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Court of Appeals will hear three cases, all from Suffolk, that could shed light on future of statute

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**BODY:**

Their crimes are notorious, brutal and shocking.

The rape and stabbing murder of a teacher taking a morning jog; the dismemberment of several prostitutes; the stabbing and sodomy of a woman in a grocery store bathroom, where she had baby wipes stuffed down her throat.

These cases, in which Suffolk juries sentenced the defendants to death, will go before the state Court of Appeals in the coming months, starting with the oral arguments on the Stephen LaValle case scheduled for Monday. Of the four defendants on death row in the state, three are from Suffolk.

The cases will help hone New York's death penalty law, passed in 1995 by the State Legislature and still largely untested on many issues - including its constitutionality.

The cases of LaValle, Robert Shulman and Nicholson McCoy are expected to present an array of due process questions for the court to consider. What's certain is that the court, the state's highest, will examine them with the same intense scrutiny that characterizes how judges around the country look at capital cases.

Already, the Court of Appeals has struck down death sentences in the three capital cases it has considered, but the rulings have been on limited legal grounds that disclose little about the court's more complete view of the death penalty. And at the same time, the court upheld the first-degree murder convictions in two cases, knocking it down to second-degree murder in a third case.

For those looking for clues to how the court intends to interpret the death penalty generally, there has been little to go on. But, that's not atypical.

George Kendall, a Manhattan lawyer who specializes in capital defense, said the state is in the "infant stage" of capital litigation. "If there was a block of votes on the court that believed the statute was unconstitutional, it would have asserted itself by now," he said. "But it hasn't. The court has chosen to do what courts usually do: Look at each case and rule on the specific issues involved."

The three cases decided, like the three from Suffolk, were heinous, high-profile crimes. The court acknowledged overwhelming proof of guilt in each case but ordered the defendants to be re-sentenced to something less than death.

In the Darrel Harris case, the first capital case, a former correction officer admitted to shooting two people to death and fatally stabbing a third in a Brooklyn social club.

James Cahill of Syracuse attacked his wife with a baseball bat. She survived, but Cahill later snuck into her hospital room and poisoned her.

Angel Mateo of Monroe County, the most recent case considered, suffocated and shot a mentally ill man.

In the Mateo and Harris cases, the court set aside the death sentence because the law allowed defendants to plead guilty instead of going to trial, as a way of avoiding the risk of the death penalty. The court struck down the provision, saying it coerced defendants into forgoing a trial.

#### Aggravating factors

In the Cahill ruling, the court set aside the death sentence because it said the evidence of so-called aggravating factors - necessary to obtain a first-degree murder conviction - wasn't sufficient. They ruled that the separate crimes connected to the murder, the factors that made it first-degree murder, weren't distinct from the killing itself.

Such decisions have frustrated state lawmakers hoping to see the new statute put to work.

State Sen. Dale Volker (R-DePew), the Senate's main author of the law, said of the Mateo case: "It looked like they were straining to find some issues in that case because they don't want to rule for the death penalty. They are afraid."

Some legal scholars agree the court seems to have gone out of its way to avoid imposing the death penalty but they say it's still early to make sweeping conclusions.

"A lot of politicians are complaining the court has been stretching to overturn the death sentences, I agree," said professor Vincent Bonventri, who teaches death penalty law at Albany Law School. "I think what the court has done has been arguable, but it has been erring on the side of overturning the death penalty. . . on the other hand, it has been erring on the side of upholding the convictions in these cases."

#### 'Normal process'

Others say this process of fine-tuning the law is typical and necessary. "There is no need to panic or draw any sweeping conclusions. This is the normal process of working a new statute," said Hofstra professor Eric Freedman, a death penalty expert. "There is obviously lots of legalistic detail. It doesn't demonstrate there is some ideological agenda."

