

To be argued by
MARK W. ZENO

Court of Appeals

—  —
State of New York

—  —
THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

JESUS PRATTS,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF & SUPPLEMENTAL APPENDIX

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February 3, 2011

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COURT OF APPEALS
STATE OF NEW YORK

- - - - - x

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

JESUS PRATTS, :

Defendant-Appellant. :

- - - - - x

PRELIMINARY STATEMENT

This brief is submitted in reply to Respondent's Brief (RB), received by this office on January 19, 2011.

ARGUMENT

As both parties agree, the issue in this appeal is whether an offender, like appellant, in DOCS custody on a pre-Rockefeller-reform B-felony drug sentence, is ineligible to seek resentencing under the 2009 Drug Law Reform Act, because that custody was not continuous from the date of conviction, the offender having been released but reincarcerated following a parole violation.¹ Respondent concedes that the statute's

¹Throughout this brief, we follow the convention of identifying the three drug law reform acts by the year in which they were enacted, followed by the abbreviation "DLRA." Thus, the first drug law reform act, approved December 14, 2004, becomes "2004 DLRA" (L 2004, ch 738), the second, approved August 30, 2005, "2005 DLRA" (L 2005, ch 643), and the third, approved April 7, 2009, "2009 DLRA"

(continued...)

language contains no eligibility exclusion for such offenders: it requires only that a class-B offender be in DOCS custody, a condition appellant meets. Since the statutory text is unambiguous, respondent is left to argue that a plain language application 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.'" RB at 13, quoting Doctors Council v. New York City Employees' Ret. Sys., 71 N.Y.2d 669, 675 (1988), or would frustrate the statute's purpose. Uniformed Firefighters Ass'n, Local 94 IAFF, AFL-CIO v. Beekman, 52 N.Y.2d 463, 471 (1981).

Despite this high burden, respondent can point to nothing in the 2009 DLRA or its legislative history suggesting that the "policy of the legislation as a whole" excludes returned-to-DOCS-custody parole violators from asking for resentencing. Instead, respondent constructs a counterargument based on the absence of legislative history specifying that reincarcerated parole violators were intended to be eligible to ask for resentencing. Respondent argues that the "main objective" of the drug reform was to provide "relief to those defendants serving excessive amounts of incarceration under the

¹(...continued)
(L 2009, ch 56, pt. AAA).

Rockefeller Drug Laws," that there is no language in the legislative history "outlining the need for reduced post-incarceration supervision," and that, at least in respondent's opinion, "parole violators ... need more supervision, not less," RB: 9-10. Having constructed this foundation, respondent concludes, "the only reasonable construction of the reform laws is that" once a defendant is paroled, he must "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." RB: 12.

In our opening brief, we show that the "main objective" of 2009 DLRA was not limited to reduction of the "incarceratory" portion of sentences, but, instead, to reducing overly harsh drug sentences, including too-long parole terms, and to return sentencing discretion to judges.²

²The opening sentence of respondent's argument misstates the position we took in our opening brief, stating "[d]efendant concedes that the main objective of the Drug Law Reform Acts was to provide relief to those defendants serving excessive amounts of incarceration under the Rockefeller Drug Law (see defendant's brief, p. 27)." Neither our Subpoint heading on that page, nor anything else - anywhere else - in our brief, could be read as a concession that the "main purpose" of drug reform was limited to reducing the prison portion of sentences. See, e.g., AB: 27 ("The collective effect of the three DLRAs, and 2009 DLRA in particular, demonstrates that the legislative intent of drug reform was to reduce overly harsh sentences, including too-long parole terms, and return sentencing discretion to judges; nothing in any of the provisions

(continued...)

But, putting that debate aside, the question is not whether respondent can marshal a reasonable argument that the Legislature should have enacted a contrary rule, or whether a judge applying the statute's plain language finds it unwise. "[A] statute 'must be read and given effect as it is written by the Legislature, not as the court may think it should or would have been written if the Legislature had envisaged all the problems and complications which might arise'." People v. Tychanski, 78 N.Y.2d 909, 911 (1991); People v. Smith, 79 N.Y.2d 309, 311 (1992) (not the function of a court "to pass on the wisdom of a statute or any of its requirements, but rather to implement the will of the Legislature as expressed in its enactment"). So long as the plain language does not lead to "an absurd result that would frustrate the statutory purpose," the only question is what the statute says. Long v. Adirondack Park Agency, 76 N.Y.2d 416, 420 (1990).

