

2011 Legislative Review

By Al O'Connor*

Penal Law

- **Chap. 148 (A.409-D) (New crime—assault on a judge). Effective: November 17, 2011.**

Establishes the new crime of assault on a judge:

Penal Law § 120.09 Assault on a judge.

A person is guilty of assault on a judge when, with intent to cause serious physical injury and prevent a judge from performing official judicial duties, he or she causes serious physical injury to such judge. For the purposes of this section, the term judge shall mean a judge of a court of record or a justice court.

(Class C violent felony)

- **Chap. 26 (S.1882) (Sexual abuse in the first degree — age amendment). Effective: November 1, 2011.**

Adds a new subdivision (4) to Penal Law § 130.65 to provide that a person is guilty of sexual abuse in the first degree (Class D violent felony) when, being 21 years of age or older, he or she subjects a person under the age of 13 to sexual contact.

- **Chap. 191 (S.1313-B) (Prostitution adjacent to schools and within the direct view of children). Effective: November 17, 2011.**

Establishes the new crime of prostitution in a school zone (Penal Law § 230.03 — Class A misdemeanor) and promoting prostitution in a school zone (Penal Law § 230.19 — Class E felony). The new offenses apply to defendants who are 19 years of age or older and engage in prostitution or promoting prostitution in a school zone during school hours, and when the defendant knows or reasonably should know the prostitution activity is “within the direct view of children attending such school.” School zone is defined as follows:

- (a) in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or
- (b) any public sidewalk, street, parking lot, park, playground or private land, located immediately adjacent to the boundary line of such school [Penal Law § 230.03(2)].

- **Chap. 205 (S.5455-B) (Sexual contact between employees and inmates). Effective: November 1, 2011.**

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Amends Penal Law § 130.05(3)(e) to add to the list of employees subject to criminal prosecution for having sexual contact with prisoners or parolees to whom they are not married. The section now applies to employees providing “institutional parole services or direct supervision to” inmates and those released to community supervision. (Also amends Penal Law § 130.05 pertaining to employees of the Office of Children and Family Services)

- **Chap. 215 (S.5623) (Promoting prostitution). Effective: November 17, 2011.**

Amends Penal Law § 230.20 by adding a new subdivision pertaining to distribution of obscene promotional material.

Penal Law § 230.20(2)

A person is guilty of promoting prostitution in the fourth degree when he or she knowingly:

With intent to advance or profit from prostitution, distributes or disseminates to ten or more people in a public place obscene material as such terms are defined by subdivisions one and two of section 235.00 of this title, or material that depicts nudity, as such term is defined by subdivision one of section 245.10 of this part.

- **Chap. 130 (A.4769-C) (Controlled substances — “bath salts”). Effective: August 14, 2011.**

Adds “bath salts” containing 4- methylmethcathinone (also known as mephedrone) and methylenedioxypropyrolerone (also known as MDPV) to the list of Schedule I controlled substances [Public Health Law § 3306(f)(9), (10)].

- **Chap. 327 (S.2510-B) (Obstruction of governmental duties by means of a bomb). Effective: November 1, 2011.**

Establishes the new crime of obstruction of governmental duties by means of a bomb, destructive device, explosive, or hazardous substance.

Penal Law § 195.17

A person is guilty of obstruction of governmental duties by means of a bomb, destructive device, explosive, or hazardous substance when he or she, in furtherance of a felony offense, knowingly and unlawfully installs or causes to be installed a bomb, destructive device, explosive, or hazardous substance, in any object, place, or compartment that is subject to a search so as to obstruct, prevent, hinder or delay the administration of law or performance of a government function.

(Class D felony).

➤ **Chap. 528 (A.7698) (Disruption of a religious service — buffer zone). Effective: March 21, 2012**

Extends from 100 to 300 feet the no-disruption buffer zone around religious services, funerals, burials and memorial services.

Penal Law § 240.21

A person is guilty of disruption or disturbance of a religious service, funeral, burial or memorial service when he or she makes unreasonable noise or disturbance while at a lawfully assembled religious service, funeral, burial or memorial service, or within three hundred feet thereof, with intent to cause annoyance or alarm or recklessly creating a risk thereof.

(Class A misdemeanor).

➤ **Chap. 313 (A.7811-B) (Unauthorized recording). Effective: November 1, 2011.**

Amends Penal Law § 275.00(6) to redefine a “recording” for purposes of anti-piracy laws:

6. “Recording” means an original phonograph record, disc, tape, audio or video cassette, wire, film, *hard drive, flash drive, memory card, or other data storage device* or any other medium on *which* such sounds, images, or both sounds and images are or can be recorded or otherwise stored, or a copy or reproduction that duplicates in whole or in part the original. [italicized words are new].

