

# 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:

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

3 a. The current provisions of New York's penal law pertaining to felony  
4 murder eliminate the distinction between intentional and unintentional  
5 homicide and are therefore not consistent with the principle of propor-  
6 tionality in charging and sentencing. Felony murder doctrine allows a  
7 defendant to be charged and sentenced for murder in circumstances where  
8 they were committing or attempting to commit a felony but did not actu-  
9 ally commit a homicidal act. Under current state law, an accomplice to a  
10 crime, for example someone driving a getaway car, may be charged with  
11 murder as if they had actually shot someone in the course of a crime  
12 such as robbery even in a circumstance where they were unarmed and phys-  
13 ically removed from the site of the murder. Evidence from other states  
14 indicates that as many as one in five individuals serving prison  
15 sentences for murder have been convicted based on the felony murder  
16 doctrine. Studies have also found that prosecutors use the threat of  
17 felony murder charges to obtain plea deals for lengthy sentences, demon-  
18 strating felony murder doctrine's role in extreme sentencing and mass  
19 incarceration.

20 b. Felony murder doctrine originated in England but was banned there  
21 in 1957 and subsequently in other Commonwealth countries including Cana-  
22 da, which banned it in 1990. The United States is an outlier globally in  
23 its application of felony murder doctrine, although some states, notably  
24 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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1 icant reforms with California reintroducing the intention to kill as a  
2 requirement for the application of felony murder charges. New York,  
3 however, remains one of just thirteen states including Texas and Flori-  
4 da, where the felony murder doctrine is applied by prosecutors to pursue  
5 murder charges when the individual committing a homicidal act is a third  
6 party such as a victim holding their ground, a law enforcement officer,  
7 or a bystander. The case of Jagger Freeman illustrates how this is  
8 applied. In 2019, Freeman, then a 25 year old Queens resident, was an  
9 accomplice in an attempted robbery of a mobile phone store. Police  
10 opened fire in the store on Freeman's associate, who was holding a fake  
11 gun, killing one police officer and wounding another. During the  
12 episode, Freeman had stood across the street unarmed, however he was  
13 sentenced to thirty years to life for the murder of the police officer.

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

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

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

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

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

54 § 4. The criminal procedure law is amended by adding a new section  
55 440.48 to read as follows:

1 § 440.48 Motion to vacate judgment and/or resentence in certain felony  
2 murder convictions.

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

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

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

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

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

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

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

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

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

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

4 (a) Class B violent felony offenses: an attempt to commit the class  
5 A-I felonies of murder in the second degree as defined in section  
6 125.25, kidnapping in the first degree as defined in section 135.25, and  
7 arson in the first degree as defined in section 150.20; manslaughter in  
8 the first degree as defined in section 125.20, aggravated manslaughter  
9 in the first degree as defined in section 125.22, murder in the second  
10 degree as defined in subdivision three of section 125.25, rape in the  
11 first degree as defined in section 130.35, criminal sexual act in the  
12 first degree as defined in section 130.50, aggravated sexual abuse in  
13 the first degree as defined in section 130.70, course of sexual conduct  
14 against a child in the first degree as defined in section 130.75;  
15 assault in the first degree as defined in section 120.10, kidnapping in  
16 the second degree as defined in section 135.20, burglary in the first  
17 degree as defined in section 140.30, arson in the second degree as  
18 defined in section 150.15, robbery in the first degree as defined in  
19 section 160.15, sex trafficking as defined in paragraphs (a) and (b) of  
20 subdivision five of section 230.34, sex trafficking of a child as  
21 defined in section 230.34-a, incest in the first degree as defined in  
22 section 255.27, criminal possession of a weapon in the first degree as  
23 defined in section 265.04, criminal use of a firearm in the first degree  
24 as defined in section 265.09, criminal sale of a firearm in the first  
25 degree as defined in section 265.13, aggravated assault upon a police  
26 officer or a peace officer as defined in section 120.11, gang assault in  
27 the first degree as defined in section 120.07, intimidating a victim or  
28 witness in the first degree as defined in section 215.17, hindering  
29 prosecution of terrorism in the first degree as defined in section  
30 490.35, criminal possession of a chemical weapon or biological weapon in  
31 the second degree as defined in section 490.40, and criminal use of a  
32 chemical weapon or biological weapon in the third degree as defined in  
33 section 490.47.

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

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

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

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

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

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

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

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

56 § 7. This act shall take effect immediately.