



New Criminal Justice Legislation

By Barry Kamins

This article contains an annual review of new criminal justice legislation signed into law by Governor Andrew Cuomo, amending the Penal Law (PL), Criminal Procedure Law (CPL) and other related statutes. While, in total, the Legislature passed the lowest number of bills since 1914, there was no dearth of criminal justice measures. It is recommended that the reader review the legislation for specific details as the following discussion will primarily highlight key provisions of the new laws. In some instances, where indicated, legislation enacted by both houses has not yet been sent to the Governor for his signature.

DNA Databank Expanded

A number of significant procedural changes were enacted in the past legislative session. One new law expands the 16-year-old state DNA databank. Beginning August 1, 2012, for the first time in this state and in the country, DNA samples are now collected from defendants convicted of all felonies, both within and outside the Penal Law, and all Penal Law misdemeanors.¹

In all, 250 felonies were added to the 400 Penal Law felonies already in the databank, and 180 Penal Law misdemeanors were added to the 35 Penal Law misdemeanors in the databank, which was last expanded in 2006. The only exception precludes the taking of a sample from individuals convicted of the Class B misdemeanor of marijuana possession when they have no prior convictions.

Since its inception in 1996, there have been 10,000 “hits,” or matches against the databank, resulting in more than 2,900 convictions. At the same time, 27 individuals

were exonerated in New York through the use of DNA evidence, as well as numerous suspects who were excluded and cleared at early stages of an investigation.

From a practical standpoint, if the defendant is sentenced to a term of imprisonment, the sample is taken by prison or jail officials. If the defendant is sentenced to a term of probation, the sample is taken by the Probation Department. When a defendant is not sentenced to a period of imprisonment or probation, the sample is taken by the sheriff’s office (outside New York City) and a court officer (inside New York City).

The new law also contains several provisions increasing a defendant’s access to DNA evidence – both before trial and after conviction – in the effort to establish his or her innocence. For the first time, post-conviction DNA testing is now permitted where a defendant pleads guilty, but this only applies to guilty pleas entered on or after August 1, 2012. In addition, the testing is only permitted when there is a “substantial probability” that, had DNA been tested prior to the entry of the guilty plea, the evidence would have established “actual innocence” of the offense that is subject to the defendant’s motion. In addition, the testing is restricted to homicides, sex crimes pursuant to Article 130 of the Penal Law and Class B violent felony offenses. Finally, there is a five-year statute

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of limitations with exceptions in the interest of justice or because of extenuating circumstances.

In addition, where a defendant has been convicted of a felony and a court has ordered a hearing pursuant to CPL § 440.10, and the defendant has asserted his or her actual innocence, the court may order production of property in the control or possession of the prosecutor, which property was secured in connection with the investigation or prosecution of the defendant. The court may deny the request for property based on a number of factors enumerated in the statute. There is a five-year statute of limitations for making the request, which is tolled for five years if the defendant has been in custody in connection with the conviction that is the subject of the motion.

Finally, the new law provides an additional ground for vacating a conviction after trial or the entry of a guilty plea, based upon DNA testing. After a trial, the defendant must establish that there is a “reasonable probability” that a “more favorable verdict” would have

cyberbullying or texting messages of a sexual nature.⁵ Finally, defendants who have been committed pursuant to a temporary order of observation, pursuant to Article 730 of the Criminal Procedure Law, may be sent to outpatient treatment with the consent of the prosecutor.⁶

Expanded Crimes and Penalties

In addition to the above procedural changes, the Penal Law has been amended to expand the definition of certain crimes and increase the penalties for others. Earlier this year, the New York Court of Appeals for the first time examined the statutory construction of two child pornography-related statutes as applied to the increasing amount of pornography consumed over the Internet. In *People v. Kent*,⁷ the Court analyzed the elements of two crimes: Promoting a Sexual Performance by a Child (PL § 263.15) and Possessing a Sexual Performance by a Child (PL § 263.16). The Court held that an individual is not guilty of either crime when the individual merely accesses a website containing child pornography but

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been rendered. After a guilty plea, the defendant must establish a “substantial probability” that the defendant was “actually innocent” of the offense for which he or she was convicted.

Other Procedural Changes

Other significant procedural changes were enacted in the last legislative session. When setting bail in domestic violence cases, where a defendant is charged with offenses against a family member or household member, judges are now required to consider certain risk factors, that is, whether the defendant has previously violated an order of protection, whether the order is still in effect, and the defendant’s prior history of use of a firearm.²

Another bail-related statute creates charitable bail organizations that can now post up to \$2,000 for indigent defendants charged with misdemeanors.³ The organizations will have fewer requirements than for-profit entities and will operate under the oversight of the Department of Insurance.

