STATE OF NEW YORK
COUNTY OF ONONDAGA COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

John Doe,

Defendant.

Supplemental Resentence Memorandum Submitted on Behalf of Defendant

Indictment #2002-0400

This Resentence Memorandum has been prepared by Alan Rosenthal, Esq., Patricia Warth, Esq. and Katie Krusey, Esq. of the Center for Community Alternatives (CCA) at the request of Mr. Doe's attorney, Ed Klein.

STATEMENT OF FACTS

On November 17, 2009, Mr. Doe filed his motion to be resentenced pursuant to CPL § 440.46. In order to be eligible for resentencing pursuant to CPL ' 440.46, Mr. Doe must be in the custody of the Department of Correctional Services (DOCS), be convicted of a class B felony offense defined in Article 220 of the Penal Law for a crime committed prior to January 13, 2005 (the effective date of the original DLRA), and be serving an indeterminate sentence with a maximum of more than three years.

John Doe meets these eligibility requirements. He has been convicted of class B felony drug offenses (four counts each of Criminal Possession of a Controlled Substance in the Third Degree and Criminal Sale of a Controlled Substance in the Third Degree), for crimes that were committed on May 7, 2002 and for which he received concurrent indeterminate sentences of 6 to 12 years. He is currently in DOCS custody at Cayuga Correctional Facility.

In addition to the sentences for the class B felony drug offenses, Mr. Doe was sentenced at the same time, December 20, 2002, on four counts of Criminal Possession of a Controlled in the Fourth Degree, class C felony drug offenses, to concurrent indeterminate sentences of 5 to 10 years to run concurrently with the 6 to 12 year sentence, and a class A-II felony drug offense, for which Mr. Doe was sentenced to 8 years to life, also to run concurrently with the 6 to 12 year sentence. On December 19, 2005, after enactment of the 2005 Drug Law Reform Act ("DLRA II"), this Court resentenced Mr. Doe on the A-II drug felony to a 7 year determinate sentence.

Mr. Doe has felony convictions predate the 2002 drug conviction – one each in New York and Indiana. The New York prior felony stems from a July 9, 1990, arrest in Syracuse, which resulted in a November 28, 1990 conviction for Criminal Sale of a Controlled Substance in the third degree. Mr. Doe received an indeterminate sentence of 4 ½ to 9 years for this conviction. He was released onto parole supervision on May 25, 1995.

Two Robbery cases in Indiana resulted in two convictions more than 27 years ago. Both cases were consolidated and records indicate that on November 26, 1982 Mr. Doe was convicted of two counts of Robbery and one count of Carrying a Handgun without a License. For the two Robberies, he was sentenced to 6 and 8 years respectively, to run consecutive to each other. He also received a 2 year sentence for Carrying a Handgun without a License, to run concurrent with the other sentences. Mr. Doe reports that he participated in an Indiana program which permitted him to leave the prison daily to participate in college courses. Upon successful completion of that program, he was resentenced and his robbery sentences were made concurrent to one another. He was released from custody the following day. We have requested documentation to determine this resentencing date, though we have not received it. We have obtained, however, archival information from Indiana (attached as Exhibit A), which indicates that Mr. Doe's

sentence was discharged on June 3, 1988. The release date on this document is left blank, so it is not clear if Mr. Doe was released from prison prior to this discharge date. The prosecution contends that the date of commission of the Robberies was November 9, 1982.

By the prosecutor's computations, between the commission of the present drug offense (May 7, 2002) and the commission of the previous 1982 robbery (November 9, 1982), Mr. Doe was incarcerated for a total of 9 years and 2 months. This computation includes the time he spent incarcerated for the 1982 robbery conviction in Indiana and 1990 drug conviction in New York. We do not concede that this calculation is accurate, particularly since the specific dates of Mr. Doe's confinement in Indiana are unknown. Nonetheless, for purposes of this memorandum, we will utilize the prosecution's computation of incarceration time. As discussed in more detail below, even assuming that Mr. Doe was incarcerated for 9 years and 2 months between the commission of the robbery in Indiana in 1982 and the commission of the present drug offense in New York in 2002, he is still clearly eligible for resentencing pursuant to CPL § 440.46.

CPL § 440.46 REQUIRES A STRAIGHTFORWARD COMPUTATION FOR DETERMINING IF A PRIOR VIOLENT OR MERIT TIME ALLOWANCE EXCLUDED FELONY CONVICTION RENDERS THE PROVISIONS FOR RESENTENCING INAPPLICABLE TO A PARTICULAR DEFENDANT.

