Intake & Case Assessment for DVSJA Resentencing

(CPL § 440.47)

A Guidebook for Defense Teams

PREPARED FOR AND DISTRIBUTED BY THE DVSJA STATEWIDE DEFENDER TASK FORCE

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CONTENTS

I. Purpose of this Guide

This guide was developed by the DVSJA Statewide Defender Task Force, a coalition of defense advocates across New York State working towards effective implementation of the Domestic Violence Survivors Justice Act.[1]

The guide gives an **overview of the initial steps** defense teams should take after being assigned to work on a DVSJA resentencing case under New York Criminal Procedure Law section 440.47. It includes templates in the Appendix, as well as links to the following best practices manuals that give more in-depth guidance on various steps in the process.

- DVSJA Resource Guide (Survivors Justice Project)
- DVSJA Investigations Best Practices Manual
- Interviewing for Mitigation Guide
- Storytelling for Mitigation Guide
- Introductory Guide to Coercive Control for the DVSJA Attorney
- Experts and the DVSJA: A Guidebook for Defense Attorneys

Defense teams seeking consultation on their DVSJA cases should also feel free to reach out to the ILS Statewide Appellate Support Center (SASC@ils.ny.gov or elizabeth.isaacs@ils.ny.gov) or the NYSDA DVSJA Attorney Support Project (SJBatcheller@nysda.org).

II. The Domestic Violence Survivors Justice Act

The Domestic Violence Survivors Justice Act (DVSJA) authorizes alternative sentences for individuals who are survivors of domestic violence for whom the abuse was a significant contributing factor to the offense.

Importantly, the DVSJA, enacted on May 14, 2019, gives judges: (1) the discretion to impose shorter prison terms and alternative to incarceration programs for survivors at initial sentencing;[2] and (2) the ability to resentence survivors to shorter prison terms for offenses committed before August 12, 2019.[3] This guide deals specifically with the latter: retroactive resentencing.

[1] This guidebook was prepared by members of the DVSJA Statewide Defender Task Force: Elizabeth Isaacs, Mandy Jaramillo, Jessica Kulpit, Kate Mogulescu, Zoe Root, Alan Rosenthal, Beth Walker, and Dana Wolfe.
[2] Penal Law ("PL") § 60.12.
[3] Criminal Procedure Law ("CPL") § 440.47.

Initial Eligibility

To be initially eligible, an applicant for retroactive resentencing must submit a request to the original sentencing court demonstrating all of the following[4]:

- Offense Date: Their offense occurred before August 12, 2019, the date Criminal Procedure Law (CPL) § 440.47 went into effect.
- Predicate Status: They were sentenced as a first or second felony offender. (An applicant sentenced as a second violent felony offender, persistent felony offender, or persistent violent felony offender is not eligible for DVSJA relief.);
- Custody & Sentence: They are currently confined in a DOCCS facility,[5] and they are serving a sentence of at least 8 years; and
- Crime of conviction: They were not convicted of any of the following offenses:
    - Aggravated Murder under Penal Law (PL) § 125.26;
    - Murder in the First Degree under PL § 125.27;
    - Murder in the Second Degree in the course of a rape under PL § 125.25 (5);
    - A crime related to terrorism under PL Article 490;
    - An offense which would require such person to register as a sex offender; or
    - An attempt or conspiracy to commit any above-listed offenses.

Assignment of Counsel & Meeting the Corroboration Requirement

If the initial eligibility criteria are met, the court must assign counsel to assist with preparation of a resentencing application.[6]

[4] One way to demonstrate initial eligibility is to submit a UCS-447/SF form to the court. Refer to Section III(1) of this guide for more on this process.

[5] Courts thus far have generally interpreted this requirement to mean that the applicant must be incarcerated in a DOCCS facility *at the time the resentencing motion is filed*. If they are subsequently released, and resentencing under the DVSJA could shorten or eliminate their term of post-release supervision, the motions have not been deemed moot. *See*, *e.g.*, *People v. S.M.*, 72 Misc.3d 809, 811 (Sup. Ct., Erie Cty 2021) (applicant found eligible to seek resentencing where application was filed while she was confined in an institution operated by DOCCS, even though she was released to post-release supervision (PRS) during pendency of application; application granted, resulting in discharge of remaining term of PRS).

[6] CPL § 440.47(1)(c). The statute alternatively refers to the initial filing as a "motion" or "application." Here, we will refer to it as an "application" for resentencing.

To obtain a resentencing hearing, the application must include at least two pieces of evidence corroborating the first prong of the DVSJA—that, at the time of the offense, the applicant was a victim of domestic violence subjected to substantial physical, sexual, or psychological abuse inflicted by a member of the same family or household.[7]

At least one piece of corroborating evidence must be either a court record, presentence 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.[8] For the second piece of corroborating evidence, the statute provides a non-exhaustive list of other types of acceptable documents, including: records prepared at or near the time of the commission of the offense or prosecution tending to support the claim, and records of consultation with a licensed medical or mental health care provider, social worker, or other similar advocate for the purpose of obtaining domestic violence victim counseling or support.[9]

If the applicant meets these criteria, "[t]he 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."[10]

DVJSA Resentencing Hearing – Burden of Proof

At a DVSJA resentencing hearing, the applicant has the burden of proving the following three elements. To date, courts have held that the burden of proof at a post-conviction resentencing hearing is a preponderance of the

[7] CPL § 440.47(2)(c). The definition of "member of the same family or household" includes "persons related by consanguinity or affinity" and "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time." CPL § 530.11(1)(a), (e). Factors used to determine whether a relationship is an "'intimate relationship' include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of the interaction between the persons; and the duration of the relationship." CPL § 530.11(1)(e).

[8] *Id.*

[9] *Id.*

[10] CPL § 440.47(2)(e) (emphasis added). Note that the prosecution has the opportunity to respond and either (1) consent to DVSJA resentencing, (2) consent to a hearing but oppose resentencing, or (2) argue that the defense has failed to satisfy the corroboration requirement, requesting that the application be dismissed without prejudice.

evidence (it remains an open question whether the burden is lower at a DVSJA hearing at initial sentencing).[11]

The applicant has the burden of proving the following three elements:

(1) at the time of the instant offense, the applicant was a victim of domestic violence subjected to substantial physical, sexual, or psychological abuse inflicted by a member of the same family or household;

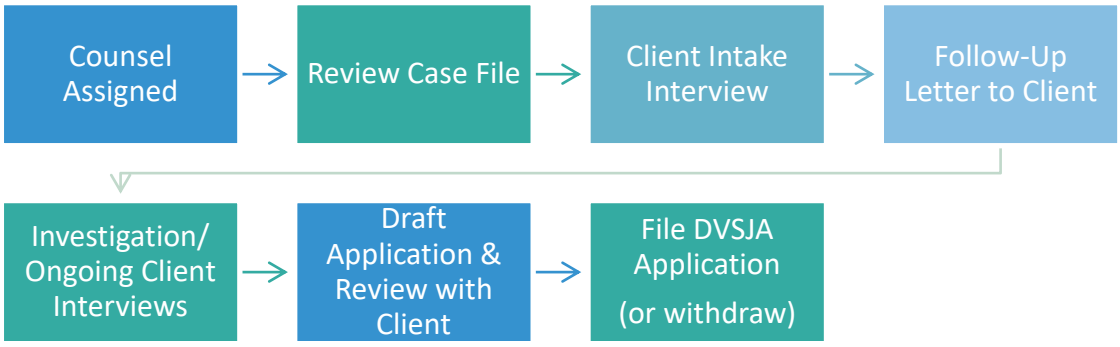
(2) such abuse was a "significant contributing factor" to the applicant's "criminal behavior"; and

(3) "having regard for the nature and circumstances of the crime and the history, character, and condition of the applicant," the sentence of imprisonment imposed was "unduly harsh."[12]

[11] *See*, *e.g.*, *People v. Brenda WW.*, 222 A.D.3d 1188 (3d Dept. 2023) (applying preponderance of the evidence standard); *People v. T.P.*, 216 A.D.3d 1469 (4th Dept. 2023) (same); *People v. Burns*, 207 A.D.3d 646 (2d Dept. 2022) (same). However, some advocates have argued that the standard of proof should be less than a preponderance, even at a resentencing hearing. Moreover, there are strong arguments that a lesser standard should apply at the initial sentencing stage, when the applicant seeks a DVSJA sentence pursuant to P.L. § 60.12.

[12] *Id.*

III. Intake & Case Assessment: DVSJA Resentencing



1. Counsel Assigned

Applicants for DVSJA resentencing are entitled to the assignment of counsel if they meet the initial eligibility requirements: (1) in custody, (2) serving a sentence of at least 8 years, (3) on a qualifying offense, (4) with a date of offense prior to August 12, 2019.[13]

To apply for resentencing you must first get permission from the court to apply. To do so, one option is for applicants to file an "Application for Permission to Apply for Resentencing" by submitting a UCS-447/SF form with the same court that originally sentenced them. CPL § 440.47(1)(a). Some applicants file the UCS 447/SF form *pro se*. Others do so with the assistance of their former trial or appellate counsel, or another advocate.

These requests are submitted directly to the sentencing court and do not need to be submitted on notice to the prosecution. Although the UCS 447/SF form (confusingly) asks questions pertaining to the merits of a DVSJA claim, those details are not relevant at this point. Only the initial eligibility questions (*see* p. 2 of this guide) are relevant at this initial stage. However, some judges erroneously deny requests for permission to apply, based on a merits assessment. Therefore, there is an advantage to counsel submitting the request for permission to apply where possible, instead of the applicant doing so *pro se*.

[13] CPL § 440.47(1)(a); CPL § 440.47(2)(c).

2. Start Gathering & Reviewing Case Files and Documents

After assignment, the defense team should immediately begin gathering documents that will help prepare for the initial intake interview. Obtain and review as many files as you can in the near-term, but don't let it unduly delay the client intake interview.

Consult the Best Practices Manual for DVSJA Investigations for a more comprehensive list of suggestions, including template releases and template cover letters for record requests. Here are some of the categories to consider:

Documents to Gather May Include (non-exhaustive list):

- Documents from initial prosecution
  - Court file
  - Trial attorney's file
  - Pre-sentence investigation report (sometimes called PSI or PSR)[14]
  - Transcripts from plea/trial and sentencing
  - Expert reports
  - Competency reports/examination notes
- Record on appeal and post-conviction proceedings
  - Appellate attorney's file, including counsel's notes[15]
  - Appellate briefs and post-conviction motions
  - Trial court and appellate decisions
  - Court of Appeals leave application
  - Federal habeas filings and decision, if any
  - Supreme court petition for a writ of certiorari, if any

[14] Once granted permission to apply for resentencing, DVSJA applicants are entitled to a copy of their pre-sentence report upon written request under CPL § 390.50(2).

[15] Clients are entitled to a copy of the case file, including attorney work product and notes, with very limited exceptions. *See Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 NY2d 30 (1997).

- Law enforcement records
    - All records where your client is listed as a victim, perpetrator, subject, or witness
    - Records for any other relevant parties
- Court records on other dockets/other courts
    - Order of protection (Family Court/Criminal Court)
    - Criminal history records of abuser(s) from DCJS and/or OCA
    - Charges against abuser(s) in a separate offense
    - Family Court records from divorce or child custody proceedings
- Medical/hospital records
- Mental health counseling/psychiatric records (from community treatment and/or county jail)
- Child welfare records
- School records
- Domestic violence organizations/shelter records
- DOCCS records
    - Programmatic, medical, and disciplinary records
    - Parole records
- OMH mental health records (while in DOCCS custody)

3. Initial Intake Interview

As soon as possible after you are assigned as counsel (ideally within a few weeks), you should schedule an intake interview with your client during a legal visit or legal call. See the **Initial Intake Interview Guide** (page 9) for more advice on how to structure the conversation and the kinds of questions to ask. However, keep the following in mind:

- **Goals**:
    - Build trust and rapport with your client.
    - Gather initial information for the investigation.
    - Begin assessing the merits of the case.

- **Trauma-Informed Approach**: Setting modest expectations for the initial intake interview is important. It is crucial to take a trauma-informed approach, understanding that your client may have difficulty speaking about past trauma, and it may take several conversations before they are ready to communicate with you about their abuse history. Consult ILS' Interviewing for Mitigation Guide for further guidance.
- **Who Participates?** Ideally, counsel should partner with a social worker or mitigation specialist to conduct the initial intake interview. Many people seeking DVSJA relief have endured significant trauma; it can be helpful to have the guidance and assistance of a colleague with expertise in trauma-informed interviewing and mitigation.
- **The Interview Should Take Place via Legal Visit or Call:**
    - Ideally this interview will take place in person, since meeting face to face will help to build trust and develop rapport with your client and will facilitate better communication and information exchange. You can also bring copies of record releases to the legal visit to sign in person. Legal visits generally have to be scheduled with the prison ahead of time. If it's your first time scheduling a visit at that facility, the best practice is to call the facility to inquire about the rules for scheduling legal visits. You can also consult DOCCS Directive No. 4404: Incarcerated Individual Legal Visits. Speak to your Chief Defender or Assigned Counsel Plan Administrator about funds available to cover expenses.
    - However, if a visit is not practicable, you can set up a confidential legal phone call by contacting the prison. The appendix to the Best Practices Manual for DVSJA Investigations contains a template for requesting a legal phone call (or a legal video conference via Webex, which is allowed at Bedford Hills Correctional Facility). For a **List of DOCCS Email Addresses to Request Legal Calls**, *see* Appendix, at A-2.
    - Conducting initial intake via letter is not ideal. It is difficult to establish trust and open communication through letters alone, many clients may not feel comfortable discussing such personal details via letter or they may struggle with literacy or language barriers, making letter correspondence ineffective. However, if you discover

that your client would *prefer* to communicate in writing, you can send them some of your key questions via legal mail.

4. Follow-Up Letter to Client

After the initial interview, you should write a follow-up letter to your client. See **Template Follow-Up Letter to Client Post-Intake Interview** (Appendix, at 1). The letter should:

- Explain again the requirements of the DVSJA;
- Caution that DVSJA applications often require substantial time to investigate and draft, and be conservative about the chance of success;
- Outline next steps for the legal team and for the client;
- Send any additional informational materials, such as the DVSJA Resource Guide, by the Survivors Justice Project;
- Send releases for the client to fill out, which will help you continue the investigation. See the Best Practices Manual for DVSJA Investigations for release templates (including a general release, HIPAA, OMH-11 form, and others).

5. Investigation

DVSJA investigations are in-depth and take time. It is critical to communicate with your client throughout the investigation with updates, as well as to schedule periodic visits and/or legal calls to continue interviewing them about their experience. Your client will be the most important source of information.

Consider whether it would be helpful to work with an investigator at this stage. The Best Practices Manual for DVSJA Investigations can serve as your roadmap at this stage. The investigation entails:

- Seeking a wide variety of records;
- Interviewing people with information about the client's abuse history, as well as other mitigating information; and

- Seeking letters of support or notarized statements from friends, family, and community members to accompany the application.

Be mindful about the roles of your team members in the investigative stage, and how that might affect their approach as you look towards a potential evidentiary hearing. For instance, if you plan to submit a report by a mitigation specialist, or have an investigator testify, a court may determine that their notes from interviews with the client and/or members of the community are discoverable. Some defense teams may opt to distinguish between the role of a mitigation specialist who testifies, on one hand, and a social worker who is providing support for the client (and/or their loved ones) as they navigate the retraumatizing aspects of the DVSJA process.

6. What's Next?

In most cases, the next step will be drafting and filing an application for resentencing pursuant to CPL § 440.47, after your client has reviewed and approved the application. At this stage, you may want to consult ILS' Storytelling for Mitigation Guide, as well as consult with the DVSJA Task Force on how to approach drafting.

In some cases, however, the defense team may want to consider withdrawing from the case. Withdrawing should be a last resort. It should be considered only where you have exhausted all investigative avenues and determined it is not possible to meet the statutory requirements.

Filing an application for DVSJA Resentencing:

Filing the application is the next step in most cases. For more comprehensive guidance on crafting resentencing applications, resources are available on ILS's SASC DVSJA Resources page, and on the NYSDA website.

Defenders can also reach out to:

- ILS's Statewide Appellate Support Center at ILS (SASC@ils.ny.gov/elizabeth.isaacs@ils.ny.gov), or

Considering Withdrawal in Non-Viable Cases

In some cases, after a thorough investigation and multiple client interviews, it may become clear that there is not sufficient evidence to meet the statutory criteria. Withdrawal is a last resort but should be considered when it would be in the client's best interest to withdraw and preserve the opportunity to pursue a claim at a later time, in the event the law is amended or more evidence is uncovered.

