degree when he or she commits the offense of unlawful fleeing a police officer in a motor vehicle in the third degree, as defined in section 270.25 of this article, and as a result of such conduct a police officer or a third person suffers serious physical injury.

(Class E felony)

Penal Law § 270.35 Unlawful fleeing a police officer in a motor vehicle in the first degree.

A person is guilty of unlawful fleeing a police officer in a motor vehicle in the first degree when he or she commits the offense of unlawful fleeing a police officer in a motor vehicle in the third degree, as defined in section 270.25 of this article, and as a result of such conduct a police officer or a third person is killed.

(Class D felony)

➤**Chap. 107 (A.8939-a) (Predatory Sexual Assault).**
Effective: June 23, 2006.

Enacts new crimes relating to predatory sexual assault, Class A-II felonies carrying life sentences.

Penal Law § 130.95 Predatory Sexual Assault.

A person is guilty of predatory sexual assault when he or she commits the crime of rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree, as defined in this article, and when:

1. in the course of the commission of the crime or the immediate flight therefrom, he or she:

(a) causes serious physical injury to the victim of such crime; or

(b) uses or threatens the immediate use of a dangerous instrument; or

2. He or she has engaged in conduct constituting the crime of rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree, as defined in this article, against one or more additional persons; or

3. He or she has previously been subjected to a conviction for a felony defined in this article, incest as defined in section 255.25 of this chapter or use of a child in a sexual performance as defined in section 263.05 of this chapter.

(Class A-II felony)

Penal Law § 130.96 — Predatory Sexual Assault Against a Child

A person is guilty of predatory sexual assault against a child when, being eighteen years old or more, he or she commits the crime of rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree, as defined in this article, and the victim is less than thirteen years old.

(Class A-II felony)

Sentencing—First and second felony offenders: Indeterminate term with a minimum term of 10 – 25 years and a maximum of life imprisonment; Persistent violent felony offender: minimum term of 25 years to life. The bill also adds these new crimes to list of offenses requiring registration under Megan’s Law (Correction Law § 168-a).

➤**Chap. 564 (A.2833) (Controlled Substances — Use of a Child).** **Effective: November 1, 2006.**

Enacts a new crime relating to use of a child to commit a controlled substance offense:

Penal Law § 220.28 Use of a Child to Commit a Controlled Substance Offense.

1. A person is guilty of use of a child to commit a controlled substance offense when, being eighteen years old or more, he or she commits a felony sale or felony attempted sale of a controlled substance in violation of this article and, as part of that criminal transaction, knowingly uses a child to effectuate such felony sale or felony attempted sale of such controlled substance.

2. For purposes of this section, “uses a child to effectuate the felony sale or felony attempted sale of such controlled substance” means conduct by which the actor:

(a) conceals such controlled substance on or about

the body or person of such child for the purpose of effectuating the criminal sale or attempted sale of such controlled substance to a third person; or

(b) directs, forces or otherwise requires such child to sell or attempt to sell or offer direct assistance to the defendant in selling or attempting to sell such controlled substance to a third person.

For purposes of this section, “child” means a person less than sixteen years of age.

(Class E felony)

➤ **Chap. 49 (A.7027) (Aggravated Harassment — Swastikas and Cross Burning). Effective: June 7, 2006.**

Adds new subdivisions to Penal Law § 240.31 relating to swastikas and cross burning:

§ 240.31 Aggravated harassment in the first degree.

A person is guilty of aggravated harassment in the first degree when with intent to harass, annoy, threaten or alarm another person, because of a belief or perception regarding such person’s race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation, regardless of whether the belief or perception is correct, he or she:

3. *etches, paints, draws upon or otherwise places a swastika, commonly exhibited as the emblem of nazi Germany, on any building or other real property, public or private, owned by any person, firm or corporation or any public agency or instrumentality, without express permission of the owner or operator of such building or real property; or*

4. *sets on fire a cross in public view.*

(Class E felony)

Sex Offenses and Offenders

➤ **Chap. 3 (S.8441) (Statute of Limitations eliminated for certain sex crimes). Effective: June 23, 2006.**

Eliminates the statute of limitations for the following Class B felonies: rape in the first degree, criminal sexual act in the first degree; aggravated sexual abuse in the first degree; course of sexual conduct against a child in the first degree. The bill also extends the statute of limitations for a civil action concerning these crimes to five years, or five years from the termination of a criminal action concerning the same conduct.

