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

6510

2009-2010 Regular Sessions

I N A S S E M B L Y

March 6, 2009

Introduced by M. of A. SCOZZAFAVA, McDONOUGH -- Multi-Sponsored by -- M. of A. ALFANO, BACALLES, BARCLAY, BARRA, BURLING, BUTLER, CALHOUN, CONTE, CROUCH, ERRIGO, FINCH, FITZPATRICK, GIGLIO, HAYES, KOLB, MILLER, OAKS, O'MARA, QUINN, RABBITT, RAIA, REILICH, SALADINO, SAYWARD, TEDISCO, THIELE, TOWNSEND, WALKER -- read once and referred to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to limiting plea bargaining for sex offenders; and to amend the penal law, the correction law and the criminal procedure law, in relation to repeat sex offenders

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

Section 1. Subdivision 5 of section 220.10 of the criminal procedure law is amended by adding a new paragraph (i) to read as follows:

(I) WHERE THE INDICTMENT CHARGES A FELONY CONTAINED IN ARTICLE ONE HUNDRED THIRTY OR SECTION 255.25, 263.05, 263.10 OR 263.15 OF THE PENAL LAW, ANY PLEA OF GUILTY THEREAFTER ENTERED IN SATISFACTION OF SUCH CHARGE MUST INCLUDE AT LEAST A PLEA OF GUILTY TO THE VIOLATION OF ONE OF THE ABOVE ENUMERATED OFFENSES AND NO OTHER DISPOSITION BY PLEA OF GUILTY TO ANY OTHER CHARGE IN SATISFACTION OF SUCH CHARGE SHALL BE AUTHORIZED, PROVIDED, HOWEVER, IF THE DISTRICT ATTORNEY UPON REVIEWING THE AVAILABLE EVIDENCE DETERMINES THAT THE CHARGE OF A VIOLATION OF THE ABOVE ENUMERATED FELONIES IS NOT WARRANTED, SUCH DISTRICT ATTORNEY MAY CONSENT, AND THE COURT MAY ALLOW A DISPOSITION BY PLEA OF GUILTY TO ANOTHER CHARGE IN SATISFACTION OF SUCH CHARGE; PROVIDED, HOWEVER, IN ALL SUCH CASES, THE COURT SHALL SET FORTH UPON THE RECORD THE BASIS FOR SUCH DISPOSITION.

S 2. Section 530.50 of the criminal procedure law, as amended by chapter 264 of the laws of 2003, is amended to read as follows:

S 530.50 Order of recognizance or bail; during pendency of appeal.

A judge who is otherwise authorized pursuant to section 460.50 or section 460.60 to issue an order of recognizance or bail pending the

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

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determination of an appeal, may do so unless the defendant received a class A felony sentence, A CLASS B OR CLASS C FELONY SENTENCE FOR A SEX OFFENSE PURSUANT TO ARTICLE SIX-C OF THE CORRECTION LAW, or a sentence for any class B or class C felony offense defined in article one hundred thirty of the penal law committed or attempted to be committed by a person eighteen years of age or older against a person less than eighteen years of age.

S 3. Section 65.10 of the penal law is amended by adding a new subdivision 4-b to read as follows:

4-B. POLYGRAPH AUTHORIZATION. WHEN IMPOSING A SENTENCE OF PROBATION THE COURT MAY, IN ADDITION TO ANY CONDITIONS IMPOSED PURSUANT TO SUBDIVISIONS TWO AND THREE OF THIS SECTION, REQUIRE A DEFENDANT, UNDER SUPERVISION FOR CONVICTION OF A SEX OFFENSE DEFINED IN ARTICLE SIX-C OF THE CORRECTION LAW, TO SUBMIT TO POLYGRAPHIC EXAMINATIONS TO ENSURE COMPLIANCE WITH THE TERMS OF PROBATION. THE COURT MAY ORDER THE OFFENDER TO PAY ALL OR A PORTION OF THE COSTS OF THE EXAMINATIONS. THE FEE MAY BE WAIVED IF THE OFFENDER IS INDIGENT OR IF PAYMENT WOULD RESULT IN AN ECONOMIC HARDSHIP TO THE OFFENDER'S IMMEDIATE FAMILY.

