STATE OF NEW YORK

6865

2023-2024 Regular Sessions

IN SENATE

May 11, 2023

Introduced by Sen. SALAZAR -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the penal law and the criminal procedure law, in relation to convictions under felony murder provisions; and to repeal certain provisions of the penal law relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings and intent. The Legislature hereby finds and declares the following:

a. The current provisions of New York's penal law pertaining to felony murder eliminate the distinction between intentional and unintentional homicide and are therefore not consistent with the principle of proportionality in charging and sentencing. Felony murder doctrine allows a defendant to be charged and sentenced for murder in circumstances where they were committing or attempting to commit a felony but did not actually commit a homicidal act. Under current state law, an accomplice to a crime, for example someone driving a getaway car, may be charged with murder as if they had actually shot someone in the course of a crime such as robbery even in a circumstance where they were unarmed and physically removed from the site of the murder. Evidence from other states indicates that as many as one in five individuals serving prison sentences for murder have been convicted based on the felony murder doctrine. Studies have also found that prosecutors use the threat of felony murder charges to obtain plea deals for lengthy sentences, demonstrating felony murder doctrine's role in extreme sentencing and mass incarceration.

b. Felony murder doctrine originated in England but was banned there in 1957 and subsequently in other Commonwealth countries including Canada, which banned it in 1990. The United States is an outlier globally in its application of felony murder doctrine, although some states, notably California and Colorado, have in the last five years introduced signif-

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

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icant reforms with California reintroducing the intention to kill as a requirement for the application of felony murder charges. New York, however, remains one of just thirteen states including Texas and Florida, where the felony murder doctrine is applied by prosecutors to pursue murder charges when the individual committing a homicidal act is a third party such as a victim holding their ground, a law enforcement officer, or a bystander. The case of Jagger Freeman illustrates how this is applied. In 2019, Freeman, then a 25 year old Queens resident, was an accomplice in an attempted robbery of a mobile phone store. Police opened fire in the store on Freeman's associate, who was holding a fake gun, killing one police officer and wounding another. During the episode, Freeman had stood across the street unarmed, however he was sentenced to thirty years to life for the murder of the police officer.

c. Evidence from across the country reveals that felony murder laws have disproportionately negative consequences for non-white people, young people, and victims of domestic violence. For example, in Pennsylvania eighty percent of those imprisoned with a felony murder conviction were people of color, while in California sixty-eight percent of those serving time for felony murder are black or Latinx. Since 2002, eighty-six percent of all defendants convicted of felony murder in New York state have been black or Latinx. According to the California Coalition for Women Prisoners, the majority of their members convicted of felony murder were victims of domestic violence.

§ 2. Subdivision 3 of section 125.25 of the penal law is REPEALED and a new subdivision 3 is added to read as follows:

3. Acting either alone or with one or more other persons, he or she commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, such person, or another participant in the underlying felony personally and directly causes the death of a person other than one of the participants, and the defendant has one of the following mental states dependent upon their role in the commission of the killing: (a) the defendant personally and directly caused the death recklessly; or (b) the defendant was an accomplice, defined as one who solicited, requested, commanded, importuned, caused, or aided and abetted the actual killer in the commission of the underlying felony, and acted with intent to cause death. Liability under this subdivision shall only apply to death caused by agents and co-felons of the defendant. A defendant is not responsible for a death caused by a third party who was not a participant in the underlying felony; or

§ 3. Subdivision 2 of section 40.00 of the penal law, such section as renumbered by chapter 73 of the laws of 1968, is amended to read as follows:

2. The defense of duress as defined in subdivision one of this section is not available when a person intentionally or recklessly places himself **or herself** in a situation in which it is probable that he **or she** will be subjected to duress**; provided, however, that this subdivision shall not apply to prosecutions brought under subdivision three of section 125.25 of this chapter when the defendant has been or is a victim of domestic violence committed by one of the participants in the underlying felony**.

§ 4. The criminal procedure law is amended by adding a new section 440.48 to read as follows:

§ 440.48 Motion to vacate judgment and/or resentence in certain felony murder convictions.

