

COUNTY COURT OF ERIE COUNTY
STATE OF NEW YORK

People of the State of New York, :
v. :
S [REDACTED] M [REDACTED], :
Defendant. :

Indictment # [REDACTED]

MEMORANDUM OF LAW

Respectfully submitted,

[REDACTED]
Attorney for S [REDACTED] M [REDACTED]

On the Application:

Justice Dunwoody, Student Attorney
Tyler O'Neill, Student Attorney

On the Hearing:

Courtney Bow, Student Attorney
Samantha Gier, Student Attorney

University at Buffalo School of Law
Criminal Justice Advocacy Clinic
507 O'Brian Hall
Buffalo, New York 14260

[REDACTED]
[REDACTED]

Dated: [REDACTED]

To: Hon. [REDACTED]
County Court Judge
Erie County Court Building
25 Delaware Avenue
Buffalo, New York 14202

[REDACTED]
Erie County District Attorney
25 Delaware Avenue
Buffalo, New York 14202

PRELIMINARY STATEMENT

S■■■■ M■■■■, the defendant in the above-captioned indictment, 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, (1) at the time of the instant offense she was a victim of domestic violence subjected to substantial abuse; (2) such abuse was a significant contributing factor to Ms. M■■■■’s criminal behavior, and (3) the original sentence imposed is unduly harsh when considering the nature and circumstances of the crime and the history, character and conditions of Ms. M■■■■.

Ms. M■■■■ began dating her soon-to-be husband, D■■■■ S■■■■, in late 2010. Their relationship was initially happy. When Mr. S■■■■ had nowhere to live, Ms. M■■■■ opened up her home to him. Mr. S■■■■ moved in with Ms. M■■■■ after only a few weeks of dating. Ms. M■■■■ soon learned that Mr. S■■■■ was a high-ranking gang member. Shortly thereafter, the abuse began. Mr. S■■■■ physically and psychologically abused Ms. M■■■■ throughout their relationship. He would beat her regularly. He also forced Ms. M■■■■ to brand herself as his property, requiring her to get a tattoo that read, “Property of Face-Off.” On other occasions he instructed his fellow gang members to beat Ms. M■■■■. On the date of the instant offense, Mr. S■■■■ forced Ms. M■■■■ to drive him and his friend as they engaged in robberies and ultimately murdered S■■■■ W■■■■. Ms. M■■■■ was threatened, physically assaulted, and coerced into participating. She plead guilty to the robberies and was ultimately sentenced to nine and a half years in prison. The DVSJA offers an opportunity for a second look at Ms. M■■■■’s sentence.

Ms. M■■■■ has met the threshold requirements and has been granted notification to apply for resentencing. This memorandum of law is submitted in support of re-sentencing.

I. **BACKGROUND**

A. **The Domestic Violence Survivors Justice Act was enacted to provide more expansive relief for survivors of domestic violence, including those who commit offenses because of the pattern of abuse they face**

On May 14, 2019, New York State Governor, Andrew Cuomo, signed the Domestic Violence Survivors Justice Act (“DVSJA”) into law. In enacting the law, the state legislature recognized the link between domestic violence and women’s incarceration.

“9 out of 10 incarcerated women have experienced severe physical or sexual violence in their lifetime; 6 out of 10 experienced serious physical or sexual violence during childhood; 75% suffered severe physical violence by an intimate partner during adulthood; and 37% were raped before their incarceration.”¹

The DVSJA has two purposes. First, “[t]o expand upon the existing provisions of alternative sentencing for domestic violence cases; second, to allow judges the opportunity to resentence currently incarcerated persons for offenses in which certain domestic violence criteria was a significant element of the offense.”² As one of the bill’s sponsors explained, the Act “corrects the contradictory injustice victims in New York face and gives second chances to those already wronged by the very system designed to help protect them.”³

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

¹ N.Y. State Assemb. Memorandum in Support of Bill A3110 (Jan. 26 2017) https://nyassembly.gov/leg/?default_fld=&leg_vIdeo=&bn=A03110&term=2017&Summary=Y&Actions=Y&Committee%2526nbspVotes=Y&Floor%2526nbspVotes=Y&Memo=Y&Text=Y.

