S T A T E O F N E W Y O R K

2812

2009-2010 Regular Sessions

I N A S S E M B L Y

January 21, 2009

Introduced by M. of A. SCHIMMINGER, GABRYSZAK -- Multi-Sponsored by -- M. of A. ABBATE, FIELDS, TOWNS -- read once and referred to the Committee on Codes

AN ACT to amend the penal law and the criminal procedure law, in relation to a killing that is preceded by and is the product of a pattern of domestic violence and sentencing procedures for murder in the first degree

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subparagraph (xiii) of paragraph (a) of subdivision 1 of section 125.27 of the penal law, as added by chapter 300 of the laws of 2001, is amended and a new subparagraph (xiv) is added to read as follows:

(xiii) the victim was killed in furtherance of an act of terrorism, as defined in paragraph (b) of subdivision one of section 490.05 of this chapter; [and] OR

(XIV) THE KILLING IS PRECEDED BY, AND IS THE PRODUCT OF, A PATTERN OF DOMESTIC VIOLENCE. AS USED IN THIS SUBPARAGRAPH, "DOMESTIC VIOLENCE" MEANS ABUSE COMMITTED AGAINST AN ADULT OR A MINOR WHO IS A SPOUSE, FORMER SPOUSE, COHABITANT, FORMER COHABITANT, OR PERSON WITH WHOM THE SUSPECT HAS A CHILD OR IS HAVING OR HAS HAD A DATING OR ENGAGEMENT RELATIONSHIP. FOR PURPOSES OF THIS SUBPARAGRAPH, "COHABITANT" MEANS TWO UNRELATED ADULT PERSONS LIVING TOGETHER FOR A SUBSTANTIAL PERIOD OF TIME, RESULTING IN SOME PERMANENCY OF RELATIONSHIP. FACTORS THAT MAY DETERMINE WHETHER PERSONS ARE COHABITATING INCLUDE, BUT ARE NOT LIMITED TO, (1) SEXUAL RELATIONS BETWEEN THE PARTIES WHILE SHARING THE SAME LIVING QUARTERS, (2) SHARING OF INCOME OR EXPENSES, (3) JOINT USE OR OWNERSHIP OF PROPERTY, (4) WHETHER OR NOT THE PARTIES HOLD THEMSELVES OUT AS HUSBAND AND WIFE, (5) THE CONTINUITY OF THE RELATIONSHIP, AND (6) THE LENGTH OF THE RELATIONSHIP; "ABUSE" MEANS INTENTIONALLY OR RECKLESSLY CAUSING OR ATTEMPTING TO CAUSE BODILY INJURY, OR PLACING ANOTHER

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD03800-01-9

PERSON IN REASONABLE APPREHENSION OF IMMINENT SERIOUS BODILY INJURY TO HIMSELF OR HERSELF, OR ANOTHER; AND "PATTERN" MEANS AT LEAST THREE PRIOR INCIDENTS OF DOMESTIC VIOLENCE. (IT SHALL NOT BE NECESSARY THAT THE DEFENDANT HAVE BEEN CHARGED OR CONVICTED OF SUCH INCIDENTS); A VIOLATION OF A PROTECTIVE ORDER, RETRAINING ORDER, DOMESTIC VIOLENCE ORDER OR SIMILAR INJUNCTION ISSUED BY A COURT OF COMPETENT JURISDICTION SHALL CONSTITUTE AN INCIDENT OF "DOMESTIC VIOLENCE"; AND

S 2. Subdivision 1 of section 400.27 of the criminal procedure law, as added by chapter 1 of the laws of 1995, is amended to read as follows:

1. Upon [the] conviction of a defendant for the offense of murder in the first degree as defined by section 125.27 of the penal law, the court shall promptly conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or to life imprisonment without parole pursuant to subdivision five of section 70.00 of the penal law, OR TO A SENTENCE OF IMPRISONMENT FOR THE CLASS A-I FELONY OF MURDER IN THE FIRST DEGREE OTHER THAN A SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE. Nothing in this section shall be deemed to preclude the people at any time from determining that the death penalty shall not be sought in a particular case, in which case the separate sentencing proceeding shall not be conducted and the court may sentence such defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

S 3. Subdivision 10 of section 400.27 of the criminal procedure law, as added by chapter 1 of the laws of 1995, is amended to read as follows:

10. (A) At the conclusion of all the evidence, the people and the defendant may present argument in summation for or against the sentence sought by the people. The people may deliver the first summation and the defendant may then deliver the last summation. Thereafter, the court shall deliver a charge to the jury on any matters appropriate in the circumstances. In its charge, the court must instruct the jury that with respect to each count of murder in the first degree the jury should consider whether or not a sentence of death should be imposed and whether or not a sentence of life imprisonment without parole should be imposed[,] and [that the jury must be unanimous with respect to either sentence. The court must also instruct the jury that in the event the jury fails to reach unanimous agreement with respect to the sentence, the court will sentence the defendant to a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life. Following the court's charge, the jury shall retire to consider the sentence to be imposed. Unless inconsistent with the provisions of this section, the provisions of sections 310.10, 310.20 and 310.30 shall govern the deliberations of the jury] WHETHER OR NOT A SENTENCE TO A TERM OF IMPRISONMENT WITH A MINIMUM TERM OF BETWEEN TWENTY AND TWENTY-FIVE YEARS, TO BE DETERMINED BY THE COURT, AND A MAXIMUM TERM OF LIFE IMPRISONMENT SHOULD BE IMPOSED.