A new law allows the Chief Administrative Judge to implement mandatory e-filing in up to six counties with the approval of the local district attorney and defense bar.⁴ The three-year program will only be implemented in post-indictment matters and exempts certain sealed documents, such as search warrants. Another new law permits a judge to impose, as a condition of an adjournment in contemplation of dismissal, that a defendant participate in an educational program on

does not engage in some affirmative act (printing, saving, downloading) that demonstrates the individual exercised “dominion and control” over illegal images.

In response to *Kent*, the Legislature amended each statute to include “knowingly access[ing]” child pornography with the intent to view it.⁸ An exemption has been added for defense attorneys who access such material solely in the course of their representation of clients charged with possession of child pornography.

The Legislature has increased the penalty for impersonating an attorney and elevated the offense from a misdemeanor to a Class E felony.⁹ This makes the penalty consistent with the penalties for the impersonation of practitioners of numerous other professions. The assault statutes have been amended to increase the penalties for assaults on sanitation workers and employees of local social services districts while they are performing their duties.¹⁰ Previously, assaults on these classes of individuals constituted only a Class A misdemeanor; they now constitute a Class D felony. In an effort to promote the safe and effective use of prescription drugs, the Legislature has classified a number of substances as “narcotic preparations,” including oxycodone and hydrocodone.¹¹

The Legislature has amended the statute dealing with incompetent or physically disabled persons. The crime of Endangering the Welfare of an Incompetent or Physically Disabled Person has been divided into two crimes. The current crime, a Class A misdemeanor, has been elevated

to a Class E felony and is committed when a person “knowingly” acts in a manner that is injurious to a person who cannot care for himself or herself. A new crime, a Class A misdemeanor, has been enacted; it is committed when a person “recklessly” engages in conduct which is likely to be injurious.¹² Finally, the crime of Falsely Reporting an Incident in the Third Degree has been amended to include making false reports of abuse or neglect of a vulnerable person.¹³

New Crimes

Each year the Legislature enacts a number of new crimes and this year was no exception. Two new crimes were enacted to enhance protection for victims of domestic violence. First, a new Class E felony – Aggravated Family Offense – was enacted to provide that a defendant with a history of domestic violence who repeatedly commits misdemeanor offenses can be prosecuted as a felon.¹⁴ An individual can be charged with this crime when he or she commits one of 50 “specified offenses” against a member of the same family or household after having

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been convicted of one or more specified offenses within the preceding five years. 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.

The second new crime, Aggravated Harassment in the Second Degree, is a Class A misdemeanor.¹⁵ A person is guilty of this crime when, with the intent to harass, a person 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.

Other new crimes include owning, possessing or manufacturing animal fighting paraphernalia, with the intent to engage in animal fighting, a Class B misdemeanor.¹⁶ Although “animal fighting” has been illegal for some time, this legislation closes a loophole by making illegal items used to promote or facilitate animal fighting. A new, unclassified misdemeanor makes it unlawful for a funeral director to knowingly give or sell embalming fluid to another person who is not authorized to perform embalming activities.¹⁷ This legislation is an effort to prevent the increased use of embalming

fluid with illegal drugs. A new law also bans the sale of electronic cigarettes to individuals under the age of 18.¹⁸

Finally, a new law establishes a Justice Center for the Protection of People with Special Needs that will investigate reports of abuse and neglect. The agency will be staffed with a prosecutor who has concurrent jurisdiction with local prosecutors to prosecute abuse and neglect crimes. Under the new law, if a human service professional fails to report to the central agency incidents of suspected abuse against vulnerable persons, that will constitute a Class A misdemeanor.¹⁹

New Laws and Legislation for Crime Victims

This past legislative session produced a large number of new laws designed to protect crime victims. One such law provides several protections to victims of domestic violence. For example, a person who is the subject of an order of protection protecting an individual who is now deceased, or a person who has been charged with causing the death of such deceased person, will no longer be eligible to exercise control of the disposition of the deceased’s remains.²⁰ An Address Confidentiality Program (ACP) has been enhanced by enabling victims to keep their whereabouts secret by using a substitute mailing address maintained by the Department of State and requiring state and local governments to recognize the substitute address.²¹ A domestic violence fatality review team has been created within the Office for the Prevention of Domestic Violence. The team will examine ways to reduce domestic violence homicides and suicides.²² Finally, domestic violence victims have been given an additional 90-day period within which to remain in residential shelters; the maximum length of stay is now 180 days.²³

Other victim-related legislation was enacted. The Crime Victims Board is now authorized to make awards to guardians, siblings, stepbrothers and stepsisters of a person who died as a direct result of a crime.²⁴ When a defendant is convicted of a crime where the defendant files a financial statement under the UCC falsely alleging that an individual is indebted to the defendant, the court must file with the Secretary of State a Certificate of Conviction. The court must certify that a judgment of conviction was entered against the defendant who was listed as the secured party in the false statement. This will assist victims in proving that the financing statement was false.²⁵

