



A research, training, and policy initiative of the Center for Community Alternatives
 115 East Jefferson Street, Suite 300, Syracuse, NY 13202
 39 West 19th Street, 10th Floor, New York, NY 10011

**CHALLENGES TO THE ADMINISTRATIVE IMPOSITION
 OF POST-RELEASE SUPERVISION:
 DOES IT MAKE SENSE TO FILE ARTICLE 78 PETITIONS
 WHILE A COURT OF APPEALS DECISION IS PENDING?**

Patricia Warth

Background

In 1998, the New York State Legislature enacted Penal Law § 70.45, which provides for the imposition post-release supervision (PRS) for those sentenced to a determinate sentences. Many judges viewed the statute as making PRS automatic and therefore, did not mention PRS during sentencing or in their sentence and commitment orders. Once these defendants reached the Department of Correctional Services (DOCS), DOCS administratively added a period of PRS to their sentences. Anthony Annucci, Deputy Commissioner and Counsel for DOCS, has stated publicly that DOCS did not keep track of those individuals who had PRS administratively added to their sentences, and thus, there is no way of knowing how many individuals have been affected by DOCS' practice of administratively adding PRS to their sentences.

State court challenges to DOCS' policy were initially unsuccessful. See e.g. Matter of Deal v. Goord, 8 A.D.3d 769 (2004), appeal dismissed 3 N.Y.3d 737 (2004). However, in June, 2006, the United States Court of Appeals for the Second Circuit decided Earley v. Murray, 451 F.3d 71 (2d Cir. 2006), rehearing den., 462 F.3d 147 (2006), in which it held that DOCS's practice of administratively imposing PRS violates federal due process. The Earley decision added renewed vigor to state court challenges to the administrative imposition of PRS. At the trial court level, these challenges met with mixed results. Over time, however, these challenges have met with growing success in all four departments of the Appellate Division. See e.g., People v. Figueroa, 2007 N.Y. Slip Op. 08352 (1st Dept., Nov. 11, 2007) (holding that DOCS "lacked the authority to add PRS to defendant's sentence"); People ex rel. Gerard v. Kalik, 843 N.Y.S.2d 398 (2d Dept. 2007) (ordering the release of petitioner, who was being held on a PRS violation, on the grounds that DOCS cannot administratively impose PRS); Matter of Dreher v. Goord, 2007 N.Y. Slip Op. 501929 (3rd Dept., Dec. 27, 2007) ("The Legislature did not authorize DOCS to impose any period of postrelease supervision... [and] [t]he only cognizable sentence is the one imposed by the judge."); Matter of Quinones v. NYS Dept. of Correctional Services, 2007 Slip. Op. 502156 (3rd Dept., Dec. 27, 2007) (same); People ex rel. Burch v. NYS Dept. of Correctional Services, 2008 N.Y. Slip Op. 0257-KAH07-01086 (4th Dept., February 20, 2008) (granting petitioner habeas relief and holding that "we agree with the decision of the Second Circuit Court of Appeals that, in the event the court does not impose a period of postrelease supervision as part of a defendant's sentence, the sentence has no postrelease supervision component."); People ex rel. Eaddy v. Goord, 2008 N.Y. Slip Op. 0258-KAH07-01086 (4th Dept., February 20, 2008) (granting petitioner relief under Article 78 "[f]or the same reasons set forth in our decisions in Burch.").

The Court of Appeals Recently Heard Oral Argument on This Issue.

On March 12, 2008, the Court of Appeals heard arguments in 6 cases involving the administrative imposition of PRS. Decisions on these cases will likely be issued in mid-to-late-April. Four of the cases (People v. Sparber, People v. Thomas, People v. Lingle, and People v. Rodriquez) are direct appeals out of the First Department challenging the imposition of PRS where the sentencing court did not impose it in open court during sentencing, but where it is included on the sentence and commitment order. The fifth case, People v. Ware, involves a CPL 440 proceeding challenging the administrative imposition of PRS.

The sixth case, Matter of Garner v. NYS Dept. of Correctional Services, is perhaps the most important case for a significant number of people in prison and people released to PRS. Mr. Garner was convicted, sentenced, served his determinate sentence, and then was released to PRS. While on PRS, he brought an Article 78 proceeding in Albany County seeking to prohibit DOCS from imposing PRS administratively. The court denied his petition; the Third Department summarily affirmed, holding that PRS was automatically included in the sentence imposed. Matter of Garner v. NYS Dept. of Correctional Services, 39 A.D.3d 1019 (2007). (As implied above, the Third Department has since explicitly overruled this case in People v. Dreher and People v. Quinones). Although the facts are not clear from the Third Department decision itself, the attorney who will be arguing the case, Elon Harpaz of the Legal Aid Society, Parole Revocation Unit, told this writer that in Mr. Garner's case, PRS was not mentioned in either the sentencing minutes or the court order of commitment.

What Should Potential Litigants Do Pending a Decision from the Court of Appeals?

Two groups of people who had PRS administratively added to their sentences – that is, people in prison serving their determinate sentences and those who have been released to PRS (and who have not been re-incarcerated on a violation) – may be enticed by Earley to file an Article 78 petition. But does it make sense to initiate such a proceeding at this time, pending a decision from the Court of Appeals? This writer consulted with Elon Harpaz, since he has litigated several of these cases since the Second Circuit's decision in Earley. According to Elon, the Attorney General's Office (AG) and DOCS are fighting all of Article 78s and habeas petitions challenging the administrative imposition of PRS, and they are appealing all decisions on which the petitioner prevails. Unfortunately, in Article 78 cases, by virtue of CPLR 5519(a)(1), the AG's office gets an automatic stay upon filing a notice of appeal. So even if a litigant were to prevail at the trial court level, the AG would file a notice of appeal and the order vacating PRS would automatically be stayed.

