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

6498

2009-2010 Regular Sessions

I N A S S E M B L Y

March 6, 2009

Introduced by M. of A. McDONOUGH, WALKER, HAWLEY -- read once and referred to the Committee on Codes

AN ACT to amend the penal law, in relation to authorizing a person to use physical force, including deadly physical force in defense of a person, in defense of a premises or in defense of a dwelling, residence or vehicle under specific circumstances and in relation to creating a presumption that a reasonable fear of death or great bodily harm exists under certain circumstances; and repealing certain provisions of such law relating thereto

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

Section 1. Section 35.15 of the penal law is REPEALED and a new section 35.15 is added to read as follows:

S 35.15 JUSTIFICATION; USE OF PHYSICAL FORCE IN DEFENSE OF A PERSON.

1. A PERSON IS JUSTIFIED IN THE USE OF PHYSICAL FORCE, EXCEPT DEADLY PHYSICAL FORCE, AGAINST ANOTHER WHEN AND TO THE EXTENT THAT THE PERSON REASONABLY BELIEVES THAT SUCH CONDUCT IS NECESSARY TO DEFEND HIMSELF OR HERSELF OR ANOTHER AGAINST THE OTHER'S IMMINENT USE OF UNLAWFUL FORCE.

2. A PERSON IS JUSTIFIED IN THE USE OF DEADLY PHYSICAL FORCE AND DOES NOT HAVE A DUTY TO RETREAT IF:

(A) HE OR SHE REASONABLY BELIEVES THAT SUCH FORCE IS NECESSARY TO PREVENT IMMINENT DEATH OR GREAT BODILY HARM TO HIMSELF OR HERSELF OR ANOTHER;

(B) HE OR SHE REASONABLY BELIEVES THAT SUCH OTHER PERSON IS COMMITTING OR ATTEMPTING TO COMMIT A KIDNAPPING, FORCIBLE RAPE, FORCIBLE CRIMINAL SEXUAL ACT OR ROBBERY;

(C) HE OR SHE REASONABLY BELIEVES THAT SUCH OTHER PERSON IS COMMITTING OR ATTEMPTING TO COMMIT A BURGLARY, AND THE CIRCUMSTANCES ARE SUCH THAT THE USE OF DEADLY PHYSICAL FORCE IS NECESSARY TO PREVENT OR TERMINATE THE COMMISSION OR ATTEMPTED COMMISSION OF SUCH BURGLARY;

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

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(D) A POLICE OFFICER OR PEACE OFFICER, OR A PERSON ASSISTING A POLICE OFFICER OR A PEACE OFFICER AT THE DIRECTION OF SUCH POLICE OFFICER OR PEACE OFFICER, IS ACTING PURSUANT TO SECTION 35.30 OF THIS ARTICLE; OR

(E) UNDER THOSE CIRCUMSTANCES PERMITTED PURSUANT TO SECTION 35.25 OF THIS ARTICLE.

3. A PERSON IS NOT JUSTIFIED IN THE USE OF THE FORCE DESCRIBED IN SUBDIVISIONS ONE AND TWO OF THIS SECTION WHEN:

(A) HE OR SHE IS ATTEMPTING TO COMMIT, COMMITTING, OR ESCAPING AFTER THE COMMISSION OF, A MURDER, KIDNAPPING, FORCIBLE RAPE, FORCIBLE CRIMINAL SEXUAL ACT, ROBBERY OR BURGLARY;

(B) HE OR SHE INITIALLY PROVOKES THE USE OF FORCE AGAINST HIMSELF OR HERSELF, UNLESS:

(I) SUCH FORCE IS SO GREAT THAT THE PERSON REASONABLY BELIEVES THAT HE OR SHE IS IN IMMINENT DANGER OF DEATH OR GREAT BODILY HARM AND THAT HE OR SHE HAS EXHAUSTED EVERY REASONABLE MEANS TO ESCAPE SUCH DANGER OTHER THAN THE USE OF FORCE WHICH IS LIKELY TO CAUSE DEATH OR GREAT BODILY HARM TO THE ASSAILANT; OR

(II) IN GOOD FAITH, THE PERSON WITHDRAWS FROM PHYSICAL CONTACT WITH THE ASSAILANT AND INDICATES CLEARLY TO THE ASSAILANT THAT HE OR SHE DESIRES TO WITHDRAW AND TERMINATE THE USE OF FORCE, BUT THE ASSAILANT CONTINUES OR RESUMES THE USE OF FORCE; OR

(C) THE PHYSICAL FORCE INVOLVED IS THE PRODUCT OF A COMBAT BY AGREEMENT NOT SPECIFICALLY AUTHORIZED BY LAW.

