

COUNTY COURT OF ERIE COUNTY
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff-Respondent

v.

S [REDACTED] K [REDACTED]

Ind. No. [REDACTED]

Defendant-Petitioner

MEMORANDUM OF LAW

Respectfully submitted,

[REDACTED]
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[REDACTED]

Dated: May 3, 2022

To: Hon. [REDACTED]
County Court Judge
25 Delaware Avenue
Buffalo, NY 14202

[REDACTED]
Assistant District Attorney
25 Delaware Avenue
Buffalo, NY 14202

PRELIMINARY STATEMENT

S ■ K ■, the Defendant-petitioner in the above-captioned case, respectfully submits this memorandum of law in support of her application for resentencing pursuant to New York Criminal Procedure Law (“C.P.L.”) § 440.47, because at the time of the offense: (1) she was a victim of domestic violence subjected to substantial physical, sexual, or psychological abuse; (2) such abuse was a significant contributing factor to her commission of the offense; and (3) the original sentence imposed in this matter is unduly harsh.

Ms. K ■ suffered repeated domestic violence from romantic partners, including Mr. R ■ P ■, her boyfriend at the time of the underlying offense. This cumulative abuse, both physical and psychological, was a significant contributing factor to the tragic events of ■ 1996. Now, more than 25 years later, Ms. K ■ is almost 70 years old. Since the date of the crime, New York law has recognized the importance of considering the impact of domestic violence when imposing or revisiting a sentence.

As a threshold matter, Ms. K ■ is eligible for resentencing as she meets the requirements for C.P.L. § 440.47. Specifically, she is currently confined at Albion Correctional Facility.¹ She is serving five indeterminate sentences with a minimum of 25 years and a maximum of life, all sentences to be served concurrently for offenses eligible for an alternative sentence under Penal Law § 60.12.² The sentences were imposed by the Honorable Sheila A. DiTullio on ■ 1997.³ This Court granted notification to file the re-sentencing motion on April 6, 2022.⁴

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LEGAL FRAMEWORK

The Domestic Violence Survivors Justice Act was enacted to provide more expansive relief for survivors of domestic violence

Nearly twenty-two (22) years after Ms. K [REDACTED]'s initial sentencing, in May of 2019, the Domestic Violence Survivors Justice Act (DVSJA) was passed. This bill recognized the impact domestic violence has on survivors who commit crimes. The law aims “to mitigate the harsh effects of punishment for those whose crimes can be directly linked to their history of trauma.”⁵

Prior to the enactment of the DVSJA, existing laws failed to adequately protect domestic violence survivors. In 1998, the state legislature enacted “Jenna’s Law”, which allowed judges to impose indeterminate sentences, as opposed to the statutorily mandated determinate sentences, in cases involving survivors convicted of certain crimes against their abusers.⁶ However, the law was “narrowly drawn” in terms of the eligible crimes and the alternate sentencing ranges.⁷ It was also intended to provide benefit only to survivors who fit a narrow, stereotypical mold: those acting in self-defense against their abuser.⁸ The DVSJA, by contrast, is an expansive law. The DVSJA also codifies more meaningful sentence reductions.

The goal of the DVSJA is sentence mitigation, not acquittal: “The legislation neither exonerates a defendant nor excuses her criminal conduct. It simply permits a court ... to reduce a sentence in consideration of that defendant’s status as a domestic violence victim.” *People v. Smith*, 132 N.Y.S. 3d 251, 254 (N.Y. Co. Ct. 2020). This is especially important because the pre-existing legal framework made it difficult for domestic violence survivors to successfully attain

⁵ *Domestic Violence Survivors Justice Act*, CTR. FOR APP. LITIG., <https://www.appellate-litigation.org/domestic-violence-survivors-justice-act/> (last visited Feb. 7, 2021)[hereinafter “Ctr. for App. Litig.”].

⁶ See N.Y.C. Bar Ass’n, *Report in Support of the Domestic Violence Survivors Justice Act*, 2 (Apr. 09, 2019), <https://s3.amazonaws.com/documents.nycbar.org/files/DVSurvivorsJusticeDVRReportFINAL6.16.11.pdf> [hereinafter “N.Y.C. Bar Ass’n Report”]

⁷ *Id.*

⁸ *Id.*

reduced sentencing. Previously, survivors were able to obtain sentencing relief only rarely, such as in stereotypical cases of survivors acting in direct self-defense against their abuser.⁹ The DVSJA, on the other hand, recognizes that many cases do not fit this stereotypical mold, that many survivors engage in criminal activity “to protect themselves from further violence” or “as a result of an abuser’s coercion.”¹⁰ Indeed the bill’s sponsor recognized the role that past trauma can play on a criminal offense: “Many of us here, we’ve reacted to things because of something that we’ve gone through. And some of you may have flashbacks because of something that you encountered years ago. But we’re not punishing you for that. We’re asking that people who have committed their crimes because of domestic violence be offered the same consideration.”¹¹ Courts implementing the DVSJA have acknowledged that trauma can have “severe effects on victims’ thought processes and behaviors” and that the DVSJA correspondingly “shifts from covering offenses only directed at the abuser, to a much broader array of offenses, including conduct directed at non-abusing third-parties.” *People v. D.L.*, 147 N.Y.S. 3d 335, 340 (N.Y. Co. Ct. 2021).

