

COURT OF APPEALS
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, ex
rel.,
ANTHONY GILL,

Petitioner-Respondent,

-against-

GARY GREENE, Superintendent, Great Meadow
Correctional Facility,

Respondent-Appellant.

**BRIEF FOR THE DISTRICT ATTORNEYS ASSOCIATION OF THE
STATE OF NEW YORK AS AMICUS CURIAE**

INTRODUCTION

Pursuant to Rule 500.23 of the Rules of this Court, the District Attorneys Association of the State of New York (DAASNY) respectfully submits this brief as Amicus Curiae in the captioned case.

This appeal concerns the scope of Penal Law Section 70.25(2-a), the statute mandating imposition of consecutive terms of imprisonment for repeat felony who commit a second felony while subject to an undischarged sentence previously imposed by a New York court. Since its enactment, decisions from the Second, Third, and Fourth Departments have reaffirmed that the New York State Department of Corrections (DOCS) is authorized to calculate the sentences as the

statute requires without an express directive from the sentencing court. In this case, however, and in a turnaround of settled precedent, the Appellate Division, Third Department, has held that the statutorily mandated consecutive sentence must be explicitly stated by the sentencing court, and that the DOCS improperly usurped the court's authority when it calculated the sentence to run consecutively in the absence of a judicial directive at sentencing. We respectfully submit that the Legislature could not have intended to create the possibility of concurrent sentences for a person convicted of a new felony while serving time on a prior felony, when the statute was enacted specifically to eliminate judicial discretion, to grant such lenity, ensuring that sentences for different crimes, imposed by different judges, would run consecutive by operation of law.

Because it is the association that represents District Attorneys throughout this state, amicus has a substantial interest in the outcome of this case. The Third Department's ruling is in direct contravention of established statutory interpretation relied upon by district attorneys, sentencing courts and DOCS. In addition, this Court's recent decisions involving imposition of post-release supervision (PRS) are not applicable. Unlike PRS, a previous sentence imposed by a prior judge is not an integral component of the new sentence imposed by another judge. Due process rights are not implicated, where, as here, all of the sentences concerned are pronounced by the judge, and the only question is the calculation of how they interrelate. Crucially, if upheld, the decision rendered in this case will severely impact the criminal justice system and public safety, for DOCS estimates that more than

30,000 convicted felons (inmates and persons on parole supervision) have consecutively-imposed sentences imposed under Penal Law Section 70.25(2-a) that would be called into question if the Third Department’s ruling is affirmed.

QUESTION PRESENTED

Did the Legislature enact Penal Law Section 70.25 (2-a) to require the sentencing court to expressly impose a new sentence to run consecutively with respect to an undischarged sentence?

The Court below answered the question affirmatively.

POINT

AN AFFIRMANCE WOULD UPSET THIRTY YEARS RELIANCE ON AN UNDERSTANDING OF PENAL LAW SECTION 70.25(2-a) THAT MANDATED CONSECUTIVE SENTENCES BY OPERATION OF LAW FOR A REPEAT FELONY OFFENDER SUBJECT TO AN UNDISCHARGED PRIOR SENTENCE, AND CAUSE ENORMOUS DAMAGE TO THE CRIMINAL JUSTICE SYSTEM

In 1978, the New York State Legislature passed the Omnibus Crime Control Bill. As part of that legislation, Penal Law Section 70.25(2-a) was enacted to create a statutory ban on the imposition of concurrent sentences for repeat felony offenders. L.1978 ch.481 §23. It specifically requires that a person sentenced as a repeat felony offender receive a consecutively imposed sentence when he or she is “subject to an undischarged indeterminate or determinate sentence of imprisonment imposed prior to the date on which the present crime was committed.” Penal Law §70.25(2-a).

