

IN THE
Supreme Court of the United States

ANTHONY J. ANNUCCI,

Petitioner,

v.

SHAWN MICHAEL VINCENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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December 2, 2014



QUESTIONS PRESENTED

1. Did the Second Circuit err in denying qualified immunity to Petitioners for consciously refusing to follow the clear constitutional holding in *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006), even though every state appellate court adopted it?
2. Do the Second Circuit decisions in these 42 U.S.C. § 1983 cases—which hold that the extra-judicial imposition and enforcement of supervised release by corrections officials violate the Due Process Clause under the discretionary sentencing regime that requires judicial pronouncement of all such sentences as a matter of New York law—conflict with two cases from the Ninth and Seventh Circuits, brought pursuant to 28 U.S.C. § 2254, which hold that this Court’s opinion in *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936), does not constitute clearly established Supreme Court precedent sufficient to warrant federal habeas relief when applied to sex offender registration regimes or mandatory supervised release statutes?

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Introduction	1
B. Background	3
1. New York Penal Law § 70.45.	3
2. <i>Earley v. Murray</i>	4
3. State Court Interpretation of N.Y. Penal Law § 70.45 Prior to <i>Earley</i>	5
4. Petitioners' Conduct Post- <i>Earley</i>	6
5. State Courts Adopt <i>Earley's</i> Constitutional Analysis.....	8
6. Respondents.	15
D. The District Courts' Rulings.....	16
E. The Second Circuit's Rulings	17

REASONS FOR DENYING THE PETITION	18
I. THE SECOND CIRCUIT'S QUALIFIED IMMUNITY DECISION IS FULLY CONSISTENT WITH THE PRECEDENTS OF THIS COURT AND OTHER CIRCUITS	18
A. Petitioners Intentionally Defied <i>Earley</i>	19
B. The Second Circuit's Decision in <i>Earley</i> Did Not Conflict with a Single State Appellate Court Decision	21
C. No Court Has Held That State Officials Are Entitled To Qualified Immunity Until State and Federal Courts At All Levels Have Achieved Unanimity	23
D. Compliance With <i>Earley's</i> Command Presented No Dilemma	27
II. THE SECOND CIRCUIT'S DUE PROCESS DECISION DOES NOT CONFLICT WITH ANY OTHER CIRCUITS', NOR IS IT WRONG	29
A. The Second Circuit's Ruling Does Not Leave New York Law Unsettled	30
B. There Is No Circuit Court Conflict	31
C. <i>Earley</i> Is Sui Generis	36
CONCLUSION	39

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES	
<i>Amore v. Novarro</i> , 624 F.3d 522 (2d Cir. 2010)	19
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987)	19
<i>Baribeau v. City of Minneapolis</i> , 596 F.3d 465 (8th Cir. 2010)	19
<i>Betances v. Fischer</i> , 852 F.Supp.2d 379 (S.D.N.Y. 2012)	16
<i>Burgess v. Lowery</i> , 201 F.3d 942 (7th Cir. 2000)	26
<i>Camreta v. Greene</i> , 131 S. Ct. 2020 (2011)	26
<i>Coleman v. N.Y. State Dep't of Corr. Servs.</i> , No. 36119/2007, 2008 WL 711730 (Sup. Ct. Kings Cnty. Mar. 14, 2008)	12
<i>Cooper v. Aaron</i> , 358 U.S. 1 (1958)	20
<i>Deal v. Goord</i> , 8 A.D.3d 769 (3d Dep't 2004)	5
<i>Dempsey v. Ekpe</i> , No. 0124219/2007, 2008 WL 828069 (Sup. Ct. St.	

Lawrence Cnty. Mar. 17, 2008)	12
<i>Donhauser v. Goord</i> , 48 A.D.3d 1005 (3d Dep’t 2008)	10
<i>Dreher v. Goord</i> , 46 A.D.3d 1261 (3d Dep’t 2007)	6, 10, 28, 38
<i>Felder v. Casey</i> , 487 U.S. 131 (1988)	22
<i>Free v. Bland</i> , 369 U.S. 663 (1962)	22
<i>Garner v. N.Y. State Dep’t of Corr. Servs.</i> , 10 N.Y.3d 358 (2008)	6, 30, 36
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982)	20
<i>Harris v. Bisceglia</i> , No. 1000-07, 2008 WL 695861 (Sup. Ct. Essex Cnty. Mar. 3, 2008)	12, 15
<i>Herb v. Pitcairn</i> , 324 U.S. 117 (1945)	35
<i>Hicks v. Oklahoma</i> , 447 U.S. 343 (1980)	36
<i>Highland v. Goord</i> , No. 0875006/2007, 2007 WL 2815515 (Sup. Ct. Albany Cnty. June 20, 2007) (Ceresia)	14
<i>Hill v. United States ex rel. Wampler</i> , 298 U.S. 460 (1936)	passim

<i>Hope v. Pelzer</i> , 536 U.S. 730 (2002)	26
<i>Hopkins v. Bonvicino</i> , 573 F.3d 752 (9th Cir. 2009)	24
<i>Illinois v. McChriston</i> , 4 N.E.3d 29 (2014)	34, 35, 36, 38
<i>In re Abelson v. N.Y. State Dep't of Corr. Servs.</i> , No. 22466/07, 2008 WL 115423 (Sup. Ct. Queens Cnty. Jan. 5, 2008)	12
<i>In re Andall v. LaClaire</i> , No. 2008-0183, 2008 WL 4056517 (Sup. Ct. Franklin Cnty. Mar. 10, 2008)	12
<i>In re Ashley v. Santor</i> , No. 000-096/2006, 2007 WL 2174164 (N.Y. Sup. 2007)	14
<i>In re Brown v. Behrle</i> , No. 0123823/2007, 2007 WL 2176949 (Sup. Ct. St. Lawrence Cnty. June 28, 2007)(Feldstein)	14
<i>In re DeJesus v. Yelich</i> , No. 00-0226/2007, 2007 WL 2174161 (Sup. Ct. Clinton Cnty. June 28, 2007)(Feldstein)	14
<i>In re DeLoach v. Santor</i> , No. 0000089/2007, 2007 WL 2174149 (Sup. Ct. Franklin Cnty. June 28, 2007)	14
<i>In re Diaz v. Dennison</i> , No. 9251/2007, 2007 WL 1775675 (Sup. Ct. Kings	

Cnty. June 7, 2007)	13
<i>In re Gil v. Behrle</i> , No. 0123826/2007, 2007 WL 2176950 (Sup. Ct. St. Lawrence Cnty. June 28, 2007)(Feldstein)	14
<i>In re Pan v. N.Y. State Dep't of Corr. Servs.</i> , No. 37058/2006, 2007 WL 1730103 (Sup. Ct. Kings Cnty. June 14, 2007)	13
<i>In re Purdie v. Hunt</i> , No. 0123463/2006, 2007 WL 2176948 (Sup. Ct. St. Lawrence Cnty. June 28, 2007)	14
<i>In re Smalls v. Sears</i> , No. 0000049/2007, 2007 WL 2174146 (Sup. Ct. Franklin Cnty. June 27, 2007)(Feldstein)	14
<i>In re Smith v. Fischer</i> , No. 0001202/2007, 2007 WL 2174134 (Sup. Ct. Albany Cnty. Apr. 14, 2007)	14
<i>In re Townsend v. Yelich</i> , No. 00-0264/2007, 2007 WL 2174162 (Sup. Ct. Clinton Cnty. June 28, 2007)(Feldstein)	14
<i>In re Turner v. Sears</i> , No. 0000126/2007, 2007 WL 2174151 (Sup. Ct. Franklin Cnty. June 28, 2007)	14
<i>In re Waters v. Dennison</i> , 13 Misc. 3d 1105 (Sup. Ct. Bronx Cnty. 2006)	13
<i>In re Waters v. Dennison</i> , 15 Misc. 3d 722 (Sup. Ct. Bronx Cnty. 2007)	13

<i>John Doe No. 1 v. Reed</i> , 561 U.S. 186 (2010)	20
<i>Leonard v. Robinson</i> , 477 F.3d 347 (6th Cir. 2007)	19
<i>Lewis v. Fischer</i> , No. 24476/07, 2008 WL 615077 (Sup. Ct. Kings Cnty. Mar. 7, 2008)	12
<i>Matter of Grant v. Fischer</i> , No. 3597-07, 2007 WL 4260142 (Sup. Ct. Albany Cnty. Dec. 5, 2007) (Ceresia)	14
<i>Michigan v. DeFillippo</i> , 443 U.S. 31 (1979)	22
<i>Mulholland v. Marion Cnty. Elec. Bd.</i> , 746 F.3d 811 7 Cir. 2014)	21
<i>Murray v. Goord</i> , 1 N.Y.3d 29 (2003)	6, 35, 37
<i>N.Y. ex rel Burch v. Goord</i> , 48 A.D.3d 1306 (4th Dep't 2008)	10
<i>N.Y. ex rel Eaddy v. Goord</i> , 48 A.D.3d 1307 (4th Dep't 2008)	11
<i>N.Y. ex rel Gerard</i> , 44 A.D.3d 804, 843 N.Y.S.2d 398 (2d Dep't 2007)	10
<i>N.Y. ex rel Gill v. Greene</i> , 12 N.Y.3d 1 (2009)	36

