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NEW YORK'S DEATH PENALTY: THE AGE REQUIREMENT

SALVATORE J. MODICA*

In *People v. Davis*, the New York Court of Appeals declared the death penalty unconstitutional.¹ However, a 1995 amendment to section 125.27 of the New York Penal Law has reinstated death as a possible punishment.² In order for the state to impose the death penalty, section 125.27 requires that the defendant be "more than 18 years old" at the time of the homicide.

This article will examine what the legislature intended by the language "more than eighteen years old." Further, this article will analyze the history of the age requirement, the plain meaning of the age requirement in the present capital murder statute, relevant case law from New York and other jurisdictions, the general construction law, and the legislative intent underlying the current statute and other New York statutes with similar language. This analysis will illustrate that the death penalty does indeed apply to persons as of the date of their eighteenth birthday.

I. HISTORY OF THE AGE REQUIREMENT IN DEATH PENALTY JURISPRUDENCE

Prior to 1948, "a child over seven and under sixteen could be prosecuted for murder or any other crime punishable by death

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¹ 43 N.Y. 2d 17 (1977). See N.Y. PENAL LAW § 125.27 (McKinney 1998) (discussing failure of section 125.27 to meet constitutional muster in 1994).

² See N.Y. PENAL LAW § 125.27 (McKinney 1998) (noting Governor's approval memorandum argues that imposition of death penalty acts as deterrent, and provides justice for those impacted by violent criminals); N.Y. PENAL LAW § 60.06 (McKinney 1998).

or life imprisonment.”³ In 1948, Governor Dewey, horrified at the prospect that a seven year old child could be tried and put to death in New York, signed legislation specifically designed to increase the age for capital punishment. As a result of this legislation, only those individuals fifteen years of age and older could potentially be sentenced to death upon a conviction of Murder in the First Degree “or any other crime punishable by death.”⁴

By 1963, in a bill prepared by the Temporary State Commission on Revision of the Penal Law and Criminal Code (the “Commission”), the Legislature excluded persons “under eighteen years of age” from the reach of the death penalty.⁵ Since that legislation did not expressly make the age requirement an element of murder in the first degree,⁶ a person under eighteen years of age could be tried for that crime, but the only possible sentence was life imprisonment.⁷

In 1965, with the enactment of the Revised Penal Law, the former Penal Law statutes⁸ were repealed and replaced.⁹ The new statute, scheduled to take effect September 1, 1967, provided that upon conviction for the crime of murder, a defendant must be held over for a death sentence hearing unless the court was “satisfied that [the defendant] was *less than eighteen years old at the time of the commission of the crime, or that the sentence of death [was] not warranted because of substantial mitigating circumstances*”.¹⁰ If either of these two factors existed, punish-

³ *People v. Oliver*, 1 N.Y.2d 152, 155 (1956). See FORMER N.Y. PENAL LAW § 486 (L. 1924 c. 477); FORMER N.Y. PENAL LAW § 2186 (L. 1909 c. 478); see also *People v. Murch*, 263 N.Y.258, 285 (1934) (highlighting criminal court’s jurisdiction over children less than 16 years of age); Michael Lumer & Nancy Tenney, *The Death Penalty in N.Y.: An Historical Perspective*, 4 J.L. & POL’Y 81, 92 (discussing N.Y. legislation on Death Penalty from 1963-77).

⁴ See *Oliver*, 1 N.Y.2d at 155-57; see also FORMER N.Y. PENAL LAW § 2186 (L. 1949 c. 388); FORMER N.Y. PENAL LAW § 486 (L. 1948 c. 554).

⁵ See FORMER N.Y. PENAL LAW § 1045 (L. 1963 c. 994); FORMER N.Y. PENAL LAW § 1045 (McKinney 1987) (discussing 1963 amendment to § 1045); see also James R. Acker, *New York’s Proposed Death Penalty Legislation: Constitutional & Policy Perspectives*, 54 ALB. L. REV. 515, 523 (1990) (discussing significant changes made with 1963 legislation).

⁶ See FORMER N.Y. PENAL LAW § 1044 (L. 1909 c. 88).

⁷ See FORMER N.Y. PENAL LAW § 1045(3) (L. 1963 c. 994) (adding subdivision four to Former N.Y. Penal Law section 1045 and transferring the language relating to persons under 18 years of age into that fourth subsection); see also James R. Acker, *When the Cheering Stopped: An Overview & Analysis of New York’s Death Penalty Legislation*, 17 PACE L. REV. 41, 49 (1996) (stating that New York law has exempted offenders who are not over 18 from death-penalty eligibility since 1963).

⁸ Former N.Y. Penal Law §§ 1045, 1045-a (L. 1963 c. 994).

⁹ Former N.Y. Penal Law §§ 125.30, 125.35 (L. 1965 c. 1030).

¹⁰ Former N.Y. Penal Law § 125.30 (L. 1965 c. 1030).

ment by death was not authorized. Instead, the Court was required to impose a life sentence. This version of the death penalty never became effective because prior to September 1, 1967 the statute was again amended by the Legislature.¹¹ One of the amendments directed the court to conduct a death penalty proceeding before a jury, following a conviction of Murder, "if [the court was] satisfied" that a defendant "*was more than eighteen years old at the time of the commission of the crime.*"¹²

In 1974, following the Court of Appeal's decision in *People v. Fitzpatrick*,¹³ New York's 1967 death penalty statute was repealed,¹⁴ and the new crime of Murder in the First Degree was created.¹⁵ Upon conviction for this crime, the death penalty was mandatory.¹⁶ In language identical to that of the former Revised Penal Law,¹⁷ the legislature limited the death penalty to defendants who were "more than eighteen years old at the time of the commission of the crime."¹⁸ Unlike the former law, which required the court to make the age determination, the 1974 legislation made the "more than eighteen" language an element of the

11 Law of 1967, c. 791 § 10, 1967 N.Y. PENAL LAW § 125.30 (repealed 1974); Law of 1967, c. 1031 § 1, 1967 N.Y. PENAL LAW § 125.35 (repealed 1974).

12 Former N.Y. Penal Law § 125.30(1)(b) (repealed 1974).

13 32 N.Y.2d 499 (1973).

14 FORMER N.Y. PENAL LAW §§ 125.30, 125.35 (repealed 1974); see also Acker, *supra* note 5, at 524-29 (stating that N.Y. Court of Appeals applied Supreme Court's holding in *Furman v. Georgia* which found N.Y.'s death penalty procedures unconstitutional).

15 See N.Y. PENAL LAW § 125.27 (L. 1974 c. 367). The 1974 amendment brought back the crimes of Murder in the First and Second Degree, though they differed in substance from the Former Penal Law. *Id.*; see also FORMER N.Y. PENAL LAW §§ 1044, 1046 (L. 1909 c. 88). Under the Former Penal Law, there were two degrees of murder – Murder in the First and Second Degree. *Id.*; FORMER N.Y. PENAL LAW § 125.25 (L. 1965 c. 1030). The Revised Penal Law, however, did not provide for gradations of murder. *Id.*; But see Acker, *supra* note 5, at 527. New York's 1967 legislation followed the format of the Model Penal Code, eliminating the distinction between First and Second degree murder. *Id.*

16 See N.Y. PENAL LAW § 60.06 (McKinney 1977); FORMER N.Y. PENAL LAW § 1045 (L. 1909 c. 88). Prior to 1937, the death penalty was mandatory in New York upon a conviction for Murder in the First Degree. *Id.*; see also Law of 1937, c. 67 §§ 1.2. Effective March 17, 1937, the death penalty was no longer mandatory for "felony murders or in non-premeditated but wanton killings." *Id.* A jury could recommend life imprisonment, albeit such recommendation was not binding on the sentencing court. *Id.*; Governor Rockefeller's Approval Mem., 1963 McKinney's Session Law at 2076-77. The 1963 legislation did away with the mandatory death penalty for premeditated murder and gave the jury the discretion to impose or not impose the death penalty, a decision which the sentencing court could not set aside. *Id.*

17 Former N.Y. Penal Law § 125.30 (repealed 1974).

18 See FORMER N.Y. PENAL LAW § 1045 (L. 1963 c. 994). "Supreme Court made it clear that a mandatory death sentence was not constitutional, and that a sentencing scheme that authorized the jury to exercise discretion within structured statutory guidelines, taking into consideration both aggravating and mitigating factors was constitutional." *Id.*

definition of Murder in the First Degree. Therefore, it became the jury's responsibility to determine whether the evidence established, beyond a reasonable doubt, that the defendant was "more than eighteen years old" at the time the homicide was committed. In 1995, after the statute was again amended, the age requirement was retained in the same language as the 1967 and 1974 drafts, and continued to be an element of Murder in the First Degree.¹⁹

