

To be argued by
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New York Supreme Court



Appellate Division -- First Department



THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

New York County
Ind. Nos. 5394/98
7375/02

- *against* -

KEITH BROCK AND GILBERTO SOSA,

Defendants-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

RESPONDENTS' BRIEF 7

PRELIMINARY STATEMENT.. . . . 7

QUESTIONS PRESENTED.. . . . 9

STATEMENT OF FACTS. 9

 Background on the Underlying Cases.. . . . 9

 Keith Brock, Indictment Number 5394/98. 9

 Gilberto Sosa, Indictment Number 7375/02. 10

 The Resentencing Applications. 10

 Keith Brock's Resentencing Application. 10

 People's Response.. . . . 12

 Petitioner's Reply. 13

 Supplemental Submissions. 13

 Gilberto Sosa's Resentencing Application. 14

 People's Response.. . . . 15

 Supplemental Submissions. 16

 The Court's Decision.. . . . 18

 Resentencings. 22

 Keith Brock.. . . . 22

 Gilberto Sosa.. . . . 23

ARGUMENT. 23

POINT I

 THE APPEAL SHOULD BE DISMISSED AS
 UNAUTHORIZED BY STATUTE. CPL §440.46; 2009
 DRUG LAW REFORM ACT, CHAPTER 56 OF THE
 LAWS OF NEW YORK, §9); L. 2004, ch. 738,
 §23... 23

POINT II

AS THE LOWER COURT FOUND, THE EXCLUSIONARY
LOOK-BACK PERIOD IS MEASURED FROM THE
APPLICATION'S FILING DATE, NOT THE
COMMISSION DATE OF THE DRUG OFFENSE, WHERE
THE STATUTE'S PLAIN LANGUAGE, ITS
AMELIORATIVE PURPOSE, ITS CONCERN FOR
PUBLIC SAFETY, AND THE OVERWHELMING WEIGHT
OF AUTHORITY, ALL SUPPORT THAT
CONSTRUCTION. CPL §440.46; 2009 DRUG LAW
REFORM ACT, CHAPTER 56 OF THE LAWS OF NEW
YORK, §9.. . . . 27

A. The overwhelming weight of authority
supports the lower court's conclusion... . . 28

B. The lower court's construction
serves both the statute's ameliorative
purpose and its concern for public safety... 38

 Remedial purpose and "aging in".. . . . 38

 Public safety.. 40

C. The lower court's construction comports
with the legislature's emphasis on a
petitioner's institutional track record .. . 43

D. The lower court's construction properly
facilitates the exercise of sentencing
discretion.. 44

E. The People's false accusations of
manipulation and gamesmanship... 47

CONCLUSION. 50

PRINTING SPECIFICATIONS STATEMENT.. 51

TABLE OF AUTHORITIES

STATE CASES

Matter of Santangelo v. People, 38 N.Y.2d 536 (1976).. . . . 26

People v. Arroyo, 28 Misc.3d 1205(A) (Sup. Ct. Bronx Co. 2010). 29, 49

People v. Bautista, 7 N.Y.3d 838 (2006).. 23, 25

People v. Brown, 26 Misc.3d 1204(A) (Sup. Ct. N.Y. Co. 2010). 30, 41, 45, 50

People v. Burnett, 28 Misc. 3d 928 (Sup. Ct. Queens Co. 2010). 30

People v. Cagle, 7 N.Y.3d 647 (2006). 44

People v. Danton, 27 Misc.3d 638 (Sup. Ct. N.Y. Co. 2010).. 12, 18, 31, 32

People v. Day, 73 N.Y.2d 208 (1989).. 44, 45

People v. DeJesus, 54 N.Y.2d 447 (1981).. 23

People v. Farrar, 52 N.Y.2d 302 (1981). 45

People v. Finnegan, 85 N.Y.2d 53 (1995).. 32

People v. Laing, 79 N.Y.2d 166 (1992).. 26

People v. Loftin, 26 Misc.3d 1229(A) (Onondaga Co. 2010).. . . 31

People v. Paniagua, 45 A.D.3d 98 (1st Dept. 2007).. 34

People v. Quinones, 12 N.Y.3d 116 (2009). 44

People v. Reed, 276 N.Y. 5 (1938).. 24

People v. Roman, 26 Misc.3d 784 (Sup. Ct. Bronx Co. 2009) 30, 31, 33, 45

People v. Walltower, 27 Misc.3d 1205(A) (Sup. Ct. Queens Co. 2010) 30

State v. King, 36 N.Y.2d 59 (1975).. 24

Tall Trees Const. Corp. v. Zoning Board of Appeals of Town of Huntington, 97 N.Y.2d 86 (2001). 32

DOCKETED CASES

People v. Austin, Ind. No. 6738/02 (Sup. Ct. N.Y. Co. 2010) . 30

People v. Bush & Freeman, Ind. Nos. 217/04, 730/02 (Co. Ct. Monroe Co. 2010). 31

People v. Cristostomo, Ind. No. 2809/01 (Sup. Ct. Bronx Co. 2010).. 41

People v. Dalton, Ind. No.9513/97 (Sup. Ct. N.Y. Co. 2010). . 31

People v. Dudley, Ind. No. 4795/03 (Sup. Ct. N.Y. Co. 2010) . 30

People v. Estella, Ind. Nos. 720/04 & 4336/04 (Sup. Ct. N.Y. Co. 2010).. 30

People v. Footman, Ind. No. 4477/01 (Sup. Ct. N.Y. Co. 2010).. 29

People v. Haughton, Ind. No. 7490/99 (Sup. Ct. N.Y. Co. 2010).. 29, 41

People v. Johnson, Ind. No. 3920/04 (Sup. Ct. N.Y. Co. 2010).. 31

People v. Keating, Ind. No. 579/00 (Sup. Ct. N.Y. Co. 2010).31

People v. Lashley, Ind. No. N10596/04 (Sup. Ct. Queens Co. 2010).. 30, 33

People v. Murray, Ind. No. 121/03 (Sup. Ct. Kings Co. 2010).31

People v. Murray, Ind. No. 3248/99 (Sup. Ct. N.Y. Co. 2010).46

People v. Parker, Ind. No. 6520/00 (Sup. Ct. N.Y. Co. 2010).31

People v. Perez, Ind. No. 5450 (Sup. Ct. N.Y. Co. 2010).. . 46

People v. Reed, Hill, & Watson, Ind. Nos. 03/73, 99/57, 95/958 (Onondaga Co. 2010) 30

People v. Rivera, Ind. Nos. 6228/01, 6228A (Sup. Ct. N.Y. Co. 2010).. 31

People v. Rodriguez, S.C.I. No. 254/98 (Sup. Ct. N.Y. Co. 2010).. 30

People v. Sanabria, Ind. No. 2316/92 (Sup. Ct. N.Y. Co. 2010).. 30

People v. Stanley, Ind. No. 3242/04 (Sup. Ct. Queens

Co. 2010)	31
<u>People v. Villalona</u> , Ind. No. 2455/03 (Sup. Ct. Bronx Co. 2010)	31
<u>People v. Williams</u> , Ind. No.1352/04 (Sup. Ct. N.Y. Co. 2010)	31
<u>People v. Williams</u> , Ind. No. 9280/99 (Sup. Ct. N.Y. Co. 2009)	30, 33

STATUTES

CPL §440.46	<i>passim</i>
CPL § 450.20	25
CPL § 450.30	25
L. 2004, ch. 738, § 23	9, 23, 24
PL § 70.04	19, 34, 35
PL § 70.06	19, 34, 35
PL § 70.07	19, 35
McKinney's, Statutes	
§ 76	32
§ 94	33
§ 97	43
§ 213	42
§ 238	35
§ 240	34
§ 321	38

MISCELLANEOUS

Blumstein and Nakamura, <u>Redemption in the Presence of Widespread Criminal Background Checks</u> , <i>Criminology</i> , vol 47, no. 2 at 327-359 (2009)	39
Greenberg, et al., <u>New York Criminal Law</u> , Volume 6	32
Preiser, Practice Commentary to CPL § 216.00	36
Preiser, Practice Commentary to CPL § 440.46	36

when “the term of the new sentence is unauthorized as a matter of law.” (Emphasis added). As the terms of respondents’ new sentences are within the legal range set forth by DLRA 3, the People’s appeal is unauthorized.