It is not uncommon for states to take years examining loopholes in a death penalty law. In New Jersey, the highest court there has not allowed any execution since the new death penalty was re-enacted in 1982, although there are 13 prisoners on death row. Last February, the Superior Court of New Jersey imposed a moratorium on executions, saying that the state's regulations on lethal injections were "arbitrary and unreasonable."

New York's prosecutors have been cautious as well in seeking the death penalty. According to the state capital defender's office, the office created by the law to defend the accused in capital cases, as of Dec. 31 last year, district attorneys had investigated 816 murders as possible capital crimes but sought the death penalty just 52 times.

#### 4 on death row

There have been 18 capital trials, 15 of which proceeded to a guilt and penalty phase. Seven defendants have been sentenced to death and four remain on death row.

Ahead for the Court of Appeals, which automatically considers all death sentences, are substantial issues. They start with jury selection.

Jurors have to be death and life "qualified," meaning they may have misgivings about the death penalty or life without parole, but won't rule out either. After the guilt phase, the judge can replace jurors who say they can't meet this standard.

The problem, say scholars, is that studies show people who say they can impose the death penalty are more likely to convict, believe law enforcement witnesses and be male whites.

"A lot of studies have shown that systematically throwing off those against the death penalty produces a more conservative jury more likely to convict," said James Acker, a law professor at the State University of New York at Albany. "When you death qualify a jury, you tend to disproportionately exclude African-Americans, Hispanics and women and that undermines the jury of your peers requirement."

### Unusual provision

Also on the radar scope is a provision that says if the jury is deadlocked between life without parole and death, a judge can impose a sentence of as little as 20 years in prison. The judge can tell jurors about this, although not all judges do.

The provision is unusual among such statutes, and critics worry the jury will feel pressured to make a choice.

"You can imagine in any jury situation, with the force of the unique personalities involved, what will come into play is an emotional game of chicken," said Kevin Doyle, who leads the state office that defends capital defendants. "Who will take the responsibility of releasing a person into society again?"

Finally, the law says certain types of murders make a defendant eligible for the death penalty, but it gives no guidelines to prosecutors on picking out a capital case. More upstate prosecutors have tended to seek the death penalty, but Suffolk's three death sentences are the most of the state's 62 counties.

"That's a head-scratcher," said Doyle. "We can either assume that human nature is worse in Suffolk or there is an undue political skewing of capital prosecutions."

### County differences

Critics say such disparity makes the law unconstitutional because defendants committing the same crime are treated differently based on where they live. Nassau District Attorney Denis Dillon has not pursued the death penalty and has said he would only under extremely limited circumstances.

"It presents conceptually a very intriguing issue about whether state law can be evenly handled on geographic basis, depending on which side of the county line you are on," said Acker. "The countervailing argument is that prosecutors should be responsible to their local constituencies."

But Sean Byrne, executive director of state's Prosecutors Training Institute, said those against the death penalty are using the discretion issue to attack capital punishment, saying, "The paradox is, in circumstances where prosecutorial discretion is most carefully exercised, issue advocates on the opposite side assert that discretion is inappropriately vested.

"The facts dictate more than anything else whether a death penalty should be pursued," said Byrne. "That is indisputably the key factor."

1) 'If there was a block of votes on the court that believed the statute was unconstitutional, it would have asserted itself by now. But it hasn't. The court has chosen to do what courts usually do: Look at each case and rule on the specific issues involved.'- George Kendall, a Manhattan lawyer

2) 'I think what the court has done has been arguable, but it has been erring on the side of overturning the death penalty . . . on the other hand, it has been erring on the side of upholding the convictions in these cases.'- Law professor Vincent Bonventri

**GRAPHIC:** 1) Newsday file photo / Daniel Goodrich - THE STATE COURT OF APPEALS in the coming months will hear the cases of NicholsonCOVER:Death Row Decisions Starting tomorrow, 3 LI cases to define state's position on capital punishment. 1) Stephen LaValle Murdered a teacher taking her morning jog. 2) Robert Shulman Killed and dismembered three prostitutes 3) Nicholson McCoy Abused, killed woman in a store bathroom

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