

By Al O'Connor*

DNA Testing

➤ **Chap. 19 (S.6733) (DNA testing for virtually all criminal convictions). Effective: Applies to convictions entered on or after August 1, 2012 (as amended by Chap. 55, Part A).**

Requires DNA testing of defendants convicted of all felonies and Penal Law misdemeanors, except first time convictions of criminal possession of marijuana under Penal Law § 221.10(1) (amounts of 25 grams or less burning or open to public view). The new testing requirements apply to convictions entered on or after August 1, 2012. The legislation specifies that DNA samples are to be taken by jails and prisons when the defendant is committed to custody, and by probation offices when a probationary term is imposed. Otherwise, samples are to be taken by court officers or sheriff's offices or, in the city of New York, by court officers.

The legislation also amends the discovery statute [CPL § 240.40(1)(d)] to authorize defense motions for comparison of DNA material "gathered in connection with the investigation or prosecution of the defendant" against the DNA databank when the request is "reasonable" and comparison is "material" to the defense. For the first time, post-conviction DNA testing under CPL § 440.30 will be available in cases where the defendant pleaded guilty, but only for pleas entered on or after August 1, 2012 and only for certain specified crimes (homicide, sex offenses, and violent felonies). The legislation also authorizes a highly qualified right to compelled production of property in possession of the prosecutor when the court orders an evidentiary hearing in a CPL § 440.10 proceeding.

Penal Law

➤ **Chap. ___ (S.7638, Part D) (Family Offenses — Offense Level Upgrades). Effective: 60 days after governor's signature, except the new Penal Law § 240.75 and CPL § 200.63 are effective 90 days after governor's signature.**

This legislation elevates shoving, kicking and other physical contact to aggravated harassment in the second degree, a Class A misdemeanor, when the offense is committed against a member of the same family or household and the victim suffers physical injury. It also establishes the new Class E felony of aggravated family offense when the defendant has been convicted of any one of a long list of crimes against a family member within the preceding five years (exclusive of time in custody). Finally, the legis-

lation amends the bail setting criteria defined in CPL § 510.30 to require the court in family offense matters to consider "(A) any violation by the principal of an order of protection issued by any court for the protection of a member or members of the same family or household . . . whether or not such order of protection is currently in effect; and (B) the principal's history of use or possession of a firearm."

Penal Law § 240.30 — Aggravated harassment in the second degree.

Subdivisions 4 and 5 of § 240.30 of the Penal Law are renumbered subdivisions 5 and 6 and a new subdivision 4 is added to read as follows:

"4. Strikes, shoves, kicks or otherwise subjects another person to physical contact thereby causing physical injury to such person or to a family or household member of such person as defined in section 530.11 of the criminal procedure law."

(Class A misdemeanor)

Penal Law § 240.75 Aggravated family offense.

1. A person is guilty of aggravated family offense when he or she commits a misdemeanor defined in subdivision two of this section as a specified offense and he or she has been convicted of one or more specified offenses within the immediately preceding five years. For the purposes of this subdivision, in calculating the five year period, any period of time during which the defendant was incarcerated for any reason between the time of the commission of any of such previous offenses and the time of commission of the present crime shall be excluded and such five year period shall be extended by a period or periods equal to the time served under such incarceration.

2. A "specified offense" is an offense defined in section 120.00 (assault in the third degree); section 120.05 (assault in the second degree); section 120.10 (assault in the first degree); section 120.13 (menacing in the first degree); section 120.14 (menacing in the second degree); section 120.15 (menacing in the third degree); section 120.20 (reckless endangerment in the second degree); section 120.25 (reckless endangerment in the first degree); section 120.45 (stalking in the fourth degree); section 120.50 (stalking in the third degree); section 120.55 (stalking in the second degree); section 120.60 (stalking in the first degree); section 121.11 (criminal obstruction of breathing or blood circulation); section 121.12 (strangulation in the second degree); section 121.13 (strangulation in the first degree); subdivision one of section 125.15 (manslaughter in the second degree); subdivision one, two or four of section 125.20 (manslaughter in the first degree); section 125.25 (murder in the second degree); section 130.20 (sexual mis-

