NEW YORK SUPREME COURT
APPELLATE DIVISION – SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. [redacted] Defendant-Appellant.	App. Div. Docket No. [redacted] Dutchess County Indictment No. [redacted] **NOTICE OF MOTION FOR LEAVE TO FILE THE ATTACHED PROPOSED BRIEF OF LEGISLATORS AS *AMICI CURIAE***

PLEASE TAKE NOTICE that, on the attached affirmation of Eric R. Breslin (the "Breslin Affirmation"), dated [redacted] Assemblyman Jeffrion L. Aubry, Senator Brian A. Benjamin, Senator Alessandra Biaggi, Senator David Carlucci, Senator Andrew Gounardes, Senator Brad Hoylman, Senator Monica R. Martinez, Senator Shelley B. Mayer, Senator Zellnor Myrie, Senator Kevin S. Parker, Senator Roxanne J. Persaud, Senator Gustavo Rivera, Senator Diane J. Savino, and Senator Luis R. Sepúlveda will move this Court, at a term for motions to be held on [redacted] at the [redacted] Courthouse, [redacted], at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order granting them leave to file a brief as *amici curiae*, pursuant to 22 NYCRR §§ 670.4(c), 1250.4(f). A copy of the brief is attached to the Breslin Affirmation and is submitted in support of the Brief for Appellant, [redacted], filed on [redacted] 2020.

PLEASE TAKE FURTHER NOTICE that, under CPLR 2214(b), answering papers, if any, shall be served on the undersigned counsel at least seven (7) days prior to the return of this motion.

Respectfully submitted,

[redacted]

Dated: [redacted]
New York, New York

[redacted]

Supreme Court Appellate Division
Second Department
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Brooklyn, New York 11201

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NEW YORK SUPREME COURT
APPELLATE DIVISION – SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. [redacted] Defendant-Appellant.	App. Div. Docket No. [redacted] Dutchess County Indictment No. [redacted] **AFFIRMATION OF ERIC R. BRESLIN IN SUPPORT OF MOTION FOR LEAVE TO FILE THE ATTACHED PROPOSED BRIEF OF LEGISLATORS AS *AMICI CURIAE***

[redacted] duly affirms under penalties of perjury as follows:

1. I am an attorney at law admitted to practice in the State of New York and a member of the law firm Duane Morris LLP, counsel to Assemblyman Jeffrion L. Aubry, Senator Brian A. Benjamin, Senator Alessandra Biaggi, Senator David Carlucci, Senator Andrew Gounardes, Senator Brad Hoylman, Senator Monica R. Martinez, Senator Shelley B. Mayer, Senator Zellnor Myrie, Senator Kevin S. Parker, Senator Roxanne J. Persaud, Senator Gustavo Rivera, Senator Diane J. Savino, and Senator Luis R. Sepúlveda, collectively the "Proposed Amici."

2. I am familiar with the facts and circumstances set forth below and submit this affirmation in support of a motion, under 22 NYCRR §§ 670.4(c), 1250.4(f), by the Proposed Amici for leave to file the attached proposed brief as

amici curiae in support of the Brief for Appellant, submitted by [redacted] on [redacted] 2020.

3. We request permission to file the accompanying brief for the following reasons:

4. Proposed Amici are members of the New York Senate and Assembly who sponsored or supported the passage of the Domestic Violence Survivors Justice Act (the "DVSJA"), which was passed in March 2019 and signed into law in May 2019.

5. Proposed Amici come from areas across the State and count over 4.37 million people as constituents. The following legislators have agreed to be Proposed Amici:

a. Assemblyman Jeffrion L. Aubry, Assembly District 35

b. Senator Brian A. Benjamin, 30th Senate District

c. Senator Alessandra Biaggi, 34th Senate District

d. Senator David Carlucci, 38th Senate District

e. Senator Andrew Gounardes, 22nd Senate District

f. Senator Brad Hoylman, 27th Senate District

g. Senator Monica R. Martinez, 3rd Senate District

h. Senator Shelley B. Mayer, 37th Senate District

i. Senator Zellnor Myrie, 20th Senate District

j. Senator Kevin S. Parker, 21st Senate District

k. Senator Roxanne J. Persaud, 19th Senate District

l. Senator Gustavo Rivera, 33rd Senate District

m. Senator Diane J. Savino, 23rd Senate District

n. Senator Luis R. Sepúlveda, 32nd Senate District

6. Proposed Amici have a strong interest in this case because it presents the first opportunity for the Appellate Division to consider the application of the DVSJA to a victim of domestic violence. Indeed, the trial court in this case was among the first to address the statute and determine its applicability.

7. As Proposed Amici explain in the attached brief, this appeal therefore serves as a test of the effectiveness of this new legislation, which was designed to reform the methods by which courts impose criminal sentences on survivors of domestic violence.

8. As set forth in the attached brief, Proposed Amici are particularly interested in ensuring that this Court appreciates the goal of the Legislature in passing the DVSJA—namely, to encourage judges to impose more appropriately tailored sentences for domestic violence survivors who commit crimes that have a substantial connection to their history of abuse.

9. Proposed Amici therefore seek leave to submit this brief to provide this Court with the legislative history of the DVSJA and an understanding of the

purpose of the DVSJA from the perspective of those who sponsored, advocated for, and supported this legislation.

10. The attached brief by Proposed Amici further explains that the DVSJA was enacted to protect individuals like [redacted] the defendant here, who presented credible evidence of her history of abuse and how that abuse led to the death of her abuser. Rather than giving effect to this legislation, the trial court reverted to outdated ideas of domestic violence and discredited theories in which victims of abuse are faulted for not leaving their abusers or fighting back to protect themselves. By relying on these outdated conceptions, the court misapplied the DVSJA and ignored the intent of the legislation.

11. The Proposed Amici are concerned that, if the trial court's decision not to apply the DVSJA is upheld, the DVSJA will be rendered effectively meaningless. Indeed, if the trial court's rationale is affirmed, it may become almost insurmountably difficult for most survivors of domestic violence to gain the intended benefit of the Act.

12. If Ms. [redacted]'s conviction is otherwise affirmed, Proposed Amici urge this Court to vacate the sentence imposed and remand with instructions to sentence Ms. [redacted] under the DVSJA.

13. Proposed Amici's motion is made on notice to all parties.

14. Counsel for Proposed Amici have contacted the attorneys for all parties to this action to seek consent. Counsel for Appellant [redacted] has consented. No other parties have yet consented.

15. Because the Proposed Amici believe the proposed brief will be of special assistance to this Court, we respectfully request that the Proposed Amici be granted leave to submit the accompanying brief, together with such other and further relief as the Court may deem to be just and proper.

Respectfully submitted,

[redacted]

Dated: [redacted]
New York, New York

New York Supreme Court

Appellate Division – Second Department

Docket No. [redacted]

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

[redacted]

Defendant-Appellant.

BRIEF OF LEGISLATORS AS *AMICI CURIAE*

Of Counsel:

[redacted]

[redacted]

Dutchess County Indictment No. [redacted]

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INTEREST OF AMICI CURIAE

Amici curiae are members of the New York Senate and Assembly who sponsored or supported the passage of the Domestic Violence Survivors Justice Act (the "DVSJA"), which was passed in March 2019 and signed into law in May 2019. Amici come from areas across the State and count over 4.37 million people as constituents. The following legislators are signatories to this brief:

Assemblyman Jeffrion L. Aubry, Assembly District 35

Senator Brian A. Benjamin, 30th Senate District

Senator Alessandra Biaggi, 34th Senate District

Senator David Carlucci, 38th Senate District

Senator Andrew Gounardes, 22nd Senate District

Senator Brad Hoylman, 27th Senate District

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Senator Roxanne J. Persaud, 19th Senate District

Senator Gustavo Rivera, 33rd Senate District

Senator Diane J. Savino, 23rd Senate District

Senator Luis R. Sepúlveda, 32nd Senate District

Amici have a strong interest in this case because it presents the first opportunity for the Appellate Division to consider the application of the DVSJA to a victim of domestic violence. Indeed, the trial court in this case was among the first to address the statute and determine its applicability. This appeal therefore serves as a test of the effectiveness of this new legislation, which was designed to reform the methods by which courts impose criminal sentences on survivors of domestic violence.

Amici are particularly interested in ensuring that this Court appreciates the goal of the Legislature in passing the DVSJA—namely, to encourage judges to impose more appropriately tailored sentences for domestic violence survivors who commit crimes that have a substantial connection to their history of abuse. Amici therefore submit this brief to provide this Court with the legislative history of the DVSJA and an understanding of the purpose of the DVSJA from the perspective of those who sponsored, advocated for, and supported this legislation. This brief further explains that the DVSJA was enacted to protect individuals like [redacted], the defendant here, who presented credible evidence of her history of abuse and how that abuse led to the death of her abuser.

Rather than giving effect to this legislation, the trial court reverted to outdated ideas of domestic violence and discredited theories in which victims of abuse are faulted for not leaving their abusers or fighting back to protect

themselves. By relying on these outdated conceptions, the court misapplied the DVSJA and ignored the intent of the legislation. The signatories of this brief are concerned that, if the trial court's decision not to apply the DVSJA is upheld, the DVSJA will be rendered effectively meaningless. Indeed, if the trial court's rationale is affirmed, it may become almost insurmountably difficult for most survivors of domestic violence to gain the intended benefit of the Act. If Ms. [redacted]'s conviction is otherwise affirmed, Amici urge this Court to vacate the sentence imposed and remand with instructions to sentence Ms. [redacted] under the DVSJA.

INTRODUCTION AND SUMMARY OF ARGUMENT

[redacted] suffered brutal abuse from her domestic partner, [redacted] for many years. Mr. [redacted] tortured, burned, and raped Ms. [redacted] and engaged in all manner of sadistic and manipulative behavior. *See, e.g.*, Trial Tr. at [redacted] During the evening of September [redacted] after being visited by Child Protective Services earlier in the day because of reports that Mr. [redacted] was abusing Ms. [redacted], Mr. [redacted] brandished a gun and threatened to kill Ms. [redacted], leaving their two young children without a mother. Trial Tr. at [redacted] Faced with these threats against the backdrop of terror and trauma that Mr. [redacted]'s repeated abuse instilled, Ms. [redacted] retrieved the gun and fatally shot Mr. [redacted] Trial Tr. at 744. At her trial, Ms. [redacted] recounted the horrific abuse she suffered and the ever-present fear for her life. *See, e.g.*, Trial Tr. at 641, 644-78, 686-716. The jury nevertheless found her guilty of second-degree murder. Ms. [redacted] then asked the court to sentence her under the newly-enacted Domestic Violence Survivors Justice Act (the "DVSJA" or "Act"), codified in Penal Law § 60.12.

The DVSJA allows judges to use their discretion to impose tailored sentences for individuals like Ms. [redacted]—survivors of domestic violence who are convicted of crimes, including against the perpetrator of domestic violence. The DVSJA reflects the New York State Legislature's recognition of the

inextricable connection between domestic violence and the incarceration of women. The DVSJA is the culmination of the Legislature's repeated efforts to reform a criminal justice system that responds too harshly to domestic violence survivors who commit crimes that are substantially related to the effects of domestic violence. Now, if survivor-defendants demonstrate their eligibility for the alternative sentencing mechanisms in the DVSJA, judges have the discretion to impose shorter sentences or, in appropriate cases, utilize alternatives to incarceration.

Ms. [redacted] was a prime candidate for sentencing under the DVSJA. She supported her request for sentencing under the DVSJA with days of testimony from friends, acquaintances, and medical professionals who observed and documented the injuries she suffered at the hands of Mr. [redacted]. *See, e.g.*, CPL § 60.12 Hearing Tr. at [redacted] (testimony of [redacted] a social worker and neighbor); CPL § 60.12 Hearing Tr. at [redacted] (testimony of [redacted] a licensed therapist and friend); CPL § 60.12 Hearing Tr. at [redacted] (testimony of [redacted] a licensed clinical social worker). These witnesses also testified that they had observed circumstantial evidence that Mr. [redacted] had taken pictures of Ms. [redacted]—who was naked, bound, and gagged—and posted them on pornography websites without her consent. CPL § 60.12 Hearing Tr. at [redacted]

Ms. [redacted] corroborated this testimony with pictures and other records of her injuries and abuse. *See, e.g.*, Defendant's Exhibits HH-OO, QQ-YY, BBB, DDD, FFF-KKK, MMM, BBBB. And at trial, Ms. [redacted] offered her own testimony about Mr. [redacted]s sadistic treatment. *See, e.g.*, Trial Tr. at [redacted] An expert on domestic violence testified on Ms. [redacted]s behalf to explain why victims of abuse remain in abusive relationships, fail to take advantage of resources to help them leave their abusers, and may not want their abusers to be prosecuted. CPL § 60.12 Hearing Tr. at 305-31. Based on her history of abuse, the unrebutted evidence that her abuse significantly contributed to her crime, and her lack of any criminal history, Ms. [redacted] requested to be sentenced to five to fifteen years' imprisonment in accordance with the DVSJA.

The trial court declined to apply the statute and instead imposed a life sentence with the possibility of parole after nineteen years. In ruling that the DVSJA did not apply to Ms. [redacted]'s case, the judge faulted Ms. [redacted] for failing to leave her abuser, remarking that she had "advice, assistance, support, and opportunities to escape her alleged abusive situation." Decision and Order re: CPL § 60.12, dated [redacted] at 42. The court concluded that "[t]he decision not to accept the advice and help of these individuals when viewed in the context of the homicide facts, significantly weakens the defendant's position in her

use of deadly force." *Id.* Similarly, the court determined that Ms. [redacted] should have escaped the house rather than shoot Mr. [redacted]. *Id.* at 43.

By denying Ms. [redacted]'s motion to be sentenced under the DVSJA, the court ignored the intent of the Legislature in passing the Act. The court compounded its error by relying on outdated conceptions of how domestic violence victims should act and the circumstances that might lead them to commit crimes, especially against their abusers. As discussed in detail below, the Legislature expressly disproved of these outdated notions when it chose to enact the DVSJA. Importantly, the Legislature specifically rejected the idea that an abuse victim should be expected to leave her abuser in order to avoid harsh criminal penalties.

The court's decision in refusing to apply the DVSJA disturbingly results in an interpretation of the Act that renders the statute's conditions practically impossible for any domestic violence survivor to satisfy. Rather than recognizing the significant trauma that victims of domestic violence suffer, considering that trauma during sentencing, and treating Ms. [redacted] with compassion, the trial court discounted the evidence Ms. [redacted] presented. Moreover, the court unduly emphasized Ms. [redacted]'s failure to leave her abuser—a fact that is present in many cases in which victims of abuse kill their abuser. If left uncorrected, the trial court will have rendered the DVSJA effectively powerless to protect those most in need of protection in the criminal justice system, including

Ms. [redacted] This Court should therefore vacate Ms. [redacted]s sentence and remand for re-sentencing under the DVSJA, if she is not granted a new trial.

ARGUMENT

I. The Legislature amended Penal Law § 60.12 to remedy the defects in prior legislation.

The DVSJA allows trial courts to sentence a defendant who was also the victim of domestic violence to a shorter, determinate sentence than the one she would receive under the otherwise-applicable sentencing scheme. By allowing the court to use its discretion to sentence survivor-defendants to shorter, determinate sentences, the DVSJA remedied one of the major problems with the prior legislation that was supposedly meant to benefit domestic violence survivors. *See* New York State Assembly Memorandum in Support of Legislation, Bill No. A3974 ("Assembly Memorandum of Support"), at 2, attached as Appendix A.[1] Under the prior version of Penal Law § 60.12, which was enacted as part of the 1998 Sentencing Reform Act, more commonly known as Jenna's Law, judges were allowed to sentence survivors of domestic violence to indeterminate sentences. *Id.*

Although the Legislature, when passing Jenna's Law, assumed that the provision would result in survivor-defendants receiving shorter sentences than if

[1] The Assembly Memorandum of Support is available at: https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A03974&term=2019&Memo=Y (last visited July 6, 2020).

they had been sentenced without regard to their status as victims of domestic violence, that turned out not to be the case. *Id.* Instead, Jenna's Law was only used once between 1998 and 2019, and, in that case, it actually had the opposite effect of that intended by the Legislature. *Id.* Rather than receiving a shorter sentence, the survivor-defendant was sentenced to a longer term of imprisonment than the minimum term allowed if Jenna's law had not been applied. *Id.* Thus, Jenna's Law failed to accomplish the Legislature's aim of imposing more compassionate sentences on victims of domestic violence who commit crimes because of the violence they suffered.

The DVSJA was meant to remedy the problems with Jenna's Law. The Legislature recognized that Jenna's Law failed to instruct members of the judiciary to consider fully the impact of domestic violence on survivors during sentencing. *Id.* Without such consideration of and appreciation for the circumstances that may have caused a victim of domestic violence to commit a crime, the trial courts often imposed "long, unfair prison sentences." *Id.*

The DVSJA aimed to ameliorate these problems and implement the New York State Sentencing Commission's recommendation that Jenna's Law be replaced with "a comparable ameliorative provision that would allow for the imposition of less harsh, determinate sentences" in cases involving defendants who were victims of domestic violence. *Id.* Rather than imposing more requirements

on judges and making it harder for domestic violence survivors to be sentenced to shorter prison terms, the DVSJA reflected the Legislature's intent to remove restrictions on judges and allow for less punitive sentences.

II. The Legislature intended victims of domestic violence to be sentenced compassionately, not further victimized.

In proposing the DVSJA, the sponsors of the bill recognized that, "[o]ver the past 30 years, domestic violence has been increasingly recognized as a national epidemic." *Id.* As Assemblymember Aubry, a principal sponsor of the bill and signatory of this brief recognized, "[p]eople for many years did not report domestic violence" and "did not record it, afraid that they would be treated differently." N.Y. Assembly on No. A03974, March 4, 2019, at 12, attached as Appendix B.[2] Once domestic violence cases started being recorded, studies showed the close linkage between domestic violence and the incarceration of women. For example, 90% of incarcerated women have experienced severe physical or sexual violence during their lives, and 75% of incarcerated women suffered severe physical violence at the hands of an intimate partner. *See* Assembly Memorandum of Support, at 1, Appendix A.[3]

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[2] The transcript is available at: http://www2.assembly.state.ny.us/write/upload/transcripts/2019/3-4-19.pdf (last visited July 6, 2020).

