

4314--C

2013-2014 Regular Sessions

I N A S S E M B L Y

February 4, 2013

Introduced by M. of A. AUBRY, CLARK, PERRY, LIFTON, PEOPLES-STOKES, TITONE, PAULIN, BRONSON, ZEBROWSKI, O'DONNELL, PRETLOW, JAFFEE, CRESPO, SCHIMEL, MAGNARELLI, MOSLEY, ROZIC, BARRETT, ROBINSON, GOTTFRIED, JACOBS, COOK -- Multi-Sponsored by -- M. of A. ARROYO, BRENNAN, FAHY, GLICK, GOODELL, HOOPER, LENTOL, MARKEY, MILLMAN, ORTIZ, RAIA, RODRIGUEZ, ROSENTHAL, SCARBOROUGH, TITUS, WALTER, WEISENBERG, WRIGHT -- read once and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- again reported from said committee with amendments, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Codes in accordance with Assembly Rule 3, sec. 2 -- 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  
8 section], 70.06 OR SUBDIVISION TWO OR THREE OF SECTION 70.71 OF THIS  
9 TITLE, other than FOR an offense defined in [article one hundred thirty  
10 of this chapter] SECTION 125.26, 125.27, SUBDIVISION FIVE OF SECTION  
11 125.25, OR ARTICLE 490 OF THIS CHAPTER, OR FOR AN OFFENSE WHICH WOULD  
12 REQUIRE SUCH PERSON TO REGISTER AS A SEX OFFENDER PURSUANT TO ARTICLE  
13 SIX-C OF THE CORRECTION LAW, AN ATTEMPT OR CONSPIRACY TO COMMIT ANY SUCH  
14 OFFENSE, and is authorized or required pursuant to [such section]

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

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1 SECTIONS 70.00, 70.02, 70.06 OR SUBDIVISION TWO OR THREE OF SECTION  
2 70.71 OF THIS TITLE to impose a [determinate] sentence of imprisonment  
3 [for such offense], the court, upon a determination following a hearing  
4 that (a) AT THE TIME OF THE INSTANT OFFENSE, the defendant was [the] A  
5 victim of DOMESTIC VIOLENCE SUBJECTED TO SUBSTANTIAL physical, sexual or  
6 psychological abuse [by the victim or intended victim of such offense,]  
7 INFLICTED BY A MEMBER OF THE SAME FAMILY OR HOUSEHOLD AS THE DEFENDANT  
8 AS SUCH TERM IS DEFINED IN SUBDIVISION ONE OF SECTION 530.11 OF THE  
9 CRIMINAL PROCEDURE LAW; (b) such abuse was a SIGNIFICANT CONTRIBUTING  
10 factor [in causing the defendant to commit such offense and] TO THE  
11 DEFENDANT'S CRIMINAL BEHAVIOR; (c) [the victim or intended victim of  
12 such offense was a member of the same family or household as the defend-  
13 ant as such term is defined in subdivision one of section 530.11 of the  
14 criminal procedure law, may, in lieu of imposing such determinate  
15 sentence of imprisonment, impose an indeterminate sentence of imprison-  
16 ment in accordance with subdivisions two and three of this section.]  
17 HAVING REGARD FOR THE NATURE AND CIRCUMSTANCES OF THE CRIME AND THE  
18 HISTORY, CHARACTER AND CONDITION OF THE DEFENDANT, THAT A SENTENCE OF  
19 IMPRISONMENT PURSUANT TO SECTION 70.00, 70.02 OR 70.06 OF THIS TITLE  
20 WOULD BE UNDULY HARSH MAY INSTEAD IMPOSE A SENTENCE IN ACCORDANCE WITH  
21 SUBDIVISION TWO, THREE, FOUR, FIVE, SIX OR SEVEN OF THIS SECTION, AS  
22 APPLICABLE.