To override the plain terms of a statute respondent must show that an application of those words would be contrary to the very policies sought to be achieved by the legislation as a whole. New York State Bankers Ass'n v. Albright, 38 N.Y.2d 430, 437 (1975). The lack of word-for-word backup in the

²(...continued)
suggests that parole violators are excluded from this relief"
[emphasis added, initial capitalization omitted]).

legislative history for every operational permutation of the plain language of a statute is no basis for disregarding plain statutory language. The Legislature's failure to include a matter within a statute is all the proof necessary to demonstrate that its exclusion was intended. See, Pajak v. Pajak, 56 N.Y.2d 394, 397 (1982).

Section 440.46's plain language, which allows in-DOCS-custody parole violators to request resentencing, does not conflict with even respondent's characterization of the 2009 DLRA's legislative purpose. Using respondent's most restrictive statement of the statute's purpose, the objective of 2009 DLRA was to reduce prison terms for non-violent drug offenders. RB: 9. Permitting returned-to-DOCS-custody parole violators to ask for a reduction of their old-law unduly harsh sentence serves this legislative policy, because, self-evidently, an offender returned to prison following a parole violation is incarcerated serving a pre-reform prison sentence. Even if the Court were to accept respondent's unsupported and counterintuitive suggestion that the remaining prison term an offender must serve after a parole violation is not a part of the original sentence (see, RB: 23 at n. 8), a request to reduce the old-law prison term a parole violator

must serve out does not frustrate the Legislature's stated goal of reducing prison terms.

Respondent thus cannot show that the plain language of §440.46 - allowing reincarcerated in-DOCS-custody parole violators to ask for resentencing - is at variance with the purpose of drug law reform.

That the Legislature included an early-parole-termination remedy in 2004 DLRA offers no proof of an intent to exclude reincarcerated parole violators from asking for resentencing under 2009 DLRA. Respondent has argued, and the First Department found, that the early-parole-termination remedy of Executive Law §259-j(3-a), added by 2004 DLRA, is the exclusive sentence-reduction remedy available to drug offenders once they are released to parole. This is so, respondent argues, because "[t]he 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." RB at 11 (emphasis omitted). Respondent is wrong for a number of reasons.

First, and most importantly, as we argued at pages 35 to 36 of our opening brief, nothing in any of the three DLRA's suggests that 2004 DLRA's early-parole-termination remedy

preempts CPL §440.46's resentencing remedy. Respondent's assumption that these are mutually exclusive remedies ignores the basic rule that "courts must harmonize" the plain language of related statutes "in a way that renders them compatible." Matter of Tall Trees Constr. Corp. v Zoning Bd. Of Appeals of Town of Huntington, 97 N.Y.2d 86, 91 (2001). These plain language provisions are harmonious complementary remedies: section 259-j automatically entitles a parolee to termination of his parole. But a parolee who is returned to DOCS custody must ask a court to consider reducing his sentence pursuant to CPL §440.46. Reduction of his sentence, and, incidentally, his post-incarceration supervision, is not guaranteed. Neither provision interferes with the other.

Second, because Executive Law §259-j(3-a) was enacted as part of 2004 DLRA, which extended resentencing relief only to those offenders convicted of class-A-I sentences, its primary goal was ameliorating those offenders' mandatory lifetime parole terms. Unconsolidated provisions of 2004 DLRA (L 2004, ch 738), gave in-DOCS-custody offenders the right to ask a judge for a reduced sentence. Section 259-j gave those offenders out on parole a separate remedy: if they completed two years of unrevoked parole, the lifetime parole term was terminated. Executive Law §259-j(3-a). Those lifetime parole

terms presented a particular problem separate from the continuing threat of return to incarceration - even well-behaved parolees were subject to lifetime supervision. Section 259-j remedied that unique problem; nothing in that provision hints that it was intended to exclude in-DOCS-custody parole violators from asking for resentencing, and particularly not those offenders who had no right even to apply for resentencing until years later under 2009 DLRA.

