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This memorandum is uncorrected and subject to revision before  
publication in the New York Reports.  
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No. 143 SSM 14  
The People &c.,  
Respondent,  
v.  
Morris B. Yuson,  
Appellant.

Submitted by Janet C. Somes, for appellant.  
Submitted by Kelly C. Wolford, for respondent.

MEMORANDUM:

The order of the Appellate Division should be modified  
by vacating the sentence and remitting the case to County Court  
for resentencing in accordance with this memorandum and, as so  
modified, affirmed.

On November 30, 2007, defendant pleaded guilty, as a

first time felony offender, to assault in the second degree (Penal Law § 120.05 [2]), a class D violent felony offense (see Penal Law § 70.02 [1] [c]). County Court promised defendant that it would impose a determinate sentence of imprisonment of 3½ years with the "minimum" allowable PRS term. At sentencing, County Court imposed a five-year term of PRS.

Defendant maintains that the court erred when it imposed a five-year PRS term. We agree. It is true that Penal Law § 70.45 (2) generally provides that the term of PRS for a determinate sentence shall be five years. Penal Law § 70.45 (2) (e), however, states the term of PRS

"shall be not less than one and one-half years nor more than three years whenever a determinate sentence of imprisonment is imposed pursuant to subdivision three of section 70.02 of this article upon a conviction of a class D or class E violent felony offense."

Penal Law § 70.02 (3) sets forth the sentencing ranges courts must adhere to when imposing a determinate sentence of imprisonment on a first time felony offender. For a class D violent felony, the imprisonment term "must be at least two years and not exceed seven years" (Penal Law § 70.02 [3] [c]). Since defendant was sentenced in accordance with Penal Law § 70.02 (3) (c), the imposition of a five-year PRS term was improper. The People's argument that Penal Law § 70.02 (4) required County Court to impose a five-year PRS term has no merit. Subdivision four of section 70.02 merely provides that a determinate sentence of imprisonment must be imposed under certain circumstances.

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On review of submissions pursuant to section 500.11 of the Rules, order modified by vacating defendant's sentence and remitting the case to Monroe County Court for resentencing in accordance with the memorandum herein and, as so modified, affirmed. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided May 1, 2012