<i>N.Y. ex rel. Hernandez v. Warden,</i> No. 75063-06, 2006 WL 3843586 (Sup. Ct. Bronx Cnty. Dec. 8, 2006).....	15
<i>N.Y. ex rel. Johnson v. Warden,</i> No. 75087-06, 2007 WL 755412 (Sup. Ct. Bronx Cnty. Mar. 12, 2007)	13
<i>N.Y. ex rel. Joyner v. N.Y. State Div. of Parole,</i> No. 75045/07, 2007 WL 1345702 (Sup. Ct. Bronx Cnty. May 8, 2007).....	14
<i>N.Y. ex rel. Lewis v. Warden,</i> 14 Misc. 3d 468 (Sup. Ct. Bronx Cnty. 2006).....	13
<i>N.Y. ex rel. Mazario v. Warden,</i> No. 75090/07, 2007 WL 2012417 (Sup. Ct. Bronx Cnty. July 10, 2007).....	13
<i>N.Y. ex rel. Melendez v. N.Y. State Div. of Parole,</i> No. 75169/07, 2007 WL 4561600 (Sup. Ct. Bronx Cnty. Dec. 20, 2007).....	12
<i>N.Y. ex rel. Ramos v. Warden,</i> No. 75178/07, 2007 WL 4439437 (Sup. Ct. Bronx Cnty. Dec. 11, 2007).....	13
<i>N.Y. ex rel. Santos v. Warden,</i> No. 75123-07, 2007 WL 3133318 (Sup. Ct. Bronx Cnty. Oct. 23, 2007)	13
<i>N.Y. ex rel. White v. Warden,</i> 15 Misc. 3d 360 (Sup. Ct. Bronx Cnty. 2007)..	13, 34

<i>N.Y. ex rel. Wilder v. Reilly</i> , No. 1093N/01, 2007 WL 2187520 (Sup. Ct. Nassau Cnty. July 13, 2007).....	13
<i>New York v. Benson</i> , 38 A.D.3d 563 (2d Dep’t 2007).....	10
<i>New York v. Bloom</i> , 269 A.D.2d 838 (4th Dep’t 2000)	6
<i>New York v. Bolden</i> , 44 A.D.3d 784, 844 N.Y.S.2d 67 (2d Dep’t 2007) ..	10
<i>New York v. Brown</i> , 39 A.D.3d 659 (2d Dep’t 2007).....	10
<i>New York v. Cephus</i> , No. 7337/01, 2006 WL 2714448 (Sup. Ct. Kings Cnty. June 28, 2006).....	13, 27
<i>New York v. Crawford</i> , 15 Misc. 3d 329 (Sup. Ct. Kings Cnty. 2007)	13
<i>New York v. Davis</i> , No. 0008222/2000, 2007 WL 4620848 (Sup. Ct. Kings Cnty. Dec. 17, 2007)	12
<i>New York v. Davis</i> , No. 8222/00, 2007 WL 2481906 (Sup. Ct. Kings Cnty. Sept. 4, 2007)	13
<i>New York v. Deangelo</i> , No. 0002453/2005, 2007 WL 2174103 (Sup. Ct. Kings Cnty. May 30, 2007)	13

<i>New York v. Drummond</i> , 47 A.D.3d 728, 851 N.Y.S.2d 583 (2d Dep’t 2008)	10
<i>New York v. Duncan</i> , 42 A.D.3d 470, 840 N.Y.S.2d 805 (2d Dep’t 2007)	10
<i>New York v. Edwards</i> , No. 5588/2001, 2007 WL 969416 (Sup. Ct. N.Y. Cnty. Mar. 21, 2007)	15, 28
<i>New York v. Figueroa</i> , 45 A.D.3d 297 (1st Dep’t 2007)	10
<i>New York v. Giles</i> , No. 1514/01, 2006 WL3489100 (Sup. Ct. Kings Cnty. 2006)	13
<i>New York v. Guare</i> , 45 A.D.3d 697, 846 N.Y.S.2d 247 (2d Dep’t 2007)	10
<i>New York v. Guerrero</i> , 39 A.D.3d 878, 2007 N.Y. Slip Op. 03717 (2d Dep’t 2007)	10
<i>New York v. Hayes</i> , 48 A.D.3d 831 (2d Dep’t 2008)	10
<i>New York v. Hill</i> , 39 A.D.3d 1 (1st Dep’t 2007)	10
<i>New York v. Hill</i> , 830 N.Y.S.2d 33 (1st Dep’t 2007)	34
<i>New York v. Holder</i> , 46 A.D.3d 577, 2007 N.Y. Slip Op. 09605 (2d Dep’t 2007)	10

<i>New York v. Howell</i> , 40 A.D.3d 882 (2d Dep’t 2007).....	10
<i>New York v. Keile</i> , No. 9917-98, 2006 WL 2569964 (Sup. Ct. N.Y. Cnty. Sept. 5, 2006)	15
<i>New York v. Lane</i> , No. 111/2001, 2007 WL 6870823 (Sup. Ct. Dutchess Cnty. Jan. 26, 2007).....	14
<i>New York v. Lemos</i> , 34 A.D.3d 343 (1st Dep’t 2006).....	11
<i>New York v. Lingle</i> , 34 A.D.3d 287 (1st Dep’t 2006).....	11
<i>New York v. Martinez</i> , 40 A.D.3d 1012, 837 N.Y.S.2d 221 (2d Dep’t 2007)	10
<i>New York v. Noble</i> , 37 A.D.3d 622 (2d Dep’t 2007).....	10
<i>New York v. O’Shea</i> , 45 A.D.3d 701, 846 N.Y.S.2d 245 (2d Dep’t 2007)	10
<i>New York v. Osbourne</i> , 28 Misc. 3d 935 (Sup. Ct. Nassau Cnty. 2010)	3
<i>New York v. Pagon</i> , 48 A.D.3d 486, 851 N.Y.S.2d 622 (2d Dep’t 2008)	10
<i>New York v. Prendergast</i> , No. 2367/01, 2008 WL 1862304 (Sup. Ct. Queens Cnty. Apr. 28, 2008).....	12

<i>New York v. Rodriguez</i> , No. 1736/99, 2007 WL 2597881 (Sup. Ct. Bronx Cnty. Sept. 7, 2007)	13
<i>New York v. Rodriguez</i> , No. 1736/99, 2007 WL 967097 (Sup. Ct. Bronx Cnty. Mar. 30, 2007)	15
<i>New York v. Royster</i> , 40 A.D.3d 885, 835 N.Y.S.2d 732 (2d Dep’t 2007)	10
<i>New York v. Ryan</i> , 13 Misc. 3d 451 (Sup. Ct. Queens Cnty. 2006) .4,	13
<i>New York v. Sebastian</i> , 38 A.D.3d 576, 833 N.Y.S.2d 109 (2d Dep’t 2007)	10
<i>New York v. Smith</i> , 37 A.D.3d 499 (2d Dep’t 2007).....	9, 10, 37
<i>New York v. Sparber</i> , 10 N.Y.3d 457 (2008)	6, 30, 36
<i>New York v. Sparber</i> , 34 A.D.3d 265 (1st Dep’t 2006).....	12
<i>New York v. Summers</i> , No. 3904/02, 2007 WL 623473 (Sup. Ct. Kings, Cnty. Feb. 23, 2007).....	13
<i>New York v. Thomspen</i> , 39 A.D.3d 572 (2d Dep’t 2007).....	10
<i>New York v. Turner</i> , 5 N.Y.3d 476 (2005)	9

<i>New York v. Tuten</i> , No. 6140/99, 2007 WL 602579 (Sup. Ct. Kings Cnty. Feb. 26, 2007)	15
<i>New York v. Williams</i> , 14 N.Y3d 198 (2010)	28
<i>New York v. Williams</i> , 44 A.D.3d 335 (1st Dep’t 2007)	10
<i>New York v. Wilson</i> , 37 A.D.3d 855, 2007 N.Y. Slip Op. 01765 (2d Dep’t 2007)	10
<i>Preiser v. Rodriguez</i> , 411 U.S. 475 (1973)	7
<i>Quinones v. Dep’t of Corr. Servs.</i> , 46 A.D.3d 1268 (3d Dep’t 2007)	10
<i>Quinones v. State of N.Y. Dep’t of Corr. Servs.</i> , 14 Misc. 3d 390 (Sup. Ct. Albany Cnty. 2006)	14
<i>Reichle v. Howards</i> , 132 S. Ct. 2088 (2012)	18, 20
<i>Sapp v. Payant</i> , No. 2007-4485, 2007 WL 2934948 (Sup. Ct. Erie Cnty. Sept. 18, 2007)	13
<i>Seling v. Young</i> , 531 U.S. 250 (1987)	33
<i>Smith v. Doe</i> , 538 U.S. 84 (2003)	33

<i>Smith v. Fischer</i> , 50 A.D.3d 1279 (3d Dep’t 2008).....	10
<i>Stanton v. Sims</i> , 134 S. Ct. 3, 7 (2013).....	26
<i>Starlight Sugar, Inc. v. Soto</i> , 253 F.3d 137 (1st Cir. 2001)	24, 25
<i>Sutterfield v. City of Milwaukee</i> , 751 F.3d 542 (7th Cir. 2014).....	24, 25
<i>United States v. Lanier</i> , 520 U.S. 259 (1997).....	26
<i>United States v. Salerno</i> , 481 U.S. 739 (1987).....	33
<i>Vincent v. Yelich</i> , 812 F.Supp.2d 157 (W.D.N.Y. 2011)	16, 17
<i>Vitek v. Jones</i> , 445 U.S. 480 (1980).....	22
<i>Waters v. Dennison</i> , 15 Misc. 3d 722 (Sup. Ct. Bronx Cnty. 2007).....	5, 8
<i>Watkins v. N.Y. State Dep’t of Corrs.</i> , No. 3637-06, 2007 WL 2815325 (Sup. Ct. Albany Cnty. Jan. 11, 2007).....	14
<i>Wilson v. State of N.Y. Dep’t of Corrs.</i> , No. 3637-06, 2007 WL 5556052 (Sup. Ct. Albany Cnty. Jan. 11, 2007) (Ceresia)	14