² *Id.*

³ Press Release, N.Y. State Sen. Roxanne Persaud, *Domestic Violence Survivor’s Justice Act, Longtime Bill Sponsored by Senator Persaud, Passes Senate* (Mar. 12, 2019), available at <https://www.nysenate.gov/newsroom/press-releases/roxanne-j-persaud/domestic-violence-survivors-justice-act-longtime-bill>.

cases involving survivors convicted of certain crimes against their abusers.⁴ However, the law was “narrowly drawn” in terms of the eligible crimes and the alternate sentencing ranges.⁵ It also was intended to provide benefit only to survivors who fit a narrow, stereotypical mold: those acting in self-defense against their abuser.⁶ The DVSJA, by contrast, is an expansive law. Its aims include protecting survivors who were coerced into crimes by their abusers.

“We are acutely aware of how abusers use fear and control to manipulate their victim, including manipulating victims to commit criminal activity directly leading to their present incarceration. Many incarcerated survivors have committed criminal activity to protect themselves from further violence, and others have convictions stemming from acts taken as a result of an abuser’s coercion.”⁷

Unlike previous laws, the DVSJA protects survivors in cases where the victim of the crime is not the abuser.⁸ This recognizes the reality that “abusers often force survivors to participate in crimes like forgery, robbery, burglary, drug sales and prostitution using physical attacks, threats of violence, manipulation and provocation.”⁹ As one of the DVSJA’s sponsors explained in response to a question about the law encompassing crimes against victims other than the abuser:

Years ago, we wouldn’t even be talking about this. It wasn’t recognized. People didn’t report it, nor did we at all think about the long-term impact that individuals who’ve undergone this particular crime have had. And what it may induce them to do. . . .So, yes, we are opening up this discussion to recognize these other factors, and to give a judge an opportunity to look at those factors in both sentencing and resentencing.¹⁰

⁴ See N.Y.C. Bar Ass’n, *Report in Support of the Domestic Violence Survivors Justice Act*, 2 (Apr. 09, 2019), available at https://s3.amazonaws.com/documents_nycbar.org/files/DVSurvivorsJusticeDVReportFINAL6.16.11.pdf.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ N.Y. State Assemb., Regular Session, March 4, 2019, 10

<https://www2.assembly.state.ny.us/write/upload/transcripts/2019/3-4-19.pdf#search=%223974%22>

⁹ New York State Coalition Against Domestic Violence, *Memorandum of Support: Domestic Violence Survivors Justice Act* (April 2016).

¹⁰ N.Y. State Assemb., Regular Session, May 8, 2018, 58.

<https://www2.assembly.state.ny.us/write/upload/transcripts/2017/5-8-18.pdf#search=%223110%22>

The DVSJA amended New York State Penal Law § 60.12 and created C.P.L. § 440.47. C.P.L. § 440.47 allows survivors to apply to be re-sentenced as long as they meet certain criteria. First, a survivor must make an application to the original sentencing judge, or a judge in the same court, seeking permission to apply for re-sentencing. Upon being granted permission to apply, a survivor can file an application for re-sentencing with the court.

B. Request to apply for re-sentencing

According to C.P.L. § 440.47:

. . . any person confined in an institution operated by the department of correction 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.

Ms. M■■■■ meets the requirements for resentencing. On December 3, 2020, this Court granted

Ms. M■■■■'s request to apply for resentencing in accordance with C.P.L. § 60.12.¹¹

C. Re-sentencing Application

Under P.L. § 60.12 and C.P.L. § 440.47, eligibility for resentencing requires the applicant to demonstrate that:

¹¹ Exhibit A.

- (1) 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 the applicant as such term is defined in C.P.L. § 530.11(1);
- (2) that such abuse was a significant contributing factor to her criminal behavior; and
- (3) the sentence imposed is unduly harsh having regard for the nature and circumstances of the crime and the history, character, and conditions of the applicant.

Under C.P.L. § 440.47(2)(c), an applicant for re-sentencing 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 C.P.L. § 530.11(1). 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 an order of protection.

