



TABLE OF CONTENTS

30	<u>CONCLUSION</u>
28	be denied. "substantial justice" dictates that resentencing should court for a hearing and consideration of whether were incorrect, the case should be remitted to the lower conclusions concerning his eligibility for resentencing If this Court determines that the lower court's
15	<u>POINT III</u>
15	resentencing. the date of the drug felony for which a defendant seeks ten-year look back period should be measured from of commission of the present [drug] felony." That commission of the previous felony and the time incarcerated for any reason between the time of excluding any time during which the offender was of violent felonies "within the preceding ten years, eligible offenders who were "previously convicted" The 2009 DRLA precludes resentencing of otherwise
5	<u>POINT II</u>
5	application for re-sentencing. only as parole violators at the time of their of re-sentencing to defendants incarcerated CPL 440.46(1) as not extending the benefits The court below correctly interpreted
3	<u>POINT I</u>
3	<u>STATEMENT OF FACTS</u>
3	<u>PRELIMINARY STATEMENT</u>
1	<u>QUESTIONS PRESENTED</u>
ii	<u>TABLE OF AUTHORITIES</u>
Page	

TABLE OF AUTHORITIES

FEDERAL CASES

People v Brown, 2010 WL 9928 (NY Co Sup Ct, Jan 4, 2010) 22, 25

People v Mathews, 26 Misc3d 1217(A), 2010 WL 363449, 2010 NY Slip Op 50118(U) 29

People v Rivera, 27 Misc3d 1217(A), 2010 WL 1780946, 2010 NY Slip Op 50788(U) 29

People v Romero, 26 Misc3d 1218A, 2010 WL 391281, 2010 NY Slip Op 50170(U) (Sup Ct Bronx Co, Feb 4, 2010) 14

STATE CASES

People v Avila, 897 N.Y.S.2d 871 (Kings Co. Sup. Ct. Mar. 19, 2010) 21

People v Avila, 27 Misc3d 974 (Sup Ct Kings Co, 2010) 29

People v Bagby, 11 Misc3d 882, 885-886 (Supreme Ct Westchester Co 2006) 7

People v Bell, 138 A.D.2d 298 (1st Dept 1988), rev'd, 73 N.Y.2d 153 (1989) 23

People v Cagle, 7 NY3d 647, 651 (2006) 23

People v Cuella, 77 AD3d 500 (1st Dept 2010) 6

People v Danton, 27 Misc3d 638 (Sup Ct NY Co, February 2, 2010) 27

People v Dozier, 163 A.D.2d 220 (1st Dept 1990) 23

People v Jose Figueroa, 27 Misc3d 751 (Sup Ct NY County, 2010 (Conviser, J)) 10

People v Gonzalez, 29 AD3d 400 (1st Dept 2006) 7

People v Mills, 11 NY3d 527 (2008) 7, 8

People v Paulin, 74 AD3d 685 (1st Dept 2010), lv granted 15 NY3d 854 5, 6

People v Perez, 57 AD3d 921 (2d Dept, 2008) 29

Public Health Law §3383	16
PL § 220.39	3
PL § 220.16	3
PL § 70.71	19
PL § 70.70	25, 26
PL § 70.08	20
PL § 70.04	20, 23
PL § 70.02	20
PL § 60.04(3)	9, 26
Executive Law §259-j	9, 14
CPL §710.30	10
CPL § 440.46 1, 3, 4, 5, 7, 8, 9, 10, 12, 13, 15, 18, 19, 22, 20, 21, 25, 28	
CPL §216	26
Corrections Law §803	10, 19, 25

STATUTES

<i>People v Pratts</i> , 74 AD3d 536 (1st Dept 2010), lv granted 15 NY3d 895	5, 6, 7, 24
<i>People v Rodriguez</i> , 68 AD3d 676 (1st Dept 2009)	7
<i>People v Wallace</i> , 206 A.D.2d 825 (4th Dept 1994), ap denied 84 N.Y.2d 834	29
<i>People v White</i> , 73 N.Y.2d 468 (1989)	9
<i>People v Wright</i> , 78 AD3d 474 (1st Dept 2010)	27

QUESTIONS PRESENTED

1. Was defendant ineligible for resentencing pursuant to CPL § 440.46, because, at the time of his application, defendant was re-incarcerated as a parole violator.
Answer of the court below: Yes. The motion court denied defendant's application for resentencing, in part holding that he was ineligible because his incarceration at the time of application was based solely on a parole violation.
2. The 2009 DLRA precludes resentencing of otherwise eligible offenders who were "previously convicted" of violent felonies "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 [drug] felony." Is that ten-year look back period measured from the date of the application for resentencing or from the date of the drug felony for which he seeks resentencing?
Answer of the court below: The court determined that because defendant committed and was sentenced for the drug felony within ten years of the commission of the violent felony, he had committed an exclusion offense and was ineligible for resentencing under the 2009 DLRA.
3. Even if defendant was eligible for resentencing under CPL § 440.46, would it have been appropriate to deny resentencing on the ground that "substantial justice" dictated that denial was appropriate?

Answer of the court below: Although the People argued that resentencing is discretionary, and that based on defendant's egregious record it should be denied, the Court did not reach that basis for denial inasmuch as it denied on other grounds.

June 13, 2007, he was again violated and returned to prison until November 16, 2007. He was revoked and he was again incarcerated until April 4, 2007 when he was released to parole. On 2004, when he was released to the Division of Parole (A 29). On January 10, 2007, parole was satisfaction with the agreement of all parties (A 19, 27). He was incarcerated until April 1,

(Appendix [hereinafter A] 29). A pending Burglary in the Third Degree charge was taken in

felony offender, he was sentenced to concurrent terms of imprisonment of 10 to 20 years.

in the Third Degree, both committed on May 27, 1992. On February 26, 1993, as a second

a Controlled Substance in the Third Degree and Criminal Possession of a Controlled Substance

In 1993, defendant was found guilty after a jury trial of two B felonies, Criminal Sale of

STATEMENT OF FACTS

years with the Department of Corrections (DOCS).