II. PLAIN MEANING OF THE AGE REQUIREMENT LANGUAGE

When the phrase "more than eighteen years old," was first inserted into the death penalty statute in 1967, neither the governor nor the legislature attempted to explain its meaning, nor did either branch provide any clarification in the 1974 or 1995 amendments.²⁰ The plain meaning of Former Penal Law section 1045,²¹ as well as case law, support the conclusion that the language, "less than eighteen year old", as used in that statute, meant persons who, at the time of the commission of the crime, had not reached their eighteenth birthday.²² Thus, under the death penalty law prior to the September 1, 1967 change, persons who were at least eighteen years old at the time they committed a murder were subject to the death penalty.²³

However, the plain meaning of the term, "more than eighteen years old," in section 125.27 of the penal law, is not easily discernible. This term may apply only to persons who have attained their nineteenth birthday, since the "more than" language

¹⁹ See Acker, *supra* note 7, at 49. (stating "To be convicted of 1st degree murder, and thus be eligible for the death penalty, an offender must have been more than 18 years old at the time of the commission of the crime."); see also William Hauptman, Note, *Lethal Reflection: New York's New Death Penalty and Victim Impact Statements* 13 N.Y.L. SCH. J. HUM. RTS. 439, 452 (1997) (stating that currently there is little dispute as to constitutionality of new law). See generally, Acker, *supra* note 5, at 534-36 (discussing legislative intent for expanded death penalty statutes from 1977 to 1990).

²⁰ See *People v. Carr*, 159 Misc.2d 1093, 1094 (N.Y. Sup. Ct. 1994) (stating that court found no published legislative history on meaning of phrase "more than eighteen years old" as used in statute).

²¹ Former N.Y. Penal Law (L. 1963 c. 994) (amended L. 1965 c. 321).

²² See *People v. Stevenson*, 23 A.D.2d 472, 473 (2d Dep't 1965), *rev'd* 17 N.Y.2d 682 (1966) (holding defendant who was born on August 25, 1947 was on August 24, 1963, less than sixteen years old to be within meaning of Family Court Act Section 712(a)).

²³ The 1963 version of Former N.Y. Penal Law § 1045 expressed the age requirement as "under eighteen years of age." It is obvious that the expressions "less than eighteen years old" and "under eighteen years of age" have the same meaning.

arguably excludes persons eighteen years of age or younger.²⁴ Alternatively, the age of a person can be subdivided. A person born at the stroke of midnight on January 1, 1980, would have lived in excess of eighteen years one second after midnight on January 1, 1998, and, at that point in time, would be "more than eighteen years old."²⁵ Still another possible interpretation of this phrase is that it excludes persons who are alleged to have committed murder on their eighteenth birthday and, instead, applies only to persons eighteen years and one day old or older.²⁶ In sum, the term, "more than eighteen years old," does not necessarily mean nineteen years or older. Logically, the phrase may apply to persons who commit murder either on their eighteenth birthday or in their eighteenth year.²⁷ The various interpretations of this language demonstrate that there is no plain meaning to the term "more than eighteen years old."²⁸ Accordingly, the legislative intent cannot be discerned merely by looking at the language.

III. OTHER JURISDICTIONS

Courts in other jurisdictions, that have interpreted age requirements in similarly worded statutes, have reached different conclusions. For example, in *State v. Hansen*,²⁹ the Supreme Court of Florida held that the phrase, "over eleven years old,"

²⁴ See Acker, *supra* note 7, at 49 (discussing ambiguities created by language of statute); see also Carr, 159 Misc.2d at 1093 (holding that "the phrase more than eighteen years old includes persons who have reached their eighteenth birthday").

²⁵ Of course, strictly applying this analysis, if the homicide is committed by persons on their eighteenth birthday, but prior to the exact time of their birth, those persons would not, under this view, be "more than eighteen years old."

²⁶ See *Matter of Ellingham*, 116 A.D.2d 1032, 1033 (4th Dep't 1986). It should be noted that, "in determining a person's age, fractions of days are not computed." *Id.* In *Ellingham*, the Appellate Division held that the "defendant became 16 years of age at the beginning of the day of his 16th birthday." That the defendant had been born in the afternoon was irrelevant in determining his age. *Id.*; see also *Aultman Taylor Co. v. Syme*, 163 NY 54, 61 (1900). "The law does not recognize fractions of days." *Id.*

²⁷ See N.Y. CONSTR. & INTERP. LAW § 94 (McKinney 1997) (indicating legislative intent is to be ascertained from words and language used, and statutory language is generally construed according to its natural and most obvious sense, without resorting to artificial or forced construction); N.Y. CONSTR. & INTERP. LAW § 232 (McKinney 1997) (stating words of ordinary import used in statutes are to be given their usual and commonly understood meaning, unless it is plain from statute that different meaning is intended).

²⁸ See Acker, *supra* note 7, at 49 (stating that meaning of "more than eighteen years old at time of commission of crime will not be certain until New York Court of Appeals has opportunity to decide minimum age for 1st degree murder liability under statute).

²⁹ 404 So.2d 199, 200 (Fla. Dist. Ct. App. 1981), *aff'd*, 421 So.2d 504 (Fla. 1982).

applied only to children at least twelve years of age. By contrast, a significant number of jurisdictions have taken the position that age requirements in statutes with "more than" or "over" language do not necessarily mean the year following the particular age mentioned.³⁰ But, even within the majority view, there appears to be disagreement over whether a person is "more than" or "over" a certain age on the exact date of his birthday or on the following day.³¹

Perhaps the confusion in the meaning of the term, "more than [x] years of age," can be traced back to the common law rule that "a person reached his next year of age on the day before the anniversary of his birth."³² The rationale supporting this proposition is that "[a] person is in existence on the day of his birth. On the first anniversary he has lived one year and one day."³³ On the day before the person's birthday, that person is exactly one year old and the following day, the anniversary of his birth, that person is now "over one year old." Drafters, especially those in states that followed the common law rule (as New York did until the Court of Appeals decided *People v. Stevenson* in 1966)³⁴

³⁰ See *Bay Trust Co. v. Agricultural Life Ins. Co.*, 279 Mich. 248 (1937). See, e.g., *State v. Linn*, 363 P.2d 361, 363 (Alaska 1961); *Arkansas v. Banks*, 271 Ark. 331 (1980); *Gibson v. People*, 44 Colo. 600 (1909); *Farrow v. State*, 258 A.2d 276, 277 (Del. 1969); *Knott v. Rawlings*, 96 N.W.2d 900 (Iowa 1959); *Carolina Freight Carriers Corp. v. Keane*, 534 A.2d 1337 (Md. 1988); *State v. McGaha*, 295 S.E.2d 449 (N.C. 1982); *Green v. Patriotic Sons of Am.*, 87 S.E.2d 14 (N.C. 1955); *Ohio v. Maxon*, 375 N.E.2d 781 (Ohio 1978); *In Re John Smith*, 351 P.2d 1076 (Okla. Crim. App. 1960). The Oklahoma Court of Criminal Appeals held that where reference is made in the penal statutes to a "male over 18 years of age," it does not mean 19 years of age. *Id.*; *State v. Jordan*, 528 A.2d 731 (R.I. 1987); *Butler v. State*, 194 S.W. 166, 167 (Tex. Crim. App. 1917).

³¹ Compare *Linn*, 363 P.2d at 363 (stating, "We find the law to be quite well established that, with respect to penal statutes, a person is over and under a certain age, say 16 years, when he has reached that particular anniversary of his birthday."), and *In Re John Smith*, 351 P.2d at 1077 (holding that when one reaches his fiftieth birthday, he will not have lived fifty calendar years), with *McGaha*, 306 N.C. at 700 (asserting that once child has reached twelfth birthday, child is no longer twelve years old or less); *Maxon*, 54 Ohio St.2d at 191 (ruling that person past fifteenth birthday is "over fifteen years of age"), and *Gibson*, 99 P. at 333 (noting some states hold that people who are, for example, eighteen years and one day old, are no longer "eighteen and under").