Under C.P.L. § 440.47 (2)(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. At the hearing, the court may consider any number of facts or circumstances, including the applicant's institutional record. C.P.L. § 440.47(2)(e).

II. MS. M [REDACTED] SHOULD BE RE-SENTENCED UNDER THE DVSJA

Ms. M [REDACTED] presents a paradigmatic case for DVSJA re-sentencing relief. As previously discussed, the DVSJA aims to address the traumatization of survivors of domestic abuse when

they commit crimes for which the abuse was a significant contributing factor. Ms. M■■■■ is eligible for re-sentencing under C.P.L. § 440.47 because (1) at the time she was a victim of domestic violence subjected to substantial physical and psychological abuse; (2) such abuse was a significant contributing factor to her commission of the underlying offense; and (3) the original sentence imposed in this matter is unduly harsh.

A. Ms. M■■■■ survived substantial physical and psychological abuse

At the time of the underlying offense, Ms. M■■■■ was a victim of domestic violence suffering substantial physical and psychological abuse from a member of the same household. Ms. M■■■■'s husband, D■■■■ S■■■■, would regularly physically assault her, and he instructed his fellow gang members to beat Ms. M■■■■. He would also psychologically control Ms. M■■■■. He would routinely take her vehicle without her permission, and try to control who she talked to, what she did, and how she spent her money. This physical and psychological abuse was substantial and constitutes domestic violence under New York law.

1. Mr. S■■■■'s relationship with Ms. M■■■■ constituted "Domestic Violence" by a member of the same family or household

New York law considers a "victim of domestic violence" to be someone who is subjected to violence, coercion, or abuse by a member of the same "family or household" N.Y. Soc. Serv. Law § 459-a. The definition of "members of the same family or household" in C.P.L. § 530.11(e) includes "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time," as well as "persons legally married to one another." C.P.L. § 530.11(e). Courts can consider many factors to determine if a relationship is "intimate" under the law. This includes "the nature or type of relationship; whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship." Id.

The relationship between Ms. M [REDACTED] and Mr. S [REDACTED] was intimate. They were in a romantic relationship and began living together within weeks of first dating. Ultimately, on June 27, 2012, Ms. M [REDACTED] and Mr. S [REDACTED] were married. They were members of the same family or household under C.P.L § 530.11 and therefore the conduct falls under the purview of the DVSJA.

2. Ms. M [REDACTED] suffered substantial abuse at the hands of Mr. S [REDACTED]

a. Assault

New York law provides that a person is guilty of assault in the third degree when “[w]ith intent to cause physical injury to another person, he causes such injury to such person. . .”. P.L. § 120.05. Mr. S [REDACTED] would assault Ms. M [REDACTED] on an-almost daily basis. These assaults were often unprovoked or prompted by something as simple as not turning on a turn signal quickly enough while driving or any perceived disrespect. He would hit her, shove her, and beat her. On one occasion he hit Ms. M [REDACTED] in the face in front of his family because she loaned his brother a car without consulting Mr. S [REDACTED]. On another occasion, Mr. S [REDACTED] dragged Ms. M [REDACTED] down a flight of stairs. That assault resulted in Mr. S [REDACTED]’s parole being revoked. Despite Mr. S [REDACTED] going to prison for a year, the abuse returned as soon as he did. A couple of months after he got out of prison, Mr. S [REDACTED], knocked her to the ground, pinned her down, and headbutted her, leaving her with eyes so swollen the next day that she couldn’t drive her son to school.

Mr. S [REDACTED]’s physical abuse of Ms. M [REDACTED] continued until the time of their arrests. In August of 2012, Mr. S [REDACTED] injured Ms. M [REDACTED] so badly that she was forced to seek medical attention. He pointed a pistol at her then smashed her in the head with it.¹² The blow left Ms.

¹² Penal Law § 120.10 provides that a person is guilty of assault in the first degree when “[w]ith intent to cause serious physical injury to another person, he causes such injury to such person . . . by means of a deadly weapon or a dangerous instrument.

