CHAPTER 10

APPLYING FOR RE-SENTENCING FOR DRUG OFFENSES*

A. Introduction

Federal and New York law have been changed so that some prisoners who were convicted of drug crimes may apply for re-sentencing. If you were convicted of a federal drug crime, you should read Part B of this Chapter to learn about federal re-sentencing for drug crimes. If you were convicted of a state drug crime in New York, you should read Part C of this Chapter for information on re-sentencing in New York. Appendix A contains sample forms that you may need to apply for re-sentencing for federal drug crimes. Appendix B contains forms that you may need to apply for re-sentencing in New York State.

B. Re-Sentencing for Federal Drug Crimes

1. Introduction

The Federal Sentencing Commission has recently changed the United States Sentencing Guidelines ("the Guidelines") for some drug offenses. The Commission has made changes that lower the sentencing recommendations for crimes involving crack cocaine (also called cocaine base). The new crack sentencing Guidelines took effect on November 1, 2007.[1] On December 11, 2007, the Commission decided to apply the new sentencing Guidelines "retroactively." This means that some prisoners who were sentenced for certain federal drug offenses under the old, harsher Guidelines can apply for re-sentencing under the new Guidelines. So, if you were sentenced for a federal offense involving crack cocaine or one of a few other drug offenses (such as those involving Percocet or live marijuana plants), you might be eligible to apply for re-sentencing.

This Chapter describes who can apply for re-sentencing and explains the re-sentencing process. Section 2 explains who is allowed to apply for re-sentencing. Section 3 explains how to apply for re-sentencing and the possible results of your re-sentencing application. Appendix A at the end of the Chapter provides sample forms you can use if you decide to apply for re-sentencing.

2. Eligibility: Who Is Allowed to Apply?

If you are serving time for a federal drug offense and wish to apply for re-sentencing, you must first determine whether you may do so. Not all prisoners serving time for federal drug offenses are able to apply for re-sentencing.

In order for changes in the Guidelines to apply to prisoners who were *already* sentenced under the old Guidelines, the changes must be passed *retroactively*. Section 1B1.10 of the Guidelines shows which changes in the law are retroactive.[2] Section 1B1.10 says that you can apply for re-sentencing if one of the amendments listed in Section 1B1.10(c) of the Guidelines lower the sentencing Guideline range for your offense.[3] The only amendments listed in Section 1B1.10(c) that apply to drug offenses are Amendments 126, 130, 484, 488, 499, 505, 516, 591, 657, and 706 as changed by 711 and 715.[4] To decide if you can apply for re-sentencing, you must first see if any of these amendments have to do with the sentencing Guidelines for your offense.

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1. U.S. Sentencing Guidelines Manual § 2D1.1(c) (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/CHAP2_D.pdf, at 141–162 (last visited Sept. 23, 2012).

2. U.S. Sentencing Guidelines Manual § 1B1.10, policy statement (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/CHAP1.pdf, at 37 (last visited Sept. 23, 2012).

3. U.S. Sentencing Guidelines Manual § 1B1.10(a)(1), policy statement (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/CHAP1.pdf, at 37 (last visited Sept. 23, 2012).

4. U.S. Sentencing Guidelines Manual app. C (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/2008_manual.cfm (last visited Sept. 23, 2012) (providing three links to Appendix C, which has the Amendments).

This Chapter will focus on Amendment 706 as changed by Amendments 711 and 715. This Amendment changes the Guidelines for crack cocaine offenses. It also changes the way you figure out the "base offense level" for crimes involving possession of both crack cocaine and one or more other drugs. The base offense level is a number given to a type of crime and is a starting point for determining its seriousness. More serious crimes, such as kidnapping, have higher base offense levels than less serious crimes, such as trespass. The base offense level is used to help calculate the range of sentences in the Guidelines that a court may give for a particular crime.[5]

You should remember that if any of the other Amendments from Section 1B1.10(c) listed above applies to your case and would lower the Guidelines sentencing range for your offense, then you may also be eligible for re-sentencing. For example, Amendment 516 changes the Guidelines for cases involving more than fifty "marijuana plants." In the Guidelines, a marijuana plant is defined as a marijuana cutting with roots, a rootball, or root hairs.[6] Amendment 516 lowers the amount of marijuana each plant is expected to produce from one kilogram (KG) to 100 grams (G).[7] So, if you were sentenced for an offense involving more than fifty marijuana plants before Amendment 516 was passed, you might be eligible for re-sentencing. Similarly, Amendment 657 changes the way that the weight of the drug Oxycodone is calculated for sentencing purposes. This change usually results in shorter sentences for offenses involving Percocet and OxyContin pills.[8] So, if you were sentenced for an offense involving possession of Percocet or OxyContin, you should check to see if the new standards would lower your Guidelines range, making you eligible for re-sentencing.

(a) Determining Eligibility for Re-Sentencing for an Offense Involving Crack Cocaine

If you are currently serving time for an offense committed prior to November 1, 2007 involving only crack cocaine, you will probably be able to apply for re-sentencing. Before 2007, the sentencing Guidelines said that 150KG of powder cocaine was the same as 1.5KG of crack cocaine (cocaine base) for sentencing purposes.[9] This meant that if you were convicted of possessing a certain amount of crack cocaine, your sentence would be the same as if you were convicted of possessing 100 times as much powder cocaine. This was known as the "100:1 cocaine sentencing disparity." There is an important difference between changes to mandatory minimum laws, which are created by Congress, and changes to the Guidelines, which are created by the United States Sentencing Commission. The Guidelines give recommended sentencing ranges for offenses based on drug quantity. At one time, the 100:1 difference for cocaine sentencing was in both the Guidelines and the laws about mandatory minimum sentences. This Chapter primarily focuses on the Guidelines because their amendments (changes) have been made retroactive, which means that even though you were sentenced under the old Guidelines, you may be able to apply for re-sentencing under the new ones.

The 100:1 disparity in (or difference between) the sentences given out for crack offenses as compared to the sentences given for cocaine offenses has received a lot of criticism. Many people in the legal community thought that it was unfair to have such tough sentences for crack cocaine and much lighter sentences for powder cocaine. Some judges even began thinking about this unfair difference when sentencing defendants for crack cocaine offenses, stating that the unfair difference was a reason to give the defendants shorter sentences than the sentencing Guidelines called for.[10] In 2007, the United States Sentencing Commission

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5. An Overview of the Federal Sentencing Guidelines, *available at* http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/Overview_Federal_Sentencing_Guidelines.pdf (last visited Sept. 23, 2012).

6. U.S. Sentencing Guidelines Manual app. C, amend. 518 (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/APPCVOLI.pdf, at 430–434 (last visited Sept. 23, 2012).

7. U.S. Sentencing Guidelines Manual app. C, amend. 516 (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/APPCVOLI.pdf, at 425–426 (last visited Sept. 23, 2012).

8. U.S. Sentencing Guidelines Manual app. C, amend. 657 (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/APPCVOLII.pdf, at 387–388 (last visited Sept. 23, 2012).

9. U.S. Sentencing Guidelines Manual app. C, amend. 706 (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/Suppl_to_AppendixC_2008.pdf, at 221–226 (last visited Sept. 23, 2012).

10. *See* Kimbrough v. United States, 552 U.S. 85, 91, 128 S. Ct. 558, 564, 169 L. Ed. 2d 481, 491 (2007)

issued a report to Congress calling for reform of the federal cocaine sentencing disparity.[11] The report said that members of the legal community and the public were very concerned and critical about the unfair cocaine sentencing policy that had higher sentences for crack cocaine offenses than for powder cocaine offenses.[12]

The Guidelines were amended in 2007, and these changes were made retroactive. Amendment 706, which came into effect on November 1, 2007, reduces the difference between sentences for crack (cocaine base) and powder cocaine. The old version of Section 2D1.1(c)(1) stated that 150KG of powder cocaine was the same as 1.5KG of crack cocaine. Amendment 706 corrected this, changing Section 2D1.1(c)(1) so that 150KG of powder cocaine is now the same as 4.5KG of crack cocaine. Although there is still a significant disparity between sentences for crack and powder cocaine, this amendment has led to lower sentences for crack cocaine than under the old version of the Guidelines.

The following table illustrates the changes in Section 2D1.1(c) for calculating the base offense level for crack cocaine offenses. Level 38 is the most severe base level sentence that can be given for a drug offense (not taking into account sentencing enhancements).[13]

Base Offense Level	Amount of drug (pre-Amendment 706) [Old Guideline][14]	Amount of drug (post-Amendment 706) [New Guideline][15]
38	150KG or more of cocaine or 1.5 KG or more of cocaine base (crack)	150KG or more of cocaine or 4.5KG or more of cocaine base
36	50KG–150KG cocaine or 500G–1.5KG cocaine base	50KG–150KG cocaine or 1.5KG–4.5KG cocaine base
34	15KG–50KG cocaine or 150G–500G cocaine base	15KG–50KG cocaine or 500G–1.5KG cocaine base

(holding that sentencing judges may think about the difference between sentences for powder and crack cocaine when deciding not to use the sentence recommended by the Guidelines and impose a lighter sentence); *see also* Gall v. United States, 552 U.S. 38, 47, 128 S. Ct. 586, 595, 169 L. Ed. 2d 445, 459 (2007) (holding that appeals courts cannot require "extraordinary circumstances" if sentencing judges move away from the Guidelines to give a lighter sentence); United States v. Booker, 543 U.S. 220, 245, 125 S. Ct. 738, 757, 160 L. Ed. 2d. 621, 651 (2005) (holding that the Guidelines are advisory rather than mandatory, that judges may use their discretion (make their own decision) when deciding to depart from the Guidelines, and that sentencing decisions can only be overturned by appeals courts for "abuse of discretion" even if the sentencing judge did not follow the Guidelines).

11. U.S. Sentencing Comm'n., Report to the Congress: Cocaine and Federal Sentencing Policy 2 (2007), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf (last visited Sept. 23, 2012).

12. The Commission has repeatedly recommended that Congress correct the disparity between mandatory minimum sentences for crack and powder cocaine. *See* U.S. Sentencing Comm'n, Report to the Congress: Cocaine and Federal Sentencing Policy 6–9 (2007) *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf (last visited Sept. 23, 2012). In 2010, Congress finally passed the Fair Drug Sentencing Act, which changed mandatory minimum sentences for crack cocaine, increasing the amount of cocaine that triggers a five-year mandatory minimum from 5G to 28G. This adjustment reduced the mandatory minimum sentencing disparity from 100:1 to about 18:1. However, the change has not been made retroactive, which means that as of now, this new law probably does not provide a basis for you to apply for re-sentencing. Fair Sentencing Act of 2010, Pub. L. No. 111-20, §§ 2–3, 124 Stat. 2372, 2372 (to be codified at 21 U.S.C. 841(b)(1), 844(a)) (reducing the quantity thresholds triggering mandatory minimum sentences for crack cocaine and eliminating mandatory minimums for possession-only offenses).

13. U.S. Sentencing Guidelines Manual app. C, amend. 505 (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/APPCVOLI.pdf, at 415–417 (last visited Sept. 23, 2012).

14. U.S. Sentencing Guidelines § 2D1.1(c) (2003), *available at* http://www.ussc.gov/Guidelines/2003_guidelines/Manual/CHAP2-2.pdf, at 129–147 (last visited Sept. 23, 2012).

15. U.S. Sentencing Guidelines § 2D1.1(c) (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/CHAP2_D.pdf, at 141–162 (last visited Sept. 23, 2012).

32	5KG–15KG cocaine or 50G–150G cocaine base	5KG–15KG cocaine or 150G–500G cocaine base
30	3.5KG–5KG cocaine or 35G–50G cocaine base	3.5KG–5KG cocaine or 50G–150G cocaine base
28	2KG–3.5KG cocaine or 20G–35G cocaine base	2KG–3.5KG cocaine or 35G–50G cocaine base
26	500G–2KG cocaine or 5G–20G cocaine base	500G–2KG cocaine or 20G–35G cocaine base
24	400G–500G cocaine or 4G–5G cocaine base	400G–500G cocaine or 5G–20G cocaine base
22	300G–400G cocaine or 3G–4G cocaine base	300G–400G cocaine or 4G–5G cocaine base
20	200G–300G cocaine or 2G–3G cocaine base	200G–300G cocaine or 3G–4G cocaine base
18	100G–200G cocaine or 1G–2G cocaine base	100G–200G cocaine or 2G–3G cocaine base
16	50G–100G cocaine or 500MG–1G cocaine base	50G–100G cocaine or 1G–2G cocaine base
14	25G–50G cocaine or 250MG–500MG cocaine base	25G–50G cocaine or 500MG–1G cocaine base
12	Less than 25G cocaine or less than 250MG cocaine base	Less than 25G cocaine or less than 500MG cocaine base

In general, sentences for crack cocaine under the new Guidelines are usually about two levels lower than sentences under the old Guidelines. This can mean that you might be able to get a reduction in your sentence if you were convicted of a crack cocaine offense committed before the new Guidelines came into effect on November 1, 2007.

(b) Determining Eligibility for Re-Sentencing for an Offense Involving Crack Cocaine and at Least One Other Drug

Amendment 706, as changed by Amendments 711 and 715, reformed the way that the base offense level is calculated for crimes involving crack cocaine and at least one other drug.[16] Under the old Guidelines, the base offense level for offenses involving more than one drug was calculated by converting all the drugs involved to their equivalent amounts of marijuana using the "Drug Equivalency Tables,"[17] These amounts were then added together, and the total was used to find the correct base offense level using the "Drug Quantity Table."[18]

This calculation can be a little confusing, so an example may be helpful: Imagine you were convicted of selling 80G of cocaine, 30G of cocaine base, and 1KG of marijuana. In order to calculate the base offense level, you would look at the Drug Equivalency Tables to determine that 1G of cocaine is equal to 200G of marijuana, and 1G of cocaine base is equal to 20KG of marijuana. So, the cocaine sold is equal to 16,000G (or 16KG) of marijuana (80G x 200G/1G = 16,000G). The cocaine base is equal to 600KG of marijuana (30G x 20KG/1G = 600KG). The total offense, therefore, involves the equivalent of 617KG of marijuana (16KG + 600KG + 1KG). Looking now at the Drug Quantity Table, we can see the 617KG of marijuana corresponds to a Level 28 base offense level.

Amendment 715 doesn't change the old method of calculating the base offense level for multiple-drug offenses. However, it says that whenever the offense involves *crack cocaine and at least one other drug*, the

16. U.S. Sentencing Guidelines Manual app. C, amend. 715 (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/Suppl_to_AppendixC_2008.pdf, at 249–253 (last visited Sept. 23, 2012).

17. The Drug Equivalency Tables can be found at the end of Note 10(D) of § 2D1.1 in both the 2003 and 2008 versions of the Sentencing Guidelines.

18. U.S. Sentencing Guidelines § 2D1.1 cmt. n.10 (2003), *available at* http://www.ussc.gov/Guidelines/2003_guidelines/Manual/CHAP2-2.pdf, at 138–143 (last visited Sept. 23, 2012).

base offense level you get using the method above should be lowered by two levels.[19] So, under the new Guidelines, your base offense level would be calculated exactly as it was under the old Guidelines (as demonstrated in the example above), *but* the base offense level would then be reduced by two levels. So, in the example above, the base offense level would actually be Level 26 (Level 28 – 2 levels = Level 26).

This means that if you were convicted of an offense involving crack cocaine and at least one other drug, you are probably eligible to apply for re-sentencing because the new Guideline for your offense is most likely two levels lower than it was under the old Guidelines.[20] You should be aware, however, that Amendment 715 provides three exceptions to the two-level reduction in cases involving crack cocaine. The two-level reduction will not apply if: 1) your offense involved 4.5KG or more of crack cocaine; 2) your offense involved less than 250MG of crack cocaine, or; 3) the base offense level after the two-level reduction would be lower than the base offense level for the same offense involving only the other drugs and not the cocaine base.[21] If one of these three exceptions applies to your case, you probably will not be eligible for re-sentencing.

An example may be helpful to explain the third exception: Suppose a case involves 5G of cocaine base and 6KG of heroin. Under the Drug Equivalency Tables in subdivision (E) of this note, 5G of cocaine base converts to 100KG of marijuana (5G x 20KG/1G = 100KG), and 6KG of heroin converts to 6,000KG of marijuana (6KG x 1000KG/1G = 6,000KG), which, when added together equals 6,100KG of marijuana. Under the Drug Quantity Table, 6,100KG of marijuana leads to a combined offense level of 34, which is reduced by two levels to 32. For the heroin, the 6,000KG of marijuana corresponds to an offense level 34 under the Drug Quantity Table. The combined offense level for cocaine and heroin, if reduced, would be Level 32. Since this is less than the offense level for *only* heroin (Level 34), the reduction does not apply. So, the combined offense level for the cocaine and heroin is still Level 34.[22]

(c) What if Your Original Sentencing Judge Already Gave You a Shorter Sentence than the Old Guidelines Recommended?

Even if you were originally sentenced to shorter time in prison than the Guidelines recommended, you may still be eligible for re-sentencing. There is very little law in this area, but it is possible that you can receive a further reduction in your prison sentence if the Sentencing Commission has lowered the prison sentence for your offense in the New Guidelines. Section 1B1.10(b)(2)(B) of the 2008 Federal Sentencing Guidelines Manual governs this situation. Its precise interpretation is still unclear.[23] For example, one circuit has held that when re-sentencing a prisoner, a district court must treat the Guidelines, including Section 1B1.10, as advisory, not mandatory.[24] That means that a court can give a lower sentence, or a higher

19. U.S. Sentencing Guidelines app. C, amend. 715 (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/Suppl_to_AppendixC_2008.pdf, at 249–253 (last visited Sept. 23, 2012).

