

COUNTY COURT

COUNTY OF ONONDAGA STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

-vs-

Indictment # 2004-0073-1
Index # 03-1113

EDUARDO JIMENEZ,

Defendant.

HON. WILLIAM D. WALSH

DECISION/ORDER

The defendant has moved pursuant to Section 440.46 of the Criminal Procedure Law (the Rockefeller Drug Law Reform Act) for an order vacating the aggregate indeterminate sentence of four and one-half to nine years imposed upon the judgment of conviction entered against him pursuant to his pleas of guilty to the crimes of *Criminal Possession of a Controlled Substance in the Third Degree, Criminal Possession of a Controlled Substance in the Fourth Degree and Criminal Possession of a Controlled Substance in the Seventh Degree*, and seeks to be resentenced in accordance with the provisions of Penal Law §§ 60.04 and 70.70.

The People have opposed the motion on the grounds that the defendant is not an eligible inmate who qualifies for the relief sought because he has previously been convicted of an "exclusion offense", i.e., *Manslaughter in the Second Degree*.

Criminal Procedure Law § 440.46 (1), which became effective on October 7, 2009, sets forth the eligibility requirements for B drug felons who may apply to be resentenced, as follows:

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.

Criminal Procedure Law § 440.46 (5) states, in relevant part:

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 the commission of the previous felony and the time of the commission of the present felony, which was: (i) a violent felony offense as defined in section 70.02 of the penal law; or (ii) any other offense for which a merit time allowance is not available pursuant to subparagraph (ii) of paragraph (d) of subdivision one of section eight hundred three of the correction law; ...

The court finds that the defendant is not an eligible inmate because his prior conviction for the crime of *Manslaughter in the Second Degree* meets the criteria for an "exclusion offense" set forth in *Criminal Procedure Law* § 440.46 (5)(a)(ii). *Manslaughter in the Second Degree* is an offense for which merit time is not

allowed pursuant to *Correction Law* § 803(1)(d)(ii). The defendant entered a plea of guilty in Onondaga County Court to *Manslaughter in the Second Degree* (reduced from *Murder in the Second Degree* and in full satisfaction of the additional crimes of *Robbery in the Second Degree*, *Robbery in the Third Degree*, *Assault in the Third Degree* and *Criminal Possession of a Weapon in the Fourth Degree* alleged to have occurred on June 6, 1991) and was sentenced to an indeterminate term of three to nine years on February 18, 1992. On March 17, 1994, he entered a plea of guilty in Onondaga County Court to the crime of *Attempted Criminal Possession of a Controlled Substance in the Third Degree* and received an indeterminate sentence of one to three years.

The defendant was initially released to parole supervision on October 17, 1996. On April 16, 1997, parole was revoked and he was returned to state prison as a parole violator. He was again paroled on February 4, 1998, and on October 8, 2002 parole was again revoked and he returned for a second time to state prison as a parole violator. He was finally released from state prison on June 6, 2003 and discharged from parole supervision on October 27, 2003, the maximum expiration date of his sentence.

Additionally, a bench warrant was issued for the defendant on June 18, 1991 and is not clear from the Division of Criminal Justice Services records before the court when he was returned to court on that warrant. Another bench warrant was issued for the

defendant on April 17, 1992, upon which he was returned to court on November 18, 1993. On December 14, 2001 he was arrested for the offense of *Petit Larceny*, which he subsequently entered a plea of guilty to in Syracuse City Court on March 28, 2002 and was sentenced to a definite term of thirty days and a one year conditional discharge.

The time period between the commission of the present drug offense, November 12, 2003, and June 6, 1991, the date of the commission of the offense of *Manslaughter in the Second Degree*, is slightly over twelve years. The exact amount of time the defendant has been incarcerated during that time period is not ascertainable due to the incomplete records before the court with respect to the bench warrants issued, when parole detainers were lodged and the time he actually served on the 2002 *Petit Larceny* conviction. However, when the total amount of time the defendant spent incarcerated which is ascertainable is taken into account, the twelve year period between the offenses is tolled by approximately six years, bringing him well within the ten year time frame for the purposes of determining whether he was convicted of an "exclusion offense."

Furthermore, although not relevant to the issue of the defendant's eligibility, it is worth noting that he is an illegal immigrant who has previously been deported from this country by the Federal Bureau of Immigration and Customs Enforcement, and who will

again be subject to deportation upon his upcoming release from state prison.

Accordingly, because the defendant is not an eligible inmate within the meaning of *Criminal Procedure Law* § 440.46, his motion is in all respects denied.

This shall constitute the Decision and Order of the Court.

Dated: December 9, 2009



HON. WILLIAM D. WALSH

ENTER

To: Eduardo Jimenez
Linda M. Campbell, Esq.
Michael E. Ferrante, Esq.