SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM - KINGS COUNTY: PART 60

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PEOPLE OF THE STATE OF NEW YORK,	:	
Respondent,	:	NOTICE OF MOTION FOR LEAVE TO RENEW UNDER CPLR §2221(E)
-against-	:	Ind. Nos. 7790/03, 143/04; SCI No. 5769/04
RICHARD LUCIANO,	:	
Defendant.	:	

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PLEASE TAKE NOTICE that upon the annexed affirmation of DAVID CROW, the exhibits thereto, and all the prior papers and proceedings herein, the undersigned will move this Court, at the Courthouse, located at 320 Jay Street, Brooklyn, New York 11201, on March 31, 2011, at 10:00 a.m. or as soon thereafter as counsel can be heard, for leave to renew, pursuant to CPLR §2221, defendant's application for resentencing under the Drug Law Reform Act of 2009, and for such other and further relief as this Court deems appropriate.

Dated: New York, New York,
March 22, 2011

Respectfully submitted,

DAVID CROW
Attorney for Defendant
The Legal Aid Society
199 Water Street – 5th Floor

New York, New York 10038
(212) 577-3282

TO: CLERK OF THE COURT
Kings County Supreme Court
320 Jay Street
Brooklyn, New York 11201

HON CHARLES HYNES
District Attorney, Kings County
Renaissance Plaza
350 Jay Street
Brooklyn, New York 11201

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM - KINGS COUNTY: PART 60

PEOPLE OF THE STATE OF NEW YORK,	:	
Respondent,	:	Ind. Nos. 7790/03, 143/04; SCI No. 5769/04
-against-	:	
RICHARD LUCIANO,	:	
Defendant.	:	

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO RENEW

DAVID CROW, an attorney duly admitted to practice in the courts of this State, hereby affirms under the penalties of perjury, that the following statements are true, except those made on information and belief, which he believes to be true:

1. I am a staff attorney with the Criminal Appeals Bureau of the Legal Aid Society, which was assigned to represent defendant RICHARD LUCIANO on an application for resentencing pursuant to CPL § 440.46. That section, known as the Drug Law Reform Act of 2009 ("DLRA 3"), permits certain defendants serving indeterminate sentences for B drug felonies to apply for resentencing to a determinate sentence. See 2009 Sess. Laws of N.Y., Ch. 56, Part AAA.

2. The application for resentencing was originally filed on February 11, 2010. At that time, Mr. Luciano was in state custody, as a parole returnee, serving

a three to nine year sentence for criminal possession of a controlled substance in the third degree.

3. In response, the People conceded that defendant met the general eligibility requirements, but argued that the statute barred resentencing parole returnees.

4. On May 17, 2010, this Court ruled that Mr. Luciano was not eligible for resentencing, based on his parole returnee status. The Court did not reach the merits of the application. (Decision attached)

5. The defense filed a timely notice of appeal, and in January 2011 filed an opening brief on appeal in the Second Department. The People have not answered.

6. On March 15, 2011, the Second Department ruled that parole returnee status is not a basis to deny resentencing. *People v. Phillips*, 2011 Slip Op. 02038 (March 15, 2011) (decision attached).

7. Mr. Luciano now moves for leave to renew his prior motion pursuant to CPLR §2221.[1]

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[1] Under CPLR §2221, a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or *shall demonstrate that there has been a change in the law that would change the prior determination.*" In light of the Second Department's ruling, renewal is appropriate here.

8. As shown in the prior proceedings, on the merits, Mr. Luciano is exactly the sort of individual envisioned by the Legislature for resentencing. He is a non-violent individual whose criminal history is driven primarily by addiction. Under the prior law, he was kept in pre-trial diversion status for some three years, then sentenced to a nine year indeterminate prison sentence. Initially, he did well in prison, and was released early as a Shock parolee. However, he has continued to struggle, and has been found in violation of parole several times. Most recently he was returned to state custody in July 2009. Ironically, as a Shock parolee, his time assessment is actually longer than it would have been had he not completed the program in the first place.[2] His anticipated release date is May 24, 2011 (see attachment). At that time, he will still have a maximum expiration date of December 22, 2014 – more than eleven years after his arrest. Compared to the sentencing ranges applicable under DLRA-3, it is incontestable that Mr. Luciano has received more than ample punishment for his actions.

