

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X
THE STATE OF NEW YORK, THE NEW YORK :
STATE DEPARTMENT OF CORRECTIONAL SERVICES :
AND THE NEW YORK STATE DIVISION OF PAROLE, : Index No.: _____

Plaintiffs, :

-against- :

MICHAEL MYERS, ROGER SMALLS, JESUS NEGRON :
AND MALCOLM CARTER, :
individually and on behalf of all others similarly situated, :

Defendants. :
-----X

**MEMORANDUM OF LAW IN SUPPORT OF TEMPORARY
INJUNCTIVE RELIEF AND MOTION
FOR PRELIMINARY INJUNCTION**

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PRELIMINARY STATEMENT

This application is brought in order to preserve the right of State plaintiffs to ensure the safety of the public, while implementing in an orderly fashion the mandates of Matter of Garner v. New York State Dept. Of Correctional Services, 2008 N.Y. Slip Op 03947, 2008 N.Y. LEXIS 1051 (April 29, 2008) and People v. Sparber, 2008 N.Y. Slip Op 3946, 2008 N.Y. LEXIS 1053 (April 29, 2008). In Garner, the New York State Court of Appeals held, for the first time, that where a sentencing court did not orally impose or otherwise indicate a period of post-release supervision (“PRS”), plaintiff Department of Correctional Services (“DOCS”) may not deem such supervision to be part of the sentence imposed on a felony offender even though the Legislature has mandated that all determinate felony sentences be followed by a period of supervised release. At the same time, the Court specifically noted that its decision was without prejudice to the ability of DOCS or the People to seek resentencing of defendants whose sentence, in contravention of the legislative mandate, did not include PRS. Garner, 2008 N.Y. LEXIS at **8, n. 4.

Plaintiffs, DOCS and the Division of Parole (“Parole”), as agencies responsible for the custody or supervision of these violent felons, file this class action lawsuit for declaratory relief and seek a Temporary Restraining Order to maintain the status quo, authorizing plaintiffs to continue custody or supervision of defendants for reasonably limited periods of time, pursuant to a comprehensive and orderly plan set forth in the TRO, in order to afford DOCS and Parole the time to identify defendants subject to mandatory PRS, to locate records in their possession that would indicate whether for any such defendant, the sentencing courts in fact pronounced PRS, and, finally, to refer any defendant whose sentence did not include PRS or whose records are inconclusive on that question to a sentencing court to determine whether that defendant may require resentencing or may require release.

Interim emergency relief to maintain the status quo is necessary to protect the public. Without additional time and a deliberate and orderly plan in place, the result may be the sudden and mass release of thousands of violent felons from prison or parole.

STATEMENT OF FACTS

A. Jenna's Law And the Practice of Courts, District Attorneys, Defense Counsel

In 1995, the New York Legislature rejected for predicate violent felony offenders the longstanding New York sentencing scheme under which a judge imposed a sentence with a minimum and a maximum term of imprisonment, and the date of the prisoner's release was determined at a later date by a parole board; under the new legislation judges were required to specify a fixed determinate sentence of imprisonment, not followed by parole, for predicate violent felony offenders. Act of June 10, 1995, ch. 3, 1995 McKinney's N.Y. Laws 108.

The Sentencing Reform Act of 1998 ("Jenna's Law") extended determinate sentencing to first-time violent felony offenders. It also added a new section of the Penal Law mandating post-release supervision as part of every determinate sentence. Act of Aug. 6 1998, ch. 1, 1998 N.Y. Laws 1, 5 (codified at Penal Law § 70.45(1)). The Legislature's Memorandum in Support of the Act stressed the need to supervise violent felony offenders (who, by virtue of their determinate sentences would not be released under parole supervision) for community safety, as well as the importance of providing support for their transition to life in the community: "The communities that encounter these former inmates deserve protection from further victimization and maximum assurance that offenders will be successfully reintegrated into society A period of post-release supervision is the best way of addressing the needs of the offender and the community." Memorandum in Support,

ch. 1, 1998 McKinney's N.Y. Laws 1489, 1493. Thus, "to provide greater protection to the public," the Legislative Memorandum noted, "the bill also specifies that all violent felony offenders must serve a period of post-release supervision [and] creates methods for calculating periods of post-release supervision." *Id.* at 1489.