S 2. Section 35.20 of the penal law is REPEALED and a new section 35.20 is added to read as follows:

S 35.20 JUSTIFICATION; USE OF PHYSICAL FORCE IN DEFENSE OF PREMISES.

1. A PERSON IS JUSTIFIED IN THE USE OF PHYSICAL FORCE, EXCEPT DEADLY PHYSICAL FORCE, AGAINST ANOTHER WHEN AND TO THE EXTENT THAT THE PERSON REASONABLY BELIEVES THAT SUCH CONDUCT IS NECESSARY TO PREVENT OR TERMINATE THE OTHER'S TRESPASS ON, OR OTHER TORTIOUS OR CRIMINAL INTERFERENCE WITH, EITHER REAL PROPERTY OTHER THAN A DWELLING, OR PERSONAL PROPERTY, LAWFULLY IN HIS OR HER POSSESSION OR IN THE POSSESSION OF ANOTHER WHO IS A MEMBER OF HIS OR HER IMMEDIATE FAMILY OR HOUSEHOLD OR A PERSON WHOSE PROPERTY HE OR SHE HAS A LEGAL DUTY TO PROTECT.

2. A PERSON IS JUSTIFIED IN THE USE OF A DEADLY PHYSICAL FORCE ONLY IF:

(A) HE OR SHE REASONABLY BELIEVES THAT SUCH FORCE IS NECESSARY TO PREVENT IMMINENT DEATH OR GREAT BODILY HARM TO HIMSELF OR HERSELF OR ANOTHER;

(B) HE OR SHE REASONABLY BELIEVES THAT SUCH OTHER PERSON IS COMMITTING OR ATTEMPTING TO COMMIT A KIDNAPPING, FORCIBLE RAPE, FORCIBLE CRIMINAL SEXUAL ACT, ROBBERY OR ARSON;

(C) HE OR SHE REASONABLY BELIEVES THAT SUCH OTHER PERSON IS COMMITTING OR ATTEMPTING TO COMMIT A BURGLARY, AND THE CIRCUMSTANCES ARE SUCH THAT THE USE OF DEADLY PHYSICAL FORCE IS NECESSARY TO PREVENT OR TERMINATE THE COMMISSION OR ATTEMPTED COMMISSION OF SUCH BURGLARY; OR

(D) A POLICE OFFICER OR PEACE OFFICER, OR A PERSON ASSISTING A POLICE OFFICER OR A PEACE OFFICER AT THE LATTER'S DIRECTION, IS ACTING IN THE PERFORMANCE OF HIS OR HER DUTIES.

3. A PERSON DOES NOT HAVE A DUTY TO RETREAT IF THE PERSON IS IN A PLACE WHERE HE OR SHE HAS A RIGHT TO BE.

S 3. Section 35.25 of the penal law is REPEALED and a new section 35.25 is added to read as follows:

S 35.25 JUSTIFICATION; USE OF DEADLY PHYSICAL FORCE IN DEFENSE OF A DWELLING, RESIDENCE OR OCCUPIED VEHICLE.

1. A PERSON IS PRESUMED TO HAVE HELD A REASONABLE FEAR OF IMMINENT DEATH OR GREAT BODILY HARM TO HIMSELF OR HERSELF OR ANOTHER WHEN USING DEADLY PHYSICAL FORCE IF:

(A) THE PERSON AGAINST WHOM THE DEADLY PHYSICAL FORCE WAS USED WAS IN THE PROCESS OF UNLAWFULLY AND FORCEFULLY ENTERING, OR HAD UNLAWFULLY AND FORCIBLY ENTERED A DWELLING, RESIDENCE, OR OCCUPIED VEHICLE, OR IF THAT PERSON HAD REMOVED OR WAS ATTEMPTING TO REMOVE ANOTHER AGAINST THAT PERSON'S WILL FROM THE DWELLING, RESIDENCE, OR OCCUPIED VEHICLE; AND

(B) THE ACTOR WHO USES DEADLY PHYSICAL FORCE KNEW OR HAD REASON TO BELIEVE THAT AN UNLAWFUL AND FORCIBLE ENTRY OR UNLAWFUL AND FORCIBLE ACT WAS OCCURRING OR HAD OCCURRED.