CPL § 440.46(5) governs "exclusion offenses." This subsection provides as follows:

> (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
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> (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.

A plain-language reading of this provision requires the following straightforward 5-step method for calculating whether a previous violent felony conviction or a conviction for an offense for which merit time allowance is not available (also referred to as a "merit time allowance excluded felony" or "exclusion offense") makes the resentencing provisions of this statute inapplicable to a particular defendant.

> **Step 1:** Calculate the period of time between the date of the filing of the motion for resentencing[1] on the present class B drug offense and the date of the conviction[2] for 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 commission of the previous "exclusion offense" and the date of 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.
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> **Step 5**: If the total time resulting from the calculation performed in Step 4 is 10 years and 1 day or more, the defendant is eligible for resentencing. If the time resulting

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[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.

[2] For the sake of this argument we will use the date of conviction on the previous "exclusion offense" as the end point for the ten year period. Some authorities have suggested that a better reading of the statute would be to run the measurement of the interval of ten years from the time of filing of the motion back to the date of the commission of the previous "exclusion offense." Since neither date would result in a finding of ineligibility for resentencing we will use the date of conviction for purposes of this calculation, without conceding which is the better interpretation.

from the calculation performed in Step 4 is 10 years or less, the defendant is ineligible for resentencing.

USING THE 5-STEP COMPUTATION IT IS DETERMINED THAT MR. DOE'S 1982 CONVICTION DOES NOT MAKE THE RESENTENCING PROVISIONS OF CPL § 440.46 INAPPLICABLE TO HIM.

Applying this simple 5-step method to the facts of this case yields the following:

Step 1: The period of time between the date of filing the motion for resentencing on the present class B drug offense (November 17, 2009) and the date of the conviction for the previous violent exclusion offense (November 26,1982) is ***26 years, 11 months and 22 days.***

Step 2: Since 26 years, 11 months and 22 days is more than 10 years and 1 day, we proceed to Step 3.

Step 3: The amount of time incarcerated for any reason between the date of the commission of the previous "exclusion offense" (November 26, 1982) and the date of the commission of the present class B drug offense (May 7, 2002) is ***9 years and 2 months.***

As stated above, although we do not concede that it is accurate, we will use the prosecution's computation for the time Mr. Doe has been incarcerated for any reason during this interval for purposes of this computation.

Step 4: Subtracting the time calculated in step 3 (9 years and 2 months) from the time calculated in step 1 (26 years, 11 months and 22 days**)** we calculate the difference to be ***17 years, 9 months and 22 days.***

Step 5: Since the total time resulting from the calculation performed in step 4 is ***10 years and 1 day or more***, the provisions of this resentencing statute are applicable to Mr. Doe.

ARGUMENT

MR. DOE'S 1982 CONVICTION DOES NOT PRECLUDE HIM FROM RESENTENCING.

The prosecution does not contest that Mr. Doe meets all of the criteria for resentencing set forth in CPL § 440.46(1). Rather, what the prosecution asserts is that the resentencing provisions are not applicable to Mr. Doe because he committed an "exclusion offense" within the

preceding ten years (otherwise known as the "ten year 'look back'"). In making this assertion, the prosecution circumvents the plain language of CPL § 440.46(5)(a) and instead adopts a tortured reading of the ten year "look back" period.

The prosecution contends that the ten year "look back" period is measured from the date of the commission of the present drug felony rather than the date of the filing of the motion for resentencing. This interpretation would deny many defendants, including possibly Mr. Doe, any benefit from the recent Drug Law Reform Act ("DLRA III") and is inconsistent with the statute's plain language and ameliorative purpose.

By conflating and distorting the time periods set forth in CPL § 440.46(5)(a), prosecutors have artificially created confusion regarding the manner in which the ten year "look back" period is calculated. In so doing, they have failed to acknowledge the simple reality that subdivision (5)(a) establishes two separate and distinct intervals of time to be used for the purpose of calculating whether a defendant is precluded from resentencing. Recognition of the two distinct time intervals established by the statute makes this legislation easy to understand and the method for calculating the ten year "look back" obvious.

