

Domestic Violence Survivors Justice Act

Resource Guide

*A guide for individuals seeking sentencing/resentencing under
New York's Domestic Violence Survivors Justice Act (DVSJA)*

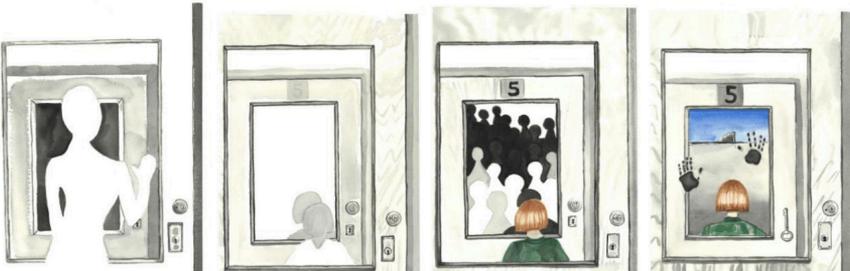


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HELLO AND WELCOME

Thank you for picking up this Resource Guide to learn more about the Domestic Violence Survivors Justice Act (DVSJA). The guide was written by the Survivors Justice Project, a group primarily comprised of women who have experienced incarceration, many of whom fought for the passage of the DVSJA, and all of whom are advocates for ending mass incarceration and domestic violence. We are leading DVSJA implementation efforts across New York State, and one of the most important parts of our work is supporting you through the process. This guide is one way we hope to support you in learning about and navigating the DVSJA process.

The DVSJA is a gender-neutral law, and it should be used by all survivors who meet the law's criteria regardless of gender identity. Our work pays special attention to women, since cisgender¹, transgender², and gender expansive³ women are disproportionately impacted by domestic violence, often left out of conversations around criminal legal reform, and face greater barriers in accessing resources. In New York, the movement to highlight domestic violence's role in criminal legal involvement began with women. Decades ago in 1985, there was a public hearing attended by elected officials inside Bedford Hills Correctional Facility where incarcerated women courageously shared their personal experiences of abuse. Their testimonies planted the seeds for deeper understanding around how abuse and trauma lead to arrest, prosecution, and punishment. The New York Coalition of Women Prisoners continued the fight and campaigned for 10 years to get the DVSJA passed. The DVSJA was signed into law in 2019.

We understand that abuse (physical, sexual, verbal, emotional/psychological, financial, and spiritual) experienced from family members and/or partners at any time over the course of someone's life is a systemic problem. These traumatic experiences often leave behind shame, confusion, anger, and fear. Please know that you are not alone. We stand with you, we fight with you, and we hope we are able to provide support.

1 Cisgender: Describes individuals who identify with the gender assigned at birth.

2 Transgender: Describes individuals who identify with a gender that is different than the one assigned to them at birth.

3 Gender-expansive: Describes individuals with a more flexible range of gender identity, who may be non-binary and not identify with the defined categories of female or male, and may use the pronouns "they," "them," and "theirs."

Survivors have found that applying and going through the DVSJA process can be difficult. The information in this guide may feel overwhelming so please take your time with it and read it at your own pace. We are always open to feedback on how we can improve the Resource Guide, so please feel free to send us your comments.

In struggle and strength,
Survivors Justice Project

INTRODUCTION & HISTORY

What is the Survivors Justice Project?

The Survivors Justice Project (SJP) is a collective of activists, lawyers, social workers, students, and professors/researchers, many of whom are survivors of incarceration and domestic violence. Since the Domestic Violence Survivors Justice Act (DVSJA) went into effect, SJP has come together to fight for the decarceration of survivors of domestic abuse through robust and state-wide implementation of the DVSJA. Of our many goals, we hold supporting survivors in jails and prisons who are seeking sentencing or resentencing under the DVSJA to be the most important.

What is the History of the DVSJA?

In 2009, the New York Coalition for Women Prisoners, a group of currently and previously incarcerated women, and their allies launched the campaign to pass the Domestic Violence Survivors Justice Act. Along with domestic violence advocates, attorneys, judges, activists, and sentencing experts, they advocated for 10 years for recognition of the critical need for the criminal legal system to stop imposing harsh, long prison sentences when domestic violence survivors⁴ are convicted of crimes stemming from the abuse they suffered. In 2019, the DVSJA was finally passed and signed into law.

What Does the DVSJA Do?

The DVSJA does two main things:

1. For domestic violence survivors who are charged with an offense committed after August 12, 2019, it gives judges the discretion to sentence to shorter prison terms and, in some cases, to community-based alternative-to-incarceration programs; and
2. for domestic violence survivors who were sentenced for offenses committed before the law went into effect and are still incarcerated, it gives judges the ability to reduce the sentence to a shorter term.

4 When this Guide uses terms like “survivor,” “abuse,” and “domestic violence,” it is not intended to label any individual who has experienced violence. We honor your journey and recognize that individuals are in various stages of their processing and healing and may use different words to describe themselves and their experiences.

What are the Goals of the DVSJA Resource Guide?

The DVSJA Resource Guide aims to provide insight into the law itself, support you in identifying your needs and creating and taking ownership of your personal narrative, and link you to resources to strengthen your ability to use the DVSJA. This guide can also educate defense attorneys, judges, prosecutors, jail/prison staff and others who are working with survivors.

WHY IS THIS RESOURCE GUIDE NEEDED?

This guide is for anyone applying for either sentencing or resentencing under the DVSJA who is looking for additional information and support. We believe it may be particularly useful for those who identify as women, especially in light of the very high rates of past abuse among women in New York State prisons: 94% have experienced physical or sexual violence in their lifetimes, 82% were severely abused as children, and 75 percent have suffered serious physical violence by an intimate partner as adults.⁵ Domestic violence – whether it be physical, sexual, or the many forms of emotional/psychological abuse – is a major pathway to women’s criminal legal involvement, and the problem is exacerbated by poverty and racism.⁶ For example, survivors may be charged/convicted when they acted in self-defense against an abusive partner/family member, were coerced into participating in a criminal act under the threat of violence, were implicated for their partner/family member’s abuse of their child(ren), assumed responsibility for their abusive partner/family member’s crime, or committed a criminal act in order to cope with, survive, or escape the abuse.

All too often the criminal legal system’s response is to send survivors to prison, sometimes for many years. This represents a shameful failure of the legal system. Instead of giving compassion and assistance to survivors who have suffered abuse, the system imposes harsh punishment and puts them in prison. Instead of providing protection, the criminal legal system becomes just one more entity that has failed survivors in the continuum of violence in their lives.

In this guide, we attempt to explain and demystify the language of the law, which may feel limiting or intimidating, and provide insight into the process. If you decide to apply, the process will require working with an attorney/legal team, gathering evidence, processing and sharing your narrative (your personal history told from your unique perspective), potentially participating in a DVSJA hearing, and waiting for decisions.

5 Browne, A., Miller, B., & Maguin, E. (1999). Prevalence and severity of lifetime physical and sexual victimization among incarcerated women. *International journal of law and psychiatry*. This study presents the most recent data on the experience of lifetime abuse for individuals incarcerated in New York’s women facilities. No recent data suggests these numbers would be much different now.

6 DeHart, D., Lynch, S., Belknap, J., Dass-Brailsford, P., & Green, B. (2014). Life history models of female offending: The roles of serious mental illness and trauma in women’s pathways to jail. *Psychology of Women Quarterly*, 38(1), 138-151.

The law requires survivors to show a link between the abuse they experienced and the offense for which they were prosecuted. Therefore, a critical piece of the process is revisiting and describing your involvement in the offense. Some survivors have said this feels scary because the criminal legal system is so hostile to defendants.

Other people have shared that telling the story from their own perspective, in the context of their life experiences, is empowering and even healing. Sometimes it is both, but there is no question that the sentencing/resentencing process under the DVSJA can be challenging and may feel like yet another struggle that feels daunting to undertake.

We hope you use this guide, as well as the support from your attorney/legal team, trusted friends, and loved ones, as you go through the process. If you have questions or need support, please feel free to reach out to the Survivors Justice Project. You can send us a letter at: Survivors Justice Project, c/o Kate Mogulescu, Brooklyn Law School, 250 Joralemon St., Brooklyn, NY 11201. Please send any letters via legal mail. Lastly, starting a DVSJA application does not mean you have to finish it. You have the power to control the course of the DVSJA application, and you have no obligation to complete the application process if at any point it does not feel right to you.

QUICK REFERENCE GUIDE: SENTENCING AND RESENTENCING

This guide contains information and support on both the sentencing and resentencing process under the DVSJA, and a lot of the information is relevant to both processes. Here is a quick reference guide to point you to the right sections.

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WHAT DOES IT MEAN TO BE A “SURVIVOR” UNDER THE DVSJA?

DOMESTIC VIOLENCE

The term “domestic violence” refers to abuse experienced from a family member, or an intimate partner. An intimate partner can include a spouse, former spouse, a person with whom you have a child in common, and anyone you were intimately involved with. (For more information, see Question 8 in DVSJA: Frequently Asked Questions.) This abuse is often a pattern of behavior that is meant to exert power and control over another person. The abuse can be psychological, emotional, physical, verbal, sexual, and/or financial. The abuse can involve threatening to take children, stalking, and responses and coping mechanisms exhibited in response to these traumatic experiences are varied and complex.

