

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
PAUL BETANCES, LLOYD A. BARNES, GABRIEL
VELEZ a/k/a GABRIEL BELIZE, individually and on
behalf of all others similarly situated,

Plaintiffs,

– against –

BRIAN FISCHER, in his capacity as Commissioner
of the New York State Department of Correctional
Services (DOCS), and in his individual capacity;
ANTHONY J. ANNUCCI, in his capacity as Deputy
Commissioner and Counsel for DOCS, and in his
individual capacity; LUCIEN J. LECLAIRE, JR., former
Acting Commissioner of DOCS, in his individual capacity;
GLENN S. GOORD, former Commissioner of DOCS,
in his individual capacity; JOHN/JANE DOES 1-25
(DOCS Supervisory, Training, and Policy Personnel);
ANDREA W. EVANS, in her capacity as Chair and Chief
Executive Officer of the New York State Division of
Parole (DOP), and in her individual capacity; MARK
MANTEI, in his capacity as Executive Director of DOP,
and in his individual capacity; TERENCE TRACY,
in his capacity as Chief Counsel for DOP, and in his
individual capacity; ROBERT J. DENNISON, former
Chair of DOP, in his individual capacity; ANTHONY G.
ELLIS II, former Executive Director of DOP, in his
individual capacity; GEORGE B.ALEXANDER,
former Chair and Chief Executive Officer of DOP, in
his individual capacity; and JOHN/JANE DOES 26-50
(DOP Supervisory, Training, and Policy Personnel),

Defendants.
-----X

11 Civ. 3200 (SAS)

**AMENDED
CLASS ACTION
COMPLAINT AND
JURY DEMAND**



Plaintiffs Paul Betances, Lloyd A. Barnes and Gabriel Velez (a/k/a Gabriel

Belize) on behalf of themselves and others similarly situated, for their Amended Complaint,
allege as follows:

INTRODUCTION

1. More than seventy-five years ago, a unanimous Supreme Court held that only the judgment of a court establishes a defendant's sentence, and that imposition of an extra-judicial sentence violates a defendant's constitutional rights. *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936) (Cardozo, J.).

2. Consistent with *Wampler*, on June 9, 2006, the Court of Appeals for the Second Circuit held that the imposition of an extra-judicial sentence of post-release supervision ("PRS") by the New York State Department of Correctional Services ("DOCS") and the New York State Division of Parole ("DOP") violated clearly established Supreme Court precedent. *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006).

3. Notwithstanding the unambiguous command of *Wampler* and *Earley*, defendants continued to administratively impose and enforce PRS on and against individuals such as plaintiffs Betances, Barnes and Velez, and thousands of others, whose sentences never included PRS (the "PRS Policy") even *after Earley* was decided. In its most egregious form, defendants' unlawful imposition and enforcement of PRS in violation of clearly established law included the post-*Earley* imprisonment of plaintiffs Betances, Barnes and Velez, and thousands of others, based on nothing more than a violation of the terms of their unconstitutionally imposed PRS.

4. Notably, in the immediate aftermath of the Second Circuit's decision in *Earley*, defendants, including defendant Annucci, undertook an analysis of DOCS records in order to identify all inmates, or former inmates, who were administratively sentenced to PRS by DOCS notwithstanding any indication that a court had actually sentenced that person to PRS, whether in their sentencing and commitment paperwork or the minutes of their sentencing. That

analysis identified 8,100 inmates that could not be subjected to PRS under *Earley*, including 1,600 that had already been released and subjected to PRS. We know this happened because defendant Annucci swore to the truth of these facts under penalty of perjury in an affirmation dated June 4, 2008 and submitted to a court.

5. Defendants, however, did nothing with the information that was gathered. Instead of lifting the terms and conditions of PRS for everyone that had already been released and changing the policy of imposing and/or enforcing PRS sentences after the maximum sentence expiration date for each released inmate was reached, defendants brazenly continued their unconstitutional policy and practice in violation of clearly established law.

6. Indeed, on July 7, 2007, defendant Annucci, on behalf of himself and defendant Fischer, sent a letter to an inmate who had invoked his rights under *Earley* (attached as Ex. A). In the letter, defendant Annucci made it clear that defendants did not consider themselves to be bound by *Earley*, but instead would continue to impose and enforce DOCS own administratively imposed PRS sentences unless and until they were “specifically ordered” to “set aside” an individual inmate’s “period of post-release supervision . . . by a state or federal court.” *Id.*

7. Consistent with the July 7, 2007 Annucci letter, defendants engaged in a vigorous campaign of defying *Earley*’s command. Indeed, defendants actively opposed every attempt by any inmate, whether through a court proceeding or otherwise, to obtain the relief required by *Earley*. See Declaration of Elon Harpaz, dated October 12, 2011, which is incorporated by reference (attached as Ex. B).

8. Plaintiffs Betances, Barnes and Velez bring this action for injunctive and declaratory relief, and for compensatory and punitive damages, on behalf of themselves and

others similarly situated who were sentenced to prison in New York State for a fixed term that did not include a term of PRS, but were nevertheless subjected to PRS and/or incarcerated for nothing more than a violation of PRS after the maximum expiration date of their determinate sentence(s).