FEDERAL STATUTES & RULES

18 U.S.C. § 242	26
28 U.S.C. § 2254.....	2
42 U.S.C. § 1983	7, 26, 32
Fed. R. Civ. P. 12(b)(6)	16

STATE STATUTES

N.Y. Corr. Law § 601–d(5)	31
N.Y. Crim. P. Law. § 380.20.....	6, 36
N.Y. Crim. P. Law § 380.40.....	6, 36
N.Y. Crim. P. Law § 380.60.....	6, 36
N.Y. Penal Law § 70.45	passim
1998 N.Y. Laws Ch. 1, § 15	3
2004 N.Y. Laws Ch. 738, § 35	3
2008 N.Y. Laws Ch. 141, § 3	4
730 ILCS § 5/5–8–1(d)	34

STATEMENT OF THE CASE

A. Introduction

The two arguments in the Petition for a Writ of Certiorari are based on manufactured conflicts among the lower courts. Both are unpersuasive.

First, Petitioners argue that their entitlement to qualified immunity raises difficult questions about the roles of state and federal courts in “clearly establishing” constitutional rights. Three years before Petitioners¹ finally ceased to enforce post-release supervision (“PRS”) against individuals on whom it had never been judicially imposed, the Second Circuit held that precise conduct unconstitutional in *Earley v. Murray*, 451 F.3d 71 (*Earley*), *reh’g denied*, 462 F.3d 147 (*Earley II*) (2d Cir. 2006), *cert. denied*, 551 U.S. 1159 (2007). Petitioners’ argument that *Earley* nevertheless failed to establish the law for qualified immunity purposes rests on a less than candid presentation of state court cases. State appellate courts never “rejected” *Earley*’s “constitutional holding,” Pet. at 9. Indeed,

¹ Petitioners are current or former high-level officials of the New York State Department of Correctional Services (“DOCS”), the New York State Division of Parole (“DOP”), or the recently combined entity, New York State Department of Corrections and Community Supervision (“DOCCS”), who at all relevant times were responsible for administratively imposing and enforcing extra-judicial terms of post-release supervision (“PRS”).

every Appellate Division case that considered the constitutional necessity of judicial imposition of PRS expressly adopted *Earley's* holding. To the extent that circuits require guidance over qualified immunity analysis when state and federal courts disagree about a constitutional right, this is not the case in which to provide it.

Second, Petitioners contend that the due process right that they violated has not been recognized by the Seventh and Ninth Circuits. But procedural and factual differences between the cases fully account for their apparently divergent due process rulings. The Ninth Circuit's ruling concerned the imposition of civil, not criminal penalties. And only New York's PRS regime vested judges with discretion over the severity of the penalties at issue, and required that judges, not correction officers, impose all criminal penalties.

Additionally, the Seventh and Ninth Circuit cases were federal habeas decisions; this case is not. *Earley*, like the Seventh and Ninth Circuit cases, determined that Supreme Court precedent had established a due process right for federal habeas purposes. To the extent that they reached inconsistent conclusions (and, due to their factual differences, they did not), that inconsistency would necessarily be limited to the clarity of Supreme Court precedent for purposes of 28 U.S.C. § 2254. Any such conflict is appropriately resolved in a federal habeas case, not in this case, where the Second Circuit determined that Petitioners' conduct

violated the Due Process Clause as clearly established by *Earley*.

B. Background

1. **New York Penal Law § 70.45.** In 1998, an amendment to New York sentencing laws known as Jenna’s law established a scheme of determinate sentencing for individuals convicted of violent felony offenses. The amendment required imposition of PRS terms for such defendants, but it did not dictate the length of these terms for all defendants. For first-time felony offenders, the statute identified ranges of 1.5 to 3 years or 2.5 to 5 years, depending on the seriousness of the offense and the criminal history of the defendant, and vested judges with discretion to impose terms within those ranges. 1998 N.Y. Laws Ch. 1, § 15 (codified at N.Y. Penal Law § 70.45 (1), (2)).² “Unlike parole, which is a discretionary release on an indeterminate sentence that may last for the length of time remaining on that sentence, post-release supervision is *added on* to a determinate sentence and allows the Division of Parole to continually monitor those who have been released.” *New York v. Osbourne*, 28 Misc. 3d 935, 937 (Sup. Ct. Nassau Cnty. 2010) (emphasis supplied).

² Penal Law § 70.45 has been amended several times since its adoption. As relevant here, one of the amendments altered the discretionary ranges—but not the fact of discretion—applicable to certain first-time offenders. 2004 N.Y. Laws Ch. 738, § 35.

Following adoption of Jenna’s Law, judges did not universally inform defendants pleading guilty that they would be subjected to PRS, pronounce terms of PRS during sentencing proceedings, or include terms of PRS in defendants’ commitment orders. *See, e.g., Catu*, 4 N.Y.3d 242.³ Petitioners’ policy in such circumstances was to administratively impose the PRS terms that they deemed appropriate under § 70.45 and to enforce those terms absent court order. In cases where judges imposed PRS terms that petitioners believed were shorter than required by statute, they would disregard the judicially imposed sentences and impose longer terms than ordered. *See, e.g., New York v. Ryan*, 13 Misc. 3d 451, 452-53 (Sup. Ct. Queens Cnty. 2006) (defendant sentenced by judge to 2.5 years PRS, but DOP imposed a five-year term of post release supervision upon his release from incarceration).

2. *Earley v. Murray*. On June 9, 2006, in *Earley v. Murray*, the Second Circuit plainly and unequivocally held that the administrative imposition of PRS by Petitioners violates the federal constitutional right to Due Process. 451 F.3d 71. Relying on this Court’s decision in *Wampler*, the Second Circuit explained that “[o]nly the judgment of a court, as expressed through the sentence imposed

³ An amendment that became effective in June 2008 expressly directed judges to “in each case state not only the term of imprisonment, but also” the applicable PRS term. 2008 N.Y. Laws Ch. 141, § 3.

by a judge, has the power to constrain a person's liberty." *Id.* at 75-76. *Earley's* holding as to the unconstitutionality of a term of PRS that was neither pronounced by a sentencing court nor contained in the sentencing court's judgment and order of commitment, was as unmistakable as it was unambiguous: "The additional provision for post-release supervision added by DOCS is a nullity." *Id.* at 76. Any defendant who had not been properly sentenced to PRS could be resentenced; otherwise PRS could not be enforced.

The Second Circuit reiterated the holding two months later in *Earley II*, stating that the Constitution "requires the custodial terms of sentences to be explicitly imposed by a judge, any practice to the contrary is simply unconstitutional and cannot be upheld." 462 F.3d at 150.

3. State Court Interpretation of N.Y. Penal Law § 70.45 Prior to *Earley*. At the time *Earley* was decided, no state court had considered a due process challenge to the administrative imposition of PRS under § 70.45. *See Waters v. Dennison*, 15 Misc. 3d 722, 727-28 (Sup. Ct. Bronx Cnty. 2007) ("[t]he Pre-*Earley* authorities . . . did not consider, address, nor decide the [constitutional] issues"). The Appellate Division, Third and Fourth Departments, had held that, as a matter of state *statutory* interpretation, PRS could be automatically included in defendants' sentences, suggesting that PRS could therefore be enforced even if no court had expressly imposed it. *See Deal v. Goord*, 8 A.D.3d 769 (3d Dep't 2004),

overruled by Dreher v. Goord, 46 A.D.3d 1261 (3d Dep’t 2007); *New York v. Bloom*, 269 A.D.2d 838 (4th Dep’t 2000).

This conclusion was contrary to state statutes and rulings of the New York Court of Appeals prohibiting correction officers from imposing any penalty that did not appear on the face of a commitment order or any penalty that was not orally pronounced at sentencing. *See Murray v. Goord*, 1 N.Y.3d 29, 32 (2003); N.Y. Crim. P. Law. §§ 380.20, 380.40(1), 380.60. Based on these authorities, after *Earley*, the New York Court of Appeals rejected the Third and Fourth Departments’ reading of § 70.45 and held definitively that, as a matter of state law, “the sentencing judge—and only the sentencing judge—is authorized to pronounce the PRS component of a defendant’s sentence,” and that enforcement of any PRS term *not* orally pronounced at sentencing and included in the commitment order is “in excess of DOCS’s jurisdiction.” *Garner v. N.Y. State Dep’t of Corr. Servs.*, 10 N.Y.3d 358, 362 (2008); *New York v. Sparber*, 10 N.Y.3d 457, 468 (2008).

4. Petitioners’ Conduct Post-*Earley*. In the wake of the Second Circuit’s decision in *Earley*, Petitioners analyzed DOCS’ records and concluded that the sentence and commitment orders in DOCS’ possession did not support the imposition of PRS on 8,100 individuals, including 1,600 who had already been released and were then subjected to unconstitutionally imposed PRS terms. Pet. App.