³² *Ellingham*, 116 A.D.2d at 1033 (4th Dep't 1986) (stating that person reached his next year of age at first moment of day before anniversary of his birth (citing *Nichols v. Ramsel*, 2 Mod. 280, 86 Eng. Rep. 1072 (1677))); see *Fisher v. Smith*, 319 F. Supp. 855, 856 (W.D. Wash. 1970) (explaining that person's given age is computed by earliest moment of day proceeding anniversary of birth).

³³ See *In re Harris*, 5 Cal. App. 4th 813, 844 (1993) (quoting *State v. Alley*, 594 S.W.2d 381, 382 (Tenn. 1980)); see also *Bailey v. City of Lawrence, Indiana*, 972 F.2d 1447, 1458 (7th Cir. 1992) (recognizing "of age" requirement met on day proceeding traditional birthday); *In re Rosenstein's Estate*, 124 N.Y.S.2d 783, 786 (Sur. Ct. 1953) (stating that the calendar year means period of 365 days from January 1 through December 31).

³⁴ See *People v. Stevenson* 23 A.D.2d 472, 473 *rev'd* 17 N.Y.2d 682 (1966); see also

may have wanted to exclude persons whose birthday would be computed by this legal fiction. Perhaps a much simpler explanation exists to figure out these ambiguous phrases; the terms "over [x] years old" and "more than [x] years old" have come to include the particular age mentioned based upon "long standing custom and usage."³⁵ Regardless of the accuracy of these explanations, the majority rule fails to clearly define this term.

IV. THE GENERAL CONSTRUCTION LAW

It may be argued that the interpretation of this phrase is governed by the General Construction Law, which contains "general provisions relating to the construction of statutes and contracts, public and private instruments."³⁶ According to the General Construction Law, the word "year," as used in a statute, means 365 days.³⁷ Under this statute, eighteen years arguably means 6570 days. Thus, under the General Construction Law, a person who is 6571 days old [i.e. eighteen years and one day old] could be considered "more than eighteen years old." If applicable, the General Construction Law would exclude people on their eighteenth birthday from the death penalty. The General Construction Law, however, applies to the construction of the language in "every statute unless its general object or the context of the language construed, or other provision of law indicates a different meaning or application was intended from that required to be given."³⁸ As will be shown, both the legislative history and the legislature's common understanding of the words, "more than eighteen years old," indicate that the General Construction Law does not control this issue.³⁹

Ellingham, 116 A.D.2d at 1034 (stating Court of Appeals rejected common law rule that "age" occurs on day before birthday); *People v. Ennis*, 94 A.D.2d 746, 747 (2d Dep't 1983) (recognizing *Stevenson* court's ability to determine what constitutes age in state); *Rodriguez v. A.F. Myerson*, 69 A.D.2d 162, 166 (2d Dep't 1979) (explaining that legislature clearly wants to enlarge term juvenile delinquent, but recognizing that one cannot reach "age" in New York until birthday); *People v. Alouisa*, 466 N.Y.S.2d 1007, 1009 (Suffolk County Ct. 1983) (negating common law rule for computing age).

³⁵ *Smith*, 351 P.2d at 1078.

³⁶ See N.Y. GEN. CONSTR. LAW, CONSOLIDATOR'S NOTES, Book 21, p. IX (1997).

³⁷ See N.Y. GEN. CONSTR. LAW § 58 (McKinney 1998) (describing meaning of term "year" as provided in statutes, contracts, and public or private instruments).

³⁸ See N.Y. GEN. CONSTR. LAW § 110 (McKinney 1998).

³⁹ See *In re Bardol*, 4 N.Y.S.2d 795, 798 (4th Dep't 1938), *aff'd* 278 N.Y. 543 (1938). The Court of Appeals, affirming the decision of the Appellate Division, refused to apply the General Construction Law to calculate a person's age; the method of computing age

V. LEGISLATIVE INTENT

In *People ex rel Makins v. Wilkins*,⁴⁰ the Fourth Department held that the language, "over the age of ten years and less than sixteen years of age," in former Penal Law Section 483-b⁴¹ applied only to children who have reached their eleventh birthday and are under sixteen years old. The court reached its decision, not from a semantical analysis of the meaning of "over [x] years of age" in a statute, but from determining the legislative intent as revealed by the history underlying the enactment of this statute.⁴² In the words of the court:

It is recognized that the words "over" or "under" when used in connection with a specified age may be judicially construed with varying results. Similarly, a literal construction of [this] section . . . may well produce a rule contrary to that here reached. But such a literal construction must be rejected if it is evident that a literal construction does not correctly reflect the legislative intent, as indicated by the general purpose and history of the statute and its language read as a whole and not word by word.⁴³

Makins is significant, not only for its guidance in gleaning the legislative intent of the statute, but for its recognition that some-

was the common law rule that a person reached their next year of age on the day before the anniversary of their birthday. *Id.* As noted above, the Court of Appeals subsequently refused to follow the common law rule. *Id.*; see also *Stevenson*, 23 A.D.2d at 472. The court held that a person reaches their next year of age on the day of their birthday. *Id.* *Stevenson*, however, does not stand for the proposition that the General Construction Law is to be used to interpret the meaning of age language contained in any statute. *Id.* Specifically, the Court's decision was not based on the General Construction Law, rather, the determination of age was based on a person's actual birth date, "the common understanding of the . . ." meaning of the phrase "less than sixteen years of age." *Id.* See generally *Heywood v. Boyland*, 140 N.Y.S.2d 769, 770 (Sup. Ct. 1955) (limiting General Construction Law exclusions to not having appreciation for New York City's Charter Section which excludes holidays).

40 22 A.D.2d 497 (4th Dep't 1965). See generally *New York State Dep't of Hygiene v. State Div. of Human Rights*, 103 A.D.2d 546, 551 (2d Dep't 1984), *aff'd* 66 N.Y.2d 752 (2d Dep't 1985) (stating that drafters do not always get exact idea across in statute); *Rouse v. O'Connell*, 78 Misc.2d 82 (N.Y. Sup. Ct. 1974) (recognizing that statute construction is important science); *Izzo v. Kirby*, 56 Misc.2d 131, 136 (N.Y. Sup. Ct. 1968) (stating that literal construction should be rejected if it does not meet legislative intent).

41 See FORMER N.Y. PENAL LAW § 483-b (L. 1929 c. 684) (amended L. 1957 c. 482).

42 In fact, the General Construction Law was never mentioned in the Court's decision.

43 *Makins*, 22 A.D.2d at 500. See *Hudson City Savings v. Druzen*, 153 A.D.2d 91, 93 (3rd Dep't 1990) (discussing importance of avoiding statute construction that conflicts with legislative intent); *Izzo*, 56 Misc.2d at 134 (claiming apparent significance of language is not always controlling); *In re Stafford's Estate*, 103 N.Y.S.2d 153, 154 (Sur. Ct. 1951) (noting how all courts should make decisions with legislature's intent in mind).

thing as seemingly simple as interpreting the age requirement of a statute can be a difficult undertaking. The age language of Penal Law Section 125.27 will no doubt engender vigorous litigation as to its meaning. This issue will be troubling for courts since a particular interpretation may have deadly consequences for persons who are either exactly eighteen years old, or have not yet reached their nineteenth birthday. For some courts interpreting this statute, the immediate and understandable reaction will be that the "more than eighteen" language means nineteen years old. Other courts may reach a contrary result; of those courts faced with the indictment of a person who, by chance, is alleged to have committed First Degree Murder on his/her eighteenth birthday, the struggle will be whether the statutory age language means exactly eighteen years old, eighteen years and one day old or older, or nineteen years old.

Needless to say, only one statutory interpretation is possible. Despite the absence of an express statement from either the governor or the legislature as to the meaning of the words "more than eighteen years old," a conclusive interpretation based upon a plain reading of this phrase, or a clear rule to follow from other jurisdictions, the answer to this question can ultimately be found in the legislative history, dating as far back as 1963, New York case law and New York statutes using similar language.

Initially, when interpreting a statute, "the primary command to the judiciary . . . is to ascertain and effectuate the purpose of the Legislature."⁴⁴ "Whenever such intent is apparent from the entire statute, its legislative history, or the statutes of which it is made a part, it must be followed in construing the statute."⁴⁵ Ordinarily, if the statutory language is clear and unambiguous,

⁴⁴ See *Abood v. Hospital Ambulance Serv.*, 30 N.Y.2d 295, 298 (1972); see also *Rankin v. Shankar*, 23 N.Y.2d 111, 114 (1968) (explaining legislative intent); *Application of Carns*, 43 N.Y.S.2d 497, 504 (Sup. Ct. 1943) (stating that courts will indulge legislative intent arguments because they are controlling); *People v. Formiscio*, 39 N.Y.S.2d 149, 151 (N.Y. City Ct. Spec. Sess. 1943) (noting that literalness takes backseat to any legislative intent that is evident).

