Bronx County Indictment Nos. 3959/2001, 5330/2001 and 58077C/2004

Court of Appeals of the State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

DAVID LANCE PAULIN and JESUS PRATTS,

Defendants-Appellants.

BRIEF AMICUS CURIAE

for DAVID LANCE PAULIN and JESUS PRATTS
on behalf of the New York City Bar Association

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INTEREST OF AMICUS CURIAE

The New York City Bar Association (the "Association"), established in 1870, is a professional organization of more than 23,000 attorneys that seeks to promote integrity in, and public respect for, the justice system. The Association, by its Corrections Committee, submits this amicus brief to further the Association's decades-long advocacy of sensible reform of the Rockefeller Drug Laws.

The Association has continually been troubled by the Laws' disparate racial impact and how they have, at great expense, filled New York prisons with people convicted of nonviolent crimes. While the majority of people who use and sell drugs in New York and the nation are white, Blacks and Latinos compose nearly 90% of people imprisoned for drug convictions in New York.[1] Such inequitable effects threaten public respect for the law and our profession. While the cost of incarcerating one person in a New York state prison is about $44,000 per year with no guarantee of drug treatment, the same individual can receive outpatient or residential treatment for an average of $4,500 and $21,000 respectively.[2] That

[1] Corr. Ass'n of N.Y., The Campaign to Repeal the Rockefeller Drug Laws 2 (2009), available at http://www.correctionalassociation.org/publications/download/ppp/factsheets/DTR_Fact_Sheet_2009.pdf.

[2] Id.

treatment, in turn, reduces recidivism linked to substance abuse, and provides a pathway towards a future as a productive citizen.

The Association has advocated its views through numerous letters of support to officials in the legislative and executive branches, and its members—who represent members of both the prosecution and defense bars—have testified at hearings regarding the deleterious effects of the Rockefeller Drug Laws. In particular, the Association supported the resentencing made available by the 2009 Drug Law Reform Act ("DLRA-3"). A broad interpretation of who is eligible to seek resentencing not only benefits Defendants-Appellants, but thousands of inmates imprisoned for low-level drug convictions more than five years ago who now have a true chance to start their lives anew after serving their debt to society.

The Association has urged Rockefeller Drug Law reform because incarcerating nonviolent drug offenders erodes public confidence in the judicial system when more humane, beneficial, and cost-effective treatment alternatives exist. The Legislature has declared that individuals serving long indeterminate sentences, like Defendants-Appellants, should be eligible for resentencing to shorter, determinate terms. For these reasons, and because the laws contain no exclusions rendering them ineligible, parole violators like Defendants-Appellants should not be categorically barred from seeking resentencing under DLRA-3.

PRELIMINARY STATEMENT

The Association submits this brief amicus curiae in support of Defendants'-Appellants' appeal seeking reversal of the Appellate Division, First Department's judgments, which had affirmed the Supreme Court's determinations that their status as parole violators precluded them from seeking resentencing on their Class B drug felony under DLRA-3. Defendants-Appellants are two of thousands of individuals re-incarcerated in New York State correctional facilities following parole violation, which are often linked to a long struggle with substance abuse.

DLRA-3 is the Legislature's most recent attempt to reflect a shift in public sentiment toward treatment and graduated sanctions for nonviolent drug offenders, rather than incarceration. DLRA-3 eliminated mandatory incarceration for the vast majority of drug offenders, L. 2009, ch. 56, Part AAA §§ 21-25; introduced judicial diversion to drug treatment for nearly all drug offenders, even those convicted of some property crimes, id. § 4; allowed sealing of some convictions upon successful completion of a diversion program, id. § 3; and provided retroactive resentencing for Class B felony drug offenders, expanding judicial discretion. Id. § 9.