82a-83a. Petitioners, ignoring *Earley*, continued to enforce them.

Petitioners also continued to imprison individuals who violated PRS terms that had been unconstitutionally imposed. Those who complained about their unconstitutional incarceration received letters in which Petitioners Annucci and Fischer (then chief counsel and commissioner of DOCS, respectively) *expressly acknowledged* that they were defying *Earley* and claimed that they were entitled to do so pursuant to the pre-*Earley* state court case law that had condoned administrative imposition of PRS as a matter of state law. Pet. App. 84a. The letter acknowledged that “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,” but refused to do so “[i]n the absence of such order.” *Id.*

Because of *Preiser v. Rodriguez*, 411 U.S. 475 (1973), individuals adversely affected by Petitioners’ campaign to defy *Earley* could not file an action in federal court under 42 U.S.C. § 1983 to obtain injunctive relief enforcing *Earley’s* holding, but were instead required to file individual state court habeas petitions. For more than two years, as inmate after inmate sought release from their unconstitutional “sentences,” Petitioners opposed such relief. As described in the *Betances* pleadings, in

more than one hundred habeas corpus actions
filed by . . . the Legal Aid Society [alone] in

the wake of *Earley*. . . . “[t]he 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*.

Pet. App. 104a, n.77.

5. State Courts Adopt *Earley*’s Constitutional Analysis. As individual defendants filed their individual enforcement actions, “for the first time” the state courts began to “address the constitutional stumbling blocks in the imposition of PRS post sentence.” *Waters*, 15 Misc. 3d at 729. Petitioners are simply wrong when they claim, without citation, that two of the four departments of New York’s intermediate appellate court “rejected the constitutional holding of *Earley*” and “continu[ed] to find enforcement of nonjudicially pronounced PRS terms constitutional,” Pet. at 9. Every department of the Appellate Division, as it considered the due process question, concluded that a PRS term could not be enforced if it was not orally pronounced at a defendant’s sentencing or included in his commitment order.

In February 2007, approximately eight months after *Earley*, the Second Department of the Appellate Division issued the first state appellate court decision that addressed the constitutional question raised in *Earley*. It held that where a trial court “sentence[s] a] defendant to a determinate prison term . . . [and] neither the sentencing minutes nor the court’s order of commitment mention[s] the imposition of any period of postrelease supervision . . . , the sentence . . . does not include any period of post-release supervision.” *New York v. Smith*, 37 A.D.3d 499, 499 (2d Dep’t 2007) (citing *Wampler*, 298 U.S. 460; *Earley I*, 451 F.3d 71; *Earley II*, 462 F.3d 147). It was at that time the only Appellate Division ruling concerning the constitutionality of administratively imposed PRS and therefore was binding on all trial-level courts in the state unless and until the Court of Appeals or the Departments in which those trial courts sat disagreed. *See New York v. Turner*, 5 N.Y.3d 476, 482 (2005).

That disagreement never came. Each of New York’s four intermediate appellate departments, when finally presented with the constitutional question, uniformly held that DOCS “lacked authority to add PRS to [a] defendant’s sentence” where “neither the sentencing minutes, nor the court’s order of commitment, mentioned the imposition of any period of post-release supervision,” *New York v. Figueroa*, 45 A.D.3d 297, 298 (1st Dep’t 2007) (alterations omitted) (quoting *New York v.*

Noble, 37 A.D.3d 622 (2d Dep't 2007) (quoting *Wampler* and *Earley*));⁴ *accord Smith*, 37 A.D.3d 499;⁵ *Dreher*, 46 A.D.3d at 162;⁶ *N.Y. ex rel Burch v.*

⁴ See also *New York v. Hill*, 39 A.D.3d 1 (1st Dep't 2007) (PRS must be judicially imposed at least to the extent that § 70.45 provides for discretionary PRS terms), *rev'd on unrelated grounds*, 9 N.Y.3d 189 (2007); *New York v. Williams*, 44 A.D.3d 335 (1st Dep't 2007) (same).

⁵ See also *New York v. Hayes*, 48 A.D.3d 831 (2d Dep't 2008); *New York v. Pagon*, 48 A.D.3d 486, 851 N.Y.S.2d 622 (2d Dep't 2008); *New York v. Drummond*, 47 A.D.3d 728, 851 N.Y.S.2d 583 (2d Dep't 2008); *New York v. Holder*, 46 A.D.3d 577, 2007 N.Y. Slip Op. 09605 (2d Dep't 2007); *New York v. O'Shea*, 45 A.D.3d 701, 846 N.Y.S.2d 245 (2d Dep't 2007); *New York v. Guare*, 45 A.D.3d 697, 846 N.Y.S.2d 247 (2d Dep't 2007); *New York v. Bolden*, 44 A.D.3d 784, 844 N.Y.S.2d 67 (2d Dep't 2007); *New York ex rel Gerard*, 44 A.D.3d 804, 843 N.Y.S.2d 398 (2d Dep't 2007); *New York v. Duncan*, 42 A.D.3d 470, 840 N.Y.S.2d 805 (2d Dep't 2007); *New York v. Martinez*, 40 A.D.3d 1012, 837 N.Y.S.2d 221 (2d Dep't 2007); *New York v. Royster*, 40 A.D.3d 885, 835 N.Y.S.2d 732 (2d Dep't 2007); *New York v. Howell*, 40 A.D.3d 882 (2d Dep't 2007); *New York v. Guerrero*, 39 A.D.3d 878, 2007 N.Y. Slip Op. 03717 (2d Dep't 2007); *New York v. Brown*, 39 A.D.3d 659 (2d Dep't 2007); *New York v. Thompsen*, 39 A.D.3d 572 (2d Dep't 2007); *New York v. Sebastian*, 38 A.D.3d 576, 833 N.Y.S.2d 109 (2d Dep't 2007); *New York v. Benson*, 38 A.D.3d 563 (2d Dep't 2007); *New York v. Wilson*, 37 A.D.3d 855, 2007 N.Y. Slip Op. 01765 (2d Dep't 2007); *New York v. Noble*, 37 A.D.3d 622, 831 N.Y.S.2d 198 (2d Dep't 2007).

⁶ *Smith v. Fischer*, 50 A.D.3d 1279 (3d Dep't 2008); *Donhauser v. Goord*, 48 A.D.3d 1005 (3d Dep't 2008); *Quinones v. Dep't of Corr. Servs.*, 46 A.D.3d 1268 (3d Dep't 2007).

Goord, 48 A.D.3d 1306 (4th Dep’t 2008).⁷

Ignoring every one of these cases, Petitioners cite *Scott v. Fischer* to support their inaccurate representation that New York appellate departments found imposition of PRS constitutional. 616 F.3d 100, 107 (2d Cir. 2010). *Scott* in turn cites two Appellate Division cases: One dismissed a challenge to administrative imposition of PRS on a statutory procedural ground and contains no reference to the Constitution, due process, or *Earley*. *Garner v. N.Y. State Dep’t of Corr. Servs.*, 39 A.D.3d 1019 (3d Dep’t 2007); see also *Scott*, 616 F.3d at 107 (*Garner* “appear[s] to reflect oversight rather than defiance of *Earley*”). The other actually assumed without deciding “the existence of a constitutional requirement that every portion of a sentence be ‘entered upon the records of the court’” and found due process satisfied because PRS was included in the defendant’s commitment order. *New York v. Thomas*, 35 A.D.3d 192, 193 (1st Dep’t 2006) (quoting *Wampler*, 298 U.S. at 464), *rev’d*, *Sparber*, 10 N.Y.3d 457 (holding that a PRS term is not enforceable unless it is *also* pronounced by the sentencing judge).⁸ Accordingly, the only Appellate Division

⁷ See also *N.Y. ex rel Eaddy v. Goord*, 48 A.D.3d 1307 (4th Dep’t 2008).

⁸ See also *New York v. Lingle*, 34 A.D.3d 287 (1st Dep’t 2006), *rev’d*, *Sparber* 10 N.Y.3d 457; *New York v. Lemos*, 34 A.D.3d 343 (1st Dep’t 2006); *New York v. Sparber*, 34 A.D.3d 265 (1st Dep’t 2006), *rev’d*, 10 N.Y.3d 457. As the district court in (continued on next page)

cases that have considered the constitutional necessity of judicial imposition before PRS terms could be enforced have been resolved squarely against Petitioners.

The overwhelming weight of state authority therefore aligned with *Earley*. This holds true even at the trial court level, where judges began to adopt *Earley*'s reasoning immediately after it was rendered, even though they, unlike Petitioners, were not bound by it.⁹ The holdouts were few, though

Betances noted, “*Lingle, Sparber, Thomas, and Boyer . . . did not deal with administratively-imposed PRS at all,*” as “the PRS imposed on the defendants in these cases had been written in the sentencing courts’ sentence and commitment orders.” Pet. App. 101a-102a.