The legislation also amends Penal Law § 60.27 to provide that a victim of unauthorized recording offense includes “any owner or lawful producer of a master recording, or a trade association that represents such owner or lawful producer”

➤ **Chap. 357 (S.5658) (Criminal possession of a weapon in the fourth degree — antique weapons). Effective: January 30, 2012.**

Adds antique firearms, black powder rifles, black powder shotguns, and any muzzle-loading firearm to the list of firearms that may not be lawfully possessed by a person with a felony conviction or conviction for a serious offense under Penal Law § 265.01 (4).

➤ **Chap. 8 (S.2510-B) (Gambling device — definition). Effective: March 25, 2011.**

Amends Penal Law § 225.00(7-a) to clarify that “[a] machine which awards free or extended play is not a gambling device merely because such free or extended play may constitute something of value provided that the outcome depends on the skill of the player and not in a material degree upon an element of chance.”

Criminal Procedure Law

➤ **Chap. 154 (A.2063-C) (Good Samaritan exception to criminal liability for certain drug crimes when reporting a suspected overdose). Effective: September 18, 2011.**

This legislation confers immunity from prosecution for certain crimes when a person seeks emergency assistance for someone who is experiencing a drug or alcohol overdose. The immunity shall also apply when a person seeks emergency help for himself or herself. If the police discover or otherwise obtain evidence of a drug or alcohol related crime when responding to the emergency, the person who sought medical assistance will have immunity from prosecution for most drug crimes, possession of alcohol by persons under age 21, and drug paraphernalia offenses. Immunity will not apply to Class A-I drug offenses, or to drug sales “involving sale for consideration or other benefit or gain.” However, the legislation establishes an affirmative defense for drug or marijuana sale crimes (except A-I and A-II felonies) when the defendant sought the emergency assistance, and has not previously been convicted of a Class A-I, A-II or B felony drug crime.

CPL § 220.78 Witness of victim of drug or alcohol overdose.

1. A person who, in good faith, seeks health care for someone who is experiencing a drug or alcohol overdose or other life threatening medical emergency shall not be charged or prosecuted for a controlled substance offense under article [220] or a marijuana offense under article [221] of this title, other than an offense involving sale for consideration or other benefit or gain, or charged or prosecuted for possession of alcohol by a person under the age of twenty-one years under section [65-c] of the alcoholic beverage control law, or for possession of drug paraphernalia under article [39] of the general business law, with respect to any controlled substance, marijuana, alcohol or paraphernalia that was obtained as a result of such seeking or receiving of health care.

....

3. Definitions. As used in this section the following terms shall have the following meanings:

(a) “drug or alcohol overdose” or “overdose” means an acute condition including, but not limited to, physical illness, coma, mania, hysteria or death, which is the result of consumption or use of a controlled substance or alcohol and relates to an adverse reaction to or the quantity of the controlled substance or alcohol or a substance with which the controlled substance or alcohol was combined; provided that a patient’s condition shall be deemed to be a

drug or alcohol overdose if a prudent layperson, possessing an average knowledge of medicine and health, could reasonably believe that the condition is in fact a drug or alcohol overdose and (except as to death) requires health care.

(b) "Health care" means the professional services provided to a person experiencing a drug or alcohol overdose by a health care professional licensed, registered or certified under title eight of the education law or article thirty of the public health law who, acting within his or her lawful scope of practice, may provide diagnosis, treatment or emergency services for a person experiencing a drug or alcohol overdose.

➤ **Chap. 58 (S.2808-D) (ACODs prohibited for commercial license holders). Effective: May 30, 2011.**

Adds a new subdivision 9 to CPL § 170.55 to prohibit courts from issuing adjournments in contemplation of dismissal for VTL offenses (other than parking-related ones) to holders of commercial licenses:

CPL § 170.55(9):

Notwithstanding any other provision of this section, a court may not issue an order adjourning an action in contemplation of dismissal if the offense is for a violation of the vehicle and traffic law related to the operation of a motor vehicle (except one related to parking, stopping or standing), or a violation of a local law, rule or ordinance related to the operation of a motor vehicle (except one related to parking, stopping or standing), if such offense was committed by the holder of a commercial driver's license or was committed in a commercial motor vehicle, as defined in subdivision four of section five hundred one-a of the vehicle and traffic law.