In particular, DLRA-3 authorizes certain individuals like Defendants-Appellants, serving long indeterminate sentences, to petition for resentencing to a determinate prison term. To be eligible for resentencing, individuals must have

been convicted of one or more Class B drug felonies—which frequently involve sales of just $10 to $20 in street value or possession of a small amount of illegal drugs[3]—and: (1) have committed the offense(s) prior to January 13, 2005; (2) be in the custody of the Department of Correctional Services ("DOCS"); (3) have been sentenced to an indeterminate term of imprisonment for which the maximum period exceeds three years; and (4) not have been convicted of an "exclusion offense." N.Y. Crim. Proc. Law § 440.46(1), (5) (McKinney 2009 & Supp. 2010). An exclusion offense is either a conviction within the past ten years, excluding time incarcerated, for a violent felony offense or for any other crime for which merit time is unavailable; or a conviction at any time for which an individual was adjudicated a second violent or a persistent violent felony offender. N.Y. Crim. Proc. Law § 440.46(5) (McKinney 2009 & Supp. 2010).

Defendants-Appellants meet the above criteria. Their resentencing petitions were denied, however, because they were in DOCS custody following a parole violation and, the courts reasoned, should not benefit from that violation. The Association respectfully urges that this is inconsistent with the plain language of DLRA-3 and its goal of keeping nonviolent drug offenders out of prison and in treatment.

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[3] William Gibney & Terence Davidson, Drug Law Resentencing: Saving Tax Dollars with Minimal Community Risk 3 (2010), available at http://www.legal-aid.org/media/127984/drug-law-reform-paper-2009.pdf.

ARGUMENT

Because only those convicted of an "exclusion offense" cannot be resentenced under DLRA-3, and violation of parole is not an exclusion offense, parole violators are statutorily eligible to apply for resentencing relief. No case binds this Court to hold otherwise. Cases to the contrary are inapplicable because they interpret previous, less expansive versions of DLRA, and because the reasoning in those cases was implicitly and explicitly rejected by the Legislature when it enacted DLRA-3. Instead, the Legislature recognized substance abuse as a public health problem, one better handled by judges with discretion to direct people towards treatment and away from prison. Therefore, categorically excluding parole violators from seeking resentencing relief under DLRA-3 is inappropriate.

I. PAROLE VIOLATORS CONVICTED OF CLASS B DRUG FELONIES ARE ELIGIBLE TO SEEK RESENTENCING UNDER DLRA-3.

Both the plain language of DLRA-3 and the legislative intent behind the law support the conclusion that state prison inmates who are reincarcerated due to parole violations are eligible to seek resentencing under DLRA-3. Appellate decisions finding parole violators ineligible under the Drug Law Reform Acts of 2004 and 2005 ("DLRA-1" and "DLRA-2," respectively) are inapplicable because these laws' eligibility provisions are more restrictive than DLRA-3. Further, classifying parole violators as ineligible would effectively deprive sentencing

judges of the broad discretion DLRA-3 grants them. This Court should not read an additional exclusion into DLRA-3 where doing so would defy the statute's plain language, the legislative intent behind this wide-reaching reform, and the public policy reasons for eliminating lengthy indeterminate prison sentences for Class B felony drug offenses.

A. DLRA-3's single exception to resentencing eligibility is for certain violent offenders, not for parole violators.

This Court cannot read additional exclusions into the wide-reaching 2009 Drug Law Reform Act when the plain language of DLRA-3's resentencing statute is unambiguous.

"As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." Majewski v. Broadalbin-Perth Cent. Sch. Dist., 91 N.Y.2d 577, 583 (1998) (quoting Tompkins v. Hunter, 149 N.Y. 117, 122-23 (1896)). "Where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning." People v. Kisina, 14 N.Y.3d 153, 158 (2010) (citation omitted) (declining to carve out exemption for third parties in Penal Law § 175.10 and affirming conviction for falsifying business records). Because the Legislature "is presumed to mean what it says . . . [t]he language of a statute is generally construed according to its natural and most obvious sense,

without resorting to an artificial or forced construction." N.Y. Stat. § 94 (McKinney 2009). It is equally well established that "[w]hen one or more exceptions are expressly made in a statute, it is a fair inference that the Legislature intended that no other exceptions should be attached to the act by implication." N.Y. Stat. § 213 (McKinney 2009). Finally, "the 2009 DLRA is a remedial statute which must be liberally construed." People v. Figueroa, 27 Misc. 3d 751, 772 (Sup. Ct. N.Y. County 2010).