JURISDICTION AND VENUE

9. This action arises under the Fourth and Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

10. The jurisdiction of this Court is predicated upon 28 U.S.C. §§ 1331, 1343(a) and 2201.

11. Venue is lodged in this Court pursuant to 28 U.S.C. 1391(b).

JURY DEMAND

12. Plaintiff demands trial by jury in this action

THE PARTIES

13. Plaintiff Paul Betances “plead guilty to Robbery in the First Degree and with a promised sentence of five years incarceration” on or about July 20, 2004. Consistent with that agreement, Mr. Betances was sentenced to “a determinate term of five years.” Mr. Betances was not sentenced to PRS. Although Mr. Betances was never sentenced to PRS, DOCS and DOP administratively imposed a five year term of PRS on April 24, 2008, upon his release from prison after having served 6/7ths of his five year determinate sentence. Mr. Betances’s maximum determinate sentence expired on January 14, 2009. His unconstitutionally imposed PRS sentence was not scheduled to expire until April 24, 2013. Thereafter, starting on or about July 9, 2009, DOCS and DOP imprisoned Mr. Betances for violating the conditions of his PRS.

14. Plaintiff Lloyd A. Barnes plead guilty to attempted assault and attempted burglary on July 31, 2000 and was sentenced on August 15, 2000 to a determinate term of five years and a second determinate term of six years to run concurrently. Although Mr. Barnes was never sentenced to PRS, DOCS and DOP administratively imposed a five year term of PRS on October 19, 2005, upon his release from prison after having served 6/7ths of his six year determinate sentence. Mr. Barnes's maximum determinate sentence expired in 2006. His unconstitutionally imposed PRS sentence was not scheduled to expire until November 13, 2010. Thereafter, starting in or around the Summer of 2008, DOCS and DOP imprisoned Mr. Barnes for violating the conditions of his PRS.

15. Plaintiff Gabriel Velez (a/k/a Gabriel Belize) plead guilty to attempted robbery and was sentenced on February 20, 2001 to a determinate term of five years. Although Mr. Velez was never sentenced to PRS, DOCS and DOP administratively imposed a five year term of PRS. Mr. Velez was released from prison on July 2, 2004 after having served 6/7ths of his five year determinate sentence. Mr. Velez's maximum determinate sentence expired on March 22, 2005. His unconstitutionally imposed PRS sentence was not scheduled to expire until July 2, 2009. Thereafter, starting on or about July 8, 2008, DOCS and DOP imprisoned Mr. Velez for violating the conditions of his PRS.

16. Defendant Brian Fischer is the Commissioner of DOCS. Since he was appointed to that position on January 1, 2007, he has been and continues to be responsible for the policy, practice, supervision, implementation, and conduct of all DOCS matters and responsible for the appointment, training, supervision, and conduct of all DOCS personnel. In addition, Commissioner Fischer has been and continues to be responsible for enforcing the rules of DOCS, and for ensuring that DOCS personnel obey the Constitution and laws of the United States. As

Commissioner of DOCS, Fischer is a policy-maker with respect to DOCS's decisions to administratively impose PRS. Commissioner Fischer is sued in his individual and official capacities.

17. Defendant Anthony J. Annucci is a Deputy Commissioner of, and Counsel to, DOCS. At all times relevant to this action, defendant Annucci has been, and continues to be, responsible for the policy, practice, supervision, implementation, and conduct of all DOCS matters and responsible for the appointment, training, supervision, and conduct of all DOCS personnel. In addition, Deputy Commissioner Annucci has been and continues to be responsible for enforcing the rules of DOCS, and for ensuring that DOCS personnel obey the Constitution and laws of the United States. As a Deputy Commissioner of, and Counsel to, DOCS, Annucci is a policy-maker with respect to DOCS's decisions to administratively impose PRS. Defendant Annucci is sued in his individual and official capacities.

18. Defendant Lucien J. Leclaire, Jr., was Acting Commissioner of DOCS from August 30 to December 31, 2006. Throughout that time, Acting Commissioner LeClaire was responsible for the policy, practice, supervision, implementation, and conduct of all DOCS matters and responsible for the appointment, training, supervision, and conduct of all DOCS personnel. In addition, Commissioner Leclaire was responsible for enforcing the rules of DOCS, and for ensuring that DOCS personnel obey the Constitution and laws of the United States. As Acting Commissioner of DOCS, Leclaire was a policy-maker with respect to DOCS's decisions to administratively impose PRS. Former Acting Commissioner Leclaire is sued in his individual capacity.

19. Defendant Glenn S. Goord was the Commissioner of DOCS from 1996 to August 30, 2006. Throughout that time, Commissioner Goord was responsible for the policy,

practice, supervision, implementation, and conduct of all DOCS matters and responsible for the appointment, training, supervision, and conduct of all DOCS personnel. In addition, Commissioner Goord was responsible for enforcing the rules of DOCS, and for ensuring that DOCS personnel obey the Constitution and laws of the United States. As a former Commissioner of DOCS, Goord was a policy-maker with respect to DOCS's decisions to administratively impose PRS. Former Commissioner Goord is sued in his individual capacity.

20. At all relevant times, defendants "Jane/John Does 1-25" were training, supervisory and policy making personnel within DOCS who implemented, enforced, perpetuated and/or allowed the unconscionable PRS Policy that is the subject of this action, acting in their capacity of agents, servants and employees of defendants Commissioners Fischer, Annucci, Leclaire and Goord and within the scope of their employment as such. Plaintiff is unable to determine the names of these DOCS supervisory defendants at this time and thus sue them under a fictitious designation. All are sued in their individual capacities.

21. Defendant Andrea W. Evans is the Chair and Chief Executive Officer of DOP. In that capacity, she has been and continues to be responsible for the policy, practice, supervision, implementation, and conduct of all DOP matters and responsible for the appointment, training, supervision, and conduct of all DOP personnel. In addition, Chair Evans has been and continues to be responsible for enforcing the rules of DOP, and for ensuring that DOP personnel obey the Constitution and laws of the United States. As Chair of DOP beginning on June 8, 2009, and prior thereto as a Director of DOP, Evans has been a policy-maker with respect to DOP's decisions to administratively impose and/or enforce PRS. Chair Evans is sued in her individual and official capacities.