➤ **Chap. 177 (A.7930) (Papers to accompany order of commitment). Effective: September 1, 2011.**

Requires that a certificate of conviction specify the section and subdivision of law under which the conviction was entered, and that any order of protection issued by the court at the time of sentencing be delivered to the correctional facility with the defendant's order of commitment (new CPL § 380.65).

➤ **Chap. 9 (A.88) (Family offense orders of protection). Effective: May 13, 2011.**

Amends CPL § 530.12 to provide that final orders of protection in family offense matters shall issue from the date of sentencing, not the date of conviction.

➤ **Chap. 565 (S.4469) (CPL § 180.80 period following release and recommitment on felony complaint).**

Effective: October 23, 2011

Amends CPL § 530.60 to provide that a new CPL § 180.80 period shall commence upon the recommitment of a defendant who was previously released on a felony complaint.

➤ **Chap. 258 (A.698-D) (Crime of domestic violence — procedure). Effective: November 29, 2011.**

Establishes a procedure to determine whether a defendant convicted of certain misdemeanor crimes (listed below) is related to the victim for purposes of notification to DCJS and the FBI, and subsequent enforcement of federal laws prohibiting gun purchases and possession by persons convicted of crimes of domestic violence (new CPL §§ 370.15, 380.97). The federal law applies to crimes "committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." 18 U.S.C. § 921(a)(33)(a)(ii).

The covered crimes include: assault and attempted assault in the third degree, menacing and attempted menacing in the second degree, criminal obstruction of breathing or blood circulation (and attempt to commit the same), forcible touching and attempted forcible touching.

➤ **Chap. 186 (A.8247-A) (Statutory double jeopardy exception — Tax crimes). Effective: October 18, 2011.**

Adds a new subparagraph (i) to CPL § 40.20(2) to permit separate prosecutions of certain tax crimes based upon the same act or criminal transaction where:

One of the offenses consists of a violation of 18 U.S.C. 371, where the object of the conspiracy is to attempt in any manner to evade or default any federal income tax or the payment thereof, or a violation of 26 U.S.C. 7201, 26 U.S.C. 7202, 26 U.S.C. 7203, 26 U.S.C. 7204, 26 U.S.C. 7205, 26 U.S.C. 7206 or 26 U.S.C. 7212(A), where the purpose is to evade or defeat any federal income tax or the payment thereof, and the other offense is committed for the purpose of evading or defeating any New York state or New York city income taxes and is defined in article one hundred fifty-five of the Penal Law, article one hundred seventy of the penal Law, article thirty-seven of the tax law or chapter forty of title eleven of the administrative code of the city of New York.

➤ **Chap. ___ (S.5734-A) (Charitable bail organizations). Effective: 90 days after governor's signature.**

Adds a new section (21) to CPL § 500.10 to define a charitable bail organization as a "non-profit organization organized under section 501 (c) 3 of title 26 of the United

States code, registered as a charity pursuant to article seven-A of the executive law, and organized for the purpose of posting cash bail on behalf of poor persons.” The subsection goes on to provide that “[a] charitable cash bail organization shall not charge a premium nor receive compensation for cash bail given or provided pursuant to this chapter.”

Sex Offender Registration Act

- **Chap. 532 (A.7950) (SORA — employment address for level 2 offenders). Effective: September 23, 2011.**

Amends Correction Law § 168-f(2)(b-1) to require level 2, as well as level 3, offenders to report their employment addresses to DCJS as part of the annual registration process. Eliminates the requirement that DCJS maintain and distribute a hard copy of the sex offender subdirectory to law enforcement agencies.

The legislation also authorizes law enforcement to release the *exact* address of level 2 offenders to entities with vulnerable populations. (Prior law authorized release of an approximate address.)

- **Chap. ___ (A.424) (SORA — procedure when registrant fails to verify with DCJS). Effective: 60 days after governor’s signature.**

Amends the Sex Offender Registration Act (SORA) to provide that law enforcement officers shall visit the last known address of a Megan’s Law (SORA) registrant who fails to annually verify his address with DCJS; provides for up to a \$200 civil penalty to cover the costs of law enforcement for the visit [Correction Law § 168-f(2)].

- **Chap. 513 (A.5661) (SORA — new offense and new information disclosure authorized). Effective: September 23, 2011 (Registration required for persons convicted of new listed crime where offense was committed before September 23, 2011 provided that sentence was not completed before that date).**

Adds the crime of attempted unlawful surveillance in the second degree under subdivisions 2, 3, or 4 of Penal Law § 250.45 to the list of registerable offenses under Megan’s Law (SORA). A court can decline to order the defendant convicted of such crime to register when, “having regard to the nature and circumstances of the crime and to the history and character of the defendant, [it] is of the opinion that registration would be unduly harsh and inappropriate.”