The first interval is the ten year period – or the "look back" – used to determine whether the conviction for the previous violent or merit time allowance excluded felony offense ("exclusion offense") occurred within the preceding ten years, which would make the provisions for resentencing inapplicable to this particular defendant. This interval is measured from the present time (date of filing the motion) back to the date of conviction for the "exclusion offense." The use of this interval ensures that the previous offense is sufficiently remote in time to reasonably conclude that the defendant is no longer prone to committing violent crimes. The second interval is the time between the commission of the previous felony and the commission

of the present drug felony, during which time period any days spent incarcerated are excluded from the counting of the ten year "look back", thereby tolling, or extending, the ten years.

These two intervals – the ten year "look back," and the period of exclusion for incarceration – have different beginning dates and different ending dates. The statute only becomes confusing when the two time intervals are conflated and are treated as one and the same period of time. Stated another way, it is a mistake to use the phrase "commission of the present felony" to John the beginning of the ten year "look back" when it is only intended to John the beginning of the interval during which incarceration will be excluded or toll the running of the ten years.

As explained further below, merging the two separate intervals created by the statute, as the prosecution does, and defining the ten year "look back" as running from the commission of the B felony drug offense rather than the present, undermines the statute's ameliorative purpose, conflicts with its plain meaning, and is at odds with the interpretation of the statute promulgated by DOCS and the Unified Court System.

I. The Statute's Ameliorative Purpose Compels Reading the Ten Year Look Back as Starting at the Present.

By adopting an interpretation that significantly limits the reach of CPL § 440.46, the prosecution's interpretation of the ten year "look back" undermines the ameliorative purpose of the statute. There is no dispute that the Legislature enacted the DLRA III, the latest round of drug law reform, in order to amend the inordinately harsh punishments that the Rockefeller Drug Laws have imposed on low-level, non-violent offenders for over thirty years. Indeed, New York's Rockefeller Drug Laws have been the subject of intense criticism for many years. In 2004, the Legislature, in initiating drug law reform, stated that New York's drug laws "provide

inordinately harsh punishment for low level non-violent drug offenders, warehouse offenders in state prison who could more productively be placed into effective drug treatment programs, and waste valuable state tax dollars which could be used more effectively to provide drug treatment to addicts ...." See NY Bill Jacket, 2004 A.B. 11895, Ch. 738, at p. 6. Governor Paterson reiterated this point in enacting the more recent 2009 changes, stating, "I have seen too many lives destroyed by outrageously harsh and ineffective mandatory sentencing laws...." March 27, 2009 Press Release, available at: www.state/nyus/governor/press_0327091_print.html. The 2004 and 2005 reforms to the Rockefeller Drug Laws sought to ameliorate the lifetime sentences meted out to individuals who had been convicted of Class A-I and Class A-II drug offenses (hereinafter, DLRA I and II, respectively). DLRA III now extends much-needed sentencing relief to those convicted of Class B, and accompanying C, D and E offenses, individuals who, like Mr. Doe, are typically serving lengthy prison terms for selling or possessing a small amount of drugs.

The outcome pursued by the prosecution through their misinterpretation of the statute appears even more senseless when considered in light of the observations about amelioration in a recent decision by Judge Conviser:

> The Court must be mindful of the ameliorative purposes of the 2009 DLRA'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.

People v. Cecil Jones, Ind. No. 3981/04 (Sup. Ct. NY Co. 12/10/09). (Attached as Exhibit B for the Court's convenience).

The presumption in favor of granting resentencing applications is a very strong one, further highlighting the Legislature's intent to see that amelioration was provided to the vast

majority of eligible defendants. Judge Conviser captured the significance of this very high standard in Jones at p. 6:

> [I]n order for a court to completely deny resentencing, the facts and circumstances of an offender's instant crime, criminal history, institutional record and other relevant facts must point so strongly against resentencing, when considering notions of fairness, reasonableness and due process, as to authoritatively command that an application be completely denied. Whether that standard is reached in any particular case requires a discretionary determination. But there is little doubt that the bar for complete denial of a resentencing application under the DLRA is a high one.

In the very recently decided case, People v. Roman, 4931/96 & 6894/96 (Sup. Ct. Bronx County, 12/2/09, attached as Exhibit C), the court relied on the DLRA III's ameliorative purpose to reject the prosecution's argument that the ten year "look back" starts at the date of the commission of the drug offense. The Roman court reasoned as follows:

> [T]o adopt the position put forth by the People would be to deny a court the ability to reevaluate the propriety of an otherwise draconian sentence meted out under the former sentencing structure. The entire purpose of the 2009 Drug Law Reform Act, and its predecessor 2004 and 2005 drug law reform acts, is to ameliorate the lengthy sentences given to defendants for selling or possessing a small amount of drugs.

