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

2810

2009-2010 Regular Sessions

I N A S S E M B L Y

January 21, 2009

Introduced by M. of A. SCHIMMINGER, DelMONTE, HOOPER -- Multi-Sponsored by -- M. of A. CHRISTENSEN, WEISENBERG -- read once and referred to the Committee on Codes

AN ACT to amend the penal law, in relation to aggravating factors of murder in the first degree; and to amend the criminal procedure law, in relation to authorizing the jury to consider an indeterminate sentence therefor

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

Section 1. Subparagraph (vii) of paragraph (a) of subdivision 1 of section 125.27 of the penal law, as amended by chapter 264 of the laws of 2003, is amended to read as follows:

(vii) the victim was killed while the defendant was in the course of committing or attempting to commit and in furtherance of robbery, burglary in the first degree or second degree, kidnapping in the first degree, arson in the first degree or second degree, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse in the first degree or escape in the first degree, or in the course of and furtherance of immediate flight after committing or attempting to commit any such crime, or in the course of and furtherance of immediate flight after attempting to commit the crime of murder in the second degree OR AFTER, AS A PART OF THE SAME CRIMINAL TRANSACTION, THE DEFENDANT COMMITTED BURGLARY IN THE FIRST OR SECOND DEGREE IN ORDER TO FACILITATE HIS OR HER KILLING OF THE VICTIM; provided however, the victim is not a participant in one of the aforementioned crimes and, provided further that, unless the defendant's criminal liability under this subparagraph is based upon the defendant having commanded another person to cause the death of the victim or intended victim pursuant to section 20.00 of this chapter, this subparagraph shall not apply where the defendant's criminal liability is based

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

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upon the conduct of another pursuant to section 20.00 of this chapter; or

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 PART 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 aggravat-

ing 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], 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 judgment 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 judgment 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.