⁴⁵ *Abood*, 30 N.Y.2d at 298. See *Wing v. Ryan*, 255 A.D. 163, 164 (3rd Dep't 1938), *aff'd*, 278 N.Y. 710 (1938) (stating statutes should not be interpreted by strict adherence to technically grammatical rules); see also *In re Bickerton*, 232 N.Y. 1, 1 (1921) (noting that it is not uncommon to enlarge or restrain meaning of words in order to meet legislative intent); *Travelers Ins. Co. v. Padura*, 224 N.Y. 397, 399 (1918) (permitting courts to transpose words in order to reach legislative intent); *People v. Cubiotti*, 157 N.Y.S.2d 784, 789 (Rochester City Ct. 1956) (recognizing that courts are always justified in departing from literal meaning of words in order to preserve intent of legislature).

then the plain meaning of the statute should be given effect.⁴⁶ Such a literal interpretation is to be avoided, however, where it does not “express the statute’s manifest intent and purpose.”⁴⁷ With these principles in mind, it is necessary for two reasons, to go beyond the literal language of Penal Law Section 125.27 and determine the underlying legislative intent of this statute. First, an argument can be made that the literal language of “more than eighteen years old” is vague and ambiguous. The term may mean either a person exactly eighteen years old, eighteen years and one day old or older, or nineteen years old. Accordingly, this ambiguity can only be resolved by determining what the Legislature intended this phrase to mean. Second, even if it is more logical to conclude that the plain meaning of “more than eighteen years old” means either eighteen years and one day old or nineteen years old, any one of these interpretations is contrary to the Legislature’s intent that Penal Law Section 125.27 includes persons who have reached their eighteenth birthday.

To begin, the 1963 amendment to New York’s death penalty was specifically patterned after the Model Penal Code.⁴⁸ Two significant features of the Model Penal Code were made part of the 1963 legislation: The express rejection of capital punishment for persons under eighteen years of age and a two stage jury proceeding in death penalty cases. (The first stage was designed to determine a defendant’s guilt on the underlying murder, and the second to determine if the death penalty should be imposed).⁴⁹

⁴⁶ See *Brooklyn Bridge Park Coalition v. Port Authority*, 951 F. Supp. 383, 385 (S.D.N.Y. 1997) (outlining how common sense tells that plain meaning of statute must be considered if result is not outrageous); see also *Choate v. City of Buffalo*, 57 N.Y.S. 383, 391 (4th Dep’t 1899), *aff’d*, 167 N.Y. 597 (1901) (noting that cases can be decided by reading plain language of statute); *Greenman v. Levitt*, 93 Misc.2d 310, 315 (N.Y. Sup. Ct. 1978) (adopting plain meaning unless construction leaves statute totally negatory).

⁴⁷ See *People v. Schwebel*, 255 N.Y.S.2d 760, 763, *aff’d*, 16 N.Y.2d 724 (1965) (allowing departure from plain language if legislative intent can be achieved). See generally *Ball v. State of New York*, 52 A.D.2d 47, 60 (3rd Dep’t 1976), *aff’d*, 41 N.Y.2d 617 (1977) (disallowing claim based on legislative intent simply because statute could have been worded better); *O’Mera v. A&P*, 169 Misc.2d 697 (N.Y. Sup. Ct. 1996) (weighing legislative intent heavily when deciding applicable construction of statute).

⁴⁸ See 1963 N.Y. Laws c. 994, § 2076 (approving statute which removed mandatory death penalty for murder and kidnapping, giving jury discretion to impose death penalty); see also 1963 N.Y. Laws c. 565, § 2018 (proposing bill that would impose death penalty in all cases except for felony murder and wanton or depraved types of first degree murder).

⁴⁹ See MODEL PENAL CODE § 210.6(1)(d) (Proposed Official Draft, 1962); see also Memorandum of N.Y. Temp. Comm. on Revision of the Penal Law and Crim. Code, 1963 McKinney’s Session Laws of N.Y. at 2018.

When the revised Penal Law went into effect in 1967, the legislature though changing the wording of the age requirement for the death penalty from "less than eighteen years old" to "more than eighteen years old" was simply carrying over the 1963 legislation, as had been influenced by the Model Penal Code. Age eligibility for the death penalty remained unchanged at eighteen years old. In fact, there were substantive changes made to the death penalty by the time of the Revised Penal Law's 1967 effective date. The purpose of these amendments, however, had absolutely nothing to do with increasing the age for death eligibility. To understand this, some background is necessary.

Prior to 1965, under the Former Penal Law, the death penalty applied to all forms of Murder in the First Degree.⁵⁰ In 1965, the legislature limited the death penalty under the former Penal Law solely to premeditated murder, but only where the victim was a peace officer or the defendant was serving a life sentence.⁵¹ A year later, however, the legislature expanded the death penalty under the Former Penal Law to include both premeditated murders, as well as felony murders. In either situation, the victim had to have been a peace officer or the defendant must have been serving a life sentence.⁵²

While legislation refining the scope of the death penalty was ongoing, the Commission was at work drafting the Revised Penal Law. Less than one month after the legislature narrowed the scope of the death penalty under the Former Penal Law, the Revised Penal Law was enacted. In approving this legislation, Governor Rockefeller acknowledged that further amendments would undoubtedly be necessary before the September 1, 1967 effective date.⁵³ Such an amendment was indeed required with respect to the death penalty, for given the timing of the amendment to the Former Penal Law,⁵⁴ the Commission had no opportunity to incorporate the changes made in that legislation to the Revised Penal Law's death penalty.⁵⁵ As a result, the death penalty under the Revised Penal Law essentially mirrored that of

50 See FORMER N.Y. PENAL LAW § 1045 (L. 1963 c. 994).

51 See FORMER N.Y. PENAL LAW § 1045 (L. 1965 c. 321).

52 See FORMER N.Y. PENAL LAW § 1045 (L. 1966 c. 66).

53 See Gov. Rockefeller's Approval Memorandum, 1965 N.Y. Laws at 2120.

54 See FORMER N.Y. PENAL LAW § 1045 (L. 1965 c. 321).

55 See Sixth Interim Report of the State of N.Y. Temp. Comm. on Revision of the Penal Law and Criminal Code, NY Legis. Doc. No. 6 at 4 (1967).

the 1963 amendment, not the death penalty as had been revised by the 1965 amendment to the Former Penal Law.⁵⁶ Thus, the purpose of the 1967 amendment to the Revised Penal Law⁵⁷ was to ensure that the death penalty under the new Penal Law reflected "the recent will of the legislature," as was expressed in the legislative changes of 1965 and 1966 to the death penalty under the Former Penal Law.⁵⁸ Such was the sole reason for the amendment; increasing the age requirement for the death penalty played absolutely no role in that legislation. As generally explained by the Commission, the reason for the modification from "less than eighteen" to "more than eighteen" was simply a "language change . . . designed to accommodate [this] section . . . to the new [Penal Law] pattern."⁵⁹ In fact, a comparison of the death penalty statutes from 1963 to 1967 (set forth in the Appendix) clarifies this explanation. The 1965 version of the Penal Law were almost identical, both in wording and structure,⁶⁰ to the Former Penal Law.⁶¹ By contrast, the Penal Law sections drafted in 1967⁶² were a combination of these statutes; in drafting the 1967 amendment, the Commission rearranged the language and expressed certain parts of the prior statutes somewhat differently. Specifically, whereas the Former Penal Law and the Revised Penal Law of 1965 directed the court to sentence a defendant to other than death if he/she was "under or less than eighteen years old," the 1967 Penal Law directed the court to hold a defendant over for a death penalty hearing if satisfied that a defendant was "more than eighteen years old." In effect, the format chosen for the 1967 versions of the Penal Law resulted in the age requirement being expressed by the direct language "more than eighteen years old," rather than by the negative wording, "not less than eighteen years old." In essence, the

56 See Appendix; see also *Staff Comments to Proposed NY Penal Law* § 130.30 (subsequently renumbered Penal Law § 125.30), 1C-63 GILBERT CRIMINAL CODE AND PENAL LAW (1969 ed.).

