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**REPORT ON LEGISLATION BY THE
CRIMINAL JUSTICE OPERATIONS COMMITTEE
DOMESTIC VIOLENCE COMMITTEE**

A.2005-A / S.1505-A (Budget Article VII) – Part U

Enacts into law major components of legislation necessary to implement the state public protection and general government budget for the 2019-2020 state fiscal year; to amend the penal law and the criminal procedure law, in relation to sentencing and re-sentencing in certain domestic violence cases.

Domestic Violence Survivors Justice Act

THIS PROVISION IS APPROVED

INTRODUCTION

This report is respectfully submitted by the Committee on Criminal Justice Operations and the Domestic Violence Committees of the New York City Bar Association, an organization of more than 24,000 legal professionals dedicated to improving the administration of justice.

The City Bar supports the inclusion of the Domestic Violence Survivors Justice Act (DVSJA) in the New York State Budget. This provision would amend New York's penal and criminal procedure laws to give greater discretion to judges when sentencing defendants who are survivors of domestic violence, and would permit certain survivor-defendants to petition the court post-conviction for alternative re-sentencing. The DVSJA would allow the court to impose an alternative sentence, either prospectively, or retroactively, where it finds that:

1. the defendant, at the time of the offense, was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as defined by Criminal Procedure Law §530.11;
2. the abuse was a significant contributing factor to the defendant's criminal behavior; and
3. a sentence within the generally applicable statutory range would be unduly harsh.

The range of alternative sentences would include shorter determinate prison sentences and increased availability of definite sentences and periods of probation than under current sentencing law.

RATIONALE FOR THE LEGISLATION

Domestic violence continues to be a longstanding national problem and the number one cause of injury to women in the United States. Yet the consequences of domestic violence reverberate far beyond the individual victim to the survivor's children, who are repeatedly traumatized by the violence in their homes, and to society at large, which shouldered the cost of medical bills, lost days of work and social services. The consequences to children and society are especially severe when victims of domestic violence are incarcerated due to actions taken as a direct result of the violence they have experienced. Healing the scars of domestic violence and affirming the relationships between parents and children is particularly difficult when the survivor and her children are separated by prison walls. New York taxpayers do not fare much better as a result of victims' incarceration, as they are often left to pay for both the children's care and the hefty cost of incarceration.

We are acutely aware of how abusers use fear and control to manipulate their victim, including manipulating victims to commit criminal activity directly leading to their present incarceration. Many incarcerated survivors have committed criminal activity to protect themselves from further violence, and others have convictions stemming from acts taken as a result of an abuser's coercion. One study found that of 525 abused women evaluated at a mental health center who had committed at least one crime, nearly half had been coerced into committing crimes by their batterers as "part of a structural sequence of actions in a climate of terror and diminished, violated sense of self."¹

In 1998, the Legislature endeavored to address these issues by establishing a domestic violence exception to the 1998 Sentencing Reform Act, known as "Jenna's Law" (L.1998, c.1, §1). That provision, codified in Penal Law §60.12, permits judges to grant indeterminate sentences to survivors convicted of certain homicide or assault crimes against their abusers, rather than imposing the statutorily mandated determinate terms. Although the intention of its drafters was commendable, in practice, Penal Law §60.12 has fallen short of fulfilling its promise for several reasons.

First, the current provision in Jenna's Law is very narrowly drawn, omitting a range of crimes which victims of abuse have been known to commit and which would be captured by the DVSJA. It also offers sentencing ranges which are not meaningfully reduced: an individual could receive a longer indeterminate maximum term under the exclusion than under the determinate sentencing scheme. Present law also fails entirely to account for crimes committed by abuse survivors at the behest of, but not against, their abusers, which omits a significant number of domestic violence survivor-defendants.

Similarly, the existing defenses of duress or justification do not adequately address the issues raised in these cases, as victims of abuse may not be psychologically or socially capable of invoking such defenses at the time of their trials, due to their victimization and its impact on

¹ Marti Tamm Loring & Pati Beaudoin, *Battered Women as Coerced Victim-Perpetrators*, 2 J. Emotional Abuse 3, 13 (2000).

them. Further, motions for dismissal in furtherance of justice (CPL §210.40) or for alternative sentencing on federal or state constitutional grounds of cruel and unusual punishment (People v. Broadie, 37 NY2d 100 [1975]) may not be appropriate in such cases.

