

To be argued by
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(15 Minutes)

COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

DAVID LANCE PAULIN,

Defendant-Appellant.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT 1

QUESTION PRESENTED 2

INTRODUCTION..... 3

THE FACTS 5

The Sentence and Relevant Procedural History 5

The Motion for Resentencing 6

The Appellate Division..... 8

Leave to Appeal..... 8

ARGUMENTS

POINT ONE

 DEFENDANT’S APPEAL IS MOOT BECAUSE HIS
 SENTENCE HAS REACHED ITS MAXIMUM
 EXPIRATION DATE 9

POINT TWO

 THE APPELLATE DIVISION CORRECTLY HELD
 THAT THE DRUG LAW REFORM ACT OF 2009
 WAS NOT INTENDED TO PERMIT PAROLE
 VIOLATORS TO BE ELIGIBLE TO SEEK
 RESENTENCING TO A LOWER PRISON TERM
 WHEREAS THOSE DEFENDANTS WHO ABIDED
 BY THEIR PAROLE TERMS WOULD NOT BE
 ELIGIBLE 11

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES

United States v. Monia, 317 U.S. 424 (1943) 12

STATE CASES

Doctors Council v. New York City Employees' Ret. Sys., 71 N.Y.2d 669
(1988). 11, 12

Hearst Corp. v. Clyne, 50 N.Y.2d 707 (1980) 9, 10

People v. Bagby, 11 Misc.3d 882 (Supreme Ct. Westchester Co. 2006) 25

People v. Buss, 11 N.Y.3d 554, 558 (2008) 26

People v. Mills, 11 N.Y.3d 527 (2008) passim

People v. Paulin, 74 A.D.3d 685 (1st Dept.), lv. granted, 15 N.Y.3d 854
(2010). 2, 8

People v. Pratts, 74 A.D.3d 536 (1st Dept.) lv. granted, 15 N.Y.3d 895
(2010). 2, 8, 10

People v. Rodriguez, 68 A.D.3d 676 (1st Dept. 2009) 3, 25

People v. Utsey, 7 N.Y.3d 398, 402 (2006). 18

People v. White, 73 N.Y.2d 468 (1989) 17

Petterson v. Daystrom Corp., 17 N.Y.2d 32 (1966) 16

STATUTES, REGULATIONS, AND LEGISLATIVE MATERIALS

9 N.Y.C.R.R. § 8002.1 21

9 N.Y.C.R.R. § 8003.1. 21

Correction Law § 803 passim

Correction Law § 851	26, 27
CPL § 440.46	<u>passim</u>
Executive Law § 259-i	20
Executive Law § 259-j	<u>passim</u>
L. 2004, Ch. 738, § 23	24, 25
L. 2004, Ch. 738, § 37	13, 28
L. 2005, Ch. 643, § 1	26
McKinney’s 2004 Session Laws of NY, NYS Assembly, Memorandum in Support of Bill A11895	4, 12, 28
McKinney’s Cons. Laws, Book I, Statutes § 97	13
McKinney’s Cons. Laws, Book I, Statutes § 141	17
McKinney’s Cons. Laws, Book I, Statutes § 143	17
McKinney’s Cons. Laws, Book I, Statutes § 145	17
McKinney’s Cons. Laws, Book I, Statutes § 148	17
McKinney’s Cons. Laws, Book I, Statutes § 221	13
McKinney’s Cons. Laws, Book I, Statutes § 222	13
Penal Law § 60.01	16
Penal Law § 60.04	16
Penal Law § 65.20	16
Penal Law § 70.45	30

Penal Law § 105.10	6
Penal Law § 155.35	6
Penal Law § 220.16	5
Penal Law § 220.44	5

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RESPONDENT'S BRIEF

STATEMENT

By permission of the Honorable Eugene F. Pigott, Jr., Associate Judge of the Court of Appeals, defendant appeals from an order of the Appellate Division, First Department, entered on June 29, 2010, affirming a decision of the Supreme Court, Bronx County (Collins, J.), rendered November 12, 2009, denying a motion for resentencing pursuant to CPL § 440.46 on the ground that defendant was ineligible to be resentenced under the 2009 Drug Law Reform Act [2009 DLRA]. Defendant was released from the custody of the Department of Correctional Services (“DOCS”) on July 27, 2005, into the supervision of the Division of Parole. After defendant’s release, he violated parole on three occasions, resulting in re-incarceration. The maximum expiration of defendant’s sentence was July 27, 2010

(A. 30, 51).¹ Defendant, however, remains incarcerated pursuant to an unrelated judgment (SA. 1-2).

QUESTIONS PRESENTED

1. Whether the motion court properly deemed defendant ineligible for resentencing pursuant to CPL § 440.46, where he had been re-incarcerated because of a parole violation.

The trial court denied defendant's application for resentencing pursuant to CPL § 440.46, holding that he was ineligible because his incarceration was based on a parole violation.

