The Complexity of Sentencing Under the DVSJA:

A CHALLENGE FOR JUDGES AND DEFENSE COUNSEL

By Alan Rosenthal

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The New York Legislature enacted the Domestic Violence Survivors Justice Act (DVSJA), effective May 14, 2019, thus authorizing alternative sentences for defendants who were victims of domestic violence and for whom the abuse was a "significant contributing factor" to their "criminal behavior." (Penal Law § 60.12). A corollary provision of the Act, CPL § 440.47, (effective August 12, 2019), provides for resentencing relief for certain victims of domestic abuse.

The recently enacted DVSJA adds a new level of analysis to the already difficult judicial duty of sentencing. Yet it should be a welcome challenge, if what we seek to impose on our fellow citizens is a just sentence informed by what we have learned from the rapidly developing behavioral sciences and a growing awareness about the dynamics of domestic violence. This article takes a look at the knowledge and analysis that must now be brought to bear in the course of this new sentencing determination by judges and correspondingly the advocacy required of defense counsel. But before doing so, let's review what has previously been required for a judicial sentencing determination.

Sentencing Prior to the DVSJA

It is generally agreed that sentencing is "the most difficult and delicate decision that a judge is called upon to perform." In a 2018 New York Law Journal article, Joel Cohen suggested that "[v]irtually every judge would agree that sentencing is the most solemn and difficult decision they must make." Cohen posited that "almost every one of them, though, truly struggles with it every time." In response, Judge Leon Polsky agreed that "sending someone to prison should be the hardest thing a judge sitting in a criminal term should ever have to do." But the bigger concern, he

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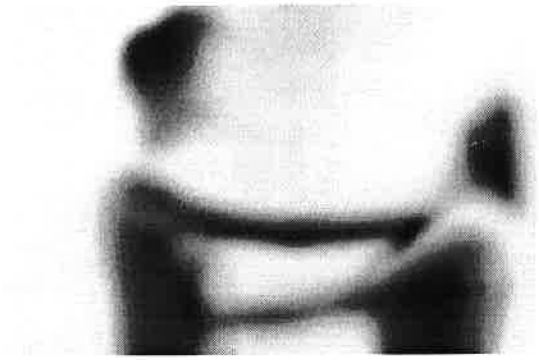
wrote, "is not when [judges] struggle, it's when they don't."

Undoubtedly, many judges grapple with the impact imprisonment has on the human beings they sentence. As Judge Kaufman observed, "every judge is aware that five years in a penitentiary is a long time. He well knows that in many cases a prison term not only withers the life of the prisoner but spreads like a stain in an ever-widening circle, blighting the lives of innocent members of the family. Every judge is painfully aware of what five years without a father may mean to a prisoner's son." Some judges struggle with the need to provide a rationale for the sentence. Other judges consider most critical the individual factors of the defendant when arriving at the proper individualized sentence, fitting the punishment to the person and not merely to the crime. And some judges labor over identifying an incarcerative sentence that is a sufficient "minimum amount," but "not greater than necessary."

But the most difficult aspect of sentencing is "the sensitive balancing of the objectives and criteria." The objectives and criteria to be balanced are generally acknowledged to be "the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction." The four traditional objectives or purposes of sentencing that must be considered are 1) retribution, 2) incapacitation, 3) deterrence, and 4) rehabilitation. They are established by the Legislature in Penal Law § 1.05 (6). In 2006, a fifth sentencing purpose was added by the Legislature, amending Penal Law § 1.05 (6) to include "the promotion of their [defendants'] successful and productive reentry and reintegration into society." This amendment has been recognized as a move to a Reintegration-Focused Sentencing Model. A sentencing judge is now obliged to give due consideration to the five purposes of sentencing. One or more factors cannot be disregarded entirely. The balancing of these interacting, and often mutually antagonistic purposes "requires more than a good heart and a sense of fair play on the judge's part, although these are certainly prerequisites." The weighty responsibility placed on the sentencing judge is to determine what relative priority to attach to each objective or purpose.

The DVSJA requires judges to do all of this and more.