22. Defendant Mark Mantei is Executive Director of DOP. In that capacity, he has been and continues to be responsible for the policy, practice, supervision, implementation, and conduct of all DOP matters and responsible for the appointment, training, supervision, and conduct of all DOP personnel. In addition, Director Mantei has been and continues to be responsible for enforcing the rules of DOP, and for ensuring that DOP personnel obey the Constitution and laws of the United States. As Executive Director of DOP, Mantei has been a policy-maker with respect to DOP's decisions to administratively impose and/or enforce PRS. Director Mantei is sued in his individual and official capacities.

23. Defendant Terence Tracy, is Chief Counsel for DOP. At all times relevant to this action, defendant Tracy has been, and continues to be, responsible for the policy, practice, supervision, implementation, and conduct of all DOP matters and responsible for the appointment, training, supervision, and conduct of all DOP personnel. In addition, defendant Tracy, has been and continues to be responsible for enforcing the rules of DOP, and for ensuring that DOP personnel obey the Constitution and laws of the United States. As Chief Counsel to DOP, Tracy is a policy-maker with respect to DOP's decisions to administratively impose and/or enforce PRS. Defendant Tracy is sued in his individual and official capacities.

24. Defendant George B. Alexander was Acting Chair and Chief Executive Officer of DOP from May 2007 until June 2009. During his tenure, Acting Chair Alexander was responsible for the policy, practice, supervision, implementation, and conduct of all DOP matters and responsible for the appointment, training, supervision, and conduct of all DOP personnel. In addition, Acting Chair Alexander was responsible for enforcing the rules of DOP, and for ensuring that DOP personnel obey the Constitution and laws of the United States. As Acting Chair of DOP, Alexander was a policy-maker with respect to DOP's decisions to

administratively impose and/or enforce PRS. Former Acting Chair Alexander is sued in his individual capacity.

25. Defendant Robert J. Dennison was Chair of DOP prior to defendant Alexander. During his tenure, Chair Dennison was responsible for the policy, practice, supervision, implementation, and conduct of all DOP matters and responsible for the appointment, training, supervision, and conduct of all DOP personnel. In addition, Chair Dennison was responsible for enforcing the rules of DOP, and for ensuring that DOP personnel obey the Constitution and laws of the United States. As Chair of DOP, Dennison was a policy-maker with respect to DOP's decisions to administratively impose and/or enforce PRS. Former Chair Dennison is sued in his individual capacity.

26. Defendant Anthony G. Ellis II, was Executive Director of DOP prior to defendant Mantei. During his tenure, Director Ellis was responsible for the policy, practice, supervision, implementation, and conduct of all DOP matters and responsible for the appointment, training, supervision, and conduct of all DOP personnel. In addition, Director Ellis was responsible for enforcing the rules of DOP, and for ensuring that DOCS personnel obey the Constitution and laws of the United States. As a former Executive Director of DOP, Ellis was a policy-maker with respect to DOP's decisions to administratively impose and/or enforce PRS. Former Director Ellis is sued in his individual capacity.

27. At all relevant times, defendants "Jane/John Does 26-50" were training, supervisory and policy making personnel within DOP who implemented, enforced, perpetuated and/or allowed the unconscionable PRS Policy that is the subject of this action, acting in their capacity of agents, servants and employees of defendants Evans, Mantei, Tracy, Alexander, Dennison and Ellis and within the scope of their employment as such. Plaintiffs are unable to

determine the names of these DOP supervisory defendants at this time and thus sues them under a fictitious designation. All are sued in their individual capacities.

28. During all times mentioned in this complaint, defendants, separately and in concert, engaged in acts and/or omissions which constituted deprivations of plaintiffs' constitutional rights, and the privileges and immunities of the plaintiffs, and while these acts were carried out under color of law, they had no justification or excuse, and were instead gratuitous, illegal and improper.

CLASS ACTION ALLEGATIONS

29. Plaintiffs Betances, Barnes and Velez bring this case as a class action under Fed. R. Civ. P. 23(b)(1)(A), (b)(2) and (b)(3) on behalf of all persons who were sentenced to prison in New York State for a fixed term that did not include a term of PRS, but were nevertheless subjected to PRS and/or incarcerated for nothing more than a violation of PRS after the maximum expiration date of their determinate sentence(s).

30. This case is appropriate for treatment as a class action under Rule 23(b)(1)(A) because the prosecution of separate actions by or against will create the risk of inconsistent or varying adjudications, thus establishing incompatible standards of conduct for defendants.

31. This case should also be certified as an injunctive class under Rule 23(b)(2) because defendants have acted, or failed to act, on grounds generally applicable to the putative class, thereby making appropriate final injunctive relief with respect to the Rule (b)(2) Class as a whole.

32. This case is also appropriate for treatment as a damages class under Rule 23(b)(3) because common issues predominate over individual issues and a class action resolving

the claims of this putative damages class is superior to any other method of fair and efficient adjudication.

33. On information and belief, the Class includes hundreds of members. They are so numerous that joinder is impracticable.

34. On information and belief, joinder also is impracticable because many members of the Class are low-income persons, may not speak English, and likely would have great difficulty in pursuing their rights individually.

