

To be argued by  
**MAUREEN L. GROSDIDIER**  
(15 Minutes)

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# **COURT OF APPEALS**

STATE OF NEW YORK

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

*Respondent,*

-against-

**JESUS PRATTS,**

*Defendant-Appellant.*

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## **RESPONDENT'S BRIEF**

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**RESPONDENT'S BRIEF**

**STATEMENT**

By permission of the Honorable Theodore T. Jones, Associate Judge of the Court of Appeals, defendant appeals from an order of the Appellate Division, First Department, entered on June 10, 2010, affirming a decision of the Supreme Court, Bronx County (Collins, J.), rendered December 1, 2009, denying a motion for resentencing pursuant to CPL § 440.46 on the ground that defendant was ineligible to be resentenced under the 2009 Drug Law Reform Act [2009 DLRA]. Defendant was released from the custody of the Department of Correctional Services ("DOCS") on April 19, 2007, into the supervision of the Division of Parole. After defendant's release, he violated parole, resulting in re-incarceration.

Defendant is currently incarcerated at Cape Vincent Correctional Facility.

## QUESTIONS PRESENTED

1. Whether the motion court properly deemed defendant ineligible for resentencing pursuant to CPL § 440.46, where he had been re-incarcerated because of a parole violation.

The trial court denied defendant's application for resentencing pursuant to CPL § 440.46, holding that he was ineligible because his incarceration was based on a parole violation.

In People v. Pratts, 74 A.D.3d 536, 904 N.Y.S.2d 380 (1st Dept. 2010), the Appellate Division, First Department, held that defendant was ineligible to be resentenced under the 2009 Drug Law Reform Act (L 2009, ch. 56) because he was released to parole and re-incarcerated for a parole violation. Additionally, the court noted that the purpose of the Drug Law Resentencing provisions was to relieve prison inmates of onerous sentences of incarceration.

2. Whether defendant's claim will be considered moot if he is released to the Division of Parole before this Court has an opportunity to hear this appeal.

Neither the trial court nor the Appellate Division had an opportunity to respond to this issue, as it is being raised for the first time on appeal to this Court.

## INTRODUCTION

The Drug Law Reform Act of 2009,<sup>1</sup> codified in CPL § 440.46, allows for a narrow class of drug offenders to seek relief from harsh sentences imposed under the Rockefeller Drug Laws. In order to be eligible for such relief, a defendant must be in the custody of the Department of Correctional Services, serving an indeterminate sentence with a maximum term of more than three years for a class B drug felony committed prior to January 13, 2005. See CPL § 440.46. At issue on this appeal is whether re-incarcerated parole violators are eligible to apply for resentencing under the DLRA of 2009.

An interpretation of the Drug Law Reform Act of 2009 that makes parole violators eligible for resentencing would result in a windfall for parole violators, who could only meet the eligibility requirement if they violate parole, thereby returning to the custody of DOCS.<sup>2</sup> The Drug Law Reform Act, which contains provisions that incentivize drug offenders by reducing sentences or terminating parole in exchange for good behavior and the completion of drug treatment programs, would also paradoxically operate to reward those offenders who prove

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<sup>1</sup> The Drug Law Reform Acts of 2004 (L 2004, ch 738), 2005 (L 2005, ch 643), and 2009 (L 2009, ch 56) will be referred to as “DLRA of 2004” or “2004 Act,” “DLRA of 2005” or “2005 Act,” and “DLRA of 2009” or “2009 Act,” respectively.

<sup>2</sup> Such a benefit would only be afforded to those defendants eligible under the DLRA of 2009, since the Appellate Division held that parole violators are not eligible under the DLRA of 2004 (see People v. Rodriguez, 68 A.D.3d 676 [1st Dept. 2009]), and this Court held that parole violators are not eligible under DLRA of 2005. See People v. Mills, 11 N.Y.3d 527 (2008).

unable to comply with the conditions of their parole. This illogical consequence, which creates the potential for a more expeditious route to liberty through misconduct, could not have been the intention of the Legislature.

Instead, the remedy provided to parole violators lies within Executive Law § 259-j, which allows for automatic termination after two years of unrevoked parole. Provisions of the Drug Law Reform Act, such as Correction Law § 803, which penalizes parolees with the loss of earned merit time after a parole violation, makes clear that the Drug Law Reform Act was not intended to provide a windfall to parole violators.