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

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

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

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

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

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

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

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

55 4. WHERE A COURT WOULD OTHERWISE BE REQUIRED TO IMPOSE A SENTENCE FOR  
56 A CLASS A FELONY OFFENSE PURSUANT TO SUBPARAGRAPH (I) OF PARAGRAPH (B)

1 OF SUBDIVISION TWO OF SECTION 70.71 OF THIS TITLE, THE COURT MAY FIX A  
2 DETERMINATE TERM OF IMPRISONMENT OF AT LEAST FIVE YEARS AND NOT TO  
3 EXCEED EIGHT YEARS.

4 5. WHERE A COURT WOULD OTHERWISE BE REQUIRED TO IMPOSE A SENTENCE FOR  
5 A CLASS A FELONY OFFENSE PURSUANT TO SUBPARAGRAPH (I) OF PARAGRAPH (B)  
6 OF SUBDIVISION THREE OF SECTION 70.71 OF THIS TITLE, THE COURT MAY FIX A  
7 DETERMINATE TERM OF IMPRISONMENT OF AT LEAST FIVE YEARS AND NOT TO  
8 EXCEED TWELVE YEARS.

9 6. WHERE A COURT WOULD OTHERWISE BE REQUIRED TO IMPOSE A SENTENCE FOR  
10 A CLASS A FELONY OFFENSE PURSUANT TO SUBPARAGRAPH (II) OF PARAGRAPH (B)  
11 OF SUBDIVISION TWO OF SECTION 70.71 OF THIS TITLE, THE COURT MAY FIX A  
12 DETERMINATE TERM OF IMPRISONMENT OF AT LEAST ONE YEAR AND NOT TO EXCEED  
13 THREE YEARS.

14 7. WHERE A COURT WOULD OTHERWISE BE REQUIRED TO IMPOSE A SENTENCE FOR  
15 A CLASS A FELONY OFFENSE PURSUANT TO SUBPARAGRAPH (II) OF PARAGRAPH (B)  
16 OF SUBDIVISION THREE OF SECTION 70.71 OF THIS TITLE, THE COURT MAY FIX A  
17 DETERMINATE TERM OF IMPRISONMENT OF AT LEAST THREE YEARS AND NOT TO  
18 EXCEED SIX YEARS.

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

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

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

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

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

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

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

39 11. WHERE A COURT WOULD OTHERWISE BE REQUIRED TO IMPOSE A SENTENCE  
40 PURSUANT TO SUBDIVISION THREE OF SECTION 70.06 OF THIS TITLE, WHERE THE  
41 PRIOR FELONY CONVICTION WAS FOR A FELONY OFFENSE DEFINED IN SECTION  
42 70.02 OF THIS TITLE, THE COURT MAY IMPOSE A SENTENCE IN ACCORDANCE WITH  
43 THE PROVISIONS OF SUBDIVISION FOUR OF SECTION 70.70 OF THIS TITLE.

44 S 2. Paragraphs (a), (b), (c), (d), (e) and (f) of subdivision 2 of  
45 section 70.45 of the penal law, as amended by chapter 7 of the laws of  
46 2007, are amended to read as follows:

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

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

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

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

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

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

21 S 3. The criminal procedure law is amended by adding a new section  
22 440.47 to read as follows:

23 S 440.47 MOTION FOR RESENTENCE; DOMESTIC VIOLENCE CASES.

24 1. (A) NOTWITHSTANDING ANY CONTRARY PROVISION OF LAW, ANY PERSON  
25 CONFINED IN AN INSTITUTION OPERATED BY THE DEPARTMENT OF CORRECTION AND  
26 COMMUNITY SUPERVISION SERVING A SENTENCE WITH A MINIMUM OR DETERMINATE  
27 TERM OF EIGHT YEARS OR MORE FOR AN OFFENSE COMMITTED PRIOR TO THE EFFEC-  
28 TIVE DATE OF THIS SECTION AND ELIGIBLE FOR AN ALTERNATIVE SENTENCE  
29 PURSUANT TO SECTION 60.12 OF THE PENAL LAW MAY, ON OR AFTER SUCH EFFEC-  
30 TIVE DATE, SUBMIT TO THE JUDGE OR JUSTICE WHO IMPOSED THE ORIGINAL  
31 SENTENCE UPON SUCH PERSON A REQUEST TO APPLY FOR RESENTENCING IN ACCORD-  
32 ANCE WITH SECTION 60.12 OF THE PENAL LAW. SUCH PERSON MUST INCLUDE IN  
33 HIS OR HER REQUEST DOCUMENTATION PROVING THAT SHE OR HE IS CONFINED IN  
34 AN INSTITUTION OPERATED BY THE DEPARTMENT OF CORRECTIONS AND COMMUNITY  
35 SUPERVISION SERVING A SENTENCE WITH A MINIMUM OR DETERMINATE TERM OF  
36 EIGHT YEARS OR MORE FOR AN OFFENSE COMMITTED PRIOR TO THE EFFECTIVE DATE  
37 OF THIS SECTION AND THAT SHE OR HE IS SERVING SUCH SENTENCE FOR ANY  
38 OFFENSE ELIGIBLE FOR AN ALTERNATIVE SENTENCE UNDER SECTION 60.12 OF THE  
39 PENAL LAW.