Before the decision in this case, all courts rejected challenges to sentencing calculations by DOCS when the last sentencing court did not expressly impose the sentences to run consecutively. Indeed, in the thirty years since enactment of subdivision (2-a), the Third Department itself consistently rejected challenges to sentence calculations by DOCS when the last sentencing court did not expressly impose the sentences to run consecutively. *See generally Matter of Rolon v. Senkowski*, 160 A.D.2d 1072, 1073 (3d Dept. 1990)(where sentences were required to run consecutively under Penal Law §70.25(2-a), DOCS properly correctly calculated the sentences as consecutive); *People ex rel. Batista v. Walsh*, 48 A.D.3d 845 (3d Dept. 2008); *Matter of Gray v. Goord*, 37 A.D.3d 904, 905 (3d Dept. 2007)(same); *Matter of Jackson v. Smith*, 36 A.D.3d 1067, 1068 (3d Dept. 2007); *Matter of Collins v. Woodruff*, 32 A.D.3d 1139 (3d Dept. 2006); *Matter of Moore v. Goord*, 34 A.D.3d 909, 910 (3d Dept. 2006); *Matter of Valentin v. Smith*, 30 A.D.3d 862, 863 (3d Dept. 2006); *Matter of Myles v. Smith*, 32 A.D.3d 1142 (3d Dept. 2006); *El-Aziz v. Goord*, 27 A.D.3d 861 (3d Dept.), *app. denied*, 7 N.Y.3d 704 (2006), *writ of habeas corpus denied sub nom* 2008 U.S. Dist LEXIS 75301 *12-13 (S.D.N.Y. Sept. 29, 2008); *Matter of Soriano v. New York State Department of Correctional Services*, 21 A.D.3d 1233, 1234 (3d Dept. 2005); *Matter of Parilla v. Goord*, 274 A.D.2d 820, 821 (3d Dept. 2000); *Matter of Forman v. Potempa*, 261 A.D.2d 671 (3d Dept. 1999); *Matter of White v. Van Zandt*, 236 A.D.2d 763 (3d Dept. 1997).

The First Department has not had the opportunity to consider the issue

directly,¹ but the Second and Fourth Departments have been in agreement with this view of the statute. *Matter of Rice v. Goord*, 35 A.D.3d 867 (2d Dept. 2006); *People ex rel. Washington v. Burge*, 30 A.D.3d 1066 (4th Dept. 2006); *People ex rel. Smith v. Burge*, 27 A.D.3d 1156 (4th Dept.), *app. denied*, 7 N.Y.3d 701, *cert. denied*, ___ U.S. ___, 127 S. Ct. 513 (2006); *Matter of Rivera v. Goord*, 24 A.D.2d 679, 680 (2d Dept. 2005), *app. denied*, 6 N.Y.3d 710 (2006), *writ of habeas corpus denied sub nom*, 2008 U.S. Dist. LEXIS 56756 (N.D.N.Y. July 22, 2008); *People v. Fucci*, 16 A.D.3d 597 (2d Dept. 2005); *Matter of Madison v. Goord*, 274 A.D.2d 483, 484 (2d Dept. 2000); *Matter of Grant v. Goord*, 252 A.D.2d 978, 979 (4th Dept. 1998).

Although the statutory directive is plain and unambiguous, the Appellate Division, Third Department, perhaps swayed by a false and superficial similarity to this Court's PRS cases, ruled that a sentence that is not specified to run consecutively is erroneous and unlawful, and that DOCS has no authority to calculate the sentences consecutively or to correct the "error." *People ex rel. Gill v. Greene*, 48 A.D.3d 1003, 1005 (3d Dept. 2008). In reaching that conclusion, the Third Department disregarded the legislative history of the statute, which conclusively demonstrates that the Legislature intended to remove judicial authority to impose concurrent terms of imprisonment in certain circumstances. The Third Department also ignored longstanding precedent from its own court and sister appellate courts, which has uniformly recognized that DOCS properly calculates sentences to run consecutively

