

To be argued by  
MARK W. ZENO

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**New York Supreme Court**



**Appellate Division -- First Department**



THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

Bronx County  
Ind. No. 6046/02

- *against* -

ALEXIS ORTA,

*Defendant-Appellant.*

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**BRIEF FOR DEFENDANT-APPELLANT**

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unopposed by the People, and remains pending before the Court.

Appellant currently is incarcerated pursuant to the September 24, 2003 judgment. He has sought no stay.

#### **QUESTION PRESENTED**

Where appellant met the unambiguous statutory requirements for DLRA-3 resentencing, because he was in DOCS custody on a class-B drug felony, whether the court erroneously found him ineligible on the grounds that he was in custody on a parole violation and not the original

sentence.

#### **INTRODUCTION**

Last April, in the final stage of Rockefeller drug law sentence reform, Governor Paterson signed the Drug Law Reform Act of 2009 into law (Chapter 56 of the Laws of New York, section 9 [DLRA-3]).<sup>1</sup> DLRA-3 included a procedure for allowing inmates, like appellant, to ask for resentencing. The Act renders eligible "any person in the custody of the department of correctional services" convicted of a class-B drug felony whose maximum term of imprisonment under the provisions that were in effect prior to January 13, 2005, exceeded 3 years.

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<sup>1</sup>The 2004 and 2005 reforms to the Rockefeller Drug Laws sought to ameliorate the lifetime sentences meted out to individuals who had been convicted of Class A-I and Class A-II drug offenses (L 2004, ch 738 & L 2005, ch 643 [hereinafter, DLRA-1 and 2, respectively]).

Unlike DLRA-2, DLRA-3 contains no language excluding inmates from eligibility based on their parole status. Eligibility under the statute rests solely on custody.<sup>2</sup>

Appellant was convicted of a class-B drug felony on September 24, 2003, and sentenced to a 2-to-6-year prison term. He was released from DOCS custody on April 22, 2004, but reincarcerated for an unspecified parole violation on August 8, 2008. By motion dated October 7, 2009, he moved for DLRA-3 resentencing.

The People responded that appellant was not eligible to be resentenced because he was in custody due to a parole violation, and not on the original sentence. Though it is settled law that a defendant in custody on a parole violation is in custody on his original indeterminate sentence, People ex rel. Petite v. Follette, 24 N.Y.2d 60, 62-63 (1969), the court found appellant ineligible for resentencing because "neither the 2009 Act [n]or any legislat[ive] comment indicate[] that eligibility to apply for resentencing was intended to apply to anyone other than those serving the original sentence" (Minutes of 12/1/09 at 11).

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<sup>2</sup>The Act also rendered certain inmates who had committed certain prior violent predicate offenses within the preceding 10 years. Appellant has no prior violent felony convictions.

Since the plain language of that statute requires only that an inmate be in custody on a class-B drug felony, and contains no exclusion for parole violators, this Court should reverse supreme court's order and hold that appellant was eligible to be resentenced.

### **STATEMENT OF FACTS**

#### The Guilty Plea & Sentence

Appellant was convicted, on September 24, 2003, after pleading guilty, of one count of criminal sale of a controlled substance in the third degree (PL § 220.16), under Bronx Co. Ind. No. 6046/02 (Collins, J), for selling a street-level quantity of crack to an undercover officer on December 3, 2002 (S: 5-7; PR: 3-4).<sup>3</sup>

After pleading guilty on January 27, 2003, but before sentencing, appellant was given an opportunity to complete drug treatment. If successful, appellant would plead guilty to a reduced charge and receive a reduced sentence. Appellant did not successfully complete treatment. He absconded from the TASC on August 10, 2003,

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<sup>3</sup>Numbers in parentheses preceded by "S" refer to the minutes of appellant's September 24, 2003 sentencing; those preceded by "R" to the December 1, 2009 proceeding at which the court denied resentencing; those preceded by "DM" to appellant's Resentence Motion dated October 7, 2009; those preceded by "PR" to the People's Response dated October 20, 2009; and those preceded by "DR" to appellant's reply dated November 5, 2009; and "DSR" to appellant's supplemental reply dated November 16, 2009.

and a warrant was issued. He was returned involuntarily on August 20, 2003. The court denied appellant's request for a further opportunity to complete treatment. The Court found that because appellant had violated the terms of his TASC plea agreement, he forfeited his right to a reduction of the charges. The court sentenced appellant to the agreed upon 2-to-6-year prison term (DM: ¶16, pp. 6-7; PR: 4-5).

