

CONFIDENTIAL
LEGISLATIVE BILL REVIEW FORM: 2016

Bill Number: H.536 Name of Bill: An act relating to murder and manslaughter

Agency/Dept: VSP Author of Bill Captain JP Sinclair
Review: _____

Date of Bill Review: 02/01/16 Related Bills and Key Players: H.614

Status of Bill: (check one)

Upon Introduction As passed by 1st body As passed by both bodies

Recommended Position:

Support Oppose Remain Neutral Support with modifications identified in # 8 below

Analysis of Bill

- 1. Summary of bill and issue it addresses.** *The bill proposes to establish the elements of manslaughter in statute and create an affirmative defense to murder based on provocation.*
- 2. Is there a need for this bill?** *Yes. In discussion with DPS legal counsel, this bill is introduced in conjunction with dept of state's attorneys and the attorney general's office in regards to a Vt Supreme Court decision related to the overturning of the murder conviction of Kyle Bolaski in the Vincent Tamburello homicide (Chester VT, 2008, Windsor County). In essence, the decision was related to effectively causing the prosecution/investigation to prove the lack of "provocation" in murder cases. Without the ability to prove that the victim did not cause an action of provocation towards the accused, the appropriate charge would be manslaughter. In many homicides, the case is built without the aid of an independent witness or any statements from the accused. In such cases, it would be problematic for the investigators to show an absence of provocation. This would have effected some of Vermont's most high profile murder cases such as Brooke Bennett or Michelle Gardner Quinn for example. This bill would put into statute the requirement for the defendant to prove the affirmative defense by preponderance of evidence that the defendant committed the act under the influence of sudden passion or great provocation.*

See below for 7 days article on the Supreme Court decision:

In an unusual move, the Vermont Supreme Court today overturned the murder conviction of a Windsor County man who has spent three years in prison for a shooting he has long claimed was self-defense.

In a 5-0 opinion, justices ruled that a trial judge improperly excluded key evidence that could have bolstered Kyle Bolaski's claim of self-defense in the 2008 shooting of Vincent Tamburello, who had charged at a group of Bolaski's friends with a small axe. Additionally, the court said the judge gave improper instructions to jurors that made the murder conviction more likely.

Currently serving a 25-year-to-life sentence, Bolaski may soon be freed from a Kentucky prison in which Vermont houses long-term inmates. Bolaski, 30, was free on bail before his 2011 trial. With the case effectively reset to pre-trial status, courts traditionally revert to the prior bail status.

It is unclear when a new trial would occur, though a hearing on Bolaski's bail status will likely come much sooner.

Members of Bolaski's family in Chester and Tamburello's family outside Boston did not immediately respond to messages.

Today's decision was a dramatic twist in a six-year old case that has been fraught with controversy from the start.

Bolaski fired two shots from a .30-06 rifle at Tamburello during an August 2008 fracas in broad daylight on a softball field in Chester. Tamburello, a Boston native who had recently moved to Vermont, had been feuding with a group of Bolaski's friends for days over a disagreement about stolen marijuana. The victim had no prior contact with Bolaski.

Wielding a splitting maul, Tamburello charged at a group that included Bolaski, chased Bolaski back to Bolaski's truck, and began pummeling the truck with the axe. Under highly disputed circumstances that were at the heart of the trial, Bolaski grabbed his rifle, shot Tamburello once in the leg and a second time in the back. Tamburello, 32, bled to death.

Prosecutors argued that Tamburello had been retreating from Bolaski when he was killed. Defense attorneys made the point that Bolaski rightly feared for his life and was in a state of high anxiety when he fired two quick shots.

The initial prosecutor in the case, former Windsor County State's Attorney Robert Sand, reduced the murder charge to voluntary manslaughter, saying there was insufficient evidence to prove murder. The Tamburello family was enraged and lobbied to have Sand removed from the case. Eventually, Franklin County Deputy State's Attorney John Lavoie took over — and reinstated the murder charge.

A jury took only two hours to return a guilty verdict after a two-week trial in Windsor Superior Court.

The Vermont Supreme Court's decision to reverse the conviction is based in part on information that jurors never heard during the trial. Bolaski's attorneys sought to show jurors medical evidence indicating that Tamburello was suicidal shortly

before the incident and had several drugs in his system at the time of his death.

Judge Patricia Zimmerman rejected that request, preventing jurors from hearing that evidence.

Today the justices said Zimmerman, who has since retired, was wrong.

"In this case, the victim's conduct at the ball field, and particularly in the last minutes before the killing, is relevant to the defendant's self-defense claim," justices wrote in a 23-page opinion. "If the victim's state of mind is, in turn, relevant to the victim's conduct...it meets the relevancy requirement."

The court also ruled that Zimmernan erred when she failed to explain to jurors that prosecutors were obligated to prove that Bolaski did not act out of "passion or provocation" — which Bolaski argued was exactly what happened — in order to return a guilty verdict on second-degree murder.

"We conclude that the jury instruction caused a miscarriage of justice that affected the fairness of the trial," the court wrote. "We cannot uphold the resulting verdict."

Bolaski's attorney at the trial, Kevin Griffin, has since been appointed a judge and is currently serving in Chittenden County.

