

# STATE OF NEW YORK

3974

2019-2020 Regular Sessions

## IN ASSEMBLY

January 31, 2019

Introduced by M. of A. AUBRY -- 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 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 § 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  
16 70.71 of this title to impose a [~~determinate~~] sentence of imprisonment  
17 [~~for such offense~~], the court, upon a determination following a hearing  
18 that (a) at the time of the instant offense, the defendant was [~~the~~] a  
19 victim of domestic violence subjected to substantial physical, sexual or  
20 psychological abuse [~~by the victim or intended victim of such offense,~~  
21 inflicted by a member of the same family or household as the defendant  
22 as such term is defined in subdivision one of section 530.11 of the  
23 criminal procedure law; (b) such abuse was a significant contributing  
24 factor [~~in causing the defendant to commit such offense and~~] to the  
25 defendant's criminal behavior; (c) [~~the victim or intended victim of~~

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

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1 ~~such offense was a member of the same family or household as the defend-~~  
2 ~~ant as such term is defined in subdivision one of section 530.11 of the~~  
3 ~~criminal procedure law, may, in lieu of imposing such determinate~~  
4 ~~sentence of imprisonment, impose an indeterminate sentence of imprison-~~  
5 ~~ment in accordance with subdivisions two and three of this section.]~~  
6 having regard for the nature and circumstances of the crime and the  
7 history, character and condition of the defendant, that a sentence of  
8 imprisonment pursuant to section 70.00, 70.02 or 70.06 of this title  
9 would be unduly harsh may instead impose a sentence in accordance with  
10 this section.

11 A court may determine that such abuse constitutes a significant  
12 contributing factor pursuant to paragraph (b) of this subdivision  
13 regardless of whether the defendant raised a defense pursuant to article  
14 thirty-five, article forty, or subdivision one of section 125.25 of this  
15 chapter.

16 At the hearing to determine whether the defendant should be sentenced  
17 pursuant to this section, the court shall consider oral and written  
18 arguments, take testimony from witnesses offered by either party, and  
19 consider relevant evidence to assist in making its determination. Reli-  
20 able hearsay shall be admissible at such hearings.

21 2. [~~The maximum term of an indeterminate sentence imposed pursuant to~~  
22 ~~subdivision one of this section must be fixed by the court as follows:.~~]  
23 Where a court would otherwise be required to impose a sentence pursuant  
24 to section 70.02 of this title, the court may impose a definite sentence  
25 of imprisonment of one year or less, or probation in accordance with the  
26 provisions of section 65.00 of this title, or may fix a determinate term  
27 of imprisonment as follows:

28 (a) For a class B felony, the term must be at least [~~six years~~] one  
29 year and must not exceed [~~twenty-five~~] five years;

30 (b) For a class C felony, the term must be at least [~~four and one-half~~  
31 ~~years~~] one year and must not exceed [~~fifteen~~] three and one-half years;

32 (c) For a class D felony, the term must be at least [~~three years~~] one  
33 year and must not exceed [~~seven~~] two years; and

34 (d) For a class E felony, the term must be [~~at least three years~~] one  
35 year and must not exceed [~~four~~] one and one-half years.

36 3. [~~The minimum period of imprisonment under an indeterminate sentence~~  
37 ~~imposed pursuant to subdivision one of this section must be fixed by the~~  
38 ~~court at one-half of the maximum term imposed and must be specified in~~  
39 ~~the sentence]~~ Where a court would otherwise be required to impose a  
40 sentence for a class A felony offense pursuant to section 70.00 of this  
41 title, the court may fix a determinate term of imprisonment of at least  
42 five years and not to exceed fifteen years.

43 4. Where a court would otherwise be required to impose a sentence for  
44 a class A felony offense pursuant to subparagraph (i) of paragraph (b)  
45 of subdivision two of section 70.71 of this title, the court may fix a  
46 determinate term of imprisonment of at least five years and not to  
47 exceed eight years.