9. Since the time of this Court's previous ruling, Mr. Luciano has continued to serve his sentence in good standing. He is attending the rigorous Hale

[2] Mr. Luciano's return to prison was the result of a finding that he had changed his residence without approval. The Division of Parole had discretion to revoke and restore Mr. Luciano to parole, but decided to revoke his parole instead and return him to state prison. As a "Shock releasee," Mr. Luciano was required to serve the so-called "Shock minimum," i.e., his minimum indeterminate sentence, without credit for time periods spent in Shock programs. Thus, when his sentence was recalculated by DOCS, it resulted in a mandatory period of incarceration of almost two years. See 9 NYCRR §8010.3.

Creek residential program, which has recently been recognized by the Correctional Association as the most effective of DOCS programs for persons with addiction.[3] Mr. Luciano has every intention of continuing to comply with its strictures, and to be released on schedule in May 2011. In seeking resentencing, Mr. Luciano wishes only to conform his sentence with the new law, which is what the Legislature intended.

10. The Court of Appeals has granted leave to the defense in two cases that raise the issue of parole returnee eligibility. See *People v. Pratts*, 74 AD3d 536 (1st Dept. 2010), leave granted 15 NY3d 895; *People v. Paulin*, 74 AD3d 685 (1st Dept. 2010), leave granted, 15 NY3d 854. A decision in these cases may give an authoritative resolution to the issue by late June or early July 2011. However, we submit that since Second Department precedent is now in favor of Mr. Luciano, he is entitled to consideration of his application for resentencing now, without waiting several more months.

11. The time-sensitive nature of this application is further evident in the potential applicability of another restrictive ruling of the First Department, in the *Orta* case, in which that Court held that applicants for resentencing lose eligibility when they are released from state custody. While the defense vigorously challenges the correctness of that decision, and the Court of Appeals has granted

[3] The Correctional Association's new study is the most comprehensive outside assessment of DOCS addiction treatment programs to date. It commends the Hale Creek program, while finding many other DOCS programs significantly less effective. See http://www.correctionalassociation.org/PVP/substance_abuse.htm

leave to the defense to consider the issue, see *People v. Santiago*, 77 AD3d 407 (1st Dept. 2010), leave granted February 3, 2011, we request a ruling on this application before Mr. Luciano's release date so that his application is not in danger of being deemed moot.

WHEREFORE, we respectfully submit that the motion for leave to renew should be granted and that the court offer Mr. Luciano a determinate sentence amounting to time served, as envisioned by C.P.L. §440.46.

Dated: New York, New York
March 22, 2011

DAVID CROW
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EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 60

Court Clerk K. Scally
Deborah Bimler

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PEOPLE OF THE STATE OF NEW YORK — DECISION AND ORDER

-against- — Ind. Nos.: 7790/03, 143/04
SCI. No: 5769/04

RICHARD LUCIANO, — Date: May 17, 2010

Defendant — By: Hon. Joseph E. Gubbay

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On December 16, 2003, under Indictment Number 7790-2003, defendant pled guilty to one count of Criminal Possession of a Controlled Substance in the Third Degree (PL § 220.16) and one count of Criminal Possession of a Controlled substance in the Seventh Degree (P.L. § 220.03). Defendant was released on his own recognizance pending sentence. Shortly thereafter, on January 5, 2004, defendant was again arrested. On March 2, 2004, under Indictment Number 143-2004, defendant pled guilty to one count of Criminal Possession of a Controlled Substance in the Third Degree (P.L. § 220.16[1]) and one count of Criminal Possession of a Controlled Substance in the Seventh Degree (P.L. § 220.03) in full satisfaction of the indictment. Defendant was again released on his own recognizance pending sentence.

