

## Are Life Sentences Still Possible Under The Reformed Drug Laws?

By Arthur H. Hopkirk\*

The provisions of the 2004 Drug Law Reform Act (DLRA) that replaced life sentences for class A-I and A-II drug felonies with determinate sentences received considerable attention within both the criminal justice system and the community at large. See L.2004, chapter 738; Penal Law (PL) § 70.71. This article explores whether, despite the headlines arising from the 2004 legislation, life sentences or their functional equivalent may still be imposed for drug offenses in limited circumstances.

Although two recent decisions by the Appellate Division do not directly address the legal issue, the facts of those cases prompt the question of whether a defendant convicted of a drug offense committed on or after January 13, 2005, the effective date for the new sentencing provisions in the 2004 law, may still receive a life sentence as a discretionary persistent felony offender. See *People v. Jones*, 47 AD3d 961 (3d Dept 2008), *lv den* \_\_ NY3d \_\_ (Mar. 20, 2008); *People v. Thacker*, 47 AD3d 423 (1st Dept 2008), *lv den* \_\_ NY3d \_\_ (Mar. 20, 2008). A close reading of the DLRA shows that persistent felony offender sentences pursuant to Penal Law § 70.10 are no longer permitted for drug crimes defined in Penal Law articles 220 (controlled substances) and 221 (marihuana). In contrast, another recent Appellate Division case suggests that a life sentence may still be imposed upon those found to be persistent felony offenders for inchoate crimes such as conspiracy to commit drug offenses. See *People v. Anonymous*, 43 AD3d 806 (1st Dept 2007). Finally, defense lawyers must consider whether, despite the statutory caps that normally limit a defendant's maximum sentencing exposure for non-violent felonies to 30 years, certain defendants convicted of class A drug felonies may be subject to *de facto* life sentences if consecutive determinate sentences are imposed.

### Abolition of Discretionary Persistent Felony Offender Sentences for Drug Crimes

As attorneys who regularly practice criminal law in state courts in New York know, Penal Law § 70.10 permits the imposition of a class A-I felony sentence of between 15 and 25 years to life in prison instead of a sentence within the otherwise applicable sentencing range when a defendant previously has been convicted of two qualifying felonies and the judge makes a finding that "the history and character of the defendant and the nature and

circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest." Up until passage of the 2004 DLRA, there was no question that defendants convicted of drug-related felonies could qualify for sentencing as a discretionary persistent felony offender pursuant to section 70.10. However, under a provision of the 2004 law that was not well publicized, it appears that those convicted of offenses involving controlled substances or marihuana that are defined in Penal Law articles 220 or 221 may no longer be sentenced as persistent felony offenders.

### Statutory Construction

The 2004 Drug Law Reform Act (L. 2004, ch 738) added PL § 60.04, entitled: Authorized disposition; controlled substances and marihuana felony offenses. Penal Law § 60.04(1) states that

*[n]otwithstanding the provisions of any law, this section shall govern the dispositions authorized when a person is to be sentenced upon a conviction of a felony offense defined in article two hundred twenty or two hundred twenty-one of this chapter or when a person is to be sentenced upon a conviction of such a felony as a multiple felony offender as defined in subdivision five of this section.*

[Emphasis added.]

Penal Law § 60.04(5), governing the sentencing of "multiple felony offenders," provides that "second felony drug offenders" shall be sentenced in accordance with PL § 70.70. A "second felony drug offender" for purposes of the latter section is a "second felony offender," as defined in PL § 70.06, who is currently being sentenced for a drug or marihuana felony other than a class A felony. See PL § 70.70(1)(b). Penal Law § 70.06(1)(a) defines a "second felony offender," in relevant part, as someone who has "previously been subjected to one or more predicate felony convictions." [Emphasis added.] Notably, the only state prison sentences authorized by PL § 70.70 are determinate sentences, and that section neither contains a sentencing provision for persistent felony offenders nor has a cross-reference to PL § 70.10.

Similarly, PL § 70.71 contains the only authorized prison sentences for class A felony drug offenders regardless of whether they are first-time offenders or predicate felons. See PL § 60.04(2). Once again, the only state prison sentences authorized by section 70.71 are determinate sentences and it contains neither a provision for sentencing persistent felony offenders nor a cross-reference to PL § 70.10.