Another goal of the DVSJA is to address the revictimization faced by domestic survivors through incarceration and supervision.¹² Imprisonment can have serious mental health effects on domestic violence survivors, and intrusive and demanding penal procedures and post-release supervision often serve to revictimize women.¹³ “By establishing a more compassionate sentencing structure for survivors and enhancing recognition of the impact of [domestic

⁹ N.Y.C. Bar Ass’n Report”, *supra* note 2 at 2.

¹⁰ N.Y.C. Bar Ass’n, *supra* note 2 at 2.

¹¹ Senator Persaud, New York State Senate, Regular Session (March 12, 2019) at 1571.

¹² CTR. FOR APP. LITIG, *supra* note 1.

¹³ K.P. Moloney, B.J. van den Bergh, L.F. Moller, *Women in Prison: The Central Issues of Gender Characteristics and Trauma History*, PUBLIC HEALTH J., 426, 428 (2009).

violence] on survivor-defendants, the Act makes it less likely that survivors will be victimized by the very system that should help protect them.”¹⁴

The DVSJA Requirements and Resentencing Process

The DVSJA created C.P.L. § 440.47 and amended Penal Law § 60.12. C.P.L. Section 440.47 was created to allow survivors of domestic violence to apply for resentencing as long as they meet certain criteria. C.P.L. § 440.47 outlines the eligibility requirements to apply for resentencing under the DVSJA. Ms. K [REDACTED] has met the threshold requirements and been granted leave to apply for resentencing.

Under Penal Law § 60.12(1), an applicant for resentencing must demonstrate the following:

- (a) at the time of the offense, she 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 such term is defined in C.P.L. § 530.11(1);
- (b) such abuse was a significant contributing factor to the applicant’s criminal behavior;
- (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, the original sentence was unduly harsh.

In support of an application filed under C.P.L. § 440.47, the applicant must provide “at least two pieces of evidence corroborating the claim that he or she was, at the time of the offense, a victim of domestic violence subjected to a substantial physical, sexual or psychological abuse inflicted by a member of the same family or household.” C.P.L. § 440.47(2)(c). At least one piece of evidence must be either a court record, presentence report, social services record, hospital record,

¹⁴ Coalition for Women Prisoners, *Memo in Support of the DVSJA*, April 25, 2018.

sworn witness statement, law enforcement record, domestic incident report, or order of protection. *Id.*

Once an applicant has fulfilled the requirements of C.P.L. § 440.47(2)(c), the court shall conduct a hearing to aid in determining whether the applicant should be resentenced in accordance with Penal Law § 60.12. At this hearing, the court is charged with determining any controverted issue of fact relevant to the issue of sentencing. Reliable hearsay is admissible at this hearing. P.L. § 60.12(1). The court is permitted to consider any fact or circumstance relevant to resentencing, and specifically may consider an applicant's institutional record. If the court finds the applicant's original sentence to be unduly harsh, the court may impose a reduced sentence under the terms of Penal Law § 60.12(2).

ARGUMENT

I. MS. K [REDACTED] SHOULD BE RESENTENCED UNDER THE DVSJA

Ms. K [REDACTED] satisfies each of the statutory criteria of C.P.L. § 440.47 and § 60.12 required for resentencing pursuant to the DVSJA. First, at the time of the offense Ms. K [REDACTED] was the victim of substantial physical and psychological abuse from a member of the same family or household as defined by § 530.11. In addition to the abuse she endured contemporaneous to the crime, Ms. K [REDACTED] suffered significant physical and psychological abuse throughout her adult life, beginning with emotional and psychological abuse in her marriage, and continuing with regular, violent physical abuse in her subsequent intimate relationships. Second, the abuse that Ms. K [REDACTED] suffered was a significant contributing factor to the underlying offense. Her complex history of trauma directly contributed to her alcohol addiction and to the events of January 10, 1996. Third, the original sentence of 25 years to life imposed in this matter is unduly harsh.

A. Ms. K [REDACTED] was the victim of substantial domestic violence

1. Ms. K [REDACTED]'s relationships with her husband, with W [REDACTED] B [REDACTED], and with R [REDACTED] P [REDACTED] constituted "domestic violence" under state law.

New York defines a "victim of domestic violence" as any person who experiences violence or coercion from a family or household member that results in "actual physical or emotional injury, or . . . creates a substantial risk of physical harm." N.Y. Soc. Serv. Law § 459-a(1). The same family or household includes "persons related by consanguinity or affinity" and "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time." C.P.L. § 530.11(1)(a). Factors used to determine whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of the interaction between the persons; and the duration of the relationship. C.P.L. § 530.11(1)(e).

Ms. K [REDACTED]'s relationships with her husband, with Mr. P [REDACTED], and with Mr. B [REDACTED] all meet the definition of a member of the same family or household under C.P.C. § 530.11. At the time of the offense, Ms. K [REDACTED] was living with her boyfriend, R [REDACTED] P [REDACTED], in a rented apartment. They were in a romantic relationship and had a child together. Ms. K [REDACTED] had also been in an intimate relationship with Mr. B [REDACTED] and lived with him for a period of time. She was married and lived in the same household as Mr. K [REDACTED] for seventeen years. Ms. K [REDACTED]'s relationships with these men thus fall within the purview of C.P.L. § 530.11 and the DVSJA. As described below and in the accompanying affirmation, these men frequently subjected Ms. K [REDACTED] to physical and/or emotional harm.