Following these changes to the sentencing statutes, courts throughout New York State regularly sentenced violent felons and committed them to DOCS' custody with the apparent understanding that, much like the parole it replaced, PRS was automatically added to the determinate term of a sentence by operation of law, pursuant to Penal Law § 70.45(1). Thus, in many instances, DOCS received prisoners for whom a term of PRS was required by law, but for whom the commitment order received from the court did not explicitly provide for such a term. In such instances, beginning in 1998, DOCS calculated terms of mandatory PRS as provided by statute and included those terms on the inmates' records. Accordingly, when an inmate, sentenced to a determinate sentence as a violent felony offender under Penal Law §§70.02, 70.70, or 70.80, was received into DOCS' custody, DOCS would calculate the inmate's maximum expiration date and his term of PRS, by applying the mandates of Penal Law §70.45 to the information on the inmate's sentence and commitment order.

B. The Courts' Concurrence With DOCS' Practice Of Calculating Mandatory PRS Periods

Until recently the New York State courts agreed that PRS was imposed by operation of law and that the "administrative" calculation of PRS by DOCS, which Parole also relied on, was simply required, to enforce the already-extant PRS part of a determinate sentence. *See, e. g., Garner v. NY State Dept. Of Correctional Services*, 39 A.D.3d 1019 (3rd Dep't 2007) (as DOCS was "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"), reversed, Matter of Garner v. New York State Dept. Of Correctional Services, 2008 NY Slip Op 03947, 2008 N.Y. LEXIS 1051 (April 29, 2008); People v. Boyer, 36 A.D.3d 1084 (3rd Dep't 2007); People v. Feng, 15 A.D.3d 862 (4th Dept. 2005) ("there is no need for the court to specify a period of postrelease supervision at sentencing"), lv. denied 5 N.Y. 809 (2005); People v. Dale, 19 A.D.3d 712 (2d Dep't 2005) ("the failure of the County Court to specify the term of post-release supervision at the time of sentence does not warrant vacatur of the plea"); Deal v. Goord, 8 A.D.3d 769, 770 (3rd Dep't 2004) ("[s]ince respondents are enforcing a statutorily-required part of petitioner's sentence, they have not performed any judicial function, making prohibition an unavailable remedy"), lv. denied 3 N.Y.3d 737 (2004) ("[a]ppel dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved"); People v. White, 296 A.D.2d 867 (4th Dep't 2002) ("[p]ostrelease supervision is mandatory for determinate sentences and is automatically included in the sentence"), lv. denied 99 N.Y.2d 540 (2002); and People v. Bloom, 269 A.D.2d 838 (4th Dep't 2000) ("[t]he length of the period of 'post-release supervision' is five years ... unless the court specifies a shorter period"), lv. denied 94 N.Y.2d 945 (2000).¹

C. Challenges To Postrelease Supervision in the State and Federal Courts

Eight years after the passage of Jenna's Law, in Earley v. Murray, 451 F.3d 71, rearg. denied 462 F.3d 147 (2nd Cir. 2006), the United States Court of Appeals for the Second Circuit ruled in

¹ See also People v. Crump, 302 A.D.2d 901 (4th Dep't 2003) lv. denied 100 N.Y.2d 537 (2003); People v. Thweatt, 300 A.D.2d 1100 (4th Dep't 2002); and People v. Bloom, 269 A.D.2d 838 (4th Dep't 2000). These cases each held that post-release supervision is imposed automatically, and sentencing judges have no discretion to ignore the legislative mandate. See also People v. Lindsey, 302 A.D.2d 128, 129 (3rd Dep't 2003), lv. denied, 100 N.Y.2d 583 (2003); People v. Munck, 4 A.D.3d 627, 628-69 (3rd Dep't 2004); and People v. Hazen, 308 A.D.2d 637, 637-638 (3rd Dep't 2003).

a federal habeas corpus proceeding that, regardless of the language of Penal Law §70.45, "[t]he only cognizable sentence is the one imposed by the judge." Therefore, the Court stated, "[t]he additional provision for post-release supervision added by DOCS is a nullity." Earley, 451 F.3d, at 76. Upon petition for rehearing, the Second Circuit, "adhere[d] to [its] view that the inclusion of a five-year period of PRS in Earley's sentence when that PRS was not included in the sentence imposed at Earley's sentencing hearing violated his rights under the Due Process Clause of the United States Constitution." Earley, 462 F.3d, at 148.

Even after Earley, many courts in New York denied challenges to PRS, reaffirming that PRS was imposed automatically by operation of law. See People v. Thomas, No. 9750, 2006 N.Y. App. Div. LEXIS 14489, at *1 (1st Dep't Dec. 7, 2006); People v. Lingle, No. 8143/06, 2006 N.Y. App. Div. LEXIS 13419 at *1 (1st Dep't Nov. 14, 2006); and People v. Sparber, No. 9509, 2006 N.Y. App. Div. LEXIS 13267, at *1 (1st Dep't 2006). And in a post-Earley decisions, the New York State Court of Appeals suggested in dicta that PRS was imposed by operation of law. In People v. Hill, 9 N.Y.3d 189 (2007), the Court held that the sole remedy for failing to advise a defendant before accepting his plea that the sentence would include PRS was vacatur of the guilty plea because, "the constitutional defect lies in the plea itself and not in the resulting sentence, [and thus] vacatur of the plea is the remedy..." Hill, at 191. Nowhere did the Court of Appeals suggest that mandatory PRS could not be enforced if not imposed by a sentencing court.