- **Chap. 507 (A.2565) (SORA — type of supervision). Effective: September 23, 2011.**

Amends Correction Law § 168-b(1)(c) to require disclosure of the “type of assigned supervision and the length of time of such supervision” in the sex offender registry.

Vehicle and Traffic Law

- **Chap. 60, Part D (S.2810-C) (Driver’s License Suspension after Drug Conviction). Sunset Clause eliminated.**

In 1993, the Legislature passed a law requiring a 6-month suspension of the driver’s license, or a 6-month delay in eligibility for a driver’s license, of any person convicted of a misdemeanor or felony drug offense, including juvenile and youthful offender adjudications (L. 1993, Chap. 533). The sunset clause of this legislation has eliminated and the law is now permanent.

- **Chap. 109 (S.5643) (Use of cell phone while driving — primary offense). Effective: July 12, 2011.**

Makes use of a cell phone or other handheld electronic device while driving a primary VTL violation that can independently justify a traffic stop. Previously, a motorist could only be ticketed for the offense when stopped for committing another violation.

- **Chap. 376 (A.7932) (DMV records — free access for legal aid societies). Effective: August 3, 2011.**

Amends VTL § 202(1) to provide free access to DMV records for a “legal aid bureau or society or other private entity when acting pursuant to section seven hundred twenty-two of the county law.” Note: public defenders were already afforded free access to DMV records under the statute.

- **Chap. 400 (A.3518-A) (School bus drivers — list of disqualifying criminal convictions). Effective: February 12, 2012.**

Establishes a comprehensive list of scores of criminal convictions that disqualify a person from being a school bus driver [VTL § 509-cc(4)].

- **Chap. 458 (S.2769-B) (VTL — due care to avoid hazard vehicles). Effective: August 17, 2011.**

Requires motorists to “exercise due care to avoid colliding with a hazard vehicle which is parked, stopped or standing on the shoulder or on any portion of [a] highway . . . [and] is displaying one or more amber lights . . .” For motorists on parkways or controlled access highways, due care shall include, but not be limited to, moving from the lane nearest the hazard vehicle [VTL § 1144-a(b)].

Prisons — Jails — Parole

- **Chap. 62 (S.2812) (Consolidation of the Division of Parole and Department of Correctional Services). Effective: March 29, 2011.**

Chapter 62 consolidates the former Division of Parole and Department of Correctional Services into a newly formed Department of Corrections and Community

Supervision. The new agency has the “combined responsibilities” of the former ones and is charged with “provid[ing] for a seamless network for the care, custody, treatment and supervision of a person from the day a sentence of state imprisonment commences until the day such person is discharged from supervision.” The consolidation does not affect the Board of Parole, as distinct from the Division of Parole. The Board “retain[s] its authority to make release decisions based on board of parole members’ independent judgment and application of statutory criteria as well as decisions regarding revocations of release.” However, the establishment of terms and conditions of release to supervision will now be made by the Department of Corrections and Community Supervision, not the Board. The consolidation does not bring about any major changes in the law governing inmates and persons under supervision. But the Board of Parole’s statutory responsibility to establish “guidelines” for parole release decision-making (an obligation that has not been updated in over 25 years) has been changed to provide that the Board shall establish “procedures” for such decision-making. The “procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of [the board] in determining which inmates may be released to parole supervision.”

➤ **Chap. 299 (A.7237) (Ontario County Jail). Effective: August 3, 2011.**

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

➤ **Chap. ___ (A.1363-B) (Payment of parole supervision fees). Effective: upon governor’s signature.**

Provides that a parole supervision fee shall not be collected by supervising parole officers, but shall be deposited at a central location designated by the parole office [Correction Law § 201(9)(e)].

➤ **Chap. 488 (S.5757) (Certificates of relief from civil disability — timing). Effective: August 17, 2011.**

Amends Correction Law § 702(1) to promote issuance of certificates of relief from civil disability at the time of sentence. The amendment provides that when a court imposes a sentence of local jail, a revocable sentence or lesser sanction, upon application of the defendant the court “shall initially determine the fitness of an eligible offender for such certificate prior to or at the time sentence is pronounced.”

Miscellaneous

➤ **Chap. 543 (A.8368) (E-filing in criminal courts — advi-**

sory committee). Effective: September 23, 2011.

Authorizes the chief administrative judge to create an advisory committee to consult with her regarding the development of a program for filing by electronic means in criminal actions and proceedings under Family Court Act Articles 3 and 10.

