

7874

2011-2012 Regular Sessions

I N A S S E M B L Y

May 20, 2011

Introduced by M. of A. AUBRY -- Multi-Sponsored by -- M. of A. P. RIVERA
-- read once and referred to the Committee on Codes

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 ASSEM-
BLY, 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;
23 (b) such abuse was a SIGNIFICANT CONTRIBUTING factor [in causing the
24 defendant to commit such offense and] TO THE DEFENDANT'S CRIMINAL
25 BEHAVIOR;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

47 S 3. The criminal procedure law is amended by adding a new section
48 440.47 to read as follows:

49 S 440.47 MOTION FOR RESENTENCE; DOMESTIC VIOLENCE CASES.

50 1. NOTWITHSTANDING ANY CONTRARY PROVISION OF LAW, ON THE EFFECTIVE
51 DATE OF THIS SECTION, ANY PERSON IN THE CUSTODY OF THE DEPARTMENT OF
52 CORRECTIONS AND COMMUNITY SUPERVISION SERVING A SENTENCE WITH A MINIMUM
53 OR DETERMINATE TERM OF EIGHT YEARS OR MORE FOR AN OFFENSE COMMITTED
54 PRIOR TO SUCH EFFECTIVE DATE AND ELIGIBLE FOR AN ALTERNATIVE SENTENCE
55 PURSUANT TO SECTION 60.12 OF THE PENAL LAW MAY SUBMIT AN APPLICATION TO

1 BE RESENTENCED IN ACCORDANCE WITH SECTION 60.12 OF THE PENAL LAW IN THE
2 COURT WHICH IMPOSED THE ORIGINAL SENTENCE.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 S 5. This act shall take effect on the first of November next succeed-
10 ing the date upon which it shall have become a law.