

# Pro Se

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## ***NEW DEVELOPMENTS REGARDING POST-RELEASE SUPERVISION***

### ***DOCS and Parole File Class Action; State Passes New Legislation***

Since the Spring 2008 issue of *Pro Se* went to press, there have been a number of developments regarding Post-Release Supervision (PRS). First, DOCS and Parole filed a class action lawsuit designed to prevent the release of anyone serving a determinate term without post-release supervision. Second, shortly after the class action lawsuit was filed, but before any decision was reached, the State passed new legislation concerning PRS. This special edition of *Pro Se* traces the history of the PRS issue and takes a look at the two developments since our Spring issue.

#### Background

Before 1995, nearly all sentences in New York were indeterminate sentences with a minimum and a maximum. People released before the maximum were subject to parole supervision until the maximum expiration of the sentence.

In 1995, the State began to impose determinate sentences. Determinate sentences do not provide for discretionary release by the Parole Board. One-seventh of a determinate sentence is good time, and if the good time is not taken by the DOCS Time Allowance Committee (TAC), a person could get out on a Conditional Release (CR) date, after serving six-sevenths of the determinate sentence. A person released at the CR date would be subject to parole supervision until the maximum expiration.

On September 1, 1998, the statutory framework for determinate sentences was modified by adding a requirement in Penal Law § 70.45 that every determinate sentence must include a period of PRS. The period of PRS begins after release from prison and is in addition to the underlying determinate sentence. In most cases the period is five years, but in some cases it can be less. Between September 1, 1998 and some time in 2003, judges in many cases did not mention PRS either at the plea or sentencing proceeding. Beginning in September 1998, when people began to arrive in state prison with determinate sentences that required PRS but where no PRS was included in the commitment, DOCS administratively added the required period of PRS to the sentence. DOCS' position was that the Penal Law required the period of PRS automatically, regardless of whether it was mentioned by the sentencing court.

#### People v. Catu

The first major court decision from the New York Court of Appeals to address PRS was People v. Catu, 4 N.Y.3d 242 (2005). There, New York's highest court ruled that if at the proceeding where the defendant entered a plea of guilty the sentencing court failed to inform the defendant that PRS would be required as part of a determinate sentence, then the defendant is entitled to vacate the original plea,

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on the ground that the plea was not knowing and voluntary.

### Earley v. Murray

In 2006, the Second Circuit decided Earley v. Murray, 451 F.3d 71 (2d Cir. 2006). There, the federal appeals court held that as a fundamental matter of constitutional law, all components of a sentence must be imposed by the sentencing court. In particular, the court held that PRS must be imposed by the sentencing court to be part of a sentence and that DOCS does not have the authority to administratively add PRS to a sentence.

Even after Earley v. Murray was decided, DOCS continued to administratively impose PRS. DOCS is bound by decisions of the state courts, and the state courts are bound by decisions of the U.S. Supreme Court. However, decisions of the lower federal courts, such as the Second Circuit, may be viewed as persuasive, but they are not binding on state courts. People v. Kin Kan, 78 N.Y.2d 54.

After Earley v. Murray was decided, state courts began to adopt its holding. By the early part of 2008, all four of New York's appellate divisions had adopted the holding of Earley v. Murray, that PRS must be imposed by the sentencing court in order to be part of a sentence.

### Garner and Sparber

In April 2008, New York's Court of Appeals issued two decisions in which it clearly held that PRS must be imposed by the sentencing court, and cannot be added administratively to a sentence by DOCS. The cases are Matter of Garner v. DOCS, 10 N.Y.3d 358 (1988) and People v. Sparber, 10 N.Y.3d 457 (1988). As a result of these two decisions, it is now clear beyond all dispute that PRS must be imposed by the sentencing court in order to be part of a sentence. However, it is equally clear that a determinate sentence (imposed since September 1, 1998) without PRS is an illegal sentence.

Courts generally have inherent authority to correct an unlawful sentence. While a DA has a one-year deadline to make a motion to correct a sentence, if the sentence is unlawful, the court has the inherent authority to correct it and there is no

deadline for doing so. In both Garner and Sparber, the Court of Appeals referred to re-sentencing, that is, a re-sentencing procedure at which the sentencing court could impose PRS and thereby correct the unlawful sentence. The Court ordered re-sentencing in Sparber, where the parties were still serving the underlying determinate sentences. However, in Garner, where the petitioner had completed his determinate sentence and returned to DOCS custody as a PRS violator, the Court suggested that re-sentencing might be possible, but did not resolve that issue. PLS believes there is a very strong argument that for people who have completed the sentence imposed by the sentencing court, re-sentencing would be unlawful in that it would violate the double jeopardy clause of the U.S. Constitution.

### DOCS' Re-Sentencing Project

After Garner and Sparber were decided, DOCS began a re-sentencing project. This involved identifying all inmates affected--that is, all inmates with determinate sentences for which PRS was required but in which PRS did not appear to be imposed by the court. DOCS has begun communicating with courts to request that the courts re-sentence these individuals to impose PRS. DOCS' re-sentencing plan includes holding affected inmates in DOCS custody and maintaining affected releaseses under Parole supervision until re-sentencing is complete.