If you are considering withdrawal, consult the guide on **Considering Withdrawal of a DVSJA Application** (Section IV), which includes a checklist on pre-withdrawal steps to take.

Some scenarios where withdrawal may be appropriate:

- The investigation has not uncovered enough corroboration to satisfy the evidentiary pleading requirement for DVSJA resentencing applications under CPL § 440.47(2)(c);
- The abuser was not a member of the same family or household, as defined in CPL § 530.11 (note this is a very broad definition that does not necessarily require that the applicant and abuser co-habitated or are blood relatives);
- The abuse is too attenuated from the offense to satisfy the DVSJA's temporal nexus language (it is strongly advised to consult with ILS, NYSDA, and/or the DVSJA Statewide Defender Task Force before concluding that the abuse is too attenuated); or
- The abuse clearly was not a significant contributing factor to the offense.

IV. Intake Interview Guide

When you are working on a resentencing case under the Domestic Violence Survivors Justice Act (CPL § 440.47), it is important to conduct an initial intake interview with your client as soon as practicable—ideally within a few weeks of assignment. Connecting with your client early allows you to (1) begin the critical process of building a trusting relationship, (2) begin to assess the merits of the case, and (3) learn information that will shape your investigation.

The intake interview template below provides a roadmap for the first conversation with your client, whether it is on a legal call or during an in-person legal visit. The topics and questions below are just a starting point. They should be expanded on and individually tailored, based on the facts of each case.

1. Introduction

- Share your name, pronouns (if you want), organization (if applicable).
- Explain your role: you've been assigned to work with the client to explore resentencing under the Domestic Violence Survivors Justice Act (DVSJA).
- Ask your client how they're doing. How are things going at their current facility? Are they involved in any programs or classes? (This is an effort to get to know your client and make them feel comfortable, before jumping into the substance of the visit or call. It also gives you an initial picture of the positive mitigation you can put forward from their period of incarceration)
- Explain the purpose of the interview/conversation:
    - To meet the client and start to get to know them;
    - To ask some initial questions relevant to the DVSJA;
    - To explain the requirements of the law; and
    - To answer any questions the client may have.

- Set expectations about the DVSJA process.
    - The process of investigating a DVSJA claim can take time—months and often years. Even after filing the application, it will still be a long time before going to court. The prosecutor will need to review their files before responding to the application. It can also take time to schedule the hearing, and then the hearing itself can take a long time.
    - The process can be emotionally difficult for some people, since it involves discussing traumatic events from the past.
    - You can't promise that you will be able to file an application on the client's behalf.
    - You will need their help in conducting an investigation.

- Emphasize client agency and communication.
    - At any point in the process, the client can decide they do not want to move forward with the resentencing application.
    - During this conversation, or any future conversations, they can always ask to take a break or end early if it becomes too difficult to discuss certain things.
    - You will seek their permission before requesting records or speaking with people in their life who may be able to help with the case.
    - They will control and approve everything that is included in a potential filing. You will explain why you think something might be important and included, but ultimately it is their decision since the application centers on their experience.

- Check-in: "Do you have any questions at this point about what I've just explained?"

2. Give Your Client an Overview of the DVSJA

- As the client may know, the DVSJA is a new law that was passed in 2019, which recognizes that domestic violence is a significant contributing factor to many criminal offenses. It gives judges the option to reduce a sentence when a survivor of domestic violence can show they meet the law's requirements.

- For someone whose offense occurred before the date the law went into effect (August 12, 2019), there is an option to go back to the original sentencing court and ask for a lower sentence.
- To be initially eligible for resentencing, an applicant must meet these criteria:
    - Currently incarcerated
    - Serving a sentence of at least 8 years
    - Convicted of an offense that is covered by the statute[16]
    - Sentenced as a first or second felony offender (not a second violent, persistent felony offender, or persistent violent felony offender)
- If it's clear the client meets the baseline criteria: "Based on my review of your case, I believe you do meet these criteria, which is why you were already assigned counsel by the court."
- Statutory Elements: the next step to qualify for a reduced sentence requires us to show three things:
    1. At the time of the offense, the client was a victim of substantial physical, sexual, or psychological abuse perpetrated by a family member, member of the household, or someone with whom the client was in (or had been in) a close relationship;
    2. The abuse the client experienced was a significant contributing factor to the offense; and
    3. The original sentence the client received was "unduly harsh," taking into account all the circumstances of the client's case, past history, accomplishments and disciplinary record in prison, and prospects for success rejoining the community.

[16] Excluded offenses:
- First-degree murder (PL 125.27)
- Second-degree murder in the course of a rape (PL 125.25(5))
- Aggravated murder (PL 125.26)
- Terrorism (PL 490)
- Any offense that requires registration on the sex offender registry (Correction Law 6-C)
- Any attempt or conspiracy to commit the above offenses

- Breakdown these 3 factors for your client:
    - First factor:
        - "The abuse you experienced might have been physical, sexual, or emotional/psychological -- or a combination of these. I'll be asking you some questions that are very personal to try to understand what you experienced, but please let me know if there's anything you don't feel comfortable discussing. We can always take a break or go to another topic – it's up to you."
        - "The law requires that we have two pieces of evidence to corroborate (or support) that the abuse occurred. At least one piece of evidence has to fall into a category defined by the law: either a court record, presentence report, social services record, hospital record, law enforcement record, domestic incident report, order of protection, OR a sworn affidavit from someone who was a witness to the abuse or has first-hand knowledge of it."
    - Second factor:
        - "To show the connection between the abuse you experienced and your offense, I'll be asking you how you think they are connected. It's OK if you're not sure – we can try to explore this together."
        - "Keep in mind that your abuse history does not need to be the *only reason* for your actions. We will need to show that it was a *significant factor* contributing to the offense, but I understand that there could have been many reasons for what occurred."
    - Third factor:
        - "This is an opportunity to share what has happened in your life that goes beyond the story that came out in court or was presented by the prosecution."
        - "To show that the sentence you have now is too harsh, we can bring in evidence from your life before the offense, and also

evidence about your time in prison – programming, accomplishments, your current relationships with family, and your plan for reentry."

- "However, the judge can also take into consideration the facts of the offense, so we have the opportunity to give more context about what happened."
- "I'll need your help in understanding both the difficult experiences you went through, and also the things you are most proud of."

- Check-in: "Do you have any questions at this point, or is anything unclear?"
- Give your client an overview of the DVSJA process:
    - First phase: Investigation
        - The investigation phase can take a long time – sometimes over a year. It consists of:
            - Conversations between client and defense team
            - Investigation: requesting records related to the case, and to the abuse the client experienced; interviewing people who may have knowledge of the abuse, or could provide favorable letters to support the application
            - "In some cases, it may make sense to work with an expert – such as a psychologist or a social worker – who would meet with you to conduct an evaluation. I do not know at this point if that makes sense in your case, and you would not be forced to do this if you are not comfortable. If we were to work with an expert, I would make sure you feel prepared and supported."

- Second phase: Filing the application / Negotiating with the DA
    - "Once we have investigated your case, we will talk about whether we have enough evidence to go forward with an application for resentencing."
    - "The application has to be filed with the same judge who sentenced you, unless that judge is no longer on the bench. Then it will be assigned by the court clerk to a different judge."
    - "The application must be filed before you are released from prison."
    - "Either before or after we file, we may approach the District Attorney's office to see if they would consent to resentencing in your case. Sometimes these conversations are quick, but other times they can stretch out over weeks or even months."
    - "Once the application is filed, the prosecution will have a chance to respond in writing. This can take at least a few months, and sometimes longer. If they haven't consented to resentencing, the DA will likely argue that you should not get DVSJA relief."
    - "After we have the prosecution's response, we will decide whether it makes sense to write a 'reply' in writing, telling the court why the prosecution's arguments are wrong."
- Third phase: Hearing or Summary Denial
    - Once the application is filed, the court will either grant a hearing, or deny the application.
        - "The main issue for the court to decide at this stage is whether we have submitted the required two pieces of evidence corroborating your experience of abuse."
    - "If the application is denied, then we have the right to appeal, asking the appellate court to grant a hearing. We would also have the option to resubmit the application, providing additional evidence."

        - "If the application for a hearing is granted, we will be given a date for a hearing in the trial court."
        - "What a hearing looks like is different depending on the case. It might include any of the following:
            - Testimony from fact witnesses (you would not be forced to testify if you do not want to);
            - Testimony from expert witnesses;
            - Introduction of documentary evidence;
            - Arguments by lawyers – orally, or sometimes in writing after the hearing is over."
        - At the end of the hearing, the judge decides whether to grant the application for resentencing, or to deny it.
        - "If we do have a hearing, I will make sure you feel as prepared as possible. You have a right to be present at a hearing and would be brought to the hearing from prison. I know the thought of going back to court can bring a lot of anxiety and I want to try to make sure we are working together to get through that anxiety. We can talk about this in more detail if this situation arises."
    - Fourth phase: Resentencing or Appeal
        - "If we were to win at a hearing, your sentence may be reduced." [Explain sentencing range for client's offense/predicate status under the DVSJA.]
        - "If we were to lose, you have a right to appeal, and a right to counsel on appeal."
- Check-in: "I've shared a lot of information with you, and I understand it may feel overwhelming or confusing. Do you have any questions at this point?"

3. Sample Intake Questions

Where to Start

At this stage, it can be helpful to **give your client options** regarding which topic they'd like to start with. You can also ask if they're comfortable with a certain topic before you start. How you frame your questions will depend on the information you may already have about the abuse history and/or the context of the offense. Most importantly, follow your client's lead—if they seem to want to talk about the day of the offense, start there. If they are more reluctant to open up about the past, try asking questions about their life right now—programs they are involved in, or their day-to-day routines and interests.

No matter where you start, keep your questions open-ended, and stay attuned to whether the interview is becoming retraumatizing for your client.

Some optional starting points:

- What are your client's current interests? Things they are most proud of?
  - "How are things going for you these days? Are you involved in any programs? Do you have a current work assignment? How has that been for you? Is there anyone you're in touch with regularly?"
- Background/where your client grew up.
  - "Where are you from originally? Who did you live with growing up? What kind of things did you like doing as a kid?"
- How your client learned about the DVSJA.
  - "I'm curious how you learned about the DVSJA – can you tell me about that? What did you think when you first found out about it? Do you know anyone who has gone through the DVSJA process?"
- What was going on in the client's life in the days/months before their arrest:
  - "Can you tell me about what was going on in your life right before your arrest? Where were you living? Were you working at the time? What was your relationship like with your family?"
- Relationship with a certain family member or intimate partner:

- "I'd like to ask you some questions that will help me understand how to move forward with the case. I have some questions about your relationship with [PERSON]– would it be OK to start there?"

- The day of the offense:
  - "You mentioned earlier that you wanted to share more about what happened. Can you walk me through that day, starting with when you woke up in the morning?"

Below are some sample questions you could ask under various topics:

Sample Questions about Abuse History

- How did you hear about the DVSJA? Can you tell me why you thought it might apply to you?
- Abuse can take a lot of different forms. Are there people in your life who have hurt you, either physically or emotionally?
- Are there people who have hurt you in the past?
- How did you know him/her/them?
- Can you tell me about the relationship that you think is most connected to this offense?
  - When did you meet? What were your first impressions? Did that change over time?
  - Did you live together? Where? How long?
  - Was the relationship romantic?
  - Do/did you have any children with them?
  - Can you describe how their words or actions hurt you?
  - Are there specific incidents you remember and feel comfortable sharing?

Sample Questions about Corroboration of the Abuse

- As I mentioned before, I'd like to work together to figure out if there are any documents or records that would help the case, or people I

should talk to. But I understand that it can be really hard to tell anyone, even people close to you, about the abuse you went through, and many people who have experienced abuse often don't report it to anyone.

- Were there ever times that you told anyone [that they were hitting you; that they were acting controlling; that they were calling you repeatedly, etc.]?
    - Who did you tell? When did this happen? Can you tell me about that conversation? Do you remember what you shared? Is it OK for me to reach out to this person/agency/organization? If so, do you know how I can get in touch with them?
    - Did you ever talk about your relationship with [the abuser(s)] with:
        - The police?
        - A doctor or other medical provider?
        - A therapist or counselor?
        - A teacher or school guidance counselor?
        - A family member?
        - A coworker or friend?

***Depending on the client's responses to these questions, you should get:

- Permission from the client to contact the people/entities. (For people, ask your client how best to approach them, and whether/how often they are still in touch/whether they know that your client is seeking resentencing under the DVSJA);
- Contact information for the people/entities to whom the abuse was disclosed, or who may have witnessed the abuse or its effects on you (or any identifying information that would facilitate a Westlaw People Search);
- Date ranges for when the abuse occurred and when disclosures occurred, to the best of the client's ability to recall. It may be helpful to

use major life events as anchors in creating a timeline (e.g., children's birthdates, major world events, etc.).

Sample Questions about the Connection Between Abuse and Offense

- Can you tell me about what happened that led to your arrest?
    - Can we go back to the day/week/month before the incident?
    - What was going on for you at that time?
    - Where were you living? Were you working?
    - What were your major worries during that period? What was causing you to feel worried/stressed/anxious?

- Was anyone else involved in what happened?
    - Was this something that was planned, or was it unexpected?
    - How would you describe your role in what happened?
    - Did anyone make you feel pressured to participate in the incident? How so?

- How do you think the abuse played a role in what happened?
    - When was the last time you saw [the abuser(s)]?
    - How often had you been seeing them in the days/months/weeks leading up to the incident?
    - Can you walk me through the day that it happened?
    - Can you describe how you were feeling? What were your fears at that time?

4. Releases

- Before the interview, refer to the Best Practices Manual for DVSJA Investigations for release templates.
- Explain to your client that in order to request records and/or speak to some record-keeping entities, you will need to obtain signed releases from them. They do not have to sign any or all of them, but having access to these records will help the investigation process.

- Walk through the core releases and what they cover:
    - General release (trial counsel, counsel on any Family Court matters, etc., DOCCS, school records, court records, etc.)
    - HIPAA (healthcare/medical records)
    - OMH-11 (Office of Mental Health records for any mental health evaluations/treatment while in custody) - explain that this *must be signed in front of a witness*, although the witness does not have to be a DOCCS staff member, as the form indicates.
- If you are conducting the intake interview over the phone, explain that you will mail hard copies of these releases to the client with your follow-up letter.
- If you are on a legal visit, your client should be able to take the papers back with them to sign/notarize. *See* DOCCS Directive No. 4404, Section IV(G). You can also consider bringing a notary stamp on the legal visit if you are a notary (but get it approved on the gate clearance beforehand!).

5. Next Steps/Closing

- Thank your client for all they've shared. Acknowledge how difficult it may have been for them to speak with you. Invite them to continue thinking about what you've discussed.
- Outline next steps for the defense team.
    - The defense team will send a follow-up letter summarizing your conversation and giving additional information about the DVSJA. With this letter will be enclosed releases for the client to sign if they are willing to do so.
    - Once you have the releases, you will submit requests for records from some of the people/entities you have discussed.
    - You will need some time to assess the case.

- Outline next steps for the client.
    - Ask the client to review/sign the releases and mail them back to counsel.
    - If they have any other suggestions for people you should speak to, or agencies/entities from whom you should seek records, they should write to you via legal mail.
    - They should contact you with any concerns.

- Set specific expectations for future communication and seek client input.
    - Will there be a follow-up legal call?
        - If so, approximately how long after you receive the releases from the client?
    - How can they reach you?
        - Is it best to send you legal mail, requesting a legal call?
        - Can they put your number on their call list? If so, what are the best times to reach you? (Note that the cost of non-legal calls will be charged to counsel, and the calls are not necessarily confidential.)
        - Do you correspond via Jpay (non-confidential prison email system)? If so, be sure to explain that the communications are not confidential and should only be used if they want to request a legal call or to discuss scheduling.
    - Ask the client if there are days/times that are better for them to do legal calls or visits, depending on their programming/work/class schedule.
    - Is there a family member or friend they'd like you to contact if there are any urgent issues/updates?
        - If so, what is the scope of the information that it's OK to disclose to that person? (This is often helpful if there's a loved one who your client speaks to on the phone frequently, and you'd like to get the client information quickly. It can be helpful to get this permission in writing, since in some cases sharing this information will constitute a waiver of privilege.)

- Explain that you may not be able to respond to them immediately, but this does not mean you are not working on their case.

- Closing – at least 10 minutes
  - Try to leave at least 10 minutes at the end of the interview to return to a more conversational interaction.
  - It is important for your client to have time to decompress and compose themselves emotionally before reentering the prison environment. This has been described as "putting back on your armor."
  - Questions you can ask your client:
    - "How are you feeling? I know this may have been a hard conversation, and I appreciate how much you've shared."
    - "What does the rest of your day look like?"
    - "Is there something you can do today to take care of yourself? Is there anyone you can talk to, or an activity that helps you destress?"
  - Thank the client for speaking with you and reiterate that you will follow up with a letter/releases.

