

To Be Argued By:
DAVID JUERGENS
Assistant Public Defender
Estimated Time: 15 Minutes

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FOURTH DEPARTMENT**

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-vs-

RAFAEL WALLACE,

Appellant.

BRIEF FOR APPELLANT
Monroe County Indictment Number 92-0763
Monroe County Index Number 92-9986
Docket Number KA 10-01441

TIMOTHY P. DONAHER
Monroe County Public Defender
Attorney for Appellant
BY: DAVID JUERGENS
Assistant Public Defender
Of Counsel
10 N. Fitzhugh Street
Rochester, New York 14614
(585) 753-4210

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QUESTIONS PRESENTED

1. Is a person incarcerated in state prison based upon a parole violation "in the custody of" the Department of Correctional Services for purposes of a resentencing application under CPL 440.46 (2009 Drug Law Reform Act)?

Answer below: No.

2. Is a burglary in the second degree, committed almost twenty-six years before the filing of a motion for resentence, "within the preceding ten years" for purposes of CPL 440.46 (5) (a)?

Answer below: Yes.

PRELIMINARY STATEMENT

This is an appeal from an order of the Supreme Court, Monroe County (Egan, J), rendered on May 17, 2010, denying appellant's motion for resentencing which appellant made under the authority of CPL 440.46, codified under the 2009 Drug Law Reform Act (L2009, ch 56, part AAA, § 9) (DLRA-3).

Appellant asked to be resentenced on indeterminate sentences of imprisonment (ten to twenty years) for criminal sale and criminal possession of a controlled substance in the third degree, imposed in 1993 by the Monroe County Court (Wiggins, J.).

Following denial of the motion, a notice of appeal was timely filed. Rafael Wallace's motion for leave to appeal as a poor person on the original record and typewritten briefs and the assignment of the Monroe County Public Defender, as counsel on appeal, was granted by an order of the Appellate Division, Fourth Department, entered August 25, 2010.

Mr. Wallace is currently incarcerated pursuant to the April 2, 1993 judgment. He has sought no stay.

STATEMENT OF FACTS

In 1993, a jury found Rafael Wallace guilty of two class B drug felonies (criminal sale and possession of a controlled substance in the third degree - Penal Law §§ 220.16, 220.39) for selling a “dime” (ten-dollar) bag of cocaine to an undercover police officer (*People v. Wallace*, 206 AD2d 825 [4th Dept 1994]).

On April 2, 1993, Mr. Wallace received, as a second felony offender, concurrent indeterminate sentences of 10 to 20 years (Appendix, “A” at 7).

On March 19, 2010, Mr. Wallace filed a CPL 440.46 motion for resentencing, alleging that he satisfied every statutory criteria for resentencing, including that:

- (1) he was in the custody of the department of correctional services;
- (2) he did not have a violent felony conviction within the preceding ten years.

The People filed a Re-sentencing Brief / Affidavit, arguing that Mr. Wallace was not eligible for resentencing for two reasons: (1) as a parole violator, Mr. Wallace was not “in the custody of” the department of correctional services and (2) that Mr. Wallace’s 1984 conviction for burglary in the second degree, was an “exclusion offense” as defined in CPL 440.46 (5) (a) {A 19-21}.

In response, Mr. Wallace filed a Memorandum of Law with attachments (A 68-108) and the People filed a Sur Reply / Re-sentencing Affidavit (A 109-110).

On May 17, 2010, without considering the merits of the application, the court below ruled that Mr. Wallace was not eligible for resentencing on both grounds raised by the People and dismissed Mr. Wallace’s application (A 13-14).

POINT I: BY RULING THAT A PERSON INCARCERATED IN STATE PRISON, BASED UPON A PAROLE VIOLATION, IS NOT "IN THE CUSTODY OF" THE DEPARTMENT OF CORRECTIONAL SERVICES (DOCS) AND, THEREFORE, IS NOT ELIGIBLE FOR RESENTENCING UNDER CPL 440.46 (1) (2009 DRUG LAW REFORM ACT) (DLRA-3), THE COURT BELOW, IN EFFECT, RE-WROTE THE STATUTE AND INCORRECTLY DISMISSED MR. WALLACE'S RESENTENCING APPLICATION WITHOUT CONSIDERING ITS MERITS.

A. Introduction

Under the old "Rockefeller Drug Laws" of 1973, the legislature required trial courts to impose long indeterminate sentences of imprisonment on persons convicted of certain drug felonies. Under these old laws, even the sale of a "dime" (ten-dollar) bag of cocaine - the present charge against Rafael Wallace - would require the trial court to commit the defendant to state prison.

During the past six years, however, recognizing unfairness and failure created by the old Rockefeller Drug Laws, the legislature enacted three Drug Law Reform Acts (DLRAs). In addition to drastically changing the sentencing landscape for new drug felonies, this ameliorative legislation now requires trial courts to consider applications for resentencing by persons previously convicted of certain drug felonies - class A-I (L 2004, ch 738, § 23)(DLRA-1), class A-II (L 2005, ch 643, § 1)(DLRA-2) and class B (L 2009, ch 56, part AAA, § 9)(DLRA-3) - if the statutory eligibility requirements are satisfied.

Rafael Wallace's appeal presents two issues of first impression for the Appellate Division, Fourth Department. Under Point I, the first issue concerns the

eligibility requirement contained in CPL 440.46 (1) (codified by DLRA-3) that the resentencing applicant must be “in the custody of” the department of correctional services (DOCS). The court below erroneously held that all parole violators, despite being incarcerated in a correctional facility under the jurisdiction of the department of correctional services (DOCS), are somehow not “in the custody of” DOCS.

This holding judicially re-writes CPL 440.46 to add, in effect, a statutorily non-existent “parole violator” exception to the statute, a result which not only conflicts with the plain language of all relevant statutes and the ameliorative spirit of the legislation, but also defies reality and common sense. The “parole violator” exception is bad law (The Court of Appeals has granted leave in two cases involving this identical issue. *People v Pratts*, 74 AD3d 536 [1st Dept 2010] *lv granted* __ NY3d __ [2010, Jones, J.] and *People v Paulin*, 74 AD3d 7685 [1st Dept 2010] *lv granted* __ NY3d __ [2010, Pigott, J.]).

Initially, this brief will review the relevant text of DLRA-3 (2009/class B) and the legislature’s consistent, comprehensive, unambiguous statutory framework defining a person’s service of an indeterminate sentence. Such review will demonstrate that, within this framework, the statutory phrase - “in the custody of” - has a definite meaning, free from ambiguity or confusion.

Next, this brief will review the text of CPL 440.46 (5) - which defines the DLRA-3’s new statutory exception to resentencing eligibility (an “exclusion offense”) - an exception not found in DLRA-1 or DLRA-2 - and discuss how the legislature’s glaring omission of any generic “parole violator” exception in DLRA-3 compels a

finding that incarceration for a parole violation, standing alone, is not an automatic bar to resentencing eligibility.

Finally, this brief will examine case law under the 2004, 2005 and 2009 DLRA's - explaining the critical difference between the "proximity to parole eligibility" requirement (created in DLRA-2 and abandoned in DLRA-3) and the common requirement of all DLRA's ("in the custody of" DOCS) - exposing the flawed logic and faulty reasoning behind the judicially-created "parole violator" exception (*People v Bagby*) - showing how prosecutors misuse Court of Appeals language (*People v Mills/Then*) to support the spread of the "parole violator" exception - and arguing that this bad law should not be followed by the Fourth Department.

B. The Plain Meaning of the Statute

Any judicial evaluation of a legislature's statute must start with a reading of the statute's plain language. Where the statute's words are clear and create no ambiguity, a court should not search for meaning beyond those words or from sources outside of the statutory text. Instead, consistent with the proper role of the judiciary under New York's constitution, a court's duty is to apply the statute's plain language to the particular facts of the particular case (*see Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998] ["As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof"] and, quoting *Tompkins v Hunter*, 149 NY 117, 122-23 [1896] [if the words of a statute

“have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning”]).

Adherence to the plain meaning rule prevents courts from legislating under the guise of interpretation (*People v Finnegan*, 85 NY2d 53 [1995]).

C. “In the Custody of”

Deciding that the mandatory sentencing laws for felony drug offenses, enacted by the legislature in 1973, were too harsh and draconian, the legislature changed course and enacted the DLRA of 2004 (DLRA-1), 2005 (DLRA-2) and 2009 (DLRA-3). For felony drug offenses, this ameliorative legislation reduced prison sentences, increased judicial discretion and shifted the primary focus of sentencing from incarceration to alternatives such as substance abuse treatment and rehabilitation.

In addition, with the passage of each DLRA, the legislature gave certain persons, previously convicted of class A-I, class A-II or class B drug felonies, the right to apply for resentencing. In every case, however, the legislature limited eligibility for resentencing relief to persons “in the custody of” the department of correctional services (DOCS). This “in the custody of” requirement can be viewed as a decision by the legislature, in the interests of conserving judicial resources, to limit court applications for resentencing to persons serving time in state prison - the class of persons suffering the most from unduly harsh sentences imposed under the

old Rockefeller drug laws. Making such a distinction (in-custody vs. out-of-custody) is not an irrational or absurd decision and is completely consistent with other legislative efforts to conserve judicial resources, such as taking away "limited credit time benefits" from prisoners who file frivolous lawsuits (see Correction Law § 803-b [1] [e]; [2] [c] - enacted by DLRA-3 - L2009, ch 56, part L, § 4).

The Legislature did not overlook the "out-of-custody" persons still serving unduly harsh Rockefeller drug law sentences. Currently fortunate enough to be serving their sentences under the supervision and control of the division of parole, parolees can earn a complete termination of sentence by having unrevoked parole for three years (class A drug felonies) or for two years (any other drug felony). Also conserving judicial resources in this context, the legislature does not require parolees to file a court application or to make a court appearance in order to obtain this relief. Unrevoked parole is the only requirement and complete termination of sentence is mandatory. Importantly, a parolee may violate parole on numerous occasions, but regains his eligibility for this relief whenever he regains "parolee" status (see Executive Law § 259-j [3-a] [added by DLRA-1, L2004, ch 738, § 37]; *People v Then*, 11 NY3d 527, 537 [2008]).

On the other hand, revoked parole returns the person to state prison, where, once again, the person is "in the custody of" DOCS and, while serving the indeterminate sentence in state prison, is now, once again, a member of the class of persons suffering the most from the old Rockefeller drug laws. In other words, whenever a person loses "parolee" status and regains "state prisoner" status, he loses his eligibility for mandatory termination of sentence relief (Executive Law §

259-j [3-a]), but regains his eligibility for discretionary resentencing relief under DLRA-3 (unless barred from such relief by the new “exclusion offense” exception).

For a class B felony drug offender, the following court application for resentencing may be available. Codified by the DLRA-3, CPL 440.46 (1) states that:

“Any person *in the custody of* the department of correctional services convicted of a class B felony offense defined in article [220] of the penal law which was committed prior to [01-13-05], who is serving an indeterminate sentence with a maximum of more than [3] years, may, except as provided in subdivision [5] 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” (emphasis added).