In People v. Paulin, 74 A.D.3d 685 (1st Dept. 2010), the First Department, relying on its decision in People v. Pratts, 74 A.D.3d 536 (1st Dept. 2010), held that defendant was ineligible to be resentenced under the 2009 Drug Law Reform Act (L 2009, ch. 56) because he was released to parole and re-incarcerated for a parole violation.

¹ Numbers preceded by "A." refer to pages from defendant's Appendix, and numbers preceded by "SA." refer to pages from respondent's Supplemental Appendix.

INTRODUCTION

The Drug Law Reform Act of 2009,² codified in CPL § 440.46, allows for a narrow class of drug offenders to seek relief from harsh sentences imposed under the Rockefeller Drug Laws. In order to be eligible for such relief, a defendant must be in the custody of the Department of Correctional Services, serving an indeterminate sentence with a maximum term of more than three years for a class B drug felony committed prior to January 13, 2005. See CPL §. 440.46. At issue on this appeal is whether re-incarcerated parole violators are eligible to apply for resentencing under the DLRA of 2009.

An interpretation of the Drug Law Reform Act of 2009 that makes parole violators eligible for resentencing would result in a windfall for parole violators, who could only meet the eligibility requirement if they violate parole, thereby returning to the custody of DOCS.³ The Drug Law Reform Act, which contains provisions that incentivize drug offenders by reducing sentences or terminating parole in exchange for good behavior and the completion of drug treatment programs, would also paradoxically operate to reward those offenders who prove

² The Drug Law Reform Acts of 2004 (L 2004, ch 738), 2005 (L 2005, ch 643), and 2009 (L 2009, ch 56) will be referred to as “DLRA of 2004” or “2004 Act,” “DLRA of 2005” or “2005 Act,” and “DLRA of 2009” or “2009 Act,” respectively.

³ Such a benefit would only be afforded to those defendants eligible under the DLRA of 2009, since the Appellate Division held that parole violators are not eligible under the DLRA of 2004 (see People v. Rodriguez, 68 A.D.3d 676 [1st Dept. 2009]), and this Court held that parole violators are not eligible under DLRA of 2005. See People v. Mills, 11 N.Y.3d 527 (2008).

unable to comply with the conditions of their parole. This illogical consequence, which creates the potential for a more expeditious route to liberty through misconduct, could not have been the intention of the Legislature.

Instead, the remedy provided to parole violators lies within Executive Law § 259-j, which allows for automatic termination after two years of unrevoked parole. Provisions of the Drug Law Reform Act, such as Correction Law § 803, which penalizes parolees with the loss of earned merit time after a parole violation, makes clear that the Drug Law Reform Act was not intended to provide a windfall to parole violators.

The Legislature stated that the Rockefeller Drug Laws “provide[d] inordinately harsh punishment for low level non-violent drug offenders, warehouse[d] offenders in state prison who could more productively be placed into effective drug treatment programs...” McKinney’s 2004 Session Laws of NY, NYS Assembly, Memorandum in Support of Bill A11895. Accordingly, the main goal of the Drug Law Reform Act is to reduce onerous terms of imprisonment. As a result of eradicating those excessive sentences, parole terms were reduced, but it was not the intent of the legislation to reduce the supervision of drug offenders. If it had been, the Drug Law Reform Acts would have included parolees instead of limiting its reach to drug offenders in the custody of the Department of Correctional Services.

Accordingly, the Appellate Division, First Department, was correct when it held that the Drug Law Reform Act of 2009 was not intended to apply to parole violators.

THE FACTS

The Sentence and Relevant Procedural History

On or about March 13, 2003, defendant appeared in Supreme Court, Bronx County, and pleaded guilty to one count of Criminal Possession of a Controlled Substance in the Third Degree (Penal Law § 220.16) and one count of Criminal Sale of a Controlled Substance In or Near School Grounds (Penal Law § 220.44), in satisfaction of Indictment Numbers 3959/2001 and 5330/2001, respectively. Defendant was permitted to attend a drug treatment program with the Fortune Society in lieu of a term of incarceration, with a jail alternative of from two to six years of incarceration (A. 8-10, 50). On May 14, 2003, defendant was arrested in New York County for possessing three and one-half ounces of drugs (A. 9, 11). Although the arrest was ultimately dismissed, at the time of arrest, defendant told police that he owned the drugs and explained how he packaged the drugs (A. 9-12). On October 14, 2003, the court found that defendant's statement constituted a violation of the terms of his release, and entered a judgment convicting him of Criminal Sale of a Controlled Substance in the Third Degree, and sentencing him to an indeterminate term of incarceration of from two to six years (A. 12- 13).

Defendant was paroled on or about July 27, 2005 (A. 53). According to a review of defendant's criminal history, after his arrests in July 2001, he was convicted of five additional misdemeanors. Since his release from incarceration, on July 27, 2005, he violated his parole on three occasions. Defendant was re-incarcerated for these violations from February 27, 2006 to May 5, 2006, March 5, 2007 to March 26, 2007, and February 2, 2009 until his maximum expiration date of July 27, 2010 (A. 51).