The law applies prospectively to crimes committed on or after June 23, 2006, as well as retroactively where the former statute of limitations had not yet expired by June 23, 2006.

➤ **Chap. 1 (S.6409) (Megan’s Law — duration of registration periods extended). Effective: January 18, 2006.**

Chapter 1 extends the duration of registration requirements under the Sex Offender Registration Act to life for all offenders classified as Level 2 (with a right to petition for relief from registration requirements after 30 years), and to twenty years for those classified as Level 1. Regardless of risk level, those offenders who are designated sexual predators, sexually violent offenders, or predicate sex offenders must register for life with no right to petition for relief. The legislation also amends Correction Law § 168-o to limit the right to petition for downward modification of risk level to once every two years (from annually).

Federal district court judge Denny Chin ruled in April, 2006 that this legislation violated the consent decree in *Doe v. Pataki*, 3 F.Supp.2d 456 (S.D.N.Y. 1998), with respect to class members who were classified as Level 1 and 2 offenders and were originally governed by a 10 year registration requirement. 427 F.Supp.2d 398 (S.D.N.Y. 2006). Judge Chin’s order has been stayed and the matter is currently on appeal to the Second Circuit.

➤ **Chap. 106 (A.8370) (Megan’s Law — expansion of public notification). Effective: June 23, 2006.**

This law expands the public notification provisions of Megan’s Law by requiring DCJS to post the names, approximate addresses, photographs and other information concerning Level 2 sex offenders on the internet. The law also authorizes law enforcement agencies to release the names, approximate addresses, photographs and other information concerning Level 1 sex offenders to “entities with vulnerable populations related to the offense committed,” which may further disseminate such information at their discretion.

➤ **Chap. 320 (S6277-b) (Incest — three degrees corresponding to seriousness of underlying criminal acts). Effective: November 1, 2006.**

In response to a false, tabloid-fueled campaign asserting that prosecutors in New York charge familial sex abuse as the Class E felony of incest instead of indicting offenders on more serious rape and criminal sexual act charges, the Legislature has redrafted the incest statute into three degrees, which correspond to the most serious underlying criminal acts alleged.

Penal law § 255.25 Incest in the third degree.

A person is guilty of incest in the third degree when he or she marries or engages in sexual intercourse, oral sexual conduct or anal sexual conduct with a person whom he or she knows to be related to him or her, whether through marriage or not, as an ancestor, descendant, brother or sister of either the whole or the half

blood, uncle, aunt, nephew or niece.
(Class E felony)

Penal Law § 255.26 Incest in the second degree.

A person is guilty of incest in the second degree when he or she commits the crime of rape in the second degree, as defined in section 130.30 of this part, or criminal sexual act in the second degree, as defined in section 130.45 of this part, against a person whom he or she knows to be related to him or her, whether through marriage or not, as an ancestor, descendant, brother or sister of either the whole or the half blood, uncle, aunt, nephew or niece.

(Class D felony)

Penal Law § 255.27 Incest in the first degree.

A person is guilty of incest in the first degree when he or she commits the crime of rape in the first degree, as defined in subdivision three or four of section 130.35 of this part, or criminal sexual act in the first degree, as defined in subdivision three or four of section 130.50 of this part, against a person whom he or she knows to be related to him or her, whether through marriage or not, as an ancestor, descendant, brother or sister of either the whole or half blood, uncle, aunt, nephew or niece.

(Class B felony)

➤**Chap. 96 (S.7277) (Sex offenders — Board of Parole notification to local social services districts). Effective: June 7, 2006**

Requires the Board of Parole to notify the local social services district upon the release from prison of a Level 2 or 3 sex offender when it appears the inmate is “likely to seek access to local social services for homeless persons.” (Amends Executive Law § 259-c). Previously, the Department of Correctional Services was required to perform this function.

➤**Chap. 91 (S.6934) (Megan’s Law – DNA databank compelling prostitution added). Effective: June 7, 2006 – Megan’s Law amendment applies retroactively to defendants who have not completed sentence by effective date.**

Adds compelling prostitution (Penal Law § 230.33) to the list of crimes covered by the Sex Offender Registration and DNA databank laws.

Penal Law

➤**Chap. 98 (S.7588) (Purposes of Penal Law) – Effective: June 7, 2006.**

Adds reentry and reintegration to the expressed purposes of the Penal Law.