(B) THE COURT MUST INSTRUCT THE JURY THAT THE JURY MUST BE UNANIMOUS WITH RESPECT TO THE SENTENCE TO BE IMPOSED. THE COURT MUST ALSO INSTRUCT THE JURY THAT IN THE EVENT THAT THE JURY FAILS TO REACH UNANIMOUS AGREEMENT WITH RESPECT TO THE SENTENCE, THE COURT WILL SENTENCE THE DEFENDANT TO A TERM OF LIFE IMPRISONMENT WITHOUT PAROLE.

(C) FOLLOWING THE COURT'S CHARGE, THE JURY SHALL RETIRE TO CONSIDER THE SENTENCE TO BE IMPOSED. UNLESS INCONSISTENT WITH THE PROVISIONS OF THIS SECTION, THE PROVISIONS OF SECTIONS 310.10, 310.20 AND 310.30 OF THIS CHAPTER SHALL GOVERN THE DELIBERATIONS OF THE JURY.

S 4. Subdivision 11 of section 400.27 of the criminal procedure law, as added by chapter 1 of the laws of 1995, is amended to read as follows:

11. (a) The jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors established, if any, and unanimously determines that the penalty of death should be imposed. Any member or members of the jury who find a mitigating factor to have been proven by the defendant by a preponderance of the evidence may consider such factor established regardless of the number of jurors who concur that the factor has been established.

(b) If the jury directs imposition of [either] a sentence of death [or], A SENTENCE OF life imprisonment without parole, OR A SENTENCE TO A TERM OF IMPRISONMENT WITH A MINIMUM TERM OF BETWEEN TWENTY AND TWENTY-FIVE YEARS, TO BE DETERMINED BY THE COURT, AND A MAXIMUM TERM OF LIFE IMPRISONMENT, it shall specify on the record those mitigating and aggravating factors considered and those mitigating factors established by the defendant, if any.

(c) With respect to a count or concurrent counts of murder in the first degree, the court may direct the jury to cease deliberation with respect to the sentence or sentences to be imposed if the jury has deliberated for an extensive period of time without reaching unanimous agreement on the sentence or sentences to be imposed and the court is satisfied that any such agreement is unlikely within a reasonable time. The provisions of this paragraph shall apply with respect to consecutive counts of murder in the first degree. In the event the jury is unable to reach unanimous agreement, the court must sentence the defendant in accordance with [subdivisions one through three] SUBDIVISION FIVE of section 70.00 of the penal law with respect to any count or counts of murder in the first degree upon which the jury failed to reach unanimous agreement as to the sentence to be imposed.

(d) If the jury unanimously determines that a sentence of death should be imposed, the court must thereupon impose a sentence of death. Thereafter, however, the court may, upon written motion of the defendant, set aside the sentence of death upon any of the grounds set forth in section 330.30 OF THIS PART. The procedures set forth in sections 330.40 and 330.50 OF THIS PART, as applied to separate sentencing proceedings under this section, shall govern the motion and the court upon granting the motion shall, except as may otherwise be required by subdivision one of section 330.50 OF THIS PART, direct a new sentencing proceeding pursuant to this section. Upon granting the motion upon any of the grounds set forth in section 330.30 OF THIS PART and setting aside the sentence, the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order setting aside the sentence of death. The taking of an appeal by the people stays the effectiveness of that portion of the court's order that directs a new sentencing proceeding.

(e) If the jury unanimously determines that a sentence of life imprisonment without parole should be imposed the court must thereupon impose a sentence of life imprisonment without parole.

(E-1) IF THE JURY UNANIMOUSLY DETERMINES THAT A SENTENCE TO A TERM OF IMPRISONMENT WITH A MINIMUM TERM OF BETWEEN TWENTY AND TWENTY-FIVE YEARS, TO BE DETERMINED BY THE COURT, AND A MAXIMUM TERM OF LIFE IMPRISONMENT SHOULD BE IMPOSED, THE COURT MUST THEREUPON IMPOSE SUCH SENTENCE.

(f) Where a sentence has been unanimously determined by the jury it must be recorded on the minutes and read to the jury, and the jurors must be collectively asked whether such is their sentence. Even though no juror makes any declaration in the negative, the jury must, if either party makes such an application, be polled and each juror separately asked whether the sentence announced by the foreman is in all respects his or her sentence. If, upon either the collective or the separate inquiry, any juror answers in the negative, the court must refuse to accept the sentence and must direct the jury to resume its deliberation. If no disagreement is expressed, the jury must be discharged from the case.

S 5. Severability. If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgement shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgement shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included therewith.

S 6. This act shall take effect immediately, and shall apply to crimes committed prior to, on, or after the effective date of this act.