

2010 Legislative Review

By Al O'Connor*

New Crimes

➤ **Chap. 405 (S.6987-A) (Strangulation and related offenses). Effective: November 11, 2010.**

Creates new Penal Law article 121 with three new crimes relating to strangulation and obstruction of blood flow or breathing.

Penal Law § 121.11 Criminal obstruction of breathing or blood circulation

A person is guilty of criminal obstruction of breathing or blood circulation when, with intent to impede the normal breathing or circulation of the blood of another person, he or she:

- (a) applies pressure on the throat or neck of such person; or
- (b) blocks the nose or mouth of such person.

(Class A misdemeanor)

Penal Law § 121.12 Strangulation in the second degree

A person is guilty of strangulation in the second degree when he or she commits the crime of criminal obstruction of breathing or blood circulation, as defined in section 121.11 of this article, and thereby causes stupor, loss of consciousness for any period of time, or any other physical injury or impairment.

(Class D violent felony)

Penal Law § 121.13 Strangulation in the first degree

A person is guilty of strangulation in the first degree when he or she commits the crime of criminal obstruction of breathing or blood circulation, as defined in section 121.11 of this article, and thereby causes serious physical injury to such other person.

(Class C violent felony).

It is an affirmative defense to these crimes that the conduct was performed for a valid medical or dental purpose.

A conviction for any of these crimes subjects the defendant to DNA databank testing. All three have been added to list of family offenses subject to concurrent jurisdiction of the criminal and family courts. Penal Law § 60.05 has been amended to require imprisonment upon conviction of the Class D felony of strangulation in the second degree. First- and second-degree strangulation have been added to the list of "specified offenses" that can support a hate crimes prosecution under Penal Law Article 485, and have also been designated crimes subject to the sex

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offender civil commitment law (Mental Hygiene Law Article 10) when charged as "sexually motivated" crimes under Penal Law § 130.91.

Penal Law

➤ **Chap. 232 (A.5537-A) (Loitering — Repeal of unconstitutional provisions). Effective: July 30, 2010.**

Repeals subdivisions of Penal Law § 240.35 that have been declared unconstitutional. The repealed subdivisions are:

(1) Loiters, remains or wanders in a public place for the purpose of begging [*Loper v New York City Police Department*, 999 F.2d 699 (1993)];

(3) Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in oral sexual conduct, anal sexual conduct or other sexual behavior of a deviate nature [*People v Uplinger*, 58 N.Y.2d 936 (1983)]; and

(7) Loiters or remains in any transportation facility, or is found sleeping therein, and is unable to give a satisfactory explanation for his presence [*People v Bright*, 71 N.Y.2d 376 (1988)].

➤ **Chap. 284 (S.5620-A) (Hypodermic syringes). Effective: October 29, 2010.**

Chap. 284 clarifies that persons who possess residual amounts of a controlled substance in a lawfully possessed hypodermic syringe under Public Health Law § 3381 are not guilty of criminal possession of a controlled substance in the seventh degree. It also clarifies that Penal Law § 220.45 (criminally possessing a hypodermic needle) does not apply to needles lawfully obtained under the Public Health Law.

➤ **Chap. 447 (A.11111) (Abandonment of a child — Endangering the welfare of a child). Effective: August 30, 2010.**

In 2000, the legislature established an affirmative defense to the crimes of abandonment of a child and endangering the welfare of a child when the defendant leaves a newborn (no more than 5 days old) "with the intent that the child be safe from physical injury and cared for in an appropriate manner . . . with an appropriate person or in a suitable location and promptly notified an appropriate person of the child's location."

The law has now been amended to cover children no more than 30 days old, and to make such conduct an ordinary defense to the charges of abandonment of a child and endangering the welfare of a child.

➤ **Chap. 464 (S.5536-A) (Larceny of an automated teller machine). Effective: November 1, 2010.**

Establishes the new crime of aggravated grand larceny of an automated teller machine.