35. The questions of law and fact presented by plaintiffs' claims are common to the absent class members they seek to represent. Among others, the questions of law and fact common to the Class are: (i) whether defendants enforced or failed to prevent the enforcement of the PRS Policy; (ii) the degree of acquiescence of supervisory personnel in DOCS and DOP to the known unlawful acts of subordinates, and the failure of supervisory defendants to train, supervise, and discipline DOCS and DOP subordinates; (iii) whether the PRS Policy violates due process; (iv) whether defendants' actions were sufficiently wanton as to warrant the imposition of punitive damages; (v) whether defendants are immune from suit; and (vi) the nature of injunctive relief necessary to ameliorate the effects of the PRS Policy and protect the class from future harm.

36. Common issues of law and fact such as those set forth above (and many others) predominate over any individual issues.

37. The PRS Policy has resulted in the wrongful detention and confinement of, and the infliction of injuries upon, plaintiffs and the Class. The claims alleged and the practices challenged in this complaint are common to all members of the Class.

38. The violations suffered by plaintiffs Betances, Barnes and Velez are typical of those suffered by the Class. The entire Class will benefit from the remedial and monetary relief sought.

39. Plaintiffs Betances, Barnes and Velez have no conflict of interest with Class members, and will fairly and adequately protect the interests of the class. Counsel competent and experienced in federal class actions, federal civil rights litigation and criminal defense has been retained to represent the class. Emery Celli Brinckerhoff & Abady LLP is a law firm with offices in New York City with extensive experience in civil rights litigation and as class counsel in numerous lawsuits against state and local governments.

40. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because: (a) the prosecution of hundreds of separate actions would be inefficient and wasteful of legal resources; (b) the members of the class are scattered throughout New York State and are not likely to be able to vindicate and enforce their Constitutional and statutory rights unless this action is maintained as a class action; (c) the issues raised can be more fairly and efficiently resolved in the context of a single class action than piecemeal in many separate actions; (d) the resolution of litigation in a single forum will avoid the danger and resultant confusion of possible inconsistent determinations; (e) the prosecution of separate actions would create the risk of inconsistent or varying adjudications with respect to individuals pursuing claims against defendants which would establish incompatible standards of conduct for defendants; (f) defendants have acted and will act on grounds applicable to all class members, making final declaratory and injunctive relief on behalf of all members necessary and appropriate; and (g) questions of law and/or fact common to members of the class, especially on

issues of liability predominate over any question, such as that of individual damages, that affect individual members.

41. There will be no extraordinary difficulty in the management of the class action.

FACTS

42. The United States Constitution prohibits public officials, such as the Commissioner of the State DOCS and the Chair of DOP, or any of their subordinates, from administratively imposing and/or enforcing any term of detention on an individual beyond what a sentencing court has authorized.

43. Defendants know that they may not institute, enforce, or permit the imposition of PRS absent an express statement or judgment from a sentencing court to that effect.

44. Defendants' policy, practice, and custom mandating the imposition and enforcement of PRS on individuals not sentenced to PRS has been promulgated, effectuated, and/or enforced in bad faith and contrary to clearly established law.

45. In 1936, a unanimous Supreme Court held that the judgment of a court establishes a defendant's sentence, and that imposition of an additional sentence by an administrator violates a defendant's constitutional rights. *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936) (Cardozo, J.). "The only sentence known to the law is the sentence or judgment entered upon the records of the court." *Id.* at 464. Any administratively added provision prolonging that sentence is void. *Id.* at 467.

46. In 2006, the Court of Appeals for the Second Circuit, relying on *Wampler*, held unconstitutional DOCS's administrative addition of a PRS term to the sentence of an individual whose sentence did not include PRS. *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006).

Describing *Wampler* as “clearly established Supreme Court precedent,” the Second Circuit declared: “The only cognizable sentence is the one imposed by the judge.” 451 F.3d at 75. “Only the judgment of a court, as expressed through the sentence imposed by a judge, has the power to constrain a person’s liberty.” *Id.* Thus, “[t]he additional provision for post-release supervision added by DOCS is a nullity. The imposition of a sentence is a judicial act; only a judge can do it. The penalty [of PRS] administratively added by the Department of Corrections was, quite simply, never a part of the sentence.” *Id.* at 76. DOCS’s imposition of PRS violated the individual’s due process rights. *Id.* at 76.

47. In flat defiance of the clear constitutional commands of *Wampler* and *Earley*, defendants have promulgated, implemented, enforced, and/or failed to rectify a policy, practice, and custom mandating the administrative imposition and enforcement of PRS on persons without authorization from a sentencing court.

48. On information and belief, hundreds (perhaps thousands) of individuals have been subjected to PRS pursuant to defendants’ PRS Policy.

49. Each member of the class, including plaintiffs Betances, Barnes and Velez, were victims of the PRS Policy.

50. As a direct result of the unlawful imposition and enforcement of PRS pursuant to the PRS Policy, each member of the Class has suffered or will suffer actual damages in forms involving, without limitation, mental anguish, pain and suffering.

Plaintiff Betances

51. Plaintiff Paul Betances’s experience is representative of those of the putative class.

52. On or about July 20, 2004, Mr. Betances plead guilty to a crime and received a five year determinate sentence.

53. The Court did not impose a period of PRS as part of the sentence. Nor was PRS mentioned on the sentencing commitment sheet.

54. Due to credit for time served awaiting trial, Mr. Betances's maximum determinate sentence expiration date was January 14, 2009.

55. Due to a 1/7th reduction for good time, Mr. Betances was released from prison on April 24, 2008, and subjected to a five year term of PRS imposed by defendants.

56. In November 2008, Mr. Betances was arrested and thereafter was charged with violating the terms of his PRS.

57. On or about January 23, 2009, after the expiration of his maximum determinate sentence, Mr. Betances pleaded guilty to misdemeanor drug possession and was sentenced to a term that would expire on or about July 9, 2009.