Given that the sentencing provisions contained in Penal Law § 60.04 apply to drug felonies "notwithstanding the provisions of any law" (PL § 60.04(1)), the plain language of the 2004 DLRA supports the conclusion that

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drug felons may no longer receive life sentences as discretionary persistent felony offenders. *See People v. Utsey*, 7 NY3d 398, 404 (2006) (relying upon “plain language” of DLRA to find that new sentencing provisions did not apply to drug offenses committed prior to the effective date of the statute that were not class A felonies); *People v. Finnegan*, 85 NY2d 53, 58, *cert den* 516 US 919 (1995) (“when the ‘language is clear and unambiguous, it should be construed to give effect to the plain meaning of [the] words’ used”).

The conclusion that the Legislature intended to eliminate discretionary persistent felony offender sentences for drug and marijuana felonies defined in Penal Law articles 220 and 221 when it reformed the drug laws in 2004 is fortified by looking at other provisions of the Penal Law. In contrast to the provision on multiple felony offenders in drug cases that contains a cross-reference to PL § 70.70 and omits any reference to PL § 70.10 (*see* PL § 60.04(5)), the provision in PL § 60.05(6) that governs the sentencing of multiple felony offenders in most non-drug cases includes cross-references to other predicate felony sentencing provisions including PL § 70.10, the section governing discretionary persistent felony offender sentencing. Furthermore, as part of the DLRA, the Legislature amended PL § 60.05(1) to clarify that the provisions governing the sentencing of most felons do not apply to dispositions of felony drug offenses covered by PL § 60.04. In a further contrast to PL §§ 60.04(5), 70.70, and 70.71, when the Legislature subsequently enacted another exception to PL § 60.05 that governed sentences for felony sex offenses, it was careful to ensure that the power to sentence a defendant as a discretionary persistent felony offender was reserved through cross-references to PL § 70.10. *See* L.2007, ch 7; PL § 70.80(5)(d), (6).

Thus, as demonstrated by both PL §§ 60.05(6) and 70.80, when the Legislature wanted to include a cross-reference to PL § 70.10 in a statute so as to ensure that a discretionary persistent felony offender sentence could be imposed, it knew how to do so. *See Matter of Robert J.*, 2 NY3d 339, 345 (2004) (stating that “[i]t is clear that the Legislature knew how to include age-restricting language in a juvenile delinquency placement provision when it wanted to do so,” and drawing an inference as to legislative intent from the failure to include such an age-based restriction in another statutory provision). The omission of such a cross-reference from PL § 60.04(5) reinforces the conclusion based upon the plain language of the DLRA that life sentences are no longer permitted for drug felonies defined in Penal Law articles 220 and 221.

### Recent Appellate Division Decisions

There have yet to be any appellate decisions analyzing whether defendants may be sentenced as discretionary persistent felony offenders for drug felony convictions. However, the facts of two recent Appellate Division deci-

sions suggest that some attorneys are unaware of the potential argument that a sentence imposed pursuant to section 70.10 is no longer legal in drug cases. In addition, these cases provide an opportunity to discuss some of the ramifications for criminal defense practice of the change in the law.

In *People v. Jones*, 47 AD3d 961 (3d Dept 2008), following the seizure of cocaine and heroin in May 2005, subsequent to the effective date of the DLRA, the defendant was convicted of criminal possession of a controlled substance in the first and third degrees and two counts of criminally using drug paraphernalia in the second degree. He was sentenced as a discretionary persistent felony offender to an aggregate term of 25 years to life in prison. *See id.* at 962. On appeal, although challenges were raised and rejected concerning the procedure by which Jones was sentenced as a persistent felony offender (*see id.* at 965),<sup>1</sup> no issue was raised about whether such a life sentence was legal in the aftermath of the DLRA.

In *People v. Thacker*, 47 AD3d 423 (1st Dept 2008), the defendant waived his right to appeal his trial conviction of criminal sale of a controlled substance in the third degree and a misdemeanor “in exchange for a favorable sentence, along with the People’s waiver of their right to commence persistent felony offender proceedings.” The defendant was sentenced to a determinate prison term of 12 years. *See id.* at 423. Since the factual information in the *Thacker* opinion is sparse, one must examine the defendant’s Appellate Division brief and the Department of Correctional Services’s website to fully understand what happened. The crime occurred in 2006 after the effective date of the DLRA. The defendant had eight prior felony convictions and 35 misdemeanor convictions. Although at least one of the felony convictions from the early 1980s was for a violent felony, it appears that the parties may have assumed that it was too remote to be used as a predicate felony. Instead, the People filed a predicate felony statement based on Thacker’s 2004 conviction of the non-violent felony of attempted burglary in the third degree. On appeal, Thacker attacked the validity of the waiver of the right to appeal as the product of ineffective assistance of counsel. *See id.* at 423. However, Thacker never argued that the waiver was not knowing and voluntary because the threat to adjudicate him as a persistent felony offender was an empty one since a life sentence was no longer available pursuant to PL § 70.10 after the passage of the DLRA.