February 26, 1993, defendant was sentenced to an indeterminate term of incarceration of 10 – 20

felony) in violation of Penal Law § 220.39-1. Both crimes occurred on May 27, 1992, and on

Criminal Possession of a Controlled Substance in the Third Degree (a class B non-violent

the Third Degree (a class B non-violent felony) in violation of Penal Law § 220.16-1 and

Court (Wiggins, J.) upon a conviction after trial of Criminal Sale of a Controlled Substance in

The sentence which defendant sought to have modified had been imposed by the Monroe County

May 17, 2010, which denied defendant's motion for resentencing made pursuant to CPL 440.46.

Defendant appeals from an order of the Supreme Court, Monroe County (Egan, J.), dated

PRELIMINARY STATEMENT

then again released until November 6, 2008, when he was returned. He was again released to parole from March 6, 2009, to January 25, 2010, when he was again returned as a parole violator. (A 30-31). On March 17, 2010 he filed his application to be resentenced (A 15). On or about March 19, 2010, defendant, through his attorney the Public Defender's Office of Monroe County, filed an Application for Resentencing under Penal Law sections 70.71 and 60.04 (A 15-18). The People opposed, arguing that defendant was not eligible for resentencing due to a prior violent felony and because he was not in custody as that term applies to resentencing. (A 20). The People argued further that resentencing should be denied as a matter of discretion. (A 109).

Supreme Court Justice David D. Egan determined that the motion was without merit and that defendant had "a previous violent felony conviction which was committed within ten years prior to the date of the original sentencing date, with appropriate tolling" (A 14), which rendered him ineligible for resentencing under the 2009 DLRA, CPL § 440.46(5)(a). The Court further determined that at the time of the application defendant was incarcerated as a parole violator, and thus was not "in the custody of DOCS" within the meaning of the 2009 DLRA. (A 14). Based on those grounds, the court did not reach the question of discretionary denial. This appeal ensued.

Court wishes to consider the issue, we urge that the court below correctly interpreted the statute.

this case pending the Court of Appeals determination in *Fraits* and *Paulin*. In the event this holding will, in all likelihood, be dispositive of this case. Thus, it would be reasonable to hold

If the Court of Appeals affirms the First Department's interpretation of the statute, that

time of this writing, the briefs for both parties have been filed in the Court of Appeals.

custody when they moved to be resentenced and would therefore have been ineligible. At the

liberty by adhering to the conditions of parole. Had they done so they would not have been in

had been relieved of their sentences of incarceration by parole and could have remained at

incarceration on a violation of parole. Those defendants, like the defendant in the case at bar,

not intended to apply to those offenders who had been paroled and then returned to

were not eligible to be resentenced under the 2009 Drug Law Reform Act, since that law was

the First Department held that defendants had been reincarcerated as parole violators and thus

People v Paulin, 74 AD3d 685 [1st Dept 2010], *lv granted* 15 NY3d 854). In both those cases

the cases of *People v Fraits* (74 AD3d 536 [1st Dept 2010], *lv granted* 15 NY3d 895) and

precise question thus raised by defendant is currently before the New York Court of Appeals, in

re-sentencing. Defendant claims that this was an incorrect interpretation of the statute. The

440.46(1) because he was in custody solely on a revocation of parole at the time he applied for

The court below ruled that defendant was not eligible for re-sentencing under CPL §

**The court below correctly interpreted CPL 440.46(1) as not
extending the benefits of re-sentencing to defendants
incarcerated only as parole violators at the time of their
application for re-sentencing.**

POINT I

The pertinent language in the 2009 DLRA is nearly identical. It reads:

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 2004 DLRA provided, in pertinent part:

The court below held that "because Defendant is a parole violator and was returned to custody after a parole violation, he is not eligible for resentencing under DLRA 3." (A 4) Since that determination, the Appellate Division, First Department has three times held that "the 2009 DLRA, like its predecessors, 'was not intended to apply to those offenders who have served their term of imprisonment, have been released from prison to parole supervision, and whose parole is then violated, with a resulting period of incarceration'" *People v Pratts*, 74 AD3d 536 (1st Dept 2010)(quoting *People v Bagby*, 11 Misc3d 882, 887 [Supreme Ct. Westchester Co. 2006]); *see also People v Paulin*, 74 AD3d 685 (1st Dept 2010); *People v Cuello*, 77 AD3d 500 (1st Dept 2010). Although defendant in those cases and in the case at bar moved for resentencing pursuant to the 2009 Drug Law Reform Act ("2009 DLRA" or "2009 Act"), the portions of the 2009 Act pertinent to eligibility for resentencing are, in all relevant aspects, no different from those contained in the 2004 Act. Nevertheless, defendant asks this Court to find that the Legislature intended that the 2009 DLRA permit class B drug felony parole violators to seek resentencing, even when their class A-I drug felony counterparts, the subject of the 2004 provisions, are not permitted to do so. Defendant's claim should be rejected.