The DVSJA sentencing/resentencing process requires that you reflect on and process these experiences, which we recognize may be difficult and painful, particularly when you are incarcerated and if you are in the midst of feeling the impact of the abuse.

In the words of one survivor:⁷

“People always make stupid comments, like ‘Why didn’t she just leave?’ or ‘How couldn’t you get out of this situation?’ ...In my instance, I was being forced to sell my body and when I was going to court nobody took that into account. All they saw was what I did. They never said ‘What led up to that?’ I didn’t wake up one day and say ‘I’m going to be an arsonist.’ That’s not how it happened.”

7 All the quotations included in the Resource Guide are from survivors of domestic violence who have gone through the DVSJA application process and have given consent for their words to be included.

APPLYING FOR DVSJA AT INITIAL SENTENCING

AN IMPORTANT NOTE ABOUT THE TIMING

The first kind of relief under the DVSJA is available at sentencing right after you are convicted. If you are facing sentencing for offenses committed after August 12, 2019, you must request DVSJA consideration before you are sentenced. Applying at sentencing is your only option to use the DVSJA and get sentencing relief. As the law stands now, for offenses committed after August 12, 2019, you will NOT have the option to bring your case back to court for reduced DVSJA resentencing once you are sentenced.

CHALLENGES OF DISCLOSING ABUSE AFTER ARREST

Some survivors have said that they could not have revealed their experiences of family abuse, sex trafficking, and/or domestic violence right away. During the period immediately after their arrest, during their prosecution, in plea negotiations, or at trial, they did not feel ready, did not want to, or did not feel capable of sharing that history. This can come from the complex feelings towards the partner or family member that was abusive—whether fear, love, confusion, or a combination of all three—or shame, self-blame, and fear of other people in their life learning about the abuse they endured. All of these reactions make sense, which is why some survivors have said it took them a long time to feel safe enough to share their history. For these reasons, applying for the DVSJA when you are facing sentencing can be particularly difficult. In resentencing cases, survivors usually have more time and distance from those traumatic experiences which hopefully makes it a little easier to talk about them.

The DVSJA's limitation that survivors cannot apply for DVSJA resentencing if the offense was committed after August 12, 2019 does not take into account the nature of trauma and how trauma keeps survivors from sharing their truth. Breaking the silence around abuse is a difficult thing to do. If you have not yet been sentenced, and someone in your life has harmed you in a way that was controlling, violent, or abusive, and you feel that those experiences contributed to the offense you have been arrested and convicted of, the DVSJA may apply to you and could reduce your sentence.

If you are scared or not comfortable sharing this history with your attorney, we encourage you to reach out to one of these organizations to speak with a counselor/advocate:

If your case is in the five boroughs of New York City...	If your case is outside of NYC...
<p>STEPS to End Family Violence (a program of Rising Ground)</p>	<p>Women’s Prison Association</p>
<p>STEPS offers holistic clinical and legal advocacy services for survivors of intimate partner violence and other forms of gender-based violence facing felony and/or misdemeanor charges in New York City.</p>	<p>WPA supports women impacted by incarceration through a variety of programs and services.</p>
<p>CONTACT INFO:</p> <p>STEPS to End Family Violence Attn: Criminalized Survivors Program 151 Lawrence St., 5th Floor Brooklyn, NY 11201</p>	<p>CONTACT INFO:</p> <p>Women’s Prison Association 347 East 10th Street New York, NY 10009</p>

WHAT IF I DIDN'T KNOW ABOUT THE DVSJA WHEN I WAS SENTENCED?

If the offense you are convicted of was committed after August 12, 2019 but you were not informed about the option to seek DVSJA sentencing by your lawyer before your plea or trial, and you think you would have been eligible, you should discuss this with your appeals lawyer. If you do not have a pending appeal, you can contact one of the following offices via legal mail to discuss your options:

NYS Office of Indigent Legal Services
Alfred E. Smith Building
80 S. Swan St.
Suite #1147
Albany, NY 12210

or

Survivors Justice Project
c/o Kate Mogulescu
Brooklyn Law School
250 Joralemon St.
Brooklyn, NY 11201

IDENTIFYING YOUR NEEDS

As you begin to contemplate applying for DVSJA sentencing/resentencing, or are on your journey through the process, it is important to take account of the support you may need. Here is a list of questions to help you prepare.

SUPPORT SYSTEM: WHO CAN SUPPORT ME WHILE I GO THROUGH THIS PROCESS?

“There’s a lot of women I talk to who are trying this and they don’t believe they are victims.

Who are like ‘No, no, no, they’re not going to believe me, no one is going to believe me,’ and they’re too ashamed and scared. They need that support system.”⁸

You will have both **strategic/legal needs** pertaining to the preparation of your DVSJA case (such as collecting evidence and statements) and **personal/emotional needs** as you process and share your trauma. There may be people in your life that can provide information that helps your legal case, but who may not be able to be there for you emotionally as you go through the DVSJA process, and it will be important to distinguish between the two. For those who can provide legal case support, you will want to link them to your attorney, social worker, advocate, or legal team as soon as you can.

8 All the quotations included in the Resource Guide are from survivors of domestic violence who have gone through the DVSJA application process and have given consent for their words to be included.

PERSONAL/EMOTIONAL NEEDS

- Some survivors of abuse have trouble discussing their experiences of domestic violence because they feel shame or fear. Discussing those memories can trigger trauma symptoms including nightmares, anger, sadness, hypervigilance, and anxiety. Going through the process can be stressful and it will be helpful to discuss your stress, fears, and hopes with a trusted friend/loved one so you do not feel like you are going through the process alone.
- You may not have had supportive people in your life before incarceration but hopefully there are one or two people that you can count on now as you work through the stages of the sentencing/resentencing process. Your support system may include people you have gotten close to while you have been incarcerated, like trusted friends, clergy, or a counselor. As always, keep in mind the risks that come from discussing the details of your legal case with anyone outside of your legal team. Those conversations are not confidential, so it is a good idea to use them to talk about emotions and feelings rather than specifics regarding your application or hearing. If you have any questions or doubts about what you can discuss about the case with people close to you, it's a good idea to just ask your legal team before having those conversations.
- Some survivors have reported that the DVSJA hearings are upsetting and exhausting. You will likely need support before and after hearings since you may feel attacked by the district attorney or the judge in the process.
- If you are having a hard time identifying your support system, please reach out to the Survivors Justice Project at: Survivors Justice Project, c/o Kate Mogulescu, Brooklyn Law School, 250 Joralemon St., Brooklyn, NY 11201. Please send any letters via legal mail.

STRATEGIC/LEGAL NEEDS

- In order to collect the evidence corroborating your experience of domestic violence, think through all the people in your life who may have witnessed the abuse, noticed the repercussions of the abuse (such as bruises, injuries, or depression), and suspected or even asked you about it. There may be more people who knew or suspected abuse than you think: family members, friends, neighbors, coworkers, supervisors, teachers, classmates, acquaintances, doctors, and nurses could have noticed injuries or suspected abuse based on your actions/behaviors.
- Did you ever talk about the abuse with someone? Was law enforcement or any other government agency ever involved?
- What accomplishments are you proud of since your prosecution? These could be benchmarks like programs you've completed or a good disciplinary record, but they could also be more personal milestones that mean something to you.
- What are your plans for the future and what are you looking forward to after incarceration? You may be able to access support from domestic violence and/or reentry organizations that can assist around reentry planning. Sometimes these organizations can provide a letter of assurance to confirm their commitment to support you if /when you are released.

LEGAL REPRESENTATION: WHAT SHOULD I KEEP IN MIND WHEN I AM WORKING WITH MY ATTORNEY?

- Your attorney should be working with you to build rapport and trust, including answering all your questions and responding to your needs.
- You can work with your attorney to gather the following documents, and assisting with this work may help you feel involved and in control of your narrative every step of the way:
 - Police and domestic incident reports
 - Medical records, including emergency room visits, routine doctor exams and notes, and mental health records
 - Witness statements
 - The pre-sentence report
 - Articles and other media pieces (media attention may have impacted your case)
 - Incarceration records: certificates, work assignment reports, mental health records
- You can ask to see everything that has been gathered so you know what may get submitted to the court and you can work with your team to put it all together and support your narrative (for an explanation of narrative, please see “Working Through Your Narrative” on Page 18). You should know exactly what is going to be included in any court filings and have an opportunity to read them before they are filed if you want. The whole case file, including any documents gathered in the investigation, belongs to you. If you ever want copies of these documents, you can ask your legal team to share them with you.

PARENTING NEEDS:

HOW MIGHT MY DVSJA CASE IMPACT MY CHILDREN?

Some survivors have concerns about how revealing a history of domestic violence in court could impact their child(ren) and connection with them. We encourage you to discuss these concerns with your legal team (attorney, social worker, and/or advocate) so that any issues can be addressed. One option may be to try to protect certain information from being accessible to the public or the media.

PAROLE NEEDS:

HOW MIGHT MY DVSJA CASE IMPACT MY PAROLE HEARING?

