

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D32318  
C/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - September 6, 2011

MARK C. DILLON, J.P.  
DANIEL D. ANGIOLILLO  
THOMAS A. DICKERSON  
JEFFREY A. COHEN, JJ.

2010-05257

DECISION & ORDER

The People, etc., respondent,  
v Guy McEachin, appellant.

(Ind. No. 10549/99)

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Lynn W. L. Fahey, New York, N.Y. (Paul Skip Laisure of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano,  
Johnnette Traill, and Ayelet Sela of counsel), for respondent.

Appeal by the defendant from an order of the Supreme Court, Queens County (Blumenfeld, J.), dated May 21, 2010, which denied his motion for resentencing pursuant to CPL 440.46, on his conviction of criminal possession of a controlled substance in the third degree (two counts), which sentence was originally imposed, upon a jury verdict, on September 14, 2000.

ORDERED that the order is reversed, on the law, and the matter is remitted to the Supreme Court, Queens County, for further proceedings on the defendant's motion for resentencing pursuant to CPL 440.46.

The Supreme Court denied the defendant's motion for resentencing pursuant to CPL 440.46 solely on the basis that the defendant's release to parole after he applied for resentencing rendered him ineligible for that relief. However, where, as here, the defendant applies for resentencing while still in the custody of the Department of Corrections and Community Supervision, the defendant is not rendered ineligible based upon a post-application release to parole supervision (*see* CPL 440.46[1]; *People v Santiago*, 17 NY3d 246; *People v Overton*, 86 AD3d 4; *People v Wiggins*, 84 AD3d 1279). Since the defendant met all eligibility requirements of CPL

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440.46, it was error to deny the motion on the basis that the defendant was statutorily ineligible for resentencing, and we remit the matter to the Supreme Court, Queens County, for further proceedings on the defendant's motion.

DILLON, J.P., ANGIOLILLO, DICKERSON and COHEN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan  
Clerk of the Court