Exhibit C at p. 2.

The Roman court's reasoning comports with the well-established rule of statutory construction that "courts are obligated to construe an enactment so as to effectuate the intent of the Legislature." Long v. State of New York, 7 N.Y.3d 269 (2006). The prosecution's assertion that the ten year "look back" starts at the date of the commission of the B felony drug offense rather than the present is at odds with both the purpose of the statute and its plain meaning.

II. Under the Statute's Plain Meaning the Ten Year "Look Back" Starts on the Date the Resentencing Motion is Filed.

The most fundamental rule of statutory construction is to give plain meaning to the

statute's language. "The starting point is always to look to the language itself and where the language of a statute is clear and unambiguous, courts *must give effect to its plain meaning*." Pultz v. Economakis, 10 N.Y.3d 542, 547 (2008) (emphasis added); see also State of New York v. Patricia II, 6 N.Y.3d 160, 162 (2006). In other words, "as the clearest indicator of legislative intent is the language itself, the starting point in any case of interpretation must always be the language itself, giving affect to the plain meaning thereof." Majewski v. Broadalpin-Perth, Cent. School Dist., 91 N.Y.2d 577, 583 (1998). Adherence to the plain meaning rule prevents courts from legislating under the guise of interpretation. People v. Finnegan, 85 N.Y.2d 53 (1995).

Applying these principles to CPL § 440.46, there is absolutely no support for the prosecution's assertion that the ten year "look back" starts at the date of the commission of the B felony drug offense. Indeed, the part of the statute which defines the ten year "look back" specifically defines this interval as "the preceding ten years" CPL § 440.46(5)(a). (emphasis added).

The prosecution eschews the statute's plain meaning, and instead superimposes the language establishing the interval for determining exclusion or tolling due to incarceration, onto the interval for actually measuring the ten year "look back." By merging the two separate and distinct intervals contained within the statute, the prosecution is seeking to limit the reach of the resentencing statute by creating a new rule that defies the statute's plain meaning. In so doing the prosecution invites this Court to legislate "under the guise of interpretation." People v. Finnegan, 85 N.Y.2d 53 (1995).

As discussed further below, there is additional support to be found in the statute itself that leads to the unavoidable conclusion that the ten year "look back" starts at the date the resentencing motion is filed, and not on the date of the commission of the B felony drug offense.

A. The Statute is Framed in the Present Time Which Leads to the Inescapable Conclusion that the Ten Year "Look Back" Starts in the Present.

The plain meaning of the phrase "previously convicted within the **preceding** ten years..." certainly leads to the conclusion that the calculation looks back from the present time. There is no other meaning to this phrase. According to the Merriam-Webster dictionary, preceding means that which "*immediately* precedes in time or place." (Emphasis added). Consequently, use of the word preceding in the statute does not contemplate skipping back to some prior time period, such as the time that the defendant committed the instant drug offense. Moreover, this interpretation is consistent with the Legislature's desire to ameliorate the sentences of the vast majority of class B drug offenders.

In People v. Roman, 4931/96 & 6894/96 (Sup. Ct. Bronx County, 12/2/09) Judge Mogulescu soundly rejected the same prosecution argument that is propounded here. Judge Mogulescu held that the measurement of the ten year "look back" starts from the time of filing the motion.

> "Contrary to the People's position, the statute by its plain meaning contemplates eligibility determinations from the present date. The statute does not state, as the People now purport, that the court shall measure this ten year time period from the commission of a past offense."

In Roman, the prosecution put forward the notion that the phrase in the statute that reads "commission of the previous felony and the time of commission of the present felony," somehow referred to and qualified the interval to be used to measure the "look back" period and the "preceding ten years." It is apparent that such is not the case and is exactly why the phrase is set off by commas. Judge Mogulescu recognized the prosecution's ruse and would have none of it.

> "Rather, the statute does not qualify the term "within the preceding ten years" with reference to any time frame thus

> imposing a plain meaning to this phrase, *viz*, that this time frame is measured from the date of the motion."

Roman at p. 2.

In addition to the wording itself, the entire structure of DLRA III is framed in terms of the present and the effective date – October 7, 2009. Thus, a person can only petition for resentencing if he is in DOCS custody on the statute's effective date. See CPL. § 440.46(1). Similarly, CPL § 440.46(5)'s provisions set forth the exclusion offenses in terms of the statute's effective dates, excluding any person "who is serving a sentence for or has a predicate felony conviction for an exclusion offense." [emphasis added]. These provisions contemplate eligibility calculations from the present, not from some remote time in the past.