D. The Garner and Sparber Decisions

Last month, the Court of Appeals decided Garner, and held, for the first time, that DOCS could not include a period of PRS in its sentence calculation if the sentencing court had not pronounced PRS or otherwise included it in the written sentencing documents. It also decided a

group of five cases, combined under People v. Sparber, 2008 N.Y. Slip Op 3946, 2008 N.Y. LEXIS 1053 (April 29, 2008), involving challenges on direct appeals to the validity of periods of PRS that were not orally pronounced by the sentencing court.

In Sparber, the Court of Appeals rejected defendants' contention that a remedy lay in "striking PRS from [their] sentences." Instead, it held that the proper remedy was resentencing, with the defendant having a right to the vacatur of the plea if the defendant was not informed of PRS at the time of a guilty plea. See Sparber, citing People v. Catu, 4 N.Y. 3d 242 at 244 (2005). However, if the defendant specifically declined such remedy, as in Sparber, or if the defendant was advised of PRS at plea, as in Thomas, the Court of Appeals ruled the failure to address PRS at sentencing constituted nothing more than a procedural error which the sentencing court could remedy easily by returning the defendant before it for pronouncement of the required PRS. When the sentence follows conviction at trial, as in Lingle, Rodriguez and Ware, the remedy is likewise resentencing. "The sole remedy for a procedural error such as this is to vacate the sentence and remit for a resentencing hearing so that the trial judge can make the required pronouncement." See Sparber, citing People v. Sturgis, 69 N.Y. 2d 816 (1987), and People v. Stroman, 36 N.Y. 2d 939 (1975). Clearly, the Court of Appeals' decisions in Garner and Sparber have not called into question the fundamental point that certain convicted felons are required by law to have mandatory PRS imposed upon them.

E. The Aftermath Of Garner And Sparber And The Post-Release Resentencing Initiative

By the time of the Garner and Sparber decisions, DOCS and Parole had already begun to prepare a plan to identify every inmate in DOCS custody who should have mandatory PRS and then to identify those whose commitment documents did not satisfy the Garner and Sparber requirements. Plaintiffs have prioritized categories of inmates within the pool of inmates with possible PRS

sentencing errors. DOCS and Parole have given highest priority to those inmates who are currently in custody for violating the conditions of their PRS. Since the Court of Appeals' decisions, plaintiffs have deployed working groups dedicated to the task of manually reviewing thousands of files in order to identify and to seek remediation of all PRS problems. While DOCS and Parole have manually reviewed, within the last month, over 40,000 files of inmates and parolees who may be affected by the Garner and Sparber decisions, plaintiffs require further additional time to review carefully the documents in their possession for each potentially affected inmate or parolee and respond appropriately. Indeed, for over one-third of the files of potentially affected defendant class members, plaintiffs do not have sufficient documentation in their files to make the determination over whether the sentencing courts actually imposed mandatory PRS.

At the same time plaintiffs' are reviewing inmate files, DOCS and Parole have followed the direction of the Court of Appeals and, in coordination with all appropriate New York State and county agencies, have launched the "Post-Release Resentencing Initiative," which promises an efficient, fair and orderly response to the Court of Appeals' invitation to have defendants appropriately resentenced, upon what appear to be widespread omissions of PRS by the sentencing courts. The initiative, described in a letter from DOCS to all of the State's District Attorneys, is set forth in a memorandum attached as Exhibit A to the Annucci Affirmation and is entitled "Post-release Supervision Resentencing Initiative." On May 14, 2008, OCA distributed a memorandum (attached as Exhibit B to the Annucci Affirmation) to all of the administrative judges in order to facilitate the resentencing initiative. With the memorandum from OCA, a proposed letter from DOCS to sentencing judges was circulated in two forms – one form, for cases in which DOCS has a copy of the sentencing minutes, and another form, for cases in which DOCS has no copy of the

sentencing minutes (attached to the May 14, 2008 OCA memorandum). As explained in the letters (copies of which are sent to each inmate), DOCS requests that those courts calendar the referred matters for further investigation of the facts or for resentencing, upon notice to the parties. In the event that a court does not calendar a matter for resentencing, DOCS asks the sentencing judges to issue an order directing DOCS to calculate the terms of imprisonment without post-release supervision and release any such inmates forthwith to the community without any further supervision. DOCS has provided the sentencing courts with form orders reflecting DOCS' plan. To date, DOCS has sent letters to courts, District Attorneys and inmates in the cases of almost 500 separate individuals. DOCS will have completed addressing this first wave of high priority inmates as soon as practicable.