Penal Law § 155.43

A person is guilty of aggravated grand larceny of an automated teller machine when he or she commits the crime of grand larceny in the third degree, as defined in subdivision two of section 155.35 of this article [relating to automated teller machines] and has been previously convicted of grand larceny in the third degree within the preceding five years.

(Class C felony)

➤ **Chap. 479 (S.8175) (Larceny of religious property). Effective: August 30, 2010.**

Amends subdivision 9 of Penal Law § 155.30 pertaining to theft of religious property. The subdivision now applies to a “scroll, religious vestment, a vessel, an item comprising the display of religious symbols which forms a representative expression of faith, or other miscellaneous item of property” and is valued at \$100 or more and kept in — or upon the curtilage of — a religious building (underlined matter new) (Class E felony).

➤ **Chap. 315 (A.2257-B) (Trespass — sex offenders in schools). Effective: November 1, 2010.**

Amends Penal Law § 140.15 to provide that a level 2 or 3 sex offender who enters a school knowing that the victim of the offense for which registration is required is or was a student in that school is guilty of criminal trespass in the second degree. The law provides exceptions when a sex offender is an enrolled student in the school, or the parent of one, the school is the person’s polling place, or entry was authorized by school officials (Class A misdemeanor).

➤ **Chap. 318 (A.3103-A) (Assault on a nurse). Effective: November 1, 2010.**

Adds registered and licensed nurses to the lists of professionals 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) (Class D felony).

➤ **Chap. 345 (A.9186-B) (Assault on sanitation enforcement agents). Effective: September 12, 2010.**

Adds sanitation enforcement agents to the lists of professionals 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) (Class D felony).

➤ **Chap. 193 (A.9938-A) (Definition of “sexual contact”). Effective: October 13, 2010.**

Amends Penal Law §§ 130.00(3) and 260.31(2) to

expand the definition of “sexual contact” to include the “emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.”

➤ **Chap. 14 (A.9534) (Endangering the welfare of an incompetent or physically disabled person). Effective: May 22, 2010.**

Expands the scope of Penal Law §§ 260.30 and 260.34 (endangering the welfare of a vulnerable elderly person) to include an incompetent or physically disabled person, defined as an “individual who is unable to care for himself or herself because of physical disability, mental disease or defect.”

➤ **Chap. 1 (S.6439) (Defrauding the government). Effective: February 12, 2010.**

Amends Penal Law § 195.20 to apply the statute to fraudulent obtaining of “services or resources of the state” or government instrumentality (in addition to “property”), and adds a new subparagraph (a)(ii) pertaining to fraudulent use of governmental property, services or resources for private business purposes.

➤ **Chap. 321 (A.3762) (Slot machines). Effective: August 13, 2010.**

Amends Penal Law § 225.30 to provide that transportation and possession of a slot machine shall not be unlawful “where such slot machine was transported into this state in a sealed container and possessed for the purpose of product development, research, or additional manufacture or assembly, and such slot machine will be or has been transported in a sealed container to a jurisdiction outside of this state for purposes which are lawful in such outside jurisdiction.”

Criminal Procedure Law

➤ **Chap. 332 (A.7670) (Loitering for purposes of prostitution — motion to vacate judgment on ground defendant was a victim of sex trafficking). Effective: August 13, 2010.**

Adds a new paragraph (i) to CPL § 440.10(1) to authorize a court to vacate a conviction based on an arrest for loitering for the purpose of engaging in prostitution (Penal Law § 240.37) when the defendant was a sex trafficking victim.

➤ **Chap. 10 (A.602) (Execution of bench warrants by uniformed court officers). Effective: May 22, 2010.**

Amends CPL § 530.70(2) to authorize uniformed court officers in all courts that are part of the unified court system to execute bench warrants in the buildings where they are employed or in the immediate vicinity thereof.