Appellant's Incarceration On the Class-B Drug Felony

Appellant was released to parole on April 22, 2004 (PR: 5). While incarcerated, appellant had successfully completed DOCS' ASAT (Alcohol and Substance Abuse Treatment) program (DM: at ¶18, p. 7). Following his release, appellant was convicted of a misdemeanor and a violation, for which he was sentenced to 30 days and 7 days, respectively. He also served time in the Willard Drug Treatment facility during this period (DM: ¶19, p. 8).

Appellant's parole was revoked on August 8, 2008, when he failed to check in with and report to parole upon his release from county jail, and to inform them of a change of address DM: ¶19, p. 8, PR: 5). He remains incarcerated for that violation.

Appellant's DLRA-3 Resentence Motion

By motion dated October 7, 2009, appellant moved pursuant to CPL §440.46, for an order resentencing him in accordance with Penal Law §§60.04 and 70.70. Appellant contended that he was eligible for resentencing because he was (1) in the custody of the Department of Correctional Services; and (2) his maximum term of imprisonment under the provisions that were in effect prior to January 13, 2005 exceeded 3 years. He also contended that he should be resentenced because "substantial justice" did not dictate otherwise (DM: 2-12).

The People responded that appellant was not eligible to be resentenced because he was in custody due to a parole violation:

It is the People's position that, as the petitioner has finished his original terms of incarceration received under Indictment Number[] 6046/2002, any issues regarding present and future supervision and or incarceration must be addressed by the Department of Parole pursuant to Executive Law §259-j as newly amended by the Drug Law Reform Act of 2009.

PR: 2.

The court denied appellant's resentence motion, finding that appellant was ineligible because he was in custody on a parole violation and not the original sentence:

The defendant has served his sentence and has been released to the New York State Division of Parole.

Is a defendant who has been release from parole, violates parole and is reincarcerated []eligible for re-sentencing pursuant to the 2009 Drug Reform Act? This Court finds he is not.

In writing relative to the Drug Law Reform Act of 2005, the Court, [in] People against McLeod, 38 A.D.3d 1056, stated, "We do not believe that the drug reform laws were intended to apply to offenders who have served their terms of imprisonment, have been released to parole supervision, violated their parole, and as a result were subject to a subsequent period of incarceration." See also, People against Hardy 49 A.D.3d 779.

Neither the 2009 Act or any legislature comment indicates that eligibility to apply for resentencing was intended to apply to anyone other than those serving the original sentence. Clearly the legislature did not intend to foster lawlessness when it enacted the Rockefeller Law Reform Act. That was the 2005 Act. See People against Bagby, 11 Misc.3d 882. So surely in 2009 the legislature did not intend to foster lawlessness.

The petitioner is not eligible for re-sentencing. The motion is denied.

R: 10-11; Written Order denying resentence, dated December 1, 2009.

#### ARGUMENT

#### POINT

**WHERE APPELLANT MET THE UNAMBIGUOUS STATUTORY REQUIREMENTS FOR DLRA-3 RESENTENCING, BECAUSE HE WAS IN DOCS' CUSTODY ON A CLASS-B DRUG FELONY, THE COURT ERRONEOUSLY FOUND HIM INELIGIBLE ON THE GROUNDS THAT HE WAS IN CUSTODY ON A PAROLE VIOLATION AND NOT THE ORIGINAL SENTENCE (CPL §440.46; 2009 DRUG LAW**

**REFORM LEGISLATION, CHAPTER 56 OF THE LAWS OF NEW YORK, §9).**

The 2004 and 2005 reforms to the Rockefeller Drug Laws sought to ameliorate the lifetime sentences meted out to individuals who had been convicted of class-A drug offenses (hereinafter, DLRA-1 and 2, respectively). DLRA-3, signed into law last April, extended sentencing relief to those convicted of class-B, C, and D offenses. Individuals like Mr. Orta, who are serving lengthy prison terms for selling or possessing only a small amount of drugs – in appellant’s case, allegedly selling a street-level quantity of crack to an undercover officer more than 7 years ago – became eligible to have their sentences reduced.