[3] These statistics have been verified in a number of studies. For example, in a 1999 study of women incarcerated at the Bedford Hills Correctional Facility, 75% of

Yet, even with the significant advances in social services and in society as a whole in recognizing the scourge of domestic violence, until passage of the DVSJA, the Legislature had not been succeeding in "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." *Id.* The sponsors of the Act were concerned that, in too many cases, when a survivor of abuse acts to defend herself and her children, the "criminal justice system responds with harsh punishment instead of with compassion and assistance." *Id.* The Legislature attributed this problem to the current sentencing scheme under which judges lacked the discretion to consider fully "the impact of domestic violence

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incarcerated women suffered severe physical violence by intimate partners, with 35-40% experiencing the most severe forms of abuse, such as being choked, threatened with a knife or gun, or forced to participate in sexual activity. *See* Angela Browne, et al., *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 Int'l J. of Law & Psychiatry 301, 308, 313 (1999). Similarly, a study by the New York State Division of Criminal Justice Services found that 93% of women convicted of killing an intimate partner had also been physically or sexually abused by an intimate partner. *See* New York State Division of Criminal Justice Services, *Homicide by Women*, at 8 (June 1996). Overall, experts agree that there is "a strong connection . . . between women's victimization by intimate partners and the incidence of homicide women commit against those partners," with most homicides by women resulting from "physical, sexual, and emotional abuse that has escalated to the point that women feel their well-being and even their lives are in immediate danger and kill as an effort toward self-preservation or in self-defense." Vickie Jensen, *Why Women Kill* 11-12 (1996).

when determining sentence lengths." *Id.* This lack of discretion led to "long, unfair prison sentences for many survivors."[4]

The DVSJA was therefore proposed to "chang[e] the system that treats [domestic violence survivors] even more harshly than they do others in the criminal justice system." N.Y. Senate on No. S1077, March 12, 2019, at 1576

[4] Notably, "[t]he average prison sentence of men who kill their women partners is 2 to 6 years. Women who kill their partners are sentenced on average to 15 years, despite the fact that most women who[] kill do so in self-defense." Bernice R. Kennedy, *Domestic Violence: A.K.A. Intimate Partner Violence (IPV)* 52 (2007). Women are also often charged with more serious crimes than their male counterparts after killing a partner. *See* Elisabeth Ayyildiz, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Women as Vigilante*, 4 J. of Gender & The Law 141, 142-43 (1995). These trends hold true in New York as well. For example, Valerie Seeley was sentenced to 19 years to life for killing her abusive partner during an argument. (*See People v. Seeley*, 683 N.Y.S.2d 795, 798-99 [Sup. Ct., Kings County 1998]); *see also Seeley v. Perez*, No. 06 Civ. 1916, 2008 WL 3992289, at *1 (E.D.N.Y. Aug. 26, 2008). Niki Rossakis was initially sentenced to 23 years to life for killing her abusive husband; her sentence was reduced on appeal to 15 years to life. (*People v. Rossakis*, 256 A.D.2d 366 [2d Dept 1998]). Cynthia Galens was sentenced to 23 years after being convicted of first-degree manslaughter for poisoning and killing her abusive partner. *See Galens v. Kaplan*, 15-CV-37A, 2017 WL 2774194, at *2, 4 & nn. 7-8 (W.D.N.Y. May 15, 2017). Kelly Forbes was sentenced to 21 years' imprisonment for first-degree manslaughter for killing her husband after he tried to strangle her. (*See People v. Forbes*, 75 A.D.3d 608 [2d Dept 2010] and associated briefing). Theresa Debo was convicted of second-degree murder and was sentenced to 22 years to life for killing her partner, even though her partner was abusive for many years and, on the night in question, hit her on the head with a beer bottle and threatened her with a gun. (*See People v. Debo*, 45 A.D.3d 1349 [4th Dept 2007] and associated briefing).

(statement of Senator Montgomery), attached as Appendix C.[5] As many in the Assembly and the Senate recognized, "all too often in our court system when women are defending themselves against domestic violence, instead of being met with a judge with compassion and assistance and help, the judge is just putting forth punishment." *Id.* at 1572 (statement of Senator Carlucci).

The Legislature intended the DVSJA to change that paradigm by ensuring judges would only sentence victims in accordance with all the facts of a case, including their history of domestic abuse. N.Y. Assembly on No. A03974, March 4, 2019, at 18, Appendix B. As Senator Persaud, the principal sponsor of the Act in the Senate, explained, "we should not hold [domestic violence survivors] accountable to the extent that the law has been holding them accountable. The law should take into consideration the circumstances that they were living under when they're being sentenced." N.Y. Senate on No. S1077, March 12, 2019, at 1569-70, Appendix C.

Among the factors that judges can consider are the system's failure to protect these victims, even when some resources are available. As Assemblymember Barron explained when speaking in support of the Act,

[5] Transcript is available at: https://legislation.nysenate.gov/pdf/transcripts/031219.txt/ (last visited July 6, 2020).

"sometimes these victims are not protected and . . . commit desperate acts for whatever reasons." N.Y. Assembly on No. A03974, March 4, 2019, at 20, Appendix B. Assemblymember Barron recognized that "we don't know what it means emotionally and physically to be a victim of domestic violence," and for that reason, survivors of abuse should receive the "highest of reconsideration and sensitivity." *Id.*

The Legislature did not intend for the Act to absolve victims of abuse of all consequences of their crimes; however, it sought to recognize that "these women are victims, [and] they should be treated as such." N.Y. Senate on No. S1077, March 12, 2019, at 1570, Appendix C. In many cases, these victims "have suffered enough," and the sentencing judge should "take into consideration what [the defendants] have gone through [and] what they were living with." *Id.*

The Legislature also supported the DVSJA because it allows the victim-defendants to return home to their families much sooner and rebuild their relationships with their children. *See* Assembly Memorandum of Support, at 2, Appendix A. Allowing for shorter prison sentences for victim-defendants is particularly appropriate because, in most cases, they have "no prior criminal records, no history of violence, and extremely low recidivism rates." *Id.* Remarkably, "of the 38 women convicted of murder and released between 1985

and 2003, not a single one returned to prison for a new crime within a 36-month period of release—a 0% recidivism rate." *Id.*

Most importantly, the Legislature recognized that the ability to live free from violence is an essential human right. *Id.* By enacting the DVSJA, the government of New York "recognized its responsibility to preserve this right and provide support" for survivors of domestic violence. *Id.* This responsibility crucially "does not end when a survivor becomes involved in the criminal justice system because of the abuse she suffers." *Id.*

Ultimately, the DVSJA was meant to "address the years of injustice faced by survivors whose lives have been shattered by domestic abuse and decrease the likelihood of survivors being victimized by the very system that should help protect them." *Id.* On that basis, the DVSJA enjoyed overwhelming support, with 54 Senators and 103 Assemblymembers voting in favor of the Act.

III. The DVSJA was meant to be used to sentence survivor-defendants like [redacted]

For the Act to have any meaning, judges must recognize the spirit of the law and actually implement it to help those who have suffered for years as victims of abuse and become involved in the criminal justice system as a result. The judge in Ms. [redacted]'s case failed to do so, further victimizing Ms. [redacted] and stripping the DVSJA of its intended effect.

A. By refusing to apply the DVSJA, the trial court failed to adhere to the spirit of the law.

As explained in detail above, the primary purpose of the DVSJA was to avoid further victimizing survivors of domestic abuse when they enter the criminal justice system because of the abuse they suffered. Such survivors should be treated with compassion, and all the circumstances of their abuse should be accounted for when imposing a sentence.

The trial court failed in these goals in Ms. [redacted]'s case. Rather than taking Ms. [redacted]'s circumstances into account when imposing a sentence, the trial court disregarded and discredited her history of abuse. Despite calling Ms. [redacted]'s story "compelling," the court refused to apply the DVSJA because, in the court's view, Ms. [redacted] gave inconsistent statements about her history of abuse. Decision and Order re: CPL § 60.12, dated [redacted] at 41-42. The court thought Mr. [redacted] did not fit the profile of an abuser and discredited Ms. [redacted]s testimony because she revealed the identity of her abuser "to only two witnesses." *Id.* at 16, 41-42. The court also denied application of the DVSJA because Ms. [redacted] did not leave her abuser when she had the chance, either in the weeks and months before Mr. [redacted]'s death, or in the moments before shooting Mr. [redacted] when she had, in the court's perception, a path to escape. *Id.* at 42-43.

On the basis of these findings, the court found that Ms. [redacted] failed to establish each of the three elements of the DVSJA. The court's opinion denying the motion for sentencing under the DVSJA makes clear that the court failed to give meaningful consideration to the purpose and the goals of the Act. The court refused to recognize the DVSJA as the paradigm shift that the Legislature intended it to be. The result is a sentence that utterly fails to take into account the circumstances in which Ms. [redacted] herself on the night of September [redacted]

B. Using the DVSJA to sentence Ms. [redacted] would fulfill all the policy goals advanced by the Legislature in passing the DVSJA.

If the trial court had met Ms. [redacted] with understanding rather than hostility, the court would have recognized that Ms. [redacted]'s case was ripe for application of the DVSJA. Ms. [redacted] testified credibly about her extensive and horrific history of abuse. *See, e.g.*, Trial Tr. at [redacted] She explained how she was raped, burned, strangled, bitten, and beaten by Mr. [redacted]. *Id.* During the abuse, Mr. [redacted] filmed and photographed her and then posted those videos and photographs on pornography sites without her consent. CPL § 60.12 Hearing Tr. at [redacted] When evaluated by counselors experienced with domestic violence, Ms. [redacted] was judged to be in severe danger. *Id.* at 119. Yet, Ms. [redacted] did not leave her abuser or report him to the police. Ms. [redacted] also knew that the most dangerous time for a victim of

domestic abuse is when she tries to leave her abuser. *See* Sentencing Tr. of [redacted] at 27.

In the evening of [redacted] after being visited by Child Protective Services, [redacted] threatened Ms. [redacted] with a gun. Trial Tr. at [redacted], [redacted]. He claimed that he would kill her and then commit suicide so that the children would be orphans. *Id.* at 741-43. He conducted Internet searches on his phone about killing Ms. [redacted] in her sleep. *Id.* at [redacted] And when he continued his threats, Ms. [redacted] shot Mr. [redacted] with the same gun that he had been pointing at her. *Id.* at 744-46.

At her sentencing, Ms. [redacted] explained that she wished "more than anything this ended another way." Sentencing Tr. of [redacted] Ms. [redacted] recognized that if it had ended differently, she would not be in the courtroom but, in her view, she also "wouldn't be alive either, and [she] wanted to live." *Id.* at [redacted]. Ms. [redacted] explained, "I wanted this all to stop. I was afraid to stay, afraid to leave, afraid that nobody would believe me, afraid of losing everything. This is why women don't leave." [redacted] Ms. [redacted] expressed that she knew "killing is not a solution and staying hurts, but leaving doesn't mean living. So often we end up dead or where I'm standing alive but still not free." [redacted]

Ms. [redacted] was a prime candidate for sentencing under the DVSJA. As her statement and the testimony at trial demonstrate, Ms. [redacted] experienced cumulative, long-term physical and psychological abuse by an intimate partner. Because of that abuse, she killed her partner. She deserves compassion and understanding rather than further victimization by the criminal justice system. And her sentence should have taken into account the suffering she has already experienced rather than just heaping on punishment.

The primary goal of the DVSJA is to allow and, in fact, to encourage judges to shift their thinking about what it means to be a victim of domestic violence. The DVSJA recognizes the profound suffering that has led these victims to commit crimes and seeks to prevent further victimization through inappropriately harsh punishments. The DVSJA should be read and applied broadly to effectuate this goal.

Furthermore, Ms. [redacted]'s case does not present any public safety concerns that should preclude sentencing under the DVSJA. Like many other survivor-defendants, Ms. [redacted] has no prior criminal history and no history of violence. Just as most incarcerated women have very low recidivism rates, Ms. [redacted], too, is highly unlikely to reoffend. Moreover, she has two young children, who were ages two and four on the night their father died. They are now facing a minimum of almost twenty years without any parents in their lives.

Sentencing Ms. [redacted] under the DVSJA would allow her to be reunited with her children with less damage to their lives and development, and a meaningful opportunity to rebuild her family.

The DVSJA was enacted with the understanding and intent that it should actually be employed by courts and given its full effect. It was meant to help victims and to reform a system that was unduly harsh and punitive when addressing survivors of domestic violence. Ms. [redacted]'s case presented one of the first opportunities for application of the DVSJA, but the trial court failed to give the act its intended effect. Moreover, the trial court's reasoning for refusing to apply the DVSJA made clear that the court's decision was rooted in outdated and roundly-rejected misunderstandings of domestic violence and its profound impact on survivors.

The court clearly did not consider the legislative history of the Act. Nor did the court effectuate the goal of the Legislature in allowing individuals like Ms. [redacted] to receive more compassionate and tailored sentences in recognition of the abuse they suffered and how that abuse led them to commit the offense at issue. This Court should correct that error now and preserve the DVSJA's status as a meaningful legislative reform to the criminal justice system.

CONCLUSION

Ms. [redacted] was precisely the type of survivor-defendant that the Legislature intended to help by enacting the DVSJA. The court erred by failing to apply the DVSJA and recognize that a more compassionate sentence under the Act was warranted and appropriate here. If this Court declines to overturn Ms. [redacted]'s conviction, it should vacate her sentence and remand with instructions to sentence Ms. [redacted] under the DVSJA.

Respectfully submitted,

[redacted]

Dated: [redacted]
New York, New York

[redacted]

CERTIFICATE OF COMPLIANCE WITH 22 NYCRR 670.10.3(a)(f)

[redacted] an attorney duly admitted to practice in the courts of the State of New York and attorney for the Amici, certifies that the foregoing brief was prepared on a computer using size 14 Times New Roman font and is double spaced. According to the word count function of Microsoft Word, the brief contains 4,690 words, not including the table of contents, table of authorities, and this certificate of compliance.

Dated: [redacted]
New York, New York

[redacted]

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Appendix A

- This bill is not active in this session.

A03974 Memo:

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A3974

SPONSOR: Aubry

TITLE OF BILL:

An act to amend the penal law and the criminal procedure law, in relation to sentencing and resentencing in domestic violence cases

PURPOSE:

To expand upon the existing provisions of alternative sentencing for domestic violence cases; second, to allow judges the opportunity to resentence currently incarcerated persons for offenses in which certain domestic violence criteria was a significant element of the offense.

SUMMARY OF PROVISIONS:

Section 1 of the bill amends § 60.12 of the penal law to add new subdivisions 4 through 11 to specify which offenses may be considered under the section, and provides the alternate sentencing ranges a judge may impose upon a determination the defendant was a victim of domestic violence at the time of the offense and the abuse was a significant contributing factor in the commission of the offense.

Section 2 of the bill amends § 70.45 of the penal law to permit determinate sentencing for persons sentenced pursuant to § 60.12(12).

Section 3 of the bill adds a new § 440.47 to the criminal procedure law to allow currently incarcerated persons to apply for resentencing pursuant to § 60.12 of the penal law.

Section 4 of the bill amends § 450.90 of the criminal procedure law to Grant leave for appeal to include the new § 440.47.

Section 5 of the bill amends § 390.50 of the criminal procedure law to allow defendants seeking relief under § 60.12 to access his or her presentence reports.

Section 6 of the bill provides that sections one and two of this act shall take place immediately, with sections three, four, and five, taking place within 90 days after it has become law.

JUSTIFICATION:

Domestic violence and women's incarceration are inextricably linked: 9 out of 10 incarcerated women have experienced severe physical or sexual violence in their lifetimes; 6 out of 10 experienced serious physical or sexual violence during childhood; 75% suffered severe physical violence by an intimate partner during adulthood; and 37% were raped before their incarceration. Ninety-three percent of women convicted of killing an intimate partner were abused by an intimate partner in the past.

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.

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.

The Domestic Violence Survivors Justice Act would address this problem for both male and female survivors of domestic violence by: (1) allowing judges to sentence survivors to alternative sentences of imprisonment including determinate sentences and, in some cases, community-based alternative-to incarceration program and (2) providing survivors currently in prison the opportunity to apply for resentencing, granting much-deserved relief for incarcerated individuals who pose no threat to public safety.

The Act contains protections to ensure appropriate use of this discretion - a judge can only grant an alternative sentence to a defendant if s/he finds that: (1) the defendant 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 defendant as that term is defined in subdi-

vision one of section 530.11 of the criminal procedure law; (2) the abuse was a "significant contributing factor" to the defendant's participation in the crime; and, (3) a sentence under current law would be "unduly harsh."

The bill requires a judge to apply the same test when determining resentencing eligibility for an incarcerated survivor who submits a resentencing application to the court. In order to be considered for eligibility, an incarcerated survivor is also required to include evidence corroborating the claim she was, at the time of the offense, a victim of domestic violence.

The Act would address shortcomings in New York's current domestic violence sentencing exception, enacted-as part of the state's 1995 Sentencing Reform Act; commonly known as Jenna's Law. This exception allows judges to give survivors indeterminate sentences. At the time state officials thought this exception would lead to less punitive sentencing for survivors unfortunately, it did not. In 2007, only one person had been sentenced under this exception. He received 6 to 12 years (longer than the minimum term allowed for individuals not sentenced under this provision) and was denied parole twice. In 2009, not a single person was incarcerated under the exception.

The New York State Sentencing Commission, established in 2007, noted that this law should be replaced "with a comparable ameliorative provision that would allow for the imposition of less harsh, determinate sentences in such cases." The Domestic Violence Survivors Justice Act would do just that.

Eligibility for alternative indeterminate sentences of imprisonment, determinate sentences of imprisonment and alternatives to incarceration for women survivors is particularly appropriate as they most often have no prior criminal records, no history of violence and extremely low recidivism rates: of the 38 women convicted of murder and released

between 1985 and 2003, not a single one returned to prison for a new crime within a 36-month period of release - a 0% recidivism rate.

Community-based alternative programs are far more effective than prison in allowing survivors to rebuild relationships with their families, recover from abuse, and take responsibility while positively participating in their communities. Allowing mothers to live in the community while serving sentences also permits them to maintain ties to children and lessen the trauma of separation - thereby increasing the likelihood that children will receive the support they need to become healthy, productive adults.

In addition, New York can save substantial costs by sentencing DV survivors to lower sentences and alternative programs. It costs approximately $43,000 per year to incarcerate a person in a New York State prison, while the annual cost per participant of an alternative to incarceration program in New York City is only $11,000. Alternative programs save taxpayers tens of thousands of dollars per person each year while helping to build healthy and safe individuals and communities.

Domestic and international human rights standards uphold the right of women and all people - to live free from violence. Our government has recognized its responsibility to preserve this right and provide support for DV survivors. This responsibility does not end when a survivor becomes involved in the criminal justice system because of the abuse she suffers - in part because the very lack of adequate protection, intervention and support is what often leads to this involvement in the first place.

With no compromise to public safety, the DV Survivors Justice Act will help New York address the years of injustice faced by survivors whose lives have been shattered by domestic abuse and decrease the likelihood of survivors being victimized by the very system that should help protect them.

PRIOR LEGISLATIVE HISTORY:

A.7874-A amended and recommitted to codes in 2011; referred to codes in 2012 and 2013.

A.4314-C was amended and recommitted to codes in 2013; and 2014.

A.4409-B was referred to codes in in 2015 and 2016.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:

Given that this legislation may result in: (1) alternative sentences and nonincarcerative sentences for at least some domestic violence survivor-defendants and (2) resentencing and conditional release for at least some currently incarcerated survivors, it is very likely that this bill will save the state funds.

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

Appendix B

MONDAY, MARCH 4, 2019 2:55 P.M.

ACTING SPEAKER AUBRY: The House will come to order.

In the absence of clergy, let us pause for a moment of silence.

(Whereupon, a moment of silence was observed.)

Visitors are invited to join the members in the Pledge of Allegiance.

(Whereupon, Acting Speaker Aubry led visitors and members in the Pledge of Allegiance.)

A quorum being present, the Clerk will read the Journal of Saturday, March 2nd.

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Mr. Speaker, I move to

No. 71, Bichotte, Ortiz, Richardson, Williams, Solages, Walker, Blake, Gottfried, Hyndman, Seawright, Stirpe. An act to amend the Economic Development Law, in relation to the publication of information regarding awards of State contracts.

ACTING SPEAKER AUBRY: Read the last section.

THE CLERK: This act shall take effect on the 30th day.

ACTING SPEAKER AUBRY: The Clerk will record the vote.

(The Clerk recorded the vote.)

ACTING SPEAKER PICHARDO: Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

Mrs. Peoples-Stokes.

MRS. PEOPLES-STOKES: Mr. Speaker, if we could go to page number 6, Calendar No. 79 on debate, Mr. Aubry.

ACTING SPEAKER PICHARDO: The Clerk will read.