Appealability aside, as established in Point II, the People’s position must be rejected. It is at odds with the overwhelming weight of authority, see fn. 3, post. For as these many courts have found – and as conceded by the People at the trial level in Sosa – the statute’s plain language specifying that an exclusion offense must have been incurred within the “preceding ten years,” contemplates calculations from the present, not some earlier time. Rules of statutory construction and the statute’s ameliorative purpose additionally compel the lower court’s construction.

In addition to its legal incorrectness, the human and systemic costs of the People’s interpretation weigh heavily against its adoption. It would not serve justice to re-incarcerate the respondents, both of whom were released months ago, have returned to their families, and have been leading law-abiding lives. Nor would it serve justice to put at risk other individuals now either released or on post-release supervision, who were found eligible and resentenced by trial judges exercising their discretion after due consideration of the relevant facts.

This Court should reject the People’s position and either dismiss the appeal or affirm the orders below.

QUESTIONS PRESENTED

1. Whether the appeal should be dismissed as unauthorized by statute. CPL § 440.46; 2009 Drug Law Reform Act, Chapter 56 of the Laws of New York, § 9; L. 2004, ch. 738, § 23.
2. Whether, as the lower court found, the exclusionary look-back period is measured from the application's filing date, not the commission date of the drug offense, where the statute's plain language, its ameliorative purpose, its concern for public safety, and the overwhelming weight of authority, all support that construction. CPL § 440.46; 2009 Drug Law Reform Act, Chapter 56 of the Laws of New York, § 9.

STATEMENT OF FACTS

Background on the Underlying Cases

Keith Brock, Indictment Number 5394/98

By New York County Indictment Number 5394/98, respondent Keith Brock, then 37 years old, was charged with a single count of third-degree criminal sale of a controlled substance for participating in a \$10 crack sale to an undercover officer on December 21, 1998. He was convicted after trial and sentenced as a second felony offender, based on his 1994 conviction for attempted third-degree sale of a controlled substance, to an indeterminate term of 7 1/2 to 15 years (A. 39, 45).¹

¹Numbers in parentheses preceded by "A." refer to the Appendix filed by the People.

Gilberto Sosa, Indictment Number 7375/02

By New York County Indictment Number 5394/98, respondent Gilberto Sosa, then 49 years old, was charged with two counts of criminal possession of a controlled substance in the third degree, one count of criminal sale in the third degree, and one count of criminal possession in the fourth degree. It was alleged that Mr. Sosa possessed 1/8 ounce plus 12.4 grains of cocaine, and that he sold crack/cocaine. After a jury trial, respondent was convicted of criminal possession in the third and fourth degrees. The jury acquitted him of one count of third-degree possession, and the sale count was dismissed. The court imposed concurrent indeterminate prison sentences of 10 to 20 and 3 to 6 years (A. 171, 181-82).

The Resentencing Applications

Keith Brock's Resentencing Application

On October 7, 2009, Mr. Brock, 48 years old and suffering from kidney failure, moved, through counsel, under DLRA 3 for resentencing on his 1998 third-degree sale conviction. Mr. Brock was eligible for resentencing under CPL § 440.46 because: he was in custody on the date the resentencing motion was filed; he was sentenced under the laws in effect prior to January 13, 2005, for a Class B drug offense committed before that date; he was serving an indeterminate term of imprisonment having a maximum greater than three years; and he had no "exclusion" offense (A. 44-45). As to the latter, counsel pointed out that Mr. Brock's prior

violent conviction for robbery was more than 30 years old, and therefore "well outside the excluded 10-year period" (A. 45).

Counsel further argued that there were no facts that would cause the court to determine that "substantial justice" dictated that the application be denied. Specifically, Mr. Brock stood convicted of a low-level, non-violent drug offense. His most immediate prior conviction was also drug-related, a 1994 attempted third-degree sale conviction, and, except for the 1979 robbery conviction, his other convictions were lower level, non-violent offenses (1992: third-degree burglary and fifth-degree criminal possession of a controlled substance; 1987: first-degree reckless endangerment and first-degree criminal possession of stolen property) (A. 45-47).

His institutional record supported resentencing, as he had successfully completed, on schedule, DOCS' rigorous six-month Alcohol and Substance Abuse Training program, as well as Phase III of Transitional Services, a pre-release planning program (A. 47). He possessed a GED, and had pursued practical vocational training, particularly in floor covering, where he was promoted to teacher's aide and sought more advanced training (A. 47-48). Over the eleven years of his incarceration, he had accrued, early in his incarceration, a single disciplinary ticket for a less

serious Tier 2 infraction (A. 48). Otherwise, he had maintained a spotless disciplinary record (A. 48).

People's Response

The Office of the Special Narcotics Prosecutor opposed resentencing on eligibility grounds, contending that Mr. Brock's 1979 conviction for second-degree robbery was an "exclusion offense" that rendered him ineligible for resentencing under CPL § 440.46(5)(a). The robbery was less than ten years old, despite its remote conviction date, the People argued, because the relevant dates for calculation purposes were the commission dates of the two crimes – the 1979 robbery and the 1998 drug sale on which he sought resentencing. "Because the total time that elapsed between those two dates is approximately 19 years and 9 months," and he was incarcerated for approximately 11 years and 9 months between those dates, "application of the tolling period means that petitioner committed the 1979 Second Degree Robbery about 8 years before he committed the present 1998 B level narcotics sale." (A. 75).

On November 30, 2009, the lower court consolidated Mr. Brock's case with People v. Claude Danton, Ind. Nos. 5759/03; 620/04, a resentencing case presenting related issues, and deemed all papers filed in each case to apply to the other.

See Justice Marcy Kahn's letter of November 30, 2009).²

Petitioner's Reply

In a reply filed by petitioner Danton on his resentencing application and deemed by the lower court to apply to Mr. Brock's case on related issues, see ante, the defense argued that the People's calculation of the exclusionary period was flawed. The proper calculation, under the statute's plain wording and according to memos issued by the Department of Corrections and the Unified Court System, called for the initial ten-year calculation to be made by counting back from the motion's October 7, 2009, filing date, to the predicate conviction date in 1979, and then to extract the periods of incarceration between the two commission dates (Reply Memorandum, Point II, and Exhibits A, B, C). Using that calculation, Mr. Brock's prior robbery was more than 16 years old, well outside the 10-year window (A. 130-31).

Supplemental Submissions

In a letter from the court to the parties dated December 4, 2009, the court recounted its conversation with Richard de Simone, Esq., Associate Counsel-in-Charge, Office of Sentencing Review for DOCS (A. 128), in which Mr. de Simone confirmed the agency's view that the look-back period commences with the filing date of the motion, that the period

²Relevant submissions in Mr. Danton's case were forwarded to the Court for inclusion in the record on appeal on October 6, 2010.

of incarceration on the instant offense does not toll the running of the exclusion period, and that the statute is deemed to contemplate inmates "ag[ing] into" eligibility.

In a letter dated December 7, 2009, the People asked the court to reject Mr. de Simone's position as contrary to "the plain reading of CPL 440.46," and referred to Professor Peter Preiser's interpretation, as set forth in the 2009 Practice Commentary to CPL § 440.46 (A. 132), which would measure the interval between the commission of the two crimes for determining the exclusionary period (A. 132-33).

At no point did the People contend that substantial justice dictated denying Mr. Brock's application.