From the wording of the statute and the framing of eligibility calculations from the present, not from some past event, it is quite evident that the time to start measuring the ten year "look back" is measured from the time of filing the motion.

B. The Legislature's Decision Not to Include Reference to Penal Law § 70.06 Indicates that the Ten Year "Look Back" Is Measured from the Time of Filing.

There is additional statutory evidence that the interpretation advanced by the prosecution, that the ten year "look back" period should be measured back from the date of the commission of the present drug offense, and not from the present time (date of filing the motion), is flawed. It creates a gaping inconsistency in the plain meaning and structure of the statute. Fixing the starting date for measuring the ten year "look back" at the time of the commission of the present drug offense, the interpretation that the prosecution promotes, is tantamount to the saying that all defendants who were sentenced on a class B drug offense as second felony offenders pursuant to Penal Law § 70.06, shall not be eligible for resentencing, where the predicate felony conviction was for a violent felony offense or an offense for which merit time allowance is not available.

Had the Legislature intended for the "look back" period to commence from the time of the commission of the present drug offense, and not from the present time, then indeed they would simply have excluded from resentencing all class B drug offenders who were sentenced as second felony offenders pursuant to Penal Law § 70.06 with a predicate conviction for a violent felony. They would have created the same blanket exclusions that they enacted in paragraph (b) of subdivision (5) of CPL § 440.46 for individuals sentenced as multiple felony offenders under Penal Law §§ 70.04 and 70.08. The Legislature did not do this. There is no reference to Penal Law § 70.06 made in the statute. Its absence is glaring and significant and can only be explained by one interpretation.

The Legislature did not intend the blanket exclusion that the prosecution suggests. Instead, the Legislature created a separate way of computing the exclusion that only makes sense if the ten year "look back" is measured from the filing date of the motion. If they meant the ten year "look back" to be measured from the date of the commission of the present drug offense they would have simply excluded all second felony drug offenders by reference to Penal Law § 70.06. Clearly the Legislature knows how to exclude by reference to sentencing statutes, if that was their intention, as they did in referring to the companion statutes, Penal Law §§ 70.04 and 70.08.

The universal principle in the interpretation of statutes that *expressio unius est exclusio alterius* is of direct application in this instance. (See Statutes § 240). Where a law expressly describes a particular group of people to which it shall apply or exclude, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded. In this case the statute specifically references people serving sentences pursuant to Penal Law § 70.04 and § 70.08 while leaving out reference to those sentenced pursuant to § 70.06 for

predicate violent or an offense for which merit time allowance is not available. By not including a reference to Penal Law § 70.06 the Legislature specifically rejected running the ten year "look back" from the commission of the present drug offense, instead opting to run it from the present time.

C. Time Served on the Present Drug Offense is Relevant to Determining a Person's Eligibility for Resentencing.

The ten year "look back" is intended to prevent someone with a recent history of committing violent crimes from being resentenced. The more recent the commission of a violent crime, the more reasonable it is to assume that the person has a propensity towards violence and thus, poses a danger to the community, if released. It makes no sense, therefore, to refrain from considering the most recent period of time – that is, the period of time between the commission of the drug offense and the filing of the motion – for it is this period of time that best gauges a person's current commitment to living a law abiding life. In Mr. Doe's case, the past 7 1/2 years of time in prison clearly demonstrates his genuine efforts to turn his life around.[3]

It undermines the statute's ameliorative purpose to exclude from resentencing individuals, like Mr. Doe, who have constructively used their time in prison to further their rehabilitation. Doing so would also be contrary to the framework of the statute as a whole, which directs resentencing courts to focus on the person's institutional record. See CPL § 440.46(3). In fact, unlike the resentencing provisions of DLRA I and II, DLRA III directs courts to specifically consider the person's willingness to participate in treatment and behavior while in

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[3] Apparently, the prosecution believes that "time on the streets" or in the community is the only way to gauge criminal propensity. Of course, this makes no sense, and for years decision-makers in the criminal justice system have viewed time in prison as an important measure of a person's commitment to living a law-abiding life. Indeed, this is the core of decision-making by the parole board in making parole decisions and DOCS' officials in making merit time and good time decisions.

prison. Id. Courts are to consider these two factors because they are good indicators of a person's efforts at rehabilitation and commitment to living a law-abiding life. Since consideration of rehabilitation efforts while in prison on the B felony drug offense is a significant part of CPL § 440.46 as a whole, the prosecution's assertion that this time period is irrelevant is without merit.

