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

4398--A

2011-2012 Regular Sessions

I N S E N A T E

April 4, 2011

Introduced by Sen. FLANAGAN -- read twice and ordered printed, and when printed to be committed to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the penal law and the criminal procedure law, in relation to mandatory imprisonment and plea restrictions for offenses victimizing the elderly and physically disabled

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

Section 1. It is hereby found and declared that elderly and physically disabled people continue to be singled out as victims of crime. It is also found that the physical harm and emotional trauma suffered by elderly and physically disabled crime victims has a devastating effect on the lives of those victims.

The elderly or physically disabled victim has a decreased physical capability to resist an attacker and thus becomes an inviting target of crime. Moreover, the aftereffects of crime on the elderly and the physically handicapped affect them more deeply than any statistics would indicate. The emotional trauma and possible serious physical damage resulting from a face to face crime may cause a permanent downgrading in the elderly or physically disabled victim's lifestyle. Such victims often impose "house-arrest" on themselves, afraid to shop, to visit friends, to go to the doctor, to live, unless behind locked doors. Even those elderly or physically disabled who are not direct victims of crime suffer indirectly, because they, having learned of the terrible tragedy suffered by other elderly and physically disabled and fearful for their own individual safety, barricade themselves within their homes. The older or physically disabled crime victim is thus twice victimized--by the crime and by its aftermath.

Criminologists, sociologists, psychologists, and the police all recognize and acknowledge these facts, but the law does not. It has been

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

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ineffective in deterring crimes against the elderly and the physically disabled, particularly those involving violence or the threat of violence. Similarly, special projects on crime prevention and improved techniques of communications for the elderly to the police do not halt or reduce such crime. For these reasons, offenses committed against the elderly or the physically disabled must be treated as unique, and legislation must be enacted to provide a meaningful deterrent for those offenders who now victimize the elderly and the physically disabled.

S 2. Subdivision 18 of section 10.00 of the penal law, as amended by chapter 7 of the laws of 2007, is amended to read as follows:

18. "Juvenile offender" means (1) a person thirteen years old who is criminally responsible for acts constituting murder in the second degree as defined in subdivisions one and two of section 125.25 of this chapter or such conduct as a sexually motivated felony, where authorized pursuant to section 130.91 of [the penal law] THIS CHAPTER; and

(2) a person fourteen or fifteen years old who is criminally responsible for acts constituting the crimes defined in subdivisions one and two of section 125.25 (murder in the second degree) and in subdivision three of such section provided that the underlying crime for the murder charge is one for which such person is criminally responsible; section 135.25 (kidnapping in the first degree); 150.20 (arson in the first degree); subdivisions one and two of section 120.10 (assault in the first degree); 125.20 (manslaughter in the first degree); subdivisions one and two of section 130.35 (rape in the first degree); subdivisions one and two of section 130.50 (criminal sexual act in the first degree); 130.70 (aggravated sexual abuse in the first degree); 140.30 (burglary in the first degree); subdivision one of section 140.25 (burglary in the second degree); 150.15 (arson in the second degree); 160.15 (robbery in the first degree); subdivision two of section 160.10 (robbery in the second degree) of this chapter; or section 265.03 of this chapter, where such machine gun or such firearm is possessed on school grounds, as that phrase is defined in subdivision fourteen of section 220.00 of this chapter; or defined in this chapter as an attempt to commit murder in the second degree or kidnapping in the first degree; SECTION 280.00 (VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE THIRD DEGREE); SECTION 280.05 (VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE SECOND DEGREE); OR SECTION 280.10 (VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE FIRST DEGREE), or such conduct as a sexually motivated felony, where authorized pursuant to section 130.91 of [the penal law] THIS CHAPTER.

S 3. Section 10.00 of the penal law is amended by adding three new subdivisions 21, 22 and 23 to read as follows:

21. "ELDERLY PERSON" MEANS A HUMAN BEING SIXTY-TWO YEARS OLD OR MORE.