“In the custody of” - a common phrase found in numerous New York statutes - has a natural meaning. The words describe a power relationship where, for some period of time, one person or entity has the legal ability to exercise some degree of control over another thing or another person (*see e.g.* Family Ct Act § 718 [c] [“child . . . in the custody of a commissioner of social services”]; Family Ct Act § 353.3 [1] [“respondent . . . in the custody of a suitable relative”]; CPL 330.20 [8] [“defendant . . . in the custody of the [mental health] commissioner”]; CPL 725.05 [7] [“defendant . . . in the custody of the sheriff”]; Correction Law § 601 [a] [“inmate . . . in the custody of the local correctional facility”]; Correction Law § 508 [1] [sick prisoners removed from jail to a hospital remain “in the custody of said sheriff”]; Correction Law § 23 [inmates taken to a hospital remain “in the custody of the department”]; CPL 410.50 [1] [“person who is under a sentence of probation is in

the legal custody of the court that imposed it pending expiration or termination of the period of the sentence”]).

In criminal cases, where the issue is the degree and duration of legal control over a person convicted, by plea or verdict, of a crime, the legislature has created a consistent, comprehensive, unambiguous set of rules for the courts to follow. During a person’s service of an indeterminate sentence, at any point in time, these rules specify who has legal control over or “custody of” such person.

“When a sentence of imprisonment is pronounced . . . the defendant must forthwith be committed to the custody of the appropriate public servant and detained until the sentence is complied with” (CPL 430.20 [1]). “In the case of an indeterminate . . . sentence of imprisonment, commitment must be to the custody of the state department of correctional services The order of commitment must direct that the defendant be delivered to an institution designated by the commissioner of correctional services” (CPL 430.20 [2]). “[W]hen an indeterminate . . . sentence of imprisonment is imposed, the court shall commit the defendant to the custody of the state department of correctional services for the term of his or her sentence and until released in accordance with the law” (Penal Law § 70.20 [1] [a]); *see also* Correction Law § 71 [1]; § 72 [1] [confinement continues “until paroled, conditionally released, transferred to the care of another agency or released or discharged in accordance with the law”]).

While incarcerated in state prison, a person is under the highest degree of control permitted by state law. The legislature created the department of correctional services (DOCS) (Correction Law § 5) and set forth specific rules for the

department to follow while exercising control over the inmates (see Correction Law Article 4). In general, the type of correctional facility and its security classification (minimum, medium, or maximum) determines the degree of control exercised.

By express legislative design, however, the custody of (or control over) a state prisoner may change at some point during the prisoner's service of an indeterminate sentence. Penal Law § 70.00 (1) defines an indeterminate sentence as a *single* sentence of imprisonment with a "maximum term" as defined in subdivision (2) and a "minimum period of imprisonment" as defined in subdivision (3). Felony classification pursuant to Penal Law § 55.05 (1) determines the permissible range of the minimum period and the maximum term of the sentence.

With an indeterminate sentence, "[r]elease on parole shall be in the discretion of the state board of parole, and such person shall continue service of his sentence . . . while on parole, in accordance with and subject to the provisions of the executive law" (Penal Law § 70.40 [1] [a]). "Persons . . . paroled . . . from an institution under the jurisdiction of the department of correctional services . . . shall, while on . . . parole . . . be in the legal custody of the division of parole until expiration of the maximum term or period of sentence . . . or return to the custody of the department of correctional services, as the case may be" (Executive Law § 259-i [2] [b]).

Again, by express legislative design, the custody of (or control over) a parolee may change at any point during the parolee's continued service of an indeterminate sentence and may transfer back to the department of correctional services. Prior to release on parole, a person must sign a contract with the division

of parole (a certificate of release) agreeing to follow specific conditions of release. Many of these conditions require the parolee to abide by various “technical” rules - to refrain from conduct otherwise lawful (i.e., permissible conduct for a non-parolee) (leaving New York, etc.) or to engage in conduct otherwise non-mandatory for a non-parolee (making office reports, etc.). Upon release, the parolee gains or regains eligibility for mandatory termination of sentence (Executive Law § 259-j [3-a]).

In Executive Law § 259-i, the legislature set forth a detailed set of rules which must be followed by the division of parole during the parole revocation process. At the conclusion of the process, custody of the person will either remain with the division of parole or return to the department of correctional services. “When a person is alleged to have violated the terms of . . . parole and the state board of parole has declared such person to be delinquent, the declaration of delinquency shall interrupt the person’s sentence as of the date of delinquency and such interruption shall continue until the return of the person to an institution under the jurisdiction of the state department of correctional services” (Penal Law § 70.40 [3]).

In addition to incarceration (regaining “state prisoner” status), revoked parole causes the former parolee to lose current eligibility for mandatory termination of sentence (Executive Law § 259-j [3-a]) and to forfeit any good behavior “merit time allowances” that were previously earned (Correction Law § 803 [5]). However, as a state prisoner (“in the custody of” DOCS), the person, if otherwise eligible, may now seek discretionary resentencing relief under DLRA-1 (class A-1) or DLRA-3

(class B), but not DLRA-2 (class A-II) (based upon application of the “proximity to parole eligibility” rule). Notably, DOC’s Office of Sentencing Review concurs with this conclusion. When identifying inmates for DLRA-3 resentencing, DOCS makes no distinction between inmates incarcerated, but never paroled, and inmates incarcerated based upon a violation of parole. Although not binding on this Court (see e.g. *People v Ricardo Rivera*, Sup Ct, NY County, April 30, 2010, Kahn, J., Ind. No. 06288/01, p.14-15), DOCS’s opinion should be given significant weight as the administrative agency charged with executing the laws relating to state inmates.

In sum, the plain language of the relevant statutes - defining a person’s service of an indeterminate sentence - clearly expresses that a person incarcerated in state prison, following a parole violation, is “in the custody of” the department of correctional services. Whether the text of CPL 440.46 (1) is read alone or in conjunction with other relevant provisions of this consistent, comprehensive, unambiguous statutory framework (the criminal procedure law, penal law, correction law and executive law), no other answer makes sense.

D. Expressio Unius Est Exclusio Alterius

In reality, the permanent blanket exclusion of all parole violators from resentencing eligibility under CPL 440.46 is an improper, judicially-created exception to the statute’s application. The words “in the custody of” do not distinguish between pre-parole and post-parole incarceration. If the legislature had intended to make all parole violators permanently ineligible for resentencing relief under either DLRA-1 (2004/class A-II) or DLRA-3 (2009/class B), then it would have

said so expressly in the statute(s). The complete absence of any generic “parole violator” exception in the statutory text of either statute is a glaring omission.

Additionally, with DLRA-3, unlike DLRA-I or DLRA-II, the legislature specifically articulates particular groups of offenders that it wished to exclude from resentencing consideration. CPL 440.46 (5) contains a detailed listing of carefully considered exclusions, creating a strong inference that the legislature intends to bar only those specifically mentioned and to include all others, such as parole violators (as a generic category) who were not expressly excluded.

The statutory construction maxim - *expressio unius est exclusio alterius* - states that “where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded” (McKinney’s Cons Laws of NY, Book 1, Statutes § 240) (McKinney’s Statutes).

Under this rule of statutory construction, a court, once again, reads the plain language of a statute, searching for any express exceptions to the statute’s application. Where express exceptions appear in a statute, a court should interpret such statute to preclude any additional exceptions. In other words, where the legislature expressly excludes specific persons from a statute’s application, a presumption arises that the legislature did not intend to exclude any other persons. Where the exceptions or exclusions appear in a carefully-drafted statute, rather than a loosely-drawn one, “the inference that omitted particulars were intended to be excluded is stronger” (*People v Figueroa*, 27 Misc 3d 751, 771 [Sup Ct, NY County 2010, Conviser, J.][citing commentary in McKinney’s Statutes § 240]).

DLRA-3's express exception to resentencing eligibility is found in the carefully-drafted definition of an "exclusion offense." CPL 440.46 (5) provides that

"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 . . . within the preceding ten years . . . 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 [803 (1) (d) (ii)] 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" (emphasis added).

Clearly, by its express language, CPL 440.46 (5) does not include a generic "parole violator" exception. This omission should end the inquiry.

Indeed, the legislature knew how to draft language specifically excluding parole violators, as a group, from the application of a statute. In the same session law chapter enacting DLRA-3, the legislature specifically excluded parole violators, as a group, from eligibility for "limited credit time benefits." Correction Law § 803-b (1) (b) (ii) (C) provides that:

"[A]n *inmate shall not be eligible* for the credit defined herein if he or she is returned to the department pursuant to a *revocation of . . . parole . . .* and has not been sentenced to an additional indeterminate . . . term of imprisonment" (emphasis added).

The legislature's use of this specific language (revocation of parole) in the same chapter of legislation that enacted the DLRA-3 is conclusive proof that the legislature did not intend to exclude parole violators, as a group, from CPL 440.46 resentencing eligibility. Further, in Correctional Law §803-b (1) (a), the legislature

defines an “eligible offender” for “limited credit time benefits” as meaning “a person under the custody of the department.” Later, in Correction Law §803-b (1) (b) (ii) (C), the legislature specifically excludes some parole violators (those returned to state prison based solely upon the parole violation) from the general definition of “eligible offender.” Clearly, by this express language, the legislature, once again, recognizes that parole violators are “in the custody of” DOCS.

The key point to be made here is that, if the legislature had intended to exclude “parole violators,” as a group, from resentencing under DLRA-3 (2009/class B felonies), then the legislature would have expressly stated this exception somewhere in the statutory text. No blanket exception for “parole violators” can be found in the words of the statute. Under the particular facts of a particular case, parole violation charges may involve the commission of an “exclusion offense,” rendering the parole violator ineligible for resentencing under the explicit language of CPL 440.46 (5). In such a case, the trial court would examine the reasons for the parole violation and determine whether an “exclusion offense” exists. But the total permanent ban of all parole violators, even those incarcerated for technical violations (missing parole appointments, curfew violations, alcohol possession, failure to report an address change, etc.), from resentencing eligibility under DLRA-3 (2009/class B) is an act of judicial legislation, simply re-writing the statute to include a generic “parole violator” exception that was not included by the legislature.

E. Ameliorative Nature of the DLRAs

The DLRA's are remedial statutes and should be given as broad a meaning as its language allows (*see McKinney's Statutes* § 321 ["Generally, remedial statutes are liberally construed to carry out the reforms intended and to promote justice"]; *see also, Asman v Ambach*, 64 NY2d 989, 990 [1985] [explaining that laws that are remedial in nature should be liberally construed to spread the law's benefits as widely as possible]).

Found in every DLRA, the "in the custody of" requirement is a recognition that the ones suffering the most from the draconian sentences imposed under the Rockefeller Drug Laws are those persons who are incarcerated in state prison. Whether those persons are sitting in prison before or after a release to parole supervision does not change the fact that they are incarcerated under sentences that have been deemed too harsh by the legislature, precisely the situation contemplated by the legislature for allowing them to seek relief.