20. If you were convicted of a crime committed between Nov. 1, 2007, and May 1, 2008, your sentence may have been calculated using the method established by Amendment 711. If this is the case, you should calculate your base offense level the way that Amendment 711 tells you to and compare this result to your base offense level using the current Guideline method explained in Part B(2)(a) of this Chapter.

21. U.S. Sentencing Guidelines app. C, amend. 715 (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/Suppl_to_AppendixC_2008.pdf, at 249–253 (last visited Sept. 23, 2012).

22. U.S. Sentencing Guidelines Manual § 2D1.1 cmt. n.10(D)(iii)(II) (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/CHAP2_D.pdf, 141 (last visited Sept. 23, 2012).

23. § 1B1.10(b)(2)(B) reads as follows: "Exception.—If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and United States v. Booker, 543 U.S. 220 (2005), a further reduction generally would not be appropriate." U.S. Sentencing Guidelines Manual § 1B1.10(b)(2)(B), policy statement (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/CHAP1.pdf, 38 (last visited Sept. 23, 2012).

24. United States v. Hicks, 472 F.3d 1167, 1170 (9th Cir. 2007) (holding that a prisoner could be re-sentenced to a term lower than the new Guidelines recommendation based on the finding, in United States v. Booker, that the U.S. Sentencing Guidelines are always advisory), *abrogated by* Dillon v. United States, 130 S. Ct. 2683, 177 L. Ed. 2d 271 (U.S. 2010). *But see* United States v. Fanfan, 558 F.3d 105, 108–110 (1st Cir. 2009) (specifically rejecting the Ninth Circuit's interpretation of Booker in *United States v. Hicks* and holding that prisoners could not be re-sentenced below the current Guidelines).

sentence, than what the Guidelines suggest. You should conduct your own research to see how courts in your area have re-sentenced prisoners who received less time on their original sentences according to the New Guidelines.[25]

(d) Are You Eligible for Re-Sentencing Even if Your Current Sentence Is the Result of a Binding Plea Agreement?

You may not be eligible for re-sentencing if your current sentence is the result of a binding plea agreement.[26] Many courts have held that if you were sentenced pursuant to a binding plea agreement, then you are automatically ineligible for re-sentencing.[27] However, not all courts agree.[28] Even if you pleaded guilty and are eligible for re-sentencing, you may not be re-sentenced automatically. You may have to prove that your plea agreement was based on the existing Guideline recommendations for your offense level.[29] Thus, if your sentence is the result of a binding plea agreement, you can file for re-sentencing, but you should be prepared to argue that your sentence was in fact based on the Guidelines. You should also know that a judge might find you ineligible for re-sentencing because you entered into a binding plea agreement.

(e) Are You Eligible for Re-Sentencing if You Were Originally Sentenced as a "Career Offender"?

A "career offender" is defined under Section 4B1.1 of the New Guidelines.[30] The Guidelines says that you are a "career offender" if: [31]

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25. *See JLM*, Chapter 2 for information on how to conduct legal research.

26. Fed. Pub. & Cmty. Defenders, Crack Retroactivity: Questions, Answers, Caselaw, Argument Outlines 7 (2008), *available at* http://www.fd.org/docs/crack-cocaine/Defender-Authority-Combined-FINAL-2-18-0819.pdf (last visited Oct. 17, 2012).

27. *See*, *e.g.*, United States v. Rivera-Martinez, 607 F.3d 283, 287 (1st Cir. 2010); United States v. Green, 595 F.3d 432, 436 (2d Cir. 2010); United States v. Sanchez, 562 F.3d 275, 277–79 (3d Cir. 2009), *abrogated by* Freeman v. United States, 131 S. Ct. 2685, 180 L. Ed. 2d 519 (U.S. 2011); United States v. Scurlark, 560 F.3d 839, 841 (8th Cir. 2009); United States v. Peveler, 359 F.3d 369, 377–79 (6th Cir. 2004), *abrogated by* Freeman v. United States, 131 S. Ct. 2685, 180 L. Ed. 2d 519 (U.S. 2011); United States v. Trujeque, 100 F.3d 869, 870–71 (10th Cir. 1996) (all holding that sentences obtained by binding plea agreements cannot be reduced under the revised crack-cocaine sentencing Guidelines).

28. *See* United States v. Garcia, 606 F.3d 209, 214 (5th Cir. 2010) (*per curiam*) (holding that "[t]he jurisdictional question is whether the sentence was 'based on' the subsequently amended crack-offense Guidelines, and answering that question requires that we examine the nuances of both the plea agreement and the sentencing transcript in each particular case"); United States v. Franklin, 600 F.3d 893, 896 (7th Cir. 2010) (holding that some binding plea agreements may be eligible for re-sentencing if original sentence was based on the Guidelines); United States v. Bride, 581 F.3d 888, 891 (9th Cir. 2009) (holding that where a binding plea agreement is based on the Guidelines, it does not render the offender ineligible for re-sentencing).

29. *See* United States v. Garcia, 606 F.3d 209, 214 (5th Cir. 2010) (*per curiam*) (holding that binding plea agreements could be eligible for re-sentencing if they could be fairly said to have been based on the Guidelines); United States v. Franklin, 600 F.3d 893, 896 (7th Cir. 2010) (holding that some binding plea agreements may be eligible for re-sentencing); United States v. Cobb, 584 F.3d 979, 985 (10th Cir. 2009) (holding that the court has broad discretion to re-sentence offenders under 18 U.S.C. § 3582(c)(2) even where the original sentence was based on a binding plea agreement); United States v. Bride, 581 F.3d 888, 891 (9th Cir. 2009) (holding that where a binding plea agreement is based on the Guidelines, the offender may be eligible for re-sentencing); United States v. Coleman, 594 F. Supp. 2d 164, 167 (D. Mass. 2009) (holding that sentences obtained by binding plea agreements may be reduced under the revised sentencing Guidelines). Prisoners sentenced under binding plea agreements may also be eligible for re-sentencing in the Fourth Circuit, although the law is not entirely clear because the decision was vacated and is no longer the law. *See* United States v. Dews, 551 F.3d 204, 209 (4th Cir. 2008), *reh'g en banc granted* (Feb 20, 2009), *reh'g dismissed as moot* (May 04, 2009), (holding that nothing in the federal rule regarding binding plea agreements "precludes a defendant pleading guilty under that rule from receiving the benefit of a later favorable retroactive amendment to the Guidelines, provided, of course, that the requirements of § 3582(c)(2) are met").

30. U.S. Sentencing Guidelines Manual § 2B1.1(a) (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/4b1_1.cfm (last visited Sept. 23, 2012).

31. U.S. Sentencing Guidelines Manual § 2B1.1(a) (2008), available at http://www.ussc.gov/Guidelines/2008_guidelines/Manual/CHAP4.pdf (last visited Oct. 17, 2012).

(1) You were at least eighteen years old when you committed the offense you are currently serving time for;
(2) The crime you are in jail for now is a felony, either a crime of violence or a controlled substance abuse; and
(3) You had at least two prior felony convictions of either crimes of violence or controlled substance abuse.

If you were sentenced as a career offender under Section 4B1.1 of the Guidelines, you are probably not eligible to receive a sentence reduction under the new Guidelines. This is because your sentence may not have been based on the parts of the Guidelines that were amended. If the sections of the Guidelines that you were sentenced under were not amended, your sentence would probably not be lower under the New Guidelines. Recent decisions in a variety of circuit courts have rejected applications for re-sentencing made by prisoners designated as career offenders.[32] However, if you were designated a career offender, but you were ultimately sentenced based on the crack cocaine amount Guidelines, not the career offender Guidelines, you could be eligible for re-sentencing.[33] It is still unclear whether prisoners sentenced as career offenders can receive sentence reductions. If you were sentenced as a career offender, you may still want to apply for re-sentencing. But you should know that your request might be denied because you were sentenced as a career offender.

(f) Are You Eligible for Re-Sentencing if You Were Originally Sentenced to a Minimum Sentence under a Statute?

If you were sentenced a statutory minimum sentence, for example sixty months for 5G or more of crack or 120 months for 50G or more of crack, you are probably not eligible for re-sentencing. This is because the statutory minimum sentence outweighs any reduction under the new Guidelines.[34]

3. Applying for Re-Sentencing

(a) How Do You Apply?

To apply for re-sentencing because the new Guidelines have lowered the sentence for your offense, you must file a motion under 18 U.S.C. § 3582(c)(2).[35] You must file the motion in the same district court where you were sentenced. 18 U.S.C. § 3582(c)(2) allows courts to re-sentence prisoners who were sentenced using the old Guidelines when the new Guidelines have lowered the suggested sentence for your offense.[36] You can find sample motions at the end of this Chapter.

It is still unclear whether you have a right to an attorney if you wish to apply for re-sentencing.[37] You may need to create and file your application for re-sentencing on your own. This is called filing a motion *pro se*.

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32. *See* United States v. Ayala-Pizarro, 551 F.3d 84, 85 (1st Cir. 2008) (holding that prisoners sentenced as career offenders are not eligible for re-sentencing); United States v. Caraballo, 552 F.3d 6, 10 (1st Cir. 2008) (holding that career offenders are not eligible for re-sentencing unless their sentence as a career offender would be lower under the amended Guidelines, which is highly unlikely); United States v. Sharkey, 543 F.3d 1236, 1239 (10th Cir. 2008) (holding that, because Amendment 706 of the Sentencing Guidelines has no effect on the Guidelines for career offenders, prisoners sentenced as career offenders are not eligible for re-sentencing).

33. United States v. McGee, 553 F.3d 225, 230 (2d Cir. 2009) (holding that a prisoner was eligible for re-sentencing because his sentence was based on Guidelines for crack cocaine in his possession, not the Guidelines for career offenders).

34. U.S. Sentencing Guidelines Manual § 1B1.10 cmt. n.1(A), § 5G1.1(b) (2008), a*vailable at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/1b1_10.cfm (last visited Sept. 23, 2012); *see also* U.S. Sentencing Guidelines Manual, *available at* http://www.ussc.gov/Guidelines/2008_guidelines/2008_manual.cfm (last visited Sept. 23, 2012) (providing links to chapters one and five). The changes made to the mandatory minimum sentencing scheme in 2010 by the Fair Sentencing Act have not been made retroactive, which means the old mandatory minimums still apply to you if you were sentenced under them. See Part B(2)(a) of this Chapter for more on the Fair Sentencing Act of 2010.

35. 18 U.S.C. § 3582(c)(2) (2006).

36. Office of Defender Servs., Retroactivity of Crack Cocaine Amendments: Guidance to CJA Panel Attorneys, *available at* http://www.fd.org/odstb_CrackRetroactivity.htm (last visited Sept. 23, 2012).

37. For more information on the right to counsel issue, see Part C(3) of this Chapter.

(i) How to File a Section 3582(c)(2) Re-Sentencing Motion *Pro Se*

In order to file a motion *pro* se for resentencing under 18 U.S.C. § 3582(c)(2), you will need to prepare an application. When you are finished, you will file your application and submit it to the district court that handled your original sentencing. Before you begin your application, you should make sure you know some key facts about your case: [38]

(1) Your criminal case number.
(2) Your base offense level—you can find this in the "Criminal Computation" section of your pre-sentence report or you can calculate it yourself.
(3) Your criminal history.
(4) The Sentencing Guideline range that was originally used in your sentencing.
(5) Your actual sentence.
(6) The new Sentencing Guideline range that would be applicable to your crime under the amended Guidelines.
(7) Whether you were sentenced pursuant to a binding plea agreement or were sentenced based on your status as a career offender.
(8) Your disciplinary record and program participation during your incarceration.

Your application is a chance for you to argue that you are an ideal candidate for re-sentencing. You should remember that the court will probably receive many of these kinds of motions from prisoners, so you may not want to make your application too long. Using the sample motions at the end of this chapter and filling in your own information is probably the simplest way to file an effective *pro se* motion.[39]

After you file your motion for re-sentencing under 18 U.S.C. § 3582(c)(2), the judge may hold a re-sentencing hearing. At this hearing, the judge may consider factors listed in 18 U.S.C. § 3553(a).[40] If you think that some of these factors might help you for re-sentencing, you may want to explain them in your application. For example, you should mention any vocational or educational programs you have participated in while in prison. You should also mention other ways in which you can show your own rehabilitation. If you think these factors will be important in your re-sentencing, you should apply to have an attorney appointed using the form in Appendix A of this Chapter.

(b) Are You Entitled to a Hearing?

Under the Sentencing Guidelines, you are entitled to a hearing whenever any important factor in the sentencing determination is "reasonably in dispute" or whenever a judge plans to consider facts not found at the original sentencing proceeding.[41] Usually, courts find that a hearing is appropriate whenever there is a legitimate question of fact. Some appellate courts have found abuse of discretion where the lower court refused to hold a 18 U.S.C. § 3582(c)(2) hearing and denied the prisoner's Section 3582(c)(2) motion for a sentence reduction.[42]

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38. *See* Office of Defender Servs., Sample Motions, Briefs, Petitions and Orders Relating to Retroactive Application of Crack Cocaine Guideline Amendment, *available at* http://www.fd.org/odstb_CrackSampleMotions.htm (last visited Sept. 23, 2012) (providing links to various sample forms).

39. The Sample Document in Appendix B of this Chapter can serve as a template for your application.

40. These factors include the nature of the offense committed, the prior history and character of the prisoner, the need for the punishment to reflect the seriousness of the offense, the need to provide just punishment and protect the public, the need to avoid arbitrary sentencing differences among defendants with similar records who have been found guilty of similar conduct, and the need to provide restitution to victims.

41. U.S. Sentencing Guidelines Manual § 6A1.3 (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/CHAP6.pdf, 470 (last visited Sept. 23, 2012) ("[w]hen any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor"); *see also* Fed. Pub. & Cmty. Defenders, Crack Retroactivity: Questions, Answers, Caselaw, Argument Outlines 3–4 (2008), *available at* http://www.fd.org/docs/crack-cocaine/Defender-Authority-Combined-FINAL-2-18-0819.pdf (last visited Oct.17, 2012).

42. *See* United States v. Byfield, 391 F.3d 277, 280–81 (D.C. Cir. 2004) (citing U.S. Sentencing Guidelines Manual § 6A1.3 (2004)) (finding that the lower court had abused its discretion by failing to hold an evidentiary hearing where prisoner's factual assertions in his § 3582(c)(2) motion raised "enough of a smidgeon to put the matter 'reasonably in dispute'"); United States v. Mueller, 168 F.3d 186, 189–90 (5th

(c) Are You Entitled to Be Represented by Counsel at a Section 3582(c)(2) Proceeding?

Because Section 1B1.10 of the Guidelines was recently amended, it is still unclear whether you are entitled to counsel at a Section 3582(c)(2) proceeding.[43] Section 1B1.10 was revised in May 2008 and says that proceedings under Section 3582(c)(2) "do not constitute a full resentencing of the defendant."[44] Because of this, many courts have held that you do not have a right to counsel at a Section 3582(c)(2) proceeding.[45]

However, Section 1B1.10 calls for judges to reconsider the facts surrounding the offense as part of considering the factors in 18 U.S.C. § 3553(a).[46] Judges may also consider your post-sentencing conduct (such as your disciplinary record while incarcerated).[47] These kinds of factual determinations are characteristic of the kinds of proceedings where the Sixth Amendment[48] requires that defense counsel be available to defendants.[49] There are some cases suggesting that a prisoner might be entitled to counsel at particular 18 U.S.C. § 3582(c)(2) hearings, but no court has found a general right to counsel during re-sentencing.[50]

If you wish to have an attorney represent you during the re-sentencing process and cannot afford to hire one, you can apply to have counsel appointed. The form at Appendix A-1 of this Chapter provides a template for your application to have an attorney appointed on your behalf.

Cir. 1999) (holding that where a judge, in deciding a §3582(c)(2) motion, intends to consider evidence not presented in the defendant's pre-sentencing report, the judge must give notice to the prisoner and allow prisoner an opportunity to respond); United States v. Jules, 595 F.3d 1239, 1245, 22 Fla. L. Weekly Fed. C 512 (11th Cir. 2010) (holding that a district court must allow the prisoner and Government an opportunity to dispute evidence in a § 3582(c)(2) motion when the court relies on new information).

43. Memorandum on Appointment of Counsel in Crack Retroactivity Cases from the Training Branch of the Office of Defender Servs. to Participants, Nat'l Sentencing Policy Inst. (Jun. 25, 2008), *available at* http://www.fd.org/docs/crack-cocaine/crack_appointment_of_counsel.pdf (last visited Oct. 17, 2012).

44. U.S. Sentencing Guidelines Manual § 1B1.10(a)(3) (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/CHAP1.pdf (last visited Sept. 23, 2012).

45. *See, e.g.*, United States v. Webb, 565 F.3d 789, 794–95 (11th Cir. 2009) (holding that prisoners have no constitutional or statutory right to representation at § 3582(c)(2) proceedings); United States v. Harris, 568 F.3d 666, 668–69 (8th Cir. 2009) (same); United States v. Forman, 553 F.3d 585, 590 (7th Cir. 2009) (same); United States v. Legree, 205 F.3d 724, 730 (4th Cir. 2000) (same); United States v. Townsend, 98 F.3d 510, 512–13 (9th Cir. 1996) (same); United States v. Reddick, 53 F.3d 462, 463–65 (2d Cir. 1995) (same); United States v. Brown, 556 F.3d 1108, 1113 (10th Cir. 2009) (same).

