SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM – NEW YORK COUNTY – PART 83

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THE PEOPLE OF THE STATE OF NEW YORK, :

: INDICTMENT [redacted]

-against- :

[redacted], :

Petitioner. :

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AFFIRMATION IN SUPPORT OF MOTION TO REARGUE/RENEW

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

1. I am associated with Steven Banks, counsel of record for The Legal Aid Society's Criminal Appeals Bureau, to represent Mr. [redacted] in his motion for resentencing pursuant to the Drug Law Reform Act of 2009 [2009 Sess. Laws of N.Y., Ch. 56, §9]. I submit this affirmation in support of Mr. [redacted] motion to reargue/reconsider the Court's Decision and Order, dated July 25, 2011, denying resentencing.

2. The defense filed opening papers in this matter on January 20, 2011. The People filed an answer on June 3, 2011, and the defense filed a reply on June 17, 2011. The matter was scheduled for decision for July 29, 2011, and the People agreed to file an

order to produce defendant on that date. At the calendar call, defendant was not produced, apparently because no order had been filed with the prison. The court advised me that it reached a decision, and gave me a copy of its decision, dated July 25, 2011. I noted that the defendant had the right to be personally present for decision, and the court agreed to adjourn the matter to August 25, 2011, to see how the defense wished to proceed.

3. The defense now moves for reargument/reconsideration of the Court's July 25 decision. Initially, we note that the law is clear that the defendant should be brought before the court where a resentencing petition is adjudicated on grounds of substantial justice. See *People v. Jenkins*, __ AD3d ___, (July 28, 2011) (attached as Defense A). Thus, the Court's written decision should not be deemed a final determination of the case.

4. For the reasons set forth below, we request that the Court reconsider its decision in light of recent case law, and offer Mr. [redacted] a determinate sentence commensurate with the reduced ranges available under current law.

5. Under C.P.L.R. § 2221(d), a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." Under C.P.L.R. § 2221(e), C.P.L.R. §2221(e)(2) provides, in relevant part, that a party may file a motion for leave to renew when "there has been a change in law that would change the prior determination." *See Dinallo v. DAL*, 60 A.D.3d 620 (2d Dept. 2009).

6. On July 21, 2011, the Appellate Division, First Department, handed down a decision in *People v. Milton*, Slip Op. 05981 (copy attached as Defense B), reversing

denial of re-sentencing and directing that defendant be offered a determinate sentence under circumstances similar to the instant case. In *Milton*, the defendant had been convicted of two street level drug sales, and been sentenced as a second felony offender to 4.5 – 9 years in prison. The lower court denied re-sentencing, based in part on the defendant's failure to complete diversion programming and a substantial post-sentencing disciplinary record. The Appellate Division reversed, finding that the 2009 Act's ameliorative provision did not require a showing that the applicant had been a "model prisoner." The defendant in Milton in fact had accumulated 10 misdemeanors and a prior drug felony, and 41 disciplinary tickets while in prison. Significantly, however, none of these incidents involved violence against other inmates or prison guards, and he was never found in possession of a dangerous instrument or weapon. (See Appellant's Brief in People v. Milton, at 6-7, and Decision and Order Denying Resentencing in Milton, at 3, attached hereto as Defense C and D).

7. The First Department added, "Resentencing promotes the purpose of the 2009 DLRA to ameliorate harsh sentences, and the requisite period of post-release supervision affords protection to the community." Thus, the appellate court reinforced what other courts have indicated, that there is a strong presumption in favor of resentencing, and that it should be the unusual case where resentencing is denied outright. See *People v. Figueroa*, 894 N.Y.S.2d 724, 745 (N.Y. Sup. 2010) (purpose of the resentencing provision of the DLRA-3 is not solely to ameliorate unduly harsh sentences but also 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. Jones, 25 Misc. 3d 1238, at *4 (Sup. Ct. N.Y. Cty. Dec. 10, 2009); *see also Beasley*, 47 A.D.3d at 640-41 (observing that the enactment of new minimum determinate terms "represents a legislative judgment that the lesser penalty . . . is sufficient to meet the legitimate ends of the criminal law") (quotations and citations omitted).

8. Mr. [redacted] case is on a par, and in some ways more favorable than, *Milton*. He served four and one-half years in prison pursuant to this sentence before being paroled in 2008. His criminal record includes misdemeanors clearly related to his problems with addiction, two drug felonies, and a second-degree burglary in 1997, which is classified as a violent felony under New York law but which, in this case, did not involve any actual violence. He has consistently been recognized as an individual with serious addiction and health problems, who needs treatment and support, and is not a threat to society. His recent parole violations have been based on incidents like turnstile-jumping and petit larceny. These incidents would be better handled in the community, through diversion programs, rather than through re-incarceration.

9. Mr. [redacted] disciplinary history is significantly better than the defendant in *Milton* – he has only two Tier III violations, once for gambling in 2006, the other, in 2008, for an unauthorized exchange. As in *Milton*, neither of these incidents involved violence or the threat of violence. Neither these two Tier III incidents, nor Mr. Robinson's overall disciplinary record, prompted the Parole Board to deny parole in 2008.

10. We respectfully submit that in denying resentencing outright, this Court failed to give due weight to the presumption in favor of resentencing. In particular, we submit that the Court has viewed Mr. [redacted] disciplinary record in prison unduly harshly. Mr. [redacted], now age 39, is a drug addict with serious health problems. His disciplinary incidents do not involve violence. Moreover, he has made substantial efforts to overcome his addiction, including completing completion of CASAT in 2007, and an intensive program in Willard in 2008 and in Arthurkill in 2010. The Court's July 25 Decision fails to note or give weight to these good faith efforts on defendant's part.

11. In sum, continuing [redacted] indeterminate nine year sentence, which has led to parole violations for relatively minor transgressions and repeated re-incarceration, is contrary to the ameliorative spirit of the DLRA. We respectfully request that the Court reconsider its decision, especially in light of the new case law from the Appellate Division reinforcing the strong presumption in favor of resentencing, and offer Mr. [redacted] a determinate sentence commensurate with the reduced ranges available under the new law.

Dated: New York, New York
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