S T A T E O F N E W Y O R K

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2011-2012 Regular Sessions

I N S E N A T E

May 20, 2011

Introduced by Sen. HASSELL-THOMPSON -- read twice and ordered printed, and when printed to be committed 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 ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 60.12 of the penal law, as added by chapter 1 of the laws of 1998, is amended to read as follows:

S 60.12 Authorized disposition; alternative [indeterminate] sentence [of imprisonment]; domestic violence cases.

1. Notwithstanding any other provision of law, where a court is imposing sentence UPON A PERSON pursuant to section 70.00, 70.02 [upon a conviction for an offense enumerated in subdivision one of such section] OR 70.06 OF THIS TITLE, other than FOR an offense defined in [article one hundred thirty of this chapter] SECTION 125.26, 125.27, SUBDIVISION FIVE OF SECTION 125.25, OR ARTICLE FOUR HUNDRED NINETY OF THIS CHAPTER, AN ATTEMPT OR CONSPIRACY TO COMMIT ANY SUCH OFFENSE, OR WHERE SUCH PERSON IS REQUIRED TO REGISTER AS A SEX OFFENDER PURSUANT TO ARTICLE SIX-C OF THE CORRECTION LAW, and is authorized or required pursuant to [such section] SECTIONS 70.00, 70.02 OR 70.06 to impose a [determinate] sentence of imprisonment [for such offense], the court, upon a determination following a hearing that

(a) AT THE TIME OF THE INSTANT OFFENSE, the defendant was [the] A victim of DOMESTIC VIOLENCE SUBJECTED TO SUBSTANTIAL physical, sexual or psychological abuse [by the victim or intended victim of such offense,] INFLICTED BY A MEMBER OF THE SAME FAMILY OR HOUSEHOLD AS THE DEFENDANT AS SUCH TERM IS DEFINED IN SUBDIVISION ONE OF SECTION 530.11 OF THE CRIMINAL PROCEDURE LAW;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

S 440.47 MOTION FOR RESENTENCE; DOMESTIC VIOLENCE CASES.

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

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

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

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

2. THE APPLICATION FOR RESENTENCING SHALL BE REFERRED FOR DETERMINATION TO THE JUDGE OR JUSTICE WHO IMPOSED THE ORIGINAL SENTENCE UPON THE APPLICANT. IF, AT THE TIME OF THE APPLICATION, THE ORIGINAL SENTENCING JUDGE OR JUSTICE IS A JUDGE OR JUSTICE OF A COURT OF COMPETENT JURISDICTION, BUT SUCH COURT IS NOT THE COURT IN WHICH THE ORIGINAL SENTENCE WAS IMPOSED, THEN THE APPLICATION SHALL BE RANDOMLY ASSIGNED TO ANOTHER JUDGE OR JUSTICE OF THE COURT IN WHICH THE ORIGINAL SENTENCE WAS IMPOSED, PROVIDED THAT THE DISTRICT ATTORNEY AND APPLICANT MAY AGREE THAT THE APPLICATION BE REFERRED TO THE ORIGINAL SENTENCING JUDGE. IF THE ORIGINAL SENTENCING JUDGE IS NO LONGER A JUDGE OR JUSTICE OF A COURT OF COMPETENT JURISDICTION, THEN THE APPLICATION SHALL BE RANDOMLY ASSIGNED TO ANOTHER JUDGE OR JUSTICE OF THE COURT.

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

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

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

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

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

(D) IF THE COURT DETERMINES, AFTER REVIEW OF THE SUBMISSIONS AND THE FINDINGS OF FACT MADE IN CONNECTION WITH THE APPLICATION, THAT SUCH APPLICANT MEETS THE CRITERIA ESTABLISHED IN SUBDIVISION ONE OF SECTION 60.12 OF THE PENAL LAW AND SHOULD BE RESENTENCED PURSUANT TO THIS SECTION, THE COURT SHALL INFORM SUCH APPLICANT OF THE NEW SENTENCE IT WOULD IMPOSE UPON SUCH CONVICTION, AS AUTHORIZED BY SECTION 60.12 OF THE PENAL LAW, AND SHALL ENTER AN ORDER TO THAT EFFECT. IF THE COURT DETERMINES THAT SUCH PERSON DOES NOT MEET THE CRITERIA ESTABLISHED IN SUBDIVISION ONE OF SECTION 60.12 OF THE PENAL LAW AND SHOULD NOT BE RESENTENCED, THE COURT SHALL INFORM SUCH APPLICANT OF ITS DECISION AND SHALL ENTER AN ORDER TO THAT EFFECT.

(E) THE COURT SHALL NOTIFY THE APPLICANT THAT, UNLESS HE OR SHE WITHDRAWS THE APPLICATION OR APPEALS FROM SUCH ORDER, THE COURT WILL ENTER AN ORDER VACATING THE SENTENCE ORIGINALLY IMPOSED AND IMPOSING THE NEW SENTENCE TO BE IMPOSED AS AUTHORIZED BY SECTION 60.12 OF THE PENAL LAW. ANY ORDER ISSUED BY A COURT PURSUANT TO THIS SECTION MUST INCLUDE WRITTEN FINDINGS OF FACT AND THE REASONS FOR SUCH ORDER.

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

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

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

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

1. Provided that a certificate granting leave to appeal is issued pursuant to section 460.20 OF THIS TITLE, an appeal may, except as provided in subdivision two, be taken to the court of appeals by either the defendant or the people from any adverse or partially adverse order of an intermediate appellate court entered upon an appeal taken to such intermediate appellate court pursuant to section 450.10, 450.15, or 450.20 OF THIS ARTICLE, or from an order granting or denying a motion to set aside an order of an intermediate appellate court on the ground of ineffective assistance or wrongful deprivation of appellate counsel, or by either the defendant or the people from any adverse or partially adverse order of an intermediate appellate court entered upon an appeal

taken to such intermediate appellate court from an order entered pursuant to section 440.46 OR SECTION 440.47 of this [chapter] TITLE. An order of an intermediate appellate court is adverse to the party who was the appellant in such court when it affirms the judgment, sentence or order appealed from, and is adverse to the party who was the respondent in such court when it reverses the judgment, sentence or order appealed from. An appellate court order which modifies a judgment or order appealed from is partially adverse to each party.

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