➤ **Chap. 131 (A.6037-A) (Sale of smoking paraphernalia to minors). Effective: January 1, 2012.**

Amends Public Health Law § 1339-aa and 1330-cc to prohibit the sale of smoking paraphernalia (pipe, water pipe, hookah, rolling papers, vaporizer of any other device, equipment or apparatus designed for the inhalation of tobacco) and shisha (tobacco mixed with syrup) to minors.

➤ **Chap. 307 (A.7465-A) (Subpoena for medical records). Effective: August 3, 2011.**

Amends CPLR § 2302(b) to clarify that “[i]n the absence of an authorization by a patient, a trial subpoena duces tecum for the patient’s medical records may only be issued by a court.”

➤ **Chap. 97 (S.5856) (Crimes in OMH facilities — state payment for prosecution). Effective: July 24, 2011.**

Requires the state to pay prosecution and defense costs of any prosecution of a prison inmate for a crime committed while the inmate-patient was committed to the custody of the Office of Mental Health (new MHL § 29.28).

➤ **Chap. 534 (A.8091) (Office of Victim Services awards — new offenses). Effective: December 22, 2011.**

Amends Executive Law § 631(12) to add criminal obstruction of breathing or blood circulation to the list of offenses that can result in an award to the victim by the Office of Victim Services.

➤ **Chap. 91 (S.3777-A) (Mandatory child abuse reporters — day camp directors). Effective: June 22, 2011.**

Adds directors of overnight and day camps to the list of persons who are required to report suspected child abuse under the Social Services Law (Social Services Law § 413(1)(a)).

➤ **Chap. 29 (A.55-A) (Interstate Compact for Juveniles). Effective: June 23, 2011.**

Enacts the most current Interstate Compact for Juveniles to provide for orderly interstate management of juveniles who are under parole or probation supervision (Executive Law § 501-e).

➤ **Chap. 309 (A.7632) (Family offense petitions). Effective: August 3, 2011.**

Amends Family Court Act § 821(1)(a) to add criminal obstruction of breathing or blood circulation and strangu-

lation to the list of offenses that may support a Family Court Article 8 petition.

➤ **Chap. 176 (A.7869-A) (Railroad trespassing). Effective: January 16, 2012.**

Amends § 83-a of the Railroad Law to provide that knowing, unauthorized use of motor vehicles, recreational vehicles, all terrain vehicles (in addition to snowmobiles), and the riding of animals on railroad property or tracks shall constitute trespassing as a violation. First offense: \$100–\$250 fine; second offense: \$250–\$500 fine.

➤ **Chap. 332 (S.3237-A) (Offense upgrade — animal fighting). Effective: September 2, 2011.**

Upgrades the offense of being present as a spectator at an animal fighting exhibition [Agriculture and Markets Law § 351(5)(b)] from a violation to a Class B misdemeanor.

Sunset Clause Extended

➤ **Chap. 57 (S.2807-C) (Omnibus sunset extender)**

Extends the sunset clauses of the following programs and laws to September 1, 2013:

- Jenna’s Law (1998) and Sentencing Reform Act (1995)
- Correction Law § 189 — \$1 weekly incarceration fee
- CPLR § 1101(f) — Fees for inmate filings
- CPL Article 65 — Closed circuit testimony of certain child witnesses
- Family Protection and Domestic Violence Intervention Act of 1994 (*e.g.*, mandatory arrest)
- CPL Article 182 — Electronic court appearances in certain counties
- Penal Law §§ 205.16, 205.17, 205.18, 205.19 — Absconding offenses
- VTL § 1809 — Mandatory surcharges

➤ **Chap. 101 (S.4071)**

Sunset clause for driver’s license suspension for failure to pay child support extended to September 1, 2013. ☪

2011 Annual Meeting and Conference: Recognizing Generations of Defenders



Norman Shapiro (r), a founding NYSDA member and long-time Board Vice President, receiving a 2011 Service of Justice Award; he is shown with Board President Edward J. Nowak.



Gary Horton, Genesee County Public Defender, accepting the Wilfred R. O’Connor Award, which honors exceptional, client-centered work by a public defense attorney in practice 15 or more years.



Heather Toole, Ulster County Assistant Public Defender, addressing conferees after she was given the Kevin M. Andersen Award, created by the Genesee County Public Defender Office to recognize outstanding work by public defense attorneys who have been in practice less than 15 years.



Stephen J. Pittari, recently-retired head of the Westchester County Legal Aid Society and continuing NYSDA Board member, speaking after being presented with a 2011 Service of Justice Award, which recognizes those who have been of great assistance to the Association and its Backup Center, and/or who have generously and meaningfully served the defender and client community.