

7874--A

2011-2012 Regular Sessions

I N A S S E M B L Y

May 20, 2011

Introduced by M. of A. AUBRY, N. RIVERA -- Multi-Sponsored by -- M. of A. P. RIVERA -- read once and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the penal law and the criminal procedure law, in relation to sentencing and resentencing in domestic violence cases

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Section 60.12 of the penal law, as added by chapter 1 of
2 the laws of 1998, is amended to read as follows:
3 S 60.12 Authorized disposition; alternative [indeterminate] sentence [of
4 imprisonment]; domestic violence cases.
5 1. Notwithstanding any other provision of law, where a court is impos-
6 ing sentence UPON A PERSON pursuant to section 70.00, 70.02 [upon a
7 conviction for an offense enumerated in subdivision one of such section]
8 OR 70.06 OF THIS TITLE, other than FOR an offense defined in [article
9 one hundred thirty of this chapter] SECTION 125.26, 125.27, SUBDIVISION
10 FIVE OF SECTION 125.25, OR ARTICLE FOUR HUNDRED NINETY OF THIS CHAPTER,
11 AN ATTEMPT OR CONSPIRACY TO COMMIT ANY SUCH OFFENSE, OR WHERE SUCH
12 PERSON IS REQUIRED TO REGISTER AS A SEX OFFENDER PURSUANT TO ARTICLE
13 SIX-C OF THE CORRECTION LAW, and is authorized or required pursuant to
14 [such section] SECTIONS 70.00, 70.02 OR 70.06 to impose a [determinate]
15 sentence of imprisonment [for such offense], the court, upon a determi-
16 nation following a hearing that
17 (a) AT THE TIME OF THE INSTANT OFFENSE, the defendant was [the] A
18 victim of DOMESTIC VIOLENCE SUBJECTED TO SUBSTANTIAL physical, sexual or
19 psychological abuse [by the victim or intended victim of such offense,]
20 INFLICTED BY A MEMBER OF THE SAME FAMILY OR HOUSEHOLD AS THE DEFENDANT
21 AS SUCH TERM IS DEFINED IN SUBDIVISION ONE OF SECTION 530.11 OF THE
22 CRIMINAL PROCEDURE LAW;

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

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1 (b) such abuse was a SIGNIFICANT CONTRIBUTING factor [in causing the
2 defendant to commit such offense and] TO THE DEFENDANT'S CRIMINAL
3 BEHAVIOR;

4 (c) [the victim or intended victim of such offense was a member of the
5 same family or household as the defendant as such term is defined in
6 subdivision one of section 530.11 of the criminal procedure law, may, in
7 lieu of imposing such determinate sentence of imprisonment, impose an
8 indeterminate sentence of imprisonment in accordance with subdivisions
9 two and three of this section.] HAVING REGARD FOR THE NATURE AND CIRCUM-
10 STANCES OF THE CRIME AND THE HISTORY, CHARACTER AND CONDITION OF THE
11 DEFENDANT, THAT THE SENTENCE OF IMPRISONMENT PURSUANT TO SECTION 70.00,
12 70.02 OR 70.06 OF THIS TITLE WOULD BE UNDULY HARSH MAY INSTEAD IMPOSE A
13 SENTENCE IN ACCORDANCE WITH SUBDIVISION TWO, THREE, FOUR, FIVE, SIX OR
14 SEVEN OF THIS SECTION.

15 A COURT MAY DETERMINE THAT SUCH ABUSE CONSTITUTES A SIGNIFICANT
16 CONTRIBUTING FACTOR PURSUANT TO PARAGRAPH (B) OF THIS SUBDIVISION
17 REGARDLESS OF WHETHER THE DEFENDANT RAISED A DEFENSE PURSUANT TO ARTICLE
18 THIRTY-FIVE, ARTICLE FORTY, OR SUBDIVISION ONE OF SECTION 125.25 OF THIS
19 CHAPTER.