D. CPL § 440.46(5)(a) Specifically Defines the Past Incarceration Time to Be Excluded or Tolled from the Ten Year "Look Back" Thereby Indicating that the Present Incarceration Time Should Not Be Excluded.

Under CPL § 440.46(5)(a), the time to be excluded from the ten year "look back" is specifically defined and limited to any time the person was incarcerated between "the commission of the previous felony and the time of commission of the present felony." (also known as the "exclusionary period"). The exclusionary period does *not* include days incarcerated since the commission of the B felony drug offense. Yet in an effort to reduce the number of people eligible for resentencing, the prosecution seeks to artificially add to this exclusionary period by also excluding time incarcerated on the B felony drug offense.

The plain meaning of CPL § 440.46 is that any time spent in confinement on the present conviction *does* count toward the calculation of the ten year look back period. If the Legislature intended that the present period of incarceration should not be counted as part of the ten year look back, they would have included that period of time as an exclusion in the statute; the Legislature did not do so. Consequently, all of the time since the commission of the present drug offense, whether incarcerated or not, counts toward the calculation of the ten year "look back."

In Mr. Doe's case, the exclusionary period (period of possible tolling of days due to incarceration) is the period of time between 1982, the commission of the violent felony offense, and 2002, the commission of the B felony drug offense. The 9 years and 2 months that Mr. Doe

was incarcerated during this time tolls or is excluded from the ten year "look back," thereby extending the ten years by 9 years and 2 months. To adopt the prosecution's argument, which simply ignores the 7 ½ years since the commission of the present drug offense, would, in effect, erroneously add 7 1/2 years to this exclusionary period, possibly rendering him ineligible for resentencing, and thereby undermining the statute's ameliorative purpose.

E. This Court Should Reject the Prosecution's Tortured Reading of the Statute Because it Would Lead to Absurd Results.

A statute should not be interpreted in such a way as to create "absurd consequences." Long v. State, 7 N.Y.3d 269 (2006). The absurdity created by the prosecution's interpretation of CPL § 440.46 is illustrated by the facts of this case. If the prosecution's interpretation is adopted, Mr. Doe will be ineligible for resentencing because of a crime he committed more than 27 years ago. An absurd result indeed, when one considers that a person convicted today of the same class B drug offense, having been convicted two days earlier of a predicate violent felony offense, would be eligible to be sentenced to the same six year determinate sentence that the prosecution seeks to deny Mr. Doe.

The fact that this Court has previously resentenced Mr. Doe on his A-II conviction further highlights the absurd result that the prosecution proposes here. Mr. Doe's freedom is now controlled by the harsher sentence he is serving for the lesser crime of a class B drug offense. The only way to avoid this absurd result is to reject the prosecution's tortured interpretation of CPL § 440.46(5)(a).

F. The Rule of Lenity Compels Reading the Ten Year "Look Back" as Starting at the Date the Resentencing Motion is Filed.

CPL § 440.46(5)(a) has a straightforward and plain meaning. Any suggestion that there is ambiguity simply ignores the clear intent of the Legislature and plain meaning of the statute to

create two separate, distinct, and different intervals of measure. It is only by conflating the two intervals that the prosecution raises the specter of ambiguity. However, even if the statutory language were considered ambiguous, Mr. Doe would be entitled to an interpretation of the statute which favors his eligibility under the well-recognized rule of lenity. Under the rule of lenity, "if two constructions of a statute are plausible, the one more favorable to the defendant should be adopted in accordance with the rule of lenity." People v. Green, 68 N.Y.2d 151, 153 (1986); see also McKinney's Statutes § 271 ("Generally, penal statutes are to be strictly construed against the State in favor of the accused."). Accordingly, the prosecution's strained and restrictive interpretation of DLRA III, which does not comport with the statute's plain meaning or ameliorative purpose, should be rejected.