M■■■■ with a bleeding wound that required stitches.¹³ She was treated at Niagara Falls Memorial Medical Center and referred to a domestic violence shelter upon discharge.¹⁴ She obtained a temporary order of protection against Mr. S■■■■.¹⁵

Mr. S■■■■'s abuse was an almost-daily occurrence for Ms. M■■■■ for more than two years. These examples provide only a limited glimpse into the continuous abuse Ms. M■■■■ suffered.

b. Assault and coercion by other gang members at Mr. S■■■■'s behest

On two separate occasions, Mr. S■■■■ instructed members of his gang to “jump” Ms. M■■■■. This entailed multiple men and women punching, kicking, and stomping on her. Members of the gang also threatened Ms. M■■■■ if she did not support Mr. S■■■■ while he was incarcerated on a parole violation for assaulting her. They forced Ms. M■■■■ to put money on his commissary account and to visit Mr. S■■■■ regularly in prison, making an hours-long drive to see him. Ms. M■■■■ was afraid not to comply.

c. Psychological abuse and threats

Mr. S■■■■ attempted to control Ms. M■■■■. He became upset when she did something as simple as loaning out her own car without his permission. If he thought she disrespected him, he would beat her. He would regularly threaten her with “what [he] would do to her” if he thought he was being slighted. He would also belittle her, calling her a “stupid bitch” and “dumb as hell”. This psychological abuse was a way of exerting power and control over Ms. M■■■■.¹⁶

¹³ See Exhibit E.

¹⁴ See Exhibits E, F, G, H.

¹⁵ Exhibit I.

¹⁶ Power and control are two major components of domestic violence, which includes psychological abuse. See 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.”). Psychological abuse can come in three forms: mental, emotional, and verbal abuse.

3. At least two pieces of evidence corroborate that, at the time of the offense, Ms. M█████ was a victim of domestic violence subjected to substantial physical and psychological abuse.

At least two pieces of evidence corroborate Ms. M█████'s abuse at the time of the offense.

At least one piece of evidence attached to this application meets the statutory requirement of being either a court record, presentence report, social services record, hospital report, sworn statement from a witness to the domestic violence, law enforcement record, domestic incident report, or order of protection. Attached to the Affirmation of Alexandra Harrington are: S█████ M█████'s medical records dated August 6, 2012 from Niagara Falls Memorial Medical Center (Exhibit E); YWCA of Niagara Safe House records (Exhibit F); Niagara Falls Police Department Domestic Incident Report dated August 6, 2012 (Exhibit G); Records from the Child Advocacy Center Family Services Advocate dated August 6, 2012 (Exhibit H); and a Niagara Falls City Court Temporary Order of Protection dated August 9, 2012 (Exhibit I). Ms. M█████'s Pre-sentence Memorandum by ██████████ dated November 14, 2013, the Presentence Investigation Report ("PSI"),¹⁷ and the Sentencing Minutes¹⁸ in this case also corroborate that

Robinson, *Id.* at 80. This type of abuse is unseen, as compared to physical abuse, and can cause a victim to feel as if they are worthless or feel that everything their abuser is telling them is true, even when in reality their abuser is wrong. *See* Knapp at 316; Robinson, 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."). Psychological violence can include using coercion or threats, economic control, male privilege where the woman is seen as more of a servant, blaming the victim, and using isolation and intimidation tactics. Claire Wright, *Torture at Home: Borrowing from the Torture Convention to Define Domestic Violence*, 24 HASTINGS WOMEN'S L.J. 457, 469-70 (2013).

¹⁷ Pursuant to C.P.L. § 390.50, the pre-sentence memorandum and PSI are not attached to this affirmation in order to preserve their confidentiality. A copy of the pre-sentence memorandum can be provided upon request.