The Legislature stated that the Rockefeller Drug Laws “provide[d] inordinately harsh punishment for low level non-violent drug offenders, warehouse[d] offenders in state prison who could more productively be placed into effective drug treatment programs...” McKinney’s 2004 Session Laws of NY, NYS Assembly, Memorandum in Support of Bill A11895. Accordingly, the main goal of the Drug Law Reform Act is to reduce onerous terms of imprisonment. As a result of eradicating those excessive sentences, parole terms were reduced, but it was not the intent of the legislation to reduce the supervision of drug offenders. If it had been, the Drug Law Reform Acts would have included parolees instead of limiting its reach to drug offenders in the custody of the Department of Correctional Services.

Accordingly, the Appellate Division, First Department, was correct when it held that the Drug Law Reform Act of 2009 was not intended to apply to parole violators.

## **THE FACTS**

### **The Sentence and Relevant Procedural History**<sup>3</sup>

On or about April 11, 2005, defendant appeared in Supreme Court, Bronx County, and plead guilty to Criminal Sale of a Controlled Substance In or Near School Grounds (Penal Law § 220.44), in full satisfaction of Indictment Number 58077C-2004 (A. 46). As part of the agreed-upon sentence, defendant was placed under the supervision of Treatment Accountability for Safer Communities (TASC), and ordered to enter and complete a twelve-to-eighteen-month residential drug treatment program in lieu of incarceration.<sup>4</sup> If, however, defendant failed to comply with any of the terms of his plea, he faced a jail alternative of from two to six years of incarceration (A. 46). Defendant violated the terms and conditions of his plea by leaving the program without permission and was returned to court on a warrant. He was given another opportunity to complete TASC, but left the

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<sup>3</sup> Numbers preceded by "A." refer to pages from defendant's Appendix.

<sup>4</sup> At the time of defendant's plea, he had an open docket for Criminal Contempt in the First Degree (Penal Law § 215.51), to which he pleaded guilty on April 25, 2005. Defendant was sentenced to a conditional discharge in that case, the condition being that he completed the drug treatment program that he was sentenced to for the drug conviction. After two failed attempts to complete the program, defendant was re-sentenced to a term of ten months for the criminal contempt conviction (A. 47).

program again and was involuntarily returned to court on April 17, 2006. On June 9, 2006, the court sentenced defendant to an indeterminate term of incarceration of from two to six years (A. 11, 47).

Defendant was paroled on or about April 25, 2007 (A. 47).<sup>5</sup> On or about June 10, 2009, defendant was re-incarcerated because he violated his parole by failing to report a change of address to his parole officer (A. 21, 47).

### **The Motion for Resentencing**

In papers dated October 16, 2009, defendant, by way of counsel, moved to be resentenced pursuant to the Drug Law Reform Act of 2009, specifically, CPL § 440.46. Defendant argued that because he was in the custody of DOCS serving an indeterminate sentence for a class B drug felony committed prior to January 13, 2005, and was “in custody as of the filing of this motion,” he was eligible to be resentenced under the 2009 DLRA (A. 18). Defendant then argued that, assuming his eligibility, he was an appropriate candidate for a reduced sentence, citing a variety of factors including his criminal history, participation in several rehabilitation programs, and minimal disciplinary infractions<sup>6</sup> (A. 20-24).

In opposition papers dated October 27, 2009, the People argued that because defendant had been released on parole, he was no longer incarcerated on the

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<sup>5</sup> According to a review of defendant’s criminal history, since his release from incarceration, he was convicted upon his plea of guilty to Failure to Disclose the Origin of a Recording in the Second Degree (Penal Law § 275.35) (A. 48).

<sup>6</sup> Defendant received three Tier 2 disciplinary infractions between 2006 and 2009 (A. 24).

“present matter,” and, thus, could only seek a termination of his sentence from the Division of Parole (A. 48). Defendant responded to the People’s opposition in a reply dated November 4, 2009 (A. 51-53), and also filed a supplemental reply dated November 16, 2009 (A. 55-57).

In a written order dated December 1, 2009, Justice Collins denied defendant’s motion, holding that defendant was not eligible for resentencing because “[n]either the 2009 Act or any legislative comments indicates that eligibility to apply for resentencing was intended to apply to anyone other than those serving the original sentence” (A. 59).

### **The Appellate Division**

Defendant appealed to the Appellate Division, First Department, claiming that Supreme Court erroneously held that he was ineligible for resentencing pursuant to the Drug Law Reform Act of 2009.