2. Ms. K [REDACTED] experienced substantial psychological and physical abuse from Mr. K [REDACTED], Mr. B [REDACTED] and Mr. P [REDACTED]

a. Abuse by Mr. K [REDACTED]

The abuse Mr. K [REDACTED] inflicted upon Ms. K [REDACTED] included verbal, emotional, and psychological abuse. Ms. K [REDACTED] married Mr. K [REDACTED] while she was still quite young. During the course of their marriage, her husband regularly berated, belittled, and insulted her. He blamed her for their infertility, invoking her irregular menstrual cycle and her past dating history as reasons for their difficulty conceiving. He controlled her behavior and her interactions.

Power and control are two major components of domestic violence, which includes psychological abuse.¹⁵ Psychological abuse can come in three forms: mental, emotional, and verbal abuse.¹⁶ This type of abuse is unseen and leaves few demonstrable traces, compared to physical abuse, and it can cause a victim to feel as though they are worthless and not to be believed and that everything their abuser is telling them is true.¹⁷ Psychological violence can include making one partner servile to the other, blaming the victim, and controlling the victim's actions.¹⁸ This form of abuse, often referred to as "coercive control," is now understood to be

¹⁵ See Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence*, 52 *SEX ROLES* 743, 747 (2005); Delaney Rives Knapp, *Fanning the Flames: Gaslighting as a Tactic of Psychological Abuse and Criminal Prosecution*, 83 *ALB. L. REV.* 313, 315 (2019); Jessica C. Robinson, *The Unseen Forms of Violence Against Women: Why Psychological Abuse Must Be Treated as a Criminal Offense*, 18 *APPALACHIAN J.L.* 75, 84 (2018/2019) ("Abusive behavior which causes . . . psychological effects is the root strategy by which abusers exert power and control over their victims.").

¹⁶ Robinson, *supra* at 80.

¹⁷ See Knapp, *supra* at 316; Robinson, *supra* at 80-81 ("Psychological abuse has recognizable behavioral signs including, but are certainly not limited to: yelling; insulting the partner; swearing at one's partner or calling them names; belittling; ridiculing; berating one's partner; putting down the partner's physical appearance or intellect; saying things to upset or frighten one's partner; acting indifferently to one's partner's feelings; or making their partner feel crazy.").

¹⁸ Claire Wright, *Torture at Home: Borrowing from the Torture Convention to Define Domestic Violence*, 24 *HASTINGS WOMEN'S L.J.* 457, 469-70 (2013).

one of the main forms of domestic violence.¹⁹ Such psychological abuse is expressly encompassed within P.L. § 60.12(1).

Mr. K [REDACTED] exercised power and control over Ms. K [REDACTED]'s behavior to a point that was abusive. He did not allow her to drink during the duration of their marriage, despite drinking excessively himself. He did not initially allow her Ms. K [REDACTED] to work outside of the home. When she did eventually work outside of the home because the couple needed the money, he would become jealous if she talked to any male co-workers. At home after work, he would yell at her and call her a whore. She internalized his insults and believed his accusations that she was responsible for their failure to have a child of their own.²⁰ Eventually, after a failed attempt to initiate divorce proceedings, Ms. K [REDACTED] finally left her husband. However, the divorce left her separated from her child and their former home and life, and without the support of her conservative family. This situation prompted a downward spiral in her life during which time she became entangled in more than one abusive relationship.

b. Abuse by Mr. B [REDACTED]

Ms. K [REDACTED] entered a relationship with Mr. W [REDACTED] B [REDACTED] that was plagued with serious, physically abusive incidents as well as by coercion. Mr. B [REDACTED] would coerce Ms. K [REDACTED] to use stolen credit cards or bad checks by threatening her and her family if she did not comply. He also inflicted physical violence upon Ms. K [REDACTED], hitting her, and once beating her with a baseball bat when she was eight months pregnant. Mr. B [REDACTED]'s violence and threats are corroborated by a police report from 1991, which documents the abuse and Ms. K [REDACTED]'s fear, as

¹⁹ See EVAN STARK. COERCIVE CONTROL. HOW MEN ENTRAP WOMEN IN PERSONAL LIFE (2007). See also CDC, *Intimate Partner Violence Surveillance Uniform Definitions and Recommended Data Elements*, Version 2.0, 8 (2015), [file:///C:/Users/kcapu/Downloads/WANT%20THIS %20CDC%20Defintitions.pdf](file:///C:/Users/kcapu/Downloads/WANT%20THIS%20CDC%20Defintitions.pdf) (defining coercive control as being psychological aggression which can include “limiting access to transportation money, friends, and family”).

²⁰ Ms. K [REDACTED] was subsequently able to become pregnant with other men after her marriage ended.

well as her struggle to leave him.²¹ Ms. K [REDACTED] was finally able to leave Mr. B [REDACTED] only after he was arrested and incarcerated.

c. Abuse by Mr. P [REDACTED]