The obvious question is whether there would be any other reason to file an Article 78 petition, even though it is unlikely that there would be any real action on it before the Court of Appeals finally issues its decision in April.

Those who have been released from custody to administratively-imposed PRS may want to file an Article 78 petition to preserve the availability of federal habeas relief should the Court of Appeals reverse all four departments of the Appellate Division and hold that it is permissible for the Department of Correctional Services to administratively impose PRS. See 28 U.S.C. §

2254(b)(1) (those seeking federal habeas relief must exhaust state court remedies). However, for those who have already served a year of administratively-imposed PRS, it is likely that federal habeas relief will be time-barred. See 28 U.S.C. § 2255 (f) (imposing a one year statute of limitations for filing a petition for federal habeas relief).

But this reason for filing an Article 78 petition does not exist for those still serving their determinate sentences or those who have been released to PRS more than a year ago. There is no way of knowing what procedure DOCS and Parole will establish to process these cases if the Court of Appeals holds that DOCS cannot administratively impose PRS. Since DOCS did not keep track of those people whose sentences were affected by DOCS's policy of administratively imposing PRS, whatever procedure DOCS and Parole employs will necessarily require some affirmative action of the affected individuals. Having a favorable court order could possibly expedite this process, but there is no way of being sure.

Thus, at this juncture, the only benefits to filing an Article 78 petition are preserving availability of federal relief and the possibility that obtaining a favorable court order might expedite release from PRS if the Court of Appeals issues a decision in accordance with Earley. A person in prison or on parole considering the possibility of litigating now versus waiting for the Court of Appeals to issue a decision may want to consider the court costs and filing fees, which total \$305 for proceedings in local Supreme Courts (\$210 to obtain an index number and \$95 for the Request or Judicial Intervention). Indigent persons who are not incarcerated might qualify for poor person status under CPLR 1101(d),(e). Unfortunately, individuals in prison are not able eligible for poor person status, though under CPLR 1101(f) they might be eligible for reduced filing fees.

Is It Possible to File an Article 78 Petition Directly in the Appellate Division?

There is a recent Second Department case, People ex rel. McBride v. Alexander, 848 N.Y.S.2d 284 (2d Dept. 2007), in which a person who had been released to PRS filed a habeas petition seeking discharge from PRS. The individual filed the petition directly in the Second Department. (Under CPLR 7002(b)(2), such petitions for habeas writs can be filed directly in the Appellate Division). The Second Department held that the claim really should have been filed as an Article 78 petition, and using its broad discretionary powers under CPLR 103(c), converted the matter to an Article 78 petition for a writ of prohibition. (Under CPLR 103(c), once a court obtains jurisdiction over the parties, the court may convert rather than dismiss a case that was not brought in the proper form). The Second Department went on to note that since there was nothing said about PRS in the sentencing minutes or the sentence and commitment order, the individual's sentence did not include PRS. The court then issued an order "for the immediate cessation of the enforcement, by the Division of Parole, of the terms of the post-release supervision improperly added to his sentence." 848 N.Y.S.2d at 286.

Though other litigants likely could not do exactly what the petitioner in McBride did (as it would be too transparent that the litigant was attempting to circumvent proper procedure to get into the Appellate Division), the McBride decision gives rise to two questions: 1) is there any basis for filing an Article 78 petition directly in the Appellate Division and, if so, 2) are the stay rules more favorable for an Appellate Division rather than trial court order?

Unfortunately, potential litigants are out of luck on both questions. There is no basis for filing an Article 78 petition directly in the Appellate Division. In terms of where to file, CPLR 7804 references CPLR 506(b). Under CPLR 506(b), the only Article 78 petitions that can be filed directly in the Appellate Division are those against supreme court justices, county court judges, or judges of courts of general sessions. Moreover, even if a litigant could file directly in the Appellate Division, the stay rules are not that much better. Under CPLR 5519(e), to stay an order from an intermediate court (including the Appellate Division) while seeking permission to appeal to a higher court, most litigants must file a *motion* (not just a notice of intent) for leave to appeal within 5 days of the lower level court order being entered. But in Summerville v. City of New York, 97 N.Y.2d 427 (2002), the Court of Appeals held that this five day limitation does not apply to state or municipal officials or agencies. Just as the government gets an automatic stay from a lower court decision by filing a notice of appeal, so too does the government get a stay upon filing a motion for leave to appeal from an intermediate court order, even if this motion is not filed within the five day time limit.

In short, there is no procedure by which to file an Article 78 petition directly in the Appellate Division, and even if there were, the stay provisions are not much better than they are for trial court orders.

Conclusion

Until the Court of Appeals rules on these cases (likely in April, 2008), other than preserving the availability of a potential federal habeas petition, there appears to be very little practical advantage to filing an Article 78. The lower courts are likely to adjourn these petitions until the Court of Appeals decides these cases. Even if a lower court is not restrained by the pending Court of Appeals decisions, the successful petitioner is still thwarted from PRS release by the automatic stay that accrues to the benefit of the state on appeal.

Of course, Earley and its progeny have not adversely affected the Court of Appeals decision in People v. Catu, 4 N.Y.3d 242 (2005). In Catu, the Court of Appeals held that for those individuals who have not been advised of PRS, their pleas are deemed involuntary since PRS is a direct consequence of their convictions. Catu provides the basis for such individuals to withdraw their pleas.

However, for those who have clients who are not interested in withdrawing their pleas pursuant to Catu but who would rather take advantage of Earley, there appears to be limited advantage to filing an Article 78 petition until after we see which way the Court of Appeals goes on this issue.