STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
ARIEL PAULA, #02-A-4871,
Petitioner,

for Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

DECISION AND JUDGMENT
RJI #44-1-2009-0266.22
INDEX #130508
ORI # NY044015J

HENRY LEMONS, Chief Executive Officer, New York State Division of Parole, and **JUSTIN TAYLOR,** Superintendent, Gouverneur Correctional Facility,
Respondents,

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Ariel Paula, filed in the St. Lawrence County Clerk's office on April 27, 2009. Petitioner, who is an inmate at the Gouverneur Correctional Facility, is challenging the alleged administrative imposition of a period of post-release supervision in connection with his controlling 2002 determinate sentence. The Court issued an Order to Show Cause on May 1, 2009, and has received and reviewed respondents' Answer and Return, verified on June 18, 2009. The Court has received no Reply thereto from petitioner.

On July 26, 2002, petitioner was sentenced in Supreme Court, Queens County, to a controlling determinate term of 12 years upon his convictions of the crimes of Robbery 1° (18 counts) and Attempted Robbery 1°. Robbery 1° is a class B violent felony offense under the provisions of Penal Law §70.02(1)(a). Petitioner was received into DOCS custody on September 13, 2002, certified as entitled to 605 of jail time credit. At that time

DOCS officials computed the maximum expiration and conditional release dates of petitioner's controlling 12-year determinate sentence to be January 12, 2013, and April 22, 2011, respectively. In addition, and notwithstanding the fact that neither petitioner's sentence and commitment orders nor his sentencing minutes makes reference to any period of post-release supervision (Penal Law §70.45), DOCS computed petitioner's controlling sentence as including a 5-year period of post-release supervision.

Citing, *inter alia*, *Garner v. New York State Department of Correctional Services*, 10 NY3d 358, petitioner asserts that DOCS officials may not administratively impose a period of post-release supervision when such period was not pronounced by the sentencing court. Accordingly, he seeks an order vacating/expunging the administratively imposed period of post-release supervision.

At the time petitioner was sentenced Penal Law §70.45(1) provided, in relevant part, that "[e]ach determinate sentence also includes, as a part thereof, an additional period of post-release supervision." Penal Law §70.45(1), as added by L 1998, ch 1, §15. The respondents acknowledge, however, that the Court of Appeals in *Garner* ". . . held that a PRS [post-release supervision] term is only valid if judicially imposed at the time of sentencing." They nevertheless go on to argue that in *Garner* and *People v. Sparber*, 10 NY3d 457, the Court of Appeals ". . . did not adopt the position that PRS is automatically vacated, rather it emphasized that a sentencing court retains the authority to correct a procedural sentencing error . . ." Respondents also note the post-*Garner/Sparber* enactment of Correction Law §601-d (L 2008, ch 141, §5, effective June 30, 2008) which, they assert, establishes " . . . a procedural frame work for re-sentencing of those defendants whose convictions required a mandatory PRS component that had not

been imposed by the sentencing court." This Court notes that the re-sentencing procedure set forth in the relevant provisions of Correction Law §601-d(2) is initiated by notice to the sentencing court by the New York State Department of Correctional Services.

Citing "the extremely large numbers" of DOCS inmates requiring PRS re-sentencing notification pursuant to Correction Law §601-d(2), respondents assert that petitioner has not yet been scheduled for such notification since ". . . his earliest release date is April 22, 2011." Notwithstanding the foregoing, respondents further assert in paragraphs 15 and 16 of their Answer and Return that Correction Law §601-d is " . . .based upon the premise that PRS assessed by DOCS will remain in effect pending the return of such cases as Petitioner's to the sentencing courts. Until then, DOCS cannot recalculate the Petitioner's release dates without the PRS supervision assessed on his determinate term of imprisonment. . . [I]t is respondent's position that said issues should not be litigated in a collateral proceeding against DOCS or the Division of Parole. The matter should be returned to the sentencing court for adjudication." For the reasons set forth below, however, this Court does not agree.