Unfortunately, after the relationship with Mr. B [REDACTED], Ms. K [REDACTED] entered another physically abusive relationship with R [REDACTED] P [REDACTED], who is the father of her third child (second biological child). This relationship continued up through the date of the underlying crime. Mr. P [REDACTED] would regularly viciously beat Ms. K [REDACTED]; he pushed her, punched her, kicked her, and gave her numerous black eyes. He once beat her to the point she sustained cracked ribs. The horrific physical abuse Ms. K [REDACTED] endured with Mr. P [REDACTED] is documented in an order of protection she secured in January 1994.²² The abuse became so violent that Ms. K [REDACTED] attempted to leave Mr. P [REDACTED] with the help of her friends. Mr. P [REDACTED] threatened her and the friends with a gun when he discovered the plan. Ms. K [REDACTED] spent a night in a women's shelter, but ultimately returned to the relationship. Her inability to leave the relationship is unfortunately all too common in domestic violence relationships: survivors may fear physical retaliation or death if they leave, and their sense of self-worth may be damaged to the point they feel they cannot leave or do not deserve anything better.²³

3. At least two pieces of evidence corroborate that Ms. K [REDACTED] was subjected to substantial physical, sexual or psychological abuse

At least two pieces of evidence corroborate the substantial abuse Ms. K [REDACTED] suffered. The evidence includes court records, and police records as required by C.P.L. § 440.47(2)(c). The documents supporting Ms. K [REDACTED]'s application for resentencing are attached as exhibits to

²¹ Exhibit G to Harrington Affirmation.

²² Exhibits E and F to Harrington Affirmation.

²³ See, e.g., Jason B. Whiting, *Eight Reasons Women Stay in Abusive Relationships*, BYU Faculty Publications (2016); National Coalition against Domestic Violence, *Why Do Victims Stay*, <https://ncadv.org/why-do-victims-stay>.

the accompanying attorney affirmation. The evidence includes: A Petition for Temporary Order of Protection against R [REDACTED] P [REDACTED] documenting numerous instances of physical abuse (Exhibit E); A Temporary Order of Protection against R [REDACTED] P [REDACTED] (Exhibit F); and Cheektowaga Police Department Report of complaint against Mr. W [REDACTED] B [REDACTED] documenting his physical abuse and threats against Ms. K [REDACTED] (Exhibit G).

B. The abuse Ms. K [REDACTED] experienced was a significant contributing factor of the offense.

The abuse Ms. K [REDACTED] endured was a significant contributing factor to the offense, as required by C.P.L. § 60.12 and C.P.L. § 440.47. The abusive relationship with Mr. P [REDACTED], ongoing at the time of the crime, as well as the culmination of years of abuse from intimate partners, were a significant contributing factor to Ms. K [REDACTED]'s actions on January 10, 1996.

The DVSJA requires that domestic violence be a “significant contributing factor” to the underlying offense. Although the law does not define “significant contributing factor,” the meaning can be discerned through reference to the plain meaning of the language, the legislative history, and case law. Merriam-Webster defines the term “significant” as “having or likely to have influence or effect; important.”²⁴ It defines the term “contributing” as “to play a significant part in making something happen.”²⁵ Last, it defines “factor” as “one that actively contributes to the production of a result; ingredient.”²⁶ The plain language suggests that “significant contributing factor” means that the effects of the domestic violence were sufficiently important or meaningful to have likely influenced or played a part in the applicant’s criminal behavior.

Meanwhile, the language shift from the original Penal Law § 60.12 demonstrates legislative intent to lower the nexus of causation between the abuse and the offense. *Compare*

²⁴ Merriam-Webster.com, Dictionary. Accessed 21 Jan. 2021

²⁵ *Id.*

²⁶ *Id.*

Penal Law § 60.12 (L. 1998, Ch. 1, § 1) (“(B) such abuse was a factor in causing the defendant to commit such offense . . .”) *with* Penal Law § 60.12 (L. 1998, Ch 31, § 1) (“(b) such abuse was a significant contributing factor to the defendant’s criminal behavior.”). As this Court explained in *People v. Smith*:

In order to obtain relief under the DVSJA, a defendant need not establish that the abuse she suffered was the exclusive, or even the overriding factor to her criminal conduct. That it was a significant contributing factor will suffice. It is therefore entirely possible for a defendant to be motivated by any number of factors . . . but to be entitled to the relief afforded by CPL 440.47 nonetheless.

132 N.Y.S.3d at 257.

Another significant change from the earlier Penal Law § 60.12 to the current law is that a defendant need not show they were in the “throes of an attack or that one be imminent.” *People v. Smith*, 132 N.Y.S. 3d at 257. Courts must now “consider the cumulative effect of the abuse together with the events immediately surrounding the crime, paying particular attention to the circumstances under which defendant was living and adopting a ‘full picture’ approach in its review.” *Id.* at 258. As one court explained, “[t]he DVSJA requires the following analysis: (1) Did the defendant experience domestic abuse? (2) Did the defendant suffer trauma as a result of that abuse? (3) Has that trauma affected the defendant’s functioning and behavior so as to be a ‘significant contributing factor’ to the defendant’s criminal behavior?” *People v. D.L.*, 147 N.Y.S. 3d at 340.

