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May 8, 2012

Senator Ruth Hassell -Thompson
Room 707 LOB
Albany, New York 12247

Assemblyman Jeffrion Aubry
Room 526 LOB
Albany, New York 12248

Re: S5436, A7874A (Hassell-Thompson, Aubry),
"Domestic Violence Survivors Justice Act"

Dear Senator Hassell-Thompson and Assemblyman Aubry:

I am writing on behalf of the District Attorneys Association of the State of New York to express the Association's opposition to and explain our concerns regarding the above-referenced legislation which purports to offer increased protection to "domestic violence survivors who act to protect themselves from an abuser's violence". As written, however, this proposal would offer both greatly reduced sentences and an opportunity for post-conviction resentencing to those who commit violent felonies against innocent and unrelated third parties who were not the defendants' abusers.

The proposed bill amends the existing Penal Law (PL) § 60.12 which has, since 1998, provided explicit discretion to judges to offer significantly shorter and more flexible sentences to domestic violence survivors convicted of violent crimes against their abusers. The proposed legislation would greatly expand eligibility for the lenient sentences available under PL § 60.12. Currently, only a domestic violence survivor who commits a violent crime against his or her abuser is eligible. The proposed amendment would delete the requirement that the crime be committed against an abuser and the limitation that only a first offender is eligible for a sentence reduction. It would dilute the requirement that the prior abuse was a causative factor in commission of the crime and only require that it be a significant contributing factor. Finally, it would expand eligibility to those convicted of murder and other A felonies.

In addition, the proposed bill would greatly expand the relief provided. First, it would dramatically reduce the already reduced sentences currently available

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under PL § 60.12 and even provide for sentences of probation in some cases. Second, individuals convicted of violent felonies and serving substantial prison sentences would be allowed to move years after conviction for resentencing and reduction of their sentences. Finally, there would be no time limitation on the ability of convicted violent felons to seek such resentencing.

Accordingly, the Association, as set forth herein, opposes this bill on several grounds not the least of which is the failure of the bill to give adequate consideration to the rights of innocent victims and to the impact of the bill on public safety. Further, the proposed legislation overlooks the numerous avenues of redress in the criminal justice system already available to defendants who are domestic violence survivors.

Special sentencing provisions for domestic violence survivors were enacted as part of the State's 1998 Sentencing Reform Act, known as *Jenna's Law*. Ironically, this new bill would undermine the legislative intent of *Jenna's Law* to limit discretionary release of convicted violent offenders from state prison. The 1998 law mandated that violent felons serve six-sevenths of their determinate prison terms and imposed post-release supervision following their imprisonment. The law was enacted in the memory of Jenna Grieshaber who was murdered by a neighbor after his early release from prison.

Pursuant to the special provisions for domestic violence survivors as codified in PL § 60.12, a judge may explicitly consider mitigating circumstances of domestic violence and following a hearing, impose a substantially reduced and an indeterminate (rather than a determinate) sentence for first time violent felons. For example, under current law, upon a finding that the alternative dispositions for domestic violence survivors are applicable, a defendant who is convicted of manslaughter in the first degree, a B violent felony, for killing his or her abuser may be sentenced to a minimum sentence of 2 to 6 years instead of the normally applicable 5 year minimum sentence. The maximum sentence that domestic violence survivors could be given for manslaughter under PL § 60.12 is 8 1/3 to 25 years as opposed to a 25 year sentence.

The proposed bill would lower these sentences even further. For instance, the bill proposes a further reduction of the minimum sentence to only one year for B violent felonies such as manslaughter in the first degree. (Other B violent felonies include robbery, assault and burglary in the first degree).

The proposed bill's overly broad language, expanding PL § 60.12 eligibility to violent crimes committed against innocent and unrelated third parties, ignores the harm caused to the actual crime victim and creates a strong incentive for every violent offender to claim that he or she was subjected to some form of domestic abuse in order to receive a more lenient sentence. For instance, under the bill, a man who commits a knife point robbery and assault at a train station against a victim he has never met may claim that he was a victim of psychological abuse inflicted by his parents and that such abuse was a

significant contributing factor in his commission of the violent robbery. A defendant in a vehicular manslaughter case may argue that his or her intoxication was the result of an effort to self-medicate due to physical or even psychological abuse suffered within an intimate relationship. This proposal would encourage individuals charged with a wide array of serious, violent crimes to argue for leniency with absolutely no direct causal link between the crimes they commit against innocent victims and their personal history of abuse. Such a law is patently unfair to the innocent victims of the crimes and is inconsistent with public safety.

By eliminating the requirement that the crime victim is the person who abused the defendant, the bill would allow for sentence reduction in crimes against our most helpless and vulnerable victims–including children and the elderly. The proposed bill would even extend eligibility for reduced sentences to a domestic violence survivor/defendant who assaults or kills his or her own child or parent or an unrelated child or elderly victim.

The bill also provides relief for defendants convicted of murder against unrelated third parties by reducing the minimum penalty for A felony offenders from 15 years to only 5 years. Existing PL § 60.12 does not include murder as an eligible crime. To include murder when the victim is not the abuser would be completely unjust to the families of innocent murder victims.

In addition to authorizing drastically reduced sentences immediately upon conviction, the bill permits an eligible offender who was convicted before this bill passed and received a sentence of more than 8 years to request resentencing to a reduced prison term. This provision is troubling for several reasons.