III. The Two State Agencies Most Directly Involved in the Application and Enforcement of the Resentencing Statute Agree that There are Two Distinct and Different Intervals Referred to in the Statute and that the Ten Year "Look Back" Starts at the Present.[4]

In the months following enactment of the DLRA III, DOCS and the Unified Court System distributed memoranda and answered questions about the DLRA III. With regard to the DLRA III's resentencing provisions, these memoranda uniformly support the fundamental concepts that: 1) CPL § 440.46(5)(a) includes two separate, distinct and different time intervals - one for calculating the ten year "look back" and one for determining the exclusionary period for incarceration; 2) the exclusionary period for incarceration includes days incarcerated that fall *only* between the commission of the prior violent felony and the commission of the B felony drug offense, and it does not include time in prison on the B felony drug offense; and 3) the ten

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[4] The prosecution asks this Court to rely on the commentary of Peter Preiser. However, because Mr. Preiser is not grounded in the day-to-day implementation and enforcement of this statute, his commentary in this particular instance lacks a depth of analysis and practicality that is reflected in the more thorough analysis from DOCS, the Unified Court System and sitting Judges.

year "look back" period starts to run from the date of filing the motion for resentencing and continues back to the date of the conviction for the exclusion offense.

Department of Correctional Services:

On April 28, 2009, Anthony Annucci, Executive Deputy Commissioner and former Counsel for DOCS, issued a memorandum to all DOCS Superintendents clarifying which prisoners would be eligible for resentencing relief under DLRA III. (This memorandum is attached as Exhibit D). This memorandum sets forth the eligibility criteria and in so doing, explains that the exclusionary period for incarceration under CPL § 440.46(5)(a) includes any time the person "was incarcerated for any reason *between* the dates on which the prior and present offenses were committed." See Exhibit D, at 5. In a subsequent memorandum dated September 29, 2009, (which is attached as Exhibit E), Executive Deputy Commissioner Annucci reiterated this position to leave no doubt that the period of incarceration that is excluded from counting the ten year "look back" does not include time served on the current offense:

> In other words, the ten-year period is only extended by any time you may have been incarcerated BETWEEN THE DATES on which your prior and present offenses were committed. *Any other time you spent in custody, such as the time you have been incarcerated with DOCS after your present offense was committed, will not affect the calculation of the ten-year period in determining whether or not you are eligible to apply to the sentencing courts to be resentenced.*

Exhibit E (emphasis added).

The two different intervals, and their two different start and end dates, are made clear in the two memoranda. For the ten year "look back," it starts at the time of filing the motion for resentencing and counts back to the date of conviction for the previous violent felony or conviction for an offense for which merit time allowance is not available. For the other interval - the interval during which any time incarcerated will extend or toll the running of the ten years - it

begins at the commission of the present drug offense and ends at the commission of the previous felony.

If there were any doubt about the DOCS's interpretation of the statute, an interpretation that is entirely consistent with the plain meaning interpretation advanced here, it was clarified and memorialized in a letter by Supreme Court Justice Marcy L. Kahn, Criminal Term, New York County. This letter, which is attached as Exhibit F, was sent to the parties in three resentencing cases after the parties had urged Justice Kahn to contact DOCS for clarification regarding the ten year "look back." In her letter, Justice Kahn explains that DOCS views the ten year "look back" period as the "ten-year period preceding the filing of the application for re-sentencing..." In DOCS's view the legislative intent behind the concept of running the ten year "look back" from the present time was to "permit inmates to 'age into' eligibility for DLRA-3 re-sentencing." See Exhibit F at pp. 1-2.

Finally, we contacted Richard de Simone, DOCS Associate Counsel-in-Charge of the Office of Sentencing Review, by e-mail and follow up by telephone. In his capacity as a co-author of the soon to be released pocket part to *New York Criminal Law* published by West, Mr. de Simone stated that he is responsible for addressing CPL § 440.46's eligibility and exclusion criteria, and that in the updates to *New York Criminal Law*, to be released in the near future, he explains that the ten year "look back" period runs from the date of filing of the resentencing motion. The computation used by de Simone is substantively identical to our proffered calculation and, of course, yields the same results. Like our calculation, Mr. de Simone's calculation can be reduced to a two step analysis: 1) calculate the amount of time between the date the defendant applied to be resentenced and the date on which the defendant was convicted of the ineligible crime; and 2) deduct from the interim result of step 1 the amount of time the

defendant was incarcerated between the dates of the commission of the previous ineligible crime and commission of the class B drug offense. The defendant is eligible for resentencing as long as the final result is more than ten years.

Unified Court System

Like DOCS, the Unified Court System issued a memorandum explaining that the interval for tolling or excluding time while incarcerated from the ten year "look back" refers only to time incarcerated between the commission of the previous felony and the commission of the present felony. See Memorandum of Michael Colodner dated July 7, 2009 at p.5, annexed as Exhibit G. Likewise, this memorandum makes it clear that the ten year "look back" runs from the present back to the date of the conviction of the prior violent felony offense, not the commission of the crime, as suggested by the prosecution.