Disagreeing with the result recently reached by 3 other judges on the same issue,<sup>4</sup> the court below found appellant ineligible for resentencing because he had been paroled on his indeterminate term and reincarcerated for a technical parole violation. The court concluded that appellant was ineligible to even be considered for a reduced determinate sentence because he had “served his sentence and ... been released” to parole. The court’s

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<sup>4</sup>See People v. Haulsey, Ind. No. 5780/99 (Sup. Ct. N.Y. Co. November 20, 2009) (Allen, J.); People v. Taylor Ind. Nos. 5045-00, 5399-00 (Sup. Ct. Bronx Co. December 10, 2009) (Villegas, J.); People v. Vega, Ind. Nos. 4198-04, 56616C-04, 59094C-04 (Sup. Ct. Bronx Co. December 16, 2009) (Oliver, J.).

position is both counter to longstanding Court of Appeals law and ignores the plain language of the statute. While a defendant's compliance with parole should factor into a determination of the merits of defendant's application, it does not affect eligibility. This Court's recent decision in People v. James Rodriguez, \_\_ A.D.3d \_\_, 2009 Slip Op 09717 (December 29, 2009), finding a DLRA-1 defendant ineligible for resentencing is not to the contrary. This Court should hold that appellant was eligible to be resentenced under the plain language of the statute - which requires only that a defendant be in custody on a class-B drug felony - and return the matter to supreme court for a consideration of the motion's merits.

DLRA-3 provides that "[a]ny person in the custody of the department of correctional services convicted of a class B felony" under the old drug laws and meeting certain other eligibility requirements, may apply to be resentenced to a determinate sentence. See CPL §440.46(1). The court below found that appellant's release to parole supervision disqualified him for relief, and his subsequent reincarceration did not revive his ability to seek resentencing. By the court's reasoning, once appellant was released to parole, he had completed his sentence. Any subsequent reincarceration for a violation

of the parole portion of his indeterminate sentence was not part of the original sentence.

But a parole violator, like appellant, who is reincarcerated for violating the terms of his release is in DOCS custody serving his indeterminate sentence. An indeterminate sentence begins once it's imposed, and runs until the maximum expiration of the sentence. Release to parole and reincarceration for parole violations does not change this:

As a general rule, when a prisoner is committed to prison, his sentence begins to run and continues until it has been fully served, less any reduction in sentence. After he has been imprisoned for the minimum term [of an indeterminate] sentence the Parole Board may ameliorate the conditions of his sentence by allowing him to serve the remainder of it outside the walls of the prison on parole. While a prisoner is on parole, his sentence continues to run until its maximum term has expired. However, if a prisoner commits some violation of the conditions of his parole and the Parole Board declares him a parole delinquent, the running of his sentence is halted until his return to prison where he may be required to serve the maximum amount of his sentence remaining, dating from the time of his act of delinquency.

People ex rel. Petite v. Follette, 24 N.Y.2d 60, 62-63

(1969) (citations omitted) (emphasis added).

Contrary to the reasoning of the court below, a defendant's indeterminate sentence is not separated into an "original sentence," which precedes release to parole, and a separate portion which follows parole release. See

Oriole v. Saunders, 2009 N.Y. Slip Op. 06298, at \*3-4 (1st Dep't August 25, 2009) (a prisoner continues to serve his or her sentence while on parole unless a parolee is declared delinquent and then he or she is returned to "the jurisdiction of the Department of Correctional Services" to serve the remainder of the sentence in prison); People v. Buss, 11 N.Y.3d 553, 558 (2008) (a defendant returned to prison after parole release continues to be subject to his sentence for the duration of his aggregate sentence for SORA purposes).