In sum, if Thacker was ineligible for sentencing as a persistent felony offender, he made a poor bargain. Based upon the assumption that he was otherwise eligible for sentencing as a second felony drug offender whose prior felony conviction was for a non-violent felony, Thacker gave up his right to appeal his trial conviction in exchange for the maximum sentence permitted by PL §§ 70.70 (3)(b)(i) and 70.45(2)(d), twelve years in prison and three years of post-release supervision.

### Practice Implications

The *Thacker* and *Jones* decisions provide a useful starting point for exploring the practice implications of the elimination of persistent felony offender sentences in drug cases.

Although waivers of the right to appeal in trial cases such as *Thacker* are a rarity, that case has implications for plea bargaining. Most obviously, defense lawyers should not be fooled by the threat of a persistent felony offender adjudication in a drug case and accept a plea deal premised on such a threat. All things being equal, if the possibility of a life sentence is off the table, attorneys should be able to negotiate a lower sentence than would be available if the prosecutor had a potential discretionary persistent felony offender determination as a bargaining chip. Moreover, without the risk of a life sentence, it will be less dangerous to pursue a suppression hearing or go to trial in a winnable case.

The *Jones* decision raises the question of what an attorney can do if he or she enters a post-DLRA drug case after the defendant has received a life sentence as a discretionary persistent felony offender, or even after the direct appeal is over, and a client's previous attorneys have not argued that such a sentence is illegal under the DLRA. Unlike a failure to follow the proper procedures in sentencing a defendant or a fact-specific challenge to the validity of a purported predicate felony, a claim that a court lacked the power to sentence a defendant as a persistent felony offender because, based on the face of the record, such a sentence was not authorized by the Legislature may be raised as a question of law on direct appeal despite the lack of an objection at sentencing. See *People v. Morse*, 62 NY2d 205, 214 n.2 (1984), *app dis* 469 US 1186 (1985); *People v. Samms*, 95 NY2d 52, 55-58 (2000).

Moreover, if a defendant's direct appeal has already been decided and the issue was not raised on appeal, it may still be possible to vacate an illegal persistent felony offender sentence through a motion made pursuant to Criminal Procedure Law (CPL) § 440.20. In contrast to motions to vacate judgments pursuant to CPL § 440.10, an unjustifiable failure to raise an issue as to the legality of a sentence on direct appeal is not a procedural bar to a successful motion raising the issue pursuant to CPL § 440.20. Compare CPL § 440.10(2)(c). As the Staff to the Temporary Commission on Revision of the Penal Law and Criminal Code wrote in 1967 with respect to the draft provision that became CPL § 440.20, unlike the procedure established by the provision that became C.P.L. § 440.10(2)(b)-(c),

the circumstance that the issue is presently appealable or could with due diligence have been appealed . . . does not authorize the court to refuse to entertain the sentence motion. An illegal sentence, it is believed, should be subject to challenge and rectification in the trial court without

compelling the defendant to pursue the more lengthy and cumbersome appellate procedure.<sup>2</sup>

The recent decision of the Court of Appeals in *People v. Taveras*, 10 NY3d 227 (2008), buttresses this legislative history. Although the Court in *Taveras* upheld the Appellate Division's decision to dismiss the defendant's direct appeal for failure to prosecute pursuant to CPL § 470.60(1) after the defendant was tried in absentia and was not captured for many years, Judge Pigott pointed out that the defendant could still raise his argument that his sentence was illegal through a motion made pursuant to CPL § 440.20. *Taveras*, 10 NY3d at 233. The paucity of cases explaining the availability of relief under CPL § 440.20 despite the failure to raise the illegality of a sentence on direct appeal is undoubtedly the product of the clarity of the statutory language and legislative history. However, lawyers practicing in the Third Department, in particular, should be aware of three cases in recent years that failed to recognize the procedural distinctions between motions to vacate judgments pursuant to CPL § 440.10 and motions to vacate illegal sentences pursuant to CPL § 440.20. See *People v. Pratt*, 23 AD3d 770, 771 (3d Dept 2005), *app dis* 6 NY3d 816 (2006); *People v. O'Hanlon*, 13 AD3d 718, 719 (3d Dept 2004); *People v. Pham*, 287 AD2d 789, 790 (3d Dept 2001). In making statements indicating that relief pursuant to CPL § 440.20 was unavailable when the illegality of a sentence could have been raised on direct appeal, the Third Department did not discuss the legislative history or analyze the differences between CPL §§ 440.10(2) and 440.20(2).<sup>3</sup> In light of the Court of Appeals's recent statement in *Taveras* about the availability of relief pursuant to CPL § 440.20, even when the defendant unjustifiably failed to perfect a direct appeal in a timely manner, defense lawyers in the Third Department have a strong basis for arguing that the contrary suggestions in *Pratt*, *O'Hanlon*, and *Pham* are incorrect statements of law that should not be followed.