In many instances, inmate records, particularly sentencing minutes, are missing, incomplete or ambiguous. In such a case, DOCS cannot make a determination as to whether PRS is properly deemed to be a part of and calculated in the inmate's sentence. DOCS must defer to the sentencing courts to resolve those issues, which affect a substantial number of inmates. And, of course, only the sentencing court, with input from the District Attorney and defense counsel, can make the individualized determinations whether resentencing is appropriate or permissible in cases where PRS turns out not to have been imposed by the court. Thus while DOCS and Parole are working diligently to resolve the issues posed by the Court's decisions, it is a process that requires a reasonable period of time to complete, and that also requires the involvement of the sentencing courts.

While this process is ongoing, DOCS and Parole should not be compelled to release hundreds or even thousands of violent felons from custody or supervision. Plaintiffs therefore seek temporary

and preliminary injunctive relief declaring pursuant to CPLR §§ 6311 and 6313 that the status quo be maintained for the class of defendants consisting of all of the individuals in DOCS custody, Parole custody, or under Parole supervision, for whom it appears that the documents in the possession of DOCS and Parole do not record terms of mandatory PRS imposed by the sentencing courts for specified periods of time in order that the State of New York be afforded time to determine whether the sentencing courts did impose PRS, and if not, whether the court will resentence defendants.

F. The Defendant Class And Subclasses And The Class Action Relief Sought

Plaintiffs make this application for a temporary restraining order pending a hearing and determination of their application for a preliminary injunction seeking a declaratory judgment with the understanding that as increasing numbers of individuals are individually challenging their incarceration by DOCS or custody or supervision by Parole, plaintiffs' plan promises an expedited avenue for review of potential Garner claims. Plaintiffs seek as interim relief a declaration that a defendant class be declared as consisting of all individuals in DOCS custody or under parole supervision for whom it appears that the documents in the possession of DOCS and Parole do not record terms of mandatory PRS imposed by the sentencing courts, even though the individuals were subject to mandatory PRS under the applicable sentencing statutes. Because DOCS and Parole are now burdened with determining which inmates in custody and parolees under supervision must be referred back to the sentencing courts, and the numbers of individuals affected number in the tens of thousands, plaintiffs ask this Court to authorize plaintiffs to continue to maintain custody of the proposed defendant class members while it prioritizes members of the defendant class by three subclasses, and then authorizes plaintiffs to address defendants' potential sentencing errors in orderly

stages as follows:

(1) any member of subclass A of defendants² as defined in the complaint in this action shall be referred to the sentencing court, and shall be continued in custody by DOCS for up to 60 days from the date of this order, or by Parole, in a city correctional facility or local jail, for up to 90 days from the date of this order, pending action by the sentencing court, and shall be held in custody thereafter only if the sentencing court informs DOCS or Parole or otherwise provides notice, prior to the expiration of such period, that the sentencing court will either hold resentencing proceedings, or is obtaining records in order to determine whether to hold resentencing proceedings, in the case of said subclass A member;

(2) any member of subclass B of defendants³ as defined in the complaint herein who has reached, or will reach on or before July 31, 2008, the maximum expiration date of such class member's determinate sentence, shall be referred to the sentencing court within 60 days of this Order, and shall be continued in custody or supervision for up to 90 days following such referral to the sentencing court, and shall be continued in custody or supervision thereafter only if the sentencing court informs DOCS or Parole or otherwise provides notice, prior to the expiration of such 90 day

² Subclass A includes those defendants who currently are in custody of DOCS (in a State correctional facility) or Parole (in a city correctional facility or a local jail) within the State of New York held pursuant to a violation of PRS, where the PRS period is beyond the maximum expiration date of the class member's determinate sentence, and where it appears that the documents in the possession of DOCS and Parole do not record a court-imposed term of PRS, although the defendant was subject to mandatory PRS under the applicable sentencing statute.