58. On or about February 23, 2009, after the expiration of his maximum determinate sentence, the DOP sentenced Mr. Betances to 12 months based on his alleged violation of the terms of his PRS.

59. On or about early July 2009, when Mr. Betances's sentence for misdemeanor drug possession was fully served, defendants continued to detain and incarcerate Mr. Betances based on the alleged violation of the terms of PRS.

60. Mr. Betances was not released by defendants until after Justice Richard L. Price granted his petition for a writ of habeas corpus and directed his immediate release because "DOCS exceeded its authority by unilaterally imposing a five-year period of post release

supervision” when “the sentencing minutes clearly reflect that no period of post release supervision was imposed” by the sentencing court.

61. As a direct and proximate result of defendants’ unlawful imposition and enforcement of PRS on Mr. Betances, pursuant to the PRS Policy, and the unlawful period of imprisonment pursuant to the same Policy, Mr. Betances has suffered and continues to suffer loss of liberty, loss of wages, psychological pain, suffering, and mental anguish.

Plaintiff Barnes

62. Plaintiff Lloyd A. Barnes’s experience is representative of those of the putative class.

63. On or about July 31, 2000, Mr. Barnes plead guilty to charges of attempted assault and attempted burglary and was later sentenced to a six year determinate sentence.

64. The Court did not impose a period of PRS as part of the sentence. Nor was PRS mentioned on the sentencing commitment sheet.

65. Due to credit for time served awaiting trial, Mr. Barnes’s maximum determinate sentence expiration date was in or around late 2005 or early 2006.

66. Mr. Barnes was released from prison on or around October 19, 2005, and subjected to a five year term of PRS imposed by defendants.

67. In the summer of 2008, Mr. Barnes was arrested and thereafter was charged with violating the terms of his PRS.

68. On or about June 2008, after the expiration of his maximum determinate sentence, the DOP sentenced Mr. Barnes to three months based on his alleged violation of the terms of his PRS.

69. After being incarcerated for three months based solely on the charge that he had violated the conditions of his PRS, Mr. Barnes was released in or around September or October 2008.

70. On November 14, 2008, Richmond County Supreme Court Justice Stephen Rooney confirmed that “no mention of post-release supervision was made” in initially sentencing Mr. Barnes and “reimpose[d] the originally imposed determinate sentences of imprisonment without any term of post-release supervision.”

71. As a direct and proximate result of defendants’ unlawful imposition and enforcement of PRS on Mr. Barnes, pursuant to the PRS Policy, and the unlawful period of imprisonment pursuant to the same Policy, Mr. Barnes has suffered and continues to suffer loss of liberty, loss of wages, psychological pain, suffering, and mental anguish.

Plaintiff Velez

72. Plaintiff Gabriel Velez’s experience is representative of those of the putative class.

73. On or about February 20, 2001, Mr. Velez, incorrectly referred to by the District Attorney and trial court as Gabriel “Belize”, plead guilty to a crime and received a five year determinate sentence.

74. The Court did not impose a period of PRS as part of the sentence. Nor was PRS mentioned on the sentencing commitment sheet.

75. Due to credit for time served awaiting trial, Mr. Velez’s maximum determinate sentence expiration date was March 22, 2005.

76. Due to a 1/7th reduction for good time, Mr. Velez was released from prison on July 2, 2004, and subjected to a five year term of PRS imposed by defendants.

77. In July 2008, Mr. Velez was arrested and thereafter was charged with violating the terms of his PRS.

78. On or about October 6, 2008, after the expiration of his maximum determinate sentence, Mr. Velez plead guilty to a charge of violating the terms of his unlawfully-imposed PRS, and was sentenced to a mental health treatment facility.

79. After being incarcerated for three months based solely on the charge that he had violated the conditions of his PRS, Mr. Velez was released on October 8, 2008.

80. On or around October 15, 2008, Mr. Velez was ordered released from the terms of PRS by the Supreme Court of New York, Bronx County, in response to a habeas corpus petition.

81. As a direct and proximate result of defendants' unlawful imposition and enforcement of PRS on Mr. Velez, pursuant to the PRS Policy, and the unlawful period of imprisonment pursuant to the same Policy, Mr. Velez has suffered and continues to suffer loss of liberty, loss of wages, psychological pain, suffering, and mental anguish.

FIRST CAUSE OF ACTION

42 U.S.C. § 1983; Fourth and Fourteenth Amendment

82. Plaintiffs repeat and reallege the foregoing paragraphs as if the same were fully set forth at length herein.

83. By implementing, promulgating, and enforcing and/or effectuating a policy, practice and custom pursuant to which the named plaintiffs and other members of the plaintiff class were or will be subject to PRS when imposition of PRS was never authorized by any sentencing court, defendants have deprived plaintiff and members of the plaintiff class of rights, remedies, privileges and immunities guaranteed to every citizen of the United States, in violation

of 42 U.S.C. § 1983, and of rights guaranteed by the Fourth and Fourteenth Amendment of the United States Constitution. Defendants also conspired among themselves to do so (taking numerous overt steps in furtherance thereof), and/or failed to prevent one another from doing so.

84. Defendants acted under pretense and color of state law and in their individual and official capacities and within the scope of their employment.

85. Defendants acted beyond the scope of their jurisdiction, without authority of law, and abused their powers.

86. Defendants acted willfully, knowingly, and with the specific intent to deprive plaintiffs of their constitutional rights secured by 42 U.S.C. § 1983, and by the Fourteenth Amendment to the United States Constitution.

87. As a direct and proximate result of the misconduct and abuse of authority detailed above, each and every plaintiff and members of the plaintiff class suffered and continues to suffer the damages hereinbefore alleged.

