

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 80

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

**DECISION & ORDER**  
**Re: Defendant's Motion**  
**For Re-sentencing**  
**Ind. Nos. 5241/99**  
**5261/99**  
**1824/00**

**RAY TAVAREZ,**

Defendant

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**ALVARADO, J.:**

**PROCEDURAL BACKGROUND**

On January 9, 2001 defendant entered a plea of guilty to the crime of Criminal Sale of a Controlled Substance in the Third Degree [ P.L. Sec 220.39(1)], a Class B felony, in full satisfaction of the charges contained in Ind. No. 5241/99. Defendant did not appear in court for his scheduled sentence on March 1, 2001 and a bench warrant for his arrest was issued. Defendant was also scheduled to appear for proceedings on his two other pending cases on that date and bench warrants were issued for those cases also.

On December 28, 2007 defendant was arrested in Florida after a routine traffic stop revealed the outstanding bench warrants. He was thereafter extradited to New York. On May 23, 2008 defendant entered a plea of guilty to the crime of Criminal Sale of a Controlled Substance in the Third Degree [P.L. Sec. 220.39(1)] in full satisfaction of the charges contained in Ind. No. 5261/99. On that same date defendant entered a

plea of guilty to the crime of Criminal sale of a Controlled Substance in the Third Degree [P.L. Sec. 220.39(1)] in full satisfaction of the charges contained in Ind. No. 1824/00. On June 23, 2008 defendant was sentenced to three concurrent indeterminate sentences of two to six years incarceration for each of his three indictments.

### **CURRENT RELEASE STATUS**

All parties agree that defendant received a merit release from NYSDOCS custody on October 13, 2009. The NYSDOCS inmate locator website indicates that defendant was released into the custody of the Federal Bureau of Immigration and Customs Enforcement (ICE).

The People aver that defendant was released to the custody of the Federal Bureau of Prisons for deportation as the result of an outstanding final deportation order issued in 1989. In their most recent written submission the People also averred that defendant had already been deported to the Dominican Republic. Defense counsel then averred in writing that as of January 27, 2010 defendant was still in federal custody as a result of a stay of the final deportation order obtained in October of 2009. At the February 25, 2010 court appearance in Part 80 both defense counsel and the People agreed that defendant was in fact still in a federal detention facility in Batavia, N.Y.

### **THE CURRENT APPLICATION**

Defendant now seeks to be re-sentenced pursuant to the re-sentencing provisions of the Drug Law Reform Act of 2009 ("DRLA -III") (Chapter 56 of the Laws of 2009). It is uncontroverted that this motion was filed on October 7, 2009, i.e. prior to his

merit release.

In an effort to facilitate and simplify the re-sentencing process, the New York State Department of Correctional Services prepared a list of those defendants who appeared to meet the qualifications for re-sentencing outlined in DLRA-III. Defendant's name appears on the aforementioned NYSDOCS list which was prepared months prior to the filing of the instant motion.

In order to meet the basic eligibility requirements for re-sentencing, a defendant must have been convicted of a B felony drug offense committed before January 13, 2005, have been sentenced to an indeterminate term, be in NYSDOCS custody, and have a maximum sentence term which exceeds three years. Defendant is not serving a sentence for an "exclusion offense" nor does he have a predicate felony conviction for an exclusion offense. See CPL. Sec. 440.46.

DLRA-III provides that an eligible defendant shall be re-sentenced pursuant to CPL Sec. 440.46 unless 'substantial justice dictates' that re-sentencing be denied.

### CONCLUSIONS OF LAW

The threshold issue in the instant motion is whether defendant is *eligible* for re-sentencing. As referred to above, *inter alia*, pursuant to CPL. Sec. 440.46 defendant must be in NYSDOCS custody.

There is no definition or explanation of the meaning of the phrase, '*in the custody of the department of correctional services*,' in any of the drug law reform acts. Nor does either side cite, and the Court is unaware of, any reported decision of an appellate court construing the phrase under C.P.L. §440.46(1) specifically. However, our appellate courts have held that a defendant becomes ineligible for resentencing under DLRA/04 and DLRA/05 once (s)he is released to parole from incarceration on the underlying sentence of imprisonment, and remains ineligible even if (s)he is subsequently re-incarcerated in a DOCS facility for violating the conditions of that parole. See, e.g.,

*People v. Mills*, 11 N.Y.3d 527, 536-537 (2008) (holding 'that once a defendant has been released to parole supervision for a class A-II drug felony conviction, he or she no longer qualifies for 2005 DLRA relief for that particular conviction'); *People v. Rodriguez*, 68 A.D.3d 676 (1st Dep't 2009) (applying the *Mills* holding in affirming the denial of a motion for resentencing under DLRA/04 made by a defendant who had been paroled and then re-incarcerated for a parole violation); *People v. McCloud*, 38 A.D.3d 1056 (3rd Dep't 2007) (affirming the denial of a motion for resentencing under DLRA/05 made by a defendant who had been paroled and then re-incarcerated for a parole violation; cited with approval in *Mills*) *lv dismissed* 8 N.Y.3d 947 (2007)

*People v. Romero*, 2010 WL 391281, 26 Misc.3d 1218(A), 2010 WL 391281 (Sup.Ct.

Bronx Co., February 4, 2010 (Newman, J.); *Contra People v. Figueroa*, 2010 WL 4549192010 (Sup. Ct. N.Y.Co., February 10, 2010) (Conviser, J.); *People v. Rivera*, NYLJ, 2/16/10, p. 18, col. 1(Benitez, J.).

Notwithstanding the split of authority catalogued above with regard to whether or not an incarcerated alleged parole violator is DLRA -III eligible, it seems clear that DLRA -III was enacted to remediate " many thousands of people serving what the legislature now views as unnecessarily lengthy sentences. " *People v. Rivera*, *supra*; see also *People v. Danton*, 2010 WL 424920 (Sup. Ct. N.Y. Co., February 02, 2010)(Kahn, J.).

In light of the clear purpose of the statute, the disposition of the instant case is clear and obvious. Notwithstanding the fact that defendant was in NYSDOCS custody when the motion was filed, and regardless of whether defendant is still in this country, it is indisputable that defendant is not in NYSDOCS custody *at the present time*. The fact that he was entitled to make the motion at the time the motion was filed, does not determine his eligibility for re-sentencing at the time the motion is considered. To put it simply, defendant was released from the custody of New York State.<sup>1</sup> Consequently, this

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<sup>1</sup>The term "in custody" has been defined as, "[i]n jail or prison." (Ballentine's Law Dictionary 606 [3rd ed.1969] ).*People v. Romero*, *supra*. DLRA-III specifies NYSDOCS custody.

court holds that defendant is not "eligible " to be re-sentenced under DLRA -III.

Therefore defendant's application is denied.

This constitutes the Decision and Order of the Court.

Dated: March 15, 2010

Bronx, N.Y.

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EFRAIN ALVARADO, A.J.S.C.