³Subclass B includes those defendants who currently are in custody of DOCS in a correctional facility within the State of New York or under the supervision of Parole and whose period of PRS will, on or before June 1, 2009, extend beyond the maximum expiration date of the class member's determinate sentence, and where it appears that the documents in the possession of DOCS and Parole do not record a term of court-imposed PRS, although the defendant was subject to mandatory PRS under the applicable sentencing statute.

period, that the sentencing court will either hold resentencing proceedings, or is obtaining records in order to determine whether to hold resentencing proceedings, in the case of such subclass B member;

(3) any member of subclass B of defendants as defined in the complaint herein who will reach, after July 31, 2008, the maximum expiration date of such class member's determinate sentence, shall be referred to the sentencing court prior to said maximum expiration date, and shall be continued in custody or supervision pending action by such court, for up to 90 days after such subclass B member's maximum expiration date, and shall be continued in custody or supervision thereafter only if the sentencing court informs DOCS or Parole or otherwise provides notice, prior to the expiration of such 90 day period, that the sentencing court will either hold resentencing proceedings, or is obtaining records in order to determine whether to hold resentencing proceedings, in the case of such subclass B member;

(4) any member of subclass C of defendants⁴ as defined in the complaint in this action shall be referred to the sentencing court within 12 months of the service of this order, and that said subclass C member should be released from DOCS or Parole supervision into the community without any further supervision by Parole upon the maximum expiration date of said subclass C member, unless a sentencing court informs DOCS or Parole or otherwise provides notice, prior to the maximum expiration date of said subclass C member, that the sentencing court will either hold

⁴Subclass C includes those defendants who currently are in custody of DOCS in a correctional facility within the State of New York or released to the supervision of Parole on conditional or other release (but not exclusively PRS) and whose period of PRS will, after June 1, 2009, extend beyond the maximum expiration date of the class member's determinate sentence, and it appears that the documents in the possession of DOCS and Parole do not record a term of court-imposed PRS, although the defendant was subject to mandatory PRS under the applicable sentencing statute.

re-sentencing proceedings, or is obtaining records in order to determine whether to hold resentencing proceedings, in the case of said subclass C member.

Plaintiffs respectfully request that the Court grant plaintiffs the authority to maintain the status quo for an interim period, pending a hearing and determination of the application for a preliminary injunction and then declare a class and grant plaintiffs' application for a preliminary injunction. In addition, plaintiffs request that the Court provide that this Court may extend any of the above dates based on particular circumstances applicable to any individual class member.

ARGUMENT

I. THIS COURT SHOULD DECLARE THAT PLAINTIFFS HAVE THE RIGHT TO BE AFFORDED TIME IN ORDER TO CARRY OUT THE COURT'S AND THE LEGISLATURE'S MANDATES

A declaratory judgment action is here appropriate to delineate the rights plaintiffs have to be afforded time to review files and other records related to thousands of inmates and parolees who may have sentencing errors in their sentences and then to refer such individual to their sentencing courts. Plaintiffs have the right to promote adherence to the intent of the Court of Appeals in Garner and Sparber. Declaratory relief need not be an "extraordinary remedy [, but rather,] 'is a remedy sui generis and escapes both the substantive objections of special writs and extraordinary remedies,'" and "seeks a determination of rights before a 'wrong' occurs, rather than collateral review of a court's ruling." In The Matter of Sidney Oglesby v. Langston C. McKinney, 28 A.D. 3d 153 (4th Dep't 2006) citing Matter of Morgenthau v. Erlbaum, 59 N.Y. 2d 143, 147, 150 (1983), cert. denied, 464 U.S. 993 (1983). In Matter of Morgenthau, 59 N.Y. 2d 147, 150, 152 (1983), the Court of Appeals held that a declaratory judgment action is appropriate

where “the legality or meaning of a statute is in question,” and the State is the appropriate party to file such an action, particularly where the controversy arises out of the frustration of the legislative function (here, the mandatory PRS legislation) by the courts (here, in not expressly pronouncing mandatory PRS at defendants’ sentencings).

II. A TRO IS NECESSARY IN ORDER TO AVOID IMMEDIATE AND IRREPARABLE HARM TO THE CITIZENS OF NEW YORK

Immediate and irreparable harm will result to the citizens of New York if a TRO does not issue. Pursuant to CLPR § 6313 a Court may issue a temporary restraining order pending a hearing on a request for a preliminary injunction. The applicant for such temporary relief must show that without the temporary relief the party would suffer “immediate and irreparable injury, loss or damage.” CLPR § 6313(a). As set forth in the complaint, and in the supporting Annucci and Tracy Affirmations, plaintiffs will be immediately and irreparably harmed if custody or supervision of defendants is not continued pursuant to the provisions outlined in the Order To Show Cause. Rather than immediately release from custody all inmates or from supervision all parolees whose sentences may contain PRS sentencing errors, based upon the documentation in possession of DOCS and Parole, plaintiffs ask this Court to authorize them to continue to pursue the “Post-Release Resentencing Initiative,” and afford them time to have the appropriate courts correct the errors before burdening the community and threatening public safety by releasing thousands of violent felons to the streets. In the absence of such relief, piecemeal and inevitably inconsistent resolution of individual actions by the defendants herein will ensue, consuming judicial resources that could otherwise be devoted to implementing the Garner and Sparber decisions in a systematic manner. The failure to grant relief will also frustrate the intent of the Court of Appeals that the State’s right to

seek resentencing not be prejudiced, and will in the event that large number of violent offenders are suddenly released without any transitional services or supervision pose a grave and imminent threat to public safety. Public safety and the orderly administration of justice compel issuance of the TRO.