V. Do I Have a Corroboration Problem?

What is the DVSJA Corroboration Requirement?

In order to obtain a hearing, applicants for resentencing under CPL § 440.47 must submit two pieces of corroborating evidence, supporting the claim that they were, "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 defined in CPL § 530.11.[17]

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, or
- 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
- 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 CPLR § 4510, or other advocate acting on behalf of an agency that assists victims of domestic violence for the

[17] See CPL § 440.47(2)(c). Note that applicants seeking DVSJA relief at *initial* sentencing under PL § 60.12 do not have to show two pieces of corroboration in order to be granted a DVSJA sentencing hearing. *See* PL § 60.12(1)(a). They are entitled to have the judge hear their application for DVSJA sentencing so long as they were convicted of a qualifying offense and are either a first or second felony offender. *See id.*

purpose of assisting such person with domestic violence victim counseling or support.

When Do I Submit the Corroboration?

At least two pieces of corroborative evidence must be included in the CPL § 440.47 application requesting a DVSJA resentencing hearing. Note that this application is separate from the Application for Permission to Apply for Resentencing, which must be filed with the sentencing judge to show *initial eligibility* so that counsel may be assigned. Of course, further corroboration and supporting evidence can also be submitted at a hearing.

Practice Tips

Litigating the Corroboration Requirement in DVSJA Resentencing Cases

The Corroboration Requirement Imposes a Minimal Threshold Burden

Both the plain text and the spirit of the DVSJA as a remedial statute weigh in favor of interpreting the corroboration requirement as a minimal threshold burden at the pleading stage. This evidentiary gatekeeping mechanism was intended to weed out demonstrably false or frivolous claims. It was not intended, however, as a substitute for a determination on the merits. This is especially true given the well-documented phenomenon of underreporting among survivors of domestic violence, which was understood by the legislature when it passed the DVSJA.[18] *See Generally* Elizabeth Langston Isaacs, *The Mythology of the Three Liars & the Criminalization of Survival*, 42 YALE L. & POL'Y REV. 427 (2024) (criticizing the DVSJA corroboration

[18] One of the bill's sponsors, Assemblymember Aubry, stated during a 2019 floor debate, "[p]eople for many years did not report domestic violence, did not record it, afraid that they would be treated differently. And so, we're recognizing this evolving circumstance for [] domestic violence…where we think that individuals have been impeded from shining a public light on their private lives." Transcript of Floor Debate, NYS Assembly, at 12 (March 4, 2019).

requirement as a reincarnation of regressive evidentiary doctrines grounded in race and gender bias, and arguing that it should be interpreted leniently by courts).

Client's Self-Reporting Can Qualify as Corroboration

Plain text argument: CPL § 440.47(2)(c) lists several examples of acceptable corroborating evidence that will often contain statements from the accused in a criminal case, *e.g.*, pre-sentence reports, social service records, medical records, court records, records of consultations with domestic violence shelters, clergy, and other service providers. As one court recognized, nothing in the statute "appear[s] to require that corroboration come a source or sources other than the defendant herself. What must be corroborated is the current claim of abuse made in the motion. Court records, pre-sentence reports and social service records, for example, may well include allegations made exclusively by the defendant, and the statute includes no language excluding such documents from among those required." *People v. E.R.*, *6 (Sup. Ct., Bronx Cty 2021) (unpublished). *See* Appendix.

Case Law: Courts have found corroborative evidence sufficient in several cases where the documents at issue rely on the client's reports of their experience of abuse. Some examples include:

- **Client's statements to police post-arrest** (*People v. Coles*, 202 A.D.3d 706 (2d Dept. 2022); *People v. Burns*, 207 A.D.3d 646 (2d Dept. 2022); *People v. K.B.*, 81 Misc.3d 1224(A) (Sup. Ct. Erie Cty 2023))
- **Client's statements to Probation in the Presentence Investigation Report** (*People v. K.B.*, 81 Misc.3d 1224(A) (Sup. Ct. Erie Cty 2023); *People v. Fisher*, 221 A.D.3d 1195 (3d Dept. 2023))
- **Client's statements to psych expert, social worker, or mitigation specialist** (*People v. Fisher*, 221 A.D.3d 1195 (3d Dept. 2023) (psychological evaluation in preparation for initial sentencing); *People v. S.S.*, 79 Misc.3d 1235(A) (Sup. Ct. N.Y. Cty 2023) (records from Central New York Psychiatric Center))

- **Client's affidavit accompanying DVSJA application** (*People v. Fisher*, 221 A.D.3d 1195 (3d Dept. 2023))

Corroboration Can Consist of Records Created while the Criminal Case Was Pending, or in Preparation for the DVSJA Application

Plain text argument: The statute explicitly contemplates courts accepting corroborating evidence that was generated in the course of the client's prosecution (e.g., the pre-sentence report). *See also* CPL § 440.47(2)(c) ("Other evidence may include…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.").

Supporting case law:

- *People v. Coles*, 202 AD3d 706 (2d Dept. 2022) (hearing warranted based on client's post-arrest statements to police and affidavits from family members solicited by DVSJA counsel);
- *People v. Burns*, 207 A.D.3d 646 (2d Dept. 2022) (reversing denial of DVSJA resentencing, where hearing had been granted in Suffolk County based on pre-sentence report, domestic incident report, applicant's statements to law enforcement alleging abuse, and sentencing minutes);
- *People v. M.O.* (Sup. Ct., Bronx Cty 2020) (unpublished) (granting hearing based, in part, on affidavit from applicant's counselor in county jail and statement by trial attorney that applicant had bruised face at arraignment). *See* Appendix.
- ***But see*** *People v. White*, 2024 NY Slip Op 022154 (2d Dept.) (affirming summary denial of DVSJA resentencing application due to insufficient corroboration where affidavits provided vague, undetailed accounts of an incident of abuse at an unspecified time in the past, and other evidence did not corroborate the occurrence of sexual abuse). For purposes of distinguishing this case, additional facts not apparent from the opinion may be useful: neither notarized letter submitted was sworn; the records from the Office of Children and Family Services (OCFS) and the PSR contradicted the DVSJA claim; the claim itself was based on a single

incident of childhood sexual abuse; and the client maintained his innocence in the DVSJA submission. Also note that *White* involved a *pro se* application pursuant to CPL § 440.47, where the primary issue on appeal—that the applicant should have been assigned new counsel after his original counsel requested to be relieved—was not addressed by the Second Department.

Tips for Corroborating Psychological Abuse

Evidence corroborating psychological abuse, including coercive control, can be more subtle and nuanced than evidence supporting physical or sexual abuse. Witness affidavits corroborating psychological abuse need not provide "eyewitness accounts." *See People v. Coles*, 202 A.D.3d 706 (2d Dept. 2022) (affidavits from family members attested to observing DVSJA applicant's fear of abuser, among other observations).

To identify evidence of psychological abuse, it is important to understand, often with the help of an expert, how the psychological/emotional abuse manifested, and the effects it had on your client. It may also be helpful to consult the Introductory Guide to Coercive Control for the DVSJA Attorney to better understand how psychological abuse can manifest as coercive control.

Some issues to consider:

- **Name calling/verbal abuse:** did the client tell any friends, family, medical providers, therapists, social service provider, or law enforcement about the verbal abuse? Check any and all relevant records for treatment notes, police reports, or other documentary evidence mentioning denigrating or harsh language by the abuser.
- **Financial/resource control:** did the abuser restrict the client's access to money or basic necessities? Your client may have mentioned this to authorities, friends or family, a therapist, a domestic violence counselor, or in another kind of report. Bank or credit card statements may reveal helpful patterns. Look through any and all records for any reference to financial hardship or lack of access to funds.

- **Lack of agency:** coercive control can be very subtle, especially if it is premised entirely on threatened harm and does not involve physical violence. Did the client experience manipulation or coercion that resulted in loss of agency over their personal autonomy and decision-making? Do any records refer to "rules" the client had to follow, or things the abuser did not allow them to do? Family and friends might be able to share about family events the client stopped attending, or other ways their behavior changed while in the abusive relationship.
- **Weaponizing systems of authority**: did the abuser use family court/custody proceedings to control the client? Did the abuser call the police, child protective services, or immigration authorities on the client? Did they tell the client to lie about the source of their injuries when they went to the hospital? Some documents that at first blush look like they don't corroborate the abuse at all, do in fact reveal the insidious layers of coercive control when understood in context.

Corroboration Need Not Support Every Incident or Aspect of the Abuse

- **Plain text argument**: CPL § 440.47(2)(c) describes corroborating evidence as documentation "*tending* to support the person's claim" (emphasis added), suggesting that a hearing should be ordered even where the corroboration illustrates one aspect of the abuse, or a single incident (where the abuse was long-term).
- **Analogy to corroboration in child abuse/neglect cases:** hearsay admissible if accompanied by "[a]ny other evidence *tending to support* the reliability of the previous statements." *In re Christina F.*, 74 N.Y.2d 532, 536 (1989) (quoting Fam. Ct. Act. 1046(a)(vi) (emphasis added)).
    - Note that the Second Department favorably cited two cases from child neglect cases in *People v. Coles*, 202 A.D.3d 706, 707 (2d Dept. 2022) (citations omitted).
- **Supporting Case Law**
    - *People v. Coles*, 202 A.D.3d 706 (2d Dept. 2022)
    - *People v. J.F.* (Sup. Ct., Kings Cty 2021) (unpublished) (holding that the DVSJA "does not require that the mandated 'one piece' of a

certain type of evidence corroborate the entire claim or even any particular element of it")). *See* Appendix.

Questions of Credibility Must Be Resolved at a Hearing

- Prosecutors frequently argue that a hearing should be denied because the client has inconsistently reported certain factual details about their history of abuse. But questions of credibility are not a bar to a hearing. *See People v. M.O.*, *4 (Sup. Ct., Bronx Cty 2020) (unpublished) ("The People have referred the Court to various statements made by the defendant that she was not subject to abuse from the victim. Such statements do not defeat the defendant's entitlement to a hearing, but instead give rise to the kind of material issue of fact that is best resolved at an evidentiary hearing."). *See also People v. E.R.*, *6 (Sup. Ct., Bronx Cty 2021). *See* Appendix.
- Inconsistent accounts should not foreclose resentencing after a hearing.
    - Research has established that "domestic violence often results in neurological and psychological trauma, both of which can affect a survivor's comprehension and memory." Deborah Epstein & Lisa Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PENN. L. REV. 399, 406 (2019).
    - Inconsistent accounts may also be the result of a survivor's avoidance, a fear of being punished, fear of family members, grief, or any other number of psycho-social factors related to trauma.
    - As a result, survivors' stories are more likely to appear "internally inconsistent and therefore implausible," and/or "externally consistent"—i.e., they do not comport with common understandings of "how we believe the world works." *Id*. *See also* Battered Women's Justice Project, *Myths and Misconceptions: Criminalized Survivors*, 5 (Sept. 2023) ("Trauma can impact a survivor's ability to tell a story in a linear fashion" and can affect the "ability to access memories immediately after the triggering event."); Jill Laurie Goodman & Dorchen A. Leidholt, eds., *Lawyer's Manual on Human Trafficking: Pursuing Justice for Victims*, 171 (2011)

("Minimization, denial, and memory loss, all symptoms of psychological trauma, can make it extremely difficult to elicit information necessary to understand whether the exploiter's conduct rises to the level of actionable trafficking.").

VI. What If There's a Time Gap Between Abuse & Offense?

What is the Temporal Nexus Requirement?

DVSJA applicants must prove that they were "a victim, **at the time of the offense**, of substantial physical, sexual, or psychological abuse," perpetrated by a member of the same family or household, as defined in CPL § 530.11.[19] But what does it mean to be a victim of domestic violence *at the time of the offense*?

This temporal phrase has been a source of confusion and therefore the subject of litigation. From the plain text, it appears that the DVSJA requires some degree of "temporal nexus" between the client's experience of victimization and their criminal offense. What exactly this means has been frequently litigated since the law was passed in 2019 and remains an open question. If you believe there is a time gap between the abuse your client experienced and their criminal offense, read on! This portion of the guide is intended to provide some ideas about questions you should be asking, legal arguments you may want to advance, and strategies you should consider.

Common Factual Scenarios

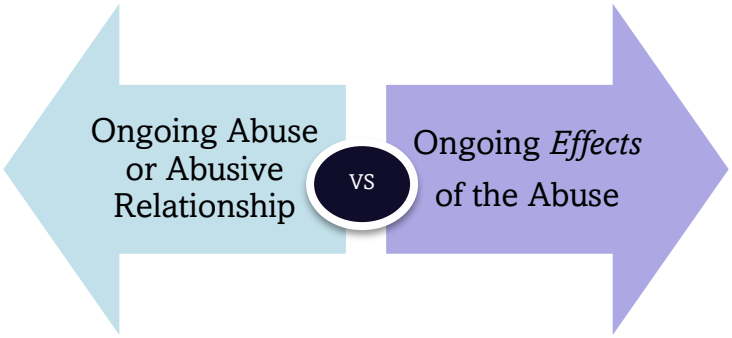
The question of whether a DVSJA applicant was a victim of domestic violence "at the time of the offense" arises in many different factual scenarios. Here are some common ones:

- The client experienced abuse in childhood/adolescence, but a number of years passed between the last known incident of abuse and the date of the offense.

[19] CPL § 440.47(1)(a); PL § 60.12(1)(a) (emphasis added).

- The client was in one or more abusive relationships in the past, but they had not been with an abusive partner for some time before the offense occurred.
- The client experienced physical and/or sexual abuse in the past, but the most recent abuse was primarily psychological.
- The client is a survivor of severe abuse, but the offense was committed against a non-abuser and appears to be completely unrelated to the abuse (e.g., robbery, drug sale, assault of an innocent third party).

How Are Courts Interpreting "At the Time of the Offense"?



As of April 2024, only the First and Third Departments of the Appellate Division have interpreted the DVSJA's "at the time of the offense" language.

- In ***People v. Williams***, 198 A.D.3d 466 (1st Dept. 2021), *lv. denied* 37 N.Y.3d 1165 (2022), the First Department adopted the prosecution's argument that to be a victim of domestic violence "at the time of the offense," the DVSJA applicant must demonstrate that "**the abuse or abusive relationship [was] ongoing**" when the offense occurs. *Id.* at 467. The court did recognize, however, that "the DVSJA does not require that the abuse occur simultaneously with the offense or that the abuser be the target of the offense." *Id.* at 466. The court held that Ms. Williams had experienced substantial physical and psychological abuse in the past, but that the more recent psychological abuse she alleged did not qualify as "substantial." Notably, the defense did not proffer a

mental health expert at the DVSJA hearing on the issue of the substantiality of the more recent psychological abuse. *See People v. Williams*, *7 (Sup. Ct., N.Y. Cty 2020) ("At the hearing, the defense failed to establish any legal, medical, psychiatric or other expert evidence that established a connection regarding how the domestic abuse and trauma from Ms. Williams' prior relationships with other men was a significant contributing factor to the defendant's criminal behavior in killing" the complainant) (unpublished).

- In ***People v. Fisher***, 221 A.D.3d 1195, 1197 (3d Dept. 2023), the Third Department adopted the First Department's statutory interpretation of the temporal nexus required. In that case, the DVSJA resentencing applicant alleged that physical abuse by her father was a significant contributing factor to her offense, which was a physical assault on both her father and her mother. The Third Department affirmed denial of the resentencing application, holding that (1) the father's physical abuse was too attenuated, since the evidence presented showed that it had ended several years before the offense, and (2) the abuse was not a significant contributing factor to the offense, citing admissions by the applicant and affidavits from family members that the attack was actually motivated by the applicant's anger over the father's marital infidelity. Again, it is notable that there was no psychological evaluation conducted analyzing the applicant's experiences of what the court called "occasional verbal bullying" in the more recent past, or any connection between the abuse and offense.

The holdings in *Williams* and *Fisher* are in tension with the prevailing psychological literature on trauma,[20] which recognizes the **cumulative and**

[20] *See, e.g.*, Kira, I. A., et al., *The Direct and Indirect Impact of Trauma Types and Cumulative Stressors and Traumas on Executive Functions*, APPLIED NEUROPSYCHOLOGY: ADULT, 29(5) (2022); Galovski, T. E., et al., *The Relative Impact of Different Types of Military Sexual Trauma on Long-Term PTSD, Depression, and Suicidality,* JOURNAL OF INTERPERSONAL VIOLENCE, 38(15/16) (2023); Follette, V. M.,et al., *Cumulative Trauma: The Impact of Child Sexual Abuse, Adult Sexual Assault, and Spouse Abuse*, JOURNAL OF TRAUMATIC STRESS, 9, 1, 25-35.

long-lasting effects of abuse. Some courts have demonstrated an appreciation for this broader view of how earlier abuse can significantly contribute to an offense.