Sentencing Under the DVSJA – A Trauma-Informed Approach

The emergence of trauma theory over the past several decades has created a significant shift in the way we understand the role of domestic abuse and trauma's effects on the behavior of survivors.

There is nothing new about a trauma-informed approach. Over the last decade this concept has been developed for use in many different programs, organizations, and systems by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services (SAMHSA). It has applicability in the fields of healthcare, education and mental health, to name a few. It has been recognized as having applicability to the criminal legal system by SAMHSA and by the Center for Court Innovation, both promoting the concept that trauma-informed responses can help improve the criminal legal system. The emergence of trauma theory has led to the adoption of a trauma-informed approach in many judicial settings including Veterans Courts, Treatment Courts, Mental Health Courts, Divorce and Family Courts.

Lamentably, criminal laws in New York have not kept up with behavioral science. The first attempt by New York to adopt a more compassionate and contextual approach to sentencing in domestic violence cases was an abysmal failure. An exception to Jenna's Law, former Penal Law § 60.12, was designed to provide relief for some survivor-defendants. Because it was too narrowly drafted, it provided de minimis benefit. The DVSJA captures the shift in society's sense of justice and fairness and the advances in science and research. The time has come to apply the same trauma-informed approach in our criminal courts. The DVSJA not only invites it; it implicitly requires it in many cases.

Here is how this trauma-informed approach works in practice under the DVSJA. After conducting a hearing, the sentencing court must make a determination that three statutory factors are present in order to impose an alternative sentence pursuant to Penal Law § 60.12. First, the judge must decide whether the defendant was the victim of domestic abuse, and second, whether the domestic abuse was a "significant contributing factor" to the defendant's "criminal behavior." The

third factor requires the judge to address whether a traditional sentence would be "unduly harsh."

Alternative sentencing under the DVSJA is authorized whether or not the defendant has raised the defense of justification, duress, entrapment, renunciation, mental disease or defect or extreme emotional disturbance. Even if such a defense was raised and rejected by the jury, a sentencing judge may still consider domestic violence for DVSJA sentencing purposes. The reason is simple. The factual showing required to establish a defense is a higher and more exacting a standard than the factual determination required by the DVSJA to establish that the "abuse was a significant contributing factor to the defendant's criminal behavior."

In some DVSJA cases, a showing that the domestic abuse was a "significant contributing factor" may be made without regard to trauma. For example, the survivor who commits a financial crime because of threats of physical abuse made by an intimate partner, may not suffer from trauma. Nevertheless, that threatened physical abuse would certainly be a "significant contributing factor" to her crime of possession of a forged instrument. In this example, the defendant may raise the domestic abuse as the affirmative defense of duress under Penal Law § 40.00. The jury might convict the defendant, finding that the threatened use of unlawful physical force was not "imminent," as required for the statutory defense of duress. However, the judge would still be authorized to impose an alternative domestic violence sentence by making a finding that the threat by the intimate partner was sufficient, even if not imminent, to be a "significant contributing factor" to the survivor's criminal possession of a forged instrument.

On the other hand, many DVSJA cases will involve establishing that the survivor suffered trauma. When trauma is implicated, this calls for an additional level of analysis, requiring more than just applying the law to the facts. The sentencing judge must first determine if the defendant suffered domestic abuse either prior to, or contemporaneous with, their criminal conduct, and then undertake an interdisciplinary approach to determine whether the domestic abuse resulted in trauma. The final step in the analysis is for the judge to determine whether that trauma affected the defendant's functioning and behavior so as to be a "significant contributing factor" to the defendant's "criminal behavior." In other words, the sentencing judge is required to take a trauma-informed approach to determine whether the defendant is eligible for alternative sentencing and to determine an appropriate sentence.

A second level of analysis arises from the statute's third factor. The sentencing judge must determine whether a sentence within the range of the traditional sentencing scheme would be unduly harsh, so as to warrant a less punitive sentence. The statute requires the judge to consider "the nature and circumstances of the crime and the history, character and condition of the defendant."

In order to undertake both levels of analysis, a judge should be both trauma-informed and fully familiar with the dynamics of domestic violence based upon reliable and evidence-based research in the field.