See below for H.614 bill language as introduced:

BILL AS INTRODUCED H.614 2016 Page 1 of 3 VT LEG #312884 v.1 1 H.614 2 Introduced by Representative Clarkson of Woodstock 3 Referred to Committee on 4 Date: 5 Subject: Crimes; murder; manslaughter 6 Statement of purpose of bill as introduced: This bill proposes to establish the 7 elements of manslaughter in statute and create an affirmative defense to 8 murder based on provocation. 9 An act relating to murder and manslaughter 10 It is hereby enacted by the General Assembly of the State of Vermont: 11 Sec. 1. 13 V.S.A. § 2301 is amended to read: 12 § 2301. MURDER—DEGREES DEFINED 13 (a) Murder committed by means of poison, or by lying in wait, or by wilful 14 willful, deliberate, and premeditated killing, or committed in perpetrating or 15 attempting to perpetrate arson, sexual assault, aggravated sexual assault, 16 robbery, or burglary, shall be murder in the first degree. All other kinds of 17 murder shall be murder in the second degree. 18 (b) In any prosecution under this subsection, it shall be an affirmative 19 defense that the defendant committed the proscribed act or acts under the 20 influence of sudden passion or great provocation that would have caused a BILL AS INTRODUCED H.614 2016 Page 2 of 3 VT LEG #312884 v.1 1 reasonable person to lose self-control. Reasonableness shall be determined 2 from the viewpoint of a reasonable person in the defendant's situation under 3 the circumstances as the defendant believed them to be. Nothing contained in 4 this subsection shall constitute a defense to a prosecution for, or preclude a 5 conviction of, manslaughter or any other crime. The burden shall be on the 6 defendant to prove the affirmative defense by a preponderance of the evidence. 7 Sec. 2. 13 V.S.A. § 2304 is amended to read: 8 § 2304. MANSLAUGHTER—DEFINITIONS AND PENALTIES 9 (a) Voluntary manslaughter. Criminal homicide constitutes voluntary 10 manslaughter when: 11 (1) It is committed recklessly. 12 (2) A homicide which would otherwise be murder is committed under 13 the influence of sudden passion or great provocation

that would have caused a 14 reasonable person to lose self-control. Reasonableness shall be determined 15 from the viewpoint of a person in the actor's situation under the circumstances 16 as the actor believed them to be. 17 (b) Involuntary manslaughter. Criminal homicide constitutes involuntary 18 manslaughter when it is committed negligently. 19 (c) Penalty. A person who commits manslaughter shall be fined not more 20 than \$3,000.00, or imprisoned for not less than one year nor more than 21 15 years, or both. BILL AS INTRODUCED H.614 2016 Page 3 of 3 VT LEG #312884 v.1 1 Sec. 3. EFFECTIVE DATE 2 This act shall take effect on July 1, 2016.

See below for H.536 language as introduced:

BILL AS INTRODUCED H.536 2016 Page 1 of 2 VT LEG #312337 v.2 1 H.536 2 Introduced by Representative Clarkson of Woodstock 3 Referred to Committee on 4 Date: 5 Subject: Crimes; murder; manslaughter 6 Statement of purpose of bill as introduced: This bill proposes to require the 7 defendant to prove provocation for a conviction of manslaughter as a lesser 8 included offense. 9 An act relating to the burden of proof for reduction of murder charge to 10 manslaughter 11 It is hereby enacted by the General Assembly of the State of Vermont: 12 Sec. 1. 13 V.S.A. § 2310 is amended to read: 13 § 2310. CONVICTION OF LESSER OFFENSE 14 (a) Upon indictment or information for an offense under this chapter, a 15 person may be convicted of a lesser included offense, as the case may be, upon 16 the proofs. 17 (b) The time limitation created by subsection 4501(b) of this title for the 18 crime of manslaughter shall not bar a conviction under this section. BILL AS INTRODUCED H.536 2016 Page 2 of 2 VT LEG #312337 v.2 1 (c) For a conviction of a lesser included offense of manslaughter based on 2 provocation, the defendant bears the burden of establishing provocation by a 3 preponderance of the evidence. 4 Sec. 2. EFFECTIVE DATE 5 This act shall take effect on July 1, 2016

3. What are likely to be the fiscal and programmatic implications of this bill for this Department?

None

4. What might be the fiscal and programmatic implications of this bill for other departments in state government, and what is likely to be their perspective on it?

None

5. What might be the fiscal and programmatic implications of this bill for others, and what is likely to be their perspective on it? (for example, public, municipalities, organizations, business, regulated entities, etc)

None

6. Other Stakeholders:

6.1 Who else is likely to support the proposal and why?

Department of State's Attorneys/Attorney General's Office.

6.2 Who else is likely to oppose the proposal and why?

Defender General's office. Puts the onus on the defendant to prove provocation.

7. Rationale for recommendation: Justify recommendation stated above.

Common sense dictates that the defendant should be the one in conjunction with their defense attorney to present a case for a jury to consider in reduction from a 1st or 2nd degree murder to a lesser offense of manslaughter in mounting a defense. It would have a huge impact and miscarriage of justice to have the burden of proving lack of provocation on the prosecution.

8. **Specific modifications that would be needed to recommend support of this bill:** *None. This has been well thought out by the SA's/AG's.*

9. **Will this bill create a new board or commission AND/OR add or remove appointees to an existing one? If so, which one and how many?**

No

Secretary/Commissioner has reviewed this document



Date: 2/12/16