Penal Law § 1.05

The general purposes of the provisions of this chapter

are:

(6) To insure public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, *the promotion of their successful and productive reentry and reintegration into society*, and their confinement when required in the interests of public protection.

➤**Chap. 13 (A.9835) (Riot in the first degree – prison incidents). Effective: March 21, 2006.**

In 2005, the Legislature expanded the crime of rioting in the first degree to conduct occurring within state correctional facilities (Penal Law § 240.06). This bill extends the statute to local correctional facilities:

Penal Law § 240.06 (2)

A person is guilty of riot in the first degree when he:

(2) while in a correctional facility or local correctional facility, as those terms are defined in subdivisions four and sixteen, respectively, of section two of the correction law, simultaneously with ten or more other persons, engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing alarm within such correctional facility and in the course of and as a result of such conduct, a person other than one of the participants suffers physical injury or substantial property damage occurs.

➤**Chap. 682 (S.6997-a) (Music/Video Piracy – threshold for felony reduced). Effective: November 1, 2006.**

Reduces the threshold for felony-level music and video piracy (Penal Law § 275.40 — failure to disclose the origin of a recording in the first degree) from one thousand to one hundred unauthorized recordings. The bill also elevates the crime of failure to disclose the origin of a recording in the second degree to the first degree offense when the defendant has a previous conviction for the same crime within the previous five years.

➤**Chap. 110 (S.7008) (Reckless assault of a child — shaken baby syndrome). Effective: November 1, 2006.**

Enacts a new assault crime involving reckless assault by a person at least 18 years old on a child less than five years old by shaking or causing blunt trauma to the head.

Penal Law § 120.02 reckless assault of a child.

A person is guilty of reckless assault of a child when, being eighteen years of age or more, such person recklessly causes serious physical injury to the brain of a child less than five years old by shaking the child, or by slamming or throwing the child so as to impact the child’s head on a hard surface or object.

2. For purposes of subdivision one of this section, the following shall constitute “serious physical injury”:

a. “serious physical injury” as defined in subdivision

ten of section 10.00 of this chapter; or

b. extreme rotational cranial acceleration and deceleration and one or more of the following: (i) subdural hemorrhaging; (ii) intracranial hemorrhaging; or (iii) retinal hemorrhaging.

(Class D violent felony)

➤**Chap. 349 (S.7054) (Criminal contempt in the first degree — aggravated criminal contempt added as predicate offense). Effective: November 1, 2006.**

Adds aggravated criminal contempt (Penal Law § 215.52) to the list of predicate offenses that can support a prosecution for criminal contempt in the first degree pursuant to Penal Law § 215.51 (c).

➤**Chap. 350 (S.7055) (Aggravated criminal contempt — previous convictions). Effective: November 1, 2006.**

Adds two new subdivisions to Penal Law § 215.52 to elevate the crime of criminal contempt in the first degree (Class E felony) to aggravated criminal contempt (Class D felony) when the defendant has prior criminal contempt convictions:

Penal Law § 215.52 Aggravated criminal contempt.

A person is guilty of aggravated criminal contempt when:

2. he or she commits the crime of criminal contempt in the first degree as defined in subdivision (b) or (d) of section 215.51 of this article and has been previously convicted of the crime of aggravated criminal contempt; or

3. he or she commits the crime of criminal contempt in the first degree, as defined in paragraph (i), (ii), (iii), (v) or (vi) of subdivision (b) or subdivision (c) of section 215.51 of this article, and has been previously convicted of the crime of criminal contempt in the first degree, as defined in such subdivision (b), (c) or (d) of section 215.51 of this article, within the preceding five years.

➤**Chap. 436 (S.8431) (Sale of a controlled substance on or near school grounds). Effective: September 1, 2006.**

Amends Penal Law § 220.34 to add school buses to the locations covered by the law prohibiting sale of a controlled substance on or near school grounds.

Criminal Procedure Law

➤**Chap. 215 (A.9907-a) (Increased duration of orders of protection). Effective: August 25, 2006.**

Amends CPL §§530.12 and 530.13 to increase the maximum duration of an order of protection in felony cases to eight years (up from five) from the date of conviction or from the date of expiration of the maximum term of an indeterminate or determinate sentence of imprisonment, whichever is longer. For Class A misdemeanors, the maximum period has been increased to five years (up from

three), and in all other cases the maximum period has been increased to two years (up from one).