20 AT THE HEARING TO DETERMINE WHETHER THE DEFENDANT SHOULD BE SENTENCED
21 PURSUANT TO THIS SECTION, THE COURT SHALL CONSIDER ORAL AND WRITTEN
22 ARGUMENTS, TAKE TESTIMONY FROM WITNESSES OFFERED BY EITHER PARTY, AND
23 CONSIDER RELEVANT EVIDENCE TO ASSIST IN MAKING ITS DETERMINATION. RELI-
24 ABLE HEARSAY SHALL BE ADMISSIBLE AT SUCH HEARINGS.

25 2. [The maximum term of an indeterminate sentence imposed pursuant to
26 subdivision one of this section must be fixed by the court as follows:]
27 WHERE A COURT WOULD OTHERWISE BE REQUIRED TO IMPOSE A SENTENCE PURSUANT
28 TO SECTION 70.02 OF THIS TITLE, THE COURT MAY IMPOSE A DEFINITE SENTENCE
29 OF IMPRISONMENT OF ONE YEAR OR LESS, OR PROBATION IN ACCORDANCE WITH THE
30 PROVISIONS OF SECTION 65.00 OF THIS TITLE, OR MAY FIX A TERM OF IMPRI-
31 SONMENT AS FOLLOWS:

32 (a) For a class B felony, the term must be at least [six years] ONE
33 YEAR and must not exceed [twenty-five] FIVE years;

34 (b) For a class C felony, the term must be at least [four and one-half
35 years] ONE YEAR and must not exceed [fifteen] THREE AND ONE-HALF years;

36 (c) For a class D felony, the term must be at least [three years] ONE
37 YEAR and must not exceed [seven] TWO years; and

38 (d) For a class E felony, the term must be [at least three years] ONE
39 YEAR and must not exceed [four] ONE AND ONE-HALF years.

40 3. [The minimum period of imprisonment under an indeterminate sentence
41 imposed pursuant to subdivision one of this section must be fixed by the
42 court at one-half of the maximum term imposed and must be specified in
43 the sentence] WHERE A COURT WOULD OTHERWISE BE REQUIRED TO IMPOSE A
44 SENTENCE FOR A CLASS A FELONY OFFENSE PURSUANT TO SECTION 70.00 OF THIS
45 TITLE OR TO SUBDIVISION TWO OR THREE OF SECTION 70.71 OF THIS TITLE, THE
46 COURT MAY FIX A TERM OF IMPRISONMENT OF AT LEAST FIVE YEARS AND NOT TO
47 EXCEED FIFTEEN YEARS.

48 4. WHERE A COURT WOULD OTHERWISE BE REQUIRED TO IMPOSE A SENTENCE
49 PURSUANT TO SUBDIVISION SIX OF SECTION 70.06 OF THIS TITLE, THE COURT
50 MAY FIX A TERM OF IMPRISONMENT AS FOLLOWS:

51 (A) FOR A CLASS B FELONY, THE TERM MUST BE AT LEAST THREE YEARS AND
52 MUST NOT EXCEED EIGHT YEARS;

53 (B) FOR A CLASS C FELONY, THE TERM MUST BE AT LEAST TWO AND ONE-HALF
54 YEARS AND MUST NOT EXCEED FIVE YEARS;

55 (C) FOR A CLASS D FELONY, THE TERM MUST BE AT LEAST TWO YEARS AND MUST
56 NOT EXCEED THREE YEARS;

1 (D) FOR A CLASS E FELONY, THE TERM MUST BE AT LEAST ONE AND ONE-HALF
2 YEARS AND MUST NOT EXCEED TWO YEARS.

3 5. WHERE A COURT WOULD OTHERWISE BE REQUIRED TO IMPOSE A SENTENCE FOR
4 A CLASS B, C, D OR E FELONY OFFENSE PURSUANT TO SECTION 70.00 OF THIS
5 TITLE, THE COURT MAY IMPOSE A SENTENCE IN ACCORDANCE WITH THE PROVISIONS
6 OF SUBDIVISION TWO OF SECTION 70.70 OF THIS TITLE.

7 6. EXCEPT AS PROVIDED IN SUBDIVISION SEVEN OF THIS SECTION, WHERE A
8 COURT WOULD OTHERWISE BE REQUIRED TO IMPOSE A SENTENCE PURSUANT TO
9 SUBDIVISION THREE OF SECTION 70.06 OF THIS TITLE, THE COURT MAY IMPOSE A
10 SENTENCE IN ACCORDANCE WITH THE PROVISIONS OF SUBDIVISION THREE OF
11 SECTION 70.70 OF THIS TITLE.