In this case, the abuse that Ms. K [REDACTED] suffered throughout her romantic relationships led to her dependence on alcohol to self-medicate. As the violence in her relationships escalated with Mr. P [REDACTED], so too did Ms. K [REDACTED]’s reliance on alcohol deepen. Domestic violence does not occur in a vacuum and experiencing it multiple times, over decades, can have a profound effect

on a person.²⁷ Victims of domestic violence who experience trauma over and over again, are often identified as having experienced compound, or complex trauma.²⁸

The effects of intimate partner violence and alcohol use have been well studied.²⁹ Research documents the correlation between domestic violence and resultant alcohol abuse by survivors.³⁰ Studies have found that “drinking to cope partly explain[s] the association between victimization and alcohol problems.”³¹ One study in particular demonstrates that “drinking to cope is an important predictor of drinking problems, as well as an outcome of experiencing violence in the relationship.”³² This study found that this correlation was stronger for women.³³ As the authors explain, “[i]ndividuals who have experienced [intimate partner violence] seem to experience greater alcohol problems because they are drinking as a means of coping with the

²⁷ *Impact on Survivors*, Arizona Coalition to End Sexual & Domestic Violence, <https://www.acesdv.org/domestic-violence-graphics/impact-on-survivors/> (“The chronic exposure to domestic violence – and the stress fear resulting from this exposure- can cause not only immediate physical injury, but also mental shifts that occur as the mind attempts to process trauma or protect the body.”).

²⁸ Complex trauma is a type of trauma that occurs repeatedly and cumulatively, usually over a period of time and within specific relationships and contexts. Christine A. Courtois, *Complex Trauma, Complex Reactions: Assessment and Treatment*, 41 *Psychotherapy: Therapy, Research, Practice, Training*, 412, 412, 414 (2004). People identified as having complex trauma were associated with specific “problem areas,” including “alternations in the regulation of affective impulses, including difficulty with modulation of anger and self-destructiveness. This category . . . include[s] . . . all methods used for emotional regulation and self-soothing, including addictions,” as well as “alternations in perception of the perpetrator.” *Id.*

²⁹ See, e.g., Heather Foran & K. Daniel O’Leary, *Alcohol and intimate partner violence: A meta-analytic review*, 28 *CLIN. PSYCH. REV.* 1222-1234 (2008); K.E. Leonard, *Drinking patterns and intoxication in marital violence: Review, critique, and future directions for research*, in *Alcohol and interpersonal violence: Fostering multidisciplinary perspectives* (Susan E. Martin ed., National Institute on Alcohol Abuse and Alcoholism Research Monograph No. 24, 1993) 253–280; Gregory Stuart, Todd Moore, et. al., *The Temporal Association between Substance Use and Intimate Partner Violence among Women Arrested for Domestic Violence*, 81 *J. CONSULT. & CLIN. PSYCH.* 681-690 (2013).

³⁰ See, e.g., Jeff R. Temple, Rebecca Watson, et. al., *The Longitudinal Association between Alcohol Use and Intimate Partner Violence among Ethnically Diverse Community Women*, 33 *ADDICTIVE BEHAV.* 1244-1248 (2008); Maria Testa & Kenneth E. Leonard, *The Impact of Marital Aggression on Women’s Psychological and Marital Functioning in a Newlywed Sample*, 16 *J. FAM. VIOLENCE* 115-130 (2001); Maria Testa, Jennifer A. Livingston & Kenneth E. Leonard, *Women’s Substance Use and Experiences of Intimate Partner Violence: A Longitudinal Investigation Among a Community Sample*, 28 *ADDICTIVE BEHAV.* 1649-64 (2003).

³¹ Camilla S. Overup, Angela M. DiBello, et. al., *Drowning the Pain: Intimate Partner Violence, and Drinking to Cope Prospectively Predict Problem Drinking*, 41 *ADDICTIVE BEHAV.* 152-161 (2015).

³² *Id.*

³³ *Id.*

negative effects associated with their victimization, including depression, anxiety, and social problems.³⁴

In Ms. K [REDACTED]'s case, examining the full picture reveals that she repeatedly endured domestic violence throughout her adult romantic relationships, which in turn spurred her alcohol dependence. As a result of this complex trauma and loss of control in her life, she turned to the use of alcohol to cope and to deal with the violence and stress in her life, and her intake increased over time. By the time of the crime, Ms. K [REDACTED] was drinking heavily just to get through the day.

On the morning of [REDACTED] 1996, Ms. K [REDACTED] had been drinking even more than usual. Mr. P [REDACTED] had berated her and left the home shortly before, she was about to lose the apartment, and she was drinking to forget her problems. By that afternoon she was heavily intoxicated. When the fire erupted, Ms. K [REDACTED] was not reacting rationally, nor processing what was happening around her. Her intoxication prevented her from reacting quickly and appropriately. She felt trapped and threatened and was unable to assess the situation calmly. She ultimately could not reach her children before the fire and smoke forced her out of the apartment. When she was later taken to the hospital and treated for burns and smoke inhalation, her blood alcohol content registered at 0.30%.³⁵

³⁴ *Id.*

³⁵ Ms. K [REDACTED] was initially questioned by police at the hospital while still under the effects of alcohol and/or sedation. She provided conflicting accounts over time of what happened. Not only was Ms. K [REDACTED] under the effects of alcohol and medication when she originally recounted what happened, her experience of domestic violence also informed her narration of the story. It is important to note that victims of domestic violence do not always tell their histories and stories in a linear fashion or in a way that is logically coherent. Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 405–08(2019)(“We tend to believe stories that are internally consistent—they have a linear thread and are emotionally and logically coherent. But domestic violence often results in neurological and psychological trauma, both of which can affect a survivor's comprehension and memory. The result is a story that, to the untrained ear, sounds internally inconsistent and therefore implausible.”).