On June 10, 2010, the Appellate Division unanimously affirmed the lower court’s order, holding that defendant was not eligible to be resentenced under the 2009 Drug Law Reform Act because he “was relieved of his sentence of incarceration when he was paroled, and he could have remained at liberty by adhering to his parole conditions” but, instead, he was re-incarcerated for a parole violation. See People v. Pratts, 74 A.D.3d 536, 904 N.Y.S.2d 380 (1st Dept. 2010). The court further reasoned that, but for defendant’s parole violation, he would not

have been afforded an opportunity for resentencing, and that the Legislature could not have intended that parole violators would gain the windfall of a lesser prison sentence. Id.

### **Leave to Appeal**

On October 1, 2010, the Honorable Theodore T. Jones, granted defendant leave to appeal to this Court. People v. Pratts, 15 N.Y.3d 895 (2010).

## ARGUMENT

### POINT ONE

**THE APPELLATE DIVISION CORRECTLY HELD THAT THE DRUG LAW REFORM ACT OF 2009 WAS NOT INTENDED TO PERMIT PAROLE VIOLATORS TO BE ELIGIBLE TO SEEK RESENTENCING TO A LOWER PRISON TERM WHEREAS THOSE DEFENDANTS WHO ABIDED BY THEIR PAROLE TERMS WOULD NOT BE ELIGIBLE.**

Defendant concedes that the main objective of the Drug Law Reform Acts was to provide ameliorative relief to those defendants serving excessive amounts of incarceration under the Rockefeller Drug Laws (see defendant's brief, p. 27). The Legislature enacted this relief because the Rockefeller Drug Laws "provide[d] inordinately harsh punishment for low level non-violent drug offenders, warehouse[d] offenders in state prison who could more productively be placed into effective drug treatment programs..." McKinney's 2004 Session Laws of NY, NYS Assembly, Memorandum in Support of Bill A11895. The statute's stated purpose was "to reduce prison terms for non-violent drug offenders, provide retroactive sentencing relief, and make related drug law sentencing improvements." *Id* (emphasis added). The supporting memorandum focuses on the reduction of incarceratory sentences and the promotion of drug treatment programs. There is no language outlining the need for reduced post-incarceration supervision. Since parole violators exhibit difficulty abiding by the conditions of

their parole, it follows that they need more supervision, not less. That is not to say that the DLRA did not account for parolees. Indeed, the DLRA of 2004 amended Executive Law § 259-j by adding a new subdivision 3-a, which granted termination of sentence after two years of unrevoked parole to, inter alia, a class B drug felony parolee. See L. 2004, c. 738, § 37 (eff. Feb. 12, 2005). While class B felony drug offenders on parole received ameliorative relief in the DLRA of 2004 through the passage of Executive Law § 259-j (3-a), it was not until the DLRA of 2009 that the Legislature turned its attention to those class B felony drug offenders still incarcerated.

Although defendant argues that the plain language of CPL § 440.46 should prevail, he agrees that the legislative intent behind DLRA 2009 is best determined by considering all the acts together (see defendant's brief, p. 27). Importantly, "[a] statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent." McKinney's Cons. Laws, Book I, Statutes (hereinafter "Statutes") § 97. Where two or more statutes are in pari materia, or "enacted at different times but with reference to the same subject matter," they "are to be construed together as though forming part of the same statute." Statutes §§ 221(a), (b). In that regard, "[a] statute is to be construed with reference to earlier statutes in pari materia" (Statutes § 222), that is, "earlier statutes are properly considered as illuminating the intent of the

Legislature in passing later acts, especially where there is doubt as to how the later act should be construed, since when enacting a statute the Legislature is presumed to act with deliberation and with knowledge of the existing statutes on the same subject.” Statutes § 222 (comment).

Thus, the ameliorative provision to which defendant should have availed himself was the one provided in Executive Law § 259-j (3-a), which mandates termination of sentence after two years of unrevoked parole. To be sure, a drug offender who continually violates the terms of his parole and is repeatedly re-incarcerated could ultimately serve a lengthy cycle of parole/incarceration imposed under the Rockefeller drug laws. This, however, is not at odds with the goals of the reform acts. Where a defendant remains unrehabilitated and proves unable or unwilling to live a law-abiding, drug-free life, he is engaging in actions that directly conflict with the legislative goals. Surely, the legislative intent of providing relief to those with promising rehabilitative potential is not furthered by making re-incarcerated parole violators eligible for resentencing.