Defendant remains incarcerated pursuant to a New York County judgment entered on August 5, 2010. Defendant pleaded guilty to Grand Larceny in the Third Degree (Penal Law § 155.35) and Conspiracy in the Fourth Degree (Penal Law §105.10[1]), and was sentenced to two concurrent indeterminate sentences of from two and one-half to five years and two to four years, respectively (SA. 3-5).

The Motion for Resentencing

In papers dated October 7, 2009, defendant, by way of counsel, moved to be resentenced pursuant to the Drug Law Reform Act of 2009, specifically, CPL § 440.46. Defendant argued that because he was in the custody of DOCS serving an indeterminate sentence for two class B drug felonies imposed prior to January 13, 2005, and was "in custody as of the filing of this motion," he was eligible to be resentenced under the 2009 DLRA (A. 26). Defendant then argued that, assuming his eligibility, he was an appropriate candidate for a reduced sentence, citing a

variety of factors including his prison behavior,⁴ “programmatic participation,” and criminal history (A. 25-26).

In opposition papers dated October 14, 2009, the People argued that because defendant had been released on parole, he was no longer incarcerated on the “present matter,” and, thus, could only seek a termination of his sentence from the Division of Parole (A. 53). Defendant responded to the People’s opposition in a reply affirmation dated October 19, 2009, in which he argued that he was not requesting adjustments of parole supervision or the length of time he was incarcerated for his parole violation. Defendant further argued that the remedy provided in Executive Law § 259-j and CPL § 440.46 were separate (A. 57-59).

Both parties appeared before the Honorable John P. Collins on November 12, 2009, during which each presented oral argument. Following argument, the court held:

The Court finds that the defendant has served his sentence and has been released to the New York State Division of Parole. Neither the 2009 Act or any legislature’s comments indicate that eligibility to apply for resentencing was intended to apply to anyone other than those serving the original sentence. The petitioner is not eligible for resentencing.

This Court finds i[t] accordingly. The motion is denied.
(A. 66-67).

⁴ Defendant received five Tier 2 disciplinary infractions between 2003 and 2005 (A. 40)

In a written order dated November 12, 2009, incorporating the ruling as delivered from the bench verbatim, the Court denied defendant's motion (A. 69).

The Appellate Division

Defendant appealed to the Appellate Division, claiming that the Supreme Court erroneously held that he was ineligible for resentencing pursuant to the Drug Law Reform Act of 2009.

On June 29, 2010, the Appellate Division unanimously affirmed the lower court's order, holding that defendant was not eligible to be resentenced under the 2009 Drug Law Reform Act because he was released on parole from custody on his drug conviction, but re-incarcerated for a parole violation. See People v. Paulin, 74 A.D.3d 685 (1st Dept. 2010). The court relied on People v. Pratts, 74 A.D.3d 536 (1st Dept. 2010), in which it reasoned that the Legislature could not have intended that parole violators, who would not have been afforded opportunities for resentencing but for their violations, would gain the windfall of a lesser prison sentence.

Leave to Appeal

On September 22, 2010, the Honorable Eugene F. Pigott, Jr., granted defendant leave to appeal to this Court. People v. Paulin, 15 N.Y.3d 854 (2010).

ARGUMENTS

POINT ONE

DEFENDANT’S APPEAL IS MOOT BECAUSE HIS SENTENCE HAS REACHED ITS MAXIMUM EXPIRATION DATE.

Defendant is no longer incarcerated pursuant to the sentence he challenges in this appeal. Accordingly, this Court should find defendant’s claim to be moot. “It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal.” Hearst Corp. v. Clyne, 50 N.Y.2d 707, 713 (1980) (internal citations omitted). As of July 27, 2010, the maximum expiration date, defendant completed the sentence at issue (A. 33-34). Defendant, however, is currently incarcerated pursuant to an unrelated judgment in New York County (SA. 1-2). Since defendant’s rights will not be directly affected by the determination of this appeal, his claims should be found moot. See Hearst, 50 N.Y.2d 714.

Furthermore, defendant’s claims do not meet the criteria for the exception to the doctrine of mootness. An exception to mootness exists when the claim exhibits “(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i. e., substantial and

novel issues.” Clyne, 50 N.Y.2d 714-15. Since defendant is no longer incarcerated pursuant to an eligible felony under CPL § 440.46, there is no likelihood that he will raise this issue in the future. Furthermore, review of this case in light of similar future litigation is unnecessary since this same issue will be reviewed by this Court in People v. Pratts, 74 A.D.3d 536 (1st Dept.), lv. granted, 15 N.Y.3d 895 (2010).

