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

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January 10, 2011

Introduced by M. of A. TEDISCO, RAIA, TOBACCO, BOYLE, HAWLEY -- Multi-Sponsored by -- M. of A. AMEDORE, BARCLAY, BURLING, BUTLER, CALHOUN, CONTE, CROUCH, DUPREY, FINCH, FITZPATRICK, GIGLIO, HAYES, JORDAN, KOLB, P. LOPEZ, McDONOUGH, McKEVITT, J. MILLER, MOLINARO, OAKS, RABBITT, REILICH, SALADINO, SAYWARD, SPANO, THIELE -- read once and referred to the Committee on Codes

AN ACT to amend the penal law and the criminal procedure law, in relation to crimes against vulnerable elderly or disabled persons

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

Section 1. Section 260.31 of the penal law, as added by chapter 381 of the laws of 1998, subdivision 1 as amended, subdivision 4 as added and such section as renumbered by chapter 14 of the laws of 2010, and subdivision 2 as amended by chapter 193 of the laws of 2010, is amended to read as follows:

S 260.31 Vulnerable elderly persons; definitions.

For the purpose of sections 260.32 and 260.34 of this article, the following definitions shall apply:

1. ["Caregiver" means a person who (i) assumes responsibility for the care of a vulnerable elderly person, or an incompetent or physically disabled person pursuant to a court order; or (ii) receives monetary or other valuable consideration for providing care for a vulnerable elderly person, or an incompetent or physically disabled person.

2.] "Sexual contact" means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. 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, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.

[3.] 2. "Vulnerable elderly person" means a person sixty years of age or older who is suffering from a disease or infirmity associated with

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

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advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care OR A PERSON SEVENTY YEARS OF AGE OR OLDER.

[4.] 3. "Incompetent or physically disabled person" means an individual who is unable to care for himself or herself because of physical disability, mental disease or defect.

S 2. The opening paragraph and subdivision 4 of section 260.32 of the penal law, as amended by chapter 14 of the laws of 2010, are amended to read as follows:

A person is guilty of endangering the welfare of a vulnerable elderly person, or an incompetent or physically disabled person in the second degree when[, being a caregiver for a vulnerable elderly person, or an incompetent or physically disabled person]:

4. He or she subjects such person to sexual contact without the latter's consent. Lack of consent under this subdivision results from forcible compulsion or incapacity to consent, as those terms are defined in article one hundred thirty of this [chapter] PART, or any other circumstances in which the vulnerable elderly person, or an incompetent or physically disabled person does not expressly or impliedly acquiesce [in the caregiver's conduct]. In any prosecution under this subdivision in which the victim's alleged lack of consent results solely from incapacity to consent because of the victim's mental disability or mental incapacity, the provisions of section 130.16 of this [chapter] PART shall apply. In addition, in any prosecution under this subdivision in which the victim's lack of consent is based solely upon his or her incapacity to consent because he or she was mentally disabled, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent.

S 3. The opening paragraph of section 260.34 of the penal law, as amended by chapter 14 of the laws of 2010, is amended to read as follows:

A person is guilty of endangering the welfare of a vulnerable elderly person, or an incompetent or physically disabled person in the first degree when[, being a caregiver for a vulnerable elderly person, or an incompetent or physically disabled person]:

S 4. Paragraphs (c) and (d) of subdivision 1 of section 70.02 of the penal law, paragraph (c) as amended by chapter 405 of the laws of 2010 and paragraph (d) as amended by chapter 7 of the laws of 2007, are amended to read as follows:

(c) Class D violent felony offenses: an attempt to commit any of the class C felonies set forth in paragraph (b); reckless assault of a child as defined in section 120.02, assault in the second degree as defined in section 120.05, menacing a police officer or peace officer as defined in section 120.18, stalking in the first degree, as defined in subdivision one of section 120.60, strangulation in the second degree as defined in section 121.12, rape in the second degree as defined in section 130.30, criminal sexual act in the second degree as defined in section 130.45, sexual abuse in the first degree as defined in section 130.65, course of sexual conduct against a child in the second degree as defined in section 130.80, aggravated sexual abuse in the third degree as defined in section 130.66, facilitating a sex offense with a controlled substance as defined in section 130.90, criminal possession of a weapon in the third degree as defined in subdivision five, six, seven or eight