➤**Chap. 253 (A.10767-a) (Orders of Protection — companion animals). Effective: July 26, 2006.**

Amends the Family Court Act and the Criminal Procedure Law to authorize a court to issue an order of protection concerning “companion animals.” The court may order a defendant to “refrain from intentionally injuring or killing, without justification, any companion animal [the defendant or respondent] knows to be owned, possessed, leased, kept or held by [the victim or petitioner] or a minor child residing in the household.

➤**Chap. 695 (S.7408) (Jury Selection — challenges for cause). Effective: November 1, 2006.**

Amends CPL § 360.25 (1)(e) to provide that a prospective juror may be challenged for cause when he or she “served on a trial jury in a prior civil or criminal action involving the same *incident* charged . . .” The section currently refers to “the same *conduct* charged,” and the amendment is intended to clarify that prospective jurors are not subject to for-cause challenge because of prior jury service involving the same type of crime as the one alleged. The new language conforms to CPL § 270.20 (1)(e). *See People v. Petikas*, 10 Misc.3d 915 (Dist. Ct. Nassau Co. 2005).

➤**Chap. 470 (S.6385) (Audio-Visual court appearances). Effective: August 16, 2006.**

Amends CPL § 182.20 to add Essex 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. 532 (S.7987) (Audio-Visual court appearances). Effective: August 16, 2006.**

Amends CPL § 182.20 to add Orange 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.

DNA Databank

➤**Chap. 2 (S.8446) (Expanded DNA databank offenses). Effective: June 23, 2006, applies to offenses committed on or after such date, and to crimes committed prior thereto where the sentence was not completed by June 23, 2006.**

Expands the list of DNA databank offenses [Executive Law § 995 (7)] to include all felonies defined in the Penal Law and the following misdemeanors:

Assault in the third degree

Attempted aggravated assault upon a person less than eleven years old

Attempted menacing in the in the first degree

Menacing in the second degree
Menacing in the third degree
Reckless endangerment in the second degree
Stalking in the fourth degree
Stalking in the third degree
Attempted stalking in the second degree
Forcible touching
Sexual abuse in the third degree
Unlawful imprisonment in the second degree
Attempted unlawful imprisonment in the first degree
Criminal trespass in the second degree
Possession of burglar's tools
Petit larceny
Endangering the welfare of a child
Endangering the welfare of an incompetent or physically disabled person

Guns/Firearms

➤**Chap. 742 (S.8467) (Criminal possession of a loaded firearm elevated to Class C violent felony). Effective: November 1, 2006.**

NOTE: Prosecutors have raised technical objections to this bill. It will likely be amended later this year. Unfortunately, the final version will probably continue to define illegal possession of a loaded firearm as a Class C felony.

This bill elevates the crime of criminal possession of a loaded firearm, without the intent to use it unlawfully against another, from a Class D to a Class C violent felony. It repeals Penal Law § 265.02 (4) and inserts the provision in Penal Law § 265.03, which is revised as follows:

Penal Law § 265.03 Criminal possession of a weapon in the second degree.

A person is guilty of criminal possession of a weapon in the second degree when:

- (1) with intent to use the same unlawfully against another, such person:
 - possesses a machine-gun;
 - possesses a disguised gun; or
- (2) such person possesses five or more firearms; or
- (3) such person possesses any loaded firearm. Such possession shall not, except as provided in subdivision one or seven of section 265.02 of this article, constitute a violation of this section if such possession takes place in such person's home or place of business.

The effect of this upgrade is that a determinate sentence with a minimum of 3½ years and a maximum of 15 years will be mandatory for a first offense. Even with a plea to the Class D violent felony of attempted criminal possession of a weapon in the second degree, a prison sentence can only be avoided if the court finds, pursuant

to Penal Law § 70.02 (4) (b), that an alternative sentence is "consistent with the public safety and does not deprecate the seriousness of the crime and one or more of the following factors exist: i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or iii) possible deficiencies in proof of the defendant's commission of an armed felony."

➤**Chap. 764, L.2005 (Criminal sale/possession of a weapon). Effective: December 21, 2005.**

Redefines the crime of criminal possession of a weapon in the third degree (Penal Law § 265.02 (5) — Class D felony) as possession of 3 or 4 firearms (from 20 or more). Defines the crime of criminal possession of a weapon in the second degree (new subdivision 2 of Penal Law § 265.03 — Class C felony) as possession of 5 or more firearms, and defines the crime of criminal possession of a weapon in the first degree (Penal Law § 265.04 (1) — Class B felony) as possession of 10 or more firearms.