48 5. Where a court would otherwise be required to impose a sentence for  
49 a class A felony offense pursuant to subparagraph (i) of paragraph (b)  
50 of subdivision three of section 70.71 of this title, the court may fix a  
51 determinate term of imprisonment of at least five years and not to  
52 exceed twelve years.

53 6. Where a court would otherwise be required to impose a sentence for  
54 a class A felony offense pursuant to subparagraph (ii) of paragraph (b)  
55 of subdivision two of section 70.71 of this title, the court may fix a

1 determinate term of imprisonment of at least one year and not to exceed  
2 three years.

3 7. Where a court would otherwise be required to impose a sentence for  
4 a class A felony offense pursuant to subparagraph (ii) 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 three years and not to  
7 exceed six years.

8 8. Where a court would otherwise be required to impose a sentence  
9 pursuant to subdivision six of section 70.06 of this title, the court  
10 may fix a term of imprisonment as follows:

11 (a) For a class B felony, the term must be at least three years and  
12 must not exceed eight years;

13 (b) For a class C felony, the term must be at least two and one-half  
14 years and must not exceed five years;

15 (c) For a class D felony, the term must be at least two years and must  
16 not exceed three years;

17 (d) For a class E felony, the term must be at least one and one-half  
18 years and must not exceed two years.

19 9. Where a court would otherwise be required to impose a sentence for  
20 a class B, C, D or E felony offense pursuant to section 70.00 of this  
21 title, the court may impose a sentence in accordance with the provisions  
22 of subdivision two of section 70.70 of this title.

23 10. Except as provided in subdivision seven of this section, where a  
24 court would otherwise be required to impose a sentence pursuant to  
25 subdivision three of section 70.06 of this title, the court may impose a  
26 sentence in accordance with the provisions of subdivision three of  
27 section 70.70 of this title.

28 11. Where a court would otherwise be required to impose a sentence  
29 pursuant to subdivision three of section 70.06 of this title, where the  
30 prior felony conviction was for a felony offense defined in section  
31 70.02 of this title, the court may impose a sentence in accordance with  
32 the provisions of subdivision four of section 70.70 of this title.

33 § 2. Paragraphs (a), (b), (c), (d), (e) and (f) of subdivision 2 of  
34 section 70.45 of the penal law, as amended by chapter 7 of the laws of  
35 2007, are amended to read as follows:

36 (a) such period shall be one year whenever a determinate sentence of  
37 imprisonment is imposed pursuant to subdivision two of section 70.70 of  
38 this article or subdivision nine of section 60.12 of this title upon a  
39 conviction of a class D or class E felony offense;

40 (b) such period shall be not less than one year nor more than two  
41 years whenever a determinate sentence of imprisonment is imposed pursu-  
42 ant to subdivision two of section 70.70 of this article or subdivision  
43 nine of section 60.12 of this title upon a conviction of a class B or  
44 class C felony offense;

45 (c) such period shall be not less than one year nor more than two  
46 years whenever a determinate sentence of imprisonment is imposed pursu-  
47 ant to subdivision three or four of section 70.70 of this article upon  
48 conviction of a class D or class E felony offense or subdivision ten of  
49 section 60.12 of this title;

50 (d) such period shall be not less than one and one-half years nor more  
51 than three years whenever a determinate sentence of imprisonment is  
52 imposed pursuant to subdivision three or four of section 70.70 of this  
53 article upon conviction of a class B felony or class C felony offense[+] or  
54 subdivision eleven of section 60.12 of this title;

55 (e) such period shall be not less than one and one-half years nor more  
56 than three years whenever a determinate sentence of imprisonment is

1 imposed pursuant to subdivision three of section 70.02 of this article  
2 or subdivision two or eight of section 60.12 of this title upon a  
3 conviction of a class D or class E violent felony offense or subdivision  
4 four, five, six, or seven of section 60.12 of this title;

5 (f) such period shall be not less than two and one-half years nor more  
6 than five years whenever a determinate sentence of imprisonment is  
7 imposed pursuant to subdivision three of section 70.02 of this article  
8 or subdivision two or eight of section 60.12 of this title upon a  
9 conviction of a class B or class C violent felony offense.