Victims of sexual assaults who are at risk for contracting HIV/AIDS will now receive additional medical treatment. They will be provided a seven-day starter pack of HIV post-exposure prophylaxis treatment.²⁶ A new law expands the universe of victims who must be notified when a criminal prosecution is terminated after a defendant has been committed to the custody of the Commissioner of Mental Hygiene. Previously, notification had to be sent only in cases where the defendant was committed in a

felony prosecution. Notification must now be sent where charges are dismissed in a misdemeanor prosecution as well. In addition, both in felony and misdemeanor prosecutions, all victims of family offense crimes must be notified regardless of the victim's relationship to the perpetrator.²⁷ A new law codifies the right of prosecutors to employ licensed practitioners to provide mental health services to people who are impacted by crime and the criminal justice system.²⁸

Finally, the Legislature has increased protection for patients who are under the care of a health care provider. Currently, there is only a mechanism for reporting sexual acts committed by a psychiatrist. A new law requires that law enforcement officials be notified when there is an alleged act of sexual misconduct by other licensed professionals – for example, a psychotherapist or a social worker.²⁹

Sentencing and Parole

A number of changes have taken place in the area of sentencing and parole. Courts are now permitted to transfer supervision of defendants serving *interim* probation to the probationer's county of residence in the same manner currently in place for individuals serving *regular* probation.³⁰ This will allow courts to offer defendants, when appropriate, the same plea options whether or not they reside in the same county as the court. The sentencing court shall retain jurisdiction during the period of interim probation but the probation department in the receiving jurisdiction will assume the powers and duties of the original probation department.

Parole officers are no longer required to collect fees from parolees who are on community supervision; this removes a conflict of interest that has strained the relationship between parole officers and parolees.³¹ Two new laws will impact on inmates in correctional facilities. First, inmates will no longer be assigned to duties that involve access to Social Security numbers of other individuals.³² Second, the State Commission of Correction now has the authority to review hospital records of inmates in order to conduct post-mortem investigations of people who have died while in the custody of corrections officials.³³

Finally, in New York City, the Department of Corrections is now prohibited from honoring civil immigration detainers by holding an individual beyond the time when such person would otherwise be released from custody or notifying federal immigration authorities of such person's release.³⁴ However, this applies only where a defendant's case is dismissed, results in an adjournment of contemplation of dismissal, or where the defendant is only charged with or convicted of a violation. In addition, Corrections will honor the detainer if the defendant has an outstanding warrant or is identified as a known gang member or is a possible match in a terrorist screening database.

Sex Offenders

Several new laws relate to sexual offenders. First, law enforcement officials are now authorized to update the photographs of level three offenders every 90 days or if the offender's appearance has changed, depending on which comes sooner.³⁵ Second, Parole Boards are now required to make a verbatim record of parole release interviews when the inmate is a sex offender. These records are then provided to the Office of Mental Health and the Attorney General's office for use in determining whether to seek civil confinement for an offender.³⁶ Finally, several changes were enacted to the Sex Offender Management and Treatment Act (SOMTA). Courts now have the authority to permit psychiatric examiners, upon good cause shown, to testify via two-way closed circuit television at probable cause hearings. In addition, a respondent can now be sent back to the custody of the Department of Corrections if the respondent has not reached his or her maximum expiration on the sentence and it is determined, after an administrative hearing, that the respondent was significantly disruptive of the treatment program at the secure treatment facility.³⁷

Other Statutory Changes

A number of changes have been made in statutes other than the Penal Law and Criminal Procedure Law. The Department of Health has issued new regulations to deter the increasingly widespread use of synthetic drugs that are marketed and sold as bath salts. The new regulations will affect small business owners who sell these products containing "designer drugs" that are manufactured with a modified structure as a means of avoiding existing drug laws. A first offense now carries a criminal penalty of a \$250 fine and up to 15 days in jail. Each subsequent offense carries a penalty of a \$500 fine and up to 15 days in jail.³⁸

In an effort to speed up criminal investigations, the Legislature has created a voluntary surveillance access database (VSAD). This permits residential homeowners and business owners who maintain video surveillance systems to register voluntarily their contact information in the database. This will eliminate many hours of investigation by law enforcement.³⁹

In an effort to curb sex trafficking in New York City, the City Council has enacted a law that penalizes a taxi driver for knowingly using his vehicle to facilitate sex trafficking. There is a \$10,000 civil penalty and it will result in the revocation of the driver's license.⁴⁰ ■

1. 2012 N.Y. Laws ch. 19 (amending Executive Law § 995-c, CPL § 240.40, adding CPL §§ 440.30(1)(b), 440.30(1-a)(2) and 440.10(g-1), eff. Oct. 1, 2012); 2012 N.Y. Laws ch. 55 (changing effective date to August 1, 2012).