¹⁸ Sentencing Minutes, *People v. M█████*, Indictment No. 01001-2012, November 18, 2013, at 4-5 (hereinafter "S.T. #") (defense counsel explaining:

And by way of explanation and not excuse, she was in a position in her marriage to the person who committed the murder where she was under extreme coercion. She didn't have much choice in participating or not. The instances of domestic violence between Mr. S█████ and my client were numerous. He was incarcerated – Mr. S█████ was incarcerated last summer, the summer before last as a result of one of those incidents. . . . my client was stuck in that relationship to the point where he basically branded her. . . . had her branded like a piece of cattle, a head of cattle. My client was not treated like a human being by this

Ms. M■■■■ was a victim of substantial domestic violence.

B. Ms. M■■■■’s abuse was a significant contributing factor to her criminal behavior.

Ms. M■■■■’s experience with abuse was a significant contributing factor to her commission of the underlying crime. Mr. S■■■■, using physical violence and threats, coerced Ms. M■■■■ into participating in the underlying crime. Ms. M■■■■, influenced by her history of abuse at the hands of Mr. S■■■■ and all too cognizant of what happened when she disobeyed him, unwillingly participated. At one point, she attempted to extricate herself from the day’s events. Mr. S■■■■ physically assaulted her.

The DVSJA does not require that the abuse the applicant suffered be the exclusive factor informing her criminal conduct. *People v. S■■■■*, 132 N.Y.S. 3d 251, 257 (N.Y. Co. Ct. 2020).

“Neither is it required that the defendant be in the throes of an attack or that one be imminent.”

Id. Nonetheless, in this case, Mr. S■■■■’s abuse and coercion were the overriding factors that compelled Ms. M■■■■’s participation in the offense. Given her history of being abused by Mr. S■■■■, and his assault and threats that day, Ms. M■■■■ felt she had no choice but to participate.

As the New York City Bar explained in its report in support of the DVSJA:

We are acutely aware of how abusers use fear and control to manipulate their victim, including manipulating victims to commit criminal activity directly leading to their present incarceration. Many incarcerated survivors have committed criminal activity to protect themselves from further violence. . . .¹⁹

person. He was – she was treated almost as chattel and that’s indicative of the relationship that she had with Mr. S■■■■.);

at 7 (judge expressing doubt regarding whether Ms. M■■■■ was “operating under duress” but acknowledging “it seems like you had an abusive relationship with this character D■■■■ S■■■■. . . .” and “I’m not suggesting that you were not in an abusive relationship with D■■■■ S■■■■; this kid’s a punk in every sense of the word, but you’re not a victim to me. . . .”).

¹⁹ See N.Y.C. Bar Ass’n, *Report in Support of the Domestic Violence Survivors Justice Act*, 2 (Apr. 09, 2019), available at

<https://s3.amazonaws.com/documents.nycbar.org/files/DVSurvivorsJusticeDVReportFINAL6.16.11.pdf>. See also Marti Tamm Loring & Pati Beaudoin, *Battered Women as Coerced Victim-Perpetrators*, 2 J. EMOTIONAL ABUSE 3, 13 (2000) (finding that out of 525 abuse survivors who had committed at least one crime, almost half had been coerced into committing crimes by their abusers).

Similarly, the New York State Coalition Against Domestic Violence explained:

The DVSJA gives judges discretion in sentencing and re-sentencing both domestic violence survivors who defended themselves against their abusers, and also those convicted of engaging in other illegal acts to protect themselves from their abuser's violence. It is important to include this second group, because abusers often force survivors to participate in crimes like forgery, robbery, burglary, drug sales and prostitution using physical attacks, threats of violence, manipulation and provocation.²⁰

This Court's evaluation of whether the abuse was a significant contributing factor to Ms. M■■■■'s crime "is not transactional. . . . [i]t is cumulative, requiring the court to consider the cumulative effect of the abuse together with the events immediately surrounding the crime, paying particular attention to the circumstances under which the defendant was living and adopting a 'full picture' approach in its review." *People v. S■■■■*, 132 N.Y.S. 3d at 258.