When judges are trauma-informed they understand that domestic abuse can cause trauma. They understand what trauma is. They understand that trauma can be pervasive, re-shaping a person's worldview and affect many aspects of life including altering how they function, perceive danger and react, abuse alcohol and drugs, and engage in problematic behavior that may include criminal actions. Being trauma-informed will help the sentencing judge avoid reliance on misconceptions and myths about domestic abuse and survivors, and avert misinterpreting the significance of confusing or counterintuitive survivor behavior. Trauma-informed judges are better equipped to use the tools of sentencing and resentencing to respond once the effects of trauma resulting from domestic abuse are recognized and to take on the added complexity of the already difficult task of sentencing.

Being trauma-informed and familiar with the dynamics of domestic violence simply asks judges to approach DVSJA sentencing in a fair, just and knowledgeable way. As Judge Kaufman recognized more than sixty years ago, "[t]he task of improving our sentencing techniques is so important to the nation's moral health that it deserves far more careful attention than it now receives from the bar and the general public." Judge Kaufman urged his fellow judges to make use of the developments in behavioral science to do a better job of sentencing. "We must re-examine in the light of modern scientific knowledge some of our sentencing axioms."

There is much for judges to learn about the effects of trauma resulting from domestic abuse. The research and literature from the 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

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and other criminal conduct. It helps place the behavior of survivors in a context, not to excuse, but to allow for a fully balanced perspective.

To ensure that the sentences imposed on criminalized survivors are just, we must insist that our judges are prepared with knowledge and information from the most current advances in the medical and behavioral sciences and that they prepare themselves for the challenge of trauma-informed and reintegration-focused sentencing under the DVSJA. Unquestionably, the sensitive balancing of objectives and criteria, while taking a trauma-informed approach, makes the process of sentencing the most difficult and delicate decision that a judge is called upon to make. However, "[i]f such a [balancing] effort is not made, then any sentence passed, while it may be legal, will not be a just one."

The Challenge for Defense Counsel

Since the sentences we seek for our clients are ones that are just, defense counsel cannot, and should not, leave judges to their own devices to become trauma-informed, knowledgeable about domestic violence, reintegration-focused or to balance the five objectives of sentencing.

The ultimate challenge for defense counsel in a DVSJA case is to present the case in such a manner that the judge is not only made aware of the fact that the defendant was physically, sexually or psychologically abused by a member of his/her family or household, but also to educate the judge about trauma and the dynamics of domestic violence so that the dots can be readily connected between the defendant's victimization and the defendant's "criminal behavior." Providing this education will pave the way to a judicial determination that the domestic abuse was a "significant contributing factor" to the defendant's "criminal behavior." In many of the DVSJA cases, although not all of them, the pattern of the connecting dots is established by a showing of trauma and its effects on the defendant.

In order to educate judges, defense attorneys must first educate themselves and become trauma-informed in their approach to the case and to their client. They must be knowledgeable about the dynamics of domestic and intimate partner violence so that they can help judges avoid relying on common myths and misinformation. Defense counsel must learn about the many types of domestic abuse that flow from the abuser's attempts to coercively control the survivor, be they by physical abuse, sexual abuse or psychological abuse and its many manifestations including financial control, isolation, threats to harm or take away the children and many other forms of emotional battering. Defense counsel must understand the dynamics of domestic violence and trauma in order to be able to explain to the judge why the defendant's "counterintuitive" behavior should not be interpreted in such a way as to be treated as compelling evidence of her lack of credibility. It is imperative that defense counsel understand that behavior that may seem counterintuitive to the judge is understood by experts to actually represent common victim responses to domestic violence and trauma.

Defense counsel should take an inter-disciplinary approach; learning from the research and literature in the fields of epidemiology, psychology, psychiatry, developmental psychopathology, and neuroscience which can provide a basis to understand that trauma can change brain structure, brain chemistry and brain function. This allows defense counsel to place the defendant's behavior in a context.