57 See L. 1967 c. 791 (repealed 1974).

58 See Sixth Interim Report of the State of N.Y. Temp. Comm. on Revision of the Penal Law and Criminal Code, N.Y. Legis. Doc. No. 6 at 4 (1967); see also Bill Jacket to L. 1968 c. 949.

59 See Sixth Interim Report of the State of N.Y. Temp. Comm. on Revision of the Penal Law and Criminal Code, N.Y. Legis. Doc. No. 6 at 4 (1967).

60 See FORMER N.Y. PENAL LAW §§ 125.30, 125.35 (L. 1965 c. 1030) (repealed 1974).

61 See FORMER N.Y. PENAL LAW §§ 1045, 1045-a (L. 1963 c. 994).

62 See FORMER N.Y. PENAL LAW §§ 125.30, 125.35 (L. 1967 c. 791) (repealed 1974).

change in language was intended to be stylistic in nature, not substantive.

It should also be remembered that the change in language arose as part of a revision of the law. It is a rule of statutory construction that, in a revision, the legislature does not intend a change in the law merely because of a change in statutory language.⁶³ Rather, in the absence of a clear expression of a legislative purpose to effect such change, there is a presumption that no change is intended.⁶⁴ Not only is an expression of such intent absent, but that an age change was even intended is belied by the commentators to the Revised Penal Law – the Executive Director and Counsel respectively to the Commission – who noted in 1967:

This section and two other provisions (sections 60.05, 125.35) collectively restate the substance of sections 1045 and 1045-a of the former Penal Law. The latter two statutes, representing important recent legislation, combined to abolish the death penalty for murder in all but two narrow situations. They also establish a so-called “two stage” trial for all actions in which the death penalty may legally be imposed, involving separate jury proceedings to determine whether the sentence should be death or life imprisonment.⁶⁵

Given this explanation, it seems that the legislature fully intended to carry the age eligibility for the death penalty, as it existed under the 1963 and 1965 amendments, into the 1967 amendment. Therefore, the language “more than eighteen years old” was intended by the Legislature to include persons at least eighteen years of age. Since that same language was retained in the 1974 and 1995 amendments, it would continue to have the same meaning.⁶⁶

⁶³ See N.Y. GEN. LAWS § 422 (McKinney 1998).

⁶⁴ *Id.*

⁶⁵ See Denzer & McQuillan, McKinney's Practice Commentaries, N.Y. PENAL LAW § 125.30 (1967).

⁶⁶ See Bill Jacket, 1995 N.Y. Laws § 125.27. It should also be noted that the bill jacket for the 1995 amendment to Penal Law § 125.27 contains a memorandum from Attorney General Vacco to Governor Pataki stating that the death penalty applies to persons at least eighteen years of age. *Id.*; see also People *ex rel* Makins, 22 A.D.2d 497, 497 (4th Dep't 1965). “Communications sent to the Governor relating to a bill passed by the Legislature and before him for action are not conclusive but they are aids in seeking legislative intent.” *Id.* at 498.

Finally, the legislature's silence as to the age issue may also be indicative of its position. In 1948 and 1963, when the legislature increased the age requirement for death eligibility, that goal was spelled out expressly in the legislative history. The silence in 1967, 1974, and 1995, therefore, bespeaks an intent to retain the age requirement as it existed in both 1963 and 1965. Notably, in 1965, a majority of the Commission to the Revised Penal Law had recommended to the governor and the legislature that the death penalty should be abolished in New York.⁶⁷ In fact, several bills to abolish capital punishment were introduced and ultimately defeated in the legislature.⁶⁸ For the legislature to have increased the age requirement in 1967 from eighteen years of age to eighteen years and one day old, or even nineteen years of age without a word from either Governor Rockefeller, the legislature, or the Commission is seemingly unthinkable. Any change of such magnitude would probably have been reflected either in the legislative history, the interim reports prepared by the Commission, or the staff comments prepared in conjunction with the Revised Penal Law.

VI. NEW YORK CASE LAW

The conclusion that the death penalty applies to persons at least eighteen years old is also supported by the Court of Appeals in *People v. Davis*.⁶⁹ In *Davis*, the court struck down the mandatory death penalty of 1974.⁷⁰ Writing for the majority, Judge Cooke stated that, "under the recent decisions of the Supreme Court, the exclusion of an entire category of offenders under eighteen years of age by New York Penal Law⁷¹ from punishment by death is not a mitigating factor since such limitations do

⁶⁷ See Fourth Interim Report of the State of NY Temp. Comm. on Revision of the Penal Law and Criminal Code, N.Y. Legis. Doc. No. 25 at 68-70 (1965).

⁶⁸ See New York Legislative Record and Index, 1965, p. 1380; see also Fourth Interim Report of the State of N.Y. Temp. Comm. on Revision of the Penal Law and Criminal Code, N.Y. Legis. Doc. No. 25 at 71 (1965).

⁶⁹ 43 N.Y.2d 17 (1977).

⁷⁰ See *id.* Actually, *Davis* only struck down that part of the mandatory death penalty as it related to persons who intentionally murder police officers and employees of state or local correctional facilities. *Id.*; see also N.Y. PENAL LAW § 125.27(1) (a) (i)-(ii) (L. 1974 c. 367); *People v. Smith*, 63 N.Y.2d 41, 78 (1984). The Court of Appeals struck down the mandatory death penalty as it related to a person who, while serving a term of life imprisonment, commits intentional murder. *Id.*

⁷¹ N.Y. Penal Law § 125.27(1)(b) (L. 1974 c. 367).

not afford individualized consideration of the individual.”⁷² Chief Judge Breitel, writing for the dissent, pointed out that one ameliorative aspect of Penal Law section 125.27, was that “a person may not be convicted of first degree murder unless he is at least 18 years of age.”⁷³ Though disagreeing over the constitutionality of the death penalty, the Court of Appeals unanimously agreed that the 1974 death penalty statute, which contained the language “more than eighteen years old,” applied to persons eighteen years of age or older.⁷⁴

The language in *Davis* strongly supports the conclusion that the words “more than eighteen years old,” means persons eighteen years old and older. Indeed, this conclusion is further buttressed by the Court of Appeals decision in *Kuczka v. Clark*.⁷⁵ There the court held that the language “more than twenty-nine years old” in the Civil Service Law included persons who were exactly twenty-nine years old.⁷⁶ The Court of Appeals affirmed on the basis that “a person who reaches his twenty-ninth birthday has already lived a full twenty-nine years and thereafter he may be said to be more than twenty-nine years of age.”⁷⁷ Since the age language of Penal Law section 125.27 is identical to the age language used in the Civil Service Law, it appears that the same analysis employed in *Kuczka* to interpret that particular age language may be applied to construe the age language of Penal Law section 125.27. Accordingly, using *Kuczka* as an interpretive aid, the language “more than eighteen years old” in Penal Law section 125.27 means persons who have reached their eighteenth birthday.⁷⁸

Two lower courts directly faced with this issue have concluded that the age requirement in Penal Law Section 125.27⁷⁹ applies to persons who are eighteen years old.⁸⁰ In *Bell*, the court, interpreting Penal Law Section 125.27,⁸¹ stated that the defendant,

⁷² *Davis*, 43 N.Y.2d at 17.

⁷³ *Id.* at 42

⁷⁴ *Id.*

⁷⁵ 86 A.D.2d 980 (4th Dep’t), *aff’d*, 58 N.Y.2d 738 (1982).

⁷⁶ *See id.*

⁷⁷ *Id.* at 981.

⁷⁸ *Id.*

⁷⁹ N.Y. Penal Law Law § 125.27 (McKinney 1998).

⁸⁰ *See People v. Morris Bell*, N.Y.L.J., March 27, 1997, at 31-32; *see also People v. Carr*, 159 Misc.2d 1093, 1095 (N.Y. Sup. Ct. 1994).