- In *People v. D.L.*, 72 Misc.3d 257 (Columbia Cty Ct 2021), DVSJA resentencing relief was granted where the applicant's trauma from childhood sexual abuse led to substance use disorder, and his addiction contributed to his burglary offense. The court recognized that, "[a]lthough the sexual abuse Mr. L. experienced is removed in time from the 2008 crime for which he seeks a reduced sentence, the continuing trauma he experienced was a contributing factor to his drug use and addiction and related burglaries." Notably, *D.L.* was decided before *Williams* or *Fisher*.
- In *People v. C.S.* (Cty Ct., Westchester Cty 2023) (unpublished), the court recognized that a DVJSA applicant had proved that she was a victim at the time of the offense because she was still suffering from Post-Traumatic Stress Disorder (PTSD) from prior abuse. The court ultimately declined to grant relief, finding that there was insufficient evidence that the prior abuse was a significant contributing factor to the offense. Nonetheless, *C.S.* illustrates an understanding that continuing *effects* of abuse, which may manifest in PTSD or similar diagnoses, may satisfy the DVSJA's temporal requirement. *See* Appendix.

Practice Tips

Litigating Temporal Nexus in DVSJA Resentencing Cases

How to approach a time gap between abuse and offense:

Is There Actually a Time Gap Between Abuse and Offense?

At the outset, it is crucial to learn about your client's experiences in the months and years directly preceding the offense. In many cases, there may actually be more recent abuse that your client does not initially identify as such. This is especially true where the more recent abuse is primarily psychological/emotional. In cases where there may be a time gap between

abuse and offense, it is almost always advisable to engage an expert to conduct an evaluation to better understand the full range of abuse your client experienced.

"Ongoing Abuse" v. "Ongoing Effects of Abuse"

Williams and *Fisher* adopt a transactional approach to domestic violence that ignores the extensive psychological research and brain science demonstrating the long-term effects of abuse on a person's behavior. Even if you cannot identify recent experiences that would qualify as "substantial abuse," your client's offense may have been motivated by their experience of the ongoing effects of abuse–even many years after the abuse "ended."

What is the Role of PTSD and Trauma-Related Diagnoses?

Post-Traumatic Stress Disorder and other conditions associated with past trauma may be key to arguing that your client was experiencing the ongoing effects of domestic violence that is somewhat attenuated in time from the offense. Even if your client has not yet been diagnosed, an expert may be able to identify PTSD and related symptomologies that were active close in time to the offense.

Consult an Expert

Consider whether you can educate the court through an expert witness and/or psychological literature about the connection between past trauma and current behavior. Establishing this connection may help you overcome a court's reluctance to view the abuse as sufficiently recent in time.

Notably, in *Williams* and *Fisher*, there was no testimony from an expert who had evaluated the applicant for purposes of the DVSJA claim. By contrast, in both *D.L.* and *C.S.*, the defense called expert witnesses to testify about the continuing effects of prior abuse-related trauma, and how that trauma was connected to the offense. You may want to consult the DVSJA Task Force's guide, Experts and the DVSJA: A Guidebook for Defense Attorneys.

"Ongoing Abusive Relationships" with Parents

In *Williams*, the First Department held that the abuse or the *abusive relationship* must be ongoing at the time of the offense to satisfy the temporal nexus requirement. It is notable that the abusive relationship in question in *Williams* was an intimate partner relationship, which is qualitatively different than a parental relationship. Because the relationship with one's parents is so foundational to one's development and identity, and so inherently enduring, one is potentially always in a relationship with one's parents, even during periods of limited contact. Accordingly, it is possible that your client's ongoing abusive relationship with their parent was a significant contributing factor to their behavior despite, for example, the physical abuse having become less frequent, or the client having moved out of their parent's home.

The Relationship Between Prongs 1 and 2

The DVSJA hearing court's decision in the *Williams* case expressed concern about the lack of expert testimony establishing a connection between the past abuse and the DVSJA applicant's offense (i.e., the DVSJA's second prong). The First Department then focused on the absence of "ongoing" abuse or an abusive relationship (i.e., the timing language in the DVSJA's first prong). This suggests a conflation between the two elements. Perhaps had there been expert opinion evidence about the second prong (the abuse was a significant contributing factor to the offense), then the attenuation/timing question would not have been such a cause for concern.

Preserve the Challenge to Williams and *Fisher*

Even if you argue that your case falls within the *Williams/Fisher* framework – that the abuse or abusive relationship was ongoing at the time of the offense – the best practice is to argue in the alternative that *Williams* and *Fisher* interpreted the DVSJA's timing language too narrowly. If the issue ultimately goes to the Court of Appeals, you'll want to have made your record.

VI. Considering Withdrawal of a DVSJA Application

A Last Resort

Seeking to withdraw a DVSJA application (or asking to be relieved) should be a last resort. This course should be considered only after the defense team has worked closely with the client, conducted multiple interviews, and pursued a thorough investigation.

This arises most often in two situations:

(1) the defense has not been able to identify the required two pieces of evidence corroborating that the applicant was a victim of domestic violence, subjected to substantial physical, sexual, or psychological abuse; or

(2) the abuse is significantly attenuated in time from the offense and the connection between the abuse and the offense is tenuous.

If either of these scenarios applies to your case, you should consult these sections of the guide before pursuing withdrawal: **Do I Have a Corroboration Problem? (Section IV)** and **What If There's a Time Gap Between Abuse and Offense? (Section V)**. Below are steps defense teams should consider taking if they do intend to pursue withdrawal.

Facing Corroboration and/or Temporal Nexus Challenges

Thorough investigation and in-depth client interviews ultimately may not yield sufficient corroboration to meet the statutory requirements. Or, after consultation with an expert and/or with the DVSJA Statewide Defender Task Force, you may be convinced that the temporal attenuation between the abuse and the offense makes a DVJSA application untenable. In these situations, consider the following steps:

- Legal Visit or Call with Client:
    - **Go back to your client**. On a confidential legal visit or phone call, explain the investigation steps you have taken and your opinion that there is insufficient corroboration and/or too large a time gap between abuse and offense to satisfy the evidentiary requirements for a hearing.
    - This is an opportunity to **invite your client to**:
        - Brainstorm additional sources of corroborating evidence,
        - Identify more recent experiences of abuse, or
        - Explain how the effects of more distant abuse were still influencing their behavior at the time of the offense.
    - **Bring compassion**. Be prepared that your client may experience this conversation as yet another instance of someone not believing them. It is important to communicate that you do believe them, and that the truth of their experience is not diminished by the limitations of the DVSJA. In other words, just because there is not sufficient documentary evidence to meet the law's demands, or because the abuse they suffered does not fall under the law's timing requirements, that does not mean that they were not victimized, and that their abuse did not play a role in the offense.
    - **Recommend withdrawal**. You can explain that, at this point, you recommend that they withdraw their request to file a DVSJA resentencing application at this time. This will allow for the potential of re-filing in the future, if additional evidence is uncovered or new connections between abuse and the offense develop. It will also allow them to re-file if the law is amended to change either the corroboration or temporal nexus requirements.
    - **Ask for their opinion**. After asking if they have any questions, inquire if they know what they'd like to do at this point. Remind them that they have time to think it over.
    - **Promise a follow-up letter**. Explain that you will send a letter outlining everything you've discussed and asking them to agree to withdraw the application by signing a Stipulation of Withdrawal. Tell them you will give them some time to think this over, and that they are always welcome to come back to you with questions.

- Follow-Up Letter
    - If the client agrees to withdrawal, send them a letter reiterating what was expressed in the phone call, enclosing a stipulation of withdrawal, as well as a draft letter to the court you plan to send. Ask them to sign and return. See **Template Withdrawal Letter to Client** (Appendix, at 5).
        - Send withdrawal packet to court, including:
            - Cover letter to court (client consent)
            - Original order of assignment
            - Stipulation to withdraw (Appendix, at 8)
            - Proposed order (Appendix, at 10)
    - If client does not agree to withdrawal, send them a letter reiterating what was expressed in the visit/phone call, explaining that you still plan to ask the court to assign another lawyer to their case.
        - In the letter, you should give them an opportunity to reconsider signing a stipulation to withdraw. You should also enclose a copy of the proposed stipulation, as well as a draft letter to the court you will send in the event they do not agree to withdrawal.
        - Send to the court:
            - A request to be relieved as counsel (informal);
            - Original order of assignment; and
            - Proposed order relieving counsel (Appendix, at 10).
        - Consider communicating with the court via email, or request a case conference to minimize any prejudice to your client that may occur by filing a formal application taking a position on the merits of the case.
- Closing letter: If the court approves withdrawal of the application (or assigns new counsel), send a letter to the client attaching a copy of the order and explaining:
    - *If withdrawing the application:* the client may pursue a DVSJA claim in the future if they are able to provide the required corroboration, or if there is additional evidence to satisfy the temporal nexus requirement. The letter should encourage them to reach out to your office if they are able to identify or recall additional relevant information that could meet the statutory requirement.

- *If assigning new counsel:* you are available to speak with newly appointed counsel about the case and to provide your entire case file, which belongs to the client.

APPENDIX

List of DOCCS Email Addresses to Request Legal Calls

To identify your client's current facility, visit: https://nysdoccslookup.doccs.ny.gov/

Facility	Email Address to Request Legal Calls
Adirondack	AdirondackLegalCallRequests@doccs.ny.gov
Albion	AlbionLegalCallRequests@doccs.ny.gov
Altona	AltonaLegalCallRequests@doccs.ny.gov
Attica	AtticaLegalCallRequests@doccs.ny.gov
Auburn	AuburnLegalCallRequests@doccs.ny.gov
Bare Hill	BareHillLegalCallRequests@doccs.ny.gov
Bedford Hills	BedfordHillsLegalCallRequests@doccs.ny.gov
Cape Vincent	CapeVincentLegalCallRequests@doccs.ny.gov
Cayuga	CayugaLegalCallRequests@doccs.ny.gov
Clinton	ClintonLegalCallRequests@doccs.ny.gov
Collins	CollinsLegalCallRequests@doccs.ny.gov
Coxsackie	CoxsackieLegalCallRequests@doccs.ny.gov
Eastern	EasternLegalCallRequests@doccs.ny.gov
Edgecombe	EdgecombeLegalCallRequests@doccs.ny.gov
Elmira	ElmiraLegalCallRequests@doccs.ny.gov
Fishkill	FishkillLegalCallRequests@doccs.ny.gov
Five Points	FivePointsLegalCallRequests@doccs.ny.gov
Franklin	FranklinLegalCallRequests@doccs.ny.gov
Gouverneur	GouverneurLegalCallRequests@doccs.ny.gov
Great Meadow	GreatMeadowLegalCallRequests@doccs.ny.gov
Green Haven	GreenHavenLegalCallRequests@doccs.ny.gov
Greene	GreeneLegalCallRequests@doccs.ny.gov
Groveland	GrovelandLegalCallRequests@doccs.ny.gov
Hale Creek	HaleCreekLegalCallRequests@doccs.ny.gov
Hudson	HudsonLegalCallRequests@doccs.ny.gov
Lakeview	LakeviewLegalCallRequests@doccs.ny.gov
Marcy	MarcyLegalCallRequests@doccs.ny.gov
Midstate	MidStateLegalCallRequests@doccs.ny.gov
Mohawk	MohawkLegalCallRequests@doccs.ny.gov
Orleans	OrleansLegalCallRequests@doccs.ny.gov
Otisville	OtisvilleLegalCallRequests@doccs.ny.gov
Queensboro	QueensboroLegalCallRequests@doccs.ny.gov
Riverview	RiverviewLegalCallRequests@doccs.ny.gov
Shawangunk	ShawangunkLegalCallRequests@doccs.ny.gov
Sing Sing	SingSingLegalCallRequests@doccs.ny.gov
Sullivan	SullivanLegalCallRequests@doccs.ny.gov
Taconic	TaconicLegalCallRequests@doccs.ny.gov
Ulster	UlsterLegalCallRequests@doccs.ny.gov
Upstate	UpstateLegalCallRequests@doccs.ny.gov
Wallkill	WallkillLegalCallRequests@doccs.ny.gov
Wende	WendeLegalCallRequests@doccs.ny.gov
Woodbourne	WoodbourneLegalCallRequests@doccs.ny.gov
Wyoming	WyomingLegalCallRequests@doccs.ny.gov

Template Follow-Up Letter to Client Post-Intake Interview

DATE

CLIENT NAME
DIN #
FACILITY ADDRESS

Dear [Client],

I hope you're doing well. It was good [meeting/talking] with you recently about your resentencing application under the Domestic Violence Survivors Justice Act (DVSJA). I am writing to follow up on our conversation. This letter goes over some of the topics we discussed in our conversation: DVSJA eligibility, what the law requires us to prove at each stage of the process, and the next steps in our investigation. I have also enclosed releases for you to sign and return to me via legal mail, all of which I will explain in more detail below.

DVSJA Eligibility

To be eligible for resentencing under the DVSJA, Criminal Procedure Law (CPL) section 440.47 requires that you:

- Are currently incarcerated;
- Serving a sentence of at least 8 years;
- Have an offense date before August 12, 2019; and
- Were not convicted of one of the offenses excluded by the statute.

As we discussed, you meet these requirements, and that is why I was assigned as counsel to represent you on your resentencing application.

DVSJA Requirements for Resentencing

For eligible applicants, DVSJA gives courts the option to issue reduced sentences for survivors of domestic violence if they can prove that they meet the criteria under the statute. For people in your situation, whose offense date is before August 12, 2019, you must prove the following at a hearing:

(1) At the time of the offense, you were a victim of "substantial abuse" perpetrated by a family member, member of the household, or someone you were in (or had been in) an intimate relationship with;
(2) The abuse you experienced was a "significant contributing factor" to the offense; and
(3) The original sentence you received is "unduly harsh," taking into account all the circumstances—including the circumstances of the offense, your abuse history, any prior

criminal record you may have, expressions of remorse for the offense, your accomplishments while in prison, your prison disciplinary record, and your prospects for successful reentry into the community when you come home.

Getting a DVJSA Hearing

The first step is to request a DVSJA hearing by filing a written application. Our application does not need to prove all three of the elements listed above. In order to get a hearing, we need to focus primarily on the first element: that you were the victim of substantial physical, sexual, and/or psychological abuse at the time of the offense.

The DVSJA requires that we submit with our application two pieces of evidence to corroborate (or support) that the abuse occurred. At least one piece of evidence has to fall into a category defined by the law, and must be either a:

- Court record,
- Presentence report,
- Social services record,
- Hospital record,
- Law enforcement record,
- Domestic incident report,
- Order of protection, or
- Sworn affidavit from someone who was a witness to the abuse, or has first-hand knowledge about it.

Next Steps in Our Investigation

You know your own experience better than anyone, and we will need to work together going forward to identify the best evidence to put forward in your case. Our task now is to work together to gather the evidence needed to file an application requesting a DVSJA hearing.

My Next Steps

Based on what you shared in our conversation, I plan to request records from the following places:

- [List relevant agencies/entities and date ranges identified based on intake interview]

I also plan to contact the following people, to ask them questions about what they remember that could be helpful to our DVJSA application:

- [List relevant people identified based on intake interview]

My understanding from our conversation is that you have given permission for me to contact these organizations and individuals. If I misunderstood, or if you have changed your mind regarding that permission, please write to me and let me know as soon as possible.