A blanket exclusion for parole violators would deny the possibility of relief to those former parolees who would no longer be on parole except for the excessive sentence.

F. The "Parole Violator" Exception - An Overview

Courts holding, erroneously, that someone in state prison for a parole violation is *not* "in the custody of" DOCS - must use the qualifying phrase "within the meaning of" the statute. These courts cannot base their holdings on the plain statutory text, because the legislature's words, defining a person's service of an

indeterminate sentence, require a contrary conclusion. Instead, these courts permanently bar “parole violators,” as a group, from applying for discretionary resentencing relief under DLRA-1 and DLRA-3 - relying upon several arguments concocted by prosecutors that boil down to opinions or feelings: (a) that, because a parolee violated the conditions of release, the parolee does not “deserve” resentencing relief; (b) that a parolee should not receive a “reward” or “windfall” for bad behavior; (c) that it would be extremely “unfair” to the compliant parolees and put the non-compliant parolee in a “better” position; (4) that a parolee will be “motivated” to violate parole and return to state prison, (5) that allowing parole violators to apply for discretionary resentencing relief will somehow reduce the effectiveness of Executive Law §259-j (3-a) relief (mandatory termination of sentence), etc. Such arguments have no relevance on the threshold question of eligibility. The legislature, not the court, defines the eligibility requirements for resentencing. If the eligibility requirements are met, then the application must be heard. Ultimately, the court, exercising sound judicial discretion, will make the final resentencing decision, but only after hearing the facts of the application.

The rise of the judicially-created “parole violator” exception to DLRA resentencing eligibility begins with a wrongly-reasoned case involving an unusual set of facts - *People v Bagby* (11 Misc 3d 882 [Sup Ct, Westchester County 2006, Bellantoni, J.]). Causing needless confusion that continues to this day, *Bagby* takes a conclusion (parolees are not eligible for resentencing) derived from the “proximity to parole eligibility” rule - a requirement found *only* in DLRA-2 (2005/class A-II) - and wrongly grafts that conclusion onto the general DLRA requirement (“in the custody

of” DOCS). As a result, *Bagby* creates bad law - the “parole violator” exception to resentencing eligibility under DLRA-1 (2004/class A-I).

In *People v Mills / People v Then* (11 NY3d 527 [2008]), two cases involving DLRA-2 (2005/class A-II), the Court of Appeals employs language in the decision (dicta involving “fresh crimes,” etc.) that is seized upon and contorted by prosecutors to support and spread *Bagby’s* “parole violator” exception (a) to other cases under DLRA-1 (2004/class A-I) and (b) to cases under DLRA-3 (2009/class B). Although many trial courts have held that parole violators are not automatically barred from resentencing under DLRA-1 or DLRA-3 (see *People v Jose Figueroa*, 27 Misc 3d 751 [Sup Ct, NY County 2010, Conviser, J.]; *People v Joseph Rivera*, 26 Misc 3d 1236(A), 2010 WL 936218 [Sup Ct, Bronx County 2010, Benitez, J.]; *People v Jerry Williams*, Sup Ct, NY County 2009, Pickholz, J., Ind. #s 9280/99, 5364/04; *People v Raheem Taylor*, Sup Ct, Bronx County 2009, Villegas, J., Ind. #s 5045/00, 5399/00; *People v Robert Haulsey*, Sup Ct, NY County 2009, Allen, J., Ind. #5780/99 [cases not available on Westlaw are attached to this brief]), the “parole violator” exception has spread to the Appellate Division, First Department.

In *People v Rodriguez* (68 AD3d 676 [1st Dept 2009]), a case under DLRA-1 (2004/class A-I), the First Department follows the “parole violator” exception, quoting *Bagby’s* “rationale” without discussion and citing the prosecutor’s contorted reading of *Mills/Then*. In *People v Pratts* (74 AD3d 536 [1st Dept 2010]), the court, simply repeating the *Rodriguez* language and ignoring DLRA-3’s new

“exclusion offense” exception (CPL 440.46 [5]), extends the “parole violator” exception to DLRA-3 (2009/class B).

G. Genesis of the “Parole Violator” Exception - *People v Bagby*

As noted earlier, *People v Bagby* involves an unusual set of facts. In 1979, for a class A-I drug felony, Vernon Bagby (patient zero) received an indeterminate sentence of 15 years to life. In 1981, the governor commuted Mr. Bagby’s sentence to 8 1/3 years to life. In early 2005, Vernon Bagby applied for resentencing under DLRA-1 (2004/class A-I) which states:

“[A]ny person *in the custody of* the department of correctional services convicted of a *class A-I felony* offense defined in *article 220* of the penal law which was committed prior to the effective date of this section, and sentenced thereon to an *indeterminate* term of imprisonment with a *minimum period not less than [15] years* pursuant to the provisions of the law in effect prior to the effective date of this section, may, upon notice to the appropriate district attorney, apply to be resentenced” (L 2004, ch 738, § 23)(emphasis added).

On October 29, 2005, while Mr. Bagby’s resentencing application was still pending, DLRA-2 became effective. Mr. Bagby petitioned for relief under this statute as well. DLRA-2 (2005/class A-II) states:

“Notwithstanding any contrary provision of law, any person *in the custody of* the department of correctional services convicted of a *class A-II felony* offense defined in *article 220* of the penal law which was committed prior to the effective date of this section, and was sentenced thereon to an *indeterminate* term of imprisonment with a *minimum period not less than [3] years* pursuant to provisions of the law in effect prior to the effective date of this section, and who is *more than [12] months* from being an *eligible inmate* as that term is defined in [851 (2)] of the correction law, and who meets the eligibility requirements of [803 (1) (d)] of the correction law may, upon notice to the appropriate district attorney, apply to be resentenced in accordance with section 70.71 of the penal law in the

court which imposed the original sentence” (L. 2005, ch 643, §1)(emphasis added).

Under the facts, the *Bagby* court correctly held that Vernon Bagby was not eligible for resentencing under either statute. First, Mr. Bagby was not eligible under DLRA-1 (2004/class A-I), because his commuted sentence (8 1/3 to life) was less than the statutory requirement (15 to life). Second, Mr. Bagby was not eligible for resentencing under DLRA-2 (2005/class A-II), because (even assuming arguendo that a commuted class A-I felony may properly be treated as a class A-II felony) Mr. Bagby did not satisfy the “proximity to parole eligibility” rule (*Bagby*, 11 Misc 3d at 890).

The “proximity to parole eligibility” rule - a requirement found *only* in DLRA-2 (2005/class A-II) - combines of the “eligible inmate” definition in Correction Law § 851 (2) (eligible for release on parole within two years) and DLRA-2's requirement that the person must be “more than twelve months from being an eligible inmate.” Thus, to satisfy DLRA-2's unique “proximity to parole eligibility” requirement, a person must be *more than three years* away from being eligible for release on parole. If a person is eligible for parole in *less* than three years, then such person is *not* eligible for resentencing under DLRA-2 (2005/class A-II). Under the “proximity to parole eligibility” rule, the key point to understand is that, because parole hearings must be scheduled every two years, any person who has been before the parole board, whether or not parole is granted, will never be more than two years away from his or her next parole hearing and, therefore, will never be

eligible for DLRA-2 resentencing (see Executive Law § 259-i [2] [a]; *People v Mills*, 11 NY3d 527, 537 [2008]). Thus, based upon his prior appearance before the parole board (his actual release to parole was irrelevant), Mr. Bagby simply did not meet, and never again could meet, the “proximity to parole eligibility” requirement, because he would always be within two years of parole eligibility. DLRA-2 requires a person to be more than three years away.

At this point, the *Bagby* court simply could have stopped and denied resentencing based upon the above-stated rationales. Instead, the court creates (for unknown reasons) and addresses another “issue” - whether Mr. Bagby, as a parole violator, was “in the custody of” DOCS. Once again, even on this “custody” issue, the court simply could have stopped and denied resentencing based upon the plain meaning of some statutes. Clearly, although apparently unrecognized by the *Bagby* court, Mr. Bagby, as a parolee participating in the Willard Drug Treatment Program, was “in the custody of” the division of parole, not DOCS (see Executive Law § 259-i [2] [b]; Correction Law § 2 [20]; § 70 [1] [c] [“a drug treatment campus . . . used to provide intensive drug treatment services for parolees and certain parole violators, shall not be deemed to be a correctional facility”], see also Correction Law § 120 [2]; CPL 410.91; www.docs.state.ny.us/directives/0027.pdf).

The *Bagby* court does not stop and goes further than necessary to decide the case. As a result, *Bagby*’s creation and entire discussion of a generic “parole violator” exception to DLRA-1 resentencing eligibility should be considered as dicta (see *People v Figueroa*, 27 Misc 3d at 766 n7). In a wrongly-reasoned decision,

Bagby states its new rule: a parole violator “is not in the custody of the Department of Correctional Services within the meaning of the act, and therefore he is not a person eligible for resentencing” (*Bagby*, 11 Misc 3d at 886).

H. The *Bagby* “Analysis”

While claiming to base its conclusion “upon a plain reading” of DLRA-1, the *Bagby* court fails to identify any specific text in any statute that states, or even remotely implies, that a person incarcerated in state prison for a parole violation is somehow “not” in the custody of DOCS. Instead, *Bagby* attempts to find some legislative history - as a substitute for the missing words - and attempts to explain how, “within the meaning of the act,” a person incarcerated in state prison is not really in the custody of DOCS. During the course of its analysis, the *Bagby* court continues to make mistakes.

From the beginning, *Bagby* focuses on matters beyond the plain words of any statute. *Bagby* cites one principle of statutory construction: “[i]n ascertaining the purpose and applicability of a statute, it is proper to consider the legislative history of the act, the circumstances surrounding the statute’s passage, and the history of the times” (*Bagby*, 11 Misc 3d at 886 [quoting McKinney’s Statutes § 124]). However, other rules of statutory construction instruct that *Bagby*’s principle operates when the text of a statute contains some ambiguity or conflicts with the text of other relevant statutes (see McKinney’s Statutes § 76 [“Where words of a

statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation”]).

Even assuming *arguendo* that looking beyond the statutory text is permissible (which, in our case, it is not), *Bagby* fails to uncover any legislative support for its new rule. The legislative history discussion reveals the ameliorative purpose of DLRA-1 (2004/class A-I) (to relieve certain drug offenders from harsh, mandatory sentences, including maximum terms of life) and also acknowledges that drug addiction often leads to the commission of drug offenses (*Bagby*, 11 Misc 3d at 886-889). Importantly, however, this legislative history discussion contains absolutely no reference to “parole,” a “parole violation,” an “original sentence,” the service of an “original prison sentence,” the service of a “term of imprisonment” or the statutory phrase “in the custody of.”

Undeterred, *Bagby* states:

“Ever mindful of the foregoing, this court nonetheless concludes that the Rockefeller Drug Law Reform 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. Neither the act itself, nor the comments of the Legislature in enacting said act, indicates that the ability to apply for resentencing was intended to apply to anyone *other than those serving their original sentence*”

(*Bagby*, 11 Misc 3d at 887)(emphasis added).