22. "VICTIM", AS THAT TERM IS USED IN ARTICLE TWO HUNDRED EIGHTY OF THIS CHAPTER, MEANS, IN A CASE OF:

(A) ASSAULT, THE PERSON INJURED OR INTENDED TO BE INJURED;

(B) MANSLAUGHTER OR MURDER, THE PERSON KILLED OR INTENDED TO BE KILLED OR INJURED;

(C) RAPE OR CRIMINAL SEXUAL ACT, THE PERSON WITH WHOM THE DEFENDANT HAS THE SEXUAL INTERCOURSE OR DEVIATE SEXUAL INTERCOURSE;

(D) KIDNAPPING, THE PERSON ABDUCTED;

(E) BURGLARY OR ROBBERY, THE PERSON INJURED, OR AGAINST WHOM A DANGEROUS INSTRUMENT IS OR IS THREATENED TO BE USED, OR TO WHOM THE WEAPON IS DISPLAYED;

(F) ARSON, THE PERSON PRESENT IN THE BUILDING AT THE TIME; OR

(G) LARCENY, THE PERSON IN WHOM FEAR IS INSTILLED.

23. "PHYSICALLY DISABLED PERSON" MEANS A HUMAN BEING:
(A) HAVING AN IMPAIRMENT REQUIRING THE USE OF LEG BRACES, CRUTCHES OR ARTIFICIAL SUPPORT, OR
(B) HAVING AN IMPAIRMENT REQUIRING CONFINEMENT TO A WHEELCHAIR, OR
(C) HAVING AN IMPAIRMENT CAUSED BY AMPUTATION OF A LIMB, OR
(D) HAVING TOTAL OR PARTIAL IMPAIRMENT OF SIGHT NECESSITATING THE USE OF A GUIDE DOG OR OTHER GUIDING DEVICE.

S 4. The penal law is amended by adding a new article 280 to read as follows:

ARTICLE 280

OFFENSES AGAINST THE ELDERLY OR PHYSICALLY DISABLED

SECTION 280.00 VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE THIRD DEGREE.
280.05 VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE SECOND DEGREE.
280.10 VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE FIRST DEGREE.

S 280.00 VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE THIRD DEGREE.

A PERSON IS GUILTY OF VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE THIRD DEGREE WHEN HE OR SHE:
1. COMMITS ANY OF THE FOLLOWING FELONIES:
ATTEMPT TO COMMIT VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE SECOND DEGREE AS DEFINED IN SECTION 280.05, OR ASSAULT IN THE SECOND DEGREE AS DEFINED IN SECTION 120.05; AND
2. THE VICTIM OF SUCH CRIME IS AN ELDERLY PERSON OR A PHYSICALLY DISABLED PERSON.

VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE THIRD DEGREE IS A CLASS D FELONY.

S 280.05 VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE SECOND DEGREE.

A PERSON IS GUILTY OF VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE SECOND DEGREE WHEN HE OR SHE:
1. COMMITS ANY OF THE FOLLOWING FELONIES:
ATTEMPT TO COMMIT VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE FIRST DEGREE AS DEFINED IN SECTION 280.10, ASSAULT IN THE FIRST DEGREE AS DEFINED IN SECTION 120.10, BURGLARY IN THE SECOND DEGREE AS DEFINED IN PARAGRAPH (B), (C), OR (D) OF SUBDIVISION ONE OF SECTION 140.25, GRAND LARCENY IN THE SECOND DEGREE AS DEFINED IN CLAUSE (A) OF SUBDIVISION TWO OF SECTION 155.40, OR ROBBERY IN THE SECOND DEGREE AS DEFINED IN SUBDIVISION TWO OF SECTION 160.10; AND
2. THE VICTIM OF SUCH CRIME IS AN ELDERLY PERSON OR A PHYSICALLY DISABLED PERSON.

VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE SECOND DEGREE IS A CLASS C FELONY.

S 280.10 VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE FIRST DEGREE.

A PERSON IS GUILTY OF VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE FIRST DEGREE WHEN HE OR SHE:
1. COMMITS ANY OF THE FOLLOWING FELONIES:
ATTEMPT TO COMMIT A CLASS A-I FELONY OTHER THAN AN OFFENSE DEFINED IN ARTICLE TWO HUNDRED TWENTY, MANSLAUGHTER IN THE FIRST DEGREE AS DEFINED IN SECTION 125.20, RAPE IN THE FIRST DEGREE AS DEFINED IN SECTION 130.35, CRIMINAL SEXUAL ACT IN THE FIRST DEGREE AS DEFINED IN SECTION 130.50, KIDNAPPING IN THE SECOND DEGREE AS DEFINED IN SECTION 135.20, BURGLARY IN THE FIRST DEGREE AS DEFINED IN SUBDIVISION TWO, THREE OR

FOUR OF SECTION 140.30, OR ROBBERY IN THE FIRST DEGREE AS DEFINED IN SUBDIVISION ONE, THREE OR FOUR OF SECTION 160.15; AND

2. THE VICTIM OF SUCH CRIME IS AN ELDERLY PERSON OR A PHYSICALLY DISABLED PERSON.

VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE FIRST DEGREE IS A CLASS B FELONY.

