

Post-Release Supervision and *Earley v Murray*

By Elon Harpaz*

Penal Law 70.45 and the *Earley Decision*

In September 1998, the New York legislature brought post-release supervision (PRS) into existence, enacting Penal Law 70.45. The statute gave the impression that PRS was automatically included in every determinate sentence, making a pronouncement by the sentencing judge unnecessary. As a result, for the next several years, many judges neither imposed PRS at sentencing, nor advised defendants of it while accepting guilty pleas. Instead, the Department of Correctional Services (DOCS) added PRS to the sentence. In March 2005, the New York Court of Appeals held, in *People v Catu*, 4 NY3d 242 (2005), that a court's failure to advise of PRS renders the plea involuntary because PRS is a direct consequence of the conviction. The prospect of hundreds of defendants withdrawing their pleas suddenly loomed.

On June 9, 2006, the United States Court of Appeals for the Second Circuit went one step further. In *Earley v Murray*, 451 F3d 71 (2d Cir), rehearing den, 462 F3d 147 (2006), the 2nd Circuit held that, because PRS is not merely a direct consequence of a conviction, but an actual part of the sentence, it must be judicially imposed to satisfy due process under the federal constitution. Relying on the Supreme Court's decision in *Hill v US ex rel. Wampler*, 298 US 460 (1936), the 2nd Circuit made clear that the only sentence known to the law is the one pronounced by the judge and that any administrative alteration to that sentence is a nullity. Upon a petition for rehearing, the court refused to budge, notwithstanding the specter of nullification of PRS for thousands of defendants invoked by the Kings County District Attorney's Office, and the retooled argument that PRS is imposed, not administratively, but by operation of Penal Law 70.45 as an automatic consequence of a determinate sentence. As to the latter argument, the 2nd Circuit declared in no uncertain terms that any statute purporting to impose sentence by operation of law, without need for judicial pronouncement, would itself be unconstitutional.

The Reaction of New York Appellate Courts

While the systemic chaos predicted in the rehearing petition has yet to materialize, the reaction of New York

appellate courts to *Earley* has produced more than its share of legal chaos. And, until the Court of Appeals sorts it all out, litigating an *Earley* claim will require attorneys to make difficult choices and to navigate a series of legal minefields.

The 1st Department

The 1st Department was the first appellate court to address *Earley*. Reviewing direct appeals in *People v Sparber*, 34 AD3d 265 (1st Dept 11/09/06) and *People v Lingle*, 34 AD3d 287 (1st Dept 11/14/06), the Court distinguished *Earley* on its facts, drawing a line at the sentencing commitment sheet. The court held that, where the judge fails to impose PRS at sentencing, any potential constitutional problem is obviated when the court clerk, acting as agent of the judge, records PRS on the commitment sheet, thereby satisfying *Wampler's* requirement that sentence "be entered upon the records of the court." There is serious doubt, though, whether *Sparber* and *Lingle* are truly consistent with *Wampler*, since the Supreme Court in *Wampler* struck down a sentence that had been recorded on the commitment sheet by a court clerk after the judge had failed to pronounce it at sentencing. The 1st Department left for another day how it would rule on facts indistinguishable from *Earley*.

Seemingly presented with just such an opportunity in *People v Hill*, 830 NYS2d 33 (1st Dept 1/30/07), the 1st Department instead found another distinction. In *Hill*, the judge originally sentenced the defendant to a 15-year determinate term; no period of PRS was pronounced in court or recorded on the commitment sheet. Relying on *Catu*, the defendant moved to vacate his plea pursuant to CPL 440.10, but the court instead resentenced him to 12½ years, plus 2½ years of PRS. By a 3-2 vote, the 1st Department upheld the remedy because the defendant was given a better deal than the original offer.