Gilberto Sosa's Resentencing Application

On October 7, 2009, Mr. Sosa moved through counsel under DLRA 3 for resentencing on his 2003 convictions for criminal possession of a controlled substance in the third and fourth degrees. Mr. Sosa was eligible for resentencing under CPL § 440.46 because: he was in custody on the date the resentencing motion was filed; he was sentenced under the laws in effect prior to January 13, 2005 for a Class B drug offense committed before that date; he was serving a 10 to 20 year indeterminate term of imprisonment; and he had no "exclusion" offense (A. 179-80). As to the latter, counsel pointed out that OCA records confirmed that Mr. Sosa's 1995 conviction for criminal possession of a weapon in the third degree was under subdivision 2 of PL § 265.02, and was

therefore a non-violent Class D felony (A. 180). The remainder of his criminal history related almost entirely to drugs (A. 181-82).

Counsel further argued that there were no facts that would cause the court to determine that "substantial justice" dictated that the application be denied. Specifically, Mr. Sosa, 49 years old at the time of the offense, had suffered from drug addiction for his adult life, as his criminal history reflected. He was serving a 10 to 20 year sentence, notwithstanding that the People had offered him a plea before trial with a 4 1/2-to-9-year sentence (A. 181-82).

His institutional record supported resentencing. He had successfully completed, on schedule, DOCS' intensive Aggression Replacement Training (ART) program. Vocationally, he was receiving training in horticulture and agriculture, earning high marks and the praise of his instructor. As a result, he had garnered employable skills in greenhouse work and plant care. His disciplinary history was limited to four tickets – two, including his last infraction in 2006, for less serious Tier 2 infractions, and two Tier 3 infractions from 2004 and 2005 (A. 183, 206). Since March 2006, over three years before the resentencing application, Mr. Sosa had no disciplinary incidents (A. 183).

People's Response

In an affirmation dated November 25, 2009, the People opposed resentencing, alleging that Mr. Sosa was ineligible

owing to his prior conviction for criminal possession of a weapon in the third degree, which they asserted was a violent offense, not a non-violent one as Mr. Sosa had maintained (A. 212). As Mr. Sosa thus had "a predicate felony conviction for an exclusion offense," he was ineligible (A. 212-13). The People did not argue that substantial justice dictated denying the application.

Supplemental Submissions

At a court appearance on December 17, 2009, Justice Kahn produced court file documents that seemed to establish that the weapon possession conviction was under subdivision (4) of CPL § 265.02, and thus a violent predicate felony conviction (A. 221). This finding, the court stated, shifted the focus to "the look-back rule," and whether the prior violent conviction qualified as an exclusion offense (A. 222). The court asked the parties to produce any relevant legislative history and invited submissions from each side (A. 231).

In a supplementary affirmation dated January 6, 2010, the People conceded that "the plain meaning of the statute would lend itself to a literal reading that would support the defendant's position that the ten year period should be measured from . . . the date of the resentencing application." Nonetheless, the People argued that the legislature meant to treat violent offenders harshly (A. 369).

In a supplementary letter dated January 7, 2010, counsel for Mr. Sosa set forth her efforts to ascertain the true nature of Mr. Sosa's weapon possession conviction. Notwithstanding the OCA printout and rap sheet on which she relied - both of which indicated that the conviction was for the non-violent offense - documents she had recently obtained from Mr. Sosa's trial counsel revealed that the conviction was for the violent offense (A. 233-34). Counsel pointed out, however, that a "violent felony conviction is not automatically an exclusion offense," and argued that the clear statutory language (as conceded by the People), the ameliorative purpose of the statute, past practices under DLRA 1 and DLRA 2, and the clearly stated tolling provisions of the statute, all supported - as other lower courts had found - that the look-back calculation was measured from the date of the resentencing application, not the date of the instant drug offense's commission (A. 234-40).

Noting that Mr. Sosa's resentencing application was filed under a mistaken view of the facts, and that measuring from the application date in this particular case would render Mr. Sosa ineligible by a few weeks, counsel asked the court to deem the filing date to be the date of the instant letter, or alternatively, to permit Mr. Sosa to withdraw and resubmit his application (A. 234). The legislation, counsel pointed out, imposed no time limit for an application to be filed, a structure which was designed to allow applicants to

demonstrate their rehabilitative efforts over time (A. 237). Deeming the filing date later would permit Mr. Sosa to provide the court with continuing and up-to-date information relevant to his eligibility (A. 234).

The Court's Decision

In a consolidated decision covering People v. Brock, People v. Sosa, and People v. Danton, the court determined that Mr. Brock and Mr. Sosa were eligible for resentencing under the look-back calculation it adopted, which would measure the look-back period from the date of the resentencing application's filing, and then exclude any time during which the defendant was incarcerated for any reason between the date of the commission of the previous violent felony and the date of commission of the present drug felony.

The court's reasons for arriving at this conclusion included "the natural and obvious meaning of 'within the preceding ten years,'" which the court identified as "the ten year-period immediately preceding the date of filing of the re-sentencing application." (A. 8). The court also considered the "spirit and purpose" of DLRA 3, the third in a series of statutory reforms intended to alleviate some of the draconian aspects of the Rockefeller drug laws (A. 9). The court described DLRA 3's wide-ranging provisions, which included not only the resentencing provisions of CPL § 440.46, but also judicial diversion, and new authorized dispositions at the trial level, including non-incarceratory

sentences, shock incarceration, and definite sentences (A. 9-11). The court concluded that "this legislation was designed to authorize a more lenient, and more therapeutic, judicial response to all but the most serious drug crimes." (A. 11). It was, therefore, "appropriate to resolve any ambiguity in favor of the more ameliorative, rather than punitive, construction," (A. 12, citing Statutes § 321), and to adopt an interpretation that would permit "defendants to age into eligibility for resentencing" a view consistent with DOCS' (Id.).

The court addressed and rebutted each of the People's arguments to the contrary. Concerning the People's primary argument that the phrase "predicate felony conviction" in CPL § 440.46(5) should receive the same construction as in the recidivist context, the court explained that the recidivist definition was conspicuously absolute, either explicitly or by reference, from CPL § 440.46(5). As the court pointed out, when the legislature intends for the period to run from the date of commission of the instant offense back to the date of sentence of an earlier crime, it expressly says so (A. 14) (citing PL §§ 70.04[1][b][ii], [iv]; 70.06 [1][b][ii], [iv]). Or the statute incorporates by reference such look-back provisions, see PL § 70.07[3] (incorporating by reference PL § 70.06[1][b])) (A. 15).

Further, while it makes sense in the recidivist context to impose more severe punishment on persons who continue to

commit serious crimes relatively soon after having been subjected to punishment for similar criminal conduct, the DLRA's intent is not punitive sentencing. Its different rationale – to permit an individual to demonstrate the rehabilitative progress made since the instant conviction as a ground upon which re-sentencing should be founded – makes the omission of reference to the recidivist statutes and their specific language “no accident.” (A. 16). Criminal Procedure Law § 440.46's “creation in a totally different context requires a totally different interpretation.” (A. 17).

The court dismissed the People's reliance on Professor Preiser's Practice Commentary, pointing out that it offered “no support or explanation for this construction . . . which seems to conflate the statute's look-back period with its tolling provisions.” (A. 18).

The court rejected that its construction would promote “gamesmanship” by encouraging petitioners “to wait ten years after the commission of their drug crime,” questioning why defendants should be precluded from demonstrating their rehabilitative progress. The court noted that the DLRA expressly directed the reviewing court to consider the inmate's institutional record, and that it evidenced “no concern that a defendant may engage in good behavior while incarcerated in order to convince the court to grant resentencing.” (A. 19).

The court also rejected the People's view that the ameliorative policies of the DLRA, including DLRA 3, should not apply to predicate violent felony offenders (A. 19). The court observed that violent felony offenders were granted resentencing under both the DLRA and DLRA 2, and that CPL § 440.46 did not categorically bar such offenders. "Were all applicants with past violent felonies intended to be disqualified from relief, the language of section 440.46 would most certainly have clearly so provided." (A. 19).

Applying the look-back calculation to Mr. Brock, the court determined that the look-back period was over 30 years, and that he was incarcerated between the dates of commission for some 12 years, leaving over 18 years of untolled time. Therefore, as this period was well outside the exclusionary 10-year window, Mr. Brock was eligible for re-sentencing (A. 28-30).

As for Mr. Sosa, the court recounted defense counsel's misapprehension as to whether Mr. Sosa's prior weapon possession conviction was a violent offense, and determined that under the circumstances, "and in the absence of any opposition from the People," the court would deem Mr. Sosa's application to have been filed as of January 7, 2010 (A. 33). As a result, the look-back period was just over 14 years. As Mr. Sosa's periods of incarceration from commission date to commission date amounted to just under 4 years, the

exclusionary period was just over 10 years, and outside the exclusionary window (A. 30-33).

Resentencings

Keith Brock

On February 3, 2010, Mr. Brock appeared via teleconference for resentencing. (Mr. Brock had waived his physical presence owing to his medical condition, which required twice-a-week dialysis (A. 138-39)). As the People had confined their objections to eligibility and had never argued that substantial justice dictated against resentencing, the court considered the appropriate term. Defense counsel recounted Mr. Brock's outstanding institutional accomplishments (including nearly ten years without a disciplinary infraction), his preparations for release, his family support, and the length of time he had already served (A. 140-44). For their part, the People asserted that Mr. Brock should be sentenced as a drug offender with a prior violent felony conviction, thus increasing the applicable range to 6 years determinate to 15 years determinate (A. 144).

The court offered Mr. Brock a sentence of 7 1/2 years plus 3 years of post-release supervision (A. 149-50). Mr. Brock accepted the proposed sentence, and was resentenced as a second drug offender with a prior violent conviction (A. 153-56).

Mr. Brock remains at liberty. His years incarcerated satisfied both the incarceratory and post-release supervision components of his new sentence.

Gilberto Sosa

On January 22, 2010, Mr. Sosa appeared for resentencing. The court recounted its reasoning for finding Mr. Sosa eligible (A. 373-84), and offered him sentences of 7 years plus 2 years post-release supervision on the Class B offense, and 5 years plus 2 years post-release supervision on the Class C offense (A. 389). Mr. Sosa accepted the proposed resentence and was sentenced as a second drug offender with a prior violent conviction (A. 391-96).

Mr. Sosa has been compliant and actively reporting to parole since that time. See <https://parole.state.ny.us/lookup.html> (last checked November 29, 2010).

ARGUMENT

POINT I

THE APPEAL SHOULD BE DISMISSED AS UNAUTHORIZED BY STATUTE. CPL §440.46; 2009 DRUG LAW REFORM ACT, CHAPTER 56 OF THE LAWS OF NEW YORK, §9); L. 2004, ch. 738, § 23.

Appeals in criminal cases are strictly limited to those authorized by statute. People v. Bautista, 7 N.Y.3d 838, 838-39 (2006); People v. DeJesus, 54 N.Y.2d 447, 449 (1981) ("It is fundamental that in the absence of a statute expressly authorizing a criminal appeal, there is no right to

appeal in a criminal case in this State."); People v. Reed, 276 N.Y. 5, 10 (1938) ("Appeal to the Appellate Division and to the Court of Appeals is entirely a matter of statute."). Sometimes this operates to "the seeming detriment of the defendant and sometimes to the detriment of the People." State v. King, 36 N.Y.2d 59, 63 (1975). It is the Legislature's policy prerogative "to limit appellate proliferation in criminal matters." Id.

DLRA 3 contains no provisions authorizing appeals to the Appellate Division, but incorporates by reference the unconsolidated appeal provisions of the 2004 Drug Law Reform Act. See CPL § 440.46 (3). That earlier statute sets forth specific circumstances for an appeal as of right:

An appeal may be taken as of right in accordance with applicable provisions of the criminal procedure law: (a) from an order denying resentencing; or (b) from a new sentence imposed under this provision and may be based on the grounds that (i) the term of the new sentence is harsh or excessive; (ii) that the term of the new sentence is unauthorized as a matter of law.

L. 2004, ch. 738, § 23. Thus, an appeal may be taken by the defendant from either a denial of resentencing or from the new sentence imposed. An appeal may be taken by the People in only one instance, on the ground that "the term of the new sentence is unauthorized as a matter of law."

The terms imposed upon Mr. Brock and Mr. Sosa are not unauthorized as a matter of law. The court not only imposed

terms within the legal range for their offenses, but agreed with the People's view that respondents should be sentenced as second drug offenders with prior violent felony convictions. Therefore, the People can have no complaint about the terms, which are fully authorized by law.

Unlike the provisions authorizing a defendant's appeal from a denial of resentencing, the statute does not encompass an appellate challenge by the People to a court's grant of resentencing. The legislature, of course, could have granted the People an appeal as of right from CPL § 440.46 resentencing grants, as it did with respect to other Article 440 motions, see CPL § 450.20 (5), (6), (7) (giving the People the right to appeal from the grant of CPL § 440.20 and 440.10 motions, and the denial of 440.40 motions), but it limited the People's appeal right only to cases where – resentencing having been granted – the “term” imposed is unauthorized. Nor can a broader right be implied from legislative silence. See People v. Bautista, 7 N.Y.3d 838, 839 (2006) (declining to find an appeal by permission to the Court of Appeals from orders denying resentencing under the 2005 Drug Law Reform Act, where “[t]he Legislature failed to mention CPL 450.90” in the reform act).

Moreover, no other statutory provision operates to grant the People the right to appeal from a resentencing grant. Criminal Procedure Law §§ 450.20 and 450.30, for example, permit the People to appeal on the ground that a “sentence

was invalid as a matter of law," but those provisions do not apply to orders pertaining to resentencing appeals. See Bautista, 7 N.Y.3d at 839 (2006) (dismissing appeal from an order denying resentencing under the 2005 Drug Law Reform Act because such order "is not equivalent to an appealable sentence" within the provisions of CPL 450.10, 450.15, or 450.20). DLRA 3's specific provisions governing appeals to the Appellate Division control and limit the right to appeal. See, e.g., People v. Laing, 79 N.Y.2d 166, 171-72 (1992) (declining to find a People's right to appeal from a CPL 710.30 preclusion order where the Legislature left preclusion orders out of the People's appeal authorization section; further declining to "rejigger" the language or specific prescriptions of the existing provisions "to fill the People's void"). As the Court observed in Laing, where the omission similarly left the People "out of appeals court," "any arguments for a change in the practice, however persuasive, must be addressed to the legislature.'" Id. at 172 (quoting Matter of Santangelo v. People, 38 N.Y.2d 536, 539 (1976)).

Accordingly, because the court's grant of resentencing based on its eligibility determination is not a ground upon which the People may take an appeal, this Court must dismiss their appeal.

POINT II

AS THE LOWER COURT FOUND, THE EXCLUSIONARY LOOK-BACK PERIOD IS MEASURED FROM THE APPLICATION'S FILING DATE, NOT THE COMMISSION DATE OF THE DRUG OFFENSE, WHERE THE STATUTE'S PLAIN LANGUAGE, ITS AMELIORATIVE PURPOSE, ITS CONCERN FOR PUBLIC SAFETY, AND THE OVERWHELMING WEIGHT OF AUTHORITY, ALL SUPPORT THAT CONSTRUCTION. CPL §440.46; 2009 DRUG LAW REFORM ACT, CHAPTER 56 OF THE LAWS OF NEW YORK, §9.

The lower court properly construed CPL § 440.46(5) (a). Consonant with the many other trial courts to have addressed the issue, the lower court initially calculated the exclusionary period for a prior violent felony conviction by looking back from the filing date of the resentencing application. Using that calculation, and then tolling the statutorily mandated periods of incarceration, the court determined that each violent conviction was more than ten years old and thus not a disqualifying exclusion offense. The countervailing position rejected by the court would have measured the ten-year time frame from the commission of the instant drug offense.

This Court should affirm. As demonstrated below, the statute's plain language and its overall purpose make clear why lower courts across the State have adopted this same approach. The People's arguments asking this Court to find against the overwhelming weight of authority on this point of

statutory interpretation are meritless, illogical, and ill-serve the cause of justice.