THE CLERK: Assembly No. A03974, Calendar No. 79, Aubry, Ortiz, Gottfried, Hevesi, Weprin, Steck, Bronson, Barrett, Pretlow, Lifton, Blake, Zebrowski, Simotas, Perry, Rozic, De La Rosa, Cook, Peoples-Stokes, Cahill, Bichotte, Quart, Jaffee, Stirpe, Mosley, Fahy, Crespo. An act to amend the Penal Law and the Criminal Procedure Law, in relation to sentencing and resentencing in

domestic violence cases.

ACTING SPEAKER PICHARDO: An explanation is requested, Mr. Aubry.

Can we get quiet in the Chambers, please? We're on debate members. One second, Mr. Aubry.

Proceed, sir.

MR. AUBRY: Thank you so much, Mr. Speaker. This bill would provide a judge with discretion in sentencing and resentencing domestic violence survivors who are convicted of certain crimes where domestic violence was a significant contributing factor in their criminal behavior. In order to be eligible for this consideration, a judge must determine that the survivor was subject to domestic violence at the time of the offense; the abuse was a significant contributing factor to the crime; and any other sentence would be unduly harsh and excessive. The bill also permits individuals currently serving a sentence of eight years or more to apply for resentencing. Certain convictions are not eligible for alternative sentence, such as aggravated murder, first degree murder, acts of terrorism and any offense that requires registration as a sex offender. This bill has passed the Assembly in 2016, 2017 and 2018, the fourth being a charm.

ACTING SPEAKER PICHARDO: Mr. Ra.

MR. RA: Thank you, Mr. Speaker. Will the sponsor yield?

ACTING SPEAKER PICHARDO: Do you yield,

sir?

MR. AUBRY: To Mr. Ra, certainly.

ACTING SPEAKER PICHARDO: The sponsor yields.

MR. RA: Good to see you down here on the floor, getting a little break.

MR. AUBRY: We're always the same size, Mr. Ra.

(Laughter)

MR. RA: Thank you. So just going through this bill, and I know we've debated this in the past. Under current law, I believe there are some opportunities for victims of domestic violence to have a reduced sentence that were -- that were put into law a few years back, but this expends that. Those, I believe, only apply in current law. It's only if the victim of domestic violence commits a crime against their abuser, correct?

MR. AUBRY: That's right.

MR. RA: And under the provisions of this, it -- it would no longer really be material who the -- who the victim of domestic violence commits an offense against?

MR. AUBRY: Yes, that's right.

MR. RA: Okay. So it can be any third-party, somebody not involved in the abuse, correct?

MR. AUBRY: That's right.

MR. RA: Okay.

So, it could be any -- any third-party, somebody not

involved in the abuse.

MR. AUBRY: That's correct.

MR. RA: Okay. So in terms of proving the abuse. What -- what is the procedure for the -- for the victim of domestic violence? Does there have to be formal documentation, formal charges having been filed regarding the domestic violence? How do they go about proving that they are a victim of domestic violence?

MR. AUBRY: There are three tests that has to be required. The application for this -- and, again, this is -- gives the judge the discretion to provide this relief. That -- this is not an automatic situation. This gives the judge an opportunity to look at the evidence that will be provided to determine whether relief should be granted or not. One form of the evidence to be provided is a court record, a Social Service record, hospital record, sworn statement from a witness of the domestic violence, law enforcement record or an order of protection or domestic incident report.

MR. RA: Okay. And then once -- once they've -- once the court has determined that the person is a victim of domestic violence and qualifies for this reduced sentence, what -- what is the sentencing range for that individual then?

MR. AUBRY: It would depend on the type of crime. Again, we're leaving that to the judge to make that determination. Looking at this -- individual cases as these kind of cases are going to be individually looked at.

MR. RA: Now, is it correct, though, that once the

person is deemed to have qualified by -- by the judge that they then can be -- essentially the minimum sentence becomes the maximum they can be sentenced to?

MR. AUBRY: Right. It does reduce the sentences greatly, but the judge has the discretion to establish that. We're not -- we are empowering the judge in this case, not commanding the judge.

MR. RA: Okay. Now is there any requirement, because I know this deals both with sentencing and, I guess, resentencing. Is there any requirement that the individual have raised a defense of duress or -- or have raised the domestic violence at the time of their trial?

MR. AUBRY: No. And we do understand that this is an evolving circumstance in our society. People 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 the domestic violence, much as we have in other sets of circumstances where we think that individuals have been impeded from shining a public light on their private lives.

MR. RA: Okay. Now you mentioned earlier that there are certain exceptions in terms of crimes that this would not apply to, but there are some violent offenses that this still would apply to like manslaughter, first degree assault, battery, robbery; it would apply to those crimes?

MR. AUBRY: Yes and, again, because we're giving the judge discretion, he or she can look at those issues and determine

whether or not eligibility has been met and whether it's in the interest of justice.

MR. RA: Okay. And one of the objections that's been raised, you know, I have a memo regarding this from the District Attorney's Association talking about the provision, which I believe is on page 3, that references Section 70.6 in -- in the Penal Law which applies when there's prior felony convictions for a felony offense. So, this would -- this would apply in those circumstances, as well?

MR. AUBRY: So, again, certainly the judge looks at that to determine whether or not this is appropriate for that individual case.

MR. RA: Now currently my understanding is under those circumstances the sentencing would be between eight and 25 years. Under this bill, it would be three -- between three and eight?

MR. AUBRY: That is correct, but, again, the bill is subject to the discretion of the judge.

MR. RA: Okay. And then there's one other piece of terminology with regard to these hearings that -- that I did want to get into. So -- the bill on page 5, lines 36 and 37, and this was something we discussed in the Codes Committee, refers to "reliable hearsay." I wasn't familiar with that term. The Codes Committee staff was able to provide a little bit of information regarding there being other references to this -- this term within the law and a couple of them I found were with regard to sentencing, I think one was for -- one was for Murder 1's, I believe -- is there a definition for what that is?

MR. AUBRY: No. We're not -- we're not looking at a definition, but case law has established that it has been used. Particularly I'm aware of people going to Willard as a part of a drug rehabilitation program, where it has been used in order to establish a prior addiction that would require that kind of treatment.

MR. RA: Okay, so -- but, is the term "reliable hearsay" as used here, this is something different than the exceptions to the rule against hearsay that would be applicable in an ordinary, you know, criminal trial, correct?

MR. AUBRY: That is correct.

MR. RA: Okay. Thank you. I mean, do you have any example of what would constitute "reliable hearsay"?

MR. AUBRY: Counsel tells me an out-of-court witness statement that was taken under oath.

MR. RA: Okay. Thank you very much, Mr. -- Mr. Aubry.

MR. AUBRY: Thank you, Mr. Ra.

MR. RA: Mr. Speaker, on the bill.

ACTING SPEAKER PICHARDO: On the bill, sir.

MR. RA: Thank you. I think, you know, we all recognize and, you know, we often each year do packages of bills relating to domestic violence and -- and certainly over the years we've learned more about the impact, you know, that that abuse has -- has on a victim. And acting accordingly, about 20 years ago this -- this Legislature did put some provisions in to allow reduced sentences

where somebody who has been abused commits a crime against their abuser. This is greatly expanding that to a crime that could be committed against a completely innocent third-party that has nothing to do with the abuse.

You know, our judicial system is set up to give some discretion to judges and they certainly would have the ability to consider these situations under current law and -- and give, you know, a sentence on the lower end of -- of the guidelines as opposed to on the higher end for somebody who had been -- who had been a -- the victim of domestic violence. The -- the problem we have here is that we end up in a situation where an individual who has been the victim of a crime might not really be able to get justice for the crime that was committed against them based on who the perpetrator was.

So I think that this is well-intentioned. Again, I think that it's important that we -- we take action whenever we can to help protect victims of domestic violence, but -- but I think that there is a third party who might be a victim of a crime that -- that suddenly is not able to get justice for the crime committed against them. And I think there's adequate recourse and flexibility within the current system where a judge could just choose to impose, you know, something at the lower end of the range having considered these factors. I think this may be going a step too far given that there's a third party who is a victim here. And that's why myself and I know many others will be casting our vote in the negative. Thank you.

ACTING SPEAKER PICHARDO: Mr. Goodell.

MR. GOODELL: Thank you, Mr. Speaker.

On the bill.

ACTING SPEAKER PICHARDO: On the bill, sir.

MR. GOODELL: Thank you, sir. Thank you for the colloquy between our colleagues which was very helpful in explaining the actual details of this bill. I'm -- my view is a little bit, if you will, a broader picture. It seems to me that the purpose of our criminal laws and our sentencing guidelines is at least three-fold. First, we want the potential sentence to be a deterrent to criminals so hopefully they refrain from victimizing innocent people. We want people to think twice before they break into our house or pull out a gun or assault someone or shoot someone, or even beat up somebody else. So, a deterrent is certainly a major factor.

Second, there's a punishment aspect. If someone comes in and steals your probably or destroys your property or attacks your spouse or shoots you or beats you up or holds you up at knifepoint or gunpoint, we want that person to be punished so that they won't do it again, so that other innocent people aren't victimized. And the third reason it occurs to me is there's a prevention aspect. There are some people out there, face it, that are dangerous people, that we don't want them out in the streets victimizing our senior citizens or our kids or anyone else. We want them off the street.

So, how does this bill stack up against those objectives? It says if you're a victim of domestic abuse and you attack an innocent third party, you hold up a liquor store, you shoot someone

else, you beat someone else up, you rob someone, you break into the house; if you're a victim, this bill says, *Well, we don't need to worry so much about deterrents, we'll give you -- your maximum sentence could be the minimum for everyone else*. And how does that deal with deterrents? How does that deal with punishment? How does that deal with prevention?

I'm very sympathetic, as everyone in this room is, we're all sympathetic to the plight of abused people, men and women who suffered trauma when they were young or they're growing up or they're in an abusive relationship. It's touched my family, too, but that doesn't give the right for me or any member of my family to commit a violent crime against some third party and get a reduced sentence. For that reason, while I'm sympathetic to that plight of those who suffer from domestic abuse and would certainly support everything reasonable that we can do to help them, we shouldn't open the door to a lower sentence, less deterrents, less punishment and less prevention when it comes to innocent third parties that have nothing whatsoever to do with that abusive situation, just had the misfortune of having a criminal interaction with someone who was abused by someone else.

Thank you, Mr. Speaker.

ACTING SPEAKER PICHARDO: Thank you.

Read the last section.

THE CLERK: This act shall take effect immediately.

ACTING SPEAKER PICHARDO: The Clerk will record the vote.

(The Clerk recorded the vote.)

Mr. Aubry to explain his vote.

MR. AUBRY: Certainly, to explain my vote, Mr. Speaker.

First, I want to commend those who have worked so diligently on this bill. They're here in our Chamber today. This has been a long, long journey on their part to find justice. And I can't say just sympathy, but the ability for our justice system to recognize this scourge on our society. Domestic violence is just that, a scourge on our society. And people do get punished and will be punished even when that has been a factor, but we want our system to be able to look at the facts of a case, particularly for those -- there are some people who have been in jail a very long time, in prison a long time when this was not such a prevalent issue, when they couldn't introduce this as a factor in their case. And this bill allows that to happen for those who may face this, but also, individuals who have faced it in the past.

The -- we've had memos of support and memos of disapproval, but from the City Bar -- the City Bar supports the Domestic Violence Survivors Act which would amend New York's Penal and Criminal Procedure Law to give greater discretion to justice -- to judges when sentencing defendants who are survivors of domestic violence and would permit certain survivor defendants to petition the court post-conviction for alleviating resentencing; the defendant at the time of the offense was a victim of domestic violence subject to substantial, physical, sexual or psychological abuse inflicted

by a member of the same family or household as defined in the Criminal Procedure Law; the abuse was a significant contributing factor to the defendant's criminal behavior and the sentence within the generally applicable statutory range would be unduly harsh.

And that's why we do this, ladies and gentlemen, and have carried this bill for many years. I think I had no gray hair at the time we started, but I withdraw my request and vote in the affirmative.

ACTING SPEAKER PICHARDO: Mr. Aubry in the affirmative.

Mr. Weprin to explain his vote.

MR. WEPRIN: Thank you, Mr. Speaker. I want to praise the sponsor for persevering on this bill for many years. I think this may be the first time that it's actually going to pass the Senate and be signed by the Governor. The Governor did propose something similar in his budget, but I -- I prefer this particular approach. It only gives discretion to the judges to -- to resentence; it doesn't mandate it. But it certainly is a very worthwhile and comprehensive piece of legislation that the sponsor has worked on for many years and I strongly support it and I withdraw my request and vote in the affirmative.

ACTING SPEAKER PICHARDO: Mr. Weprin in the affirmative.

Mr. Barron to explain his vote.

MR. BARRON: I just wanted to thank the sponsor for this bill. I've known several women that were in this predicament

and sometimes people say to women, *Oh, just go get an order of protection.* And then the police will tell the woman, *Yeah, we have to wait for him to do something before we can do anything with the order of protection.* So sometimes these victims are not protected and when people have sometimes commit desperate acts for whatever reasons, that they should be reconsidered. They should be put on the highest of reconsideration and sensitivity because we don't know what it means emotionally and physically to be a victim of domestic violence. So, I am glad that I could support this bill and I'm glad that the sponsor came forward with it. There have to be many, many victims of domestic violence that have to be applauding you today. So, I thank you for this and I vote in the affirmative.

ACTING SPEAKER PICHARDO: Mr. Barron in the affirmative.

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

Mrs. Peoples-Stokes.

(Applause)

MRS. PEOPLES-STOKES: Thank you, Mr. Speaker, for allowing me to interrupt the proceedings once again to introduce some guests our colleague, Rebecca Seawright, has in the Chambers today. There's Howard Axel. Howard is the Chief Executive Officer of Four Freedoms Park Conservancy. Along with Mr. Axel is Robert Kafin. He's the Chair of the Garden Teach

Appendix C

NEW YORK STATE SENATE

THE STENOGRAPHIC RECORD

ALBANY, NEW YORK

March 12, 2019

4:20 p.m.

REGULAR SESSION

SENATOR BRIAN A. BENJAMIN, Acting President

ALEJANDRA N. PAULINO, ESQ., Secretary

P R O C E E D I N G S

ACTING PRESIDENT BENJAMIN: The Senate will come to order.

I ask everyone present to please rise and repeat with me the Pledge of Allegiance.

(Whereupon, the assemblage recited the Pledge of Allegiance to the Flag.)

ACTING PRESIDENT BENJAMIN: Rabbi Adam Englander, of the Hebrew Academy of Long Beach, in Woodmere, will give today's invocation.

Rabbi Englander.

RABBI ENGLANDER: Our Father in heaven, guard and protect the members of this New York State Senate. Instill within them the wisdom, courage, and moral clarity to faithfully represent the citizens of this state and provide them with the strong leadership that they deserve.

May this body that treasures rigorous debate do so in a way that doesn't allow for divisiveness. May they strive for and achieve unity without demanding uniformity. May they continue to promote justice, peace, respect and understanding in a world where these virtues

SENATOR GIANARIS: Mr. President, can you please recognize Senator Persaud for an introduction.

ACTING PRESIDENT BENJAMIN: Senator Persaud.

SENATOR PERSAUD: Thank you, Mr. President.

I would just like to briefly welcome three ladies who are sitting in our chamber here today. They are here today -- they were hoping to be here when we voted on legislation that's important to them, but maybe not; they have to leave.

These are women who were previously incarcerated. And I have one young lady here, LaDeamMa, who spent 21 years incarcerated -- will you please stand -- 21 years incarcerated. She's a victim of domestic violence, and because of that, the trauma she went through caused her to do things that caused her to be incarcerated for 21 years.

The other two ladies who are here, they have been tirelessly coming up here asking us to do this legislation that will benefit not them, but other women -- well, not only women,

other people who are victims of domestic violence.

So, Mr. President, I ask you today to please welcome them and thank them for their tireless, tireless advocacy in terms of fighting for people who are incarcerated due to domestic violence issues.

Domestic violence affects our communities dearly, and these women have never given up. And they will never give up the fight. And so 21 years in prison, 18 years in prison -- other women are out there asking us for our support.

So again, please recognize these ladies today. Thank you.

ACTING PRESIDENT BENJAMIN: To our guests, I welcome you on behalf of the Senate. I extend to you the privileges and courtesies of this house. Thank you for everything you're doing on behalf of women and men who are victims of domestic violence.

Please rise and be recognized.

(Cheers from gallery; standing ovation.)

ACTING PRESIDENT BENJAMIN: Senator

The Senate will stand at ease.

(Whereupon, the Senate stood at ease at 5:12 p.m.)

(Whereupon, the Senate reconvened at 5:24 p.m.)

ACTING PRESIDENT BENJAMIN: The Senate will return to order.

Senator Gianaris.

SENATOR GIANARIS: Mr. President, can we return to the reports of standing committees. I believe there's a report of the Rules Committee at the desk. Can we take it up, please.

ACTING PRESIDENT BENJAMIN: Reports of standing committees.

There's a report of the Rules Committee at the desk.

The Secretary will read.

THE SECRETARY: Senator Stewart-Cousins, from the Committee on Rules, reports the following bills:

Senate Print 1077, by Senator Persaud, an act to amend the Penal Law and the Criminal Procedure Law;

Senate Print 4023, by Senator

Serrano, an act to amend Chapter 192 of the Laws of 2011;

Senate Print 4089, by Senator Thomas, an act to amend the Vehicle and Traffic Law and the Public Officers Law;

Senate Print 4350, by Senator Breslin, an act to amend the Election Law;

Senate Print 4355, by Senator Serino, an act to amend the Parks, Recreation and Historic Preservation Law;

Senate Print 4356, by Senator Ortt, an act to amend the Insurance Law;

And Senate Print 4413, by Senator Metzger, an act to amend the Labor Law.

All bills ordered direct to third reading.

SENATOR GIANARIS: Mr. President, move to accept the report of the Rules Committee.

ACTING PRESIDENT BENJAMIN: All those in favor of accepting the report of the Rules Committee signify by saying aye.

(Response of "Aye.")

ACTING PRESIDENT BENJAMIN: Opposed, nay.

(No response.)

ACTING PRESIDENT BENJAMIN: The report is accepted.

Senator Gianaris.

SENATOR GIANARIS: Can we now take up the reading of the supplemental calendar, please.

ACTING PRESIDENT BENJAMIN: There is a substitution at the desk.

The Secretary will read.

THE SECRETARY: Senator Persaud moved to discharge, from the Committee on Codes, Assembly Bill Number 3974 and substitute it for the identical Senate Bill 1077, Third Reading Calendar Number 252.

ACTING PRESIDENT BENJAMIN: The substitution is so ordered.

The Secretary will read.

THE SECRETARY: Calendar Number 252, Assembly Print 3974, by Assemblymember Aubry, an act to amend the Penal Law and the Criminal Procedure Law.

SENATOR GRIFFO: Lay it aside.

ACTING PRESIDENT BENJAMIN: Lay it aside.

THE SECRETARY: Calendar Number

the roll.

(The Secretary called the roll.)

ACTING PRESIDENT BENJAMIN: Senator Persaud to explain her vote.

SENATOR PERSAUD: Thank you, Mr. President.

Today is an important day for the women of the State of New York, particularly women who have suffered through domestic violence. Studies have shown that nine out of 10 incarcerated women have experienced severe physical or sexual violence in their lifetime. Eight out of 10 experience physical or sexual violence during childhood.

