

Justice and Dignity for DV Survivors in the Criminal Justice System
What You Need to Know About the
Domestic Violence Survivors Justice Act (A.4314/S.3337)

“I was a victim before I was a defendant.” From the time Kate was 7 until she was 10, a friend of Kate’s stepfather sexually abused her. At 20, Kate began to date Darnell. Looking back, Kate realizes that Darnell’s initial attentiveness was the first sign of his need to isolate and control her. “He instilled fear in me and once the fear is instilled, it’s always there.”

In the years that followed, Darnell beat and raped Kate. She had him arrested five times, but it never stopped the violence. On three occasions, Kate’s injuries were so severe that she went to the hospital. Twice, she admitted to hospital staff that Darnell had beaten her. Friends wondered why she didn’t leave. “Experience taught me happiness didn’t come without pain. I thought dealing with Darnell’s temper was a small price to pay.”

One day, while driving, Darnell and Kate got into a terrible fight. Darnell pulled over and started choking Kate. As they struggled, Kate reached for a gun Darnell kept under the seat. She swung up to sitting position and the gun went off, the bullet hitting Darnell. Kate got out of the car and ran. Darnell drove away. The next day, the police arrested Kate and told her that Darnell had died.

The prosecutor refused to lower his plea offer of 8 years. “I didn’t fit the profile of a battered woman because I had a job.” Kate did not want to plead guilty and instead went to trial. At trial, a DV expert did not testify on her behalf and documents attesting to the abuse were never entered into the record. Kate was convicted of Manslaughter in the 1st Degree.

Kate was sentenced to 8 1/3 to 25 years in prison. She was denied parole 4 times and served 17 years before her release in 2008.

Why is the Domestic Violence Survivors Justice Act important?

- Domestic violence (DV) affects women in prison in staggering numbers:
 - 75% of women in NY's prisons suffered severe physical violence by an intimate partner during adulthood.
 - The NYS Department of Corrections and Community Supervision found that 67% of women sent to prison in 2005 for killing someone close to them were abused by the victim of their crime.
- All too often the criminal justice system's response to DV survivors who act to protect themselves from an abuser's violence is to send them to prison, often for many years. This represents a shameful miscarriage of justice. Instead of giving survivors who have suffered life-shattering abuse compassion and assistance, we give them harsh punishment and prison. Instead of providing protection, the criminal justice system becomes just one more entity in the continuum of violence in survivors' lives. We are failing survivors twice, first by failing to protect them from abusive relationships, and second by sending them to prison.
- Much of the problem lies with the fact that the law's mandatory sentencing provisions force judges to send survivors to prison for long periods of time even when they think an alternative-to-incarceration program or a lower sentence is more appropriate.
- The DV Survivors Justice Act would change this. By untying judges' hands and giving them discretion in these cases, the Act would help restore humanity and justice to the way we treat survivors who protect themselves. By allowing incarcerated survivors to apply for resentencing, the Act would bring long overdue relief to survivors who have been locked up for years and who pose no threat to public safety.

Who supports this bill?

- A broad coalition of **111 domestic violence organizations, women's groups, crime victims groups and criminal justice organizations and thousands of individuals from across the state** are united in support of this legislation.
- These groups include: the Downstate Coalition for Crime Victims, NY State Coalition Against DV, Erie County Coalition Against Family Violence, Nassau County Coalition Against DV, Suffolk County Coalition Against DV, Sanctuary for Families, Lawyers Committee Against DV, Men Can Stop Rape, Rockland Family Shelter, Safe Homes of Orange County, Equinox Domestic Violence Services, Family Counseling Service of the Finger Lakes, NYS Public Affairs Committee of the Junior League, NYC Bar Association's Domestic Violence Committee, the YWCA of Northeastern NY, My Sisters' Place, American Association of University Women NYS Chapter, Legal Action Center, Osborne Association, Fortune Society, Women's Prison Association, Center for Community Alternatives, Hour Children, Greenhope Services for Women, Bronx Defenders, STEPS to End Family Violence, Community Service Society, the Correctional Association of NY and the Coalition for Women Prisoners, a statewide alliance of over 1,800 people in New York.

What are the bill numbers?

- A.4314 and S.3337

Who are the bill sponsors and co-sponsors?

- *Bill Sponsors:* Senator Ruth Hassell-Thompson and Assemblymember Jeffrion Aubry

- *Co-Sponsors*: 32 Assemblymembers and 21 Senators

Where is the bill now?

- In the Assembly Codes Committee and the Senate Codes Committee

What would the bill do?