Therefore, pursuant to CPL § 440.20, it should be possible to raise the issue that persistent felony offender sentences are unauthorized under the DLRA even when the issue was not raised on direct appeal. However, in future cases, there should be no need to wait that long; the issue should be raised during plea bargaining, at sentencing, or on direct appeal.

### *Life Sentences for Inchoate Crimes Related to Drugs*

Since there have not been any appellate decisions either accepting or rejecting the preceding interpretation of the DLRA, a certain humility is required in advising clients on their exposure to sentencing as a discretionary persistent felony offender for drug felonies until the courts weigh in on the question. In contrast, the First Department's recent decision in *People v. Anonymous*, 43

AD3d 806 (1st Dept 2007), gives a firm basis for advising clients charged with inchoate crimes such as felony-level conspiracy to commit drug offenses that they face a potential life sentence as a persistent felony offender if they have two qualifying prior felony convictions.<sup>4</sup>

In *People v. Anonymous*, the Appellate Division held that a defendant who had been convicted of the class A-I felony of conspiracy in the first degree under PL § 105.17<sup>5</sup> during the 1990's was not entitled to be resentenced under the DLRA even though "the conspiracy related to class A drug felonies." 43 AD3d at 806; see also *People v. Caba*, 852 NYS2d 773 (1st Dept 2008). The First Department explained that resentencing for class A-I felonies was "only available to those persons who were convicted of offenses defined in article 220 of the Penal Law (see L 2004, ch 738, § 23)." *People v. Anonymous*, 43 AD3d at 806. In support of its conclusion, the Appellate Division wrote that "[i]f the Legislature had intended to include conspiracy to commit drug offenses, it could have inserted the necessary language, and its failure to do so is presumed to be intentional." *Id.* at 807.

The First Department's analysis in *People v. Anonymous* has implications that reach beyond the ineligibility for resentencing of class A-I drug conspirators under the DLRA. First, the decision means that those convicted in the future of the class A-I felony of conspiracy in the first degree where the conspiracy's objective is the commission of a class A drug felony may continue to receive sentences of up to 25 years to life in prison despite the passage of the DLRA. Second, since conspiracy is not defined in either article 220 or 221 of the Penal Law and, therefore, the sentencing provisions of PL §§ 60.04, 70.70, and 70.71 do not apply to it, those convicted of felony-level conspiracy to commit drug offenses may be sentenced to life in prison as persistent felony offenders pursuant to PL § 70.10 in qualifying cases. Moreover, felony-level drug conspirators who receive state prison sentences should be sentenced to indeterminate terms pursuant to PL §§ 70.00 or 70.06, rather than determinate sentences pursuant to PL § 70.70. Finally, the rationale of *People v. Anonymous* would appear to apply with equal force to felony-level criminal solicitation or criminal facilitation of drug offenses.<sup>6</sup> See PL articles 100 and 115.

The drafters of the new sentencing provisions governing sex offenses appear to have anticipated the problem identified by the Appellate Division in *People v. Anonymous*. Therefore, the definition of "felony sex offense" for sentencing purposes includes, *inter alia*, felonies defined in article 130 of the Penal Law and felony attempts or conspiracies to commit such crimes. See L.2007, ch 7; PL §§ 60.13 and 70.80(1)(a).

Notwithstanding the more careful drafting of the new statutory provisions governing sentences for sex offenses and the statement in *People v. Anonymous* that one could infer legislative intent from the omission of a reference to

drug-related conspiracies from the DLRA, since a policy that would allow conspiracy to commit a crime to be punished in some instances more severely than the object crime itself does not make much sense, the failure to include certain inchoate crimes in the new sentencing scheme created by the DLRA is probably the result of an oversight by its drafters. Therefore, legislative action should be taken to explicitly include felony-level conspiracies and attempts<sup>7</sup> to commit drug offenses, and criminal facilitation or solicitation of drug crimes within the scope of the DLRA. Such an amendment would be analogous to the inclusion of felony-level conspiracies and attempts to commit sex offenses in the recent legislation governing sentencing of sex offenders. See PL §§ 60.13 and 70.80(1)(a).