Third, respondent argues that because two years is now the maximum post-release supervision term for a first-time class-B drug offender, and it is the same length as the 2-year period of unrevoked parole necessary to become eligible for early parole termination under §259-j, the Legislature must have intended that only those offenders who successfully complete two years of parole should be eligible for sentencing relief. RB: 26-27. But this argument ignores that the reformed sentencing laws impose a maximum post-release-supervision term of two years - regardless of whether defendant is successful. Two years, in the Legislature's determination, is the maximum a class-B drug offender should be subject to post-incarceration supervision, and the threat of reincarceration. This basic policy is perfectly consistent with the plain language of CPL §440.46, which allows those

offenders who do not successfully serve the long parole terms imposed under the pre-reform law, to ask a court to shorten their sentences to one consistent with post-reform drug sentences.

Respondent argues, alternatively, that this Court's decision in People v. Mills, 11 N.Y.3d 527 (2008), which construed a provision in 2005 DLRA that expressly excluded offenders from asking for resentencing based unless they were more than three years away from their initial parole eligibility date, applies with equal force to 2009 DLRA, even though it contains no such provision. See, RB at 12-13, 23-25, 27. That the Legislature decided to exclude some offenders from eligibility for resentencing under 2005 DLRA based on their parole status, and included a specific statutory provision to that effect, is proof that it intended no such exclusion in 2009 DLRA, because it eliminated any statutory parole-status eligibility exclusion from the 2009 Act. See, Bay Shore Family Partners, LP v. Found. of Jewish Philanthropies, 239 A.D.2d 373 (2d Dep't 2007) ("the Legislature did not include a substantial compliance provision [in the new statute] even though such a provision had existed in the previous statutory scheme. This omission is not to be viewed as legislative oversight but rather as an indication

that the exclusion of such a provision was intended" [internal citations omitted]).

To be sure, this Court's decision in Mills did include the statement that the Legislature "did not intend fresh crimes to trigger resentencing opportunities." 11 N.Y.3d at 537. But this was in the context of a defense argument based on the specific language of 2005 DLRA. The defendant had pointed out that he had been convicted of a new crime, which rendered him ineligible for release on parole for more than three years, and suggested that this made him technically eligible for resentencing on his Class A-II drug offense as well. This Court rejected the argument, finding that the statute was intended to limit eligibility to those who were more than three years away from release on the drug crime, not on other new crimes. Id. Rather than support the conclusion that all three DLRAs exclude defendants from seeking resentencing once they have been released to parole, Mills' repeated reliance on 2005 DLRA's parole-eligibility language supports appellant's position that, without such express language, there is no exclusion.

Finally, a recurrent theme of respondent's argument is that a plain language application of the statute would provide an unwarranted benefit to misbehaving parolees, by allowing

them to ask for resentencing (see, e.g., RB: 15-16). Our first response is that the question of whether the benefit is warranted is for the Legislature to answer, and the plain language of the statute provides its answer: in-DOCS-custody parole violators are eligible to apply for resentencing.

Our second response is that the plain language of the statute provides in-DOCS-custody parole violators only the right to ask for resentencing. It provides no guarantee. As discussed in our main brief at pages 31 to 33, whether or not the offender will be resentenced is a matter for the sentencing judge's discretion - measured by the substantial justice standard. There is no risk that undeserving parole violators will receive windfalls. See, e.g., People v. Hernandez, NY County Ind. No. 1067/03 (Pickholz, J.) (May 26, 2010) (unreported, included in supplemental appendix at p. A: 1) (finding in-DOCS-custody parole violator eligible to be resentenced, but declining to resentence him on substantial justice grounds); People v. King, NY County Ind. No. 7608/97 (Conviser, J.) (Feb. 8, 2010) (unreported, included in supplemental appendix at p. A: 5) (same); People v. Vega, Bronx County Ind. No. 4198/2004 (Oliver, J.) (Dec. 16, 2009) (unreported, included in supplemental appendix at p. A: 13) (same).