DLRA-3 is clear and unambiguous. It provides for resentencing by application for Class B felony drug offenders in DOCS custody who are serving indeterminate sentences with maximum terms exceeding three years, but statutorily excludes petitions from defendants convicted of certain "exclusion offense[s]." N.Y. Crim. Proc. Law § 440.46 (McKinney 2009 & Supp. 2010).

Violation of parole is not among those exclusions. As several courts have held—including the Appellate Division, Second Department—DLRA-3 contains "specific exclusions [for] certain prior felony convictions, and those exclusions do not deny eligibility for resentencing to those in custody on their original sentence because of a parole violation." People v. Rivera, 26 Misc. 3d 1236(A), at *4 (Sup. Ct. Bronx County 2010); see also People v. Phillips, 82 A.D.3d 1011, 1012 (2d Dep't 2011) ("[N]othing in CPL 440.46 supports a conclusion that such status

renders a person ineligible to apply for resentencing in the first instance."); People v. Avila, 27 Misc. 3d 974, 977-78 (Sup. Ct. Kings County 2010); People v. William Sanabria, Ind. No. 2316/92, slip op. at 2-3 (Sup. Ct. N.Y. County Apr. 12, 2010) (Pickholz, J.); Figueroa, 27 Misc. 3d at 770-71; People v. Jerry Williams, Ind. Nos. 9280/99 & 5364/04, slip op. at 5 (Sup. Ct. N.Y. County Dec. 23, 2009) (Pickholz, J.) ("Williams I"), aff'd, People v. Jerry Williams, Ind. Nos. 9280/99 & 5364/04, slip op. at 2 (Sup. Ct. N.Y. County Jan. 27, 2010) (Pickholz, J.) ("Williams II"); People v. Robert Haulsey, Ind. No. 5780/99, slip op. at 2 (Sup. Ct. N.Y. County Nov. 20, 2009) (Allen, J.).[4]

The DLRA-3 resentencing provision does not distinguish between incarcerated people who had never been paroled and those returned on parole violations. In fact, in another section of the DLRA-3, the Legislature confirmed that its phrase "in the custody of" DOCS includes individuals who have been paroled on an indeterminate sentence and subsequently returned to prison to continue serving their sentence there after a parole violation. Specifically, DLRA-3 provides a limited credit time allowance for designated persons "under the custody of the department," and specifically excludes parole returnees from eligibility. See L. 2009, ch 56, Part L, § 4, amending N.Y. Correct. Law §§ 803-

[4] All unreported decisions are attached as Appendix A to this brief.

b(1)(a)), 803-b(1)(b)(ii)(C) ("[A]n inmate shall not be eligible for the credit defined herein if he or she is returned to the department pursuant to a revocation of presumptive release, parole, conditional release, or post-release supervision and has not been sentenced to an additional indeterminate or determinate term of imprisonment."). No such exclusion exists in section 440.46 of the Criminal Procedure Law.

The resentencing provision does, however, distinguish between defendants with prior nonviolent and violent convictions, and DLRA-3 makes this same distinction in the new sentencing provisions for second felony drug offenders. L. 2009, ch. 56 Part AAA §§ 23-25; compare, e.g., N.Y. Penal Law § 70.70(3)(b), (c), (d), (e) (McKinney 2009 & Supp. 2010) (with prior nonviolent felony, court may impose sentence of probation, parole supervision, jail term of one year or less, or determinate prison term of two to twelve years), with N.Y. Penal Law § 70.70(4)(b) (McKinney 2009 & Supp. 2010) (with prior violent felony conviction, court must impose determinate prison term of six to fifteen years).