The plain language of DLRA-3 must control, and the plain language states only that individuals in DOCS custody on a class-B drug conviction may apply for resentencing. People v. Paniagua, 45 A.D.3d 98, 105 (1st Dept. 2007) (DLRA is construed according to its plain language, and in light of its ameliorative purpose); see McKinney's Statutes, §94 at 194 (1971) ("[t]he language of an enactment should be given its plain meaning. . . and [a] court should neither limit nor extend plain language").

The statute does not exclude reincarcerated parole violators. The legislature could have tied resentence eligibility to parole status as it did in DLRA-2 (2005), but did not. Both DLRA-2 and DLRA-3 begin by defining an eligible inmate as "any person in the custody of the

department of correctional services" convicted of a qualifying drug offense. But DLRA-2 has an additional parole-status eligibility clause, stating that a defendant is not eligible to be resentenced unless he "is more than twelve months from being an eligible inmate as that term is defined in subdivision 2 of section 851 of the correction law [more than 2 years away from parole eligibility]." 2005 DLRA [L. 2005, ch. 643, § 1]. That the Legislature chose to include language in DLRA-2 that excluded parole violators, but included no parole-status-eligibility language in DLRA-3, demonstrates that it did not intend to exclude parole violators from resentencing eligibility.

This Court's recent decision in People v. James Rodriguez, \_\_ A.D.3d \_\_, 2009 Slip Op 09717 (December 29, 2009), finding a DLRA-1 (2004) defendant ineligible for resentencing because he violated parole by committing a new crime, does not require otherwise. Rodriguez was sentenced to 15 years to life in September 1982 following his conviction for first-degree criminal sale of a controlled substance (Appellant's Brf. at 5). He was released to parole in 1997. Id. Six years later, while still on parole, Rodriguez was convicted of fourth-degree criminal sale of a controlled substance and sentenced to a

3-to-6-year prison term. Id. at 6. Rodriguez's application for resentencing on his class-A offenses was denied.

This Court affirmed, finding Rodriguez ineligible for resentencing. Citing the Court of Appeals' decision in People v. Mills, 11 N.Y.3d 527 (2008), the Court found that had the defendant not "violated his parole conditions, he would not have been in the custody of the Department of Correctional Services when he moved to be resentenced, and he would therefore have been ineligible for resentencing.... Surely the Legislature did not intend fresh crimes to trigger resentencing opportunities" [internal citations omitted].

Rodriguez does not control here for three reasons. First, appellant's case is factually distinguishable; his parole violation was not for a new conviction. As this Court pointed out in Rodriguez, defendant's parole violation there was a new crime: a fourth-degree sale conviction for which he was sentenced to a 3-to-6-year prison term. Here, appellant was released from DOCS custody on April 22, 2004, and returned for a technical parole violation on August 8, 2008. Since he had no new conviction, his resentencing application was not triggered by a "fresh crime." Therefore, even if this Court finds that defendants returned to custody by virtue of new criminal convictions are ineligible for DLRA resentencing,

that exclusion should not apply to inmates like appellant, who are returned to custody for only technical violations of parole conditions.

This is a distinction worth making. While an argument can be made that a parolee's arrest and conviction on a new crime should not render him eligible for a reduced sentence on an old crime, the same cannot be said for technical parole violations. A defendant like appellant returned to custody for only a technical parole violation has no new conviction and sentence, only the pre-existing indeterminate sentence. The parole violation is solely a function of the deemed-too-long-by-the-Legislature indeterminate sentence. Had it not been for the too-long sentence, defendant would not be subject to incarceration.

The Legislature has determined that a defendant who remains in prison on an indeterminate term past his earliest release date due to a discretionary determination by the Parole Board is eligible for a sentence reduction. Defendants who are released to parole and then reincarcerated following a discretionary determination by that same Parole Board for non-criminal conduct should not be excluded from relief. In offering sentencing relief, the Legislature recognized that sentences were too long regardless of the Parole Board's discretion to offer early release.