* * *

For the reasons stated above, and in our opening brief, this Court should give the 2009 DLRA's resentencing eligibility provision its plain and natural meaning. This Court should not insert a judicially created exclusion into this ameliorative statute. Such a categorical exclusion would be inappropriate because, under the plain language of the statute, the sentencing judge still retains the discretion whether to grant or deny resentencing.

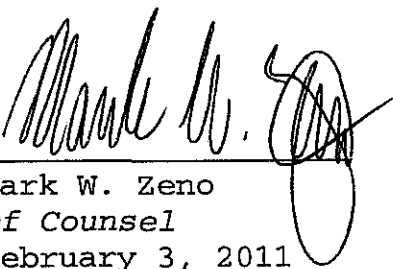
CONCLUSION

FOR THE REASONS STATED ABOVE, AND IN APPELLANT'S OPENING BRIEF, THE DECISION OF THE APPELLATE DIVISION SHOULD BE REVERSED AND THE MATTER REMANDED TO SUPREME COURT FOR IT TO CONSIDER WHETHER SUBSTANTIAL JUSTICE DICTATES DENIAL OF APPELLANT'S MOTION.

Respectfully submitted,

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By


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February 3, 2011

**Supplemental Appendix
of Unreported Cases**

SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART 66

-----X
THE PEOPLE OF THE STATE OF NEW YORK :

- against - : Indictment No. 1067/03
1460/93
JUAN HERNANDEZ, : 12091/93
Defendant. :

-----X
RUTH PICKHOLZ, J.

The petitioner applies for resentencing pursuant to the 2009 Drug Law Reform Act.

Four separate sentences, arising out of three indictments, are at issue here. The first indictment, 12091/93, arose from a February 11, 1993 incident in which an undercover police officer recovered 75 bags of crack cocaine from petitioner. The second, 1460/93, was based upon a December 3, 1993 recovery of 87 glassine envelopes of crack cocaine by a police officer who observed him throw them to the ground. Petitioner pleaded guilty on each case to a charge of criminal possession of a controlled substance in the third degree and was sentenced on July 21, 1994 to concurrent four and one-half to nine year prison terms. While he was on parole on these convictions the police observed him discard a bag containing 160 bags of cocaine. The incident resulted in indictment 1067/03. Petitioner was convicted after a bench trial on this indictment of criminal possession of a controlled substance in the third and fourth degrees. The trial

court (Sudolnik, J.) sentenced him as a second felony offender on December 4, 2003, to terms of four and one-half to nine years, and three to six years, respectively. He is currently in custody and now ask to be resentenced to the minimum terms authorized by the 2009 Drug Law Reform Act.

Although petitioner has never been committed of a violent felony, the sentences at issue are only the latest in a series that he has served as a result of being convicted of various drug crimes. He was convicted by plea of attempted criminal sale of a controlled substance in the third degree in 1987 under two separate indictments and received a jail term of six months jail and a five-year probationary term on each case. He subsequently violated the terms of his probation and was resentenced to a term of one to three years in prison. He pleaded guilty to a drug misdemeanor in 1988. The following year he pleaded guilty under two separate indictments to two counts of attempted criminal sale of a controlled substance in the third degree. He received probationary sentences on the 1989 convictions, but was resentenced to a prison term of one to three years in 1990 for violating the terms of the probation. The violation undoubtedly stemmed from 1990 convictions under two different indictments, the first for attempted criminal possession of a controlled substance in the third degree, and the second for attempted criminal sale of a controlled substance in the third degree. He received a prison term of three to six years on each case. He appears to have ten felony and two misdemeanor drug convictions in all.