What is shared in your DVSJA hearing—including your testimony, if you decide to testify, and the court’s decision—can be introduced in your parole board hearing. It is helpful to be mindful of how that may impact parole proceedings so please talk through any concerns with your legal team.

OTHER LEGAL NEEDS:

HOW MIGHT MY DVSJA CASE IMPACT OTHER PENDING LEGAL MATTERS?

If you have any other litigation pending – such as a direct appeal, a C.P.L. § 440 motion, a federal habeas petition, a Family Court matter, or a civil lawsuit against the government – you should consult with your lawyer(s) on those cases to discuss whether a DVSJA claim could impact them. There may be no problem with filing a DVSJA claim while you have another case pending, but it is important to check in with counsel before doing so.

WORKING THROUGH YOUR NARRATIVE

"It was hard. Because you put a lot of that stuff away. You don't want to relive it.

You don't want to go through it.... When you're telling your story, you're telling it to a person who knows absolutely nothing about you, nothing about your history, so you're basically backtracking. You need to start from the beginning and sometimes it is difficult.

There would be days when they would come visit me, I would get halfway through and be like 'Guys, I can't do this today.' And they would be very understanding and say 'OK, we're going to stop here' and they would change what we were talking about."⁹

The DVSJA process is centered on your personal narrative—the story of your life, not the story of your case. The offense may have been an isolated incident, but your story started long before your arrest and conviction. For those of you whose case has been covered in the media, there may be a narrative out there about you, but you are not this story either. You are the only expert of your life, and in order to share your true narrative with your defense team and ultimately the court, you will need to take time to reflect on how you see yourself, how you understand your history, and how the events of your past impacted you.

"You need to let it all out. You need to let everything out. It is going to make you feel better, even if you lose this case or not. It's going to make you feel better. It's time to share your story. It's time to speak up."

This is not an easy process, and it is even harder to do in jail or prison. While incarcerated, it is often not safe to talk openly about your case, particularly discussing the full context surrounding what happened. Additionally, the process involves revisiting experiences and relationships from your past that might trigger feelings of trauma, anger (towards others and yourself), as well as shame.

9 All the quotations included in the Resource Guide are from survivors of domestic violence who have gone through the DVSJA application process and have given consent for their words to be included.

Traumatic experiences are events in which you felt your life or well-being were in danger, and those can be painful to recall, especially when you experienced them repeatedly (which is often the case with childhood abuse or other types of domestic violence). So, avoidance of these memories – consciously or unconsciously – is a common coping mechanism. You may also feel scared to share too much with your attorney or may worry how revealing a history of domestic violence will affect you in other parts of your life. It probably feels safer to remain silent about the circumstances surrounding your life and case to spare yourself from judgment and more punishment.

Also, some people feel locked into what they first said to the police, their attorney, and loved ones. That first story sticks with you and you may feel unable to change it now. However, that is not true. As you think through your history and how your experiences (your fears, your relationship patterns, your coping mechanisms, etc.) have shaped your life, your self-awareness and insight will increase. The new telling of your narrative will reflect that.

"I felt like I wasn't innocent, but I wasn't guilty either."

For trauma survivors, it is normal to have gaps in your memory. In order to feel safe enough to revisit those experiences, you need to trust the process and the individuals helping you through it, so we recommend you seek support from your loved ones, defense team, and/or outside organizations. This process will help you connect your experiences of domestic violence to your case, which is a central piece to your DVSJA hearing.

Finally, you may be asking yourself, "How do I share my story but not hurt myself in the process?" This is important to think about, and for your legal team to understand as well. Remember that you are building your narrative to help yourself and your legal team. Information you share with your legal team cannot be shared without a discussion and your consent.

If your attorney or someone on your team is not your same gender (especially if you identify as a woman and your attorney is a man), it may be more difficult to share details of your history. This is completely understandable. It is often easier to share experiences with someone you know can identify with you. If this is the case, you can consider sharing this challenge with your attorney. Knowing your concerns will hopefully encourage your attorney to get the assistance of another attorney, or a social worker or mitigation specialist, to meet with you.

Below are some suggested questions to help you get started. Journaling can be a helpful tool as well, but make sure your journal and all of your legal papers are kept safe.

QUESTIONS ABOUT YOUR HISTORY

- What was your home, school, and neighborhood environment like? How did those environments influence you?
- What do you want the court to know about you? What parts of yourself do you want to highlight?
- What experiences from childhood and adolescence impacted your life in meaningful ways? How did these experiences change the trajectory of your life? How did they shape your view of yourself? Your view of your world?
- If you experienced childhood abuse, how did you internalize this experience? How did you think of yourself afterwards? How did you cope?
- How do you think those earlier experiences relate to the path that led to your criminal conviction (if they did)?

QUESTIONS ABOUT THE DOMESTIC ABUSE AND TRAUMA

- When did the abuse start?
- If you didn't see it as abuse at the time, how did you understand it/rationalize it?
- How did it change over time?
- In what specific ways did your partner/family member hurt or scare you?
- What coping mechanisms did you use to deal with the abuse/trauma? What messages did you tell yourself about this abuse? (For example, you have to stay, you cannot leave because your partner/family member will come after you, hurt you or someone else, etc.)
- At the time of the offense, what were you thinking and feeling?

QUESTIONS SURROUNDING RESPONSIBILITY AND REMORSE

- Who were all the people impacted by the offense and how? Try to create a list.
- What would you say to the victim(s) of the offense? What would you say to their loved ones?

*WHEN YOU ARE PLANNING FOR YOUR RELEASE AND REENTRY,
HERE ARE A FEW THINGS TO THINK ABOUT:*

- Safe shelter
- Support in your community, spiritual connections
- Possible employment/educational/vocational opportunities
- Healthcare services
- Substance use services and support groups
- If you do not think it will be helpful to return to your prior community or family, where else might be better?

This personal work is a critical part of the DVSJA process. You alone hold the key to connecting the dots between your past experiences of abuse and your criminal legal involvement. At first it may feel stressful, which is why people can sometimes be passive in the process, but being able to stand in your truth and speak freely about what has transpired in your life can be liberating. The thing you may feel the most fear talking about is also what you may be yearning to discuss.

THE DVSJA RESENTENCING PROCESS

CRIMINAL PROCEDURE LAW § 440.47

This flow chart explains the process for seeking resentencing for survivors already sentenced and in prison. For DVSJA consideration at initial sentencing, under Penal Law § 60.12, you must request DVSJA consideration before you are sentenced. There is no specific application process to complete.

To apply for resentencing you must:

- (1) be incarcerated
- (2) be serving a sentence with a minimum/determinate term of 8 years or more
- (3) have been convicted of an offense committed before August 12, 2019; and
- (4) the offense must be eligible for alternative sentencing under PL § 60.12.

Your request will go to your original sentencing judge (if judge is still on the bench). You can also request an attorney in your initial application.

Trial Court

(same court where you were sentenced before)

Submit Initial Request to Apply

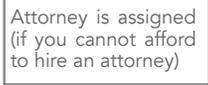
*Sample application form (UCS447 Form)

Request Approved

Request Denied

Can Reapply Without Prejudice

Attorney is assigned (if you cannot afford to hire an attorney)



To file you must:

- (1) be a survivor of domestic violence subjected to substantial physical, sexual, or psychological abuse;
- (2) such abuse was a significant contributing factor to criminal behavior; and
- (3) the original sentence was unduly harsh.

You must submit 2 pieces of evidence with application. The DA is notified and given a copy of the application.

*For questions about this stage, please see DVSJA: Frequently Asked Questions.

File DVSJA Application

"Without prejudice" means the decision is not permanent; you can reapply/resubmit