A. The overwhelming weight of authority supports the lower court's conclusion.

Criminal Procedure Law § 440.46(1) sets forth DLRA 3's eligibility provisions: Any person in DOCS custody, convicted of a class B drug offense which was committed before January 13, 2005, and who is serving an indeterminate term of imprisonment with a maximum term of more than three years, may apply for resentencing under DLRA 3.

Criminal Procedure Law § 440.46(5) sets out the exception:

(5) The provisions of this section shall not apply to any person who is serving a sentence on a conviction for or has a predicate felony conviction for an exclusion offense. For purposes of this subdivision, an "exclusion offense" is:

(a) a crime for which the person was previously convicted within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony, which was: (i) a violent felony offense as defined in section 70.02 of the penal law; or (ii) any other offense for which a merit time allowance is not available pursuant to subparagraph (ii) of paragraph (d) of subdivision one of section eight hundred three of the correction law; or

(b) A second violent felony offense pursuant to section 70.04 of the penal law or a persistent violent felony offense pursuant to section 70.08 of the penal law for which the person has previously been adjudicated.

Thus, under CPL § 440.46(5)(a), a person serving a sentence for, or having a predicate felony conviction for, an "exclusion offense" is ineligible for resentencing. Although

an exclusion offense must be a violent offense under PL § 70.02, or a merit-time-ineligible offense under the Corrections Law, not every such conviction is an exclusion offense. To qualify – whether the person is serving it, or it is a prior conviction – it must be a crime for which the person was convicted “within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony.” CPL § 440.46(5) (a).

The lower court properly determined that the starting point for calculating the pre-tolling look-back period is the application’s filing date. Virtually every lower court in the State to have considered this issue has reached the same conclusion, relying, as the lower court here did, on an array of supporting factors, including the statute’s plain language and natural and obvious meaning in context, the statute’s overall purpose, and the absurd results that would follow from a contrary interpretation. In the footnote below, we include many, if not most, of these decisions.³ These

³ See, e.g., People v. Footman, Ind. No. 4477/01 (Sup. Ct. N.Y. Co. Sept. 17, 2010) (Hayes, J.) (rejecting People’s argument regarding lookback and finding that under the proper interpretation of the statute defendant “was not convicted of that [violent] offense within the preceding ten years”); People v. Haughton, Ind. No. 7490/99 (Sup. Ct. N.Y. Co. July 26, 2010 (Kahn, J.)) (“the look-back period for an exclusion offense is properly defined as the ten years preceding the date of filing or a resentencing application”); People v. Arroyo, 28 Misc.3d 1205(A); 2010 WL 2651649 (unreported; available on Westlaw) (Sup. Ct. Bronx Co. June 25, 2010 (Price, J.) (measuring the look-back period from the date the defendant files

the motion for resentencing); People v. Lee, Ind. 1408/00 (Sup. Ct. N.Y. Co. June 22, 2010) (Goldberg, J.) (finding "that the 'look-back provision' of the statute refers to the ten year period immediately preceding the date of the filing of the application for resentence"); People v. Burnett, 28 Misc.3d 928 (Sup. Ct. Queens Co., June 17, 2010) (Kron, J.) ("As held by other courts of concurrent jurisdiction, this Court finds that the controlling time-period under CPL § 440.46[5], which excludes resentencing eligibility for individuals serving a sentence for an exclusion offense, is to be measured from the time of the filing of the application"); People v. Rodriguez, S.C.I. No. 254/98 (Sup. Ct. N.Y. Co. May 13, 2010) (Nunez, J.) ("The consensus, with which this court agrees, is that the plain meaning of the statute dictates the time frame is measured from the date of the instant application."); People v. Sanabria, Ind. No. 2316/92 (Sup. Ct. N.Y. Co. Apr. 23, 2010) (Pickholz, J.) (finding the "ten-year period dates back from the date of the filing of the petition for resentencing"); People v. Walltower, 27 Misc.3d 1205(A); 2010 WL 1371963 (unreported; available on Westlaw) (Sup. Ct. Queens Co. Apr. 6, 2010) (Kohm, J.) ("the natural meaning of the term 'within the preceding ten years' in CPL 440.46(5) (a) is the ten-year period immediately preceding the date of filing the application for resentencing"); People v. Lashley, Ind. N10596/04 (Sup. Ct. Queens Co. April 5, 2010 (Braun, J.) ("To measure the 'look-back' period from a date other than the date of the resentencing application would be detrimental to furthering the goals of the current legislation. It would clearly have the unintended effect of excluding an otherwise worthy defendant who has made concerted efforts toward rehabilitation during his or her period of incarceration because of a remote exclusionary crime"); People v. Dudley, Ind. No. 4795/03 (Sup. Ct. N.Y. Co. Mar. 31, 2010) (Carro, J.) ("the court finds that the starting date for the 'look-back' period is the date of the application for resentencing"); People v. Estella, Ind. Nos. 720/04 & 4336/04 (Sup. Ct. N.Y. Co. Mar. 24, 2010) (Uviller, J.) (finding that "the relevant point in time from which the statutory 'preceding ten years' is to be measured is the date of the filing of the petition for re-sentencing"); People v. Austin, Ind. No. 6738/02 (Sup. Ct. N.Y. Co. Mar. 22, 2010) (Bartley, J.) ("I find the words 'previously convicted within the preceding ten years' should be construed to give effect to their plain meaning, to wit: ten years from the date the application is filed"); People v. Reed, Hill, & Watson, Ind. Nos. 03/73, 99/57, 95/958 (Sup. Ct. Onondaga Co. Feb. 2010) (Brunetti, J.) ("The court plans to follow the lead of respected colleagues and reach the same result [as in Danton, Brown, Roman, and Williams]; People v. Brown, 26 Misc.3d 1204(A); 2010 WL 9928 (unreported; available on Westlaw) (Sup. Ct. N.Y. Co. Jan. 4, 2010) (Conviser, J.) (holding that "the most natural construction of the law is to read its reference point as the date of a resentencing application"); People v. Williams, Ind. Nos. 9280/99 and 5364/04 (Sup. Ct. N.Y. Co. Dec. 23, 2009) (Pickholz, J.) (holding that "the more natural reading of the statute is that the ten-year period looks back from the present, *i.e.*, the date of the filing of the application"); People v. Roman, 26 Misc.3d 784

decisions issue from courts that have restrictively construed DLRA 3's other eligibility provisions;⁴ additionally, our research has uncovered only one Kings County court that has directly addressed the look-back issue (favorably for respondents' position, see People v. Murray, Ind. No. 121/03 (Sup. Ct. Kings Co. Mar. 22, 2010)); it is our understanding

(Sup. Ct. Bronx Co. Dec. 2, 2009) (Mogulescu, J.) (holding that "the statute, by its plain meaning, contemplates eligibility determinations from the present date . . . not . . . from the date of the commission of a past offense"); see also People v. Murray, Ind. No. 121/03 (Sup. Ct. Kings Co. Mar. 22, 2010) ("It is this court's opinion that these terms refer to the ten years immediately preceding the application for resentencing."); People v. Bush & Freeman, Ind. Nos. 2004-217 & 2002-730 (Co. Ct. Monroe Co. Mar. 16, 2010) (following reasoning of Danton, Roman, and Brown decisions); People v. Loftin, 26 Misc.3d 1229(A); 2010 WL 716165 (unreported; available on Westlaw) (Co. Ct. Onondaga Co. Mar. 2, 2010) (Fahey, J.) ("This court is inclined to agree with an increasing number of other trial courts who have ruled that the statute, by its plain meaning, contemplates eligibility determinations from the present date."); People v. Stanley, Ind. No. 3242/04 (Sup. Ct. Queens Co. Mar. 1, 2010) ("This court is especially persuaded by the opinion in People v. Brown [concluding that the lookback period commences upon the filing of the application]"); see also People v. Johnson, Ind. No. 3920/04 (Sup. Ct. N.Y. Co. May 14, 2010) (FitzGerald, J.) ("most *nisi prius* courts that have ruled on the [look-back] issue have agreed with the manner of calculation urged by the defense, a position which this court shares"); People v. Villalona, Ind. No. 2455/03 (Sup. Ct. Bronx Co. May 3, 2010) (Adler, J.) (examining the ten year period "from the filing of the defendant's motion"). All of these decisions are in counsel's possession and available for the court's review.

