



RESENTENCING ELIGIBILITY (2009): CALCULATING THE 10 YEAR LOOK BACK SIMPLIFIED

Class B Drug Offense Resentence - CPL § 440.46

Determining the 10 Year Look Back Period

Step 1: Calculate the period of time between the date of the filing of the motion for resentencing¹ on the present class B drug offense and the date of the commission of the “exclusion offense.”

Step 2: If the period of time calculated in Step 1 is 10 years or less the defendant is ineligible for resentencing and no further calculation is necessary. If the period of time calculated in Step 1 is 10 years and 1 day or more, go on to Step 3.

Step 3: Calculate the amount of time the defendant was incarcerated for any reason between the date of the commission of the previous “exclusion offense” and the date of the commission of the present class B drug offense for which resentencing is sought.

Step 4: Subtract the time calculated in Step 3 from the time calculated in Step 1.

Step 5: If the total time resulting from the calculation performed in

¹ Since the defendant can withdraw his or her motion and re-file at any time (including the date of argument), it might be the better practice to use the date that the case is argued before the court rather than the date of filing.

Step 4 is 10 years and 1 day or more, the defendant is eligible for resentencing. If the time resulting from the calculation performed in Step 4 is 10 years or less, the defendant is ineligible for resentencing.

Exclusion Offense

The “exclusion offense” occurring in the preceding 10 year look back period referenced in CPL § 440.46 (a) includes a conviction for any of the following crimes: a violent felony offense or manslaughter in the second degree, or vehicular manslaughter in the first degree, or criminally negligent homicide, or an offense defined in article 130 of the Penal Law, or incest, or an offense defined in article 263 of the Penal Law, or aggravated harassment of an employee by an inmate.

Example: Defendant, Ben Toolong

4/7/09	Date of filing of motion for resentence regarding the CSCS 3 rd which was committed on 6/5/03.
6/5/03	Date of commission of the class B drug offense of CSCS 3 rd .
2/5/93 - 6/5/03	During this period of time the defendant was incarcerated for a total of 54 months and was not incarcerated for a total of 70 months.
2/5/93	Date of commission of the “exclusion offense” of Assault in the Second Degree.

Calculation for Example Above:

Step 1: The period of time between 4/7/09 and the 2/5/93 is calculated to be 16 years, 2 months and 3 days.

Step 2: Since the period of time calculated in Step 1 is 10 years

and 1 day or more we go on to Step 3.

Step 3: Between the time of the commission of the previous “exclusion offense” on 2/5/93 and the time of the commission of the present class B drug offense on 6/5/03 for which resentencing is sought the defendant spent a total of 54 months (4 years and 6 months) incarcerated for various charges including pretrial detention and sentenced time. The defendant spent a total of 70 months (5 years and 10 months) not incarcerated.

Step 4: Subtracting the period of time the defendant was determined to be incarcerated in Step 3 from the period of time calculated in Step 1, the difference is found to be 11 years, 8 months and 3 days.

Step 5: Since the total time resulting from the calculation performed in Step 4 (11 years, 8 months and 3 days) is 10 years and 1 day or more, the defendant is eligible for resentencing.

Applicable Statutes

CPL § 440.46 Motion for resentencing; certain controlled substance offenders

(5) The provisions of this section shall not apply to any person who is serving a sentence on a conviction for or has a predicate felony conviction for an exclusion offense. For purposes of this subdivision, an “exclusion offense” is:

(a) a crime for which the person was previously convicted within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony, which

was: (i) a violent felony offense as defined in section 70.02 of the penal law; or (ii) any other offense for which a merit time allowance is not available pursuant to subparagraph (ii) of paragraph (d) of subdivision one of section eight hundred three of the correction law; or (b) a second violent felony offense pursuant to section 70.04 of the penal law or a persistent violent felony offense pursuant to section 70.08 of the penal law for which the person has previously been adjudicated.

Correction Law § 803(1)(d)(ii)

Such merit time allowance shall not be available to any person serving an indeterminate sentence authorized for an A-I felony offense, other than an A-I felony offense defined in article two hundred twenty of the penal law, or any sentence imposed for a violent felony offense as defined in section 70.02 of the penal law, manslaughter in the second degree, vehicular manslaughter in the second degree, vehicular manslaughter in the first degree, criminally negligent homicide, an offense defined in article one hundred thirty of the penal law, incest, or an offense defined in article two hundred sixty-three of the penal law, or aggravated harassment of an employee by an inmate.