Exclusion of the many individuals newly released from prison who run into difficulty because they lack the necessary resources and support to help them succeed would be contrary to the DLRAs' ameliorative purposes. The difficulties of re-entry have become a centerpiece of political platforms. Cyrus Vance, Manhattan's new District Attorney, announced a "Plan to Reduce Recidivism: Enhancing Reentry Services," describing it as a "program to help those leaving incarceration find jobs, housing and essential services, aimed at significantly reducing the instances of repeat offenses." See <http://cyvanceforda.com/plantoreducerecidivism>. Mr. Vance has stated:

Men and women leaving incarceration confront job discrimination, untreated drug dependencies, psychological problems, inadequate housing and transportation. Unresolved, these problems are a recipe for recidivism. . . . This is not our justice system functioning well for all. It is unjust because these individuals have served their time and deserve a clean slate."

Id.

That appellant violated the conditions of his parole should not render him ineligible for resentencing. Reintegration into society poses extreme challenges. Of the 4500 individuals released to New York County each year from state prisons, approximately 38% of them are

reincarcerated within three years. See <http://cyvanceforda.com/plantoreducerecidivismrelease>. But that successful re-entry is not without false starts and missteps does not justify continued incarceration under the harsh Rockefeller laws.

Second, Rodriguez's conclusion that parole violators should not be eligible for DLRA resentencing - while valid for DLRA-1 and DLRA-2 - should not apply to those seeking resentencing under DLRA-3. The two acts have differing purposes and beneficiaries. Further, the carefully constructed "exclusion offense" provision in CPL § 440.46(5) compels the inference that the statute comprehensively covers the exceptions to eligibility. As the statute's detailed exception does not embrace parole violators, there is no basis for inferring that exception.

DLRA-1, the first set of drug law reforms, permitted only class-A-1 drug offenders "to apply to their sentencing courts for a conversion of their sentence to a new term consistent with the prospective reforms." See New York State Assembly, Memorandum in Support of Legislation, available at <http://image.iarchives.nysed.gov/images/images/91303.pdf>. The resentencing provisions targeted these offenders first, because, serving life sentences with a minimum

period of 15 years in prison, they were most acutely suffering the effects of the harsh Rockefeller drug laws. The Legislature anticipated that the 2004 resentencing reform would affect only about 400 inmates, see id. at 00006, supporting that its reach was limited to the relatively small class of individuals serving exceptionally long prison sentences.

DLRA-3's resentencing provisions, by contrast, ameliorate sentences that – while unduly severe and inappropriate for low-level drug offenders in need of treatment – rarely match the former 15-year minimum sentence for A-1 offenders, and, of course, contain no life maximum. More, by opening up resentencing to class-B felony drug offenders, the Legislature manifestly intended a broad-based reform that would potentially reach thousands of individuals languishing in prison as a result of the Rockefeller Drug Laws. Given the different constituency for these reforms, and the differing magnitude of the sentences at issue, the Legislature must have intended to benefit individuals reincarcerated after violating parole. The Legislature, guided by drafting advice provided by DOCS, was well aware that parole violators are among those most likely to be “in custody” even on relatively modest sentences. See, People v. Mills,

11 N.Y.3d at 535 (citing DOCS Commissioner's letter in Bill Jacket to DLRA-2 as evidence of legislative intent).

Further, DLRA-3 reflects the culmination in a shift in public understanding of drug addiction that applies equally to non-violent parole violators, whose recidivism typically ties back to their underlying drug problem. Drug use and addiction are no longer viewed solely as a criminal matter but one of public health as well. DLRA-3, enacted under Governor Paterson, institutes sweeping treatment and cost-saving measures that, in addition to its resentencing provisions, include the elimination of mandatory minimum sentences and imparting discretion to judges to divert eligible individuals into drug treatment. These changes are far broader than the DLRA-1, which, enacted under Governor Pataki, primarily concerned itself with converting indeterminate sentences to determinate sentences. While an important first step, it did not eliminate mandatory minimum sentences, authorize judges to avoid imposing state time, or provide broad-based resentencing opportunities.