### ***Inapplicability of Sentence Capping Statute to Class A Drug Felonies***

Another consequence the Legislature probably did not contemplate when it eliminated nominal life sentences for class A drug felonies in 2004 is that defendants charged with class A drug felonies and other consecutive counts now may be subject to a *de facto* life sentence due to the inapplicability of the capping provisions of PL § 70.30. This is a trap for the unwary. In no other instance does New York sentencing law provide for the imposition of determinate sentences and not allow for the capping of consecutive sentences where all of the crimes at issue were committed before the defendant was imprisoned for any of them.

Penal Law § 70.30(1)(e) provides that when consecutive sentences are imposed for crimes that were committed before the defendant was imprisoned for any of them, either the aggregate of the determinate sentences or aggregate maximum term of the indeterminate sentences shall be capped at 20, 30, 40, or 50 years, depending upon the severity of the crimes, unless one of the sentences is imposed for a class A felony. If none of the consecutive sentences are for crimes more serious than a class C felony, the aggregate determinate sentence or aggregate maximum term of indeterminate sentences is capped at 20 years. See PL § 70.30(1)(e)(i), (ii). Even if one or more of the consecutive sentences is for a class B felony, the aggregate sentence or aggregate maximum term will be capped at 30 years unless two or more of the crimes are violent felonies and one of those is a class B violent felony. See PL § 70.30(1)(e)(iii)-(vii).

Applying these principles, a defendant who received consecutive 15-year determinate sentences for four counts of second-degree robbery, a class C felony, would have his or her nominal 60-year sentence reduced to a 20-year sentence. If consecutive 15-year sentences were imposed for three counts of second-degree robbery and one count of criminal sale of a controlled substance in the third degree, a class B felony (see PL § 70.70(4)(b)(i)), the nominal 60-

year sentence would only be reduced to 30 years. However, if the same consecutive 15-year sentences were imposed for three counts of criminal sale of a controlled substance in the third degree and one count of criminal possession of a controlled substance in the first degree, a class A-I felony, the capping rules would not apply at all and the aggregate sentence would be calculated as 60 years. Since the capping provisions of PL § 70.30 do not apply when one of the consecutive sentences is imposed for a class A felony, a defendant could potentially receive a total sentence of hundreds or thousands of years in prison. Even a consecutive sentence of as little as three (3) years for a class A-II felony (see PL § 70.71(2)(b)(ii)) could eliminate a defendant's chance to have his or her aggregate sentence reduced through the capping provisions.

For the practicing defense attorney, the capping rules are likely to be most important when advising clients about the risks of going to trial. However, they also must be considered when plea bargaining so that unintended consequences are avoided and so that accurate advice concerning the ramifications of a bargain can be given to clients. Since prosecutors and judges may not always be fully conversant with the intricacies of PL § 70.30, on occasion, one may be able to negotiate a better deal for one's client by persuading one's adversary to allow a client to plead to a count charging a lower degree of crime in exchange for the same nominal sentence as is being offered for a plea to a more serious charge. In some instances, the capping provisions may allow an attorney to negotiate a plea to outstanding charges following a trial conviction with little additional exposure even if the prosecutor insists on a consecutive sentence.<sup>8</sup> The capping provisions should also be considered when making strategic decisions during trial such as whether to ask for a lesser included offense or to concede guilt of a less serious count while contesting a more serious count. However, given the limited number of situations in which there is an opportunity to obtain a charge to a felony-level lesser included offense in drug cases, taking the capping statute into account when making charge requests is more likely to present promising strategic gambits in non-drug cases.

Penal Law § 70.30 excludes those sentenced for class A felonies from the capping provisions because it would make no sense that a defendant serving, for example, a single class A felony sentence for murder or kidnapping or concurrent sentences for those crimes would have a maximum sentence of life in prison while someone serving consecutive sentences for a class A felony and another crime would have his or her sentence capped at less than a life sentence.<sup>9</sup> See *Matter of Roballo v. Smith*, 63 NY2d 485, 488-89 (1984) (excluding from the capping provisions those sentenced to class A-I felony sentences as persistent felony offenders pursuant to PL § 70.10 because capping their consecutive sentences would place them in a better position than those who were sentenced to concurrent life

terms). However, now that life sentences for class A drug felonies have been replaced by determinate sentences, that rationale does not justify excluding class A drug felons from the benefit of some capping provision. Applying a capping provision of some sort would not leave those with consecutive sentences better off than those who received concurrent sentences for the same crimes. On the other hand, not applying a capping provision means that non-violent felons with a class A felony drug conviction will be potentially subject to consecutive sentences that in the aggregate amount to a *de facto* life sentence while violent felons will be entitled to have their aggregate sentences capped pursuant to PL § 70.30 as long as they are not sentenced as persistent felony offenders.