⁴ E.g., People v. Dalton, Ind. No. 9513/97 (Sup. Ct. N.Y. Co. May 17, 2010) (FitzGerald, J.) (finding parole violators ineligible); People v. Rivera, Ind. Nos. 6228/01; 6228A/01 (Sup. Ct. N.Y. Co. April 30, 2010) (Kahn, J.) (same); People v. Keating, Ind. No. 579/00 (Sup. Ct. N.Y. Co. April 26, 2010) (White, J.) (same); People v. Parker, Ind. No. 6520/00 (Sup. Ct. N.Y. Co. Jan. 28, 2010) (Zweibel, J.) (same); People v. Williams, Ind. No. 1352/04 (Sup. Ct. N.Y. Co. May 6, 2010) (Zweibel, J.) (finding releasees to parole ineligible).

that the District Attorneys offices in those counties have conceded the issue at the trial court level.⁵

Hornbook law also supports the lower court's construction. See Greenberg, et al., New York Criminal Law, Volume 6, April 2010 Supplement, § 3:24 at 28 [3d ed.] (measuring the 10-year disqualifying period from the "[d]ate of application for resentencing on the class B drug felony").

That the overwhelming weight of authority supports respondents' view does not surprise. The most elemental rule of statutory construction holds that "where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning." Tall Trees Const. Corp. v. Zoning Bd. of Appeals of Town of Huntington, 97 N.Y.2d 86, 91 (2001); accord, Statutes §76 ("[w]here words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation"); People v. Finnegan, 85 N.Y.2d 53, 58 (1995) (when statutory language is clear and unambiguous, it should be construed to give effect to the plain meaning of the words used).

⁵ See People v. Danton, Reply Affirmation at fn. 4, record on appeal, citing a representative DLRA 3 response filed by the Kings County District Attorney's office, in which the prosecution conceded that the defendant's 1992 prior violent felony conviction would fall within 10 years. The Assistant acknowledged that DOCS "has taken the position that the period runs back in time from the date that defendant filed his motion, and that his time spent incarcerated on the case for which he is seeking resentencing is therefore counted in the ten-year period." Id.

Here, the phrase "within the preceding ten years" refers to the present time. According to the Merriam-Webster dictionary, preceding means that which "immediately precedes in time or place." (Emphasis added). Consequently, use of the word "preceding" in the statute does not contemplate skipping back to some prior time period. The phrase is not attached to the drug commission date (which, by contrast, is specifically referenced with respect to tolling, see ante), or any other prior date. Construing the statutory language "according to its natural and most obvious sense," see Statutes § 94, thus supports the lower court's conclusion that the pre-tolling calculation looks back from the present time. See also People v. Roman, 26 Misc.3d 784, 486 (Sup. Ct. Bronx Co. 2009) ("the statute by its plain meaning contemplates eligibility determinations from the present date....[t]he statute does not qualify the term 'within the preceding ten years' with reference to any time frame thus imposing a plain meaning to this phrase, viz, that this time frame is measured from the date of the motion"); People v. Williams, Ind. No. 9280/99, Sup. Ct. N.Y. Co. (Dec. 23, 2009) ("The more natural reading suggests that inherently, 'within the preceding ten years' refers to the day on which the resentencing application was filed"); People v. Lashley, Ind. No. N10596/04 (Sup. Ct. Queens Co. April 5, 2010) ("Thus, the plain meaning of the phrase 'within the preceding ten years,' unadorned as it is by any limiting language, appears

intended to run from the time immediately preceding the application made under CPL 440.46").

Such construction also comports with the present-tense framework of the resentencing statute. A person can only petition for resentencing if he is currently in DOCS custody. See CPL § 440.46(1), again supporting that eligibility is to be determined in "a contemporaneous, rather than an historical fashion" (A. 12). Notably, on an application for resentencing under the 2005 DLRA, the parties, without dispute, used the resentencing application's filing date to determine whether the defendant was eligible for parole within three years. See People v. Paniagua, 45 A.D.3d 98, 103-04 (1st Dept. 2007).

Specific principles of statutory construction strongly support measuring the look-back period from the present. The universal rule of statutory construction – *expressio unius est exclusio alterius* – applies in particular. That rule of interpretation provides that "where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." Statutes § 240.

Here, "exclusion offense" is its own statutorily defined term. Section 440.46 neither tracks the language of recidivist sentencing statutes such as § 70.04 and § 70.06, which expressly pin the ten-year look-back period to the

commission of the present felony ("sentence must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted," see PL § 70.04(1)(b)(iv); § 70.06(1)(b)(iv)), nor reference them. That omission is telling, if not dispositive, for as the lower court pointed out, when the legislature has intended for the period to run from the date of commission of the instant offense back to the date of sentence of an earlier crime, it has expressly said so, or has incorporated by reference such look-back provisions. See §§ 70.04(1)(b)(iv); 70.06(1)(b)(iv); 70.07. Having not done so here produces an "irrefutable inference," Statutes § 240, that the look-back calculation was not meant to parallel the recidivist statute.⁶ Along the same lines, when a statute contains both a general and a particular provision, "the general does not overrule the particular." Statutes § 238. Here, the general phrase "predicate felony conviction" must yield to the particular phrase "exclusion offense," which is uniquely defined for purposes of § 440.46, and is not tethered to recidivist statutes.

⁶A different provision of CPL § 440.46 (5) does expressly reference the recidivist sentencing statutes in defining a different category of exclusion offenses, see CPL § 440.46(5)(b) (excluding individuals convicted of a "second violent felony offense pursuant to section 70.04 of the penal law or a persistent violent felony offense pursuant to section 70.08 of the penal law for the person has previously been adjudicated"). The Legislature thus wrote a blanket exclusion for certain repeat violent offenders, showing its ability to incorporate the recidivist statutes when it wanted to.

The lone source on which the People rely in support of their position is Professor Preiser's Practice Commentary, which they continue to insist should prevail over the collective thinking of the many courts that have ruled on the issue, commentators such as Mr. de Simone uniquely positioned to address the statute's meaning, and the interpretation imparted by state agencies intimately involved in the statute's drafting, execution, and operation (Brief at 17).

The Practice Commentary's analysis is flawed. While it is true that Professor Preiser shares the prosecution's interpretation – more or less, see post – his commentary contains no explanation whatsoever, only the bare conclusion that the ten-year period dates from the commission of the present drug offense. In contrast, in his commentary on CPL § 216.00(1)(a), Professor Preiser appears to read the same language as creating a look-back period dating from the present, again without elaboration. Preiser, Practice Commentary to CPL § 216.00. Given Professor Preiser's unexplained inconsistency in construing these related, identically worded statutes, it appears that he did not give them his usual careful consideration, and his commentary on them is, thus, of little value either way.

Indeed, Professor Preiser's look-back calculation is different even than the position advanced by the People on this appeal. The People contend that the look-back calculation used by recidivist statutes should control here,

and, using that formula, would have courts measure back from the commission date of the present felony to the conviction date of the violent felony (Brief at 13-14: counting days between "conviction" on the violent felony and commission of the instant drug felony); see, e.g., PL § 70.06 (1) (b) (iv) (requiring that "sentence must have been imposed" within ten years of the present felony's commission). Professor Preiser would measure back to the commission date of the violent felony. Preiser, Practice Commentary to CPL § 440.46. For the many reasons discussed herein, the People are wrong, but insofar as they rely on Professor Preiser to support their position, his analysis finds no support in any court, and does not actually represent the People's position before this Court.

