

3337--C

2013-2014 Regular Sessions

I N S E N A T E

February 1, 2013

Introduced by Sens. HASSELL-THOMPSON, BALL, ADDABBO, AVELLA, BRESLIN, CARLUCCI, DIAZ, DILAN, ESPAILLAT, GIANARIS, GIPSON, GRISANTI, HOYLMAN, KENNEDY, KLEIN, KRUEGER, LATIMER, MONTGOMERY, PARKER, PERALTA, PERKINS, RIVERA, SAMPSON, SANDERS, SAVINO, SERRANO, SMITH, SQUADRON, STAVISKY, STEWART-COUSINS, TKACZYK -- read twice and ordered printed, and when printed to be committed to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Codes in accordance with Senate Rule 6, sec. 8 -- 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]
15 SECTIONS 70.00, 70.02, 70.06 OR SUBDIVISION TWO OR THREE OF SECTION

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

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

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

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

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

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

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

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

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

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

54 4. WHERE A COURT WOULD OTHERWISE BE REQUIRED TO IMPOSE A SENTENCE FOR
55 A CLASS A FELONY OFFENSE PURSUANT TO SUBPARAGRAPH (I) OF PARAGRAPH (B)
56 OF SUBDIVISION TWO OF SECTION 70.71 OF THIS TITLE, THE COURT MAY FIX A

1 DETERMINATE TERM OF IMPRISONMENT OF AT LEAST FIVE YEARS AND NOT TO
2 EXCEED EIGHT YEARS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55 (c) such period shall be not less than one year nor more than two
56 years whenever a determinate sentence of imprisonment is imposed pursu-

1 ant to subdivision three or four of section 70.70 of this article OR
2 SUBDIVISION SIX OR SEVEN OF SECTION 60.12 OF THIS TITLE upon conviction
3 of a class D or class E felony offense;

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

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

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

19 S 3. The criminal procedure law is amended by adding a new section
20 440.47 to read as follows:

21 S 440.47 MOTION FOR RESENTENCE; DOMESTIC VIOLENCE CASES.

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

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

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

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

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

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

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

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

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

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

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

PLINARY 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.

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

(G) IF THE COURT DETERMINES THAT THE APPLICANT SHOULD BE RESENTENCED IN ACCORDANCE WITH SECTION 60.12 OF THE PENAL LAW, 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.

3. 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. AN APPEAL IN ACCORDANCE WITH THE APPLICABLE PROVISIONS OF THIS CHAPTER MAY ALSO BE TAKEN AS OF RIGHT BY THE APPLICANT FROM AN ORDER SPECIFYING AND INFORMING SUCH APPLICANT OF THE TERM OF THE DETERMINATE SENTENCE THE COURT WOULD IMPOSE UPON RESENTENCING ON THE GROUND THAT THE TERM OF THE PROPOSED SENTENCE IS HARSH OR EXCESSIVE; 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. THE APPLICANT MAY REQUEST THAT THE COURT ASSIGN HIM OR HER AN ATTORNEY FOR THE PREPARATION OF AND PROCEEDINGS ON ANY APPEALS REGARDING HIS OR HER APPLICATION FOR RESENTENCING PURSUANT TO THIS SECTION. THE ATTORNEY SHALL BE ASSIGNED IN ACCORDANCE WITH THE PROVISIONS OF 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.

4. 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, 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, 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. An order of an intermediate appellate

1 court is adverse to the party who was the appellant in such court when
2 it affirms the judgment, sentence or order appealed from, and is adverse
3 to the party who was the respondent in such court when it reverses the
4 judgment, sentence or order appealed from. An appellate court order
5 which modifies a judgment or order appealed from is partially adverse to
6 each party.

7 S 5. Paragraph (a) of subdivision 2 of section 390.50 of the criminal
8 procedure law, as amended by section 5 of part 00 of chapter 56 of the
9 laws of 2010, is amended to read as follows:

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

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