Survivors react to the trauma of their abuse in different ways, and each survivor's reaction "must be explained in the context of her life as well as the way the abuse has specifically impacted her state of mind."²¹

In this case, Ms. M■■■■ had been subjected to Mr. S■■■■'s physical and psychological abuse throughout their relationship. She knew what would happen to her if she disobeyed or disrespected him, and he proved this to her when she attempted to stop participating. Without Mr. S■■■■'s prior assaults on Ms. M■■■■ and without his assaults on her that day, Ms. M■■■■ would not be in front of this court today. So too did her history of abuse, starting in childhood, inform her actions. Domestic violence does not happen in a vacuum, and the repeated exposure to abuse can have a profound effect on a person's life and choices.²²

²⁰ N.Y. State Coal. Against Domestic Violence, *Memorandum of Support of DVSJA*, March 2017

²¹ Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 Notre Dame J.L. Ethics & Pub. Pol'y 321, 324 (1992).

²² See *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

The DVSJA contemplates cases that present tragic outcomes yet where re-sentencing is still appropriate and just.²³ This is so where, like here, the experience of abuse contributed significantly to the offense.

C. Ms. M■■■■'s sentence of nine and a half years with five years of post-release supervision is unduly harsh.

A primary purpose of the DVSJA is to recognize the impact of trauma on abuse survivors and their involvement in the criminal legal system. This “critical shift” 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.”²⁴

This Court has a chance to look at the underlying circumstances of the instant matter and to properly take into account the abuse Ms. M■■■■ endured. Additionally, Ms. M■■■■’s record during the intervening nine years, what she has accomplished while incarcerated, and her growth and development, also support the need for resentencing.

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.”); C. Thresa Yancey & David J. Hansen, 15 *Relationship of Personal, Familial, and Abuse-Specific Factors with Outcome Following Childhood Sexual Abuse*, 410, 411 (2010). There is no universal definition of what constitutes sexual abuse of children, yet there are predictable outcomes and effects of such abuse. *Id.* at 411. These outcomes can be grouped as internalizing (e.g., depression, self-harm, low self-esteem, anxiety, PTSD), externalizing (conduct problems, aggressive behaviors, sexual behaviors), and asymptomatic responses. *Id.*; AMERICAN PSYCHOLOGICAL ASSOCIATION, *Report of the APA Task Force on the Sexualization of Girls* (2007), <https://www.apa.org/pi/women/programs/girls/report-full.pdf> (stating “The constricted sense of self of the sexually abused child and the coercive refusal of the perpetrator to respect the child’s physical boundaries may result in subsequent difficulties in asserting boundaries, impaired self-protection, and a greater likelihood of being further victimized as an adult.”).

²³ See N.Y. State Assemb. Memorandum in Support of Bill A3110 (Jan. 26 2017) https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A03110&term=2017&Summary=Y&Actions=Y&Committee%2526nbspVotes=Y&Floor%2526nbspVotes=Y&Memo=Y&Text=Y.

²⁴ Cynthia Feathers, *Domestic Violence Survivor-Defendants: New Hope for Humane and Just Outcomes*, New York State Bar Association Journal (March 2020).

1. Mr. S■■■■ coerced Ms. M■■■■ to participate in the underlying crime; the original sentence does not account for the role the abuse played in her participation

The original sentence did not account for the role that domestic violence playing in informing Ms. M■■■■'s actions on the day of the crime. While acknowledging that Ms. M■■■■ "had an abusive relationship" with Mr. S■■■■, the sentencing court discounted the coercion and abuse that led to her participation in the crime: "[y]ou seemed to be a willing participant." S.T. at 7. As the court explained, "I'm not suggesting that you were not in an abusive relationship with D■■■■ S■■■■; this kid's a punk in every sense of the word, but you're not a victim to me, ok, insofar as all of that is concerned." *Id.* The court imposed a nine-and-a-half-year sentence with five-years post-release supervision. *Id.* at 8.

A trial court must hear a resentencing application regardless of whether it previously considered evidence that the applicant was a victim of domestic abuse. The operative question is not just what information the court previously reviewed and considered, but also how the court viewed and considered the applicant's history of abuse. The lens through which the court must look to determine an appropriate sentence for a victim of domestic violence has changed in many significant ways since the original sentence was imposed. The original sentencing court was not required to determine whether the abuse Ms. M■■■■ suffered "was a significant contributing factor" to her participation in the crime. P.L. § 60.12(1)(b). The DVSJA provides a new sentencing framework and a new way to consider the context of the survivor-defendant. In part it does so by breaking down the false dichotomy between victim and defendant.