12 7. WHERE A COURT WOULD OTHERWISE BE REQUIRED TO IMPOSE A SENTENCE
13 PURSUANT TO SUBDIVISION THREE OF SECTION 70.06 OF THIS TITLE, WHERE THE
14 PRIOR FELONY CONVICTION WAS FOR A FELONY OFFENSE DEFINED IN SECTION
15 70.02 OF THIS TITLE, THE COURT MAY IMPOSE A SENTENCE IN ACCORDANCE WITH
16 THE PROVISIONS OF SUBDIVISION FOUR OF SECTION 70.70 OF THIS TITLE.

17 S 2. Paragraphs (a), (b), (c), (d), (e) and (f) of subdivision 2 of
18 section 70.45 of the penal law, as amended by chapter 7 of the laws of
19 2007, are amended to read as follows:

20 (a) such period shall be one year whenever a determinate sentence of
21 imprisonment is imposed pursuant to subdivision two of section 70.70 of
22 this article OR SUBDIVISION FIVE OF SECTION 60.12 OF THIS TITLE upon a
23 conviction of a class D or class E felony offense;

24 (b) such period shall be not less than one year nor more than two
25 years whenever a determinate sentence of imprisonment is imposed pursu-
26 ant to subdivision two of section 70.70 of this article OR SUBDIVISION
27 FIVE OF SECTION 60.12 OF THIS TITLE upon a conviction of a class B or
28 class C felony offense;

29 (c) such period shall be not less than one year nor more than two
30 years whenever a determinate sentence of imprisonment is imposed pursu-
31 ant to subdivision three or four of section 70.70 of this article OR
32 SUBDIVISION SIX OR SEVEN OF SECTION 60.12 OF THIS TITLE upon conviction
33 of a class D or class E felony offense;

34 (d) such period shall be not less than one and one-half years nor more
35 than three years whenever a determinate sentence of imprisonment is
36 imposed pursuant to subdivision three or four of section 70.70 of this
37 article OR SUBDIVISION SIX OR SEVEN OF SECTION 60.12 OF THIS TITLE upon
38 conviction of a class B felony or class C felony offense;

39 (e) such period shall be not less than one and one-half years nor more
40 than three years whenever a determinate sentence of imprisonment is
41 imposed pursuant to subdivision three of section 70.02 of this article
42 OR SUBDIVISION TWO OF SECTION 60.12 OF THIS TITLE upon a conviction of a
43 class D or class E violent felony offense;

44 (f) such period shall be not less than two and one-half years nor more
45 than five years whenever a determinate sentence of imprisonment is
46 imposed pursuant to subdivision three of section 70.02 of this article
47 OR SUBDIVISION TWO OF SECTION 60.12 OF THIS TITLE upon a conviction of a
48 class B or class C violent felony offense.

49 S 3. The criminal procedure law is amended by adding a new section
50 440.47 to read as follows:

51 S 440.47 MOTION FOR RESENTENCE; DOMESTIC VIOLENCE CASES.

52 1. NOTWITHSTANDING ANY CONTRARY PROVISION OF LAW, ON THE EFFECTIVE
53 DATE OF THIS SECTION, ANY PERSON IN THE CUSTODY OF THE DEPARTMENT OF
54 CORRECTIONS AND COMMUNITY SUPERVISION SERVING A SENTENCE WITH A MINIMUM
55 OR DETERMINATE TERM OF EIGHT YEARS OR MORE FOR AN OFFENSE COMMITTED
56 PRIOR TO SUCH EFFECTIVE DATE AND ELIGIBLE FOR AN ALTERNATIVE SENTENCE

1 PURSUANT TO SECTION 60.12 OF THE PENAL LAW MAY SUBMIT AN APPLICATION TO
2 BE RESENTENCED IN ACCORDANCE WITH SECTION 60.12 OF THE PENAL LAW IN THE
3 COURT WHICH IMPOSED THE ORIGINAL SENTENCE.