Before reaching that conclusion, however, the court had to determine that resentencing was permissible at all, since a lawfully imposed sentence may not be altered. In finding the original sentence of 15 years illegal, the appellate court relied on the defendant's status as a first-time felony offender. Because Penal Law 70.45(2), which was in effect through 2004, gave judges discretion as to how long a period of PRS to impose on first offenders, the court, mindful of *Earley*, held that the statute did not automatically mandate the maximum permissible period when the judge failed to exercise discretion. Since the 15-year determinate sentence for defendant Hill accordingly did not include PRS by operation of law, and since PRS was required, the sentence imposed was unlawful and therefore subject to correction pursuant to the judge's inherent powers. The 1st Department specifically declined to decide, however, whether automatic imposition of the mandatory 5-year period of PRS for predicate offenders would violate due process.

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The 2nd Department

The 2nd Department reached that question in a series of decisions issued in February. In *People v Smith*, 37 AD3d 499 (2d Dept 2/6/07), *People v Noble*, 37 AD3d 622 (2d Dept 2/13/07) and *People v Wilson*, 37 AD3d 855 (2d Dept 2/27/07), the court strongly endorsed *Earley v Murray*, holding that, where the sentencing minutes and the commitment sheet are silent as to PRS, “the sentence actually imposed by the court never included, and does not now include, any period of post-release supervision.” *Noble*, 37 AD3d at 622. Not only did the 2nd Department hold that administratively imposed PRS is a nullity, it signaled its apparent intention, in opposition to *Sparber* and *Lingle*, to reach the same holding even when PRS is recorded on the commitment sheet.

These 2nd Department decisions have created a procedural black hole. To hammer home its point that administratively imposed PRS is not part of a defendant’s sentence, the court dismissed the appeals in *Smith*, *Noble* and *Wilson*; since direct appeals and 440 motions can only challenge the actual sentence imposed by the court, they cannot be used to challenge the administrative imposition of PRS. Most tellingly, in *Wilson*, the 2nd Department dismissed an appeal from the denial of a CPL 440.10 motion, holding that the defendant got the exact sentence promised—one without post-release supervision—and thus had no basis to complain about the court’s failure to warn him about PRS. For the 2nd Department, then, far from creating a problem, *Earley* represents a solution to the potential undoing of numerous pleas in the aftermath of *Catu* based on the failure to warn of post-release supervision. But litigants in the 2nd Department are left in a state of uncertainty, possessed of a meritorious claim, with no clear way to obtain relief from a period of PRS that is not included in the sentencing minutes and the commitment sheet, *i.e.* PRS added by DOCS.

The 3rd Department

The 3rd Department has gone in the opposite direction—maybe. In *Garner v NYS Dept. of Correctional Services*, 831 NYS2d 923 (3d Dept 4/12/07), the court reaffirmed its holding in *Deal v Goord*, 8 AD3d 769 (3d Dept 2004) that prohibition does not lie in an Article 78 proceeding challenging administrative imposition of post-release supervision because PRS is automatically included in a defendant’s sentence by operation of law and DOCS has thus usurped no judicial function in imposing it. *Deal* was a pre-*Earley* statutory construction case that never considered whether a statute that makes it unnecessary for the judicial branch of government to impose sentence is unconstitutional. And, although *Garner* was only just decided, it is by no means clear that the 3rd Department considered the due process claim raised in *Earley*. The court’s decision does not hint at any such consideration,

making no mention of *Earley* or related cases. Furthermore, the Attorney General’s Office did not even cite *Earley* in its legal argument defending on appeal the trial court’s pre-*Earley* denial of the Article 78 petition. While it is thus unclear if the 3rd Department has rejected *Earley*, rest assured that attorneys for the State will be strongly advocating precisely such a reading of *Garner*.

The 4th Department

Finally, the 4th Department has yet to weigh in on *Earley*. However, pre-*Earley* decisions from that court uniformly held that post-release supervision is an automatic consequence of a determinate sentence and that a defendant is not entitled to excision of PRS based on the plea court’s failure to advise the defendant about it or the sentencing court’s failure to exercise discretion as to first-time offenders. Thus, until the 4th Department directly addresses *Earley*, it will be an uphill struggle to convince trial level courts in the 4th Department to grant relief on *Earley* claims.