Hearing

Application Dismissed

Can Resubmit Application Without Prejudice

Resentence Granted

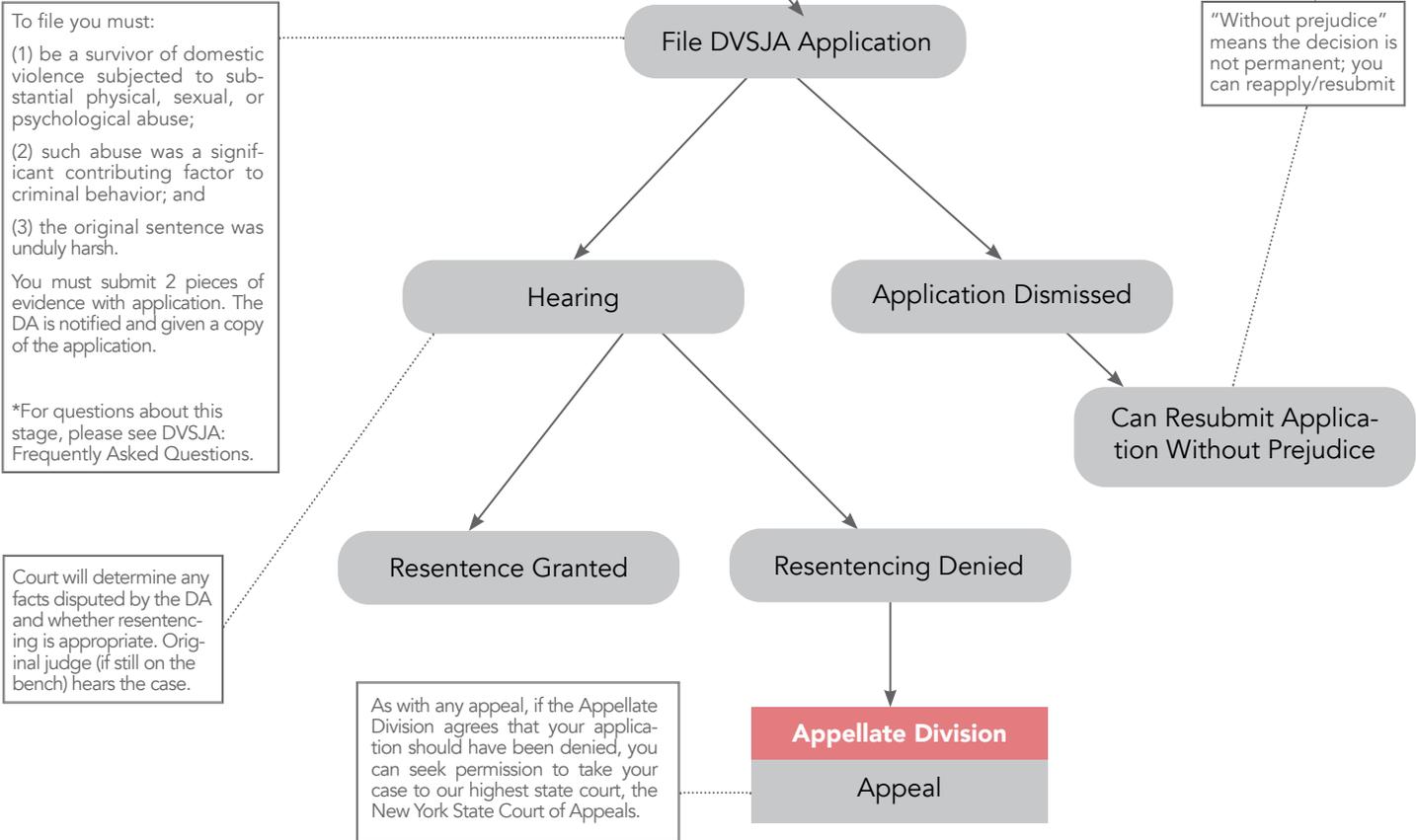
Resentencing Denied

Court will determine any facts disputed by the DA and whether resentencing is appropriate. Original judge (if still on the bench) hears the case.

As with any appeal, if the Appellate Division agrees that your application should have been denied, you can seek permission to take your case to our highest state court, the New York State Court of Appeals.

Appellate Division

Appeal



DVSJA: FREQUENTLY ASKED QUESTIONS

1. *WHAT ARE THE CRITERIA FOR APPLYING FOR DVSJA AT YOUR INITIAL SENTENCING?*

If you are seeking DVSJA sentencing you must:

1. Be a victim of substantial domestic violence at the time of the offense (see Question 5 for additional explanation);
2. The abuse must be a significant contributing factor to the offense (see Question 6); and
3. The sentence (or possible sentence) imposed must be unduly harsh (see Question 7).

The person harmed in the offense does not need to be the abusive partner/family member. (For criminal offense restrictions, please see Question 3.)

2. *WHAT ARE THE CRITERIA FOR APPLYING FOR DVSJA RE-SENTENCING?*

In order to apply for resentencing, the law requires that you meet all three criteria for DVSJA sentencing (listed in Question 1) and three additional criteria:

1. Be currently incarcerated;
2. Be serving a minimum or determinate sentence of 8 years or more in prison; and
3. Be convicted for an offense committed before August 12, 2019.

(For criminal offense restrictions, please see Question 3.)

3. WHAT OFFENSES ARE ELIGIBLE FOR DVSJA SENTENCING/ RESENTENCING? WHAT OFFENSES ARE NOT ELIGIBLE?

The DVSJA applies to:

- Felonies (P.L. § 70.00);
- Violent felonies (P.L. § 70.02);
- Predicate felonies/second felony offenses (P.L. § 70.06); and
- Class A drug felonies (P.L. § 70.71).

The DVSJA includes offenses directed towards an abusive partner or family member/caregiver, directed towards a third party, and offenses without a “victim” (for example, drug possession). It is important to note that the “victim” does not need to be the person responsible for perpetrating the domestic abuse.

The DVSJA does not apply to:

- Aggravated Murder (P.L. § 125.26);¹⁰
- Murder 1 (P.L. § 125.27);
- Murder 2-Rape (P.L. § 125.25(5));¹¹
- Terrorism (any offense in Penal Law Article 490);
- Any offense that requires an individual to register as a sex offender.

10 Aggravated Murder (P.L. § 125.26): Intentionally causing the death of another person who was a police officer or a peace officer performing his or her official duties; a firefighter, emergency medical technician, ambulance driver, paramedic, physician or registered nurse responding to an emergency; employee of a state correctional facility performing his or her official duties; or someone who was less than 14 years old or younger in a particularly cruel manner, such as by first torturing the victim.

11 Murder 2-Rape (P.L. § 125.25(5)): Being eighteen years old or more, while in the course of committing rape in the first, second or third degree, criminal sexual act in the first, second or third degree, sexual abuse in the first degree, aggravated sexual abuse in the first, second, third or fourth degree, or incest in the first, second or third degree, against a person less than fourteen years old, he or she intentionally causes the death of such person.

4. HOW IS “SUBSTANTIAL” DOMESTIC VIOLENCE DEFINED?

The DVSJA requires that you have experienced “substantial physical, sexual or psychological abuse” that is related to the offense. However, “substantial” domestic violence is not explicitly defined in the Penal Law or the Criminal Procedure Law. In the broadest sense, it means that the abuse has had an important and noteworthy impact (as opposed to immaterial, unsubstantial, or trivial impact). Each case is unique, and you will be able to work with your legal team to describe to the court the abuse you experienced.

5. DO YOU HAVE TO BE EXPERIENCING DOMESTIC VIOLENCE “AT THE TIME” OF THE OFFENSE?

The law states that you must have been a “victim of domestic violence” subjected to substantial physical, sexual, or psychological abuse “at the time of the instant offense.” However, this does not mean that the offense must have occurred during an incident of domestic violence. The time between the domestic violence and the offense is important but does not solely determine whether or not the DVSJA applies.

One of the questions arising in DVSJA cases is ‘when does someone stop being a victim of abuse?’ since trauma can affect people for years after they experience domestic violence, including those who experienced abuse when they were children. If you feel that prior domestic violence contributed to the incident in your case, there may be a legal argument to make that you were still a victim “at the time of the offense.” This will be a topic to discuss with your attorney. As of 2021, there has been at least one successful case in which the DVSJA application was based on childhood abuse from many years before the offense.¹² On the other hand, there has also been an appeals court decision in another case saying that the abuse or abusive relationship must be “ongoing” at the time of the offense.¹³ Therefore, how the law will view your experience with abuse is an open question that you will need to work through with your legal team.

¹² People v. D.L., 72 Misc.3d 257 (Cnty Ct., Columbia Cnty 2021).

¹³ People v. Williams, 198 A.D.3d 466 (1st Dep’t 2021).

6. HOW IS “SIGNIFICANT CONTRIBUTING FACTOR” DEFINED?

“Significant contributing factor” is also not explicitly defined in the Penal Law or the Criminal Procedure Law. By looking at the plain language itself, case law, and legislative history, it can be understood as an experience of domestic violence that is important or meaningful and has a clear and prominent connection to your participation in the offense and/or conviction. One question to ask yourself is whether your conviction would not have occurred without the experience of domestic abuse. If so, then the abuse may have been a significant contributing factor.

While the experience of domestic abuse needs to have a connected to the conviction, it does not need to be the sole or primary reason that the offense was committed (such as fighting back in self-defense). Additionally, you do not need to have raised a specific defense relating to the domestic violence (for example: justification, duress, or extreme emotional disturbance) at the time of prosecution in order to be eligible.

You might be wondering how exactly the court makes this determination, and we encourage you to discuss all of your questions and concerns with your legal team. Educating the judge and district attorney on how your specific experience of domestic violence impacted your life, decision-making, emotional well-being, state of mind, and, ultimately, the offense is a critical part of every DVSJA sentencing/resentencing process.

7. WHAT IS AN “UNDULY HARSH” SENTENCE?

The judge determines whether a sentence is “unduly harsh” after taking into account the “nature and circumstances of the crime” and the “history, character and condition of the defendant.” Some factors that the court might consider in determining if a sentence is unduly harsh include: the details of the offense itself, a person’s institutional record while incarcerated, vulnerability (the risk factors you faced prior to the conviction and/or the vulnerability you will experience during incarceration), your age, the perspective of the person harmed by the crime, and your perspective.

8. *DOES THE DVSJA INDICATE WHO THE PERPETRATOR OF THE ABUSE MUST BE?*

Yes. The DVSJA requires that the perpetrator of the abuse was “a member of the same family or household,” as those terms are defined by another part of the law: Criminal Procedure Law Section 530.11.