IV. A Felony Conviction in a Jurisdiction Other Than New York Is Not a "Predicate Conviction for an Exclusion Offense" and Cannot Bar Resentencing Pursuant to CPL § 440.46.

In light of the analysis set forth above, it is apparent that the statute requires a relatively simple and straightforward computation of the ten year "look back," and that Mr. Doe is eligible for resentencing. However, an even more simple and elementary analysis requires rejection of the prosecution's objection to the resentencing of the Defendant.

Stated quite simply, an Indiana conviction is not an "exclusion offense" within the meaning of the DLRA III and therefore cannot be used by the prosecution to argue that such conviction makes CPL § 440.46 inapplicable to Mr. Doe.

CPL § 440.46(5) is very explicit in its definition of "exclusion offense." There are only four categories of "exclusion offense." The categories are: 1) a violent felony defined in Penal

Law § 70.02; 2) any other offense for which merit time allowance is not available pursuant to Correction Law § 803(1)(d)(ii); 3) a second violent felony offense pursuant to Penal Law § 70.04; and 4) a persistent violent felony offense pursuant to Penal Law § 70.08.

There is no indication in the statute that the predicate conviction for an exclusion offense can be based upon a conviction in any other jurisdiction, other than New York. The crimes listed in Penal Law § 70.02 and Correction Law § 803(1)(d)(ii) are specifically New York crimes. Mr. Doe has not been convicted of a crime under any of those sections of the Penal Law and there is no suggestion that Mr. Doe was previously adjudicated a second violent felony offender or a persistent violent felony offender. Therefore, he is not a person who "has a predicate felony conviction for an exclusion offense."

The Legislature specifically has not included reference to convictions "in any other jurisdiction," other than New York, in this statute. It is therefore limited to New York State convictions. Every other statute pertaining to the sentencing of a defendant, where the predicate felony is relevant, makes specific reference to the fact that convictions in other jurisdictions are included for the purpose of determining whether a prior conviction is a predicate felony conviction. See Penal Law §§ 70.04(1)(b)(I), 70.06(1)(b)(I), 70.07(3)(referring to § 70.06(1)(b) criteria), 70.08(1)(b) (referring to § 70.06(1)(b) criteria), and 70.10(1)(b). This resentencing statute is devoid of any such reference.

Because an Indiana conviction is not an "exclusion offense" as defined by CPL § 440.46, the resentencing provisions of that statute are applicable to Mr. Doe.

Conclusion

The convictions in Indiana 27 years ago should not, and do not, make the provisions for resentencing established by CPL § 440.46 inapplicable to Mr. Doe. Such out-of-state

convictions are not predicate felony convictions "for an exclusion offense" within the meaning of the new resentencing statute, and the ten year "look back" provision is therefore irrelevant.

The prosecution is incorrect in its contention that the commission of a robbery in 1982 by Mr. Doe, which occurred more than 27 years ago, falls within the ten year "look back" period established by CPL § 440.46 and is therefore an "exclusion offense" that makes him ineligible for resentencing. Their interpretation of the relevant measuring date for the calculation of the ten year "look back" period is substantively and structurally wrong. Under the statute's plain meaning, CPL § 440.46(5)(a) can be interpreted in only one way. The measuring date to start counting back the ten years is the date of filing the motion for resentencing.

When the correct dates for the calculation of the ten year period are used, Mr. Doe's 1982 robbery conviction falls well outside the ten year "look back" period. Even assuming that the prosecution is correct in asserting that Mr. Doe was incarcerated for 9 years and 2 months between the date of the commission of the robbery and the commission of the present class B felony drug offense that which would toll or extend the ten year "look back," there is still a span of 17 years, 9 months and 22 days between the filing of the motion (November 17, 2009) and the date of the conviction on the previous robbery felony (November 26, 1982). In fact, the robbery conviction dates back more than 7 years beyond the ten year "look back" period even after allowing for the tolling of 9 years and 2 months for incarceration. As a result, the 1982 robbery conviction does not constitute an "exclusion offense" as that term is defined in CPL § 440.46(5)(a).

Accordingly, Mr. Doe meets all of the statutory eligibility requirements for resentencing and the resentencing provisions do apply to him. Since the prosecution does not otherwise oppose the motion, this Court should grant the application for resentencing.

Dated: December 20, 2009

Respectfully submitted,

_____

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