¹The First Department has agreed with the statutory interpretation of Penal Law Section 70.25 (2-a) in the context of CPL Section 440.10 post-judgment proceedings. See *People v. Wilson*, 299 A.D.2d 222 (1st Dept.), *app. denied*, 99 N.Y.2d 566 (2002), *writ of habeas corpus denied in Wilson v. McGinnis*, 2004 U.S. Dist. LEXIS 15432 (S.D.N.Y. Aug. 5, 2004), *aff'd*, 413 F.3d 196 (2d Cir. 2005); *People v. Johnson*, 183 A.D.2d 573 (1st Dept.), *app. denied*, 80 N.Y.2d 905 (1992).

whenever Penal Law Section 70.25 (2-a) applies, even when the sentencing court has not expressly stated whether the sentences are to run consecutively or concurrently.

Reliance on this apparently settled rule has resulted in imposition of consecutive sentencing on approximately 30,000 multiple felony offenders since 1978. To rule to the contrary would cause untoward damage to an already overburdened criminal justice system. In this submission, amicus DAASNY will detail why reliance on the settled understanding of Penal Law Section 70.25(2-a) was reasonable. Amicus will then detail the foreseeable consequences of upsetting that settled rule with an affirmance here.

A. The Plain Meaning of the Statute

When a court construes a statute, the primary goal is to ascertain and give effect to the intention of the Legislature. The clearest indicator of legislative intent is the language of the statute itself. *See*, McKinney's Statutes, §92. "If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must be regarded as conclusive.'" *United States v. Turkette*, 452 U.S. 576, 580 (1981), *quoted in El-Aziz v. LeClair*, 2008 U.S. Dist. LEXIS 75301 *12-13 (S.D.N.Y. Sept. 29, 2008) (Scheidlin, J.).

It follows that any discussion about the meaning and scope of a statute must begin with the text of the statute. Penal Law Section 70.25(2-a) provides:

When an indeterminate or determinate sentence of imprisonment is imposed [upon a second or persistent felony or violent felony offender], and such person is subject to an undischarged indeterminate or determinate sentence of imprisonment imposed prior to the date on which the present crime was committed, the court must

impose a sentence to run consecutively with respect to such undischarged sentence.

By the term “must,” the statute plainly mandates the substantive result – that a sentence of imprisonment be imposed to run consecutively to an undischarged prior sentence imposed at a previous time by a New York court.

Thus, there being no doubt about that, the question before this Court is whether the sentencing court must expressly state, presumably at the sentencing, that the sentence or sentences are to run consecutively, or whether they run consecutively by operation of law. We join in appellant’s arguments (Appellant’s Brief at 13) that the Third Department incorrectly interpreted the statute based on its reading of the phrase “the court shall impose a sentence to run consecutively,” which essentially recognizes that the court pronounces the sentence which is mandated to run consecutively, whether the court notes that fact or remains silent about it. But even if the use of the phrase raises some doubt about the law’s intended scope, the legislative history resolves any question about it.

B. The Legislative History

Where the plain text of a statute is ambiguous, courts must attempt otherwise to ascertain and give effect to the intention of the Legislature. *See*, McKinney’s Statutes, §92(b). This Court has held that “legislative history can be useful to aid in interpreting statutory language[.]” *People v. Garson*, 6 N.Y.3d 604, 611 (2006) (citations omitted); *see also, e.g., People v. Cagle*, 7 N.Y.3d 647 (2006). Moreover, the New York Legislature has instructed that, when interpreting penal statutes in particular, courts

should avoid strict or narrow interpretation of terms. Rather, the language of the statute must be fairly interpreted “to promote justice and affect the objects of the law.” Penal Law §5.00; *see also* McKinney’s Statutes, §276. A court must also interpret the statute to avoid certain objectionable consequences, “such as the sacrifice of public interests.” McKinney’s Statutes §152. There is an extremely strong public interest involved here, that of having recidivist felony offenders who are convicted of subsequent crimes serve the consecutive term of imprisonment as mandated by subdivision (2-a).