Chapter 764 also redefines the crime of criminal sale of a firearm in the first and second degrees (Penal Law §§ 265.13, 265.12) as unlawful sale of ten or more firearms (1st degree) or five or more firearms (2nd degree) in a period of not less than one year.

➤**Chap. 199 (A.9272) (Firearms prohibited on school buses). Effective: November 1, 2006.**

Amends Penal Law § 265.01 to prohibit possession of a rifle, shotgun or firearm on school buses.

➤**Chap. 281 (A.11864) (Possession of guns at pistol ranges — minimum age requirement). Effective: July 26, 2006.**

Amends Penal Law § 265.20 (7)(e) to legalize the possession of a pistol or revolver by a person fourteen years of age (down from eighteen) at a pistol range under certain conditions.

Vehicle and Traffic Law and Driving (or Boating) While Intoxicated

➤**Chap. 732 (S.8232) (DWI — new offenses, increased penalties, new conditions). Effective: November 1, 2006.**

This bill enacts numerous changes to driving while intoxicated laws and related Penal Law statutes:

It enacts a new crime, aggravated driving while intoxicated, defined as a blood alcohol reading of .18% or higher (VTL § 1992-a), a misdemeanor punishable by up to one-year imprisonment, and enhanced fine of \$1000–

\$2500. The bill restricts plea bargaining below the level of driving while intoxicated in these cases, unless the district attorney determines the charge is "not warranted" and the court "sets forth upon the record the basis for a [less-er] disposition." In any event, plea dispositions must include mandated completion of a drinking driver program, unless the defendant completed the program prior to sentencing as a condition of the plea. Sentences of probation for aggravated driving while intoxicated must include installation and maintenance of an ignition interlock system during the period of probation. The mandatory license revocation period pursuant to VTL § 1993 (2) for convictions of aggravated driving while intoxicated is one year; 18 months when the defendant has a prior conviction for an offense defined in VTL § 1192 (2) (2-a) (3) or (4) within the preceding 10 years.

Aggravated driving while intoxicated involving the operation of a taxicab or livery car carrying passengers, or certain non-commercial and commercial trucks, shall be a Class E felony, punishable by up to 4 years imprisonment and a fine of \$1000–\$5000. Cases involving operation of a school bus carrying a passenger, or a truck carrying hazardous material, shall be a Class D felony, punishable by up to 7 years imprisonment and fine of \$2000–\$10,000.

The bill also enacts a new crime driving while ability impaired by the combined influence of drugs and alcohol, VTL § 1192 (4-a), a misdemeanor punishable by up to one year imprisonment and a fine of \$500–\$1,000; higher penalties apply to operation of special vehicles.

The bill also requires that a defendant charged with driving while intoxicated, or impaired by drugs, or drugs and alcohol, attend and complete a drinking driver program as a condition of a plea of guilty to driving while impaired, unless the defendant has already done so as a condition of the plea, or "for other good cause shown":

VTL § 1192 (10)

In any case wherein the charge laid before the court alleges a violation of subdivision two, three, four or four-a of this section, no plea of guilty to subdivision one of this section shall be accepted by the court unless such plea includes as a condition thereof the requirement that the defendant attend and complete the alcohol and drug rehabilitation program established pursuant to section eleven hundred ninety-six of this article, including any assessment and treatment required thereby; provided, however, that such requirement may be waived by the court upon application of the district attorney or the defendant demonstrating that the defendant, as a condition of the plea, has been required to enter into and complete an alcohol or drug treatment program prescribed pursuant to an alcohol or substance abuse screening or assessment con-

ducted pursuant to section eleven hundred ninety-eight-a of this article or for other good cause shown. The provisions of this subparagraph shall apply, notwithstanding any bars to participation in the alcohol and drug rehabilitation program set forth in section eleven hundred ninety-six of this article; provided, however, that nothing in this paragraph shall authorize the issuance of a conditional license unless otherwise authorized by law.

The bill requires alcohol dependency screening for all first offenders with a blood alcohol level of less than .15%, and requires an alcohol dependency assessment when it is 1) indicated by screening; 2) the defendant is a repeat offender; or 3) the blood alcohol level is alleged to be .15% or higher.