The requirement contained in Executive Law § 259-j (3-a) (that a parolee complete two unrevoked years of parole) makes it clear that the Legislature intended that parolees exhibit lawful behavior in order to receive any relief under the reform laws. Defendant’s lack of compliance with the terms of his parole, thereby rendering him ineligible for relief from the Division of Parole, should not

lead to the peculiar result that he may now seek a different, and perhaps more expeditious, remedy from the courts by way of a CPL § 440.46 motion. To the contrary, the only reasonable construction of the reform laws is that since defendant was re-incarcerated, he must serve the term of incarceration imposed as a consequence of his parole violation. Then, upon his re-release to parole, he will again be afforded a new opportunity to obtain a mandatory termination of sentence in two years, so long as he behaves in such a manner as to prevent revocation of his parole. If, however, defendant is persistently unable to comply with the terms of his parole, thereby demonstrating that he is undeserving of ameliorative relief, then, consistent with legislative intent, he will continue to volley between incarceration and parole until the maximum term of his sentence is served, regardless of how excessive that sentence may seem in light of the new sentencing schemes.

Allowing those who could not abide with the conditions of parole to benefit from their misconduct would give rise to “illogical, if not perverse, results.” People v. Mills, 11 N.Y.3d 527, 537 (2008). In Mills, this Court previously rejected a similar argument, which also “boil[ed] down to the proposition that, solely because [the defendant was] a repeat offender, he qualified for relief . . . otherwise beyond his reach.” Mills, 11 N.Y.3d at 537. Here, the same illogical consequence would result from the “plain reading” of CPL § 440.46 that defendant suggests (see

defendant's brief, pp. 16-23) because a parole violator would become eligible under CPL § 440.46 by virtue of the misconduct that led to his re-incarceration.

When construing statutory provisions, "the spirit and purpose of the statute and the objectives sought to be accomplished by the legislature must be borne in mind. The legislative intent is the great and controlling principle. Literal meanings of words are not to be adhered to or suffered to defeat the general purpose and manifest policy intended to be promoted." Petterson v. Daystrom Corp., 17 N.Y.2d 32, 38 (1966) (internal citations and quotations omitted). Furthermore, consideration of extrinsic factors is permissible where the plain meaning of the statute would lead to "absurd or futile results or even unreasonable results plainly at variance with the policy of the legislation as a whole." Doctors Council v. New York City Employees' Ret. Sys., 71 N.Y.2d 669, 675 (1988) (internal quotations omitted).

In fact, defendant's reading of CPL § 440.46 could very well have the curious effect of placing parole violators in a more advantageous position than their parole-compliant counterparts. For example, a re-incarcerated defendant whose parole was revoked because he missed curfew could move for sentence modification and conceivably have his sentence reduced to an unconditional discharge.<sup>7</sup> Such a defendant's journey from parole to unencumbered freedom

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<sup>7</sup> See CPL § 440.46; Penal Law §§ 60.04(3) and (4); 60.01(3)(d); 65.20.

could take substantially less than two years. By contrast, the compliant parolee would have to abide by the conditions of his parole for two years before his sentence could be terminated. It is certainly foreseeable that some parolees might purposefully violate their parole, if only in a technical manner, to avail themselves to this quicker avenue to freedom. However, whether the violation of parole is planned or inadvertent, the potential consequence under defendant's reading of CPL § 440.46 would be one that the Legislature could not have intended. See Statutes § 141 ("In construing a statute which is ambiguous the construction to be adopted is the one which will not cause objectionable results"); § 143 ("Generally, statutes will be given a reasonable construction, it being presumed that a reasonable result was intended by the Legislature"); § 145 ("A construction which would make a statute absurd will be rejected"); § 148 ("In accordance with a presumption of the legislative intention, the courts will construe a statute in order to avoid mischievous or disastrous consequences"); cf. People v. White, 73 N.Y.2d 468, 474 n.1 (1989) (this Court "avoided an interpretation of CPL 710.30 that placed too much emphasis on the statute's literal language when doing so would produce results plainly at odds with the policy of the legislation as a whole").

Instead of considering the meaning of CPL § 440.46 within the context of the statutory scheme, defendant urges this Court to read the language of the statute

in isolation, and argues that the “critical eligibility words” of the statute demonstrate the breadth of the statute’s reach (see defendant’s brief, pp. 18-20). Although defendant acknowledges that the statute contains many qualifications, he fails to explore the meaning and consequences of these exclusions. For example, the Legislature manifested an intent to bar broad retroactive relief by excluding defendants who were convicted before January 13, 2005. Thus, even though the statute is ameliorative, a fact that usually creates a presumption in favor of broad application (see People v. Utsey, 7 N.Y.3d 398, 402 [2006]), the Legislature, instead, exhibited a desire to keep the class of eligible defendants narrow.