⁹ See e.g., *New York v. Prendergast*, No. 2367/01, 2008 WL 1862304 (Sup. Ct. Queens Cnty. Apr. 28, 2008); *Dempsey v. Ekpe*, No. 0124219/2007, 2008 WL 828069 (Sup. Ct. St. Lawrence Cnty. Mar. 17, 2008); *Coleman v. N.Y. State Dep’t of Corr. Servs.*, No. 36119/2007, 2008 WL 711730 (Sup. Ct. Kings Cnty. Mar. 14, 2008); *In re Andall v. LaClaire*, No. 2008-0183, 2008 WL 4056517 (Sup. Ct. Franklin Cnty. Mar. 10, 2008); *Lewis v. Fischer*, No. 24476/07, 2008 WL 615077 (Sup. Ct. Kings Cnty. Mar. 7, 2008); *Harris v. Bisceglia*, No. 1000-07, 2008 WL 695861 (Sup. Ct. Essex Cnty. Mar. 3, 2008); *In re Abelson v. N.Y. State Dep’t of Corr. Servs.*, No. 22466/07, 2008 WL 115423 (Sup. Ct. Queens Cnty. Jan. 5, 2008); *N.Y. ex rel. Melendez v. N.Y. State Div. of Parole*, No. 75169/07, 2007 WL 4561600 (Sup. Ct. Bronx Cnty. Dec. 20, 2007); *New York v. Davis*, No. 0008222/2000, 2007 WL 4620848 (Sup. Ct. Kings Cnty. Dec. 17, 2007); *N.Y. ex rel. Ramos v. Warden*, No. 75178/07, 2007 WL 4439437 (Sup. Ct. Bronx Cnty. Dec. 11, 2007); *N.Y. ex rel. Santos v. Warden*, No. 75123-07, 2007 WL (continued on next page)

prolific. Compared to over sixty state court opinions citing *Earley* and available on Westlaw that deemed administrative enforcement of PRS illegal in just the first twenty months following *Earley*, *see supra* notes 4-7, 9, Respondents have identified just six trial judges who were convinced by Petitioners and other state officials that administratively imposed PRS terms should remain enforceable pending further

3133318 (Sup. Ct. Bronx Cnty. Oct. 23, 2007); *Sapp v. Payant*, No. 2007-4485, 2007 WL 2934948 (Sup. Ct. Erie Cnty. Sept. 18, 2007); *New York v. Rodriguez*, No. 1736/99, 2007 WL 2597881 (Sup. Ct. Bronx Cnty. Sept. 7, 2007); *New York v. Davis*, No. 8222/00, 2007 WL 2481906 (Sup. Ct. Kings Cnty. Sept. 4, 2007); *N.Y. ex rel. Wilder v. Reilly*, No. 1093N/01, 2007 WL 2187520 (Sup. Ct. Nassau Cnty. July 13, 2007); *N.Y. ex rel. Mazario v. Warden*, No. 75090/07, 2007 WL 2012417 (Sup. Ct. Bronx Cnty. July 10, 2007); *In re Pan v. N.Y. State Dep't of Corr. Servs.*, No. 37058/2006, 2007 WL 1730103 (Sup. Ct. Kings Cnty. June 14, 2007); *In re Diaz v. Dennison*, No. 9251/2007, 2007 WL 1775675 (Sup. Ct. Kings Cnty. June 7, 2007); *New York v. Deangelo*, No. 0002453/2005, 2007 WL 2174103, at *8-9 (Sup. Ct. Kings Cnty. May 30, 2007); *N.Y. ex rel. Johnson v. Warden*, No. 75087-06, 2007 WL 755412 (Sup. Ct. Bronx Cnty. Mar. 12, 2007); *New York v. Crawford*, 15 Misc. 3d 329 (Sup. Ct. Kings Cnty. 2007); *New York v. Summers*, No. 3904/02, 2007 WL 623473 (Sup. Ct. Kings, Cnty. Feb. 23, 2007); *In re Waters v. Dennison*, 15 Misc. 3d 722 (Sup. Ct. Bronx Cnty. 2007); *N.Y. ex rel. White v. Warden*, 15 Misc. 3d 360, 368 (Sup. Ct. Bronx Cnty. 2007); *New York v. Giles*, No. 1514/01, 2006 WL3489100 (Sup. Ct. Kings Cnty. 2006); *N.Y. ex rel. Lewis v. Warden*, 14 Misc. 3d 468 (Sup. Ct. Bronx Cnty. 2006); *In re Waters v. Dennison*, 13 Misc. 3d 1105 (Sup. Ct. Bronx Cnty. 2006); *New York v. Ryan*, 13 Misc. 3d 451 (Sup. Ct. Queens Cnty. 2006); *New York v. Cephus*, No. 7337/01, 2006 WL 2714448 (Sup. Ct. Kings Cnty. June 28, 2006).

consideration of *Earley* by the state appellate courts.¹⁰ At least one of those six judges soon

¹⁰ *In re DeJesus v. Yelich*, No. 00-0226/2007, 2007 WL 2174161 (Sup. Ct. Clinton Cnty. June 28, 2007) (Feldstein); *In re Townsend v. Yelich*, No. 00-0264/2007, 2007 WL 2174162 (Sup. Ct. Clinton Cnty. June 28, 2007) (Feldstein); *In re Brown v. Behrle*, No. 0123823/2007, 2007 WL 2176949 (Sup. Ct. St. Lawrence Cnty. June 28, 2007) (Feldstein); *In re Gil v. Behrle*, No. 0123826/2007, 2007 WL 2176950 (Sup. Ct. St. Lawrence Cnty. June 28, 2007) (Feldstein); *In re Smalls v. Sears*, No. 0000049/2007, 2007 WL 2174146 (Sup. Ct. Franklin Cnty. June 27, 2007) (Feldstein); *Matter of Grant v. Fischer*, No. 3597-07, 2007 WL 4260142 (Sup. Ct. Albany Cnty. Dec. 5, 2007) (Ceresia); *Highland v. Goord*, No. 0875006/2007, 2007 WL 2815515 (Sup. Ct. Albany Cnty. June 20, 2007) (Ceresia); *Wilson v. State of N.Y. Dep't of Corrs.*, No. 3637-06, 2007 WL 5556052 (Sup. Ct. Albany Cnty. Jan. 11, 2007) (Ceresia); *Quinones v. State of N.Y. Dep't of Corr. Servs.*, 14 Misc.3d 390 (Sup. Ct. Albany Cnty. 2006) (Ceresia), *rev'd*, 46 A.D.3d 1268 (3d Dep't 2007); *In re Smith v. Fischer*, No. 0001202/2007, 2007 WL 2174134 (Sup. Ct. Albany Cnty. Apr. 14, 2007) (Teresi), *rev'd*, 50 A.D.3d 1279 (3d Dep't 2008); *In re Turner v. Sears*, No. 0000126/2007, 2007 WL 2174151 (Sup. Ct. Franklin Cnty. June 28, 2007) (Feldstein), *rev'd* 63 A.D.3d 1404 (3d Dep't 2009); *In re Purdie v. Hunt*, No. 0123463/2006, 2007 WL 2176948 (Sup. Ct. St. Lawrence Cnty. June 28, 2007) (Feldstein); *In re DeLoach v. Santor*, No. 0000089/2007, 2007 WL 2174149 (Sup. Ct. Franklin Cnty. June 28, 2007); *N.Y. ex rel. Joyner v. N.Y. State Div. of Parole*, No. 75045/07, 2007 WL 1345702 (Sup. Ct. Bronx Cnty. May 8, 2007) (Feldstein); *New York v. Lane*, No. 111/2001, 2007 WL 6870823 (Sup. Ct. Dutchess Cnty. Jan. 26, 2007) (Hayes), *modified in relevant part*, 2007 WL 6870823; *Watkins v. N.Y. State Dep't of Corrs.*, No. 3637-06, 2007 WL 2815325 (Sup. Ct. Albany Cnty. Jan. 11, 2007) (Ceresia); *In re Ashley v. Santor*, No. 000-096/2006, 2007 WL 2174164 (N.Y. Sup. 2007) (Feldstein); *N.Y. ex rel. Hernandez v. Warden*, No. 75063-06, 2006 WL 3843586 (Sup. Ct. Bronx Cnty. Dec. 8, 2006) (continued on next page)

reversed course and adopted *Earley's* holding. *See, e.g., Harris v. Bisceglia*, No. 1000-07, 2008 WL 695861 (Sup. Ct. Essex Cnty. Mar. 3, 2008) (Feldstein, *J.*). And every one of these decisions was overturned or superseded by the uniform rulings of the Appellate Division and Court of Appeals that held administratively imposed PRS to be illegal.

6. Respondents. All of the Respondents in these actions pleaded guilty and were sentenced to fixed terms of imprisonment. None agreed to a sentence that included PRS as part of his plea agreement. None was sentenced to a period of PRS by a judge during sentencing. None was incarcerated pursuant to a sentence and commitment order (or judgment) that contained a sentence of PRS. Notwithstanding these facts, every Respondent was subjected to a term of PRS that was imposed and/or enforced by Petitioners *after* the Second Circuit's decision in *Earley* in June 2006.

(Fisch). In four additional cases, trial courts expressed uncertainty or skepticism regarding *Earley's* holding but nonetheless ordered that defendants be resentenced to satisfy the due process requirements that it identified. *New York v. Edwards*, No. 5588/2001, 2007 WL 969416 (Sup. Ct. N.Y. Cnty. Mar. 21, 2007), *aff'd*, 62 A.D.3d 467 (1st Dep't 2009); *New York v. Rodriguez*, No. 1736/99, 2007 WL 967097 (Sup. Ct. Bronx Cnty. Mar. 30, 2007); *New York v. Tuten*, No. 6140/99, 2007 WL 602579 (Sup. Ct. Kings Cnty. Feb. 26, 2007); *New York v. Keile*, No. 9917-98, 2006 WL 2569964 (Sup. Ct. N.Y. Cnty. Sept. 5, 2006).