➤ **Chap. 94 (A.8530-E) (Right to phone call following arrest). Effective: July 24, 2010.**

Adds a new subdivision 8 to CPL § 120.90 and a new subdivision 7 to CPL § 140.20 to codify an arrestee's right to make a phone call to obtain counsel or inform someone of the arrest. CPL § 120.90(8) provides:

Upon arresting a defendant, other than a juvenile offender, for any offense pursuant to a warrant of arrest, a police officer shall, upon the defendant's request, permit the defendant to communicate by telephone provided by the law enforcement facility where the defendant is held to a phone number located anywhere in the United States or Puerto Rico, for the purposes of obtaining counsel and informing a relative or friend that he or she has been arrested, unless granting the call will compromise an ongoing investigation or the prosecution of the defendant.

(CPL § 140.20(7) is similarly worded) [Also amends CPL § 170.10(3)(b), CPL § 180.10(3)(b), CPL § 210.15(2)(b)]. Chap. 96 (A.10750) deleted a sentence concerning access to seized cellphones and other digital devices.

Sentencing

➤ **Chap. 377 (A.11391) (Expands SHOCK incarceration program eligibility). Effective: August 13, 2010.**

Chap. 377 significantly expands eligibility criteria for the SHOCK incarceration program. Defendants with prior non-violent felony convictions that resulted in a state prison sentence are now eligible for the SHOCK program when the current felony conviction is a SHOCK eligible offense [see Corr. Law § 865(1)], including direct judicial placement when the current conviction is a drug or marijuana offense. Under former law, clients who had previously been committed to the Department of Correctional Services were categorically ineligible for the SHOCK program.

Furthermore, the statute has been amended to allow a defendant convicted of a Class B felony drug offense, who has a predicate violent felony conviction that did not result in a state prison sentence, to participate in the SHOCK program. Previously, such clients were not eligible.

The new criteria for SHOCK eligibility are as follows:

- Eligible for release on parole or conditional release within 3 years
- Has not reached age 50 at the time of DOCS' reception
- Not previously committed to DOCS for a violent felony (or out-of-state offense with same elements)
- Current conviction cannot be for a violent felony, A-I felony (including A-I drug offense), homicide offense (Penal Law Article 125), sex offense (Penal Law Article 130), escape or absconding offense.

➤ **Chap. 121 (S.2405) (Willard Drug Treatment Program). Effective: June 15, 2010.**

Amends CPL § 410.91 to clarify that a sentence of parole supervision with commitment to the Willard drug treatment program is available when the court imposes a determinate sentence (as for a drug felony).

➤ **Chap. 179 (A.7961) (Probation reports). Effective: July 15, 2010.**

Amends CPL § 390.20 to authorize jail sentences up to 180 days without a probation report (increased from 90 days).

➤ **Chap. 158 (A.9220-A) (Hate crimes sentencing). Effective: November 1, 2010.**

Amends Penal Law § 485.10 to authorize courts to sentence persons convicted of hate crimes to "complete a program, training session or counseling session directed at hate crime prevention and education."

➤ **Chap. 56, Part D, § 7 (A.9706-C) (Restitution orders). Effective: September 20, 2010.**

Adds a new subdivision 14 to Penal Law § 60.27 to specify a procedure for handling restitution orders when the defendant's probation supervision is transferred to another county.

Penal Law § 60.27(14)

Where a transfer of probation has occurred pursuant to section 410.80 of the criminal procedure law and the probationer is subject to a restitution condition, the department of probation in the county in which the order of restitution was imposed shall notify the appropriate district attorney. Upon notification by the department of probation, such district attorney shall file a certified copy of the judgment with the clerk of the county in the receiving jurisdiction for purposes of establishing a first lien and to permit institution of civil proceedings pursuant to the provisions of subdivision six of section 420.10 of the criminal procedure law.

➤ **Chap. 56, Part D, § 8 (A.9706-C) (Probation transfers — waiver of extradition). Effective: September 20, 2010.**

Amends Penal Law § 65.10(3)(b) to require probationers to sign a waiver of extradition as a condition being granted permission to move or travel out of state.

