COUNTY COURT, SUFFOLK COUNTY
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

TODD COSTA,

Defendant.

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JAMES F.X. DOYLE, J.C.C.

Indictment No. 492-99

Dated: March 29, 2006

HON. THOMAS J. SPOTA
SUFFOLK COUNTY DISTRICT ATTORNEY
By: MARCIA R. KUCERA, ESQ.
Criminal Courts Building
210 Center Drive
Riverhead, New York 11901

TODD COSTA (00-A-2054)
Defendant Pro Se
Fishkill Correctional Facility
P.O. Box 1245
Beacon, New York 12508

Upon the following papers numbered 1 to 2 read on this motion for an order seeking to vacate sentence; Notice of Motion and supporting papers 1 ; Affidavit in Opposition and Memorandum of Law 2, the application is determined as follows:

By motion dated December 5, 2005, defendant pursuant to CPL §§ 440.10 and 440.20, seeks an order vacating the plea and sentence previously imposed upon him on March 13, 2000 (Corso, J.) on the grounds that: (1) he was not informed prior to his conviction and sentence that he would be subject to a mandatory five year period of post-release supervision; (2) he did not have the benefit of effective assistance of counsel; (3) his plea was coerced; (4) the trial court abdicated its role; and (5) the trial court erred by not taking into account his jail-time credit when calculating the expiration date of the permanent order of protection. The People oppose the application however, consent to an adjustment of the expiration date of the Permanent Order of Protection.

Defendant Todd Costa stands convicted, upon his plea of guilty on August 10, 1999, to the entire Indictment under #492-99, which consisted of one count of Kidnaping in the second degree (PL § 135.20), one count of Burglary in the second degree (PL § 140.25[2]), one count of Reckless Endangerment in the first degree (PL § 120.25) and one count of Unlawful Imprisonment in the first degree (PL §135.10). Following an unsuccessful motion to withdraw his guilty plea (on the ground that the defendant "did not know the paucity of evidence against him" and the plea was the result of "intense pressure from his attorney"), the defendant ultimately was sentenced on March 13, 2000, to concurrent determinate terms of imprisonment of ten years on counts one and two (Kidnaping in the second degree and Burglary in the second degree), an indeterminate sentence of three and one-half year to seven years on count three (Reckless Endangerment in the first degree) and an indeterminate sentence of two to four years

on count four (Unlawful Imprisonment in the first degree). Defendant's conviction was subsequently affirmed by the Appellate Division Second Department (*People v. Costa,* 285 AD2d 611 (2d Dept.), *lv. den.* 96 NY2d 939 [2001]).

Defendant contends in this motion that he was not properly advised by trial counsel, prior to accepting the bargained-for plea, that the ten year determinate sentence required him to serve post-release supervision following his term of imprisonment. There is no indication in the record that defendant was ever informed that his determinate sentence included a period of post-release supervision, nor does the "Sentence and Commitment" sheet indicate that the defendant was sentenced to any period of post-release supervision (hereinafter referred to as "PRS"). However, he claims that he learned about the PRS from the Department of Correction "Time Confrontation Sheet." Based upon the foregoing, the defendant asserts that he could not have discovered with due diligence at the time of the plea bargaining agreement that he was also pleading to five years of PRS; that trial counsel did not properly advise the defendant when entering the plea that he had to serve five years PRS and that the trial court failed to take into account his jail time credit when issuing the order of protection.

DEFENDANT'S APPLICATION UNDER CPL §440.10 RELATIVE TO PRS

CPL Article 440, which codifies the common-law writ of error *coram nobis*, permits the court in which a judgment of conviction has been entered, upon defendant's motion, to vacate the judgment on several enumerated grounds. This procedure, which is designed to inform a court of facts not reflected in the record and not known at the time of judgment that would, as a matter of law, undermine the judgment, cannot be used as a vehicle for a second appeal or as a substitute for direct appeal (*see, People v. Crimmins,* 38 N.Y.2d 407, 381 N.Y.S.2d 1, 343 N.E.2d 719, *People v. Donovan,* App.Div., --- N.Y.S.2d ---- [2d Dept., Apr. 1, 1985]). CPL §440.10(2) specifically provides, insofar as pertinent here, that the motion must be denied when the grounds or issues raised have been determined on appeal (concededly not the case at bar), or when: "© Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him. Subdivision 3 of the same section further narrows the availability of the procedure by permitting the court, in its discretion, to deny the motion when, *inter alia,* (a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined upon appeal."

