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Qualified immunity and Post-Release Supervision: Defining a Right

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Qualified Immunity and Post-Release Supervision

DEFINING A RIGHT

INTRODUCTION

In the realm of constitutional torts, courts seek to balance citizens' constitutional rights with officials' effective performance of their duties.[1] In furtherance of this goal, the judiciary articulated the affirmative defense of qualified immunity, which limits liability when an official action does not violate a clearly established "statutory or constitutional right[] of which a reasonable person would have known."[2] In fact, the Supreme Court has found that a clearly established right is one that is "beyond debate."[3] While qualified immunity may seem like a simple test, defining when a right becomes clearly established often proves difficult. Because the underlying purposes of qualified immunity are to afford predictability and protection for officials and society, courts undercut the doctrine's primary functions when they split on whether a constitutional issue is clearly defined.

Among other questions, federal circuit courts have split on when it became clearly established that sentencing judges must orally pronounce statutorily mandated terms of post-release supervision, such as parole or sex offender registration. While post-release supervision is generally permissible, issues arise when the provision is required by statute, but state sentencing judges fail to mention the appropriate term at sentencing. When the judge omits these terms of post-release supervision, relevant state authorities are still required to enforce the statutory mandate. Federal circuit courts have disagreed about when it became clearly established that

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[1] Stacey Haws Felkner, *Proof of Qualified Immunity Defense in 42 U.S.C.A. § 1983 or Bivens Actions Against Law Enforcement Officers*, 59 AM. JUR. PROOF OF FACTS 3d 291 § 1 (2014).

[2] *Id.*

[3] Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011).

enforcing the omitted terms of post-release supervision was a constitutional violation for purposes of qualified immunity. The United States Court of Appeals for the Second and Ninth Circuits addressed this question within four months of each other in 2013, arriving at different conclusions.[4] In both cases, plaintiffs relied on a 2006 case from the Second Circuit, *Earley v. Murray*,[5] as the point at which the law in question was clearly established. In *Earley* the court granted a habeas petition on the grounds that the petitioner's term of post-release supervision was not orally pronounced at sentencing, it was administratively added, and was not a part of the sentence.[6] In *Vincent v. Yelich*, the Second Circuit agreed with the plaintiffs and concluded that defendant state officials were not entitled to qualified immunity.[7] In *Maciel v. Cate*, however, the Ninth Circuit found that *Earley* did not clearly establish the law.[8] This inconsistency provides an opportunity to investigate what qualified immunity is and how the Second and Ninth Circuits' applications accord with precedent on the subject.

This note argues that the Second Circuit did not properly apply the principles of qualified immunity in *Vincent*. Part I of this note will offer a historical overview of post-release supervision in New York. Part II will provide an analysis of the doctrine of qualified immunity. Part III will address Second Circuit precedent prior to *Vincent v. Yelich* and will analyze how the *Vincent* court concluded that *Earley v. Murray* clearly established the law for purposes of qualified immunity. This section will also address the Ninth Circuit's *Maciel v. Cate* decision and will analyze how that court concluded that *Earley* did not clearly establish the law under similar circumstances. Finally, Part V will argue that the Ninth Circuit's decision in *Maciel* offers a better interpretation of the law and leads to results more consistent with the central tenants of qualified immunity.

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[4] *See* Vincent v. Yelich, 718 F.3d 157 (2d Cir. 2013), *cert. denied*, 2015 WL 132971 (Jan. 12, 2015); Maciel v. Cate, 731 F.3d 928 (9th Cir. 2013).

[5] 451 F.3d 71 (2d Cir. 2006).

[6] *Id.* at 76.

[7] 718 F.3d at 160.

[8] 731 F.3d at 930, 933-34 & n.7.