Ms. K [REDACTED]'s actions on that day were informed by her history of abuse, abuse that was ongoing. "What we know now, but did not in 1999 [or 1997], is how profoundly the trauma of abuse and exploitation affects a victim's behavior and choices, and how that trauma informs us and provides us with a new lens through which to view and assess a defendant's criminal conduct." *People v. Smith*, 132 N.Y.S. 3d at 258. *People v. D.L.* provides another example of a case where the trauma of abuse contributed to the applicant's substance abuse and subsequent criminal actions. In that case, the DVSJA applicant had been repeatedly sexually abused in childhood by his uncle. *People v. D.L.*, 147 N.Y.S. 3d at 336. He turned to alcohol and drugs to "numb the pain" of the sexual abuse, and he committed burglaries to get money to feed his addiction. *Id.* at 337. He was convicted of multiple burglaries and applied for resentencing under the DVSJA. *Id.* at 336-37. The court reasoned that "the continuing trauma he experienced was a contributing factor to his drug use and addiction and related burglaries." *Id.* at 341. So too in this case was the trauma Ms. K [REDACTED] experienced a contributing factor to the crime. She turned to alcohol because of the domestic violence she suffered, and the alcohol use tragically colored her actions on the day of the offense. The abuse Ms. K [REDACTED] suffered was a significant contributing factor to the underlying offense. Her experiences of having been subjected to psychological and physical violence in relationship after relationship, including her relationship at the time of the crime, are "inextricably interlinked" with what happened on that day.

The result, in this case, was a tragic loss of lives. Cases like this one where the victims were innocent children are some of the most difficult to comprehend. Yet, the tragedy of the crime does not dispose of the question whether Ms. K [REDACTED] ought to be resentenced. Ms. K [REDACTED] does not seek exoneration from her actions. Indeed, she blames herself for her children's deaths

and recognizes that “if [she] had been sober the outcome would have been different.”³⁶ She writes, “I cannot describe the pain and torment I felt upon waking and being told my children were gone, that I had failed them by not saving them.”³⁷ The DVSJA was never intended to hold a defendant blameless for her actions or excuse her criminal conduct. It instead both recognizes the severity of an offense while also affording some measure of mercy for the offender.” *People v. Smith*, 132 N.Y.S. 3d at 259. Ms. K [REDACTED] seeks to have her history of abuse and its consequences for her criminal conduct considered in imposing a new sentence; she does not seek to abdicate responsibility for the serious crime in this case.

B. Resentencing Ms. K [REDACTED] under the DVSJA would serve the interests of justice: Examining the nature and circumstances of the crime, as well as Ms. K [REDACTED]’s history, character, and condition demonstrates that her sentence is unduly harsh.

The DVSJA was enacted in recognition of the impact that domestic violence has on survivors. The DVSJA allows courts to resentence survivors, “granting much-deserved relief for incarcerated individuals who pose no threat to public safety.”³⁸ The DVSJA’s recognition of the effects of domestic violence and the need for sentencing alternatives is premised on the notion that where “survivors’ decisions and actions are driven by trauma, in appropriate cases, the emphasis should be on rehabilitation and treatment, not punitive imprisonment and prolonged separation from family and society.”³⁹

Over time a community’s sense of justice and fairness can shift, and such cultural changes can impact criminal sentencing law. The DVSJA was enacted because of a shift in the

³⁶ Exhibit H at 20.

³⁷ *Id.* at 21.

³⁸ Coalition for Women Prisoners, *Memo in Support of the DVSJA*, April 25, 2018.

³⁹ Cynthia Feather, *Domestic Violence Survivor-Defendants: New Hope for Humane and Just Outcomes*, N.Y. STATE BAR ASS’N J. (March 2020).

treatment of domestic violence survivors who commit crimes due to their own victimization. The DVSJA reflects a change in our evolving perspective on domestic violence, a perspective that now prioritizes treating abuse as a mitigating factor in sentencing. The rationale for this paradigm shift is expressed clearly in the Assembly Sponsor's memo:

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

The DVSJA's alternative sentencing ranges demonstrate our evolving standards for sentencing, which reflect our growing knowledge of trauma and developing awareness of the false dichotomy between domestic violence survivor and defendant. The DVSJA allows a court to take into account the applicant's history of abuse, as well as the full picture of her life at the time of the crime and her rehabilitation since that date.

The DVSJA contemplates a trauma-informed approach to sentencing. The research and literature from various fields of behavioral science help clarify the process by which trauma can lead to a host of devastating psychological and behavioral consequences, including violence and other criminal conduct. We now understand that trauma can be pervasive, re-shaping a person's worldview and affecting many aspects of life including altering how they function, perceive danger, react, abuse alcohol and drugs, and engage in problematic behavior that may include criminal actions.⁴⁰ When a trauma-informed sentencing analysis is undertaken in DVSJA resentencing cases, it is nearly axiomatic that the prior sentence, determined and imposed without the benefit of a trauma-informed approach, will be revealed as unduly harsh.

⁴⁰ Alan Rosenthal, *The Complexity of Sentencing Under the DVSJA: A Challenge for Judges and Defense Counsel*, 32(2) *Atticus* 39, 42 (Spring 2020).

The DVSJA aims to rectify the past devastation of harsh sentencing by acknowledging the duality of survivor-defendants like Ms. K [REDACTED] as having both experienced and caused harm. Governor Cuomo repeatedly highlighted the “ameliorative” nature of the DVSJA and noted the grave concern of ongoing incarceration of survivors like Ms. K [REDACTED]: “The Domestic Violence Survivors Justice Act will allow New York to take critical steps toward addressing the years of injustice faced by survivors whose lives have been shattered by abuse and make it less likely that survivors will be re-victimized or reincarcerated.”⁴¹ A life sentence for a survivor-defendant like Ms. K [REDACTED] fails to address her dual status as a defendant but also as a victim harmed by violence.

