

STATE OF NEW YORK
COUNTY OF MONROE

COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

-vs-

DECISION & ORDER
Index #2004/03613
Ind. #2004-0217

DAVID J. BUSH,
Defendant.

APPEARANCES:

For the People: **MICHAEL C. GREEN, District Attorney**
By: Robin Schlia, Esq.
Assistant District Attorney

For the Defendant: **Martin P. McCarthy, II, Esq.**
144 Exchange Blvd., Suite 402
Rochester, New York 14614

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

-vs-

DECISION & ORDER
Index #2002/14867
Ind. #2002-0730

ALAN FREEMAN,
Defendant.

APPEARANCES:

For the People: **MICHAEL C. GREEN, District Attorney**
By: Teodoro X. Siguenza, Esq.
Assistant District Attorney

For the Defendant: **TIMOTHY P. DONAHER, Public Defender**
By: Roger Brazill, Esq.
First Assistant Public Defender

HON. FRANK P. GERACI, JR.

These Rockefeller resentencing cases are before the court pursuant to the Drug Law Reform Act of 2009, specifically, CPL § 440.46 (Added L 2009, c 56, pt AAA, § 9). At issue,

in both instances, is the ten-year look-back period set forth in subdivision five of the statute which provides as follows:

“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 merit time allowance is not available pursuant to subparagraph (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.”

The statute does not specify what is meant by the term “within the preceding ten years” or qualify it by referring to any particular time frame. The Assistant District Attorney has argued, without citing any authority, that neither defendant is eligible for resentencing because the ten-year look-back period starts on the date of the commission of the felony for which the defendant is currently serving time. According to a noted commentator, the categories of inmates excluded from consideration for resentencing are as follows:

“Inmates presently serving a sentence for or who were convicted in the preceding ten years of a violent felony offense or of a crime not eligible for allowance of ‘merit time’ pursuant to Correction Law § 803 [1(d) (ii)], measuring the ten year period by the interval between commission of the former and present crimes excluding time spent under incarceration. And paragraph (b) excludes all inmates previously adjudicated as a second or persistent violent felony offender.”

(Preiser, Supp Practice Commentaries, McKinney’s Cons Laws of NY, Book 11A, Criminal

Procedur  Law   440.46, 2010 Pocket Part, at 25).

On the other hand, the defendants have argued that the ten-year look-back period starts on the date of the filing of the application for resentencing, citing several miscellaneous cases (*People v. Danton*, 2010 WL 424920; *People v. Roman*, 889 NYS2d 922 [2009]; *People v. Brown*, 26 Misc3d 1204[A], 2010 NY Slip Op 50000 [U] [2010]), which state as much on the basis of the statute’s “plain language” and its underlying ameliorative purposes. *Danton* even discounts Prieser’s Practice Commentary as wrongfully interpreting the statute.

Under this reasoning, inmates who meet the criteria set forth in subdivision one¹ of the statute, and who have not otherwise been excluded, would be eligible to apply for resentencing after serving ten years in prison. Consequently, the classic look-back period for predicate felons² as set forth in the recidivist statutes (Penal Law   70.04 [1] [b] [iv], [v];   70.06 [1] [b] [iv], [v];   70.08 [1] [b]), would not apply.

¹Subdivision one of CPL   440.46 provides:

“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.”

²CPL   70.04 (1) (b), in relevant part, provides as follows:

“(iv) Except as provided in subparagraph (v) of this paragraph, sentence must have been imposed not more than ten years before commission of the felony of which the defendant stands convicted.

“(v) In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration.”

Additionally, the court is aware of several case decisions wherein other courts have ruled that the defendants were eligible to apply for resentencing under CPL § 440.46 even where they were paroled on their previously imposed sentences for a class B drug felony and, as parole violators, are now in custody of the Department of Correctional Services serving the previously imposed sentences (*see People v. Figueroa*, 2010 WL 454919; *People v. Rivera*, Sup Ct, Bronx County, February 1, 2010, Benitez, J., indictment Nos. 2000-2608 and 1977-2000; *People v. Haulsey*, Sup Ct, New York County, November 20, 2009, Allen, J., indictment No. 1999-5780; *see also People v. Jones*, 25 Misc3d 1238[A], 2009 NY Slip Op 52483[U] [2009]).