Using this false statement of “legislative intent,” *Bagby* creates the “parole violator” exception. The language above has been quoted, without further analysis, by a number of courts, including the First Department, but proper analysis completely undermines *Bagby*'s conclusion.

The *Bagby* court states its conclusion very carefully, in such a manner that, at first glance, the circular reasoning is not readily apparent. When searching the statutory text and legislative history, *Bagby* looks for affirmative statements that DLRA-1 resentencing eligibility applies to parole violators. Not satisfied with the plain meaning of the statutory words (“in the custody of”), *Bagby* looks for something somewhere stating that DLRA-1 resentencing applies not only to persons in state prison who have never been paroled, but also to persons paroled, but then reincarcerated in state prison on a parole violation. Finding no such positive statement, *Bagby* circles back to its original assumption, holding that DLRA-1 resentencing applies only to persons in state prison who have never been paroled.

Stated more clearly, *Bagby* reasoned in the following circle: (1) assume that persons serving their “original sentence” (whatever that means - more later) are eligible for DLRA-1 resentencing; (2) examine the act itself and the legislative comments; (3) determine that neither the act nor the comments specifically state that “parole violators” are eligible for DLRA-1 resentencing; (4) ignore that neither the act nor the comments specifically state that “parole violators” are not eligible for DLRA-1 resentencing; and finally (5) conclude that “silence” on the “parole violator” issue (an issue concocted by the *Bagby* court itself) means that the legislature did not intend DLRA-1 resentencing “to apply to anyone *other than* those serving their *original sentence*” (*Bagby*, 11 Misc 3d at 887) (emphasis added).

The point missed (or perhaps ignored) by *Bagby* is that “silence” on the parole violator “issue” has a simple explanation - DLRA-1 (2004/class A-I) - just like

DLRA-3 (2009/class B) - makes no distinction for purposes of resentencing eligibility between individuals who are in state prison (serving an indeterminate sentence) who have never been paroled and those who are in state prison (serving an indeterminate sentence) after being found in violation of parole. DLRA-2 (2005/class A-II) is the only resentencing statute where this distinction has any relevance. However, as will be explained, even with DLRA-2, this distinction (“pre-parole” vs. “post-parole” incarceration) is not the critical resentencing eligibility factor. This distinction is merely a result or by-product produced from application of DLRA-2’s unique “proximity to parole eligibility” rule (all parole violators are less than three years away from parole eligibility).

In a further attempt to bolster its “legislative intent” conclusion, *Bagby* cites a legislative memo, estimating that DLRA-1 resentencing would affect roughly 400 inmates, and a criminal defense attorney’s memo, estimating the number to be approximately 450 (*Bagby*, 11 Misc 3d at 888-889). Without explaining the 50 inmate difference, discussing how these estimates were made or what they really mean, *Bagby* uses these numbers to speculate about legislative intent and argues, once again, that legislative silence concerning parolees is somehow a strength, rather than a glaring weakness. Most importantly, *Bagby* makes no showing that these numerical estimates did not include one or more parole violators - continuing to serve their indeterminate sentences on class A-I drug felonies following a violation of parole (*see also People v Figueroa*, 27 Misc 3d 751, 763-765 [Sup Ct, NY County 2010, Conviser, J.]).

Finally, *Bagby* attempts to bolster its new “parole violator” exception with an incredible hypothetical: that if parole violators are eligible for DLRA-1 resentencing, then parolees would intentionally violate “their parole so that they may reap the benefits of the new sentencing scheme - an illogical result not intended by the Legislature. Clearly, the Legislature did not intend to *foster lawlessness*” (*Bagby*, 11 Misc 3d at 887) (emphasis added). *Bagby*’s legislative history discussion reveals absolutely no legislative concern for the occurrence of this strange and illogical hypothetical.

The legislature has created many incentives for a parolee not to violate parole. First and foremost, he will be incarcerated and possibly returned to state prison. The legislature has designed a detailed statutory framework for the determination and punishment of parole violations. Second, the parolee loses his current opportunity to obtain a complete termination of his sentence. After two years of unrevoked parole, the division of parole must terminate the sentences for class B drug felonies (a “state prisoner” regains eligibility for this mandatory relief when he regains “parolee” status) (Executive Law § 259-j [3-a]). Third, the parolee forfeits any good behavior “merit time allowances” that were previously earned (Correction Law § 803 [5]). Fourth, the court may not grant the resentencing application. Resentencing is not automatic (CPL 440.46 [3] incorporates the same standard of review contained in L2004, ch 738, § 23 [grant resentencing “unless substantial justice dictates that the application should be denied”]). Certainly the prosecutor will argue that the parole violation itself should be a reason to deny resentencing.

With respect to the “intentional” parole violator, *Bagby* imagines a problem that would never exist in the real world (*see also People v Figueroa*, 27 Misc 3d 751, 762-763 [Sup Ct, NY County 2010, Conviser, J.]).

I. “Original Sentence” & Vernon Bagby

Bagby repeatedly misuses the phrase “original sentence” - revealing a fundamental error in the court’s analysis. When stating its unfounded conclusion of legislative intent, *Bagby* equates “original sentence” - sometimes “original prison sentence” or “term of imprisonment” - with the statutory phrase “minimum period of imprisonment” (*see* Penal Law § 70.00 [1], [3]).

“Clearly, the purpose of the Rockefeller Drug Law Reform Act is to provide those defendants who presently are serving their original prison sentence with a mechanism for resentencing . . . the Rockefeller Drug Law Reform Act was not intended to apply to those offenders who have served their term of imprisonment . . . Neither the act itself, nor the comments of the Legislature in enacting said act, indicates that the ability to apply for resentencing was intended to apply to anyone other than those serving their original sentence”

(*Bagby*, 11 Misc 3d at 887).

Bagby’s conclusion - that DLRA-1 resentencing does not apply to parole violators, that it only applies to those “serving their original sentence” - provokes defense attorneys to ask - if not the original sentence, then what is the parole violator serving? - a new sentence? - a second sentence? - an un-original sentence? Clearly, *Bagby* is just wrong in both its terminology and its analysis. An incarcerated parole violator is serving the “original sentence.”

When employing the phrase “original sentence” in the DLRA’s, the legislature states that, if eligible, a person with a felony drug conviction may “apply to be resentenced . . . in the court which imposed the original sentence” (L2004, ch 738, § 23; L 2005, ch 643, § 1; CPL 440.46 [3]). Under every DLRA, resentencing involves the conversion of an old Rockefeller indeterminate sentence (the “original sentence”) into a new determinate sentence. Contrary to *Bagby’s* faulty analysis, the phrase “original sentence” has absolutely nothing to do with a person’s service of a “minimum period of imprisonment.”

In a footnote that reveals a key factor in the court’s analysis, *Bagby* further “bolsters” its conclusion that resentencing relief under DLRA-1 (2004/class) is not available to parole violators:

“The legislation concerning A-II defendants, which was enacted after the provision concerning A-I defendants, and which clearly provides relief to defendants *incarcerated on their original sentence*, lends further support to the conclusion that the legislation concerning A-I felony offenders is inapplicable to parolees. When the A-I and A-II resentencing provisions are read in conjunction, it is clear, based upon the legislative history and the plain wording of the legislation, that the Legislature intended to provide only those defendants incarcerated on their original prison sentence with a mechanism for resentencing”

(*Bagby*, 11 Misc 3d at 891 n 7 [emphasis in original]).

This key footnote unlocks the riddle of the *Bagby* case. *Bagby* wrongly concludes that if the legislature intended to permanently ban parole violators under DLRA-2 (as a consequence of the application of the “proximity to parole eligibility” rule), then the legislature must have intended the same result with DLRA-1. Thus, by reading the two statutes “in conjunction” (DLRA-1 and DLRA-2), *Bagby* takes a

DLRA-2 conclusion - that “parole violators” are not eligible for resentencing relief (a valid conclusion under DLRA-2’s unique “proximity to parole eligibility” rule); looks backward in time; and wrongly grafts that DLRA-2 conclusion onto DLRA-1 - creating bad law (the “parole violator” exception). *Bagby* attaches great importance to the timing of the legislation, wrongly concluding that legislative intent to permanently bar certain persons from resentencing under DLRA-2 (2005/class A-II) establishes an earlier legislative intent to permanently bar parole violators from resentencing under DLRA-1 (2004/class A-I).

Significantly, when enacting DLRA-3 (2009/class B), the legislature abandons the “proximity to parole eligibility” rule, showing an intent to remove “parole violator” status as a bar to resentencing eligibility. Further, the legislature added an express statutory exception to DLRA-3 resentencing eligibility (an “exclusion offense”) (CPL 440.46 [5]) (not found in DLRA-1 or DLRA-2), which demonstrates a legislative intent to deny DLRA-3 resentencing eligibility based upon the commission of an “exclusion offense,” but not based upon the judicially-created category of “parole violator.”

J. “Fresh Crimes,” Hypotheticals, & Jose Then

To hasten the spread of the “parole violator” exception, prosecutors take language from two Court of Appeals cases involving DLRA-2 (2005/class A-II) (*People v Donald Mills*, *People v Jose Then*, 11 NY3d 527 [2008]) and misapply that language to cases involving DLRA-1 (2004/class A-I) and DLRA-3 (2009/class B).

Contrary to prosecution arguments, however, “fresh crimes” and other language in *People v Then* does not support excluding parole violators from resentencing eligibility under either DLRA-1 or DLRA-3.

In 1999, for a class A-II drug felony, Jose Then received an indeterminate sentence (5 years to life). Several years later, he was released to parole supervision. While on parole, he committed another class A-II drug felony. In 2003, as a second felony offender, Jose Then received an indeterminate sentence (6 years to life). Based upon the new conviction, his parole was revoked.

After DLRA-2 (2005/class A-II) became law, Jose Then applied for resentencing on both his 1999 and 2003 class A-II drug felony convictions. The trial court granted both applications and resented Mr. Then to determinate sentences on each conviction. The People appealed, challenging resentencing on the 1999 conviction, but not on the 2003 conviction (the “fresh crime”).

Reversing the trial court, the Appellate Division held that “[u]nder the 2005 DLRA, a defendant applying for resentencing must be more than three years away from parole eligibility When defendant applied for resentencing in 2005, he did not qualify, because he had already been paroled” (*People v Then*, 47 AD2d 404 [1st Dept 2008] [citations omitted]). In other words, as a former parolee on the 1999 conviction (now entitled to a parole hearing every two years), Mr. Then, did not, and never could, satisfy the “proximity to parole eligibility” rule. The Appellate Division vacated the new determinate sentence and re-instated the old indeterminate sentence for Mr. Then’s 1999 conviction. The Court of Appeals affirmed.