To be trauma-informed for a DVSJA case, defense counsel must be willing to learn: What is trauma? What causes trauma? What are trauma's effects? How to present the survivor's case in a trauma-informed way? How to promote trauma-informed sentencing? SAMHSA recommends following the "Four R's" as a framework for a trauma-informed approach: Realize, Recognize, Respond and Resist Re-traumatization. This framework can readily be adapted to a trauma-informed approach by defense counsel in a DVSJA case. Realize the impact of trauma on your client. Recognize your client's signs and symptoms of trauma. Respond by integrating knowledge about trauma into all facets of your representation. Resist re-traumatization of your client.

Defense counsel has an array of tools to choose from to help educate the judge about trauma and the dynamics of domestic violence. A hearing is provided for both sentencing and resentencing cases by the DVSJA. This hearing can be used to introduce evidence about trauma and domestic violence

through experts, reports, documents and other exhibits. Reliable hearsay is admissible. Either the report and/or testimony from a mitigation specialist may be an effective way to provide an overview of the survivor's social and psychological history and place the defendant's conduct in context. A defendant's pre-sentence memorandum is authorized by CPL § 390.40 and is also authority for a defendant's re-sentencing memorandum.

Defense counsel should consider the use of an expert in DVSJA cases. Several different types of experts might be considered. Thought should be given to using either a report and/or testimony from a clinical psychologist. In addition, consideration should be given to introducing testimony from an expert on trauma and the dynamics of domestic violence. A report or testimony from an investigator may help fill in necessary facts. It will be necessary to introduce into evidence some documents or testimony that help to establish that the defendant was subjected to substantial physical, sexual or psychological abuse by a member of the same family or household as the defendant, and that such abuse occurred prior to or at the time of the defendant's criminal behavior. Consider lay witnesses who observed the abuse or some manifestations. Make use of documents including law enforcement reports, medical records, and domestic violence counseling and support records.

Keep in mind that even if you are not successful in convincing the judge to impose an alternative sentence under DVSJA, all of the evidence that you introduce will also go to the mitigation of a traditional sentence. This is exactly what happened in a recent Erie County case where the defendant was charged with Manslaughter in the first degree and was facing a 25-year sentence. Although defense counsel did not "win" the Penal Law § 60.12 hearing, it was the hearing that defense co-counsel attributed for "a very good outcome" that would not have been otherwise likely. The Judge, after hearing all of the mitigation introduced at the hearing, imposed a sentence of 8 years.

Not only will developing a full and complete record at the hearing increase your chances of better outcomes for alternative sentencing and traditional sentencing, it will preserve a much richer record for any appeal.

Careful consideration should be given as to whether your client should testify at the hearing. Be circumspect about such a strategy for at least two reasons. First, having the client testify exposes him or her to cross-examination. Second, it runs the considerable risk of violating one of the "Four R's - Resist Re-traumatization. Just being in the courtroom may retraumatize your client. Being required to testify and being subject to cross-examination may be a dangerous trigger for any survivor, and may do some real damage to your client and the case. The risk should be carefully examined. Instead, give thought to providing the survivor's perspective through an affidavit or a videotaped interview. Perhaps humanizing the survivor and providing their perspective can be accomplished through defense counsel's mitigation specialist.

Scholarly articles and research are effective educational tools. Defense counsel should consider introducing into evidence literature and research from various fields of behavioral science to assist the judge to become knowledgeable about domestic violence and trauma. Not only should the citations to the research and literature be provided, defense counsel should introduce the articles into evidence.

"For most of human history, acts of domestic violence have been minimized, denied, swept under the carpet, and hidden behind closed doors. It is only in the last few decades that our criminal justice system and our culture have recognized domestic violence for the insidious and destructive crime that it is." Over this period, the New York court system embraced innovative approaches to domestic violence cases. Now a critical shift is happening in the treatment of domestic violence victims, survivors, who commit crimes due to their own victimization. The State of New York has recognized the right of women and all people to live free from violence in many different legal contexts. Our government has recognized its responsibility to preserve this right and provide support for domestic violence 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. A full and meaningful implementation of the DVSJA will require judges, prosecutors and defense lawyers to step up to meet the challenge, taking a trauma-informed approach and educating themselves about the dynamics of domestic violence. For that is what it will take, as Justice Debra Ann James so poignantly observed, for us to arrive at "a day when survivor-defendants are treated with the fairness and dignity they deserve." ■