46. U.S. Sentencing Guidelines Manual § 1B1.10 cmt. n.1(B)(i) (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/CHAP1.pdf, 37 (last visited Sept. 23, 2012).

47. U.S. Sentencing Guidelines Manual § 1B1.10 cmt. n.1(B)(iii) (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/CHAP1.pdf, 37 (last visited Sept. 23, 2012).

48. U.S. Const. amend. VI.

49. Fed. Pub. & Cmty. Defenders, Crack Retroactivity: Questions, Answers, Caselaw, Argument Outlines (2008), *available at* http://www.fd.org/docs/crack-cocaine/Defender-Authority-Combined-FINAL-2-18-0819.pdf (last visited Oct. 17, 2012).

50. *See* Halbert v. Michigan, 545 U.S. 605, 610, 125 S. Ct. 2582, 2587, 162 L. Ed. 2d 552, 560 (2005) (finding that the Due Process and Equal Protection clauses of the Federal Constitution require that if an avenue for relief is provided by statute, the government may not "bolt the door to equal justice to indigent defendants"); Mempa v. Rhay, 389 U.S. 128, 135, 88 S. Ct. 254, 257, 19 L. Ed. 2d. 336, 341 (1967) (holding that the 6th Amendment guarantees a right to counsel in a proceeding where a judge has to recommend a revised sentence to the parole board because "to the extent such recommendations are influential in determining the resulting sentence, the mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent"); United States v. Robinson, 542 F.3d 1045, 1052 (5th Cir. 2008) (holding that where a prisoner convicted of selling crack cocaine moved for a sentence reduction by filing a §3582(c)(2) motion and requesting counsel, the interest of justice warranted appointment of counsel; the court refrained from definitively stating that all prisoners have a right to counsel at § 3582(c)(2) hearings); United States v. Reddick, 53 F.3d 462, 465 (2d Cir. 1995) (holding that appointment of counsel for § 3582(c)(2) application rests in the discretion of the district court); Turnbow v. Estelle, 510 F.2d 127, 129 (5th Cir. 1975) (holding that there is a right to counsel whenever the judge can exercise some discretion and influence over the sentence imposed); *see also* Fed. Pub. & Cmty. Defenders, Crack Retroactivity: Questions, Answers, Caselaw, Argument Outlines (2008), *available at* http://www.fd.org/docs/crack-cocaine/Defender-Authority-Combined-FINAL-2-18-0819.pdf (last visited Oct. 17, 2012) (arguing that prior case law finding no right to counsel under United States Sentencing Guidelines § 1B1.10 for § 3582(c)(2) proceedings is now obsolete because of the significant revisions of § 1B1.10 in 2008).

(d) Are You Entitled to Be Present at a Section 3582(c)(2) Hearing?

You are not generally entitled to be present at a Section 3582(c)(2) hearing. Under the Federal Rules of Evidence, proceedings under Section 3582(c) are exempt from the rule that a prisoner must be present at his sentencing.[51] You may also choose not to be present if your absence from prison would interfere with your housing, your work, or other obligations. However, if you have reason to believe that important facts relating to your case will be considered at the hearing, you can argue that you have a constitutional right to be present.[52]

(e) What Sentence Might You Receive if a Judge Grants Your Motion for Re-Sentencing?

Most likely, you will receive a sentence within the amended Guidelines. You may receive a sentence that is lower than the recommended sentence from the amended Guidelines if your original sentence was a downward departure from the sentence recommended by the old Guidelines.[53]

(f) May a Court Deny Your Motion for Re-Sentencing Even When the New Guidelines Have Been Lowered for Your Offense?

Yes, a court may deny your Section 3582(c)(2) motion even if it is clear that the Sentencing Commission has lowered the sentencing Guidelines for the offense for which you are serving time. A judge may choose not to re-sentence you if he finds that the factors listed in Section 3553(a), your post-conviction history, or concerns about public safety suggest that a reduction in your sentence would be inappropriate.[54]

4. Conclusion

In conclusion, the recent retroactive changes in the Federal Sentencing Guidelines for some drug offenses, especially those involving crack cocaine, make some prisoners currently serving sentences for federal drug convictions eligible to apply for sentence reductions under the new Guidelines. If the sentencing range for your offense has been lowered by the amendments, you may be eligible for re-sentencing. You should try to have an attorney appointed to your case or, if you are unable to get an attorney, you should file a re-sentencing application *pro se*.

C. Re-Sentencing for Drug Crimes in New York State

1. Introduction

In 2004, New York reformed the state's old Rockefeller drug laws by adopting the Drug Law Reform Act ("DLRA").[55] The DLRA took effect on January 13, 2005, and changed sentencing ranges for drug offenses, generally by making sentences shorter.[56] The new, shorter sentence ranges automatically apply to anyone

51. *See* Fed. R. Crim. P. 43(b)(4); United States v. Gainer, 303 F. App'x 795, 796–97 (11th Cir. 2008) (*per curiam*) (holding that a prisoner has no right to be present for a § 3582(c)(2) re-sentencing hearing); United States v. Jones, 298 F. App'x 70, 72 (2d Cir. 2008) (*unpublished*) (distinguishing United States v. DeMott and holding that prisoners who file § 3582(c)(2) motions for re-sentencing have no right to be present at a hearing); United States v. Parrish, 427 F.3d 1345, 1347–48 (11th Cir. 2005) (holding a prisoner has no right to be present at a § 3582(c)(2) re-sentencing hearing and that Federal Rule of Procedure 43(b)(4) exempts proceedings under § 3582(c)(2) from the rule that a prisoner must be present at sentencing). *But see* United States v. DeMott, 513 F.3d. 55, 58 (2d Cir. 2008) (holding that defendant has a constitutional right to be present during re-sentencing, insofar as the proceeding is technically imposing a new sentence in place of the vacated sentence).

52. Fed. Pub. & Cmty. Defenders, Crack Retroactivity: Questions, Answers, Caselaw, Argument Outlines (2008), *available at* http://www.fd.org/docs/crack-cocaine/Defender-Authority-Combined-FINAL-2-18-0819.pdf (last visited Oct.17, 2012) (finding a possible constitutional right to be present at a re-sentencing hearing where important facts are in dispute).

53. Review Part B(2)(c) above.

54. U.S. Sentencing Guidelines Manual § 1B1.10 cmt. n.1(B) (2008), *available at* http://www.ussc.gov/Guidelines/2008_guidelines/Manual/CHAP1.pdf, 37 (last visited Apr. 11, 2012).

55. Drug Law Reform Act of 2004, ch. 738, 2004 N.Y. Sess. Laws 1462 (McKinney).

56. Drug Law Reform Act of 2004, ch. 738, § 36, 2004 N.Y. Sess. Laws 1462, 1479–82 (McKinney) (codified as amended at N.Y. Penal Law §§ 70.70–70.71 (McKinney 2009 & Supp. 2012)) (listing new sentences for drug offenders).

sentenced for a drug offense committed after January 13, 2005.[57] The DLRA also allows people currently serving sentences for A-I felony drug offenses under the old law to apply for re-sentencing under the new law.[58] A second law, which took effect on October 29, 2005, also allows some people serving sentences for A-II felony drug convictions to apply for re-sentencing under the new law.[59] The New York state legislature also adopted new re-sentencing policies in April 2009.[60]

The bill created a new provision of the criminal procedure law that allows certain people currently serving sentences for Class B felony drug offenses to apply for re-sentencing.[61] This means that if you are serving a sentence for an A-I, A-II, or Class B felony drug offense, and you were sentenced under the old laws, you may be able to have your sentence reduced under the new laws. This Chapter describes who is allowed to apply for re-sentencing, which new sentences you could receive if you apply, and how to apply for re-sentencing. Section 2 of this Part describes who is eligible to apply for re-sentencing. Section 3 describes what happens if you decide to apply. Section 4 explains how to apply for re-sentencing. Appendix B at the end of the Chapter provides forms you will need to apply for re-sentencing.

2. Eligibility: Who Is Allowed to Apply?

If you are serving time for a felony drug offense, you must first determine whether you are eligible for re-sentencing. Re-sentencing is only available to people who were convicted of A-I, A-II, and Class B felony drug offenses and are currently serving time for those offenses in the custody of the New York State Department of Corrections. The A-I felony drug offenses are criminal possession of a controlled substance in the first degree,[62] criminal sale of a controlled substance in the first degree,[63] and operating as a major trafficker.[64] The A-II felony drug offenses are criminal possession of a controlled substance in the second degree[65] and criminal sale of a controlled substance in the second degree.[66] The Class B felony drug offenses are criminal possession of a controlled substance in the third degree,[67] criminal sale of a controlled substance in the third degree,[68] criminal sale of a controlled substance in or near school grounds,[69] criminal sale of a controlled substance to a child,[70] and unlawful manufacture of methamphetamine in the first degree.[71] These offenses are all described in Section 220 of the New York Penal Law.[72] People who are serving sentences for A-I, A-II, and Class B felony drug offenses have different re-sentencing requirements.

(a) If You Are Serving a Sentence for an A-I Felony Drug Conviction

Generally, if you are serving an indeterminate sentence for an A-I felony drug offense and you were sentenced under the old law, you may apply for re-sentencing.[73] An indeterminate sentence means that the sentence did not have a specified end date. But you must still meet some requirements to apply for re-sentencing. The courts have interpreted the law to mean that you must be "in the custody of the

57. People v. Nelson, 21 A.D.3d 861, 862, 804 N.Y.S.2d 1, 1 (1st Dep't 2005) (holding that new sentencing ranges under the DLRA do not apply to persons sentenced for offenses committed before January 13, 2005, even where sentencing takes place after January 13, 2005). New York's highest court, the New York Court of Appeals, upheld this decision in the consolidated appeals of three inmates in People v. Utsey, 7 N.Y.3d 398, 855 N.E.2d 791, 822 N.Y.S.2d 475 (2006).

58. Drug Law Reform Act of 2004, ch. 738, §23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

59. Drug Law Reform Act of 2005, ch. 643, §§ 1–2, 2005 N.Y. Sess. Laws 1581, 1581–82 (McKinney).

60. Drug Law Reform Act of 2009, ch. 56, pt. AAA, § 9, 2009 N.Y. Sess. Laws 128, 225–26 (McKinney) (codified as amended at N.Y. Crim. Proc. Law § 440.46 (McKinney Supp. 2012)).

61. N.Y. Crim. Proc. Law § 440.46 (McKinney Supp. 2012).

62. N.Y. Penal Law § 220.21 (McKinney 2008).

63. N.Y. Penal Law § 220.43 (McKinney 2008).

64. N.Y. Penal Law § 220.77 (McKinney Supp. 2012).

65. N.Y. Penal Law § 220.18 (McKinney 2008).

66. N.Y. Penal Law § 220.41 (McKinney 2008).

67. N.Y. Penal Law § 220.16 (McKinney 2008).

68. N.Y. Penal Law § 220.39 (McKinney 2008).

69. N.Y. Penal Law § 220.44 (McKinney 2008).

70. N.Y. Penal Law § 220.48 (McKinney Supp. 2012).

71. N.Y. Penal Law § 220.75 (McKinney 2008).

72. N.Y. Penal Law § 220 (McKinney 2008 & Supp. 2012).

73. Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

Department of Correctional Services" to qualify for re-sentencing.[74] If you are incarcerated for a parole violation after being released from prison for your original A-I sentence, you are not considered to be "in the custody of the Department of Correctional Services" and cannot apply for re-sentencing under the Drug Reform Laws.[75]

To be eligible for A-I re-sentencing, you also must have been subjected to an indeterminate length of imprisonment of fifteen or more years.[76] If you were sentenced to an A-I felony of fifteen or more years, but then had your sentence commuted to less than fifteen years, you might not be eligible for re-sentencing under an A-I felony drug offense.[77] However, you should look to Subsection (b) to see whether you are eligible for re-sentencing under an A-II felony drug conviction,[78] or Subsection (c) to see if you are eligible to apply for re-sentencing under a Class B felony drug conviction. Both of these Subsections are found below.

(b) If You Are Serving a Sentence for an A-II Felony Drug Conviction

If you are serving a sentence for an A-II felony drug offense and you were sentenced under the old law, you may apply for re-sentencing if you meet two additional requirements.[79] The first requirement is the "Time to Parole Eligibility" requirement. This requirement sets Guidelines on how long it must be until you are eligible for parole under your current sentence. The second requirement is the "Merit Time Eligibility" requirement. This requirement concerns whether you are currently eligible for a merit time reduction. Both of these requirements are explained below. If you meet both of them, and you are serving a sentence for an A-II felony drug offense under the old law, then you may apply for re-sentencing.

(i) The Time to Parole Eligibility Requirement

The first requirement is that you must be a certain period of time away from parole eligibility under your current sentence. The New York courts have determined this period to be three years, although the law itself does not clearly state how many years are required.[80] The law only says you must be "more than twelve months from being an eligible inmate as that term is defined in [S]ubdivision 2 of [S]ection 851 of the correction law."[81] An "eligible" person, according to Subdivision 2 of Section 851, is a prisoner "who is eligible for release on parole or who will become eligible for release on parole or conditional release within two years."[82] This meaning of "eligible" has two parts—"eligible for release on parole" and "who will become eligible for release on parole or conditional release within two years." Even though there are two possible meanings of the time to parole eligibility requirement in the re-sentencing law, New York has only followed the three-year requirement. In other words, the courts have stated that you must be three years away from parole eligibility.[83]

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74. People v. Bagby, 11 Misc. 3d 882, 886, 816 N.Y.S.2d 302, 304 (Sup. Ct. Westchester County 2006) (holding (1) that defendant whose A-I felony sentence was commuted to eight and one third years to life was not eligible for re-sentencing for an A-I offense; (2) that a defendant who has been placed on parole for an A-I or A-II offense, violates that parole, and is then incarcerated as a result of his parole violation, is not eligible for re-sentencing; and (3) that only those defendants incarcerated on their original prison sentence have a mechanism for re-sentencing).

75. People v. Bagby, 11 Misc. 3d 882, 886, 816 N.Y.S.2d 302, 304 (Sup. Ct. Westchester County 2006). *But see* People v. Figueroa, 894 N.Y.S.2d 724, 732, 736–39 (Sup. Ct. N.Y. County. 2010) (holding that neither the Drug Law Reform Act of 2009 nor the Drug Law Reform Act of 2004 bars parole violators from resentencing).

76. People v. Bagby, 11 Misc. 3d 882, 890, 816 N.Y.S.2d 302, 309 (Sup. Ct. Westchester County 2006).

77. People v. Bagby, 11 Misc. 3d 882, 890, 816 N.Y.S.2d 302, 309 (Sup. Ct. Westchester County 2006).

78. People v. Bagby, 11 Misc. 3d 882, 890, 816 N.Y.S.2d 302, 309 (Sup. Ct. Westchester County 2006).

79. Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney).

80. *See* People v. Bautista, 26 A.D.3d 230, 230–31, 809 N.Y.S.2d 62, 63 (1st Dep't 2006) (holding that in order to be eligible for re-sentencing under the 2005 law, a prisoner serving time for an A-II drug felony must be at least three years away from his first possible parole date), *appeal granted*, 6 N.Y.3d 831, 847 N.E.2d 376, 814 N.Y.S.2d 79 (2006), *appeal dismissed,* 7 N.Y.3d 838, 857 N.E.2d 49, 823 N.Y.S.2d 754 (2006).

81. Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney).

82. N.Y. Correct. Law § 851(2) (McKinney 2003 & Supp. 2012).

83. *See* People v. Corley, 45 A.D.3d 857, 847 N.Y.S.2d 148 (2d Dep't 2007) (holding that a defendant who had already been denied parole and whose motion for re-sentencing would always be less than three years away from the next parole hearing was not eligible for re-sentencing); People v. Perez, 44 A.D.3d 418, 843 N.Y.S.2d 68 (1st Dep't 2007) (holding that the Supreme Court was not required to assign counsel or

(1) The Established Meaning of the Time to Parole Eligibility Requirement in New York

Basically, this requirement for re-sentencing means that you must be more than three years away from becoming eligible for release on parole or conditional release.[84] The Appellate Division First Department decided the three-year requirement in 2006.[85] In later cases, the Appellate Division in the Second, Third, and Fourth Departments have followed the three-year requirement for eligibility.[86]

For example, if you will become eligible for release on parole or conditional release on December 1, 2016, you may apply for re-sentencing on or before November 30, 2013, but not on or after December 1, 2013. *If you file your application with the court more than three years before your earliest possible release date under your current sentence, you will be eligible for re-sentencing.*

You should be aware that if you have already become eligible for parole and have been denied parole, it is likely that you are not eligible for re-sentencing. Once you have been granted a parole hearing and your request has been denied, your next parole hearing will be scheduled within two years of your last hearing. So, once you have come up for parole and been denied, you are always "eligible for release on parole within two years" and are therefore ineligible for re-sentencing because you fail to meet the Time to Parole Eligibility Requirement.[87]

(2) Measuring Time to Parole Eligibility

Time to Parole Eligibility is measured from the date that the court receives your application for re-sentencing.[88] The day that you file the application with the court must be **more** than three years from your

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conduct a hearing for a defendant who was less than three years from parole eligibility when he filed a motion for re-sentencing since defendant was ineligible for re-sentencing); People v. Nolasco, 37 A.D.3d 622, 831 N.Y.S.2d 197 (2d Dep't 2007) (holding that because defendant was less than three years from parole, he was an "eligible inmate" in the meaning of Chapter 643 and was not allowed to proceed with a motion for re-sentencing); People v. Thomas, 35 A.D.3d 895, 826 N.Y.S.2d 456 (3d Dep't 2006) (holding that defendant who was convicted of an A-II felony drug offense was not eligible for re-sentencing under the Drug Law Reform Act, because the defendant was eligible for parole within three years); People v. Parris, 35 A.D.3d 891, 828 N.Y.S.2d 429 (2d Dep't 2006) (holding that, since defendant was less than three years away from eligibility for parole, defendant could not seek re-sentencing under Chapter 643).