Clearly, under the statutory criteria of the DLRA-2 (2005/class A-II), Mr. Then was eligible for resentencing on his 2003 conviction (the “fresh crime”), because, based upon the length of his sentence (6 years to life), he was more than three years away from parole eligibility. However, Mr. Then also wanted to be resentenced on the 1999 conviction (5 years to life). He argued that, even though he had been previously paroled on the 1999 conviction, he was no longer an “eligible inmate” for parole on the 1999 conviction, because the length of his “fresh crime” sentence (6 years to life on the 2003 conviction) caused his actual physical release date from prison to be more than three years away. In other words, Mr. Then wanted to rely upon his new, unrelated, longer-than-three-year state prison sentence on the 2003 conviction to avoid the “proximity to parole eligibility” rule for his 1999 conviction.

In widely-quoted dicta, the Court of Appeals responded to Mr. Then’s argument, with a four-sentence commentary:

“This would create illogical, if not perverse, results. For example, if Then had *not* broken the law while on parole, he would clearly be ineligible for resentencing on the 1999 conviction under the 2005 DLRA (he would not have been in DOCS’s custody, for one thing), leaving him with an indeterminate lifetime sentence. Then’s argument boils down to the proposition that, solely because he is a repeat offender, he qualified for relief (possible resentencing to a determinate term for the 1999 conviction) otherwise beyond his reach. Surely the Legislature did not intend fresh crimes to trigger resentencing opportunities”

(*People v Then*, 11 NY3d 527, 537 [2008] [emphasis in original]).

Prosecutors remove this language (dicta) from its proper context (DLRA-2) and misapply the language to DLRA-1 and DLRA-3, distorting the meaning and inflating the importance of the words.

The “illogical, if not perverse” result that concerned the Court of Appeals arises from the crucial fact that, under the “proximity to parole eligibility” rule, Jose Then would never again be eligible for DLRA-2 resentencing relief on the 1999 conviction. Because parole hearings must be held every two years (Executive Law § 259-i [2] [a]), Mr. Then’s first appearance before the parole board on the 1999 conviction forever barred him from DLRA-2 resentencing. After that first parole board appearance, Mr. Then could never again be more than three years away from parole eligibility on the 1999 conviction.

With this crucial fact in mind, the Court of Appeals refused to allow Mr. Then to circumvent DLRA-2’s “proximity to parole eligibility” rule by committing a “fresh crime” (in Mr. Then’s case, a new felony with a longer-than-three-year prison sentence). Stated more broadly, an “illogical, if not perverse” result would occur if the Court were to allow Mr. Then to defeat the plain language of the statute (permanent ineligibility for DLRA-2 resentencing) by any subsequent action, including criminal behavior (“fresh crimes”). Indeed, the result sought under Mr. Then’s rejected theory appears even more “illogical, if not perverse” when one considers that a shorter prison sentence for his “fresh crime” (less than three years) would have been too short for eligibility purposes.

Importantly, the Court of Appeals does not rule that Mr. Then was barred from resentencing under DLRA-2 (2005/class A-II) because he was a parole violator or because he was not “in the custody of” DOCS on the 1999 conviction (“within the meaning of the statute” or otherwise). Instead, the Court holds that, even though Mr. Then was “in the custody of” DOCS on the 1999 conviction, he was still eligible

for parole in less than three years on that specific charge and therefore was not eligible for resentencing on that specific charge under the “proximity to parole eligibility” rule (*People v Then*, 11 NY3d 527, 537 [2008]) (“We therefore hold 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”).

When viewed in proper context, as a judicial response to an unpersuasive argument involving a rare set of facts, the Court’s “fresh crimes” statement simply describes the legislature’s intent concerning proper application of the “proximity to parole eligibility” rule and, therefore, must be strictly confined to DLRA-2 cases. The Court could have stated, more broadly, that the legislature did not intend any subsequent conduct by a class A-II drug offender to defeat the plain language of DLRA-2, but the Court, focusing on Mr. Then’s specific argument, describes the subsequent conduct (the 2003 conviction) as a “fresh crime” (compared to the 1999 conviction). Notably, to even raise his argument, Jose Then’s “fresh crime” needs to be special - a felony with a more-than-three-year sentence - not a felony with a lesser sentence, not a misdemeanor crime, not a technical parole violation.

The limited application of the Court’s “fresh crimes” language (strictly confined to application of DLRA-2’s “proximity to parole eligibility” rule) becomes even more apparent when one considers that Jose Then was resentenced to a determinate sentence on the 2003 conviction. Without question, Mr. Then was “in the custody of” DOCS. The conviction was a “fresh crime” and the “fresh crime” did trigger a resentencing opportunity. The critical difference is that, in one case (the

1999 conviction), Mr. Then was attempting to defeat the plain language of DLRA-2 (the “proximity to parole eligibility” rule) and, in the other case (2003 conviction), Mr. Then was applying the plain language of DLRA-2 (Mr. Then met the statutory criteria for resentencing eligibility). Similarly, Rafael Wallace asks the Court to apply the plain language of DLRA-3 (Mr. Wallace also meets the statutory criteria).

The Court’s other comment that, hypothetically, “if Then had not broken the law while on parole . . . he would not have been in DOCS custody” is a true statement. Stating the logic in general terms for the sake of clarity, the hypothetical boils down to a statement: “if A . . . , then B” For example, if a person commits a crime, then the person goes to prison. Alternatively, if a person does not commit a crime, then the person does not go to prison. Using the Court’s hypothetical, if Jose Then did not break the law (commission of a new felony while on parole), then Jose Then would not be in DOC’s custody. Under those assumed facts, Jose Then would not be eligible for resentencing under any DLRA, because we assume that Mr. Then is not “in the custody of” DOCS. But, in reality, Jose Then did break the law and, therefore, he is “in the custody of” DOCS.

When stated as an actual occurrence (not as a hypothetical), the Court’s comment implicitly recognizes that Mr. Then, because he did commit a new felony while on parole, he was “in the custody of” DOCS. Jose Then’s resentencing eligibility problem was not the general DLRA “in the custody of” requirement, but rather, it was DLRA-2’s “proximity to parole eligibility” rule. Clearly, any argument that the Court’s (“if . . . , then”) language stands for, or even remotely supports,

the proposition that a parole violator in state prison is somehow “not” in the custody of DOCS is false and misleading.

But this argument has been raised by prosecutors in various forms. The basic thrust of these arguments is that, if the person did not engage in the bad conduct in the first place (a violation of the conditions of parole), then the person would not be in state prison. Such a hypothetical could be expanded to cover the bad behavior of any defendant in the criminal justice system, but it ignores the threshold eligibility question: is a state prisoner (parole violator) “in the custody of” DOCS?

K. Legislative Intent & Donald Mills

In 1995, for an A-II drug felony, Donald Mills received an indeterminate sentence of 3 years to life. Parole was denied five times (1998, 2000, 2002, 2004 and 2006). Mr. Mills sought resentencing relief under DLRA-2, but the Court of Appeals held that Mr. Mills was not eligible, citing the “proximity to parole eligibility” rule (*People v Mills*, 11 NY3d at 530-531, 534 [“we hold that in order to qualify for resentencing under the 2005 DLRA, class A-II felony drug offenders must not be eligible for parole within three years of their resentencing applications”])).

Mills demonstrates clearly that application of the “proximity to parole eligibility” rule does not depend upon either an actual release to parole supervision or a subsequent parole violation. From day one, Donald Mills was not eligible for resentencing under DLRA-2, because his minimum period of imprisonment was not

long enough. With his sentence (3 years to life), Mr. Mills was always within three years of parole eligibility. Even if Donald Mills committed a new felony in prison and received a more-than-three-year sentence, like Jose Then and his “fresh crime,” Mr. Mills would still be barred from DLRA-2 resentencing.

Although *Mills* involves an extreme set of facts (Donald Mills serving more than 8 years of incarceration on a 3 year minimum), the Court of Appeals finds that legislative intent to restrict resentencing relief (to class A-II drug offenders who are more than three years away from parole eligibility) did not create an irrational distinction (*Mills*, 11 NY3d at 536, citing *People v Bautista*, 26 AD3d 230 [1st Dept 2006] [this restriction “ameliorat[es] the conditions of those A-II offenders facing the *longest prison time*”] [emphasis in original]).

Mills recognizes that the legislature, for policy reasons (including the conservation of scarce judicial resources), may restrict DLRA resentencing relief to specific groups (those suffering the most from the old Rockefeller Drug Laws). For group membership, the legislature requires all persons to be “in the custody of” DOCS (“state prisoner” status) and to have sufficiently long indeterminate sentences: (1) class A-I (minimum period not less than 15 years) (L2004, ch 738, § 23); (2) class A-II (minimum period not less than 3 years) (L2005, ch 643, § 1); and (3) class B (maximum of more than 3 years) (CPL 440.46 [1], [5]) (L2009, ch 56, part AAA, § 9). Under the DLRA statutes, the legislature denies resentencing relief to parole violators under DLRA-2 (as a result or by-product of the “proximity

to parole eligibility” rule), but permits state prisoners (including parole violators) to apply for resentencing relief under DLRA-1 and DLRA-3.

For our purposes, the fundamental difference between these two resentencing eligibility requirements boils down to recognition that, under one rule (“proximity to parole eligibility”), the person’s status never changes (once ineligible, always ineligible), but, under the other rule (“in the custody of”), the person’s custody status will change as detailed by the statutes (the criminal procedure law, penal law, correction law, and executive law) enacted by our legislature.

L. Aftermath

Before the Court of Appeals decisions in *Mills / Then*, no appellate court followed *Bagby*. In *People v Gonzalez*, the prosecutor had briefed the argument that parole violators are categorically ineligible for resentencing relief under DLRA-1, specifically asking the First Department to adopt *Bagby*’s “parole violator” exception (see *People v Rivera*, 26 Misc 3d 1236(A), 2010 WL 936218, *3 [Sup Ct, Bronx County 2010, Benitez, J.]). By declining to do so and reviewing only the trial court’s “substantial justice” determination, the First Department implicitly recognized that “parole violators” were eligible for resentencing relief under DLRA-1 (*People v Gonzalez*, 29 AD3d 400 [1st Dept 2006]).

After *Mills / Then*, prosecutors crafted various unsound arguments to spread *Bagby*, taking Court of Appeals language (specifically restricted to DLRA-2 cases) and misapplying that language to DLRA-1 and DLRA-3 cases. Without

analysis, simply repeating language from *Bagby*, *Mills* and *Then*, the First Department adopted the “parole violator” exception for DLRA-1 (*People v Rodriguez*, 68 AD3d 676 [1st Dept 2009]) and for DLRA-3 (*People v Pratts*, 74 AD3d 536 [1st Dept 2010]). Trial courts now follow *Pratts*, some expressly disagreeing with its rationale (see e.g., *People v Terry*, Broome County Court, Jul. 2, 2010, Smith, J., Ind. No. 03-91). Under DLRA-1, the *Rodriguez* decision could not be appealed, because the statute did not provide a right to apply for leave to appeal.

Under DLRA-3, however, such right does exist. As noted earlier, the Court of Appeals has granted leave to appeal on this identical issue (*People v Pratts*, 74 AD3d 536 [1st Dept 2010] *lv granted* ___ NY3d ___ [2010, Jones, J.] and *People v Paulin*, 74 AD3d 7685 [1st Dept 2010] *lv granted* ___ NY3d ___ [2010, Pigott, J.]).