POINT TWO

THE APPELLATE DIVISION CORRECTLY HELD THAT THE DRUG LAW REFORM ACT OF 2009 WAS NOT INTENDED TO PERMIT PAROLE VIOLATORS TO BE ELIGIBLE TO SEEK RESENTENCING TO A LOWER PRISON TERM WHEREAS THOSE DEFENDANTS WHO ABIDED BY THEIR PAROLE TERMS WOULD NOT BE ELIGIBLE.

It is a well-accepted maxim of statutory interpretation that the plain language of a statute should control the outcome unless doing so produces absurd results. See Doctors Council v. New York City Employees' Ret. Sys., 71 N.Y.2d 669, 675 (1988). Here, interpreting the statute as defendant desires would mean that defendants who are on parole and comply with its lawful mandates could only seek amelioration under Executive Law § 259-j (3-a) (which terminates their parole), but those who fail to comply with the mandates of parole could nonetheless seek a change in their prison sentence, a change that is not available to law-abiding parolees. The lower courts were correct in rejecting defendant's efforts to create this absurd result by an all too literal reading of the statutory provisions at issue. Instead, Supreme Court and the Appellate Division wisely followed a course suggested by the admonition of Justice Frankfurter, delivered over half-a-century ago, when he wrote: "This question cannot be answered by closing our eyes to everything except the naked words of the [statute]. The notion that because the

words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification.” United States v. Monia, 317 U.S. 424, 431 (1943) (dissenting).

Defendant concedes that the main objective of the Drug Law Reform Acts was to provide ameliorative relief to those defendants serving excessive amounts of incarceration under the Rockefeller Drug Laws (see defendant’s brief, p. 24). The Legislature enacted this relief because the Rockefeller Drug Laws “provide[d] inordinately harsh punishment for low level non-violent drug offenders, warehouse[d] offenders in state prison who could more productively be placed into effective drug treatment programs...” McKinney’s 2004 Session Laws of NY, NYS Assembly, Memorandum in Support of Bill A11895. The statute’s stated purpose was “to reduce prison terms for non-violent drug offenders, provide retroactive sentencing relief, and make related drug law sentencing improvements.” Id (emphasis added). The supporting memorandum focuses on the reduction of incarceratory sentences and the promotion of drug treatment programs. There is no language outlining the need for reduced post-incarceration supervision. Since parole violators exhibit difficulty abiding by the conditions of their parole, it follows that they need more supervision, not less. That is not to say that the DLRA did not account for parolees. Indeed, the DLRA of 2004 amended Executive Law § 259-j by adding a new subdivision 3-a, which granted termination of sentence after two years of unrevoked parole to, inter alia, a class B drug felony

parolee. See L. 2004, c. 738, § 37 (eff. Feb. 12, 2005). While class B felony drug offenders on parole received ameliorative relief in the DLRA of 2004 through the passage of Executive Law § 259-j (3-a), it was not until the DLRA of 2009 that the Legislature turned its attention to those class B felony drug offenders still incarcerated.

Although defendant argues that the plain language of CPL § 440.46 should prevail, he agrees that the legislative intent behind DLRA 2009 is best determined by considering all the acts together (see defendant’s brief, p. 23-24). Importantly, “[a] statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent.” McKinney’s Cons. Laws, Book I, Statutes (hereinafter “Statutes”) § 97. Where two or more statutes are in pari materia, or “enacted at different times but with reference to the same subject matter,” they “are to be construed together as though forming part of the same statute.” Statutes §§ 221(a), (b). In that regard, “[a] statute is to be construed with reference to earlier statutes in pari materia” (Statutes § 222), that is, “earlier statutes are properly considered as illuminating the intent of the Legislature in passing later acts, especially where there is doubt as to how the later act should be construed, since when enacting a statute the Legislature is presumed to act with deliberation and with knowledge of the existing statutes on the same subject.” Statutes § 222 (comment).

Thus, the ameliorative provision to which defendant could have availed himself (had he been law-abiding) was the one provided in Executive Law § 259-j (3-a), which mandates termination of sentence after two years of unrevoked parole. To be sure, a drug offender who continually violates the terms of his parole and is repeatedly re-incarcerated could ultimately serve a lengthy cycle of parole/incarceration imposed under the Rockefeller drug laws. This, however, is not at odds with the goals of the reform acts. Where a defendant remains unrehabilitated and proves unable or unwilling to live a law-abiding, drug-free life, he is engaging in actions that directly conflict with the legislative goals. Surely, the legislative intent of providing relief to those with promising rehabilitative potential is not furthered by making re-incarcerated parole violators eligible for resentencing.