The First Department held, in *People v Rodriguez*, 68 AD3d 676 (1st Dept 2009), 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. In so doing, that Court relied on the reasoning in *People v Bagby* (11 Misc3d 882, 885-886 [Supreme Ct Westchester Co 2006]), that a defendant paroled from an indeterminate sentence on a drug felony who was later reincarcerated after violating parole was not "in the custody of the department of correctional services" under the 2004 DRLA. The First Department reassessed that logic in affirming a denial of resentencing under the 2009 DRLA in *People v Pratts, supra*, where it noted that there was "no reason to believe that the Legislature intended parole violations to trigger resentencing opportunities (see *People v Mills*, 11 NY3d 527, 537 ...). A statutory interpretation that is 'contrary to the dictates of reason or leads to unreasonable results is presumed to be against the legislative intent' (McKinney's Cons Laws of NY, Book 1, Statutes [hereinafter Statutes], § 143)." *Pratts, supra* at 536; *People v Mills*, 11 NY3d 527 (2008).

Defendant cites to the First Department's decision in *People v Gonzalez* (29 AD3d 400 [1st Dept 2006]), to argue that *Rodriguez* was wrongly decided. In *Gonzalez*, a class A-I drug felon was denied resentencing under the 2004 Act after having been re-incarcerated on a parole violation. *Gonzalez, supra*. That Court found that in denying resentencing, the lower court

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).

“providently exercised the degree of discretion it possessed.” *Id.* Defendant asserts that because that Court opined that the lower court had discretion in ruling on the motion, this Court implicitly found that that defendant was not automatically ineligible by virtue of his re-incarceration (defendant’s brief, p 38). But as noted, the notion that re-incarcerated parolees might be eligible for resentencing has been soundly refuted by the language in *Mills* that the Legislature “[s]urely . . . did not intend fresh crimes to trigger resentencing opportunities.” See *Mills*, 11 NY3d at 537. Moreover, the First Department’s opinion in *Gonzalez* did not address the defendant’s eligibility for resentencing. Thus, *Gonzalez*, has little precedential value for defendant’s eligibility argument.

In the end, the reasoning of *Bagby* and *Rodriguez*, with respect to the 2004 DLRA, is 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 certain 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.

In looking at the legislative intent behind DLRA 2009, all the acts which reference the same subject matter “should be construed together as though forming part of the same statute.” Statutes § 221(a)(b). Thus, earlier statutes *in pari materia*, are to be “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). When thus viewed as a whole, the entire DLRA provides remedies for drug felons who are re-incarcerated after a parole violation, if they meet the showing of willingness too live a rehabilitated life. Resentencing, however, is not an option. Under Executive Law § 259-j(3-a), after two years of unrevoked parole his sentence would have been terminated. The fact that defendant continually violated the terms of his parole and was repeatedly re-incarcerated does not put the statutory scheme at odds with the reform acts. When a defendant remains unrehabilitated and proves unable or unwilling to live a law-abiding life, he is engaging in actions in conflict with the legislative goals. 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 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 repeated lack of compliance with the terms of his parole that rendered 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. 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 follows the conditions of his parole and the requirements of statute so as to prevent another revocation of his parole. If, however, defendant is persistent in 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.

Defendants should not be placed in a more advantageous position than parole-compliant offenders, a situation which could result from adopting this defendant's interpretation of the law. 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. *See* CPL § 440.46; Penal Law §§ 60.04(3) and (4); 60.01(3)(d); 65.20. Such a defendant's journey from parole to unencumbered freedom 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 can be terminated. It is certainly foreseeable that some parolees might purposefully violate their parole, if only in a technical manner, to avail themselves of this quicker avenue to freedom. Yet it matters little whether the violation of parole was 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 NY2d 468, 474 n 1 (1989) (Court of Appeals has "avoided an interpretation of CPL 710.30 that places 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"). Accordingly, the danger of interpreting

CPL § 440.46 in a way that would permit re-incarcerated parolees to receive a benefit not afforded to those parolees who comply with the conditions of their parole, has less to do with "fostering lawlessness" and more to do with producing absurd results that are clearly at odds with the aim of the DLRA. Therein lies the fundamental flaw in *People v Jose Figueroa* (27 Misc3d 751 [Sup Ct NY County, 2010 [Conviser, J]], a case upon which defendant relies. In *Figueroa*, the court's argument against fostering lawlessness is flawed because it only aims to defeat the premise that parolees would be incentivized to violate their parole by committing new crimes. The court does not address the fact that parolees who violate their parole purely in a technical manner (e.g. failing to reporting to a parole office, failing to provide the parole officer with a new address, or failing to meet curfew), will also be in a better position than the parolee who obeys all conditions of his parole. It is also unlikely that a parole violation of that nature would influence the "discretion vested in trial judges considering resentencing applications." *Figueroa, supra* at 774.

Defendant further seeks to buttress his interpretation of the statute by reference to Correction Law § 803-b. However, that provision as well as Correction Law § 803(5) evince an expectation by the Legislature that a drug offender should adhere to the law and the conditions of parole if they are to receive the benefits of reductions to their sentences. Indeed the express exclusion of parole violators from the credit time afforded by Correction Law § 803-b shows the Legislature's intent to enhance the penalization of parole violators. To find that the same Legislature, as a later *in pari materia* 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 argues that the statute is ameliorative in nature and thus must be given the broadest possible meaning. (Defendant's brief, 17). In seeking to provide relief to those defendants serving excessive amounts of incarceration under the Rockefeller Drug Laws, the Legislature aimed to provide an opportunity for low-level non-violent drug offenders who were incarcerated and "could more productively be placed into effective drug treatment programs..." McKinney's 2004 Session Laws of NY, NYS Assembly, Memorandum of 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 incarceration sentence and the promotion of drug treatment programs. Class B felony drug offenders on parole received ameliorative relief in the DLRA 2004 through Executive Law § 259-j, and then under the DLRA of 2009 the Legislature turned its attention to those class B felony drug offenders still incarcerated. Reading the drug reform statutes together, it is clear that there was an ameliorative piece to which defendant could have looked, had he not by his own misdeeds been re-incarcerated. A drug offender who continually violates the terms of his parole and is repeatedly re-incarcerated could indeed ultimately serve a lengthy cycle of parole/incarceration. This is not, however, at odds with the goals of the reform acts. When a defendant remains unhabilitated and proves unable or unwilling to live a law-abiding drug-free life, he is engaging in actions that 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.