Requests for Your Next Steps

To help show the court what you have been through, it is important for me to have a full picture of your past, including the abuse you experienced, the offense itself, and also your accomplishments and plans for the future. I understand that it may be difficult to share very personal, and sometimes traumatic, information about your life. It may be the first time you are doing so, especially to a lawyer. I want to assure you that I will keep this information confidential, and will check in with you before taking steps in the investigation based on what you share with me. To assist with the investigation, I am asking you to do the following:

Sign Releases

Also enclosed here are a series of releases—documents that give me permission to receive records and information on your behalf:

- HIPAA Release: HIPAA stands for "Health Insurance Portability and Accountability Act," a federal law that protects personal health information. This release allows me to request medical records and medical information from hospitals, doctors' offices, and other medical providers, including the prison system.
- OMH Release: This release allows me to request information from the New York State Office of Mental Health, which provides mental health care in the prison system. Even if you have never seen an OMH counselor while incarcerated, there may be OMH records from your intake process that could be helpful to your DVSJA application.
    - Please note: you must sign this release in the presence of a staff member of the Department of Corrections and Community Supervision (DOCCS). The staff member must also sign and date the document. You may want to ask your Offender Rehabilitation Coordinator (ORC) in the guidance office, or another prison staff member to assist with you this release.
- General Release: this release covers a wide array of other entities. For example, I would use this release to request the files from lawyers who have represented you in the past, as well as your program and disciplinary records from the prison.
- NYS Office of Children & Family Services Release: this release allows me to access documents related to any investigations related to child protective services in New York State.
- [NYC only:] NYC Administration of Children's Services Release [if client has had past ACS involvement in NYC as either child or parent]: this release allows me to request records from the New York City agency that handles investigations into child welfare issues.
- [NYC only:] NYC Child Protective Services Release [if client has had past CPS involvement in NYC as either child or parent]: this is another release that allows me to request records from New York City related to child welfare issues.

You do not have to complete these documents, but I encourage you to do so because they will help me in gathering evidence for your DVSJA resentencing claim. If you have any questions about the releases or the questionnaire, please let me know.

Finally, as we discussed in our intake conversation, I want to remind you that the process of investigating a DVSJA resentencing case can take time—at least several months, and sometimes longer. I know the process can be frustrating, and I appreciate your patience as we work together going forward. In addition to the documents already mentioned, I am enclosing a DVSJA Resource Guide created by the Survivors Justice Project, which is designed to assist people going through the DVSJA process. I hope it can answer some of your questions about what to expect and provide you with information about supports available to you.

Once you send me back the documents enclosed here, I will follow up with any questions I have, and will let you know the status of the investigation. In the meantime, please don't hesitate to reach out with any questions or concerns. I look forward to working with you.

Sincerely,

ATTORNEY

Template Withdrawal Letter to Client

DATE

CLIENT NAME
DIN #
FACILITY ADDRESS

Dear [Client],

I hope you're doing well. As you know, the [Supreme/County] Court has assigned our office as legal counsel for your application for resentencing under the Domestic Violence Survivors Justice Act ("DVSJA"). As we discussed on our legal call, enclosed is a letter I will be submitting to the court regarding your request to apply for resentencing under the Domestic Violence Survivors Justice Act (DVSJA), CPL § 440.47. This letter asks this court for permission to withdraw your application for resentencing at this time, with the ability to file it at a later date.

As I explained in our call, and is laid out further below, I do not believe that we have uncovered enough evidence corroborating your abuse AND/OR enough evidence of abuse close in time to the offense to file a resentencing application on your behalf. Therefore, I am asking that you sign a Stipulation of Withdrawal, agreeing to have your DVSJA case discontinued. You'll see that the stipulation asks the court to discontinue the case "without prejudice." If the court agrees to this, it would allow you to re-file your DVSJA resentencing application in the future, if you are able to gather the evidence required under the statute.

DVSJA Requirements

To submit an application for resentencing under Criminal Procedure Law § 440.47, an applicant must prove that they were, "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" (Penal Law § 60.12). The definition of "member of the same family or household" includes current and former intimate partners, regardless of marriage, and people with whom you share a child in common, even if they never lived with you.

Evidence Requirements [Include this ¶ if you have a corroboration issue.]

In addition to the above criteria, in order to be eligible for a DVSJA resentencing hearing, the applicant must include at least two pieces of evidence corroborating their claim of abuse. At least one of those pieces 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.

Timing Requirements [Include this ¶ if you have an attenuation/temporal nexus issue.]
The DVSJA's language that the applicant was a victim of substantial abuse "at the time of the offense" can present a challenge. In two cases, *People v. Williams,* 198 A.D.2d 466 (1st Dept. 2021), and *People v. Fisher*, 221 A.D.3d 1195 (3d Dept. 2023), appeals courts have determined that the DVSJA requires a "temporal nexus" between the abuse and the instant offense. These courts interpreted this to mean that either "the abuse or abusive relationship" must have been "ongoing" at the time the applicant committed the instant offense for which they are serving the current sentence. I understand that the effects of abuse can be long-term, and trauma can continue to affect people months and years after the abuse "ends." However, many courts have taken a narrower approach to the DVSJA, and it can be very hard to succeed on a claim where it is difficult to show that the abuse or the effects of the abuse are still active and ongoing at the time the offense occurs.

Status of Our Investigation
I have conducted an investigation in your case based on my conversations with you, [interviews with members of your family/friends/witnesses], and a review of records I have been able to obtain. [INSERT SPECIFICS OF INVESTIGATION.]

Unfortunately, I have been unable to gather sufficient evidence that corroborates [that you were a victim of substantial abuse] AND/OR [that the abuse you experienced was ongoing at the time of the instant offense] AND/OR [that the domestic abuse you suffered was caused by a member of your family or household, as defined by the law.]

[INSERT EXPLANATION ABOUT WHY THE INVESTIGATION DOES NOT SUPPORT A VIABLE CLAIM AT THIS TIME.]

Withdrawing Your DVSJA Application
Unfortunately, based on the investigation up to this point, we are unable to meet the DVSJA's procedural requirements at this time. Therefore, I recommend that we ask the court to withdraw your request to apply for resentencing, *without prejudice*. In the future, if there is additional information that becomes available that would help your claim, or if the law is changed to relax the DVSJA's requirements, you may be able to restart your case by resubmitting the UCS 447 form – Application for Permission to Apply for Resentencing – to the sentencing court.

It is your choice whether to withdraw the application. However, if you do not wish to do so, I will ask the court to terminate my order of assignment. This means that if the court approves the request, I will no longer represent you as your attorney, and the court may assign another lawyer to represent you.

Request for Your Consent to Withdraw

If you agree to withdraw your application, I would ask that you sign the Stipulation to Withdraw Application for Resentencing Under CPL § 440.47 form enclosed with this letter within three weeks of the date of this letter. You do not have to give your consent. As mentioned before, however, if you choose not to consent to withdrawal, I will request to be relieved as counsel.

I know this is a disappointing result and I am sorry we are not able to move forward with a resentencing application at this time. I would have been honored to be able to help try to reduce your sentence. It has been a pleasure getting to know you and I wish you and your loved ones all the best. If you have any questions before signing, please feel free to contact me.

Sincerely,

ATTORNEY

Template Stipulation to Withdraw DVSJA Resentencing Application

SUPREME/COUNTY COURT OF THE STATE OF NEW YORK
_____ COUNTY
----------X
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

CLIENT,
Defendant.
----------X

STIPULATION
TO WITHDRAW
APPLICATION FOR
RESENTENCING UNDER
C.P.L. § 440.47

Ind. No. XXX-XXXX

IT IS HEREBY REQUESTED by CLIENT, upon consultation with assigned counsel, that the *pro se* request to apply for resentencing pursuant to Criminal Procedure Law § 440.47(1) and the assignment of counsel in connection with those proceedings, granted by this Court on DATE, be withdrawn without prejudice, upon the consent of the Defendant.

Dated: TOWN/CITY, New York
_____, 2024

_____
CLIENT
Defendant

Attorney for Defendant
By_____
ATTORNEY NAME

Template Draft Order Granting Withdrawal of Request to Apply for DVSJA Resentencing

SUPREME/COUNTY COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: _____ COUNTY

ORDER

----------X

Ind. No. XXX-XXXX

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

CLIENT,

Defendant-Petitioner

----------X

JUDGE NAME, J.

The above-named Defendant having been granted permission pursuant to Criminal Procedure Law § 440.47(1) to submit an application for resentencing through assigned counsel;

The above-named Defendant having indicated by way of stipulation to withdraw that she/he/they does/do not wish to presently file an application for resentencing pursuant to Criminal Procedure Law § 440.47(2);

Now, upon reading and filing the stipulation of the parties hereto and due deliberation having been had thereon,

It is ORDERED that the request to apply for resentencing and the request for assignment of counsel is withdrawn without prejudice in accordance with the aforesaid stipulation, and counsel is relieved of the assignment.

So ordered.

Dated: _____, 2024
_____ County

_____
Justice of the Supreme/County Court

Template Draft Order Granting Request for Counsel to be Relieved

SUPREME/COUNTY COURT OF THE STATE OF NEW YORK
CRIMINAL TERM: _____ COUNTY

ORDER

----------X

Ind. No. XXX-XXXX

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

CLIENT,

Defendant-Petitioner

----------X

JUDGE NAME, J.

The above-named Defendant having been granted permission pursuant to Criminal Procedure Law § 440.47(1) to submit an application for resentencing through assigned counsel.

Upon request of counsel, it is hereby ORDERED that LAWYER/ORGANIZATION is relieved of the assignment.

So ordered.

Dated: _____, 2024
_____ County

_____
Justice of the Supreme/County Court

Cited Unpublished Decisions

People v. M.O. (Sup. Ct., Bronx Cty 2020)

People v. Williams, (Sup. Ct., NY Cty 2020)

People v. J.F. (Sup. Ct., Kings Cty 2021)

People v. E.R. (Sup. Ct., Bronx Cty 2021)

People v. C.S. (Cty Ct., Westchester Cty 2023)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 73

----------X

THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER
INDICTMENT NO. 3540-2014

-against-

M[redacted] O[redacted],

Defendant.

----------X

LIEB, J.

By motion (the "Motion") dated August 12, 2020, the defendant moves (1) for an Order, pursuant to Criminal Procedure Law ("CPL") § 440.10, vacating her May 2, 2018, judgment of conviction, following a plea of guilty, of one count of Manslaughter in the First Degree, and (2) for an Order, pursuant to CPL § 440.47, resentencing her in accordance with revised Penal Law § 60.12, pursuant to the 2019 Domestic Violence Survivors Justice Act ("DVSJA"). With the Court's consent, the parties agreed to bifurcate the proceedings and ask the Court to resolve the defendant's DVSJA application first. On October 23, 2020, the People responded to the defendant's DVSJA claim.[1]

Pursuant to CPL § 440.47, the Court must grant a hearing if it finds that the defendant (who otherwise meets the eligibility requirements, as this defendant has) has complied with the requirements set forth in CPL § 440.47(c). That subsection, in turn, provides that in her application for resentencing, the defendant must include "at least two pieces of evidence corroborating the applicant's claim that . . . 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 . . . ." The provision further provides in relevant part that "[a]t least one piece of evidence must be either a

[1] The Court permitted the People to postpone filing their response to the defendant's motion to vacate her judgment of conviction until her DVSJA claim was resolved.

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." CPL § 440.47(c). Appended to the defendant's application are voluminous exhibits, including her own affidavit (Def. Exh. A) as well as the affidavits of two family members (Def. Exhs. B and C), a psychological evaluation report prepared by Dr. Wendy Levy, dated June 7, 2017 (Def. Exh. D), an affidavit from Nancy Diaz, the defendant's STEPS counselor from early 2016 through May 2018 (Def. Exh. H), the minutes of her Criminal Court arraignment (Def. Exh. J), and various NYC Health and Hospitals records (Def. Exh. Y).

The People oppose the defendant's DVSJA motion for resentencing and argue that the defendant has failed to include adequate records in her application to support her allegation that she was subjected to substantial abuse at the time of the offense by the victim of the crime to warrant the Court's award of a hearing. The People argue that (1) any abuse at the time of the offense was not shown to be "substantial" and (2) the records submitted rely on the defendant's self-reporting and therefore do not provide the necessary "corroboration" for her claim. The People maintain that "corroboration" requires something in addition to the defendant's own statements.

The Court addresses the People's second argument first. Citing People v. Moses, 63 N.Y.2d 299, 306 (1984), the People ask this Court to deem all statements of the defendant worthless in corroborating her claim of abuse. This is too constricted a view of the corroboration requirement. Moses determined the kind of corroboration necessary for a court to admit accomplice testimony pursuant to CPL § 60.22, and has not been used to analyze the kind of corroboration necessary for a defendant to earn a hearing under the DVSJA. The Moses Court reflected the concern that a person not be wrongfully convicted of a crime by reliance on a form of testimony that has been viewed with a "suspicious eye." Id. at 305 (quotation omitted). The same concern about the risk of a wrongful

conviction simply does not apply in the DVSJA context. Further, the People's view that all statements by a defendant, regardless of to whom made and under what circumstances, are incapable of providing the necessary corroboration required under the statute is too broad. While it may be argued that a defendant's self-serving statements to law enforcement, for example, could be discounted as unreliable when a Court considers whether such statements serve to "corroborate" her claim under the DVSJA, statements made by a defendant to treating professionals, including medical doctors, nurses, counselors and therapists, stand on a different footing. The incentive to be honest with treating professionals in order to receive the best care provides indicia of reliability and trustworthiness that justify the Court's consideration of them in evaluating whether a defendant has met her burden under CPL § 440.47(c).[2]

The defendant has provided at least two documents that corroborate her claim of substantial contemporaneous abuse by the victim. Further, as discussed below, one consists of a hospital record and one of a court record.

In her affidavit, Ms. Diaz, a counselor with the STEPS to End Family Violence program at Rikers, who provided weekly counseling to the defendant over a two-year period, sets forth her view that "[t]he abuse Ms. O[redacted] suffered in this relationship [with the victim] was one of the more severe cases I have seen during my career." (Def. Exh. H, para. 8). Ms. Diaz stated that the defendant had told her of "an escalating pattern of physical, sexual, verbal, and psychological abuse in her relationship with [the victim]." (Id. at para. 3). Ms. Diaz's affidavit sets forth that the defendant suffered "substantial" abuse at the hands of the victim at the time of the offense.

Further corroborating her claim, the defendant submitted a record from the NYC Health and Hospitals from days after the charged incident in which it was reported: "[T]his patient accidentally

[2] The Court is not basing its decision on whether or not to grant a hearing on the evaluation of Dr. Levy, who examined the defendant in an attempt to secure a more beneficial plea for the defendant; the Court makes no ruling as to the reliability of the defendant's statements to Dr. Levy in the context of a full evidentiary hearing.

killed her boyfriend who was beating her. She is numb, labile, suicidal." (Def. Exh. Y.).[3] This evidence is reinforced by the statement of the defendant's attorney at her Criminal Court arraignment that there were bruise marks on both sides of the defendant's neck, the left side of her jaw, the left side of her face, and both sides of her forehead, and his request for the defendant to receive medical attention. (Def. Exh. J, at 4).

The People have referred the Court to various statements made by the defendant that she was not subjected to abuse from the victim. Such statements do not defeat the defendant's entitlement to a hearing, but instead give rise to the kind of material issue of fact that is best resolved at an evidentiary hearing.

CONCLUSION

For the foregoing reasons, a hearing is granted pursuant to CPL § 440.47.

This constitutes the Decision and Order of the Court.

Dated: November 13, 2020
Bronx, New York

JUDITH LIEB, A.J.S.C.

[3] The Court notes that several of the medical records included in Exhibit Y are incomplete. Although this defect does not change the Court's ruling as to the award of a hearing, the defendant will need to supply the Court with complete records if she chooses to rely on them at the hearing. In the event such records contain private material that is irrelevant, the Court can review them in camera.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 66

X----------X

People of the State of New York

-Against-

Indictment No. 1621/09
Motion to Resentence
DECISION AND ORDER

Erica Williams, Defendant

X----------X

Defendant moves pursuant to Criminal Procedure Law §440.47, for an order vacating the original sentence imposed and to be resentenced pursuant to Penal Law §60.12, on the grounds that: (1) at the time of the commission of the offense she was a victim of domestic violence subjected to substantial physical, sexual and psychological abuse; (2) such abuse was a significant contributing factor to her commission of the offense and; (3) the original sentence imposed in this matter is unduly harsh. The People oppose.

The defense argues that defendant's history of domestic violence and its related trauma significantly contributed to her killing Mark Williams. While defendant does not contend that she was subjected to physical abuse by Mark Williams, she claims that their relationship was marked by verbal and emotional abuse and therefore the negotiated sentence imposed by the Court was unduly harsh.

The People contend defendant failed to establish that she was a victim of domestic violence by Mark Williams. Further, the People assert that defendant failed to demonstrate how her prior history of abuse and trauma inflicted by other abusers, substantially contributed to the killing of Mark Williams and that the Court's original sentence was not unduly harsh.

After extensive post-conviction briefing on this matter, a hearing was held remotely on July 7, 2020. A review of the original record in this case as well as all the post-conviction evidence requires this Court to deny defendant's application for resentencing pursuant to Penal Law §60.12. [See, CPL §440.47(2)(f).]

PROCEDURAL HISTORY

On April 3, 2009, defendant was indicted for Murder in the Second Degree, Penal Law §125.25(1) and Criminal Possession of a Weapon in the Second Degree, Penal Law §265.03(1)(b), for intentionally shooting her husband at close range in the head and thereby causing his death.