Over the past 30 years, intimate partner violence has been increasingly recognized as a national epidemic. Today on the floor we had three women who were here to tell us their stories, who were living testament of what happens when people react in a certain way because of domestic violence. We should not hold them accountable to the extent that the law has been holding them accountable. The law should take into consideration the circumstances that they were living under when they're being

sentenced.

We're not by any means saying that these women are not responsible for what has happened. But we're saying these women are victims, they should be treated as such. We have women who have spent 20 years or more in prison because they reacted to the violence that they were in -- being a part of.

I have to say it's not -- you know, when we talk about domestic violence, we tend to talk in terms of the female gender. Domestic violence affects every gender. Every gender. And this legislation today is going to work in favor of everyone who has encountered domestic violence.

I ask my colleagues today to support the women -- because it's primarily women -- who have suffered. They have suffered enough. We are not saying that you throw out what they've done out of the window in the sentencing. The judge still has the discretion. We're asking the judge to take into consideration what they have gone through, what they were living with.

When you have someone who has suffered in a marriage for 18 years -- and for

most of those years they have been abused in every which way possible -- and they have committed a crime, something we consider a crime, because of what they were going through, we really need to take that into consideration.

Sometimes it's because we have no choice. Many of us here, we've reacted to things because of something that we've gone through. And some of you may have flashbacks because of something that you encountered years ago. But we're not punishing you for that. We're asking that the people who have committed their crimes because of domestic violence be offered the same consideration.

So I thank you all for supporting this legislation. I thank you for standing with the women -- I keep saying women, because it's primarily women. But thank you for standing with all domestic violence survivors and telling them that we understand what you've gone through. We understand. We hold you accountable, yes, but we will take into consideration what you have gone through that caused you to react the way you did.

So again, I ask all of my colleagues to support this legislation to show the women

that we understand them.

Thank you all. I vote aye.

ACTING PRESIDENT BENJAMIN: Senator Persaud to be recorded in the affirmative.

Senator Carlucci to explain his vote.

SENATOR CARLUCCI: I rise, I want to thank Senator Persaud for putting forth such an important piece of legislation, and really thank her for her commitment and steadfastness towards this legislation.

As was said, all too often in our court system when women are defending themselves against domestic violence, instead of being met with a judge with compassion and assistance and help, the judge is just putting forth punishment.

And Senator Persaud's legislation here today is really changing the paradigm, to make sure that it's not just this black or white, that it's not a situation where the judge doesn't have discretion. We want to make sure that that's taken into consideration, that the full picture is examined.

So I want to thank Senator Persaud and all of the advocates here today, the women

that have come forward to share your story and the trials that you've had to come through. So thank you for that. I want to thank everyone for supporting this legislation. And Mr. President, I'll be supporting it and voting in the affirmative.

Thank you.

ACTING PRESIDENT BENJAMIN: Senator Carlucci to be recorded in the affirmative.

Senator Bailey to explain his vote.

SENATOR BAILEY: Thank you, Mr. President.

I rise to thank my colleague Senator Persaud for bringing this important piece of legislation to the floor and for being a tireless advocate.

When I was elected to the New York State Senate, my predecessor in government, Ruth Hassell-Thompson, she was championing this bill. And on day one, coming into the Senate, Senator Persaud said, "Hi, I'm Roxanne Persaud, and I need to make sure I have this bill, because it's that important to me in and my commitment to survivors of domestic violence."

To make sure that we are in a place

and a position and a time where we actually allow judges to have discretion -- and we give judges discretion in so many other areas of law, but when it comes down to folks who have suffered at the hands of an abuser, we had not until today had that discretion.

So I want to thank my predecessor in government, Ruth Hassell-Thompson, for her championing this issue and for calling me at 7 o'clock in the morning the other day to make sure that we pushed this bill forward. Thank you, Ruth.

(Laughter.)

SENATOR BAILEY: And I want to make sure I thank Roxanne Persaud for telling me every day, as the chairman of codes, that this was an important bill that we had to move.

So Roxanne, thank you for your tireless efforts. And the advocates should know that Roxanne did not let a day go by without advocating for this bill and speaking about this bill. I think that's the reason why she saves me a seat in conference, so she can talk to me about this bill.

(Laughter.)

SENATOR BAILEY: And on a serious note, to all of the victims of domestic violence, we hear you. We stand you with you, and we support you.

And Mr. President, I support this legislation. I vote aye.

ACTING PRESIDENT BENJAMIN: Senator Bailey to be recorded in the affirmative.

Senator Montgomery to explain her vote.

SENATOR MONTGOMERY: Yes, thank you, Mr. President.

I want to the -- I rise to absolutely thank my colleague. I know how difficult it is and how long you've worked on this. So Senator Persaud, we thank you today.

And it's very fitting that this particular bill is -- since you say that this is primarily women, we know that that's who primarily ends up being incarcerated because of some incident related to domestic violence. So we're here today with the chief law enforcement person in our state. And I'm so proud not only for the fact that she is a friend, but she has herself worked in the area of dealing with

domestic violence issues at every level. And that is Attorney General Tish James, who is with us today.

So she's made history. This is Women's History Month. And this is history month for Senator Persaud, whose bill is now passed. It's history month for the women who are here today to celebrate the fact that we have finally been able to do something that makes sense for women who are incarcerated. And we hope that this results in changing the system that treats them even more harshly than they do others in the criminal justice system.

And I just want to say to those women who are here representing the women that we're trying to work on behalf of today through this legislation, I bring you greetings from our own Attorney General of the State of New York, Tish James. She joins us in celebrating this moment in our history and the history of our state for women.

So thank you, Senator Persaud. Thank you, members, for voting yes on this very important legislation. And to the women of the state, hallelujah.

(Laughter.)

SENATOR MONTGOMERY: Thank you.

ACTING PRESIDENT BENJAMIN: Senator Montgomery to be recorded in the affirmative.

Announce the results.

THE SECRETARY: In relation to Calendar Number 252, those Senators recorded in the negative are Senators Antonacci, Helming, Jacobs, LaValle, O'Mara, Ortt and Seward.

Ayes, 54. Nays, 7.

ACTING PRESIDENT BENJAMIN: The bill is passed.

(Tumultuous cheering, applause from galleries.)

ACTING PRESIDENT BENJAMIN: Senator Gianaris, that completes the reading of the supplemental calendar.

SENATOR GIANARIS: Mr. President, is there any further business at the desk?

ACTING PRESIDENT BENJAMIN: There is no further business at the desk.

SENATOR GIANARIS: I move to adjourn until tomorrow, Wednesday, March 13th, at 12:00 noon.

ACTING PRESIDENT BENJAMIN: On

Appendix D

2017 WL 2774194
Only the Westlaw citation is currently available.
United States District Court, W.D. New York.

Cynthia S. GALENS, Petitioner,
v.
Sabina KAPLAN, Superintendent, Bedford Hills Correctional Facility, Respondent.

15-CV-37A
|
Signed May 12, 2017
|
Filed 05/15/2017

Attorneys and Law Firms

Cynthia S. Galens, Bedford Hills, NY, pro se.

Priscilla I. Steward, New York State Attorney General's Office, New York, NY, for Respondent.

REPORT AND RECOMMENDATION

JEREMIAH J. MCCARTHY, United States Magistrate Judge

***1** Cynthia S. Galens, *pro se*, brings this petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254, challenging her conviction on charges of manslaughter in the first degree in State of New York Supreme Court, County of Ontario on November 10, 2010 [1]. [1] For the following reasons, I recommend that the petition be denied.

1 Bracketed references are to the CM/ECF docket entries.

BACKGROUND

On October 2, 2009, petitioner and Kevin Stack, who had lived together for a more than two years ([12-2], pp. 36, 86 of 142), spent the afternoon drinking at a bar in Canandaigua, New York. [12-2] at pp. 14-15 of 142. [2] When they returned home, petitioner poured antifreeze into a margarita mix she "knew" Mr. Stack would drink. [12-6], p. 123 of 139. [3] Petitioner testified that she only poured one shot glass full of antifreeze into the margarita mix. [12-6], p. 69 of 139. However, a toxicologist testified at trial that Mr. Stack consumed "somewhere between 8 and 16 ounces" of ethylene glycol (which is found in antifreeze). [12-5], p. 106 of 138.

2 Petitioner was working at the Veteran's Administration Hospital ("VA") in Canandaigua when she met Mr. Stack, who was an inpatient in the substance abuse program. [12-5] at p. 34 of 138. Three days after meeting him, petitioner asked Mr. Stack to move in with her. [12-6], p. 58 of 139. Because he was a patient, their relationship was against VA policy. [12-6], p. 59 of 139. She entered into a "last-chance" agreement, pursuant to which she agreed to end her relationship with Mr. Stack. [12-6], p. 100 of 139. However, she continued her relationship with Mr. Stack and was terminated from her employment with the VA. Id.

3 Mr. Stack was an alcoholic. [12-6], p. 13 of 139.

Petitioner went to bed at approximately 7:30 p.m. that evening and left Mr. Stack downstairs. [12-6], p. 71 of 139. She stated that Mr. Stack came up to the bedroom the following morning on October 3, 2009, having spent the evening on the couch, and they had sex. [12-6], p. 71 of 139. They then went downstairs to have coffee, after which Mr. Stack told her that he was not feeling well. [12-6], p. 72 of 139.

Mr. Stack was supposed to go to his friend Leigh VanNostrand's house that day to watch a college football game. [12-2], p. 19 of 142. Mr. Stack phoned Mr. VanNostrand and told him that he could not make it because he was sick. [12-2] at 20 of 142. He told Mr. VanNostrand that he had "a couple of margaritas" [12-2] at p. 21 of 142. Later that morning Mr. Stack and Mr. VanNostrand spoke again by phone. [12-2] at p. 22 of 142. This time, Mr. VanNostrand observed that Mr. Stack was slurring his words "really bad". Id. At that point, Mr. VanNostrand asked to talk to petitioner. [12-2] at p. 24 of 142. He told petitioner that Mr. Stack must have "got into something he shouldn't have got into" and to call 911. Id. Petitioner told Mr. VanNostrand she would call 911. Id. Petitioner admitted that despite telling Mr. VanNostrand that she would call 911 she did not do so. [12-6], p. 130 of 139. She acknowledged that the fact that she did not call for medical assistance that morning contributed to Mr. Stack's death. [12-6], p. 132 of 139.

***2** Petitioner stated that Mr. Stack looked "tired" [4] but was watching the football game, when she decided to go to pick up her daughter and "tell her what I'd done". [12-6], p. 75 of

139. Emily Galens, petitioner's daughter, [5] testified that on the morning of October 3, 2009, petitioner picked her up from her father's home and stated: "[l]et's go for a ride and talk". [12-2], p. 42 of 142. As they were driving, petitioner told Ms. Galens "I did something bad.... I poisoned him". [12-2], pp. 44-45 of 142. She advised Ms. Galens that she got the idea from a television show called "Snapped", where a woman put antifreeze into a mix of Jell-O shots for her husband. [12-2], pp. 45-46 of 142. Ms. Galens testified that petitioner told her that she put antifreeze in the margarita mix and that she used more antifreeze than the women on the television show but did not state an exact amount. [12-2] at p. 47 of 142. According to Ms. Galens, petitioner stated that the woman's husband on the television showed died a week after ingesting the Jell-O shots. Id. [6] Petitioner asked Ms. Galens to help her "[g]et rid of the body" but she refused. [12-2], p. 49 of 142; [12-6], p. 134 of 139.

4 Petitioner testified that at this time Mr. Stack was already losing touch with reality and did not even recognize who she was. [12-6], p. 8 of 139.

5 Ms. Galens was nineteen years old. [12-2], p. 38 of 142. On October 3, 2009, she was living with her father ([12-2] at p. 39 of 142), having moved out of her mother's residence a month earlier because she could not get along with Mr. Stack. [12-2] at pp. 70, 79 of 142. Petitioner testified that Mr. Stack was verbally abusive to Ms. Galens, that he would yell at her, call her names such as "slut" and "whore" and accuse her of prostitution and selling drugs. [12-6], p. 65 of 139. She stated that Mr. Stack threatened to change the locks so that Ms. Galens would have to make an appointment if she wanted to visit. [12-6], p. 66 of 139. Petitioner stated that Mr. Stack was also verbally abusive to her, calling her similar names, and telling her parents that she was a prostitute and that she sold drugs. [12-6], p. 65 of 139.

6 Petitioner admitted that she got the idea of using antifreeze from watching "Snapped" and that she knew drinking antifreeze could cause death. [12-6], pp. 111, 120 of 139.

Petitioner told Ms. Galens that she poisoned Mr. Stack because she wanted her "back in her life and that she couldn't prove to [Ms. Galens] any other way that he would really be gone". [12-2], p. 69 of 142. [7] Ms. Galens testified that she and Mr. Stack would argue on a daily basis and that on one occasion Mr. Stack threatened her with a knife ([12-2] at p. 79 of 142), but that he never struck her or petitioner. [12-2] at p. 106 of 142. [8]

7 At trial, petitioner testified that she had kicked Mr. Stack out of her home on several occasions, and had obtained various orders of protection against him, but that she would not comply with the orders of protection, and that she always kept inviting him back into the home. [12-6], pp. 60-61 of 139. She stated that she thought if she made him sick so that he had to be taken to the hospital, Ms. Galens would be able to move back in, and when Mr. Stack recovered from the poisoning she would have the strength to tell him he could not come back to her home. [12-6], p. 121 of 139.

8 Petitioner testified that she made up the incident in which Mr. Stack allegedly threatened Ms. Galens with a knife. [12-6], p. 30 of 139. According to petitioner, "[i]t did not happen". Id. Petitioner admitted making up other allegations against Mr. Stack, including an allegation that he physically pushed her, which led to Mr. Stack being arrested and jailed. [12-6], p. 102 of 139. Nevertheless, petitioner maintained that there was one occasion in which Mr. Stack became physical. [12-6], p. 103 of 139.

Ms. Galens and petitioner drove to petitioner's home, and petitioner asked Ms. Galens to go inside and check on Mr. Stack. [12-2] at p. 51 of 142. Ms. Galens did so and found Mr. Stack sitting in a chair, breathing but unresponsive with a milky white liquid coming out of his nose and mouth. [12-2] at pp. 51-54 of 142. [9] Ms. Galens stated that petitioner was outside sitting on the steps. [12-2] at p. 56 of 142. Petitioner was calm. Id. Although Mr. Stack was still alive, Ms. Galens testified that petitioner again asked her to help her move him. [12-2] at p. 57 of 142. Ms. Galens again refused (id.) and told petitioner to call the police. [12-2] p. 89 of 142. She testified that petitioner asked her about "chopping him up" and putting him in the garbage. [12-2], p. 57 of 142. [10]

9 Petitioner admitted that Mr. Stack's condition as described by Ms. Galens was worse than it was when petitioner left the house. [12-6], p. 136 of 139. Still, she did not call for medical assistance. Id.

10 Petitioner denied suggesting that Mr. Stack should be chopped up and placed in the garbage. [12-6], p. 135 of 139.

***3** After Ms. Galens told petitioner that she would not help her, petitioner called Dick Spencer, a friend petitioner used to work with. [12-2] at pp. 59-61 of 142. Petitioner told Spencer that she needed his "help with something" and asked him to come over. [12-2] at 61 of 142. It took Mr. Spencer 40 to 45 minutes to drive to petitioner's home. [12-2] at p. 122 of 142. Mr. Spencer stated that when he arrived at petitioner's home, she told him that she "laced" Mr. Stack's margaritas with antifreeze. [12-2] at p. 123 of 142. At this point, Ms. Galens left her petitioner and returned home. [12-2] at p. 66 of 142. Mr. Spencer testified that he told petitioner to call law enforcement or an ambulance. [12-2], at p. 126 of 142. She said she would "in a few minutes" but instead called her ex-husband David Galens. [12-2] at p. 127 of 142. She then told Spencer to leave and that she should never have gotten him involved. [12-2] at p. 129 of 142.

Mr. Galens testified that when he arrived petitioner was waiting alone for him outside. [12-2], p. 142 of 142. She asked him to go inside and check to see if Mr. Stack was breathing. [12-3], p. 2 of 139. He went inside an observed that Mr. Stack was still breathing but was unresponsive. [12-3], pp. 2-3 of 139. He stated that he went back outside and told petitioner to "call 911 immediately" and she did so. [12-3], p. 4 of 139. The 911 call was placed at 4:39 p.m. [12-3], pp. 5, 26 of 139. Before the police arrived, petitioner told Mr. Galens that she had put antifreeze in the margarita mix that Mr. Stack had been drinking. [12-3], p. 6 of 139.

Neither the police, nor the paramedics who responded, were told that Mr. Stack had ingested antifreeze. [12-3], p. 8 of 139. Petitioner admitted that although she knew he was in the condition he was in because he had ingested antifreeze ([12-7], p. 7 of 131), she did not tell anyone because she knew what she did was a crime and she was trying to protect herself. [12-7], p. 8 of 131. During the 911 call, petitioner made statements suggesting that Mr. Stack had attempted suicide in the past ([12-3], pp.33-35 of 139) admittedly to "throw them off the track". [12-7], p. 5 of 131. State Trooper Scott Knapp, one of the first to respond to the call, testified that he asked petitioner if she knew of any empty bottles of antifreeze lying around the house because two weeks earlier he had responded to a call where someone had committed suicide by ingesting antifreeze and that person displayed the same symptoms as Mr. Stack. [12-3] at pp. 42-43 of 139. Petitioner responded: "no". [12-3] at p. 44 of 139.

Paramedics took Mr. Stack to Thompson Memorial Hospital ("Thompson"). [12-3], p. 91 of 139. Dr. Jason Galarneau, who treated Mr. Stack at Thompson, stated that they suspected toxic substance ingestion, but were not sure if Mr. Stack had ingested toluene (which is usually in solvents like paint thinner) or ethylene glycol (which is in antifreeze). [12-3], pp. 110-112 of 139. Compounding the problem was that the treatment for the ingestion of those two substances is "exactly the opposite". [12-3], p. 113 of 139. Dr. Galarneau testified that plaintiff was sent home to look for clues as to whether there were any toxic substances such as paint thinner or antifreeze that Stack might have ingested. She returned and told them that she could not find any substances like that in the home. [12-3], pp. 117-118 of 139. Dr. David Trawick testified that the effects resulting from the ingestion of ethylene glycol (antifreeze) are reversible if medical treatment begins without delay. [12-4], p. 33 of 140. He stated that delay in obtaining treatment makes a "fatal outcome more likely". [12-4], p. 34 of 140.

Mr. Stack died on February 7, 2009. [12-3], pp. 68-69. On February 8, 2009, State Trooper Michael Mault took a statement from petitioner. [12-3], p. 58 of 139. According to her statement to Mault, after she went to bed, Mr. Stack "stayed up and had a bucket of margaritas that was about half full next to him". [12-3], p. 59 of 139. She stated that Mr. Stack came up to the bedroom "tired and intoxicated" the next morning and that his speech "was slurred and hard to understand". [12-3], p. 60 of 139. Petitioner claimed that she left the house at approximately 12:00 p.m. to go to the cemetery with her daughter to visit the grave of her deceased son, and did not return home until 4:15 p.m. Id. At that time, she stated that she found Mr. Stack "passed out snoring with drool coming from his mouth and his eyes open". Id. According to petitioner's statement, she then called Mr. Galens, who came over, and then they called 911. [12-3], p. 61 of 139. At trial, petitioner admitted that much of her statement to State Trooper Mault was a lie. [12-7], p. 23 of 131. [11]

11 The investigation into the circumstances surrounding Mr. Stack's death was closed on November 10, 2009 after a follow-up phone interview during which petitioner advised New York State Police Investigator Mark Eifert that Mr. Stack had previously attempted suicide and had overdosed on drugs in June of 2009. [12-5], pp. 33-34 of 138.