In sum, parole violators are eligible to seek resentencing under DLRA-3 because both the resentencing provision and other amendments indicate the Legislature's intent to ameliorate the older sentencing scheme for drug offenders, with certain exceptions for those offenders with prior violent convictions.

B. The Legislature intended to benefit a broad class of people with DLRA-3.

When DLRA-3 was enacted, the only appellate opinion addressing whether a parole violator would be eligible to seek resentencing was People v. Gonzalez, 29 A.D.3d 400 (1st Dep't), lv. denied, 7 N.Y.3d 867 (2006). In upholding the lower court's decision to deny resentencing, the First Department implicitly found parole violators eligible to seek resentencing under DLRA-1. Id. at 400. Since no other appellate decisions had construed DLRA-1 otherwise, the Legislature's choice to use DLRA-1's language in drafting DLRA-3 means the Legislature intended to allow parole violators to seek resentencing.

DLRA-1 provides that "any person in [DOCS] custody . . . convicted of a class A-I [drug] felony" committed before the law's effective date, and serving an "indeterminate term of imprisonment with a minimum period not less than fifteen years," may petition for resentencing to a new determinate term. L. 2004, ch. 738, § 23. DLRA-3 contains these same eligibility requirements, but for Class B felony drug offenders serving indeterminate sentences with minimum terms exceeding three years. N.Y. Crim. Proc. Law § 440.46 (McKinney 2009 & Supp. 2010).[5]

[5] As noted in Point I.A, DLRA-3 contains an additional requirement, precluding resentencing petitions from defendants convicted of an exclusion offense. See N.Y. Crim. Proc. Law § 440.46(5) (McKinney 2009 & Supp. 2010).

In People v. Rodriguez, which did not cite or distinguish Gonzalez, the First Department found a parole violator ineligible to seek resentencing under DLRA-1, reasoning that he should not be allowed to benefit from the new crime that triggered his parole violation. 68 A.D.3d 676 (1st Dep't 2009). Rodriguez, however, does not support or mandate an automatic bar to resentencing for parole violators under DLRA-3 for two reasons. First, Rodriguez was not the law when DLRA-3 was passed—it was decided eight months later—so the Legislature could not have considered its reasoning. See Williams II, slip op. at 1-2, 5. Second, the Appellate Division's rationale was based upon the limited class DLRA-1 was supposed to affect: those serving the longest sentences for drug offenses, while DLRA-3 benefits a broad class of nonviolent drug offenders.

The legislative history of DLRA-1 indicates that the Legislature intended to convert indeterminate sentences to determinate sentences and allow A-I felony drug offenders to apply for resentencing. See N.Y. Bill Jacket, 2004 A.B. 11895, Ch. 738, at 5-6; see also Rivera, 26 Misc. 3d 1236(A), at *4. In targeting a small class of individuals serving exceptionally long prison sentences for the state's most serious drug offenses, the Legislature was able to calculate the number of individuals—roughly four hundred—that DLRA-1 would affect. See People v.

Bagby, 11 Misc. 3d 882, 887 (Sup. Ct. Westchester County 2006) (citing 2004 McKinney Session Laws of NY, at 2178).

"DLRA 3, on the other hand, is applicable to many thousands of people serving what the legislature now views as unnecessarily lengthy sentences." Rivera, 26 Misc. 3d 1236(A), at *4. Most of the legislative history behind DLRA-3 concerns initial sentences and judicial power to mandate drug treatment alternatives to incarceration. Only one passage of the floor debates addresses resentencing: "'Anyone with a violent felony within 10 years, a myriad of ineligible offenses, including all sex offenses, you're not eligible to apply' [for resentencing]." People v. Brown, 26 Misc. 3d 1204(A), at * 8-9 (Sup. Ct. N.Y. County 2010) (citing Senate Debate on Senate Bill 56-B, Apr. 2, 2009, at 2683-84 (statement of Senator Carl Kruger)).