40 (B) IF, AT THE TIME OF SUCH PERSON'S REQUEST TO APPLY FOR RESENTENCING  
41 PURSUANT TO THIS SECTION, THE ORIGINAL SENTENCING JUDGE OR JUSTICE IS A  
42 JUDGE OR JUSTICE OF A COURT OF COMPETENT JURISDICTION, BUT SUCH COURT IS  
43 NOT THE COURT IN WHICH THE ORIGINAL SENTENCE WAS IMPOSED, THEN THE  
44 REQUEST SHALL BE RANDOMLY ASSIGNED TO ANOTHER JUDGE OR JUSTICE OF THE  
45 COURT IN WHICH THE ORIGINAL SENTENCE WAS IMPOSED. IF THE ORIGINAL  
46 SENTENCING JUDGE IS NO LONGER A JUDGE OR JUSTICE OF A COURT OF COMPETENT  
47 JURISDICTION, THEN THE REQUEST SHALL BE RANDOMLY ASSIGNED TO ANOTHER  
48 JUDGE OR JUSTICE OF THE COURT.

49 (C) IF THE COURT FINDS THAT SUCH PERSON HAS MET THE REQUIREMENTS TO  
50 APPLY FOR RESENTENCING IN PARAGRAPH A OF THIS SUBDIVISION, THE COURT  
51 SHALL NOTIFY SUCH PERSON THAT HE OR SHE MAY SUBMIT AN APPLICATION FOR  
52 RESENTENCING. UPON SUCH NOTIFICATION, THE PERSON MAY REQUEST THAT THE  
53 COURT ASSIGN HIM OR HER AN ATTORNEY FOR THE PREPARATION OF AND  
54 PROCEEDINGS ON THE APPLICATION FOR RESENTENCING PURSUANT TO THIS  
55 SECTION. THE ATTORNEY SHALL BE ASSIGNED IN ACCORDANCE WITH THE  
56 PROVISIONS OF SUBDIVISION ONE OF SECTION SEVEN HUNDRED SEVENTEEN AND

1 SUBDIVISION FOUR OF SECTION SEVEN HUNDRED TWENTY-TWO OF THE COUNTY LAW  
2 AND THE RELATED PROVISIONS OF ARTICLE EIGHTEEN-A OF SUCH LAW.

3 (D) IF THE COURT FINDS THAT SUCH PERSON HAS NOT MET THE REQUIREMENTS  
4 TO APPLY FOR RESENTENCING IN PARAGRAPH A OF SUBDIVISION ONE OF THIS  
5 SECTION, THE COURT SHALL NOTIFY SUCH PERSON AND DISMISS HIS OR HER  
6 REQUEST WITHOUT PREJUDICE.

7 2. (A) UPON THE COURT'S RECEIPT OF AN APPLICATION FOR RESENTENCING,  
8 THE COURT SHALL PROMPTLY NOTIFY THE APPROPRIATE DISTRICT ATTORNEY AND  
9 PROVIDE SUCH DISTRICT ATTORNEY WITH A COPY OF THE APPLICATION.