Defendant further contends that CPL § 440.46(5) contains a definition of "exclusion offense" which does not include the parole violator exception, thus proving that the Legislature did not intend to exclude parole violators from the resentencing benefits of the statute. That section categorically excludes certain violent and homicidal felons from relief altogether based entirely on the nature of their crimes. However, parole violators were previously afforded a very definite relief by way of mandatory termination of sentence – a benefit such defendants squandered by violating parole. Therefore, the remedy available is to become re-eligible for parole, and once re-released, abide by the conditions of parole for two years. This is entirely distinguishable from a categorical exclusion from ameliorative relief.

Finally, defendant relies on the unpublished Supreme Court decision in *People v Haalsey*, a New York County case under Indictment No. 5780/99, where, in an order dated November 20, 2009, the Honorable Bruce Allen granted a motion for resentencing under CPL § 440.46, filed by a class B drug offender who had been re-incarcerated after violating parole. (see attachments to defendant's brief, Exhibit 5, p 37-39) That court found, over the People's objections, that despite having violated his parole, the defendant was nevertheless eligible for resentencing because, unlike the 2005 DLRA, CPL § 440.46 contained language granting resentencing eligibility to "[a]ny person in the custody of the department of correctional services," which, the court reasoned, could not exclude re-incarcerated parole violators. *Haalsey*, p 2. Under the reasoning discussed herein, the error in that opinion is clear. In *Haalsey*, the court found that the defendant, who had been released on parole three times, was, as of the time of the motion, returned on revocation of parole for having absconded from parole supervision. *Id.* at p 1. The court described the defendant as having "never demonstrated the ability to live a law-abiding life." *Id.* at p 2. As discussed above, by being paroled on three

occasions, Hausley had repeatedly been given an opportunity for an automatic, as-of-right termination of sentence under Executive Law § 259-j(3-a), which he repeatedly squandered by violating the terms of his parole. Surely, the mandatory termination provisions, in addition to the merit time accrual granted to drug felons, sent Hausley a clear, unmistakable message that if he were to behave, lead a law-abiding life, and follow the terms of his incarceration and, later, parole, he would have a non-discretionary remedy. Nevertheless, he wasted each and every opportunity. Justice Allen's decision, respectfully, deprived Executive Law § 259-j(3-a) of any credible effectiveness by essentially granting Hausley a windfall for having repeatedly violated his parole. Because *Hausley* did not advance the Legislature's intent that parolees abide by the conditions of their parole, it should not have any persuasive value.

The defendant in the case at bar squandered repeated opportunities for liberty and the possibility of complete termination of his sentence under Executive Law § 259-j. As the Court of Appeals noted in *Mills, supra*, had he not broken the law while on parole, he would clearly have been ineligible for resentencing, and to permit such an offender to receive a more lenient sentence after he has violated the conditions of his parole "would create illogical, if not perverse results." *Mills, supra*, at 537. The crux of defendant's argument is that he is eligible for resentencing because in violated parole. Such an interpretation of the statute would turn the intent of drug reform on its head, make the possibility of a more lenient sentence an incentive to violate parole, and be contrary to any understanding of justice or common sense. *See also, People v Romero*, 26 Misc3d 1218A, 2010 WL 391281, 2010 NY Slip Op 50170(U) (Sup Ct Bronx Co, Feb 4, 2010). The decision of the court below should be affirmed.

Defendant has a long criminal history, dating back to his earliest arrest in 1975. He has had 50 arrest and 13 convictions, including 5 felonies. He has seven times had parole revoked. (A 24). As relates to the issue at hand, defendant committed a violent felony on August 18, 1983. Although the record is unclear how long he spent incarcerated after his arrest, it is clear that he was sentenced on April 11, 1984, to an indeterminate term of 3 to 6 years imprisonment following his conviction on a plea of guilty to Burglary in the 2d Degree and Grand Larceny. (A 37) He was received into the Department of Corrections on April 24, 1984, and held there until February 12, 1988, when he was paroled. He was arrested on September 21, 1988 and charged with Robbery 2d Degree and other charges. On November 28, 1988, he was convicted on a

The Facts

The lower court also denied resentencing on the ground that the defendant, although conditionally eligible as a class B non-violent drug felon, had a previous violent felony conviction which was committed within ten years prior to the date of the original sentencing date, with appropriate tolling, and thus was not eligible because he had committed an "exclusion offense" under CPL § 440.46 (5)(a). Defendant argues that the court used the wrong period of time to calculate the "look-back" provision, and instead should have started the ten year period from the date of the defendant's application for resentencing.

The 2009 DRLA precludes resentencing of otherwise eligible offenders who were "previously convicted" of violent felonies "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 [drug] felony." That ten-year look back period should be measured from the date of the drug felony for which a defendant seeks resentencing.

POINT II

plea of guilty to Assault 3d Degree and sentenced to a term of 6 months. (A 20, 34). On January 7, 1989, his parole was again revoked, and he remained incarcerated until September 19, 1989, when he was again released to parole. (A 38).