Unlike DLRA-1, DLRA-3's legislative history does not suggest the Legislature intended to benefit a fixed number of people in custody at a particular time, nor preclude those in custody for parole violations. Instead, DLRA-3 was designed to allow all people convicted of Class B drug felonies, who received unduly harsh indeterminate sentences under the old Rockefeller Drug Laws, to seek resentencing. Indeed, the eligibility requirements of DLRA-3 "mean that, by definition, many offenders who are eligible for resentencing under the statute will

be offenders returned to prison after parole violations." Figueroa, 27 Misc. 3d at 771.

This Court should decline to follow Rodriguez because it was not the law when DLRA-3 was passed and because Rodriguez construed DLRA-1, a statute targeting a small number of people. Accordingly, and as the trial courts in Figueroa, Rivera, and Williams II noted, a parole violation should be one factor in a court's decision whether or not to grant resentencing, not a flat bar to eligibility.

C. In DLRA-3, the Legislature rejected DLRA-2's link between parole eligibility and eligibility to seek resentencing.

In DLRA-3, the Legislature rejected DLRA-2's link between parole eligibility and resentencing eligibility, allowing all nonviolent drug offenders to petition for resentencing.

Class A-II felony drug offenders eligible for parole within three years could not seek resentencing under DLRA-2. L. 2005, ch. 643, § 1; see People v. Mills & Then, 11 N.Y.3d 527, 537 (2008). This prevented two groups of inmates from seeking resentencing: individuals who had been denied parole, since they are automatically eligible for another hearing within two years, N.Y. Exec. Law § 259-i(2)(a) (McKinney 2009), and individuals who had been returned to prison following parole violations. L. 2005, ch. 643, § 1. See Mills, 11 N.Y.3d at 537.

DLRA-3, however, removed DLRA-2's parole eligibility requirement. Therefore, "Mills does not apply to motions for resentencing under the 2009 DLRA." Phillips, 82 A.D.3d at 1012. See also Haulsey, slip op. at 2 (finding parole violator eligible to seek resentencing since DLRA-3 "does not contain any language comparable to that portion of DLRA 2," which "limited eligibility to defendants who were more than three years from their earliest parole date"); Williams II, slip op. at 4 ("The statutory text of the 2009 DLRA is not at all similar to that of the 2005 DLRA, and there is nothing remotely comparable for me to parse."); People v. Loftin, 26 Misc.3d 1229(A), at *2 (Sup. Ct. Onondaga County 2010) (reincarcerated parole violators are not automatically precluded from seeking resentencing under DLRA-3 because the new law "does not contain any language comparable to that portion of the Drug Law Reform Act of 2005" which tied resentencing eligibility to proximity to parole eligibility). Because DLRA-3 lacks DLRA-2's limiting language, cases interpreting the latter should not control interpretation of the former.

People never paroled because of bad behavior are indisputably eligible to petition for resentencing under DLRA-3. Denying resentencing eligibility to all parole violators would have the perverse result of punishing those who earned parole due to good behavior while incarcerated. Indeed, many inmates denied

early release because of disciplinary infractions have already been resentenced on consent under DLRA-3. See, e.g., People v. Jovan Wells, Ind. No. 1239/04 (Sup. Ct. Bronx County Dec. 8, 2009) (Collins, J.) (defendant, a second felony offender, resentenced in spite of fifteen prison infractions for weapons, violent conduct, fighting, assault on inmates, threats, and other violations); People v. Anthony Thomas, Ind. Nos. 55313C/04 & 63647C/04 (Sup. Ct. Bronx County Nov. 24, 2009) (Boyle, J.) (defendant, a second felony offender, resentenced notwithstanding four prison infractions involving, inter alia, fighting, drug use, and gang materials).