Given these views, the court has undertaken an analysis of each defendant's circumstances when calculating the ten-year look back-period from the date of each defendant's application for resentencing. This analysis basically tracks that set forth in the afore-cited cases.

Each defendant is currently in the custody of the Department of Correctional Services. Defendant Bush was convicted of the crime of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), a class B felony, on November 15, 2004 and sentenced to an indeterminate term of 4½ to 9 years in the Department of Correctional Services. Defendant Freeman was convicted of the crimes of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]) on June 16, 2003 and sentenced to concurrent indeterminate terms of 7½ to 15 years and 3½ to 7 years, respectively. As such, each defendant meets the first four general threshold requirements of CPL § 440.46 (1).

The next step is to determine whether these defendants have an "exclusion offense" for which he was convicted within the preceding ten years, excluding any time during which he was incarcerated for any reason between the time of commission of the previous felony and the time of the commission of the present felony which would render him ineligible for resentencing.

The pertinent cases discussed herein-above used the date of the filing of the defendant's application for resentencing as the point in time from which the ten-year look-back period commences. Thus, the ten-year period preceding this filing date (**3653 days**), as tolled by any time the defendant was incarcerated for any reason from the time of the commission of the potential exclusion offense and the time of the commission of the instant offense, constitutes the relevant period.

A multi-step calculation process was used to measure the relevant time frame applicable to each defendant's circumstances: in **Step One**, determine the period between the date of the filing of the defendant's application for resentencing and the date sentence was imposed (conviction date) for the potential exclusion offense; in **Step Two**, determine the time period(s) during which the defendant was incarcerated for any reason between the time of the commission of the potential exclusion offense and the time of the commission of the instant offense; in **Step Three**, from the gross result obtained in Step One, subtract the time period(s) during which the defendant was incarcerated for any reason between the time of the commission of the potential exclusion offense and the time of the commission of the instant offense; in **Step Four**, determine whether the time period in Step Three is within or outside the ten-year period preceding the filing date. For purposes of these calculations, each defendant's circumstances will be analyzed separately, as set forth herein below.

Defendant Bush – Ind. #2004/0217

There is no dispute that Defendant Bush was convicted on May 13, 1988 of the crime of rape in the first degree (Penal Law § 130.35), a class B violent felony offense (Penal Law § 70.02 [1] [a]), and sentenced to a term of 2½ to 7 years in the Department of Correctional Services. This offense occurred on or about February 18, 1988. He was incarcerated from May 13, 1988 until November 5, 1993. Defendant Bush was also incarcerated for violating parole from July 24, 1995 until September 8, 1995 and from May 24, 2000 until April 9, 2002. The

present offense occurred on or about May 2, 2003. Defendant filed the instant application on January 25, 2010.

Step One: Between January 25, 2010 (filing date) and May 13, 1988 (conviction date of potential exclusion offense) there are 7927 days or 21 years, 8 months and 12 days.

Step Two: Between February 18, 1988 (commission of potential exclusion offense) and May 2, 2003 (commission of instant offense), defendant was incarcerated from May 13, 1988 until November 5, 1993 (2002 days), July 24, 1995 until September 8, 1995 (46 days) and May 24, 2000 until April 9, 2002 (685 days) for a total of 2733 days.

Step Three: The difference between the gross total time obtained in Step One (7927 days) and the time spent in incarceration (2733 days), as reflected in Step Two, is 5194 days.

Step Four: Starting from the application filing date, the number of days in the preceding ten years, 3653 days, is less than the 5194 days reflected in Step Three.

