

2008 Legislative Review

By Al O'Connor*

[Ed. Note: The REPORT annually presents Staff Attorney Al O'Connor's review of relevant New York State legislation.]

New Crimes

➤ Chap. 69 (A.614) (Criminal Mischief – Interference with Emergency Calls). Effective: July 6, 2008.

Adds a new subdivision to Penal Law § 145.00 (criminal mischief in the fourth degree — Class A misdemeanor) to criminalize disabling or removing telephone equipment with the intent to interfere with the placing of a call for emergency assistance.

Penal Law § 145.00 — A person is guilty of criminal mischief in the fourth degree when: having no right to do so, nor any reasonable ground to believe he or she has such right, he or she:

4. With intent to prevent a person from communicating a request for emergency assistance, intentionally disables or removes telephonic, TTY or similar communication sending equipment while that person: (a) is attempting to seek or is engaged in the process of seeking emergency assistance from police, law enforcement, fire or emergency medical services personnel; or (b) is attempting to seek or is engaged in the process of seeking emergency assistance from another person or entity in order to protect himself, herself or a third person from imminent physical injury. The fact that the defendant has an ownership interest in such equipment shall not be a defense to a charge pursuant to this subdivision.

In an approval message, Governor Paterson wrote: "Although this is a laudable step, an abuser can keep a victim from making or completing a call by means other than disabling or removing telephone equipment. For example, if the abuser physically restrains the victim from using the telephone, or simply hangs up the telephone without damaging the equipment, that is an equally blameworthy and harmful act, and should be subject to the same punishment."

➤ Chap. 405 (A.8488-a) (Luring a Child). Effective: October 4, 2008.

Penal Law § 120.70 Luring a child.

1. A person is guilty of luring a child when he or she

* 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.

lures a child into a motor vehicle, aircraft, watercraft, isolated area, building, or part thereof, for the purpose of committing against such child any of the following offenses: an offense as defined in section 70.02 of this chapter; an offense as defined in section 125.25 or 125.27 of this chapter; a felony offense that is a violation of article one hundred thirty of this chapter; an offense as defined in section 135.25 of this chapter; an offense as defined in sections 230.30, 230.33 or 230.34 of this chapter; an offense as defined in sections 255.25, 255.26, or 255.27 of this chapter; or an offense as defined in sections 263.05, 263.10, or 263.15 of this chapter. For purposes of this subdivision "child" means a person less than seventeen years of age. Nothing in this section shall be deemed to preclude, if the evidence warrants, a conviction for the commission or attempted commission of any crime, including but not limited to a crime defined in article one hundred thirty-five of this chapter.

2. Luring a child is a class E felony, provided, however, that if the underlying offense the actor intended to commit against such child constituted a class A or a class B felony, then the offense of luring a child in violation of this section shall be deemed respectively, a class C felony or class D felony.

The legislation also adds this new crime to the list of Megan's Law offenses defined in the Correction Law.

➤ Chap. 74 (A.9480) (Aggravated Harassment — Displays of Nooses). Effective: November 1, 2008.

Adds a new subdivision (5) to Penal Law § 240.31 (aggravated harassment in the first degree) dealing with displays of nooses:

Penal Law § 240.31 — 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:

5. Etches, paints, draws upon or otherwise places or displays a noose, commonly exhibited as a symbol of racism and intimidation, 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.

(Class E felony)

➤ **Chap. 304 (S.4053) (Impersonating another on the internet). Effective: November 1, 2008.**

Adds a new subdivision to Penal Law § 190.25 (criminal impersonation in the second degree — Class A misdemeanor) relating to impersonating others on the internet.

Penal Law Section § 190.25 — A person is guilty of criminal impersonation in the second degree when he:

4. Impersonates another by communication by internet website or electronic means with intent to obtain a benefit or injure or defraud another, or by such communication pretends to be a public servant in order to induce another to submit to such authority or act in reliance on such pretense.

➤ **Chap. 308 (S.6466-a) (Criminalizes presence at an animal fight). Effective: July 21, 2008.**

Adds a new subdivision (5) to Agriculture and Markets Law § 351 to criminalize the “knowing presence as a spectator at any place where an exhibition of animal fighting is being conducted.” First offense — violation punishable by fine of up to \$500; second and subsequent offense within 5 years — misdemeanor punishable by 1 year imprisonment and/or \$1,000 fine.

➤ **Chap. 639 (S.8201-a) (Unauthorized recording). Effective: December 6, 2008.**

In 1994, the Legislature enacted the crime of unauthorized operation of a recording device in a motion picture theater, a violation. This bill expands the crime to live theaters, and upgrades the offense to a Class A misdemeanor (second degree) or Class E felony (first degree) under certain aggravating circumstances.

Penal Law § 275.33 Unlawful operation of a recording device in a motion picture or live theater in the second degree.

A person is guilty of unlawful operation of a recording device in a motion picture or live theater in the second degree when he or she violates section 275.32 of this article:

1. for financial profit or commercial purposes; or
2. in circumstances where the material recorded is fifteen or more minutes, or all or a substantial portion, of the motion picture or live theatrical performance; or
3. in circumstances where such person has previously been convicted within the past five years of violating section 275.32 or 275.34 of this article or this section.

(Class A misdemeanor)

Penal Law § 275.34 Unlawful operation of a recording device in a motion picture or live theater in the first degree.