Furthermore, in order to be eligible, a defendant must be in “the custody of the department of correctional services.” CPL § 440.46. This requirement underscores the Legislature’s intent to exclude those who have been paroled. Such a reading is consistent with the fact that, as noted, five years earlier the Legislature had already accounted for felony drug offenders who had been paroled.

Defendant argues that the remedy provided by Executive Law § 259-j is not the exclusive remedy for parolees and should, instead, be read as a complementary remedial measure (see defendant’s brief, pp. 35-36). However, his concession that they are complementary remedial measures serves to underscore the correctness of the Appellate Division’s ruling. The provision that allows law-abiding parolees to apply for relief is complimented by CPL § 440.46, which allows incarcerated

defendants, who have not been paroled, to apply for relief, but they each deal exclusively with one group of defendants. The complimentary nature of these statutes does not give rise to a third group entitled to relief, namely, paroled defendants who, as a result of their own misbehavior, are re-incarcerated before they qualify for relief under Executive Law § 259-j.

Defendant essentially argues that the Legislature intended that he should be permitted two bites at the apple. While on parole, he is eligible for relief under Executive Law § 259-j, if he complies with parole for two years. However, if he squanders that opportunity and is re-incarcerated, he maintains that he should have a second opportunity for sentence amelioration under CPL § 440.46. Such “double” relief, however, could lead to unfair results. For instance, a defendant who is re-sentenced to a determinate term and post-release supervision pursuant to CPL § 440.46, who later violates his post-release supervision and is re-incarcerated, is no longer eligible for relief under CPL § 440.46 or Executive Law 259-j. Accordingly, allowing defendant another chance at DLRA relief would be fundamentally unfair as compared to other inmates who have already been re-sentenced.

Additionally, the existence of the mandatory termination of sentence provided for in the Executive Law also dispenses with defendant’s analogy between “an inmate whose poor disciplinary record prevented early release,” and

one who was “paroled due to good behavior while in prison, but returned to DOCS custody on an eligible class-B felony owing to a technical parole violation” (see defendant’s brief, pp. 30-31). Defendant essentially contends that since a discretionary determination to deny an inmate parole leaves him eligible for DRLA resentencing, so too should a discretionary grant of parole followed by revocation. The two scenarios are distinguishable, however.

An inmate may be denied parole for a variety of reasons, many of which bear no relation to his behavior in prison, such as the nature of his crime, the feasibility of his release plans, pending deportation issues, or a statement made to the Parole Board by a crime victim. See Executive Law § 259-i (2)(c)(A)(“Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law”). The ultimate decision whether to grant parole is, indeed, discretionary, albeit not arbitrary. Therefore, a defendant may be held for several years past his initial parole eligibility date despite having appeared before the parole board on numerous occasions. By contrast, once a defendant has been paroled, the discretionary element is gone; the defendant’s

sentence must be terminated after two years of unrevoked parole. Thus, a parolee who leads a law-abiding life will, indeed, see his sentence terminated. The distinction is clear. No matter the sentence under which a defendant is presently on parole, he is expected to “live and remain at liberty without violating the law.” 9 N.Y.C.R.R. § 8002.1(a). To that end, “the releasee is expected to comply faithfully with all conditions specified in writing at the time of his release and with all other conditions and instructions, whether oral or in writing, given him by the board, a member, an authorized representative of the board or a parole officer.” 9 N.Y.C.R.R. § 8003.1(b).

By analogy, further evidencing the Legislature’s hopes that drug offenders can learn to lead law-abiding lives once they have begun serving their sentence are the provisions for merit time accrual, enacted as yet another component of the 2004 Act. Pursuant to Correction Law § 803, a statute entitled, “Good behavior allowances against indeterminate and determinate sentences,” any inmate serving “an indeterminate sentence of imprisonment of one year or more . . . imposed pursuant to section 70.70 or 70.71 of the penal law, may earn a merit time allowance” of up to one-sixth off of the minimum period of their sentence, provided they are not also serving a sentence for any of a number of enumerated violent felonies or homicide. Correction Law §§ 803(1)(d)(i); (ii); and (iii). This allowance is earned when an inmate

successfully participates in [an assigned] work and treatment program, . . . and when such inmate obtains a general equivalency diploma, an alcohol and substance abuse treatment certificate, a vocational trade certificate following at least six months of vocational programming or performs at least four hundred hours of service as part of a community work crew.

Correction Law § 803(1)(d)(iv).