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conduct); section 130.30 (rape in the second degree); section 130.35 (rape in the first degree); section 130.40 (criminal sexual act in the third degree); section 130.45 (criminal sexual act in the second degree); section 130.50 (criminal sexual act in the first degree); section 130.52 (forcible touching); section 130.53 (persistent sexual abuse); section 130.55 (sexual abuse in the third degree); section 130.60 (sexual abuse in the second degree); section 130.65 (sexual abuse in the first degree); section 130.66 (aggravated sexual abuse in the third degree); section 130.67 (aggravated sexual abuse in the second degree); section 130.70 (aggravated sexual abuse in the first degree); section 130.91 (sexually motivated felony); section 130.95 (predatory sexual assault); section 130.96 (predatory sexual assault against a child); section 135.05 (unlawful imprisonment in the second degree); section 135.10 (unlawful imprisonment in the first degree); section 135.60 (coercion in the second degree); section 135.65 (coercion in the first degree); section 140.20 (burglary in the third degree); section 140.25 (burglary in the second degree); section 140.30 (burglary in the first degree); section 145.00 (criminal mischief in the fourth degree); section 145.05 (criminal mischief in the third degree); section 145.10 (criminal mischief in the second degree); section 145.12 (criminal mischief in the first degree); section 145.14 (criminal tampering in the third degree); section 215.50 (criminal contempt in the second degree); section 215.51 (criminal contempt in the first degree); section 215.52 (aggravated criminal contempt); section 240.25 (harassment in the first degree); subdivision one, two or four of section 240.30 (aggravated harassment in the second degree); aggravated family offense as defined in this section or any attempt or conspiracy to commit any of the foregoing offenses where the defendant and the person against whom the offense was committed were members of the same family or household as defined in subdivision one of section 530.11 of the criminal procedure law.

3. The person against whom the current specified offense is committed may be different from the person against whom the previous specified offense was committed and such persons do not need to be members of the same family or household.

(Class E felony)

A new CPL § 200.63 has been enacted to provide for special informations for the charge of aggravated family offense, thereby offering the defendant an opportunity to admit to the prior offense and keep it out of evidence or, alternatively, deny it and have it be the subject of trial proof.

➤ **Chap. 456 (S.7742) (Obscene sexual performance by a child). Effective: September 7, 2012.**

Amends Penal Law § 263.11 (possessing an obscene sexual performance by a child) and Penal Law § 263.16 (possessing a sexual performance by a child) to include “knowingly access[ing]” such material on the internet with the intent to view it. The legislation is in response to *People v Kent* (19 NY3d 290 [2012]), where the Court of Appeals held that a defendant who merely accessed a website containing child pornography was not guilty of possession without further evidence that he downloaded or saved the contents of the site. The legislation also includes an exclusion for defense attorneys. A new subdivision 9 of Penal Law § 263.00 provides that the terms “possession,” “control” and “promotion” “shall not include conduct by an attorney when the performance was provided to such attorney in relation to the representation of a person under investigation or charged under this chapter or as a respondent pursuant to the family court act, and is limited in use for the purpose of representation for the period of such representation.”

➤ **Chap. 434 (S.7720) (Assault on an employee of a social service district). Effective: November 1, 2012.**

Adds employees of social service districts to the list of job titles covered by Penal Law § 120.05. (Class D felony)

Penal Law § 120.05

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

3-a. With intent to prevent an employee of a local social services district directly involved in investigation of or response to alleged abuse or neglect of a child, a vulnerable elderly person or an incompetent or physically disabled person, from performing such investigation or response, the actor, not being such child, vulnerable elderly person or incompetent or physically disabled person, or with intent to prevent an employee of a local social services district directly involved in providing public assistance and care from performing his or her job, causes physical injury to such employee including by means of releasing or failing to control an animal under circumstances evincing the actor’s intent that the animal obstruct the lawful activities of such employee;

11-a. With intent to cause physical injury to an employee of a local social services district directly involved in investigation of or response to alleged abuse or neglect of a child, vulnerable elderly person or an incompetent or physically disabled person, the actor, not being such child, vulnerable elderly person or incompetent or physically disabled person, or with intent to prevent an employee of a local social services district directly involved in providing public assistance and care from performing his or her job, causes physical injury to such employee.