A person is guilty of unlawful operation of a record-

ing device in a motion picture or live theater in the first degree when he or she commits the crime of unlawful operation of a recording device in a motion picture or live theater in the second degree as defined in section 275.33 of this article and has previously been convicted within the past ten years of violating section 275.33 of this article or this section.

(Class E felony)

➤ **Chap. 566 (A.2385) (Disturbance of a funeral or memorial service). Effective: September 25, 2008.**

Penal Law § 240.21 criminalizes the disturbance of a religious service (Class A misdemeanor). This bill adds funeral, burial or memorial services to the statutory scheme. The legislation is a response to the crackpot activities of the Westboro Baptist Church of Topeka, Kansas, which has demonstrated at the funerals of soldiers killed in Iraq, claiming their deaths were God’s vengeance for American society’s tolerance of homosexuality.

➤ **Chap. 586 (A.10343-c) (Confining companion animals in extreme temperatures). Effective: January 23, 2009.**

Adds a new section to the Agriculture and Markets Law (§ 353-d) prohibiting the confinement of companion animals in vehicles in extreme temperatures (hot or cold) without proper ventilation or protection. First offense — violation carrying \$50 - \$100 fine; second and subsequent offenses \$100 - \$250.

➤ **Chap. 431 (S.1862) (Facilitating a sexual performance by a child with a controlled substance). Effective: November 1, 2008.**

Establishes a new Class B felony of facilitating a sexual performance by a child with a controlled substance or alcohol.

Penal Law § 263.30 Facilitating a sexual performance by a child with a controlled substance or alcohol.

1. A person is guilty of facilitating a sexual performance by a child with a controlled substance or alcohol when he or she:

- (a) (i) knowingly and unlawfully possesses a controlled substance as defined in section thirty-three hundred six of the public health law or any controlled substance that requires a prescription to obtain, (ii) administers that substance to a person under the age of seventeen without such person’s consent, (iii) intends to commit against such person conduct constituting a felony as defined in section 263.05, 263.10, or 263.15 of this article, and (iv) does so commit or attempt to commit such conduct against such person; or
- (b) (i) administers alcohol to a person under the age of seventeen without such person’s consent, (ii) intends to commit against such person conduct constituting a

felony defined in section 263.05, 263.10, or 263.15 of this article, and (iii) does so commit or attempt to commit such conduct against such person.

2. For the purposes of this section, “controlled substance” means any substance or preparation, compound, mixture, salt, or isomer of any substance defined in section thirty-three hundred six of the public health law.

(Class B felony)

➤ **Chap. 279 (S.8376-a) (Unlawful possession of “skimmer devices” — Grand Jury Business Records). Effective: Penal Law amendments — November 1, 2008; Grand Jury amendments (p. 12) — August 6, 2008.**

Establishes new crimes relating to unlawful possession of a “skimmer device,” a “device designed or adapted to obtain personal identifying information from a credit card, debit card, public benefit card, access card or device, or other card or device that contains personal identifying information.”

Penal Law § 190.85 Unlawful possession of a skimmer device in the second degree.

1. A person is guilty of unlawful possession of a skimmer device in the second degree when he or she possesses a skimmer device with the intent that such device be used in furtherance of the commission of the crime of identity theft or unlawful possession of personal identification information as defined in this article.

(Class A misdemeanor)

Penal Law § 190.86 Unlawful possession of a skimmer device in the first degree.

A person is guilty of unlawful possession of a skimmer device in the first degree when he or she commits the crime of unlawful possession of a skimmer device in the second degree and he or she has been previously convicted within the last five years of identity theft in the third degree as defined in section 190.78, identity theft in the second degree as defined in section 190.79, identity theft in the first degree as defined in section 190.80, unlawful possession of personal identification information in the third degree as defined in section 190.81, unlawful possession of personal identification information in the second degree as defined in section 190.82, unlawful possession of personal identification information in the first degree as defined in section 190.83, unlawful possession of a skimmer device in the second degree as defined in section 190.85, unlawful possession of a skimmer device in the first degree as defined in this section, grand larceny in the fourth degree as defined in section 155.30, grand larceny in the third degree as defined in section 155.35, grand larceny in the second degree as defined in section 155.40 or grand larceny in the first degree as defined in section 155.42 of this chapter.

(Class E felony)

The law also amends the restitution statute (Penal Law § 60.27) to provide that a victim of an identity theft offense is eligible for restitution for the “value of the time reasonably spent . . . attempting to remediate the harm incurred . . . from the offense.”

Sex Offenders

➤ **Chap. 67 (S.6875-a) (Sex Offenders — disclosure of internet screen names — prohibition on e-mail communication with minors). Effective: April 28, 2008.**

Chapter 67 requires registered sex offenders to provide DCJS with internet service account information, and their “internet identifiers,” such as e-mail addresses, and “designations used for chat, instant messaging, social networking or other similar internet communication.” Offenders must notify DCJS within 10 days of a change in this information, or face felony charges for failure to comply with the Sex Offender Registration Act. DCJS is authorized to release this information to “authorized internet entities” that run social networking sites accessible to persons under the age of 18.