⁸¹ N.Y. Penal Law Law § 125.27 (McKinney 1998).

who was eighteen years and six months old at the time of the homicide, was "more than eighteen years old" within the meaning of the statute.⁸² Interestingly, it was suggested that a different conclusion might have been reached in *Bell* had the homicide occurred on the defendant's eighteenth birthday by the court's statement: "[G]iven the fact that the defendant had attained his eighteenth birthday *prior* to the date of the crime, he was more than eighteen years old as required by the statute."⁸³

The court in *Carr*, however, interpreting the 1974 version of Penal Law Section 125.27 held that the language, "more than eighteen years old," applies to persons who have reached their eighteenth birthday.⁸⁴ In *Carr*, the defendant argued that the legislature's decision to use the obviously different phrase, "eighteen years old or more," in the statutes defining various sex offenses,⁸⁵ was evidence that a different meaning was intended for Penal Law section 125.27,⁸⁶ namely, that persons eighteen years of age and younger were not criminally responsible for Murder in the First Degree.⁸⁷ The court in *Carr*, however, pointed out that Penal Law section 130.55 uses the term "more than fourteen years old," which, according to the practice commentaries, includes people who are fourteen years old.⁸⁸ If "more than fourteen years old" includes persons at least fourteen years of age for Penal Law Section 130.55, then it is logical to assume that the same construction was intended for the age language of Penal Law Section 125.27.⁸⁹

⁸² See *Bell*, N.Y.L.J., March 27, 1997 at 32.

⁸³ *Id.* The Court in *Bell* cited *Carr* with approval. *Id.* To interpret the meaning of "more than eighteen years old," the *Bell* court used an analysis similar to the one used in *Kuczka*. *Id.*

⁸⁴ See *Carr*, 159 Misc.2d at 1095.

⁸⁵ *Id.* (emphasis added).

⁸⁶ N.Y. Penal Law Law § 125.27 (L. 1974 c. 794).

⁸⁷ See *Carr*, 159 Misc.2d 1093 (N.Y. Sup. Ct. 1994).

⁸⁸ See Donnino, *Practice Commentary*, MCKINNEY'S CONSOLIDATED LAWS OF NY, PENAL LAW, Book 39, at 571 (1997) (noting support for conclusion reached in practice commentary to Penal Law section 130.55 came from original Staff Comments to Law Revision Committee); STAFF COMMENTS OF THE COMMISSION OF THE REVISION OF THE PENAL LAW, MCKINNEY'S SPEC. PAMPH., 276 (1965); see also Fourth Interim Report of the State of N.Y. Temp. Comm. on Revision of the Penal Law and Criminal Code, N.Y. Legis. Doc. No. 25 at 30-31 (1965) (stating under Penal Law § 130.55, "a person cannot commit 'sexual abuse' upon an acquiescent 'victim' of the age of fourteen, fifteen, or sixteen unless he (the actor) is at least five years older than such 'victim'").

⁸⁹ See *Carr*, 159 Misc.2d at 1095.

VII. NEW YORK STATUTES CONTAINING SIMILAR LANGUAGE

That the language, "more than eighteen years old," in Penal Law Section 125.27 means persons exactly eighteen years of age is also supported by rules of statutory construction as applied to related statutes defining age requirements. The basic rule states that where a word or phrase is used in many parts of a statute, it is presumed to be used in the same manner throughout the statute.⁹⁰

This rule is modified by the additional rule that "[a] statute or legislative act is to be read and construed as a whole, and all parts of an act are to be read together to determine the legislative intent."⁹¹ In other words, even though the Penal Law is divided into articles, "all sections . . . must be read together to determine its fair meaning."⁹² Accordingly, the legislature's intended meaning for the term "more than fourteen years old" in Penal Law Section 130.55 is evidence that the same construction was intended for Penal Law Section 125.27.⁹³ This seems especially true since the Commission drafted both of these sections of the Penal Law.

Penal Law Sections 125.27 and 130.55, however, are not isolated uses of the words "more than [x] years old" by the Legislature. For example, New York Criminal Procedure Law Section 60.20(2) states:

Every witness *more than twelve years old* may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath. A child *less than twelve years old* may not testify under oath unless the court is satisfied that he understands the nature of an oath. If the court is not so satisfied, such child or such witness *over twelve years old* who cannot, as a result of mental disease or defect, understand the nature of an oath may nevertheless be permitted to give unsworn evidence if the court is satisfied that the

⁹⁰ See N.Y. CONSTR. & INTERP. LAW § 236 (McKinney 1998). "In the absence of anything in the statute indicating an intention to the contrary, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and the same meaning will be attached to similar expressions in the same or related statute." *Id.*

⁹¹ N.Y. Constr. & Interp. Law § 97 (McKinney 1998).

⁹² N.Y. Constr. & Interp. Law § 130 (McKinney 1998).

⁹³ N.Y. Penal Law § 125.27 (L. 1974 c. 367).

witness possesses sufficient intelligence and capacity to justify the receipt thereof.⁹⁴

The "more than twelve years old" language is defined by the ensuing words "less than twelve years old," which, by excluding twelve year olds, necessarily includes twelve year olds in the "more than" category.⁹⁵ In other words, the "less than" language of New York Criminal Procedure Law Section 60.20(2) more clearly defines what the words "more than twelve years old" signify, namely persons at least twelve years old. Statutes which relate to the same subject matter "are to be construed together as though forming part of the same statute."⁹⁶ Thus, since the Penal Law and Criminal Procedure Law both relate to the criminal branch of the law, they also relate to the same subject matter.⁹⁷ Guided by this rule of statutory construction and McKinney's Statutes,⁹⁸ the meaning given by the Legislature to the phrase "more than twelve years old" in the Criminal Procedure Law,⁹⁹ is evidence that the same meaning was intended for the Penal Law.¹⁰⁰

Still another example of the Legislature's use of the words,

94 N.Y. CRIM. PROC. LAW § 60.20(2) (McKinney 1998) (emphasis added). This section was amended in 1975 to allow people 12 years of age or older, who lacked the mental capacity to testify under oath, to testify if the court determined that they possessed sufficient intelligence to give unsworn testimony. *Id.*; See FORMER CODE OF CRIM. PROC. § 392. Under the Code of Criminal Procedure section 392 and New York Criminal Procedure Law section 60.20 (L. 1970 c. 996), unsworn testimony could only be given by persons who were under the age of twelve. *Id.*

95 Any doubt as to this meaning is dispelled by the history underlying the statute. See FORMER CODE OF CRIM. PROC. § 392. The predecessor to New York Criminal Procedure Law section 60.20 was the Code of Criminal Procedure Law section 392, which contained the language "under the age of twelve years," but not the phrase, "more than twelve years old," as does New York Criminal Procedure Law section 60.20. *Id.*; see also *People v. Klein*, 266 N.Y. 188, 188 (1935). The code created a rebuttable presumption that a child under the age of twelve was incompetent to be sworn. *Id.*; PRINCE & RICHARDSON ON EVIDENCE, § 6-106, 315 (Farrell 11th ed.). Cases decided under the Code held that a person at least twelve years old was presumed competent to be sworn and testify under oath. *Id.* See, e.g., *People v. Hemphill*, 286 A.D. 1152 (4th Dep't 1955); *Olschansky v. Presnsky*, 185 A.D. 469 (2d Dep't 1918).

96 See N.Y. CONSTR. & INTERP. LAW § 221(b) (McKinney 1998) (according to general rules of construction, statutes which are *in pari materia* are to be construed together).

97 See *id.* N.Y. CONSTR. & INTERP. LAW § 221(c) (McKinney 1998).

98 See *id.* N.Y. CONSTR. & INTERP. LAW § 236 (McKinney 1998) (explaining that in absence of indication to contrary, same words used in different parts of statute will be construed similarly).

99 See N.Y. CRIM. PROC. LAW § 60.20 (McKinney 1998).

100 See N.Y. PENAL LAW § 125.27; see also N.Y. CONSTR. & INTERP. LAW § 222 (McKinney 1998) (statutes are to be construed with reference to earlier and subsequent statutes relating to same subject matter).