Prisons/Jails

➤ **Chap. 412 (S.7864) (Limited credit time allowance — expanded prison job opportunities). Effective: August 13, 2010.**

The 2009 Drug Law Reform Act included a minor provision authorizing a 6 month credit time allowance for inmates serving time for violent felonies, homicide and

non-drug A-I felony convictions (excluding sex offenses and first degree murder). The credit must be earned by “significant programmatic achievement.” Chapter 412 adds to the list of prison programs that can result in the credit, including optics, asbestos handling, sign language, and the “puppies behind bars” program.

➤ **Chap. 82 (A.8613) (Willard Drug Treatment Program – alternative programs). Effective: May 18, 2010.**

Requires the Department of Correctional Services to offer an alternative drug treatment program to defendants sentenced to the Willard Drug Treatment Program but who are unable to complete it due to medical or mental health care issues. The defendant may object to the alternative program and have the sentencing court decide which program he or she must complete. A defendant who completes an alternative program “shall be treated in the same manner as a person who has successfully completed” the Willard program.

➤ **Chap. 249 (A.9826) (Montgomery County Jail). Effective: July 30, 2010.**

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

➤ **Chap. 260 (A.10233) (Chautauqua County Jail). Effective: July 30, 2010.**

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

➤ **Chap. 56, Part OO, § 2 (A.9706-C) (DOCS’ criminal history website database). Effective: July 22, 2010.**

Requires the Department of Correctional Services to omit criminal history information from its website five years after an inmate’s sentence (including post-release supervision) has expired. The law does not apply to violent felonies, homicide offenses, sex offenses, escape or absconding, or aggravated harassment of an employee by an inmate.

➤ **Chap. 56, Part OO, §§ 8-9 (A.9706-C) (Notification of restoration of voting rights). Effective: July 22, 2010.**

Requires the Department of Correctional Services and the Division of Parole to notify persons being discharged upon maximum expiration of their sentences (including parole or post-release supervision) that they are eligible to vote and to give them voter registration materials.

Vehicle and Traffic Law

➤ **Chap. 409 (S.7485-A) (License suspension — Failure**

to exercise due care). Effective: August 13, 2010.

Increases the license suspension periods for a violation of VTL § 1146 involving serious physical injury (“[E]very driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary.”). First offense — 6 month suspension; second offense within 5 years — 1 year suspension [Amending VTL § 510(2)(b)(xiv)].

➤ **Chap. 169 (S.46-B) (Drawing of blood for alcohol or drug testing). Effective: July 13, 2010.**

Amends VTL § 1194(4)(a)(1) to authorize additional persons to draw blood for purposes of testing for alcohol or drug content. At the request of a police officer, the following additional persons may draw blood: a certified nurse practitioner or an advanced emergency medical technician as certified by the Department of Health. The following additional persons may draw blood under the supervision and at the direction of a physician: a registered physician assistant or certified nurse practitioner acting within his or her lawful scope of practice, or upon the express consent of the person eighteen years of age or older from whom such blood is to be withdrawn, a clinical laboratory technician or clinical laboratory technologist.

Miscellaneous

➤ **Chap. 176 (S.7945-A) (New York City stop and frisk records — personal identifying information). Effective: July 16, 2010.**

Requires the New York City Police Department to omit personal identifying information from databases concerning persons subjected to *Terry* stops and frisks when the police-citizen encounter does not lead to a summons or arrest. A new CPL § 140.50(4) states:

In cities with a population of one million or more, information that establishes the personal identity of an individual who has been stopped, questioned and/or frisked by a police officer or peace officer, such as the name, address or social security number of such person, shall not be recorded in a computerized or electronic database if that individual is released without further legal action; provided, however, that this subdivision shall not prohibit police officers or peace officers from including in a computerized or electronic database generic characteristics of an individual, such as race and gender, who has been stopped, questioned and/or frisked by a police officer or peace officer.