M. Final Argument

Parole violators in state prison are members of the class suffering the most from the old Rockefeller Drug Laws. The legislature’s decision to extend to them an opportunity for resentencing relief under DLRA-1 or DLRA-3 is not an illogical or a perverse result or such an irrational decision as to justify re-writing the unambiguous language of the statute.

Especially when applied to DLRA-3, with its express statutory exception for “exclusion offenses” (CPL 440.46 [5]), the judicially-created “parole violator” exception has become an absurdity. A technical violation of parole (missing a

parole appointment, etc.) somehow becomes “lawlessness” (*Bagby*) or a “fresh crime” (*Then*). Once released on parole, the parolee can never again be “in the custody of” DOCS (“within the meaning of” the statute, of course). Prosecutors argue, with a straight face, that parolees, walking the streets and less than two years away from complete sentence termination, will deliberately put themselves back behind prison walls, forfeiting any previously-earned “merit time allowances,” but hopeful that a judge will grant discretionary resentencing relief.

Perhaps the greatest fallacy used to justify the judicial creation of the “parole violator” exception is the idea that granting parole violators an opportunity to apply for resentencing relief is so “unfair” to compliant parolees that it creates an unreasonable or absurd result that could not have been intended by the legislature. Prosecutors argue, as great defenders of the compliant parolees, that parole violators should not be put in a “better” position. In reality, no sane parolee would trade places with a state prisoner. Further, it is doubtful that the parolees would feel any “unfairness” or even care about this issue. Finally, the legislature has enacted clear statutes covering who gets what DLRA relief and under what circumstances. The courts have no authority to second-guess or re-write these laws.

N. Summary

The plain language of all relevant statutes - defining a person’s service of an indeterminate sentence - clearly expresses that a person incarcerated in state prison, following a parole violation, is “in the custody of” the department of

correctional services. The statutory text is simply not amendable to any other interpretation.

To deny resentencing as a threshold matter on eligibility grounds before hearing any facts for or against the resentencing application goes against legislative intent. The legislature delegated to the courts the responsibility for making individual assessments for state prisoners seeking relief from old, draconian Rockefeller drug law sentences.

When Rafael Wallace filed his application for resentencing on his class B drug felony conviction, he was eligible to be considered for resentencing by the trial court. Mr. Wallace met the statutory criteria, including the requirement to be "in the custody of" the New York state department of correctional services (DOCS). Therefore, Mr. Wallace seeks a reversal and remittal of his case to the trial court.

POINT II: DISMISSING MR. WALLACE’S RESENTENCING APPLICATION FOR AN “EXCLUSION OFFENSE” UNDER CPL 440.46 (5) (a) WAS REVERSIBLE ERROR, BECAUSE THE LOWER COURT MEASURED THE TEN-YEAR “LOOK-BACK” TIME PERIOD FROM THE WRONG START DATE, USING THE COMMISSION DATE OF THE DRUG FELONIES RATHER THAN THE FILING DATE OF THE RESENTENCING APPLICATION.

A. Introduction

Rafael Wallace’s appeal raises a second issue of first impression for the Appellate Division, Fourth Department, once again involving statutory interpretation of the 2009 Drug Law Reform Act (DLRA-3) (L2009, ch 56, part AAA, § 9) (codified at CPL 440.46).

In 1993, a jury found Rafael Wallace guilty of two class B drug felonies for selling a ten-dollar bag of cocaine to an undercover police officer. At sentencing, the old Rockefeller Drug Laws of 1973 were still in effect. These draconian laws required incarceration - state prison sentences - even for low level drug offenders like Mr. Wallace - accused of selling a small amount of drugs. The trial court, finding Mr. Wallace to be a second felony offender, based upon a prior judgment of conviction for second-degree burglary, imposed an indeterminate sentence of 10 to 20 years.

Recognizing that mandatory imprisonment under the Rockefeller Drug Laws simply did not work, failing to reduce illegal drug activity, failing to address substance abuse problems, and imposing unfair sentences on low-level drug offenders, the legislature enacted a series of Drug Law Reform Acts in 2004, 2005

and 2009. These DLRA's, particularly DLRA-3, seek to promote public safety and minimize the unfair results of the Rockefeller Drug Laws by promoting a more therapeutic, less punitive response to drug offenses.

DLRA-3's statute (CPL 440.46) gives eligible class B drug felony offenders, serving indeterminate sentences imposed under the old Rockefeller Drug Laws, the right to apply to be resentenced to the same determinate sentences currently authorized for class B drug felonies. These applications may be filed at any time while the drug offender is still in state prison ("in the custody of" DOCS).

But the statute defines an exception to resentencing eligibility - an "exclusion offense" - which includes a conviction for a violent felony offense within the statute's ten-year "look back" time period. In Mr. Wallace's case, the potential "exclusion offense" was the second-degree burglary (conviction date - February 29, 1984) used to enhance the original sentences on the drug felonies (Penal Law § 70.06).

On March 19, 2010, more than twenty-six years after this burglary conviction, Mr. Wallace filed a resentencing application for his class B drug felonies. Mr. Wallace sought to have his indeterminate sentences (10 to 20 years) converted to determinate sentences. Mr. Wallace argued that the second-degree burglary conviction, more than twenty-six years old on the filing date of the resentencing application, was well outside of the ten-year "look back" time period for an "exclusion offense" and, therefore, was too remote to be an absolute bar to resentencing eligibility (A 68-70).

Importantly, when Mr. Wallace filed his resentencing application, he was not challenging his original status as a second felony offender. Instead, Mr. Wallace simply wanted to be resentenced under the new post-Rockefeller Drug Laws. For example, today, if John Doe commits the same class B drug felonies (a ten-dollar sale of cocaine) and if Mr. Doe (who committed second-degree burglary last year) is sentenced as a second felony drug offender with a prior violent felony conviction, then Mr. Doe would receive determinate sentences with terms ranging from 6 to 15 years and with post-release supervision ranging from 1 ½ to 3 years (Penal Law § 70.02 [1] [a]; § 70.45 [2] [d]; § 70.70 [1] [c]; [4] [a], [b] [i]). When he filed his resentencing application, Mr. Wallace merely sought the same treatment as Mr. Doe.

Committing reversible error, the trial court determined that the ten-year “look back” time period should not be measured from the filing date of the resentencing application, but instead, should be measured from a date related to the class B drug felonies - the drug felony commission date (May 27, 1992) (or perhaps from the original sentencing date. The prosecutor’s papers and trial court’s decision can be read to support either conclusion) (A 14, 20, 109).

Based upon the plain language of the statute, the ameliorative nature of the legislation and basic rules of statutory construction, the overwhelming majority of trial courts, addressing this same issue, agree with Mr. Wallace and conclude that the filing date of the resentencing application is the proper starting point from which to measure the ten-year “look back” time period (*see People v Arroyo*, 28 Misc 3d 1205(A), 2010 WL 2651649 [Sup Ct, Bronx County 2010, Price, J.]; *People*

v Austin, Sup Ct, NY County, March 22, 2010, Bartley, J., Ind. No. 6738/02; *People v Brown*, 26 Misc 3d 1204(A), 2010 WL 9928 [Sup Ct, NY County 2010, Conviser, J.]; *People v Bush, et al.*, Monroe County Ct, Mar. 16, 2010, Geraci, J., Ind. No. 2002-0730; *People v Danton*, 27 Misc 3d 638 [Sup Ct, NY County 2010, Kahn, J.]; *People v Devivo*, Broome County Ct, Mar. 26, 2010, Smith, J., Ind. No. 1993-102; *People v Estela*, Sup Ct, NY County, Mar. 24, 2010, Uviller, J., Ind. No. 720/2004; *People v Lashley*, Sup Ct, Queens County, Apr. 5, 2010, Braun, J., Ind. No. N10596/04; *People v Lee*, Sup Ct, NY County, Jun. 22, 2010, Goldberg, J., Ind. No. 01408-00; *People v Loftin*, 26 Misc 3d 1229(A), 2010 WL 716165 [Onondaga County Ct 2010, Fahey, J.]; *People v Murray*, Sup Ct, Kings County, Mar. 22, 2010, Gerges, J., Ind. No. 121-03; *People v Perez*, Sup Ct, NY County, Mar. 4, 2010, Zweibel, J., Ind. No. 5450/03; *People v Reed*, Sup Ct, Onondaga County, Feb. 2010, Brunetti, J., Ind. No. 03-73; *People v Roman*, 26 Misc 3d 784 [Sup Ct, Bronx County 2009, Mogulescu, J.]; *People v Stanley*, Sup Ct, Queens County, Mar. 1, 2010, McGann, J., Ind. No. 3242-04; *People v Walltower*, 27 Misc 3d 1205(A), 2010 WL 1371963 [Sup Ct, Queens County 2010, Kohm, J.]; *People v Williams*, Sup Ct, NY County, Dec. 23, 2009, Pickholz, J., Ind. No. 9280/99; *People v Williams*, Sup Ct, Bronx County, Mar. 8, 2010, Bruce, J., #BX05331-03; *People v Young*, Broome County Ct, Mar. 16, 2010, Cawley, J., Ind. No. 2003-0549; *contra People v Jimenez*, Onondaga County Ct, Dec. 9, 2009, Walsh, J., Ind. No. 2004-0073-1 [no discussion of filing date issue]; *People v Turner*, Onondaga County Ct, Dec. 9, 2009, Walsh, J., Ind. No. 2004-1159-1 [no discussion of filing date issue]).

For the court's convenience, unreported decisions not available through Westlaw are attached to this brief.

B. The Plain Meaning of the Statute

The most fundamental rule of statutory construction is to give plain meaning to the statute's language (*Pultz v Economakis*, 10 NY3d 542, 547 [2008] [“The starting point is always to look to the language itself and where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning”]; see also *State of New York v Patricia II*, 6 NY3d 160, 162 [2006]). In other words, “as the clearest indicator of legislative intent is the language itself, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof” (*Majewski v Broadalpin-Perth, Cent. School Dist.*, 91 NY2d 577, 583 [1998]).

C. An “Exclusion Offense”

CPL 440.46 (5) states:

“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 a merit time allowance is not available pursuant to [803 (1) (d) (ii)] 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 been previously adjudicated” (emphasis added).

When interpreting CPL 440.46 (5) (a), almost every trial court (and the department of correctional services [DOCS]) has reached the same conclusion - that the starting point for calculating the ten-year “look back” provision is the filing date of the resentencing application. The numerous reasons supporting this near unanimity will be summarized in the sections below.

As co-author of the new pocket part to *New York Criminal Law*, Richard de Simone, DOCS Associate Counsel-in-Charge of the Office of Sentencing Review, explains a two-step process for determining whether a conviction for a violent felony offense constitutes an “exclusion offense.”