The Reaction at the Trial Level

Not surprisingly, much of the post-*Earley* action in the New York courts has thus far taken place at the trial level. *Earley* claims have been raised via three distinct procedural vehicles: CPL 440 motions, Article 78 petitions, and Article 70 petitions for writs of habeas corpus. Habeas corpus has proven a straightforward and successful way to litigate an *Earley* claim, but its availability is limited to individuals incarcerated exclusively for violating the terms of their PRS. Most habeas claims have been filed in Bronx County on behalf of inmates awaiting final revocation hearings at Rikers Island. Three reported decisions have sustained writs: *People ex rel Johnson v Warden*, 15 Misc3d 1102A, 2007 WL 755412 (Sup Ct Bronx Co 3/12/07) (Adler, J) [not published in official reporter]; *People ex rel. White v Warden*, 15 Misc3d 360 (Sup Ct Bronx Co 1/26/07) (Marcus, J) and *People ex rel Lewis v Warden*, 14 Misc3d 468 (Sup Ct Bronx Co 11/24/06) (Cirigliano, J). In *Johnson* and *Lewis*, judges adopted the reasoning of *Earley* in its entirety, while in *White*, the court granted relief based on the inmate’s status as a first-time offender. In all three cases, the court ordered immediate release of the inmate and invalidated the period of PRS added by DOCS. The lone reported decision denying habeas relief, *People ex rel. Hernandez v Warden*, 14 Misc3d 1210A, 2006 WL 3843586 (Sup Ct Bronx Co 12/8/06) (Fisch, J) was issued prior to the 1st Department’s decision in *Hill* and would likely be decided differently now, given the petitioner’s status as a first-time offender. In addition, at least five other Bronx County judges have sustained writs of habeas corpus on *Earley* grounds in unpublished opinions.

Article 78 petitions can be filed by individuals still serving their determinate sentences, as well as by those already on PRS. Relief was granted in *Waters v Dennison*, 13 Misc3d 1105 (Sup Ct Bronx Co 2/23/07) (Cirigliano, J) and denied in *Quinones v State Dept. of Corrections*, 14 Misc3d 390 (Sup Ct Albany Co 11/16/06) (Ceresia, J). The court in *Waters* rejected the Attorney General's argument that the petition was untimely filed and expressed the view that the post-release supervision statute "usurp[s] the judiciary's authority which violates the separation of powers on one hand and clearly strips a defendant from his due process rights on the other." In *Quinones*, an Albany County judge found the 3rd Department's pre-*Earley* decision in *Deal v Goord* binding precedent compelling rejection of the *Earley* claim.

The most interesting results have come in response to CPL 440.20 motions, with judges devising creative ways to try to reconcile the statute with the dictates of *Earley* so as to ensure that defendants obtain no relief. Thus, in *People v Giles*, 13 Misc3d 1242A (Sup Ct Kings Co 12/1/06) (Goldberg, J), the court extended *Sparber* and *Lingle*'s holding, that due process is satisfied as long as PRS is contemporaneously recorded on the sentencing commitment sheet, by holding that amendment of the commitment sheet years later to include PRS is a ministerial act that brings the defendant's sentence into compliance with *Earley*. And, more recently, in *People v Edwards*, 2007 WL 96941, 2007 NY Misc LEXIS 15 (Sup Ct NY Co. 3/21/07) (Kahn, J), the court held, in the case of a predicate offender, that *Earley* would be satisfied by bringing the defendant before the court for "clarification" that his sentence included post-release supervision, then re-sentencing him to the same determinate term previously imposed, with the mandatory five years of PRS clearly stated for the record.