The People's position that the look-back period and tolling "must be understood as contemplating only a single period of time" (Brief at 18), has not only earned sweeping rejection from the courts, but, as discussed further below, would create bizarre incentives by rewarding those who have committed recent acts of violence while denying any hope of relief to those with remote violence who have made genuine strides in the intervening years. The People's tortured reading of the statute's plain language artificially conflates the two periods, as courts, commentators, DOCS, and the Unified Court system have all understood.

- B. The lower court's construction serves both the statute's ameliorative purpose and its concern for public safety.

Remedial purpose and "aging in"

As the lower court convincingly demonstrated by reference to DLRA 3's wide-ranging ameliorative provisions, the legislation was meant to mitigate the harshest aspects of the Rockefeller drug laws for low-level drug offenders. As the court stated, "this legislation was designed to authorize a more lenient, and more therapeutic, judicial response to all but the most serious drug crimes. . . . Therefore, viewing the re-sentencing provision generally, and its look-back provision particularly, in the context of the spirit and purpose underlying the legislation as a whole, it is appropriate to resolve any ambiguity in favor of the more ameliorative, rather than the more punitive construction."

(A. 11-12) (citing Statutes § 321 [remedial statutes are to be construed liberally to carry out their intended reforms and to promote justice]).

Calculating the look-back period from the date of the application is consistent with the statute's ameliorative purpose because it allows candidates to "age-in" to eligibility, as the distance between their past violent convictions and the present widens and they put the past behind them through their good behavior and rehabilitative efforts (A. 12; see also A. 129 (letter from Justice Kahn to parties confirming DOCS' view "that the legislative intent of

the 'look-back' provision was to permit inmates to 'age into' eligibility for DLRA-3 re-sentencing"). It is also consistent with penological literature recognizing that people convicted of criminal offenses age out of immature and violent behavior thus decreasing their recidivism rate. See Blumstein and Nakamura, Redemption in the Presence of Widespread Criminal Background Checks, *Criminology*, vol 47, no. 2 at 327-359 (2009).

Notably, other provisions of the DLRA also provide for "aging-in," further buttressing that the legislature intended for drug-sentencing relief to be ongoing, not static, and based on contemporaneous, not historical, calculations. Thus, DLRA 3 authorizes a similar "age-in" concept with its amendments to the eligibility requirements for the Shock Incarceration Program. Before DLRA 3, DOCS selected program participants at reception centers – one was either eligible or not at that fixed point. The statute required an "eligible inmate" to be under forty years old and eligible for release on parole (indeterminate) or conditional release (determinate) within three years.

After DLRA 3, DOCS may select program participants under fifty years old, at either a reception center or "at a general confinement facility" when the otherwise eligible inmate then becomes eligible for release on parole within three years in the case of an indeterminate term of imprisonment, or then becomes eligible for conditional

release within three years in the case of a determinate term of imprisonment" (Correction Law § 865 [1], [2]; [L2009, ch 56, Part L, §§ 1, 2]). Clearly, in this context, the legislature intended eligibility determinations to be made on a flexible date, in present time, on a rolling basis. That same legislative intent must inform CPL § 440.46 (5) (a).

Public safety

To be sure, CPL § 440.46(5)'s exclusionary provisions reflect the legislature's intent to bar certain violent offenders from being eligible to receive reduced sentences that could introduce them back into society any earlier than their old sentences would have allowed. Measuring the look-back period from the date of the application sensibly meets the legislature's valid public safety concerns by operating to exclude those whose recent violent conduct manifests a present-day impaired ability to abide by society's norms. It would exclude from even the possibility of resentencing drug offenders who cannot properly be termed "non-violent," either because their violent behavior co-occurred with the drug offense, or took place afterwards, as in prison. Such conduct would be unlikely to ever fall outside the exclusionary ten-year period.

Measuring the look-back period from the commission of the drug offense, by contrast, would have the perverse effect of extending eligibility to individuals with more recent violence, because a recent violent conviction would never

fall "within the preceding ten years" of the commission of the drug felony. The lower court understood this, noting on the record that "the People's interpretation would not render ineligible a defendant who committed a violent felony offense after starting to serve a sentence on the instant drug offense," while "[t]he defendant's interpretation would consider that" (A. 379). See also People v. Haughton, Ind. No. 7490/99 (Sup. Ct. N.Y. Co. July 26, 2010) (Kahn, J.) ("under the People's view of the look-back provision, individuals who first commit a violent felony during their term of incarceration would not be rendered ineligible for resentencing, a result which countermands common sense); People v. Brown, 26 Misc.3d 1204(A); 2010 WL 9928 (Sup. Ct. N.Y. Co. Jan. 4, 2010) (Conviser, J.) (rejecting People's construction because, inter alia, if "predicate felony conviction" were construed as the People advanced, "a violent felony conviction which occurred at the same time as the instant drug offense (or a latter time) would not serve to bar a defendant's resentence"); People v. Cristostomo, Ind. No. 2809/01 (Sup. Ct. Bronx Co. Oct. 1, 2010) ("A determination that defendant would . . . be eligible for resentencing simply because his violent felony offense occurred after his drug conviction but within ten years of the filing of his motion would lead to an absurd result").⁷

⁷ This is so even if the individual were still "serving a sentence" on a violent conviction, as such conviction, to

"Exceptions [to enactments] must be strictly construed in order that the major policy underlying the legislation itself is not defeated....all doubts should be resolved in favor of the general provision rather than the exception." Statutes § 213. The policy behind DLRA 3's resentencing remedy is to bring overly harsh Rockefeller drug law sentences in line with current sentencing norms without risking public safety. Construing subdivision (5) (a) to extend eligibility to individuals with remote violence while barring those with recent violence is consistent with this policy.⁸ The People decry that it makes no sense "to construe a restrictive section of the law in an ameliorative manner" (Brief at 26), but exceptions must indeed be understood within the legislation's larger context, Statutes § 213. What makes "no sense" is the People's interpretation, which would reward individuals who commit recent acts of violence by giving them a shot at resentencing. Supreme Court's look-back rule serves both the statute's ameliorative purpose and its public safety concerns.

constitute an exclusion offense, must still be "within the preceding ten years." CPL § 440.46(5). In other words, under the People's construction, a person who commits an act of recent violence would suffer no exclusion on the theory that he or she is serving the sentence, because the conviction would still not meet their requirement that it precede commission of the drug felony.

⁸As the lower court also noted, DLRA 3's judicial diversion provisions, CPL §§ 216.00[1][a], 216.05[3][a][I] reflect a similar intent to exclude recent violent felony offenders from the ameliorative effects of DLRA 3 (A. 12-13).

- C. The lower court's construction comports with the legislature's emphasis on the institutional track record.

In clear terms, the legislature expressed its view that an individual's behavior in prison is relevant to assessing his or her capacity to rejoin society as a law-abiding citizen. Criminal Procedure Law § 440.46(3) requires courts to consider an individual's programming and disciplinary record in determining a resentencing application. That view must animate the construction of the look-back provision for the statute as a whole to make any sense, see Statutes § 97 ("a statute . . . is to be construed as a whole, and all parts of an act are to be construed together"). As the Supreme Court concluded, the period of incarceration, which the legislature deemed relevant to assessing an individual's capacity for violence-free living, must be included in the pre-tolling look-back period.

The People nonetheless insist that the legislature meant to extend relief only to those who have "lived 10 [violent-felony-free years] while at liberty in society." (Brief at 28; emphasis in original). They would dismiss as "entirely irrelevant" an individual's behavior while incarcerated (Brief at 20), because of one's limited opportunities to act out.

Their argument conflicts with the legislature's belief that the institutional track record possesses predictive value in assessing an individual's capacity for law-abiding

behavior in society. In insisting on 10 clean years “in society,” the People again erroneously seek to engraft inapposite recidivist sentencing philosophies, see People v. Cagle, 7 N.Y.3d 647 (2006), onto an ameliorative statute.