First, the bill does not require the violent offender to raise the defenses of duress or justification or the affirmative defense of extreme emotional disturbance prior to conviction at a time when the factual basis of the claim could be fully and fairly evaluated. It may, nonetheless, be raised years later when critical witnesses and evidence may no longer be available. There is no requirement of due diligence or preservation of evidence. Indeed, contrary to the fundamental rules guarding the integrity of our judicial system, the bill allows no presumption of regularity to be accorded to the trial proceedings and the actual determination of guilt on the credible evidence presented.

Second, there is no time limitation on a request for resentencing. A defendant under this bill would be able to raise a decade later a claim not raised at trial as a basis to drastically reduce a sentence. This places the prosecution at an unfair disadvantage. The longer the period of time which elapsed between the purported family abuse and the filing of the defendant's petition for resentencing, the more difficult it will be for the prosecution to investigate defendant's belated assertions.

Third, there will be no closure for the crime victim who could find that the violent offender who robbed or assaulted him or her was being released much earlier than anticipated. Similarly, orders of protection which are linked to the term of sentence could be significantly curtailed further compromising the victim's safety and welfare. Finality in the imposition of the sentence is not only critical to the administration of justice, it is fundamentally fair to victims of crime.

Fourth, a retroactivity provision of this nature could prove burdensome and costly. Tasking the courts years after conviction with verifying allegations of past domestic abuse that were either never previously raised or consistently rejected by prosecutors, judges and juries can result in lengthy and difficult hearings. This is especially true where the judge hearing the resentencing application is not the judge who presided over the case and therefore, first must familiarize himself or herself with the entire record of the case.

Fifth, the language of this bill could be used to the benefit of domestic violence abusers – ultimately harming the very domestic violence victims it purports to protect. A defendant previously convicted in a domestic violence case could now claim that the domestic violence assault he perpetrated was related to his own victimization meriting a resentence to less prison time.

Another concern about the proposed bill is that it would allow for reduction of a sentence of a second violent felony offender for a class B violent offense to a range of 3 to 8 years as opposed to 8 to 25 years. Allowing reduced sentences to someone for their second violent felony is inconsistent with the bill's justification that the eligible defendants under the amended statute would not have a history of violence.

The bill's supporters suggest that PL § 60.12 is rarely applied, yet provide no specific case where a court did not properly exercise its discretion in this regard. Moreover, the absence of a need for domestic violence survivors whose victims are their abusers to resort to the special sentencing provisions of PL § 60.12, over the past fourteen years, demonstrates that prosecutors, grand jurors, trial juries and judges have successfully exercised their judgment in carefully weighing the evidence of a defendant's status as a domestic violence victim.

Over the years, the criminal justice system has been greatly transformed to provide better protection for domestic violence survivors. In 1994 and in 1996 criminal laws were enacted to strengthen sanctions against domestic violence abusers who violate orders of protection with the creation of the criminal contempt statutes. For decades, New York courts have recognized and routinely admitted expert evidence of battered women's syndrome which involves a pattern of coercion and control by an abusive partner to explain reactive violent behavior. In addition, the New York Penal Law provides various legal defenses which domestic violence survivors can make use of if they are charged with committing crimes of violence including duress under Article 40 due to threats of imminent physical force and justification pursuant to Article 35

where a battered woman or man uses deadly physical force to defend oneself or a third person.

Moreover, in reviewing violent crimes, the law enforcement community and the judiciary take into account the surrounding facts and circumstances in each and every case thereby increasing the likelihood that such claims will be considered as either a complete defense or mitigating factor in the charging decisions or at sentencing. Both trial and appellate courts carefully consider the defendant's history in evaluating the fairness of the sentence imposed. Finally, any defendant who is convicted can ultimately seek clemency from the Governor. [1] Of note, a female victim of domestic violence who killed her abuser was the first domestic survivor to receive clemency in this state for a murder conviction when Governor George Pataki commuted her sentence in 1996. [2] Thus, we take issue with the suggestion in the justification section of the bill's memorandum in support that domestic violence victims are treated harshly and that the circumstances under which their crimes were committed are not given full and fair consideration in the criminal justice system in this state.

For all of these reasons the District Attorneys' Association of the State of New York strongly opposes passage of this bill.

Sincerely,

JANET DiFIORE
PRESIDENT

[1] 1 In an article entitled "Lessons in DNA and Mercy," published in the *New York Times* on December 29, 2011, columnist Jim Dwyer noted that Governor Andrew Cuomo's staff are intensively examining cases involving those who "may have been justly convicted but who are serving prison terms that will hollow out their lives, at no benefit to society." Governor Cuomo's chief spokesman, Josh Vlasto, was quoted as saying that pardon and clemency "is a power that the governor will use practically and methodically to help ensure everyone is treated fairly under the law."

[2] As per the NY times article, *The Tradition of Granting Clemency, and Second-Guessing It,* by A.G. Sulzberger dated December 2, 2009, "Paul Shechtman, who was involved in clemency decisions as the director of criminal justice for New York under Mr. Pataki, questioned the notion that state prisons were full of people who should be released. "I went to Albany hoping to encourage Governor Pataki to grant more clemency applications," he said. "And I was surprised that the pool of sympathetic and worthy applicants was far smaller than I would have thought."
http://cityroom.blogs.nytimes.com/2009/12/02/clemency/