10 § 3. The criminal procedure law is amended by adding a new section  
11 440.47 to read as follows:

12 § 440.47 Motion for resentencing; domestic violence cases.

13 1. (a) Notwithstanding any contrary provision of law, any person  
14 confined in an institution operated by the department of correction and  
15 community supervision serving a sentence with a minimum or determinate  
16 term of eight years or more for an offense committed prior to the effec-  
17 tive date of this section and eligible for an alternative sentence  
18 pursuant to section 60.12 of the penal law may, on or after such effec-  
19 tive date, submit to the judge or justice who imposed the original  
20 sentence upon such person a request to apply for resentencing in accord-  
21 ance with section 60.12 of the penal law. Such person must include in  
22 his or her request documentation proving that she or he is confined in  
23 an institution operated by the department of corrections and community  
24 supervision serving a sentence with a minimum or determinate term of  
25 eight years or more for an offense committed prior to the effective date  
26 of this section and that she or he is serving such sentence for any  
27 offense eligible for an alternative sentence under section 60.12 of the  
28 penal law.

29 (b) If, at the time of such person's request to apply for resentencing  
30 pursuant to this section, the original sentencing judge or justice is a  
31 judge or justice of a court of competent jurisdiction, but such court is  
32 not the court in which the original sentence was imposed, then the  
33 request shall be randomly assigned to another judge or justice of the  
34 court in which the original sentence was imposed. If the original  
35 sentencing judge is no longer a judge or justice of a court of competent  
36 jurisdiction, then the request shall be randomly assigned to another  
37 judge or justice of the court.

38 (c) If the court finds that such person has met the requirements to  
39 apply for resentencing in paragraph (a) of this subdivision, the court  
40 shall notify such person that he or she may submit an application for  
41 resentencing. Upon such notification, the person may request that the  
42 court assign him or her an attorney for the preparation of and  
43 proceedings on the application for resentencing pursuant to this  
44 section. The attorney shall be assigned in accordance with the  
45 provisions of subdivision one of section seven hundred seventeen and  
46 subdivision four of section seven hundred twenty-two of the county law  
47 and the related provisions of article eighteen-A of such law.

48 (d) If the court finds that such person has not met the requirements  
49 to apply for resentencing in paragraph (a) of subdivision one of this  
50 section, the court shall notify such person and dismiss his or her  
51 request without prejudice.

52 2. (a) Upon the court's receipt of an application for resentencing,  
53 the court shall promptly notify the appropriate district attorney and  
54 provide such district attorney with a copy of the application.

55 (b) If the judge or justice that received the application is not the  
56 original sentencing judge or justice, the application may be referred to

1 the original sentencing judge or justice provided that he or she is a  
2 judge or justice of a court of competent jurisdiction and that the  
3 applicant and the district attorney agree that the application should be  
4 referred.

5 (c) An application for resentencing pursuant to this section must  
6 include at least two pieces of evidence corroborating the applicant's  
7 claim that he or she was, at the time of the offense, a victim of domes-  
8 tic violence subjected to substantial physical, sexual or psychological  
9 abuse inflicted by a member of the same family or household as the  
10 applicant as such term is defined in subdivision one of section 530.11  
11 of this chapter.