He was again arrested on September 4, 1991, for a violation of the Public Health Law and a Criminal Sale of a Narcotic Drug 3d Degree committed on August 29, 1991, and again on September 26, 1991, for a violation of Public Health Law § 3383. On October 25, 1991, he was sentenced to time served on the second charge, and on March 10, 1992, he was sentenced to time served on the first charge. (A 33). The record is unclear how long defendant was incarcerated for either of these charges.

On May 27, 1992, defendant was arrested for a criminal sale of a narcotic committed on that day. He was apparently released, as a bench warrant was issued on September 9, 1992 and he was returned on that warrant on November 16, 1992. On February 26, 1993, he was convicted after trial of criminal sale of a controlled substance in the 3d degree and criminal possession in the 3d and 7th degrees. On February 26, 1993, he was sentenced to an indeterminate term of 10 to 20 years incarceration. (A 29). He was received by the Department of Corrections on April 22, 1993 and incarcerated until April 1, 2004, when he was released to parole (A 29). On January 10, 2007, parole was revoked and he was again incarcerated until April 4, 2007 when he was released to parole. On June 13, 2007, he was again violated and returned to prison until November 16, 2007. He was then again released until November 6, 2008, when he was returned. He was again released to parole from March 6, 2009, to January 25, 2010, when he was again returned as a parole violator. (A 30-31). On March 17, 2010 he filed his application to be resentenced (A 15). The following chart summarizes the pertinent events and defendant's periods of incarceration since 1983.

Reason for Incarceration
 Dates
 # of Days

Commission of violent felony
 8/18/83

From sentence for violent felony to reception at
 DOCS
 4/11/84 - 4/24/84
 13

Reception at DOCS to parole
 4/24/84 - 2/12/88
 1389

Arrest for Robbery; conviction for Assault; 6
 month sentence
 9/21/88 arrest
 ?

Violation on parole till re-parole
 1/7/89 - 9/19/89
 255

New crimes
 9/4/91 - 3/10/92
 ?

Date of crime on which defendant sought
 resentencing
 10/21/92

Arrest
 5/27/92

Sentence of 10 - 20 years
 2/26/93

Return on bench warrant till received by DOCS
 11/16/92 - 4/ 22/93
 157

DOCS till parole
 4/22/93 - 4/1/2004
 3996

Revoked parole till release
 1/10/2007 - 4/4/2007
 84

Revoked parole till release
 6/13/2007 - 11/16/2007
 156

Revoked parole till release
 11/6/2008 - 3/6/2009
 129

Revoked parole till filing of application for
 resentencing
 1/25/2010 - 3/17/2010
 51

Given this record, the time elapsed between the commission of the violent felony and the
 commission of the drug felony for which defendant sought resentencing was about 3354 days
 (8/18/83 - 10/21/92), less than ten years even not considering applicable tolling for at least
 1657 days of incarceration during that time period (This does not include the amount of time he
 probably spent incarcerated in 1988 and 1991-1992, but which cannot be determined exactly
 from the record). The time elapsed between the commission of the violent felony and the
 sentencing date for the crime for which defendant sought resentencing (8/18/83 - 2/26/93) was
 3482 days. This is the time period that the court below used in reaching its decision, although it
 did not expressly calculate the number of days. (A 4)

harshness of the Rockefeller Drug Laws. Effective January 13, 2005, the 2004 DLRA modified In December 2004, the New York State Legislature enacted legislation to ameliorate the

with logic and common sense.

Legislature's intent, diametrically opposed to the purpose of the exclusion, and wholly at odds

an offender files his resentencing application. Such a reading of the statute is contrary to the

however, argues that "the preceding ten years" are the 10 years that elapse immediately before

criminal practice, and the purpose of the provision, this interpretation was correct. Defendant,

resentenced. In light of the plain language of the statute, long-standing principles of New York

the defendant committed and was sentenced on the felony for which he sought to be

In the case at bar, the lower court determined that the ten year "look back" started when

the commission of the present [drug] felony." CPL § 440.46(5)(a).

was incarcerated for any reason between the commission of the previous [violent] felony and

violent felony offense. The 10-year time period is tolled by "any time during which the offender

resentencing for offenders who, "within the preceding ten years," had been convicted of a

Laws and sentenced to indeterminate prison terms. However, the law specifically proscribes

defendants who were convicted of class B felony drug offenses under the Rockefeller Drug

The Drug Law Reform Act of 2009 (2009 DLRA) permits resentencing for many

Discussion

resentencing are subtracted (1657), the result falls outside the 10 year limitation of the statute.

the commission of the violent felony and the commission of the felony for which he seeks

comprises about 9709 days, almost 27 years. If the days defendant was incarcerated between

violent felony to the date of the filing of the resentencing application. In this case, that period

Defendant argues that the correct look-back period is the date of the commission of the

the sentencing structure for narcotics offenses, replacing the indeterminate sentencing scheme of the Rockefeller Drug Laws with a schedule of determinate sentences. See L. 2004, ch. 738, § 23. Furthermore, under the act, incarcerated defendants who had been convicted of A-1 narcotics felonies were afforded the opportunity to apply for resentencing to determinate prison terms. See Penal Law § 70.71.

In August 2005, the Legislature extended an opportunity for resentencing to other defendants serving sentences under the old laws. The 2005 DLRA permitted a limited class of defendants serving indeterminate terms for class A-II drug felonies to move for resentencing to determinate prison terms. See L. 2005, ch. 643. However, the 2005 DLRA barred from resentencing any defendant who was serving a sentence for a violent felony offense or other serious crime that precluded "merit time" reductions in their minimum terms of imprisonment. See L. 2005, ch. 643, § 1; Correction Law § 803(1)(d)(ii).

