

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX, PART T5**

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**THE PEOPLE OF THE STATE OF NEW YORK**

**DECISION & ORDER  
IND. NO. 3295/2001  
MOTION. CPL 440.46  
DRLA 2009**

-vs-

**ISAIAS FLORES,**

**Defendant.**

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Defendant, Isaias Flores, moves to: 1) Vacate the indeterminate sentence of four to twelve years imprisonment previously imposed under New York Penal Law Section 220.16 for Criminal Possession of a Controlled Substance in the Third Degree; 2) to order a hearing to consider the compelling mitigating evidence in support of his request for re-sentencing; and 3) to re-sentence him to the minimum sentence and term of post-release supervision allowable under the law pursuant to the Drug Law Reform Act of 2009 (New York Criminal Procedure Law section 440.46) and as authorized by the New York Penal law sections 66.04 and 70.70.

**SUMMARY OF FACTS AND PROCEDURAL HISTORY**

On May 9, 2001, Mr. Isaias Flores was placed under arrest by members of the Narcotics Divisions of the New York City Police Department after he handed an undercover police officer an amount of cocaine in excess of two (2) ounces in exchange of a sum of pre-recorded buying money. Thereafter, Mr. Flores was arraigned and indicted for Criminal Sale of a Controlled Substance in the First Degree (Penal Law

section 220.43[1]) under indictment 3295/2001.

On January 25, 2002, Mr. Flores entered a plea of guilty to Penal Law section 220.16(2), Criminal Possession of a Controlled Substance in the Third Degree, a Class B Felony, in full satisfaction of indictment number 3295/2001. On February 8, 2002, the court sentenced him to the negotiated and agreed upon indeterminate term of four years to twelve years incarceration.

Mr. Flores was then held at Ulster Correctional Facility until he received a presumptive merit release to the Division of Parole, on October 4, 2004. Since being released on 2004, Mr. Flores has been indicted in Bronx County on two separate occasions (Indictment numbers 4394/2006 and 1841/2008).

On October 4, 2004, Mr. Flores was convicted, upon pleas of guilty to: 1) Criminal Possession of a Controlled Substance in the Third Degree (Penal Law section 220.09) under indictment 1841/2008; and 2) Criminal Possession of a Controlled Substance in the Third Degree under indictment 4394/2006.

Subsequently, under indictment 4394/2006, Mr. Flores was permitted to withdraw his plea and re-enter a plea of guilty to Attempted Criminal Possession of a Controlled Substance in the Third Degree (Penal Law section 110/220.16[1]). On March 13, 2009, the court sentenced Mr Flores on both pleas to concurrent, determinate terms of thirty months incarceration with two years post-release supervision.

Based on these convictions, on June 4, 2009, Mr. Flores was violated by the Division of Parole and re-entered the Department of Corrections custody on the basis of

indictment number 3295/2001 and the two new indictments.

### DISCUSSION

In the recent case of *People v. Stella* (NYLJ 1/13/2010 Pg. 25, Col. 5) Justice Robert G. Seewald, clearly delineated and emphasized "the degree of discretion [this Court] possesses, in entertaining the merits, of a defendant's resentencing application pursuant to C.P.L. §440.46" (citing *People v. Gumbs*, 66 AD3d 558[1st Dept. 2009]; *People v. Vasquez*, 41 AD2d 111 [1<sup>st</sup> Dept. 2007]; and *People v. Morales*, 58 AD3d 550 [1<sup>st</sup> Dept. 2009].) In this regard, a court in exercising its discretion must determine whether substantial justice dictates the denial of a defendant's application.

Some of the factors the courts have taken into consideration to reach a determination of whether substantial justice dictates the denial of a defendant's application include: 1) The defendant's institutional record; and 2) whether the "seriousness of the underlying crime outweighed defendant's efforts at rehabilitation" (*Stella* citing *People v. Alejandro*, 55 AD3d 479 [1<sup>st</sup> Dept. 2008]). In the instant case, Mr. Flores' record includes at least three indictments and convictions involving Criminal Possession of a Controlled Substance or Attempted Criminal Possession of a Controlled Substance. Mr. Flores, has been very fortunate that the plea offers made have been reasonable in all three instances. It is clear though that since his release on October 4, 2004, Mr. Flores has been unable to lead a law abiding life which outweighs any attempts on his part to rehabilitate. It is this Court's determination that substantial

justice dictates that Mr. Flores' motion be denied.

Be that as it may, C.P.L. §440.46 provides that in order to be eligible for re-sentencing, the defendant must meet five (5) criteria:

- 1) Be in custody of the department of correctional services;
- 2) for a conviction of a class B drug felony offense defined in article 20;
- 3) which was committed prior to January 13, 2005;
- 4) who is serving an indeterminate sentence with a maximum term of more than (3) years; and
- 5) who was NOT convicted of a violent felony offense or other exclusion offense within the 10 years preceding commission of the class B drug felony on which re-sentence is sought.

Mr. Flores does not meet all of the five criteria stated. The fact is that Mr. Flores already served his time under indictment number 3295/2001. The court sentenced him upon his plea of guilty on January 25, 2002 and the Department of Corrections released him on October 4, 2004. Mr. Flores, however, was violated as result of his arrests, indictments and convictions on two separate indictments for which he is currently serving time.