The requirement contained in Executive Law § 259-j (3-a) (that a parolee complete two unrevoked years of parole) makes it clear that the Legislature intended that parolees exhibit lawful behavior in order to receive any relief under the reform laws. Defendant's lack of compliance with the terms of his parole, thereby rendering him ineligible for relief from the Division of Parole, should not lead to the peculiar result that he may now seek a different, and perhaps more expeditious, remedy from the courts by way of a CPL § 440.46 motion. To the contrary, the only reasonable construction of the reform laws is that since

defendant was re-incarcerated, he must serve the term of incarceration imposed as a consequence of his parole violation. Then, upon his re-release to parole, he will again be afforded a new opportunity to obtain a mandatory termination of sentence in two years, so long as he behaves in such a manner as to prevent revocation of his parole. If, however, defendant is persistently unable to comply with the terms of his parole, thereby demonstrating that he is undeserving of ameliorative relief, then, consistent with legislative intent, he will continue to volley between incarceration and parole until the maximum term of his sentence is served, regardless of how excessive that sentence may seem in light of the new sentencing schemes.

Allowing those who could not abide with the conditions of parole to benefit from their misconduct would give rise to “illogical, if not perverse, results.” People v. Mills, 11 N.Y.3d 527, 537 (2008). In Mills, this Court previously rejected a similar argument, which also “boil[ed] down to the proposition that, solely because [the defendant was] a repeat offender, he qualified for relief . . . otherwise beyond his reach.” Mills, 11 N.Y.3d at 537. Here, the same illogical consequence would result from the “plain reading” of CPL § 440.46 that defendant suggests (see defendant’s brief, pp. 13-20) because a parole violator would become eligible under CPL § 440.46 by virtue of the misconduct that led to his re-incarceration.

When construing statutory provisions, “the spirit and purpose of the statute and the objectives sought to be accomplished by the legislature must be borne in mind. The legislative intent is the great and controlling principle. Literal meanings of words are not to be adhered to or suffered to defeat the general purpose and manifest policy intended to be promoted.” Petterson v. Daystrom Corp., 17 N.Y.2d 32, 38 (1966) (internal citations and quotations omitted). Furthermore, consideration of extrinsic factors is permissible where the plain meaning of the statute would lead to “absurd or futile results or even unreasonable results plainly at variance with the policy of the legislation as a whole.” Doctors Council, 71 N.Y.2d at 675 (internal quotations omitted).

In fact, defendant’s reading of CPL § 440.46 could very well have the curious effect of placing parole violators in a more advantageous position than their parole-compliant counterparts. For example, a re-incarcerated defendant whose parole was revoked because he missed curfew could move for sentence modification and conceivably have his sentence reduced to an unconditional discharge.⁵ Such a defendant’s journey from parole to unencumbered freedom could take substantially less than two years. By contrast, the compliant parolee would have to abide by the conditions of his parole for two years before his sentence could be terminated. It is certainly foreseeable that some parolees might

⁵ See CPL § 440.46; Penal Law §§ 60.04(3) and (4); 60.01(3)(d); 65.20.

purposefully violate their parole, if only in a technical manner, to avail themselves to this quicker avenue to freedom. However, whether the violation of parole is planned or inadvertent, the potential consequence under defendant's reading of CPL § 440.46 would be one that the Legislature could not have intended. See Statutes § 141 ("In construing a statute which is ambiguous the construction to be adopted is the one which will not cause objectionable results"); § 143 ("Generally, statutes will be given a reasonable construction, it being presumed that a reasonable result was intended by the Legislature"); § 145 ("A construction which would make a statute absurd will be rejected"); § 148 ("In accordance with a presumption of the legislative intention, the courts will construe a statute in order to avoid mischievous or disastrous consequences"); cf. People v. White, 73 N.Y.2d 468, 474 n.1 (1989) (this Court "avoided an interpretation of CPL 710.30 that placed too much emphasis on the statute's literal language when doing so would produce results plainly at odds with the policy of the legislation as a whole").

Instead of considering the meaning of CPL § 440.46 within the context of the statutory scheme, defendant urges this Court to read the language of the statute in isolation, and argues that the "critical eligibility words" of the statute demonstrate the breadth of the statute's reach (see defendant's brief, pp. 15-17). Although defendant acknowledges that the statute contains many qualifications, he

fails to explore the meaning and consequences of these exclusions. For example, the Legislature manifested an intent to bar broad retroactive relief by excluding defendants who were convicted before January 13, 2005. Thus, even though the statute is ameliorative, a fact that usually creates a presumption in favor of broad application (see People v. Utsey, 7 N.Y.3d 398, 402 [2006]), the Legislature, instead, exhibited a desire to keep the class of eligible defendants narrow.

Furthermore, in order to be eligible, a defendant must be in “the custody of the department of correctional services.” CPL § 440.46. This requirement underscores the Legislature’s intent to exclude those who have been paroled. Such a reading is consistent with the fact that, as noted, five years earlier the Legislature had already accounted for felony drug offenders who had been paroled.