Chapter 67 also includes onerous (and possibly unconstitutional) restrictions on e-mail communication between offenders and persons under age 18 as a mandatory term and condition of probation and parole or post-release supervision. It bars defendants over the age of eighteen, who have been convicted of a sex offense involving a victim under age eighteen, from communicating by e-mail with minors. (The bill imposes the same ban on defendants classified as Level 3 offenders, and those who used the internet in the commission of the crime. The bill includes only one exception for parents who are not otherwise prohibited from communicating with their children. Thus, an eighteen year-old high-school student convicted of the misdemeanor offense of sexual misconduct for having sex with a 16 year-old girlfriend would be prohibited from e-mail communication with his younger siblings for six years. A defendant convicted of a felony level sex offense could be barred from internet communication with siblings, and other minor relatives (including grandchildren) for ten, fifteen, twenty and even twenty-five years.

➤ **Chap. 568 (A.4988) (Regulations concerning housing of sex offenders). Effective: January 23, 2009.**

This bill requires the Division of Parole, the Division of Probation and Correctional Alternatives, and the Office of Temporary and Disability Assistance to promulgate rules regarding the placement of level 2 and 3 sex offenders. The rules must address the following issues:

(a) the location of other sex offenders required to register under the sex offender registration act, specifically whether there is a concentration of registered sex

- offenders in a certain residential area or municipality;
- (b) the number of registered sex offenders residing at a particular property;
- (c) the proximity of entities with vulnerable populations;
- (d) accessibility to family members, friends or other supportive services, including, but not limited to, locally available sex offender treatment programs with preference for placement of such individuals into programs that have demonstrated effectiveness in reducing sex offender recidivism and increasing public safety; and
- (e) the availability of permanent, stable housing in order to reduce the likelihood that such offenders will be transient.

(Amending Executive Law §§ 259-a, 243 and Social Services Law § 20)

➤ **Chap. 296 (A.11500-a) (Sex Offense Conviction — Automatic Revocation of Teacher Certificate). Effective: July 21, 2008.**

Amends Education Law § 305 to require automatic revocation of a certificate of qualification as a teacher of any person convicted of a registerable sex offense. The legislation also adds a new section to the Criminal Procedure Law (CPL § 380.95) requiring district attorneys to notify the Commissioner of Education of a teacher's sex offense conviction.

➤ **Chap. 430 (S.1531) (Sex Offenders — Prohibition on holding real estate license). Effective: August 5, 2008.**

Prohibits persons convicted of a registerable sex offense from holding a license as a real estate broker or real estate salesman. The civil disability can be lifted by executive pardon or a certificate of good conduct.

➤ **Chap. 232 (S.4332) (Megan's Law — addition of new federal crimes as registerable offenses). Effective: July 7, 2008 and applies retroactively to offenses previously committed where defendant has not completed sentence by effective date.**

Adds 18 U.S.C. 2422(b) (enticement or coercion of minor to engage in prostitution or sexual activity); 18 U.S.C. 2423 (transportation of minor with intent to engage in criminal sexual activity); and 18 U.S.C. 2425 (use of interstate facilities to transmit information about a minor to engage in sexual activity) to the list of registerable offenses under the New York Sex Offender Registration Act (Correction Law § 168-a).

Penal Law

➤ **Chap. 291 (A.9813) (Defrauding vulnerable elderly persons). Effective: September 19, 2008.**

Amends Penal Law 190.65 (scheme to defraud in the first degree) to add a provision relating to the defrauding of vulnerable elderly persons. As defined in Penal Law § 260.30, a vulnerable elderly person is a "person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable or adequately providing for his or her own health or personal care."

Penal Law § 190.65 — 1. A person is guilty of scheme to defraud in the first degree when he or she:

- (c) engages in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person, more than one of whom is a vulnerable elderly person as defined in subdivision three of section 260.30 of this chapter or to obtain property from more than one person, more than one of whom is a vulnerable elderly person as defined in subdivision three of section 260.30 of this chapter, by false or fraudulent pretenses, representations or promises, and so obtains property from one or more such persons.

(Class E felony)

➤ **Chap. 68 (A.9818) (Assault on persons 65 or older). Effective: June 29, 2008.**

Adds a new subdivision to Penal Law § 120.05 (assault in the second degree) relating to victims age 65 or older by persons more than ten years younger.

Penal Law § 120.05 — A person is guilty of assault in the third degree when:

- 12. With intent to cause physical injury to a person who is sixty-five years of age or older, he or she causes such injury to such person, and the actor is more than ten years younger than such person.

(Class D felony)

➤ **Chap. 400 (A.5188-a) (Falsely Reporting an incident of child abuse). Effective: February 1, 2009.**

Expands the crime of falsely reporting an incident in the third degree [Penal Law § 240.50 (4) — Class A misdemeanor] to cover the false report of an "occurrence or condition of child abuse or maltreatment" to a mandatory child abuse reporter. The law was previously limited to false reports made to the statewide central register of child abuse.

➤ **Chap. 45 (A.6011-d) (Assault on city marshals — traffic enforcement agents). Effective: July 22, 2008.**

Adds city marshals and traffic enforcement officers and agents to the list of persons protected by Penal Law §

120.05 (3) and (11) (assault on certain persons with intent to prevent them from performing lawful duties, or while they are performing assigned duties).