In the case of *People v. Rodriguez* \_\_\_\_\_ AD3d \_\_\_\_\_, 2009 NY Slip Op 9717(1<sup>st</sup> Dept. 12/29/09), the Appellate Division, First Department expressly ruled that the "act 'was not intended to apply to those offenders who have served their term of imprisonment, have been released from prison to parole supervision, and whose parole is then violated, with a resulting period of incarceration.'" (See also, *People v. Mills*, 11

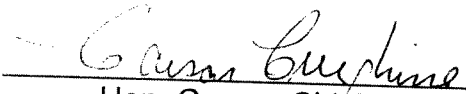
NY3d 527[2008]; *People v. Bagby*, 11 Misc.3d 882 [2006]). An examination by this Court of DLRA 2004 and DLRA 2009, reveals a similarity in meaning, language and intent and most importantly; application to Mr. Flores' case as a parole violator.

Therefore, Mr. Flores' application must be denied on this basis as well.

Accordingly, the motion by Mr. Flores is denied.

This constitutes the decision and order of this Court.

Dated: January 27, 2010  
Bronx, NY

  
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Hon. Caesar Cirigliano, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX: PART A

-----X  
THE PEOPLE OF THE STATE OF NEW YORK

-AGAINST-

DECISION AND ORDER  
INDICTMENT NO. 03008-2001  
01279-1999  
01681-1999

ELIAS DEJESUS,

DEFENDANT.  
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JOHN N. BYRNE:

Upon the aforementioned papers the Court hereby **DENIES** the Petitioners motions for re-sentencing on **Indictments 1279/1999 and 1681/1999** pursuant to the Drug Law Reform Act of 2009, L. 2009, Ch.56, Part AAA, §9 (eff. Oct. 7, 2009) (codified at N.Y. Crim. Proc. Law § 440.46). (DRLA 2009).

As to the Petitioner's motion for Re-sentence on **Indictment 3008/2001**, the Defendant's motion is **GRANTED** upon consent of the People.

On April 8, 1999, the Petitioner entered pleas of guilty to two counts of Criminal Sale of a Controlled Substance In or Near School Grounds and one count of Criminal Sale of a Controlled Substance in the Third Degree Penal Law Sections §220.44(2) and §220.39(1).

On October 28, 1999, the Court sentenced the Petitioner to concurrent indeterminate terms of two years to six years incarceration under Indictment Numbers 1279/1999 and 1681/1999.

The Petitioner was released by the New York State Department of Corrections and placed under the Supervision of the Division of Parole on June 22, 2000.

On April 9, 2001, while still on parole, the Petitioner, was re-arrested and subsequently entered a plea of guilty to Penal Law Section §220.44(2), Criminal Sale of a Controlled Substance In or Near School Grounds, in full satisfaction Indictment Number 3008/2001.

As part of his plea agreement on Indictment 3008/2001, and with the approval of the Division of Parole, the Petitioner was ordered to enter and complete an eighteen to twenty-four month residential drug treatment program. Under the supervision of Treatment Accountability for Safer Communities (TASC), if Petitioner successfully completed the TASC Program, he

would have been allowed to withdraw his felony plea and re-enter a plea to a misdemeanor. His final sentence would have been a conditional discharge. Petitioner was aware that if he failed to complete any of the terms of his plea, he faced an indeterminate jail alternative sentence of fifty four months to nine years incarceration, in addition to any undetermined term of incarceration stemming from a violation of his then-current parole supervision.

On March 4, 2002, TASC informed the Court that the Petitioner had violated the terms of the TASC Program. On December 29, 2002, the Court sentenced the Petitioner to the jail alternative of fifty-four months to nine years incarceration on Indictment 3008/2001 and for parole violations arising from Indictments 1280/1999 and 1681/1999. Petitioner is currently in the custody of the New York State Department of Corrections.

#### Petitioners 1999 Indictments

The Court has carefully reviewed the parties' papers, the Petitioner's criminal history, as well as his institutional records.

The Court agrees with the decision rendered by the Honorable John Collins in People v. Orta, Bronx County Indictment Number 6046/2002, that the legislature did not intend the Drug Law Reform Act of 2009 to apply to parole violations as is the case here. As the Court in People v. McCloud, 38 A.D. 3d 1056 (2007), stated while interpreting the DLRA of 2005, "we do not believe that the drug reform laws were intended to apply to offenders who have served their terms of imprisonment, been released to parole supervision, violated their parole and, as a result were subject to a subsequent period of incarceration. (See also, People v Hardy, 49 A.D. 3d 779 (2008)).

Neither the 2009 Act nor any legislative comments indicate that eligibility to apply for re-sentencing was intended to apply to anyone other than those serving their original sentence.

It is clear that as to Indictments 1279/1999 and 1681/1999, the Petitioner had already served his term of incarceration and was under the Supervision of the Division of parole at the time of his arrest on Indictment 3008/2001. Therefore, the Court cannot re-sentence the Petitioner on his 1999 indictments.

Finally, as noted in the People's papers, the Petitioner's request for re-sentencing of matters stemming from parole violations should be directed to Division of Parole under Executive Law Section 295. See, Executive Law §295-j, as newly amended by the Drug Law Reform Act of 2009 for a reduction or a termination of any sentence arising from violations of parole.

Therefore, the Court denies the Petitioners Motion for Re-Sentencing as to Indictments 1270-1999 and 1681/1999.

Petitioners 2001 Indictment

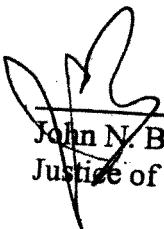
The People consent to the Petitioner's re-sentence pursuant to the Drug Law Reform Act of 2009 on Indictment 3008/2001.

As to Indictment 3008/2001, the Petitioner's motion is **Granted**. The prior sentence is vacated.

The Petitioner is sentenced *nunc pro tunc* as of January 5, 2010 to a determinate term of 3 years incarceration and 2 years post release supervision.

This opinion constitutes the decision and order of this Court.

DATED: January 5, 2010  
Bronx, New York

  
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John N. Byrne  
Justice of the Supreme Court