***4** In December of 2009 and January 2010, petitioner and Ms. Galens drove to Florida, stopping at a relative's house in Pennsylvania on the way. [12-2], p. 71-75. The two arrived in Florida on January 3, 2010 and stayed at the home of Nancy Cothern, petitioner's childhood friend. [12-2], p. 72 of 142; [12-4], p. 60 of 140. After dinner, Ms. Cothern asked how Mr. Stack died. [12-4], p. 62 of 140. Petitioner told Ms. Cothern that she put antifreeze in his margarita mix. [12-4], p. 63 of 140. [12] Ms. Cothern asked petitioner if she realized what she did, and petitioner responded: "Yes, I killed him". [12-4], p. 65 of 140. Ms. Cothern told Ms. Galens that she was "turning your mother in". [12-2], p. 76 of 142. Ms. Cothern called Darcy Hunt, a friend who was a police officer in Clearwater, Florida. [12-4], p. 69 of 140.

12 Ms. Cothern testified that petitioner told her that after she poured the antifreeze in the margarita mix, she went to bed and that when she woke up the next morning she and Mr. Stack had sex. Afterward, Mr. Stack told her he did not feel well so he went downstairs. A little later she went downstairs and saw that he was "foaming and gurgling". [12-4], pp. 63-64 of 140.

On January 4, 2010, Officer Hunt went to Cothern's home and spoke with petitioner ([12-4], p. 75 of 140) and Ms. Galens. [12-2], p. 77 of 142; [12-4], p. 76 of 160. Petitioner admitted to Officer Hunt that she put antifreeze in Mr. Stack's margarita mix. [12-4], p. 137. At Ms. Cothern's request, petitioner then flew back to Rochester, where she was picked up by Mr. Galens and Pamela Colvin, her sister. [12-4], p. 77 of 140. [13] On January 6, 2010, petitioner admitted to Investigator Eifert that she put antifreeze in Mr. Stack's margarita mix. [12-5], p. 37 of 138.

13 Upon her return from Florida, petitioner told Ms. Colvin that she had put antifreeze in Mr. Stack's drink. [12-3], p. 137 of 139.

On September 23, 2010, after a jury trial presided over by Ontario County Court Judge William F. Kocher, petitioner was convicted of manslaughter in the first degree, the only charge put to the jury. [12-7], p. 125 of 131. [14] She was sentenced to twenty-three years imprisonment. [1], ¶ 3. In this habeas corpus petition she argues that she received ineffective assistance of counsel and that her sentence was harsh and excessive. [1], ¶ 13.

14 The trial court declined to charge any lesser offense, such as manslaughter in the second degree or criminally negligent homicide, in light of the petitioner's admissions at trial. [12-7], pp. 45-46 of 131.

PROCEDURAL HISTORY

Petitioner timely appealed her conviction to the State of New York Supreme Court Appellate Division, Fourth Department. *See* Brief for Appellant [11-2], p. 61 of 135. The Fourth Department unanimously affirmed petitioner's conviction on November 8, 2013 [15] and her application for leave to appeal to the New York State Court of Appeals was denied on January 15, 2014. [16] She did not seek a writ of *certiorari* from the United States Supreme Court.

15 People v. Galens, 111 A.D.3d 1322 (2013).

16 People v. Galens, 22 N.Y.3d 1088 (2014).

"The Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA] requires a state prisoner whose conviction has become final to seek federal *habeas corpus* relief within one year." Evans v. Chavis, 546 U.S. 189, 191 (2006) (citing 28 U.S.C. § 2244(d)(1)(A), (d)(2)). AEDPA tolls this one-year limitations period for the "time during which a properly filed application for State post-conviction or other collateral review ... is pending." Id.

This federal petition for *habeas corpus* relief was timely filed on January 12, 2015. [1].

EXHAUSTION

It is well settled that a federal court may not consider a petition for *habeas corpus* unless the petitioner has exhausted all state judicial remedies. *See* 28 U.S.C. § 2254(b)(1)(A); Picard v. Connor, 404 U.S. 270, 275 (1971); Dorsey v. Kelly, 112 F.3d 50, 52 (2d Cir. 1997). In order to exhaust a federal constitutional claim for the purposes of federal *habeas* review, the substance of the federal claim, both legal and factual, must be apparent from the petitioner's presentation to the state court. Picard, 404 U.S. at 275-76. "The claim presented to the state court, in other words, must be the

'substantial equivalent' of the claim raised in the federal *habeas* petition". Jones v. Keane, 329 F.3d 290, 295 (2d Cir. 2003). Generally, this involves the completion of one full round of appellate review, meaning that the highest state court so empowered must have been presented with the opportunity to consider the petitioner's federal constitutional claim. Picard, 404 U.S. at 275–76.

***5** Here, all of the claims in the petition were presented to the Fourth Department upon direct appeal. Thus, the petitioner is fully exhausted.

ANALYSIS

A. Standard of Review

Where a petitioner challenges a state court's merits-based ruling, the federal district court reviews the state court's decision under the deferential AEDPA standard:

> "An application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(d)(1)-(2).

A state court decision is "contrary to" clearly established federal law if "the state court reached a conclusion of law that directly contradicts a holding of the Supreme Court" or, "when presented with 'facts that are materially indistinguishable from a relevant Supreme Court precedent,' " the state court arrived at an opposite result. Evans v. Fischer, 712 F.3d 125, 132 (2d Cir. 2013) (*quoting* Williams v. Taylor, 529 U.S. 362, 405 (2000)). A state court decision is an "unreasonable application" of clearly established federal law if "the state court identifies the correct governing legal principle from [Supreme Court] decisions but unreasonably applies that principle to the facts of the prisoner's case". Williams, 529 U.S. at 413. A federal court may only "issue the writ in cases where there is no possibility fair minded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents". Harrington v. Richter, 562 U.S. 86, 102 (2011).

When deciding whether a state court has made an unreasonable determination of facts, federal courts must presume that the facts determined by state courts are correct; therefore, the petitioner has the burden to rebut the presumption of correctness by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). A "state court's finding might represent an unreasonable determination of the facts where ... reasonable minds could not disagree that the trial court misapprehended or misstated material aspects of the record in making its finding, or where the court ignored highly probative and material evidence". Cardoza v. Rock, 731 F.3d 169, 178 (2d Cir. 2013). However, "even if the standard ... is met, the petitioner still bears the ultimate burden of proving by a preponderance of the evidence that his constitutional rights have been violated". Id.

B. Ineffective Assistance of Counsel

The sole basis for petitioner's ineffective assistance of counsel claim is that her "attorney misapplied the law in his summation of case facts. He kept arguing murder intent, when in fact I was on trial for manslaughter which frustrated the jury's ability to do a charge down to a lesser offense". Petition [1], ¶ 13(A).

***6** In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court stated that the test for an ineffective assistance of counsel claim in a *habeas corpus* case is whether the petitioner received "reasonably competent assistance." Id. at 688. In deciding this question, the court must apply an objective standard of reasonableness under prevailing professional norms. Id. Generally, defense attorneys are "strongly presumed to have rendered adequate assistance". Id. at 690. To succeed on such a claim the petitioner must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. at 689 (*quoting* Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

Further, even if defense counsel's performance is found to have been defective, relief may only be granted where it is shown that the defense was actually prejudiced by counsel's errors. Id. at 692. Prejudice is established upon a showing

that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The court determines the presence or absence of prejudice by considering the totality of the trial evidence. Id. at 695.

During the trial, Officer Hunt testified that petitioner stated that she poured antifreeze into Mr. Stack's margarita mix because she wanted him dead. [12-4], p. 138 of 140. Upon cross-examination, petitioner was repeatedly asked if she intended to kill Mr. Stack. [12-6], pp. 10, 15, 16, 112, 120, 122 of 139. Petitioner insisted that she did not intend to kill Mr. Stack, but only wanted to make him sick. [12-6], pp. 96, 112, 117, 120 of 139. In his summation, petitioner's counsel referenced Officer Hunt's testimony and argued that she never told Officer Hunt or Ms. Cothern that she wanted to kill Mr. Stack. He argued that petitioner just wanted to make him "not well, sick, so that he would leave". [12-7], pp. 56-57 of 131. He argued: "The important fact is what she intended to do. Her intent was never to cause serious physical injury. Her intent was never to cause the death of Mr. Stack. That was an outcome that she could not appreciate". [12-7], p. 59 of 131.

Although intent to kill is not an element of manslaughter in the first degree [17], the summation comments by petitioner's counsel were an accurate reflection of petitioner's trial testimony and were consistent with the defense theory of the case that petitioner did not intend to cause petitioner serious injury. Upon direct appeal, the Fourth Department held that the "fact that defense counsel also argued that [petitioner] lacked intent to kill ... did not prejudice [petitioner] and did not render alone render the summation ineffective". [11-2], p. 128 of 135. Such a finding was not contrary to, and did not involve an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor did it result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

17 Under New York law, in relevant part, "[a] person is guilty of manslaughter in the first degree when: 1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person". N.Y. Penal Law § 125.20.

Petitioner does not challenge the adequacy of the jury instructions. After the commencement of deliberations, at the request of the jury, Judge Kocher repeated the elements necessary to convict on manslaughter in the first degree, the intent to cause serious personal injury, and the definition of serious personal injury. [12-7], pp. 115-119 of 131. Thus, subsequent to closing arguments, the jury was clearly instructed that they had to determine whether petitioner intended to cause serious physical injury to Mr. Stack, and in doing so, caused his death. [12-7], p. 115 of 131.

***7** Petitioner's attempt to demonstrate prejudice by claiming that defense counsel's reference to the intent to kill during summation precluded the jury from being able to "charge down to a lesser offense" is also not persuasive. The record reflects that Judge Kocher declined defense counsel's request to present lesser included offenses to the jury. [12-7], pp. 45-46 of 131. The sole question put to the jury was whether petitioner was guilty of manslaughter in the first degree. The jury was not provided with the option of considering any lesser offense. Thus, defense counsel's comments reflecting petitioner's testimony to the effect that she did not intend to kill Mr. Stack did not prejudice the petitioner.

Therefore, petitioner's request for habeas corpus relief based upon ineffective assistance of counsel should be denied.

C. Harsh and Excessive Sentence

Petitioner argues that her sentence of 23-years imprisonment is harsh and excessive because this was her first and only criminal conviction, she acknowledged responsibility for the crime, and that she will be 75 years old when she re-enters society and will have difficulty obtaining employment. Petition [1], ¶ 13(B).

It is well settled that a harsh and excessive sentence claim does not constitute grounds for habeas corpus review in federal court if the sentence is within the range prescribed by the relevant state statute. White v. Keane, 969 F.2d 1381, 1383 (2d Cir. 1992) (stating that "[n]o federal constitutional issue is presented where, as here, the sentence is within the range prescribed by state law."). The petitioner does not contend that her sentence was outside of the permissible statutory range. [18] Therefore, petitioner's claim for habeas corpus relief on this ground must also be denied

18 Under New York Law, manslaughter in the first degree is a class B felony with a maximum term of imprisonment of 25 years. *See* New York Penal Law §§ 70.02(1)(a) and (3); *See also* Sandoval

v. Lee, 2016 WL 2962205, *10 (E.D.N.Y. 2016) (citing N.Y. Penal Law § 70.02(3)(a) stating that the term for a class B felony "must not exceed twenty-five years" and N.Y. Penal Law § 125.20 stating that "Manslaughter in the first degree is a class B felony").

CONCLUSION

For these reasons, I recommend that petitioner's application for habeas corpus relief [1] be denied. Because petitioner has failed to make a substantial showing of a denial of a constitutional right, I also recommend that a Certificate of Appealability not be issued. Therefore, leave to appeal to the Court of Appeals as a poor person should be denied. Coppedge v. United States, 369 U.S. 438 (1962).

Unless otherwise ordered by Judge Arcara, any objections to this Report and Recommendation must be filed with the clerk of this court by May 26, 2017. Any requests for extension of this deadline must be made to Judge Arcara. A party who "fails to object timely ... waives any right to further judicial review of [this] decision". Wesolek v. Canadair Ltd., 838 F. 2d 55, 58 (2d Cir. 1988); Thomas v. Arn, 474 U.S. 140, 155 (1985).

Moreover, the district judge will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but were not, presented to the magistrate judge in the first instance. Patterson-Leitch Co. v. Massachusetts Municipal Wholesale Electric Co., 840 F. 2d 985, 990-91 (1st Cir. 1988).

The parties are reminded that, pursuant to Rule 72(b) and (c) of this Court's Local Rules of Civil Procedure, written objections shall "specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for each objection ... supported by legal authority", and must include "a written statement either certifying that the objections do not raise new legal/factual arguments, or identifying the new arguments and explaining why they were not raised to the Magistrate Judge". Failure to comply with these provisions may result in the district judge's refusal to consider the objections.

All Citations

Not Reported in Fed. Supp., 2017 WL 2774194

New York Official Reports

45 A.D.3d 1349, 844 N.Y.S.2d 800, 2007 N.Y. Slip Op. 08574

**1 The People of the State of New York, Respondent
v
Theresa A. Debo, Appellant.

Supreme Court, Appellate Division, Fourth Department, New York
06-00779, 1199
November 9, 2007

CITE TITLE AS: People v Debo

HEADNOTES

Crimes
Confession

Court did not err in refusing to suppress statements that defendant made to police during questioning at police station; at crime scene, defendant informed responding police officers that unknown assailant entered her home, knocked her unconscious and shot her boyfriend; defendant thereafter was taken to police station, where she made oral and written statements in question—reasonable person, innocent of any crime, would not have believed that he or she was in police custody but, rather, would have believed that he or she was being interviewed as witness to crime; in any event, defendant was given *Miranda* warnings at crime scene.

Crimes
Evidence
Loss or Destruction of Evidence

Court properly denied defendant's motion for mistrial on ground that People failed to preserve material evidence, i.e., couch that, according to defendant, would provide exculpatory evidence; basis for motion was speculative and, in any event, de ***1350** fendant never sought production of couch or expressed interest in performing independent tests until its destruction was disclosed in middle of trial.

Crimes
Right to Counsel
Effective Representation

Bonita J. Stubblefield, Piffard, for defendant-appellant.
Donald H. Dodd, District Attorney, Oswego (Mary E. Rain of counsel), for respondent.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered January 9, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ordered that the judgment so appealed from be and the same hereby is unanimously affirmed.

Memorandum: On appeal from a judgment convicting her upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that County Court erred in refusing to suppress the statements that she made to the police during questioning at the police station. We reject that contention. At the crime scene, defendant informed the responding police officers that an unknown assailant entered her home, knocked her unconscious and shot her boyfriend. Defendant thereafter was taken to the police station, where she made the oral and written statements in question. Under the circumstances, we conclude that a reasonable person, innocent of any crime, would not have believed that he or she was in police custody but, rather, would have believed that he or she was being interviewed as a witness to a crime (*see People v Sherry*, 41 AD3d 1235, 1236 [2007]; *see generally People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). In any event, even assuming, arguendo, that defendant was in police custody when she made the statements, we note that she was given *Miranda* warnings at the crime scene. "[I]t is not necessary to repeat the warnings prior to subsequent questioning within a reasonable time thereafter, so long as the custody has remained continuous" (*People v Glinsman*, 107 AD2d 710, 710 [1985], *lv denied* 64 NY2d 889 [1985], *cert denied* 472 US 1021 [1985]), and here the custody was continuous.

The court properly denied defendant's motion for a mistrial on the ground that the People failed to preserve material evidence, i.e., a couch that, according to defendant, would provide exculpatory evidence. The basis for defendant's

motion was purely speculative (*see People v Schulze*, 224 AD2d 729, 730 [1996], *lv denied* 88 NY2d 853 [1996]; *People v Porter*, 179 AD2d 1018, 1018-1019 [1992], *lv denied* 79 NY2d 1006 [1992]) and, in any event, defendant never sought the production of the couch "or expressed an interest in performing independent tests until its destruction was disclosed in the middle of trial. On this record, the only conclusion to be drawn is that defendant forfeited whatever right [she] had to demand production of the [couch] ***1351** and, consequently, [she] cannot now complain about the People's failure to preserve it" (****2** *People v Allgood*, 70 NY2d 812, 813 [1987]). Defendant was not deprived of effective assistance of counsel based on defense counsel's failure to request production of the missing couch because, as noted, its value was purely speculative, and defense counsel used numerous photographs of the couch to advance defendant's theory of the case (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Contrary to defendant's further contentions, the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]), and the sentence is not unduly harsh or severe. Present—Scudder, P.J., Hurlbutt, Fahey, Green and Pine, JJ.

New York Official Reports

75 A.D.3d 608, 904 N.Y.S.2d 665 (Mem), 2010 N.Y. Slip Op. 06175

*1 The People of the State of New York, Respondent
v
Kelly Forbes, Appellant.

Supreme Court, Appellate Division, Second Department, New York
July 20, 2010

CITE TITLE AS: People v Forbes

Michael O'Brien, Syosset, New York, for appellant.
Kathleen M. Rice, District Attorney, Mineola, N.Y. (Tammy J. Smiley and Jacqueline Rosenblum of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Nassau County (Carter, J.), rendered August 18, 2008, convicting her of manslaughter in the first degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

Contrary to the defendant's contention, the grand jury proceeding did not fail to conform to the requirements of CPL article 190 to such a degree that the integrity thereof was impaired. Therefore, the Supreme Court properly denied the defendant's motion to dismiss the indictment on that ground (*see* CPL 210.35 [5]; *People v Aarons*, 2 NY3d 547, 552 [2004]; *People v Huston*, 88 NY2d 400, 409 [1996]; *People v Gervasi*, 213 AD2d 420 [1995]).

Contrary to the defendant's contention, viewing the evidence in the light most favorable to the prosecution (*see* *People v Contes*, 60 NY2d 620 [1983]), we find that it was legally sufficient to establish that the defendant intentionally caused serious physical injury to the victim, resulting in his death, and thus was legally sufficient to establish her guilt beyond a reasonable doubt of manslaughter in the first degree (*see* Penal Law § 125.20 [1]; *People v Spurgeon*, 63 AD3d 863, 863-864 [2009]). Furthermore, viewing the evidence in the light most favorable to the prosecution (*see* *People v Contes*, 60 NY2d 620 [1983]; *People v Guillen*, 37 AD3d 852 [2007]), we find that the defense of justification was disproved beyond a reasonable doubt (*see* Penal Law § 25.00 [1]; § 35.15 [1]). Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see* *People v Mateo*, 2 NY3d 383, 410 [2004], *cert denied* 542 US 946 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see* *People v Romero*, 7 NY3d 633 [2006]).

The sentence imposed was not excessive (*see* *People v Suitte*, 90 AD2d 80 [1982]).

The defendant's remaining contentions are without merit. Prudenti, P.J., Rivera, Santucci and Miller, JJ., concur.

New York Official Reports

256 A.D.2d 366, 681 N.Y.S.2d 350, 1998 N.Y. Slip Op. 10820

The People of the State of New York, Respondent,
v.
Niki Rossakis, Appellant.

Supreme Court, Appellate Division, Second Department, New York
444/93, 96-06894
(December 7, 1998)

CITE TITLE AS: People v Rossakis

***366** Appeal by the defendant from a judgment of the Supreme Court, Queens County (Fisher, J.), rendered June 27, 1996, convicting her of murder in the second degree and criminal possession of a weapon in the second degree, upon a jury verdict, and sentencing her to concurrent indeterminate terms of 23 years to life imprisonment for the conviction of murder in the second degree and 5 to 15 years imprisonment for the conviction of criminal possession of a weapon in the second degree.