Consistent with the rules of statutory construction, there can be no doubt as to the 1978 Legislature’s decision that it no longer wanted to permit sentencing courts the discretion to impose concurrent sentences for predicate felony offenders. In an era of skyrocketing crime in New York, the Legislature in 1978 intended to stem the release of dangerous career criminals released upon advantageous plea agreements that permitted lower courts to impose concurrent terms of imprisonment. That the drafters of the introductory bills in the Senate and Assembly both used the language “to require that indeterminate sentence . . . run consecutively” is strong evidence that they meant to remove any possibility of judicial discretion in this area. *See*, N.Y. Senate Bill S7587, 1978 N.Y. Legis. Record and Index, at S583; N.Y. Assembly Bill A9740, 1978 N.Y. Legis. Record and Index, at A697.

As the New York State Attorney General points out in his brief, (Appellant’s Brief at 11-16), the language used in Penal Law §70.25(2-a) leaves no doubt that the

Legislature's intent was to stiffen penalties for adults convicted of violent crimes by establishing mandatory penalties, limiting plea bargaining and allowing juveniles accused of certain types of violent crimes to be tried in adult criminal court system. Prior to the statute's enactment, Penal Law Section 70.25(1) had permitted sentencing courts to exercise discretion when sentencing second felony offenders subject to any undischarged term of imprisonment to either consecutive or concurrent terms of imprisonment. That statute was enacted in 1967, but by 1978, did not address the problems that had arisen as a result of recidivist criminals returning to the streets on parole, subject to an undischarged sentence imposed before commission of a new crime, when sentenced concurrently on that newer, unrelated crime. Enactment of Penal Law Section 70.25(2-a), together with the amendment of Penal Law Section 70.25(1) to expressly exempt second felony offenders subject to any undischarged term of imprisonment from its longstanding applicability, are unmistakable indications of a legislative intent to create a new law that mandates imposition of consecutive sentences. In light of this demonstrated awareness, the Legislature's decision to amend Penal Law Section 70.25(1) and enact Penal Law Section 70.25(2-a) to create the mandatory sentencing scheme could only have been deliberate.

It is well recognized that where a statute has been interpreted by the courts, the continued use of the same language by the Legislature subsequent to the judicial interpretation indicates that the legislative intent has been correctly ascertained. *See, Matter of Curtain v. City of New York*, 287 N.Y. 338, 342 (1942), *cited by Knight Ridder Broadcasting Co. v. Greenberg*, 70 N.Y.2d 151, 157 (1987). Had the Legislature truly

intended to establish that the court's failure to advise a defendant that his sentence was to run consecutively rendered the sentence illegal, it would have expressed its disapproval with existing decisional law by amending the statute. Instead, the Legislature has accepted existing decisional law and left the statute unchanged. *See, Arbegast v Board of Education*, 65 NY2d 161, 169 (1985).

Given the straightforward command of the statute, New York courts have uniformly applied Penal Law Section 70.25(2-a) to authorize imposition of mandatory consecutive sentences, whether or not the lower court addressed the matter at sentencing. For that reason, the Third Department has no reason to break suddenly from decades of established precedent and impose a requirement on the sentencing court that never existed in the first place.

C. Decisions Governing Post-Release Supervision Are Inapplicable to Cases Governed by Penal Law Section 70.25(2-a).

To be sure, the decisional landscape in the sentencing context has changed. In *Matter of Garner v. New York State Department of Correctional Services*, 10 N.Y.3d 358 (2008), and *People v. Sparber*, 10 N.Y.3d 457 (2008), along with *Earley v. Murray*, 451 F.3d 71 (2d Cir.), *reh'g denied*, 462 F.3d 147 (2006), *cert. denied*, 127 S.Ct. 3014 (2007), it has been held that a defendant's post-release supervision (PRS) term, a component of the original sentence, could not be enforced because the sentencing court had not pronounced it orally. In *Garner* and *Sparber*, this Court based its determination on the statutory interpretation of CPL Sections 380.20 and 380.40. In *Earley*, alternately, the

Second Circuit considered the claim as one that implicates due process. In the Third Department's view, both rationales apply equally when a sentencing court determines how two different sentences for different crimes are imposed at different times by different judges.