D. The District Courts' Rulings

This consolidated petition for a writ of certiorari concerns three district court opinions, *Vincent v. Yelich*, 812 F.Supp.2d 157 (W.D.N.Y. 2011) (two cases), Pet. App. 60a-70a, *Earley v. Annucci* (N.D.N.Y. Jan. 30, 2012) (“*Earley III*”), Pet. App. 71a-75a, and *Betances v. Fischer*, 852 F.Supp.2d 379 (S.D.N.Y. 2012) (two cases), Pet. App. 76a-116a.

In *Vincent* and *Earley III*, the district courts granted Petitioners qualified immunity on the ground that, “for two years after the *Earley* federal court case was decided, New York state courts did not *always* follow its holding.” Pet. App. 67a (emphasis supplied).

In *Betances*, the district court denied Petitioners’ motions to dismiss under Fed. R. Civ. P. 12(b)(6) on qualified immunity grounds. The district court held that Petitioners were “incorrect” when they claimed “that the Appellate Division found administrative PRS constitutional.” Pet. App. 101a. Indeed, the district court recognized that while a small number of “trial level state courts initially held that *Earley* was not binding on them and did not require that they invalidate administrative PRS,” they were quickly overruled and bound by the holdings of the Appellate Division. Pet. App. 103a-104a.

E. The Second Circuit's Rulings

On June 4, 2013, two panels of the Second Circuit Court of Appeals issued an opinion and summary order, which reversed the grant of qualified immunity to Petitioners in *Vincent* and *Earley* and affirmed the denial of qualified immunity to Petitioners in *Betances* because Respondents' due process rights were clearly established by the Second Circuit's ruling in *Earley v. Murray* on June 9, 2006. Pet. App. 1a-47a (opinion in *Vincent*); Pet. App. 52a-56a (summary order in *Betances*).

Like the district court in *Betances*, the court of appeals held that *Earley v. Murray*, which dealt “with the precise conduct at issue in the present cases—the administrative imposition of PRS on a prisoner who had not had that condition imposed on him by the sentencing court—applied *Wampler* and plainly held such an imposition of PRS to be unconstitutional.” Pet. App. 23a.

The court of appeals, like the district court in *Betances*, rejected Petitioners' post-*Earley* “confusion” argument because “none of the state court decisions cited by [Petitioners] demonstrates any confusion about whether *Earley I*, prohibited [Petitioners] from imposing PRS.” Pet. App. 26a-29a.

On May 23, 2014 (Pet. App. 48a-51a) and June 27, 2014 (Pet. App. 57a-59a), the court of appeals

denied Petitioners' petitions for rehearing and rehearing *en banc*. Thereafter, the mandates issued and jurisdiction was restored to the district courts.

REASONS FOR DENYING THE PETITION

I. THE SECOND CIRCUIT'S QUALIFIED IMMUNITY DECISION IS FULLY CONSISTENT WITH THE PRECEDENTS OF THIS COURT AND OTHER CIRCUITS

Earley addressed the *precise* conduct at issue in these cases. It unmistakably held that the administrative imposition of PRS was unconstitutional where no PRS was imposed by the sentencing court either orally or in writing. Reading the Petition, one would never suspect that in the months following *Earley*, every New York appellate court agreed that terms of PRS were unenforceable absent court order. By the time the Court of Appeals declared administrative imposition of PRS illegal as a matter of state statutory law in April 2008, the practice had been deemed unconstitutional in every precedential opinion to have addressed the issue. In this context, to say that Petitioners could “reasonably [have] anticipate[d that] their conduct [might] give rise to liability for damages” is an understatement, *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (internal quotation marks omitted).

For state officers to be held responsible for their violations of constitutional rights, this Court's precedent does not require “the very action in

question [to have] previously been held unlawful,” but in this case it was, rendering “the unlawfulness” of Petitioners’ conduct glaringly “apparent,” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). To avoid liability for their outright disregard of a binding Second Circuit ruling, Petitioners concoct a narrative involving conflicting state law authority and incompatible directives. This account is belied by the case law.

A. Petitioners Intentionally Defied *Earley*

This case presents the exceptional circumstance of state officials intentionally and systematically violating a federal court ruling. Thus, it can be resolved on the unusual dispositive ground that immunity is not available for officials who knowingly violate a final judgment that holds the very conduct for which they are subsequently sued unconstitutional. *See Amore v. Novarro*, 624 F.3d 522, 534-35 (2d Cir. 2010) (immunity “unusual” where officer enforces state statute previously held unconstitutional, unless officer did not know statute had been declared invalid despite good-faith effort to determine applicable law); *Baribeau v. City of Minneapolis*, 596 F.3d 465, 478-79 (8th Cir. 2010) (officer not entitled to qualified immunity where arrest was based on statute that had been limited by State Supreme Court to comply with First Amendment); *Leonard v. Robinson*, 477 F.3d 347, 358 (6th Cir. 2007) (same).

Earley facially invalidated Petitioners' practice of administratively imposing PRS absent court order. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010) (where court's reasoning "reaches beyond the particular circumstances of [that] plaintiff[]"). As state officials implementing a policy deemed facially invalid, Petitioners were bound by the ruling. *See Cooper v. Aaron*, 358 U.S. 1 (1958). But for years on end, as a matter of policy, Petitioners made a calculated decision to ignore *Earley* and to engage in the precise conduct that the Second Circuit had expressly held unconstitutional and directed them not to pursue. To determine that this was an abuse of office requires no further analysis.

Petitioners cannot claim that *Earley* itself was ambiguous, that they did not know of or understand its holding, or that it was not binding authority. Petitioner Annucci has testified that he was aware of *Earley* at the time it was issued. Pet. App. at 25a-26a. He and Petitioner Terrence Tracy are attorneys—chief counsel to DOCS and DOP, respectively. The other Petitioners are high-ranking DOCS and DOP officials with access to legal counsel. Pet. App. 105a-106a. Their violation of *Earley* was deliberate and precise. It did not follow from ignorance of the law, a need to make "swift, on the spot, decisions" about others' physical safety, *Reichle*, 132 S. Ct. at 2097 (Ginsburg, *J.*, concurring), or difficulty "anticipat[ing] subsequent legal developments," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Petitioners’ pursuit of a course of conduct “that a federal court has already told [them] in a final judgment is unconstitutional” makes it, to say the least, “difficult to invoke the defense of qualified immunity,” *Mulholland v. Marion Cnty. Elec. Bd.*, 746 F.3d 811, 819 & n.1 (7th Cir. 2014). The rare fact that Petitioners were under express court order *not* to engage in the conduct that deprived Respondents of their liberty renders this case extraordinary and alone provides a basis for affirming the Second Circuit’s judgment without reaching any of the qualified immunity questions raised in the Petition.

B. The Second Circuit’s Decision in *Earley* Did Not Conflict with a Single State Appellate Court Decision

While Petitioners represent that New York’s state and federal courts disagree over the constitutionality of the administrative imposition of PRS, in fact, no New York appellate court has ever “rejected the constitutional holding of *Earley*” or found “enforcement of nonjudicially pronounced PRS terms constitutional,” Pet. at 9. *See supra* notes 4-7, 9 and accompanying text. To the extent that they have found the practice legal, they have done so only as a matter of state law. *See supra* note 8 and accompanying text. This case therefore does not give the Court an opportunity to resolve whether officers are entitled to qualified immunity when state and

federal courts disagree over the existence of a constitutional right. Instead, the only question it presents is whether state officers can avoid constitutional liability when they follow the dictates of a state statute, even after it has unambiguously been declared unconstitutional. That is not a question worthy of this Court's review.

As the Second Circuit recognized, “[t]he fact that the State may have specified its own procedures that it may deem adequate for official action does not settle what protection the federal due process clause requires.” Pet. App. 28a (internal quotation marks omitted); *accord Vitek v. Jones*, 445 U.S. 480, 491 (1980). This Court’s precedent already makes clear that Penal Law § 70.45 as construed by state courts appropriately governed Petitioners’ conduct only “until and unless [the statute was] declared unconstitutional,” *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979). “Under the Supremacy Clause of the Federal Constitution, ‘the relative importance to the State of its own law is not material when there is a conflict with a valid federal law,’ for ‘any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.’” *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)). Petitioners have not identified any confusion or lower-court conflict on this point.

**C. No Court Has Held That State Officials
Are Entitled To Qualified Immunity
Until State and Federal Courts At All
Levels Have Achieved Unanimity**

Given the uniform rulings of New York's appellate courts that administrative imposition of PRS violates due process, this is an inappropriate vehicle for addressing "the relevance of state-court decisions to qualified immunity when state courts reject or otherwise disagree with a circuit's ruling on federal law," Pet. at 24. The only disagreement that ever arose between state and federal courts regarding the constitutionality of Petitioners' conduct was between, on the one hand, the Second Circuit, all New York appellate courts, and most state trial courts and, on the other, a handful of local trial courts that themselves ignored binding state appellate authority. *See supra* notes 4-9 and accompanying text. The only issue here is therefore whether state officials may ignore the unanimous weight of appellate state and federal authority as long as they can also convince a small minority of local trial courts to do so.