Trial-level judges have also struggled to define the scope of their inherent power to impose PRS once the illegally imposed period is vacated. Thus, in *People v Crawford*, 15 Misc3d 329 (Sup Ct Kings Co 3/5/07) (McKay, J) and *People v Ryan*, 13 Misc3d 451 (Sup Ct Queens Co 7/28/06) (Kron, J), courts held themselves without authority to impose the lawfully required period of PRS after vacating the unlawful period. In both cases, the judge had originally imposed an illegally low period of PRS; in *Crawford*, the court clerk recorded the correct period on the sentencing commitment sheet, while in *Ryan*, DOCS imposed the correct amount. In *People v Keile*, 824 NYS2d 757 (Sup Ct NY Co 9/5/06), the court questioned its inherent power to impose the mandated period, but did so anyway, while in *People v Rodriguez*, 2007 WL 967097, 2007 NY Misc LEXIS 1529 (Sup Ct Bronx Co 3/30/07) (Price, J), the court stated that it had the power to impose PRS after vacating the period administratively added by DOCS.

Tips for Litigating Earley Claims: by 440.20 or Article 78?

For most litigants seeking to raise an *Earley* claim, direct appellate review will no longer be available, since judges generally were imposing PRS by 2003. Therefore, the choice will usually come down to a CPL 440.20 motion or an Article 78 petition. In making that choice, a number of factors will need to be taken into account, by far the most important of which is the county of conviction. Because appellate precedents on this issue are so fractured, with each Department of the Appellate Division holding its own views, the governing law in the county of conviction is critical in deciding how to proceed.

In the 2nd Department

If the defendant was convicted in a county within the 2nd Department, dismissal of a 440.20 motion can be readily obtained on the ground that PRS is not part of the sentence. The question is whether such a "loss" can be parlayed into meaningful relief. At present, a number of litigants are awaiting an answer from DOCS on whether it will honor a decision, either from the 2nd Department or from a trial-level court, dismissing an *Earley* claim on the ground that the defendant's sentence does not include PRS. If DOCS deletes PRS in response to such decisions, filing a 440.20 motion would clearly be the way to proceed. However, if DOCS refuses, a 440.20 motion will be of no practical value, and the defendant will have no choice but to proceed by way of an Article 78 petition.

The outcome of such a petition will hinge at the trial level entirely on where venue lies. Litigants will file the Article 78 petition in the county of conviction, but the Attorney General will seek a change of venue to Albany County, on the ground that the "determination" being challenged took place there. *But see Matter of Browne v Board of Parole*, 10 NY2d 116 (1961). If venue is transferred to Albany, the petition will likely be denied on the authority of the 3rd Department precedents in *Garner* and *Deal*, while, if it remains in the county of conviction, it should be granted on the authority of the 2nd Department precedents in *Smith*, *Noble* and *Wilson*. In opposing a change of venue, it may be helpful to point out that the Attorney General's position on the merits, raised in dozens of cases thus far, is that post-release supervision is automatically included in the court's pronouncement of a determinate sentence. That being the case, venue is proper in the county of conviction, according to the Attorney General's own logic, because the key underlying material event took place there and a change of venue is thus unwarranted.

Bear in mind, though, that the outcome at the trial level is of little practical effect because the grant of an Article 78 petition is subject to an automatic stay pending appeal pursuant to CPLR 5519(a). Since the Attorney General's Office is vigorously litigating every single

Earley case, no relief will actually be afforded any litigant until he or she finally prevails on appeal. Petitioners can look forward to a prolonged period of state court litigation before taking their claim to federal court, assuming they ever need to go there. That means that serious thought needs to be given before filing an Article 78 petition on behalf of anyone already on post-release supervision, especially anyone who does not have a lot of time left to serve. In such cases, it may be better to wait to see if the individual is arrested for allegedly violating PRS. At that point, a writ of habeas corpus can be filed, which, if sustained, should fairly quickly result in liberty for the inmate and invalidation of PRS, since habeas corpus is a summary proceeding and is not subject to automatic stay pending appeal. Defendants not yet released to PRS are in a better position to endure the extensive delay in obtaining a final adjudication of their Article 78 claim.