The Legislature should amend section 70.30 so that those convicted of class A drug felonies are not excluded from its provisions. Such an amendment would be congruent with the DLRA's policy of not treating drug felons as persistent felony offenders. Simply put, neither nominal nor *de facto* life sentences should be imposed for drug offenses. ☪

### Endnotes

1. The argument that was raised in *Jones* was that the procedure for imposing sentence as a persistent felony offender violates the Sixth Amendment's guarantee of a jury trial. As the Third Department pointed out in *Jones*, 47 AD3d at 965, the Court of Appeals has rejected that argument. See *People v. West*, 5 NY3d 740, 741, cert den 546 US 987 (2005); *People v. Rivera*, 5 NY3d 61, cert den 546 US 984 (2005); *People v. Rosen*, 96 NY2d 329, cert den 534 US 899 (2001). However, defense attorneys should continue to raise such challenges. The New York Court of Appeals recently granted leave to appeal in *People v. Quinones*, 45 AD3d 874, 875 (2d Dept 2007), and is expected to revisit the Sixth Amendment issue in that case. See *People v. Quinones*, 2008 NY LEXIS 1023 (Apr. 24, 2008). Moreover, on April 16, 2008, the United States Court of Appeals for the Second Circuit heard several habeas corpus cases in which defendants argued that the New York courts unreasonably applied the United States Supreme Court's decision in *Blakely v. Washington*, 542 US 296 (2004), when the state courts upheld persistent felony offender sentences. See *Phillips v. Artus*, No. 06-3550-pr; *Morris v. Artus*, No. 07-1599-pr; *Portalatin v. Graham*, No. 07-3588-pr; *Washington v. Poole*, No. 07-3949-pr.

2. State of New York, Temporary Commission on Revision of the Penal Law and Criminal Code, *Proposed New York Criminal Procedure Law* (1967), at p. 295. The Staff Comment was to section 225.20 in the 1967 draft. In the final version of the Criminal Procedure Law, that section became CPL § 440.20. Peter Preiser's Practice Commentary to CPL § 440.20 in McKinney's Consolidated Laws of New York (2005), at p. 11, makes the same point about a court's power to consider a motion made pursuant to CPL § 440.20, in contrast to the restrictions contained in CPL § 440.10, even when the argument that a sentence was illegal could have been made on direct appeal, but was not.

3. The statements in the three Third Department decisions are arguably either *dicta* or parts of double holdings that could have

been avoided. Nonetheless, they would be troublesome in the absence of the Court of Appeals's statement in *Taveras*. The Third Department initially was derailed in *People v. Pham*, 287 AD2d at 790, a case in which the defendant had filed a motion pursuant to both CPL §§ 440.10 and 440.20. The Appellate Division carelessly treated the procedural issues as identical under the two statutory sections when they are not. Moreover, with respect to CPL § 440.20, the Third Department's statement that the errors could be raised on direct appeal was *dictum* because the defendant's sentence was vacated as part of the direct appeal from the judgment that had been consolidated with the appeals from the motion made pursuant to CPL §§ 440.10 and 440.20. In turn, in *People v. O'Hanlon*, 13 AD3d at 719, the Third Department cited the decision in *Pham* for the proposition that the CPL § 440.20 motion was properly denied because the challenge to the amount of restitution could have been raised on direct appeal. Yet, once again, it was unnecessary for the Third Department to decide that issue in *O'Hanlon* because it also concluded that a challenge to the amount of restitution did not involve a sentence that "was unauthorized, illegally imposed or otherwise invalid as a matter of law" as required for granting relief pursuant to CPL § 440.20(1). 13 AD3d at 719. Finally, the Third Department in *People v. Pratt*, 23 AD3d at 771, relied on *O'Hanlon* for the proposition that it was proper to deny the CPL § 440.20 motion. Yet, once again, it was unnecessary to reach that procedural issue because the Appellate Division also concluded that the defendant's allegations were insufficient to establish that the sentence was illegal.

