

PRO SE PRACTICE

Domestic Violence Survivors Justice Act: Resentencing Options

In 2019, New York State **amended** (changed) the laws **governing** (controlling) the sentences imposed on some victims of domestic violence who commit crimes related to their domestic abuse. The law now provides for alternate sentences (DV Alternative Sentences) for people who meet the law's eligibility requirements. Known as the Domestic Violence Survivors Justice Act, the changes in the law were necessary because laws with a similar intent, enacted in 1999, had not resulted in reduced sentences for victims of domestic violence who committed crimes related to their abuse. The DV Alternate Sentences are less harsh than the sentences for people who commit the same crimes but 1) who are not victims of domestic violence; and 2) whose crimes either were not coerced by their abusers or whose abusers were not the victims of the crimes.

This article refers to information found in the appendix to the memo version of this article. Due to space considerations, the article does not include the appendix. If you are interested in obtaining a copy of the memo with the appendix, please request a copy of the memo entitled Domestic Violence Survivors Act from the PLS Office that handles legal issues arising at the prison where you are incarcerated.

A. What Laws Have Been Amended?

1. Penal Law §60.12: Authorized Disposition, Alternative Sentence, Domestic Violence Cases;
2. Penal Law §70.45: Determinate Sentence, Post-Release Supervision;

3. Criminal Procedure Law §440.47: Motion for resentencing; Domestic Violence Cases; and
4. Criminal Procedure Law §450.90: Appeal to Court of Appeals from order of intermediate appellate court; in what cases authorized.

B. Who is Eligible for a DV Alternative Sentence?

A domestic violence survivor (defined below) may be eligible for DV Alternative Sentence with respect to:

1. Crimes committed due to coercion by an abuser;
2. Crimes committed against the defendant's abuser; or
3. Crimes committed **at the behest** (at the request or order) of the defendant's abuser.

C. What other eligibility criteria are there for a DV Alternative Sentence?

1. A defendant who has been convicted of committing any of the following crimes, or who was convicted of an attempt or conspiracy to commit any of the following crimes, **is not eligible** for an DV Alternative Sentence:
 - a. Aggravated murder (Penal Law §125.26);
 - b. Murder in the first degree (Penal Law §125.27);
 - c. Murder in the second degree (when the offender, being over the age of 18, intentionally kills the victim while in the course of one or more of specific sex offenses and the victim is under the age of 14) (Penal Law §125.25(5));
 - d. Any offense included in Penal Law Article 490: Offenses constituting Terrorism;
 - e. Any offense that would require registration as a sex offender.

For a list of the offenses that require registration as a sex offender, see Correction Law §168-a(2) and (3), included in the Appendix to the memo version of this article.

2. To be eligible for a DV Alternative Sentence, a court must find, after a hearing:

- a. That at the time of the offense, the defendant was a victim of domestic violence who had been subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant, including persons who are not related by **consanguinity** (blood) or **affinity** (marriage) who have been in an intimate relationship whether such persons have lived together at any time. For a more complete definition of “members of the same family or household,” see Criminal Procedure Law §530.11(1)(a-e), included in the appendix to the memo version of this article;
- b. The abuse was a significant contributing factor to the defendant’s criminal behavior; and
- c. Due to the nature and circumstances of the crime and the history, character and condition of the defendant, a sentence of imprisonment pursuant to Penal Law §§70.00 (first felony offender), 70.02 (first violent felony offender), 70.06 (second felony offender) or 70.71(2) or (3) (Class A felony drug offender, first and second felony offender) of this title would be unduly harsh. See the appendix to the memo version of this article for a description of the offenders to whom these sections of the Penal Law would otherwise apply.

D. Does the Law Permit Incarcerated Domestic Violence Survivors and Domestic Violence Survivors Who Are Under Parole Supervision to Apply for Resentencing Under the DV Alternative Sentencing Guidelines?

Criminal Procedure Law §440.47 permits an incarcerated Survivor of Domestic Violence to apply for resentencing under the DV Alternative Sentencing Guidelines where:

1. He or she is serving a sentence with a minimum or determinate term of at least 8 years; and
2. The sentence that he or she is serving is for an offense committed prior to the August 12, 2019.