The Court, finds nothing in *Sparber* or *Garner* limiting the relief to be granted in this situation to a transfer to the sentencing court for re-sentencing. *Sparber* involved five defendants who had all been convicted of violent felonies following pleas or jury verdicts. Although each of the *Sparber* defendants was sentenced to a determinate term of imprisonment, the sentencing judge in each case failed to mention post-release supervision (Penal Law §70.45) at sentencing. DOCS officials nevertheless computed each of the *Sparber* defendants' sentences as including a period of post-release supervision. The Court of Appeals in *Sparber* considered defendants' direct appeals from orders of the

Appellate Division, First Department, affirming their underlying convictions and sentences. As such, the Court of Appeals was specifically authorized by statute to modify the intermediate appellate court orders (*see* Criminal Procedure Law §470.35(3)) and to direct the sentencing court to take corrective action. *See* Criminal Procedure Law §§ 470.40(1) and 470.20. In this collateral proceeding, however, where DOCS's calculation of petitioner's controlling determinate sentence is at issue, the Court is without statutory authority to refer the matter at hand to a coordinate level court for corrective action.

The petitioner in *Garner,* like the defendants in *Sparber* and the petitioner in the case at bar, was sentenced to a determinate term of imprisonment but the sentencing court failed to impose the statutorily mandated period of post-release supervision. The period of post-release supervision, however, was administratively imposed by DOCS officials. After a period of time the *Garner* petitioner was conditionally released to post-release supervision but later returned to DOCS custody as a post-release supervision violator. Mr. Garner commenced a CPLR Article 78 proceeding challenging DOCS's authority to administratively add the period of post-release supervision to his sentence. The denial of Mr. Garner's petition was affirmed by the Appellate Division, Third Department, which found that "[a]s respondents [including DOCS] are only enforcing, not imposing, a part of petitioner's sentence which was automatically included by statute, they have not performed any judicial function, making prohibition an unavailable remedy." 39 AD2d 1019. The Court of Appeals reversed the Third Department in *Garner* on the same day it decided *Sparber*. According to the Court of Appeals in *Garner*, "[a]s we explained today in . . . *Sparber* . . . the combined command of CPL 380.20 and 380.40 is

that the sentencing judge - and only the sentencing judge - is authorized to pronounce the PRS component of a defendant's sentence . . . [P]etitioner is clearly entitled to the relief that he seeks because DOCS's imposition of the PRS term contravenes the CPL's express mandate that sentencing is a judicial function and, as such, lies beyond DOCS's limited jurisdiction over inmates and correctional institutions . . ." 10 NY3d 358, 362 (citation omitted). It is instructive to note that the Court of Appeals in *Garner*, which was not exercising direct appellate jurisdiction with respect to Mr. Garner's underlying sentence and conviction, merely prohibited DOCS from imposing the period of post-release supervision but did not purport to refer the matter to Mr. Garner's sentencing court. Instead, the Court of Appeals in *Garner* stated in a footnote that its holding was ". . .without prejudice to any ability that either the People or DOCS may have to seek the appropriate re-sentencing of a defendant in the proper forum." *Id*. at 363 (citation omitted).

This Court also notes that under the relevant provisions of Correction Law §601-d(8), ". . . [n]othing in this section shall affect the power of any court to hear, consider and decide any petition, motion or proceeding pursuant to . . . article . . . seventy-eight of the civil practice law and rules . . ." While the Court thus rejects respondents' assertion that it must refer this matter to Queens County for re-sentencing, this Decision and Judgment is rendered without prejudice to any ability that either the People or DOCS may have to seek the re-sentencing of petitioner in the proper forum.

Although the Court is mindful of the enormous administrative difficulties associated with the efforts of DOCS officials to identify inmates potentially affected by *Sparber*/*Garner* and to initiate re-sentencing proceedings pursuant to Correction Law

§601-d(2) with respect to those inmates, such difficulties cannot serve to validate the administrative imposition of periods of post-release supervision pending re-sentencing determinations of the sentencing courts. Citing *Garner*, the Appellate Division, Third Department recently held that in administratively imposing a period of post-release supervision without judicial pronouncement thereof, " . . . DOCS acted outside its jurisdiction" and such administratively imposed period of post-release supervision " . . . had no effect." *People ex rel Turner v. Sears*, 63 AD3d 1404 (other citation omitted). In any event, and notwithstanding the aforementioned administrative difficulties, the fact remains that the timing of the initiation of re-sentencing proceedings in cases as such as this is ultimately controlled by DOCS.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the administrative imposition of a 5-year period of post-release supervision associated with petitioner's controlling 2002 determinate sentence is vacated; and it is further

ADJUDGED, that this Decision and Judgment is rendered without prejudice to any ability that either the People or DOCS may have to seek re-sentencing of petitioner in the proper forum.

Dated: August 11, 2009, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice