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

4993

2009-2010 Regular Sessions

I N A S S E M B L Y

February 10, 2009

Introduced by M. of A. BRODSKY -- Multi-Sponsored by -- M. of A. BRENNAN, CANESTRARI, DINOWITZ, JOHN, SWEENEY -- read once and referred to the Committee on Codes

AN ACT to amend the penal law and the criminal procedure law, in relation to life imprisonment without parole for multiple or serial rape offenders

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

Section 1. Section 60.05 of the penal law, as amended by chapter 410 of the laws of 1979, the section heading and subdivisions 2, 3, 4 and 5 as amended by chapter 738 of the laws of 2004 and subdivision 1 as amended by chapter 7 of the laws of 2007, is amended to read as follows:

S 60.05 Authorized dispositions; other class A, B, certain C and D felonies [and], multiple felony offenders, AND MULTIPLE OR SERIAL RAPE OFFENDERS.

1. Applicability. Except as provided in section 60.04 of this article governing the authorized dispositions applicable to felony offenses defined in article two hundred twenty or two hundred twenty-one of this chapter or in section 60.13 of this article governing the authorized dispositions applicable to felony sex offenses defined in paragraph (a) of subdivision one of section 70.80 of this title, this section shall govern the dispositions authorized when a person is to be sentenced upon a conviction of a class A felony, a class B felony or a class C, class D or class E felony specified [herein, or] IN THIS SECTION, when a person is to be sentenced upon a conviction of a felony as a multiple felony offender, OR WHEN A PERSON IS TO BE SENTENCED UPON A CONVICTION OF A FELONY AS A MULTIPLE OR SERIAL RAPE OFFENDER.

2. Class A felony. Except as provided in subdivisions three and four of section 70.06 of this chapter, every person convicted of a class A felony must be sentenced to imprisonment in accordance with section 70.00 of this title, unless such person is convicted of murder in the

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

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first degree and is sentenced in accordance with section 60.06 of this article.

3. Class B felony. Except as provided in subdivision six OR SEVEN of this section, every person convicted of a class B violent felony offense, as defined in subdivision one of section 70.02 of this title, must be sentenced to imprisonment in accordance with such section 70.02; and, except as provided in subdivision six of this section, every person convicted of any other class B felony must be sentenced to imprisonment in accordance with section 70.00 of this title.

4. Certain class C felonies. Except as provided in subdivision six, every person convicted of a class C violent felony offense, as defined in subdivision one of section 70.02 of this title, must be sentenced to imprisonment in accordance with section 70.02 of this title; and, except as provided in subdivision six of this section, every person convicted of the class C felonies of: attempt to commit any of the class B felonies of bribery in the first degree as defined in section 200.04, bribe receiving in the first degree as defined in section 200.12, conspiracy in the second degree as defined in section 105.15, and criminal mischief in the first degree as defined in section 145.12; criminal usury in the first degree as defined in section 190.42, rewarding official misconduct in the first degree as defined in section 200.22, receiving reward for official misconduct in the first degree as defined in section 200.27, attempt to promote prostitution in the first degree as defined in section 230.32, promoting prostitution in the second degree as defined in section 230.30, OR arson in the third degree as defined in section 150.10 of this chapter, must be sentenced to imprisonment in accordance with section 70.00 of this title.

5. Certain class D felonies. Except as provided in subdivision six of this section, every person convicted of the class D felonies of assault in the second degree as defined in section 120.05 or attempt to commit a class C felony as defined in section 230.30 of this chapter, must be sentenced in accordance with section 70.00 or 85.00 of this title.

6. Multiple felony offender. [When] EXCEPT AS PROVIDED IN SUBDIVISION SEVEN, WHEN the court imposes sentence upon a second violent felony offender, as defined in section 70.04, or a second felony offender, as defined in section 70.06, the court must impose a sentence of imprisonment in accordance with section 70.04 or 70.06, as the case may be, unless it imposes a sentence of imprisonment in accordance with section 70.08 or 70.10.

7. MULTIPLE OR SERIAL RAPE OFFENDER. UPON THE CONVICTION OF A MULTIPLE OR SERIAL RAPE OFFENDER, AS DEFINED IN SECTION 70.09, THE COURT MAY, IN ITS DISCRETION, SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT WITHOUT PAROLE. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, A DEFENDANT SENTENCED TO LIFE IMPRISONMENT WITHOUT PAROLE SHALL NOT BE OR BECOME ELIGIBLE FOR PAROLE, CONDITIONAL RELEASE, PRESUMPTIVE RELEASE, OR UNCONDITIONAL RELEASE. FOR PURPOSES OF COMMITMENT AND CUSTODY, OTHER THAN PAROLE, CONDITIONAL OR UNCONDITIONAL RELEASE, AND, SUCH SENTENCE SHALL BE DEEMED TO BE AN INDETERMINATE SENTENCE.

8. Fines. Where the court imposes a sentence of imprisonment in accordance with this section, the court also may impose a fine authorized by article eighty, and, in such case the sentence shall be both imprisonment and a fine.

S 2. Subdivision 1 of section 70.00 of the penal law, as amended by section 36 of chapter 7 of the laws of 2007, is amended to read as follows:

1. Indeterminate sentence. Except as provided in subdivisions four, five [and], six AND SEVEN, of this section or section 70.80 of this article, a sentence of imprisonment for a felony, other than a felony defined in article two hundred twenty or two hundred twenty-one of this chapter, shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.

S 3. Subdivision 1 of section 70.00 of the penal law, as amended by section 37 of chapter 7 of the laws of 2007, is amended to read as follows:

1. Indeterminate sentence. Except as provided in subdivisions four [and], five AND SEVEN, of this section or section 70.80 of this article, a sentence of imprisonment for a felony, other than a felony defined in article two hundred twenty or two hundred twenty-one of this chapter, shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.

S 4. Section 70.00 of the penal law is amended by adding a new subdivision 7 to read as follows:

7. LIFE IMPRISONMENT WITHOUT PAROLE. WHEN A PERSON IS SENTENCED AS A MULTIPLE OR SERIAL RAPE OFFENDER, AS DEFINED IN SECTION 70.09 OF THIS ARTICLE, THE COURT MAY, IN ITS DISCRETION, SENTENCE THE DEFENDANT TO LIFE IMPRISONMENT WITHOUT PAROLE PURSUANT TO SECTION 60.05 OF THIS TITLE.

S 5. Subdivision 2 of section 70.02 of the penal law is amended by adding a new paragraph (d) to read as follows:

(D) NOTWITHSTANDING THE FOREGOING PROVISIONS OF THIS SUBDIVISION, THE SENTENCE IMPOSED UPON A PERSON WHO STANDS CONVICTED OF A MULTIPLE OR SERIAL RAPE, AS DEFINED IN SECTION 70.09 OF THIS ARTICLE, MAY, IN THE DISCRETION OF THE COURT, BE LIFE IMPRISONMENT WITHOUT PAROLE PURSUANT TO SECTION 60.05 OF THIS TITLE.

S 6. Subdivision 1 of section 70.04 of the penal law, as added by chapter 481 of the laws of 1978 and subparagraph (iii) of paragraph (b) as amended by chapter 471 of the laws of 1980, is amended to read as follows:

1. Definition of second violent felony offender. EXCEPT AS PROVIDED IN SECTION 70.09 OF THIS ARTICLE:

(a) A second violent felony offender is a person who stands convicted of a violent felony offense as defined in subdivision one of section 70.02 after having previously been subjected to a predicate violent felony conviction as defined in paragraph (b) of this subdivision.

(b) For the purpose of determining whether a prior conviction is a predicate violent felony conviction the following criteria shall apply:

(i) The conviction must have been in this state of a class A felony (other than one defined in article two hundred twenty) or of a violent felony offense as defined in subdivision one of section 70.02, or of an offense defined by the penal law in effect prior to September first, nineteen hundred sixty-seven, which includes all of the essential elements of any such felony, or in any other jurisdiction of an offense which includes all of the essential elements of any such felony for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed;

(ii) Sentence upon such prior conviction must have been imposed before commission of the present felony;

(iii) Suspended sentence, suspended execution of sentence, a sentence of probation, a sentence of conditional discharge or of unconditional discharge, and a sentence of certification to the care and custody of the division of substance abuse services, shall be deemed to be a sentence;

(iv) Except as provided in subparagraph (v) of this paragraph, sentence must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted;

(v) In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration;

(vi) An offense for which the defendant has been pardoned on the ground of innocence shall not be deemed a predicate violent felony conviction.

S 7. The penal law is amended by adding a new section 70.09 to read as follows:

S 70.09 SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE FOR MULTIPLE OR SERIAL RAPE OFFENDER.