Senate and Assembly representatives have stated that DLRA-3 finally addresses the public health aspect of addiction while saving New York State hundreds of millions of dollars by investing in less expensive (and more effective) treatment instead of costly and often counter-

productive incarceration for thousands of low-level drug offenders.<sup>5</sup> For example, Assembly Speaker Silver stated at the bill signing that DLRA-3 put an end to the "one-size-fits-all approach that has failed to meet the needs of those suffering from drug addiction - an approach that has wasted precious resources and torn families apart." See <http://assembly.state.ny.us/Press/20090424a/>. And Senate Speaker Malcolm A. Smith, at the Senate's passage of the bill, noted that the Rockefeller Drug Laws, by failing to allow for the rehabilitation of non-violent addicted offenders, resulted in a rate of recidivism of approximately 60 per cent. "The new reforms would end the cycle of addiction and help people return to society as functioning, contributing citizens." See <http://www.nysenate.gov/news/senate-passes-rockefeller-drug-law-reforms>.

Under principles of statutory construction, "it is relevant to consider the history of the times, the

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<sup>5</sup>DLRA-1's public health and fiscal implications, while not insignificant, were limited. See New York State Assembly, Breaking New York's Addiction to Prison: Reforming New York's Rockefeller Drug Laws at 6, available at <http://assembly.state.ny.us/ssspolicy/Rockefeller.pdf>. (noting that New York's "limited," pre-2009 drug law reform saved New York \$99.22 million); Senate Speaker Malcolm A. Smith's comments upon Senate passage of the 2009 DLRA, available at <http://www.nysenate.gov/news/senate-passes-rockefeller-drug-law-reforms> (noting that the 2009 reforms will save New York "hundreds of millions of dollars").

circumstances surrounding the statute's passage, and likewise attempted amendments," to show "the circumstances under which the statute was passed, its object and the mischief at which it was aimed." Statutes, § 124. In this regard, DLRA-1's limited reach supports a narrow reading of the "in custody" provision, while DLRA-3's sweeping goals support finding parole violators eligible to apply for resentencing.

Individuals released on parole and then returned to prison after violating the conditions of their parole are no less casualties of the failed Rockefeller Drug Laws whom DLRA-3, with its far-reaching provisions, would want to reach. With the Rockefeller Drug Laws' emphasis on punishment rather than treatment, it hardly surprises that individuals whose institutional records and criminal backgrounds supported their release to parole nonetheless failed to succeed once released. DLRA-3 should not exclude these individuals its ambit. Reducing their sentences and diverting them to drug treatment programs upon release is entirely consistent with the treatment and cost-saving policies that specifically underlie DLRA-3 and motivated its enactment.

The texts of DLRA-1 and DLRA-3 further support drawing a distinction between the two acts with respect to

parole violators. Unlike DLRA-1, DLRA-3 contains a detailed exception to eligibility, linked to prior violence. Under CPL §440.46(5), inmates who are currently serving a sentence on a conviction for an "exclusion offense" or have a "predicate felony conviction for an exclusion offense" are precluded from resentencing. The section then defines an exclusion offense – essentially, a violent or merit-ineligible predicate felony conviction within the preceding ten years. DLRA-1 contains no similar exception. Under principles of statutory construction, "[w]hen one or more exceptions are expressly made in a statute, it is a fair inference that the Legislature intended that no other exceptions should be attached to the act by implication." See Statutes §213. This is the case with the DLRA-3, where the legislature set forth a detailed exception, see CPL §440.46(5), that does not embrace non-violent parole violators.

Third, assuming that appellant's case is not factually distinguishable from Rodriguez, and Rodriguez's DLRA-1 eligibility holding applies to DLRA-3, then we respectfully submit that Rodriguez was wrongly decided, and appears to conflict with this Court's earlier decision in People v. Gonzalez, 29 A.D.3d 400 (2006).

Parole violators were eligible for resentencing under DLRA-1, and should be eligible under the identically worded DLRA-3. In Gonzalez, a defendant convicted of a class-A-I drug felony moved for DLRA-1 resentencing. Though Gonzalez had been released to parole on his A-I sentence, he was rearrested within 3 months for another drug offense, violating his parole and resulting in another conviction. This Court found that supreme court had "providently exercised" the "discretion it possessed," in finding that substantial justice dictated that resentencing should be denied. Id. This Court did not, however, find that Gonzalez's parole violation or subsequent conviction made him ineligible for resentencing. See, People v. Jesus Vega, Ind. Nos. 4198-04, 56616C-04, 59094C-04 (Sup. Ct. Bronx Co. December 16, 2009) (Oliver, J.) ("The Court is duty bound to rely on People v. Gonzalez, 29 A.D.3d 400 (First Dept. 2006), lv denied, at 7 N.Y.3d 867 (2006); and therefore determines that the defendant is eligible for resentencing under CPL §440.46.").