4 SUCH APPLICATION FOR RESENTENCING UNDER THIS SECTION MUST INCLUDE
5 EVIDENCE CORROBORATING SUCH PERSON'S CLAIM THAT HE OR SHE WAS, AT THE
6 TIME OF THE COMMITMENT OFFENSE, A VICTIM OF DOMESTIC VIOLENCE SUBJECTED
7 TO SUBSTANTIAL PHYSICAL, SEXUAL OR PSYCHOLOGICAL ABUSE INFLICTED BY A
8 MEMBER OF HIS OR HER SAME FAMILY OR HOUSEHOLD AS SUCH TERM IS DEFINED IN
9 SUBDIVISION ONE OF SECTION 530.11 OF THIS CHAPTER.

10 SUCH EVIDENCE MAY INCLUDE, BUT SHALL NOT BE LIMITED TO, WITNESS STATE-
11 MENTS, COURT RECORDS, PRE-SENTENCE REPORTS, SOCIAL SERVICES RECORDS,
12 CITY AND STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION
13 RECORDS, HOSPITAL RECORDS, LAW ENFORCEMENT RECORDS, DOMESTIC INCIDENT
14 REPORTS, ORDERS OF PROTECTION, A SHOWING BASED IN PART ON DOCUMENTATION
15 PREPARED AT OR NEAR THE TIME OF THE COMMISSION OF THE OFFENSE OR THE
16 PROSECUTION THEREOF TENDING TO SUPPORT THE PERSON'S CLAIM, OR WHEN THERE
17 IS VERIFICATION OF CONSULTATION WITH A LICENSED MEDICAL OR MENTAL HEALTH
18 CARE PROVIDER, EMPLOYEE OF A COURT ACTING WITHIN THE SCOPE OF HIS OR HER
19 EMPLOYMENT, MEMBER OF THE CLERGY, ATTORNEY, SOCIAL WORKER, OR RAPE
20 CRISIS COUNSELOR AS DEFINED IN SECTION FORTY-FIVE HUNDRED TEN OF THE
21 CIVIL PRACTICE LAW AND RULES, OR OTHER ADVOCATE ACTING ON BEHALF OF AN
22 AGENCY THAT ASSISTS VICTIMS OF DOMESTIC VIOLENCE FOR THE PURPOSE OF
23 ASSISTING SUCH PERSON WITH DOMESTIC VIOLENCE VICTIM COUNSELING OR
24 SUPPORT.

25 2. THE APPLICATION FOR RESENTENCING SHALL BE REFERRED FOR DETERMI-
26 NATION TO THE JUDGE OR JUSTICE WHO IMPOSED THE ORIGINAL SENTENCE UPON
27 THE APPLICANT. IF, AT THE TIME OF THE APPLICATION, THE ORIGINAL SENTENC-
28 ING JUDGE OR JUSTICE IS A JUDGE OR JUSTICE OF A COURT OF COMPETENT
29 JURISDICTION, BUT SUCH COURT IS NOT THE COURT IN WHICH THE ORIGINAL
30 SENTENCE WAS IMPOSED, THEN THE APPLICATION SHALL BE RANDOMLY ASSIGNED TO
31 ANOTHER JUDGE OR JUSTICE OF THE COURT IN WHICH THE ORIGINAL SENTENCE WAS
32 IMPOSED, PROVIDED THAT THE DISTRICT ATTORNEY AND APPLICANT MAY AGREE
33 THAT THE APPLICATION BE REFERRED TO THE ORIGINAL SENTENCING JUDGE. IF
34 THE ORIGINAL SENTENCING JUDGE IS NO LONGER A JUDGE OR JUSTICE OF A COURT
35 OF COMPETENT JURISDICTION, THEN THE APPLICATION SHALL BE RANDOMLY
36 ASSIGNED TO ANOTHER JUDGE OR JUSTICE OF THE COURT.

37 3. IF, IN REVIEWING THE APPLICATION, THE COURT DETERMINES THAT THE
38 APPLICANT DOES NOT STAND CONVICTED OF AN OFFENSE ELIGIBLE FOR AN ALTER-
39 NATIVE SENTENCE PURSUANT TO SECTION 60.12 OF THE PENAL LAW OR HAS NOT
40 COMPLIED WITH THE PROVISIONS OF SUBDIVISION ONE OF THIS SECTION, THE
41 COURT SHALL ISSUE AN ORDER DISMISSING THE APPLICATION WITHOUT PREJUDICE.