BY SEPTEMBER FIRST, TWO THOUSAND NINE THE CHIEF JUSTICE OF THE COURT OF APPEALS IN CONSULTATION WITH THE COMMISSIONER OF THE DIVISION OF CRIMINAL JUSTICE SERVICES SHALL DEVELOP A PROTOCOL FOR THE USE OF POLYGRAPHIC EXAMINATIONS FOR SEX OFFENDERS PLACED ON PROBATION. THIS PROTOCOL SHALL BE DISTRIBUTED TO JUDGES ACROSS THE STATE.

S 4. Subdivision 3 of section 130.00 of the penal law, as amended by chapter 650 of the laws of 1984, is amended to read as follows:

3. "Sexual contact" means any INTENTIONAL touching of the sexual or other intimate parts of [a] ANOTHER person [not married to the actor for the purpose of gratifying sexual desire of either party] FOR NO LEGITIMATE PURPOSE. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing.

S 5. Subdivisions 1 and 2 of section 168-a of the correction law, subdivision 1 as added by chapter 192 of the laws of 1995, subdivision 2 as amended by chapter 11 of the laws of 2002, paragraph (a) of subdivision 2 as amended by chapter 405 of the laws of 2008, subparagraph (i) of paragraph (d) of subdivision 2 as amended by chapter 146 of the laws of 2004, subparagraph (iii) of paragraph (d) of subdivision 2 as amended by chapter 232 of the laws of 2008, and paragraph (e) of subdivision 2 as added by chapter 69 of the laws of 2003, are amended to read as follows:

1. "Sex offender" includes any person who is convicted of (A) any of the offenses set forth in subdivision two or three of this section OR (B) ANY OTHER FELONY OFFENSE COMMITTED WITHIN FIVE YEARS OF THE DATE ON WHICH HE OR SHE WAS ADJUDICATED A YOUTHFUL OFFENDER PURSUANT TO ARTICLE SEVEN HUNDRED TWENTY OF THE CRIMINAL PROCEDURE LAW FOR ANY OF THE OFFENSES SET FORTH IN SUBDIVISION TWO OR THREE OF THIS SECTION. Convictions that result from or are connected with the same act, or result from offenses committed at the same time, shall be counted for the purpose of this article as one conviction. Any conviction set aside pursuant to law is not a conviction for purposes of this article.

2. "Sex offense" means: (a) (i) a conviction of or a conviction for an attempt to commit any of the provisions of sections 120.70, 130.20, 130.25, 130.30, 130.40, 130.45, 130.60, 130.80, 130.85, 230.34, 250.50, 255.25, 255.26 and 255.27 or article two hundred sixty-three of the penal law, or section 135.05, 135.10, 135.20 or 135.25 of such law relating to kidnapping offenses, provided the victim of such kidnapping

or related offense is less than seventeen years old and the offender is not the parent of the victim, or section 230.04, where the person patronized is in fact less than seventeen years of age, 230.05 or 230.06, or subdivision two of section 230.30, or section 230.32 or 230.33 of the penal law, or (ii) a conviction of or a conviction for an attempt to commit any of the provisions of section 235.22 of the penal law, or (iii) a conviction of or a conviction for an attempt to commit any provisions of the foregoing sections committed or attempted as a hate crime defined in section 485.05 of the penal law or as a crime of terrorism defined in section 490.25 of such law or as a sexually motivated felony defined in section 130.91 of such law; or

(b) a conviction of or a conviction for an attempt to commit any of the provisions of section 130.52 or 130.55 of the penal law, provided the victim of such offense is less than eighteen years of age; or