➤ **Chap. 590 (A.10765) (Computer Tampering/Duplication — Medical Records). Effective: November 1, 2008.**

Adds a new subdivision (2) to the crime of computer tampering in the second degree (Penal Law § 156.26) and establishes the new crime of unlawful duplication of computer related material in the second degree relating to tampering and unlawful duplication of medical records.

Penal Law § 156.26 - A person is guilty of computer tampering in the second degree when he or she commits the crime of computer tampering in the fourth degree and he or she intentionally alters in any manner or destroys:

2. computer material that contains records of the medical history or medical treatment of an identified or readily identifiable individual or individuals and as a result of such alteration or destruction, such individual or individuals suffer serious physical injury, and he or she is aware of and consciously disregards a substantial and unjustifiable risk that such serious physical injury may occur.

(Class D felony)

Penal Law § 156.29 Unlawful duplication of computer related material in the second degree.

A person is guilty of unlawful duplication of computer related material in the second degree when having no right to do so, he or she copies, reproduces or duplicates in any manner computer material that contains records of the medical history or medical treatment of an identified or readily identifiable individual or individuals with an intent to commit or further the commission of any crime under this chapter.

(Class B misdemeanor)

➤ **Chap. 426 (A.11636) (Coercion in the second degree — compelling the joining of a street gang). Effective: November 1, 2008.**

A person is guilty of coercion in the second degree if he or she, by certain threats, “compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in conduct which he or she has a legal right to engage.” This bill adds to the statutory definition: “or compels or induces a person to join a group, organization or criminal enterprise which such latter person has a right to abstain from joining.” The bill memo states the purpose is to criminalize threatening persons to compel them to join street gangs.

(Class A misdemeanor)

➤ **Chap. 226 (S.1829-c) (Offense upgrade — Identify theft of member of armed forces). Effective: November 4, 2008.**

Elevates the crime of identify theft when the victim is a member of the armed forces deployed outside of the United States.

Penal Law § 190.80-a Aggravated identity theft.

A person is guilty of aggravated identity theft 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 knows that such person is a member of the armed forces, and knows that such member is presently deployed outside of the continental United States and:

1. thereby obtains goods, money, property or services or uses credit in the name of such member of the armed forces in an aggregate amount that exceeds five hundred dollars; or
2. thereby causes financial loss to such member of the armed forces in an aggregate amount that exceeds five hundred dollars.

(Class D felony)

The bill also amends Penal Law § 190.83 (Unlawful possession of personal identification information in the first degree) by adding new subsections concerning victims who are members of the armed forces.

Penal Law § 190.83 Unlawful possession of personal identification information in the first degree.

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:

3. with intent to further the commission of identity theft in the second degree:
 - (a) he or she supervises more than two accomplices, and
 - (b) he or she knows that the person whose personal identification information that he or she possesses is a member of the armed forces, and
 - (c) he or she knows that such member of the armed forces is presently deployed outside of the continental United States.

(Class D felony)

➤ **Chap. 601 (S.2061-a) (Criminal Mischief — Jointly owned property). Effective: November 1, 2008.**

Amends Penal Law § 145.13 to provide that in criminal mischief prosecutions “property of another shall include property jointly or co-owned by another person.” The bill

provides it is “no defense that one believes that he or she has a reasonable ground or right to damage such property because he or she owns such property along with another person unless such other person has given . . . consent to damage such property.” The bill is intended to countermand the holding in *People v. Person*, 239 A.D.2d 612 (2d Dept. 1997).

➤ **Chap. 434 (S.3079-a) (Criminal Impersonation — Federal law enforcement officers). Effective: November 1, 2008.**

Penal Law § 190.26 (criminal impersonation in the first degree — Class E felony) applies to the impersonation of police officers. This bill adds federal law enforcement officers to the statutory scheme.

➤ **VETOED (S.6440) (Gambling — Coin operated gambling devices).**

Technical amendment to Penal Law § 225 (6) and (7-a) to clarify that games of amusement that provide an extra ball, time or game do not constitute “coin operated gambling devices.”

➤ **Chap. 312 (S.6764) (Enterprise Corruption — new predicate offenses). Effective: October 19, 2008.**

Adds disseminating indecent material to minors in the first degree (Penal Law § 235.22) and promoting a sexual performance by a child (Penal Law § 263.15) to the list of offenses that can support an enterprise corruption prosecution.

➤ **Chap. 70 (A.5513-c) (Non-Support of a Child — Age increase). Effective: November 1, 2008.**

This bill amends Penal Law § 260.05 to increase the age limit for criminal prosecution for a non-support of a child from 16 to 18 when there is an outstanding child support order.

➤ **VETOED (S.7899) (Fireworks permits authorized for private citizens).**

Amends Penal Law § 405 to allow fireworks permits to be issued to private citizens for displays at places of public accommodation (weddings, parties, etc.).

➤ **Chap. 510 (A.9673) (Aggravated harassment — digital messages). Effective: December 3, 2008.**

Amends the aggravated harassment statute (Penal Law § 240.30) to apply to digital recordings — reportedly in response to an incident in Yonkers where a defendant delivered threats to various households on CD-ROM.

➤ **Chap. 257 (S.7528) (Criminalizes possession of “plastic knuckles”). Effective: November 1, 2008.**

Adds plastic knuckles to the list of *per se* weapons included in Penal Law § 265.01 (criminal possession of a

weapon in the fourth degree - Class A misdemeanor) and makes various conforming amendments to Penal Law sections that refer to metal knuckles (e.g., Penal Law § 10.00 (12) — defining plastic knuckles as deadly weapons).