The bill also increases the license revocation period for refusal to submit to a chemical test to one year (up from 6 months), 18 months for repeat offenders and operators of commercial vehicles. And it provides for permanent revocation when the defendant has 1) three or more convictions under section 1192 (at least one of which is a crime) or three or more test refusals or any combination thereof within a four year period, or 2) four or more convictions, refusals or combinations thereof within an eight year period. A waiver of permanent revocation is available after five years in certain circumstances.

Penal Law Amendments:

Amends Penal Law § 125.13 (Vehicular manslaughter in the first degree) by adding new subdivisions:

A person is guilty of manslaughter in the first degree when he or she commits the crime of vehicular manslaughter in the second degree, and either:

1. commits the crime while operating a motor vehicle while such person has .18 grams or more by weight of alcohol in such person's blood as shown by chemical analysis of such person's blood, breath, urine, or saliva made pursuant to the provisions of section eleven hundred ninety-four of the vehicle and traffic law;

3. causes the death of more than one other person

4. has previously been convicted of violating any provision of this article or article one hundred twenty-five of this title involving the operation of a motor vehicle, or was convicted in any other state or jurisdiction of an offense involving the operation of a motor vehicle which, if committed in this state, would constitute a violation of this article or article one hundred twenty-five of this title; or

[Note the following subdivision is inconsistent with Chap. 245 see below]

- (5)(a) has previously been convicted two or more times within the preceding five years of a violation of the provisions of section eleven hundred ninety-two of the vehicle and traffic law for which a sentence of imprison-

ment is authorized and at least one such violation resulted in a conviction for a misdemeanor or felony, or (b) has been convicted three or more times within the preceding ten years of a violation of the provisions of section eleven hundred ninety-two of the vehicle and traffic law for which a sentence of imprisonment is authorized and at least one such violation resulted in a conviction of a misdemeanor or felony; provided that, for the purposes of this subdivision, a conviction in any other state or jurisdiction for an offense which, if committed in this state, would constitute a violation of section eleven hundred ninety-two of the vehicle and traffic law, shall be treated as a violation of such law.

➤**Chap. 245 (A.10619-b) (Vehicular Assault; Vehicular Manslaughter — offense upgrade). Effective: November 1, 2006**

This legislation adds a new subdivision to Penal Law § 125.13 to elevate vehicular manslaughter in the second degree to the first degree offense when the defendant “has previously been convicted of violating any of the provisions of section eleven hundred ninety-two of the vehicle and traffic law within the preceding ten years.” As noted above, Chapter 732 amends the same statute and inconsistently elevates the offense level when the defendant has been convicted two or more times within the preceding five years, or three or more times within the preceding ten years.

Chapter 245 also elevates the crime of vehicular assault in the second degree to the first degree offense when the defendant has a prior VTL § 1192 conviction within the preceding ten years.

➤**Chap. 571 (A.4914-b) (Vehicle and Traffic Law — right of way violations). Effective: November 1, 2006.**

Amends VTL § 510 to require a mandatory license suspension for right of way violations (VTL Article 26) that result in serious physical injury (45 day suspension) or death (75 day suspension), and provides for mandatory license revocation for a subsequent right of way violation committed within 18 months. The bill also amends Penal Law § 65.10 to authorize courts to order defendants convicted of right of way violations involving serious physical injury or death to participate in a motor vehicle accident prevention course as a term and condition of probation or conditional discharge.

➤**Chap. 231 (A.10369-a) (DWI — Out-of-state convictions). Effective: November 1, 2006 and shall apply to convictions “occurring” on or after such date.**

VTL § 1192 (8) specifies that an out-of-state conviction for any level drunk driving offense shall be considered a prior conviction for driving while ability impaired for purposes of determining penalties, provided the conduct would have constituted driving while impaired in New

York State. This bill provides that an out-of-state offense shall be deemed to be a prior felony, misdemeanor, or violation depending on its classification had the underlying conduct occurred in New York.

➤**Chap. 151 (S.7154-b) (Boating while intoxicated — increased penalties). Effective: August 6, 2006.**

Amends the Navigation Law to increase penalties for boating while impaired and intoxicated:

Boating while impaired: 15 days and fine of \$300–\$500 (up from \$250–\$300); second offense within 5 years — up to 30 days and fine of \$500–\$750 (down from \$500–\$1500); third offense within 10 years elevated to a misdemeanor punishable by up to 6 months and fine of \$500–\$1500.