(c) a conviction of or a conviction for an attempt to commit any of the provisions of section 130.52 or 130.55 of the penal law regardless of the age of the victim and the offender has previously been convicted of: (i) a sex offense defined in this article, (ii) a sexually violent offense defined in this article, or (iii) any of the provisions of section 130.52 or 130.55 of the penal law, or an attempt thereof; or

(d) a conviction of (i) an offense in any other jurisdiction which includes all of the essential elements of any such crime provided for in paragraph (a), (b) or (c) of this subdivision or (ii) a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred or, (iii) any of the provisions of 18 U.S.C. 2251, 18 U.S.C. 2251A, 18 U.S.C. 2252, 18 U.S.C. 2252A, 18 U.S.C. 2260, 18 U.S.C. 2422(b), 18 U.S.C. 2423, or 18 U.S.C. 2425, provided that the elements of such crime of conviction are substantially the same as those which are a part of such offense as of the date on which this subparagraph takes effect[.]; OR

(e) a conviction of any of the provisions of subdivision two, three or four of section 250.45 of the penal law, unless upon motion by the defendant, the trial court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that registration would be unduly harsh and inappropriate[.]; OR

(F) A CONVICTION FOR ANY OFFENSE SET FORTH IN PARAGRAPH (A) OF THIS SUBDIVISION WHICH WAS REPLACED BY A YOUTHFUL OFFENDER FINDING PURSUANT TO ARTICLE SEVEN HUNDRED TWENTY OF THE CRIMINAL PROCEDURE LAW.

S 6. Section 450.10 of the criminal procedure law is amended by adding a new subdivision 6 to read as follows:

6. AN ORDER, ENTERED PURSUANT TO SECTION 530.42, GRANTING IN WHOLE OR IN PART AN APPLICATION OF THE PEOPLE.

S 7. Subdivision 4 of section 450.20 of the criminal procedure law is amended to read as follows:

4. A sentence other than one of death, as prescribed in subdivisions two and three of section 450.30, UNLESS THE APPEAL IS BASED SOLELY UPON THE GROUND THAT A SENTENCE WAS UNDULY LENIENT WHEN SUCH SENTENCE WAS PREDICATED UPON ENTRY OF A PLEA OF GUILTY AND THE SENTENCE IMPOSED WAS NOT LESS THAN THAT WHICH WAS AGREED TO BY THE PEOPLE AS A CONDITION OF THE PLEA AND SET FORTH IN THE RECORD OR FILED WITH THE COURT AS REQUIRED BY SUBDIVISION FIVE OF SECTION 220.50 OR SUBDIVISION FOUR OF SECTION 340.20;

S 8. Section 450.20 of the criminal procedure law is amended by adding a new subdivision 12 to read as follows:

12. AN ORDER, ENTERED PURSUANT TO SECTION 530.42, DENYING IN WHOLE OR IN PART AN APPLICATION OF THE PEOPLE.

S 9. Subdivision 2 of section 450.30 of the criminal procedure law is amended to read as follows:

2. An appeal by the people from a sentence, as authorized by subdivision four of section 450.20, may be based [only] upon the ground that such sentence EITHER was (A) invalid as a matter of law OR (B) UNDULY LENIENT.

S 10. Paragraph (c) of subdivision 2 and paragraph (b) of subdivision 6 of section 470.15 of the criminal procedure law are amended to read as follows:

(c) Upon a determination that a sentence imposed upon a valid conviction is illegal [or], unduly harsh or severe OR UNDULY LENIENT, the court may modify the judgment by reversing it with respect to the sentence and by otherwise affirming it.

(b) That a sentence, though legal, was EITHER (I) unduly harsh or severe OR (II) UNDULY LENIENT.