An inmate granted early release to parole for good behavior, but who later violates parole, should not be denied a chance to apply for the relief available to a person with a chronic history of violating prison rules. Because DLRA-3 removed DLRA-2's parole-related restrictions on inmate resentencing eligibility, cases construing DLRA-2 are inapplicable and parole violators should be allowed to seek resentencing to avoid an unjust result.

II. THE LEGISLATURE GAVE JUDGES WIDE DISCRETION IN EVALUATING THE MERITS OF INDIVIDUAL RESENTENCING APPLICATIONS.

Preventing parole violators from seeking resentencing will exclude thousands of individuals whose violations are linked to substance abuse problems

or whose violations are of technical rules like curfew or address change notification. This would frustrate the legislative intent of DLRA-3 to remove nonviolent drug offenders from New York's crowded and expensive prisons. Because the vast majority of parole violators are returned on technical violations or new, nonviolent, drug or property offenses, they should not be categorically excluded from resentencing.

A. Judges have discretion under DLRA-3's "substantial justice" standard to examine many factors, including whether a new offense is connected to addiction and better addressed by treatment.

When a parole violator or any other individual seeks resentencing under Section 440.46, courts are empowered to deny resentencing where "substantial justice dictates that the application should be denied." L. 2004, Ch. 738, § 23, incorporated by reference in N.Y. Crim. Proc. Law § 440.46(3) (McKinney 2009 & Supp. 2010). Because this same flexible standard exists in all three iterations of DLRA, it has been applied and interpreted in hundreds of trial court and appellate decisions since 2004 to accurately distinguish between people who do and do not deserve a second chance through resentencing.

Courts have providently exercised their discretion to deny resentencing to individuals who pose a threat to public safety while resentencing the nonviolent, low-level drug offenders DLRA-3 was intended to benefit. For example, when a

parole violator had completed a drug treatment program in prison and held several vocational training positions, he was resentenced because his parole violation was related to drug use relapse, which "speaks more of his longstanding addiction problem than of dangerousness to society." People v. Patrick Johnson, Ind. No. 4702/01, slip op. at 3, 16, 18 (Sup. Ct. N.Y. County Dec. 22, 2009) (Kahn, J.); see also Haulsey, slip op. at 1-2 (three parole violations were "sadly typical" of a low-level drug offender).

In contrast, the trial courts in King and Vega denied resentencing petitions under DLRA-3. King concerned a parole violator with an "extensive prison disciplinary record, extensive criminal history, multiple parole violations, and . . . criminal behavior [that] continued even after he had completed a prison-based substance abuse treatment program." People v. Paul King, Ind. No. 7608/97, slip op. at 7-8 (Sup. Ct. N.Y. County Feb. 8, 2010) (Conviser, J.). Vega denied resentencing to a parole violator convicted of three Class B drug felonies, sixteen disciplinary infractions, and, while on parole, menacing when he violently threatened the complainant, climbed her apartment's fire escape, and swung a knife through her open window—"indicat[ing] a trend toward violence." People v. Jesus Vega, Ind. Nos. 4198/04, 56616C/04 & 59094C/04, slip op. at 1-3 (Sup. Ct. Bronx County Dec. 16, 2009) (Oliver, J.).

"The high standard for completely denying a resentencing application must be read in conjunction with the fact that a Court has ample discretion in tailoring the precise parameters of a new sentence." People v. Jones, 25 Misc. 3d 1238(A), at *3 (Sup. Ct. N.Y. County 2009). Indeed, as the Second Department recently noted, 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." Phillips, 82 A.D.3d at 1011.