First, the amount of time between the filing date of the resentencing application (March 19, 2010) and the conviction date for the violent felony offense must be calculated (February 29, 1984) (the ten-year “look back” period). If this interim result is less than ten years, then the inquiry must stop; the applicant is not eligible for DLRA-3 resentencing. If the interim result is more than ten years (here - more than 26 years), then the inquiry is to proceed to step two. Second, the amount of time that the applicant was incarcerated between the commission dates of the violent felony (August 18, 1983) and the drug felony (May 27, 1992) (the “tolling period”) must be excluded from the interim result obtained in step one (here - calculation was not done). If the final result is still more than ten years, then the violent felony is too remote and does not qualify as an “exclusion offense.”

(Greenberg, et al., *New York Criminal Law*, Volume 6, April 2010 Supplement, § 3:24, at 28-29 [3d ed]).

D. “Within the Preceding Ten Years” is Not Attached to a Prior Date

An unstrained, unforced reading of the phrase “within the preceding ten years” leads to the inevitable conclusion that the ten-year calculation looks back from the present time. The statute does not attach this phrase to the drug felony commission date, or any other prior date, and, therefore, does not contemplate skipping back to an earlier time period (see McKinney’s Statutes § 94 [“The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction”]).

In *People v Roman* (26 Misc 3d 784, 786 [Sup Ct, Bronx County 2009, Mogulescu, J.]), the court soundly rejected the prosecution’s argument that the statute’s tolling provision (“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”) somehow referred to and qualified the ten-year “look back” time period:

“Contrary to the People’s position, the statute by its plain meaning contemplates eligibility determinations from the present date. The statute does not state, as the People now purport, that the court shall measure this ten year time period from the commission of a past offense. Rather, the statute does not qualify the term “within the preceding ten years” with reference to any time frame thus imposing a plain meaning to this phrase, viz, that this time frame is measured from the date of the motion.”

(See also *People v Danton*, 27 Misc 3d 638, 642 [Sup Ct, NY County 2010, Kahn, J.] [“the natural and obvious meaning of ‘within the preceding ten years’ is the ten year period immediately preceding the date of filing of the resentencing application”]; *People v Williams*, Sup Ct, NY County, Dec. 23, 2009, Pickholz, J., Ind. No. 9280/99, p.11 [“The more natural reading of the statute is that the ten-year period looks back from the present, i.e., the date of the filing of the application”]; *People v Arroyo*, 28 Misc 3d 1205(A), 2010 WL 2651649, *2 [“the more natural reading suggests that inherently, ‘within the preceding ten years’ refers to the day on which the resentencing application was filed”]; *People v Lashley*, Sup Ct, Queens County, Apr. 5, 2010, Braun, J., Ind. No. N10596/04, p4 [“Thus, the plain meaning of the phrase ‘within the preceding ten years,’ unadorned as it is by any limiting language, appears intended to run from the time immediately preceding the application made under CPL 440.46”]; *People v Brown*, 26 Misc 3d 1204(A), 2010 WL 9928, *6 [Sup Ct, NY County 2010, Conviser, J.] [“But no amount of verbal parsing can overcome the plain fact that the most natural construction of the law is to read its reference point as the date of a resentencing application”]).

E. Statute Written in the Present Tense

The wording of the statute, written in the present tense, frames eligibility questions and contemplates eligibility calculations from the present time, not from some past time or event. Accordingly, the start date for measuring the ten year “look back” should be the filing date of the resentencing application (see e.g. *People v Figueroa*, 27 Misc 3d 751, 776 [Supreme Court, New York County 2010, Conviser,

J.] ["But the statute is written in the present tense and measures resentencing eligibility based on whether an offender is in DOCS custody when resentencing is applied for"]; *see also People v Danton*, 27 Misc 3d at 638, 644-645 [2010] [noting that DLRA-3's judicial diversion provisions, CPL 216.00 [1] [a] and CPL 216.05 [3] [a] [i] "employ the same look-back eligibility concept in a contemporaneous, rather than an historical fashion, suggesting the same construction for the parallel provision of section 440.46 [5] [a]").

F. Ameliorative Nature of DLRA-3

Courts uniformly recognize that the legislature enacted the DLRAs to amend the outrageously harsh and ineffective mandatory prison sentences imposed for over thirty years under the old Rockefeller Drug Laws. The ameliorative nature of DLRA-3 supports an expansive reading of the statute so as to widen the scope and availability of resentencing relief (*see McKinney's Statutes* § 96 ["construction is to be preferred which furthers the object, spirit and purpose of the statute"]; *McKinney's Statutes* § 321 ["Generally, remedial statutes are liberally construed to carry out the reforms intended and to promote justice"]).

Rejecting the prosecution's argument that the start date for the ten-year "look back" is the drug felony commission date, one court reasoned that:

"[T]o adopt the position put forth by the People would be to deny a court the ability to reevaluate the propriety of an otherwise draconian sentence meted out under the former sentencing structure. The entire purpose of the 2009 Drug Law Reform Act, and its predecessor 2004 and 2005 drug law reform acts, is to ameliorate the lengthy sentences given to defendants for selling or possessing a small amount of drugs"

(*People v Roman*, 26 Misc 3d 784, 786 [Sup Ct, Bronx County 2009, Mogulescu, J.]). As another court explained:

“The Legislature enacted these reforms because of the belief that low-level drug offender’s punishments outweighed their crimes and that research suggested better, more humane, less costly alternatives to incarceration existed. Considering the DLRA in its entirety, it is clear that its very spirit of the DLRA-3 is to reduce the sentences of low level, non-violent felony drug offenders”

(*People v Arroyo*, 28 Misc 3d 1205(A), 2010 WL 2651649, *3 [Sup Ct, Bronx County 2010, Price, J.]); *see also People v Danton*, 27 Misc 3d 638, 644 [Sup Ct, NY County 2010, Kahn, J.] [“Therefore, viewing the resentencing provision generally, and its look-back provision particularly, in the context of the spirit and purpose underlying the legislation as a whole, it is appropriate to resolve any ambiguity in favor of the more ameliorative, rather than the more punitive, construction”]; *People v Lashley*, Sup Ct, Queens County, Apr. 5, 2010, Braun, J., Ind. No. N10596/04, p4 [“To measure the ‘look back’ period from a date other than the date of the resentencing application would be detrimental to furthering the goals of the current legislation”]).

G. Legislative Intent

The ten year “look back” is intended to prevent someone with a recent history of committing violent crimes from being resentenced. The more recent the commission of a violent crime, the more reasonable it is to assume that the person has a propensity towards violence and thus, poses a danger to the community, if released.

The legislative intent behind the concept of running the ten-year “look back” period backwards from the present time was to permit inmates to “age into” eligibility for DLRA-3 resentencing. As inmates grow older and their violent felony convictions become more remote, concerns for public safety tend to decrease (*see People v Williams*, Sup Ct, NY County, Dec. 23, 2009, Pickholz, J., Ind. No. 9280/99, p.10 [“The New York State Department of Correctional services has adopted the position that the ten-year period dates back from the date of the filing of the petition for resentencing. If the statute is to be interpreted in that manner, then a defendant may “age into” eligibility as the passage of time renders his prior violent felony increasingly remote”]; *People v Austin*, Sup Ct, NY County, March 22, 2010, Bartley, J., Ind. No. 6738/02, p.4 [“The purpose of this language is to enable defendants with violent felony pasts to become eligible, with the passage of time, for resentencing”]; *People v Danton*, 27 Misc 3d 638, 644 [Sup Ct, NY County 2010, Kahn, J.] [“Adopting an interpretation of the statute which permits defendants to age into eligibility for resentencing is more in keeping with the overall purposes of DLRA-3 as well as those of the DLRA and DLRA-2, allowing prisoners to distance themselves from their past misbehaviors and demonstrate progress in rehabilitation”]).

H. “Age-In” Concept - Found Elsewhere in DLRA-3

DLRA-3 authorizes a similar “age-in” concept with its amendments to the eligibility requirements for the Shock Incarceration Program. Before DLRA-3, DOCS could only select program participants at reception centers. The statute required

an “eligible inmate” to be under forty years old and eligible for release on parole (indeterminate) or conditional release (determinate) within three years.

After DLRA-3, the age of an “eligible inmate” increases by ten years to include those under the age of fifty. Further, DOCS may now select program participants not only from a reception center, but also from “a general confinement facility when the otherwise eligible inmate then becomes eligible for release on parole within three years in the case of an indeterminate term of imprisonment, or then becomes eligible for conditional release within three years in the case of a determinate term of imprisonment” (Correction Law § 865 [1], [2]; [L2009, ch 56, part L, §§ 1, 2]).

Clearly, in this context (shock incarceration program), the legislature intended eligibility determinations to be made in present time, on a *flexible date*, allowing inmates to become eligible with the passage of time (here - when they get within three years of a parole or conditional release date). This same “age-in” concept underlies the ten-year “look back” provision found in CPL 440.46 (5) (a). As time passes, the drug offender gets older. As the temporal distance from the prior violent offense increases, the likelihood of future violence decreases. After ten years without any violent conduct, the drug offender should be deemed less dangerous and therefore a good candidate for resentencing consideration.

I. Presumption In Favor of Resentencing

The presumption in favor of granting resentencing applications is a very strong one, further highlighting the legislature's intent to see that amelioration extends to the vast majority of eligible defendants:

"[I]n order for a court to completely deny resentencing, the facts and circumstances of an offender's instant crime, criminal history, institutional record and other relevant facts must point so strongly against resentencing, when considering notions of fairness, reasonableness and due process, as to authoritatively command that an application be completely denied. Whether that standard is reached in any particular case requires a discretionary determination. But there is little doubt that the bar for complete denial of a resentencing application under the DLRA is a high one"

(*People v Jones*, 25 Misc 3d 1238(A), 2009 WL 4724244, *3 [Sup Ct, NY County 2009, Conviser, J.]).

J. Exercise of Judicial Discretion

Calculating the ten-year "look back" from the date of the resentencing application allows sentencing courts to reconsider unduly harsh Rockefeller Drug Law sentences for a much wider pool of defendants. This result preserves one of the "most traditional and basic functions" of a court - "the exercise of sentencing discretion" (*People v Quinones*, 12 NY3d 116, 130 [2009]).

As explained by the Court of Appeals:

"Sentencing courts, in the exercise of their unique judicial function in criminal proceedings, are wisely allocated wide latitude as they are recognized to be in a superior position to dispense proportionate and fair punishment . . . It is therefore consistent and compatible with that overarching principle for this court to interpret circumspectly a statute which delimits, in the power connotation as contrasted to the discretionary connotation, what a sentencing Judge *can* appropriately do"

(*People v Day*, 73 NY2d 208, 212 [1989] [citations omitted]; see also *People v Farrar*, 52 NY2d 302, 305-306 [1981] ["the court must perform the delicate balancing necessary to accommodate the public and private interests represented in the criminal process"]).

K. Exceptions to be Strictly Construed

DLRA-3's "exclusion offense" - as an exception to the statute's general ameliorative purpose and provisions - must be given a limited scope (see commentary to McKinney's Statutes § 213 ["Exceptions [to a statute] must be strictly construed in order that the major policy underlying the legislation itself is not defeated. They extend only so far as their language fairly warrants, and all doubts should be resolved in favor of the general provision rather than the exception"]).