10 (B) IF THE JUDGE OR JUSTICE THAT RECEIVED THE APPLICATION IS NOT THE  
11 ORIGINAL SENTENCING JUDGE OR JUSTICE, THE APPLICATION MAY BE REFERRED TO  
12 THE ORIGINAL SENTENCING JUDGE OR JUSTICE PROVIDED THAT HE OR SHE IS A  
13 JUDGE OR JUSTICE OF A COURT OF COMPETENT JURISDICTION AND THAT THE  
14 APPLICANT AND THE DISTRICT ATTORNEY AGREE THAT THE APPLICATION SHOULD BE  
15 REFERRED.

16 (C) AN APPLICATION FOR RESENTENCING PURSUANT TO THIS SECTION MUST  
17 INCLUDE AT LEAST TWO PIECES OF EVIDENCE CORROBORATING THE APPLICANT'S  
18 CLAIM THAT HE OR SHE WAS, AT THE TIME OF THE OFFENSE, A VICTIM OF DOMES-  
19 TIC VIOLENCE SUBJECTED TO SUBSTANTIAL PHYSICAL, SEXUAL OR PSYCHOLOGICAL  
20 ABUSE INFLICTED BY A MEMBER OF THE SAME FAMILY OR HOUSEHOLD AS THE  
21 APPLICANT AS SUCH TERM IS DEFINED IN SUBDIVISION ONE OF SECTION 530.11  
22 OF THIS CHAPTER.

23 AT LEAST ONE PIECE OF EVIDENCE MUST BE EITHER A COURT RECORD, PRE-SEN-  
24 TENCE REPORT, SOCIAL SERVICES RECORD, HOSPITAL RECORD, SWORN STATEMENT  
25 FROM A WITNESS TO THE DOMESTIC VIOLENCE, LAW ENFORCEMENT RECORD, DOMES-  
26 TIC INCIDENT REPORT, OR ORDER OF PROTECTION. OTHER EVIDENCE MAY  
27 INCLUDE, BUT SHALL NOT BE LIMITED TO, LOCAL AND STATE DEPARTMENT OF  
28 CORRECTIONS RECORDS, A SHOWING BASED IN PART ON DOCUMENTATION PREPARED  
29 AT OR NEAR THE TIME OF THE COMMISSION OF THE OFFENSE OR THE PROSECUTION  
30 THEREOF TENDING TO SUPPORT THE PERSON'S CLAIM, OR WHEN THERE IS VERIFI-  
31 CATION OF CONSULTATION WITH A LICENSED MEDICAL OR MENTAL HEALTH CARE  
32 PROVIDER, EMPLOYEE OF A COURT ACTING WITHIN THE SCOPE OF HIS OR HER  
33 EMPLOYMENT, MEMBER OF THE CLERGY, ATTORNEY, SOCIAL WORKER, OR RAPE  
34 CRISIS COUNSELOR AS DEFINED IN SECTION FORTY-FIVE HUNDRED TEN OF THE  
35 CIVIL PRACTICE LAW AND RULES, OR OTHER ADVOCATE ACTING ON BEHALF OF AN  
36 AGENCY THAT ASSISTS VICTIMS OF DOMESTIC VIOLENCE FOR THE PURPOSE OF  
37 ASSISTING SUCH PERSON WITH DOMESTIC VIOLENCE VICTIM COUNSELING OR  
38 SUPPORT.

39 (D) IF THE COURT FINDS THAT THE APPLICANT HAS NOT COMPLIED WITH THE  
40 PROVISIONS OF PARAGRAPH (C) OF THIS SUBDIVISION, THE COURT SHALL DISMISS  
41 THE APPLICATION WITHOUT PREJUDICE.

42 (E) IF THE COURT FINDS THAT THE APPLICANT HAS COMPLIED WITH THE  
43 PROVISIONS OF PARAGRAPH (C) OF THIS SUBDIVISION, THE COURT SHALL CONDUCT  
44 A HEARING TO AID IN MAKING ITS DETERMINATION OF WHETHER THE APPLICANT  
45 SHOULD BE RESENTENCED IN ACCORDANCE WITH SECTION 60.12 OF THE PENAL LAW.  
46 AT SUCH HEARING THE COURT SHALL DETERMINE ANY CONTROVERTED ISSUE OF FACT  
47 RELEVANT TO THE ISSUE OF SENTENCING. RELIABLE HEARSAY SHALL BE ADMISSI-  
48 BLE AT SUCH HEARINGS.