The law does not permit a Survivor of Domestic Violence who is under parole supervision to apply for resentencing.

E. How Does an Incarcerated Survivor of Domestic Violence Request Resentencing?

The process for requesting a DV Alternative Sentence is set forth in Criminal Procedure Law §440.47 as follows:

1. Submit a “Request to Apply for Resentencing Pursuant to Penal Law §60.12: Alternative Sentence of Imprisonment – Domestic Violence” to the judge or justice who imposed the original sentence;
2. The request must **include records** showing that:
 - a. The applicant is confined in a DOCCS facility;
 - b. The applicant is serving a sentence with a determinate term of at least 8 years or an indeterminate sentence with a minimum term of at least 8 years;
 - c. The sentence is for an offense committed prior to August 12, 2019;

- d. The applicant is serving a sentence for an offense eligible for an Alternative DV Sentence (see Question C., above, for a list of crimes that would render an applicant ineligible for a DV Alternative Sentence);
- e. If, based on the submitted records, the court finds that the person requesting the DV Alternative Sentence meets the requirements for re-sentencing, the court will notify the person that he or she may submit an application for resentencing;
- f. After receiving notice from the court that he or she may submit an application, the person may request that the court assign an attorney for the preparation of and proceedings on the application for resentencing;
- g. The application (as opposed to the *request* to submit an application for resentencing) must include at least two pieces of evidence supporting 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;
- h. After the application is submitted, the court will conduct a hearing.
- i. If the applicant wins the hearing, the court will issue an order setting forth its findings of fact and notifying the applicant that the court will enter an order vacating the sentence originally imposed and imposing a new sentence.

F. Is There an Appeal from a Decision Denying a Resentencing Application?

Yes, there is a right to appeal a lower court's denial of an application for re-sentencing to the Appellate Division.

G. What if the Judge Grants the Application but the New Sentence is Too Harsh?

There is a right to appeal from the imposition of a DV Alternative Sentence on the basis that the new sentence is too harsh.

H. If the Appellate Division Affirms the Lower Court Decision, Is there an Appeal to the Court of Appeals?

Where the Appellate Division affirms the lower court decision, the applicant can move for leave to appeal to the Court of Appeals. The procedure for moving for leave to appeal is set forth in Criminal Procedure Law §450.90.

I. What are the Sentencing Ranges for Survivors of Domestic Violence With Respect to Whom the Judge Determines that the Sentencing Ranges Set Forth in Penal Law §§70.00, 70.02, 70.06 and 70.71 are Unduly Harsh?

To show the significance of reductions in the sentencing ranges for people who are granted an Alternative DV Sentence, both the alternative sentencing range and the non-alternative sentencing range is shown in subsection 2, below.

1. For a **non-violent felony offender (first conviction) who was not convicted of a drug offense** and who would normally be sentenced pursuant to P.L. §70.00, the sentencing range is as follows:
 - a. A sentence of probation;
 - b. A definite sentence of 1 year or less; or
 - c. A determinate term, followed by a term of post-release supervision, as follows:
 - i. For a Class A felony, a determinate term of at least 5 years and no more than 15 years (not eligible for a sentence of probation or a definite sentence);