“more than [x] years,” can be found in the Former Penal Law,¹⁰¹ dealing with the sentencing of minors. That section read in pertinent part:

A child of more than seven years and less than sixteen years of age, who shall commit any act or omission which, if committed by an adult, would be a crime, shall not be deemed guilty of a crime, but of juvenile delinquency only, but any other person concerned therein, whether as a principal or accessory, who otherwise would be punishable as a principal or accessory shall be punishable as a principal or accessory in the same manner as if such child were over sixteen years of age at the time the crime was committed . . .¹⁰²

It is clear that the legislature intended that a child exactly seven years old was “more than seven years old” within the meaning of this statute, and thus could be adjudicated a juvenile delinquent. Under the Former Penal Law,¹⁰³ children under seven years of age – meaning at least six years old or younger – were deemed incapable of committing crimes and, thus, were not responsible for their conduct.¹⁰⁴ Pursuant to another section of the Former Penal Law,¹⁰⁵ however, “a child of the age of seven years and under the age of twelve years, was presumed to be incapable of crime, but the presumption [was rebuttable].”¹⁰⁶ Ac-

101 See N.Y. PENAL LAW § 2186 (L. 1948 c. 488).

102 *Id.*

103 See FORMER N.Y. PENAL LAW § 816 (L. 1909 c. 88).

104 See SIR WILLIAM BLACKSTONE, IV COMMENTARIES ON LAW OF ENGLAND 23-24 (discussing that child at least seven years old could not be guilty of felony); see also Sherri Jackson, *Too Young to Die – Juveniles and the Death Penalty – A Better Alternative to Killings and Children: Youth Empowerment*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 391, 401 (1996) (analyzing Framer’s contention that forms of juvenile punishment were cruel and unusual); Marcia Johnson, *Juveniles and the Juvenile Justice System*, 96 WHITTIER L. REV. 713, 749-51 (1996) (discussing history of juvenile punishment and current eighth amendment concern in United States); Vedp Nomda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311, 1312 (1993) (placing current juvenile justice laws in historical framework).

105 See FORMER N.Y. PENAL LAW § 817 (L. 1909 c. 88).

106 See Fam. Ct. Act § 301.2(8)(vi) (McKinney 1998) (defining Juvenile Delinquent as “person over seven and less than sixteen”; term “over seven . . . years of age” has been interpreted as applying to children who are at least seven years old); see also *Matter of Robert G.*, 121 Misc.2d 680, 681 (N.Y. Fam. Ct. 1983) (stating that common-law defense of infancy was not available to minors aged seven years five months old and nine years); *Matter of Robert M.*, 110 Misc.2d 113, 114 (N.Y. Fam. Ct. 1983) (holding that presumption of infancy is inapplicable in delinquent cases and that defendant has requisite intent); *Matter of Andrew M.*, 91 Misc.2d 813, 816 (N.Y. Fam. Ct. 1977) (holding that although defendant met statutory requirement of being over seven years and under sixteen years he did not have requisite mens rea).

cordingly, since the Former Penal Law expressly excluded children under the age of seven as being capable of committing crimes, but expressly included children at least seven years and older as potentially capable of committing crimes, it necessarily follows that the legislature's use of the term "more than seven"¹⁰⁷ meant children at least seven years of age. If this were an incorrect interpretation, then there would be a gap for seven year olds, who, although potentially capable of committing crimes, could not be dealt with legally.¹⁰⁸

With respect to the words "over sixteen years of age," it is evident that this language meant persons at least sixteen years old. The statute stipulated that persons sixteen years of age or older, who committed a crime with a child under sixteen years old, were still criminally responsible for such conduct, it being no excuse that the child lacked the capacity to commit such crime.¹⁰⁹ The statute, in essence, created the fiction that the minor who committed acts constituting a crime was to be thought of as if he/she had the legal capacity to do so; in other words, the minor was considered to be at least sixteen years old. This intent was expressed by the words "over sixteen years of age," but it is clear that the legislature intended it to mean persons at least sixteen years old.

The legislature's intention that the phrases "more than seven years old" and "over sixteen years old," in the Former Penal Law¹¹⁰ include the particular age mentioned, is evidence that the same construction was meant for the current version of Penal Law section 125.27.¹¹¹ As discussed above, "[a] statute is to be construed with reference to earlier and subsequent statutes relating to the same subject matter."¹¹²

The similar meaning of the age language in the statutory examples outlined above reflect a consistent pattern of statutory drafting. It reveals that the legislature has, for some time, un-

¹⁰⁷ See FORMER N.Y. PENAL LAW § 2186 (L. 1949 c. 388) (stating "more than seven" language).

¹⁰⁸ See N.Y. CONSTR. & INTERP. LAW § 144 (McKinney 1998) (indicating statutes will not be construed as to render them ineffective).

¹⁰⁹ See, e.g., N.Y. CRIM. PROC. LAW § 20.05 (1) (McKinney 1998) (upholding criminal liability for those "over 16" committing crime with child "under 16").

¹¹⁰ See FORMER N.Y. PENAL LAW § 2186 (L. 1949 c. 388).

¹¹¹ See N.Y. PENAL LAW § 125.27 (McKinney 1998).

¹¹² N.Y. Constr. & Interp. Law §§ 222, 236 (McKinney 1998).

derstood that age requirements expressed in "more than [x] years of age" or "over [x] years of age" include the particular age mentioned. Since the Penal Law section 125.27¹¹³ contains age language identical to these statutes, it too should be interpreted consistent with what the legislature has commonly understood the words "more than [x] years of age" to mean.

Finally, another rule of statutory construction holds that in amending a statute, the legislature is presumed to know the holdings of courts interpreting the statute and that absent evidence to the contrary, the legislature will be deemed to have accepted that interpretation.¹¹⁴ Thus, when the legislature amended sections of the Penal Law in 1995¹¹⁵ and carried over the "more than language" into that statute, it did so with presumptive knowledge of the decisions in *Davis* and *Carr* and, thus, adopted those interpretations. In addition to *Davis* and *Carr*, there is also the court of appeals decision in *Kuczka*, interpreting an age requirement with identical language. Given *Kuczka*,¹¹⁶ the legislature was on notice that age requirements, as interpreted by the judiciary, drafted in "more than [x] years" language, include the particular age mentioned. Accordingly, when the legislature amended the Penal Law in 1995 and kept the very same language for the age requirement, it adopted the interpretation given to this language by the court in *Kuczka*.

CONCLUSION

It is not certain why somewhat ambiguous words were chosen for the death penalty's age requirement. Regardless of why the words "more than eighteen years old" were used to define age eligibility for the death penalty, there is overwhelming support for the conclusion that New York's death penalty statute applies to persons who had reached their eighteenth birthday at the time of the commission of the homicide.

¹¹³ See N.Y. Penal Law § 125.27 (McKinney 1998) (describing "more than" language in statute).

¹¹⁴ See *People ex rel. Malkins v. Wilkins*, 22 A.D.2d 497, 499 (4th Dep't 1965); see also N.Y. Constr. & Interp. Law § 193 (McKinney 1998) (explaining legislature's presumed acceptance of court's interpretations).

¹¹⁵ See N.Y. Penal Law § 125.27 (McKinney 1998).

¹¹⁶ See *Kuzca v. Clark*, 58 N.Y.2d 738, 738 (1982) (supporting presumption of judicial notice on part of legislature).

APPENDIX

I. Former Penal Law § 1045¹¹⁷ stated:

1. Murder in the first degree is punishable by life imprisonment unless the death sentence is imposed as provided by § 1045-a.
2. When the court and the district attorney consent, a person indicted for murder in the first degree may plead guilty to murder in the first degree with a sentence of life imprisonment, in which case the court should sentence him accordingly.
3. When a defendant has been found guilty after trial of murder in the first degree, the court shall discharge the jury and sentence the defendant to life imprisonment if it is satisfied that defendant was under eighteen years of age at the time of the commission of the crime, or that the sentence is not warranted because of substantial mitigating circumstances.

II. Former Penal Law § 1045¹¹⁸ stated:

1. Murder in the first degree is punishable by life imprisonment unless the death sentence is imposed as provided by section ten hundred forty-five-a.
2. When the court and the district attorney consent, a person indicted for murder in the first degree may plead guilty to murder in the first degree with a sentence of life imprisonment, in which case the court shall sentence him accordingly.
3. When a defendant has been found guilty after trial of murder in the first degree, the court shall discharge the jury and shall except as provided in subdivision four of this sec-

117 FORMER N.Y. PENAL LAW § 1045 (L. 1963 c. 994).

118 FORMER N.Y. PENAL LAW § 1045 (L. 1965 c. 321).

tion, discharge the jury and shall sentence the defendant to life imprisonment.

4. When the conviction was for murder in the first degree as defined in subdivision one of section ten hundred forty-four the court shall conduct a proceeding pursuant to ten hundred forty-five-a to determine whether the defendant should be sentenced to life imprisonment, or to death if it is satisfied that either (a) the victim was a peace officer who was killed in the course of performing his official duties, or (b) at the time of the commission of the crime the defendant was confined in a state prison or was otherwise in custody upon a sentence for the term of his natural life or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or having escaped from such confinement or custody the defendant was in immediate flight therefrom. Provided that the court shall discharge the jury and shall sentence defendant to life imprisonment if it is satisfied that the defendant was under eighteen years of age at the commission of the crime, or that the sentence of death is unwarranted because of substantial mitigating circumstances.¹¹⁹

III. Former Penal Law § 1045-a¹²⁰ stated:

1. When a defendant has been found guilty after trial of murder in the first degree, and such verdict has been recorded upon the minutes, it shall not thereafter be subject to jury reconsideration.