Significantly, any such time granted prior to release on parole “shall be forfeited and shall not be restored if the paroled . . . person is returned to an institution under the jurisdiction of the state department of correctional services for violation of parole . . . .” Correction Law § 803(5). An inmate returned on a parole violation would be permitted to begin accruing merit time starting at zero, but only if the remaining portion of his term of incarceration exceeds one year. Id.

Although merit time provisions have no direct bearing on whether a defendant is eligible for resentencing under the DLRA, they evidence that the Legislature has endeavored to accelerate the return of drug offenders to their communities, but expects them to perform certain beneficial, self-improving, or service-based tasks, which would likely include participation in a substance abuse treatment program. Notably, a return to incarceration after violating parole results in the forfeiture of accumulated merit time. Thus, these provisions serve as an example of a benefit that is bestowed upon drug offenders but lost when they are re-incarcerated after violating their parole.

Defendant, however, argues that the Legislature's decision to exclude parole violators from the credit time allowance afforded by Correction Law § 803-b illustrates that the Legislature contemplated parole violators when drafting the Drug Law Reform Act (see defendant's brief, pp. 21-22). Defendant further contends that the absence of such an express exclusion in CPL § 440.46 suggests that parole violators should be afforded the opportunity to be resentenced. Defendant's argument is flawed because the express exclusion of parole violators from the credit time afforded by Correction Law § 803 evinces the Legislature's intent to enhance the penalization of parole violators. To find that the same Legislature, as a later in peri materia part of the same legislative endeavor, would seek to encourage, or even reward, non-compliant behavior by parolees would fly in the face of every statutory canon governing interpretation of the 2009 DLRA's provisions.

Defendant also contends that the Legislature made a "deliberate choice," and not an "inadvertent omission" (see defendant's brief, p. 21) when it did not expressly include parole violators from the exclusion provision of CPL § 440.46(5). The sub-section to which defendant refers categorically excludes certain violent and homicidal felons from relief altogether based entirely upon the nature of their crimes. See CPL § 440.46(5); Correction Law § 803(1)(d)(ii). What defendant overlooks, however, is that parole violators were previously

afforded a very definitive relief by way of mandatory termination of sentence (see Executive Law § 259-j) that they squandered by violating parole. Therefore, the remedy available to parole violators is to become re-eligible for parole, and, once re-released, abide by the conditions of their parole for two years.

Defendant argues that the Drug Law Reform Acts first provided relief to inmates with the most urgent needs—those with the longest terms of imprisonment (see defendant’s brief, p. 39). Although the urgency for relief decreased over time, defendant suggests that the breadth of the relief increased. The portions of the DLRA 2009 pertinent to eligibility for resentencing are, however, in all relevant aspects, no different from those contained in the DLRA 2004.

The 2004 DLRA provided, in pertinent part:

Notwithstanding any contrary provision of law, any 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 fifteen years pursuant to 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 in accordance with section 70.71 of the penal law in the court which imposed the original sentence.

L. 2004, Ch. 738, § 23.

The pertinent language in the 2009 DLRA is nearly identical to that in the 2004 Act. It reads:

Any person in the custody of the department of correctional services convicted of a class B felony offense defined in article two hundred twenty of the penal law which was committed prior to January thirteenth, two thousand five, who is serving an indeterminate sentence with a maximum term of more than three years, may, except as provided in subdivision five of this section, upon notice to the appropriate district attorney, apply to be resentenced to a determinate sentence in accordance with sections 60.04 and 70.70 of the penal law in the court which imposed the sentence.

CPL § 440.46(1).

In People v. Rodriguez, 68 A.D.3d 676 (1st Dept. 2009), the Appellate Division held that a parole violator whose underlying sentence was for an A-I felony drug offense was not eligible to be resentenced pursuant to the 2004 DRLA. Rodriguez, 68 A.D.3d at 676; accord People v. Bagby, 11 Misc. 3d 882, 887 (Sup. Ct. Westchester Co. 2006). The court essentially reasoned that a defendant who was “in the custody of the department of correctional services” merely because he had violated his parole should not receive the benefit of resentencing. The Appellate Division applied the reasoning utilized by this Court in People v. Mills, 11 NY3d 527, 537 (2008), and held that the Legislature could not have “intend[ed] fresh crimes to trigger resentencing opportunities.” Rodriguez, 68 A.D.3d at 676.