The sections above discuss the role that trauma and abuse played in the offense in this case. This section will address other relevant parts of Ms. K [REDACTED]’s history, her institutional record while incarcerated, her plans for release, and post-release supervision. Prior to her conviction in 1996, Ms. K [REDACTED] had only two offenses on her record. Ms. K [REDACTED], having suffered various forms of abuse by her intimate partners, is now a 69-year-old woman who has spent the last twenty-five years of her life working hard, improving herself, and developing the skills to live a productive life in the community. Her time incarcerated has shown her to be a dedicated, hard-working woman who spends her time providing service and mentorship to others. Her original sentence of twenty-five years to life is unduly harsh.

1. The total effective sentence of 25 years to life is unduly harsh given Ms. K [REDACTED]’s institutional record and rehabilitation

Throughout her time at Bedford Hills and Albion Correctional Facilities, Ms. K [REDACTED] has worked to better herself. Her institutional record supports her claim that she should be granted relief under the DVSJA. She has excelled at vocational skills training and her work assignments.

⁴¹ *Women’s Justice Agenda.*

Ms. K [REDACTED] has not received a disciplinary report in over fourteen years. She has completed numerous programs. Most importantly, she stopped drinking once incarcerated and has been sober for over 25 years. She has taken programming to address her substance abuse and learned how to identify her triggers. In her spare time, she crochets stuffed animals for the families of fellow incarcerated people. She sometimes donates these items as part of the Catholic Outreach Program she helps facilitate. She also teaches other women how to crochet.

Due to the role of alcohol in her crime, Ms. K [REDACTED] has completed the Alcohol and Substance Abuse Treatment (ASAT) program at Albion. Her supervisor noted that she “actively participated in group discussions and assignments”⁴² and that she “demonstrated enthusiasm and good insight to ASAT related topics.”⁴³ Ms. K [REDACTED] now understands the role that alcohol played in her life and her actions in the past. She explains:

I always thought that I was functional. Not getting my children out of a burning house proved that I was not functional. Looking back I was a very ugly person. I was hurting my parents, my children, and everybody I used to be close to. I know that life will be hard when I get out, but I learned how to cope without using alcohol.⁴⁴

She has now worked to identify the challenges that are triggers for her drinking, and to understand the tragic consequences of her alcohol addiction.

Beyond ASAT, Ms. K [REDACTED] has successfully completed numerous programs, including the Aggression Replacement Training Program, the Alternatives to Violence Project, and an advanced course in Nonviolent Conflict Resolution.

Ms. K [REDACTED] has also consistently worked during her incarceration, usually in positions where she can provide a service to others. At Bedford Hills, Ms. K [REDACTED]’s longest work

⁴² Exhibit J at 47.

⁴³ *Id.*

⁴⁴ Exhibit H at 21.

assignment was as a palliative aide at medical services for eleven years. Ms. K [REDACTED] received a letter of appreciation from Bedford's Deputy Superintendent of Health Services for her work in the infirmary. As the Deputy Superintendent of Health Services writes on the Memorandum of Commendable Work Assignment:

I recently received a letter from an inmate who was a patient in the infirmary she wrote so many nice compliments about you and other inmate assistants regarding the care you gave her during her short stay. These kind gestures of caring for your fellow inmates should not go unnoticed on our behalf. The Executive Team and I would like to thank you for such a fine caring job. Keep up the good work.⁴⁵

Ms. K [REDACTED]'s employment record indicates her passion for people and her desire to better the lives of others. Ms. K [REDACTED] often holds leadership positions, including her role in training women newly entering the prison to help orient them to their new surroundings. She previously served as an Administrative Clerk, General Library Clerk, and Shop Vocational Building, and Tool Clerk Shop Printing. According to her feedback performance reports, Ms. K [REDACTED] has excelled at her roles and earned commendable reports.⁴⁶

Ms. K [REDACTED] has a solid plan in place to successfully reenter the community should she be resentenced.⁴⁷ Ms. K [REDACTED]'s family are supportive of her and will continue to support her upon her release. Ms. K [REDACTED] plans on staying with her bother in Angola, New York. She looks forward to reconnecting with her family, joining a new church, contributing to the household through remote work, and volunteering in her free time.

⁴⁵ Exhibit J at 62.

⁴⁶ Exhibit J.

⁴⁷ See Exhibit L.

2. Ms. K [REDACTED]'s lengthy period of incarceration and accompanying lifetime supervision is unduly harsh given the burdens of incarceration and supervision and their potential to mimic the coercion of domestic violence.