Defendant argues that the remedy provided by Executive Law § 259-j is not the exclusive remedy for parolees and should, instead, be read as a complementary remedial measure (see defendant’s brief, pp. 31-32). However, his concession that they are complementary remedial measures serves to underscore the correctness of the Appellate Division’s ruling. The provision that allows law-abiding parolees to apply for relief is complimented by CPL § 440.46, which allows incarcerated defendants, who have not been paroled, to apply for relief, but they each deal exclusively with one group of defendants. The complimentary nature of these statutes does not give rise to a third group entitled to relief, namely, paroled

defendants who, as a result of their own misbehavior, are re-incarcerated before they qualify for relief under Executive Law § 259-j.

Defendant essentially argues that the Legislature intended that he should be permitted two bites at the apple. While on parole, he is eligible for relief under Executive Law § 259-j, if he complies with parole for two years. However, if he squanders that opportunity and is re-incarcerated, he maintains that he should have a second opportunity for sentence amelioration under CPL § 440.46. Such “double” relief, however, could lead to unfair results. For instance, a defendant who is re-sentenced to a determinate term and post-release supervision pursuant to CPL § 440.46, who later violates his post-release supervision and is re-incarcerated, is no longer eligible for relief under CPL § 440.46 or Executive Law 259-j. Accordingly, allowing defendant another chance at DLRA relief would be fundamentally unfair as compared to other inmates who have already been re-sentenced.

Additionally, the existence of the mandatory termination of sentence provided for in the Executive Law also dispenses with defendant’s analogy between “an inmate whose poor disciplinary record prevented early release,” and one who was “paroled due to good behavior while in prison, but returned to DOCS custody on an eligible class-B felony owing to a technical parole violation” (see defendant’s brief, p. 27). Defendant essentially contends that since a discretionary

determination to deny an inmate parole leaves him eligible for DRLA resentencing, so too should a discretionary grant of parole followed by revocation. The two scenarios are distinguishable, however.

An inmate may be denied parole for a variety of reasons, many of which bear no relation to his behavior in prison, such as the nature of his crime, the feasibility of his release plans, pending deportation issues, or a statement made to the Parole Board by a crime victim. See Executive Law § 259-i (2)(c)(A) (“Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law”). The ultimate decision whether to grant parole is, indeed, discretionary, albeit not arbitrary. Therefore, a defendant may be held for several years past his initial parole eligibility date despite having appeared before the parole board on numerous occasions. By contrast, once a defendant has been paroled, the discretionary element is gone; the defendant’s sentence must be terminated after two years of unrevoked parole. Thus, a parolee who leads a law-abiding life will, indeed, see his sentence terminated. The distinction is clear. No matter the sentence under which a defendant is presently

on parole, he is expected to “live and remain at liberty without violating the law.” 9 N.Y.C.R.R. § 8002.1(a). To that end, “the releasee is expected to comply faithfully with all conditions specified in writing at the time of his release and with all other conditions and instructions, whether oral or in writing, given him by the board, a member, an authorized representative of the board or a parole officer.” 9 N.Y.C.R.R. § 8003.1(b).

By analogy, further evidencing the Legislature’s hopes that drug offenders can learn to lead law-abiding lives once they have begun serving their sentence are the provisions for merit time accrual, enacted as yet another component of the 2004 Act. Pursuant to Correction Law § 803, a statute entitled, “Good behavior allowances against indeterminate and determinate sentences,” any inmate serving “an indeterminate sentence of imprisonment of one year or more . . . imposed pursuant to section 70.70 or 70.71 of the penal law, may earn a merit time allowance” of up to one-sixth off of the minimum period of their sentence, provided they are not also serving a sentence for any of a number of enumerated violent felonies or homicide. Correction Law §§ 803(1)(d)(i); (ii); and (iii). This allowance is earned when an inmate

successfully participates in [an assigned] work and treatment program, . . . and when such inmate obtains a general equivalency diploma, an alcohol and substance abuse treatment certificate, a vocational trade certificate following at least six months of vocational programming or performs at least four hundred hours of service as part of a community work crew.

Correction Law § 803(1)(d)(iv).

Significantly, any such time granted prior to release on parole “shall be forfeited and shall not be restored if the paroled . . . person is returned to an institution under the jurisdiction of the state department of correctional services for violation of parole” Correction Law § 803(5). An inmate returned on a parole violation would be permitted to begin accruing merit time starting at zero, but only if the remaining portion of his term of incarceration exceeds one year. Id.

Although merit time provisions have no direct bearing on whether a defendant is eligible for resentencing under the DLRA, they evidence that the Legislature has endeavored to accelerate the return of drug offenders to their communities, but expects them to perform certain beneficial, self-improving, or service-based tasks, which would likely include participation in a substance abuse treatment program. Notably, a return to incarceration after violating parole results in the forfeiture of accumulated merit time. Thus, these provisions serve as an example of a benefit that is bestowed upon drug offenders but lost when they are re-incarcerated after violating their parole.