The Appellate Division’s interpretations of the 2004 DLRA are applicable to the 2009 DLRA because the statutory language of the relevant portions of each is identical. Both Acts state that any person “in the custody of the department of correctional services” who was convicted of the class of felony defined in Article

220 of the Penal Law for which each respective Act provides ameliorative relief, convicted before specified dates, and serving an indeterminate term of imprisonment of a certain length, may apply for resentencing. See L. 2004, Ch. 738, § 23; CPL § 440.46(1). As with the 2004 Act, nothing in the 2009 Act or in the legislative comments to the Act suggest that the CPL § 440.46 remedies are available to anyone other than those still serving their original incarceration.<sup>8</sup> Further, contrary to defendant's interpretation, the legislative comments and language of the statute do not illustrate a progression towards widening the class of inmates eligible for DLRA relief.

In Mills, 11 N.Y.3d at 527, this Court considered whether two class A-II drug felons were eligible for resentencing under the parole eligibility-dependent scheme of the 2005 DLRA. The Act provides as follows, with the language distinguishing it from the 2004 and 2009 Acts underscored:

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 who was sentenced thereon to an indeterminate term of imprisonment with a minimum period not less than three years pursuant to provisions of the

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<sup>8</sup> Contrary to defendant's argument (see defendant's brief, pp. 20-21), the People did not abandon the notion that inmates' sentences are separated into two parts. The term "original sentence" was merely a phrase used to denote the portion of incarceration that defendant served before he violated parole. The purpose in separating these terms of incarceration was to keep the amount of time defendant was required to serve distinct from the time he served as a result of his inability to comply with his parole. Additionally, defendant's reliance on People v. Buss, 11 N.Y.3d 554, 558 (2008) (see defendant's brief, p. 21), is misplaced as this Court limited the scope of its holding in Buss to SORA-related matters.

law in effect prior to the effective date of this section, and who is more than twelve months from being an eligible inmate as that term is defined in subdivision 2 of section 851 of the correction law, and who meets the eligibility requirements of paragraph (d) of subdivision 1 of section 803 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 Correction Law § 851(2), an inmate is an “eligible inmate” when, inter alia, he is two years away from becoming eligible for release on parole. Therefore, under the 2005 DLRA, an A-II felony drug offender is eligible for resentencing only if he is more than 3 years away from his parole eligibility date. The 2009 DLRA does not have a similar provision. In other words, under the 2009 DLRA, a class B felony drug offender is eligible for resentencing regardless of the proximity of his parole eligibility date. See Mills, 11 N.Y.3d at 534. In People v. Then (the companion case to Mills), the Court of Appeals held that a class A-II felony drug offender who violated his parole and was re-incarcerated for committing a second class A-II drug felony could not have his original sentence modified under the 2005 DLRA. The Court reasoned that “the Legislature did not intend fresh crimes to trigger resentencing opportunities.” Mills, 11 N.Y.3d at 537.

Defendant argues that the Legislature included the “carve-out” provision in DLRA 2005 specifically to keep parole violators from being eligible, but did not

do so in DLRA 2009 (see defendant's brief, p. 44). In Mills, however, this Court discussed the legislative history, which pointed to a different purpose:

The bill is narrowly tailored to offer the possibility of relief to inmates who are most desperately in need of sentence review: those non-violent drug offenders who are serving life sentences for Class A-II drug offenses with *relatively long minimum terms* who were overlooked in the 2004 Drug Law Reform Act.

Mills, 11 N.Y.3d at 535 (emphasis provided in original). Furthermore, the legislative history noted the bill's "narrowly tailored" nature, which is a stark contrast from defendant's description of increasing breadth. Additionally, defendant fails to explain why the Legislature would attempt to keep parole violators convicted of A-II felonies from resentencing relief, while failing to include that same language for A-I felony offenders who violated parole.

Defendant further argues that finding parole violators ineligible for DLRA re-sentencing relief runs counter to the Drug Law Reform Acts' aim to give sentencing discretion back to judges (see defendant's brief, pp. 31-33). Indeed, the Legislature discussed this goal in the Memorandum in Support of the DLRA 2004, stating that

[j]udges must be given the discretion to decide whether or not to send non-violent low level addicted offenders to drug treatment programs as an alternative to prison. Under current law, mandatory minimum sentences preclude the exercise of such judicial discretion.

McKinney's 2004 Session Laws of NY, NYS Assembly, Memorandum in Support of Bill A11895. In DLRA 2004, the Legislature set forth the standard to be used by judges in re-sentencing proceedings. It stated that after the findings of fact had been made, "the court shall, unless substantial justice dictates that the application should be denied," inform the defendant of his new sentence. See L. 2004, c. 738, § 37 (eff. Feb. 12, 2005). The "substantial justice" standard, however, essentially makes resentencing the defendant the court's default position, while denying resentencing is the exception. The standard, which clearly favors resentencing, tends to show that although judges may have increased discretion to determine the appropriateness of a new sentence, there is less discretion about whether a defendant should be resentenced. Therefore, it is even less likely that the Legislature would have intended for parole violators, who are not within the class of inmates deserving of resentencing, to receive such a benefit.