On September 7, 2004, defendant was arrested for the third time in less than one year. On September 20, 2004, defendant agreed to be prosecuted by Superior Court Information Number 5769-2004 which charged him with one count of Criminal Possession of a Controlled Substance in the Third Degree (P.L. § 220.16[1]). He pled guilty to that charge with the understanding that he would enter drug treatment and if he completed the treatment program, the plea would be vacated and the charge dismissed. However, if he failed in drug treatment, a sentence of 3 to 9 years would

be imposed on that charge as well as on the charges under Indictment Numbers 7790-2003 and 143-2004, with the sentences running concurrently.

On September 20, 2006, after his repeated failure to succeed in drug treatment, defendant was sentenced to 3 to 9 years imprisonment for each of the three felony drug possession convictions and one year imprisonment for each of the two misdemeanor drug possession convictions. Defendant entered state prison on October 3, 2006, and was released on parole on May 3, 2007. Defendant was paroled a total of three times on the instant case, each time he was returned to state prison after having violated his parole and having his parole revoked. While incarcerated, defendant moved to be resentenced on the aforementioned class B felony charges, pursuant to CPL § 440.46. Defendant's motion is denied.

CPL § 440.46 allows defendants who are in the custody of the department of correctional services, and have been convicted of a Class B drug felony committed prior to January 13, 2005, and who are serving an indeterminate sentence with a maximum term of more than three years, to apply to be resentenced to a determinate sentence. In deciding the underlying motion, the court must determine if defendant is eligible for the relief requested. If eligible, the court will review defendant's record, including his institutional record, to determine if a determinate sentence is justified.

The court holds defendant is ineligible to be resentenced because he has previously been paroled. Parole, itself, is a form of sentence relief, and as appellate authority has concluded with regard to DLRA 2004 and DLRA 2005, to grant resentencing relief to a parole violator would cause a substantial injustice to those defendants who are successfully serving out their parole. See, *People v. Rodriguez*, 68 AD3d 676 [1st Dept 2009] and *People v. Mills*, 11 NY3d 527 [2008].

When a defendant is given over to the supervision of the Division of Parole, he is no longer incarcerated. Yes, he must comply with the conditions of his parole, but he is no longer behind bars. The Legislature has enacted three drug law reform acts in five years. When examined together, it is clear that the goal of all three acts was to get defendants, who have already served lengthy prison terms under the Rockefeller Drug Laws, out of prison. DLRA 2004 allowed courts to resentence Class A-I felony drug offenders, who were serving an indeterminate sentence of at least 15 years, to a determinate sentence.[1] In DLRA 2005, the Legislature extended this relief to include Class A-II felony drug offenders, however, they specifically excluded those defendants who would be eligible for parole in less than three years.[2] In making this exclusion the Legislature implicitly acknowledged parole as a form of sentence relief. These defendants were excluded because their parole was on the horizon, and assuming parole was warranted, they were due to be released from prison. See *People v. Mills*, 11 NY3d 527, at 536 (2008), "In short, the Legislature chose to confine the opportunity for resentencing in the courts to those A-II felony drug offenders unable to seek early release from prison from the Parole Board in the near term."

Even though similar language was not included in DLRA 2004, nor in DLRA 2009, it is hard to conceive of a reason for the Legislature to treat parole violators differently under each of the three drug law reform acts. A logical conclusion is that they never intended to grant resentencing relief to defendants who have been paroled. When DLRA 2004 was enacted, the defendants who were targeted for relief had already been incarcerated on lengthy sentences. To impose a parole eligibility restriction on those defendants would have been counterintuitive. However, in 2005, because relief

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[1] (DLRA 2004, [L 2004, ch 738 § 23, §§ 1 - 41]).

[2] (DLRA 2005 [L 2005, ch 643, § 1]).

was being extended to an even larger group of defendants, who were serving shorter sentences than the defendants covered under DLRA 2004, the Legislature may have felt it prudent to exclude those defendants who were approaching their parole dates. See, *People v. Mills*, 11 NY3d 527, at 535 (2008), where the Court quotes the following passage from a letter authored by the NYSDA's Executive Director to Governor Pataki, referring to DLRA 2005, "The bill is **narrowly tailored** to offer the possibility of relief to inmates who are most desperately in need of sentence review: those non-violent drug offenders who are serving life sentences for Class A-II drug offenses with *relatively long minimum terms* who were overlooked in the 2004 Drug Law Reform Act" (emphasis added).