This case was presided over by the Hon. Bonnie Wittner for more than three-years prior to defendant pleading guilty. During this period there were extensive plea negotiations. Defendant was represented by a very experienced defense attorney who submitted for the Court's consideration extensive medical records and a very thorough presentencing memoranda submitted by the STEPS program of Safe Horizon, extensive medical records regarding defendant's physical health and history of trauma, and her medical conditions as well as her state of mind at the time of the crime. Also submitted was the report of Dr. Marc Janoson, a PhD in Forensic Psychology, dated October 6, 2009.

Besides the defense attorney submissions, the Court record also includes the grand jury minutes, the voicemail messages of defendant prior to the commission of the crime, the crime scene photos, the videotaped statements of the defendant, the Probation Report and other materials.

Ultimately, the People agreed to reduce the Murder in the second-degree charge to Manslaughter in the first degree, Penal Law §125.15(1), to cover the entire indictment.

The agreed upon sentence was a determinate period of 18 years in state prison with five-years of post-release supervision.

On October 15, 2012, defendant entered a plea of guilty before Judge Wittner to the Manslaughter charge in full satisfaction of the docket. Defendant also signed a written waiver of her right to appeal. On December 20, 2012, Judge Wittner sentenced the defendant, as agreed.

THE POST-CONVICTION HEARING AND FINDINGS OF FACT

Besides the original court record, the additional factual evidence presented to this Court during the post-conviction proceedings included the testimony and written report of Delbie Guity, a Program Manager with the Women's Prison Association. Ms. Guity's testimony demonstrated that she was knowledgeable about domestic violence and the prison population she served. However, this Court will not qualify Ms. Guity as an expert witness for the purposes required in this hearing. While the Court found her testimony helpful, her testimony and written report relied heavily on the original information in the STEPS Report as well as the original record in this case. The only direct information acquired by Ms. Guilty came from a single and limited thirty-minute conversation with the defendant via telephone due to the COVID restrictions at the prison. Further, Ms. Guity's testimony did not substantiate any domestic abuse by Mark Williams. Nor was it demonstrated that she was qualified to assert as an expert that the cumulative nature of the prior trauma to Ms. Williams was a significant contributing factor in the killing of Mark Williams.

Other evidence submitted included two affidavits from friends who have known Ms. Williams for about 25 years. The affidavit of Irene Velasquez, dated August 20, 2019, is detailed in the domestic abuse suffered by Ms. Williams at the hands of certain men. It is

telling that there is no mention whatsoever of Mark Williams and the affidavit does not state that there was any abuse by Mark Williams. (See, Exhibit F, defendant's original motion) The affidavit of Tangie Williams, dated October 16, 2019, also detailed the violent nature of Erica Williams' prior relationships. However, as to Mark Williams she stated the following in paragraph six of her affidavit.

> *"6. I don't recall Mark Williams being extremely violent with Erica, but I believe much of the history she had with men played into their relationship. I think a person can break, and she did. At the time, she was also undergoing a lot of stress and trauma, including from the recent loss of her nephew Larry." (See, Exhibit G, defendant's original motion)*

The defense also submitted a NYPD Domestic Violence Incident Report (DIR) issued on February 5, 2009, based upon a radio run to the Williams' home. This DIR refers specifically to a verbal altercation and fails to establish Mark Williams as an abuser. At the time of the incident, there was no finding of domestic abuse, no injuries and no arrest was made even though Mark Williams was present at the house. The report also indicates that there was no prior domestic violence history, no prior police reports and no complaint was filed in this case. (See, Exhibit J of Defendant's original motion)

The record reflected that Ms. Williams was a victim of abuse that went unreported and undetected from the time she was a young child. That abuse went unaddressed by her family and her mother, who is reported to have also suffered from mental illness. Further, the societal safeguards in place by schools, hospitals, doctors, and social welfare workers failed. As an adult, defendant was involved in bad relationships and became a victim of domestic abuse at the hands of certain men. Ms. Williams also suffered serious physical and mental illnesses throughout her life and during her relationship with Mark Williams. However, this Court does not find that defendant's relationship with Mark Williams has been established to be one of "domestic abuse."

While certainly the relationship between defendant and Mark Williams had its dysfunctions and bad behaviors on both sides, it was not demonstrated during these post-conviction proceedings to have fallen within the legal definition of domestic violence.[1] Also worth noting is that one of defendant's family members called 911 because she believed the defendant was suicidal within days of Mark Williams being killed. EMT responded to defendant's home, but defendant refused to go to the hospital, and EMT did not override that decision. At the time of the crime, Mark Williams and his sons were merely moving his belongings out of the defendant's home.

THE LAW

The DVSJA, enacted May 14, 2019, authorizes alternative sentences for defendant's who are victims of domestic violence when the abuse was a "significant contributing factor" to their criminal behavior. Penal Law §60(1). Further, CPL §440.47, enacted August 12, 2019, provides resentencing relief for certain victims of domestic abuse. The goal of this legislation was to offer relief to victims who committed crimes against their abusers who were actively abusing them. See, People v. Patrice Smith, Indictment 98-3053-001. Decision, September 2, 2020, Erie County Court, Judge Sheila A. Ditullio. The purpose was to help protect those victims who were in prison for protecting themselves. People v. Mulumba Kazigo, Indictment 1948-05, Nassau County, 2009 N.Y. Slip Opinion 79235(U) NYAD 2nd Dept., July 28, 2009. The Kazigo case involved a young man freed after 14 years in prison for killing his abusive father. Not only was there proof of years of abuse by the father against the defendant, but the

[1] A victim of domestic violence is defined in Social Services Law §459-a as someone who is subjected to acts of violence coercion or abuse by a member of the same family or household where such acts have resulted in the actual physical or emotional injury or have created a substantial risk of physical or emotional harm to such person. Member of the same family or household is defined in CPL§530.11; and includes persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time.

killing by defendant of his father occurred when defendant learned that his father was beating his mother and siblings. Also, the cases relied upon by defendant involved victims who were active, prolonged and significant abusers of the defendants in those cases. That is not the case here. [See, People v. Smith, supra; People v. Kazigo, supra; People v. Chapman, NYS County Court Albany, October 2, 2020, Judge William A. Carter.

> Sentencing is one of the hardest tasks Judges are required to perform. A request for resentence is even more difficult because another Judge has already decided what sentence is fair. The imposition of any sentence requires consideration of the crime charged, the specific circumstances of the individual before the court and the purposes of a penal sanction; to protect society, rehabilitate defendants and deter future criminal behavior. People v. Farrar, 52 NY2d 302, 305 (1981). Sentencing courts have broad discretion when imposing sentence. People v. Rosenthal, 305 AD2d 327, 329 (1st Dept. 2003). [2]

When considering resentencing under the DVSJA provision, the court must make the determination based upon a three-prong test. First, the Court must decide if the defendant was the victim of domestic abuse. Second, the Court must determine if the domestic abuse was a significant contributing factor to the defendant's criminal behavior. Third, the Court must consider whether the sentence imposed was unduly harsh.

DVSJA - THE THREE PRONG ANALYSIS

Defense argues that the confirmation of her partner's infidelity; the failure of their relationship; his moving out of her apartment; along with the cumulative effect of her prior trauma and abuse by others, caused her to snap and kill Mark Williams. However, the Court does not

[2] The Complexity of Sentencing Under the DVSJA: A challenge for Judges and Defense Counsel, by Alan Rosenthal, *Atticus*, Volume 32 Number 2, Spring 2020, NYS Association of Criminal Defense Lawyers

believe that this rationale was what the DVSJA statute intended. People v. Smith, supra; People v. Kazigo, supra; People v. Chapman, supra. There is no doubt that at the time of the commission of this offense Erica Williams was a physically and mentally sick women. Defendant established she was a victim of prior abuse both domestic and otherwise from the time she was a young child. The record reflects that Ms. Williams is a survivor with a history of trauma. This Court is sympathetic to the difficult and abusive background this defendant sustained during her life. However, domestic abuse by Mark Williams was not established. While the relationship between the defendant and Mark Williams was fraught with bad behaviors on both sides that many marital relationships encounter such as infidelity and the difficulty in raising stepchildren, the evidence presented by defendant failed to establish that Mark Williams' bad behavior rose to the level of domestic abuse. In fact, the two affidavits submitted on defendant's behalf seem to suggest otherwise as well as the single NYPD DIR that referenced Mark Williams.

At the hearing, the defense failed to establish any legal, medical, psychiatric or other expert evidence that established a connection regarding how the domestic abuse and trauma from Ms. Williams prior relationships with other men was a significant contributing factor to the defendant's criminal behavior in killing Mark Williams.

As stated by the sponsor memorandum in support of the Legislation in the Assembly on February 4, 2019, "[i]n order to be considered for eligibility an incarcerated survivor is also required to include evidence corroborating the claim [the survivor] was, at the time of the offense, a victim of domestic violence." 2019 Legis. Bill Hist. NY A.B. 3974; See also, People v. Cordero, NYS Supreme Court, October 15, 2020, New York County, Judge Mullen.

There is no objective evidence that Mark Williams was a domestic violence abuser. The single DIR in this case indicates the exact opposite. The affidavits of Ms. Williams friends also do not support the contention that Mark Williams was a domestic abuser, although both letters did outline the abuse inflicted on defendant by other men in Ms. Williams life. If infidelity and difficulties in raising step-children were indicators of domestic abuse many American families would fall into this category. Another factor to be considered is the traumatic effect this crime had on Mr. Williams' two sons (15-years and 17-years old) who were at the location helping Mr. Williams move out of Ms. William's apartment. The boys were immediately on the scene after the shooting and witnessed their father lying dead on the stairwell. According to the Grand Jury minutes his brain matter and blood were splattered around him with a bullet wound through his head. (GJ Minutes p. 63, Lines 17-18, p. 71, lines 11-12, p.) The traumatic effect of this incident upon these young boys is immeasurable.

Therefore, this Court finds that neither the written submissions nor the hearing evidence demonstrated that at the time of the offense Ms. Williams was a victim of domestic violence by Mark Williams. Further the defense failed to establish that she was subjected to substantial physical, sexual or psychological abuse inflicted by Mark Williams. Nor did the hearing evidence establish that the history of abuse to defendant by other men was a "significant contributing factor" in the killing of Mark Williams. Penal Law §60.12. CPL§440.47(2)(c). Also, the original sentence imposed was not unduly harsh.

CONCLUSION

Defendant, as part of a negotiated deal, pled guilty to the reduced charge of Reckless Manslaughter [Penal Law 125.15(1)], even though the Grand Jury testimony established an intentional deliberate act by this defendant in the killing of Mark Williams. The defendant's complex background of trauma and abuse were considered by Judge Wittner who made a point of stating on the record that she believed this to be a fair sentence. This Court incorporates by reference the original plea minutes dated October 15, 2012, as well as the sentencing minutes dated December 20, 2012, of this defendant. Further, after this Court's own review of the entire record in this case as well as the resentencing statute of the DVSJA, and all the post-conviction submissions and proceedings; this Court holds that there is insufficient evidence that Mark Williams bad behavior rose to the level of domestic abuse. An objective review of the record reveals that there were many other significant factors that contributed to this homicide besides defendant's prior history of domestic violence. Lastly, the original sentence by Judge Wittner was not unduly harsh. Therefore, this Court declines to resentence the defendant.

SO ORDERED,
DATE: NOVEMBER 9, 2020

Ruth Pickholz

Hon. Ruth Pickholz

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 11
----------X
THE PEOPLE OF THE STATE OF NEW YORK

against-

DECISION AND ORDER
DVSJA MOTION

J[redacted] F

Kings County Indictment[redacted]

Defendant
----------X
LAURA R. JOHNSON, J.

Movant J[redacted] F pled guilty to intentional murder and robbery for the killing of C[redacted] I[redacted] a marijuana dealer, and was sentenced to eighteen years to life in 2004. After compiling an impressive record of academic and other accomplishments while incarcerated, she has now been released on lifetime parole. Movant has applied to be resentenced pursuant to the Domestic Violence Survivors Justice Act ("DVSJA"), which took effect in August of 2019, and which allows imposition of an alternative and substantially reduced sentence if the applicant meets certain requirements set out in CPL 440.47 and Penal Law 60.12.

As a general matter, the intent of the drafters and supporters of the 2019 legislation was to expand the sentencing relief accorded domestic violence survivors. Among other problems, the predecessor statute ("Jenna's Law," L. 1998, c.1, §1), codified in Penal Law 60.12 in 1998, did not take account of crimes committed by domestic violence survivors at the behest of, rather than against, their abusers, and had resulted in reduced sentences for very few victims of domestic violence. *See* Sponsor's Mem. A.B. 3974; *see also* New York City Bar Criminal Justice Operations Domestic Violence Committees, Report on Legislation at 2-3 (March 2019) ("March Bar Report," cited in Affirmation in Reply to People's Opposition to DVSJA Resentencing, ¶8). The 2019 legislation was not only intended to expand judges' discretion to impose a reduced sentence at the

outset but (as in this case) it also permitted post-conviction re-sentencing applications in some instances. *Id.* at 1.

CPL 440.47 establishes a three-part process for a post-conviction application. First, an individual seeking resentencing must obtain permission to make an application by demonstrating that they were convicted of an offense that is eligible for alternative sentence and are confined in an institution operated by DOCCS serving a sentence of eight years or more. CPL 440.47(1)(a). Movant's initial application to apply for resentencing was granted since she met the threshold statutory requirements under the statute: she had been convicted of an eligible crime and was, at the time, still serving her sentence in a State correctional facility. Movant then filed this resentencing motion.

Second, they must file a motion supported by some corroborating evidence. Since it is this aspect of the statute that is at the heart of the issue here, it is worth quoting in full:

> 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, presentence 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.
> **CPL 440.47(2)(c).**

If the movant has complied with the corroboration requirement, 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 which it "shall determine any controverted issue of fact relevant to the issue of sentencing, " and at which "reliable hearsay shall be admissible." CPL 440.47(2)(e). If the applicant has failed to comply with subsection (c), the court must, however, dismiss the application without prejudice. CPL 440.47(d). The People argue that the resentencing motion must be dismissed without a hearing pursuant to that statutory provision.

FACTUAL BACKGROUND

To a very large extent, the facts underlying this motion are undisputed. To begin, there is no disagreement that throughout her life, beginning in her early childhood and extending through her relationship with a boyfriend only months before the murder, movant was horrifically abused and neglected by her parents, step-parents and intimate partners. The murder itself occurred during movant's relationship with her co-defendant A[redacted] D[redacted], who was convicted of second degree murder after a jury trial and sentenced to a term of twenty-five years to life, which she is currently serving.

While there was some discrepancy in the statements made by movant and D[redacted] concerning the genesis of the plan to rob T[redacted], viewing the available facts in the light most favorable to movant, the robbery was proposed by D[redacted] who was T[redacted] marijuana customer and who urgently needed money to repay a debt for cocaine. D[redacted] arranged to have T[redacted] meet her in his car for a marijuana sale and provided movant, who was not known to [redacted], with a gun. The plan was for movant to interrupt the transaction, pull D[redacted] out of the car as though D[redacted] were not a participant in the robbery plan, and then take the cash that D[redacted] knew T[redacted] kept in his console. However, after initially freezing and having to be admonished by

I [redacted] to carry out the staged robbery, movant fired the gun, which had not been part of the plan. T[redacted] died as a result of a single gunshot wound to his head. As he lost control of the car, movant was unable to get the cash in the console but pulled a chain from T[redacted] neck, which she later pawned.

The homicide investigation quickly focused on D[redacted] because of the evidence that she had made calls to [redacted] shortly before his death, and she was arrested only three days later. After initially assigning sole responsibility for the robbery-murder to movant, I[redacted] eventually admitted her role in planning the robbery. When movant was arrested a few weeks later, she made statements describing the plan and confessed to having been the shooter.

THE LEGAL ISSUES

CPL 440.47 (1)(c) refers to individuals who were "*at the time of the offense*, a victim of domestic violence subjected to substantial abuse . . . ." The People claim that the italicized language means that resentencing is available only to individuals who were actively being subjected to domestic violence in a relationship defined in CPL 530.11(1) when they committed the offense for which they seek resentencing. Since it is uncontested that at the time she shot T[redacted] movant's only relationship of the sort defined in CPL 530.11 was with her co-defendant A[redacted] I[redacted] the People contend that to qualify for a hearing, movant is required to supply corroboration that at the time of the murder she was being subjected to "substantial physical, sexual or psychological abuse" at I[redacted]s hands.[1] The People argue that while her filing may suggest that her relationship with D[redacted] was less than ideal, it falls far short of corroborating that I[redacted] subjected movant to the "substantial abuse" contemplated by the statute.