Boating while intoxicated First offense: imprisonment for up to one year (from 90 days), fine of \$500–\$1000 (up from \$50–\$500); second offense within 10 years elevated to a Class E felony punishable by up to 4 years imprisonment and fine of \$1000–\$5000; third conviction within 10 years elevated to a Class D felony punishable by up to 7 years imprisonment and fine of \$2000–\$10,000.

➤**Chap. 618 (A.10891) (DWI — Blood samples — Authorized Personnel). Effective: August 16, 2006.**

Amends Public Health Law § 3703 to authorize registered physician assistants and certified nurse practitioners to supervise and direct the withdrawal of blood to determine alcohol or drug content pursuant to VTL § 1194 (4).

Collateral Consequences/Employment Discrimination/Rehabilitation

VETOED (S.7728-a) (Employment Discrimination — Inquiries about youthful offender adjudications and sealed violations prohibited).

Amends Executive Law § 296 (16) to render it an “unlawful discriminatory practice” for an employer to inquire about youthful offender adjudications, traffic infractions, or a violations sealed pursuant to CPL § 160.55, or to take adverse action against an individual because of them.

It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in sub-

division two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a traffic infraction or violation sealed pursuant to section 160.55 of the criminal procedure law in connection with the licensing, employment or providing of credit or insurance to such individual; provided, however, that the provisions hereof shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law.

VETOED (S.7730-a) (Employment Discrimination).

Correction Law Article 23-a prohibits discrimination in certain employment and licensing decisions involving persons with criminal convictions, unless there is a direct relationship between the offense and the specific license or employment sought. This bill extends the qualified protections of Article 23-a to persons who are already employed or licensed and prohibits unwarranted adverse action because of previous criminal convictions.

VETOED (A.6719) (Employment — barbering license).

Amends General Business Law §§ 434 and 438 to provide that in determining good moral character for purposes of issuing a barbering license the secretary of state “shall not automatically disqualify an applicant on the basis of a criminal conviction.”

➤**Chap. 720 (S.8021) (Access to reports concerning applications for certificates of relief from civil liabilities). Effective: June 7, 2006 (as amendment to Chap. 98).**

This bill amends Correction Law § 702 (6) to provide applicants for a certificate of relief from civil disabilities access to evaluative reports by probation offices in connection with requests for the certificate (as opposed to mere “examination” rights to such reports).

Miscellaneous

VETOED (S.8368) (Early Conditional Parole for Deportation Purposes Only available for determinate sentence for drug offense).

Following enactment of the 2004 Drug Law Reform Act, the Board of Parole announced that it would not consider inmates serving determinate sentences for drug offenses eligible for early parole release for deportation purposes only [Executive Law § 259-i (d)(i)]. This bill makes clear that such inmates are eligible for early conditional release notwithstanding service of a determinate term of imprisonment.

VETOED (A.3926) (SHU confinement barred for mentally ill inmates).

This bill bars the Department of Correctional Services from placing inmates with serious mental disorders in Special Housing Units for disciplinary confinement. Instead such inmates shall be placed in residential treatment units jointly operated by DOCS and the Office of Mental Health. Inmates covered by the ban include those with DSM Axis I diagnoses of 1. a) schizophrenia and other psychotic disorders, b) major depressive disorders, c) bipolar disorders, and d) cognitive disorders, specifically delirium, dementia and amnesiac disorder, as well as 2) inmates diagnosed with brain injury, 3) those determined to be at risk of suicide, and 4) “inmates who have otherwise substantially deteriorated mentally or emotionally while confined in isolation where [transfer to a residential treatment unit] is deemed to be clinically appropriate by a mental health clinician.” The bill gives oversight authority to the New York State Commission on Quality of Care for the Mentally Disabled to enforce compliance with its terms.

VETOED (A.10085) (Collection of parole supervision fees).

Amends Executive Law § 259-a to provide that parole supervision fees shall not be collected by parole officers but shall be payable at a central location.

VETOED (A.10113-a) (Illegal hunting — increased fines and penalties).

Amends Environmental Conservation Law § 71-0921 to increase fines and penalties for illegal taking of big game, or illegal spotlighting of big game or deer: first offense — up to 1 year imprisonment and a fine of \$500 - \$3000 (up from \$250-\$2000), subsequent offenses fine of \$1000-\$5000. In addition, the bill provides for new mandatory firearm license suspensions: first offense — 2 years; subsequent offense — 5 years.