L. Rule of Lenity

The plain language of CPL 440.46 (5) (a) creates two separate and distinct intervals of measure - the ten-year "look back" and the tolling provision. However, even if one considers the statutory language to be ambiguous, Mr. Wallace would be entitled to an interpretation of the statute that favors his eligibility under the well-recognized rule of lenity. As stated by the Court of Appeals, "if two constructions of a statute are plausible, the one more favorable to the defendant should be adopted in accordance with the rule of lenity" (*People v Green*, 68 NY2d 151, 153 [1986]; see also McKinney's Statutes § 271 ["Generally, penal statutes are to be strictly construed against the State in favor of the accused"]).

M. Avoid Injustice or Hardship

Similarly, “[w]here the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results” (*Matter of Jacob*, 86 NY2d 651, 667 [1995], quoting *H. Kauffman & Sons Saddlery Co. V Miller*, 298 NY 38, 44 [1948]). Relying upon this well-settled principle, the court in *People v Reed* (Sup Ct, Onondaga County, Feb 2010, Brunetti, J., Ind. No. 03-73, p.7-8) concluded that:

“CPL 440.46 (5) is ‘susceptible of two constructions,’ and, as a consequence, the court is required to chose the construction which avoids injustice or hardship, i.e., measure the look-back from the application date so as not to delay a defendant’s possible release from prison that may result from consideration of a resentencing motion.”

N. Avoid Absurd or Unreasonable Results

A statute should not be interpreted in such a way as to create “absurd consequences” (*Long v State*, 7 NY3d 269 [2006]). The plain language of CPL 440.46 does not require the ten-year “look back” to be measured backwards from the drug felony commission date. Reading this requirement into the statute would create at least two absurdities.

First, Mr. Wallace would be barred from any resentencing relief for an old drug felony (May 27, 1992), based upon a crime (February 29, 1984) committed more than 26 years before the resentencing application. In stark contrast, however, a person (John Doe) with a recent violent felony conviction, who today commits the same class B drug offense as Mr. Wallace (a ten-dollar sale of cocaine), would be

eligible to receive the same range of determinate sentences that the prosecution now seeks to deny Mr. Wallace.

Surely, if the legislature has determined that public safety concerns are adequately addressed by the sentencing parameters for John Doe (a person with very recent violent and drug felony convictions), then the same argument applies with even greater force for Mr. Wallace (a person with an extremely remote violent felony conviction).

Second, requiring the ten-year “look back” provision to be measured backwards from the drug felony commission date would create an absurdity where recent violent felony convictions (occurring within ten years of the filing date of the resentencing application) do not prohibit resentencing. For example, as one court has noted, if the drug felony offender commits the violent felony on or after the commission date of the drug felony and is no longer serving a sentence on the violent felony, then resentencing on the drug felony would not be prohibited (*People v Brown*, 26 Misc 3d 1204(A), 2010 WL 9928, *6 [Sup Ct, NY County 2010, Conviser, J.]). Actually, whether the person is still serving a sentence on the violent felony would be irrelevant, because, under the prosecution’s rule, an “exclusion offense” must be committed within the ten-year period preceding the commission of the drug felony. Thus, under the prosecution’s rule, a person could commit a violent felony while in prison or on parole for the drug felony and that violent felony would not be an “exclusion offense” (it did not occur within the ten-year time period preceding the commission of the drug felony!).

The legislature did not intend such absurd results. Under Mr. Wallace's reading of the statute, such results would not occur. The facts of one case provide a good illustration. The defendant commits a class B drug felony on January 15, 1993 and receives an indeterminate sentence (3 to 9 years). On July 26, 1998, the defendant commits a second-degree burglary and receives a sentence. On November 20, 2009, the defendant files an application for resentencing on the drug felony. The court finds the second-degree burglary conviction is 10 years, 5 months and 13 days from the date of the resentencing application. However, the court deducts the defendant's incarceration time between the commission dates of the drug felony and the burglary, thus extending the ten-year "look back" period and causing the court to deny the defendant's application based upon a conviction for an "exclusion offense" (*People v Devivo*, Broome County Ct, Mar. 26, 2010, Smith, J., Ind. No. 1993-102).

O. Statute Omits an Exclusion for Second Felony Offenders

When examining the language of CPL 440.46 (5), one important observation is that the statute has an express exclusion for "second violent felony" offenders (Penal Law § 70.04) and for "persistent violent felony" offenders (Penal Law § 70.08), but the statute specifically omits any exclusion for "second felony" offenders (Penal Law § 70.06) - such as Mr. Wallace. This omission severely undermines any prosecution argument that the starting point for measuring the ten-year "look back" should be the commission date of the drug felony.

If legislature meant for the ten year “look back” to be measured from the commission date of the class B drug felony, the legislature would have explicitly stated this requirement in the statute or would have simply excluded all second felony drug offenders (Penal Law §§ 70.06, 70.70 [1] [b]) with prior violent felony or merit-time-ineligible convictions. When defining a “second felony offender,” the legislature specifically states that the ten-year period for sentence enhancement purposes is measured backwards from the felony commission date (see Penal Law § 70.06 [1] [b] [iv] [the prior felony “sentence must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted”] [emphasis added]).

In contrast, when defining an “exclusion offense” for sentence reduction purposes, the legislature specifically omits any reference to the second felony offender statute or its definitions (*People v Arroyo*, 28 Misc 3d 1205(A), 2010 WL 2651649, *4 [Sup Ct, Bronx County 2010, Price, J.] [“The absence of such language in CPL 440.46 (5) (a), compared to the express language in PL 70.06, further strengthens the conclusion that the look-back period should commence from the day the resentencing application is filed, not the date on which the instant felony was committed”]).

P. “Predicate Felony Conviction”

CPL 440.46 (5)’s omission of an exclusion for second felony offenders (Penal Law § 70.06) cannot be cured by resort to the statute’s inclusion of the phrase “predicate felony conviction.” The criminal law statutes contain no general or

universal definition of “predicate felony conviction” (*People v Reed* , Sup Ct, Onondaga County, Feb. 2010, Brunetti, J., Ind. No. 03-73, p3 n1).

Penal Law §10.00 (5) defines “felony” (“an offense for which a sentence to a term of imprisonment in excess of one year may be imposed”). CPL 1.20 (13) defines “conviction” (a guilty plea or a guilty verdict). The general term “predicate” means “to use as a basis or ground of an action, defense, or argument” (Ballentine’s Law Dictionary, Third Edition, 1969). Combining these three words creates a useful, short-hand phrase, but the precise meaning of “predicate felony conviction” depends upon the specific definitions found in the relevant statutes.

To determine whether a felony conviction may serve as a “predicate” (a ground or a basis) for increasing a sentence of imprisonment, one must look to specific Penal Law statutes: § 70.04 (second violent felony offender); § 70.06 (second felony offender); § 70.07 (second child sexual assault felony offender); § 70.08 (persistent violent felony offender); § 70.10 (persistent felony offender).

For purposes of “second child sexual assault felony offender” adjudication, Penal Law § 70.07 (3) specifically incorporates the criteria from Penal Law § 70.06, but expands the definition of “predicate felony conviction” to allow sentencing on the predicate to have occurred not more than fifteen years before commission of the present felony.

As previously noted, the second felony offender statute’s definition of “predicate felony conviction” specifically requires imposition of a sentence not more than ten years before commission of the present felony (Penal Law § 70.06 [1] [b] [iv]).

In CPL 440.46 (5) (a), a person's conviction (plea or verdict) for a violent felony offense serves as a basis or ground of an action - the dismissal of a CPL 440.46 (1) resentencing application. Under the plain language of the statute, a plea or verdict for a violent felony offense within ten years of the filing date of the resentencing application is a "predicate felony conviction" within the meaning of CPL 440.46 (5), even if no sentence has been imposed.

In sum, these statutes have different start and end dates for the "look back" time periods. Penal Law § 70.06, a sentence-enhancement statute, looks from the drug felony commission date back to the violent felony sentence date. CPL 440.46 (5) (a), a sentence-reduction statute, looks from the resentencing application filing date back to the violent felony conviction date (*see People v Danton*, 27 Misc 3d 638, 645-647 [Sup Ct, NY County 2010, Kahn, J.] ["predicate felony conviction" definitions from recidivist sentencing laws are not applicable to ameliorative resentencing laws]).

Q. DOCS v Professor Preiser

When prosecutors argue that the ten-year "look back" and the "tolling" time periods are the same, they often cite McKinney's Cons. Laws of NY, Practice Commentary to CPL 440.46, by Professor Peter Preiser. However, based upon the lack of analysis and the dearth of reasoning to support its interpretation of the statute, courts decline to follow the Practice Commentary (*People v Danton*, 27 Misc 3d 638, 677 [Sup Ct, NY County 2010, Kahn, J.] ["The Practice Commentary offers no support or explanation for this construction, however, which seems to conflate

the statute's look-back period with its tolling provision"]; *People v Brown*, 26 Misc 3d 1204(A), 2010 WL 9928, *3 [Sup Ct, NY County 2010, Conviser, J.] ["Professor Preiser did not identify the 10 year look-back provision as an ambiguity or explain why he interpreted the provision as he did"]; *People v Walltower*, 27 Misc 3d 1205(A), 2010 WL 1371963, *2 [Sup Ct, Queens County 2010, Kohm, J.] [noting, but not following, the Practice Commentary]].

On the other hand, courts note with approval that the department of correctional services (DOCS), an agency very closely involved with resentencing issues, reads the statute to require measuring the ten-year "look back" period from the filing date of the resentencing application (*People v Danton*, 27 Misc 3d at 648-649 [letter received from DOCS's Office of Sentencing Review]; *People v Brown*, 2010 WL 9928, *3 [DOCS notifies inmates "in writing of their construction of the statute"]; *People v Arroyo*, 28 Misc 3d 1205(A), 2010 WL 2651649, *4 [Sup Ct, Bronx County 2010, Price, J.] ["Although not controlling, DOCS interpretation does indeed aid in clarifying which class B felony drug offenders are eligible to apply for resentencing"]).

R. Summary

The filing date of a CPL 440.46 resentencing application is the proper starting point from which to measure the ten-year "look back." By using the most recent time period ("within the preceding ten years") to determinate whether a violent felony conviction is an "exclusion offense," courts give effect to the plain meaning

of the statute and foster legislative goals, promoting public safety and minimizing the unfair results of the Rockefeller Drug Laws.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE ORDER OF THE SUPREME COURT, MONROE COUNTY, FINDING THAT APPELLANT IS NOT ELIGIBLE FOR RESENTENCING UNDER CPL 440.46, SHOULD BE VACATED AND THE MATTER REMITTED TO SUCH COURT FOR A DETERMINATION OF THE RESENTENCING APPLICATION ON THE MERITS.

Dated: November, 2010

Respectfully submitted,

**TIMOTHY P. DONAHER
Monroe County Public Defender
Attorney for Appellant**

**BY: DAVID JUERGENS
Assistant Public Defender
Of Counsel
10 N. Fitzhugh Street
Rochester, New York 14614
(585) 753-4210**