This Court's decision in Rodriguez is contrary to its prior decision in Gonzalez, which it did not even cite. We submit that Gonzalez, not Rodriguez, was correctly decided. The Court's conclusion in Rodriguez that DLRA-2's

eligibility restrictions on parole violators apply to those seeking resentencing under DLRA-1 and -3, and its reliance on the Court of Appeals' decision in People v. Mills, 11 N.Y.3d 527 (2008) for that holding, fail to account for the crucial distinction between the express language of DLRA-2 on the one hand and DLRA-1 and DLRA-3 on the other.

People v. Mills and Then held that inmates who were reincarcerated on a parole violation of their class-A-II drug sentence were ineligible for resentencing under the DLRA-2. 11 N.Y.3d at 537. Mills pleaded guilty to an A-II felony and was sentenced to 3 years to life imprisonment. After having been denied parole four times, he moved for DLRA-2 resentencing. Id. at 530-31. Then sought resentencing on a class-A-II lifetime sentence after he was reincarcerated as a result of a new conviction, the sentence for which rendered him ineligible for parole within three years. Then argued that he met all the statute's criteria, in that he was both incarcerated on an A-II felony and was more than three years away from parole. Id. at 532-33.

The Court resolved both cases on the express language of DLRA-2's parole status eligibility exclusion.

Emphasizing DLRA-2's "three-year carve-out," the Court found,

in order to qualify for resentencing under the 2005 DLRA, class A-II felony drug offenders must not be eligible for parole within three years of their resentencing applications.... The statutory text is simply not amenable to any other interpretation.

Id. at 534 [emphasis added].

Mills was ineligible for resentencing because, having passed his initial parole-eligibility date, he was required to receive a parole hearing every two years, and could therefore never be more than 3 years from parole eligibility. Id. at 536.

Then's situation, though slightly more "complicated," was again resolved by the three-year carve-out's plain language.

Reviewing DLRA-2's parole-eligibility language, the Court held that where an inmate has been released on parole after satisfying the indeterminate portion of an A-II sentence, and is subsequently convicted of a new crime, he does not satisfy the temporal requirements of the DLRA-2 because, even if his new crime renders him ineligible for parole for more than three years, the statute requires that he be more than three years away from parole on the drug crime itself. The Court emphasized the express three-

year parole eligibility "carve out" again and again. See, e.g., 11 N.Y.3d at 537.

In contrast, DLRA-1 and DLRA-3 contain none of the parole-eligibility language that limits resentencing under the DLRA-2. Rather, DLRA-1 and DLRA-3 eligibility is a question of only "custody," and not parole status. Therefore, nothing in Mills and Then's holding suggests that DLRA-1 or 3 should be limited to inmates who have never been released to parole.

When the Court of Appeals opined that the Legislature "did not intend fresh crimes to trigger resentencing opportunities," it was referring to DLRA-2's express 3-year parole eligibility carve-out. Then was more than 3 years away from parole eligibility at the time of he moved for resentencing only by virtue of the fact that he had committed and been convicted of a new charge while out on parole and had received a 6-year-to-life sentence. Given the express terms of the statute, the Court concluded, "a valid and more sensible reading of the statutory text is that in order to be eligible for resentencing, an inmate must be more than three years from parole eligibility for the same class A-II drug felony for which resentencing is sought" [emphasis in original]. Rather than support this Court's conclusion that all 3 DLRA's exclude defendants

from seeking resentencing once they have been released to parole, Mills and Then's repeated reliance on DLRA-2's express parole-eligibility language supports appellant's position that without such express language, there is no exclusion.