The decisions in Edmond highlight the unjust consequences of imposing an automatic bar to DLRA-3 resentencing for parole violators. In Edmond I, the court initially offered a parole violator returned to state custody a new four-year determinate sentence because he completed a substance abuse treatment program and only received one disciplinary infraction in prison. People v. Kevin Edmond, S.C.I. No. 1136/04, slip op. at 2 (Sup. Ct. N.Y. County Jan. 6, 2010) (Ward, J.). On a motion to reargue, however, the court reversed its earlier decision, finding it could not resentence defendant "[i]n light of Rodriguez." People v. Kevin Edmond, S.C.I. No. 1136/04, slip op. at 1 (Sup. Ct. N.Y. County Feb. 8, 2010) (Ward, J.). Simply because the defendant was a parole violator, the court believed (albeit incorrectly) it was required to deny an application that it clearly wanted to grant.

As the above cases illustrate, courts have providently exercised their discretion, fulfilling the Legislature's goal to remove low-level drug offenders from prison, regardless of whether they are reincarcerated after violating parole. DLRA-3 is the third step in a six-year progression of drug law reform, which began by reducing long sentences for a defined number of people, and which now makes incarceration the last result for nonviolent drug offenders. To now limit judicial discretion would frustrate the Legislative intent behind DLRA-3.

B. The vast majority of parole violators are returned on technical violations or new drug or property offenses.

Preventing parole violators from seeking resentencing will categorically exclude thousands of people the Legislature clearly intended to benefit: those whose recommitments are triggered by drug-seeking behavior. For the twenty-year period between 1985 and 2005, 38% of people incarcerated for drug offenses were re-incarcerated after committing a new crime or parole violation: parole violators made up 60% of those returned; 40% had committed new crimes.[6] Of the latter, however, 75% went back to prison for drug offenses.[7] The most recent numbers from 2005 are similar, except the number of parole violators has risen: 40% of those incarcerated on drug offenses were re-incarcerated—4,022 in real

[6] Michele Staley & RyangHui Kim, 2005 Releases: Three-Year Post-Release Follow-Up 38 (2009), available at http://www.docs.state.ny.us/Research/Reports/2010/2005_releases_3yr_out.pdf.
[7] Id. at 47-48.

numbers—and 73% of them were parole violators.[8] Of the people who went back for new crimes, 72% were convicted of drug offenses.[9] Adding the parole violators to those reincarcerated for drug or property offenses equals 3,720 people—or over 92% of people incarcerated for drug offenses who were recommitted.

While no statistics exist about how many parole violations are linked to substance abuse, in 2008 more individuals were in DOCS custody for drug offenses than violent felony offenses; of all the drug offenders, over half were convicted of nonviolent offenses.[10] Additionally, the Division of Parole partnered with DOCS and the New York State Department of Alcoholism and Substance Abuse Services to target parole violators with substance addictions by opening a diversion program at Edgecombe in 2008. The program provides thirty days of intensive substance abuse treatment for up to 100 individuals at a time. In the first eight months of operation, the program served 508 people. It remains nearly full to capacity.[11]

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[8] Id. at 10.
[9] Id. at 10, 46.
[10] Corr. Ass'n of N.Y., Trends in New York State Prison Commitments 1 (2009), available at http://www.correctionalassociation.org/publications/download/ppp/factsheets/DTR_TRENDS_February_2009.pdf.
[11] Id. at 63.

The language of DLRA-3 itself recognizes that relapse is foreseeable and should not stand in the way of the ultimate goal: sobriety. For example, in evaluating "what action to take" when a defendant violates the terms of his or her judicial diversion to treatment program, DLRA-3 requires courts to consider that "persons who ultimately successfully complete a drug treatment regimen sometimes relapse by not abstaining from alcohol or substance abuse or by failing to comply fully with all requirements imposed by a treatment program." L. 2009, ch. 56, § 4; N.Y. Crim. Proc. Law § 216.05(9)(c) (McKinney 2009 & Supp. 2010). Additionally, courts must consider graduated and appropriate responses to address violations while protecting public safety and facilitating successful treatment completion. Id. Even if a judge chooses to incarcerate such an individual, the judge must consider "how best to continue treatment" while the defendant is in prison. Id.