12 At least one piece of evidence must be either a court record, pre-sen-  
13 tence report, social services record, hospital record, sworn statement  
14 from a witness to the domestic violence, law enforcement record, domes-  
15 tic incident report, or order of protection. Other evidence may  
16 include, but shall not be limited to, local and state department of  
17 corrections records, a showing based in part on documentation prepared  
18 at or near the time of the commission of the offense or the prosecution  
19 thereof tending to support the person's claim, or when there is verifi-  
20 cation of consultation with a licensed medical or mental health care  
21 provider, employee of a court acting within the scope of his or her  
22 employment, member of the clergy, attorney, social worker, or rape  
23 crisis counselor as defined in section forty-five hundred ten of the  
24 civil practice law and rules, or other advocate acting on behalf of an  
25 agency that assists victims of domestic violence for the purpose of  
26 assisting such person with domestic violence victim counseling or  
27 support.

28 (d) If the court finds that the applicant has not complied with the  
29 provisions of paragraph (c) of this subdivision, the court shall dismiss  
30 the application without prejudice.

31 (e) If the court finds that the applicant has complied with the  
32 provisions of paragraph (c) of this subdivision, the court shall conduct  
33 a hearing to aid in making its determination of whether the applicant  
34 should be resentenced in accordance with section 60.12 of the penal law.  
35 At such hearing the court shall determine any controverted issue of fact  
36 relevant to the issue of sentencing. Reliable hearsay shall be admissi-  
37 ble at such hearings.

38 The court may consider any fact or circumstances relevant to the impo-  
39 sition of a new sentence which are submitted by the applicant or the  
40 district attorney and may, in addition, consider the institutional  
41 record of confinement of such person, but shall not order a new pre-sen-  
42 tence investigation and report or entertain any matter challenging the  
43 underlying basis of the subject conviction. The court's consideration of  
44 the institutional record of confinement of such applicant shall include,  
45 but not be limited to, such applicant's participation in or willingness  
46 to participate in programming such as domestic violence, parenting and  
47 substance abuse treatment while incarcerated and such applicant's disci-  
48 plinary history. The fact that the applicant may have been unable to  
49 participate in treatment or other programming while incarcerated despite  
50 such applicant's willingness to do so shall not be considered a negative  
51 factor in determining a motion pursuant to this section.

52 (f) If the court determines that the applicant should not be resen-  
53 tenced in accordance with section 60.12 of the penal law, the court  
54 shall inform such applicant of its decision and shall enter an order to  
55 that effect. Any order issued by a court pursuant to this section must  
56 include written findings of fact and the reasons for such order.

1 (g) If the court determines that the applicant should be resentenced  
2 in accordance with section 60.12 of the penal law, the court shall noti-  
3 fy the applicant that, unless he or she withdraws the application or  
4 appeals from such order, the court will enter an order vacating the  
5 sentence originally imposed and imposing the new sentence to be imposed  
6 as authorized by section 60.12 of the penal law. Any order issued by a  
7 court pursuant to this section must include written findings of fact and  
8 the reasons for such order.

9 3. An appeal may be taken as of right in accordance with applicable  
10 provisions of this chapter: (a) from an order denying resentencing; or  
11 (b) from a new sentence imposed under this provision and may be based on  
12 the grounds that (i) the term of the new sentence is harsh or excessive;  
13 or (ii) that the term of the new sentence is unauthorized as a matter of  
14 law. An appeal in accordance with the applicable provisions of this  
15 chapter may also be taken as of right by the applicant from an order  
16 specifying and informing such applicant of the term of the determinate  
17 sentence the court would impose upon resentencing on the ground that the  
18 term of the proposed sentence is harsh or excessive; upon remand to the  
19 sentencing court following such appeal the applicant shall be given an  
20 opportunity to withdraw an application for resentencing before any  
21 resentence is imposed. The applicant may request that the court assign  
22 him or her an attorney for the preparation of and proceedings on any  
23 appeals regarding his or her application for resentencing pursuant to  
24 this section. The attorney shall be assigned in accordance with the  
25 provisions of subdivision one of section seven hundred seventeen and  
26 subdivision four of section seven hundred twenty-two of the county law  
27 and the related provisions of article eighteen-A of such law.