1. DEFINITION OF MULTIPLE OR SERIAL RAPE OFFENDER. A PERSON IS A MULTIPLE OR SERIAL RAPE OFFENDER UPON CONVICTION OF TWO OR MORE QUALIFYING CONVICTIONS OF VIOLATION OF SECTION 130.35 OF THIS CHAPTER. A QUALIFYING CONVICTION IS ANY CONVICTION IN THIS STATE OF ANY ONE COUNT OF VIOLATION OF SUCH SECTION 130.35 REGARDLESS OF WHEN SUCH CONVICTION IS HAD AND REGARDLESS OF WHETHER SUCH CONVICTIONS ARE HAD UPON THE SAME OR DIFFERENT ACCUSATORY INSTRUMENTS, AT THE SAME OR DIFFERENT TRIALS, AT THE SAME TIME AS THE PRESENT CONVICTION, OR ANY OTHER CONSIDERATIONS. A QUALIFYING CONVICTION IS ALSO ANY CONVICTION HAD UNDER THE PENAL LAW OF THIS STATE IN EFFECT PRIOR TO SEPTEMBER FIRST, NINETEEN HUNDRED SIXTY-SEVEN OR IN ANY OTHER JURISDICTION OF AN OFFENSE THAT INCLUDES ALL OF THE ESSENTIAL ELEMENTS OF SECTION 130.35 OF THIS CHAPTER. A CONVICTION FOR WHICH THE DEFENDANT HAS BEEN PARDONED ON THE GROUNDS OF INNOCENCE SHALL NOT BE DEEMED A QUALIFYING CONVICTION. WHENEVER IT APPEARS THAT THE DEFENDANT HAS BEEN PREVIOUSLY SUBJECTED TO A QUALIFYING CONVICTION, IF THE DEFENDANT DOES NOT ADMIT SUCH QUALIFYING CONVICTION, THE COURT MAY CONDUCT A HEARING ON SUCH ISSUE PURSUANT TO SECTION 400.21 OF THE CRIMINAL PROCEDURE LAW.

2. SENTENCE. A MULTIPLE OR SERIAL RAPE OFFENDER MAY, IN THE DISCRETION OF THE COURT, BE SENTENCED TO LIFE IMPRISONMENT WITHOUT PAROLE PURSUANT TO SECTION 60.05 OF THIS TITLE.

S 8. Subdivision 1 of section 70.08 of the penal law, as added by chapter 481 of the laws of 1978, paragraph (a) as amended by chapter 107 of the laws of 2006, is amended to read as follows:

1. Definition of persistent violent felony offender. EXCEPT AS PROVIDED IN SECTION 70.09 OF THIS ARTICLE:

(a) A persistent violent felony offender is a person who stands convicted of a violent felony offense as defined in subdivision one of section 70.02 or the offense of predatory sexual assault as defined in section 130.95 of this chapter or the offense of predatory sexual assault against a child as defined in section 130.96 of this chapter, after having previously been subjected to two or more predicate violent

felony convictions as defined in paragraph (b) of subdivision one of section 70.04 of this article.

(b) For the purpose of determining whether a person has two or more predicate violent felony convictions, the criteria set forth in paragraph (b) of subdivision one of section 70.04 shall apply.

S 9. Section 70.20 of the penal law is amended by adding a new subdivision 3-a to read as follows:

3-A. SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE. WHEN A SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE IS IMPOSED, THE COURT SHALL COMMIT THE DEFENDANT TO THE CUSTODY OF THE STATE DEPARTMENT OF CORRECTIONAL SERVICES FOR THE REMAINDER OF THE LIFE OF THE DEFENDANT.

S 10. Subdivision 3 of section 300.40 of the criminal procedure law, the opening paragraph as amended by chapter 1 of the laws of 1995, is amended to read as follows:

3. If a multiple count indictment contains concurrent counts of murder in the first degree OR OF RAPE IN THE FIRST DEGREE, the court must submit every such count THEREOF. In any other case, if a multiple count indictment contains concurrent counts only, the court must submit at least one such count, and may submit more than one as follows:

(a) With respect to non-inclusory concurrent counts, the court may in its discretion submit one or more or all thereof;

(b) With respect to inclusory concurrent counts, the court must submit the greatest or inclusive count and may or must, under circumstances prescribed in section 300.50 OF THIS ARTICLE, also submit, but in the alternative only, one or more of the lesser included counts. A verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted, but not an acquittal thereon. A verdict of guilty upon a lesser count is deemed an acquittal upon every greater count submitted.

S 11. This act shall take effect on the first of November next succeeding the date on which it shall have become a law; provided that the amendments to subdivision 1 of section 70.00 of the penal law made by section two of this act shall be subject to the expiration and reversion of such subdivision pursuant to subdivision d of section 74 of chapter 3 of the laws of 1995, as amended, when upon such date the provisions of section three of this act shall take effect.