84. This determination is reached by adding the "more than twelve months" requirement to the "release within two years" requirement from the definition of "eligible" in Subdivision 2 of Section 851. N.Y. Correct. Law § 851(2) (McKinney 2003 & Supp. 2012).

85. People v. Bautista, 26 A.D.3d 230, 809 N.Y.S.2d 62 (1st Dep't 2006).

86. *See, e.g.*, People v. Mills, 48 A.D.3d 1108, 1108, 849 N.Y.S.2d 855, 855 (4th Dep't 2008) (finding applicant ineligible for re-sentencing because he was scheduled to appear before the parole board within two years after his initial parole denial); People v. Dunham, 46 A.D.3d 1416, 1417, 847 N.Y.S.2d 506, 506 (4th Dep't 2007) (denying application for re-sentencing because defendant was eligible for parole within two years); People v. Corley, 45 A.D.3d 857, 858, 847 N.Y.S.2d 148, 149, (2d Dep't 2007) (holding that because "defendant's next parole hearing will always be less than three years away from any date he moves for resentencing in the future . . . chapter 643 does not and will not afford him the right to move for resentencing"); People v. Smith, 45 A.D.3d 1478, 1479, 846 N.Y.S.2d 520, 521 (4th Dep't 2007) (holding that the defendant could not be resentenced because she was eligible for parole within seven months); People v. Nolasco, 37 A.D.3d 622, 623, 831 N.Y.S.2d 197, 198 (2d Dep't 2007) (denying defendants motion for re-sentencing because he was fewer than three years from parole eligibility); People v. Parris, 35 A.D.3d 891, 892, 828 N.Y.S.2d 429, 430 (2d Dep't 2006) (holding that Chapter 643 does not apply to inmates who are three or fewer years from eligibility for parole); People v. Thomas, 35 A.D.3d 895, 896, 826 N.Y.S.2d 456, 457 (3d Dep't 2006) (holding that the two provisions of Subdivision 2 of Section 851 when read together require that in order to qualify for re-sentencing under the 2005 DLRA, a class A-II felony drug offender must not be eligible for parole within three years).

87. People v. Mills, 11 N.Y. 3d 527, 536, 901 N.E.2d 196, 202, 872 N.Y.S.2d 705, 711 (2008) (holding that a prisoner who had been denied parole four times in eight years was not eligible for re-sentencing because he was necessarily within two years of his next parole hearing).

88. *See, e.g.*, People v. Then, 47 A.D.3d 404, 405, 849 N.Y.S.2d 234, 235 (1st Dep't 2008) (stating that a prisoner must be more than three years away from becoming eligible for parole at the time of his application for re-sentencing); People v. Perez, 44 A.D.3d 418, 419, 843 N.Y.S.2d 68, 68 (1st Dep't 2007) (holding that a prisoner who was less than three years away from becoming eligible for parole *at the time of his application* was ineligible for re-sentencing); Memorandum from Al O'Connor, N.Y. State Defenders Assoc., to Chief Defenders 2–3 (Oct. 5, 2005, *revised* Oct. 24, 2005), *available at* http://www.communityalternatives.org/pdf/A-II%20%20Resentencing%20Memo%20Revised%20NYSDA.pdf

parole date. In *People v. Perez*, the Appellate Division First Department noted that, since the defendant "was less than three years from his parole eligibility date when he filed the motion," he was ineligible for re-sentencing.[89] The court looked at the date of the motion for re-sentencing to measure the time to parole, and denied it because the application was filed within three years of parole eligibility. This means that the three years should be counted from the day you file the application. Other courts in New York have followed the same procedure to determine whether prisoners were eligible for re-sentencing. Therefore, *if possible, you should make sure you file your re-sentencing application with the court more than three years before your earliest possible release date*.

Another issue under the 2005 DLRA is how to measure the three years from parole if you are serving cumulative sentences for an A-II felony along with other crimes. The government has argued that eligibility for re-sentencing should be based only on the time left in serving the A-II felony sentence. This would mean that if you have served two years of a four-year A-II sentence, but also have more than three years to serve for another sentence, you would not be eligible for re-sentencing. But the Appellate Division has not followed this argument. The First Department said that defendant's parole eligibility date was the date he would be eligible for parole on his cumulative sentence for both A-I and A-II felonies—not the date he would be eligible for parole if he was just serving his A-II felony.[90] The court stated that "[t]he pivotal measuring rod is not the time remaining on an A-II felony sentence, but the time before an inmate becomes an 'eligible inmate'"—in other words, when the inmate will actually be up for parole.[91] Therefore, you should file your application with the court more than three years before your earliest possible release date.

(ii) The Merit Time Eligibility Requirement

The second re-sentencing requirement is that you must be eligible to receive a merit time reduction of your current sentence. As with the first requirement, the re-sentencing law states this requirement indirectly. Specifically, the re-sentencing law says that you must meet "the eligibility requirements of paragraph (d) of [S]ubdivision 1 of [S]ection 803 of the correction law."[92] In order to meet the merit time requirements for the purposes of the DLRA, you:

> [M]ust be serving a sentence of one year or more, be in the Correction Department's custody as of certain periods of time, not have been convicted of certain crimes, not have committed a 'serious disciplinary infraction' or commenced a frivolous civil lawsuit or other civil proceeding against a state agency, officer or employee, and have participated in certain programs."[93]

Section 803(1)(d) of the New York Correction Law states that prisoners serving sentences for certain types of crimes are ineligible for merit time.[94] These crimes are listed below, in Subsection (1) of this Section. *If you are serving time for one of the disqualifying offenses listed below, you do not meet the merit time eligibility requirement for re-sentencing, and you may not apply for re-sentencing*.

(1) Eligibility for Merit Time Under New York Correction Law § 803(1)(d): Disqualifying Offenses

If you are serving time for certain types of offenses in addition to the A-II felony drug offense, you are not eligible for merit time under Section 803(1)(d) of the New York Correction Law, and therefore you are not eligible to apply for re-sentencing. The disqualifying offenses are:

(1) Any non-drug class A-I felony;
(2) Any violent felony offense as defined in Section 70.02 of the New York Penal Law;[95]
(3) Manslaughter in the second degree;

(last visited Apr. 11, 2012) (stating "Class A-II offenders who are within the eligibility window 'at the time of the petition' are eligible for resentencing" and imploring that "caution dictates that whenever possible a motion be filed before an inmate might otherwise be time-barred. When a deadline is imminent, a bare bones application should suffice to toll the limitations period.").

89. People v. Perez, 44 A.D.3d 418, 419, 843 N.Y.S.2d 68, 68 (1st Dep't 2007).
90. People v. Paniagua, 45 A.D.3d 98, 105, 841 N.Y.S.2d 506, 511 (1st Dep't 2007).
91. People v. Paniagua, 45 A.D.3d 98, 105, 841 N.Y.S.2d 506, 512 (1st Dep't 2007).
92. Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney).
93. People v. Paniagua, 45 A.D.3d 98, 106, 841 N.Y.S.2d 506, 513 (1st Dep't 2007).
94. N.Y. Correct. Law § 803(1)(d)(ii) (McKinney 2003 & Supp. 2012).
95. N.Y. Penal Law § 70.02 (McKinney 2009 & Supp. 2012).

(4) Vehicular manslaughter in the first or second degree;
(5) Criminally negligent homicide
(6) Any sex offense defined in Article 130 of the New York Penal Law;[96]
(7) Incest;
(8) Any sexual performance by a child offense defined in Article 263 of the New York Penal Law;[97] and
(9) Aggravated harassment of an employee by a prisoner.[98]

You may wonder whether you are eligible for re-sentencing if you were sentenced for both a disqualifying offense and a drug offense, and you have arguably finished serving the sentence for the disqualifying offense. For example, if you were sentenced to two years' imprisonment for a disqualifying offense, to be served concurrently or consecutively with a longer prison term for an A-II felony drug offense, and you have already served four years, it appears that you are no longer serving time for the disqualifying offense. It is possible that you could apply for re-sentencing, but you need to argue in your application that you are no longer serving the sentence for the disqualifying offense. This argument will likely be unsuccessful. Two recent cases indicate that a defendant whose sentence originally included a disqualifying offense will not be re-sentenced.[99] The first case is *People v. Merejildo*,[100] in which the defendant was serving a consecutive sentence of two to four years for a violent felony, and eight years to life for an A-II felony. After serving more than four years, the defendant sought re-sentencing under DLRA, and argued that he was no longer serving the disqualifying offense. But the court said that "[p]ursuant to Penal Law §70.30(1)(b), defendant's consecutive sentences are merged into a single aggregate sentence, with a term of ten years to life."[101] This meant that the court still considered the defendant to be serving for the disqualifying violent felony. Because of this, he was not eligible for re-sentencing.

The New York Appellate Division First Department made a similar decision in *People v. Quiñones* in 2008.[102] In that case, a defendant was convicted of a violent felony offense (a disqualifying offense) with a maximum sentence of seven years. He was also given a concurrent life sentence for class A-II felony violations. After serving more than seven years, Quiñones applied for re-sentencing and argued that he had finished serving for the disqualifying offense. The court disagreed and said that since his sentence was concurrent, Quiñones remained imprisoned for a sentence that included a disqualifying offense. The defendant was therefore ineligible for re-sentencing.

The decisions in *Merejildo* and *Quiñones* mean that if you were sentenced for a disqualifying offense and an A-II offense at the same time, your argument that you have finished serving the disqualifying offense will probably be unsuccessful, and you will therefore not be re-sentenced under the DLRA.

You are also probably not eligible to apply for re-sentencing if you were on parole for any one of the disqualifying offenses at the time that you were charged with the A-II felony drug offense. If this is your situation, the time owed to parole on the first sentence was probably added to the A-II felony drug sentence. This would make you ineligible for merit time and therefore ineligible for re-sentencing under the new law.[103]

You probably meet the merit time eligibility requirement if you are not serving time for any of the disqualifying offenses listed above (or listed in Section 803(1)(d)(ii) of the New York Correction Law), and if you were not on parole for any of those offenses at the time that you were charged with the A-II felony drug offense.[104] However, the judge may also look at the other restrictions on granting merit time that are included in Correction Law Section 803(1)(d). These restrictions are discussed below, in Subsection (2).

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96. N.Y. Penal Law §§ 130.00–130.96 (McKinney 2009 & Supp. 2012).
97. N.Y. Penal Law §§ 263.00–263.30 (McKinney 2008 & Supp. 2012).
98. N.Y. Correct. Law § 803(1)(d)(ii) (McKinney 2003 & Supp. 2010) (listing all of the disqualifying offenses).
99. People v. Quiñones, 49 A.D.3d 323, 324, 854 N.Y.S.2d 5, 6 (1st Dep't 2008); People v. Merejildo, 45 A.D.3d 429, 430, 846 N.Y.S.2d 52, 53 (1st Dep't 2007).
100. People v. Merejildo, 45 A.D.3d 429, 430, 846 N.Y.S.2d 52, 53 (1st Dep't 2007).
101. People v. Merejildo, 45 A.D.3d 429, 430, 846 N.Y.S.2d 52, 53 (1st Dep't 2007) (citing People v. Curley, 285 A.D.2d 274, 730 N.Y.S.2d 625 (4th Dep't 2001)).
102. People v. Quiñones, 49 A.D.3d 323, 324, 854 N.Y.S.2d 5, 6 (1st Dep't 2008).
103. *See* Memorandum from Al O'Connor, N.Y. State Defenders Assoc., to Chief Defenders, 2–4 (Oct. 5, 2005, *revised* Oct. 24, 2005), *available at* http://www.communityalternatives.org/pdf/A-II%20%20Resentencing%20Memo%20Revised%20NYSDA.pdf (last visited Apr. 11, 2012).
104. *See* Memorandum from Al O'Connor, N.Y. State Defenders Assoc., to Chief Defenders, 2–4 (Oct. 5, 2005, *revised* Oct. 24, 2005), *available at* http://www.communityalternatives.org/pdf/A-

(2) Other Restrictions on Merit Time Under New York Correction Law § 803(1)(d)

Courts have noted other restrictions that might apply to merit time allowances in re-sentencing under the DLRA, according to Section 803(1)(d). "[T]o obtain a merit time allowance a defendant must . . . not have been convicted of certain crimes, not have committed a 'serious disciplinary infraction' or commenced a frivolous civil lawsuit or other civil proceeding against a state agency, officer or employee, and have participated in certain programs."[105] This means that it is possible that a judge may decide that you are ineligible for merit time—and therefore ineligible for re-sentencing—if you have a serious disciplinary infraction on your prison record or if, while you were in prison, you filed or proceeded with a lawsuit that the court dismissed as frivolous.[106] The court expressed this view in *People v. Hill*:

> To be eligible for re-sentencing under this legislation, a defendant must . . . meet the eligibility requirement of Correction Law § 803(1) (which requires a defendant be eligible to earn 'merit time,' which means the defendant cannot also be serving another sentence for which merit time is not available, such as certain sex offenses, all violent felony offenses, any homicide, or if the defendant has a poor disciplinary record, or has been found to have filed a frivolous lawsuit).[107]

In other words, even if you are not serving time for any of the disqualifying offenses, a judge might decide that you do not meet the merit time eligibility requirement for re-sentencing because, under Correction Law § 803(1)(d)(iv), you could not be granted merit time. This Section states that "[A]llowance shall be withheld for any serious disciplinary infraction or upon a judicial determination that the person, while an inmate, commenced or continued a civil action, proceeding or claim that was found to be frivolous . . . ."[108]

However, the way most courts apply the law, the re-sentencing law only requires that you be *eligible* for merit time under Correction Law § 803(1)(d). It does not require that you actually *earned* merit time under Correction Law § 803(1)(d). Therefore, a serious disciplinary infraction or a frivolous lawsuit or legal claim on your record does not necessarily prevent you from fulfilling the merit time eligibility requirement.[109] In December 2005, the Supreme Court of New York County held, in *People v. Quiñones*, that a serious disciplinary infraction *does not* hurt eligibility for re-sentencing under the new law.[110] The Supreme Court, Appellate Division Second Department, agreed with that decision in *People v. Sanders*.[111] The court stated, "the reference in the 2005 DLRA to the 'eligibility requirements' of Correction Law Section 803(1)(d), does not preclude a defendant from whom a merit time allowance has been withheld pursuant to Correction Law § 803(1)(d)(iv), from seeking re-sentencing under the 2005 DLRA."[112] In other words, eligibility for re-

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105. People v. Paniagua, 45 A.D.3d 98, 106, 841 N.Y.S.2d 506, 513 (1st Dep't 2007).

106. *See* Memorandum from Al O'Connor, New York State Defenders Association, to Chief Defenders, 3–4 (Oct. 5, 2005, *revised* Oct. 24, 2005), *available at* http://www.communityalternatives.org/pdf/A-II%20%20Resentencing%20
Memo%20Revised%20NYSDA.pdf (last visited Apr. 11, 2012).

107. People v. Hill, 11 Misc. 3d 1053(A), 814 N.Y.S.2d 892 (Sup. Ct. Kings County 2006) (holding that a prisoner who was serving time for an A-II felony and a violent felony was ineligible for re-sentencing because he failed to meet the merit time eligibility requirement).

108. N.Y. Correct. Law § 803(1)(d)(iv) (McKinney 2003 & Supp. 2012).

109. *See* People v. Quiñones, 11 Misc. 3d 582, 597, 812 N.Y.S.2d 259, 270 (Sup. Ct. N.Y. County 2005) (holding that the merit time eligibility requirement of the A-II re-sentencing law only requires that a prisoner not be serving time for any of the disqualifying offenses listed in N.Y. Correct. Law § 803(1)(d)(ii), and not that the prisoner meet any of the other requirements for actual granting of merit time); *see also* Memorandum from Al O'Connor, N.Y. State Defenders Assoc., to Chief Defenders 4 (Oct. 5, 2005, *revised* Oct. 24, 2005) *available at*
http://www.communityalternatives.org/pdf/A-II%20%20Resentencing%20Memo%20Revised%20NYSDA.pdf (last visited Apr. 11, 2012). Note that before the decision in *Quiñones*, the New York Department of Corrections had taken the position that prisoners with serious disciplinary infractions and prisoners found to have filed frivolous lawsuits while in prison do not meet the merit time eligibility requirement. Memorandum from Anthony J. Annucci, Deputy Comm'r and Counsel for N.Y. Dep't of Corr. Servs., to Criminal Justice Practitioners 2 (Sept. 20, 2005) (on file with the *JLM*).

