

# APPENDIX: MODEL DOMESTIC VIOLENCE AND HUMAN TRAFFICKING SURVIVOR JUSTICE SENTENCING LAW

The following model legislation includes many of the components of New York’s DVSJA, while incorporating the modifications and avoiding the pitfalls discussed in the recommendations above.

## I. Definitions

A. Within this Act, the following definitions shall apply:

1. Domestic Relationships –

- 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 not related by consanguinity or affinity who live in the functional or factual equivalent of a natural family, such as children and foster parents or congregate childcare workers;<sup>69</sup>
- e) persons who have a child in common, regardless of whether such persons have been married or have lived together at any time; and
- f) 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.”

2. Sex Trafficking – Compelling another to commit a commercial sex act through force, fraud, or coercion or promoting the commission of a commercial sex act by an individual under 18 years of age.<sup>70</sup>

3. Significant Contributing Factor – The effects of the domestic abuse were sufficiently important or meaningful to have likely helped to bring about the applicant’s participation in the offense. There can be more than one significant contributing factor. A significant contributing factor need not be a causal factor, the sole factor, or primary factor.

## II. Alternative sentences for survivors of domestic violence and trafficking

A. Notwithstanding any other provision of law, where a court is imposing a sentence upon a person for any offense and is authorized or required to impose a sentence of imprisonment, the court shall instead impose a sentence in accordance with Subsection IV, upon a determination following a hearing that:

1. the applicant was subjected to physical, sexual, or psychological abuse inflicted in a domestic relationship as such term is defined in subdivision I of this Act or was a victim of sex trafficking as defined in subdivision I of this Act; and
2. such abuse or victimization was a significant contributing factor to the applicant’s participation in the offense.

- B. In determining whether such abuse or victimization was a significant contributing factor to the applicant's participation in the offense, the court shall consider the cumulative impact of the abuse or victimization by one or more individuals on the applicant's mental state and culpability at the time of the underlying offense.
  - 1. The abuse or victimization need not result in physical injury, be of long-term duration, or occur contemporaneously with the underlying offense to meet this standard.
  - 2. The applicant's failure to allege or offer evidence of such abuse or victimization prior to sentencing shall not preclude the applicant from raising such abuse or victimization at sentencing and seeking an alternative sentence. Any such failure may not be considered adversely by the court when assessing the veracity of the applicant's claims.
- C. At the hearing to determine whether the applicant should be sentenced pursuant to this section, the court may consider oral and written arguments, take testimony from witnesses offered by either party, and consider any relevant evidence to assist in making its determination. Hearsay shall be admissible at such hearings. Expert testimony may be considered where relevant however shall not be required, and the applicant shall not be required to provide testimony. An applicant choosing not to provide testimony shall not be considered a negative factor in determining a motion pursuant to this section, and an applicant's testimony alone can be sufficient evidence to support the claim.
- D. *If your state has a Victim's Bill of Rights, specify here how the hearing will comply with that Act, for example, how notice and the opportunity to be heard will be given to victims.*

### **III. Resentencing for survivors of domestic violence and trafficking**

- A. Notwithstanding any contrary provision of law, any person may, on or after such effective date, submit to the court in which the original sentence was imposed upon such person an application for resentencing under this section.
- B. An individual shall be eligible for resentencing under this section if
  - 1. They are confined in an institution operated by the Department of Correction<sup>71</sup> or serving a sentence of community supervision;
  - 2. They were subjected to physical, sexual, or psychological abuse inflicted in a domestic relationship as the term is defined in Subsection I of this Act or were a victim of sex trafficking as defined in Subsection I of this Act; and
  - 3. Such abuse or victimization was a significant contributing factor to the individual's participation in the offense.
- C. When filing an application for resentencing under this section, the applicant may request that the court assign them an attorney for the preparation of and proceedings on the application for resentencing pursuant to this section. Upon receiving the request, the court shall assign an attorney in accordance with the provisions of *[relevant statutory provisions regarding the appointment of counsel]*.
- D. Upon making a determination as to assignment of counsel, the court shall also promptly order the disclosure of discovery to the person applying for resentencing and their counsel. The order of disclosure of discovery shall provide that:
  - 1. The prosecution shall produce all items and information that relate to the subject matter of the case and are in the possession, custody, and control of the prosecution or persons under their direction or control and make available for inspection any physical evidence secured in connection with the investigation or