Public Safety Will Be Irreparably Compromised If A TRO Is Not Granted

The citizens of the State of New York will suffer irreparable and immediate harm should thousands of violent felons be released from DOCS custody or Parole supervision in a sudden and disorganized fashion. Numerous members of the defendant class are likely to seek imminent release through other actions or proceedings, even where the documents in the possession of DOCS and Parole are not conclusive as to whether mandatory PRS was properly imposed by a court. The precipitous release of thousands of violent felons undeniably presents a potential for irreparable harm. As reported in news stories over the last few weeks, one violent felon, Jamal Winter, released after his PRS was “stricken” when he prevailed on a habeas corpus proceeding, was released to the community instead of being reincarcerated for parole violations. Just weeks after release from custody, on May 18, 2008, Mr. Winter was arrested and charged with the murder, just days before, of a woman who owned a dry cleaning store in Brooklyn. See, e. g., news reports, Exhibits A and B to the Affidavit of Terrence X. Tracy, dated June 4, 2008, submitted herewith.

As demonstrated in both the Affirmation of Terrence Tracy and the Affirmation of Anthony J. Annucci, dated June 4, 2008, also submitted herewith, the risk of recidivism is greatest for recent releasees, and the relevant data demonstrates that the more time offenders spend on parole supervision, the less likely they are to recidivate. Therefore, plaintiffs contend that they should be permitted time to make legitimate and reasonable efforts to correct errors in sentencing so that PRS

can be imposed by the courts, in the interests of safeguarding the security of the citizens of New York. Of the 26,000 inmates released from custody every year, 10,000 will return to prison within 3 years. However, recidivism studies also show that parolees are most likely to violate the rules governing parole in the first year following release; the failure rate decreases with the more time spent on supervision. Releasees, are also most likely to be re-arrested in the first six months following release, and the rate of re-arrest declines by the twelfth month and continues to decline through the third year following release. The statistics available to DOCS indicate that post-release supervision has been an effective tool in facilitating the adjustment of incarcerated inmates back into the community. Studies show that where supervision is not maintained, the released inmate presents a danger to the community and has less of a likelihood of succeeding by gaining employment and avoiding criminal activity. See Annucci Affirmation, at Paragraphs 29-31.

Moreover, the New York State Legislature has mandated that the members of the defendant class be subject to PRS. If members of the defendant class are immediately released from custody, plaintiffs' ability to seek resentencing of those members will be irreparably prejudiced to the extent that the criminal justice system loses then loses track of these defendants, who are released without reporting instructions, without known or appropriate residences, and without employment. Unaccounted for and unaccountable to anyone, defendants pose a threat to public safety. Therefore, the short-term liberty interests of the defendant class should, "yield to what the Legislature has determined is the greater public benefit." See Metropolitan Transp. Auth. v. Village of Tuckahoe, 67 Misc. 2d 895, 900-901, aff'd 38 AD2d 570 (2nd Dep't 1971) (granting the Metropolitan Transportation Authority an order enjoining the Village of Tuckahoe from enforcing its building code).

II. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION

Plaintiffs are entitled to a preliminary injunction granting their application for a declaration that the citizens of New York are entitled to maintain public safety through the orderly administration of resentencing proceedings for thousands of violent felons. On a motion for a preliminary injunction, the movants must prove three things: (1) that they are likely to succeed on the merits; (2) that they will suffer irreparable injury if the preliminary injunction is not granted; and (3) that a balancing of the equities tips in their favor.⁵ See C.P.L.R. § 6301; Karabatos v. Hagopian, 39 A.D. 3d, 930, 931 (3d Dep't 2007). "The purpose of a preliminary injunction is to maintain the status quo pending determination of the action." Coinmach Corp. v. Alley Pond Owners Corp., 25 A.D. 3d 642, 643 (2d Dep't 2006). A preliminary injunction pending resolution of a complaint seeking declaratory relief is appropriate. Id. The decision to grant a preliminary injunction lies within the sound discretion of the trial court. See Gray v. Serbalik, 257 A.D. 2d 869, 870 (3d Dep't 1999). A party seeking a preliminary injunction is not required to prove his case in full at a preliminary injunction hearing. See Univ. of Tex. v. Camenisch, 451 U.S. 390 (1981). As the Second Circuit has held, "[t]o justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground

⁵ Pursuant to CPLR § 2512 (1), plaintiffs are exempt from CPLR § 6312 (b)'s requirement that a party requesting a preliminary injunction post an undertaking in an amount determined by the court.

for litigation and thus for more deliberate investigation.” Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2nd Cir. 1953).