However, as the Attorney General points out, (Appellant's Brief at 27-29), a previous sentence imposed by a prior judge is not an integral component of the new sentence imposed by another judge. Moreover, unlike the PRS situation, all of the sentences concerned in the present situation were announced by the court. Thus, neither CPL Section 380.20 or Section 380.40 are at all implicated here because sentence is pronounced on each conviction as the former requires and defendant is present at both pronouncements as the latter requires.

Indeed, it is difficult to see what relevance *Sparber* and *Garner* have here. As amicus understands it, the problem addressed by those cases was a complete failure by the sentencing court to pronounce the post release supervision component of the sentence and a subsequent administrative imposition of the PRS requirement. Quite obviously, Section 380.20's requirement that a court pronounce sentence has been violated. Similarly, the administrative imposition of the sentence violates Section 380.40's pronouncement that a defendant must be personally present at sentencing. As noted, not only has the sentence imposed been pronounced by a sentencing court, but it also has been imposed in the defendant's presence. It follows, then, that due process rights are not implicated, where, as here, a person is subject to multiple sentences imposed for different crimes. This is so because calculating the two

sentences is neither increases the new sentence nor involves the imposition of enhanced punishment. *El-Aziz v. LeClair*, 2008 U.S. Dist. LEXIS 75301 at *12-13; *see also, Matter of Browne v. Board of Parole*, 10 N.Y.2d 116, 120 (1961).

El-Aziz involved a due process challenge to subdivision (2-a) of Section 70.25. The defendant was convicted in 1968 of several violent felony offenses, and received an aggregate indeterminate term of from 40 to 60 years in state prison. *El-Aziz*, 2008 U.S. Dist. LEXIS 75301 at *1. Released to parole supervision in 1980, he committed several additional violent felonies, and was violated by the Department of Parole in 1984. *Id.* In 1985, he was sentenced, as a second violent felony offender and second felony offender in three separate proceedings (for six different first degree robberies and one second degree robbery) to an aggregate prison term of from thirty-three-and-one-half to 67 years in state prison. *Id.* at *3.

On federal habeas review, El-Aziz presented a constitutional claim that the circumstances of his 1985 sentencing violated *Earley* and *Hill v. United States*, 298 U.S. 460 (1936). *Id.* at *12. In rejecting the argument, the district court held that, unlike *Earley* and *Hill*, where administrative personnel “effectively increased the sentences imposed upon the defendants by the court,” DOCS in defendant’s case “merely calculated the sentence in accord with a statutory directive by which judges themselves were bound.” *Id.* (citation omitted). The court noted that Penal Law Section 70.25 (2-a) “mandates that because El-Aziz was sentenced as a second violent felony offender and a second felony offender for his 1985 convictions, those sentences must run consecutively to his undischarged 1968 sentence, even without

explicit instruction from the court.” *Id. at* *12-13. In short, the question of whether sentencing courts are bound by a statutory directive that mandates consecutive sentences under Penal Law Section 70.25 (2-a) without explicit instruction by the court is not an issue that implicates the right to due process.

D. Interpretation of Penal Law Section 70.25(2-a).

As demonstrated, sentencing courts and prosecutors have justifiably relied on this settled interpretation of Penal Law Section 70.25 (2-a). In fact, sentencing courts have rarely included on the commitment to the Department any statement about prior sentences (R.110-118). Instead, they routinely rely on the Department to make the necessary calculation, especially in view of the uniform agreement with that practice by New York courts until now. *Matter of Santiago v. Van Zandt*, 236 A.D.2d 728, 729 (3d Dept. 1997); *see also, Matter of Jackson v. Wolford*, 232 A.D.2d 795, 796 (3d Dept. 1996). Indeed, courts and prosecutors throughout the State have operated on this assumption.