49 THE COURT MAY CONSIDER ANY FACT OR CIRCUMSTANCES RELEVANT TO THE IMPO-  
50 SITION OF A NEW SENTENCE WHICH ARE SUBMITTED BY THE APPLICANT OR THE  
51 DISTRICT ATTORNEY AND MAY, IN ADDITION, CONSIDER THE INSTITUTIONAL  
52 RECORD OF CONFINEMENT OF SUCH PERSON, BUT SHALL NOT ORDER A NEW PRE-SEN-  
53 TENCE INVESTIGATION AND REPORT OR ENTERTAIN ANY MATTER CHALLENGING THE  
54 UNDERLYING BASIS OF THE SUBJECT CONVICTION. THE COURT'S CONSIDERATION OF  
55 THE INSTITUTIONAL RECORD OF CONFINEMENT OF SUCH APPLICANT SHALL INCLUDE,  
56 BUT NOT BE LIMITED TO, SUCH APPLICANT'S PARTICIPATION IN OR WILLINGNESS

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

7 (F) IF THE COURT DETERMINES THAT THE APPLICANT SHOULD NOT BE RESEN-  
8 TENCED IN ACCORDANCE WITH SECTION 60.12 OF THE PENAL LAW, THE COURT  
9 SHALL INFORM SUCH APPLICANT OF ITS DECISION AND SHALL ENTER AN ORDER TO  
10 THAT EFFECT. ANY ORDER ISSUED BY A COURT PURSUANT TO THIS SECTION MUST  
11 INCLUDE WRITTEN FINDINGS OF FACT AND THE REASONS FOR SUCH ORDER.

12 (G) IF THE COURT DETERMINES THAT THE APPLICANT SHOULD BE RESENTENCED  
13 IN ACCORDANCE WITH SECTION 60.12 OF THE PENAL LAW, THE COURT SHALL NOTI-  
14 FY THE APPLICANT THAT, UNLESS HE OR SHE WITHDRAWS THE APPLICATION OR  
15 APPEALS FROM SUCH ORDER, THE COURT WILL ENTER AN ORDER VACATING THE  
16 SENTENCE ORIGINALLY IMPOSED AND IMPOSING THE NEW SENTENCE TO BE IMPOSED  
17 AS AUTHORIZED BY SECTION 60.12 OF THE PENAL LAW. ANY ORDER ISSUED BY A  
18 COURT PURSUANT TO THIS SECTION MUST INCLUDE WRITTEN FINDINGS OF FACT AND  
19 THE REASONS FOR SUCH ORDER.

20 3. AN APPEAL MAY BE TAKEN AS OF RIGHT IN ACCORDANCE WITH APPLICABLE  
21 PROVISIONS OF THIS CHAPTER: (A) FROM AN ORDER DENYING RESENTENCING; OR  
22 (B) FROM A NEW SENTENCE IMPOSED UNDER THIS PROVISION AND MAY BE BASED ON  
23 THE GROUNDS THAT (I) THE TERM OF THE NEW SENTENCE IS HARSH OR EXCESSIVE;  
24 OR (II) THAT THE TERM OF THE NEW SENTENCE IS UNAUTHORIZED AS A MATTER OF  
25 LAW. AN APPEAL IN ACCORDANCE WITH THE APPLICABLE PROVISIONS OF THIS  
26 CHAPTER MAY ALSO BE TAKEN AS OF RIGHT BY THE APPLICANT FROM AN ORDER  
27 SPECIFYING AND INFORMING SUCH APPLICANT OF THE TERM OF THE DETERMINATE  
28 SENTENCE THE COURT WOULD IMPOSE UPON RESENTENCING ON THE GROUND THAT THE  
29 TERM OF THE PROPOSED SENTENCE IS HARSH OR EXCESSIVE; UPON REMAND TO THE  
30 SENTENCING COURT FOLLOWING SUCH APPEAL THE APPLICANT SHALL BE GIVEN AN  
31 OPPORTUNITY TO WITHDRAW AN APPLICATION FOR RESENTENCING BEFORE ANY  
32 RESENTENCE IS IMPOSED. THE APPLICANT MAY REQUEST THAT THE COURT ASSIGN  
33 HIM OR HER AN ATTORNEY FOR THE PREPARATION OF AND PROCEEDINGS ON ANY  
34 APPEALS REGARDING HIS OR HER APPLICATION FOR RESENTENCING PURSUANT TO  
35 THIS SECTION. THE ATTORNEY SHALL BE ASSIGNED IN ACCORDANCE WITH THE  
36 PROVISIONS OF SUBDIVISION ONE OF SECTION SEVEN HUNDRED SEVENTEEN AND  
37 SUBDIVISION FOUR OF SECTION SEVEN HUNDRED TWENTY-TWO OF THE COUNTY LAW  
38 AND THE RELATED PROVISIONS OF ARTICLE EIGHTEEN-A OF SUCH LAW.