Finally, provision of alternative sentencing opportunities to survivors of domestic violence whose crimes are directly related to their abuse is particularly appropriate, as they have demonstrated extremely low recidivism rates and often have no prior felony record or history of violence.²

RELIEF AFFORDED BY THE BILL

The DVSJA would enable the court to take account of such circumstances, and would equip judges to effect justice for all parties in such cases in a manner not available under existing law, without permitting the offender to escape responsibility for having committed the crime. In no case would the bill permit the vacation of a judgment of conviction. It would merely afford a more nuanced available sentencing range, allowing the judge to fashion a punishment befitting the particular offender, taking into consideration the effect of the offender's own victimization in determining a just punishment, in those cases in which the offender is able to meet the strict three-part standard of eligibility.

The DVSJA would not mandate relief for eligible offenders, nor even presume their entitlement to it.³ Rather, it would afford the court the discretion to exercise lenity in fashioning a sentence in those cases it found meriting such relief, where the offender has satisfied the three-part eligibility requirement and the court determines that there is no threat to public safety.⁴ Prosecutors would have the opportunity at a hearing on the application to object to the imposition of an alternative sentence under the facts of the particular case, and the court would be required to issue written findings of fact in support of any order it issued, enhancing accountability for implementation of the measure.

It is estimated that the DVSJA would affect a relatively small number of offenders. To be eligible for re-sentencing, an offender would, at the outset, have to be confined in a New York State correctional institution and then serving a sentence of eight years or more. Relief would

² A study by the Correctional Association of New York showed that 80% of women incarcerated in New York State prisons for violent felonies in 2009 had never previously been convicted of a felony, and that of the 38 women convicted in New York of murder and released between the years 1985 and 2003, none returned to prison for a new crime within three years of her release. (Testimony of the Correctional Association of New York's Women In Prison Project [Tamar Kraft-Stolar, Esq.], Senate Democratic Conference Public Forum on Domestic Violence, May 30, 2012, at 5).

³ In this regard, the bill is much more restrictive than the Drug Law Reform Act of 2004 (L.2004, ch. 738, §§1-41) (DLRA), §23, and related legislation, which requires the court to re-sentence the applicant unless substantial justice dictates that relief should be denied. (*See People v. Beasley*, 47 AD3d 639, 640 [2d Dept. 2008][burden of persuasion under the DLRA is on prosecution to show grounds for denial of application for re-sentencing]).

⁴ The experience under the DLRA, where judges have frequently declined to exercise their discretionary authority to grant re-sentencing to drug offenders incarcerated under the Rockefeller drug laws, makes clear that applications under the DVSJA for alternative sentencing or re-sentencing would not automatically be granted. (*See* NYS Division of Criminal Justice Services, 2009 Drug Law Reform Update [June 2011]).

not be available for convictions of murder in the first degree, aggravated murder, sex offenses or terrorism offenses. Inmates with prior adjudications as persistent felony offenders or second violent felony offenders would not be eligible to seek relief under the bill.⁵ The applicant would then have to satisfy a very high standard of proof to demonstrate objective eligibility for relief, by providing at least two forms of statutorily prescribed evidence establishing: (1) that (s)he was, at the time of the offense, the victim of domestic violence and subjected to substantial physical, sexual or psychological abuse inflicted by a spouse, intimate partner or relative; (2) that the abuse was a significant contributing factor in the commission of the crime; and (3) that imposition of a sentence within the statutory range would be unduly harsh. Failure to satisfy these criteria would render the applicant ineligible to be considered for relief. Accordingly, the numbers of applicants for alternative sentencing and for re-sentencing under the DVSJA are expected to be a small fraction of the number of persons seeking relief under the DLRA legislation. Based upon figures from the U.S. Department of Justice Bureau of Justice Statistics and the New York State Department of Corrections and Community Supervision, the total pool of incarcerated women and men eligible to apply for re-sentencing has been estimated at 360, and the annual number of women and men eligible to seek alternative sentencing has been estimated at 480.⁶

CONCLUSION

The DVSJA represents an important step forward in achieving justice for victims of domestic violence, and would place New York in the lead in recognizing the role that abuse can play in the commission of crimes. It would return a small number of appropriate candidates to the community earlier than dictated by general sentencing provisions, thereby strengthening families without jeopardizing public safety. Cost savings would thereby be realized, but without creating any undue administrative burden on courts or prosecutors.

For these reasons, the New York City Bar Association recommends enactment of this legislation in the State Budget.

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⁵ The bill would follow the DLRA legislation in this respect. (*See* CPL §216).

⁶ Data prepared by the Correctional Association of New York supporting this conclusion has been reviewed by the Criminal Justice Operations Committee and can be made available upon request.