➤ **VETOED (S.7852-a) (Technical amendment — unlawfully dealing with a child).**

Penal Law § 260.21 (unlawfully dealing with a child in the second degree — Class B misdemeanor) prohibits an owner lessee, manager or employee of a place where alcoholic beverages are sold or given away to permit a child less than 16 to enter or remain. This prohibition literally applies to many restaurants, delis and pizzerias. The statute has been amended to replace “alcoholic beverages” with “liquor.”

Criminal Procedure Law

➤ **Chap. 401 (A.7197) (Waiver of Indictment permitted for Class A drug felonies). Effective: November 1, 2008.**

In light of the 2004 Drug Law Reform Act’s elimination of life sentences for Class A-I and A-II drug felonies, this bill amends CPL § 195.10 to authorize waiver of indictment and pleas to superior court informations on Class A felony drug crimes.

➤ **Chap. 587 (A.10502) (Youthful Offenders — sealing of accusatory instruments). Effective: January 1, 2009.**

This bill amends CPL § 720.15 (1) to require sealing of accusatory instruments filed against defendants who are eligible for youthful offender status, as opposed to the current sealing practice upon consent of the apparently eligible youth.

➤ **Chap. 279 (S.8376-a) (Unlawful possession of “skimmer devices” — Grand Jury Business Records). Effective: Penal Law amendments — November 1, 2008; Grand Jury amendments — August 6, 2008.**

The bill criminalizes possession of “skimmer devices” (see Penal Law section). It also includes an unrelated section dealing with admissibility of business records in the grand jury without the need for personal appearance by an authenticating witness. The new rule will apply to telecommunications records (including internet service provider records) and certain banking and financial records.

Section 14. Section 190.30 of the criminal procedure law is amended by adding a new subdivision 8 to read as follows:

8. (a) A business record may be received in such grand jury proceedings as evidence of the following facts and similar facts stated therein:

(i) A person's use of, subscription to and charges and payments for communication equipment and services including but not limited to equipment or services provided by telephone companies and internet service providers, but not including recorded conversations or images communicated thereby; and

(ii) financial transactions, and a person's ownership or possessory interest in any account, at a bank, insurance company, brokerage, exchange or banking organization as defined in section two of the banking law.

(b) Any business record offered for consideration by a grand jury pursuant to paragraph (a) of this subdivision must be accompanied by a written statement, under oath, that (i) contains a list or description of the records it accompanies, (ii) attests in substance that the person making the statement is a duly authorized custodian of the records or other employee or agent of the business who is familiar with such records, and (iii) attests in substance that such records were made in the regular course of business and that it was the regular course of such business to make such records at the time of the recorded act, transaction, occurrence or event, or within a reasonable time thereafter. Such written statement may also include a statement identifying the name and job description of the person making the statement, specifying the matters set forth in subparagraph (ii) of this paragraph and attesting that the business has made a diligent search and does not possess a particular record or records addressing a matter set forth in paragraph (a) of this subdivision, and such statement may be received at grand jury proceedings as evidence of the fact that the business does not possess such record or records. When records of a business are accompanied by more than one sworn written statement of its employees or agents, such statements may be considered together in determining the admissibility of the records under this subdivision. For the purpose of this subdivision, the term "business records" does not include any records prepared by law enforcement agencies or prepared by any entity in anticipation of litigation.

(c) Any business record offered to a grand jury pursuant to paragraph (a) of this subdivision that includes material beyond that described in such paragraph (a) shall be redacted to exclude such additional material, or received subject to a limiting instruction that the grand jury shall not consider such additional material in support of any criminal charge.

(d) No such records shall be admitted when an adversarial examination of such a records custodian or other employee of such business who was familiar with such records has been previously ordered pur-

suant to subdivision eight of section 180.60 of this chapter, unless a transcript of such examination is admitted.

(e) Nothing in this subdivision shall affect the admissibility of business records in the grand jury on any basis other than that set forth in this subdivision.

➤ **Chap. ___ (S.5565-a) (Court officers reclassified as police officers). Effective: Upon Governor's signature.**

Reclassifies uniformed court officers employed by the unified court system as police officers (formerly peace officers). [Amending CPL § 1.20 (34) and 2.10 (21)(c)].

➤ **Chap. 231 (S.4146) (Final orders of observation — commitment to non-OMH facilities). Effective: August 6, 2008.**

Amends CPL §§ 730.40, 730.50 and 730.60 to authorize OMH to place persons held on a final order of observation in non-OMH facilities that are licensed by OMH to accept such persons.

➤ **Chap. 317 (S.7548) (Audio-visual court appearances). Effective: July 21, 2008.**

Amends CPL § 182.20 to add Herkimer 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. 467 (S.7712-a) (Technical amendment — statute of limitations for criminal sexual act/sodomy offenses). Effective: August 5, 2008.**

Technical amendment to CPL § 30.10 (2)(a) to account for the nomenclature change from sodomy to criminal sexual act. The bill eliminates the reference to criminal sexual act, and replaces it with the phrase "a crime defined or formerly defined in section 130.50 of the penal law."