4. The requirements for a qualifying prior conviction under PL § 70.10 are slightly different than those under PL §§ 70.04, 70.06, and 70.08. To qualify as a predicate felony under section 70.10(1)(b)(i), a sentence of more than one year in prison must actually have been imposed, rather than merely being authorized. In addition, when evaluating whether the sequentiality requirements are met, the relevant question under section 70.10 is whether, at the time of commission of a subsequent felony, the defendant had been "imprisoned" for a prior felony—a term of art meaning that the defendant had been received by the state prison system, *see* PL § 70.30(1)—rather than whether sentence had been "imposed" upon the defendant for the prior felony. Compare PL §§ 70.04(1)(b)(ii), 70.06(1)(b)(ii), and 70.08(1)(b), with PL § 70.10(1)(b)(ii), (c). Thus, for example, a felony committed in a local correctional facility after sentencing for another felony, but prior to transfer to the state prison system, will not qualify as an additional "strike" under PL § 70.10, but would qualify under sections 70.04, 70.06, and 70.08. Furthermore, unlike under the other predicate sentencing statutes, some out-of-state crimes, if they led to the imposition of a sentence of more than one year, will qualify as predicate felonies under PL § 70.10(1)(b)(i), even though the conduct would not be a felony in New York and, therefore, a sentence of more than one year could not be imposed in New York. *See People v. Parker*, 41 NY2d 21, 25-27 (1976) (interpreting prior version of PL § 70.06 that was similar to current version of PL § 70.10 in this respect). Finally, unlike under the predicate sentencing provisions of PL §§ 70.04(1)(b)(iv)-(v), 70.06(1)(b)(iv)-(v), 70.07(3), and 70.08(1)(b), a sentence as a discretionary persistent felony offender may be based on otherwise qualifying prior felony convictions regardless of how many decades ago those convictions occurred. *See* PL § 70.10(1).

5. "A person is guilty of conspiracy in the first degree when, with intent that conduct constituting a class A felony be performed, he, being over eighteen years of age, agrees with one or more persons under sixteen years of age to engage in or cause the performance of such conduct." PL § 105.17.

6. Although attempts, like conspiracies, criminal solicitations, and criminal facilitations, are inchoate crimes (*see* Article 5 of the Model Penal Code, and Title G of the New York Penal Law entitled, "Anticipatory Offenses"), the logic of *People v. Anonymous* does not necessarily apply to attempted drug offenses. A complete discussion of the arguments as to why the new sentencing scheme created by the DLRA should apply to attempted drug offenses and the rationale of *People v. Anonymous* should not apply to such attempts is beyond the scope of this article. However, it appears that New York courts have been universally treating attempted drug felonies as covered by the DLRA's new sentencing scheme. Thus, a decision that attempted drug felonies were not covered by the new statute would upset the settled expectations of both defense lawyers and prosecutors, would be inconsistent with legislative intent, and would greatly complicate plea bargaining in future cases.

Nonetheless, as discussed elsewhere in this article, the new sentencing provisions for felony sex offenses explicitly state that they apply not only to completed sex crimes, but also to felony attempts and conspiracies to commit such crimes. *See* PL §§ 60.13 and 70.80(1)(a). Therefore, if the Legislature decides to pass a new statute to overcome the decision in *People v. Anonymous* and bring felony conspiracies to commit drug crimes, and criminal solicitations or facilitations of such crimes within the sentencing scheme established by the DLRA, it would also be prudent to amend the statute to clarify the Legislature's intent by explicitly stating that felony attempts to commit drug crimes committed after the effective date of the DLRA are covered by the new sentencing scheme.

7. *See* discussion in endnote 6 concerning desirability of explicitly stating that felony attempts to commit drug offenses are covered by the DLRA.

8. Even if the sentence capping provision may limit in some cases a client's aggregate sentence for a trial conviction and a subsequent guilty plea to an outstanding charge that results in a consecutive sentence, attorneys and clients should be aware of the potential consequences of such a deal in the event of a successful appeal of the trial conviction. It is obvious that one advantage of pleading guilty to an outstanding charge and receiving a sentence that runs concurrently with a sentence imposed for a trial conviction is that the defendant is exposed to little or no additional prison time. However, another advantage of taking a guilty plea in exchange for such a concurrent sentence may be less apparent. Generally, when a sentence is promised to run concurrently as part of a plea deal, a defendant is entitled to vacatur of the plea if the conviction in the other case is reversed unless there is an agreement at the time of the plea that the plea will remain in place regardless of whether the other conviction is reversed. *See People v. Rowland*, 8 NY3d 342, 344-45 (2007); *People v. Pichardo*, 1 NY3d 126, 129-30 (2003); *People v. Fuggazzatto*, 62 NY2d 862, 863 (1984). In contrast, if a defendant pleads guilty to an outstanding charge with the understanding that the sentence will be served consecutively to a sentence

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## **Defender News** (continued from page 5)