The Office of the Manhattan District Attorney opposes resentencing on indictment 12091/93 on the ground that petitioner was paroled on that conviction and is currently incarcerated on it only because he violated his parole by committing a new crime in 2003. I have elsewhere addressed and rejected the argument that an inmate who violates his parole on a conviction and is then re-incarcerated is automatically precluded from obtaining relief for that conviction under the 2009 DLRA (*see People v. Williams*, unreported decision, consolidated indictment numbers 9280/99 and 5364/04, Sup Ct NY Cty, 12/23/09 and extended discussion in *People v. Williams* upon reargument, unreported decision, indictment number 9280, Sup Ct NY Cty, 1/27/10). I adhere to the analysis expressed in those decisions. The Office of the Special Narcotics Prosecutor, which prosecuted indictments 1460/93 and 1067/03, opposes resentencing on those indictments on substantial justice grounds. They contend that petitioner has an lengthy criminal record and an egregious prison disciplinary record which require that his application be denied. I agree. The petitioner has had only modest success in completing vocational programs that were made available to him in prison , and has been unable to complete an alcohol and substance abuse program. His lack of accomplishment in these areas appears to stem from serious disciplinary issues. His prison disciplinary record is extensive. He committed 11 tier 3 infractions and 26 tier 2 infractions since he first entered the New York State prison system more than twenty years ago. Four of the tier 3 infractions, and nine of the tier 2 infractions occurred during his incarceration on his most recent (2003) conviction. Many of the infractions were for fighting. The most serious of

this type was a 2006 incident in which he slashed another inmate with a pen, for which he received one year in disciplinary confinement, loss of six months of good time, as well as other punishment. Although his criminal record is completely free of violence and consist solely of drug convictions, it is lengthy and does not commend him for any leniency. Accordingly, his application for resentencing is denied in its entirety.

A.J.S.C.

Dated: May 26, 2010

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART-95**

-----X
THE PEOPLE OF THE STATE OF NEW YORK .

Ind. No.: 7608-97

-against-

DECISION & ORDER

PAUL KING

Defendant,

-----X
The Defendant moves for resentencing pursuant to the Drug Law Reform Act of 2009 (the "2009 DLRA", Chapter 56 of the Laws of 2009, codified at CPL 440.46). That motion is opposed by the People. For the reasons stated below, Defendant's motion is denied.

STATEMENT OF FACTS

The Defendant was convicted after a jury trial of two counts of Criminal Sale of a Controlled Substance in the Third Degree and one count of Criminal Possession of a Controlled Substance in the Third Degree. He was sentenced on October 28, 1998 to three concurrent indeterminate terms of imprisonment of 6 to 12 years. Defendant's crimes involved two contemporaneous sales of a small quantity of crack cocaine to an undercover police officer and a civilian. After initially being released on parole, the Defendant was reincarcerated for parole violations on three separate occasions in 2006, 2008 and 2009. He was again released from prison to parole supervision on November 30, 2009 (after the instant motion was filed) and is currently at liberty on parole. His maximum sentence expiration date is January 6, 2011. The practical effect of granting the instant motion and reducing his sentence, therefore, would be to reduce his parole term to some period less than the 11 months he has remaining on that term

now.

Mr. King was convicted of the felony of Forgery in the Second Degree in 1994 for which he received a one year sentence. He was also convicted of a number of crimes in New Jersey which would appear to have been the equivalent of felonies in New York, although the Court is not certain precisely how these crimes were denominated in New Jersey. According to the People, these crimes include a 1990 conviction for Attempted Burglary and Receipt of Stolen Property for which he received a 4 year prison sentence, a 1986 conviction for cocaine possession for which he received a 3 year prison sentence, a 1986 conviction for Burglary for which he received an 18 month prison sentence and a 1982 conviction for Burglary, Damage to Property and Larceny from the Building for which he received a 3 month prison sentence.

The Defendant also has 13 misdemeanor convictions in New York and four of what would appear to be misdemeanor convictions in New Jersey. All of these convictions span an approximate 26 year period from 1982 to 2008. They include numerous controlled substance possession offenses, possession of a forged instrument, resisting arrest, criminal possession of a weapon, petit larceny, criminal tampering and receipt of stolen property. Mr. King absconded from custody on August 14, 1996 and was reincarcerated on August 31, 1996. He has had 22 disciplinary infractions while incarcerated on the instant offense including 5 Tier 3 infractions (the most serious of the three categories of infraction in the State Department of Correctional Services ["DOCS"] system). Defendant's Tier 3 infractions include two for lewd conduct (in 2002 and 1999). His infractions have also included numerous instances of failing to obey a direct order and three instances of fighting or violent conduct. Mr. King received "keeplock" time or a period of confinement in a Special Housing Unit ("SHU") for most of his violations.