➤ **Chap. 377 (A.6062-A) (Assault on New York City sanitation worker). Effective: September 16, 2012.**

Adds New York City sanitation workers to the list of job titles covered by Penal Law § 120.05 (assault on a person performing a lawful duty). (Class D felony)

➤ **Chap. ___ (S.7749 – Part G) (Endangering the welfare of an incompetent or physically disabled person). Effective: 30 days after governor’s signature.**

This legislation enacts major reforms of laws dealing with abuse and neglect of persons with special needs in state operated and licensed facilities. Part G splits the crime of endangering the welfare of an incompetent or physically disabled person into first- and second-degree crimes. The current offense (knowingly endangering the welfare of an incompetent or physically disabled person [Penal Law § 260.25]) is upgraded to a Class E felony (from a Class A misdemeanor). The new second-degree crime (recklessly engages in conduct which is likely to be injurious to the physical, mental or moral welfare of an incompetent or physically disabled person [Penal Law § 260.24]) is now the Class A misdemeanor. The bill also amends Penal Law § 130.05 to make it a crime for employees or volunteers who provide direct services to residents of facilities operated or licensed by the Office of Mental Health, the Office for People with Developmental Disabilities, and the Office of Alcoholism and Substance Abuse Services to engage in sexual activity with residents of such facilities. Part G amends Penal Law § 240.50 relating to falsely reporting an incident of “abuse or neglect of a vulnerable person which did not in fact occur or exist.” (Class A misdemeanor). Part F enacts new criminal background checks for employees or volunteers who work with persons with special needs in these facilities.

Criminal Procedure Law

➤ **Chap. 347 (S.7190-A) (Interim Probation — Inter-county transfers). Effective: August 1, 2012.**

The 2009 Drug Law Reform Act (DLRA) offered drug treatment as an alternative to incarceration for most persons charged with drug and marijuana offenses. Unfortunately, the bill included an oversight that made drug treatment unavailable to some defendants when they were arrested outside their home counties. The 2009 DLRA failed to include a simple amendment authorizing judges to place these defendants on interim probation in their home counties. This bill cures the oversight by authorizing judges to place defendants on interim probation supervision in their home counties during the pendency of treatment. The court will otherwise retain jurisdiction of the case. [Amending CPL §§ 216.05(8), 410.80(1), (2).]

Judiciary

➤ **Chap. 184 (A.10706) (Electronic Filing — Pilot project). Effective: July 18, 2012.**

This bill authorizes the chief administrative judge to establish pilot projects for electronic filing of documents in criminal cases in County Court and Supreme Court in six unspecified counties. Initially, the projects will be voluntary but may become mandatory with the consent of the district attorney and criminal defense bar (“all provider offices and/or organizations in the county that represented twenty-five percent or more of the persons represented by public defense providers pursuant to section 722 of the county law”). The legislation includes liberal opt-out options for attorneys who cannot comply with the electronic filing requirements.

➤ **Chap. ___ (S.1998-A) (Practicing law without a license). Effective: The first of November next succeeding the date on which is shall have become law.**

Elevates the crime of practicing law without a license to a Class E felony when a person “(1) either impersonates an attorney or offers legal services to the public under a title other than attorney; and (2) causes another person to suffer monetary loss or damages exceeding one thousand dollars or other material damage resulting from impairment of a legal right to which he or she is entitled according to law.”

Sex Offenders

➤ **Chap. 363 (A.8917) (Sex Offenders — Parole release interview transcripts). Effective: August 31, 2012.**

Amends Executive Law § 259-i(6)(a) to provide that the transcripts of parole release interviews of sex offenders shall be transcribed and delivered to the Office of Mental Health in connection with that office’s review for possible civil commitment of the inmate pursuant to Mental Hygiene Law article 10.

➤ **Chap. 364 (A.9229) (Sex Offender Registration — Photo of Level 3 sex offenders). Effective: Aug. 31, 2012.**

Authorizes law enforcement agencies to take a new photograph of a Level 3 sex offender at a quarterly verification appearance if the offender’s appearance has changed since the most recent regularly scheduled photograph was taken.

Miscellaneous

➤ **Chap. 29 (A.3964-A) (Unlawful sale of embalming fluid). Effective: November 14, 2012.**

Amends Public Health Law § 3455 to criminalize unauthorized sales of embalming fluid by funeral directors.