Because various provisions of DLRA-3 provide trial judges with a wide range of sentencing options for drug offenders, this Court should not remove judicial discretion to resentence parole violators.

C. Considering the entire Drug Law Reform Act of 2009, the law's resentencing provision should be interpreted to allow the broadest possible application.

The Legislature's recent reforms reflect a growing recognition that substance abuse "is a complex illness," and incarceration cannot treat the root addiction that underlies many low-level drug convictions.[12]

DLRA-3 significantly expanded judicial discretion in dealing with drug offenders, recognizing the complicated nature of addiction and the various ways addiction manifests itself in the criminal justice system. Specifically, DLRA-3 allows judges to seal certain convictions if the defendant completes a judicially sanctioned drug program and complies with supervision requirements. See L. 2009, ch. 56, Part AAA, § 3; N.Y. Crim. Proc. Law § 160.58 (McKinney 2009 & Supp. 2010). Additionally, DLRA-3 allows courts to divert most defendants charged with a Class B drug felony into drug treatment, even those defendants with prior felony convictions. See L. 2009, ch. 56, Part AAA, § 4; N.Y. Crim. Proc. Law § 216.05 (eff. Oct. 7, 2009). In fact, treatment alternatives are available not only for drug offenses, but for a variety of felony property crimes, reflecting the Legislature's recognition that addiction can fuel nonviolent criminal offenses

[12] Nat'l Inst. on Drug Abuse, Nat'l Insts. of Health, Principles of Drug Addiction Treatment: A Research-Based Guide v (2d ed. rev. 2009), available at http://www.nida.nih.gov/PDF/PODAT/PODAT.pdf

beyond drug possession or sale. N.Y. Crim. Proc. Law §§ 216.00(1), 216.05(1), 410.91(4) (McKinney 2009 & Supp. 2010). Under DLRA-3, a defendant convicted today of third degree burglary, second or third degree criminal mischief, certain types of third degree grand larceny, certain types of third degree criminal possession of stolen property, or a host of other offenses, may be eligible for a sentence of drug treatment rather than incarceration. Id.

Further, when evaluating "what action to take" when a defendant violates the terms of his or her judicial diversion to treatment program, DLRA-3 requires courts to consider that "persons who ultimately successfully complete a drug treatment regimen sometimes relapse by not abstaining from alcohol or substance abuse or by failing to comply fully with all requirements imposed by a treatment program." L. 2009, ch. 56, § 4; N.Y. Crim. Proc. Law § 216.05(9)(c) (McKinney 2009 & Supp. 2010). Additionally, courts must consider graduated and appropriate responses to address violations while protecting public safety and facilitating successful treatment completion. Id. Even if a judge chooses to incarcerate such an individual, the judge must consider "how best to continue treatment" while the defendant is in prison. Id.

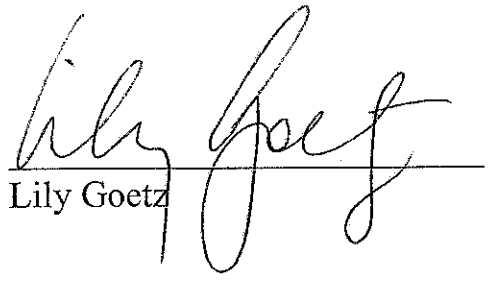
DLRA 3's resentencing provision should be read in the context of the entire Act, designed to realize the goals of treating the root cause of many drug

offenders' criminal conduct. This Court should not categorically exclude parole violators from seeking resentencing.

CONCLUSION

For the reasons stated above, the Association urges that Defendants-Appellants be permitted to seek resentencing pursuant to the 2009 Drug Law Reform Act.

Respectfully submitted,



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