- The bill does TWO main things to establish more compassionate sentencing for DV survivors:
 - 1) It allows judges to sentence DV survivors convicted of crimes directly related to the abuse they suffered to:
 - a. shorter prison terms and,
 - b. in some cases, to community-based alternative-to-incarceration (ATI) programs instead of prison.
 - 2) It provides DV survivors currently in prison the opportunity to apply to the courts for resentencing, granting much-deserved relief for incarcerated survivors who pose no threat to public safety.

Who would be eligible for DV alternative sentencing and resentencing?

To be eligible, a judge must find that:

- 1) the defendant was, at the time of the offense, a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a spouse, intimate partner or relative (either by blood or marriage).
 - 2) the abuse must be a “significant contributing factor” to the crime.
 - 3) a sentence under the law’s general sentencing provisions would be “unduly harsh.”
- A survivor who was being abused by her spouse, partner, boyfriend or girlfriend, pimp, relative, spouse’s relative or person she has a child in common with would be eligible under this bill.

What does “significant contributing factor” mean?

- There is no exact definition of this term. It is up to the court to decide. However, there IS PRECEDENT for the term – or similar terms:
 - 1) Judges can sentence defendants to serve time at Willard Drug Treatment Campus (a prison focusing on treatment of people with substance abuse histories) if they find that “the defendant has a history of controlled substance dependence that is a significant contributing factor to such defendant's criminal conduct.”
 - 2) Under the Rockefeller Drug law reforms, judges can divert a defendant with a substance abuse history to probation if, among other things, “the defendant has a history of alcohol or substance abuse or dependence” and “such alcohol or substance abuse or dependence is a contributing factor to the defendant's criminal behavior.”
 - 3) The current DV alternative sentencing uses the criteria that the abuse was a “factor” in the defendant’s committing a homicide or assault crime against her abuser. This bill adopts an even stricter standard (significant contributing factor).

How many people would this bill affect?

- This bill is all about giving judges discretion so it's difficult to project exactly how many people it would affect, BUT we do know that it will NOT affect large numbers of people.
- While it is not possible to say exactly how many people will be affected, we estimate these figures for the total pool of possible candidates. It is important to remember that NOT all of these individuals will be eligible, and that we expect that many more women than men to be eligible given that women are disproportionately affected by DV.
 - About 185 CURRENTLY incarcerated women survivors would be potentially eligible for RESENTENCING under the bill and 175 incarcerated male survivors (357 total).
 - About 365 women survivors would be potentially eligible for DV ALTERNATE SENTENCING, either lower sentences or diversion to ATIs, and 118 male survivors (483 total).
- This bill is narrowly tailored to apply to only those survivors to whom it is intended to apply. For example, to use the alternate sentencing, the judge has to find that the defendant meets a strict three-part test: 1) that the defendant was a DV survivor at the time of the offense; 2) that abuse was a "significant contributing factor" to the crime;" and 3) that a sentence under the regular sentencing statute would be "unduly harsh."
- It is important to note that to be eligible for the alternate sentencing, the survivor has to have been a victim of abuse AT THE TIME the offense was committed. In other words, having a history of childhood abuse does NOT make a person eligible under this bill.
- In addition, the judge is NOT obligated to use the discretion they are granted under this bill. The judge can always sentence a defendant to a longer sentence if they think necessary.
- The bill excludes people convicted of Murder in the First Degree, Aggravated Murder, Sex Offenses and Terrorism Offenses.

Why can't judges sentence all survivor-defendants to ATIs now?

- Most violent felony offenses and some more serious non-violent offenses carry mandatory prison penalties. Mandatory sentencing constrains a judge's ability to take DV and its effects into account during sentencing.
- Under mandatory sentencing, the charge determines the sentence if the person is convicted. For example, if a person is charged with a B violent felony, then if the person is convicted, the judge MUST sentence that person to a mandatory prison term of anywhere between 5 and 25 years.
- Under mandatory sentencing, the person who controls the charge controls the sentence (if the defendant is convicted). The person who controls the charge is the District Attorney.
- This takes power from the judge – who is supposed to be the neutral arbiter of the case – and gives it to the DA. DAs sometimes use this power to convince defendants to plead guilty (because defendants are afraid to go to trial and face a long sentence if they lose).
- Because judges lack discretion, they cannot sentence a survivor to probation or an ATI unless the prosecutor reduces the charge to a lower-level offense.

Why is it important for the bill to include DV survivors who did not defend themselves against their abuser directly but who were convicted of engaging in other illegal acts to protect themselves from their abuser's violence?