Finally, in April 2009, the Legislature extended resentencing opportunities to defendants who had been convicted of class B felonies under the old laws as well. The 2009 DRLA allows defendants who had committed class B felony drug offenses prior to January 13, 2005, and who are currently serving indeterminate prison sentences with a maximum term of more than three years, to apply to be resentenced to determinate prison terms for their drug felony convictions. See L. 2009, ch. 56, Part AAA § 9; CPL § 440.46(1). However, this law precludes resentencing for violent offenders. Specifically, resentencing is unavailable for any person "who is serving a sentence on a conviction for or has a predicate felony conviction for an exclusion offense." CPL § 440.46(5). An "exclusion offense" is a violent felony offense under Penal Law § 70.02, or any other offense that precludes merit time, and

... 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 [violent] felony and the time of commission of the present [drug] felony.

CPL § 440.46(5)(a)

In addition, defendants who have previously been adjudicated second violent felony offenders under Penal Law § 70.04 or persistent violent felony offenders under Penal Law § 70.08 are likewise ineligible for resentencing. CPL § 440.46(5)(b).

The look-back period in CPL § 440.46(5)(a) runs from the date of commission of an offender's instant drug felony in accordance with the plain meaning of the statute, the intent of the Legislature, long-standing principles of New York Criminal practice, and common sense. Under defendant's interpretation the entire time period from the commission of the violent felony to his application for resentencing counts toward the ten year maximum, with only those periods of incarceration between the commission of the two offenses being excluded. Thus, so long as the offense on which he seeks resentencing was committed more than ten years prior to his application, he will not be found to have an exclusion offense and will be eligible for resentencing.

It is a fundamental precept that statutes should be interpreted to effect the intent of the legislature. Intent can be inferred from the "natural and most obvious" meaning of the words used, as well as the "spirit and purpose underlying [the law's] enactment." McKinney's Cons. Laws of NY, Book 1, Statutes [hereinafter "Statutes"] §§ 94, 96. Specifically, courts should "consider the mischief sought to be remedied by the new legislation" and "construe the act in question so as to suppress the evil and advance the remedy." Statutes § 95. To that end, courts should interpret statutes in order to avoid consequences that are "mischievous or disastrous"

(Statutes § 148), "contrary to the dictates of reason" (Statutes § 143), or "absurd" (Statutes § 145), as well as those that would "render [the statute] ineffective" (Statutes § 144). And, of course, where a statute is divided up into sections, all parts must be read together in order to determine the proper meaning of the statute at issue. Statutes §§ 97, 130.

Judged by those standards, the only reasonable construction of CPL § 440.46(5)(a) is that the ten year period must be measured by the interval between commission of the former and present crimes excluding time spent under incarceration. *see also People v. Avila*, 897 N.Y.S.2d 871, 874 (Kings Co. Sup. Ct. Mar. 19, 2010) ("Simply stated, an 'exclusion offense' is a predicate 'violent felony' offense for which the person was convicted within the ten years [excluding tolls for incarceration] preceding the commission of the subject drug felony"). Beginning with the plain language, the statute states that an "exclusion offense" is a "violent felony offense" ... "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." CPL § 440.46(5)(a) (emphasis added). After mentioning "the preceding ten years," the statute immediately lists, in the same sentence, two temporal reference points to which the word "preceding" could refer: "the commission of the previous felony" and "the commission of the present felony." Of course, the 10-year period cannot be measured from the only other reference point to which "the preceding ten years" could reasonably refer, given the plain meaning of those words, is "the commission of the present felony." Notably, the statute does not mention anything about the filing date of a resentencing application.

Furthermore, being part of a single sentence, the look-back and tolling provisions are, as the Honorable Daniel P. Conviser has recognized, "part of a unitary thought." *People v Brown*, 2010 WL 9928 (NY Co Sup Co, Jan 4, 2010) at *6 n.9. As such, that sentence, embodying both provisions, must be understood as contemplating only a single period of time: that between the commission of the violent felony and the commission of the instant drug felony. Indeed, designed to work in tandem, the look-back and tolling provisions cannot logically be separated from, and considered in isolation of, one another. To decide nevertheless that the tolling provision should attach to one period of time while applying the look-back provision to a different period of time, as Justice Conviser did in *Brown*, seems contrary to the language of the statute.

A broader reading of CPL § 440.46 (*see* Statutes §§ 97, 130) further buttresses the People's position. While this statute affords ameliorative relief -- i.e., resentencing -- to a large class of drug offenders (CPL § 440.46[1]), it simultaneously precludes from that relief a certain sub-set of that class -- i.e., offenders with violent criminal histories (CPL § 440.46[5]). Indeed, subdivision (5)(b) bars from resentencing "all inmates previously adjudicated as a second or persistent violent felony offender." McKimney's Practice Commentary § 440.46. This reflects a judgment that repeat violent offenders currently incarcerated on drug charges should serve full indeterminate terms, as they have demonstrated that they are threats to society. Likewise, the Legislature was cautious in extending resentencing to offenders with even a single prior violent felony conviction. However, rather than implementing a complete bar, such a defendant could be resentenced so long as his violent felony conviction was remote enough to provide some basis to believe that he could be trusted to live a law-abiding, non-violent life upon his release from custody.