Defendant's counsel asserts that all of Mr. King's transgressions have arisen from his narcotics addiction and depression. The Defendant has also engaged in positive conduct since his instant conviction. He completed the DOCS Residential Substance Abuse Treatment Program ("RSAT") in 2005. Defendant's counsel also asserts that Mr. King has participated and plans on continuing to participate in Narcotics Anonymous and Alcoholics Anonymous meetings. Mr. King completed Aggression Replacement Therapy in 2005 and phase III of the DOCS Transitional Services Program in 2008. He has performed various work in prison and earned the title of Plumber's Helper. According to Defendant's counsel, Mr. King has joined a mosque and says that his religious beliefs are assisting him with the problems he has struggled with throughout his life. Defendant's counsel notes that since Defendant's most recent reincarceration in January of 2009 he has received only one disciplinary infraction for smoking. His most recent inmate review by his corrections counselor indicates that Mr. King has made a "positive custodial adjustment". Defendant's counsel, the Center for Appellate Litigation, indicates that it will assist Mr. King through its social work unit during his release.

CONCLUSIONS OF LAW

The 2009 DLRA, *inter alia*, allows certain convicted Class B felony drug offenders serving indeterminate sentences imposed prior to January 13, 2005 to be resentenced to new determinate terms under the new determinate sentencing ranges created by the statute.¹ The

¹ This Court has issued three recent previous opinions in which it analyzed a number of the resentencing provisions of the 2009 DLRA. *See People v. Figueroa*, (Index # 3664\02, February 8, 2010); *People v. Jones*, 25 Misc 3d 1238(A) (Sup Ct, New York County 2009); *People v. Brown*, 2010 N.Y. Slip Op. 50000(U), 2010 WL 9928 (Sup Ct, New York County 2010). Analysis and language from those previous decisions is incorporated in the instant Decision and Order.

statute first requires a court to determine whether a defendant is eligible for resentencing. In this case, the parties disagree about whether the Defendant is statutorily eligible for resentencing in one respect. The People argue that the Defendant is ineligible for resentencing because he is currently incarcerated only by virtue of a parole violation.

The issue of whether a defendant who is incarcerated only by virtue of having been returned to prison for a parole violation is barred from resentencing eligibility under the 2009 DLRA is one which numerous courts are now grappling with. This Court conducted an extensive analysis of the issue and concluded in *Figueroa, supra*, that the fact that an otherwise eligible offender is returned to prison after violating the provisions of that offender's parole does not bar the offender from resentencing eligibility under the 2009 DLRA. The Defendant here is otherwise eligible for resentencing under the statute. Therefore the Court holds that the Defendant is eligible for resentencing.

The 2009 DLRA provides that defendants shall be resentedenced pursuant to Penal Law §§ 60.04 & 70.70 unless "substantial justice dictates" that resentencing be denied. CPL 440.46, subdivision (3), referenciong § 23 of the 2004 DLRA.² In making a determination concerning resentencing, the Court may consider "any facts or circumstances" relevant to the imposition of a new sentence which are submitted by the Defendant or the People and in addition shall consider a defendant's institutional confinement record. Such a review shall include a defendant's

² The 2009 DLRA's standard for determining whether an eligible offender should be resentedenced -- that such resentedencing should be imposed unless "substantial justice dictates" otherwise -- is the same standard which was used in the 2004 DLRA. The 2004 standard, in fact, is incorporated by reference in the 2009 DLRA. The legislative history and case law interpreting the phrase "substantial justice dictates" under the 2004 DLRA are thus obviously relevant in interpreting the 2009 statute.

disciplinary history and participation or willingness to participate in correctional treatment or programming. *Id.*

The Legislature did not define what the term “substantial justice dictates” means but a number of parameters of the statute are obvious from its language and legislative history. First, where a Defendant is eligible for resentencing, resentencing is not mandatory. Courts rather have a “measure of discretion” in determining whether or not to grant a resentencing application. *See People v. Vasquez*, 41 AD3d 111 (1st Dept 2007), *lv dismissed*, 9 NY3d 870. It is also obvious that the statute is not neutral in guiding courts as to how to exercise that discretion. Rather, “there is a strong presumption in favor of granting a resentencing application for all eligible defendants”. *People v. Lopez*, 10 Misc3d 1056(A) (New York County 2005). The Court must be mindful of the ameliorative purposes of the 2009 DRLA’s resentencing provisions. Those provisions were obviously intended to bring the sentences of appropriate eligible offenders sentenced prior to 2005 in line with the lower sentencing parameters in existence for the same crimes today.