Thus, the practical effect of an affirmance of the Third Department’s ruling would be enormous. The widespread lack of an announcement by sentencing courts to the effect that multiple sentences are to run consecutively under Penal Law Section 70.25 (2-a) will potentially affect 30,000 outstanding felony convictions in New York state. This estimate is based on the number of felony convictions dating from July, 1978, when the statute was enacted. Conceivably, many second violent felony offenders in state prison may be entitled to immediate release under habeas corpus. Moreover, according to the Department of Corrections, it has already received more

than 150 Article 78 petitions seeking a writ of prohibition against the commissioner precluding DOCS from calculating sentences imposed consecutively under Penal Law Section 70.25(2-a) when the court was silent at the sentencing proceedings. These offenders, with extensive criminal backgrounds, are least suited to be released because they are a proven risk to public safety. DOCS estimates that about 10,000 of these inmate offenders fall into this category (R114-115).

It is no real answer to this dilemma to afford the possibility of a resentencing procedure to those incarcerated defendant serving consecutive sentences by operation of the common understanding of Penal Law Section 70.25(2-a). Of course, an affirmance in this case would mean that defendants serving such sentences without pronouncement by the sentencing court are serving illegal sentences, since Section 70.25 (2-a) mandates consecutive sentencing. *Cf., Matter of Garner, supra; People v. Sparber, supra.* But there appears to be no statutory mechanism by which such resentencing could be accomplished. The People's ability to seek vacatur of an illegal sentence ends one year after its imposition. CPL §440.40. And, while it is true that a sentencing court retains the inherent authority to correct its own errors, such courts will undoubtedly be reluctant to burden themselves with further resentencings, particularly in light of the burden placed upon them to correct the illegal determinate sentences which did not include the post-release supervision mandated by Penal Law Section 70.45. *See* Corr. Law §601-a. Moreover, since the possibility exists that an affirmance will affect judgments of conviction rendered as far back as 1978, it is likely that some judges who imposed those more remote in time sentences are no longer

on the bench, rendering questionable the ability of a new judge to exercise inherent authority to correct the error of his predecessor.

More significantly, an affirmance here will throw into question the voluntariness of pleas of guilty of defendants subject to undischarged terms of imprisonment. It is well-settled that before accepting a plea of guilty, a court need not warn a defendant of the collateral consequences of his guilty plea. *People v. Ford*, 86 N.Y.2d 397, 403 (1995). Collateral consequences are those “peculiar to the individual's personal circumstances and one not within the control of the court system.” *Id.* As currently understood, Penal Law Section 70.25(2-a) is merely a directive to the Department of Corrections about sentencing calculation and thus, not something in control of the court. *Cf. People v. Moore*, 61 N.Y.2d 575, 578 (1984)(“deeming” provision of Penal Law Section 70.30(1) “merely requires that the Department of Correctional Services calculate the aggregate maximum length of imprisonment consistent with the applicable limitation”).

Moreover, it is obviously something peculiar to the defendant who is convicted of a new crime while subject to an undischarged term of imprisonment. In that way, it is no different than a plea court's failure to advise a defendant that he would face an enhanced sentence as a second felony offender should he be convicted of a crime in the future will not entitle the defendant to vacatur of the judgment since it is merely a collateral consequence of his plea. *See, e.g., People v. Kirton*, 36 A.D.3d 1011 (3d Dept. 2007); *People v. Depeyster*, 115 A.D.2d 613 (2d Dept. 1985). After all, the failure to sentence a second felony offender to a predicate felony sentence

renders the sentence illegal. Certainly, if that mandatory consequence of his guilty plea is collateral, so is the mandatory consequence of consecutive sentencing under Penal Law Section 70.25(2-a). Significantly, the First Department has concluded that the possibility of mandatory consecutive sentences as a result of Penal Law Section 70.25(2-a) is indeed collateral. *People v. Wilson*, 299 A.D.2d 222 (rejecting voluntariness claim grounded in failure to advise the defendant that Section 70.25[2-a] mandated consecutive sentencing).