- prosecution of the applicant, including all evidence that would be discoverable pursuant to other sections of the penal/criminal procedure law; and
2. The applicant's prior trial and appellate counsel shall make available to the applicant or their counsel their complete files relating to the case; and
  3. Court clerks and probation departments shall make available to the applicant or their counsel the court files or probation records pertaining to the case; and
  4. Nothing in this section shall preclude the court from conducting an in-camera inspection of discovery material and issuing a protective order pursuant to [insert relevant section of the penal law for protective orders] at the request of the prosecution or defense.
  5. The discovery order shall require that the prosecution and prior defense counsel produce all required discovery to the person applying for relief or their counsel no later than thirty days from the issuance of the order.
- E. An application for resentencing under this section must be filed in writing<sup>72</sup> and may include affidavits, declarations, letters, prison records, or other written and electronic material. The application must include a factual statement explaining how the applicant meets the eligibility requirements for resentencing described in Subsection III.B. An application filed under this section may be freely amended by counsel following appointment or by the applicant if they choose to proceed without counsel. An application under this section, and all pertinent papers and documents, shall be confidential and may not be made available to any person or public or private entity except where specifically authorized by the court.
- F. The Office of Court Administration<sup>73</sup> shall provide forms for an application under this section and the request for the assignment of counsel to all correctional facilities. The Department of Correction shall ensure that such forms are accessible to all incarcerated individuals and allow individuals to copy their completed forms at no cost. The form shall specify the point of contact in each county court for the receipt of such forms.<sup>74</sup>
- G. Upon receipt of the application for resentencing, the court shall schedule a hearing to aid in making its determination of whether the applicant should be resentenced in accordance with Subsection III.I if the court determines that the individual:
1. Is currently serving a qualifying sentence;
  2. Has submitted a complete application as defined by Subsection III.D.<sup>75</sup> The court shall not engage in an assessment of whether the person merits relief under Subsection III.I of this Act when determining whether to grant a hearing under this subsection. If a hearing is granted, the court shall promptly notify the appropriate district attorney<sup>76</sup> and provide such district attorney with a copy of the application.
- H. If the court denies a hearing, the court shall notify the applicant of the reason(s) for denying a hearing and dismiss their application without prejudice.
- I. After the filing of an application under this section, the court may direct the parties to expand the record by submitting additional materials relating to the motion. An application filed under this section may be freely amended.

- J. The court shall impose a sentence in accordance with Subsection IV, upon a determination following a hearing that:
1. Such individual was subjected to physical, sexual, or psychological abuse inflicted by a person with whom they had a domestic relationship as such term is defined in Subsection I of this Act or was a victim of sex trafficking as defined in Subsection I of this Act; and
  2. That such abuse or victimization was a significant contributing factor to the individual's participation in the offense.
- K. In determining whether such abuse or victimization was a significant contributing factor to the applicant's participation in the offense, the court shall consider the cumulative impact of the abuse or victimization on the applicant's mental state and culpability at the time of the underlying offense.
1. The abuse or victimization need not be contemporaneous with the underlying offense, of long-term duration, or result in physical injury, to meet this standard.
  2. The applicant's failure to allege or offer evidence of such abuse or victimization prior to filing a resentencing application shall not preclude the applicant from alleging such abuse or victimization in subsequent petitions for resentencing and such failure may not be considered adversely to the applicant by the court when assessing the veracity of the applicant's claims.
  3. Similarly, an applicant is not precluded from seeking relief where they previously alleged and offered evidence of such abuse or such abuse was considered as part of the original disposition.
- L. At such hearing the court shall determine any controverted issue of fact relevant to the issue of sentencing. 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 prosecution. Relevant evidence may include, but applicants are not required to offer, medical records, social service records, police reports, domestic incident reports, the sworn statements of witnesses, and orders of protection. The court 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 applicant's institutional record of confinement shall include, but not be limited to, 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 their willingness to do so shall not be considered a negative factor in determining a motion pursuant to this section. Expert testimony may be considered where relevant but shall not be required, and the applicant shall not be required to provide testimony. An applicant choosing not to provide testimony shall not be considered a negative factor in determining an application pursuant to this section and an applicant's testimony alone can be sufficient evidence to support the claim.
- M. If the court determines that the applicant should not be resentenced in accordance with Subsection III.I, the court shall inform the 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.
- N. If the court determines that the applicant shall be resentenced in accordance with Subsection III.I, the court shall notify the applicant that, unless they withdraw the application, the court will enter an order vacating the sentence originally imposed and imposing the new sentence to be imposed as authorized by Subsection IV. Any order issued by a court pursuant to this section must include written findings of fact and the reasons for such order.