Continued incarceration will not serve Ms. K [REDACTED] or the public and will only serve to retraumatize her and inhibit rehabilitation. Ms. K [REDACTED] has completed essentially all of the programming available to her, including, most importantly, the ASAT program. She has remained without disciplinary incidents for almost 15 years. Further incarceration will not lead to continued rehabilitation. Moreover, as the sponsors of the DVSJA recognized, incarceration “further victimizes” survivors of abuse.⁴⁸ Prison procedures replicate conditions of abuse through lack of privacy, forced isolation, violence, and fear of retaliation. A recent survey of incarcerated women at Bedford Hills found that 74% have witnessed abuse within the facility while 53% experienced it firsthand.⁴⁹ Incarceration also “exacerbates pre-existing [health] conditions and exposes individuals to further healthcare issues.”⁵⁰ In a survey of 100 incarcerated women conducted by the Correctional Association of New York (CANY), 71% of respondents reported “avoid[ing] seeking medical attention to avoid being treated in an inappropriate manner.”⁵¹ At age 69, Ms. K [REDACTED] suffers from a herniated disc in her back, arthritis, and severe knee pain, all of which require medical attention. The DVSJA allows courts to consider the psychological and physical consequences that lengthy incarceration can have on a traumatized domestic violence survivor.

Ms. K [REDACTED] has reached her minimum term and is currently eligible for discretionary parole. While release on parole would certainly be an improvement over incarceration and a

⁴⁸ Press Release, N.Y. State Sen. Roxanne J. Persaud, *Domestic Violence Survivor's Justice Act, Longtime Bill Sponsored by Senator Persaud, Passes Senate*, Mar. 12, 2019. <https://www.nysenate.gov/newsroom/press-releases/roxanne-j-persaud/domestic-violence-survivors-justice-act-longtime-bill>.

⁴⁹ Correctional Association of New York (CANY), *It Reminds Us How We Got Here: (Re)Producing Abuse, Neglect, and Trauma in New York's Prisons for Women* (October 2020) at 5.

⁵⁰ *Id.* at 21.

⁵¹ *Id.*

testament to Ms. K [REDACTED]'s rehabilitation, her current sentence carries a lifetime of supervision with the attendant burdens and risks that are unduly harsh. Re-entry is a complex process for women who have experienced domestic violence. The strict constraints of parole can mimic the control of a domestic violence survivor's past abusive relationships.⁵² In a recent DVSJA resentencing case, *People v. S.M.*, the court recognized that lengthy post-release supervision can be unduly harsh and counterproductive. 150 N.Y.S. 3d 562 (Co. Ct. Erie County 2021). The court reasoned:

It is well documented that post release supervision is a burden, especially for women who are domestic violence survivors. The strict constraints of post-release supervision can mimic the abusive relationships that domestic violence survivors experienced in their relationships prior to incarceration. The risk of reincarceration for a technical violation is inconsistent with the intent of the DVSJA.

Id. at 567.

Recently, there has been a shift towards recognizing that post-release supervision periods are too long.⁵³ Sentencing trends over the past decade have increased and extended post-release time periods “far beyond” what they once were, with some lasting a lifetime, as is the case here with Ms. K [REDACTED].⁵⁴ A shorter period of post-release supervision would provide Ms. K [REDACTED] the assistance and support she needs to rejoin society without subjecting her to a lifetime of unnecessary retraumatizing, controlling conditions.⁵⁵ Nor is a longer period of supervision

⁵² Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 THE J. OF CRIM. L. AND CRIMINOLOGY, 1015, 1035 (2013).

⁵³ S [REDACTED] Deng, *Revoked – How Probation and Parole Feed Mass Incarceration in the United States*, HUMAN RIGHTS WATCH (July 31, 2020), <https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states>; Eliot Yang, *Mass Supervision: The Engine Behind Mass Incarceration*, (Mar. 22, 2020), <https://medium.com/@eliotyang/mass-supervision-the-engine-behind-mass-incarceration-4f593134e070>; Priscilla A. Ocen, *Awakening to a Mass-Supervision Crisis*, THE ATLANTIC (2019).

⁵⁴ Klingele, *supra*, at 1062.

⁵⁵ *Id.*

necessary for public safety. Given her age, gender, and criminal history, Ms. K [REDACTED] presents a negligible risk of reoffending.⁵⁶

Conclusion

For the reasons described above, Ms. K [REDACTED] should be resentenced under the DVSJA. She is a survivor of repeated domestic violence whose history of abuse was a significant contributing factor to the offense for which she is incarcerated. She is 69 years old and has served almost twenty-six (26) years in prison. Over that time she has demonstrated growth and rehabilitation. She respectfully requests that this Court provide the following relief:

1. Find that the applicant has complied with the provisions of C.P.L. § 440.47(2); and
2. Conduct a hearing to aid in making the Court's determination of whether the applicant should be resentenced in accordance with P.L. § 60.12 and to consider any fact or circumstances relevant to the imposition of a new sentence; and
3. Upon determination that the applicant should be resentenced in accordance with P.L. § 60.12, enter an order vacating the sentence originally imposed and impose the new sentence as authorized by P.L. § 60.12.
4. Grant any other relief that the Court deems just and proper.

⁵⁶ Statistics reveal a far lower recidivism rate for people over the age of 65 years compared to younger individuals released from prison. *See, e.g.,* Kim Steven Hunt & Billy Easley II, *The Effects of Aging on Recidivism Among Federal Offenders*, United States Sentencing Commission (2018); *At America's Expense: The Mass Incarceration of the Elderly*, ACLU (June 2012) (only 7% of incarcerated New Yorkers released from prison at age 50 or older were returned for new convictions). Women who have served sentences for similar crimes in this state also have a near zero recidivism rate. "[O]f 38 women convicted of murder and released between 1985 and 2003 in New York, none returned to prison within 36 months of their release." Kelly Fay, *Bill would give judges discretion when sentencing abuse victims*, LEGISLATIVE GAZETTE (May 5, 2014).