S 5. Section 60.05 of the penal law, as amended by chapter 410 of the laws of 1979, the section heading and subdivisions 2, 3 and 4 as amended by chapter 738 of the laws of 2004, subdivision 1 as amended by chapter 7 of the laws of 2007 and subdivision 5 as amended by chapter 405 of 2010, is amended to read as follows:

S 60.05 Authorized dispositions; other class A, B, certain C and D felonies and multiple felony 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 when a person is to be sentenced upon a conviction of a felony as a multiple felony offender.

2. Class A felony. Except as provided in SUBDIVISION SEVEN OF THIS SECTION AND 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 first degree and is sentenced in accordance with section 60.06 of this article.

3. Class B felony. Except as provided in [subdivision] SUBDIVISIONS six AND 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] SUBDIVISIONS six AND SEVEN, 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, 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, strangulation in the second degree as defined in section 121.12 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 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. ARTICLE TWO HUNDRED EIGHTY OFFENSES. WHEN THE COURT IMPOSES SENTENCE UPON A PERSON CONVICTED OF AN OFFENSE ENUMERATED IN ARTICLE TWO HUNDRED EIGHTY, IT MUST IMPOSE A SENTENCE OF IMPRISONMENT IN ACCORDANCE WITH SECTION 70.09, UNLESS IT IMPOSES A SENTENCE OF IMPRISONMENT IN ACCORDANCE WITH SECTION 70.06 OR 70.10.

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

S 70.09 SENTENCE OF IMPRISONMENT FOR CERTAIN OFFENSES AGAINST THE ELDERLY OR THE PHYSICALLY DISABLED.

1. EXCEPT AS PROVIDED IN SUBDIVISION FOUR EVERY PERSON, OTHER THAN A PERSON SENTENCED AS A SECOND OR PERSISTENT FELONY OFFENDER, WHO IS CONVICTED OF AN OFFENSE AGAINST THE ELDERLY OR THE PHYSICALLY DISABLED DEFINED IN ARTICLE TWO HUNDRED EIGHTY OF THIS CHAPTER, MUST BE SENTENCED TO AN INDETERMINATE SENTENCE OF IMPRISONMENT IN ACCORDANCE WITH THE PROVISIONS OF SUBDIVISIONS TWO AND THREE OF THIS SECTION.

2. THE MAXIMUM TERM OF SUCH INDETERMINATE SENTENCE MUST BE FIXED AS FOLLOWS:

(A) FOR THE CLASS B FELONY OF VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE FIRST DEGREE, THE TERM MUST BE AT LEAST NINE YEARS AND MUST NOT EXCEED TWENTY-FIVE YEARS;

(B) FOR THE CLASS C FELONY OF VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE SECOND DEGREE, THE TERM MUST BE AT LEAST SIX YEARS AND MUST NOT EXCEED FIFTEEN YEARS;

(C) FOR THE CLASS D FELONY OF VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE THIRD DEGREE, THE TERM MUST BE AT LEAST FOUR YEARS AND MUST NOT EXCEED SEVEN YEARS.

3. THE MINIMUM PERIOD OF IMPRISONMENT FOR SUCH INDETERMINATE SENTENCE MUST BE FIXED BY THE COURT AND MUST BE SPECIFIED IN THE SENTENCE AS FOLLOWS:

(A) FOR THE CLASS B FELONY OF VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE FIRST DEGREE, THE MINIMUM PERIOD OF IMPRISONMENT SHALL NOT BE LESS THAN THREE YEARS NOR MORE THAN ONE-THIRD THE MAXIMUM TERM IMPOSED BY THE COURT;

(B) FOR THE CLASS C FELONY OF VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE SECOND DEGREE, THE MINIMUM PERIOD OF IMPRISONMENT SHALL BE NOT LESS THAN TWO YEARS NOR MORE THAN ONE-THIRD THE MAXIMUM TERM IMPOSED BY THE COURT;

(C) FOR THE CLASS D FELONY OF VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE THIRD DEGREE, THE MINIMUM PERIOD OF IMPRISONMENT SHALL BE ONE-THIRD THE MAXIMUM TERM IMPOSED BY THE COURT.