Defendant Freeman – Ind. #2002/0730

Defendant Freeman has asserted that he has no previous violent felony convictions or any other offense for which merit time allowance is not available pursuant to Corrections Law § 803 (1) (d). However, according to the People, Defendant Freeman was previously convicted on March 8, 1993 of robbery in the second degree (Penal Law § 160.10), a class C violent felony offense (Penal Law § 70.02 [1] [b]), and sentenced to an indeterminate term of 3 to 6 years in the Department of Correctional Services. This crime occurred on April 19, 1992. The sentence imposed was concurrent with a conviction of criminal possession of a controlled substance in the fifth degree. He was incarcerated from May 12, 1993 until September 25, 1995. Thereafter, on April 21, 1997, he was convicted of reckless endangerment in the first degree (Penal Law §

120.25), and sentenced to a term of 2½ to 5 years in the Department of Correctional Services. He was incarcerated from May 2, 1997 until April 25, 2000, when he was released on Parole. Parole was revoked on March 7, 2002, whereupon he was returned to the Department of Correctional Services until his release on June 25, 2002. The present offense occurred on or about August 14, 2002.

Step One: Between February 3, 2010 (filing date) and March 8, 1993 (conviction date of potential exclusion offense) there are 6176 days or 16 years, 10 months and 26 days.

Step Two: Between April 19, 1992 (commission of potential exclusion offense) and August 14, 2002 (commission of instant offense), defendant was incarcerated from May 12, 1993 until September 25, 1995 (866 days), May 2, 1997 until April 25, 2000 (1089 days) and March 7, 2002 until June 25, 2002 (110 days) for a total of 2065 days.

Step Three: The difference between the gross total time obtained in Step One (6176 days) and the time spent in incarceration (2065 days), as reflected in Step Two is 4111 days.

Step Four: Starting from the application filing date, the number of days in the preceding ten years, 3653 days, is less than the 4111 days reflected in Step Three. For each of these defendants, this time period is outside the ten-year look-back period.

Therefore, the court finds that neither Defendant Bush's 1988 conviction, nor Defendant Freeman's 1993 conviction is an exclusion offense pursuant to CPL § 440.46 (5) (a). Both defendants are eligible for resentencing pursuant to CPL § 440.46, "unless substantial justice dictates" that his application for such resentencing should be denied (L 2004, ch 738 § 23). In so doing, the court must look to the facts and circumstances relevant to resentencing offered by the defendant, and the People, in addition to the institutional record of confinement of the

defendant (*id.*), including but not limited to the defendant's participation in or willingness to participate in treatment or other programming while incarcerated and his disciplinary history (CPL § 440.46 [3]). A defendant's inability "to participate in treatment or other programming while incarcerated despite such person's willingness to do so shall not be considered a negative factor in determining a motion pursuant to this section" (CPL § 440.46 [3]).

Defendant Bush – Ind. #2004/0217

The circumstances surrounding the instant drug charge are not in dispute. It arose when the defendant sold two bags of cocaine to an undercover police officer in the City of Rochester. According to the People, upon his immediate arrest, police officers recovered an additional three bags of cocaine from the defendant's person. The defendant's guilty plea also satisfied the charge of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]).

Additionally, the People cite several other reasons for requesting the denial of the motion: the presentence investigation report wherein defendant stated that he did not have any substance abuse problems, but sold drugs due to his "lack of financial resources"; his "long and violent criminal history," including the 1988 rape conviction which satisfied additional charges of sodomy and incest, a 2000 conviction of attempted criminal possession of a controlled substance in the fifth degree for which he received 1½ to 3 years in the Department of Correctional Services, a 1998 conviction of criminal contempt in the second degree for which he received a sentence of probation; and his parole and probation violation history, including, twice violating parole on the rape sentence, violating parole on the attempted criminal possession of a controlled substance in the fifth degree and with regard to the criminal contempt conviction, violating the term and conditions of the probationary sentence within four months after being placed under probation supervision. This history, the People contend, demonstrates that defendant is not the type of offender the Drug Law Reform Act was intended to benefit. If the

court is inclined to resentence the defendant, the People urge as a new determinate sentence, nine years with three years of post-release supervision.