- DV plays a complex role in a survivor's behavior. Abusers often force survivors, through a range of power and control tactics – such as physical attacks, threats of violence, manipulation, and provocation – to participate in crimes such as forgery, robbery, burglary, drug sale, shoplifting and prostitution.
- Threats from abusers can come in the form of comments or actions that might seem insignificant to an outside observer but that carry signs of imminent attack for a survivor of domestic violence. Some survivors turn to illegal substances as a way of coping with ongoing abuse. Other survivors confess to their abusers' crimes, fearing increased violence if they do not.
- Not including survivors who engaged in other acts to protect themselves from their abuser's violence would create an unfair double standard and, in effect, penalize survivors for not committing physical crimes against their abusers.

Why is the resentencing part of the bill important?

- Including a retroactivity provision is central to the bill's intent and purpose, and to the fair application of any sentencing reform effort. When a sentencing reform bill of this type becomes law, it signifies the government's recognition that the prior sentencing statute was too harsh. That recognition should extend to those convicted before the law's passage as well as to those after.
- It is counterintuitive to grant mitigated sentencing eligibility to one group of survivors and not another based solely on their conviction date. Denying resentencing eligibility to survivors who, but for their conviction date, would have been eligible for an alternate sentence is arbitrary and unjust.

How does the bill ensure that resentencing is granted only to those survivors who meet the bill's 3-part test?

- An application for resentencing does not guarantee resentencing. Far from it: to even be granted a resentencing hearing, an incarcerated person must go through two levels of screening. First, she must submit a request to apply for resentencing to the court. This request must include documentation that she meets the basic criteria under the law: that she is currently in prison serving a sentence with a minimum or determinate term of 8 years or more, that her offense occurred prior to effective date of the law, and that her offense is an eligible offense under the bill (i.e. it cannot be Murder in the first degree, Aggravated Murder, Terrorism, Sex Offense).
- Only after a court finds that an incarcerated person has passed the first level of screening is the person eligible to apply for resentencing. In her application for resentencing, a survivor must include at least two pieces of evidence that she was a DV victim at the time of her commitment offense. At least one of those pieces of evidence must be an official document, such as a police report, order of protection, domestic incidence report, hospital record or pre-sentence report.
- Only if the applicant submits the required evidence will she be granted a hearing. At the hearing, the judge must find that the applicant meets the bill's strict three-part test before granting resentencing: (1) the defendant must have been a victim of domestic violence at the time the crime was committed, (2) the abuse must be a "significant contributing factor" to the crime, and (3) a judge must find that a sentence under the law's general sentencing provisions would be "unduly harsh."
- Even after holding the hearing and reviewing the information, a judge can still decide not to resentence an applicant.

How will the bill affect public safety?

- This bill poses absolutely no risk to public safety.
- The vast majority of survivors incarcerated for crimes directly related to domestic violence have no prior history of violent behavior. For example, 85% of women sent to New York's prisons for a violent felony in 2011 had never before been convicted of a felony.
- In addition, of the 38 women convicted of murder and released between 1985 and 2003, **not a single one returned to prison for a new crime within 3 years of release.**
- Alternative-to-incarceration programs reduce recidivism, keep families together and help people build healthy, crime-free lives. By increasing the use of ATIs, this bill will enhance public safety.

Will the bill save money?

- This bill has the potential to save the state money. This is because: (1) some survivors would be sentenced to shorter prison terms; (2) some survivors would be diverted to ATIs; and (3) some survivors would be released early from prison.
- Incarceration is more costly and less effective than probation or an ATI. It costs upwards of \$55,000 to incarcerate one adult per year in New York and only \$11,000 for an ATI program.

What is the Jenna's Law DV exception and how has it fallen short?

- There is a law on the books called the Jenna's Law DV exception that was meant to provide more compassionate sentencing for survivor-defendants. This law has been a complete failure because:
 1. It doesn't provide sufficiently lower sentences. In fact, it is possible to get a LONGER sentence and serve more time under the exception than under the general statute.
 2. It doesn't allow judges to send survivor-defendants to ATIs and probation. It ONLY allows mandatory prison penalties.
 3. It is limited only to survivors convicted of certain homicide or assault crimes against abusers and excludes survivors convicted of other crimes they were involved in as a result of an abuser's violence or threats of violence. It also doesn't include murder in the second degree which is important because some survivors are convicted of this crime.
 4. It has been woefully underused: in 2007, the NYS Sentencing Commission found that only one person was serving a sentence under the statute and it was a male survivor who was sentenced to more time than the minimum allowed under the general statute and who was denied parole twice. In 2009, the Commission found that no one was serving a sentence under the exception.
- Clearly, this statute needs to be overhauled. The DV Survivors Justice Act would do just that.