of section 265.02, criminal sale of a firearm in the third degree as defined in section 265.11, intimidating a victim or witness in the second degree as defined in section 215.16, ENDANGERING THE WELFARE OF A VULNERABLE ELDERLY PERSON IN THE FIRST DEGREE AS DEFINED IN SECTION 260.34, soliciting or providing support for an act of terrorism in the second degree as defined in section 490.10, and making a terroristic threat as defined in section 490.20, falsely reporting an incident in the first degree as defined in section 240.60, placing a false bomb or hazardous substance in the first degree as defined in section 240.62, placing a false bomb or hazardous substance in a sports stadium or arena, mass transportation facility or enclosed shopping mall as defined in section 240.63, and aggravated unpermitted use of indoor pyrotechnics in the first degree as defined in section 405.18.

(d) Class E violent felony offenses: ENDANGERING THE WELFARE OF A VULNERABLE ELDERLY PERSON IN THE SECOND DEGREE AS DEFINED IN SECTION 260.32, an attempt to commit any of the felonies of criminal possession of a weapon in the third degree as defined in subdivision five, six, seven or eight of section 265.02 as a lesser included offense of that section as defined in section 220.20 of the criminal procedure law, persistent sexual abuse as defined in section 130.53, aggravated sexual abuse in the fourth degree as defined in section 130.65-a, falsely reporting an incident in the second degree as defined in section 240.55 and placing a false bomb or hazardous substance in the second degree as defined in section 240.61.

S 5. Part 4 of the penal law is amended by adding a new title Y-2 to read as follows:

TITLE Y-2
CRIMES AGAINST THE
ELDERLY OR DISABLED

ARTICLE 495
CRIMES AGAINST THE
ELDERLY OR DISABLED

SECTION 495.00 CRIMES AGAINST THE ELDERLY OR DISABLED.
495.05 SENTENCING.

S 495.00 CRIMES AGAINST THE ELDERLY OR DISABLED.

1. A PERSON COMMITS A CRIME AGAINST THE ELDERLY OR DISABLED WHEN HE OR SHE COMMITS A SPECIFIED OFFENSE AND EITHER:

(A) INTENTIONALLY SELECTS THE PERSON AGAINST WHOM THE OFFENSE IS COMMITTED OR INTENDED TO BE COMMITTED IN WHOLE OR IN SUBSTANTIAL PART BECAUSE OF A BELIEF OR PERCEPTION REGARDING THE DISABILITY STATUS OR AGE RELATED INFIRMITY OR DISEASE OF A PERSON, REGARDLESS OF WHETHER THE BELIEF OR PERCEPTION IS CORRECT; OR

(B) INTENTIONALLY COMMITS THE ACT OR ACTS CONSTITUTING THE OFFENSE IN WHOLE OR IN SUBSTANTIAL PART BECAUSE OF A BELIEF OR PERCEPTION REGARDING DISABILITY STATUS OR AGE RELATED INFIRMITY OR DISEASE OF A PERSON, REGARDLESS OF WHETHER THE BELIEF OR PERCEPTION IS CORRECT.

2. FOR THE PURPOSE OF THIS SECTION: (A) WHEN A PERSON REASONABLY APPEARS TO HAVE A DISABILITY OR AN AGE RELATED INFIRMITY OR DISEASE, THERE SHALL BE A REBUTTABLE PRESUMPTION THE DEFENDANT SELECTED THE PERSON AGAINST WHOM THE OFFENSE OR ACT IS COMMITTED OR INTENDED TO BE COMMITTED, IN WHOLE OR IN PART BECAUSE OF A BELIEF OR PERCEPTION REGARDING THE DISABILITY STATUS OR AGE RELATED INFIRMITY OR DISEASE OF SUCH PERSON; AND (B) WHEN A PERSON IS SEVENTY YEARS OLD OR MORE, THERE SHALL BE A REBUTTABLE PRESUMPTION THAT SUCH PERSON APPEARS TO HAVE A DISABILITY OR AN AGE RELATED INFIRMITY.