A. Plaintiffs Will Succeed On The Merits

To establish a likelihood of success on the merits, the movant need only make a *prima facie* showing of a right to relief. See Egan v. New York Care Plus Ins. Co. Inc., 266 A.D. 2d 600, 601 (3d Dep’t 1999).

First, Sparber requires that where a defendant raises a challenge to PRS on direct appeal, the case be returned to the sentencing court for correction of the sentence and in order to properly include the mandatory period of supervision. In parallel with Sparber, the Court stated in Garner that although DOCS itself could not correct a sentence that illegally omitted PRS, it did not intend to prejudice the ability of the People or DOCS to seek that correction from the court. It would be anomalous and illogical to allow defendants to avoid the very possibility of proper resentencing — and hence, avoid the very corrective measure the Court wished to leave open in Garner — simply by bypassing a direct appeal and immediately challenging PRS in a forum other than the sentencing court. The only reasonable way to read the Sparber and Garner decisions together is to recognize that plaintiffs must be permitted a reasonable time to investigate and refer cases back to the sentencing court.

Second, the Court of Appeals has previously recognized that in extraordinary circumstances such as those presented by the present situation, the State should be permitted to take reasonably expeditious measures to protect the public. In State of New York ex rel. Harkavy v. Consilvio, 7 N.Y.3d 607 (2007), the Court of Appeals considered a habeas corpus proceeding brought on behalf of 12 sex offenders who had been transferred from DOCS custody

to involuntary commitment in Office of Mental Health (“OMH”) hospitals upon the completion of their state prison sentences. The Court held that the prisoners were entitled to habeas relief because they were denied the pre-commitment notice and hearing procedures provided by Corrections Law §402. See Harkavy. However, the Court did not order the petitioners released; rather it granted the habeas corpus petition only to the extent of ordering immediate retention hearings for the petitioners. In doing so, the Court stated, “[w]e do not propose that these petitioners be released, nor do we propose to trump the interests of public safety. Rather we recognize that a need for continued hospitalization may well exist.” Id. at 614. When compared to the facts of Harkavy, even greater interests of public safety are implicated here, as the Jamal Winter case has already vividly demonstrated. As in Harkavy, those interests must be given paramount consideration before any member of the defendant class is released without post-release supervision.

B. Plaintiffs Will Suffer Irreparable Injury

Barring preliminary relief from this Court, plaintiffs will suffer irreparable harm. The sudden release of potentially hundreds of convicted felons will no doubt irreparably harm plaintiffs’ plan to re-sentence class defendants to their proper term of PRS as mandated by statute. The administrative and logistical burdens of releasing incarcerated class defendants into the community, plus the risk of flight or other impediments to returning these individuals for legal resentencing, will irreparably interfere with plaintiffs’ ability to resentence the effected class defendants. Cf. Sailor v. Scully, 666 F. Supp. 50, 53, rev’d on other grounds, 836 F.2d 118 (S.D.N.Y. 1987) (finding in granting stay of judgment in application for a writ of habeas corpus that government officials showed irreparable injury if stay of grant of habeas writ was not stayed

due to potential risk of flight by applicant who was a dangerous felon). Likewise, the public safety will be irreparably harmed if plaintiffs are forced to release from custody class defendants without the benefit of an orderly resentencing process. Both statistics and common sense dictate that the release en masse of hundreds of convicted violent felons will lead to injury to public safety.

Furthermore, plaintiffs possess no adequate remedy at law. Such lack of an adequate remedy at law weighs further in favor of plaintiffs' request for injunctive relief. See Paley v. Copake Lake Development Corp., 95 A.D. 2d 903 (3d Dep't 1983) (affirming trial court's grant of preliminary injunction where applicant would suffer irreparable harm and had "no adequate remedy at law.") The purpose of a preliminary injunction is not to give the plaintiff the ultimate relief it seeks, rather it is to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. See WarnerVision Entertainment v. Empire of Carolina, 101 F.3d 259, 261 (2d Cir. 1996). If the plaintiffs are denied relief, their ability to follow the Court of Appeals' guidance that resentencing is the proper remedy for Garner and Sparber errors will be irreparably prejudiced.