1. The lower courts are not divided on this question. Petitioners suggest that holdings of the First and Seventh Circuits support their position, while rulings of the Ninth Circuit and Second Circuits do not. But the approaches adopted in each of these circuits, applied here, would lead to the

same judgment.

The cases from the First and Seventh Circuits that Petitioners cite indeed acknowledge that officers may be entitled to qualified immunity even if the circuit in which they act has held similar conduct unconstitutional—but only where two further conditions are met: (1) this Court has not also held the conduct unconstitutional, and (2) binding opinions from the appellate courts of the state in which the conduct occurred have deemed it constitutional. *See Sutterfield v. City of Milwaukee*, 751 F.3d 542, 573-77 (7th Cir. 2014) (officers entitled to qualified immunity for claim of illegal entry of a home where Seventh Circuit had held community caretaker doctrine not applicable beyond vehicle searches, but the Wisconsin Supreme Court and intermediate appellate court had held doctrine applicable to home searches), *cert. denied*, No. 14-5742, 2014 WL 3950955 (Nov. 10, 2014); *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137 (1st Cir. 2001) (officers entitled to qualified immunity where First Circuit had held imposition of a Puerto Rico trade regulation in violation of the Commerce Clause, but the Puerto Rico Supreme Court had held that the Commerce Clause does not apply to Puerto Rico).

The Ninth Circuit's denial of qualified immunity in *Hopkins v. Bonvicino*, 573 F.3d 752 (9th Cir. 2009), is not to the contrary. There, one of the two conditions present in *Sutterfield* and *Starlight Sugar* was not met, as this Court had addressed the constitutional question at issue, and a California

Supreme Court opinion that “took a different view of the Fourth Amendment than . . . the United States Supreme Court” could not give rise to a defense of qualified immunity. *Id.* at 769.

Applying the approach of *Sutterfield* and *Starlight Sugar* here would require affirmance of the Second Circuit’s judgment. The second condition that those cases identify is not satisfied because the New York appellate courts that considered due process issued only opinions that agreed with the Second Circuit’s ruling. Had the Second Circuit expressly adopted the approach of *Sutterfield* and *Starlight*, its ruling would have been the same.

2. In the absence of a collision between state and federal appellate courts, Petitioners are left to argue that they could disregard the Second Circuit’s identification of a constitutional right unless and until New York’s state courts were “*uniformly* convinced that *Earley*’s due process ruling was correct or that it controlled,” Pet. at 9 (emphasis supplied). Such a rule would introduce a unanimity requirement found nowhere in qualified immunity law.

Indeed, the law of the Seventh Circuit, which Petitioners think supports their claim, has expressly rejected the unanimity rule that they advocate. The Seventh Circuit recognizes that this Court has never “la[id] down a ‘safe harbor’ rule” under which “one contrary decision” to a federal circuit’s identification of a constitutional right “provides an automatic safe

harbor” to officials who violate that right, particularly where the weight of authority is otherwise “sufficiently clear that a reasonable official would understand that what he is doing violates” the Constitution. *Burgess v. Lowery*, 201 F.3d 942 (7th Cir. 2000).

To allow state officials to disregard the clear holding of a federal circuit court, buttressed by the unwavering agreement of a state’s appellate courts, would contradict this Court’s repeated holdings that, absent “sharp divi[sion]” among precedential authorities, *Stanton v. Sims*, 134 S. Ct. 3, 7 (2013) (per curiam), unambiguous federal circuit court rulings give government officials adequate “fair warning” that their conduct is unconstitutional and may subject them to liability. *See Camreta v. Greene*, 131 S. Ct. 2020, 2030 (2011) (circuit court rulings are “designed . . . with this Court’s permission, to promote clarity—and observance—of constitutional rules,” by “establishing controlling law and preventing invocations of immunity in later cases”); *Hope v. Pelzer*, 536 U.S. 730, 743 (2002) (corrections officers not entitled to qualified immunity where circuit precedent sent a “message” to “reasonable officers in that Circuit” that their conduct was unconstitutional); *United States v. Lanier*, 520 U.S. 259, 269, 270-71 (1997) (in the context of 18 U.S.C. § 242 prosecutions, as in § 1983 actions, defendants should be held liable where “a decision of a Court of Appeals” provides them with “fair warning” that their conduct is illegal). This case gives the Court no reason to disturb that settled

precedent.

**D. Compliance With *Earley's* Command
Presented No Dilemma**

Petitioners resisted *Earley's* holding from the start, even though at the time no ruling from any court indicated that administrative imposition of PRS was constitutional. Petitioners continued to resist as, within days, the New York state trial courts began to adopt *Earley's* reasoning and direct state officers not to enforce PRS terms that had not been judicially imposed. *See, e.g., Cephus*, 2006 WL 2714448. They still resisted after the Appellate Division did the same in February 2007 in a decision that then became binding on all state trial courts. They continued to resist over the following months as every Department of the Appellate Division agreed. Even after the New York Court of Appeals definitively held in April 2008 that PRS terms could not be enforced without court order, Petitioners *still* continued to enforce PRS where they knew that no sentencing court had imposed it. They did so until at least July 2009. *See* Pet. App. 109a. Petitioners' decision to disregard Respondents' due process rights for a period of over three years was not compelled by any "conflicting legal directives," Pet. at 30, of the Second Circuit and state courts.

Nor can Petitioners' "public safety" incantation excuse their conduct. Due process did not require anyone's "immediate[] release." Pet. at 3. After *Earley*, both due process and state law authorized

Petitioners to provide to the state’s district attorneys the information they had amassed concerning more than eight thousand defendants subjected to administrative PRS and to request resentencing of any defendant who had not yet completed his sentence. *See Dreher*, 46 A.D.3d at 1261; *cf. New York v. Williams*, 14 N.Y3d 198, 217 (2010) (Double Jeopardy prohibits resentencing after a defendant has completed his judicially imposed sentence). Even state trial courts that expressed uncertainty over *Earley*’s due process analysis ordered defendants to be resentenced, recognizing that the procedure would obviate any due process concern. *See, e.g., Edwards*, 2007 WL 969416.

As Petitioners acknowledge, defendants could not be retroactively sentenced to PRS if “independent . . . constitutional officers,” including state court judges, disagreed that § 70.45 required, or even permitted, the addition of PRS to defendants’ sentences. Pet. at 30-31. If they did disagree—as they often did—and declined to pursue or conduct resentencings, Petitioners were then—and only then—constitutionally obligated to “remove[defendants] from supervision . . . or immediately release[them] from . . . revocation terms,” Pet. at 3. Perhaps concerned that many judges would not agree that PRS terms were “mandatory, enforceable, and necessary for public safety,” Pet. at 3, Petitioners chose not to pursue the course available under both state and federal law, instead disregarding their constitutional and statutory obligations as set out by Second Circuit and every appellate court in New

York State. They had every reason to know as they did so that they were violating Respondents' due process rights.

II. THE SECOND CIRCUIT'S DUE PROCESS DECISION DOES NOT CONFLICT WITH ANY OTHER CIRCUITS', NOR IS IT WRONG

The Second Circuit correctly held that Petitioners violated Respondents' due process rights when they imposed and enforced criminal sentences longer than any imposed by a judge. Aside from inviting review for error correction, the Petition requests review that is unwarranted for two additional reasons.

First, the New York Court of Appeals has independently deemed Petitioners' conduct illegal as a matter of state law. The Second Circuit's ruling therefore has no prospective effect: It does not cast doubt on the legality of New York's sentencing scheme nor void any otherwise valid criminal penalties.

Second, the Second Circuit's 2006 judgment in *Earley* is not in meaningful conflict with the decisions of other courts. Petitioners cite three cases in support of a "conflict," but those cases held correction officers' conduct permissible under entirely distinct sentencing schemes.

A. The Second Circuit's Ruling Does Not Leave New York Law Unsettled

The Second Circuit's ruling deems unconstitutional conduct that is independently illegal under both New York's current sentencing regime, and the regime in place at all times relevant to Respondents' claims. Petitioners explain that New York "amended [its] statute[] to require judicial imposition of supervision terms going forward," Pet. at 20, but there can be no dispute that, even under the earlier versions of the statute relevant here, defendants had "a statutory right to have [their PRS terms] imposed by the sentencing judge," *Garner*, 10 N.Y.3d at 363, and to "hear the court's pronouncement as to what [their] entire sentence[s] encompass[ed]," *Sparber*, 10 N.Y.3d at 470. Whatever Petitioners' due process obligations may be, they unquestionably may not legally impose PRS on any defendant absent judicial order going forward, and they may not enforce PRS that was previously administratively imposed under earlier versions of § 70.45. The ruling in this case therefore has no prospective impact on the operation of New York's sentencing scheme or on Petitioners' conduct.

For the same reason, the ruling also has no impact on a single outstanding criminal sentence, let alone the "[m]any thousands" that Petitioners suggest, Pet. at 2. Every administratively imposed PRS term has been deemed void as a matter of state

law, and the state legislature has adopted procedures for courts either to “resentence[each] defendant to a sentence that includes a term of post-release supervision” or to “determine[] that it will not resentence the defendant.” N.Y. Corr. Law § 601–d(5). Defendants who are not resentenced to PRS cannot be subjected to it by Petitioners. More particularly, each Respondent’s administratively imposed PRS term has been deemed void, and its enforcement is illegal under state law regardless of this case’s outcome. Accordingly, this Court’s review is not required to bring clarity to the scope of permissible conduct of New York’s correction officers going forward.