But if consecutive sentencing is something that must be imposed by the court, it no longer is not within control of the court system and would thus be a direct consequence of conviction. The possibility certainly exists that such defendants were not told that consecutive sentencing was mandatory and, if that is a direct consequence, their pleas would have to be undone. *Cf. People v. Catu*, 4 N.Y.3d 242 (2005) (post-release supervision is a direct consequence of a guilty plea to a violent felony; if defendant not advised that it is part of sentence, plea must be vacated).

This concern is no longer merely a hypothetical one. In *People v. Morbillo*, 2008 N.Y. Slip. Op. 09102 (2d Dept. Nov. 18, 2008), the Appellate Division, Second Department explicitly held that the failure to advise a defendant that Penal Law Section 70.25(2-a) required that the sentencing court impose a consecutive sentence mandated vacatur of a guilty plea to a new crime committed while the defendant was subject to an undischarged term of imprisonment. In the post-release supervision context, this Court has consistently refused to rule that a plea of guilty entered without knowledge that post-release supervision was a component of the promised

sentence did not have to be vacated if the defendant is given the benefit of his plea bargain by imposition of a sentence totaling the promised term, including post release supervision. *See People v. Hill*, 9 N.Y.3d 189 (2007); *People v. Van Deusen*, 7 N.Y.3d 744 (2006). This is because, in this Court's view, the pleading defendant did not possess all the information necessary for an informed choice among different possible courses of action" when entering his or her plea. *People v. Van Deusen*, 7 N.Y.3d at 746. Since jiggering of the imposed sentence cannot render an unknowing plea a knowing one, resentencing certainly cannot have that effect. In short, resentencing most assuredly will not cure this problem.

An added complication to any resentencing is that it could change the date of a felony sentence for purposes of determining whether a defendant is deemed a second or persistent felony offender for a later offense. Penal Law §70.04(1)(b)(ii); 70.06(1)(b)(ii). The Third Department's holding would also invite post-judgment motions claiming ineffective assistance of counsel based on an attorney's failure to challenge imposition of consecutive sentences without explicit court pronouncement, or the failure to advise his client that the sentences would run consecutively. Defendants may seek redress in civil lawsuits against the state alleging illegal sentencing on consecutive terms that had never actually been imposed by the lower court. All these consequences would undoubtedly require that minutes of proceedings from as far back as 1978 be obtained. There is no guarantee that this would even be possible.

Simply stated, the variety of potential collateral attacks by defendants on their predicate felony status may involve convictions that are decades-old, and thus impossible to retry. The system will be overwhelmed if prosecutors were required to obtain records of plea allocutions and sentencing proceedings for tens of thousands of defendants convicted of multiple prior felony offenses that could reach as far back as thirty years. In short, whether these cases return to the lower courts by post-judgment CPL Section 440 motions, or by the sentencing court *sua sponte*, or administratively under Article 78 or by writ of habeas corpus, the fact remains that the task ahead would stretch the limits of an overburdened criminal justice system.

* * *

In sum, the plain text of the statute mandates the imposition of consecutive terms of imprisonment for qualified second felony offenders. Moreover, the legislative history of the statute eliminates any question that the purpose and intent of the statute was to eliminate judicial discretion and require that repeat felony offenders receive consecutive sentences. There is nothing in the text of the statute itself, the legislative history, or the subsequent case law to support the Third Department's narrow interpretation of Penal Law Section 70.25(2-a). The Third Department's ruling will impact tens of thousands of convictions dating back several decades, impact public safety concerns, and unnecessarily overburden the courts in a wide range of collateral litigation. In accordance with Penal Law Section 5.00, this Court should construe the statute the Legislature intended and give effect to the purpose of the law.

CONCLUSION

The order of the Appellate Division, Third Department should be reversed.

Respectfully submitted,

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