C. The Balance of the Equities Favors the Plaintiffs

A preliminary injunction should be issued because the balance of equities favor plaintiffs. When balancing the equities, the court should consider whether the injury to be sustained is more burdensome to the movants than the harm caused to the non-movant through the imposition of the injunction. See Battenkill Veterinary Equine, P.C. v. Cangelosi, 1 A.D. 3d 856, 859 (3d Dep't 2003). There is little question here that the irreparable injury that plaintiffs and the people of the State of New York will sustain is more serious than the harm the class defendants will

suffer as a result of a short-term injunction pending the determination of this proceeding.

Without a grant of the relief sought here by plaintiffs, the citizens of the State of New York will be prejudiced by piecemeal litigation, and inconsistent decisions. In the past several weeks, dozens of Article 78 and Article 70 habeas corpus proceedings have been filed across the state, with wide-ranging outcomes. This unnecessarily burdens the courts and adds further confusion to this issue - at a time when plaintiffs are presenting a plan, through a centralized lawsuit, to avoid widespread litigation. Moreover, the Court of Appeals did not intend that defendants with unpronounced PRS should reap the accidental windfall of an abbreviated sentence. Plaintiffs' proposed plan allows for deliberate and careful resolution.

The sentencing courts are in the best position to provide complete relief to all of the involved parties, as they are in possession of the most complete records regarding the sentencing proceedings, they can hear from all of the parties, they can vacate pleas, and they can resentence the defendants if that is the appropriate relief. Habeas corpus proceedings only address the question of whether or not petitioner is to be discharged from confinement. See CPLR § 7010(a). Article 78 proceedings also cannot correct a sentence or "correct or prevent trial errors of substantive law or procedure, however grievous." LaRocca v. Lane, 37 N.Y.2d 575, 579 (1975).

Moreover, both habeas corpus proceedings and Article 78 proceedings are susceptible to procedural bars that could prevent speedy and efficient relief for some petitioners. As the Court of Appeals noted in Garner, Article 78 proceedings are time-limited. The Garner Court specifically referred to the four-month statute of limitations provided by C.P.L.R. §217, which should serve as a bar to many, if not most Article 78 petitioners. Most inmates challenge

mandatory PRS only after a violation of PRS that results in a return to custody, after the four-month period has expired. Even if a petitioner persuades a trial court to overlook the time-bar, the appellate process will prevent immediate relief. The Court of Appeals has clearly held that whatever the merits of an Article 78 petition, the time limitations imposed by the CPLR are strictly enforced. See Vega v. Bell, 47 N.Y.2d 543, 546 (1979) (“[a]s petitioner has chosen to raise his claim in the context of an article 78 proceeding seeking the extraordinary remedy of a writ of prohibition, he is subject to the limitations controlling the issuance of such a writ”). A return to the sentencing court is the only remedy available to all class defendants no matter when any member’s term of PRS begins to run.

Article 70 habeas corpus relief likewise may not ultimately be dispositive of cases in which mandatory PRS may not have been properly imposed by a court. In a habeas petition seeking release on grounds that PRS was not court-imposed, the petitioner may be referred to the sentencing court for resentencing. Direct resort to the sentencing court, however, is a far more efficient use of judicial resources, as in that forum, a petitioner can obtain all the relief he is entitled to at once. Therefore, the interests of judicial efficiency will best be served if all of the class members are referred back to the sentencing courts.

And most important, at risk on plaintiffs’ side is the loss of their ability to address this extremely serious issue of public policy and grave threat to public safety. On class defendants’ side the equities cannot possibly favor the disruption of their resentencing to PRS, which is mandated by statute. The threat to public safety which the sudden release to the community of the class defendants poses, dictates that the balance of the equities weighs in favor of plaintiffs and that a preliminary injunction should be issued. Cf. McDermott v. City of Albany, 309 A.D.

2d 1004, 1005-06 (3d Dep't 2003) (finding in upholding trial court's denial of injunction that government project which was target of injunction "was necessary to correct a serious threat to public health, safety and welfare" and "thus the balance of equities did not favor an injunction.")


CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court issue a temporary restraining order directing DOCS and Parole, their agents, officials, employees and all persons acting in concert with them or on their behalf, to maintain custody and supervision of any member of the class of defendants as so defined in the complaint in this action unless a court of competent jurisdiction orders their release or unless they are entitled to release under the law as their sentences are currently calculated; and a preliminary injunction directing plaintiffs to execute the deliberate and careful plan set forth in the Order To Show Cause and Preliminary Injunction herein.

Dated: Albany, New York
June 4, 2008

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