39 4. 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. Paragraph (a) of subdivision 2 of section 390.50 of the criminal  
10 procedure law, as amended by section 5 of part 00 of chapter 56 of the  
11 laws of 2010, is amended to read as follows:

12 (a) Not less than one court day prior to sentencing, unless such time  
13 requirement is waived by the parties, the pre-sentence report or memo-  
14 randum shall be made available by the court for examination and for  
15 copying by the defendant's attorney, the defendant himself, if he has no  
16 attorney, and the prosecutor. In its discretion, the court may except  
17 from disclosure a part or parts of the report or memoranda which are not  
18 relevant to a proper sentence, or a diagnostic opinion which might seri-  
19 ously disrupt a program of rehabilitation, or sources of information  
20 which have been obtained on a promise of confidentiality, or any other  
21 portion thereof, disclosure of which would not be in the interest of  
22 justice. In all cases where a part or parts of the report or memoranda  
23 are not disclosed, the court shall state for the record that a part or  
24 parts of the report or memoranda have been excepted and the reasons for  
25 its action. The action of the court excepting information from disclo-  
26 sure shall be subject to appellate review. The pre-sentence report shall  
27 be made available by the court for examination and copying in connection  
28 with any appeal in the case, including an appeal under this subdivision.  
29 Upon written request, the court shall make a copy of the presentence  
30 report, other than a part or parts of the report redacted by the court  
31 pursuant to this paragraph, available to the defendant for use before  
32 the parole board for release consideration or an appeal of a parole  
33 board determination OR AN APPLICATION FOR RESENTENCING PURSUANT TO  
34 SECTION 440.46 OR 440.47 OF THIS CHAPTER. In his or her written request  
35 to the court the defendant shall affirm that he or she anticipates an  
36 appearance before the parole board or intends to file an administrative  
37 appeal of a parole board determination OR MEETS THE ELIGIBILITY CRITERIA  
38 FOR AND INTENDS TO FILE A MOTION FOR RESENTENCING PURSUANT TO 440.46 OF  
39 THIS CHAPTER OR HAS RECEIVED NOTIFICATION FROM THE COURT WHICH RECEIVED  
40 HIS OR HER REQUEST TO APPLY FOR RESENTENCING PURSUANT TO SECTION 440.47  
41 OF THIS CHAPTER CONFIRMING THAT HE OR SHE IS ELIGIBLE TO SUBMIT AN  
42 APPLICATION FOR RESENTENCING PURSUANT TO SECTION 440.47 OF THIS CHAPTER.  
43 The court shall respond to the defendant's written request within twenty  
44 days from receipt of the defendant's written request.

45 S 6. This act shall take effect immediately; provided, however, that  
46 sections one and two of this act shall apply to offenses committed on,  
47 after and prior to such effective date where the sentence for such  
48 offense has not yet been imposed; provided, further that sections three,  
49 four and five of this act shall take effect on the ninetieth day after  
50 it shall have become a law.