2. Unless the court sentences the defendant to life imprisonment as provided in subdivision two or three of section ten hundred forty-five, it shall, as promptly as practical, conduct a proceeding to determine whether defendant should be sentenced to life imprisonment or death. Such proceeding shall be conducted before the court sitting with the jury that

¹¹⁹ See L. 1966 c. 66. In 1966, subsection four was amended by substituting the words "committed from a deliberate and premeditated design to effect the death of the person killed, or of another, or committed without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon person killed or otherwise," for the words "as defined in subdivision one of section ten hundred forty-four."

¹²⁰ FORMER N.Y. PENAL LAW § 1045 (L. 1963 c. 994).

found defendant guilty unless the court for good cause discharges that jury and impanels a new jury for that purpose.

3. In such proceeding, evidence may be presented by either party on any matter relevant to sentence including, but not limited to, the nature and circumstances of the crime, defendant's background and history and any aggravating or mitigating circumstances. Any relevant evidence, not legally privileged, shall be received regardless of its admissibility under the exclusionary rules of evidence.

4. The court shall charge the jury on any matters appropriate in the circumstances, including the law relating to the possible release on parole of a person sentenced to life imprisonment.

5. The jury shall then retire to consider the penalty to be imposed. If the jury report unanimous agreement on the imposition of the penalty of death, the court shall discharge the jury and shall impose the penalty of death. If the jury report unanimous agreement on the imposition of penalty of life imprisonment, the court shall discharge the jury and shall impose the sentence of life imprisonment. If, after the lapse of such time as the court deems reasonable, the jury report themselves unable to agree, the court shall discharge the jury and shall, in its discretion, either impanel a new jury to determine the sentence or impose the sentence of life imprisonment.

6. On an appeal by the defendant where the judgement is of death, the court of appeals, if it finds substantial error only in sentencing proceeding, may set aside the sentence of death and remand the case to the trial court, in which event the trial court shall impose the sentence of life imprisonment.¹²¹

¹²¹ See L. 1965 c. 321. In 1965, subdivision two was amended as follows:

Unless the court sentences the defendant to life imprisonment as provided in subdivision two, three, or four of section ten hundred forty-five, it shall as promptly as practical, conduct a proceeding to determine whether defendant should be sentenced to life imprisonment or to death. Such proceeding shall be conducted before the court sitting with the jury that found the defendant guilty unless the court for good cause discharges that jury and impanels a new jury for that purpose.

IV. Former Revised Penal Law § 125.30¹²² stated:

1. Murder is punishable as a class A felony unless the death sentence is imposed as provided by § 125.35.
2. When the court and district attorney consent, a person indicted for murder may plead guilty thereto, in which case the court shall sentence him as for a class A felony.
3. When a defendant has been found guilty after trial of murder, the court shall discharge the jury and shall sentence the defendant as for a class A felony if it is satisfied that he was less than eighteen years old at the time of the commission of the crime, or that the sentence of death is not warranted because of substantial mitigating circumstances.

V. Former Revised Penal Law § 125.35¹²³ stated:

1. When a defendant has been found guilty after trial of murder, and such verdict has been recorded upon the minutes, it shall not thereafter be subject to jury reconsideration.
2. Unless the court sentences the defendant as for a class A felony as provided in subdivision two or three § 125.30, it shall, as promptly as practical, conduct a proceeding to determine whether defendant should be sentenced as for a class A felony or to death. Such proceeding shall be conducted before the court sitting with the jury that found defendant guilty unless the court for good cause discharges that jury and impanels a new jury for that purpose.
3. In such proceeding, evidence may be presented by either party on any matter relevant to sentence including, but not limited to, the nature and circumstances of the crime, defendant's background and history and any aggravating or mitigating circumstances. Any relevant evidence, not legally privileged, shall be received regardless of its admissibility under the exclusionary rules of evidence.

¹²² FORMER N.Y. PENAL LAW § 125.30 (L. 1965 c. 1030).

¹²³ FORMER N.Y. PENAL LAW § 125.35 (L. 1965 c. 1030).

4. The court shall charge the jury on any matters appropriate in the circumstances, including the law relating to the maximum and possible minimum terms of imprisonment and to the possible release on parole of a person sentenced as for a class A felony.

5. The jury shall then retire to consider the penalty to be imposed. If the jury report unanimous agreement on the imposition of the penalty of death, the court shall discharge the jury and shall impose the penalty of death. If the jury report unanimous agreement on the imposition of the class A felony sentence, the court shall discharge the jury and impose such sentence. If, after the lapse of such time as the court deems reasonable, the jury report themselves unable to agree, the court shall discharge the jury and shall, in its discretion, either impanel a new jury to determine the sentence or impose the sentence for a class A felony.

6. On an appeal by the defendant where the judgment is of death, the court of appeals, if it finds substantial error only in the sentencing proceeding, may set aside the sentence of death and remand the case to the trial court, in which event the trial court shall impose the sentence for class A felony.

VI. Former Revised Penal Law § 125.30¹²⁴ stated:

1. When a defendant has been convicted by a jury verdict of murder as defined in subdivision one or three of § 125.25,¹²⁵ the court shall, as promptly as practical, conduct a further proceeding, pursuant to § 125.35 to determine whether defendant shall be sentenced to death in lieu of being sentenced to the term of imprisonment for a class A felony prescribed in section 70, if it is satisfied that:

(a) Either:

¹²⁴ FORMER N.Y. PENAL LAW § 125.30 (L. 1967 c. 791).

¹²⁵ Due to a drafting error in 1967, which inadvertently made the death penalty applicable to depraved mind murder instead of felony murder, FORMER REVISED PENAL LAW section 125.30(1) was amended to delete the reference to PENAL LAW section 125.25(2) and to include the reference to PENAL LAW section 125.25(3). See Law of 1968, c. 949; see also Bill jacket to Law of 1968 c. 949, S4412, Memorandum by Peter McQuillan, Counsel to the Temporary Revision of the Penal Law, to John Sheehy, Counsel to Governor Rockefeller.

(i) the victim of the crime was a peace officer who was killed in the course of performing his official duties, or

(ii) at the time of the commission of the crime the defendant was confined in a state prison or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or having escaped from such confinement or custody the defendant was in immediate flight therefrom; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime; and

(c) There are no substantial mitigating circumstances which render sentence of death unwarranted.

2. If the court conducts such a further proceeding with respect to sentence, the jury verdict of murder recorded upon the minutes shall not be subject to jury reconsideration therein.

VII. Former Revised Penal Law § 125. 35¹²⁶ stated:

1. Any further proceeding authorized by § 125.30 with respect to sentence for murder shall be conducted in the manner provided in this section.

2. Such proceeding shall be conducted before the court sitting with the jury that found defendant guilty unless the court for good cause discharges that jury and impanels a new jury for that purpose.

3. In such proceeding, evidence may be presented by either party on any matter relevant to sentence including, but not limited to, the nature and circumstances of the crime, defendant's background and history and any aggravating or mitigating circumstances. Any relevant evidence, not legally privileged, shall be received regardless of its admissibility

¹²⁶ FORMER N.Y. PENAL LAW § 125.35 (L. 1967 c. 791) (repealed 1974).

under the exclusionary rules of evidence.

4. The court shall charge the jury on any matters appropriate in the circumstances, including the law relating to the maximum and possible minimum terms of imprisonment and to possible release on parole of a person sentenced as for a class A felony.

5. The jury shall retire to consider the penalty to be imposed. If the jury report unanimous agreement on the imposition of the penalty of death, the court shall discharge the jury and shall impose the penalty of death. If the jury report unanimous agreement on the imposition of sentence of imprisonment, the court shall discharge the jury and impose such sentence. If, after the lapse of such time as the court deems reasonable, the jury report themselves unable to agree, the court shall discharge the jury and shall, in its discretion, either impanel a new jury to determine the sentence or impose the sentence of imprisonment.

6. On an appeal by the defendant where the judgment is of death, the court of appeals, if it finds substantial error only in the sentencing proceeding, may set aside the sentence of death and remand the case to the trial court, in which event the trial court shall impose the sentence of imprisonment.