Corrections / Parole

➤ **Chap. 1 (S.6422) (SHU confinement barred for mentally ill inmates). Effective: No later than July 1, 2011.**

This legislation bars the Department of Correctional Services from placing inmates with serious mental disorders in Special Housing Units for disciplinary confinement. Except in exceptional circumstances, 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:

- (1) a. schizophrenia (all sub-types),
- b. delusional disorder,
- c. schizophreniform disorder,
- d. schizoaffective disorder,
- e. brief psychotic disorder,

- f. substance-induced psychotic disorder (excluding intoxication and withdrawal),
 - g. psychotic disorder not otherwise specified,
 - h. major depressive disorders, or bipolar disorder I and II;
- (2) inmates who are actively suicidal or who have engaged in a recent, serious suicide attempt;
 - (3) inmates diagnosed with a serious mental illness that is frequently characterized by breaks with reality, or perceptions of reality, that lead the individual to experience significant functional impairment involving acts of self-harm or other behavior that have a seriously adverse effect on life or on mental or physical health;
 - (4) inmates diagnosed with an organic brain syndrome that results in a significant functional impairment involving acts of self-harm or other behavior that have a seriously adverse effect on life or on mental or physical health;
 - (5) inmates diagnosed with a severe personality disorder that is manifested by frequent episodes of psychosis or depression, and results in a significant functional impairment involving acts of self-harm or other behavior that have a seriously adverse effect on life or on mental or physical health; or
 - (6) inmates who have been determined by a mental health clinician to have otherwise substantially deteriorated mentally or emotionally while confined in segregated confinement and is experiencing significant functional impairment indicating a diagnosis of serious mental illness and involving acts of self-harm or other behavior that have a serious adverse effect on life or on mental or physical health.

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. Governor Pataki vetoed a similar bill in 2006.

➤ **Chap. 310 (S.6731) (Restores discretion to the Board of Parole to discharge persons serving life sentences from parole supervision). Effective: July 21, 2008.**

Restores discretion to the Board of Parole, eliminated in 1998, to discharge persons serving life sentences from parole supervision.

➤ **Chap. 486 (S.8521) (Mandatory termination of sentence under 2004 Drug Law Reform Act). Effective: August 5, 2008 and applies to previously imposed sentences.**

The 2004 Drug Law Reform Act provided for mandatory termination of drug sentences after 3 years of unre-

voked parole supervision for Class A-I and A-II drug felonies, and 2 years of unrevoked parole supervision for lesser drug offenses. The Division of Parole interpreted this law as prohibiting termination of supervision when the parolee was presumptively released by the Department of Correctional Services, and not released by action of the Board of Parole. This bill clarifies that presumptively released parolees are entitled to termination of sentence after 2 or 3 years.

Freedom of Information Law

➤ **Chap. 499 (A.1975) (Freedom of Information Law — subject matter lists on internet). Effective: January 2, 2009.**

Amends the Freedom of Information Law [Public Officers Law § 87 (3)(c)] to require state agencies to post their subject matter lists online.

➤ **Chap. 223 (S.962-c) (FOIL — charges for electronic and other records). Effective: August 6, 2008.**

Limits the amount an agency can charge for electronic and other non-paper records under the FOIL to “i) an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record [and] ii) the actual cost of the storage devices or media provided to the person making the request in complying with such request; and iii) the actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency’s information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy.”

The bill provides that “preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested.” Agencies shall provide estimates of preparation costs or the costs of outside professional services.

Crime Victims

➤ **Chap. 162 (A.2656) (Crime Victims Compensation — Lost wages of parent). Effective: September 1, 2008.**

Amends the Crime Victim’s Compensation Act [Executive Law § 631 (2)] to provide that “[a]n award for loss of earnings shall include earnings lost by a parent or guardian as a result of the hospitalization of a child victim under age eighteen for injuries sustained as a direct result of a crime.”

➤ **VETOED (A.9915-a) (Crime Victims — Payment for HIV prophylaxis treatment).**

Provides for streamlined direct payments from the Crime Victims Board to pharmacies for HIV prophylaxis

treatment of victims of sexual assault with significant possible exposure to HIV.

Reentry—Collateral Consequences

➤ **Chap. 534 (S.4956-a) (Employment Discrimination — evidence of employee’s prior criminal record excluded in certain actions). Effective: September 4, 2008.**

This bill amends Executive Law § 296 (15) to provide employers with a rebuttable presumption when they are sued for negligent hiring or maintaining an employee (or supervising a hiring manager) in relation to persons with criminal records. The presumption states: “there shall be a rebuttable presumption in favor of excluding from evidence the prior incarceration or conviction of any person, in a case alleging that the employer has been negligent in hiring or retaining an applicant or employee, or supervision a hiring manager, if after learning about an applicant or employee’s past criminal conviction history, such employer has evaluated the factors set forth in section seven hundred fifty-two of the correction law, and made a reasonable, good faith determination that such factors militate in favor of hire or retention of that applicant or employee.”

➤ **Chap. 469 (S.7723) (Employment—barbering license). Effective: August 5, 2008.**

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.” Similar bills were vetoed by Governors Pataki and Spitzer in 2006 and 2007.

