STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of IRA SMITH,

Petitioner,

DECISION and ORDER
RJI NO.: 0107ST7333
INDEX NO.: 120-07

For a Judgment Pursuant to Article 78
of the Civil Ptactice Law and Rules

-against-

BRIAN FISCHER, Acting Commissioner of the New York State Department of Correctional Services;

Respondent.

Albany County Supreme County All Purpose Term March 28, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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J. TERESI:

Petitioner, an inmate at Mohawk Correctional Facility, brings this Article 78 proceeding challenging Respondent's imposition of a five year period of post release supervision (PRS) on

Petitioner. Respondent opposes the Petition with an answer.

After fully reviewing the record this Court dismisses the petition.

On March 2, 2004, Petitioner received a five year determinate sentence after pleading guilty to Assault in the 1st Degree and Gang Assault in the 2nd Degree, but both the sentencing court and the commitment papers were silent regarding a period of PRS which is mandated by Penal Law § 70.45 as a part of any determinate sentence. Subsequently, Respondent, Department of Correction Services (DOCS) imposed a five year period of PRS pursuant to Penal Law § 70.45 which states that "[e]ach determinate sentence also includes, as part thereof, an additional period of post-release supervision." The period of PRS for a determinate sentence for Assault in the 1st degree and Gang Assault in the 2nd degree is

> five years except that:... (f) such period shall be not less than two and one-half years nor more than five 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 B or class C violent felony offense.

The Court of Appeals has stressed the mandatory nature of PRS under Penal Law § 70.45 as part of the elimination of parole for all violent felony offenders in 1998 (*People v. Catu*, 4 NY3d 242 [2005][holding that PRS is a direct consequence of a criminal conviction]). A determinate sentence that lacks a period of PRS is, in fact, an illegal sentence (*People v. Bell*, 305 Ad2D 694 [2d Dept 2003]). The Appellate Division, Fourth Department, where an inmate challenged the imposition of a period of PRS after the sentencing court failed to include a period of PRS, stated that "[t]here was no need for the court to specify a period of post release supervision. Under Penal Law § 70.45(2), the length of the period of post-release supervision is five years... unless the court specifies a short period" (*People v. Bloom*, 269 AD2d 838 [4th Dept

2000]). The Appellate Division, Third Department dismissed an inmate's Article 78 petition finding that the DOCS imposition of PRS was not a judicial function because it was a statutorily required part of the sentence (*Matter of Deal v. Goord*, 8 AD3d 769 [3d Dept 2004]).

The instant petition, however, is based on the Second Circuit Court of Appeals contrary finding in *Earley v. Murray*, 451 F3d 71 (2d Cir 2006) ruling that the imposition of PRS by DOCS pursuant to Penal Law § 70.45 in cases where the sentencing court and commitment were silent as to PRS violated the United States Constitution. According to the Second Circuit, the United State's Supreme Court's decision in *Hill v. United States ex rel. Wampler* (298 US 460 [1936]) prohibits DOCS from imposing any term that of PRS was not included by the sentencing judge (*Earley* at 75). If the sentencing judge neglects to impose the mandatory term of PRS, the only remedy is a subsequent judicial proceeding to correct the oversight (*Id.* at 76).

While this Court is not bound by the Second Circuit's decision in *Earley*, it may be considered useful and persuasive precedent (*see People v. Kin Kan*, 78 NY2d 59 [1991]). This Court is, of course, bound by the United States Supreme Court's decision in *Wampler* which stated that "[t]he only sentence known to the law is the sentence or judgment entered upon the records of the court... Until corrected in a direct proceeding, it says what it was meant to say, and this by irrebuttable presumption." (*Wampler* at 461). *Wampler* was incarcerated on charges of tax evasion and sentenced to eighteen months imprisonment and fines. After he was sentenced, a court clerk, pursuant to local custom, inserted a provision into the commitment order indicating that *Wampler* should continue to be imprisoned even after serving eighteen months, until the fines were paid. The Supreme Court held that such an addition was a nullity and not a part of the sentence because it was not the result of a judicial proceeding (*Id.* at 463).

The Second Circuit's decision in *Earley* has generated a flurry of conflicting decisions in New York courts, many of which are at odds with each other. Although, the second Circuit based its decision on *Wampler*, that interpretation remains subject to debate. Arguably, if the period of PRS is an automatic component of the determinate sentence, it was imposed by the sentencing judge regardless of whether it was specifically stated.