C.P.L. § 530.11 recognizes that people perpetrating domestic abuse can include: a spouse or former spouse, a person with whom you have a child in common, an intimate partner, a family member or parent, guardians and caregivers (such as foster/adoptive parents, caregivers in congregate care settings, group home staff), and religious officials. Based on recent cases, all of those examples are considered to be members of the same household for DVSJA purposes. The law says intimate partners and people who share a child in common do not necessarily have to live together and can also include relationships that were inconsistent (on again/off again), as well as relationships between youth who were dating.

With respect to intimate partners or former partners, while the law’s language specifies that the applicant must have been in a “relationship” with the abusive partner, SJP does not believe that all situations – specifically youth who were sexually abused by an adult – should be characterized as “relationships.” In cases where the perpetrator of abuse was a stranger, it may be more difficult to use the DVSJA but it does not mean you are prohibited from applying. You can still discuss your options with your legal team.

9. *HOW MUCH AND WHAT TYPE OF EVIDENCE DOES THE JUDGE TAKE INTO ACCOUNT IN ORDER TO DETERMINE THE PRESENCE OF DOMESTIC VIOLENCE?*

If you are seeking DVSJA sentencing right after conviction:

If you are seeking DVSJA consideration before you are sentenced, there are no strict guidelines as to the type of evidence required. To determine whether you should be sentenced under the DVSJA, Penal Law § 60.12 says that at the hearing, “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.”

Relevant evidence could include expert testimony, medical records, police reports, or other court documents. Reliable hearsay (certain statements made outside of court) is admissible at a DVSJA sentencing hearing.

If you are seeking DVSJA resentencing after you were already sentenced:

For DVSJA resentencing, the law requires two pieces of evidence to verify that there was domestic violence. At least one piece of evidence must be: a court record, pre-sentence report, social services record (such as ACS/child welfare record or shelter record), hospital record, sworn statement from a witness, law enforcement record, domestic incident report, or an Order of Protection.

The second piece of evidence has less strict requirements. It may include, but is not limited to, any legal, social service, or medical/mental health record prepared at or around the time of the offense that supports your claim, or verification from a licensed medical or mental health care provider, employee of the court, member of the clergy, attorney, social worker, rape crisis advocate, or other advocate acting on behalf of an agency that assists survivors of domestic violence.

When you are identifying the pieces of evidence to provide, it may be helpful to think about any time you went to the hospital or doctor (even if it was unrelated to the treatment of domestic violence related injuries or trauma), if you had to miss school or work because of the abuse (and whether a teacher, classmate, supervisor, or coworker may be able to verify that), if you ever received mental health treatment, if someone in your life (such as a neighbor, your child's teacher, school crossing guard, cashier, etc.) may have ever suspected you were experiencing domestic abuse. The process of brainstorming the type of evidence to present in court will be an important part of the work you do with your legal team.

Finally, we want to acknowledge that not all abuse can be confirmed – and that does not mean it never happened. Even if you think there's no way to corroborate abuse that happened to you, we encourage you to consider getting support from a legal team who can help you with an investigation to see what is possible. Feeling like you lack evidence to "back up" your experience of abuse should not prevent you from applying for relief.

10. WHAT ARE THE REDUCED SENTENCES UNDER THE DVSJA?

The Legal Aid Society of New York created the following chart indicating the significantly reduced sentencing/resentencing guidelines allowed under the DVSJA (as explained in Penal Law § 60.12). The DVSJA sentencing guidelines fall below New York State's standard statutory minimums.

As an example, the table indicates that if someone without a previous criminal record was convicted of Attempted Murder in the Second Degree (a class B violent felony), normal sentencing guidelines would require a determinate or flat sentence of 5 - 25 years (with 5 years post-release supervision). Under the DVSJA reduced sentencing guidelines, a judge could sentence/resentence that person to 1 - 5 years determinate/flat (with 2.5 - 5 years post-release supervision). When someone is resentenced under the DVSJA, they get credit for all the time they have already served. In most cases, if they have served more than the new sentence, they will also get credit toward the term of post-release supervision. New sentencing guidelines under the DVSJA (per Penal Law § 60.12) are as follows:

DVSJA SENTENCING COMPARISON CHART

Updated March 22, 2021

**THE
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SOCIETY**

Sentencing Provision			Standard Sentence			DVSJA Sentence		
Statute		Class	Min	Max	PRS	Min	Max	PRS
70.00 60.12(9)	1 st Non-Violent	E	1 – ½ max	3 – 4	n/a	Split or def. 1	1½	1
		D	1 – ½ max	3 – 7	n/a	Split or def. 1	2½	1
		C	1 – ½ max	3 – 15	n/a	Split or def. 1	5½	1 – 2
		B	1 – ½ max	3 – 25	n/a	Split or def. 1	9	1 – 2
70.02 60.12(2)	1 st Violent	E	1½	4	1½ – 3	Split or def. 1	1½	1½ – 3
		D	2	7	1½ – 3	Split or def. 1	2	1½ – 3
		C	3½	15	2½ – 5	Split or def. 1	3½	2½ – 5
		B	5	25	2½ – 5	Split or def. 1	5	2½ – 5
70.06(6) 60.12(8)	Violent Prior Non-Violent	E	2	4	5	1½	2	1½ – 3
		D	3	7	5	2	3	1½ – 3
		C	5	15	5	2½	5	2½ – 5
		B	8	25	5	3	8	2½ – 5

70.06(3) 60.12(10)	Non-Violent Prior Non-Violent	E	½ max	3 – 4	n/a	Split or def. 1½	2	1 – 2
		D	½ max	4 – 7	n/a	Split or def. 1½	4	1 – 2
		C	½ max	6 – 15	n/a	Split or def. 1½	8	1 – 2
		B	½ max	9 – 25	n/a	Life probn 2	12	1 – 2
70.06(3) 60.12(11)	Non-Violent Prior Violent	E	½ max	3 – 4	n/a	2	2½	1½ – 3
		D	½ max	4 – 7	n/a	2½	4½	1½ – 3
		C	½ max	6 – 15	n/a	3½	9	1½ – 3
		B	½ max	9 – 25	n/a	6	15	1½ – 3
70.00 60.12(3)	1 st Felony	A	15 – 25	Life	n/a	5	15	5
70.71(2) 60.12(4)	1 st Drug	A-I	8	20	5	5	8	1½ – 3
70.71(2) 60.12(6)	1 st Drug	A-II	3	10	5	1	3	1½ – 3
70.71(3) 60.12(5)	2 nd Drug Prior Non-Violent	A-I	12	24	5	5	12	1½ – 3
70.71(3) 60.12(7)	2 nd Drug Prior Non-Violent	A-II	6	14	5	3	6	1½ – 3

11. WHAT DOES THE DVSJA SENTENCING (P.L. § 60.12) PROCESS ENTAIL?

When applying for DVSJA sentencing, the process is more straightforward than what is required for resentencing. There is no application process. The court will hold a hearing to determine if you meet the requirements for DVSJA sentencing consideration: if you have experienced substantial domestic violence, if the domestic violence significantly contributed to the criminal offense, and if a sentence under normal sentencing guidelines would be unduly harsh. At this hearing, the judge will consider oral and/or written testimony, take testimony of witnesses offered by either party, and consider relevant evidence to assist in making its determination (“reliable hearsay,” as well as testimony from a witness under oath, is admissible). After the hearing, the judge will issue a ruling on whether to sentence under the normal sentencing guidelines or under the DVSJA guidelines (please see question 10 for new guidelines).

12. WHAT DOES THE DVSJA RESENTENCING (C.P.L. § 440.47) PROCESS ENTAIL?

For resentencing, you will need to go through the following steps, which are captured in the flow chart above on page 23:

- a. Request to Apply. The first step is to submit a request to apply for DVSJA resentencing, which also includes a request for counsel. (That request form, UCS447, is included in the Appendix and it may also be available in your law library.) There is no deadline to apply—you can do this at any time if the offense for which you are serving a sentence was committed before August 12, 2019.¹⁴ When you submit this form, you must also send proof that you are sentenced to 8 years or more of incarceration (for example, a time computation sheet). Unlike other motions to the Court, you do not need to (and should not) send this request to the District Attorney’s office. You will also be able to request that the court assign a lawyer to represent you if you are given permission to apply.

¹⁴ For offenses committed after August 12, 2019, you must request a DVSJA sentence at the time you are sentenced. You cannot later seek resentencing under the DVSJA.

Your request will either be approved or denied. If your request is approved, the approval only signifies that the Court is permitting you to move forward to the next step - submitting the actual DVSJA resentencing application. You have not been approved for resentencing. If it is denied, it is "without prejudice," which means you can resubmit the request with additional information or if the court made a mistake. If your request to apply is denied and you have questions, you can reach out to SJP by writing to: Survivors Justice Project, c/o Kate Mogulescu, Brooklyn Law School, 250 Joralemon St., Brooklyn, NY 11201. Please send any letters as legal mail.