The defendant seeks to be resented to a determinate sentence of two years, with one and a half years of post-release supervision. He contends that a period of 329 days lapsed between his arrest and the filing of the instant indictment, delay due to plea negotiations wherein the People offered an indeterminate sentence of 2 to 4 years and demonstrated their willingness to accept a plea to a reduced charge and a reduced sentence. Defendant states that had such offer been timely communicated to him by trial counsel, he would have accepted it.

Defendant also cites his positive institutional record as further evidence that the Drug Law Reform Act was intended for inmates like him. During his incarceration, defendant participated voluntarily and willingly in the following programming: (1) Alcohol and Substance Abuse Treatment ("ASAT") and, in 2007 completed the six month "ASAT" program designed to help in the recovery from alcohol and drug addiction; (2) a Pre-GED class, enrolled in 2006 and completed a Transitional Program – Phase One in 2005 and Phases Two and Three in 2007; (3) employment, most recently as a laundry operator. Regarding his behavior during incarceration, defendant states that he has had no serious disciplinary infractions since 2004 and that only one disciplinary report, a Tier II infraction for disorderly conduct in 2008, has been filed against him.

The court has considered the facts and circumstances relevant to the imposition of a new sentence which have been submitted by the defendant and the People, including the defendant's institutional record. It is the position of the court that substantial justice does not dictate that the defendant's application for resentencing be denied. Upon review of the submissions and the findings of fact made in connection with this application, the court hereby grants Defendant Bush's application for resentencing. However, any new sentence to be imposed will be determined at a later court appearance, after both sides have had the opportunity to be heard

with respect to the issue of resentencing.

Defendant Freeman – Ind. #2002/0730

The instant drug offense involved possession of a controlled substance with the intent to sell. However, Defendant Freeman points to his participation or enrollment in numerous educational and vocational programs while incarcerated, including, successful completion of the Alcohol Substance Abuse Treatment (“ASAT”) program at Green Haven Correctional Facility from May 2006 to September 2006; participation in the Residential Substance Abuse Treatment (“RSAT”) program at Green Haven Correctional Facility from February 2006 to April 30, 2006; and participation in certain vocational training programs, i.e., upholstery, electrical trades and general business at Green Haven and Attica Correctional Facilities. He seeks to be resentenced to a determinate sentence of six years, with one and a half years of post-release supervision. Defendant asserts that he has already served more than six years of imprisonment on his 2003 conviction. No disciplinary record has been presented.

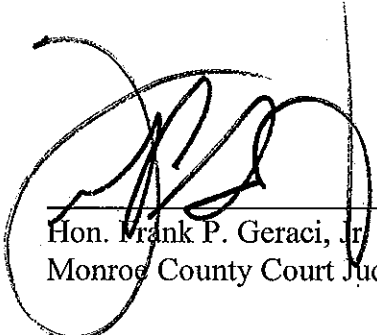
The People ask that this court consider the defendant’s prior criminal history which includes convictions of criminal possession of a controlled substance in the fourth degree, robbery in the second degree and reckless endangerment in the first degree, as well as his history of violating parole release. He was released to parole on April 25, 2000, and parole was revoked on March 7, 2002. Defendant was released from the Department of Corrections on June 25, 2002, and the instant offense occurred on August 14, 2002. The People oppose any change in the defendant’s sentence.

The court has considered the facts and circumstances relevant to the imposition of a new sentence which have been submitted by the defendant and the People, including the defendant’s institutional record. It is the position of the court that substantial justice does not dictate that the defendant’s application for resentencing be denied. Upon review of the submissions and the findings of fact made in connection with this application, the court hereby grants Defendant

Freeman's application for resentencing. However, any new sentence to be imposed will be determined at a later court appearance, after both sides have had the opportunity to be heard with respect to the issue of resentencing.

This Decision shall constitute the Order of the Court.

Dated: March 16, 2010
Rochester, New York



Hon. Frank P. Geraci, Jr.
Monroe County Court Judge