In the 1st Department

If the county of conviction is Manhattan or the Bronx, the choice of a 440.20 motion versus an Article 78 petition looks very different. This is especially true if the defendant is a first-time offender convicted following a plea at which the defendant was not advised of PRS, and where PRS was not recorded on the commitment sheet. In that case, it may well be possible to use the filing of a 440.20 motion to play “Let’s make a deal.” First, pursuant to *People v Hill*, the claim of a first-time offender is meritorious. Second, assuming that the sentencing judge is inclined to impose PRS after vacating the administratively imposed period, he or she will have to offer the defendant plea withdrawal. That prospect will likely be unappealing to the prosecution, thereby giving the defendant some real leverage, since the prosecutor will not be sure that the defendant does not want to vacate the plea. Further, there will always be something to bargain about. The court will vacate the maximum period imposed by DOCS—3 years for a class D or E violent offense, or 5 years for a class B or C violent offense—and then have discretion to replace it with as little as 1½ years for class D and E offenders and 2½ years for class B and C offenders. And, if the defendant received more than the minimum determinate sentence, it may be possible to work out a deal that shortens the defendant’s prison time. The beauty of entering an agreement is that it will not be subject to appeal. Of course, before going that route, it will be important to consider whether any combination of the judge, the prosecutor, the heinousness of the crime, or the prison record of the defendant militates against obtaining a favorable result. An Article 78 proceeding is always available as an alternative, should the 440 route not look promising.

In the 3rd and 4th Departments

For defendants convicted in counties in the 3rd or 4th Departments, no relief can be expected at the trial level, and prospects do not look especially promising in the Appellate Division either. Court of Appeals review and/or the filing of a federal habeas corpus writ may be the best bets. With that in mind, it is preferable to file an Article 78 petition, rather than a CPL 440.20 motion. First, a denial of the former, unlike the latter, is appealable as of right to the Appellate Division, making the prospect of obtaining review in the Court of Appeals more likely. Second, the Article 78 route avoids the possibility that the sentencing judge could grant relief, and then impose the exact same period of PRS, as the judge did in *Keile*. In that situation, the federal issue would be gone and the only claim left would be that the court lacked the inherent power to impose PRS.

Tips for Litigating Earley Claims: Direct Appeal?

Where direct appellate review is still available in the 1st Department, it may make sense to raise an *Earley* claim for a predicate felon. While the 1st Department has laid the groundwork for rejecting the application of *Earley* to predicate offenders, the court may decide on balance to follow the 2nd Department’s approach. As for first offenders, it is true that they should have a winning claim on direct appeal in the 1st Department. Even so, negotiating a better deal for the defendant through a 440.20 motion would seem preferable to proceeding via direct appeal, especially where it appears possible to obtain a reduction in the defendant’s prison sentence.

The 2nd Department has all but invited the claim that, contrary to the 1st Department’s decisions in *Sparber* and *Lingle*, the court clerk’s recording of PRS on the sentencing commitment sheet is insufficient because federal due process can settle for no less than the judge pronouncing sentence on the defendant. Assuming the 2nd Department embraces that position, dismissal of the appeal would appear unwarranted, since a discrepancy between the sentence pronounced by the judge and that recorded on the commitment sheet is one that a direct appeal ought to resolve. That being the case, first offenders who have PRS recorded on the commitment sheet may well be able to seek the same negotiated deal through the filing of a 440.20 motion in 2nd Department counties as their counterparts who were convicted in Manhattan or the Bronx.

In the Fourth Department, every *Earley* claim is ripe for direct appellate review. The same should be seen as true in the 3rd Department until that court specifically addresses *Earley*.