This is precisely what supreme court held recently in People v. Robert Haulsey, Ind. No. 5780/99 (Sup. Ct. N.Y. Co. November 20, 2009). There, Justice Bruce Allen rejected the People's argument that reincarceration after parole release defeats eligibility. Noting that "the text of the statute controls," Justice Allen stated that CPL §440.46 refers only to "[a]ny person in the custody of the Department of Correctional Services," and that the defendant, like appellant here, was "a person in the custody" of DOCS. Further, Justice Allen noted that DLRA-3 contains language similar to DLRA-1, and that a revoked parole release was not held to preclude eligibility for resentencing of A1 drug felons. See also See People v. Raheem Taylor, Ind. Nos. 5045-00, 5399-00 (Sup. Ct. Bronx Co. December 10, 2009) (Villegas, J.) (a defendant who violates parole is eligible to be resentenced under the DLRA-3, because the plain language of the statute "makes clear eligibility is based on the Defendant being in the Department of Correctional Services, serving an

indeterminate sentence with a maximum term of more than three years, for a class B felony, committed prior to January 13, 2005," and a defendant in for a parole violation "is still incarcerated" for his class B felony).

Finally, this Court's reliance in Rodriguez on supreme court's decision in People v. Bagby, 11 Misc.3d 882 (West. Cty. Sup. Ct. 2006), is also flawed. Bagby was "incarcerated" following a parole violation on his A-I drug felony for 90 days "to be served at the Willard Drug Treatment Center." He brought a motion pursuant to DLRA-1 seeking resentencing. The court concluded that Bagby "who is presently being held on a parole violation, is not within the contemplation of those the Legislature intended to assist by enacting the Rockefeller Drug Law Reform Act" Id. at 889. Willard is a secure facility under the jurisdiction of the Division of Parole, not the Department of Correctional Services. See, DOCS' Directive, dated 12/11/09, available online at <http://www.docs.state.ny.us/Directives/0027.pdf>. Parole places parolees at Willard as an alternative to a return to a DOCS correctional facility. Id. Incarcerated by the Division of Parole at Willard for 90 days of drug treatment, Bagby was not in the custody of DOCS. He did not meet the express eligibility criteria of DLRA-1.

Accordingly, this Court should hold that appellant was eligible to be resentenced under the plain language of the statute - which requires only that he be in custody on a class-B drug felony - and return the matter to supreme court for a consideration of the motion's merits.

CONCLUSION

FOR THE AFOREMENTIONED REASONS, SUPREME COURT'S ORDER FINDING APPELLANT INELIGIBLE FOR DLRA-3 RESENTENCING SHOULD BE VACATED, AND THE MATTER RETURNED TO THAT COURT TO CONSIDER THE MOTION'S MERITS.

Respectfully submitted,

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January 4, 2009

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    WHERE APPELLANT MET THE UNAMBIGUOUS STATUTORY  
    REQUIREMENTS FOR DLRA-3 RESENTENCING, BECAUSE HE WAS  
    IN DOCS’ CUSTODY ON A CLASS-B DRUG FELONY, THE COURT  
    ERRONEOUSLY FOUND HIM INELIGIBLE ON THE GROUNDS THAT  
    HE WAS IN CUSTODY ON A PAROLE VIOLATION AND NOT THE  
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SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION : FIRST DEPARTMENT

- - - - - x

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

ALEXIS ORTA, :

Defendant-Appellant. :

- - - - - x

STATEMENT PURSUANT TO RULE 5531

1. The indictment number in the court below was 6046/02.
2. The full names of the original parties were the People of the State of New York against Alexis Orta; there has been no change.
3. This action was commenced in Supreme Court, Bronx County.
4. This action was commenced by the filing of an indictment.
5. This is an appeal from an order of the Supreme Court, Bronx County, rendered on December 1, 2009, denying appellant's motion pursuant to CPL §440.46 for resentencing under the 2009 Drug Law Reform legislation.
6. This is an appeal from judgments of conviction rendered on December 1, 2009.
7. Appellant has been granted permission to appeal as a poor person on the original record. The appendix method is not being used.

Printing Specifications Statement

The brief was prepared in Wordperfect X4®, using a 12-point Courier (PS) font, and totaled 5650 words.