D. The lower court’s construction properly facilitates the exercise of sentencing discretion.

The lower court’s look-back rule facilitates “one of the sentencing court’s most traditional and basic functions, i.e., the exercise of sentencing discretion.” See People v. Quinones, 12 N.Y.3d 116, 130 (2009). Judicial discretion is the centerpiece of New York’s statutory sentencing scheme. It should not be disregarded lightly. People v. Day, 73 N.Y.2d 208, 212 (1989) (it is an “overarching principle” that “[s]entencing courts, in the exercise of their unique judicial function in criminal proceedings, are wisely allocated wide latitude as they are recognized to be in a superior position to dispense proportionate and fair punishment”). Reviewing courts should “interpret circumspectly” statutes that would limit “in the power connotation . . . what a sentencing Judge *can* appropriately do.” Id. (emphasis in original).

Counting back from the application’s filing date facilitates the exercise of sentencing discretion because, by widening the pool of eligible applicants, it preserves for the courts the job they are best suited to do – exercising discretion in matters of sentencing based on their

unsurpassed access to the facts necessary to rendering a fair determination. People v. Farrar, 52 N.Y.2d 302, 305-06 (1981); Day, 73 N.Y.2d at 212. The People's rule, by contrast, would hamstring resentencing courts by putting the most draconian sentences out of their reach. See People v. Roman, 26 Misc.3d 784 (Sup. Ct. Bronx Co. 2009) (resentencing defendant whose Rockefeller drug law sentences for two low-level sales totaled 14 to 28 years; "to adopt the position put forth by the People would be to deny a court the ability to reevaluate the propriety of an otherwise draconian sentence meted out under the former sentence structure for drug offenses").

Of course, affording courts the opportunity to consider resentencing for such individuals means only that they may be resentenced – not that they will be, or that they will receive a particular sentence if they are. A number of courts adopting the look-back construction respondent advances nonetheless exercised their discretion to deny the application on substantial justice grounds. In People v. Brown, 26 Misc.3d 1204(A); 2010 WL 9928 (Sup. Ct. N.Y. Co. 2010), for example, the court's comprehensive analysis of the look-back issue resulted in it adopting the view that the ten year period is measured from the date of a resentencing application, but resentencing was ultimately denied on substantial justice grounds. "[T]hat the defendant is technically eligible for resentencing," the court explained,

“does not mean that his violent felony conviction should not be strongly considered here.” See also, e.g., People v. Murray, Ind. No. 3248/99 (Sup. Ct. N.Y. Co. June 25, 2010) (finding defendant eligible but denying on substantial justice citing defendant’s “lengthy prior criminal record, his recidivism and his poor disciplinary history”); People v. Perez, Ind. No. 5450 (Sup. Ct. N.Y. Co. March 4, 2010) (finding defendant eligible but denying on substantial justice, citing defendant’s conviction of a violent felony and misdemeanor assault as especially significant).

In sum, the court is free to take into account the individual’s prior record in determining whether to resentence an eligible individual, and what sentence to impose if it decides to do so. The defendant’s status as a prior violent offender may well require the court to apply a significantly enhanced sentencing range in determining the appropriate sentence.⁹ Prior violence and recidivism, as well as the recidivist statutes themselves, thus have a role in resentencing – just not as to eligibility. The look-back rule the lower court adopted does not erase an individual’s remote violent conviction, but properly includes it among the

⁹ Indeed, the lower court’s look-back rule provided no windfall to respondents here. In each case, they were adjudicated second felony offenders with a prior violent conviction, thus exposing them to a higher sentencing range (6 years determinate to 15 years determinate, with a mandatory period of PRS, see PL § 70.70(4)(b)(i)) and enhancing their status from second felony offender, to second felony drug offender previously convicted of a violent felony.

array of factors a court may consider in the exercise of its discretion. The People's rule, by automatically excluding a class of individuals from even the possibility of resentencing, would divest courts of their sentencing discretion in all such cases.

E. The People's false accusations of manipulation and gamesmanship.

In service of their claim that counting back from the application's filing date encourages gamesmanship, the People point to the lower court's ruling with respect to respondent Sosa. There, where the available documentation at the time of the application's filing showed that Mr. Sosa's prior offense was a non-violent felony, but subsequent investigation proved otherwise, the court deemed the application date to be January 7, 2010 (rather than October 7, 2009). That modest shift in timing brought the previous felony outside the preceding ten years. As the court explained on the record, to do so comported with the "intent of the legislature . . . to allow defendants who do well in prison and make good progress and rehabilitation to age into eligibility" (A. 383).

Having never complained below, the People nonetheless indignantly cite this on appeal as evidence of "manipulation," and criticize respondent for his "brazenness"

(Brief at 22).¹⁰ But there is nothing untoward about the court's actions, as the People's silence at the time confirms. To the contrary, as the statute contemplates inmates "aging into" eligibility, and the premature filing resulted from misleading documents maintained by the State, the court sensibly fulfilled the spirit and purpose of DLRA 3 by designating the filing date several months later. The People never complained, and never argued that Mr. Sosa's application should be denied on substantial justice grounds.

The People are right that eligibility decisions should not turn on technicalities, but the wrong here would have been to deny Mr. Sosa relief owing to a mistake in timing prompted by inaccurate records. By the time the matter was before the court and the factual confusion resolved, he was eligible to be resentenced and, by the People's own lights, substantial justice did not dictate otherwise.

¹⁰ The People claim that Mr. Sosa "brazenly noted that ...he could 'easily' withdraw his resentencing application and file a new one that same day...." in order to meet eligibility requirements (Brief at 22). In fact, it was the court that, in moving the date forward, made that remark (A. 383). The People make yet another misleading claim in asserting that Claude Danton, another of the defendants before Justice Kahn, would "become eligible for resentencing in February 2012 solely by virtue of waiting out the clock." (Brief at 30). In fact, Mr. Danton was released at his CR date on January 11, 2010. It was the necessity of filing a resentencing motion while he was still in custody that resulted in his exclusion-offense ineligibility, demonstrating how the eligibility rules operate both for and against otherwise qualified candidates.

As the lower court recognized, Mr. Brock and Mr. Sosa are the intended beneficiaries of DLRA 3's resentencing reforms. Their violence long in the past – indeed, dating from the last century – each availed himself of the rehabilitative opportunities their facilities offered during their long years of incarceration. Each has made enormous strides in overcoming their addictions and distancing themselves from their prior wrongful conduct. Indeed, at no time did the People in either case contend that either man should be denied resentencing on the merits.

Prime examples DLRA 3's successful operation, these men were permitted to rejoin their families and larger society as law-abiding citizens after paying the terribly high price-in-years that the Rockefeller drug laws extracted from low level drug offenders. Affirming the lower court would serve justice, both individually and systemically. It would permit respondents to continue with their new lives while allowing courts to exercise discretion in individual cases to decide whether a person, despite an old violent conviction, has earned a sentence in line with current sentencing norms, e.g., People v. Arroyo, 28 Misc.3d 1205(A), 2010 WL 2651649 (Sup. Ct. Bronx Co. June 25, 2010) (unreported, available on Westlaw) (resentencing defendant despite remote prior conviction for criminal possession of a weapon in the third degree; "the record is entirely devoid of anything to justify such a [substantial justice] finding. In fact, quite the

opposite is true.""). At the same time, the discretion afforded courts would enable them to deny resentencing where the defendant has not sufficiently reformed to warrant relief, e.g., People v. Brown, supra.

Calculating look-back as the People propose would visit hardship on respondents and divest courts of the discretion they possess to promote justice in individual cases. A look-back rule imposing ineligibility on respondents and others similarly situated not only ignores the statute's plain language and the overwhelming weight of authority, but would tarnish the promise offered by the DLRA reforms of remedying the punitive sentencing approaches of the past.

This Court should affirm the lower court's orders.

CONCLUSION

FOR THE REASONS STATED in POINT I, THIS COURT SHOULD DISMISS THE APPEAL. ALTERNATIVELY, FOR THE REASONS STATED IN POINT II, THIS COURT SHOULD AFFIRM THE LOWER COURT'S ORDERS OF RESENTENCING.

Respectfully submitted,

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