The parole eligibility restriction was conspicuously missing from DLRA 2009. One possible explanation was that given the success of the 2004 and 2005 reforms, as measured by the low rate of recidivism for those defendants who were resentenced, in conjunction with the additional eligibility restrictions that were included in DLRA 2009, the Legislature may have felt a parole eligibility restriction was unnecessary.[3] The bill jacket for DLRA 2009 does not offer any explanation for the exclusion of the parole eligibility restriction. Nonetheless, the fact remains that the Legislature has never affirmatively included parole violators as being eligible for resentencing relief in any of the three drug law reform acts. In fact, in discussing the factors the court must

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[3] As noted by Senate Finance Committee Chairman Karl Kruger, "In the 2004-2005 reforms....out of the 476 people resentenced, we had a total of less than 2 percent recidivism...[s]o the resentencing provisions worked last time, they're going to work this time. *People v. Figueroa* 2010 WL 454919 [Sup Ct NY Co 2010]), at 18, citing Senate Floor Debate at 2682-2683. Additionally, DLRA 2009 contains many more exclusions than the 2004-2005 reforms. As asserted by Chairman Karl Kruger during debate on the bill, "I will tell you that the resentencing provision here is even tougher than the resentencing provision in the 2004-2005 reforms. We have a series of exclusions, people who are not able to apply for resentencing who were able to apply under the last round of reforms..." *People v. Figueroa*, id., at 13, citing Senate Floor Debate at 2682.

consider in granting resentencing relief, DLRA 2009 is silent as to a defendant's conduct while on parole; it only refers to a defendant's conduct while institutionalized. If the Legislature had intended to allow parole violators access to this relief, wouldn't they have directed the court to examine a defendant's conduct while on parole? Surely, such conduct is relevant. Wouldn't they have referred to it in the statute? Additionally, the fact that DLRA 2009 included an amendment to Executive Law § 259(j), making it mandatory to terminate parole after a period of successful supervision on a drug felony, indicates that the Legislature considered defendants on parole, and provided them with a separate form of sentencing relief.[4]

The strongest argument against granting sentencing relief to parole violators stems from the injustice that would occur to those defendants who are successfully serving out their parole. Each of the three drug law reform acts state that their provisions only apply to those defendants "in the custody of the department of correctional services." Some courts have been persuaded by this language, in conjunction with the fact that DLRA 2009 did not specifically exclude parole-eligible defendants, to hold that a defendant who is incarcerated on a parole violation is eligible to apply to be resentenced. See, *People v. Loftin*, 2010 WL 716165 (Co Ct Onondaga Co 2010), and *People v. Figueroa* 2010 WL 454919 (Sup Ct NY Co 2010). The problem with this holding is not that it creates an incentive to violate parole, because as a practical matter it does not, but rather that it

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[4] Executive Law § 259-j (3)(a) states: "The division of parole **must** grant termination of sentence after three years of unrevoked presumptive release or parole to a person serving an indeterminate sentence on a Class A felony offense, defined in article two hundred twenty of the penal law, and **must** grant termination of sentence after two years of unrevoked presumptive release or parole, to a person serving an indeterminate sentence for any other felony offense defined in article two hundred twenty or two hundred twenty-one of the penal law" (emphasis added).

rewards misconduct.[5] This result is unacceptable.

Once a determination is made that a defendant's bad behavior requires his parole to be revoked, it defies common sense to grant him a windfall by allowing him an opportunity to apply to be resentenced. Comparatively, a defendant who is successfully serving out his parole is not eligible to be resentenced, because his compliance has ensured that he is not in the custody of the department of correctional services. As the Court of Appeals stated in *Mills*, 11 NY3d 527 (2008) at 537, "This would create illogical, if not perverse results." See also, *Rodriguez*, in which the First Dept. reached the same conclusion, when it quoted *Mills* stating, "Surely the Legislature did not intend fresh crimes to trigger re-sentencing opportunities" (*Rodriguez*, 68 AD3d 676, supra, quoting *People v. Mills*, 11 NY3d, supra, at 537).