42 4. (A) UPON THE COURT'S ACCEPTANCE OF THE APPLICATION, THE COURT SHALL
43 PROMPTLY NOTIFY THE APPROPRIATE DISTRICT ATTORNEY AND PROVIDE SUCH
44 DISTRICT ATTORNEY WITH A COPY OF THE PETITION.

45 (B) AFTER SUCH NOTIFICATION, THE COURT MAY CONDUCT A HEARING TO AID IN
46 MAKING ITS DETERMINATION OF WHETHER THE APPLICANT MEETS THE CRITERIA
47 ESTABLISHED IN SUBDIVISION ONE OF SECTION 60.12 OF THE PENAL LAW AND
48 SHOULD BE RESENTENCED PURSUANT TO THIS SECTION. AT SUCH HEARING THE
49 COURT SHALL DETERMINE ANY CONTROVERTED ISSUE OF FACT RELEVANT TO THESE
50 CRITERIA AND TO THE ISSUE OF SENTENCING. RELIABLE HEARSAY SHALL BE
51 ADMISSIBLE AT SUCH HEARINGS.

52 (C) THE COURT MAY CONSIDER ANY FACTS OR CIRCUMSTANCES RELEVANT TO THE
53 IMPOSITION OF A NEW SENTENCE WHICH ARE SUBMITTED BY THE APPLICANT OR THE
54 DISTRICT ATTORNEY AND MAY, IN ADDITION, CONSIDER THE INSTITUTIONAL
55 RECORD OF CONFINEMENT OF SUCH PERSON, BUT SHALL NOT ORDER A NEW PRE-SEN-
56 TENCE INVESTIGATION AND REPORT OR ENTERTAIN ANY MATTER CHALLENGING THE

1 UNDERLYING BASIS OF THE SUBJECT CONVICTION. THE COURT'S CONSIDERATION OF
2 THE INSTITUTIONAL RECORD OF CONFINEMENT OF SUCH APPLICANT SHALL INCLUDE,
3 BUT NOT BE LIMITED TO, SUCH APPLICANT'S PARTICIPATION IN OR WILLINGNESS
4 TO PARTICIPATE IN PROGRAMMING SUCH AS DOMESTIC VIOLENCE, PARENTING AND
5 SUBSTANCE ABUSE TREATMENT WHILE INCARCERATED AND SUCH APPLICANT'S DISCI-
6 PLINARY HISTORY. THE FACT THAT THE APPLICANT MAY HAVE BEEN UNABLE TO
7 PARTICIPATE IN TREATMENT OR OTHER PROGRAMMING WHILE INCARCERATED DESPITE
8 SUCH APPLICANT'S WILLINGNESS TO DO SO SHALL NOT BE CONSIDERED A NEGATIVE
9 FACTOR IN DETERMINING A MOTION PURSUANT TO THIS SECTION.

10 (D) IF THE COURT DETERMINES, AFTER REVIEW OF THE SUBMISSIONS AND THE
11 FINDINGS OF FACT MADE IN CONNECTION WITH THE APPLICATION, THAT SUCH
12 APPLICANT MEETS THE CRITERIA ESTABLISHED IN SUBDIVISION ONE OF SECTION
13 60.12 OF THE PENAL LAW AND SHOULD BE RESENTENCED PURSUANT TO THIS
14 SECTION, THE COURT SHALL INFORM SUCH APPLICANT OF THE NEW SENTENCE IT
15 WOULD IMPOSE UPON SUCH CONVICTION, AS AUTHORIZED BY SECTION 60.12 OF THE
16 PENAL LAW, AND SHALL ENTER AN ORDER TO THAT EFFECT. IF THE COURT DETER-
17 MINES THAT SUCH PERSON DOES NOT MEET THE CRITERIA ESTABLISHED IN SUBDI-
18 VISION ONE OF SECTION 60.12 OF THE PENAL LAW AND SHOULD NOT BE RESEN-
19 TENCED, THE COURT SHALL INFORM SUCH APPLICANT OF ITS DECISION AND SHALL
20 ENTER AN ORDER TO THAT EFFECT.