Further, C.P.L. § 440.47(2)(e) allows the court to consider "any fact or circumstances relevant to the imposition of a new sentence." This includes any relevant fact or circumstance

that occurred between the day of sentencing up to the present. In addition, C.P.L § 440.47(2)(e) allows the court to, “consider the institutional record of confinement of such person.”

2. Ms. M■■■■'s institutional record

Ms. M■■■■'s sentence is unduly harsh given her institutional record while incarcerated and the person she has grown to become. Ms. M■■■■ has participated in numerous programs and has made remarkable achievements over the last eight years.

Prior to her incarceration, Ms. M■■■■ had a ninth-grade level of education. Over the course of multiple years and with more than one attempt, she pursued and eventually obtained her GED.²⁵ She more recently enrolled in ■■■■■ College to obtain an Associate's Degree. She routinely took nine credit hours of classes in the evenings while working during the day. In December of 2020, Ms. M■■■■ graduated *cum laude* with a 3.65 GPA²⁶

Ms. M■■■■ has consistently sought out both academic and training opportunities while incarcerated. She has an administrative clerk for chaplain services, a nurse's aide, a greenhouse laborer, and a recreation aide. She has also completed numerous programs including a 12 week Peer Facilitator Training Program; the Inmate Program Associate (IPA) Training at Albion, a selective program that trains incarcerated individuals to assist staff in providing facility programming; courses in Nonviolent Conflict Resolution as well as a facilitators' training in Alternatives to Violence; and several parenting workshops.²⁷ Additionally, Ms. M■■■■ has received a number of positive Inmate Progress Reports. Some of the reports described her as a “[g]ood student who works hard,” and “displays an enthusiastic attitude and participates in

²⁵ See Exhibit J at 52.

²⁶ *Id.* at 53-54.

²⁷ See Exhibit K

class.”²⁸ A report from the Family Violence Program indicated that Ms. M [REDACTED] “showed growth during the group,” and was a “good group member.”²⁹

In addition, Ms. M [REDACTED] has worked hard to maintain a relationship with her son and her father. Since being incarcerated, Ms. M [REDACTED] now speaks to her father twice a week. She has also been able to maintain a strong relationship with her son. Ms. M [REDACTED] hopes to find an apartment where she can care for herself and her son before ultimately relocating out of state to avoid Mr. S [REDACTED]’s associates.

3. A five-year period of post-release supervision is unduly harsh

The DVSJA recognizes that men and women who are survivors of domestic violence, and commit offenses because of their abuse, should not be punished as harshly. This principle is based not only on compassion but also the fact that domestic violence survivors are not as likely to recidivate.³⁰ Ms. M [REDACTED] is a 40-year old mother and domestic violence survivor with a minimal prior record is unlikely to re-offend.

While Ms. M [REDACTED]’s incarceration is coming to an end, she will still be serving an unduly harsh sentence: she is subject to half a decade of post-release supervision. Post-release supervision places significant demands on those trying to successfully navigate its strictures.³¹ In fact, the “sheer number of requirements imposes a nearly impossible burden on many offenders.”³²

²⁸ Exhibit L at 74, 78.

²⁹ Exhibit L at 82.

³⁰ N.Y. State Assemb. Memorandum in Support of Bill A3110 (Jan. 26 2017) https://nyassembly.gov/leg/?default_fld=&leg_vIdeo=&bn=A03110&term=2017&Summary=Y&Actions=Y&Committee%2526nbspVotes=Y&Floor%2526nbspVotes=Y&Memo=Y&Text=Y.

³¹ See e.g., Jennifer K. Wesely & Susan C. Dewey, *Confronting Gendered Pathways to Incarceration: Considerations for Reentry Programming*, 45 SOCIAL JUSTICE, 57, 61 (2018).

³² Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 THE J. OF CRIM. L. AND CRIMINOLOGY, 1015, 1035 (2013).