➤**Chap. 647 (S. 1626-a) (Notification to child protective services of certain convictions). Effective: October 12, 2006.**

Requires district attorneys to notify local child protective services agencies of convictions for crime defined in Penal Law Articles 125, 130, 260 or 263 involving a victim under the age of 18 by a person legally responsible for such child.

➤**Chap. 346 (s.6957) (Unlawful dissection, body stealing, grave robbing, sale and purchase of human organs — Offense level upgrades). Effective: November 1, 2006.**

Elevates the crime of unlawful dissection of the body of a human being (Public Health Law § 4210-a) from an unclassified misdemeanor to a Class E felony; elevates the

crimes of body stealing (Public Health Law § 4216) and grave robbing (“opening graves” — Public Health Law § 4218) from unclassified felonies to Class D felonies; elevates the crime of unlawful sale or purchase of human organs (Public Health Law § 4307) from an unclassified misdemeanor to a Class E felony.

➤**Chap. 538 (S.8096) (Right to Assigned Counsel – Supreme Court in Family Court matter). Effective: August 16, 2006.**

Adds a new subdivision 8 to Judiciary Law § 35 to provide a right to assigned counsel in Supreme Court in a “matter which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred thereto pursuant to law, and under circumstances whereby, if such proceedings were pending in family court would be required by section two hundred sixty-two of the family court act to appoint court.”

Freedom of Information Law

➤**Chap. 492 (S.7011-a) (FOIL — attorney’s fees). Effective: August 16, 2006.**

The Public Officers Law authorizes attorney’s fees in FOIL litigation only when the requested documents are of significant interest to the general public. This law changes the standard and allows attorney fees in Article 78 proceedings when the requestor substantially prevails and the agency “had no reasonable basis for denying access,” or “failed to respond to a request or appeal within the statutory time.”

VETOED (A.8007) (FOIL – electronic data).

Adds a new subdivision 9 to Public Officers Law § 89 to provide:

“When records maintained electronically include items of information that would be available under this article, as well as items of information that may be withheld, an agency in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a manner that permits the segregation and retrieval of available items in order to provide maximum public access.”

➤**Chap. 182(A.7933-b) (FOIL — electronic requests and responses). Effective: October 24, 2006.**

Amends the Freedom of Information Law (Public Officers Law § 89) to require the Committee on Open Government to “develop a form, which shall be made available on the internet, that may be used by the public to request a record.” The bill also requires agencies within the means to do so to accept e-mail requests for records.

Sunset Clause Extended

➤**Chap. 145 (A.10139) — Vehicle and Traffic Law — pay-**

ment of fees and other charges by credit card — extended to July 7, 2010.

➤**Chap. 34 (A. 10339) —** Extends the sunset provision 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 September 1, 2009.

Peace or Police Officer Status

Peace Officers

➤**Chap. 584 (A.7678) —** employees of the Town of Yorktown serving as court attendants at Town of Yorktown court facilities

➤**Chap. 581 (A.6715-b) —** certain employees of the department of public safety of the town of Rye

➤**Chap. 467 (S.6319) —** member of the Erie County Medical Center security force

➤**Chap. 438 (S.8436) —** employees of the village of Lake George acting as peace officers pursuant to local law

VETOED (A.8858-a) — civil deputies employed by the Onondaga County sheriff’s department

VETOED (S.1479-a) — employees appointed by the sheriff of Lewis County, when acting pursuant to their special duties serving as recreational patrol officers

➤**Chap. 653 (S4301-a) —** employees of the Lewis County sheriff’s department serving as uniformed security officers at Lewis County Court facilities

➤**Chap. 482 (S.6675) —** employees of the town of Riverhead serving as court officers at town of Riverhead court facilities

➤ **Chap. 501 (S.7356) —** employees of the town court of the town of Southold serving as uniformed court officers

Police Officers

➤**Chap. 693 (S.7346) –** supervisor of forest ranger services; assistant supervisor of forest ranger services; forest ranger 3, forest ranger 2; forest ranger 1 employed by the state department of environmental conservation or sworn officer of the division of forest protection and fire management in the department of environmental conservation responsible for wild land search and rescue, wild land fire management in the state as prescribed in subdivision eighteen of section 9-0105 and title eleven of article nine of the environmental conservation law, exercising care, custody and control of state lands administered by the department of environmental conservation. Effective: Upon Governor’s signature. ♪