**§ 440.47 Motion for resentence; domestic violence cases.**

1. (a) Notwithstanding any contrary provision of law, any person confined in an institution operated by the department of correction and community supervision serving a sentence with a minimum or determinate term of eight years or more for an offense committed prior to the effective date of this section and eligible for an alternative sentence pursuant to section 60.12 of the penal law may, on or after such effective date, submit to the judge or justice who imposed the original sentence upon such person a request to apply for resentencing in accordance with section 60.12 of the penal law. Such person must include in his or her request documentation proving that she or he is confined in an institution operated by 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 the effective date of this section and that she or he is serving such sentence for any offense eligible for an alternative sentence under section 60.12 of the penal law.

(b) If, at the time of such person's request to apply for resentencing pursuant to this section, 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 request shall be randomly assigned to another judge or justice of the court in which the original sentence was imposed. If the original sentencing judge is no longer a judge or justice of a court of competent jurisdiction, then the request shall be randomly assigned to another judge or justice of the court.

(c) If the court finds that such person has met the requirements to apply for resentencing in paragraph (a) of this subdivision, the court shall notify such person that he or she may submit an application for resentencing. Upon such notification, the person may request that the court assign him or her an attorney for the preparation of and proceedings on the 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.

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

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

(b) If the judge or justice that received the application is not the original sentencing judge or justice, the application may be referred to the original sentencing judge or justice provided that he or she is a judge or justice of a court of competent jurisdiction and that the applicant and the district attorney agree that the application should be referred.

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

At least one piece of evidence must be either a court record, pre-sentence report, social services record, hospital record, sworn statement from a witness to the domestic violence, law enforcement record, domestic incident report, or order of protection. Other evidence may include, but shall not be limited to, local and state department of corrections records, 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.

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

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

The court may consider any fact 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.

(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.