3. A "SPECIFIED OFFENSE" IS AN OFFENSE DEFINED BY ANY OF THE FOLLOWING PROVISIONS OF THIS CHAPTER: SECTION 120.00 (ASSAULT IN THE THIRD DEGREE); SECTION 120.05 (ASSAULT IN THE SECOND DEGREE); SECTION 120.10 (ASSAULT IN THE FIRST DEGREE); SECTION 120.12 (AGGRAVATED ASSAULT UPON A PERSON LESS THAN ELEVEN YEARS OLD); SECTION 120.13 (MENACING IN THE FIRST DEGREE); SECTION 120.14 (MENACING IN THE SECOND DEGREE); SECTION 120.15 (MENACING IN THE THIRD DEGREE); SECTION 120.20 (RECKLESS ENDANGERMENT IN THE SECOND DEGREE); SECTION 120.25 (RECKLESS ENDANGERMENT IN THE FIRST DEGREE); SECTION 120.45 (STALKING IN THE FOURTH DEGREE); SECTION 120.50 (STALKING IN THE THIRD DEGREE); SECTION 120.55 (STALKING IN THE SECOND DEGREE); SECTION 120.60 (STALKING IN THE FIRST DEGREE); SUBDIVISION ONE OF SECTION 125.15 (MANSLAUGHTER IN THE SECOND DEGREE); SUBDIVISION ONE, TWO OR FOUR OF SECTION 125.20 (MANSLAUGHTER IN THE FIRST DEGREE); SECTION 125.25 (MURDER IN THE SECOND DEGREE); SUBDIVISION ONE OF SECTION 130.35 (RAPE IN THE FIRST DEGREE); SUBDIVISION ONE OF SECTION 130.50 (CRIMINAL SEXUAL ACT IN THE FIRST DEGREE); SUBDIVISION ONE OF SECTION 130.65 (SEXUAL ABUSE IN THE FIRST DEGREE); PARAGRAPH (A) OF SUBDIVISION ONE OF SECTION 130.67 (AGGRAVATED SEXUAL ABUSE IN THE SECOND DEGREE); PARAGRAPH (A) OF SUBDIVISION ONE OF SECTION 130.70 (AGGRAVATED SEXUAL ABUSE IN THE FIRST DEGREE); SECTION 135.05 (UNLAWFUL IMPRISONMENT IN THE SECOND DEGREE); SECTION 135.10 (UNLAWFUL IMPRISONMENT IN THE FIRST DEGREE); SECTION 135.20 (KIDNAPPING IN THE SECOND DEGREE); SECTION 135.25 (KIDNAPPING IN THE FIRST DEGREE); SECTION 135.60 (COERCION IN THE SECOND DEGREE); SECTION 135.65 (COERCION IN THE FIRST DEGREE); SECTION 140.10 (CRIMINAL TRESPASS IN THE THIRD DEGREE); SECTION 140.15 (CRIMINAL TRESPASS IN THE SECOND DEGREE); SECTION 140.17 (CRIMINAL TRESPASS IN THE FIRST DEGREE); SECTION 140.20 (BURGLARY IN THE THIRD DEGREE); SECTION 140.25 (BURGLARY IN THE SECOND DEGREE); SECTION 140.30 (BURGLARY IN THE FIRST DEGREE); SECTION 145.00 (CRIMINAL MISCHIEF IN THE FOURTH DEGREE); SECTION 145.05 (CRIMINAL MISCHIEF IN THE THIRD DEGREE); SECTION 145.10 (CRIMINAL MISCHIEF IN THE SECOND DEGREE); SECTION 145.12 (CRIMINAL MISCHIEF IN THE FIRST DEGREE); SECTION 150.05 (ARSON IN THE FOURTH DEGREE); SECTION 150.10 (ARSON IN THE THIRD DEGREE); SECTION 150.15 (ARSON IN THE SECOND DEGREE); SECTION 150.20 (ARSON IN THE FIRST DEGREE); SECTION 155.25 (PETIT LARCENY); SECTION 155.30 (GRAND LARCENY IN THE FOURTH DEGREE); SECTION 155.35 (GRAND LARCENY IN THE THIRD DEGREE); SECTION 155.40 (GRAND LARCENY IN THE SECOND DEGREE); SECTION 155.42 (GRAND LARCENY IN THE FIRST DEGREE); SECTION 160.05 (ROBBERY IN THE THIRD DEGREE); SECTION 160.10 (ROBBERY IN THE SECOND DEGREE); SECTION 160.15 (ROBBERY IN THE FIRST DEGREE); SECTION 240.25 (HARASSMENT IN THE FIRST DEGREE); SUBDIVISION ONE, TWO OR FOUR OF SECTION 240.30 (AGGRAVATED HARASSMENT IN THE SECOND DEGREE); OR ANY ATTEMPT OR CONSPIRACY TO COMMIT ANY OF THE FOREGOING OFFENSES.