- b. File DVSJA Application. If the court approves your request to apply, and you requested a lawyer, you will be assigned an attorney. With the attorney, you can begin working on filing the DVSJA application. The DVSJA application must contain two pieces of evidence corroborating the domestic violence. When the application is filed, the district attorney is informed, given a copy of the application, and is allowed to respond by opposing or consenting to the application. The application will either be approved or it will be denied if the court feels there is a lack of evidence. If the court grants the application, it will schedule a resentencing hearing. This does not mean that the Court approves your resentencing, only that it has granted a hearing to learn more. If the application is denied, it is again "without prejudice," which means you can submit another application with more information. You do not need to start the entire process over again with the request to apply.
- c. Resentencing Hearing. The judge who originally sentenced you will also preside over the DVSJA resentencing hearing. The only time this will not happen is if that judge is no longer on the bench, in which case the request is assigned to another judge. While the district attorney will be able to present an argument and evidence at the hearing, this hearing is not a trial. It should not feel like one, but in many cases it will. Once the hearing is over, the judge will make a ruling and issue a decision, either granting or denying resentencing. There is no way to know how long the judge may take to issue a decision. In rare cases, the resentencing motion can be granted without a hearing. If resentencing is denied, you can appeal the decision. The Notice of Appeal must be submitted to the Appellate Division within 30 days. (For more information, please see *The DVSJA Hearing*.) For a flowchart of this entire process, please see *The DVSJA Resentencing Process*.

13. *SHOULD I SEEK RESENTENCING IF I HAVE SERVED MOST OF MY ORIGINAL SENTENCE?*

A new sentence can impact the length of time you are required to be on parole/post release supervision, so it may still be worth pursuing even if you are close to your conditional release date or if you will be released soon on parole. This can be especially important as parole violations can mandate a return to incarceration.

You must, however, submit the application while you are still incarcerated.

14. *DOES THE ORIGINAL SENTENCING JUDGE DECIDE THE RESENTENCING APPLICATION?*

Yes, if the original sentencing judge is still on the bench. If not, your case will be assigned to another judge. Going in front of the same judge can feel scary and, if you had a particularly harsh judge, it may feel useless to even apply. However, in some DVS-JA cases, judges have been open to revisiting the case, hearing new information, and rethinking their past sentencing decision. SJP encourages you to discuss these concerns with your legal team and to not let this be a barrier to applying.

15. *IF MY INITIAL REQUEST TO APPLY OR MY REQUEST FOR A HEARING IS DENIED, CAN I REAPPLY?*

Yes. Depending on what stage you were denied, you can continue to resubmit your request to apply and resubmit your request for a hearing “without prejudice” as many times as you would like.

16. *WHAT, IF ANY, IS THE TIMEFRAME FOR DVSJA SENTENCING/ RESENTENCING?*

If you have not yet been sentenced, your attorney must let the court know that you want to be considered for alternate sentencing under the DVSJA before the court sentences you. A DVSJA hearing (prior to the sentencing hearing) will then be scheduled so that evidence can be presented. If you are facing sentencing for offenses committed after August 12, 2019, you are only allowed to be considered for reduced DVSJA sentencing at the time of sentencing. If you feel that you should have been considered for DVSJA sentencing but were not aware of the option, please see Question 20 for more information.

If you were sentenced for an offense committed prior to the law going into effect on August 12, 2019, and are still in custody, there is no deadline for applying for resentencing. You can do so at any time as long as you are still incarcerated.

17. *HOW LONG IS THE PROCESS GOING TO TAKE?*

Unfortunately, there is a lot of waiting throughout the DVSJA resentencing process: waiting for your request to apply to be approved, waiting as your legal team puts together your application with you, waiting to obtain records/evidence (such as affidavits, psychological exams and reports, etc.), waiting for the prosecutor to respond after filing, waiting for the judge to grant a hearing, waiting for the hearing itself and then waiting for the decision. A great deal of delay is built into the process without much transparency around what is going on, and there is no way to tell how long each step of the process will take. The waiting times are normal, so please do not be alarmed—it does not mean anything is going badly; however, we understand these delays can certainly be frustrating and anxiety-producing.

If you are seeking DVSJA consideration before you have been sentenced, the process is shorter (see question 11), but there is still no way to tell exactly how long you will have to wait. There is one hearing required in which your judge will review the evidence in order to make a determination of whether to use the standard sentencing guidelines or the DVSJA reduced sentencing guidelines.

With both DVSJA sentencing and resentencing, it will be helpful to seek support from people in your life that you trust. Discussing your concerns will help you manage the process.

18. *WHAT HAPPENS IF THE DVSJA DOES NOT APPLY TO ME? HOW ELSE CAN MY HISTORY OF ABUSE AND TRAUMA BE USED IN MY DEFENSE?*

There are survivors whose experience of domestic abuse contributed to the offense for which they are convicted but who are ineligible for applying for the DVSJA. Those survivors may be sentenced to less than 8 years or may be convicted of one of the excluded offenses. We hope that the DVSJA brings in a new understanding and appreciation of domestic violence within the criminal legal system, and that this new awareness can also impact clemency petitions, parole hearings, and other legal proceedings. If you are already working with an attorney/legal team, we encourage you to speak to them about how your experience of domestic violence may be relevant in these other contexts. If you are not working with an attorney, you can reach out to SJP by writing to: Survivors Justice Project, c/o Kate Mogulescu, Brooklyn Law School, 250 Joralemon St., Brooklyn, NY 11201. Please send any letters via legal mail.

19. *IS MY CASE INFORMATION CONFIDENTIAL?*

Court filings are not confidential and records of the DVSJA proceedings may also be accessible to the public unless the judge seals the file. Ask your legal team to review with you what information in your case may be made publicly available and how to best protect your information.

20. *I WAS CONVICTED FOR AN OFFENSE THAT OCCURRED AFTER AUGUST 12, 2019 BUT I DID NOT REQUEST SENTENCING UNDER THE DVSJA BECAUSE I DID NOT KNOW ABOUT IT. WHAT CAN I DO NOW, SINCE I CANNOT APPLY FOR DVSJA RESENTENCING?*

If you feel your attorney failed to assess whether your experience of domestic violence contributed to your criminal conviction, or never informed you about DVSJA sentencing, you may be able to seek a new sentencing hearing by arguing that your lawyer was ineffective. There are two ways to do this: on direct appeal or through a post-conviction motion pursuant to C.P.L. § 440. A successful claim of ineffective assistance of counsel requires two things: (1) your attorney must have failed to follow professional standards while representing you, and (2) there must be a “reasonable probability” that your attorney’s poor representation negatively affected the outcome of your case.

You should discuss these options with your appellate lawyer. If you never filed an appeal, you can start the process by contacting the New York State Office of Indigent Legal Services at: NYS Office of Indigent Legal Services, Alfred E. Smith Building, 80 S. Swan St, Suite #1147, Albany, NY 12210. If your appeal is already over, you can still go back to your appeals lawyer and ask them about a C.P.L. § 440 motion based on ineffective assistance of counsel.

21. *WHAT IF I AM INNOCENT?*

The DVSJA sentencing/resentencing process requires that you were involved in the offense and that your involvement stemmed at least in part from the abuse you suffered. Therefore, if you did not have any involvement in the offense, even if you are a survivor of domestic violence, the DVSJA may not be the right vehicle of relief for you. However, there are some unique cases where a person is innocent of the offense for which they were convicted but was still involved in the underlying incident. Because each factual situation is different, it is important to discuss with your legal team how a claim of innocence would affect your DVSJA application.

22. *WHAT IF I NEVER MENTIONED MY EXPERIENCES OF FAMILY ABUSE OR INTIMATE PARTNER ABUSE DURING MY ORIGINAL PROSECUTION? WILL I BE ACCUSED OF "CHANGING MY STORY" NOW?*

There are many reasons why you might not have shared your experiences of abuse during your case. Discussing traumatic events requires a sense of safety and trust—two things that are hard to achieve after experiencing violence and then being arrested and prosecuted. Domestic violence survivors also often experience coercive control from an abusive partner/family member and may appear to “change” their story for the same reasons they may be unable to leave the relationship: violent repercussions, pressure from the abuse, intimidation, and psychological manipulation. Changes or gaps in your story, your inability to remember parts of your story, and your resistance to sharing your full story (likely due to fear or shame) can often be explained by the impact of trauma. Your legal team should work to understand how the trauma of abuse impacted you to be able to explain to the judge and district attorney why your story may be different now or has changed over time.

THE DVSJA HEARING

If you are granted a DVSJA sentencing/resentencing hearing, you might wonder what the hearing will be like and what the emotional ramifications may be for you and your loved ones. Applying for sentencing/resentencing under the DVSJA is a personal decision that you should always discuss with your attorney so that you have a clear understanding of the path ahead of you. Survivors who have gone through the process have contributed to the following tips.