S 11. Subdivision 6 of section 470.20 of the criminal procedure law is amended to read as follows:

6. Upon modifying a judgment or reversing a sentence as a matter of discretion in the interest of justice upon the ground that the sentence is unduly harsh or severe OR UNDULY LENIENT, the court must itself impose some legally authorized lesser OR GREATER sentence.

S 12. Subdivision 3 of section 530.30 of the criminal procedure law is renumbered subdivision 6 and three new subdivisions 3, 4 and 5 are added to read as follows:

3. WHEN A CRIMINAL ACTION IS PENDING IN A LOCAL CRIMINAL COURT, OTHER THAN ONE CONSISTING OF A SUPERIOR COURT JUDGE SITTING AS SUCH, A JUDGE OF A SUPERIOR COURT HOLDING A TERM THEREOF IN THE COUNTY, UPON APPLICATION OF THE PEOPLE, MAY REVOKE AN ORDER OF RECOGNIZANCE OR BAIL ENTERED BY A LOCAL CRIMINAL COURT AND FIX BAIL IN AN AMOUNT THE COURT DETERMINES SUFFICIENT OR, IF THE DEFENDANT IS CHARGED WITH ONE OR MORE CRIMES AT LEAST ONE OF WHICH IS A FELONY, COMMIT THE DEFENDANT TO THE CUSTODY OF THE SHERIFF.

4. NOTWITHSTANDING THE PROVISIONS OF SUBDIVISION THREE OF THIS SECTION, A SUPERIOR COURT JUDGE MAY NOT VACATE AN ORDER OF RECOGNIZANCE OR BAIL AND FIX BAIL OR COMMIT THE DEFENDANT TO THE CUSTODY OF THE SHERIFF UNLESS AND UNTIL:

(A) THE DEFENDANT HAS HAD AN OPPORTUNITY TO BE HEARD IN THE MATTER OR, AFTER KNOWLEDGE OR NOTICE TO THE DEFENDANT OR HIS OR HER COUNSEL OF THE APPLICATION AND REASONABLE OPPORTUNITY TO BE HEARD, HAS FAILED TO APPEAR AT THE PROCEEDING OR HAS OTHERWISE WAIVED HIS OR HER RIGHT TO DO SO; AND

(B) SUCH JUDGE HAS BEEN FURNISHED WITH A REPORT AS DESCRIBED IN SUBPARAGRAPH (II) OF PARAGRAPH (B) OF SUBDIVISION TWO OF SECTION 530.20 OF THIS ARTICLE.

5. WHEN A CRIMINAL ACTION IS PENDING IN A LOCAL CRIMINAL COURT AND AN ORDER FIXING BAIL HAS BEEN ENTERED, AND THEREAFTER A LOCAL CRIMINAL COURT ENTERS AN ORDER RELEASING THE DEFENDANT ON HIS OR HER OWN RECOGNIZANCE OR FIXING BAIL IN A LESSER AMOUNT OR IN A LESS BURDENSOME MANNER, THE PEOPLE MAY FILE WITH THE LOCAL CRIMINAL COURT A NOTICE OF INTENTION TO APPLY TO A SUPERIOR COURT JUDGE PURSUANT TO SUBDIVISION THREE OF THIS SECTION. THE FILING OF SUCH A NOTICE SHALL STAY THE EFFECT OF THE ORDER RELEASING THE DEFENDANT ON HIS OR HER OWN RECOGNIZANCE OR FIXING BAIL IN A LESSER AMOUNT OR IN A LESS BURDENSOME MANNER. A STAY PURSUANT TO THIS SUBDIVISION SHALL REMAIN IN EFFECT FOR A PERIOD OF SEVENTY-TWO HOURS

UNLESS EXTENDED OR VACATED BY THE JUDGE OF THE SUPERIOR COURT TO WHOM THE PEOPLE APPLY PURSUANT TO SUBDIVISION THREE OF THIS SECTION.