The First Department has declined to follow Earley, holding that "[t]he Penal Law does not merely direct or require a court to impose PRS when imposing a determinate sentence; instead, it provides that "Each determinate sentence also *includes, as a part thereof*, an additional period of post-release supervision [emphasis in the original]" (*People v. Lingle*, 34 AD3d 287 [1st Dept 2006]; *People v. Sparber*, 34 AD3d 265 [1st Dept 2006]; People v. Thomas, 35 AD3d 192 [1st Dept 2006]). Accordingly, the sentencing court's declaration of a determinate sentence includes the imposition of PRS. Both First Department cases are distinguishable from the instant case, however, because the inmates were both subject to a five year period of PRS with no judicial discretion, whereas, in this case, the sentencing judge had the discretionary authority to subject Petitioner to a period of PRS ranging from two and a half to five years. A recent Albany Supreme Court Case, however, held that the five year period of PRS was an automatic default from which a judge could chose to depart in some instances (*Matter of Jose Quinones v. State of New York*, 14 Misc3d 390 [Sup Ct, Albany County 2006]).

Additionally, in both First Department cases, although the sentencing court was silent as to PRS, the commitment papers included PRS. This is relevant because in *Murray v. Goord*, 1 NY3d 29 the Court of Appeals declared that "[p]rison officials are conclusively bound by the content of the commitment papers accompanying a prisoner." Notwithstanding the First

Department's decision in *Sparber*, the Bronx County Supreme Court granted a writ of habeas corpus to an inmate who was imprisoned for a violation of a period of PRS imposed by the DOCS because although it was included in the commitment order, the commitment order was not signed by the sentencing judge (*People ex rel Lewis v. Warden*, 14 Misc3d 468 [Sup Ct, Bronx County Supreme Court 2006]; *see also Matter of Waters v. Denison*, 13 Misc3d 1105 [Sup Ct, Bronx County 2006]; *People ex rel. White v. Warden*, 2007 WL 329019 [Sup Ct, Bronx County 2007]). Similarly, the New York County Supreme Court opted to direct that an inmate be re-sentenced to resolve the conflict between the illegal sentence and the unconstitutionality of the DOCS imposing a period of PRS (*People v. Keile*, 13 Misc3d 1204 [Sup CT, NY County 2006]).

The Appellate Division, Second Department, while not addressing the application of *Earley* to an Article 78 proceeding to strike a period of PRS imposed by the DOCS, has repeatedly denied CPL § 440 motions to vacate such sentences, stating that pursuant to the United state's Supreme Court's ruling in Wampler the sentence imposed by the Court did not include a period of PRS and, thus, the PRS was not a part of the sentence (*People v. Wilson*, 37 AD3d 855 [2d Dept 2007]; *People v. Noble*, 37 AD3d 622 [2d Dept 2007]; *People v. Smith*, 37 AD3d 499 [2d Dept 2007]; *People v. Sebastion*, 2007 WL 678043 [2d Dept 2007]). Generally, the failure to advise a defendant of direct consequences of a guilty plea, such as a mandatory period of PRS, is grounds to vacate the plea agreement. (*People v. Catu*, 4 NY3d 242 [2005]). Further, lower courts within the Second Department have demonstrated a willingness to nullify periods of PRS imposed by DOCS (*People v. Cephus*, 13 Misc3d 1211 [Sup Ct, Kings County 2006]; *People v. Ryan*, 13 Misc3d 451 [Sup Ct, Queens County 2006]).

Prior to *Earley*, the Third and Fourth Departments had found that "[t]here was no need

for the court to specify a period of post-release supervision at sentencing" (People v. Bloom, 269 AD2d 837 [4th Dept 2000]; *People v. Hollenbach*, 307 AD2d 776 [4th Dept 2003]; *see also People v. Thweatt*, 300 AD2d 1100 [4th Dept 2002]; *People v. Pan Zhi Feng*, 15 Ad3d 862 [4th Dept 2005]; *Matter of Deal v. Goord*, 8 AD3d 769 [3d Dept 2004]; *People v. Munk*, 4 AD3d 627 [3d Dept 2004]). Neither Department has clarified, its views in the wake of *Earley*, but the Albany County Supreme Court in an opinion by Judge Ceresia held that pursuant to the Third Department's ruling in *Deal*, a default five year period of PRS is automatically included as a part of every determinate sentence regardless of the sentencing judge's silence, although the judge may impose a lesser period of PRS in some instances (*Matter of Jose Quinones v. State of New York*, 14 Misc3d 390 [Sup Ct, Albany County 2006]).

Given the both lack of clear consensus among lower courts and the non-binding nature of the *Earley* decision, this Court finds that the Third Department's holding in *Deal* is binding precedent and that the Third Department meant what it said when it indicated that a five year period of PRS followed a determinate sentence automatically and that DOCS was not performing a judicial function by imposing that period of PRS where the sentencing judge and commitment order were both silent.

Accordingly, this Court denies the petition.

All papers, including this Decision and Order, are being returned to the attorney for the Plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: April 11 2007
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Petitioner's Notice of Petition, dated January 9, 2007 with Attached Exhibits.
2. Respondent's Answer, dated February 1, 2007 with Attached Exhibits A-C.
3. Petitioner's Reply Affirmation, dated February 7, 2007 with Attached Exhibits.