➤ **Chap. 56, Part OO, § 3 (A.9706-C) (Certificate of relief from civil disabilities — federal convictions). Effective: July 22, 2010.**

Adds a new subdivision 7 to Correction Law § 703 to

provide a qualified presumption in favor of the issuance of a certificate of relief from civil disabilities based on a federal conviction in New York when the defendant has a favorable written recommendation from the chief federal probation officer of the district.

➤ **Chap. 56, Part OO, § 5 (A.9706-C) (Inmate access to presentence reports for parole related proceedings). Effective: July 22, 2010.**

Amends CPL § 390.50(2) to give inmates a right to a copy of the presentence report from the court in order to prepare for a parole hearing or appeal.

Upon written request, the court shall make a copy of the presentence report, other than a part or parts of the report redacted by the court pursuant to this paragraph, available to the defendant for use before the parole board for release consideration or an appeal of a parole board determination. In his or her written request to the court the defendant shall affirm that he or she anticipates an appearance before the parole

board or intends to file an administrative appeal of a parole board determination. The court shall respond to the defendant's written request within twenty days from receipt of the defendant's written request.

➤ **Chap. 112 (A.2374-A) (Jury pools — collection of demographic data). Effective: September 13, 2010.**

Requires commissioners of jurors to collect demographic data concerning jurors' race, ethnicity, age and sex. The data are to be annually compiled by OCA and submitted to the governor, the legislature, and the Chief Judge of the State of New York.

➤ **Chap. 91 (A.4300) (Unauthorized practice of law — Attorney General may criminally prosecute). Effective: May 25, 2010.**

Amends Judiciary Law § 476-a to authorize the Attorney General to criminally prosecute the crime of unauthorized practice of law [addressing *People v. Romero*, 91 N.Y.2d 750 (1998)]. ⚖

2010 Legislative Highlight

Summary of Legislation Creating the Office of Indigent Legal Services: Part E of Chapter 56 of the Laws of 2010

By Susan C. Bryant*

Part E is comprised of four sections:

- Section 1: Creation of the Office of Indigent Legal Services and the Indigent Legal Services Board (adding a new Executive Law article 30 [§§ 832-833])
- Section 2: Amendments to State Finance Law § 98-b regarding distribution of monies from the Indigent Legal Services Fund
- Section 3: Amendments to County Law § 722(3) to allow counties to create conflict defender offices through bar association plans
- Section 4: Effective date- Part E is effective immediately (June 22, 2010).

I. Section 1: Office of Indigent Legal Services and the Indigent Legal Services Board

The Office of Indigent Legal Services is housed within the Executive Department, but not a particular executive agency. The Office reports to the Indigent Legal Services Board and the Board will consult with and advise the Office.

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A. The Indigent Legal Services Board

The Board has nine members. The Chief Judge of the Court of Appeals is the chair of the Board. The eight other members are appointed by the Governor as follows:

- One nominated by the temporary president of the Senate;
- One nominated by the speaker of the Assembly;
- One appointed by the Governor from a list of at least three attorney nominees submitted by the New York State Bar Association;
- Two appointed by the Governor from a list of at least four nominees submitted by the New York State Association of Counties;
- One appointed by the Governor and shall be an attorney who has provided public defense services for at least five years;
- One attorney appointed by the Governor;
- One appointed from a list of no more than two nominees submitted by the Chief Administrator of the courts, each of whom shall be a current or retired judge or justice elected to the supreme, county or family court or appointed to the New York City criminal or family court and has substantial experience presiding as such a judge or justice in trial matters before such court.

Board members cannot be active prosecutors, law enforcement officials, or persons providing prosecution-related services or employees of such prosecutor, official, or person. The Chief Judge serves *ex officio*. The other board members serve for three year terms, except that the NYSBA nominee, one of the two NYSAC nominees, and