With respect to Mr. King, as with most other defendants, there are a variety of factors which, in the Court’s view, should weigh heavily in the analysis and not all of them tilt in the same direction. The strongest factor arguing for resentencing in this case, in the Court’s view, are the facts underlying the Defendant’s instant conviction. As was noted *supra*, the Defendant in this case was convicted of selling a small quantity of crack cocaine in two contemporaneous transactions. His crime also appears to have been directly related to his substance abuse. There is no doubt that a crime such as that committed by Mr. King in the instant offense was the kind of offense which the Legislature was targeting for resentencing consideration in the 2009 DLRA.

This Court must also consider, however, Defendant's criminal history, time in prison and conduct while on parole. By the Court's count, the Defendant has 22 prior convictions spanning a three decade period. Five of these convictions were for offenses which would appear to have been felonies, although most are remote in time.

Among all of the other facts about the Defendant, however, it is his prison disciplinary record and parole violations which weigh most heavily for this Court in making the determination that substantial justice dictates a denial of Defendant's motion. Defendant's disciplinary record is marked by the number of his disciplinary infractions, by the fact that five of those infractions involved fighting or lewd behavior and the fact that the Defendant's infractions were seen as being serious enough that he was punished with keeplock or SHU confinement on multiple occasions (albeit for mostly brief periods of time).

The heavy weight which this Court puts on Defendant's disciplinary record is based on several considerations. First, the resentencing statute emphasizes this factor. Second, an offender's conduct while incarcerated is a recent indicia of his behavior. Third, an offender's conduct while in prison is information which the original sentencing court, by definition, did not have or consider when imposing a defendant's original sentence. As noted *supra*, Defendant was also reincarcerated for parole violations on three separate occasions, in 2006, 2008 and 2009. These parole violations, like his disciplinary infractions, indicate that the Defendant has failed to conform his behavior to the dictates of law even after being incarcerated for the instant offense for a significant period of time.

Courts in other resentencing applications applying the "substantial justice dictates" standard under the 2004 and 2005 DLRA have concluded that disciplinary histories like

Defendant's here, or even less significant disciplinary records, warranted denial of resentencing motions. *See People v. Flores*, 50 AD3d 1156 (2d Dept 2008), *lv dismissed*, 10 NY3d 934 (resentencing denied for defendant with six prior disciplinary infractions and a prior violent felony conviction, despite positive achievements while in prison); *People v. Perez*, 57 AD3d 921 (2d Dept 2008) (16 disciplinary infractions while incarcerated "dictated the denial of the defendant's sentencing motion").

As noted *supra*, there are also positive aspects to Defendant's conduct since being incarcerated. The most significant of these, in the Court's view, is his completion of a substance abuse treatment program. The Court credits Defendant's counsel's assertion that Mr. King's criminal behavior and disciplinary infractions have all been the result of his narcotics addiction. Drug treatment may be much more effective at reducing wrongful behavior than mandatory minimum prison sentences.

The Court's concern, however, is that, according to the People, the Defendant suffered numerous misdemeanor criminal convictions, including two for controlled substance offenses which post-dated his completion of drug treatment. Obviously, the program was not successful in eliminating Mr. King's substance abuse problems. Mr. King's three returns to prison for parole violations also post-dated his completion of substance abuse treatment. On the positive side, Mr. King has only received one disciplinary infraction, for smoking, since his most recent reincarceration in January of 2009. The Court also views as significant the fact that his corrections counselor deemed him to have made a positive adjustment to his custodial status prior to his most recent release. Looking at all of these myriad factors, however, the Court finds that Defendant's extensive prison disciplinary record, extensive criminal history, multiple parole

violations and the fact that his criminal behavior continued even after he had completed a prison-based substance abuse treatment program indicate that substantial justice dictates the denial of Defendant's motion.