RELIEF REQUESTED

WHEREFORE, plaintiffs and members of the putative Class request the following relief:

1. A judgment declaring that defendants have committed the violations of law alleged in this action;
2. An order directing defendants Fischer, Annucci, Evans, Mantei and Tracy to disgorge any money collected from plaintiffs and members of the plaintiff class as a result of defendants' PRS policy.
3. Compensatory damages against all defendants in an amount to be proven at trial;
4. Punitive damages against all defendants in an amount to be proven at trial;

5. An order awarding disbursements, costs, and attorneys' fees; and
6. Such other and further relief that may be just and proper.

Dated: October 20, 2011
New York, New York

EMERY CELLI BRINCKERHOFF
& ABADY LLP

By: 
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Adam R. Pulver

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New York, NY 10019
(212) 763-5000

EXHIBIT A



BRIAN FISCHER
COMMISSIONER

STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES
THE HARRJMAN STATE CAMPUS - BUILDING 2
1220 WASHINGTON AVENUE
ALBANY, N.Y. 12226-2050

(518) 457-4951

FAX (518) 457-7555*
*Not for service of papers.

ANTHONY J. ANNUCCI
DEPUTY COMMISSIONER and COUNSEL

July 2, 2007



Dear Mr. Smith:

Commissioner Fischer has asked me to respond to your letter regarding post-release supervision. Post-release supervision is required for every determinate term imposed for a violent felony committed after August 31, 1998 and for a drug felony committed after January 12, 2005; see subdivision 6 of Penal Law section 70.00, subdivision 1 of section 70.45, subdivisions 2(a), 3(b) and 4(b) of section 70.70, and subdivisions 2(b), 3(b) and 4(b) of section 70.71. If your determinate term was imposed pursuant to a plea bargain and you were not advised that your sentence would include post-release supervision, such claim may be raised in an appeal of your conviction or in a motion to withdraw your guilty plea; see *People v. Goss*, 733 NYS2d 310 (3d Dept 2001).

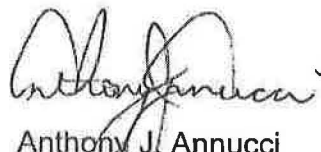
The Second Circuit for the US Court of Appeals ruled in *Earley v. Murray*, 451 F3d 71 (2006), *rehearing denied* 462 F3d 147 (2006), that a defendant cannot be subject to post-release supervision unless it is specifically imposed by the court at sentencing. Such ruling is contrary to state appellate case law which has held that the New York State Department of Correctional Services must apply to the determinate term the period of post-release supervision required by subdivision 2 of section 70.45 when the court is silent regarding post-release supervision at sentencing; see *Matter of Deal v. Goord*, 778 NYS2d 319 (3d Dept 2004), *appeal dismissed* 786 NYS2d 814 (2004), *reconsideration denied* 795 NYS2d 169 (2005). Also see *People v. Dale*, 788 NYS2d 613 (2d Dept 2005), *leave denied* 798 NYS2d 730 (2005), *People v. Munck*, 771 NYS2d 733 (3d Dept 2004), *leave denied* 781 NYS2d 302 (2004) and

Mr. Rodney Smith, 9000700393
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People v. White, 744 NYS2d 924 (4th Dept 2002), *leave denied* 752 NYS2d 601 (2002). When state and federal courts reach different results regarding state law, the state case law takes precedence over federal case law in state court until the specific issue is addressed by the US Supreme Court; see *People v. Kan*, 571 NYS2d 436, 439 (1991).

Regardless of the case law governing this subject, this Department would be required to set aside your period of post-release supervision if specifically ordered to do so by a state or federal court; see *Matter of Murray v. Goord*, 1 NY3d 29 (2003). In the absence of such order, your determinate term is deemed to include a period of post-release supervision pursuant to the statutes and state case law set forth above. It is recommended that you review your concerns regarding this matter with your legal representative.

Very truly yours,



Anthony J. Annucci
Deputy Commissioner
and Counsel

AJA:19:tf

EXHIBIT B

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

ELON HARPAZ, ESQ., declares, upon information and belief, pursuant to 28 U.S.C. § 1746, under penalty of perjury, that the following is true and correct:

1. I am an attorney employed by The Legal Aid Society of New York City. The Legal Aid Society, a private, non-profit legal services agency that provides representation to persons unable to afford legal counsel, represents the majority of individuals accused of crimes in New York City. The Society's Criminal Appeals Bureau is the primary appellate defender in New York City for indigent criminal defendants. The Parole Revocation Defense Unit ("PRDU") is the primary defender of individuals serving parole or post release supervision who are involved in revocation proceedings on Rikers Island.

2. PRDU has represented hundreds of individuals arrested by the Division of Parole ("the Division") for violating a term of post-release supervision ("PRS") administratively imposed by the New York State Department of Correctional Services ("DOCS"). I have been the principal Legal Aid Society attorney representing such individuals in habeas corpus proceedings. Many of these individuals were first-time felony offenders who could have received a term of PRS less than the maximum imposed by DOCS; a number of them were incarcerated for PRS violations beyond the minimum term they could have received, and sometimes later did receive, in court. The Criminal Appeals Bureau has represented over one thousand defendants in Correction Law §601-d resentencing proceedings who were never previously sentenced to PRS in court.

3. This declaration will provide a detailed look at the response of DOCS and the Division to the decision in *Earley v. Murray*, 451 F.3d 71 (2d Cir. June 9, 2006). In particular, it will demonstrate that the policy making administrators of these agencies engaged in a deliberate campaign of resistance to *Earley* in an attempt to justify their continued lawless enforcement of administratively imposed PRS. Having made a calculated gamble to flout the *Earley* decision, these agencies should not be entitled to qualified immunity for their actions.