(Embalming fluid is sometimes mixed with illegal drugs such as PCP.)

➤ **Chap. 287 (A.9380-B) (Electronic surveillance database). Effective: January 28, 2013.**

Establishes a voluntary database, within the Division of Homeland Security and Emergency Services, for registration of businesses and homeowners that conduct video surveillance of premises to provide law enforcement access to information about the location of privately owned surveillance cameras. The database is exempt from disclosure under the Freedom of Information Law, but the information may be accessible by judicial subpoena.

➤ **Chap. 144 (A.9552-A) (Animal fighting paraphernalia). Effective: October 16, 2012.**

Amends Agriculture and Markets Law § 351 to criminalize the possession, sale or manufacture of items commonly used to train or engage in animal fighting. (Class B misdemeanor; Class A misdemeanor if convicted of the same offense within the previous five years)

➤ **Chap. 233 (S.6848) (Crime Victims Board — eligibility for award). Effective: July 18, 2012.**

Amends Executive Law § 624 to provide that guardians, siblings, stepbrothers and stepsisters of a person who died as a direct result of a crime are eligible to receive an award from the Crime Victims Board.

Parole and Corrections

➤ **Chap. 201 (S.6237) (Collection of community supervision fees). Effective: July 18, 2012.**

Prohibits parole officers from personally collecting supervision fees from a person on community supervision.

➤ **Chap. 343 (S.6864-A) (Albany County Correctional Facility). Effective: August 1, 2012.**

Amends Correction Law § 500-a to authorize use of the Albany County Correctional Facility for the detention of persons under arrest but prior to arraignment.

Vehicle and Traffic

➤ **Chap. 55, Part C (S.6255-D) (VTL — No trial on first appearance). Effective: March 30, 2012.**

Amends VTL § 1806 to provide that upon receipt of a not guilty plea by mail, the court shall advise the motorist “by first class mail, of an appearance at which no testimony shall be taken. If the motorist requests a trial, the court shall set a trial date on a date subsequent to the date of the initial appearance”

➤ **Chap. 388 (A.9539-D) (Suffolk County Traffic and Parking Violations). Effective: April 1, 2013.**

Authorizes establishment of an agency for the adjudication of traffic and parking tickets in Suffolk County.

Peace Officer Status

➤ A.948-B — Members of the security force of Kaledia Health in Buffalo (Effective: 180 days after governor’s signature).

➤ S.6171-A — Uniform marine patrol officers appointed by the Seneca County Sheriff and employees of the Seneca County Sheriff’s Office performing court security services (Effective: upon governor’s signature).

➤ S.6319 — Uniformed court officers of the town court of the town of New Windsor (Effective: upon governor’s signature).

➤ S.6320 — Court attendants in the town of Highlands (Effective: upon governor’s signature).

➤ A.9666-A — Security services officers of the University of Rochester (Effective: upon governor’s signature).

➤ S.6996 — Uniformed officers of the fire marshal’s office of the town of Huntington (Effective: upon governor’s signature).

➤ A.10116 — Members of the fire investigation unit in the city of Schenectady (Effective: upon governor’s signature).

➤ A.10731 — Uniformed members of the bureau of fire prevention of the town of Islip. (Effective: upon governor’s signature). ⚡

Defender News *(continued from page 9)*

Injunction Sought Against NYPD Operation Clean Halls

As the *REPORT* went to press, advocates prepared to seek a judicial order ending a New York Police Department (NYPD) “unconstitutional practice”—the practice “of stopping innocent people on suspicion of trespassing in public areas outside of thousands of private apartment buildings in the Bronx,” as one source noted. An Oct. 15, 2012 hearing was scheduled in U.S. District Court in Manhattan on the matter, which is part of a federal class-action lawsuit challenging the NYPD’s enforcement of Operation Clean Halls. The suit against this “citywide program within the Police Department’s stop-and-frisk regime that allows police officers to patrol in and around certain private apartment buildings” is *Lingon v City of New York* (No. 12-CIV-2274 [SDNY]). Plaintiffs include The Bronx Defenders, the New York Civil Liberties Union, LatinoJustice PRLDEF, and Shearman & Sterling LLP. (www.nyclu.org/news/first-ever-court-hearing-nypd-stop-and-frisk-tactics-apartment-buildings.) ⚡