- ii. For a Class B felony, a determinate term of at least 1 year and no more than 9 years;
 - iii. For a Class C felony, a determinate term of at least 1 year and no more than 5½ years;
 - iv. For a Class D felony, a determinate term of at least 1 year and no more than 2½ years;
 - v. For a Class E felony, a determinate term of at least 1 year and no more than 1½ years.
 - vi. The terms of post-release supervision that a court may impose are:
 - a) For Class C and B felony convictions, the range of the period of post-release supervision is at least 1 year and at most 2 years; and
 - b) For Class D and E felony convictions, the period of post-release supervision is 1 year.
2. For a **first time felony offender convicted of a violent felony offense** who would normally be sentenced pursuant to P.L. §70.02, the sentencing range is as follows:
- a. A sentence of probation;
 - b. A definite sentence of imprisonment of 1 year or less; or
 - c. A determinate term, followed by a term of post-release supervision, as follows:
 - i. For a Class B felony, at least 1 year and no more than 5 years (This is reduced from: at least 6 years and no more than 25 years);
 - ii. For a Class C felony, at least 1 year and no more than 3½ years (This is reduced from: at least 4½ years and no more than 15 years);
 - iii. For a Class D felony, at least 1 year and no more than 2 years (This is reduced from: at least 3 years and no more than 7 years);
 - iv. For a Class E felony, at least 1 year and no more than 1½ years (This is reduced from: at least 3 years and no more than 4 years);
 - v. For Class B and C felony convictions, the period of post-release supervision is at least 2½ years and not more than 5 years;
 - vi. For Class D and E felony convictions, the period of post-release supervision is at least 1½ years and not more than 3 years.
3. For a **second felony offender whose prior and current convictions are non-violent** and who would normally be sentenced pursuant to P.L. §70.06(3), the sentencing range is as follows:
- a. A sentence of probation;
 - b. With respect to Class C, D and E felonies, a definite sentence of imprisonment of one year or less; or
 - c. A sentence of parole supervision (e.g., 90 day drug treatment program) for individuals who meet the eligibility criteria for such a sentence, see the summary of Criminal Procedure Law §410.91 – the section of the law governing eligibility for a sentence of parole supervision – included in the Appendix to the memo version of this article, and who have not been convicted of a violent felony offense or a Class A or B felony; or
 - d. A determinate term followed by a term of post- release supervision, as follows:
 - i. For a Class B felony, at least 2 years and no more than 12 years;

- ii. For a Class C felony, at least 1½ years and no more than 8 years;
 - iii. For a Class D felony, at least 1½ years and no more than 4 years;
 - iv. For a Class E felony, at least 1½ years and no more than 2 years;
 - v. The term of post-release supervision is at least 1 year and no more than 2 years.
4. For a **second felony offender whose first felony offense was violent and whose second felony offense is non-violent** and who would normally be sentenced pursuant to PL §70.06(3), the sentencing range – a determinate sentence followed by a term of post-release supervision – is as follows:
- a. For a Class B felony, at least 6 years and no more than 15 years;
 - b. For a Class C felony, at least 3½ years and no more than 9 years;
 - c. For a Class D felony, at least 2½ years and no more than 4½ years;
 - d. For a Class E Felony, at least 2 years and no more than 2½ years;
 - e. The term of post-release supervision must be at least 1½ years and no more than 3 years.
5. For a **second felony offender whose first felony offense was non-violent and whose second felony offense is violent**, and who would normally be sentenced pursuant to P.L. §70.06(6), the sentencing range – a determinate sentence followed by a term of post-release supervision – is as follows:
- a. For a Class B felony, at least 3 years and no more than 8 years;
 - b. For a Class C felony, at least 2½ years and no more than 5 years;
 - c. For a Class D felony, at least 2 years and no more than 3 years;
 - d. For a Class E felony, at least 1½ years and no more than 2 years;
 - e. The term of post-release supervision for Class B and C felony convictions must be at least 2½ years and no more than 5 years;
 - f. The term of post-release supervision for Class D and E felony convictions must be at least 1½ years and no more than 3 years.
6. For a Class A felony drug offender who would normally be sentenced pursuant to P.L. §70.71, the sentencing range is as follows:
- a. For a Class A-I first felony, at least 5 years and no more than 8 years;
 - b. For a Class A-I second felony offender, at least 5 years and no more than 12 years;
 - c. For a Class A-II felony, at least 1 year and no more than 3 years;
 - d. For a Class A-II second felony offender, at least 3 years and no more than 6 years;
 - e. The term of post-release supervision which must be imposed in addition to the above determinate terms is at least 1½ years and no more than 3 years.

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PLS Offices and the Facilities Served

Requests for legal representation and all other problems should be sent to the local office that covers the prison in which you are incarcerated. Below is a list identifying the prisons each PLS office serves:

ALBANY, 41 State Street, Suite M112, Albany, NY 12207

Prisons served: Bedford Hills, CNYPC, Cocksackie, Downstate, Eastern, Edgecombe, Fishkill, Great Meadow, Greene, Green Haven, Hale Creek, Hudson, Lincoln, Marcy, Mid-State, Mohawk, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

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Prisons served: Adirondack, Altona, Bare Hill, Clinton, Franklin, Gouverneur, Moriah Shock, Ogdensburg, Riverview, Upstate.

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