4. ALTERNATIVE DEFINITE SENTENCE FOR CLASS D FELONY OFFENSE AGAINST THE ELDERLY OR THE PHYSICALLY DISABLED. WHEN A PERSON, OTHER THAN A MULTIPLE FELONY OFFENDER, IS SENTENCED FOR THE CLASS D FELONY OF VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE THIRD DEGREE, AND THE 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 IT WOULD BE UNDULY HARSH TO IMPOSE AN INDETERMINATE SENTENCE, THE COURT MAY IMPOSE A DEFINITE SENTENCE OF IMPRISONMENT AND FIX A TERM OF ONE YEAR.

S 7. Subdivision 4 of section 180.75 of the criminal procedure law, as amended by chapter 264 of the laws of 2003, is amended to read as follows:

4. Notwithstanding the provisions of subdivisions two and three of this section, a local criminal court shall, at the request of the district attorney, order removal of an action against a juvenile offender to the family court pursuant to the provisions of article seven hundred twenty-five of this chapter if, upon consideration of the criteria specified in subdivision two of section 210.43 of this chapter, it is determined that to do so would be in the interests of justice. Where, however, the felony complaint charges the juvenile offender with AN OFFENSE AGAINST THE ELDERLY OR PHYSICALLY DISABLED, OR murder in the second degree as defined in section 125.25 of the penal law, rape in the first degree as defined in subdivision one of section 130.35 of the penal law, criminal sexual act in the first degree as defined in subdivision one of section 130.50 of the penal law, or an armed felony as defined in paragraph (a) of subdivision forty-one of section 1.20 of this chapter, a determination that such action be removed to the family court shall, in addition, be based upon a finding of one or more of the following factors: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or (iii) possible deficiencies in proof of the crime.

S 8. Paragraph (c) of subdivision 5 of section 220.10 of the criminal procedure law, as amended by chapter 410 of the laws of 1979, is amended to read as follows:

(c) Where the indictment charges a felony, other than a class A felony or class B felony defined in article two hundred twenty of the penal law or class B or class C violent felony offense as defined in subdivision one of section 70.02 of the penal law, OR THE CLASS C FELONY OF VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE SECOND DEGREE AS DEFINED IN SECTION 280.05 OF THE PENAL LAW, and it appears that the defendant has previously been subjected to a predicate felony conviction as defined in [penal law] section 70.06 OF THE PENAL LAW then any plea of guilty entered pursuant to subdivision three or four must be or must include at least a plea of guilty of a felony.

S 9. Subparagraph (vi) of paragraph (b) of subdivision 3 of section 220.30 of the criminal procedure law, as amended by chapter 481 of the laws of 1978 and as renumbered by chapter 233 of the laws of 1980, is amended to read as follows:

(vi) A plea of guilty, whether to the entire indictment or to part of the indictment for any crime other than a felony, may not be accepted on the condition that it constitutes a complete disposition of one or more other indictments against the defendant wherein is charged a class B felony other than a class B violent felony offense as defined in subdivision one of section 70.02 of the penal law, OR THE CLASS C FELONY OF

VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE SECOND DEGREE AS DEFINED IN SECTION 280.05 OF THE PENAL LAW.

S 10. Subdivision 2 of section 720.10 of the criminal procedure law, as amended by chapter 416 of the laws of 1986, paragraph (a) as amended by chapter 316 of the laws of 2006, is amended to read as follows:

2. "Eligible youth" means a youth who is eligible to be found a youthful offender. Every youth is so eligible unless:

(a) the conviction to be replaced by a youthful offender finding is for (i) a class A-I or class A-II felony, or (ii) an armed felony as defined in subdivision forty-one of section 1.20, except as provided in subdivision three, or (iii) rape in the first degree, criminal sexual act in the first degree, or aggravated sexual abuse, except as provided in subdivision three, or

(b) such youth has previously been convicted and sentenced for a felony, or

(c) such youth has previously been adjudicated a youthful offender following conviction of a felony or has been adjudicated on or after September first, nineteen hundred seventy-eight a juvenile delinquent who committed a designated felony act as defined in the family court act, OR

(D) SUCH YOUTH HAS BEEN CONVICTED OF THE CLASS B FELONY OF VICTIMIZING THE ELDERLY OR THE PHYSICALLY DISABLED IN THE FIRST DEGREE AS DEFINED IN SECTION 280.10 OF THE PENAL LAW.

S 11. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.