

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF MONROE

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THE PEOPLE OF THE STATE OF NEW YORK

v.

Indictment # 2002-0201

KEVIN LEE MARTIN,

Defendant.

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APPEARANCES:    Michael C. Green  
                         Monroe County District Attorney  
                         Allen Brenner, A.D.A.  
                         47 S Fitzhugh St, Ste 832  
                         Rochester, NY 14614

                         Timothy Donaher  
                         Monroe County Public Defender  
                         Roger Brazill, A.P.D.  
                         10 N Fitzhugh St  
                         Rochester, NY 14614

DECISION AND ORDER

JOSEPH D. VALENTINO, J.

Defendant moves for resentencing pursuant to CPL §440.46 and the Drug Law Reform Act of 2009 (hereinafter, "DLRA"). Defendant was convicted of a B felony drug offense and sentenced to an indeterminate term of imprisonment of 4½ to 9 years on September 18, 2003. He was released on parole and violated it three times. He is presently incarcerated and now moves to be resentenced.

**Background**

Following his sentencing on September 18, 2003, defendant was admitted to the Department of Corrections and subsequently released to parole on July 23, 2007, December 19, 2007, and again

on October 2, 2008, after having been twice returned to prison for parole violations. He next violated parole and was returned to DOCS on May 21, 2010. Prior to his most recent parole violation and incarceration, defendant was convicted of endangering the welfare of a child in Rochester City Court.

### **Discussion**

Pursuant to the DLRA, a defendant is eligible under certain circumstances for re-sentencing if he or she is in the custody of DOCS at the time of his or her application. The record reflects that defendant is in the custody of DOCS because he violated the terms and conditions of his parole release.

The Court agrees with the People that the Defendant is ineligible for re-sentencing under the DLRA because his present custodial status is a result of a violation of parole (*see, People v Rodriguez*, 68 AD3d 676 [1st Dept, 2009]). As the Appellate Division, First Department noted: "if the Defendant had not violated his parole conditions, he would not have been in the custody of [DOCS] when he moved to be resentenced, and he would therefore have been ineligible for resentencing." (*id.* citing *People v Mills*, 11 NY3d 527, 573 [2008]); *see also People v Pratts*, 74 AD3d 536 [1st Dept, 2010]).

The Court agrees that "the [DLRA] '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'" (*People v Rodriguez, supra*, quoting *People v Bagby*, 11 Misc3d 882, 887 [Sup Ct Westchester Co, 2006] ; *see also, People v Watson*, [Sup Ct, Queens Co, March 15, 2010] [Kohm, J.]; *People v Matthews*, 2010 WL 363449 [Sup Ct N.Y. Co., Jan. 19, 2010] [Zweibel, J.]). Defendant's serial parole violations render him ineligible

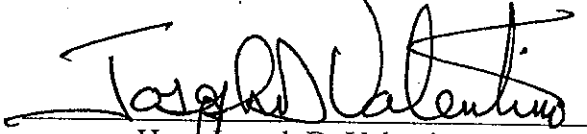
to be resentenced and to reach a contrary result would pervert the legislative intent of the DLRA and may encourage parole violations (*see, People v Pratts, supra*).

Accordingly, it is hereby

ORDERED that defendant's motion for resentencing is denied in all respects.

This constitutes the Decision and Order of the Court.

Dated: Rochester, New York  
November 29, 2010



Hon. Joseph D. Valentino  
Justice Supreme Court