Of course, in determining the remoteness of a violent felony conviction for an inmate in that latter class, the pertinent inquiry is not merely whether the inmate had lived 10 violent-felony-free years, but, rather, whether he had lived 10 such years while at liberty in society. Indeed, this notion is evidenced by the very existence of the tolling provision itself. Tolling provisions are not novel concepts; indeed, they are a prominent feature of New York's recidivist offender statutes. See Penal Law §§ 70.04(1)(b)(v); 70.06(1)(b)(v). Here, as in the recidivist offender context, the purpose of a tolling provision in conjunction with a look-back statute is to make prior violent felons "demonstrate their ability to live within the norms of civil society for 10 years." *People v. Cagle*, 7 NY3d 647, 651 (2006); see *People v. Bell*, 138 AD2d 298, 300 (1st Dept 1988) (Sullivan, J., dissenting) (harsher sentences are reserved for "a predicate felon who fails to demonstrate that he can function in society in a law-abiding manner for a 10-year period"), rev'd 73 NY2d 153, 165 (1989) ("for the reasons stated in [Justice Sullivan's] dissenting opinion"). The reasoning behind this rule is obvious: "while an offender is incarcerated, [his] opportunity to exhibit antisocial behavior is severely limited," and his "conduct while under confinement may reveal little about his capacity to function while at liberty in society." *People v. Dozier*, 163 AD2d 220, 225 (1st Dept 1990) (Sullivan and Rubin, JJ., dissenting).

Defendant ignores this purpose, as well as the longstanding and established interpretation of these look-back/tolling provisions, in order to have the resentencing court ignore the fact during the more than 17 years after the commission of the felony on which he seeks resentencing, he spent more than 12 years incarcerated because on five occasions his parole was revoked.

Defendants' reading would force a resentencing court to include some periods of incarceration in the look-back calculation while excluding others. There is no rational basis for the suggestion that the Legislature would draw arbitrary distinctions between different periods of incarceration to include some but not others in a manner that defeats the purpose of tolling in the first place. Simply stated, that result is nonsensical. See Statutes § 145 ("A construction which would make a statute absurd will be rejected"); *People v Pratts*, 74 AD3d 536 (1st Dept 2010) (holding that defendants incarcerated on parole violations were ineligible for resentencing under the 2009 DRLA, and stating that a "statutory interpretation that is 'contrary to the dictates of reason or leads to unreasonable results is presumed to be against the legislative intent'") (citing Statutes § 143).

The application of the lower court's ruling to defendant's situation exemplifies the untenable nature of defendant's proposed interpretation. The record reveals that the time elapsed from the commission of the violent felony and the commission of the crime for which defendant sought resentencing was about 3354 days (8/18/83 – 10/21/92), less than ten years even not considering applicable tolling for at least 1657 days of incarceration during that time period (This does not include the amount of time he probably spent incarcerated in 1988 and 1991-1992, but which cannot be determined exactly from the record). The time elapsed between the commission of the violent felony and the sentencing date for the crime for which defendant sought resentencing (8/18/83 – 2/26/93) was about 3482 days. This is the time period that the court below used in reaching its decision, although it did not expressly calculate the number of days. (A 4). Under either calculation, defendant had an "exclusion offense." But under defendant's reading of the statute, since there was a gap of more than ten years between his sentencing for the drug offense and his application for resentencing, it would be irrelevant

how much time he was incarcerated, tolling only referring to the time incarcerated between the commission of the two crimes.

An even broader reading of drug law reform as a whole evinces a legislative initiative to provide relief for primarily non-violent drug offenders. For instance, the 2004 DRLA drastically reduced sentencing exposure for non-violent predicates, but drew a sharp distinction for offenders with prior violent felony convictions. Under the old indeterminate sentencing scheme, a predicate drug offender could have received a minimum prison term of 4 and ½ to 9 years, and a 23 maximum term of 12 and ½ to 25 years, regardless of the nature of his prior conviction. However, under the determinate sentencing scheme, a B-felony drug offender with a non-violent predicate felony faces a prison term of up to 12 years, while a defendant with a prior violent felony faces up to 15 years' imprisonment. Notably, this latter term could ensure longer imprisonment than the harshest minimum term of 12 and ½ years that an offender faced under the old laws. See Penal Law § 70.70; *Brown*, 2010 WL 9928 at *6 n.8.

The 2005 DLRA and the 2009 DLRA drew even clearer lines between violent drug offenders and non-violent drug offenders. Indeed, the 2005 DLRA specifically proscribed resentencing for offenders who were serving sentences for violent felony convictions or convictions for which merit time was unavailable. See L. 2005 ch. 643 § 1; Correction Law § 803(1)(d). The 2009 DLRA progressed even further, barring resentencing not only for offenders who were serving sentences for violent and non-merit-time offenses, but also for offenders who had previously been convicted of such serious crimes. See CPL § 440.46(5)(a). And, while the 2009 DLRA further reduced minimum sentences for predicate non-violent felons convicted of class B drug felonies from 3 and ½ to 2 years, minimum sentences for predicate violent felons remained unchanged at 6 years. L. 2009, ch. 56 Part AAA § 23; see

Brown, 26 Misc3d 1204(A), 906 NYS2d 781 (2010 WL 9928)(unpublished decision) at *5 n.8. As such, “[m]andatory minimum sentences for non-violent offenders with a predicate violent felony convictions are now 300% higher than those for offenders with a prior non-violent felony offense.” *Brown, supra* at *6 n.8. Moreover, many provisions of the 2009 DLRA allow offenders to be sentenced to treatment programs or other non-incarceratory sentences, but only so long as they had no violent felony convictions on their records. For instance, under CPL § 216 (created by L. 2009, ch. 56, Part AAA § 4), offenders with non-violent records may undergo drug or alcohol treatment in lieu of incarceration. Moreover, Penal Law § 60.04(3) (amended by L. 2009, ch. 56, Part AAA § 17) offers first-time felony offenders the opportunity to seek non-incarceratory sentences. Additionally, Penal Law § 60.04(7) (added by L. 2009, ch. 56, Part AAA § 18) makes shock incarceration available to a wider array of defendants, but excludes those with prior violent felony convictions. Finally, Penal Law § 70.70(2)(d) (created by L. 2009, ch. 56, Part AAA § 23) affords parole supervision to second felony drug offenders, so long as they have no prior violent felony convictions. This progression shows the Legislature’s growing reluctance to provide ameliorative relief to drug offenders who have previously displayed violent tendencies.