Miscellaneous

➤ **Chap. 141 (S.8714) (Post-Release Supervision Re-sentencing proceedings). Effective: July 9, 2008.**

Enacted in the wake of the decisions in People v. Sparber, 10 N.Y.3d 457 (2008), and Garner v. Department of Correctional Services, 10 N.Y.3d 358 (2008), Chapter 141 provides an orderly process for returning inmates serving determinate sentences for crimes committed on or after September 1, 1998 to sentencing courts for possible resentencing when commitments are silent about post-release supervision. The bill does not mandate new post-release supervision terms. It expressly authorizes courts to impose determinate sentences without post-release supervision when the district attorney consents to such a disposition, which might occur, for example, when imposition of post-release supervision would now trigger a defendant’s right to withdraw a guilty plea under People v. Catu, 4 N.Y.3d 242 (2005). The bill also contemplates that sentencing courts might “otherwise” [new Cor. Law § 601-d (5)] choose not to impose post-release supervision. For exam-

ple, a court might rule that imposition of post-release supervision after maximum expiration of the original sentence would violate double jeopardy.

S.8714 applies to all inmates in DOCS’ custody or on parole serving determinate sentences (for crimes committed on or after September 1, 1998) whose original court commitment fails to include post-release supervision. If DOCS or Parole has the sentencing minutes and the minutes clearly reflect a post-release supervision term, the inmate or parolee will not be subject to resentencing under the bill. When the minutes are silent or unavailable, DOCS or Parole must notify the sentencing court, which must then take the following action within certain time frames:

1. Within ten days of the notice the sentencing court may issue a superceding commitment reflecting imposition of post-release supervision when the sentencing minutes clearly reflect that post-release supervision was initially imposed, and provide an explanation for this conclusion to DOCS or Parole, the inmate, and the attorney who represented him or is currently representing him.
2. If the sentencing court cannot dispose of the matter by issuing a superceding commitment, it must assign counsel to the inmate pursuant to County Law § 722, and calendar the matter within twenty days of the notice from DOCS or Parole. The court must assign “the attorney who appeared for the defendant in connection with the judgment or sentence or, if the defendant is currently represented concerning his or her conviction or sentence or with respect to an appeal from his or her conviction, such present counsel.”
3. “The court shall promptly seek to obtain sentencing minutes, plea minutes and any other records and shall provide copies to the parties and conduct any reconstruction proceedings that may be necessary to determine whether to resentence such person.”
4. “The court shall commence a proceeding to consider resentence no later than thirty days after receiving notice” from DOCS or Parole, and shall issue a written determination and order no later than forty days from such notice.
5. The defendant may “with counsel” consent to extend these time frames. The district attorney may apply for one ten day extension for “extraordinary circumstances.”

The bill makes clear these proceedings are without prejudice to an inmate’s or parolee’s right to seek other immediate relief. It states:

Nothing in this section shall affect the power of any court to hear, consider and decide any petition, motion or proceeding pursuant to article four hundred forty of the criminal procedure law, article sev-

enty or seventy-eight of the civil practice law and rules, or any authorized proceeding. [Correction Law § 601-d (8)]

➤ **VETOED (S.7273) (Authorizes state troopers to plea bargain traffic tickets).**

Countermands the State Police regulation that prohibits troopers from plea bargaining traffic tickets. This bill was vetoed by Governor Spitzer in 2007.

Executive Law § 231—Prosecution of certain violations of the vehicle and traffic law.

1. The division of state police shall make no rule or regulation nor shall otherwise limit a member of the state police's ability to modify or recommend the modification of a charge before a court relating to a petty violation of the vehicle and traffic law. In addition, a member who has issued a citation or uniform traffic ticket (hereafter referred to as the "issuing member") to a person for committing a petty violation of the vehicle and traffic law shall be authorized to appear before the court if authorized by the local district attorney where such violation is returnable on behalf of the people of the state of New York, at a date designated by the court, and recommend to the court the modification of the original charge or charges.
2. This section is not intended to affect any plea bargain limitations otherwise provided for in this chapter or other law of this state, including, but not limited to, those limitations set forth for the alleged commission of a violation of article thirty-one of the vehicle and traffic law.

➤ **Chap. 569 (A.5258-c) (Safe Harbour for Exploited Children Act - minors engaged in prostitution). Effective: April 1, 2010.**

This legislation encourages a treatment-oriented response when minors are arrested for prostitution offenses. It establishes a presumption that "sexually exploited children" arrested for prostitution offenses should be charged in PINS proceedings, as opposed to juvenile delinquency petitions, in Family Court, and establishes treatment programs for them, including safe houses in all social service districts in New York. A "sexually exploited child" is defined as "any person under the age of eighteen who has been subject to sexual exploitation because he or she:" a) is a victim of a sex trafficking crime; b) is an abused child as defined in Family Court Act 1012(e)(iii), or c) engages in prostitution, loitering for the purpose of prostitution, or sexual performance by a child offenses. Although the Act does not dictate charging decisions in adult criminal court for 16 and 17 year-olds, it does strongly encourage prosecutors to offer sexually exploited minors adjournments in contemplation of dismissal on

these charges. The Act specifies that "all of the services created under this article may, to the extent possible provided by law, be available to all sexually exploited children . . . as a condition of an adjournment in contemplation of dismissal issued in criminal court."