Defendant, however, argues that the Legislature’s decision to exclude parole violators from the credit time allowance afforded by Correction Law § 803-b illustrates that the Legislature contemplated parole violators when drafting the Drug Law Reform Act (see defendant’s brief, pp. 18-19). Defendant further

contends that the absence of such an express exclusion in CPL § 440.46 suggests that parole violators should be afforded the opportunity to be resentenced. Defendant's argument is flawed because the express exclusion of parole violators from the credit time afforded by Correction Law § 803 evinces the Legislature's intent to enhance the penalization of parole violators. To find that the same Legislature, as a later in peri materia part of the same legislative endeavor, would seek to encourage, or even reward, non-compliant behavior by parolees would fly in the face of every statutory canon governing interpretation of the 2009 DLRA's provisions.

Defendant also contends that the Legislature made a "deliberate choice," and not an "inadvertent omission" (see defendant's brief, p. 18) when it did not expressly include parole violators from the exclusion provision of CPL § 440.46(5). The sub-section to which defendant refers categorically excludes certain violent and homicidal felons from relief altogether based entirely upon the nature of their crimes. See CPL § 440.46(5); Correction Law § 803(1)(d)(ii). What defendant overlooks, however, is that parole violators were previously afforded a very definitive relief by way of mandatory termination of sentence (see Executive Law § 259-j) that they squandered by violating parole. Therefore, the remedy available to parole violators is to become re-eligible for parole, and, once re-released, abide by the conditions of their parole for two years.

Defendant argues that the Drug Law Reform Acts first provided relief to inmates with the most urgent needs—those with the longest terms of imprisonment (see defendant’s brief, p. 36). Although the urgency for relief decreased over time, defendant suggests that the breadth of the relief increased. The portions of the DLRA 2009 pertinent to eligibility for resentencing are, however, in all relevant aspects, no different from those contained in the DLRA 2004.

The 2004 DLRA provided, in pertinent part:

Notwithstanding any contrary provision of law, any person in the custody of the department of correctional services convicted of a class A-I felony offense defined in article 220 of the penal law which was committed prior to the effective date of this section, and sentenced thereon to an indeterminate term of imprisonment with a minimum period not less than fifteen years pursuant to provisions of the law in effect prior to the effective date of this section, may, upon notice to the appropriate district attorney, apply to be resentenced in accordance with section 70.71 of the penal law in the court which imposed the original sentence.

L. 2004, Ch. 738, § 23.

The pertinent language in the 2009 DLRA is nearly identical to that in the 2004 Act. It reads:

Any person in the custody of the department of correctional services convicted of a class B felony offense defined in article two hundred twenty of the penal law which was committed prior to January thirteenth, two thousand five, who is serving an indeterminate sentence with a maximum term of more than three years, may, except as provided in subdivision five of this section, upon notice to the appropriate district attorney, apply to be resentenced to a determinate sentence in accordance with sections 60.04 and 70.70 of the penal law in the court which imposed the sentence.

CPL § 440.46(1).

In People v. Rodriguez, 68 A.D.3d 676 (1st Dept. 2009), the Appellate Division held that a parole violator whose underlying sentence was for an A-I felony drug offense was not eligible to be resentenced pursuant to the 2004 DLRA. Rodriguez, 68 A.D.3d at 676; accord People v. Bagby, 11 Misc. 3d 882, 887 (Sup. Ct. Westchester Co. 2006). The court essentially reasoned that a defendant who was “in the custody of the department of correctional services” merely because he had violated his parole should not receive the benefit of resentencing. The Appellate Division applied the reasoning utilized by this Court in People v. Mills, 11 NY3d 527, 537 (2008), and held that the Legislature could not have “intend[ed] fresh crimes to trigger resentencing opportunities.” Rodriguez, 68 A.D.3d at 676.

The Appellate Division’s interpretations of the 2004 DLRA are applicable to the 2009 DLRA because the statutory language of the relevant portions of each is identical and there is no paramount reason to interpret them otherwise. Both Acts state that any person “in the custody of the department of correctional services” who was convicted of the class of felony defined in Article 220 of the Penal Law for which each respective Act provides ameliorative relief, convicted before specified dates, and serving an indeterminate term of imprisonment of a certain length, may apply for resentencing. See L. 2004, Ch. 738, § 23; CPL § 440.46(1). As with the 2004 Act, nothing in the 2009 Act or in the legislative comments to the

Act suggest that the CPL § 440.46 remedies are available to anyone other than those still serving their original incarceration.⁶ Further, contrary to defendant's interpretation, the legislative comments and language of the statute do not illustrate a progression towards widening the class of inmates eligible for DLRA relief.

In Mills, 11 N.Y.3d at 527, this Court considered whether two class A-II drug felons were eligible for resentencing under the parole eligibility-dependent scheme of the 2005 DLRA. The Act provides as follows, with the language distinguishing it from the 2004 and 2009 Acts underscored:

Notwithstanding any contrary provision of law, any person in the custody of the department of correctional services convicted of a class A-II felony offense defined in article 220 of the penal law which was committed prior to the effective date of this section, and who was sentenced thereon to an indeterminate term of imprisonment with a minimum period not less than three years pursuant to provisions of the law in effect prior to the effective date of this section, and who 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, and who meets the eligibility requirements of paragraph (d) of subdivision 1 of section 803 of the correction law may, upon notice to the appropriate district attorney, apply to be resentenced in accordance with section 70.71 of the penal law in the court which imposed the original sentence.