### **Recent Case Highlights Right to Counsel Problem**

In a recent decision, Justice Thomas F. Liotti concluded in *dicta* that County Law article 18-B violates the Sixth Amendment right to counsel because it does not authorize the appointment of counsel in traffic infraction cases, despite the possibility of jail time up to 15 days per violation. See *People v Quiroga-Puma*, No. LX6701631, 2008 NY Slip Op 50490(U) (Justice Ct, Village of Westbury, Nassau Co 3/12/2008). Justice Liotti recommended that the legislature amend article 18-B to specifically allow justice courts to appoint counsel in violation cases. "No one charged with a violation and who is *in forma pauperis* and where there is a possibility of jail should be denied the assignment of effective counsel." See also *People v Florcke*, 120 Misc 2d 273 (App Term, 2d Dept 1983) (holding that the court must advise a defendant charged with a violation for which a period of incarceration is authorized that, if eligible, she is entitled to assigned counsel); *Matter of Davis v Shepard*, 92 Misc 2d 181 (Sup Ct, Steuben Co 1977) (holding that CPL 170.10(3)(c) provides defendants charged with violations with the right to assigned counsel and notes that in traffic infraction cases, if there is a possibility of a sentence of imprisonment which is not waived by the court, defendants would be entitled to assigned counsel).

### **FAMM Seeks Commutation Cases from New York**

Families Against Mandatory Minimums (FAMM), a nonprofit, nonpartisan sentencing reform organization, is launching a Commutation Project campaign in New York. The Commutation Project pairs nonviolent drug offenders serving excessive sentences with pro bono lawyers who help the offender file and raise support for a petition for a commutation of sentence. When possible, FAMM also provides suggestions and support-raising help to those who have already filed commutation requests. FAMM seeks case referrals that fit some or most of the following criteria: non-violent drug offender; no gun involved; played a minor role in the offense; first-time offender or very few (1-2) nonviolent prior convictions; excessive sentence: Rockefeller Drug Law mandatory minimums, sentence over five years for a first-time offender, long drug sentence with no parole eligibility; prisoner accepts responsibility for the offense; sentence of at least 10 years; prisoner has served at least half of his/her sentence; prisoner is not eligible for parole for at least one year; prisoner has shown extraordinary rehabilitation and good conduct in prison; and all legal remedies have been

exhausted, no pending cases or motions. FAMM is a small organization with limited resources and can work on only a very small number of clemency cases each year. FAMM does not provide prisoners with legal advice or representation and cannot guarantee that anyone who seeks clemency will receive it. To refer a case to FAMM, send a completed Case Summary Form (available at [www.famm.org/Repository/Files/case%20summary.pdf](http://www.famm.org/Repository/Files/case%20summary.pdf)) to FAMM, Attn: Molly M. Gill, 1612 K Street NW, Suite 700, Washington, DC 20006 or fax to (202) 822-6704. ♪

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### **From My Vantage Point** (continued from page 7)

If the Independent Public Defense Commission proposed by the Assembly is brought into being to conduct the studies set out in the bill, many of the questions raised by the ILSF data can be answered by an entity the defense community and the State can both trust. Those answers will then provide the basis for deciding how best to move from a State study commission to full State takeover.

When core questions such as the impact of meeting standards, the ultimate cost of a state takeover, and whether there is defense/prosecution disparity are answered, I believe the paralyzing fear of change will subside, and support for reform will grow. While the route is not what I imagined a year ago, I continue to believe that we will arrive at a statewide, fully and adequately state-funded public defense system headed by an Independent Public Defense Commission. ♪

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### **Defense Practice Tips** (continued from page 13)

imposed for a trial conviction, vacatur of the plea may not be available if the trial conviction is subsequently reversed. *People v. Hemphill*, 229 AD2d 324 (1st Dept), *lv den* 88 NY2d 1021 (1996).

9. The exception to the sentence capping provision was added in 1978 as part of the amendment to PL § 70.30(1)(b) that provided that the minimum terms of consecutive indeterminate sentences should be added together to arrive at a new aggregate minimum term. See L.1978, ch 481, § 24. Until 1978, consecutive life sentences would not result in a defendant serving any more time than concurrent life sentences before becoming eligible for parole and, therefore, there was no reason for judges to impose consecutive life sentences. Under the version of PL § 70.30(1)(b) enacted in 1965 (L.1965, ch 1030), when consecutive sentences were imposed, the maximum terms were added together to arrive at an aggregate maximum term, but the minimum terms merged together and were satisfied by service of the minimum term with the longest unexpired time to run. It was only in 1978, when the law was amended so that minimum terms of consecutive sentences would be added together to form a longer aggregate minimum sentence, that judges had a basis for imposing consecutive life sentences and an exception to the capping provision for class A felonies was needed to ensure that the aggregate maximum term of consecutive life sentences was not reduced to less than life in prison.