### The State's Class Action Lawsuit

On June 4, 2008, the State, DOCS, and the Division of Parole commenced a class action in state supreme court, asking the court to approve their re-sentencing plan. In the class action, the State asked the court to issue an order granting DOCS and Parole the legal authority to continue to hold or maintain supervision over people who have completed their sentences, and who are held or supervised solely on the basis of PRS which was never imposed by a court. The defendants in the State's lawsuit were four individuals named as representatives of a purported class of all people with determinate sentences that do not have the required periods of PRS. PLS and the Legal Aid

Society have worked together to defend against this lawsuit. The court has not granted the relief sought by the State. In light of the recently passed statute on PRS (see below), it now appears that the State will withdraw, or at least will no longer pursue, the class action.

### New PRS Legislation

As the legislative session was concluding in June 2008, the State Assembly and State Senate both passed a bill which addresses the problem of people who received determinate sentences where the sentencing court did not impose the statutorily required period of PRS. Governor Paterson signed this bill into law on June 30, 2008. Key provisions of this new law are:

- ▶ when DOCS becomes aware that a sentencing court failed to impose PRS where required by law, DOCS is required to send a notice to the court immediately;
- ▶ within 10 days of receiving the notice, the court must assign counsel for the defendant and schedule an appearance which must occur within 20 days after the court receives the notice;
- ▶ the court must hold a re-sentencing hearing within 30 days of receiving the notice, and is required to issue a decision regarding re-sentencing within 40 days of receiving the notice; and
- ▶ if the DA consents, the court is authorized to re-impose the original determinate sentence with no period of PRS.

First, if the original determinate sentence was the result of a plea, and the defendant was not aware that PRS would be part of the sentence, he has a right to withdraw the plea, and go back to the position he was in before entering a plea. The new bill is only written in terms of the court's authority

to correct an unlawful sentence through re-sentencing. But, for people whose determinate sentences resulted from a plea, the defendant's right to withdraw the plea may trigger a new plea bargaining process, or possibly a trial, rather than just a re-sentence.

Second, for people who have completed the original sentence as imposed by the court, the double jeopardy clause of the U.S. Constitution would appear to prohibit re-sentencing, while the statute requires it unless the DA consents to re-imposition of the original sentence without PRS.

Third, if you are confined in prison or jail solely on the basis of a PRS violation, where PRS was never imposed as part of your sentence, then, when you appear for re-sentencing, you should argue that you are entitled to immediate release from custody, on the ground that, if there was not a valid period of PRS, there could not be a valid PRS violation. If there was not a valid, court-imposed period of PRS, a PRS violation warrant is just as much a nullity as administratively-imposed PRS, and does not authorize confinement.

### What To Expect

In light of the new statute, people with determinate sentences and no court-imposed PRS can expect to be returned to court for re-sentencing proceedings. The new statute requires that the re-sentencing proceedings take place in a very short time frame. Because the new statutory deadlines for re-sentencing are so short, *i.e.*, 40 days from first notice to the court to any re-sentencing decision, it is unlikely that PLS will be able to address these cases through habeas corpus, since it is likely the re-sentencing will be decided before PLS could obtain the documents needed to support a habeas corpus. If you are returned to court for a re-sentencing procedure, the court will assign an attorney to represent you.

Take care and best of luck.

**PLS OFFICES AND THE FACILITIES SERVED**

Requests for legal representation and all other problems should be sent to the local office that covers the prison in which you are incarcerated. Below is a list identifying the prisons each PLS office serves:

**ALBANY**

**301 South Allen Street, Albany, NY 12208**

**Prisons served:** Arthurkill, Bayview, Beacon, Bedford Hills, Mt. McGregor, Summit Shock, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Fulton, Great Meadow, Greene, Greenhaven, Hale Creek, Hudson, Lincoln, Marcy, Midstate, Mid-Orange, Mohawk, Oneida, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

**BUFFALO**

**Statler Towers, Suite 1360, 107 Delaware, Avenue, Buffalo, NY 14202**

**Prisons served:** Albion, Attica, Buffalo, Collins, Gowanda, Groveland, Lakeview, Livingston, Orleans, Rochester, Wende, Wyoming.

**ITHACA**

**102 Prospect Street, Ithaca, NY 14850**

**Prisons served:** Auburn, Butler, Camp Georgetown, Monterey Shock, Camp Pharsalia, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard.

**PLATTSBURGH**

**121 Bridge Street, Suite 202, Plattsburgh, NY 12901**

**Prisons served:** Adirondack, Altona, Bare Hill, Camp Gabriels, Chateaugay, Clinton, Franklin, Gouverneur, Lyon Mountain, Moriah Shock, Ogdensburg, Riverview, Upstate.