1. A person convicted under the provisions of subdivision three of section 125.25 of the penal law may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:

(a) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder;

(b) The petitioner was convicted of murder in the second degree following a trial or accepted a plea offer in lieu of a trial at which the petitioner could have been convicted of first degree or second degree murder; and

(c) The petitioner could not be convicted of murder in the second degree as defined in subdivision three of section 125.25 of the penal law, or would have been sentenced differently, based on the language of such subdivision as of the effective date of the chapter of the laws of two thousand twenty-three which added this section.

2. The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within sixty days of service of the petition and the petitioner may file and serve a reply within thirty days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.

3. Within sixty days after the order to show cause was issued, the court shall hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously sentenced; provided that the new sentence, if any, is not greater than the initial sentence. This deadline may be extended for good cause.

4. At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.

5. If petitioner is entitled to relief pursuant to this section, murder was charged generically, and the target offense was not charged, the petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes. Any applicable statute of limitations shall not be a bar to the court's redesignation of the offense for this purpose.

6. A person who is resentenced pursuant to this section shall be given credit for time served. The judge may order the petitioner to be subject to parole supervision for up to three years following the completion of the sentence.

§ 5. Paragraph (a) of subdivision 1 of section 70.02 of the penal law, as amended by chapter 189 of the laws of 2018, is amended to read as follows:

(a) Class B violent felony offenses: an attempt to commit the class A-I felonies of murder in the second degree as defined in section 125.25, kidnapping in the first degree as defined in section 135.25, and arson in the first degree as defined in section 150.20; manslaughter in the first degree as defined in section 125.20, aggravated manslaughter in the first degree as defined in section 125.22, **murder in the second degree as defined in subdivision three of section 125.25,** rape in the first degree as defined in section 130.35, criminal sexual act in the first degree as defined in section 130.50, aggravated sexual abuse in the first degree as defined in section 130.70, course of sexual conduct against a child in the first degree as defined in section 130.75; assault in the first degree as defined in section 120.10, kidnapping in the second degree as defined in section 135.20, burglary in the first degree as defined in section 140.30, arson in the second degree as defined in section 150.15, robbery in the first degree as defined in section 160.15, sex trafficking as defined in paragraphs (a) and (b) of subdivision five of section 230.34, sex trafficking of a child as defined in section 230.34-a, incest in the first degree as defined in section 255.27, criminal possession of a weapon in the first degree as defined in section 265.04, criminal use of a firearm in the first degree as defined in section 265.09, criminal sale of a firearm in the first degree as defined in section 265.13, aggravated assault upon a police officer or a peace officer as defined in section 120.11, gang assault in the first degree as defined in section 120.07, intimidating a victim or witness in the first degree as defined in section 215.17, hindering prosecution of terrorism in the first degree as defined in section 490.35, criminal possession of a chemical weapon or biological weapon in the second degree as defined in section 490.40, and criminal use of a chemical weapon or biological weapon in the third degree as defined in section 490.47.

§ 6. The department of corrections and community supervision, in coordination with district attorneys and any other relevant law enforcement agencies or bodies, shall issue an annual report to the chairs of the Senate and Assembly judiciary committees which shall include, but need not be limited to, the following information:

(i) The number of incarcerated persons convicted under subdivision 3 of section 125.25 of the penal law in New York State by year over the past ten years;

(ii) The age, race, and gender breakdowns of such convictions over the past ten years;

(iii) Whether felony murder (murder in the second degree) was the most serious charge against the defendant or a lower charge they accepted in a plea deal (also stratified by age/race/gender);

(iv) Sentencing data: average sentence, number of people serving life without parole;

(v) Whether each person charged under subdivision 3 of section 125.25 of the penal law was an accomplice to, major participant in, or the perpetrator of the killing act over the past ten years;

(vi) Who the decedent in the felony murder was (victim, perpetrator, law enforcement, bystander); and

(vii) Whether the killing was carried out by a perpetrator, victim, law enforcement, or bystander.

§ 7. This act shall take effect immediately.