110. People v. Quiñones, 11 Misc. 3d 582, 598, 812 N.Y.S.2d 259, 271 (Sup. Ct. N.Y. County 2005).

111. People v. Sanders, 36 A.D.3d 944, 829 N.Y.S.2d 187 (2d Dep't 2007).

112. People v. Sanders, 36 A.D.3d 944, 946, 829 N.Y.S.2d 187, 188 (2d Dep't 2007).

sentencing under the Drug Reforms laws is different from eligibility under Section 803(1)(d) as a whole. Under the DLRA the only requirement that matters for merit time eligibility is that you are not serving time for a disqualifying offense.

However, the Supreme Court, Appellate Division First Department and the Supreme Court, Appellate Division Third Department both disagree with the Second Department. In *People v. Paniagua*, the First Department court held that the defendant was ineligible for merit time because he committed two serious disciplinary infractions. The court noted that the regulations of the Department of Correctional Services define a 'serious disciplinary infraction' to include "[actions resulting in the] 'receipt of disciplinary sanctions' that entail '60 or more days of SHU [Special Housing Unit] and/or keeplock time' [or] the 'receipt of any recommended loss of good time as a disciplinary sanction.'"[113] The defendant in *People v. Paniagua* argued that since he had not committed a disqualifying offense, such as a violent felony, he had met the eligibility requirements of "earning" a merit time allowance. He argued that this was all that he needed to meet the merit time requirement for re-sentencing. The court here took a stricter view. They held that the defendant must have both *earned* and *been granted* merit time allowance in order to meet the requirement. The court stated:

> Thus, the requirements set forth in § 803(1)(d)(iv), no less than those in § 803(1)(d)(i) and (ii), constitute the "eligibility" requirements for the grant of merit time. Nothing in the 2005 DLRA or § 803(1)(d) supports defendant's argument that the phrase "eligibility requirements" refers only to the requirements for earning a merit time allowance, and not also to those for being granted one.[114]

In 2008, the Third Department decided *People v. Williams*, finding that a prisoner whose record showed serious disciplinary infractions during his incarceration was not eligible for re-sentencing because he failed to meet the merit time eligibility requirement. The court used the same reasoning as the First Department in *People v. Paniagua*. The Third Department stated:

> Here, it is undisputed that defendant has been found to have committed numerous disciplinary infractions while incarcerated which resulted in sanctions being imposed that exceeded 60 days in the special housing unit and/or keeplock. As a result of these infractions, defendant is not eligible for a merit time allowance under the provisions of Correction Law § 803(1)(d) and, as such, is not eligible for resentencing under DLRA 2005.[115]

These cases show that the departments disagree about whether eligibility for merit time requires 803(1)(d)(iv) (freedom from serious disciplinary infractions or frivolous lawsuits) in addition to 803(1)(d)(ii) (freedom from a disqualifying offense). Courts in the First and Third Departments may find that you are not eligible for re-sentencing if you have committed a "serious disciplinary infraction."[116] You would have to argue, as the Second Department reasoned in *People v. Sanders*, that Section 803(1)(d)(i) and (ii) are the only requirements for being "eligible for merit time."[117]

Another thing to note is that you probably do not have to meet the work or program assignment requirement described in New York Correction Law Section 803(1)(d)(iv). This law, effective until September 2013, also states that you *may* be granted merit time when you successfully participate in the work and treatment program assigned pursuant to New York Correction Law Section 805 *and* you successfully obtain one of the following: your general equivalency diploma (GED), an alcohol and substance abuse treatment certificate, a vocational trade certificate after six months of vocational programming, or completion of 400

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113. People v. Paniagua, 45 A.D.3d 98, 107, 841 N.Y.S.2d 506, 513–14 (1st Dep't 2007) (internal citations omitted); N.Y. Comp. Codes R. & Regs. tit. 7, § 280.2(b)(3)–(4) (2006).

114. People v. Paniagua, 45 A.D.3d 98, 108, 841 N.Y.S.2d 506, 514 (1st Dep't 2007).

115. People v. Williams, 48 A.D.3d 858, 859–60, 850 N.Y.S. 2d 717, 718 (3d Dep't 2008) (internal citation omitted).

116. *See* People v. Williams, 48 A.D.3d 858, 859–60, 850 N.Y.S. 2d 717, 718 (3d Dep't 2008) (concluding that a prisoner who committed serious disciplinary infractions was ineligible for merit time and therefore could not apply for resentencing under DLRA); People v. Paniagua, 45 A.D.3d 98, 108, 841 N.Y.S.2d 506, 514 (1st Dep't 2007) (finding a prisoner ineligible for merit time based on two serious disciplinary infractions while incarcerated); *see also* N.Y. Correct. Law § 803(1)(a) (McKinney 2003 & Supp. 2012) ("Such allowances may be granted for good behavior and efficient and willing performance of duties assigned or progress and achievement in an assigned treatment program, and may be withheld, forfeited or canceled in whole or in part for bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned."); N.Y. Comp. Codes R. & Regs. tit. 7, § 280.2(b) (2006) (discussing reasons for ineligibility for merit time).

117. People v. Sanders, 36 A.D.3d 944, 946, 829 N.Y.S.2d 187, 188 (2d Dep't 2007).

hours of community service as part of a community work crew.[118] The court in *Paniagua* suggests that participation in these programs is included under the eligibility requirements of the DLRA.[119] But most courts do not follow this. Instead, they take the position of the Second Department in *People v. Sanders,* which does not require participation in the programs listed above. Therefore, you probably do not need to participate in any of these programs in order to be considered eligible for merit time.[120]

(a) If You Are Serving a Sentence for a Class B Felony Drug Conviction

If you are serving an indeterminate sentence with a maximum term of more than three years for a Class B felony drug offense committed before January 13, 2005, you may apply for re-sentencing.[121] As part of the re-sentencing application, you may also ask to be re-sentenced for Class C, D, or E felony drug offenses. However, you must have been sentenced for the Class C, D, or E felony drug offense at the same time or in the same court order as the Class B felony drug offense.[122] The applications for resentencing under this provision are governed by the provisions of the 2004 DLRA for A-II felony drug offenses. When deciding whether you are eligible for re-sentencing, courts will consider your disciplinary history and your participation or willingness to participate in treatment or other programming while serving your sentence.[123]

You are ineligible to apply for re-sentencing under the 2009 DLRA if you committed what is called an "exclusion offense."[124] You committed an exclusion offense if you were convicted within the preceding ten years of a violent felony[125] or of a felony that makes you ineligible for merit-time allowance under Section

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118. N.Y. Correct. Law § 803(1)(d)(iv) (McKinney 2003 & Supp. 2012); *see* N.Y. Correct. Law § 805 (McKinney 2003 & Supp. 2012) (discussing work and treatment program).

119. People v. Paniagua, 45 A.D.3d 98, 106, 108, 841 N.Y.S.2d 506, 513, 514 (1st Dep't 2007).

120. *See, e.g.*, People v. Quiñones, 11 Misc.3d 582, 595–96, 812 N.Y.S.2d 259, 269 (Sup. Ct. N.Y. County 2005); *see also* State of N.Y. Comm. on Rules, Introducer's Memorandum in Support, S. 5880, Reg. Sess., at 2 (2005) ("The law is intended to apply to those class A-II felony controlled substance offenders who are eligible to earn merit time, but is not intended to require that they have earned the merit time allowance before they may apply for resentencing pursuant to the provisions of this bill.").

121. N.Y. Crim. Proc. Law § 440.46.1 (McKinney Supp. 2012).

122. N.Y. Crim. Proc. Law § 440.46.2 (McKinney Supp. 2012).

123. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012).

124. N.Y. Crim. Proc. Law § 440.46.5 (McKinney Supp. 2012).

125. These include:

(1) Class B violent felony offenses, which are:
   a. Attempted murder in the second degree
   b. Attempted kidnapping in the first degree
   c. Attempted arson in the first degree
   d. Manslaughter in the first degree
   e. Aggravated manslaughter in the first degree
   f. Rape in the first degree
   g. Criminal sexual act in the first degree
   h. Aggravated sexual abuse in the first degree
   i. Course of sexual conduct against a child in the first degree
   j. Assault in the first degree
   k. Kidnapping in the second degree
   l. Burglary in the first degree
   m. Arson in the second degree
   n. Robbery in the first degree
   o. Incest in the first degree
   p. Criminal possession of a weapon in the first degree
   q. Criminal use of a firearm in the first degree
   r. Criminal sale of a firearm in the first degree
   s. Aggravated assault upon a police officer or a peace officer
   t. Gang assault in the first degree
   u. Intimidating a victim or witness in the first degree
   v. Hindering prosecution of terrorism in the first degree
   w. Criminal possession of a chemical weapon or biological weapon in the second degree
   x. Criminal use of a chemical weapon or biological weapon in the third degree

803(1)(d)(ii) (as discussed above), or if the court ever found you to be a second-time violent felony offender or a persistent violent felony offender.[126]

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(2) Class C violent felony offenses, which are:
   a. Attempts to commit any of the class B felonies specified above
   b. Aggravated criminally negligent homicide
   c. Aggravated manslaughter in the second degree
   d. Aggravated sexual abuse in the second degree
   e. Assault on a peace officer, police officer, fireman or emergency medical services professional
   f. Assault on a judge
   g. Gang assault in the second degree
   h. Strangulation in the first degree
   i. Burglary in the second degree
   j. Robbery in the second degree
   k. Criminal possession of a weapon in the second degree
   l. Criminal use of a firearm in the second degree
   m. Criminal sale of a firearm in the second degree
   n. Criminal sale of a firearm with the aid of a minor
   o. Soliciting or providing support for an act of terrorism in the first degree
   p. Hindering prosecution of terrorism in the second degree
   q. Criminal possession of a chemical weapon or biological weapon in the third degree
(3) Class D violent felony offenses, which are:
   a. Attempts to commit any of the Class C felonies described above
   b. Reckless assault of a child
   c. Assault in the second degree
   d. Menacing a police officer or peace officer
   e. Stalking in the first degree
   f. Strangulation in the second degree
   g. Rape in the second degree
   h. Criminal sexual act in the second degree
   i. Sexual abuse in the first degree
   j. Course of sexual conduct against a child in the second degree
   k. Aggravated sexual abuse in the third degree
   l. Facilitating a sex offense with a controlled substance
   m. Criminal possession of a weapon in the third degree
   n. Criminal sale of a firearm in the third degree
   o. Intimidating a victim or witness in the second degree
   p. Soliciting or providing support for an act of terrorism in the second degree
   q. Making a terroristic threat
   r. Falsely reporting an incident in the first degree
   s. Placing a false bomb or hazardous substance in the first degree
   t. Placing a false bomb or hazardous substance in a sports stadium or arena, mass transportation facility or enclosed shopping mall
   u. Aggravated unpermitted use of indoor pyrotechnics in the first degree
(4) Class E violent felony offenses, which are:
   a. Attempts to commit various forms of criminal possession of a weapon in the third degree
   b. Persistent sexual abuse
   c. Aggravated sexual abuse in the fourth degree
   d. Falsely reporting an incident in the second degree
   e. Placing a false bomb or hazardous substance in the second degree.

N.Y. Penal Law § 70.02(a)–(d) (McKinney 2009 & Supp. 2012).

126. N.Y. Penal Law § 440.46.5 (McKinney 2009 & Supp. 2012); *see also* Memorandum from Al O'Connor, N.Y. State Defenders Assoc. to Criminal Defense Attorneys 3–4 (Apr. 8, 2009), *available at* http://www.communityalternatives.org/pdf/A-II%20%20Resentencing%20Memo%20Revised%20NYSDA.pdf (last visited Apr. 11, 2012).

(iii) The Meaning of "In Custody"

Courts have interpreted these eligibility requirements as stipulating that an applicant must be in the custody of the Department of Corrective Services (DOCS) at the time of the court's decision on re-sentencing, rather than at the time the application was filed.[127] In *People v. Tavarez*, for example, the court explicitly applied appellate court precedent under the 2004 and 2005 DLRAs finding defendants ineligible for re-sentencing once released on parole, even if they were subsequently returned to Department of Corrective Services custody.[128] The court held that this precedent applied to the 2009 DLRA to hold that "the fact that defendant was in NYSDOCS custody when the motion was filed … does not determine his eligibility for re-sentencing at the time the motion is considered." This means that a defendant released from the DOCS custody at the time the motion is considered ineligible to be re-sentenced under the 2009 DLRA.[129] Additionally, in *People v. Figueroa*, the court explicitly stated that "[o]nce a defendant is released to parole and is thus no longer incarcerated, even if reincarcerated on the original sentence for a parole violation, the defendant is no longer entitled to the ameliorative, or relieving, provisions of the Drug Law Reform Acts."[130]

Two court decisions, however, have found a defendant eligible for re-sentencing even while out of custody at the time of the court's consideration of the application, provided that the application was filed when the defendant was still in custody. In *People v. Cruz*, the court approved the defendant's re-sentencing application and imposed a determinate sentence of two years, with one year of post-release supervision.[131] The defendant originally pled guilty to a felony drug offense in 2004 and failed to complete the mandated court-monitored treatment program. He was was sentenced to a jail alternative indeterminate sentence of two to six years in 2008. In 2009, the defendant filed a motion for re-sentencing under the 2009 DLRA, but in November of that year, he was released on parole.[132] The court was persuaded by the fact that defendant was a first time non-violent felony offender at the time of his original sentence, as well as the fact that the state opposed the application only on the grounds that he was presently at liberty in the community.[133]

In *People v. Sanabria*, the court found that a defendant released on parole several days after filing his application for re-sentencing was not ineligible for re-sentencing. The court stated that this was because the

127. *See, e.g.*, People v. Villalona, No. 02455, slip op. at 1 (Sup. Ct. Bronx County May 3, 2010) ("Because the defendant is no longer in the custody of the Department of Correctional Services, he is . . . ineligible for re-sentencing.") (citing People v. Rodriguez, 68 A.D.3d 676, 892 N.Y.S.2d 356 (1st Dept. 2009), a case pertaining to the 2005 DLRA); People v. Sherwood, Nos. 6512/2000, 678/2001, slip op. at 3 (Sup. Ct. N.Y. County Apr. 7, 2010) (following lower court precedent of applying People v. Mills, 11 N.Y.3d 527, 536—537, 901 N.E.2d 196, 202—203, 872 N.Y.S.2d 705, 711—712 (2008), to the 2009 DLRA and finding that "[s]ince a *re-incarcerated* parole violator is not considered to be 'in custody' for re-sentencing purposes, then *a fortiori*, a parolee who is at liberty is not 'in custody' for such purpose."); People v. Wiggins, No. 10727/04, slip op. at 2 (Sup. Ct. Queens County Mar. 30, 2010) (holding that defendant arrested for felony drug offense in 2004 and granted release to parole supervision in January 2010 was ineligible for re-sentencing under the 2009 DLRA because he was no longer in custody at the time of the court's consideration), *rev'd*, 84 A.D.3d 1279, 923 N.Y.S.2d 349 (2d Dept. 2011); People v. Suriel, No. 10325, slip op. at 3–4 (Sup. Ct. Queens County Nov. 13, 2009) (holding that defendant released from DOCS custody and deported by Immigration and Customs Enforcement officials after applying for re-sentencing was no longer eligible for re-sentencing because not *currently* in DOCS custody), *available at* http://www.communityalternatives.org/pdf/People-v-Suriel.pdf (last visited September 30, 2012).

128. People v. Tavarez, Nos. 5241/99, 5261/99 & 1824/00, slip op. at 3—4 (Sup. Ct. Bronx County Mar. 15, 2010) (citing People v. Mills, 11 N.Y.3d 527, 536–537, 901 N.E.2d 196, 202–203, 872 N.Y.S.2d 705 (2008) and People v. Rodriguez, 68 A.D.3d 676, 892 N.Y.S.2d 356 (1st Dept. 2009)), *available at* http://www.communityalternatives.org/pdf/People-v-Tavarez-BronxCo.pdf (last visited September 30, 2012).

129. People v. Tavarez, Nos. 5241/99, 5261/99, 1824/00, slip op. at 4–5 (Sup. Ct. Bronx County Mar. 15, 2010), *available at* http://www.communityalternatives.org/pdf/People-v-Tavarez-BronxCo.pdf (last visited September 30, 2012).

130. People v. Figueroa, 27 Misc. 3d 1205(A), 910 N.Y.S. 2d 407, No. 50557, slip op. at 2 (Sup. Ct. N.Y. County Mar. 29, 2010) (applying appellate court precedent from 2004 and 2005 DLRAs to defendant's case under 2009 DLRA), *available at* http://law.justia.com/cases/new-york/other-courts/2010/2010-50557.html

131. People v. Cruz, No. 2939, slip op. at 1 (Sup. Ct. Bronx County Jan. 22, 2010), *aff'd*, 76 A.D. 3d 715, 907 N.Y.S. 734 (2d Dept. 2010)

132. People v. Cruz, No. 2939, slip op. at 1 (Sup. Ct. Bronx County Jan. 22, 2010).

133. People v. Cruz, No. 2939, slip op. at 1–2 (Sup. Ct. Bronx County Jan. 22, 2010).

"in custody" provision of the 2009 DLRA meant that a person had to be in DOCS custody on the day of filing the application.[134]

Regardless of the decisions of the court in *People v. Cruz* and *People v. Sanabria*, the rule in most New York courts appears to be that the defendant must be in DOCS custody at the time the court considers the motion for re-sentencing. Thus, petitioners filing for re-sentencing under the 2009 DLRA are probably not eligible if they are out of custody at the time the court considers the motion.