S 13. The criminal procedure law is amended by adding a new section 530.42 to read as follows:

S 530.42 ORDER OF RECOGNIZANCE OR BAIL; REVIEW BY SUPERIOR COURT.

1. WHEN A CRIMINAL ACTION IS PENDING IN A LOCAL CRIMINAL COURT OR A SUPERIOR COURT, AND THE COURT HAS ORDERED RECOGNIZANCE OR BAIL, A JUDGE OF THE SUPERIOR COURT HOLDING A TERM THEREOF IN THE COUNTY, UPON APPLICATION OF THE PEOPLE, MAY REVIEW AN ORDER OF RECOGNIZANCE OR BAIL PREVIOUSLY ENTERED IN THE ACTION AND FIX BAIL IN AN AMOUNT THE COURT DETERMINES SUFFICIENT OR, IF THE DEFENDANT IS CHARGED WITH ONE OR MORE CRIMES AT LEAST ONE OF WHICH IS A FELONY, COMMIT THE DEFENDANT TO THE CUSTODY OF THE SHERIFF.

2. UPON AN APPLICATION FOR REVIEW PURSUANT TO SUBDIVISION ONE OF THIS SECTION, THE SUPERIOR COURT JUDGE MAY GRANT THE APPLICATION ONLY UPON A DETERMINATION THAT THE ORDER OF RECOGNIZANCE OR BAIL UNDER REVIEW CONSTITUTES AN ABUSE OF DISCRETION.

3. AN APPLICATION PURSUANT TO SUBDIVISION ONE OF THIS SECTION SHALL BE ACCOMPANIED BY AN AFFIDAVIT OR AFFIRMATION WHICH SHALL STATE THE DATE, AND THE COURT OR JUDGE TO WHOM MADE, OF EVERY PREVIOUS APPLICATION, THE DISPOSITION OF EACH SUCH APPLICATION AND OF ANY APPEAL TAKEN, AND THE NEW FACTS PRESENTED IN THE APPLICATION THAT WERE NOT PRESENTED IN ANY PREVIOUS APPLICATION.

4. WHEN A CRIMINAL ACTION IS PENDING IN A SUPERIOR COURT AND AN ORDER IS ENTERED RELEASING THE DEFENDANT ON HIS OR HER OWN RECOGNIZANCE OR FIXING BAIL, THE PEOPLE MAY APPLY ON AN EMERGENCY BASIS TO THE COURT TO WHICH AN APPLICATION PURSUANT TO SUBDIVISION ONE OF THIS SECTION WOULD BE MADE FOR AN INTERIM ORDER FIXING BAIL OR COMMITTING THE DEFENDANT TO THE CUSTODY OF THE SHERIFF. SUCH AN ORDER SHALL REMAIN IN EFFECT FOR A PERIOD OF SEVENTY-TWO HOURS UNLESS EXTENDED OR VACATED BY THE COURT TO WHICH THE PEOPLE APPLY PURSUANT TO SUBDIVISION ONE OF THIS SECTION.

5. THE CHIEF ADMINISTRATOR OF THE COURTS, WITH THE ADVICE AND CONSENT OF THE ADMINISTRATIVE BOARD OF THE COURTS, SHALL ADOPT PROCEDURES REGULATING THE COURT OR COURTS IN THE COUNTY TO WHICH AN APPLICATION PURSUANT TO SUBDIVISION ONE OF THIS SECTION MAY BE MADE.