Defendant also cites the expansion of the SHOCK treatment program to allow offenders to “age in” to SHOCK eligibility in support of his argument that the Legislature intended for offenders with violent pasts to be able to “age in” to resentencing eligibility under the contested statute (Defendant’s Brief at 52-53). That analogy is flawed for several reasons. First, the 2009 DLRA does not allow inmates to “age in” to SHOCK eligibility. Rather, it merely raises the age at which an inmate may enter the program -- from forty years old to fifty -- and allows for participation in the program at a general confinement facility in addition to a reception center.

See L. 2009, ch. 56 Part L §§ 1-2. Additionally, while one purpose behind the new law may have been to extend SHOCK eligibility to more inmates, another express purpose was, as discussed, to be "even tougher" on violent felons seeking resentencing. Senate Floor Debate at 2682, quoted in Brown, 2010 WL 9928 at *6 n.11. Thus, those two aspects of the 2009 DLRA cannot be meaningfully compared.

Although defendant correctly notes that numerous trial level courts have agreed with his interpretation, no appellate court has yet ruled directly on this issue. (*People v Keith Brock and Gilberto Sosa*, two of the three cases decided in *People v Danton* (27 Misc3d 638 [Sup Ct NY Co, February 2, 2010]), are presently under appeal and awaiting decision in the Appellate Division, Third Department.) In *People v Wright* (78 AD3d 474 [1st Dept 2010]), in dealing with another interpretive issue regarding CPL § 440.46, the First Department described the exclusion offense as "premised on a prior violent felony committed within the preceding 10 years of the instant offense." That is precisely the People's position in this case. The phrase "the preceding ten years" should be interpreted as contemplating the 10 years preceding the commission of a defendant's instant drug felony, thus uniformly excluding from the 10-year calculation all time spent incarcerated since the commission of the prior violent felony offense.

If this Court determines that defendant was not ineligible based either on his custody as a parole violator or his predicate conviction for an exclusion offense, the case should be remitted to the lower court for a determination of whether defendant should in fact be resentenced. CPL 440.46(3) dictates that the determination of a motion for resentencing pursuant to the 2009 DRLA is to be governed by the provisions of Section 23 of the 2004 DRLA (L.2004, c.738, § 23). That section provides in pertinent part that after ruling a person eligible for resentencing, the court "may consider any facts or circumstances relevant to the imposition of a new sentence which are submitted by such person or the people and may, in addition, consider the institutional record or confinement of such person, but shall not order a new presentence investigation and report or entertain any matter challenging the underlying basis to the subject conviction." Further, the "court shall offer an opportunity for a hearing and bring the applicant before it [and] the court may also conduct a hearing, if necessary, to determine whether such person qualifies to be resentenced or to determine any controverted issue of fact relevant to the issue of sentencing" (L.2004, c.738, § 23). The statute also provides that upon the court's review it shall render its determination either granting a sentence and setting forth its proposed determinate sentence, or denying the application where "substantial justice dictates that the application should be denied." *Id.*

If this Court determines that the lower court's conclusions concerning his eligibility for resentencing were incorrect, the case should be remitted to the lower court for a hearing and consideration of whether "substantial justice" dictates that resentencing should be denied.

POINT III

As the court below made its determination based on its finding that that defendant was not eligible for resentencing, it did not reach its permissible discretionary review, although the prosecution did argue that because of defendant's criminal history resentencing should be denied on that basis as well as on grounds of his ineligibility. (A 109).

Defendant's criminal history dates back to 1975. His NYSIS indicates that he has been arrested 50 times, 25 times for felonies, and 11 of those for violent felonies. He has 13 total convictions, including 4 non-violent felonies and one violent felony. He has seven warrants entered against him, and seven parole revocations. (A 19-58). The drug conviction for which he seeks resentencing was for sale of cocaine, and he had previously been adjudicated a predicate felon. *People v Wallace*, 206 AD2d 825 (4th Dept 1994), *ap denied* 84 NY2d 834.

In light of the defendant's repeated refusals to comply with the terms of his parole, his repeated instances of absconding, and a criminal history dating back to 1975, it would be quite appropriate for the court to find that he is not deserving of DRLA resentencing and that substantial justice dictates that his application should be denied. *See People v Avila*, 27 Misc3d 974 (Sup Ct Kings Co, 2010); *People v Matthews*, 26 Misc3d 1217(A), 2010 WL 363449, 2010 NY Slip Op 50118(U); *People v Rivera*, 27 Misc3d 1217(A), 2010 WL 1780946, 2010 NY Slip Op 50788(U); *see also, People v Perez*, 57 AD3d 921 (2d Dept, 2008) (with listing of other Appellate Division cases finding substantial justice dictated denial of resentencing under earlier DRLAs). Defendant's continued inability or unwillingness to live a law-abiding life, provides strong indication that he does not present as the sort of offender for whom the ameliorative benefits of resentencing were intended by the Legislature.

January, 2011

Wendy Evans Lehmann,
Of Counsel

MICHAEL C. GREEN
Monroe County District Attorney
47 S. Fitzhugh Street
Rochester, New York 14614

Respectfully Submitted,

For the reasons articulated herein, the lower court's denial of resentencing should be affirmed. If this Court determines that the bases on which resentencing was denied are not valid, the case should be remitted to the lower court for a determination of whether substantial justice dictates that resentencing should be denied as a matter of discretion.

CONCLUSION