➤ **Chap. 326 (S.8665) (Family Court orders of protection — persons not related by consanguinity or affinity). Effective: July 21, 2008.**

Expands the authority of Family Court to issue orders of protection in matters involving persons in "intimate relationships," who are not related by consanguinity or affinity. The new authority extends to:

persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship".

➤ **Chap. 491 (S.8706) (Reporting names of patients for gun purchase instant criminal background checks). Effective: November 1, 2008.**

Authorizes OMH and OMRDD to report names of patients to DCJS and the FBI for purposes of Brady bill National Instant Criminal Background Checks. The bill is in response to the Virginia Tech massacre last year.

➤ **Chap. 265 (S.7811) (Fulton County District Attorney). Effective: July 7, 2008.**

Authorizes assistant district attorneys in Fulton County to live in adjoining counties.

Peace Officer Status—All bills vetoed except where noted:

- A.9844 — uniformed members of the fire marshal's office in the village of Southampton
- A.9889 — dog control officers in the city of Salamanca
- A.10397 — uniformed court officers employed by the village of Northport village justice court
- S.6847-a — employees of the village court of the village of Westhampton Beach serving as uniformed court officers
- S.7469 — uniformed court officers of the town court of the town of New Windsor

(continued on page 39)

Fourth Department *continued*

grand jury. (County Ct, Allegany Co [Euken, J (judgment); Michalski, J [proceedings after remittal])

Identification (Eyewitness) IDE; 190(10) (35) (57)
(Photographs) (Wade Hearing)

**People v Hill, 53 AD3d 1151, 860 NYS2d 780
(4th Dept 2008)**

Holding: The court erred in denying the defendant's motion to suppress the pretrial identifications. "The witnesses identified defendant from photo arrays that were compiled using a photograph of defendant taken after an illegal arrest, and thus those identifications should have been suppressed as the fruit of the illegal arrest (*see People v Dodt*, 61 NY2d 408, 417 . . .). Because none of the witnesses testified at the *Wade* hearing, the People did not establish that each witness had an independent basis for his or her in-court identification of defendant (*see [People v] Walker*, 198 AD2d [826] at 828 . . .)." Judgment reversed, motion to suppress pretrial identifications granted, and matter remitted for a new *Wade* hearing and a new trial, if the prosecution are so advised. (Supreme Ct, Erie Co [Burns, JJ]) ☞

Defender News *(continued from page 6)*

Part1.pdf.) The Commission's recommendations include consolidation of the justice courts, instituting new minimum age and education requirements for justices, and giving criminal defendants the option to have their cases heard by attorney justices. Concluding that it would be impossible to make the necessary improvements to the justice courts as they currently exist, the Commission proposes that the state legislature set up review panels in each of the state's 55 upstate counties that would develop court consolidation plans in accordance with specific guidelines and standards. The report provides extensive details regarding the composition of the review panels and the review process.

The other report, *Action Plan for the Justice Courts: Two Year Update* provides a review of the Office of Court Administration's implementation of the November 2006 plan for the justice courts. (www.nycourts.gov/whatsnew/pdf/JusticeCourts2YearUpdate9-08.pdf.) Some of the completed objectives discussed in the report are: supervising judges have been appointed for each judicial district outside of New York City and attorneys have been assigned to assist the supervising judges; all the justice courts have received digital recording equipment to ensure compliance with Rule 30.1 of the Rules of the Chief Judge, which requires all justice court proceedings to be recorded; and a redesigned education and training

program has been implemented for justices and clerks, including a new seven-week pre-bench training program for non-attorney justices. Of particular note, supervising judges are required to work with the justice courts to assure that defendants financially unable to hire an attorney have counsel. ☞

From My Vantage Point *(continued from page 5)*

community would have sufficed or been *more* effective at ensuring the community's safety).

These three categories represent thousands of people currently facing costly wrongful imprisonment in this State. Defense lawyers know what we need to make a difference in the lives of people in each of these categories to keep them out of jail and prison. At present we don't have those things, including time, access to experts and client services, and a partnership role in the State's effort to reduce its own addiction to incarceration.

We are asking New York State to join us in a paradigm shift. To recognize that when defenders are adequately trained, paid, and given resources, benefits will flow to the State at the same time they flow to our clients. Lawyers who do not have to ask about clients' cases while standing next to them before the judge; lawyers who know their witnesses before calling them to the stand; lawyers who have investigated facts, and researched law, traced family histories, and found prior critically important records; lawyers who have worked with client employers; and lawyers who make collegial decisions with clients—these lawyers can be true advocates, not disempowered cogs in an administrative processing apparatus. They become trusted gatekeepers preventing the wrongful incarceration of their clients.

New York needs an Independent Public Defense Commission that will build a competent, well-funded public defense system around the gatekeeper function just described, protect it from negative political interference, and administer it in a way that helps clients and the State both reach their goals.

The time for beginning the Independent Public Defense Commission is *now*. ☞

2008 Legislative Review *(continued from page 16)*

- S.7616-a — uniformed marine patrol officers in Cayuga County
- S.7729-a — village of Lake George seasonal constables
- S.8106 — uniformed officers of the fire marshal's office of the town of Huntington
- S.8183-a — uniform members of the bureau of fire prevention of the town of Islip
- S.8205 — security officers for the town court of the town of Alden
- Chap. 564 — certain employees of the New York City business integrity commission ☞