The court is sympathetic to the plight of a defendant who is re-incarcerated on a technical parole violation, or those defendants who have made good faith efforts to address their drug dependency through treatment, but despite their efforts engage in low level criminal conduct, thus resulting in parole revocation. However, such defendant is not without recourse. Defendants who violate parole are afforded the due process inherent in their right to a parole revocation hearing. "A parolee is entitled to a prompt final parole revocation hearing, and the failure to provide said hearing may be raised in a petition of habeas corpus." *People v. Bagby*, 11 Misc.3d 882 (Sup Ct Westchester Co 2006) citing to, *People ex rel. Menechino v. Warden, Green Haven State Prison*, 27 NY2d 376 (1971). "Moreover, a defendant may challenge a final parole revocation decision pursuant to a

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[5] This court is in agreement with those trial courts that have recognized, that as a practical matter, a parolee is unlikely to violate his parole purposely just so he could realize the potential to move to be resentenced under DLRA 2009. See, *People v. Figueroa* 2010 WL 454919 (Sup Ct NY Co 2010).

CPLR article 78 proceeding." *People v. Bagby*, id., at 889, citing to *Matter of Brew v. New York State Division of Parole*, 22 AD2d 930 (3d Dept. 2005). While the court is concerned for such defendants, the court cannot ignore the appellate authority in both *Mills* and *Rodriguez*. For the foregoing reasons the court finds the rationale in both *Mills* and *Rodriguez* to be dispositive on this issue. In so far as the defendant is ineligible for resentence, defendant's substantial justice claims are not reached.

This is the Opinion, Decision and Order of the Court.

May 17, 2010
Brooklyn, New York

Hon. Joseph E. Gubbay
Acting Supreme Court Justice

EXHIBIT B

People v Phillips

2011 NY Slip Op 02038

Decided on March 15, 2011

Appellate Division, Second Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on March 15, 2011

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

WILLIAM F. MASTRO, J.P.
MARK C. DILLON
RANDALL T. ENG
CHERYL E. CHAMBERS, JJ.

2010-00795
(Ind. No. 01-04881)

[*1]The People, etc., respondent,

v

James F. Phillips, appellant.

Mark Diamond, New York, N.Y., for appellant.
Francis D. Phillips II, District Attorney, Goshen, N.Y. (Lauren E. Grasso and Andrew R. Kass of counsel), for respondent.

DECISION & ORDER

Appeal by the defendant from an order of the County Court, Orange County (Frehill, J.), dated December 4, 2009, which denied his motion to be resentenced pursuant to CPL 440.46 on his conviction of criminal sale of a controlled substance in the third degree, which sentence was originally imposed, upon his plea of guilty, on December 14, 2001.

ORDERED that the order is reversed, on the law, and the matter is remitted to the County Court, Orange County, for further proceedings and a new determination of the defendant's motion.

In the Drug Law Reform Act of 2009 (hereinafter 2009 DLRA), the Legislature provided that "[a]ny 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 13, 2005], who is serving an indeterminate sentence with a maximum term of more than three years, may . . . apply to be resentenced" (CPL 440.46). Although the 2009 DLRA does not reference a person's parole status in determining eligibility, the County Court denied the defendant's motion to be resentenced solely on the basis that his status as a reincarcerated parole violator made him ineligible for such relief. We reverse.