- O. In calculating any new term to be served by the applicant pursuant to Subsection IV, 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.
- P. The court shall not impose a new term greater than the applicant's original sentence.
- Q. An appeal may be taken as of right<sup>77</sup> by the applicant in accordance with applicable provisions of this chapter:
  - 1. from an order denying resentencing; or
  - 2. from a new sentence imposed under this provision and may be based on the grounds that
    - a) the term of the new sentence is harsh or excessive; or
    - b) that the term of the new sentence is unauthorized as a matter of law.
- R. The applicant may request that the court assign them an attorney for the preparation of and proceedings on any appeals regarding their application for resentencing pursuant to this Section. The applicant shall have the right to assignment of counsel if indigent and that court shall presume continuing indigence if counsel was assigned for prior proceedings on the application.
- S. This Act shall not be construed to abridge or modify any existing remedy an incarcerated individual may have under habeas corpus, statutory or judicial postconviction relief, or any other legal framework.
- T. An application under this Act shall not impact in any way or be impacted in any way by any pending petitions under habeas corpus or other post-conviction proceedings, nor shall the denial of a petition under this Act preclude an applicant from any such remedy to which they are otherwise entitled.
- U. *If your state has a Victim's Bill of Rights, specify here how the hearing will comply with that Act, for example, how notice and the opportunity to be heard will be given to victims.*

#### **IV. Reduced sentences for domestic violence and trafficking survivors**

- A. If the court finds, pursuant to Subsections II or III of this Act that the individual was subjected to physical, sexual, or psychological abuse inflicted in a domestic relationship or was a victim of sex trafficking as defined in Subsection I of this Act; and that such abuse or victimization was a significant contributing factor to the individual's participation in the offense, the court shall instead impose a sentence consistent with the following provisions.<sup>78</sup>
  - 1. *Specify lowered sentencing ranges for categories of offenses. Consider making the minimum sentence otherwise specified for an offense the maximum for DVSJA beneficiaries.*
- B. For purposes of resentencing, at any time after the filing of an application, with the permission of the court, the parties may agree to vacate the original sentence and impose a sentence that is less than the term of the original sentence.

#### **V. Domestic violence and human trafficking survivors sentencing data collection**

- A. Upon receipt of a request for alternate sentencing filed pursuant to pursuant to Subsection II of this Act, the clerk of the court shall report the following information to the office of court administration:
  - 1. The name, race, gender, and age of each person seeking sentencing pursuant to this Act;
  - 2. Whether the individual was granted or denied sentencing pursuant to this Act;
  - 3. The offenses for which the individual sought sentencing pursuant to this Act;
  - 4. The sentence imposed;

5. The county and the name of the judge deciding the request;
  6. Whether the prosecutor consented, opposed, or took no position on the request.
- B. Upon receipt of a request for resentencing filed pursuant to Subsection III of this Act, the clerk of the court shall report the following information to the office of court administration:
1. The name, race, gender, and age of each incarcerated person or person on community supervision seeking resentencing;
  2. The portion of the sentence already served by each applicant at the time of the request;
  3. Any new sentence imposed, if applicable;
  4. The county and the name of the judge deciding the request;
  5. Whether the prosecutor consented, opposed, or took no position on the request; and
  6. If the applicant had submitted any prior requests pursuant to this Act, the outcome of such applications and the date such applications were decided.
- C. The office of court administration shall provide an annual collective report containing the information received from the clerks of the court pursuant to paragraphs (a) and (b) of this subdivision to the governor and legislature. This report shall be made available to the public.