(iv) The Meaning of the Ten-Year "Look Back"

The majority of New York courts have interpreted the ten-year "look back" for determining exclusion offenses to mean ten years from the date of *filing* the re-sentencing application, rather than ten years from the present felony drug offense or the effective date of the statute.[135] In *People v. Danton*, for example, the

134. People v. Sanabria, No. 2316—92, slip op. at 2 (Sup. Ct. N.Y. County Mar. 29, 2010), *available at* http://www.communityalternatives.org/pdf/People-v-Sanabria.pdf (last visited September 30, 2012).

135. *See* People v. Arroyo, 28 Misc.3d 1205(A), No. 4776-2003, slip op. at 3–5 (Sup. Ct. Bronx County June 25, 2010), *available at* http://www.communityalternatives.org/pdf/People-v-Arroyo.pdf (last visited September 30, 2012) (basing its decision that the ten-year look back should be measured from the date of the re-sentencing application on the ameliorative purpose of the 2009 DLRA, the absence of any language similar to that in other Penal Law provisions specifying the date of commission of the instant felony as the starting point for the 10-year look back, and similar decisions by other lower courts); People v. Lee, No. 01408-2000, slip op. at 2 (N.Y. Sup. Ct. June 17, 2010), *aff'd*, 88 A.D.3d 626, 931 N.Y.S.2d 502 (1st Dept. 2011) (following "the weight of authority at the trial court level . . . that the preceding ten years [in the 2009 DLRA] refers to the ten year period immediately preceding the filing of the motion for resentence"); People v. Walltower, 27 Misc. 3d 1205(A), 910 N.Y.S.2d 407, No. N10539/96, slip op. at 2 (Sup. Ct. Queens County Apr. 6, 2010), *available at* http://nycourts.law.com/cpma/NYDOI.asp?CID=124272 (last visited September 30, 2012) (holding that "in light of both the dearth of legislative guidance and the ameliorative purposes of the 2009 DLRA, the natural meaning of the term 'within the preceding ten years' . . . is the ten-year period immediately preceding the date of filing of the application for resentencing"); People v. Lashley, No. N10596/04, slip op. at 4 (Sup. Ct. Queens County Apr. 5, 2010), *available at* http://www.communityalternatives.org/pdf/People-v-Lashley.pdf (last visited September 30, 2012) (analogizing to interpretation of "other recidivist sentencing statutes" to find that "the plain meaning of the phrase 'within the preceding ten years,' unadorned as it is by any limiting language, appears intended to run from the time immediately preceding the [re-sentencing] application"); People v. Estela, Nos. 720/2004 & 4336/2004, slip op. at 4 (Sup. Ct. N.Y. County Mar. 24, 2010), *available at* http://www.communityalternatives.org/pdf/People-v-Estela-NYCo.pdf (last visited September 30, 2012) (holding that "the relevant point in time from which the statutory 'preceding ten years' is to be measured is the date of the filing of the petition for re-sentence"); People v. Austin, No. 6738/02, slip op. at 4 (Sup. Ct. N.Y. County Mar. 22, 2010), *available at* http://www.communityalternatives.org/pdf/People-v-Austin.pdf (last visited September 30, 2012) (using the interpretation of "[n]umerous trial level courts" to find that the 10-year look back means "ten years from the date the application is filed"); People v. Murray, No. 121/03, slip op. at 3 (Sup. Ct. Kings County Mar. 22, 2010) (citing People v. Danton to hold that the 10-year look back "refer[s] to the ten years immediately preceding the application for resentence") (internal citations omitted), *available at* http://www.communityalternatives.org/pdf/People-v-Murray.pdf (last visited September 30, 2012); People v. Loftin, 26 Misc. 3d 1229(A), 907 N.Y.S.2d 439, No. 2003-0035-1, slip op. at 3 (N.Y. Sup. Ct. Mar. 2, 2010) (citing People v. Roman to "agree with an increasing number of other trial courts who have ruled that the statute, by its plain meaning, contemplates eligibility determinations from the present date . . . and that the most natural construction of the law is to read the reference point as the date of a resentencing application") (internal citations omitted); People v. Stanley, No. 3242-04, slip op. at 5–6 (Sup. Ct. Queens County Mar. 1, 2010) (using the court's opinion in People v. Brown to hold that the 10-year look back is measured from the date of the re-sentencing application); People v. Brown, No. 4097/02, slip op. at 5–7 (Sup. Ct. N.Y. County Jan. 4, 2010) (citing People v. Roman to find that the 10 year period is "measured from the date of a violent felony conviction to the date of a resentencing application); People v. Roman, 26 Misc. 3d 784, 786, 889 N.Y.S.2d 922, 923 (Sup. Ct. Bronx County 2009) (holding that "the statute by its plain meaning contemplates eligibility determinations from the present date," especially in light of the clear purpose of the 2004, 2005, and 2009 DLRAs to "ameliorate the lengthy sentences given to defendants for selling or possessing a small amount of drugs"); *see also* Ctr. for Cmty. Alternatives, Resentencing Eligibility

court found that, in light of the ameliorative (relieving) purpose of both the 2004 and 2005 DLRAs, as well as the similarly corrective provisions of the 2009 DLRA, the ten-year look back provision ought to mean the ten years immediately preceding the date of filing the re-sentencing application.[136]

But three court decisions found that the ten-year "look back" period should be measured from the commission of the present drug offense for which the defendant has been sentenced. In *People v. Jimenez*, the court found the defendant was not eligible for re-sentencing because the time between the commission of the present drug offense and the date of the commission of the exclusion offense was about six years, meeting the ten-year look back stipulation of the 2009 DLRA.[137] In *People v. Turner*, the court similarly found the defendant ineligible based on an exclusion offense committed six years, five months and eleven days before the commission of the first of the present drug offenses.[138] Finally, in *People v. Wallace*, the court found the defendant ineligible for re-sentencing because he had a previous violent felony conviction, "which was committed within ten years prior to the date of the original sentencing date, with appropriate tolling."[139]

Despite these three decisions, the general outcome in the New York trial courts is that the ten-year look back is measured from the date of the re-sentencing application.[140] No appellate court has spoken on the matter to date.

(b) Conclusion

To sum up, you may apply for re-sentencing if, (1) you are serving a sentence for an A-I felony drug offense and you were sentenced under the old law, (2) you are serving a sentence for an A-II felony drug offense, you were sentenced under the old law, and you meet the time to parole eligibility and merit time eligibility requirements described above, or (3) you are serving a sentence for a Class B felony drug offense, you were sentenced under the old law, and you are not serving time for an "exclusion offense," meaning you were not convicted within the ten years preceding the re-sentencing application of a violent felony offense, an offense that makes you ineligible for merit time under Section 803(1)(d)(ii), a second violent felony offense, or a persistent violent felony offense. Sections 3 and 4 below will describe what happens if you apply for re-sentencing, and how to apply.

3. Re-Sentencing: What Happens if You Apply?

(c) The Re-Sentencing Process

The re-sentencing process is the same for A-I, A-II, and Class B felony drug offenses. When you apply, you should send your application to the court in which you were convicted, and you must also send a copy of your application to the District Attorney's office that prosecuted your conviction.[141] The application will be decided by the judge that gave you your original sentence if that judge still works in the same court.[142] Otherwise, the application will be decided by different judge in that court, chosen at random.[143] Or, if the

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(2009): Calculating the 10 Year Look Back Simplified 1–2, *available at* http://www.communityalternatives.org/pdf/ClassBDrugOffense-10YearLookBack.pdf (last visited Apr. 11, 2012).

136. People v. Danton, 27 Misc. 3d 638, 641–49, 895 N.Y.S.2d 669, 672–78 (Sup. Ct. N.Y. County 2010) ("[V]iewing the re-sentencing provision generally, and its look-back provision particularly, in the context of the spirit and purpose underlying the legislation as a whole, it is appropriate to resolve any ambiguity in favor of the more ameliorative, rather than the more punitive, construction").

137. People v. Jimenez, No. 2004-0073-1 (Sup. Ct. Onondaga County Dec. 9, 2009).

138. People v. Turner, Nos. 2004-1159-1 & 2004-1084-1, slip op. at 3 (Sup. Ct. Onondaga County Dec. 9, 2009).

139. People v. Wallace, No. 0763/92, slip op. at 2 (N.Y. Sup. Ct Monroe County. May 17, 2010).

140. See footnote 130, above, for a list of many of these cases.

141. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474 (McKinney).

142. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

143. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474 (McKinney).

original judge has moved to another court that has jurisdiction over your case, and if you and the District Attorney both agree, your application may be sent to the original judge at the new court.[144]

(d) How the Judge Will Make a Decision

If the judge finds that you meet the requirements for applying for re-sentencing, described in Part B above, the judge may consider any facts or circumstances that relate to whether you should be re-sentenced, including your prison record.[145] For Class B felony drug offenders, the judge is also instructed to consider your "participation in or willingness to participate in treatment or other programming while incarcerated" and your disciplinary history, though an inability to participate in such a program won't count against you when making the determination.[146] It is up to you to give the facts and circumstances that you want the judge to consider.[147] Similarly, the District Attorney may submit the facts and circumstances that the prosecutor wants the judge to consider.[148] The judge may also consider your institutional record of confinement.[149] Furthermore, the judge is only allowed to consider information regarding your re-sentencing. The judge is not allowed to consider information about whether you were correctly charged and convicted in the first place.[150]

If you are eligible to apply for re-sentencing, you have a right to have an attorney represent you on your application.[151] If you cannot pay for an attorney, you have a right to have one appointed by the court.[152] Part D of this Chapter, "How to Apply for Re-Sentencing," explains how to get an attorney appointed. You also have a right to a hearing on your re-sentencing application and a right to be present at that hearing.[153] The court may also order a hearing to determine whether you are actually eligible to apply for re-sentencing. The court may also order a hearing to decide any relevant factual issues that are in dispute.[154]

The judge will review the information submitted by you and the District Attorney and hold any necessary hearings before reaching a decision. If the judge decides to grant your application, he must choose

144. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

145. Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

146. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012).

147. In other words, it is up to you to convince the judge that you deserve to be re-sentenced. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

148. In other words, the District Attorney may try to convince the judge that you do *not* deserve to be re-sentenced. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

149. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

150. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

151. N.Y. Crim. Proc. Law § 440.46.4 (McKinney Supp. 2012) (citing N.Y. County Law §§ 717.1, 722.4 (McKinney 2004 & Supp. 2012)); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581–82 (McKinney) (citing N.Y. County Law §§ 717.1, 722.4 (McKinney 2004 & Supp. 2012)); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney) (citing N.Y. County Law §§ 717.1, 722.4 (McKinney 2004 & Supp. 2012)).

152. N.Y. Crim. Proc. Law § 440.46.4 (McKinney Supp. 2012) (citing N.Y. County Law §§ 717.1, 722.4 (McKinney 2004 & Supp. 2012)); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581–82 (McKinney) (citing N.Y. County Law §§ 717.1, 722.4 (McKinney 2004 & Supp. 2012)); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney) (citing N.Y. County Law §§ 717.1, 722.4 (McKinney 2004 & Supp. 2012)).

153. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

154. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

a new sentence. The judge must choose the new sentence from the current sentencing ranges, and tell you what that sentence is.[155] You will then have a choice of accepting the suggested new sentence, withdrawing your application, or appealing the suggested new sentence.[156] If you withdraw your application, you will keep serving your original sentence. If you do not take any action, the judge will vacate your original sentence and impose the new sentence.[157] All of the time you have served toward your old sentence will be counted towards your new sentence.[158] Whether the judge grants or denies your application, he must write an opinion explaining his findings of fact and legal reasoning.[159]

The success or failure of achieving re-sentencing often turns on whether "substantial justice dictates that the application should be denied." The judge is not supposed to have discretion beyond applying the law (for example, meeting the time to parole requirements, the merit time eligibility requirements, the ten-year look back) in determining whether a defendant is eligible for re-sentencing. The judge does have some discretion, however, in determining what substantial justice dictates. For example, courts have previously denied re-sentencing because of substantial justice in cases where the defendant is a high-level drug offender,[160] where the drug trafficking operation that the defendant participated in was very extensive,[161] where the amount of drugs the defendant was convicted for was high,[162] where the defendant had disciplinary infractions while in prison and a long prior criminal history,[163] and where the defendant showed no remorse for his crime and continued to deny guilt after pleading guilty.[164]

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155. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

156. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581–82 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

157. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

158. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581–82 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

159. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

160. People v. Morales, 46 A.D.3d 1395, 1396, 848 N.Y.S.2d 486, 487 (4th Dep't 2007) (affirming the lower court's denial of re-sentencing application, under the "substantial justice" provision, because defendant's conviction involved a large amount of cocaine and defendant was therefore not a "low level offender"); People v. Montoya, 45 A.D.3d 496, 496, 847 N.Y.S.2d 41, 41 (1st Dep't 2007) (holding that "substantial justice" required denial of re-sentencing to a defendant who was a high-level participant in an international narcotics distribution ring); People v. Perez, No. 5450/03, slip op. at 9–11 (Sup. Ct. N.Y. County Mar. 4, 2010) (denying re-sentencing application as a result of a long criminal record with convictions that were "not a single sale for a couple of dollars," but which included violent felony offenses and several severe infractions while in prison), *available at* http://www.communityalternatives.org/pdf/People-v-Perez-NYCo.pdf (last visited September 30, 2012).

161. People v. Montoya, 45 A.D.3d 496, 496, 847 N.Y.S.2d 41, 41 (1st Dep't 2007) (holding that "substantial justice" required denial of re-sentencing to a defendant who was a high-level participant in an international narcotics distribution ring); People v. Arana, 45 A.D.3d 311, 311, 844 N.Y.S.2d 696, 696–97 (1st Dep't 2007) (affirming lower court's denial of defendant's application for re-sentencing based on "substantial justice," since defendant had been a participant in "a very extensive drug trafficking enterprise"); People v. Estela, Nos 720/2004 & 4336/2004, slip op. at 4–5 (Sup. Ct. N.Y. County Mar. 24, 2010) (denying defendant's re-sentencing application because of "[t]he defendant's history [as] one of a drug seller, not an addict," given the fact that on one arrest "he was in possession of thirty-seven glassines of heroin and over one thousand dollars, and was observed selling four additional bags" and was later arrested "in possession of 200 glassines" while on parole).

162. People v. Montoya, 45 A.D.3d 496, 496, 847 N.Y.S.2d 41, 41 (1st Dep't 2007) (denying re-sentencing for defendant who was "a high-level participant in an international narcotics distribution ring" and was arrested in possession of 50 kilograms of cocaine).

163. People v. Rivers, 43 A.D.3d 1247, 1248, 842 N.Y.S.2d 611, 612 (3d Dep't 2007) (denying defendant's application for re-sentencing based on defendant's number of disciplinary violations while incarcerated and lengthy criminal record predating the conviction, even though defendant had achieved significant educational and vocational accomplishments while incarcerated); People v. Paniagua, 45 A.D.3d

Finally, you may also appeal a proposed, but not yet imposed, new sentence on the ground that it is harsh or excessive.[165] If you do so, you may still decide to withdraw your application after the appeal is decided and keep serving your original sentence.[166]

(e) Sentences: What Sentence Could You Receive?

While felony drug sentences imposed under the old law are indeterminate, the new sentencing laws require determinate sentences for drug felonies.[167] If you are re-sentenced, you will be given a determinate sentence.

A determinate sentence is a sentence for a fixed amount of time (eight years, for example). Under current law, you can receive good time or merit time reductions of a determinate sentence imposed for a drug offense.[168] These reductions are calculated and granted by the Department of Correctional Services. However, there is no parole from a determinate sentence, so the Parole Board has no say in when you are released.

An indeterminate sentence consists of two terms: a minimum and a maximum (for example, five to ten years). The minimum term must be at least one year. It is the amount of time you must serve before you can become eligible for parole. The maximum term must be at least three years and can be as much as life imprisonment. The maximum term is the amount of time you will have to spend in prison if there are no reductions made to your sentence and you are not paroled. Many prisoners serving indeterminate sentences for non-violent offenses can receive reductions for good time or merit time as well as parole.[169] This means that both the Department of Correctional Services and the Parole Board may have a say in when you will be released.

The new determinate sentencing ranges for A-I, A-II, and Class B felony drug offenses, effective January 13, 2005, are:

If Your Class A-I Drug Offense Is Your:	Determinate Sentence Range[170]
First Felony Offense	Between 8 and 20 years

98, 108–09, 841 N.Y.S.2d 506, 515 (1st Dep't 2007) ("An inmate's . . . repeated commission of serious acts of insubordination while incarcerated[] can only be viewed adversely in considering his likelihood of re-adjusting to life outside of prison."); People v. Vega 40 A.D.3d 1020, 1020, 836 N.Y.S.2d 685, 686 (2d Dep't 2007) (denying defendant's application for re-sentencing after considering that defendant had a criminal history that included convictions for other controlled substance offenses and second-degree murder and that defendant's prison disciplinary record was not good); People v. Sanders, 36 A.D.3d 944, 946–47, 829 N.Y.S.2d 187, 189 (2d Dep't 2007) (denying defendant's application for re-sentencing after considering that defendant committed disciplinary violation, for which he was confined to a special housing unit for at least 60 days after only 11 months in prison); People v. Walltower, No. N10539/96, slip op. at 8 (Sup. Ct. Queens County Apr. 6, 2010) (denying defendant's application for re-sentencing under 2009 DLRA because of his "poor inmate disciplinary record, consisting of 32 infractions, 21 of which are of the more serious tier 3 level," as well as his "violent felony conviction").