PREPARATION

- It is important to feel adequately prepared for the hearing. Ask your legal team all your questions so you know who will be there, what to expect, etc.
- Feel confident in your narrative and stand in your truth. If you decide to speak, whether in your testimony or personal statement, feel prepared to share your insights.
- While you are thinking about the harm you have experienced, it is important to recognize the harm that resulted from the offense. We encourage you to reflect on the impact and loss felt by those that have been harmed. We recognize that this is a process that you may do with other people (your support system, legal team, or a group in prison), or you may feel more comfortable doing alone. It's also important to remember that the harm caused by the offense and the harm you experienced are both valid and can coexist—reflecting on the harm caused by the offense does not diminish the pain of your own experience with domestic violence.
- Testifying at the hearing is a strategic and personal decision, and, with your legal team, you should explore whether or not it makes sense in your case. If you decide to testify, the district attorney and judge will probably ask you questions about the most intimate and painful parts of your life. Answering those questions can be overwhelming. This examination can also feel like a re-trial of your original case. For some people, it can also feel like an opportunity to finally tell your side of the story. Ask your legal team to help think of the questions you may be asked so you can begin to prepare. Individual emotional preparation and the act of

practicing talking through your narrative with someone you trust will help you make sense of your history, relieve your stress, and build confidence and strength.

HEARING

"Under no circumstances can anyone ever take what is inside of you. It is what defines us as individuals. The prosecutor, the judge, an attorney...do not have the capacity to ever take your strength, experience, or ability to persevere and rise above the abuse you have suffered."¹⁵

- The hearing will likely be emotionally, psychologically, and even physically exhausting.
- Although the DVSJA resentencing hearing is not supposed to be a re-trial of your original case, unfortunately it may feel like that. The DVSJA hearing is meant to be about your experience of domestic violence and how it contributed to the offense for which you have been convicted. Every hearing is different, but it is important to keep this in mind as you prepare.
- Highlight your personal growth. This will help demonstrate your insight and how you have emerged or want to emerge from the domestic violence. Discussing this can move the judge and district attorney, and it will also help give you confidence. Explore with your legal team whether this can be done in verbal testimony, in a written statement, or some other form.
- You may have to address statements you made when you were first arrested or any testimony you gave in court. If you are worried about sharing something in your DVSJA sentencing/resentencing hearing that differs from what you said when you were first arrested and prosecuted, raise this concern with your legal team. You can share something differently now, but you will likely need to address the discrepancy. There are different ways to do that depending on your specific case, and you should feel supported in deciding what is best for your situation.
- Hopefully there will be parts of this process that prove to be per-

15 All the quotations included in the Resource Guide are from survivors of domestic violence who have gone through the DVSJA application process and have given consent for their words to be included.

sonally meaningful for you, like reading a personal statement to the judge or connecting with people from your past.

- The nature and timing of court hearings has changed since the pandemic, so there is a possibility your hearing may be conducted through video conferencing. Technology limitations can make the hearing feel impersonal, but they shouldn't interfere with your ability to speak confidentially with your attorney. You should always feel free to ask to speak to your lawyer in private.

PROCESSING A DENIAL

A court's ruling on your DVSJA application is not an indication of whether or not you experienced domestic violence or other abuse. In some situations, the court may deny you sentencing/resentencing relief under the DVSJA, but it does not mean your experiences were not abusive or that they did not contribute to your case. It also does not mean you are not entitled to healing and justice—you are.

However, the criminal legal system has a long way to go in fully understanding the dynamics of abusive relationships and the impact of trauma. It is our hope that with each DVSJA case brought to court, district attorneys, judges, legislators, and the public will begin to appreciate the full complexity of how domestic violence operates, the life-altering impact it can have on a survivor's life, and how it can lead to criminal prosecution. We want the legal community to also recognize that incarceration replicates the trauma of domestic abuse and can be especially triggering for survivors.

- It is important to stay hopeful, but if you are denied DVSJA sentencing/resentencing, lean on your support system to help you process the news. The denial does not negate the truth of your experience and right to justice and relief.
- Please speak with your legal team about possible next steps and how all the work that went into the DVSJA application and hearing may be used in an appeal or other forms of relief (such as parole and clemency). If you have questions about how to pursue other options for relief, you can also write to Survivors Justice Project at: Survivors Justice Project, c/o Kate Mogulescu, Brooklyn Law School, 250 Joralemon St., Brooklyn, NY 11201. Please send any letters via legal mail.

ADDITIONAL SUPPORT/RESOURCES

If you are seeking additional support around sharing and processing your experience of domestic violence and would like to be connected to a counselor, you can reach out by letter to one of the following organizations. The counselors at these organizations provide free, confidential counseling sessions over the phone (via legal calls) for survivors who are incarcerated.

Crime Victims Treatment Center (CVTC)

40 Exchange Place
Suite 501
New York, NY 10005

Serving survivors at: Altona, Bare Hill, Clinton, Eastern, Edgecombe, Franklin, Green Haven, Moriah, Queensboro, Shawangunk, Sullivan, Upstate, and Wallkill

Restore Sexual Assault Services

RESTORE S.A.S
P.O. Box 290
Batavia, NY, 14020

Serving survivors at: Albion, Attica, Groveland, Lakeview

WestCOP Victims Assistance Services

2 Westchester Plaza
Elmsford, NY, 10956

Serving survivors at: Bedford Hills, Taconic, Fishkill, Otisville, Sing Sing

St. Peters Health Partners Crime Victims Services

Samaritan Hospital - 5 Tower
2215 Burdett Avenue
Troy, NY, 12180

Serving survivors at: Adirondack, Hale Creek, Marcy, Mid-State, Mohawk, Greene, Hudson, Great Meadow, Washington, and Coxsackie

Victims Assistance Center of Jefferson County

418 Washington Street
Watertown, NY, 13601

Serving survivors at: Cape Vincent, Riverview, Gouverneur

Family Services Center for Victim Safety and Support

29 North Hamilton Street
Poughkeepsie, NY, 12601

Serving survivors at: Downstate and Ulster

Safe Harbors of the Finger Lakes

P.O. Box 929
Geneva, NY, 14456

Serving survivors at: Auburn, Five Points, Southport, and Willard DTC

You can also reach out by letter to the New York Coalition Against Domestic Violence (NYSCADV). NYSCADV's members are domestic violence organizations across New York State and they may also be able to help link to you an organization.

NYSCADV

119 Washington Avenue
Albany, New York 12210

CONCLUSION

While the DVSJA allows for the possibility of shorter prison sentences and the potential release of domestic violence survivors, we recognize that the DVSJA is not perfect. The law is the product of a long fight to force the courts to recognize the significant impact of domestic abuse, but we know the DVSJA is just one step in a long-term struggle to expand courts' appreciation and understanding of the full impact of domestic violence and trauma. The law's criteria are narrow and do not recognize all the complexity and nuance involved in the experience of domestic violence, whether it be at the hands of an intimate partner, a family member, or someone else who has caused you harm.

Moreover, the law is new and still being contested. District attorneys and judges may dispute the significant impact of domestic violence and trauma on survivors, specifically how enduring abuse could lead to criminal legal involvement, or why it is hard for a survivor to explain the connection. It will take further public awareness, education, and advocacy efforts for courts and prosecutors to achieve greater appreciation of the impact of domestic abuse and trauma. Ushering in a true paradigm shift within the criminal legal system requires the constant chipping away of oppressive policies and practices. The DVSJA adds to those efforts by challenging the false narrative that a person who was convicted of a crime is only responsible for causing harm and cannot also be someone who experienced great harm. It begins to offer survivors with criminal convictions the dignity, understanding, empathy, and healing they deserve.

Regardless of the outcome of your application, SJP invites you to join our team and be part of the community helping to implement the DVSJA and working on all of these related issues. We want those who have been personally impacted to be centered in all of our work.

For questions or additional support, including ideas on how we can add to and improve this DVSJA Resource Guide, please reach out to:

Survivors Justice Project
c/o Kate Mogulescu
Brooklyn Law School
250 Joralemon St.
Brooklyn, NY 11201

APPENDIX

DVSJA SENTENCING

Penal Law § 60.12

Authorized disposition; alternative sentence; domestic violence cases

Effective: May 14, 2019

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 subpara-

graph (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.

DVSJA RESENTENCING

Criminal Procedure Law § 440.47

Motion for resentence; domestic violence cases

Effective: August 12, 2019

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

(b) If, at the time of such person's request to apply for resentencing pursuant to this section, the original sentencing judge or justice is a judge or justice of a court of competent jurisdiction, but such court is not the court in which the original sentence was imposed, then the request shall be randomly assigned to another judge or justice of the court in which the original sentence was imposed. If the original sentencing judge is no longer a judge or justice of a court of competent jurisdiction, then the request shall be randomly assigned to another judge or justice of the court.

(c) If the court finds that such person has met the requirements to apply for resentencing in paragraph (a) of this subdivision, the court shall notify such person that he or she may submit an application for resentencing. Upon such notification, the person may request that the court assign him or her an attorney for the preparation of and proceedings on the application for resentencing pursuant to this section. The attorney shall be assigned in accordance with the provisions of subdivision one of section seven hundred seventeen and subdivision

four of section seven hundred twenty-two of the county law and the related provisions of article eighteen-A of such law.

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

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

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

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

At least one piece of evidence must be either a court record, presentence report, social services record, hospital record, sworn statement from a witness to the domestic violence, law enforcement record, domestic incident report, or order of protection. Other evidence may include, but shall not be limited to, local and state department of corrections records, a showing based in part on documentation prepared at or near the time of the commission of the offense or the prosecution thereof tending to support the person's claim, or when there is verification of consultation with a licensed medical or mental health care provider, employee of a court acting within the scope of his or her employment, member of the clergy, attorney, social worker, or rape crisis counselor as defined in section forty-five hundred ten of the civil practice law and rules, or other advocate acting on behalf of an agency that assists victims of domestic violence for the purpose of assisting such person with domestic violence victim counseling or support.