For all of these reasons, Defendant's motion for resentencing pursuant to the 2009 DLRA is denied.

Dated: New York, New York
February 8, 2010



Daniel P. Conviser, A.J.S.C.

HON. DANIEL CONVISER

SUPREME COURT OF THE CITY OF NEW YORK
BRONX COUNTY, CRIMINAL DIVISION PART 8

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DECISION AND ORDER

IND. No.: 4198-2004
56616C-2004
59094C-2004

JESUS VEGA,

Defendant.

-----X

EUGENE OLIVER, JR.:

The defendant Jesus Vega, now before this court, moves to be resentenced under Criminal Procedure Law § 440.46 (enacted as part of the Drug Law Reform Act of 2009 [L. 2009, ch. 56, eff. 10/7/09]). This court has examined the defendant's moving papers, the People's response, the parties supplemental papers, and the related court files maintained in this case. This court held a hearing on December 16, 2009, in accordance with CPL § 440.46 makes the following determinations:

The defendant is currently incarcerated and serving a sentence imposed on a violation of parole. The People argue that the defendant is ineligible for re-sentencing under CPL § 440.46 (DLRA of 2009 [L. 2009, ch. 56, eff. 10/7/09]), and that any reduction to his current period of incarceration should be made by the Division of Parole pursuant to the Executive Law. This court is duty bound to rely on People v. Gonzalez, 29 A.D.3d 400 (First Dept. 2006). *Id. denied*, at 7 N.Y. 3d 867 (2006); and therefore determines that the defendant is eligible for re-sentencing under CPL § 440.46. The defendant has three felony drug convictions. The first for a violation of Penal Law § 220.39(1), Criminal Sale of a Controlled Substance in the Third

Degree, committed on August 20, 2004; the second for PL § 220.16, Criminal Possession of a Controlled Substance in the Third Degree, committed on October 26, 2004; and the third for another violation of PL § 220.39, committed on November 9, 2004. On February 24, 2005, the defendant received an indeterminate sentence of two to six years on Indictment Number 4198-2004, and a sentence of three to six years on the remaining two indictments, to all run concurrently. During his initial period of incarceration, the defendant accrued a disciplinary record of nine Tier -2, and five Tier-3, infractions. He was released to the Division of Parole of September 12, 2007.


On March 29, 2008, the defendant (on parole), was arrested on Docket Number 24713C-2008, for PL § 120.14(1), Menacing in the Second Degree and related charges. He ultimately pled guilty to that charge on September 17, 2008, and was sentenced to forty-five days incarceration and an order of protection for the complainant. The underlying facts of this case are disturbing. The defendant telephoned the complaining witness twice and verbally threatened her with physical violence. During this occurrence, the defendant climbed up to the fire escape of the complainant's apartment to her open window, and proceeded to swing his arm through the window while holding a knife. The complainant's minor daughter was present. This violent act clearly disturbed the complainant and her daughter. It speaks of the defendant's lack of respect for society, personal privacy and the law. It is unclear to this court why the defendant received a mere 45 day sentence for this act. His choice of using the fire escape as opposed to the front door, while armed with a knife establishes a violent intent.

The defendant was violated on parole on October 20, 2008. He has had at least two disciplinary infractions, one Tier-2, and one Tier-3, since his re-incarceration.

The defendant's application for re-sentencing pursuant to CPL § 440.46 (enacted as part of the Drug Law Reform Act of 2009 [L. 2009, c. 56, ef. 10/7/09]), is denied. The defendant's criminal record, his actions after his initial release to parole, his subsequent misdemeanor conviction, and his disciplinary record indicate a trend toward violence. He is not the model target of the re-sentencing law, nor is he the subject intended to be rewarded by the legislature. Substantial justice does not mandate re-sentencing in this case, the defendant's motion is in all respects denied.

The foregoing shall constitute the Decision and Order of this Court.

Bronx, New York
Dated: December 16, 2009



Hon. Eugene Oliver, Jr., A.S.C.J.