HEADNOTE

CRIMES
EVIDENCE
Justification

(1) Defendant shot and killed her husband as he lay in bed; although she initially denied any knowledge of what had occurred, she later confessed to shooting; at trial, defendant asserted that she had been subjected to long course of physical and emotional abuse by husband and argued that shooting was justified --- Defendant argues that court erred in excluding testimony concerning alleged threat against her made by husband four to five months prior to his death; however, it was not asserted that proffered statement by husband was known to defendant; thus, statement was not admissible as proof of defendant's state of mind; further, court did not improvidently exercise its discretion in determining that statement lacked probative value as to whether husband was aggressor.

Ordered that the judgment is modified, as a matter of discretion in the interest of justice, by reducing the sentence imposed upon the defendant's conviction of murder in the second degree from 23 years to life imprisonment to 15 years to life imprisonment; as so modified, the judgment is affirmed.

The defendant shot and killed her husband as he lay in bed. Although she initially denied any knowledge of what had occurred, she later confessed to the shooting. At trial, the defendant asserted that she had been subjected to a long course of physical and emotional abuse by the husband and argued that the shooting was justified.

On appeal, the defendant argues that the court erred in excluding testimony concerning an alleged threat against her made by the husband approximately four to five months prior to his death. However, it was not asserted that the proffered statement by the husband was known to the defendant. Thus, the statement was not admissible as proof of the defendant's state of mind (*see, People v Miller,* 39 NY2d 543; *People v Loria,* 190 AD2d 1006). Further, the court did not improvidently exercise its discretion in determining that the statement, *inter alia,* lacked probative value as to whether the husband was the aggressor (*see, People v Miller, supra; Stokes v People,* 53 NY 164; *People v Henderson,* 162 AD2d 1038).

The defendant's sentence is excessive to the extent indicated herein.

The defendant's remaining contentions are either unpreserved for appellate review or without merit.

Bracken, J. P., Ritter, Santucci and Altman, JJ., concur. ***367**

179 Misc.2d 42
Supreme Court, Kings County, New York.

The PEOPLE of the State of New York, Plaintiff,
v.
Valerie SEELEY, Defendant.

Oct. 30, 1998.

Synopsis
Defendant charged with second degree murder of her boyfriend, against whom she had previously obtained order of protection, issued subpoena for material relating to prior incidents between herself and defendant, requested material under Freedom of Information Law (FOIL), and also requested material under discovery statute. The Supreme Court, Kings County, John M. Leventhal, J., held that: (1) evidence relating to claim that defendant suffered from Battered Woman's Syndrome was relevant; (2) subpoena was improper attempt to use subpoena for purposes of discovery; (3) defendant had failed to exhaust her administrative remedies, and thus could not obtain relief under Freedom of Information Law (FOIL); (4) discovery statute does not provide basis for discovery of complaints made by defendant to law enforcement personal in unrelated matters; but (5) defendant was potentially entitled to court-ordered discovery of such materials; and (6) prosecution would be required to submit materials of which it was aware for in camera inspection.

So ordered.

Attorneys and Law Firms

****798 *43** Jesse A. Young, Brooklyn, for defendant.

Charles J. Hynes, District Attorney of Kings County, Brooklyn (Robert E. Lamb and Cynthia Lynch of counsel), for plaintiff.

Opinion

JOHN M. LEVENTHAL, J.

Defendant moves to have the People produce specified documents. Defendant claims that the records are vital to the preparation of her defense based upon the "Battered Woman's Syndrome" (BWS). Defendant has commenced three separate proceedings for the documents. Defendant has issued a subpoena for these documents, requested the material under the Freedom of Information Law (FOIL; Public Officers Law § 87), and requested the material under CPL article 240.

In deciding this motion the court has considered defendant's omnibus motion, the People's answer to the omnibus motion, the People's motion to quash the subpoena, defendant's answer to the People's motion to quash the subpoena dated June 2, 1998, defendant's answer to the People's motion to quash the subpoena dated August 3, 1998, oral argument on August 18, 1998, the autopsy report, a three-page document signed by Nicole Avery and allegedly sworn to by defendant on October 29, 1998 (a date that at the time the court received the document had not yet arrived—the court received the document on ***44** September 29, 1998), addendum to answer re People's motion to quash the subpoena, and the court file.

Background

On or about January 1, 1998 at approximately 11:00 A.M., at 106 Steuben Street in Kings County, the defendant stabbed her boyfriend to death. Defendant was apprehended at the scene of the crime. Defendant gave three oral statements, one written ****799** statement, and a videotaped statement to law enforcement agents. All five statements tell essentially the same story.

Shortly before midnight New Year's Day 1998, defendant attempted to enter her paramour's apartment with her key. Upon unlocking the door, defendant was able to open the door slightly, but not enough to gain entry. Seeing that the couch blocked the doorway, she believed her boyfriend to be asleep. She pushed the door gently so as not to disturb her paramour. Upon gaining entry into the apartment, defendant observed the victim "having sex" with a person named Diane (a person apparently known to defendant). Defendant had an argument with Diane and ordered her to leave the apartment. Diane left, and an argument ensued between defendant and her boyfriend.

At the conclusion of the argument, the victim and defendant went to sleep in different rooms. During the course of the evening, defendant woke up her boyfriend to talk about the evening's events, but he did not wish to talk about the matter. In the morning after both parties were awake, defendant continued to argue with her boyfriend. At about 11:00 A.M., during an argument, the victim was close to the defendant's

face. The defendant pushed the victim who, in turn, pushed defendant off her chair. Defendant grabbed a knife and stabbed the victim, killing him.

For this incident, defendant has been indicted on two counts of Murder in the Second Degree.

At oral argument on August 18, 1998, defendant represented that an examination of the defendant had been conducted and defendant was found to suffer from Battered Woman's Syndrome. [1]

1 Some courts have called the syndrome "Battered Wife's Syndrome" "Battered Women's Syndrome" or "Battered Woman Syndrome." In this decision these terms are used interchangeably.

The court's records show that defendant received an order of protection against the deceased on October 9, 1996, which expired April 8, 1997. The record also shows that defendant is ***45** registered with the Family Protection Registry under Case # 96R072716 and order of protection # 1996–R00465. There is thus a basis to believe that there were prior incidents between defendant and the deceased.

Battered Woman's Syndrome as a Defense

Domestic violence is a social as well as a legal issue, with responsibility placed upon the courts, as well as society, to deal with it accordingly. [2] " 'Battered Women's Syndrome' is generally recognized in the psychiatric community to explain common reactions of women in abusive relationships" (*People v. Truick,* N.Y.L.J., June 11, 1998, at 31, cols. 1, 2; *see also, People v. Ciervo,* 123 A.D.2d 393, 506 N.Y.S.2d 462; *People v. Ellis,* 170 Misc.2d 945, 650 N.Y.S.2d 503). In *People v. Ellis* (*supra*), the court held that to be admissible, testimony regarding BWS must have a scientific basis for admission and must be beyond the common knowledge of the average juror. Today, courts have commonly held that both requirements are met. BWS has been found to have a scientific basis in this State (*see, People v. Ciervo,* 123 A.D.2d 393, 506 N.Y.S.2d 462, *supra; Matter of Victoria C. v. Higinio C.,* 165 Misc.2d 702, 630 N.Y.S.2d 470; *People v. Rossakis,* 159 Misc.2d 611, 605 N.Y.S.2d 825; *Matter of Glenn G.,* 154 Misc.2d 677, 587 N.Y.S.2d 464; *People v. Torres,* 128 Misc.2d 129, 134, 488 N.Y.S.2d 358). "The typical juror hearing the domestic violence case is likely to bring with him or her many misconceptions regarding intrafamilial violence." [3]

2 *See,* Note, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer,* 76 Iowa L. Rev. 553, 555 (March 1991).

3 *Use of Domestic Violence History Evidence in the Criminal Prosecution: A Common Sense Approach,* Linsky, 16 Pace L. Rev. 73, 81 (1995); *see, People v. Torres,* 128 Misc.2d, at 134, 488 N.Y.S.2d 358, *supra; see also, People v. Taylor,* 75 N.Y.2d 277, 292, 552 N.Y.S.2d 883, 552 N.E.2d 131.

Although discretion is left to the courts, Battered Woman's Syndrome, as a defense, is generally accepted today to explain the reactions of abused spouses or intimate partners. "Learned helplessness is a term that has been applied to the psychological ****800** change that abuse causes in a battered woman. After a woman experiences repeated abusive episodes over which she believes she has no control, her ability to develop escape responses is lost, even when escape from the relationship is feasible" (Note, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer,* 76 Iowa L. Rev., *op. cit.* at 559). While a situation may appear to have an escape and the time difference between the defendant's action and the alleged abuse may be significant, BWS explains the mindset of an abused spouse whose perceptions and believed options are different ***46** from that of the ordinary juror.

> "The admission of expert testimony regarding rape trauma syndrome, learned helplessness syndrome and battered woman syndrome was proper 'to explain behavior on the part of the [complainant] that might seem unusual to a lay jury unfamiliar with the patterns of response exhibited' by a person who has been physically and sexually abused over a period of time" (*People v. Hryckewicz,* 221 A.D.2d 990, 990–991, 634 N.Y.S.2d 297, *quoting People v. Bennett,* 79 N.Y.2d 464, 471, 583 N.Y.S.2d 825, 593 N.E.2d 279).

At oral argument defense counsel represented that the defense in this case would be justification.

Calling justification a "defense" is a misnomer. Justification does not negate a particular element of the crime nor does it operate to excuse criminal activity (*People v. Pons,* 68

N.Y.2d 264, 267, 508 N.Y.S.2d 403, 501 N.E.2d 11). If the use of force is justified the force is legal and proper (*id.; People v. McManus,* 67 N.Y.2d 541, 545, 505 N.Y.S.2d 43, 496 N.E.2d 202). It is the People's burden to show beyond a reasonable doubt that the use of force was not justified (*People v. McManus, id.,* at 549, 505 N.Y.S.2d 43, 496 N.E.2d 202; *People v. Higgins,* 188 A.D.2d 839, 840, 591 N.Y.S.2d 612).

In considering justification, a jury must determine whether defendant reasonably believed that the use of deadly physical force was necessary, and whether defendant's belief was reasonable by objective standards (*People v. Goetz,* 68 N.Y.2d 96, 115, 506 N.Y.S.2d 18, 497 N.E.2d 41; *see also, People v. Aska,* 91 N.Y.2d 979, 981, 674 N.Y.S.2d 271, 697 N.E.2d 172). Evidence of Battered Woman's Syndrome is relevant to the issues of whether defendant reasonably believed that deadly physical force was necessary and whether that belief was reasonable under the circumstances.

Subpoena

Defendant has issued a subpoena to the District Attorney requesting the following:

> "Copies of all records, police reports, Criminal Complaints, DD5s, ECAB Sheets, Grand Jury Synopsis Sheets, memo books, follow-up reports, UF–61s, Orders of Protection, *Rosario* and other discovery material in all cases within the past five (5) years, in which Valerie Seeley was a complaining witness against William Oliver, as defendant [sic]."

The People have moved to quash the subpoena. [4]

4 The People claim that they did not receive the one day's notice required by CPLR 2307. The failure to give one day's notice is a defect in the subpoena (*People v. Bolivar,* 121 Misc.2d 229, 230–231, 467 N.Y.S.2d 525; *see also, In re Bott,* 125 Misc.2d 1029, 1030, 481 N.Y.S.2d 266). Nonetheless, since both parties have addressed the merits of the motion to quash, and have argued the merits, the court feels that the motion to quash should be decided upon the merits, rather than require defendant to reissue the subpoena on one day's notice.

A subpoena is a process or mandate of the court and is issued by an attorney as agent of the court and not as a representative ***47** of a party to an action (*People v. Natal,* 75 N.Y.2d 379, 384–385, 553 N.Y.S.2d 650, 553 N.E.2d 239; *Matter of Spector v. Allen,* 281 N.Y. 251, 259, 22 N.E.2d 360; *see,* CPL 610.10[2]). The purpose of a subpoena is to produce evidence at a proceeding, and it is improper to use a subpoena as a discovery tool (*Matter of Terry D.,* 81 N.Y.2d 1042, 1043–1044, 601 N.Y.S.2d 452, 619 N.E.2d 389; *People v. Carpenter,* 240 A.D.2d 863, 864, 658 N.Y.S.2d 542; *People v. Wallace,* 239 A.D.2d 272, 273, 658 N.Y.S.2d 843).

****801** It is clear from the facts of this case, the moving papers, the opposition to the motion to quash the subpoena, and the subpoena itself that defendant is using the subpoena as a discovery tool.

The subpoena directs production of *Rosario* and "other discovery material." The documents such as ECAB sheets, Criminal Complaints, DD5s, etc. are not evidence but merely lead to evidence.

The court finds that defendant is using the subpoena process for the purpose of determining what documents exist, and whether those documents support the potential defense (*see, People v. Carpenter, supra,* 240 A.D.2d, at 864, 658 N.Y.S.2d 542).

The motion to quash the subpoena is granted.

Freedom of Information Law

Defendant makes two FOIL requests. In the omnibus motion, the defendant has a heading called "Request Under Freedom of Information Law" in which she requests "all material in the possession of the District Attorney that relates to Ms. Seeley or is about Ms. Seeley be given to Ms. Seeley. Specifically the police reports in the District Attorneys possession pertaining to the present case and Ms. Selley's [sic] past arrests, or bad acts". In defendant's reply to the People's motion to quash the above-noted subpoena, defendant again makes a FOIL

request which includes the above-quoted portion and all items mentioned in the subpoena.

The Freedom of Information Law was enacted to foster the public's "inherent right to know" the workings of government (*Matter of Fink v. Lefkowitz,* 47 N.Y.2d 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). The status of a person requesting documents or records under FOIL is irrelevant. The entitlement to the record or document is based upon a petitioner's status as a member of the public (*Farbman* ***48** *& Sons, Inc. v. New York City Hlth. & Hosps. Corp.,* 62 N.Y.2d 75, 80–81, 476 N.Y.S.2d 69, 464 N.E.2d 437; *Matter of John P. v. Whalen,* 54 N.Y.2d 89, 99, 444 N.Y.S.2d 598, 429 N.E.2d 117). That the FOIL requester is or was a litigant in a matter neither enhances nor restricts such person's rights under FOIL (*id.*). Such a person makes the request as a member of the public and not as a litigant (*id.*). Because of this, a FOIL requester is entitled to receive documents that an ordinary litigant would not ordinarily receive under a particular discovery statute (*Gould v. New York City Police Dept.,* 89 N.Y.2d 267, 274, 653 N.Y.S.2d 54, 675 N.E.2d 808). Conversely, a FOIL requester may be denied access to documents that a litigant may be entitled to receive under a discovery statute. For example, a criminal defendant is entitled to receive copies of autopsy reports (*People v. Munoz,* 11 A.D.2d 79, 85, 202 N.Y.S.2d 743, *affd.* 9 N.Y.2d 638, 210 N.Y.S.2d 533, 172 N.E.2d 291; *Matter of Silver v. Sobel,* 7 A.D.2d 728, 180 N.Y.S.2d 699), Grand Jury testimony of trial witnesses (*People v. Pizarro,* 15 N.Y.2d 803, 804, 257 N.Y.S.2d 600, 205 N.E.2d 695; *People v. Renner,* 80 A.D.2d 705, 437 N.Y.S.2d 749), a witness' criminal record (CPL 240.45; *People v. Hernandez,* 210 A.D.2d 535, 536, 619 N.Y.S.2d 826; *People v. Hilton,* 210 A.D.2d 180, 621 N.Y.S.2d 23), and medical records (CPL 240.20[1][c]). A criminal defendant who requests the identical records under FOIL cannot obtain these documents (*Matter of Assakaf v. Arden,* 210 A.D.2d 325, 620 N.Y.S.2d 295; *Huston v. Turkel,* 236 A.D.2d 283, 283–284, 653 N.Y.S.2d 584; *Mullgrav v. Santucci,* 195 A.D.2d 786, 600 N.Y.S.2d 382; *Matter of Woods v. Kings County Dist. Atty.,* 234 A.D.2d 554, 555, 651 N.Y.S.2d 595; *Matter of Bennett v. Girgenti,* 226 A.D.2d 792, 640 N.Y.S.2d 307; *Newton v. District Atty., Bronx County,* 186 A.D.2d 57, 588 N.Y.S.2d 269).

Petitioner's status as a criminal defendant does not enhance her rights to documents that the public cannot obtain (*see, Matter of John P. v. Whalen, supra,* 54 N.Y.2d, at 99, 444 N.Y.S.2d 598, 429 N.E.2d 117).

A party requesting documents under the FOIL must adhere to the procedure articulated in Section 89 of the Public Officers Law. The defendant here has failed ****802** to follow the mandated procedure.[5] In failing to do so, the defendant has not exhausted her administrative remedies. Her request under ***49** FOIL must be denied (*see, Matter of Graziano v. Coughlin,* 221 A.D.2d 684, 687, 633 N.Y.S.2d 232; *Matter of Reubens v. Murray,* 194 A.D.2d 492, 599 N.Y.S.2d 580; *Matter of Newton v. Police Dept.,* 183 A.D.2d 621, 624, 585 N.Y.S.2d 5).

5 Under section 89(3) of the Public Officers Law, a party seeking the production of documents must first make a written request to the agency holding such documents that reasonably describes the items sought. Within five days the agency must produce the material or deny the request. Under section 89(4)(a), if the request is denied, the defendant has 30 days to appeal in writing to the governing body of the agency and forward a copy of the appeal to the Committee on Open Government for determination. Within 10 days, the agency must provide access to the documents or a written denial explaining the reasons for such denial. Under section 89(4)(b), the defendant upon a denial of such request may bring a review proceeding under subdivision two of section 87 of the Public Officers Law and the agency shall have the burden of proving that the requested records fall within subdivision 2.

In addition, the court notes that some of the documents requested were turned over to counsel as part of the Voluntary Disclosure Form, and as such cannot be obtained via FOIL (*Matter of Walsh v. Wasser,* 225 A.D.2d 911, 912, 639 N.Y.S.2d 506; *Moore v. Santucci,* 151 A.D.2d 677, 678, 543 N.Y.S.2d 103).

Some of the documents, such as criminal complaints, are court documents and are not available under FOIL (*see, Matter of Mullgrav v. Santucci,* 195 A.D.2d 786, 600 N.Y.S.2d 382; *Matter of Gibson v. Grady,* 192 A.D.2d 657, 597 N.Y.S.2d 84).

To the degree that defendant requests criminal records, they are also unavailable under FOIL (*Matter of Woods v. Kings County Dist. Atty.,* 234 A.D.2d 554, 555, 651 N.Y.S.2d 595; *Matter of Bennett v. Girgenti,* 226 A.D.2d 792, 640 N.Y.S.2d 307).

It is noted that one nisi prius court has held that FOIL is unavailable to a defendant while the criminal action is still pending (*Pittari v. Pirro,* 179 Misc.2d 241, 683 N.Y.S.2d 700; *cf., In re Legal Aid Socy.,* N.Y.L.J., Oct. 22, 1998, at 29, col. 4).

Defendant's request under the Freedom of Information Law is denied.

Brady Material

Defendants have a due process right to a fair trial (*Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215). A due process violation exists when the prosecution suppresses evidence that is favorable and material to the guilt or innocence of the defendant (*Brady v. Maryland,* 373 U.S., at 87, 83 S.Ct. 1194, 10 L.Ed.2d 215, *supra; People v. Steadman,* 82 N.Y.2d 1, 7, 603 N.Y.S.2d 382, 623 N.E.2d 509).