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

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

The court may consider any fact or circumstances relevant to the imposition of a new sentence which are submitted by the applicant or the district attorney and may, in addition, consider the institutional record of confinement of such person, but shall not order a new pre-sentence investigation and report or entertain any matter challenging the underlying basis of the subject conviction. The court's consideration of the institutional record of confinement of such applicant shall include, but not be limited to, such applicant's participation in or willingness to participate in programming such as domestic violence, parenting and substance abuse treatment while incarcerated and such applicant's disciplinary history. The fact that the applicant may have been unable to participate in treatment or other programming while incarcerated despite such applicant's willingness to do so shall not be considered a negative factor in determining a motion pursuant to this section.

(f) If the court determines that the applicant should not be resentenced in accordance with section 60.12 of the penal law, the court shall inform such applicant of its decision and shall enter an order to that effect. Any order issued by a court pursuant to this section must include written findings of fact and the reasons for such order.

(g) If the court determines that the applicant should be resentenced in accordance with section 60.12 of the penal law, the court shall notify the applicant that, unless he or she withdraws the application or appeals from such order, the court will enter an order vacating the sentence originally imposed and imposing the new sentence to be imposed as authorized by section 60.12 of the penal law. Any order issued by a court pursuant to this section must include written

findings of fact and the reasons for such order.

3. An appeal may be taken as of right in accordance with applicable provisions of this chapter: (a) from an order denying resentencing; or (b) from a new sentence imposed under this provision and may be based on the grounds that (i) the term of the new sentence is harsh or excessive; or (ii) that the term of the new sentence is unauthorized as a matter of law.

An appeal in accordance with the applicable provisions of this chapter may also be taken as of right by the applicant from an order specifying and informing such applicant of the term of the determinate sentence the court would impose upon resentencing on the ground that the term of the proposed sentence is harsh or excessive; upon remand to the sentencing court following such appeal the applicant shall be given an opportunity to withdraw an application for resentencing before any resentence is imposed. The applicant may request that the court assign him or her an attorney for the preparation of and proceedings on any appeals regarding his or her application for resentencing pursuant to this section.

The attorney shall be assigned in accordance with the provisions of subdivision one of section seven hundred seventeen and subdivision four of section seven hundred twenty-two of the county law and the related provisions of article eighteen-A of such law.

4. In calculating the new term to be served by the applicant pursuant to section 60.12 of the penal law, such applicant shall be credited for any jail time credited towards the subject conviction as well as any period of incarceration credited toward the sentence originally imposed.

CRIMINAL PROCEDURE LAW § 530.11

Procedures for family offense matters (section defining “members of the same family or household”)

1. For purposes of this section, “members of the same family or household” with respect to a proceeding in the criminal courts shall mean the following:
 - (a) persons related by consanguinity or affinity;
 - (b) persons legally married to one another;
 - (c) persons formerly married to one another regardless of whether they still reside in the same household;
 - (d) persons who have a child in common, regardless of whether such persons have been married or have lived together at any time; and
 - (e) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an “intimate relationship” include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an “intimate relationship”.

REQUEST TO APPLY FOR DVSJA RESENTENCING

UCS447 Form – 2 pages (Form designed by the courts to begin the resentencing process):



_____ COURT, COUNTY OF _____

UCS-447/LF

COURT ADDRESS: _____

The People of the State of New York

Application for Permission to Apply for Resentencing [CPL §440.47]

vs.

Indictment/SCI Number: _____

NYSID: _____

AKA(s): _____

DIN: _____

Sex: _____ Race: _____ DOB: __/__/____ Youthful Offender: YES NO

I was convicted of a felony in this court in the above case, and I was sentenced as follows:

Sentencing Date: __/__/____

Sentencing Judge: _____

Pursuant to the following sworn statement, I assert that I am eligible for resentencing under subdivision one of section 440.47 of the criminal procedure law, and I am requesting permission to apply for resentencing because, at the time the crime was committed:

1. I was a victim of substantial physical, sexual or psychological abuse. Yes No
2. The person who abused me was:
 - Someone I am or was married to. Yes No
 - Someone I am or was engaged to be married to. Yes No
 - Someone related to me by blood or adoption. Yes No
(For example, a parent, brother, sister, aunt, uncle or cousin.)
 - Someone I lived in the same home with. Yes No
 - Someone I have a child with. Yes No
 - Someone I have or had an intimate relationship with regardless of whether I lived with them. Yes No
(For example, a boyfriend, girlfriend or sexual partner.)
3. The abuse was a significant contributing factor in my behavior. Yes No

Eligibility for Resentencing

Answer all the following questions about the conviction you want to be resentenced for:

1. Are you currently incarcerated with the New York State Department of Correction and Community

Supervision (DOCCS) for this case? Yes No
If yes, in what correctional facility? _____
DIN: _____

2. Are you serving: a) an indeterminate sentence with a minimum of eight years or more or b) a determinate sentence of eight years or more? Yes No
If yes, what is your sentence? _____

3. Was the crime committed before August 12, 2019? Yes No
If yes, what was the date of the crime? ____/____/_____

4. Were you sentenced as a Second Violent Felony Offender or Persistent Violent Felony Offender? Yes No

5. Were you convicted of any of the following crimes?
- Murder in the First Degree under Penal Law section 125.27 Yes No
 - Aggravated Murder under Penal Law section 125.26 Yes No
 - Murder in the Second Degree under Penal Law section 125.25(5)¹ Yes No
 - A crime of terrorism under Penal Law sections 490.10, 490.15, 490.20, 490.25, 490.30, 490.35, 490.37, 490.40, 490.45, 490.47, 490.50 or 490.55 Yes No
 - An attempt or conspiracy to commit any of the crimes listed above Yes No
 - A crime that requires you to register as a sex offender Yes No

If you checked "No" for all the crimes listed above, what crime(s) were you convicted of?

Assignment of Counsel

If you are asking for a court-appointed attorney, answer all the following questions:

1. Can you afford to hire an attorney to assist you with your resentencing motion? Yes No
2. How much money do you earn per week (if any)? \$ _____
3. What is the total amount of money in your commissary account and bank account (if you have one)? \$ _____
4. What is the total value of personal property (car, jewelry, etc.) and real property (land, apartment, house, etc.) that you own? \$ _____
5. Do you get any of the following?

¹ Murder in the second degree under PL §125.25(5) is someone over 18 years old who killed a child under 14 years old while engaging in rape, a criminal sexual act, sexual abuse or incest against the child.

- Unemployment benefits
- Pension
- Alimony or support
- SSI or Social Security Disability

- Yes No
- Yes No
- Yes No
- Yes No

6. Do you have any other sources of income?
If yes, please explain:

- Yes No

7. Who represented you in this case when you were convicted? (check one)

- Public Defender or Legal Aid Society
- 18-B court-appointed attorney
- Private attorney

If you checked "private attorney":

Where did you get the money to pay your attorney?

Why can't you afford to pay an attorney now?

8. During the proceedings in court before you were sentenced, were you:

- Incarcerated
- Released on your own recognizance (ROR)
- Released on bail

If you checked "released on bail":

What was the amount of bail? \$ _____

Who posted the bail? Name: _____

If someone else posted the bail for you, what is their relationship to you? _____

Why can't you use the bail money to pay for an attorney now?

For the reasons above, I respectfully request permission to submit a motion for resentencing under CPL §440.47(1)(a).

(Optional – check if applicable): **If the court finds I am eligible and gives me permission to apply for resentencing under**

section 440.47 of the criminal procedure law, I am requesting an assigned attorney pursuant to CPL §440.47(1)(c) to represent me for my resentencing motion.

****YOU MUST SIGN THIS FORM IN FRONT OF A NOTARY PUBLIC – DO NOT SIGN UNTIL THE NOTARY PUBLIC IS PRESENT****

Applicant Signature

Sworn to before me this _____ day of _____, 20____.

Notary Public

FOR COURT USE ONLY – DO NOT WRITE BELOW THIS LINE

Determination of Application for Permission to Apply for Resentencing pursuant to CPL §440.47:

Permission Denied – Applicant is INELIGIBLE, and application is hereby dismissed without prejudice.
Reasons (if provided): _____

Permission Granted – Applicant is ELIGIBLE.
If the applicant requested assignment of counsel, the court hereby further determines that the applicant is:
 INELIGIBLE for assigned counsel and the request is DENIED
 ELIGIBLE for assigned counsel and the request is GRANTED, and the court assigns counsel as follows:
Name: _____
Address: _____
Phone: _____ Email: _____

SO ORDERED:

Dated: ____/____/_____

Judge Signature

Judge Name

Thank you to everyone who contributed their time, ideas, and feedback to the DVSJA Resource Guide. Special thanks to ShinYeon Moon for the graphic design; The New York Women's Foundation, the Vital Projects Fund, and Davis Polk & Wardwell LLP for their support of this project.