28 4. In calculating the new term to be served by the applicant pursuant  
29 to section 60.12 of the penal law, such applicant shall be credited for  
30 any jail time credited towards the subject conviction as well as any  
31 period of incarceration credited toward the sentence originally imposed.

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

35 1. Provided that a certificate granting leave to appeal is issued  
36 pursuant to section 460.20, an appeal may, except as provided in subdi-  
37 vision two, be taken to the court of appeals by either the defendant or  
38 the people from any adverse or partially adverse order of an intermedi-  
39 ate appellate court entered upon an appeal taken to such intermediate  
40 appellate court pursuant to section 450.10, 450.15, or 450.20, or from  
41 an order granting or denying a motion to set aside an order of an inter-  
42 mediate appellate court on the ground of ineffective assistance or  
43 wrongful deprivation of appellate counsel, or by either the defendant or  
44 the people from any adverse or partially adverse order of an intermedi-  
45 ate appellate court entered upon an appeal taken to such intermediate  
46 appellate court from an order entered pursuant to section 440.46 or  
47 section 440.47 of this chapter. An order of an intermediate appellate  
48 court is adverse to the party who was the appellant in such court when  
49 it affirms the judgment, sentence or order appealed from, and is adverse  
50 to the party who was the respondent in such court when it reverses the  
51 judgment, sentence or order appealed from. An appellate court order  
52 which modifies a judgment or order appealed from is partially adverse to  
53 each party.

54 § 5. Paragraph (a) of subdivision 2 of section 390.50 of the criminal  
55 procedure law, as amended by section 5 of part OO of chapter 56 of the  
56 laws of 2010, is amended to read as follows:

1 (a) Not less than one court day prior to sentencing, unless such time  
2 requirement is waived by the parties, the pre-sentence report or memo-  
3 randum shall be made available by the court for examination and for  
4 copying by the defendant's attorney, the defendant himself, if he has no  
5 attorney, and the prosecutor. In its discretion, the court may except  
6 from disclosure a part or parts of the report or memoranda which are not  
7 relevant to a proper sentence, or a diagnostic opinion which might seri-  
8 ously disrupt a program of rehabilitation, or sources of information  
9 which have been obtained on a promise of confidentiality, or any other  
10 portion thereof, disclosure of which would not be in the interest of  
11 justice. In all cases where a part or parts of the report or memoranda  
12 are not disclosed, the court shall state for the record that a part or  
13 parts of the report or memoranda have been excepted and the reasons for  
14 its action. The action of the court excepting information from disclo-  
15 sure shall be subject to appellate review. The pre-sentence report shall  
16 be made available by the court for examination and copying in connection  
17 with any appeal in the case, including an appeal under this subdivision.  
18 Upon written request, the court shall make a copy of the presentence  
19 report, other than a part or parts of the report redacted by the court  
20 pursuant to this paragraph, available to the defendant for use before  
21 the parole board for release consideration or an appeal of a parole  
22 board determination or an application for resentencing pursuant to  
23 section 440.46 or 440.47 of this chapter. In his or her written request  
24 to the court the defendant shall affirm that he or she anticipates an  
25 appearance before the parole board or intends to file an administrative  
26 appeal of a parole board determination or meets the eligibility criteria  
27 for and intends to file a motion for resentencing pursuant to 440.46 of  
28 this chapter or has received notification from the court which received  
29 his or her request to apply for resentencing pursuant to section 440.47  
30 of this chapter confirming that he or she is eligible to submit an  
31 application for resentencing pursuant to section 440.47 of this chapter.  
32 The court shall respond to the defendant's written request within twenty  
33 days from receipt of the defendant's written request.

34 § 6. This act shall take effect immediately; provided, however, that  
35 sections one and two of this act shall apply to offenses committed on,  
36 after and prior to such effective date where the sentence for such  
37 offense has not yet been imposed; provided, further that sections three,  
38 four and five of this act shall take effect on the ninetieth day after  
39 it shall have become a law.