S 14. Subdivision 1 of section 720.35 of the criminal procedure law, as amended by chapter 452 of the laws of 1992, is amended to read as follows:

1. A youthful offender adjudication is not a judgment of conviction for a crime or any other offense, and does not operate as a disqualification of any person so adjudged to hold public office or public employment or to receive any license granted by public authority but shall be deemed a conviction [only] (I) for the purposes of transfer of supervision and custody pursuant to section two hundred fifty-nine-m of the executive law OR (II) FOR THE PURPOSE OF DETERMINING WHETHER THE PERSON IS SUBJECT TO THE REQUIREMENTS OF ARTICLE SIX-C OF THE CORRECTION LAW, WHENEVER THE PERSON HAS BEEN CONVICTED OF A FELONY OFFENSE COMMITTED WITHIN FIVE YEARS OF THE DATE ON WHICH HE OR SHE WAS ADJUDICATED A YOUTHFUL OFFENDER FOR A FELONY OFFENSE DEFINED IN SUBDIVISION TWO OR THREE OF SECTION ONE HUNDRED SIXTY-EIGHT-A OF THE CORRECTION LAW OR (III) FOR THE PURPOSE OF DETERMINING WHETHER THE PERSON IS A DESIGNATED OFFENDER WITHIN THE MEANING OF SUBDIVISION SEVEN OF SECTION NINE HUNDRED NINETY-FIVE OF THE EXECUTIVE LAW AND SUBJECT TO THE REQUIREMENTS OF ARTICLE FORTY-NINE-B OF THE EXECUTIVE LAW.

S 15. Section 720.35 of the criminal procedure law is amended by adding a new subdivision 5 to read as follows:

5. NOTWITHSTANDING SUBDIVISION TWO OF THIS SECTION, WHENEVER A PERSON STANDS CONVICTED OF A FELONY OFFENSE COMMITTED WITHIN FIVE YEARS OF THE DATE ON WHICH HE OR SHE WAS ADJUDICATED A YOUTHFUL OFFENDER FOR A FELONY OFFENSE DEFINED IN SUBDIVISION TWO OR THREE OF SECTION ONE HUNDRED SIXTY-EIGHT-A OF THE CORRECTION LAW, ALL RECORDS PERTAINING TO THE YOUTHFUL OFFENDER ADJUDICATION SHALL NO LONGER BE CONFIDENTIAL.

S 16. The criminal procedure law is amended by adding a new section 60.41 to read as follows:

S 60.41 RULES OF EVIDENCE; PROOF OF PREVIOUS SEXUAL ASSAULT.

1. IN ANY PROSECUTION IN WHICH A DEFENDANT IS CHARGED WITH AN OFFENSE OF SEXUAL ASSAULT, EVIDENCE OF THE DEFENDANT'S COMMISSION OF ANOTHER OFFENSE OR OFFENSES OF SEXUAL ASSAULT IS ADMISSIBLE AND MAY BE CONSIDERED FOR ITS BEARING ON ANY MATTER TO WHICH IT IS RELEVANT, INCLUDING THE DEFENDANT'S PROPENSITY TO COMMIT AN OFFENSE OF SEXUAL ASSAULT OR THE CREDIBILITY OF THE ALLEGED VICTIM OF THE SEXUAL ASSAULT, UNLESS THE COURT DETERMINES THAT ITS PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNDUE PREJUDICE TO THE DEFENDANT.

2. FOR PURPOSES OF THIS SECTION, "OFFENSE OF SEXUAL ASSAULT" MEANS ANY CONDUCT PROSCRIBED BY ARTICLE ONE HUNDRED THIRTY OF THE PENAL LAW, OR ANY ATTEMPT TO ENGAGE IN SUCH CONDUCT, WHETHER COMMITTED IN THIS STATE OR ELSEWHERE, REGARDLESS OF WHETHER THE DEFENDANT WAS CONVICTED FOR THE CONDUCT.

S 17. Section 60.40 of the criminal procedure law is amended by adding a new subdivision 4 to read as follows:

4. IN ACCORDANCE WITH SECTION 60.41, THE PEOPLE MAY PROVE THAT A DEFENDANT HAS PREVIOUSLY BEEN CONVICTED OF AN OFFENSE OF SEXUAL ASSAULT.

S 18. This act shall take effect on the first of November next succeeding the date on which it shall have become a law; provided that section three of this act shall take effect January 1, 2010.