[1] Pursuant to Penal Law 60.12(1), if a hearing is held, the court must also determine whether the abuse was a "significant contributing factor to the [applicant's] criminal behavior" and that the standard sentencing range "would be unduly harsh."

Movant, on the other hand, argues that the statutory language does not restrict re-sentencing to persons who were in an active relationship with an abuser at the time of their criminal conduct. Instead, she argues, the eligibility requirement that the applicant have been "at the time of the offense, a victim of domestic violence" should be read to cover persons who, like her, are on-going "victims" of domestic violence, in the sense that at the time of the offense they continue to suffer PTSD and other psychological sequelae of earlier abuse. She also contends that even if the more restrictive reading is the correct one, she has provided sufficient corroborating evidence at this stage that I [redacted] subjected her to psychological abuse to avoid dismissal of her motion.

I agree with movant that there are likely many cases in which New York sentencing ranges do not allow adequate judicial discretion to consider the mitigating effect of past domestic violence. But this shortcoming is not limited to domestic abuse; there is an abundance of potential mitigating background evidence that New York's prescribed sentencing ranges do not allow a judge to fully account for in sentencing. However, those choices are the province of the Legislature, and in my view, the People's narrower interpretation of the statute accurately reflects a legislative determination to cabin the type and number of cases eligible for a judicial re-sentencing hearing under the amended statute.

Movant's broad reading makes the phrase "at the time of the offense" largely surplusage, given that the vast majority of victims of "substantial" domestic violence would almost certainly continue to experience its psychological after-effects for many years. *See Pearson v. Pearson*, 81 AD2d 291, 293 (2nd Dep't 1981) ("the Legislature, of course, is presumed to have contemplated some useful purpose for every portion of a statutory enactment."). And although it is well documented, as movant points out, that almost all of the women incarcerated in New York state prisons have symptoms of trauma as a result of past abuse, the DVSJA's supporters anticipated

that only a small group of prisoners would become eligible for *re*-sentencing. In fact, the bar association report cited by movant specifically emphasized that the inclusion of the "at the time of the offense" language was a means of *narrowing* the pool of eligible incarcerated offenders. March Bar Report at 3-4. By contrast, movant's interpretation of that phrase would allow the very large category of individuals who "at the time of their offenses" still suffer from trauma resulting from past abuse to obtain a resentencing hearing simply by alleging some link between that history and the crime. Indeed, after outlining statistical evidence as to the extremely high number of incarcerated women who have experienced severe physical or sexual violence, the introducer's supporting memorandum indicates that the bill was aimed at victims whose crimes were linked to *current* abuse, by noting that previous criminal justice reforms have failed to prevent the system from inflicting unduly harsh punishment on "domestic violence survivors *who act to protect themselves from an abuser's violence.*" Sponsor's Mem. A.B. 3974 (emphasis added).

However, I find that the evidence movant has supplied in corroboration of her claim that she was, at the time of the offense, a victim of domestic violence subjected to substantial psychological abuse inflicted by A[redacted] D[redacted] who was undisputedly a member of the same family or household as movant as the term is defined in CPL 530.11[1]) is sufficient to warrant a hearing.

Viewed in the light most favorable to her, movant makes a hybrid claim: at the time of the offense, she was involved in a psychologically abusive relationship with D[redacted] characterized by I[redacted] emotional withholding and manipulative behavior and efforts to isolate movant from any support network. Movant claims that her susceptibility to and the effects of such psychological abuse were greatly amplified by the horrific abuse (which included rape and other physical abuse) inflicted on movant for most of her childhood and adult life. According to movant,

her participation in [redacted] scheme was in significant part the product of her desire to avoid psychological pain inflicted by [redacted], in tandem with the fact that her involvement with [redacted] had meant the loss of countervailing advice from friends and family.

As discussed above, CPL 440.47(1)(c) requires that the movant submit two pieces of evidence corroborating his or her claim to have been a domestic violence victim subjected to substantial abuse at the time of the offense. One piece of evidence "must be" a specified law enforcement, court, medical and social services record or the sworn statements of a witness to the domestic violence. Movant has provided ample documentation in this mandatory category — including a pre-sentence report, various social services records and a domestic incident report — corroborating the substantial physical abuse and neglect from which she suffered up to within months of becoming involved with [redacted].

The People argue that movant is required to provide at least "one piece of evidence" from the mandated list to "corroborate" her claim of psychological abuse by [redacted]. They contend that movant's evidence — consisting largely of her statements to the case detectives describing [redacted]; arranging for movant to commit the actual stickup in order to get money for [redacted] to repay a debt to another dealer, a mitigation "Bio/Psycho-Social" report prepared by a social worker for the trial court in 2002/2003, and an affidavit her friend [redacted] swore to in 2020 describing movant's relationship with [redacted] — is not sufficient to do so. According to the People, [redacted] use of movant to commit the stickup is not evidence of abuse but was simply a practical necessity since [redacted] was known to [redacted] The mitigation report indicates, on the basis of interviews with movant and with [redacted], that movant's relationship with [redacted] was emotionally abusive, but the People argue that the report does not lay out adequate specific

information about D[redacted] conduct toward movant.[2] And though H[redacted]s affidavit *does* contain specific details, such as that D[redacted] had movant supply her with money and other services, that movant began using cocaine for the first time when she got involved with D[redacted], and that D[redacted] stopped movant from talking to H[redacted] and cut her off from other friends, the People contend it is also wanting on the ground that such conduct does "not rise to the level of 'substantial' abuse," and because Hansen failed to explain how she knew that D[redacted] discouraged movant from speaking to her and other friends.

In general, CPL 440.47 is not a model of procedural clarity or completeness. It does not set out the quantum or standard of proof needed to secure a re-sentence hearing or to prevail at one.[3] Although the statute requires corroborating evidence, subsection (c) fails entirely to specify *what* exactly must be corroborated or to define corroboration. Given my conclusion that the statute requires that a movant have been involved with an abuser at the time of the offense, I agree with the People that under 440.47(c), the evidence "corroborating" the claim must include *something* relevant to a claim of a contemporaneous relationship characterized by intentionally abusive conduct. However, contrary to their argument, subsection (c) does not require that the mandated "one piece" of a certain type of evidence corroborate the entire claim or even any particular element of it. While I also concur with the People that movant's papers hardly contain conclusive evidence of psychological abuse by D[redacted], we part company on the question of the evidence needed for movant to advance to a hearing on her application in light of movant's allegations and

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[2] The mitigation report also expressly states that Hansen told the interviewer that D[redacted] encouraged movant to use drugs. The People additionally assert that the entire mitigation report must be disregarded because it was prepared in support of an untrue claim by movant that she falsely confessed to detectives. I fail to see why it should follow that none of the report can be considered or relied upon.

[3] I agree with *People v. Addimando*, 67 Misc3d 408, 413-414 (Sup. Ct. Dutchess Cty 2020), to the extent that court analyzed relevant statutory and decisional law regarding post-conviction motions to hold that the burden of proof at a 440.47 hearing is on movant and the standard a preponderance of the evidence. That strongly suggests that the burden of supplying evidence to secure a hearing in the first instance is something less.

the particular circumstances of this case.

The People do not dispute that an individual's history of domestic violence victimization may result in greatly enhanced susceptibility to psychological abuse, including manipulative behavior, in a later relationship. Indeed, nothing in the statute precludes movant from alleging that, given terrible violence inflicted on her in the past, what might appear at first blush to be relatively minor psychological mistreatment in fact amounted to "substantial" abuse. This case is quite different from *People v. Nolan,* Ind. 3905/14 (Sup. Ct. New York Cty, March 10, 2021) (Farber, J.), a decision relied on by the People in which the court found that the co-defendant's cajoling and flattering manipulation of the defendant/movant simply did not fit the definition of domestic violence as the phenomenon has been described by experts. Notably, several of D[redacted]'s behaviors recounted by T[redacted] H[redacted] including pressure on movant to take drugs and discouraging her interaction with friend and family, actually appear as signs of abuse in a Domestic Violence Hotline document cited by the *Nolan* court, though in that case for their absence.

CPL 440.47 explicitly recognizes psychological abuse as domestic violence for purposes of re-sentencing eligibility despite the fact that it may not be readily observable to an outsider and is far less likely than physical abuse to result in intervention by agencies that generate the type of documentation specified in the "one piece of evidence" list in CPL 440.47(1)(c). In line with its drafters' intent to make sentencing relief more broadly available to survivors of domestic violence, and perhaps to ensure that claims involving psychological abuse do not go unremedied, the statute does not restrict the remaining "piece" of corroborating evidence; in fact, it need only consist of "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." While "corroboration" is otherwise unelaborated, courts have interpreted the very similar language of CPL 60.22, which

governs corroboration of accomplice testimony, generously, requiring only a minimum of supporting evidence rather than proof of the defendant's commission of the crime or of its elements. *See, e.g. People v. Glasper*, 52 NY2d 970, 971 (1981) ("[I]t is sufficient if the corroborative evidence tends to connect the defendant to the crime so as to reasonably satisfy the jury that the accomplice is telling the truth"); *People v. Robinson*, 297 AD2d 296, 297 (2d Dep't 2002) ("seemingly insignificant matters may harmonize with the accomplice narrative so as to provide the necessary corroboration . . . [and] [s]o long as the statutory minimum is met, it is for the jury to decide whether the corroboration satisfies them . . . ." [quotation omitted]).

Whether movant can ultimately prevail at a hearing without considerably more evidence concerning D[redacted]s conduct than she has put before the court thus far need not be resolved at this point. *See People v. Erica Williams*, New York Cty Ind. 1621/09 (sup. Ct. New York Cty, November 9, 2020) (Pickholz, J.) (denying application for re-sentence after a hearing for failure, *inter alia*, to establish psychological abuse by decedent). She will also have to convince the court that D[redacted]; abuse was a significant contributing factor to her criminal behavior and that the sentence previously imposed was unduly harsh. Penal Law § 60.12(1). But at this preliminary stage, I find that the corroborating evidence proffered by movant, which includes not only a great deal of documentation of movant's history as a survivor of domestic violence but also evidence consistent with and "tending to support" the alleged psychological abuse by A[redacted] D[redacted], sufficient to require that a hearing be held.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
July 9, 2021

JUL 09 2021

LAURA R. JOHNSON, A. J. S. C.

HON. L. JOHNSON

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 78

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

DECISION AND ORDER
INDICTMENT NO. [redacted]

E[redacted] R[redacted],

DEFENDANT.

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MARCUS, J.:

On January 29, 2001, in a trial before this Court, a jury found the defendant guilty of Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree for intentionally killing her husband, W[redacted] R[redacted], on December 30, 1998. On March 9, 2001, I sentenced the defendant on the Murder conviction to an indeterminate term of imprisonment of twenty-five years to life and on the weapon conviction to a concurrent determinate term of fifteen years and five years post release supervision. The judgement was affirmed on appeal in an opinion in which the First Department "perceive[d] no basis for reducing the sentence." People v. R[redacted] (1st Dept. 2004), lv. denied, [redacted] (2004). Thereafter, the defendant brought a pro se motion to vacate the judgement of her conviction pursuant to CPL §§ 440.10(1)(g) and 440.30(1-a), which this Court denied by decision dated July 22, 2008. The defendant now moves for resentencing on her murder conviction pursuant to Penal Law § 60.12, as authorized by CPL § 440.47.

The Domestic Violence Survivors Justice Act (the DVSJA) amended Penal Law

§ 60.12, authorizing the imposition of alternative sentences for survivors of domestic violence, and added section 440.47 to the Criminal Procedure Law, permitting survivors of domestic violence convicted and serving sentences for certain specified crimes to apply for resentencing pursuant to Penal Law § 60.12. As specified in CPL § 440.47(1), an applicant for resentencing who is eligible for an alternative sentence pursuant to Penal Law § 60.12 must document that she

> 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.

In this case, the defendant has provided that documentation and unquestionably meets these criteria.

In order to qualify for a hearing on resentencing, the defendant must include in the application

> 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 [the CPL].

CPL§ 440.47(2)(c). For these purposes, "members of the same family or household" include "persons legally married to one another," CPL § 530.11(1)(a), which the defendant and the deceased were at the time of the murder. CPL§ 440.47(2)(c) specifies that at least one of the pieces of evidence corroborating the defendants claim must be "either a court record, presentence 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 "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 ...." Id.

While in their submissions, the parties present arguments as to why the defendant should or should not be resentenced, the only question before the Court at this time is whether the evidence the defendant has presented meets the requirements set forth in CPL§ 440.47(2)(c), which if met, mandate that a hearing be held. In support of her motion, the defendant provided a redacted CPS (Child Protective Services) Investigation Summary (Exhibit D), redacted NYPD Domestic Violence Incident Reports (Exhibit E), and the Defense Advocacy Services Pre-Sentencing Memorandum submitted to the Court in advance of her sentencing (Exhibit C), as well as her disciplinary, medical and program participation records covering the period of her incarceration, and three letters of support from persons who have recently come to know the defendant during her incarceration.

The CPS Investigative Summary qualifies as "a social services record." Covering a period from September 14, 1997 to January 29, 1998, it includes reports of a number of incidents of physical abuse of the defendant by the deceased. According to the Summary, on September 15, 1997, the defendant reported that Mr. R[redacted] had hit her for "the first time" in ten years of marriage, and that, in what appears to be the same incident, he "grabbed her arm." When the defendant responded by "smacking his face," Mr. R[redacted] "then pushed her and grabbed her by the neck and held on as if to choke her, but then let her go." The Summary also states that the defendant reported that in an October 23, 1997

incident, Mr. R[redacted] "grabbed her by the shirt and then hit her on the hand," and that as a result, the defendant was considering getting a restraining order.

The Summary also includes the defendant's account of an incident which allegedly occurred on December 10, 1997. According to the defendant, during that incident,

> Mr. R[redacted] grabbed her neck and shoved her head in the sink. ... He dragged the phones out of the wall. The upstairs neighbors came down and stopped (sic). She left the home to call the police. However, [the defendant] says Mr. R[redacted] followed her outside the street and pulled her away from the phone, dragging her for almost a block. [The defendant] stated that she has witnesses who saw that. (Friends, as well as several neighborhood locals) When she got back to the home, she stated the police were on their way because someone had called them.

The defendant reported that when the police arrived, they were going to let her leave the home, but Mr. R[redacted] said she could not leave with the baby. Ultimately, the police had to physically restrain and arrested Mr. R[redacted]. That day, the defendant pressed charges against him and took out an order of protection.

In a CPS home visit the following day, a CPS representative interviewed a person whose name is redacted from the exhibit, who said that the defendant had recently told her that "the husband has been hitting her (off and on) since they were married." Apparently, the defendant was asked about this statement, and she responded by saying that "Mr. R[redacted] has not hit her throughout the marriage," but that he did hit her "in 1987 until 1988 and only this year (1997) after the problems arose with her cheating."

The Domestic Violence Incident Reports submitted by the defendant qualify as "law enforcement record(s)." Two of the reports document the defendant's complaints that Mr. R[redacted] had "pushed her" without causing injury. In a third report, the defendant

complained that he had choked her and "hit her about the body," and that this was "an ongoing problem."

It does not appear that the Pre-Sentencing Memorandum qualifies as a "presentence report" within the meaning of CPL§ 440.47(2)(c), since CPL §§ 390.20 refers to the "presentence report" as that resulting from a pre-sentence investigation ordered by the court, while § 390.40 refers to a defendant's "pre-sentence memorandum," which the defendant may file with the court prior to sentence. It nonetheless qualifies as "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 [defendant's] claim."

The Memorandum includes reports of numerous incidents of violence by the defendant's husband against her, the source for which was someone other than the defendant. For instance, the Memorandum states than on September 13, 1997, Mr. R[redacted] attacked the defendant, causing her to spit up blood and requiring medical treatment at North Central Bronx Hospital. It also states that E[redacted] Ra[redacted], the defendant's sister, had described "incidents that required her to separate [Mr. R[redacted]] and Mrs. R[redacted] because he was choking, pushing or slapping her, or pulling her hair," and that E[redacted] had witnessed much of the December 10, 1997 incident described in the Summary, "including [Mr. R[redacted]] dragging her sister by the neck and hair." The Memorandum also reports that the defendant's sister "cited other incidents during 1998 in which [Mr. R[redacted]] hit or slapped her sister and one in which he grabbed Mrs. R[redacted] by the hair and slammer her head into a wall," and that two of the defendant's children with Mr. R[redacted] "confirmed that their parents' conflicts ... persisted throughout 1998."