164. People v. Rivers, 43 A.D.3d 1247, 1248, 842 N.Y.S.2d 611, 612 (3d Dep't 2007) (denying defendant's application for re-sentencing and noting that defendant did not freely admit guilt for either his criminal acts or his disciplinary violations); People v. Sanders, 36 A.D.3d 944, 946–47, 829 N.Y.S.2d 187, 189 (2d Dep't 2007) (noting that defendant showed no remorse and continued to deny his guilt of the crime for which he was convicted, even though he had plead guilty, at hearing on defendant's application for re-sentencing); People v. Rodriguez, No. 254/98, slip op. at 10–11 (Sup. Ct. N.Y. County May 13, 2010) (noting that defendant had absconded prior to sentencing in two cases and subsequently was convicted for another drug felony).

165. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581–82 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

166. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581–82 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

167. N.Y. Penal Law §§ 70.70–70.71 (McKinney 2009 & Supp. 2012).

168. N.Y. Correct. Law §§ 803–806 (McKinney 2003 & Supp. 2012).

169. *See* N.Y. Correct. Law §§ 803–806 (McKinney 2003 & Supp. 2012).

170. N.Y. Penal Law § 70.71 (McKinney 2009 & Supp. 2012).

Second Felony Offense (Prior Felony = Non-Violent)	Between 12 and 24 years
Second Felony Offense (Prior Felony = Violent)	Between 15 and 30 years

If Your Class A-II Drug Offense Is Your:	Determinate Sentence Range[171]
First Felony Offense	Between 3 and 10 years
Second Felony Offense (Prior Felony = Non-Violent)	Between 6 and 14 years
Second Felony Offense (Prior Felony = Violent)	Between 8 and 17 years

If Your Class B Drug Offense Is Your:	Determinate Sentence Range[172]
First Felony Offense	Between 1 and 9 years
Second Felony Offense (Prior Felony = Non-Violent)	Between 2 and 12 years
Second Felony Offense (Prior Felony = Violent)	Between 6 and 15 years

Each of these determinate sentences includes a five-year period of post-release supervision.[173]

If you are re-sentenced, you will receive a specific term of imprisonment. The term will fall *within* the appropriate range shown in the tables above. Any time you have already served under your original sentence will be subtracted from the time you will have to serve under your new sentence. After your release, you will be subject to a five-year period of supervision.

When deciding whether to apply for or accept a new sentence, you will want to compare your earliest likely release date under your old sentence with your earliest likely release date under your new sentence. Keep in mind that, depending on your prison record, you may or may not receive reduction for good time and/or merit time. Also, consider whether the Parole Board is likely to grant you parole under your indeterminate sentence. It is possible that your earliest re-sentenced determinate date could be longer than your earliest possible release date under your current sentence. For example, in *People v. Newton*, the defendant was originally sentenced six years to life, and the proposed re-sentencing was eleven years, which on appeal was found to be neither harsh nor excessive.[174] Remember that even if the minimum term of your indeterminate sentence is shorter than the determinate sentence you receive at re-sentencing, you may be better off in some cases with the determinate sentence if you think that the Parole Board is unlikely to grant you parole at an earlier date.[175]

4. How to Apply for Re-Sentencing

You have the right to have an attorney represent you in your application for re-sentencing. [176] If you cannot afford an attorney, you can have one appointed.[177] You can file an application to have an attorney appointed together with a notice of motion and basic application for re-sentencing. Once appointed, your attorney can prepare a more detailed and complete application for you. You can find a sample application for

171. N.Y. Penal Law § 70.71 (McKinney 2009 & Supp. 2012).
172. N.Y. Penal Law § 70.70 (McKinney 2009 & Supp. 2012).
173. N.Y. Penal Law § 70.45 (McKinney 2009 & Supp. 2012).
174. People v. Newton, 48 A.D.3d 115, 120, 847 N.Y.S.2d 645, 649 (2d Dep't 2007).
175. *See* "Understanding the A-II Resentencing Law," Memorandum from Al O'Connor, N.Y. State Defenders Assoc., to Chief Defenders 2 (Oct. 5, 2005, *revised* Oct. 24, 2005), *available at* http://www.communityalternatives.org/pdf/A-II%20%20Resentencing%20Memo%20Revised%20NYSDA.pdf (last visited September 30, 2012).
176. N.Y. Crim. Proc. Law § 440.46.4 (McKinney Supp. 2012) (citing N.Y. County Law §§ 717.1, 722.4 (McKinney 2004 & Supp. 2012)).
177. N.Y. Crim. Proc. Law § 440.46.4 (McKinney Supp. 2012) (citing N.Y. County Law §§ 717.1, 722.4 (McKinney 2004 & Supp. 2012)); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581–82 (McKinney) (citing N.Y. County Law §§ 717.1, 722.4 (McKinney 2004 & Supp. 2012)); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney) (citing N.Y. County Law §§ 717.1, 722.4 (McKinney 2004 & Supp. 2012)).

an appointed attorney, a sample notice of motion, and a basic application for re-sentencing attached to this Chapter as Appendix B.[178]

If you are applying for re-sentencing for an A-II felony drug offense and your earliest possible release date is not much more than three years away, it is important that your application for an appointed attorney include an application for re-sentencing. This is because you need to make sure your application is filed in time to meet the Time to Parole Eligibility requirement, explained above in Part C(2)(b)(i) of this Chapter. If you are applying for re-sentencing for a Class B felony drug offense, you need to make sure your application is not barred by the ten-year look back for exclusion offenses, explained above in Part (C)(2)(c)(ii) of this Chapter. You should always try to have an attorney represent you in your re-sentencing application. You should only file a detailed application *pro se* (on your own) if you have trouble getting an attorney.

(f) Filing a *Pro Se* Application

If you are applying for re-sentencing for an A-II felony drug offense under the alternate, one-year-to-parole-eligibility reading, you may have to prepare your own application because you may have trouble getting an attorney appointed.[179] You may also have trouble getting an attorney if you were sentenced for a disqualifying offense at the same time you were sentenced for the felony drug offense. This may be a problem even if you have already finished serving the sentence for the disqualifying offense, as described above in Part C(2)(b)(ii)(a).[180] In these cases, you may have to prepare a *pro se* application.

Your *pro se* application should explain why you deserve a new sentence. You might want to include information about your role in the offense, the nature of the offense, the judge's position at the original sentencing, and your prior criminal history (or lack of). You might also want to include information about your health, your prison disciplinary record, favorable evaluations from correctional personnel, your participation in educational, drug-treatment, or work programs while in prison, and other attempts to rehabilitate yourself. You might include your plans for re-entry into your community, such as where you plan to live and how you plan to look for work when you are released.[181] You should provide as much documentation as possible. For example, you should include any certificates you received for program participation while in prison.[182]

If you think they will be helpful, you can try to request documents from the prison records office. These documents might include your medical file, your disciplinary file, your visit log, your education file, your guidance file, and your legal file. A sample document request letter is attached to this Chapter as Appendix B-4. Some prisons refuse to cooperate with document requests from prisoners. It may be easier for a lawyer to request your records than for you to do it yourself. This is one reason that you should try to get a lawyer appointed instead of filing your application for re-sentencing *pro se*.

If you file your application *pro se*, you should submit a notice of motion and basic petition for re-sentencing (a sample is attached in Appendix B) along with a signed, written statement, or affirmation, in support of your application and any supporting documents you have collected. Your affirmation in support of your application should include: (1) a description of your original sentence, including the offense of which you were convicted, the term of the original sentence, the date it was imposed, how much of it you have served, and the judge who imposed it; (2) an explanation of why you are eligible for re-sentencing under the requirements of Chapter 738, Section 23 of the Laws of 2004 (for an A-I felony), Chapter 643 of the Laws of 2005 (for an A-II felony), or Section 440.46 of the Criminal Procedure Law (for a Class B felony); (3) what new sentence you think the judge should give you, according to the new sentencing law (for example, the minimum sentence allowed under the new law); and (4) the reasons you deserve the suggested new sentence, including, for example, an explanation of your prison disciplinary record, your participation in any work or drug-rehabilitation programs while in prison, any serious health problems you may have, and your plans to find housing and employment once you leave prison.[183]

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178. The sample document in Appendix B is for a prisoner serving time for an A-II felony drug offense.

179. E-mail from William Gibney, The Legal Aid Soc'y, to Sydney Bird, contributing author of this Chapter (Nov. 17, 2005) (on file with the *JLM*).

180. *See* e-mail from William Gibney, The Legal Aid Soc'y, to Sydney Bird, contributing author of this Chapter (Nov. 17, 2005) (on file with the *JLM*).

181. Ctr for Cmty. Alternatives, Rockefeller Drug Law Reform: Mitigation and Re-entry Planning Tips (2005) (on file with the *JLM*).

182. Ctr. for Cmty. Alternatives, Rockefeller Drug Law Reform: Mitigation and Re-entry Planning Tips (2005) (on file with the *JLM*).

183. Sample Affirmation provided by William Gibney, The Legal Aid Society (2005) (on file with the

Remember that when you file your application for re-sentencing, you must send it to both the court and the District Attorney's office that prosecuted your conviction.[184] You must do this regardless of whether you are filing only a basic application or one combined with an application for an appointed attorney.

5. Conclusion

Many changes to the New York State drug laws went into effect in 2009. Some allow prisoners serving time for drug offenses to apply for re-sentencing under the new, better sentencing framework. Prisoners serving time for A-I felony drug offenses are automatically eligible for re-sentencing.[185] Prisoners serving time for A-II and Class B felony drug offenses must meet additional requirements.[186] If you are serving time for an A-I, A-II, or Class B felony drug offense that occurred prior to January 13, 2005, you should consider whether you are eligible for re-sentencing. You should also consider whether re-sentencing is likely to give you an earlier release date. If you are eligible and think you might benefit from re-sentencing, you should try to get an attorney appointed to prepare your re-sentencing application. If you have trouble getting an attorney, you may file a re-sentencing application *pro se*.

D. Conclusion

Recent changes in the federal law and the law of New York have made some prisoners eligible to apply for re-sentencing. Because the changes are relatively recent, some aspects of the laws are still unclear. You should make sure to conduct your own research and find out how these new amendments are being applied to cases similar to your own. If you were convicted of a drug crime in either New York State or in federal court, you may be eligible for a reduction in your sentence. The reduction is not automatic, though, so you will need to make sure to apply for re-sentencing.

JLM).

184. N.Y. Crim. Proc. Law § 440.46.3 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney); Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474 (McKinney).

185. Drug Law Reform Act of 2004, ch. 738, § 23, 2004 N.Y. Sess. Laws 1462, 1474–75 (McKinney).

186. N.Y. Crim. Proc. Law § 440.46.1, .5 (McKinney Supp. 2012); Drug Law Reform Act of 2005, ch. 643, § 1, 2005 N.Y. Sess. Laws 1581, 1581 (McKinney).

APPENDIX A: SAMPLE FORMS FOR APPLYING FOR FEDERAL RE-SENTENCING

A-1. SAMPLE EX-PARTE APPLICATION FOR APPOINTMENT OF COUNSEL[187]

UNITED STATES DISTRICT COURT
DISTRICT OF _____
_____ DIVISION
UNITED STATES OF AMERICA,

Plaintiff,_____ NO. CR_____
v.
Defendant._____ Ex Parte Application for Appointment of Counsel; Exhibits

Defendant hereby respectfully requests that this Court re-appoint his counsel under the Criminal Justice Act to assist him in preparing and filing a motion for reduction of sentence pursuant to 18 U.S.C.§ 3582(c).

This application is made pursuant to 18 U.S.C. § 3006A, and is based on the attached memorandum of points and authorities, declaration of counsel, and exhibits; the files and records of this case; and any such further information as shall be made available to the Court.

Respectfully submitted,

DATED: [Month] __, 20__ By_____

187. Adapted from an example from Office of Defender Servs., Sample Motions, Briefs, Petitions and Orders Relating to Retroactive Application of Crack Cocaine Guideline Amendment, *available at* http://www.fd.org/odstb_CrackSampleMotions.htm (last visited Apr. 11, 2012).

Memorandum of Points and Authorities

_____ respectfully applies to this Court to appoint counsel for his proceeding under 18 U.S.C. § 3582(c). As set forth in the attached declaration, undersigned counsel was appointed to represent _____ in his criminal proceedings. He was convicted of _____ and sentenced by this Court to a term of _____ months' imprisonment. His case involved cocaine base. Based on a review of records and files in this case, as well as the law, counsel believes that _____ is likely eligible to file a motion for reduction of sentence, pursuant to 18 U.S.C. § 3582(c).

This Court should appoint counsel. The amendments to USSG § 1B1.10, effective March 3, 2008, now invite the presentation of new facts and arguments in the context of § 3582(c) proceedings. See Amendment 712 to Guidelines. Moreover, in United States v. Hicks, 472 F.3d 1167 (9th Cir. 2007), the Ninth Circuit held that, when resentencing defendants pursuant to § 3582(c)(2), district courts must treat the Guidelines as advisory, as required by United States v. Booker, 543 U.S. 220 (2005). In view of these changes to § 3582(c) proceedings, _____ will be greatly assisted by the appointment of counsel. In addition, appointment of counsel will allow for negotiation with the Government, facilitate factual and legal presentation to the Court, and promote the efficient use of judicial resources.

_____ is still indigent. See Exhibit A. As the Court is aware, the Administrative Office of the United States Courts has established a new representation type for appointment of counsel in these cases. See Exhibit B.

For the foregoing reasons, _____ respectfully submits that appointment of counsel, as set forth in the proposed order, is appropriate.

Respectfully submitted,

DATED: [Month] __, 20__ By_____

A-2. SAMPLE APPLICATION FOR RE-SENTENCING[188]

[DEFENDANT'S NAME]

UNITED STATES DISTRICT COURT
*** DISTRICT OF ***
*** DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.
[DEFENDANT'S NAME],
Defendant.

NO. CR_____

NOTICE OF MOTION; MOTION FOR REDUCTION OF SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)(2); MEMORANDUM OF POINTS AND AUTHORITIES
Hearing Date: [INSERT DATE]
Hearing Time: [INSERT TIME]

TO: UNITED STATES ATTORNEY ***, AND ASSISTANT UNITED STATES ATTORNEY [AUSA'S NAME]:

PLEASE TAKE NOTICE that on [DATE], at [TIME], defendant, [NAME], will bring on for hearing the following motion:

MOTION

Defendant, [NAME], hereby moves this Honorable Court for a reduction in the sentence imposed in this case on [DATE]. This motion is made pursuant to 18 U.S.C. § 3582(c)(2) and is based upon the attached memorandum of points and authorities, all files and records in this case, and such further argument and evidence as may be presented at the hearing on this motion.

Respectfully submitted,

DATED: [Month] __, 20__ By_____

188. Adapted from an example from Office of Defender Servs., Sample Motions, Briefs, Petitions and Orders Relating to Retroactive Application of Crack Cocaine Guideline Amendment, *available at* http://www.fd.org/odstb_CrackSampleMotions.htm (last visited Apr. 11, 2012).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On [DATE], [NAME] was sentenced for [TYPE OF CRACK OFFENSE, I.E., DISTRIBUTION, POSSESSION WITH INTENT TO DISTRIBUTE, CONSPIRACY, ETC.], to serve _____ months of imprisonment and _____ years of supervised release. The sentence was imposed under the sentencing Guidelines [QUALIFY THIS IF POST-BOOKER], with a base offense level computed under § 2D1.1 of the Guidelines for a crack cocaine quantity of [INSERT AMOUNT IN YOUR CASE] grams. That base offense level—under the Guidelines in effect at the time—was _____. Combined with other Guidelines factors, it produced a guideline range of _____. The sentence imposed by the Court was _____ months, [WHICH WAS THE LOW END/WHICH WAS THE HIGH END/WHICH WAS WITHIN THE RANGE/WHICH WAS BELOW THE RANGE/ABOVE THE RANGE, BASED ON A [DESCRIBE DEPARTURE IF ANY]].

Subsequent to [NAME]'s sentencing—on November 1, 2007—an amendment to § 2D1.1 of the Guidelines took effect, which, generally, reduces base offense levels for most quantities of crack cocaine by two levels and, specifically, reduces the base offense level for the [INSERT AMOUNT IN YOUR CASE] gram quantity of crack cocaine in this case by two levels, to _____. *See* U.S.S.G. § 2D1.1. This amendment was adopted in response to studies that raise grave doubts about the fairness and rationale of the 100-to-1 crack/powder ratio incorporated into the sentencing Guidelines. *See generally* United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (May 2007) (hereinafter Commission Report"); United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002); United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (April 1997); United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995). *See also Kimbrough v. United States*, 128 S. Ct. 558, 568-69 (2007) (discussing history of crack cocaine guideline and various Sentencing Commission reports). Yet the amendment is only a partial response, as the Sentencing Commission itself recognized. The Commission explained:

> The Commission, however, views the amendment only as a partial remedy to some of the problems associated with the 100-to- 1 drug quantity ratio. It is neither a permanent nor a complete solution to these problems. Any comprehensive solution requires appropriate legislative action by Congress. It is the Commission's firm desire that this report will facilitate prompt congressional action addressing the 100-to-1 drug quantity ratio. 2007 Sentencing Commission Report, *supra*, at 10.