21 (E) THE COURT SHALL NOTIFY THE APPLICANT THAT, UNLESS HE OR SHE WITH-
22 DRAWS THE APPLICATION OR APPEALS FROM SUCH ORDER, THE COURT WILL ENTER
23 AN ORDER VACATING THE SENTENCE ORIGINALLY IMPOSED AND IMPOSING THE NEW
24 SENTENCE TO BE IMPOSED AS AUTHORIZED BY SECTION 60.12 OF THE PENAL LAW.
25 ANY ORDER ISSUED BY A COURT PURSUANT TO THIS SECTION MUST INCLUDE WRIT-
26 TEN FINDINGS OF FACT AND THE REASONS FOR SUCH ORDER.

27 5. AN APPEAL MAY BE TAKEN AS OF RIGHT IN ACCORDANCE WITH APPLICABLE
28 PROVISIONS OF THIS CHAPTER: (A) FROM AN ORDER DENYING RESENTENCING; OR
29 (B) FROM A NEW SENTENCE IMPOSED UNDER THIS PROVISION AND MAY BE BASED ON
30 THE GROUNDS THAT (I) THE TERM OF THE NEW SENTENCE IS HARSH OR EXCESSIVE;
31 OR (II) THAT THE TERM OF THE NEW SENTENCE IS UNAUTHORIZED AS A MATTER OF
32 LAW. UPON REMAND TO THE SENTENCING COURT FOLLOWING SUCH APPEAL THE
33 APPLICANT SHALL BE GIVEN AN OPPORTUNITY TO WITHDRAW AN APPLICATION FOR
34 RESENTENCING BEFORE ANY RESENTENCE IS IMPOSED.

35 6. SUBDIVISION ONE OF SECTION SEVEN HUNDRED SEVENTEEN AND SUBDIVISION
36 FOUR OF SECTION SEVEN HUNDRED TWENTY-TWO OF THE COUNTY LAW AND THE
37 RELATED PROVISIONS OF ARTICLE EIGHTEEN-A OF SUCH LAW SHALL APPLY TO THE
38 PREPARATION OF AND PROCEEDINGS ON APPLICATIONS PURSUANT TO THIS SECTION,
39 INCLUDING ANY APPEALS.

40 7. IN CALCULATING THE NEW TERM TO BE SERVED BY THE APPLICANT PURSUANT
41 TO SECTION 60.12 OF THE PENAL LAW, SUCH APPLICANT SHALL BE CREDITED FOR
42 ANY JAIL TIME CREDITED TOWARDS THE SUBJECT CONVICTION AS WELL AS ANY
43 PERIOD OF INCARCERATION CREDITED TOWARD THE SENTENCE ORIGINALLY IMPOSED.

44 S 4. Subdivision 1 of section 450.90 of the criminal procedure law, as
45 amended by section 10 of part AAA of chapter 56 of the laws of 2009, is
46 amended to read as follows:

47 1. Provided that a certificate granting leave to appeal is issued
48 pursuant to section 460.20, an appeal may, except as provided in subdi-
49 vision two, be taken to the court of appeals by either the defendant or
50 the people from any adverse or partially adverse order of an intermedi-
51 ate appellate court entered upon an appeal taken to such intermediate
52 appellate court pursuant to section 450.10, 450.15, or 450.20, or from
53 an order granting or denying a motion to set aside an order of an inter-
54 mediate appellate court on the ground of ineffective assistance or
55 wrongful deprivation of appellate counsel, or by either the defendant or
56 the people from any adverse or partially adverse order of an intermedi-

1 ate appellate court entered upon an appeal taken to such intermediate
2 appellate court from an order entered pursuant to section 440.46 OR
3 SECTION 440.47 of this chapter. An order of an intermediate appellate
4 court is adverse to the party who was the appellant in such court when
5 it affirms the judgment, sentence or order appealed from, and is adverse
6 to the party who was the respondent in such court when it reverses the
7 judgment, sentence or order appealed from. An appellate court order
8 which modifies a judgment or order appealed from is partially adverse to
9 each party.

10 S 5. This act shall take effect on the one hundred twentieth day after
11 it shall have become a law.