B. There Is No Circuit Court Conflict

Petitioners argue that the Court’s attention is nonetheless needed to clarify the scope of permissible conduct by correction officers in *other* jurisdictions. They claim that this uncertainty arises from a division of authorities over the significance of this Court’s holding in *Wampler*. But the three cases that Petitioners cite to illustrate this division prove nothing more than that the Due Process Clause applied in different circumstances calls for different results.

1. Petitioners argue that the Second Circuit’s ruling in *Earley* is at odds with two habeas cases from the Ninth and Seventh Circuits. But the procedural postures of those cases make any comparison meaningless. *Carroll v. Daugherty*, 764

F.3d 786, 788 (7th Cir. 2014), and *Maciel v. Cate*, 731 F.3d 928 (9th Cir. 2013), considered habeas corpus petitions filed by individuals who were suffering statutorily mandated consequences of convictions that had not been pronounced by their judges at sentencing. The limited question that the cases addressed was therefore whether *Wampler* constituted clearly established Supreme Court precedent sufficient to warrant federal habeas review under the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”). The Seventh and Ninth Circuits held that it was not. This, by contrast, is a civil rights case under 42 U.S.C. § 1983, which turns on whether administrative imposition of PRS in fact violates due process, not on whether that violation is made clear by established Supreme Court precedent sufficient to satisfy AEDPA.

By framing the question here in terms of “*Wampler’s* relevance . . . to state sentencing procedures,” Pet. at 19, Petitioners attempt to narrow the constitutional question at issue. Petitioners sue for violations of the Due Process Clause, not *Wampler*. The Second Circuit’s conclusion that Respondents in this case had a due process right not to be subjected to deprivations of liberty that were never part of their sentences, and that that right was clearly established by the Second Circuit’s holding in *Earley*, can stand, but it does not necessarily fall, on the proper reading of *Wampler*.

2. Petitioners’ comparison of this case with *Maciel*, *Carroll*, and *Illinois v. McChriston*, is

additionally inapt because of the differences among the sentencing regimes at issue and the injuries complained of in each of the four cases. Because of these material differences, the Second Circuit's determination that Petitioners' rights were violated here does not imply the illegality of California or Illinois correction officers' conduct.

First, the difference between the liberty interests and, in turn, the due process considerations here and in *Maciel* are glaring. The court in *Maciel* denied an individual habeas relief from statutorily mandated sex-offender registration requirements. 731 F.3d 928 (9th Cir. 2013).¹¹ As the Ninth Circuit recognized, registration requirements are civil in nature—"burdensome regulation" as opposed to "*punishment*." *Id.* at 935. Their liberty implications do not approach those of supervised release. *Smith v. Doe*, 538 U.S. 84, 101-02 (2003). This Court's involvement is not needed to explain why greater due process protections attach to the former than the latter. *See Seling v. Young*, 531 U.S. 250, 266-67 ("[w]hether a confinement scheme is punitive has been the threshold question for some constitutional challenges," including due process challenges (citing *United States v. Salerno*, 481 U.S. 739 (1987))).

¹¹ Petitioner had also sought relief from terms of probation that were also administratively imposed, but the petitioner's parole term had expired by the time of his appeal, and the Ninth Circuit found the question of its enforceability moot. *Maciel*, 731 F.3d at 932.

Second, the equivalence that Petitioners attempt to draw between this case and the Illinois and California cases fails because the supervised release provisions at issue in those cases were in all respects mandatory, while New York Penal Law § 70.45 vests sentencing judges with the discretion to determine the length of PRS terms. For first-time offenders, § 70.45 has always set out applicable ranges and imposed on sentencing judges the “duty” to select an “appropriate period of post-release supervision.” *New York v. Hill*, 830 N.Y.S.2d 33, 40 n.7 (1st Dep’t 2007), *rev’d on other grounds*, 9 N.Y.3d 189 (2007); *see also N.Y. ex rel. White v. Warden*, 15 Misc. 3d 360, 833 N.Y.S.2d 363, 367 (Sup. Ct. Bronx Cnty. 2007) (the PRS sentence, under § 70.45(2)(d) or (e), is “not ‘precisely five years,’ ‘precisely three years,’ or any other period ‘precisely’ set by the Penal Law”).

In each of the cases that Petitioners cite, by contrast, defendants were sentenced pursuant to statutes that left “no room for the exercise of judicial discretion.” *Carroll*, 764 F.3d at 788 (emphasis supplied); *see id.* at 787 (“a three-year term of supervised release was required by statute to be part of his sentence”); *Illinois v. McChriston*, 4 N.E.3d 29, 32 (2014) (same); *see also* 730 ILCS § 5/5–8–1(d) (2004) (the “mandatory supervised release term shall be . . . for . . . a Class X felony . . . 3 years”). And in each of those cases, the court held that *Wampler* had not clearly established a due process right to judicial pronouncement of the *non-discretionary* sentencing terms at issue. But each court also acknowledged

that *Wampler* “expressly” applies to “discretionary sentencing terms” and recognized that “[t]he choice of pains and penalties, *when . . . committed to the discretion of the court*, [are] part of the judicial function.” *Maciel*, 731 F.3d at 934 (quoting *Wampler*, 298 U.S. at 463-64); *see also Carroll*, 764 F.3d at 788 (noting that by law a choice of penalties “had been committed to the sentencing judge”); *id.* at 789 (noting that “[t]he New York statute was indeed less clear than the Illinois statute regarding the mandatory character of post-release supervision”); *McChriston*, 4 N.E.3d at 36-37 (“[U]nlike the court in *Wampler*, the trial court had no discretionary power in this case.”).

Judgments that administrative imposition of supervision is unconstitutional in New York but not in Illinois reflect not disarray among the lower courts but differences in the sentencing schemes at issue. Petitioners argue that other courts have criticized the Second Circuit’s *reasoning* in *Earley*, but they have identified no conflict among the courts over the *judgment* that officers may not usurp the authority to determine the length of custodial sentences where that authority is by statute discretionary. *See Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (“[O]ur power is to correct wrong judgments, not to revise opinions.”).

Third, administrative imposition of PRS diverges from the practices challenged in the cases Petitioners cite because, under New York law, defendants have a statutory right to judicial

imposition of all aspects of their sentences. *See Murray v. Goord*, 1 N.Y.3d at 32; N.Y. Crim. Law §§ 380.20, 380.40, 380.60. In Illinois, by contrast, state law provided for the automatic inclusion of sentencing terms “by operation of law.” *McChriston*, 4 N.E.3d at 33. *Compare id. with N.Y. ex rel Gill v. Greene*, 12 N.Y.3d 1, 6 (2009) (“The problem in . . . *Earley* was that a part of the sentence—the PRS term—was never imposed.”).

Any administrative “enforcement” of a PRS term in New York violates defendants’ right under state law to be subject to PRS only when it is pronounced by the trial court and included in the commitment order. *Garner*, 10 N.Y.3d at 363; *Sparber*, 10 N.Y.3d at 470. Petitioners’ denial of Respondents’ state-law right to have judges and not Petitioners fix their punishment in the first instance presents an alternate basis for affirming the Second Circuit’s conclusion that Petitioners’ administrative imposition of PRS in New York violates due process—a basis that was apparently not available to prisoners in Illinois. *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (where state law requires jury sentencing, state courts may not enforce sentence not imposed by jury without violating Due Process guarantees).

C. *Earley* Is Sui Generis

The Second Circuit’s judgment holds that administrative imposition of PRS is unconstitutional in New York, where state sentencing law, *first*, vests

judges with discretion over the length of PRS terms and, *second*, deems a nullity any PRS term that was not both judicially pronounced and set forth in a commitment order. *See Murray v. Goord*, 1 N.Y.3d at 32. For these reasons, PRS terms in New York do not purport to be “automatic,” and answering the question that the Petition presents—whether “due process prohibits the automatic imposition of supervision and other postrelease sentencing terms by statute,” Pet. at 14—would not be dispositive of this case. Also for these reasons, the determination that administrative imposition of PRS in New York violates due process does not bear upon the constitutionality of correction officers’ conduct under materially different schemes in other states that *do* purport to authorize enforcement of non-discretionary criminal penalties absent judicial pronouncement. *See* Pet. at 19-20.

Petitioners are able to equate these other sentencing schemes with New York’s only by misconstruing New York’s Correction and Penal Laws. For a period of time, lower state courts made a similar mistake, misunderstanding § 70.45 to allow for the automatic inclusion of PRS terms in defendants’ sentences and overlooking the statutory requirements that all sentence elements be pronounced by the sentencing court and included in the commitment order. That began to change within months of *Earley*—but years before Petitioners changed their PRS enforcement practices—when, first, the Appellate Division and then the Court of Appeals clarified that “the Legislature did not

authorize DOCS to impose any period of post-release supervision,” and “to the extent that . . . prior decisions have held otherwise, they should no longer be followed.” *In re Dreher*, 46 A.D.3d at 1262; *see also Smith*, 37 A.D. 499 (decided Feb. 6, 2007). Arguably, for that brief period, a subset of New York defendants—only those for whom Penal Law § 70.45 set out a determinate PRS term rather than a discretionary range—were similarly situated to the Illinois defendants in *Carroll* and *McChriston*. Whether that subset of individuals would have been entitled to federal habeas relief had they sought it during that six month window has perhaps been retroactively rendered a disputed question in light of *Carroll*. But that question forms no part of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 2, 2014

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