L. 2005, Ch. 643, § 1 (emphasis added).

⁶ Contrary to defendant's argument (see defendant's brief, pp. 17-18), the People did not abandon the notion that inmates' sentences are separated into two parts. The term "original sentence" was merely a phrase used to denote the portion of incarceration that defendant served before he violated parole. The purpose in separating these terms of incarceration was to keep the amount of time defendant was required to serve distinct from the time he served as a result of his inability to comply with his parole. Additionally, defendant's reliance on People v. Buss, 11 N.Y.3d 554, 558 (2008) (see defendant's brief, p. 18), is misplaced as this Court limited the scope of its holding in Buss to SORA-related matters.

Under Correction Law § 851(2), an inmate is an “eligible inmate” when, inter alia, he is two years away from becoming eligible for release on parole. Therefore, under the 2005 DLRA, an A-II felony drug offender is eligible for resentencing only if he is more than 3 years away from his parole eligibility date. The 2009 DLRA does not have a similar provision. In other words, under the 2009 DLRA, a class B felony drug offender is eligible for resentencing regardless of the proximity of his parole eligibility date. See Mills, 11 N.Y.3d at 534. In People v. Then (the companion case to Mills), the Court of Appeals held that a class A-II felony drug offender who violated his parole and was re-incarcerated for committing a second class A-II drug felony could not have his original sentence modified under the 2005 DLRA. The Court reasoned that “the Legislature did not intend fresh crimes to trigger resentencing opportunities.” Mills, 11 N.Y.3d at 537.

Defendant argues that the Legislature included the “carve-out” provision in DLRA 2005 specifically to keep parole violators from being eligible, but did not do so in DLRA 2009 (see defendant’s brief, p. 42). In Mills, however, this Court discussed the legislative history, which pointed to a different purpose:

The bill is narrowly tailored to offer the possibility of relief to inmates who are most desperately in need of sentence review: those non-violent drug offenders who are serving life sentences for Class A-II drug offenses with *relatively long minimum terms* who were overlooked in the 2004 Drug Law Reform Act.

Mills, 11 N.Y.3d at 535 (emphasis provided in original). Furthermore, the legislative history noted the bill’s “narrowly tailored” nature, which is a stark contrast from defendant’s description of increasing breadth. Additionally, defendant fails to explain why the Legislature would attempt to keep parole violators convicted of A-II felonies from resentencing relief, while failing to include that same language for A-I felony offenders who violated parole.

Defendant further argues that finding parole violators ineligible for DLRA re-sentencing relief runs counter to the Drug Law Reform Acts’ aim to give sentencing discretion back to judges (see defendant’s brief, pp. 28-30). Indeed, the Legislature discussed this goal in the Memorandum in Support of the DLRA 2004, stating that

[j]udges must be given the discretion to decide whether or not to send non-violent low level addicted offenders to drug treatment programs as an alternative to prison. Under current law, mandatory minimum sentences preclude the exercise of such judicial discretion.

McKinney’s 2004 Session Laws of NY, NYS Assembly, Memorandum in Support of Bill A11895. In DLRA 2004, the Legislature set forth the standard to be used by judges in re-sentencing proceedings. It stated that after the findings of fact had been made, “the court shall, unless substantial justice dictates that the application should be denied,” inform the defendant of his new sentence. See L. 2004, c. 738, § 37 (eff. Feb. 12, 2005). The “substantial justice” standard, however, essentially

makes resentencing the defendant the court's default position, while denying resentencing is the exception. The standard, which clearly favors resentencing, tends to show that although judges may have increased discretion to determine the appropriateness of a new sentence, there is less discretion about whether a defendant should be resentenced. Therefore, it is even less likely that the Legislature would have intended for parole violators, who are not within the class of inmates deserving of resentencing, to receive such a benefit.

Contrary to defendant's contention that the DLRA sought to reduce post-incarceration supervision (see defendant's brief, p. 26), the Legislature's elimination of lengthy periods of parole was merely a by-product of reducing incarceratory sentences. The goal of the DLRA is clear—to reduce unnecessarily lengthy periods of incarceration for drug offenders while simultaneously recognizing that those offenders need supervision and treatment for successful reintegration into society. The Legislature deemed a two-year maximum term of post-release supervision an appropriate length of time (see Penal Law § 70.45[2][b]), which is consistent with the two-year period of unrevoked parole required by Executive Law 259-j.

CONCLUSION

**FOR THE FOREGOING REASONS, THE ORDER
APPEALED FROM SHOULD BE AFFIRMED IN
ALL RESPECTS.**

Respectfully submitted,

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