The State is Confronted With the Earley Decision

4. On June 9, 2006, the United States Court of Appeals for the Second Circuit decided *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006). The Second Circuit held that the only sentence known to the law is the one pronounced by the judge and that any alteration to that sentence through the addition by DOCS of a term of post-release supervision is a nullity. The Second Circuit declared that PRS custodial supervision of individuals who has been sentenced to PRS administratively rather than by a judge was “contrary to *clearly established* federal law as determined by the United States Supreme Court.” *Earley v. Murray*, 451 F.3d 71, 76 (2d Cir. June 9, 2006) (emphasis added). Indeed, the *Earley* court opined that DOCS and the Division should have known better than to unilaterally impose and administer PRS sentences because of *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936), which “undeniably stands for the proposition that the only valid terms of a defendant’s sentence are the terms imposed by the judge.” *Earley v. Murray*, 462 F.3d 147, 149 (2d Cir. 2006) (denying rehearing with opinion).

5. The policy-making administrators of DOCS and the Division now had a fateful choice to make: (i) implement the Second Circuit’s ruling, which clearly

established a principle of federal constitutional law and declared that its holding was based on a precedent clearly established in 1936; or (ii) despite the correctness of the holding in *Earley*, embark on a campaign of massive resistance to and defiance of *Earley*, asking New York's courts to reject it. The futility of the latter option was apparent, since ultimately federal district courts would be implementing *Earley* in federal habeas corpus proceedings once state remedies were exhausted: the latter option would not prevent enforcement of *Earley* but would merely delay it, illegally keeping many individuals in prison for PRS technical violations, and many more under PRS supervision, for extended periods of time. And although the former option -- immediate implementation of *Earley* -- would have required the expenditure of resources and time, the policy-making administrators of DOCS and the Division of Parole knew that their agencies certainly had the capacity to identify all the persons under PRS supervision who had been subjected to administratively imposed PRS, end PRS supervision as to those persons, release the individuals in custody for violations of administrative PRS, and ask the trial judge in each case to recalendar the matter for consideration of resentencing.

6. DOCS and the Division chose to defy *Earley*.

Litigation In the Aftermath of *Earley*

7. Over the course of nearly two years DOCS and the Division, represented by the Attorney General's Office ("AG"), opposed every single writ of habeas corpus and Article 78 proceeding brought anywhere in the State of New York that raised an *Earley* claim. At the same time, DOCS continued to impose PRS administratively as inmates were released from prison, and the Division continued to enforce those terms through arrests and incarceration for technical violations (e.g., failure to report on schedule or to

adhere to curfew restrictions). The policy making administrators of DOCS and the Division did order a review for their own records as to which prisoners might have been sentenced to PRS by the administrative fiat of DOCS rather than by the sentencing judge, but they did nothing with their findings other than to record them in their own files.

8. The Legal Aid Society's Parole Revocation Defense Unit, recognizing *Earley's* implications for the client population that we served, assigned a team of lawyers to handle all PRS litigation in the aftermath of *Earley*. If, as *Earley* held, administratively imposed PRS was a nullity, then, *a fortiori*, any warrant issued for violating its terms would be equally null and void, and anyone incarcerated solely on such a warrant would be entitled to immediate release from custody. Accordingly, PRDU prepared its first Article 70 writ of habeas corpus raising an *Earley* claim six days after *Earley* was handed down. During the next two years we filed over 100 state habeas writs and won the overwhelming majority of them. Most of the writs were filed in Bronx County Supreme Court, as our clients were in custody awaiting their final revocation hearings at Rikers Island, which is within the geographic confines of the Bronx. Because such a large percentage of revocation hearings statewide are conducted at Rikers Island and because our office had the resources to devote to this issue, Bronx County became ground zero in the battle over judicial recognition of the *Earley* decision, at least at the trial level.

9. We also filed habeas writs in various counties throughout the state because we often did not receive the sentencing minutes and thus did not know we had a valid claim until our client had already been sent to state prison to serve a time assessment imposed at the conclusion of the final revocation hearing. See CPLR §7004(c)

(specifying that habeas writ filed on behalf of a state prisoner must be made returnable in the county of incarceration). As a result, our office received a full picture of the coordinated statewide attack on *Earley*.

10. The initial response from the AG on behalf of DOCS and the Division did not cite a single appellate precedent that purportedly disagreed with *Earley*. Instead, the response merely stated that *Earley* was not binding on the New York courts, and did not even attempt to argue that *Earley* was wrong on the merits. DOCS and the Division of Parole did not claim that they were trapped between competing precedents and thereby believed in good faith that they were obligated to oppose *Earley*. Rather, the policy making administrators of these agencies made a calculated decision -- one not based on the law -- to continue to impose and enforce administrative PRS come what may.

11. Although the DOCS and PRS administrators succeeding in persuading some New York State lower court judges to deny habeas corpus relief on the ground that they were not bound by *Earley*, ultimately all four Appellate Divisions accepted *Earley*. *People ex rel. Burch v. Goord*, 48 A.D.3d 1306 (4th Dept. Feb. 20, 2008); *Dreher v. Goord*, 46 A.D.3d 1261 (3d Dept. Dec. 27, 2007); *People v. Figueroa*, 45 A.D.3d 297 (1st Dept. Nov. 8, 2007); *People v. Smith*, 37 A.D.3d 499 (2d Dept. Feb. 6, 2007).