When a defendant has knowledge of the exculpatory material, or when such material is fully available to the defendant, it is not considered to be suppressed by the People, nor is it deemed to be *Brady* material (*People v. Fein,* 18 N.Y.2d 162, 170, 272 N.Y.S.2d 753, 219 N.E.2d 274; *see, People v. Gordon,* 237 A.D.2d 376, 376, 655 N.Y.S.2d 61; *People v. Williams,* 236 A.D.2d 493, 493, 654 N.Y.S.2d 587; *People v. Rodriguez,* 223 A.D.2d 605, 606, 637 N.Y.S.2d 171; *People v. Buxton,* 189 A.D.2d 996, 997, 593 N.Y.S.2d 87; *People v. Deas,* 174 A.D.2d 751, 571 N.Y.S.2d 778; *People v. LaRocca,* 172 A.D.2d 628, 629, 568 N.Y.S.2d 431; *People v. Murray,* 140 A.D.2d 949, 950, 529 N.Y.S.2d 628; *People v. Banks,* 130 A.D.2d 498, 499, 515 N.Y.S.2d 81; *People v. Murphy,* 109 A.D.2d 895, 487 N.Y.S.2d 89; *People v. Jones,* 85 A.D.2d 50, 448 N.Y.S.2d 543).

***50** It is clear that the defendant has knowledge of many of the facts contained in the reports and records filed by the defendant with the prosecution. Thus, the material sought is not *Brady* material.

While defendant claims that much documentary evidence is unavailable to her because she cannot obtain her property without sufficient funds, no application has ever been made to this court seeking an order releasing or making available to her the documents in the possession of other individuals.

At oral argument on August 18, 1998, the People claimed that defendant was not suffering from BWS. The People's belief ****803** is irrelevant to the issue of whether any material is exculpatory (*see, People v. Baxley,* 84 N.Y.2d 208, 213–214, 616 N.Y.S.2d 7, 639 N.E.2d 746; *People v. Robinson,* 133 A.D.2d 859, 860, 520 N.Y.S.2d 415).

The People are reminded that the "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police" (*Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490; *People v. Wright,* 86 N.Y.2d 591, 598, 635 N.Y.S.2d 136, 658 N.E.2d 1009). In this case, the People "have a duty to learn of any evidence" that supports the "defense" of justification and, in this case, Battered Woman's Syndrome, whether they believe or disbelieve that defendant suffers from the Syndrome.

This court has no reason to believe that the People will not fulfill their obligation, and defendant has failed to show that any such material exists.

Discovery

At common law, courts had no power to order discovery in criminal cases (*People v. Colavito,* 87 N.Y.2d 423, 426, 639 N.Y.S.2d 996, 663 N.E.2d 308; *People ex rel. Lemon v. Supreme Court,* 245 N.Y. 24, 28, 156 N.E. 84). There is also no Federal or State constitutional right to discovery (*Weatherford v. Bursey,* 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30; *Matter of Miller v. Schwartz,* 72 N.Y.2d 869, 870, 532 N.Y.S.2d 354, 528 N.E.2d 507). The New York Legislature has taken into account values "premised on constitutional rights and fundamental fairness," and adopted Article 240 of the Criminal Procedure Law which, by specifying what exactly is discoverable prior to a criminal trial, essentially excludes items not mentioned from

discovery (*People v. Colavito, supra,* 87 N.Y.2d, at 427, 639 N.Y.S.2d 996, 663 N.E.2d 308).

Since there is no Constitutional right to discovery in criminal cases, courts cannot grant discovery where no statutory basis exists (*Matter of Sacket v. Bartlett,* 241 A.D.2d 97, 101, 671 N.Y.S.2d 156; *Pirro v. LaCava,* 230 A.D.2d 909, 910, 646 N.Y.S.2d 866). Thus, discovery in criminal proceedings is entirely governed by statute (*People v. Copicotto,* 50 N.Y.2d 222, 225, 428 N.Y.S.2d 649, 406 N.E.2d 465; *Matter of Hynes v. Cirigliano,* 180 A.D.2d 659, 579 N.Y.S.2d 171).

***51** The People contend that the requested material should not be provided because no statutory provision mandating or allowing such disclosure exists (*see,* CPL 240.20). CPL 240.20(1) provides in pertinent part that "the prosecutor shall disclose to the defendant and make available for inspection" certain materials. While CPL 240.20(1)(a) lists "any written, recorded or oral statement of the defendant ... made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement," the People contend that this does not include prior complaints made by the defendant on unrelated matters, but only to statements relating to the incident for which defendant was indicted. This court agrees with the People's contention that the legislative purpose behind CPL 240.20(1)(a) was to allow the discovery of defendant's statements made about the present criminal act.

Our analysis, however, does not end here.

CPL 240.40(1)(c) reads in pertinent part that the court "may order discovery with respect to any other property, which the people intend to introduce at the trial, upon a showing by the defendant that discovery with respect to such property is material to the preparation of his defense, and that the request is reasonable" (*see, People v. Colavito, supra,* 87 N.Y.2d, at 427, 639 N.Y.S.2d 996, 663 N.E.2d 308; *People v. Bissonette,* 107 Misc.2d 1049, 1051, 436 N.Y.S.2d 607). In order to be entitled to discovery by court order, defendant must show that the People intend to introduce the property at trial (*People v. Bissonette, supra; People v. 230 W. 54th St. Corp.,* 135 Misc.2d 502, 516 N.Y.S.2d 395). Defendant must also show that the property is material to the preparation of her defense, and that the request is reasonable.

At oral argument on August 18, 1998 the Assistant District Attorney stated that if defendant were to present expert testimony regarding BWS, the People would then introduce expert testimony that defendant was ****804** not a "battered woman" and that it was the deceased who was a "battered person." The People claimed that they have evidence including criminal complaints in which the victim sought court assistance in defense of assaults by the defendant.

Since the claim in this case is justification, and the People have the burden of proving beyond a reasonable doubt that the force used by defendant was unjustified, it will be necessary for the People to introduce evidence at trial regarding prior complaints made by defendant against the victim, and complaints by the victim against the defendant. The expert called by the People will in all likelihood rely upon many of the documents demanded by defendant.

***52** It is noted that courts have permitted both the defendant and the prosecution to introduce evidence of BWS (*see, People v. Truick, supra,* N.Y.L.J., June 11, 1998, at 31, col. 1; *People v. Ellis,* 170 Misc.2d 945, 650 N.Y.S.2d 503, *supra*).

It is also noted that even if the Assistant District Attorney does not introduce evidence of violence against the defendant by the victim, when defendant testifies as to these violent acts, the People will seek to use defendant's statement to law enforcement agents as prior inconsistent statements. Although prior inconsistent statements are not received into evidence for their truth, the jury may see any written statements for their impeachment value (*People v. Blanchard,* 177 A.D.2d 854, 856, 577 N.Y.S.2d 322; *see also, People v. Alicea,* 229 A.D.2d 80, 88–89, 656 N.Y.S.2d 2). In this respect, the court notes that any records that resulted in a favorable disposition as defined by CPL 160.50(3) are sealed, and may not be used by the People on either their direct case or on cross-examination as impeachment evidence (*People v. Hunter,* 88 A.D.2d 321, 453 N.Y.S.2d 212; *see also, Matter of Alonzo M. v. New York City Prob. Dept.,* 72 N.Y.2d 662, 536 N.Y.S.2d 26, 532 N.E.2d 1254).

The court finds that defendant has shown that the People intend to introduce at the trial certain evidence regarding defendant's prior relationship with the victim, including evidence that the victim committed or did not commit

violent acts against defendant. The requirement under CPL 240.40(1)(c) that the discoverable material be property that the People intend to introduce at trial has been met.

CPL 240.40(1)(c) also requires that the "property" be material to the defense and the request be reasonable.

Except in the addendum to answer re: People's motion to quash the subpoena, the defendant has failed to specify the time and dates of any incidents between the victim and defendant. Defendant has asked for documents during a five-year period. The court realizes the difficulty that defendant has in giving specifics and in deciding this motion has taken that into account (see, *People v. Mendoza,* 82 N.Y.2d 415, 429, 604 N.Y.S.2d 922, 624 N.E.2d 1017). As previously stated this court is aware of the issuance of an order of protection # 1996–R00465 issued in Kings County by the Criminal Court on October 9, 1996 enjoining the victim from certain activities against the defendant. Also, important to the court's decision is the fact that the People may obtain information regarding the victim's criminal history through the use of its computers, and have access to police records in the precinct in which the defendant and victim resided.

The court directs that the People turn over to this court for an in camera inspection all records of which they are aware, or ***53** which a reasonable search would reveal (*see, People v. Coleates,* 86 Misc.2d 614, 616, 376 N.Y.S.2d 374), other than those attached to defendant's addendum to answer re: the People's motion to quash the subpoena. Should there be any sealed records in the possession of the prosecution, they shall be turned over to this court without examination by the People. Should the People become aware of sealed records that are not in their possession, they shall submit to this court a list of such records and the information they have regarding the record.

Defendant is directed to supply to the People, as best as possible, the approximate times and places of any incidents that were reported to any law enforcement agency. The names and location of such law enforcement ****805** agency shall also be given to the prosecution.

After an in camera inspection, the court will determine what documents and/or information shall be disclosed to any party.

The People need not turn over documents already in defendant's possession as evidenced by defendant's addendum dated October 1, 1998.

All Citations

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NOT FOR PUBLICATION
United States District Court,
E.D. New York.

Valerie SEELEY, Petitioner,
v.
ADA PEREZ, Respondent.

No. 06 Civ.1916(BMC).
|
Aug. 26, 2008.

Attorneys and Law Firms

Valerie Seeley, Bedford Hills, NY, pro se.

Thomas M. Ross, Brooklyn, NY, for Respondent.

MEMORANDUM DECISION AND ORDER

COGAN, District Judge.

***1** Petitioner seeks to bring an additional petition for habeas corpus under 28 U.S.C. § 2254, her first one having been dismissed by this Court on August 27, 2007. For the reasons set forth below, petitioner's motion is deemed to be a petition for habeas corpus relief, and is dismissed.

BACKGROUND

On March 31, 2003, a Kings County jury convicted petitioner of depraved indifference murder for the stabbing death of her boyfriend. Petitioner was sentenced to 19 years to life in prison and is currently incarcerated at the Bedford Hills Correctional Facility in New York. The Appellate Division affirmed her conviction on December 20, 2005, and the New York Court of Appeals denied leave to appeal on January 7, 2005. Petitioner timely filed her § 2254 petition for a writ of habeas corpus on February 23, 2006. She subsequently made a motion to vacate the judgment against her under N.Y.Crim. P. Law § 440.10, which the New York Supreme Court denied on May 8, 2007, and the Appellate Division denied leave to appeal on August 20, 2007. Petitioner made a motion for a writ of error coram nobis, which the Appellate Division denied on October 30, 2007. The New York Court of Appeals denied leave to appeal the coram nobis motion on February 15, 2008.

In a Memorandum Decision and Order issued August 27, 2007, this Court denied petitioner's habeas corpus petition after finding her claims to be without merit. Petitioner applied for a certificate of appealability from the Second Circuit, which was denied in a mandate issued February 28, 2008.

By papers dated February 25, 2008, petitioner sought permission from the Second Circuit to file additional habeas corpus claims. Petitioner asserted: (1) the evidence presented at trial was legally insufficient to establish depraved indifference murder because the murder was a one-on-one stabbing; (2) ineffective assistance of trial counsel for failing to preserve the first claim for appellate review; and (3) ineffective assistance of appellate counsel for failing to raise these claims on appeal. Because the mandate denying petitioner's certificate of appealability had not yet issued at the time she filed her motion for a successive habeas petition, the Second Circuit denied petitioner's application as "unnecessary." Citing *Whab v. U.S.,* 408 F.3d 116 (2d Cir.2005), the Second Circuit transferred petitioner's application to this Court "for whatever further action the district court finds appropriate, as if it has been filed directly in the district court."

DISCUSSION

Petitioner asks the Court to view her motion as one for a new § 2254 petition asserting these three new claims. Respondent, on the other hand, urges the Court to construe petitioner's motion as a motion to amend her original habeas petition and deny amendment because the new claims are untimely. The Court agrees with petitioner. The Court has already dismissed petitioner's original petition, and the Second Circuit has denied her a certificate of appealability. Thus, there is nothing pending before this Court for petitioner to amend. *See, e.g., Breeden v. Ercole,* No. 06 CV 3860, 2007 WL 3541184, *1 (E.D.N.Y. Nov.14, 2007) ("[B]ecause the Second Circuit ultimately denied a certificate of appealability, the two petitions will not be before this Court simultaneously ... this Court need not treat the instant petition as a motion to amend the prior petition."); *Palmer v. Phillips,* No. 05 Civ. 9894, 2007 WL 60419, *2 (S.D.N.Y. Jan.8, 2007) ("The instant petition was filed [four days] before the Second

Circuit denied him a COA on his first petition ... The instant petition need not be considered a motion to amend the earlier petition, which is not before this Court."). The Court will therefore address petitioner's claims on the merits as a new petition. [1]

1 Although the Court adopts petitioner's construction of her motion, the disposition would be the same even if the Court construed the motion as one to amend. As respondent argues, these additional claims were available to petitioner on direct appeal, and consequently should have been raised in her original habeas petition. Petitioner thus had until April 7, 2006-one year and ninety days after the Court of Appeals denied leave to appeal the conviction-to assert these claims, and they are untimely asserted now. Under Fed.R.Civ.P. 15(c)(2), which governs a motion to amend, petitioner may only add these untimely claims if they relate back to the original petition. *See* *Mayle v. Felix,* 545 U.S. 644, 654-55, 125 S.Ct. 2562, 162 L.Ed.2d 582 (2005). Relation back requires that new claims arise from "the same core facts as the timely filed claims" and not differ from those claims in time or type. *Id.* at 657. Amendment is not allowed simply because the new claim arose from "the same trial, conviction, or sentence" as the timely-filed claim. *Id.* at 664. Here, petitioner's new claims do not arise from the same core set of facts as any of her original claims. The Court would therefore deny a motion to amend.

1. Petitioner's One-on-One Claim is Procedurally Barred

***2** Petitioner first claims that the evidence presented at trial was insufficient to establish depraved indifference murder, essentially asserting that the Court should analyze her conviction in light of a post-conviction shift in the New York depraved indifference standard. The controlling law at the time of petitioner's conviction, reflected in *People v. Register,* 60 N.Y.2d 270, 469 N.Y.S.2d 599, 457 N.E.2d 704 (1983) and *People v. Sanchez,* 98 N.Y.2d 373, 748 N.Y.S.2d 312, 777 N.E.2d 204 (2002), held that a defendant could be convicted of depraved indifference murder in a one-on-one killing where the defendant acted recklessly (i.e., not intentionally) in harming the victim, but committed the crime under circumstances evidencing an indifference to or disregard of the risks attending his conduct. *E.g.,* *Register,* 60 N.Y.2d at 274, 469 N.Y.S.2d 599, 457 N.E.2d 704; *Sanchez,* 98 N.Y.2d at 378, 748 N.Y.S.2d 312, 777 N.E.2d 204. Depraved indifference was not a subjective mental state in itself, but rather an objective characterization of the degree of risk surrounding defendant's actions. *See* *Register,* 60 N.Y.2d at 276-78, 469 N.Y.S.2d 599, 457 N.E.2d 704. Under this standard, a one-on-one attack with a deadly weapon during an argument was deemed to present such an inherent risk of causing harm to the victim that it "readily [met] the level of manifested depravity needed to establish murder." *Sanchez,* 98 N.Y.2d at 378, 748 N.Y.S.2d 312, 777 N.E.2d 204.

Subsequent cases, including *People v. Hafeez,* 100 N.Y.2d 253, 762 N.Y.S.2d 572, 792 N.E.2d 1060 (2003), *People v. Gonzales,* 1 N.Y.3d 464, 775 N.Y.S.2d 224, 807 N.E.2d 273 (2004), *People v. Payne,* 3 N.Y.3d 266, 786 N.Y.S.2d 116, 819 N.E.2d 634 (2004), and *People v. Suarez,* 6 N.Y.3d 202, 811 N.Y.S.2d 267, 844 N.E.2d 721 (2005), have reflected a shift in the depraved indifference standard to require that a defendant exhibit a specific mental state beyond recklessness and the inherent depravity involved in taking the life of another. *Suarez,* 6 N.Y.3d at 208, 213-14, 811 N.Y.S.2d 267, 844 N.E.2d 721. As a result, New York courts now require that a defendant's conduct manifest "an utter disregard for the value of human life," *Suarez,* 6 N.Y.3d at 214, 811 N.Y.S.2d 267, 844 N.E.2d 721, and the *Register / Sanchez* standard "no longer support[s] most depraved indifference murder convictions, particularly one-on-one shootings or stabbings." *People v. Feingold,* 7 N.Y.3d 288, 294, 819 N.Y.S.2d 691, 852 N.E.2d 1163 (2006) (overruling *Register* and *Sanchez* and establishing depraved indifference as a *mens red*). Indeed, as the *Suarez* court noted, an unintentional one-on-one killing now meets the requisite mental state for depraved indifference only where the defendant's conduct is "marked by uncommon brutality," such as where a defendant "abandons a helpless and vulnerable victim in circumstances where the victim is highly likely to die" or "engages in torture or a brutal, prolonged and ultimately fatal course of conduct against a particularly vulnerable victim." 6 N.Y.3d at 211-13, 811 N.Y.S.2d 267, 844 N.E.2d 721. Relying

on this post-*Sanchez* language, petitioner contends that her conviction was improper. [2]

2 The Court notes, as did the state court in denying petitioner's § 440.10 motion, that the Court of Appeals has declared that its overruling of *Sanchez* and *Register* does not apply retroactively. *Policano v. Herbert,* 7 N.Y.3d 588, 601-02, 825 N.Y.S.2d 678, 859 N.E.2d 484(2006).

Petitioner also raised this claim in her § 440.10 motion. There, the New York State Supreme Court rejected it under N.Y.Crim. P. Law § 440.10(2)(c), because the trial record indicated that petitioner's counsel moved to dismiss the depraved indifference charge on grounds that the prosecution had not made out its prima facie case. (Decision and Order, May 8, 2007, at 3). Thus, the state court found that the one-on-one claim was available to petitioner on direct appeal and should have been raised at that time. (*Id.*) This is an independent and adequate state procedural ground to reject petitioner's argument, and this Court must concur with the state court's determination unless petitioner can show cause for the failure to appeal, and prejudice or deprivation of a fundamental right. *See* *Clark v. Perez,* 510 F.3d 382, 390-93 (2d Cir.2007); *Bossett v. Walker,* 41 F.3d 825, 828-29 (2d Cir.1994). Petitioner has made no such showing of cause, prejudice, or deprivation here; therefore, this Court cannot consider her one-on-one claim.

2. Petitioner's Ineffective Assistance of Trial Counsel Claim is Meritless

***3** Petitioner next asserts an ineffective assistance of trial counsel claim based on counsel's failure to preserve her one-on-one argument, which she also raised in her § 440.10 motion. In analyzing this assertion, the Court must determine whether the state court's determination on this claim was contrary to, or an unreasonable application of, the ineffective assistance standard set forth in *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See* *Williams v. Taylor,* 529 U.S. 362, 384-85, 391, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under *Strickland,* the appropriate inquiry is whether petitioner had "reasonably effective assistance" of counsel, such that counsel's actions neither (1) fell below an objective standard of reasonableness; nor (2) caused a reasonable probability that the result of the trial would have been different but for counsel's unprofessional errors. 466 U.S. at 686-95.