While a person's status as a parole violator may be relevant in determining whether "substantial justice dictates that the application should be denied" on the merits (L 2004, ch 738, § 23; *see* CPL 440.46[3]), nothing in CPL 440.46 supports a conclusion that such status renders a person ineligible to apply for resentencing in the first instance. We do not agree with the conclusion of the Appellate Division, First Department, that interpreting the statute to permit parole violators to apply for resentencing would be " contrary to the dictates of reason or leads to unreasonable results'" (*People v Pratts*, 74 AD3d 536, 537, *lv granted* 15 NY3d 895, quoting McKinney's Cons Laws of NY, Book 1, Statutes § 143, Comment, at 288). Although the Court of Appeals has stated that "the Legislature did not intend fresh crimes to trigger resentencing opportunities" (*People v Mills*, 11 NY3d 527, 537), the Court in that case was not concerned with the 2009 DLRA, but with the Drug Law Reform Act of 2005 (L 2005, ch 643, § 1; hereinafter the 2005 DLRA), which permits resentencing only if the defendant is not within three years of eligibility for release on parole. In *[*2]Mills*, the defendant Jose Then argued that, after being reincarcerated

following his parole violation, he was more than three years away from parole eligibility (*People v Mills*, 11 NY3d at 532). The Court rejected that argument, since the defendant was continuing to serve his sentence on the original conviction, during which he had already become eligible for parole (and, in fact, had been released on parole), and thus he could not be considered to be more than three years away from parole eligibility with respect to that conviction. Accordingly, the Court held that "once a defendant has been released to parole supervision for a class A-II drug felony conviction, he or she no longer qualifies for 2005 DLRA relief for that particular conviction" (*id.* at 537). That is to say, such a defendant is no longer more than three years away from parole eligibility. Inasmuch as the 2009 DLRA contains no requirement that a defendant be more than three years away from parole eligibility, *Mills* does not apply to motions for resentencing under the 2009 DLRA. We therefore decline to follow the decisions in *Pratts* and *People v Paulin* (74 AD3d 685, *lv granted* 15 NY3d 854).

Accordingly, we remit the matter to the County Court, Orange County, for further proceedings and a new determination of the defendant's motion.
MASTRO, J.P., DILLON, ENG and CHAMBERS, JJ., concur.

ENTER:

Matthew G. Kiernan

Clerk of the Court

Return to Decision List

EXHIBIT C

Department of Correctional Services

Inmate Information

Inmate Information Data Definitions are provided for most of the elements listed below. When a detailed definition is available for a specific element, you may click on the element's label to view it.

Identifying and Location Information
As of 03/22/11

DIN (Department Identification Number)	06R4236
Inmate Name	LUCIANO, RICHARD
Sex	MALE
Date of Birth	05/21/1982
Race / Ethnicity	HISPANIC
Custody Status	IN CUSTODY
Housing Releasing Facility	HALE CREEK ASACTC
Date Received (Original)	10/03/2006
Date Received (Current)	07/21/2009
Admission Type	RETURN FROM PAROLE/COND REL
County of Commitment	KINGS
Latest Release Date / Type (Released Inmates Only)	

Crimes of Conviction
If all 4 crime fields contain data, there may be additional crimes not shown here. In this case, the crimes shown here are those with the longest sentences.
As of 03/22/11

Crime	Class
CRIM POSS CONTR SUBSTANCE 3RD	B
CRIM POSS CONTR SUBSTANCE 3RD	B
CRIM POSS CONTR SUBSTANCE 3RD	B

Sentence Terms and Release Dates
Under certain circumstances, an inmate may be released prior to serving his or her minimum term and before the earliest release date shown for the inmate.
As of 03/22/11

As of 03/22/11

Aggregate Minimum Sentence	0003 Years, 00 Months, 00 Days
Aggregate Maximum Sentence	0009 Years, 00 Months, 00 Days
Earliest Release Date	05/20/2011
Earliest Release Type	OPEN DATE FOR PAROLE RELEASE
Parole Hearing Date	09/2011
Parole Hearing Type	OPEN DATE/6 MO AFTER REAPPEARANCE
Parole Eligibility Date	01/28/2009
Conditional Release Date	02/08/2013
Maximum Expiration Date	12/22/2014
Maximum Expiration Date for Parole Supervision	
Post Release Supervision Maximum Expiration Date	
Parole Board Discharge Date	