The People urge the Court to summarily dismiss the defendant's application for resentencing on a number of grounds, none of which have merit. CPL§ 440.47(2)(c) does not require that a "social services record," a "law enforcement record" or even "documentation prepared at or near the time of the commission of the offense or the prosecution thereof" be sworn. Nor, as the cases cited by the defendant in her reply memorandum attest, does anything in CPL§ 440.47(2)(c) appear to require that corroboration come from a source or sources other than the defendant herself. What must be corroborated is the current claim of abuse made in the motion. Court records, pre-sentence reports and social service records, for example, may well include allegations made exclusively by the defendant, and the statute includes no language excluding such documents from among those required.

The People's claim that the allegations of abuse in the documents were contradicted by evidence adduced at trial may well be relevant to the Court's ultimate determination as to whether they are credible and whether the defendant can make the requisite showing in the hearing for resentencing, but it has no bearing on whether the defendant is entitled to that hearing. The same is true of the fact that the defendant swore in her CPL Article 440 motion that she took no part in Mr. R[redacted]'s murder.

In addition, as the defendant argues, collateral estoppel has no application to this motion. "As collateral estoppel has evolved in our criminal jurisprudence, the formal prerequisites are identity of parties; identity of issues; a final and valid prior judgment; and a full and fair opportunity to litigate the prior determination." People v. Aguilera, 82 N.Y.2d 23, 29-30 (1993) (citation omitted). Here there is an identity of parties, but no

identity of issues. At issue at the time of sentence was simply that: what sentence to impose. While the truth of the defendant's allegations of abuse were of relevance in making the discretionary sentencing decision, it was not an "issue" to be determined. In any case, as the Court of Appeals has noted, "countervailing policies ... may at times outweigh the otherwise sound reasons for preventing repetitive litigation to the greatest extent possible," id. at 30 (citations omitted), and the adoption of the DVSJA represents such a countervailing policy.

Finally, the People argue that CPL § 440.4(2)(c) requires evidence of a "temporal nexus" between the abuse and the crime and that the defendant has failed to provide such evidence. Penal Law § 60.12 authorizes alternative sentencing for a victim of "substantial physical, sexual or psychological abuse" when that abuse has occurred "at the time of the instant offense," Penal Law § 60.12(1)(a), and if "such abuse was a significant contributing factor to the defendant's criminal behavior." Penal Law § 60.12(1)(b). CPL § 440.4(2)(c) does not require corroboration of the causal connection of the abuse to the crime of which the defendant was convicted, leaving that question to the hearing, if one occurs. Still, like Penal Law § 60.12, it requires evidence corroborating that the defendant was the victim of the abuse "at the time of the instant offense," a logical precursor to the requisite showing at the hearing that the abuse was "a significant contributing factor" in the commission of the crime.

The defendant killed W[redacted] R[redacted] on December 30. 1998. The latest incident of abuse described in the Child Protective Services Investigation Summary and the Domestic Violence Incident Reports allegedly occurred on December 10, 1997, more than a year

before the murder. The Defense Advocacy Services Pre-Sentencing Memorandum includes allegations made by the defendant's sister that Mr. R[redacted] physically abused the defendant "during 1998," and, as recounted in the Memorandum, the children asserted that "their parents' conflicts ... persisted throughout 1998."

That a defendant must provide evidence that he or she was a victim of the domestic violence "at the time of the ... offense" does not mean that an act of abuse must occur contemporaneously with that time or nearly so. As one court held, "there need not be actual physical abuse at the time of the homicide to satisfy Penal Law § 60.12." People v. Addimando, 67 Misc. 3d 408, 440 (Dutchess Co. Ct. 2020). Recognizing that "alleged events that occurred years earlier may be given more limited weight," the court nonetheless observed that "the spirit of the statute requires the court to consider the culmination of the abuse endured by the domestic violence victim." Id. Similarly, in People v. Lagas, 2021 WL 1307869 (Columbia Co. Ct. 2021), a defendant who had been sexually abused as a boy sought resentencing on a burglary conviction as an adult. The court held that "[a]lthough the sexual abuse Mr. Lagas experienced is removed in time from the 2008 crime for which he seeks a reduced sentence, the continuing trauma he experienced was a contributing factor to his drug use and addiction and related burglaries." Id. at *6. See also People v. Smith, 69 Misc. 3d 1030, 1037 (Erie Co. Ct. 2020) (noting that it is not required that a defendant "be in the throes of an attack or that one be imminent. Instead, a court must evaluate a defendant's conduct in light of the cumulative effect of her abuse"). Thus, for the limited purposes of determining whether a hearing is mandated, the allegations set forth

in these documents are sufficient as evidence that the defendant was "at the time of the offense, a victim of domestic violence..." within the meaning of CPL § 440.47(2)(c).

Accordingly, this Court "shall conduct a hearing to aid in making its determination of whether the defendant should be resentenced in accordance with section 60.12 of the penal law." CPL§ 440.47(2)(e). The hearing shall be held at a time to be set by the Court after consultation with the parties.

DATED: May 19, 2021

MARTIN MARCUS
J.S.C.

Honorable Martin Marcus

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

C S

DECISION AND ORDER
Indictment No.

Defendant.

----------X
FUFIDIO, J.

The Defendant, C S has moved under CPL 440.47 for resentencing under Penal Law §60.12. The Court has considered the Defendant's moving papers and exhibits, as well as the People's response thereto, which includes their affirmation in opposition, their memorandum of law and attached exhibits. In addition, the Court has conducted an evidentiary hearing in which it heard from, among others, expert witnesses for the Defendant and the People and the Defendant herself, after which the parties submitted further memoranda for the Court's review. Upon consideration of the foregoing, the Court finds as follows:

On April 18, 2015, the Defendant ran over the victim, with her car. Ms. was intimately involved with the Defendant's boyfriend, Evidence adduced at trial showed that on the days leading up to the killing, the Defendant stalked Mr. and Ms. made increasingly more serious threats to Mr. via text messaging, staked out Mr. and Ms. s houses overnight and took pictures of Ms. s car near Mr. s house. After trial, a jury convicted the Defendant of manslaughter in the first degree, among other charges and she was sentenced to 25 years in prison, a sentence that was upheld on appeal as not excessive (*People v S*). She now moves for a reduced sentence based upon CPL 440.47, claiming that a significant contributing factor to her homicidal behavior was that throughout her life she had been the victim of abuse at the hands of various abusers which has manifested as post-traumatic stress disorder (PTSD) and it was a post-traumatic stress reaction to the shock of seeing Ms. coming at her car, which led to her killing.

CPL 440.47, enacted in 2019 as the Domestic Violence Survivor's Justice Act (DVSJA), is a mechanism for post-conviction relief which gives applicant's retroactive access to the sentencing scheme set forth in Penal Law §60.12, enacted in 1998, which offered domestic violence victims reduced sentences at their original sentencing date. The DVSJA sets forth a multi-step procedure whereby an applicant must first submit an *ex parte* request for permission to apply for relief under the act and must meet certain statutory criteria. Next, if such permission is granted, the Defendant may file his/her actual motion which is then referred to the District Attorney for a response. The DVSJA also sets forth criteria for material that must be submitted with the actual motion in order to establish a *prima facie* right to a Penal Law §60.12 resentencing hearing and to avoid dismissal. The motion, "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" (CPL 440.47 (2)(c) *emphasis added*). This creates a temporal nexus between the abuse and the crime, and it also creates a quantum of abuse that needs to be met.

The Court found that the Defendant met that initial threshold and ordered that a hearing be held to determine whether the Defendant qualified for resentencing under Penal Law section 60.12. In order to be so eligible the Defendant must demonstrate that, "...(a) at the time of the instant offense, the defendant 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 the defendant as such term is defined in subdivision one of section 530.11 of the criminal procedure law; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment pursuant to section 70.00, 70.02, 70.06 or subdivision two or three of section 70.71 of this title would be unduly harsh, and therefore may instead impose a sentence in accordance with this section" (Penal Law sec. 60.12).

The People have once again asked the Court to consider the "at the time of the offense, the defendant was a victim of domestic violence" clause in CPL 440.47 and Penal Law sec. 60.12. They argue the language creates a temporal nexus between the abuse and the crime that has not been met by the Defendant whom they argue had not been subjected to physical abuse

for at least four months prior to Ms. [redacted]'s killing. On the other hand, the Defendant argues that a lifetime of physical abuse has manifested in the Defendant as PTSD and that although she was not subject to physical abuse at the time of the offense, her reaction to events just prior to the killing, specifically that she was taken by surprise by Ms. [redacted]'s presence, was the result of her abuse induced PTSD.

In addition to the "at the time" argument, the People also contend that the Defendant's testimony is not credible; that she has not demonstrated that her history of abuse significantly contributed to her criminal behavior and that the sentence, under the circumstances to be considered by the court, was not unduly harsh.

Turning first to the "at the time" argument; the People put forth that *People v Williams*, 198 AD3d 466 [1st Dept. 2021] compels the Court to find the *abuse* suffered by the defendant/petitioner must occur in close, though not simultaneous temporal proximity to the crime. The instant case differs somewhat from *Williams* in that here, the Defendant avers that past substantial abuse has manifested as PTSD and that her criminal behavior in this case was triggered by an abuse caused, post-traumatic stress reaction to seeing her victim, [redacted] in front of the car she was in. *Williams* only concerned itself with past instances, but not how those abusive acts have manifested in the behavioral aspects of a particular defendant. This Court finds that it is well within the legislative intent to consider PTSD caused by abuse when considering a defendant's CPL 440.47 motion. [1]

The revision and retroactive access to Penal Law sec. 60.12 and the creation of CPL 440.47 that grants such access are laws that are part of a larger progressive trend of the legal system in general and criminal jurisprudence in particular. They are representative of a more holistic response to explaining the root causes of criminal behavior and appropriately addressing them (*see, e.g*, Steven Zeidman, *Rotten Social Background and Mass Incarceration: Who is a Victim?*, 87 Brook. L. Rev. 1299 [2022]; Cynthia Godsoe, *The Victim/Offender Overlap and Criminal System Reform*, 87 Brook. L. Rev. 1319, 1327-28 [2022]). It is within that larger context that the Court locates the legislative intent. The New York State Assembly justified the bill leading to the legislative enactment of CPL 440.47 and the changes to Penal Law sec. 60.12

[1] PTSD, it seems, may have many simultaneous root causes. For example, trauma inflicted on a defendant can be one; trauma inflicted on another by the defendant can be another. (Cynthia Godsoe, *The Victim/Offender Overlap and Criminal System Reform*, 87 Brook. L. Rev. 1319, 1327-28 [2022]). Or it might not even be the effect of abuse or assaultive behavior at all.

as the recognition that, "Over the past 30 years, domestic violence has been increasingly recognized as a national epidemic. Unfortunately, the significant advances made by the anti-violence movement have stopped short of reforming the unjust ways in which the criminal justice system responds to and punishes domestic violence survivors who act to protect themselves from an abuser's violence" (2019 NY A.B. 3972). Further, "All too often, when a survivor defends herself and her children, our criminal justice system responds with harsh punishment instead of with compassion and assistance. Much of this punishment is a result of our state's current sentencing structure which does not allow judges discretion to fully consider the impact of domestic violence when determining sentence lengths. This leads to long, unfair prison sentences for many survivors" (*Id.*). Indeed, the final bill that was signed into law goes even farther than simply allowing such access to defendants who have defended themselves or their children against their abusers. Based on the forgoing and the discussion during the voting on the bill (Chamber Video/Transcript at pages 8-20, 2019 New York Assembly Bill A03974, March 4, 2019) it is clear that a strict interpretation of the legislature's own words would absurdly frustrate their intent (*People v Graubard*, ___ AD3d ___, 2023WL2506352 [2nd Dept. 2023]; *Seltzer v City of Yonkers*, 286 AD 557 [2nd Dept. 1955]). It is easy to imagine a scenario similar to the one presented here where a defendant has suffered a lifetime of abuse and who clearly suffers from PTSD as a result but is unable to access relief because they were not in an actively abusive relationship at the time the crime was committed versus someone in a relatively new abusive relationship that was ongoing at the time the crime was committed. There is no way, in this Court's opinion, that this legislature intended the result of excluding one type of domestic violence survivor while championing another. This comports with other similar mitigation type statutes, such as with extreme emotional disturbance, for example, where the conditions that led to the disturbance were simmering (*People v Patterson*, 39 NY2d 288, 303 [1976][Though an extremely emotionally disturbed act does not need to be spontaneously undertaken; "it may be that a significant mental trauma has affected a defendant's mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore]) or with the so called "insanity" defense, where the defendant's mental disease or defect may have been chronic but cannot form the basis for the defense unless the defendant is under the influence of its effects at the time the crime was committed (*People v Ludwigsen*, 159 AD2d 591 [2nd Dept. 1990]). What is operative in those two prior examples and what is operative here is what was the

defendant's state of mind at the time of the offense. By referencing the traditional "state of mind" defenses and dispensing with any requirement that one had to have been previously raised in order to be eligible for this kind of relief, it appears that the legislature intended this operation as well (Penal Law sec. 60.12(1)). Whether that state of mind was caused by the immediate after effects of abuse or whether it was the result of post-traumatic stress brought about from a lifetime of abuse but which was triggered by something other than abuse, it seems that the impact is the same, though it would also seem that as one moves farther away from the actual abuse and more into the general psychological make up of a particular defendant, determining this element becomes harder.

The legislature imposed some other limitations on a defendant's access to this relief. It is not enough that the effects of the abuse contributed to a defendant's criminal behavior, rather its contribution must have been *significant* (Penal Law sec. 60.12). In this case, the Court does not entirely discredit the Defendant's expert witness, however, it does not agree with his assessment that the Defendant's PTSD was a significant contributing factor, so as to make her eligible for Penal Law sec. 60.12 relief. His explanation of PTSD and how it impacts a person is credible, as was the Defendant's experience with abuse to the point where it may well have been a contributing factor to her PTSD. Nevertheless, the Court found the People's expert's opinion, that the Defendant has an anti-social personality disorder, to be credible as well and that anti-social personality disorder provides another contributing factor to the Defendant's criminal behavior. The Court, not hearing otherwise, can see how both PTSD and anti-social personality disorder could exist mutually in a person and has no real way of discerning exclusivity. Certainly, given the facts in this case, especially the ongoing feud between the Defendant and the victim and the Defendant's propensity to attack female rivals, the Court cannot say that either one significantly contributed, only that each was a likely factor, but at the same time cannot say by a preponderance of the evidence that there was any *significant* contributing factor.

Next, the legislature gave the courts discretion where, even if it was found that relatively contemporaneous substantial abuse was a significant contributing factor to a defendant's criminality, relief could still be denied if, "...the nature and circumstances of the crime and the history, character and condition of the defendant" did not warrant such relief (Penal Law sec. 60.12(1)). In some cases, the application of this element of the statute seems pretty clear, such as when the victim of abuse attacks their abuser, or if a defendant up until their crime has led a

relatively blameless life. Here, however, the Defendant's history, character and condition do not warrant relief.

To begin, though certainly not dispositive, the jury was presented with and rejected a justification defense and on appeal her maximum sentence of 25 years in state prison was upheld as not excessive (*People v* [redacted]; *lv. denied,* [redacted]). The sentencing court (Zambelli, J.) described the killing as a, "ruthless act driven by anger and hate" and it was evident that this was the tragic, if not somewhat predictable ending to a long simmering feud between the Defendant and her victim [redacted] over [redacted], that ultimately led the Defendant, after the victim had turned away from the car that the Defendant was in, to put her car into drive and drive into and then over the victim, killing her. Unfortunately, this type of behavior was not isolated to this incident. The Defendant has a well documented history of violence towards female rivals she feels as being competitors for her love interests' affections. Critically, those violent tendencies did not stop there. Her criminal history is replete with violence directed at intimate partners, police, CPS workers and court personnel as well. Nor did it stop once she was incarcerated. Even in prison she has demonstrably been unable to comport her behavior as demonstrated by numerous prison rule violation convictions for violence and threatened violence. It is evident that the Defendant has not demonstrated, in or out of prison, that if she did earn a reduced sentence that she would not simply slip back into her established patterns of violent behavior. Thus, although the Court finds that the Defendant did indeed suffer various forms of abuse in her life and suffers from PTSD as a result, it does not agree that it excuses the rightfully earned sentence she is now serving for the killing of [redacted] and the violence she has inflicted upon the citizens of Westchester County. The Court finds that the defendant's sentence for killing [redacted] is not unduly harsh.

Accordingly, based upon the foregoing, the defendant's application under CPL 440.47 on this case is denied.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
March 29 2023

Honorable George E. Fufidio, A.J.S.C.
Judge of the County Court

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