The Court finds that the state court's rejection of this claim was neither contrary to, nor an unreasonable application of, the *Strickland* standard. As noted by the state court in denying petitioner's § 440.10 motion, her counsel made an oral motion to dismiss based on the prosecution's failure to make out its prima facie case against her. (Decision and Order, May 8, 2007, at 3). Moreover, the evidence of depraved indifference murder was sufficient to convict petitioner under *Sanchez,* the controlling law at the time of conviction. Like the defendant in *Sanchez,* found guilty of depraved indifference murder after shooting his victim in the chest at point-blank range during an argument, petitioner stabbed her boyfriend in the chest and back during an argument. Both cases involved conduct that "appeared to have been sudden, spontaneous and not well-designed to cause imminent death." *Sanchez,* 98 N.Y.2d at 377, 748 N.Y.S.2d 312, 777 N.E.2d 204. It was not unreasonable for petitioner's trial counsel to assume that the evidence presented at trial was sufficient to convict petitioner under *Sanchez* and decide not to specifically preserve her one-on-one claim for appeal. Petitioner's claim for ineffective assistance of trial counsel is meritless.

3. Petitioner's Ineffective Assistance of Appellate Counsel Claim is Meritless

Lastly, petitioner asserts a claim for ineffective assistance of appellate counsel based on counsel's failure to raise either her one-on-one claim or her ineffective assistance of trial counsel claim on appeal, a claim she made in her coram nobis motion to the Appellate Division. The Court again must analyze whether the state court's adjudication of this claim was contrary to, or an unreasonable application of, the *Strickland* standard. *Smith v. Robbins,* 528 U.S. 259, 285-88, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). The Court must also analyze the state court's determination in light of *Jones v. Barnes,* 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), which held that to be effective, appellate counsel is not required to raise every non-frivolous claim that a defendant wants raised. *Id.* at 753-54.

***4** Again, the Court concludes that the Appellate Division's rejection of this claim was neither contrary to, nor an unreasonable application of, *Strickland* and *Jones.* Petitioner's appellate counsel submitted an affidavit to the

Appellate Division in response to the coram nobis petition, stating that he did not raise the claims on appeal because (1) the one-on-one claim was unpreserved for appellate review; (2) the evidence of petitioner's mental state at the time of the stabbing was conflicting; and (3) *Sanchez*-which had affirmed a depraved indifference murder for a one-on-one killing-was the controlling law at the time of conviction. (Affirmation of John Gemmill, Aug. 17, 2007, at ¶¶ 12-14). Given these reasons, the Court agrees with the Appellate Division's conclusion that petitioner failed to establish her ineffective assistance claim. Petitioner's claim for ineffective assistance of appellate counsel is meritless.

CONCLUSION

For the reasons stated above, petitioner's habeas corpus petition is dismissed. Petitioner has failed to make a substantial showing of the denial of a constitutional right. Therefore, a certificate of appealability shall not issue. 28 U.S.C. § 2253. Further, I certify that any appeal from this Order would not be taken in good faith. *See* 28 U.S.C. § 1915(a); *Coppedge v. U.S.,* 369 U.S. 438, 444, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 3992289

Appendix E

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Two. Sentences
Title E. Sentences
Article 60. Authorized Dispositions of Offenders (Refs & Annos)

McKinney's Penal Law § 60.12

§ 60.12 Authorized disposition; alternative sentence; domestic violence cases

Effective: May 14, 2019
Currentness

1. Notwithstanding any other provision of law, where a court is imposing sentence upon a person pursuant to section 70.00, 70.02, 70.06 or subdivision two or three of section 70.71 of this title, other than for an offense defined in section 125.26, 125.27, subdivision five of section 125.25, or article 490 of this chapter, or for an offense which would require such person to register as a sex offender pursuant to article six-C of the correction law, an attempt or conspiracy to commit any such offense, and is authorized or required pursuant to sections 70.00, 70.02, 70.06 or subdivision two or three of section 70.71 of this title to impose a sentence of imprisonment, the court, upon a determination following a hearing 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 may instead impose a sentence in accordance with this section.

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

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

2. Where a court would otherwise be required to impose a sentence pursuant to section 70.02 of this title, the court may impose a definite sentence of imprisonment of one year or less, or probation in accordance with the provisions of section 65.00 of this title, or may fix a determinate term of imprisonment as follows:

(a) For a class B felony, the term must be at least one year and must not exceed five years;

(b) For a class C felony, the term must be at least one year and must not exceed three and one-half years;

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

(d) For a class E felony, the term must be one year and must not exceed one and one-half years.

3. Where a court would otherwise be required to impose a sentence for a class A felony offense pursuant to section 70.00 of this title, the court may fix a determinate term of imprisonment of at least five years and not to exceed fifteen years.

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

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

6. Where a court would otherwise be required to impose a sentence for a class A felony offense pursuant to subparagraph (ii) of paragraph (b) of subdivision two of section 70.71 of this title, the court may fix a determinate term of imprisonment of at least one year and not to exceed three years.

7. Where a court would otherwise be required to impose a sentence for a class A felony offense pursuant to subparagraph (ii) of paragraph (b) of subdivision three of section 70.71 of this title, the court may fix a determinate term of imprisonment of at least three years and not to exceed six years.

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

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

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

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

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

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

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

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

Credits

(Added L.1998, c. 1, § 1, eff. Aug. 6, 1998. Amended L. 2019, c. 31, § 1, eff. May 14, 2019; L.2019, c. 55, pt. WW, § 1, eff. May 14, 2019.)

Editors' Notes

PRACTICE COMMENTARY

by William C. Donnino

Introduction

In 2019 (c. 31 and c. 55, effective May 14, 2019), the Legislature substantially revised and expanded the authorization of Penal Law § 60.12 for a court to impose an alternative, less severe, sentence for a victim of domestic violence who is convicted of certain felonies.

The statute consists primarily of three parts:

(1) a listing of the felony convictions that are eligible for an alternative sentence authorized by Penal Law § 60.12 in lieu of any other sentence;

(2) the criteria to apply in deciding whether a person who is convicted of an eligible felony is also eligible for an alternative sentence, and if so, whether to impose same; and

(3) the alternative sentences authorized by Penal Law § 60.12.

Notably, the statute took effect on May 14, 2019, and the foregoing parts of the statute applied to "offenses committed on, after and prior to such effective date where the sentence for such offense has not yet been imposed." L. 2019, c. 31, § 6. Where a sentence had already been imposed, a separate section, CPL 440.47, was enacted to authorize a resentence for those incarcerated individuals who would qualify under that section for an alternative sentence under the revised Penal Law § 60.12.

Eligible Felony Conviction

With exceptions, a defendant is eligible for a sentence pursuant to Penal Law § 60.12 when the defendant stands convicted of a felony for which a sentence of imprisonment is "required or authorized" by Penal Law § 70.00 [sentence for a felony]; Penal Law § 70.02 [sentence for violent felony offender]; Penal Law § 70.06 [sentence for second felony

offender]; or Penal Law § 70.71 [sentence for a class A felony drug offender as defined in subd. (2) [first felony drug offender], or subd. (3) [second felony drug offender].

The exceptions are for a defendant convicted of homicide, as defined in Penal Law §§ 125.26 [aggravated murder], 125.27 [murder first degree], 125.25(5) [being 18 years old or more, he or she intentionally causes the death of a person less than 14 during commission of certain sexual offenses]; or a defendant convicted of a terrorism offense [Penal Law art. 490]; or a defendant convicted of any offense which would require that person to register as a sex offender [Correction Law art. 6]; or a defendant convicted of an attempt or conspiracy to commit any of those specified offenses.

Eligible Offender and Criteria for Alternative Sentence

A court may impose a Penal Law § 60.12 sentence in lieu of any other sentence upon a defendant who stands convicted of an eligible felony, when that person, "following a hearing," meets three criteria:

(1) the defendant, "at the time" of the offense, was subjected to "substantial" physical, sexual or psychological abuse inflicted by "a" member of the same family or household [as defined by CPL 530.11];

(2) the abuse was a "significant contributing factor" to the defendant's criminal behavior; in making this determination, it matters not whether the defendant raised a defense of justification [Penal Law art. 35]; duress, entrapment, renunciation, or insanity [Penal Law art. 40]; extreme emotional disturbance, or the causing or aiding of suicide [Penal Law § 125.25(1)]); and

(3) upon consideration of the standard sentencing factors, it "would be unduly harsh" to impose the otherwise applicable sentence of imprisonment.

At a hearing on these issues, "reliable hearsay" is admissible. Given that hearsay that is subject to exclusion at a trial is by definition not reliable, care must be taken in determining that the offered hearsay is reliable; the source; the reason, if any, not to speak the truth; and whether there is other evidence tending to corroborate the hearsay should be considered.

Once a court determines to impose a sentence authorized by Penal Law § 60.12, it must of course then decide what the sentence should be.

Penal Law § 60.12 Authorized Sentences

A major change in the authorized sentences is the authorization of a determinate sentence of imprisonment rather than an indeterminate sentence of imprisonment. With the determinate sentence of imprisonment, a period of post-release supervision [PRS] was provided for by amendments in the 2019 legislation to Penal Law § 70.45(2).

Sentence for a felony in lieu of Penal Law § 70.00

For a class A felony, the authorized alternative sentence is a determinate term of imprisonment of not less than 5 years nor more than 15 years [Penal Law § 60.12(3)], with a PRS period of 5 years [Penal Law § 70.45(2)].

For a class B, C, D, or E felony, Penal Law § 60.12(9) sets forth the authorized alternative sentence as any sentence set forth in Penal Law § 70.70(2) for the respective class of felony. If a determinate term of imprisonment is imposed, the PRS period for a Class B or C felony is not less than 1 year nor more than 2 years; and for a Class D or E felony, 1 year. Penal Law § 70.45(a) and (b).

Sentence for a violent felony offense in lieu of Penal Law § 70.02

The authorized alternative sentences, pursuant to Penal Law § 60.12(2), are a definite sentence of imprisonment of 1 year (364 days) or less; probation; or a determinate term of imprisonment of at least 1 year and:

- for a class B felony, not more than 5 years, with a PRS period of not less than 2.5 years nor more than 5 years [Penal Law § 70.45(2)(f)];

- for a class C felony, not more than 3.5 years, with a PRS period of not less than 2.5 years nor more than 5 years [Penal Law § 70.45(2)(f)];

- for a class D felony, not more than 2 years, with a PRS period of not less than 1.5 years nor more than 3 years [Penal Law § 70.45(2)(e)]; and

- for a class E felony, not more than 1.5 years, with a PRS period of not less than 1.5 nor more than 3 years. Penal Law § 70.45(2)(e).

Sentence, as a second felony offender, in lieu of Penal Law § 70.06(3), except if the prior or current conviction is for a violent felony offense

Pursuant to Penal Law § 60.12(10), the authorized alternative sentence is any sentence set forth in Penal Law § 70.70(3) for a class B, C, D, or E felony, respectively. If a determinate sentence of imprisonment is imposed, the PRS period is not less than 1 year nor more than 2 years. Penal Law § 70.45(2)(c).

Sentence, as a second felony offender, in lieu of Penal Law § 70.06(3) where the prior felony conviction was for a violent felony offense

Penal Law § 60.12(11) sets forth the authorized alternative sentence as any sentence set forth in Penal Law § 70.70(4) for a class B, C, D, or E felony, respectively. If a determinate sentence of imprisonment is imposed, the PRS period is not less than 1.5 years nor more than 3 years. Penal Law § 70.45(2)(d).

Sentence, as a second felony offender, in lieu of Penal Law § 70.06(6) where the current conviction is for a violent felony offense

The authorized alternative sentence is a determinate term of imprisonment set forth in Penal Law § 60.12(8) as follows:

- for a class B felony, the term must be at least 3 years and not more than 8 years, with a PRS period of not less than 2.5 years nor more than 5 years [Penal Law § 70.45(2)(f)];

- for a class C felony, the term must be at least 2.5 years and not more than 5 years, with a PRS period of not less than 2.5 years nor more than 5 years [Penal Law § 70.45(2)(f)];

- for a class D felony, the term must be at least 2 years and not more than 3 years, with a PRS period of not less than 1.5 years nor more than 3 years [Penal Law § 70.45(2)(e)];

- for a class E felony, the term must be at least 1.5 years and not more than 2 years, with a PRS period of not less than 1.5 years nor more than 3 years [Penal Law § 70.45(2)(e)].

Sentence for a class A felony for a "first felony drug offender" in lieu of Penal Law § 70.71(2):

For a class A-I felony, the authorized alternative sentence is a determinate term of imprisonment of not less than 5 years nor more than 8 years. Penal Law § 60.12(4).

For a class A-II felony, the authorized alternative sentence, is a determinate term of imprisonment of at least 1 year and not to exceed 3 years. Penal Law § 60.12(6).

The PRS period in each instance is not less than 1.5 years nor more than 3 years. Penal Law § 70.45(2)(e).

Sentence for a class A felony for a "second felony drug offender" in lieu of Penal Law § 70.71(3):

For a class A-I felony, the authorized alternative sentence, is a determinate term of imprisonment of not less than 5 years nor more than 12 years. Penal Law § 60.12(5).

For a class A-II felony, the authorized alternative sentence, is a determinate term of imprisonment of not less than 3 years nor more than 6 years. Penal Law § 60.12(7).

The PRS period in each instance is not less than 1.5 years nor more than 3 years [Penal Law § 70.45(2)(e)].

CPL 440.47 Resentence Pursuant to Penal Law § 60.12

In addition to the "prospective" application of the revised criteria and sentences provided by Penal Law § 60.12, a separate section was enacted [CPL 440.47] to make the alternative sentences retroactive to defendants who were previously convicted and sentenced and who would meet the present criteria of Penal Law § 60.12. To the extent a resentence is ameliorative, there is no violation of the Ex Post Facto Clause. *People v. Oliver*, 1 N.Y.2d 152, 159-60, 151 N.Y.S.2d 367, 134 N.E.2d 197 (1956) ("where an ameliorative statute takes the form of a reduction of punishment for a particular crime, the law is settled that the lesser penalty may be meted out in all cases decided after the effective date of the enactment, even though the underlying act may have been committed before that date"). *People ex rel. Lonschein, etc. v. Warden,* 43 Misc.2d 109, 119, 250 N.Y.S.2d 15 (Supreme Court, Queens County, 1964) *aff'd upon the opinion at the Supreme Court* 15 N.Y.2d 663, 255 N.Y.S.2d 876, 204 N.E.2d 206.

The initial requirement is that the defendant is in the custody of the state, serving a sentence with a minimum or determinate term of 8 years or more [CPL 440.47(1)(a)].

The statute then sets up an unusual procedure. A defendant must first submit a "request" to the judge who imposed his or her sentence "to apply" for resentencing [CPL 440.47(1(a)] on the grounds that he or she meets the initial requirements and is "eligible for an alternative sentence" pursuant to Penal Law § 60.12. If that original sentencing judge is not available, an alternate judge will be assigned [CPL 440.47(1)(b); *see also* subd. (2)(b)].

If the court finds that the defendant "has met the requirements," the court must notify the defendant that he or she may "apply" for resentence, and the defendant may in turn apply for assigned counsel [CPL 440.47(1)(c)]. The district attorney is not required to be notified of the "request" to apply for resentence and may therefore have no input on whether the defendant "has met the requirements" for a formal application. Once the request is granted and the defendant's application is filed, the district attorney must then be given a copy of the application [CPL 440.47(2)(a)].

The defendant is required to include in the application "at least" two pieces of evidence that corroborate his or her claim [CPL 440.47(2)(c)]. One piece of evidence "must be" 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" [CPL 440.47(2)(c)]. The second type of evidence that must be submitted is not mandated

from a given list; however, the statute provides examples of the type of evidence that may be submitted [CPL 440.47(2)(c)]. By amendment of a separate section, CPL 390.50(2)(a), the defendant is entitled to a copy of his or her presentence report for use in the application for resentence.

If the court finds that the applicant "has complied with" the requirements, the court "shall" conduct a hearing and "determine any controverted issue of fact"; at the hearing, "reliable hearsay" is admissible [CPL 440.47(2)(e)].

Arguably, putting the proverbial "cart before the horse," the statute appears to have the court "consider any fact or circumstances relevant to the imposition of a new sentence," including the defendant's "institutional record of confinement" before it decides that a resentence is warranted [CPL 440.47(2)(e), second paragraph].

If the court denies the application for resentence, the defendant may appeal of right to the Appellate Division. CPL 440.47(3)(a).

If the court finds that the defendant should be resentenced, the court must notify the defendant of the decision and of the "new" sentence the court will impose unless the defendant changes his or her mind and "withdraws the application" or "appeals from such order" [CPL 440.47(2)(g)]. The appeal is "of right" to the Appellate Division, from the order with the proposed new sentence, on the grounds that the term of that sentence is "harsh or excessive." If the defendant is not successful on appeal, on remand to the trial court, the defendant is yet entitled to withdraw his or her application for resentence. CPL 440.47(3) second sentence.

A defendant is also entitled to appeal of right to the Appellate Division "from a new sentence imposed" on the grounds that the new sentence is "harsh or excessive," or "unauthorized as a matter of law." CPL 440.47(3)(b).

Providing an appeal both from a proposed sentence and from the imposition of that sentence on the grounds that it may be harsh or excessive is unusual. It may, however, be for a defendant who may wish to argue that a proposed sentence is harsh or excessive but who would not want to withdraw the application for resentence if that argument were not successful; in that case, the defendant may choose not to appeal the proposed sentence but upon imposition of that sentence, would then appeal, arguing that the imposed sentence was harsh or excessive.

The People are not entitled to appeal to the Appellate Division an order granting defendant's application for resentence; nor, as is standard, are they entitled to appeal the proposed or imposed sentence.

Either party may appeal, by permission, to the Court of Appeals from a qualifying order of the Appellate Division. CPL 450.90. A qualifying order will not, as is standard, include an Appellate Division order finding in its discretion that a new sentence is harsh or excessive.

The defendant may request that the court assign him or her an attorney for the appeal.

Notes of Decisions (4)

McKinney's Penal Law § 60.12, NY PENAL § 60.12
Current through L.2019, chapter 758 & L.2020, chapters 1 to 56, 58 to 134. Some statute sections may be more current, see credits for details.

End of Document

NEW YORK SUPREME COURT
APPELLATE DIVISION – SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. NICOLE ADDIMANDO, Defendant-Appellant.	App. Div. Docket No. 2020-02485 Dutchess County Indictment No. 74/2018 **AFFIDAVIT OF SERVICE**

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

ROLANDO MARTIN, being duly sworn, deposes and says:

1. I am employed by the firm of Duane Morris LLP.

2. I am over 18 years of age, reside in Manhattan, New York, and am not a party to this action.

3. On August 6, 2020, I caused service of true and correct copy of **MOTION FOR LEAVE TO FILE THE ATTACHED PROPOSED BRIEF OF LEGISLATORS AS *AMICI-CURIAE*** by overnight delivery and electronic means, upon the following:

Hon. Robert V. Tendy By ADA Larry Glasser Office of the Putnam County District Attorney County Office Building 50 Gleneida Avenue Carmel, NY 10512	Garrard R. Beeney Sullivan & Cromwell LLP 125 Broad Street New York, New York 10004

Rolando Martin

Sworn to before me this
6th day of August, 2020

Notary Public

PIERRE GEORGES BONNEFIL
NOTARY PUBLIC-STATE OF NEW YORK
NO. 02BO4947919
QUALIFIED IN NEW YORK COUNTY
MY COMMISSION EXPIRES 10-11-2021