Re-entry for women who have been incarcerated is already complex and it can be even more so for those who experienced domestic violence prior to their offense. These survivors have already experienced the trauma of being in prison, where they may have dealt with violence within prison itself. Upon release, the strict constraints and limits on one's freedom can mimic the controlling, abusive relationships that domestic violence survivors have experienced in the past.³³ Parole and post-release supervision focus on a "responsibilization discourse that emphasize[s] individual accountability" over the social conditions that got someone into the criminal justice system in the first place, meaning that women are blamed for having the life histories they have, such as being involved in violent relationships rather than leaving.³⁴ In this case, the strict requirements of supervision also function to keep Ms. M■■■■ in an area where she feels unsafe and is surrounded by her abuser's gang associates. She has previously attempted to escape Mr. S■■■■'s control and been threatened and pulled back in by his "brothers." She will only feel safe when she can leave New York state to begin a new life with her son.

Supervision is meant to "facilitat[e] the successful completion of the sentence or period of community supervision."³⁵ Parole officers "monito[r] parolee compliance with the conditions of community supervision," and "respond to each parolee's need for services, treatment, and assistance to increase the likelihood that the parolee will succeed in the community."³⁶ However, while the support and supervision may be helpful and even necessary in the period immediately following release from prison, the opportunity for violations outweigh the benefits of supervision

³³ See Klingele, *supra* note 32, at 1060 (arguing post-release supervision should be less restrictive of the freedom of those trying to successfully reenter); Priscilla A. Ocen, *Awakening to a Mass-Supervision Crisis*, THE ATLANTIC (2019) (explaining parole officers may not understand "why women who have experienced abuse may not respond positively to coercive forms of supervision"; describing how a survivor experienced supervision as "remind[ing] her of her abusive relationship").

³⁴ See e.g., Wesely, *supra* note 31, at 62.

³⁵ DOCCS Community Supervision Handbook, <https://doccs.ny.gov/community-supervision-handbook/introduction> (last visited Feb. 7, 2021).

³⁶ *Id.*

as time goes on. The likelihood of recidivism decreases every year after release from prison.³⁷ Yet lengthy supervision provides “almost unlimited opportunity for violations and revocation.”³⁸ Technical violations in this case could include drinking alcohol or frequenting an establishment where alcohol is sold or served as its main business, or for failing to abide by a curfew.³⁹ In this state particularly, numbers of parole revocations for technical violations have increased in recent years.⁴⁰ “Between 2014 and 2018, for example, the percentage of people held on technical violations of parole increased by 15 percent, even as the overall jail population declined by 21 percent.”⁴¹

As recently as 2015, the American Law Institute “recommends that the length of supervision be decoupled from the original term of imprisonment that was imposed, served or unserved, and limited to a maximum of five years for moderate- to high-risk offenders.”⁴² A shorter period of supervision will still meet the purpose of assisting in re-entry and keep the focus on reducing the risk of reoffending during the early months after release.⁴³

III. CONCLUSION

S■■■■ M■■■■ thought that with Mr. S■■■■ she could create a happy, loving family for herself and her son. Instead, she was physically assaulted, demeaned, and controlled by Mr. S■■■■. Ultimately, her forced Ms. M■■■■ to participate in the underlying offense. For the reasons described in this memo, Ms. M■■■■ meets the requirements for resentencing under the DVSJA. A sentence in accordance with the DVSJA will allow her to put back together the pieces of her

³⁷ Edward E. Rhine, Joan Petersilia, & Kevin R. Reitz, *Improving Parole Release in America*, 28 FED. SENT’G REP. 96, 103 (2015).

³⁸ Klingele, *supra* note 32, at 1062.

³⁹ Exhibit M.

⁴⁰ See NEW YORK TIMES, *The Problem with Parole*, Feb. 11, 2018, <https://www.nytimes.com/2018/02/11/opinion/problem-parole.html>.

⁴¹ *Id.*

⁴² Rhine, *supra* note 37, at 102.

⁴³ *Id.*; Klingele, *supra* note 32, at 1062.

life and create a new future for herself and her son. Ms. M [REDACTED] 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.