In this application, the defendant's claim is procedurally barred and no hearing is warranted (*see,* CPL §440.10[2][c]). The court must deny a motion to vacate a judgment when a defendant, although having filed an appeal, did not have appellate review or determination upon the issues raised (*see,* CPL §440.10[2][c]). Defendant's claim could have been reviewed on an appeal because the failure to advise him of post-release supervision was clear from the record. Since defendant did not raise this issue on appeal, and this court views this as an on the record claim, defendant's motion is procedurally barred. If sufficient facts appear on the record to permit the question to be reviewed, sufficiency of the plea allocution can be reviewed only by direct appeal (*People v. Cooks,* 67 NY2d 100, 500 NYS2d 503 [1986]). As the record of the plea permitted adequate review upon direct appeal, the defendant is foreclosed from raising the issue in a collateral attack upon his conviction and accordingly his application under this prong of his motion is denied (CPL 440.10 [2][c]).

DEFENDANT'S APPLICATION UNDER CPL §440.20 RELATIVE TO PRS

Defendant's motion to vacate his plea pursuant to CPL §440.20 is also denied. The section upon which the defendant also relies states in pertinent part that a court may set aside a sentence on the grounds that it was "unauthorized, illegally imposed or otherwise invalid as a matter of law." The relevant procedural rules for deciding a motion to set aside a sentence pursuant to CPL §440.20(1) are set forth in CPL §§ 440.20(2) and (3), and in CPL §440.30(4)(a). Criminal Procedure Law §440.20(4) states that "an order setting aside a sentence pursuant to this section does not affect the validity or status of the underlying conviction, and after entering such an order, the court must re-sentence the defendant in accordance with the law." In addition, in the matter of *People v. Bell*, 305 AD2d 694, 791 NYS2d 239 (2nd Dept. 2003), the court held that "a determinate sentence without post-release supervision constitutes an illegal sentence.

PRS is a direct consequence of a plea about which a defendant must be informed before the plea is entered (*People v. Catu,* 4 NY3d 242, 792 NYS2d 887 [2005]). The failure of a court to advise a defendant of PRS requires reversal of the conviction (id.). Initially, the matter at hand is distinguishable from *People v. Catu, supra.*, which raised the instant issue on appeal and not pursuant to collateral motion as is the case here.

Further, the People argue that the new rule enunciated in *Catu* (that post-release supervision is a direct consequence of a plea that a defendant must be informed of since it is part of the sentence) does not apply retroactively to the defendant's case . This court concurs.

In *People v Mitchell,* 80 NY2d 519, 591 NYS2d 990 (1992), the court reiterated three factors to consider when determining if a new rule has retroactive effect. These three factors are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice of retroactive application (*Mitchell, supra,* citing *People v. Pepper,* 53 NY2d 213, 440 NYS2d 889 [1981]). Since no question of Federal constitutional

principles are involved here, the question of retroactivity is one of State Law (*People v. Martello,* 93 NY2d 645, 695 NYS2d 525 [1999]).

The law set forth in *Catu* does not address guilt or innocence since it is clear that the rule applies to defendants who have already entered a guilty plea. Thus, the purpose of this new rule is unrelated to the fact-finding process and, in that respect, in no way affects the determination of guilt or innocence.

Under the second factor, the courts have extensively relied upon the old law and have not generally advised a defendant of post-release parole supervision as part of the sentence since it had not been determined that this factor was a direct and not indirect consequence of a defendant's plea.

Finally, in light of the extent of the reliance by the Courts when taking plea allocutions upon the old rule where defendants again were generally not advised of post-release parole supervision, retroactive application of the rule would work a substantial hardship upon the administration of justice. A large number of cases currently pending in the trial and appellate court dockets would be affected by a retroactive application. (*Martello, supra* at 652). Furthermore, retroactive application would not have any beneficial effect upon the integrity of the truth-seeking process. Thus, had there not been a mandatory procedural bar applicable here, no prospective application of the *Catu* rule is warranted in any event.

HAD THE DEFENDANT KNOWN OF PRS, HE WOULD NOT HAVE PLEADED GUILTY

The defendant also raises the alternative claim that had he known that his plea of guilty would require a period of five years post-release supervision, he "would have pleaded not guilty and insisted. . .on a trial." Here, the *bona fides* of defendant's claim is highly suspicious. Courts have held that delay on the part of a defendant in seeking to vacate a judgment on the grounds that he was not advised of the post-release supervision may be considered in assessing the veracity of such claim (*Catu, supra.*). It is notable that the defendant filed his objection to post release supervision almost seven years after he was sentenced. While the defendant asserts that neither his first trial counsel, John Schick, Esq., nor his second attorney, Steven J. Wilutis, Esq., ever advised him that he would be required to serve a period of post-release supervision, defendant has not stated unequivocally the same as to Stanley J. Krawitz, Esq. (counsel for defendant on appeal). In support of his contentions, the defendant fails to submit an affirmation from any of his former attorneys that this plea consequence was not discussed, but relies however, on oblique statements regarding the duty of counsel in general and an unpersuasive, unsworn correspondence from Mr. Schick. Mr. Schick's letter specifically informs the defendant that "it is [his] common practice to advise clients of post release supervision during pre-plea discussions...". An affirmation from counsel attesting to the defendant's contentions is imperative to his application (*People v. Dolan,* 8 Misc3d 555, 796 NYS2d 218 [NY Co. Ct., May 2005]). Here, the defendant has failed to show through documentary proof that he was not, in fact, apprised of the five year period of post-release supervision. As a result, the court has

determined that the defendant's conclusory allegations in this regard have not been substantiated and are entirely disingenuous as a matter of law. Based upon the foregoing, that prong of defendant's motion is denied.

DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED UPON COUNSEL'S ALLEGED COERCION AND FAILURE TO APPRISE HIM OF PRS

The defendant's application that he was denied effective assistance of counsel on the basis that his plea of guilty had been coerced is procedurally barred and accordingly summarily denied by this court. These argument's were previously argued on direct appeal and denied by the Appellate Division as being without merit (*People v. Costa,* 285 AD2d at 611).

The defendant's application that he was denied effective assistance of counsel on the "new" basis that trial counsel did not properly advise the defendant that he had to serve five years PRS, is likewise denied based upon the various reasons delineated above. However, if the court were to consider the substantive arguments of this branch of the defendant's application, it nonetheless would be denied for the reasons set forth below.

The right to assistance of counsel guaranteed by both the federal and state constitution is recognized because of "the effect it has on the ability of the accused to receive a fair trial" (*People v. Claudio,* 83 NY2d 76, 607 NYS2d 912 [1993], quoting *United States v. Cronic,* 466 US 648 [1984]). "So long as the evidence, the law and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met." (*People v. Baldi,* 54 NY2d 137, 444 NYS2d 893 [1981]). In applying the standard, counsel's performance should be judged as of the time of trial, and not second-guessed with the clarity of hindsight (*People v. Benevento,* 91 NY2d 708, 674 NYS2d 629 [1998}; *People v. Satterfield,* 66 NY2d 796, 497 NYS2d 903 [1985]).

In order to prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel rendered effective assistance (*People v. Baldi, supra.*) and that the attorney's conduct was so prejudicial as to deprive the defendant of a fair trial (*People v. Maldonado,* 278 AD2d 513, 718 NYS2d 387 [2d Dept., 2000]). The defendant must show that, but for counsel's allegedly deficient performance, the outcome of the criminal action would have been different (*People v. Cuesta,* 177 AD2d 639, 576 NYS2d 342 [2d Dept., 1991]). Where, as here, the evidence and the circumstances of a particular case reveal that meaningful representation was provided, a defendant's constitutional right to the effective assistance of counsel has been satisfied (*People v. Brown,* 300 AD2d 314, 752 NYS2d 347 [2d Dept., 2002]*; citing People v. Satterfield, supra.*).

Ineffective assistance of counsel claims are determined by looking at whether counsel's performance fell outside the range of competence required of an attorney *(Strickland v. Washington,* 466 US 668 [1984]; *People v. Modica,* 64 NY2d 828, 486 NYS2d 931 [1985];

People v. Palma, 305 AD2d 333, 760 NYS2d 472 [1st Dept., 2003]). *Strickland* sets forth a two-prong test requiring defendants claiming ineffective assistance to show: (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. The prejudice prong focuses on whether counsel's ineffective performance affected the outcome of the plea process (*Hill v. Lockhart,*474 US 52). Based upon the foregoing, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilt and would have insisted on going to trial (*Hill,* 474 US at 59).

Here again, defendant has failed to submit an affidavit or affirmation from counsel that the plea consequences were not discussed. As noted *supra,* the defendant was in fact represented by three attorneys, two of whom consulted with the defendant prior to sentencing. Thus, it is entirely possible that either one or both of his trial attorneys informed the defendant of post-release supervision prior to sentencing. The defendant made no showing to the contrary in that regard. Upon considering the merits of the motion, the court may deny it without a hearing if an allegation of fact essential to support the motion is made solely by the defendant and is unsupported by any other affidavit or evidence, and under these and all other circumstances attending the case, there is no reasonable possibility that such allegation is true (CPL §440.30[4][d]).

Upon review of the parties' submissions, the court file, the plea minutes and the applicable law, the defendant's assertions are not believable in light of the strength of the prosecutor's case, the substantial jail time which the defendant would have faced had he gone to trial and been convicted, the relatively lenient plea offer and the timing of the instant motion. Accordingly, that branch of defendant's motion is denied.

PERMANENT ORDER OF PROTECTION

The defendant contends that the permanent order of protection issued as a result of his plea did not properly compute his jail time credit. The People concur. Based upon the foregoing, the People shall submit to this court for execution a superceding amended permanent order of protection reflecting a expiration date of February 21, 2012.

The foregoing constitutes the decision and order of the court.

ENTER.

JAMES F.X. DOYLE, J.C.C.