Subsequent to the effective date of this amendment to § 2D1.1, the Sentencing Commission considered whether to make the amendment retroactive under the authority created by 18 U.S.C. § 3582(c)(2). It took that action on December 11, 2007, by including this amendment in the list of retroactive amendments in § 1B1.10 of the Guidelines. *See* 73 Fed. Reg. 217-01 (2008). Based on this retroactivity, the statutory authority underlying it, and the Supreme Court's intervening [ONLY IF ALL OF FOLLOWING CASES WERE AFTER YOUR SENTENCING] decisions in *United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 127 S. Ct. 2456 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007); and *Kimbrough v. United States*, 128 S. Ct. 558 (2007),

[NAME] brings this motion to reduce his sentence.

II. ARGUMENT

A. [NAME]'S OFFENSE LEVEL SHOULD BE REDUCED FROM _____ TO _____, AND THE GUIDELINE RANGE REDUCED FROM _____ TO _____ BASED ON THE AMENDMENT TO § 2D1.1.

18 U.S.C. § 3582(c)(2) provides as follows:

> [I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Section 1B1.10 is the Guidelines policy statement which implements 18 U.S.C. § 3582(c)(2). Subsection (c) of that policy statement lists amendments that are covered by the policy statement, and one of the amendments listed is amendment 711 to the Guidelines. Amendment 711 reduced the base offense level for crack cocaine offenses. *See* U.S.S.G., App. C, § 711.

Application of this amendment to the crack cocaine guideline in the present case results in a decrease of the base offense level from _____ to _____, a decrease in the total offense level from _____ to _____, and a decrease in the resulting guideline range from _____ to _____.
[THEN GO THROUGH CALCULATIONS TO ESTABLISH THIS AND ALSO DISCUSS ANY OTHER ISSUES THAT ARE RELEVANT SUCH AS MANDATORY MINIMUMS THAT LIMIT REDUCTION, WHETHER QUESTION OF SAFETY VALVE CAN BE REOPENED, ETC.].

B. THE COURT SHOULD REDUCE [NAME]'S SENTENCE [TO [INSERT SPECIFIC AMOUNT]/A SIGNIFICANT AMOUNT/SOME OTHER CHARACTERIZATION YOU CHOOSE].

Based on the amendment to § 2D1.1, the Court should significantly reduce [NAME]'s sentence. It follows from the discussion in the preceding section that the amendment alone justifies a reduction of [INSERT DIFFERENCE BETWEEN GUIDELINE RANGES] months.

[THIS PARAGRAPH ONLY IF ORIGINAL SENTENCING PRE-BOOKER, BUT CONSIDER ADAPTING HICKS AND KIMBROUGH DISCUSSION EVEN IF POST-BOOKER.] The Court should not stop there, however. At the time of [NAME]'s original sentence, the Court was required to treat the Guidelines as mandatory, under the controlling law at that time. Since then, the Supreme Court has held the Guidelines in their mandatory form are unconstitutional and—through severing 18 U.S.C. § 3553(b)—made them "effectively advisory." *Booker*, 543 U.S. at 245. *Booker* and subsequent Supreme Court cases clarifying it—namely, *Rita v. United States, supra*; *Gall v. United States, supra*; and *Kimbrough v. United States, supra*—have created a brave new world, in which the Guidelines are but one of several factors to be considered under § 3553(a). What the Supreme Court has described as the "overarching provision" in § 3553(a) is the requirement that courts "'impose a sentence sufficient, but not greater than necessary" to accomplish the goals of sentencing. *Kimbrough*, 128 S. Ct. at 570.

Moreover, *Booker* and its progeny apply to the imposition of a new sentence under 18 U.S.C. § 3582(c)(2). The Ninth Circuit considered this question in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007) and held, put most succinctly, that "*Booker* applies to § 3582(c)(2) proceedings." *Hicks*, 472 F.3d at 1169. As the court explained in more depth:

> *Booker* explicitly stated that, "as by now should be clear, [a] mandatory system is no longer an open choice." Although the Court acknowledged that Congress had intended to create a mandatory guideline system, *Booker* stressed that this was not an option: "[W]e repeat, given today's constitutional holding, [a mandatory Guideline regime] is not a choice that remains open. . . . [W]e have concluded that today's holding is fundamentally inconsistent with the judge-based sentencing system that Congress enacted into law." The Court never qualified this statement, and never suggested, explicitly or implicitly, that the mandatory Guideline regime survived in any context.
>
> In fact, the Court emphasized that the Guidelines could not be construed as mandatory in one context and advisory in another. When the government suggested, in *Booker*, that

> the Guidelines be considered advisory in certain, constitutionally-compelled cases, but mandatory in others, the Court quickly dismissed this notion, stating, "we do not see how it is possible to leave the Guidelines as binding in other cases. . . . [W]e believe that Congress would not have authorized a mandatory system in some cases and a nonmandatory system in others, given the administrative complexities that such a system would create." In short, *Booker* expressly rejected the idea that the Guidelines might be advisory in certain contexts, but not in others, and Congress has done nothing to undermine this conclusion. Because the "mandatory system is no longer an open choice," district courts are necessarily endowed with the discretion to depart from the Guidelines when issuing new sentences under § 3582(c)(2). *Hicks*, 472 F.3d at 1170 (citations omitted).

Here, there are a number of non-Guidelines factors that justify a sentence below even the new guideline range. [EITHER HERE OR BELOW, INSERT ARGUMENT ABOUT ANY § 3553(a) FACTORS AND *BOOKER/GALL/KIMBROUGH*] [EITHER CONTINUATION OF LAST TEXT SENTENCE ABOVE OR NEW PARAGRAPH] One [OR ANOTHER?] consideration to which the Court should give particular weight is a consideration expressly recognized by the Supreme Court in *Kimbrough v. United States*, *supra* as a ground for not following the Guidelines—the questionable provenance of the crack/powder ratio. As the Government itself acknowledged in *Kimbrough*, "the Guidelines 'are now advisory' and . . . , as a general matter, 'courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.'" *Kimbrough*, 128 S. Ct. at 570 (quoting Brief for United States 16). While the government then tried to distinguish policy disagreement with the 100-to-1 crack/powder ratio from other policy disagreements, the Supreme Court squarely rejected that argument. *See Kimbrough*, 128 S. Ct. at 570–74.

Indeed, the Court suggested that policy disagreement in this area was even *more* defensible than in other areas. It noted that "in the ordinary case, the Commission's recommendation of a sentence will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives,' *id.* at 574 (quoting *Rita*, 127 S. Ct. at 2465), and so "closer review may be in order when the sentencing judge varies from the Guidelines, based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." *Kimbrough*, 128 S. Ct. at 575. The Court then explained that this was not the case with the crack cocaine Guidelines, however.

The crack cocaine Guidelines, however, present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission's exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of "empirical data and national experience." Indeed, the Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions, *i.e.*, sentences for crack cocaine offenses "greater than the necessary" in light of the purposes of sentencing set forth in § 3553(a). Given all this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence "greater than necessary" to achieve § 3553(a)'s purposes, *even in a mine-run case*. *Kimbrough*, 128 S. Ct. at 574-75 (emphasis added) (citations omitted).

These concerns are only partially assuaged by the recent amendment reducing crack cocaine offense levels, moreover. This also was recognized by the Supreme Court in *Kimbrough*:

> This modest amendment yields sentences for crack offenses between two and five times longer than sentences for equal amounts of powder. (Citation and footnote omitted.) Describing the amendment as "only . . . a partial remedy" for the problems generated by the crack/powder disparity, the Commission noted that "[a]ny comprehensive solution requires appropriate legislative action by Congress." *Kimbrough*, 128 S. Ct. at 569 (quoting 2007 Sentencing Commission Report, *supra* pp. 3-4 at 10).

Kimbrough's rationale for varying from the crack Guidelines therefore remains even after the new guideline is applied. [CONSIDER APPLYING THIS *KIMBROUGH* ARGUMENT TO YOUR SPECIFIC CASE IN SOME WAY; FOR EXAMPLE, BY POINTING OUT WHAT YOUR SENTENCE WOULD HAVE BEEN IF IT WAS JUST POWDER]

[INSERT ANY ARGUMENT ABOUT ANY § 3553(a) FACTORS AND *BOOKER/GALL/KIMBROUGH* NOT ALREADY INSERTED ABOVE]

III. CONCLUSION

The Court should adjust [NAME]'s sentencing guideline range downward to_____. It should then [RECOMMEND SPECIFIC SENTENCE AND/OR MORE GENERAL URGING FOR LOWER SENTENCE, IF YOU DON'T WANT TO RECOMMEND A SPECIFIC SENTENCE].

Respectfully submitted,

DATED: MONTH DAY, YEAR By_____

APPENDIX B: SAMPLE APPLICATION FOR NY STATE RE-SENTENCING[189]

B-1. SAMPLE PETITION FOR RE-SENTENCE

SUPREME COURT OF THE STATE OF NEW YORK[190]
_____ COUNTY CRIMINAL TERM

_____x		
THE PEOPLE OF THE STATE OF NEW YORK,	:	
Plaintiffs,	:	
	:	PETITION FOR
- against -	:	RE-SENTENCE
	:	
_____,	:	_____ County
Defendant.	:	
_____x	Ind. No. _____	

PLEASE TAKE NOTICE that, upon the annexed affirmation of _____, and all the prior proceedings, the undersigned will move this Court, at 100 Centre Street, New York, New York, 10013, on _____, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an order vacating the sentence imposed by the Court on _____ (_____, J.); re-sentencing defendant pursuant to the Rockefeller Drug Law Reform Act of 2005 ("DLRA") [see 2005 Sess. Law of N.Y., Ch. 643 (S. 5880)]; and granting such other relief as the Court may deem proper.

Please also accept this as an application for appointment of counsel. I am indigent, currently incarcerated, and I cannot afford counsel to represent me in this application for re-sentence.

Dated: _____, New York
_____ , 20__

Yours,

_____

TO: Clerk of the Court
New York County Supreme Court
100 Centre Street
New York, New York 10013

Hon. Cyrus R. Vance, Jr.
New York County District Attorney
1 Hogan Place
New York, New York 10013
or
Hon. Bridget Brennan
Special Narcotics Prosecutor
80 Centre Street
New York, New York 10013

189. Adapted from New York Legal Aid Society sample document. This sample is tailored to a prisoner serving time for an A-II felony drug offense.

190. Your Notice of Appeal is addressed to the court you were tried in, not the Appeals Court. This sample presumes you were tried in a Supreme Court. If you were tried in a County Court, be sure to replace this court for the Supreme Court at the top of the form. Make sure to address the form to the correct individuals in the "To:" section.

B-2. SAMPLE AFFIRMATION

SUPREME COURT OF THE STATE OF NEW YORK
_____ COUNTY CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,	:	
	:	AFFIRMATION
- against -	:	
	:	_____ County
Defendant.	:	Ind. No. _____

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Defendant _____, hereby affirms, under penalty of perjury, that the following statements are true.

1. I [pleaded guilty to] [was convicted after a trial of] second-degree criminal [possession] [sale] of a controlled substance (P.L. ' [possession: 220.18] [sale: 220.41]) and [list other counts, if any]. On_____, the court sentenced defendant to imprisonment for an indeterminate term of _____ years to the second-degree [sale] [possession] count to run [concurrently with] [consecutively to] [note other sentences, if any].

2. I am presently incarcerated on an A-II drug conviction.

3. Defendant is more than 12 months from being an "eligible inmate" as that term is defined in Subdivision 2 of Section 851 of the Correction Law.

4. Defendant meets the statutory eligibility requirements for merit time under Correction Law Section 803(1)(d).

5. For the above-stated reasons, defendant believes that [he] [she] is eligible to be re-sentenced under the Drug Law Reform Act of 2005 ("DLRA") [see 2005 Sess. Law of N.Y., Ch. 643 (S. 5880)] and defendant, thus, moves for such relief.

6. Defendant has yet to receive [his] [her] program and disciplinary records from the Department of Corrections. Defendant is filing this motion now to protect [his] [her] rights under the DLRA. Nevertheless, defendant requests the opportunity to supplement this motion and to provide the Court with additional pertinent information when that information becomes available.

WHEREFORE, Defendant respectfully requests that the Court grant [his] [her] petition for re-sentence. Defendant further requests that the Court grant [him] [her] permission to supplement this application after additional information is obtained.

Dated: _____, New York
_____, 20__

_____
[Name of Defendant]

B-3. SAMPLE AFFIDAVIT OF SERVICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,	:	
- against -	:	AFFIDAVIT OF SERVICE
	:	_____ County
Defendant.	:	Ind. No. _____

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

_____ being duly sworn, deposes and says that he is over the age of eighteen years and is not a party in this proceeding; that on the _____ day of _____ 20___, deponent served the within Petition for Re-sentence upon _____ in this action, at _____, the address designated by _____ for that purpose by depositing a true copy of the same by mail, enclosed in a post-paid properly addressed wrapper, in _____ a post office _____official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

_____
Signature

Subscribed and sworn to before
me this _____ day of ____ 20___

_____
Notary Public

B-4. SAMPLE DOCUMENT REQUEST LETTER[191]

_____ Correctional Facility
Attn: Inmate Records
Box ___
_____, NY _____

[Date]

Dear Sir/Madam,

I am writing to request a copy of my entire inmate record. My name is _____, my date of birth is __/__/__, and my NYSID No. is _____. Please include the following records:

(1) Complete copy of my legal file.
(2) Complete copy of my guidance file.
(3) Complete copy of my education file.
(4) Complete copy of my package room file.
(5) Complete copy of my medical file.
(6) Complete copy of my disciplinary and disposition file.
(7) Explanation of codes used in the inmate progress note sheets.
(8) Visit log.

Thank you for your attention to this matter.

Sincerely,

_____
[Your Name]

191. Adapted from New York Legal Aid Society sample document.

APPENDIX C: SAMPLE PRO SE APPLICATION[192]

C-1. SAMPLE PETITION FOR RE-SENTENCE

SUPREME COURT OF THE STATE OF NEW YORK
_____ COUNTY CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,	:	
- against -	:	PETITION FOR RE-SENTENCE
	:	_____ County
Defendant.	:	Ind. No. _____

PLEASE TAKE NOTICE that, upon the annexed affirmation of _____, and all the prior proceedings, the undersigned will move this Court, at 100 Centre Street, New York, New York, 10013, on _____, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an order vacating the sentence imposed by the Court on __ (__, J.); re-sentencing defendant pursuant to the Rockefeller Drug Law Reform Act of 2005 ("DLRA") [see 2005 Sess. Law of N.Y., Ch. 643 (S. 5880)]; and granting such other relief as the Court may deem proper.

Dated: _____, New York
_____, 20__

Yours,

_____

TO: Clerk of the Court
New York County Supreme Court
100 Centre Street
New York, New York 10013

Hon. Cyrus R. Vance, Jr.
New York County District Attorney
1 Hogan Place
New York, New York 10013
or
Hon. Bridget Brennan
Special Narcotics Prosecutor
80 Centre Street
New York, New York 10013

192. Adapted from New York Legal Aid Society sample document. This sample is tailored to a prisoner serving time for an A-II felony drug offense.

C-2. SAMPLE AFFIRMATION

SUPREME COURT OF THE STATE OF NEW YORK
_____ COUNTY CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,	:	
	:	AFFIRMATION
- against -	:	
	:	_____ County
Defendant.	:	Ind. No. _____

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Defendant _____, hereby affirms, under penalty of perjury, that the following statements are true.

1. I [pleaded guilty to] [was convicted after a trial of] second-degree criminal [possession] [sale] of a controlled substance (P.L. [possession: 220.18] [sale: 220.41]) and [list other counts, if any]. On_____, the court sentenced defendant to imprisonment for an indeterminate term of years on the second-degree [sale] [possession] count to run [concurrently with] [consecutively to] [note other sentences, if any].

2. I am presently incarcerated on an A-II drug conviction.

3. Defendant is more than 12 months from being an "eligible inmate" as that term is defined in Subdivision 2 of Section 851 of the Correction Law.

5. Defendant meets the statutory eligibility requirements for merit time under Correction Law Section 803(1)(d).

6. For the above-stated reasons, defendant believes that [he] [she] is eligible to be re-sentenced under the Drug Law Reform Act of 2005 ("DLRA") [see 2005 Sess. Law of N.Y., Ch. 643 (S. 5880)] and defendant, thus, moves for such relief.

7. Defendant has yet to receive [his] [her] program and disciplinary records from the Department of Corrections. Defendant is filing this motion now to protect [his] [her] rights under the DLRA. Nevertheless, defendant requests the opportunity to supplement this motion and to provide the Court with additional pertinent information when that information becomes available.

WHEREFORE, Defendant respectfully requests that the Court grant [his] [her] petition for re-sentence. Defendant further requests that the Court grant [him] [her] permission to supplement this application after additional information is obtained.

Dated: _____, New York
_____, 20__

_____
[Name of Defendant]

C-3. SAMPLE AFFIDAVIT OF SERVICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,	:	
- against -	:	AFFIDAVIT OF SERVICE
	:	_____ County
Defendant.	:	
		Ind. No. _____

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

_____ being duly sworn, deposes and says that he is over the age of eighteen years and is not a party in this proceeding; that on the _____ day of _____ 20___, deponent served the within Petition for Re-sentence upon _____ in this action, at _____, the address designated by _____ for that purpose by depositing a true copy of the same by mail, enclosed in a post-paid properly addressed wrapper, in _____ a post office _____official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

_____
Signature

Subscribed and sworn to before
me this _____ day of ____ 20__

_____
Notary Public