12. How did DOCS and the Division respond to the unanimous adoption of *Earley* by all departments of the Appellate Division? They continued to oppose every habeas corpus petition in the State trial courts. They even argued that there was a line of New York cases rejecting *Earley*, a proposition that was completely unfounded, and that they were bound to follow those alleged precedents despite the host of Appellate Division decisions arrayed against that position. (Several months after *Earley* they had begun

presenting this line of argument in the state trial courts, but it had been rejected by many state trial judges and, as noted above, had ultimately been rejected by all four Appellate Divisions.)

13. The beauty of this argument, however specious, lay in the ability to continue to trot it out, no matter how many courts dismissed it, because there was only one court that could conclusively reject it once and for all and that was the New York State Court of Appeals. Thus, the argument provided legal cover for the policy making administrators of DOCS and the Division to continue their imposition and enforcement of administrative PRS unabated.

14. The policy making administrators of DOCS and the Division chose to continue ignoring *Earley* -- to continue placing and keeping individuals on PRS status and sending them back to prison for technical violations -- and to hold out until there was a determination of the New York State Court of Appeals, which did not arrive until April 29, 2008. *Matter of Garner v. New York State Department of Correctional Services, et al.*, 10 N.Y.3d 358, 889 N.E.2d 467, 859 N.Y.S.2d 590 (2008) (unanimously holding as a matter of state law that only a court, not an administrative agency, can impose sentence).

15. The undersigned argued *Garner*, and looked forward to DOCS and the Division finally complying after their campaign of nearly two years, in more than a hundred cases, to delay implementation of *Earley*. But even after *Garner* resistance continued.

16. If further proof were required of the fierce defiance of *Earley* on the part of DOCS and the Division of Parole, it was supplied in the days immediately following the decision in *Garner*. One would have thought that the highest priority, in compliance

with *Garner*, was for DOCS to release immediately all individuals in their custody for violating administratively imposed PRS terms and for the Division of Parole to do the same with respect to individuals being held in local custody on pending violation charges. The agencies had in fact identified such individuals in the immediate aftermath of *Earley*.

17. But eliminating terms of PRS and releasing persons in compliance with *Garner* was not part of the plan. Instead, within three days of the *Garner* decision, the AG filed papers in Bronx County Supreme Court with respect to six individuals whose writs were pending there, taking the position that any decision should be stayed while these individuals were resentenced to post-release supervision, and that a resentencing to PRS *nunc pro tunc* would retroactively validate the PRS term and the parole violation warrant, thereby eliminating the need to release anyone.

18. The theory of retroactive validation of a violation of a DOCS-imposed period of PRS through *nunc pro tunc* judicial resentencing was never adopted in a published decision by any New York court, and it was eventually put to rest by the Third Department in *State v. Randy M.*, 57 A.D.3d 1157 (3d Dept. 2008). Indeed, in the aftermath of *Garner* the overwhelming majority of affected individuals were released from prison and from PRS custody by sentencing judges. Many had already completed their sentences, or at least had been on PRS long enough to have served the minimum PRS term that the judge could have imposed at sentencing. (DOCS had imposed the maximum PRS term in every instance, even though the sentencing judges could and often did impose shorter PRS terms.) But raising the argument gave DOCS and the Division the cover they were seeking to not release anyone in their custody, even when they were

in possession of the sentencing minutes and knew for a fact that PRS had never been imposed by a judge.

19. Of course, DOCS and the Division could have asked the sentencing judges immediately after *Earley* to modify the sentence to include PRS, but that would have required accepting the validity of *Earley* and thereby interfered with their goal of delaying compliance with the decision as long as possible. The New York State Court of Appeals has held that where a sentencing court may have made a mistake, it is “within the trial court’s inherent power to correct the error made at sentencing” and the one-year limitation of Criminal Procedure Law §440.40 is not a “restriction on the court’s inherent ability to correct its own errors.” *People v. Wright*, 56 N.Y.2d 613, 614, 615, 435 N.E.2d 1088, 450 N.Y.S.2d 473 (1982). *Wright* was recognized and applied in *Earley* itself on remand, 2007 WL 1288031 (E.D.N.Y. 2007).

20. Only after *Garner* did DOCS and the Division begin making inquiry of some sentencing judges, asking them to calendar the matter for resentencing to PRS *nunc pro tunc*. They clearly did not consider their requests to these judges time-barred (*see People v. Wright*, above), for they did not wait for additional legislation (subsequently enacted two months after *Garner*, effective June 30, 2008, New York Correction Law §601-d, L. 2008 c. 141 § 5) before making such requests. They knew that while state legislation would be helpful to smoother and more efficient resolution of the status of persons illegally in PRS custody, many of who were in State Prison for PRS technical violations, they could not keep people in PRS custody and in State Prison while hoping for the Legislature in the closing days of its session to address the matter.

21. Even after the legislation took effect, DOCS and the Division continued to resist the release of every individual incarcerated for violating a term of DOCS-imposed PRS, arguing that a judicial resentencing to PRS *nunc pro tunc* would not only keep them on PRS, but obviate the need to release them from State Prison. However, by now even prosecutors in several counties had had enough of this kind of stonewalling, and many consented to release.

22. In the aftermath of *Earley*, the Department of Correctional Services and the Division of Parole made a calculated decision to continue to impose and enforce administrative terms of post-release supervision. They dug in their heels, and fought tooth and nail over the course of nearly two years to oppose every single attempt by an individual incarcerated for violating a term of administratively imposed PRS to regain his or her freedom. And they did so not based on any good faith belief that they could ultimately prevent implementation of *Earley*. Their conduct is entirely unworthy of bestowing qualified immunity upon them in connection with civil damage claims brought by those whom they wrongfully imprisoned.

Dated: New York, New York
October 12, 2011


ELON HARPAZ