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Fourth Department *continued*

prior matter in which he had pled guilty to a lesser charge. That conviction was included in the search warrant application as part of the basis for probable cause. The judge was not required to recuse herself as a result of the prior representation. *See gen People v Marrero*, 30 AD3d 637. The judge signed an affirmation stating that in her 10 years as an assistant public defender, she had represented thousands of defendants and had no independent recollection of the defendant. Recusal is required when a judge's impartiality might reasonably be questioned, including when the judge *knows* that the judge served as a lawyer in the matter in controversy. *See* 22 NYCRR 100.3(E)(1)(b)(i). It is uncontroverted that the judge here did not know of the prior representation when issuing the warrant. Nor was recusal required by Judiciary Law 14. The contention that he should have been allowed to withdraw the plea because he had only a short time in which to make his decision is rejected. Judgment affirmed. (Supreme Ct, Monroe Co [Affronti, JJ])

Search and Seizure (Automobiles and Other Vehicles [Investigative Searches]) SEA; 335(15[k])

People v Jones, No. KA 06-03349, 4th Dept, 4/20/2007

Holding: Evidence at the suppression hearing showed that police stopped the defendant's vehicle based on his violation of a noise ordinance. The area in which the stop occurred was the source of many complaints about drug activity. After two officers approached the defendant's car, sought and obtained his license, registration, and insurance information, they returned to their car. They saw the defendant open the center console, as he admitted in hearing testimony. Believing he had either retrieved or concealed a weapon or contraband, they ordered him out of his car, patted him down, and retrieved "a large wad of money in small denominations consistent with street level sales of cocaine." The defendant became nervous. The offices found nothing in the front passenger seat area but retrieved a digital scale with white residue from the rear passenger area. In the driver's area they found small pieces of white residue resembling crumbs of crack cocaine. Based on these discoveries, the police search the vehicle and found cocaine in the trunk. The suppression court erred in determining that the police were justified in search the "grabbable area" of the car. The search should have ended when no weapon or contraband was found in the front passenger area and console. As to the alternative ground of consent to search, the suppression court did not resolve it. Decision reserved, matter remitted for findings of fact on that issue based on the evidence presented at the suppression hearing. (County Ct, Onondaga Co [Fahey, JJ]) ⚖

Defense Practice Tips

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Going to Federal Court

Finally, a word of caution about going to federal court after exhausting state court remedies. The petitioner in *Earley* did not win his claim outright. Rather, the 2nd Circuit remanded to the District Court for a hearing on whether the petition was timely filed. The Antiterrorism and Effective Death Penalty Act (AEDPA) established draconian time limits on state prisoners seeking federal relief. Under AEDPA, a federal habeas claim must be filed within one year after the defendant learns that PRS has been imposed, not counting time spent exhausting state remedies. Thus, any defendant who has served more than one year of post-release supervision or learned more than a year earlier that DOCS had added a PRS period before filing an *Earley* claim in the state courts would be barred from going to federal court. As for defendants who are still in prison, it will depend on when DOCS notified the defendant that it had added PRS to the sentence. In many cases, that may not occur until the defendant is actually released from prison and handed a sheet containing the conditions of release. Those defendants should be able to seek relief in federal court if they lose in state court.

More Than a Technicality

It might appear at first blush that an *Earley* claim is the ultimate in legal technicalities. The defendant is asserting that he should not have to serve a period of post-release supervision that the law requires him to serve just because it was imposed by the wrong entity. However, viewed from a judge's perspective, the issue may not appear so technical after all. At its core, *Earley* stands for the proposition that administrative agencies and statutes in our society do not impose sentence on defendants, judges do. Litigants would do well, somewhere in their papers, to try to tap into the gut sense that administrative imposition of post-release supervision usurps the judge's authority over sentencing.

The state of the law with respect to *Earley* is evolving rapidly. Each month, new decisions are issued, at the appellate or trial level, that impact on how to litigate an *Earley* claim. Indeed, it would not be surprising if some of the information contained in this article is outdated by the time of publication. Review by the Court of Appeals is sorely needed to bring order to what can best be described as an appellate free-for-all. Until then, if ever an issue required lawyers to stay on top of the very latest developments in the law, this is the one. ⚖