4. FOR THE PURPOSES OF THIS SECTION:

(A) A PERSON HAS AN AGE RELATED INFIRMITY OR DISEASE WHEN, BEING SIXTY YEARS OLD OR MORE, SUCH PERSON HAS A PHYSICAL OR MENTAL DISEASE OR INFIRMITY, TYPICALLY ASSOCIATED WITH ADVANCED AGE, WHICH SUBSTANTIALLY LIMITS A MAJOR LIFE ACTIVITY;

(B) THE TERM "SUBSTANTIAL PART" INCLUDES BUT IS NOT LIMITED TO CIRCUMSTANCES IN WHICH A DEFENDANT SELECTS A PERSON AGAINST WHOM TO COMMIT OR ATTEMPT TO COMMIT A CRIME DUE TO A BELIEF OR PERCEPTION THAT SUCH PERSON IS LESS LIKELY TO RESIST OR BE ABLE TO RESIST SUCH CRIME DUE TO THEIR DISABILITY OR AGE RELATED INFIRMITY OR DISEASE, REGARDLESS OF WHETHER SUCH BELIEF OR PERCEPTION IS CORRECT;

(C) THE TERM "DISABILITY" MEANS A PHYSICAL OR MENTAL IMPAIRMENT THAT SUBSTANTIALLY LIMITS A MAJOR LIFE ACTIVITY; AND

(D) THE TERM "RESIST" INCLUDES, IN ADDITION TO ITS REGULAR MEANING, REPORTING SUCH CRIME TO LAW ENFORCEMENT, OBSERVING, RECALLING, OR REPORTING KEY FEATURES OF ANY ACT OR CHARACTERISTIC OF A DEFENDANT RELATED TO SUCH CRIME, OR PROVIDING EVIDENCE TO AID IN THE INVESTIGATION OR PROSECUTION OF SUCH CRIME.

S 495.05 SENTENCING.

1. WHEN A PERSON IS CONVICTED OF A CRIME AGAINST THE ELDERLY OR DISABLED PURSUANT TO THIS ARTICLE, AND THE SPECIFIED OFFENSE IS A VIOLENT FELONY OFFENSE, AS DEFINED IN SECTION 70.02 OF THIS CHAPTER, THE CRIME AGAINST THE ELDERLY OR DISABLED SHALL BE DEEMED A VIOLENT FELONY OFFENSE.

2. WHEN A PERSON IS CONVICTED OF A CRIME AGAINST THE ELDERLY OR DISABLED PURSUANT TO THIS ARTICLE AND THE SPECIFIED OFFENSE IS A MISDEMEANOR OR A CLASS C, D OR E FELONY, THE CRIME AGAINST THE ELDERLY OR DISABLED SHALL BE DEEMED TO BE ONE CATEGORY HIGHER THAN THE SPECIFIED OFFENSE THE DEFENDANT COMMITTED, OR ONE CATEGORY HIGHER THAN THE OFFENSE LEVEL APPLICABLE TO THE DEFENDANT'S CONVICTION FOR AN ATTEMPT OR CONSPIRACY TO COMMIT A SPECIFIED OFFENSE, WHICHEVER IS APPLICABLE.

3. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, WHEN A PERSON IS CONVICTED OF A CRIME AGAINST THE ELDERLY OR DISABLED PURSUANT TO THIS ARTICLE AND THE SPECIFIED OFFENSE IS A CLASS B FELONY OFFENSE:

(A) THE MAXIMUM TERM OF THE INDETERMINATE SENTENCE MUST BE AT LEAST SIX YEARS IF THE DEFENDANT IS SENTENCED PURSUANT TO SECTION 70.00 OF THIS CHAPTER;

(B) THE TERM OF THE DETERMINATE SENTENCE MUST BE AT LEAST EIGHT YEARS IF THE DEFENDANT IS SENTENCED PURSUANT TO SECTION 70.02 OF THIS CHAPTER;