2. THE PRESUMPTION SET FORTH IN SUBDIVISION ONE OF THIS SECTION DOES NOT APPLY IF:

(A) THE PERSON AGAINST WHOM THE DEADLY PHYSICAL FORCE IS USED, HAS THE RIGHT TO BE IN OR IS A LAWFUL RESIDENT OF THE DWELLING, RESIDENCE, OR VEHICLE, SUCH AS AN OWNER, LESSEE, OR TITLEHOLDER, AND THERE IS NOT AN INJUNCTION FOR PROTECTION FROM DOMESTIC VIOLENCE OR A WRITTEN JUDICIAL ORDER OF NO CONTACT AGAINST THAT PERSON;

(B) THE PERSON WHO USES DEADLY PHYSICAL FORCE IS ENGAGED IN AN UNLAWFUL ACTIVITY OR IS USING THE DWELLING, RESIDENCE, OR OCCUPIED VEHICLE TO FURTHER UNLAWFUL ACTIVITY; OR

(C) THE PERSON AGAINST WHOM DEADLY PHYSICAL FORCE IS USED IS A POLICE OFFICER OR PEACE OFFICER, WHO ENTERS OR ATTEMPTS TO ENTER A DWELLING, RESIDENCE, OR VEHICLE IN THE PERFORMANCE OF HIS OR HER OFFICIAL DUTIES AND THE OFFICER IDENTIFIED HIMSELF OR HERSELF IN ACCORDANCE WITH ANY APPLICABLE LAW OR THE PERSON USING DEADLY PHYSICAL FORCE KNEW OR REASONABLY SHOULD HAVE KNOWN THAT THE PERSON ENTERING OR ATTEMPTING TO ENTER WAS A POLICE OFFICER OR PEACE OFFICER.

3. A PERSON WHO UNLAWFULLY AND BY FORCE ENTERS, OR ATTEMPTS TO ENTER, A PERSON'S DWELLING, RESIDENCE, OR OCCUPIED VEHICLE IS PRESUMED TO BE DOING SO WITH THE INTENT TO COMMIT AN UNLAWFUL ACT INVOLVING FORCE OR VIOLENCE.

4. AS USED IN THIS SECTION, THE FOLLOWING TERMS HAVE THE FOLLOWING MEANINGS:

(A) "DWELLING" IS A BUILDING OR CONVEYANCE OF ANY KIND, INCLUDING ANY ATTACHED PORCH, WHETHER THE BUILDING OR CONVEYANCE IS TEMPORARY OR PERMANENT, MOBILE OR IMMOBILE, WHICH HAS A ROOF OVER IT, INCLUDING A TENT, AND IS DESIGNED TO BE OCCUPIED BY PEOPLE LODGING THEREIN AT NIGHT;

(B) "RESIDENCE" IS A DWELLING IN WHICH A PERSON RESIDES EITHER TEMPORARILY OR PERMANENTLY OR IS VISITING AS AN INVITED GUEST;

(C) "VEHICLE" IS A CONVEYANCE OF ANY KIND, WHETHER OR NOT MOTORIZED, WHICH IS DESIGNED TO TRANSPORT PEOPLE OR PROPERTY.

S 4. Subdivision 3 of section 265.35 of the penal law, as renumbered by chapter 1041 of the laws of 1974, is amended to read as follows:

3. Any person who, otherwise than in self defense, IN DEFENSE OF PREMISES or in the discharge of official duty, (a) wilfully discharges any species of firearms, air-gun or other weapon, or throws any other deadly missile, either in a public place, or in any place where there is any person to be endangered thereby, or, in Putnam county, within one-quarter mile of any occupied school building other than under supervised instruction by properly authorized instructors although no injury to any person ensues; (b) intentionally, without malice, points or aims any firearm or any other gun, the propelling force of which is gunpowder, at or toward any other person; (c) discharges, without injury to any other person, firearms or any other guns, the propelling force of which is gunpowder, while intentionally without malice, aimed at or toward any

person; or (d) maims or injures any other person by the discharge of any firearm or any other gun, the propelling force of which is gunpowder, pointed or aimed intentionally, but without malice, at any such person, is guilty of a class A misdemeanor.

S 5. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.