2. S.7638 (sent to the Governor for signature Oct. 15, 2012).

3. 2012 N.Y. Laws ch. 181 (amending Insurance Law § 1108, eff. Oct. 16, 2012).

4. 2012 N.Y. Laws ch. 184 (adding Judiciary Law § 6-a, § 6-b and § 6-c, eff. July 18, 2012).

5. 2012 N.Y. Laws ch. 55 (amending CPL § 170.55, eff. Mar. 30, 2012).

6. 2012 N.Y. Laws ch. 56 (amending CPL § 730.40, eff. Mar. 30, 2012).

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7. 19 N.Y.3d 290 (2012).
 8. 2012 N.Y. Laws ch. 456 (amending PL § 263.11 and 263.16, eff. Sept. 7, 2012).
 9. S.1998-A (adding Judiciary Law § 485-a, not yet sent to the Governor for his signature).
 10. 2012 N.Y. Laws ch. 377 (amending PL § 120.05, eff. Sept. 16, 2012) (sanitation workers); 2012 N.Y. Laws ch. 434 (amending PL § 120.05, eff. Nov. 1, 2012) (social service workers).
 11. 2012 N.Y. Laws ch. 447 (amending Public Health Law § 3306(II)(b)(1), eff. Aug. 27, 2012).
 12. S.7749 (adding PL § 260.24, not yet sent to Governor for his signature).
 13. S.7749 (amending PL 240.05, not yet sent to the Governor for his signature).
 14. S.7638 (adding PL § 240.75, sent to Governor for signature Oct. 15, 2012).
 15. S.7638 (adding PL § 240.30, sent to the Governor for signature Oct. 15, 2012).
 16. 2012 N.Y. Laws ch. 144 (adding Agricultural and Markets Law § 6(a), eff. Oct. 16, 2012).
 17. 2012 N.Y. Laws ch. 29 (amending Public Health Law § 3455, eff. Sept. 13, 2012).
 18. 2012 N.Y. Laws ch. 448 (amending Public Health Law § 1399-aa, eff. Jan. 1, 2013).
 19. S.7749 (adding Social Services Law § 489, not yet sent to the Governor for signature).
 20. S.7638 (amending Public Health Law § 4201, sent to Governor for signature Oct. 15, 2012).
 21. S.7638 (amending Executive Law § 108, sent to Governor for signature Oct. 15, 2012).
 22. S.7638 (adding Executive Law § 575(10), sent to Governor for signature Oct. 15, 2012).
 23. 2012 N.Y. Laws ch. 459 (amending Social Services Law § 459-b, eff. Apr. 1, 2013 Oct. 15, 2012).
 24. 2012 N.Y. Laws ch. 233 (amending Executive Law § 624, eff. July 18, 2012).
 25. 2012 N.Y. Laws ch. 113 (adding CPL § 440.70, eff. July 18, 2012).
 26. 2012 N.Y. Laws ch. 39 (amending Executive Law § 631, eff. Nov. 27, 2012).
 27. 2012 N.Y. Laws ch. 476 (amending CPL §§ 730.40 and 730.60 eff. Oct. 3, 2012).
 28. 2012 N.Y. Laws ch. 358 (amending County Law § 700, eff. Aug. 1, 2012).
 29. 2012 N.Y. Laws ch. 365 (amending Education Law § 6510, eff. Aug. 1, 2012).
 30. 2012 N.Y. Laws ch. 347 (amending CPL § 410.80, eff. Aug. 1, 2012).
 31. 2012 N.Y. Laws ch. 201 (amending Correction Law § 201, eff. July 18, 2012).
 32. 2012 N.Y. Laws ch. 371 (amending Correction Law § 170, eff. Nov. 12, 2012).
 33. 2012 NY Laws ch. 232 (amending Correction Law § 46, eff. July 18, 2012). *See also N.Y. City Health & Hosps. Corp. v. N.Y. State Comm. of Corr.*, 19 N.Y.3d 239 (2012).
 34. Local Law 62-2011 (eff. Mar. 21, 2012).
 35. 2012 N.Y. Laws ch. 364 (amending Correction Law § 168, eff. Aug. 31, 2012).
 36. 2012 N.Y. Laws ch. 363 (amending Executive Law § 259-i, eff. Aug. 31, 2012).
 37. 2012 N.Y. Laws ch. 56 (amending Mental Hygiene Law §§ 10.06 10.08, eff. Mar. 30, 2012).
 38. Public Health Law pt. 9 (eff. Aug. 7, 2012).
 39. 2012 N.Y. Laws ch. 287 (adding Executive Law 718, eff. Jan. 28, 2013).
 40. Local Law 36-2012 (eff. Sept. 20, 2012).

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