(C) THE TERM OF THE DETERMINATE SENTENCE MUST BE AT LEAST TWELVE YEARS IF THE DEFENDANT IS SENTENCED PURSUANT TO SECTION 70.04 OF THIS CHAPTER;

(D) THE MAXIMUM TERM OF THE INDETERMINATE SENTENCE MUST BE AT LEAST FOUR YEARS IF THE DEFENDANT IS SENTENCED PURSUANT TO SECTION 70.05 OF THIS CHAPTER; AND

(E) THE MAXIMUM TERM OF THE INDETERMINATE SENTENCE OR THE TERM OF THE DETERMINATE SENTENCE MUST BE AT LEAST TEN YEARS IF THE DEFENDANT IS SENTENCED PURSUANT TO SECTION 70.06 OF THIS CHAPTER.

4. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, WHEN A PERSON IS CONVICTED OF CRIME AGAINST THE ELDERLY OR DISABLED PURSUANT TO THIS ARTICLE AND THE SPECIFIED OFFENSE IS A CLASS A-1 FELONY, THE MINIMUM PERIOD OF THE INDETERMINATE SENTENCE SHALL BE NOT LESS THAN TWENTY YEARS.

S 6. Subdivisions 4 and 7 of section 200.50 of the criminal procedure law, as amended by chapter 7 of the laws of 2007, are amended to read as follows:

4. A statement in each count that the grand jury, or, where the accusatory instrument is a superior court information, the district attorney, accuses the defendant or defendants of a designated offense, provided that in any prosecution under article four hundred eighty-five of the penal law, the designated offense shall be the specified offense, as defined in subdivision three of section 485.05 of the penal law, followed by the phrase "as a hate crime", [and] provided further that in any prosecution under section 490.25 of the penal law, the designated offense shall be the specified offense, as defined in subdivision three of section 490.05 of the penal law, followed by the phrase "as a crime of terrorism"; AND PROVIDED FURTHER THAT IN ANY PROSECUTION UNDER SECTION 495.00 OF THE PENAL LAW, THE DESIGNATED OFFENSE SHALL BE THE SPECIFIED OFFENSE, AS DEFINED IN SUBDIVISION THREE OF SECTION 495.00 OF THE PENAL LAW, FOLLOWED BY THE PHRASE "AS A CRIME AGAINST THE ELDERLY OR

DISABLED"; and provided further that in any prosecution under section 130.91 of the penal law, the designated offense shall be the specified offense, as defined in subdivision two of section 130.91 of the penal law, followed by the phrase "as a sexually motivated felony"; and

7. A plain and concise factual statement in each count which, without allegations of an evidentiary nature,

(a) asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation; and

(b) in the case of any armed felony, as defined in subdivision forty-one of section 1.20, states that such offense is an armed felony and specifies the particular implement the defendant or defendants possessed, were armed with, used or displayed or, in the case of an implement displayed, specifies what the implement appeared to be; and

(c) in the case of any hate crime, as defined in section 485.05 of the penal law, specifies, as applicable, that the defendant or defendants intentionally selected the person against whom the offense was committed or intended to be committed; or intentionally committed the act or acts constituting the offense, in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person; and

(d) in the case of a crime of terrorism, as defined in section 490.25 of the penal law, specifies, as applicable, that the defendant or defendants acted with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping; and

(e) in the case of a sexually motivated felony, as defined in section 130.91 of the penal law, asserts facts supporting the allegation that the offense was sexually motivated; and

(F) IN THE CASE OF ANY CRIME AGAINST THE ELDERLY OR DISABLED, AS DEFINED IN SECTION 495.00 OF THE PENAL LAW, SPECIFIES, AS APPLICABLE, THAT THE DEFENDANT OR DEFENDANTS INTENTIONALLY SELECTED THE PERSON AGAINST WHOM THE OFFENSE WAS COMMITTED OR INTENDED TO BE COMMITTED; OR INTENTIONALLY COMMITTED THE ACT OR ACTS CONSTITUTING THE OFFENSE, IN WHOLE OR IN SUBSTANTIAL PART BECAUSE OF A BELIEF OR PERCEPTION REGARDING THE DISABILITY STATUS OR AGE RELATED INFIRMITY OR DISEASE OF A PERSON; AND

S 7. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.