Contrary to defendant's contention that the DLRA sought to reduce post-incarceration supervision (see defendant's brief, p. 29), the Legislature's elimination of lengthy periods of parole was merely a by-product of reducing incarceratory sentences. The goal of the DLRA is clear—to reduce unnecessarily lengthy periods of incarceration for drug offenders while simultaneously recognizing that those offenders need supervision and treatment for successful reintegration into society. The Legislature deemed a two-year maximum term of

post-release supervision an appropriate length of time (see Penal Law § 70.45[2][b]), which is consistent with the two-year period of unrevoked parole required by Executive Law 259-j.

Defendant attempts to distinguish his “technical” parole violation from that of a “new crime” violation (see defendant’s brief, p. 47). Just as the Legislature could not have intended for parole violators to benefit from committing new crimes (see Mills, 11 N.Y.3d at 537), “technical” parole violations should not give a parolee the opportunity for windfall re-sentencing. Labeling a parole violation as “technical” is a semantic device that is apparently used to somehow convince this Court that such a violation does not indicate blameworthiness sufficient to make the parole violator ineligible for re-sentencing. Of course, this alleged distinction obscures the fact that the parole violator who commits a new crime also has to face the consequences stemming from a conviction for a new crime. For instance, a parolee convicted of another felony while on parole must serve consecutive sentences (see Penal Law § 70.25 [2-a]). Therefore, our criminal justice system does not treat the two parole violators the same in toto, but only for the purposes of ameliorative re-sentencing on their past crime.

Defendant, relying on original motion papers submitted in this case (A. 21), seeks to engender legally irrelevant empathy by claiming that the basis of his parole violation was simply the failure to provide a change of address to his parole

officer (see defendant's brief, pp. 9, 47). Defendant, however, is not the victim of some benign "technical" violation that gave rise to a disproportionate consequence. He has squandered numerous treatment opportunities over the years, and demonstrated that he is unable to lead a law-abiding life. Defendant fails to mention that, in addition to his "technical" parole violation, he was convicted in 2007, upon his plea of guilty, of Failure to Disclose the Origin of a Recording (Penal Law § 275.35), a class A misdemeanor, after his initial release from incarceration. He was sentenced to fifteen-days in prison. Subsequently, defendant was again released to parole, and "suffered a relapse" (A. 21). As a result of his relapse, he served 60 days at the Willard Drug Treatment Center. *Id.*<sup>9</sup> Finally, defendant was re-incarcerated when his parole was revoked after he failed to provide his parole officer with a change of address (A. 21).

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<sup>9</sup> The record is unclear about whether defendant's relapse, presumably the failure of a drug test since he was not charged with drug possession, constituted a violation of parole.

## POINT TWO

### **DEFENDANT'S ARGUMENT REGARDING MOOTNESS IS PREMATURE SINCE HE REMAINS INCARCERATED.**

Defendant claims that if he is released to the Division of Parole before this Court renders a decision, his claim should not be found moot (defendant's brief, at 50). Additionally, defendant argues that this appeal meets the criteria for the exception to the doctrine of mootness (see defendant's brief, p. 58-59). An exception to mootness exists when the claim exhibits "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i. e., substantial and novel issues." Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714-15 (1980). Defendant's argument, however, is premature because, as of this writing, defendant is still incarcerated.

As this Court stated in Hearst, "[i]t is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal." Hearst, 50 N.Y.2d 713 (internal citations omitted). Importantly, this Court also noted that this principle "forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions." Id. Defendant concedes that he has not yet been released to the Division of Parole

(defendant's brief, p. 51). Given that defendant is still in the custody of the DOCS, his argument is merely hypothetical.

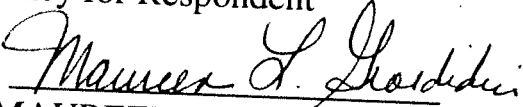
If defendant were to be released from custody during the pendency of this appeal, this Court could find an exception to mootness under the guidelines set forth by Hearst, 50 N.Y.2d 707.

**CONCLUSION**

**FOR THE FOREGOING REASONS, THE ORDER  
APPEALED FROM SHOULD BE AFFIRMED IN  
ALL RESPECTS.**

Respectfully submitted,

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