I. HISTORICAL OVERVIEW OF NEW YORK STATE POST-RELEASE SUPERVISION

A. Inception of Jenna's Law and the Judicial Pronouncement Issue

On November 6, 1997, Albany City Police responded to a 911 call from the basement apartment of 22-year-old nursing student, Jenna Grieshaber.[9] When police entered the apartment, they found Jenna on the floor, brutally beaten, stabbed through the neck with the post of her antique bed frame.[10] The perpetrator of this heinous murder was later revealed to be one of Jenna's neighbors, Nicholas Pryor.[11] Mr. Pryor was a parolee, released early after serving five years on a stabbing conviction.[12] In the wake of overwhelming public response to this crime,[13] state officials introduced a major reform to the State's sentencing rules.[14]

New York Penal Law Section 70.45, dubbed "Jenna's Law" in memory of the slain nursing student, overhauled New York's existing scheme of indeterminate sentences and discretionary parole.[15] In its place was imposed a system of determinate sentences "followed by periods of mandatory post-release supervision."[16] After Jenna's Law passed on August 6, 1998,[17] members of the legal community engaged in the sentencing process operated under the belief that the post-release supervision (hereinafter PRS) terms were a mandatory portion of the sentence, regardless of whether the judge explicitly,

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[9] Grieshaber v. City of Albany, 279 A.D.2d 232, 233 (N.Y. App. Div. 3d Dep't. 2001); *Defendant is Convicted in 'Jenna's Law' Slaying*, N.Y. TIMES (Sept. 24, 1998), http://www.nytimes.com/1998/09/24/nyregion/defendant-is-convicted-in-jenna-s-law-slaying.html [hereinafter *Defendant Convicted*].

[10] *Grieshaber*, 279 A.D.2d at 234; *Defendant Convicted*, *supra* note 9.

[11] *Defendant Convicted*, *supra* note 9; Evelyn Nieves, *Our Towns; Lost Crusader Inspires 'Jenna's Law'*, N.Y. TIMES (May 3, 1998), http://www.nytimes.com/1998/05/03/nyregion/our-towns-lost-crusader-inspires-jenna-s-law.html.

[12] *Defendant Convicted*, *supra* note 9.

[13] *History*, JENNA FOUNDATION FOR NON-VIOLENCE (2006), http://204.200.130.247/History.html; Nieves, *supra* note 11.

[14] *See* 1998 N.Y. Sess. Laws 1 (McKinney).

[15] N.Y. PENAL LAW § 70.45 (McKinney 2011) (requiring courts to state an additional period of post-release supervision when imposing determinate sentences); Nieves, *supra* note 11.

[16] People v. Catu, 4 N.Y.3d 242, 244 (2005); N.Y. PENAL LAW § 70.45 ("When a court imposes a determinate sentence it shall in each case state not only the term of imprisonment, but also an additional period of post-release supervision as determined pursuant to this article.").

[17] *Overview of Key Provisions of Chapter 1 of the Laws of 1998—Jenna's Law*, N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., http://criminaljustice.ny.gov/pio/jenna.htm (last visited Feb. 1, 2015).

orally pronounced those terms at sentencing.[18] In *Gastelu v. Breslin*, the United States District Court for the Eastern District of New York held that "[u]nder New York law, a term of post-release supervision is imposed automatically . . . regardless of whether a defendant was informed of the term."[19] As a result of this understanding, Department of Corrections and Community Supervision (DOCCS)[20] officials would "administratively impose" the PRS term prescribed by Jenna's Law, even if the term was not orally pronounced by the judge at the sentencing hearing. This administrative practice was first called into question in 2005 by the New York Court of Appeals in *People v. Catu*.[21] There, the court vacated petitioner's guilty plea because he was not informed of the PRS term before accepting the plea.[22] However, *Catu* did not resolve "whether the administrative imposition of PRS was itself unconstitutional."[23] The Second Circuit addressed that question the very next year.[24]

In *Earley v. Murray*, decided in 2006, the Second Circuit vacated an inmate's PRS term, pending District Court determination of whether his petition for *habeas corpus* was timely filed.[25] In reaching this decision, the court relied upon a 1936 Supreme Court case, *Hill v. United States ex rel. Wampler*.[26] In *Wampler*, a court clerk added as a condition of release that the defendant had to pay his court-imposed fines.[27] The sentencing judge, however, did not order such a condition. The Court, in vacating the term imposed by the clerk, held that "[t]he only sentence known to the law is the sentence or judgment entered upon the records of the court[,]" and non-judicial officers cannot alter or affect that record.[28] The Second Circuit noted that *Wampler* was not directly analogous because the condition at

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[18] *See, e.g.*, Gastelu v. Breslin, No. 03 CV 1339 JG, 2005 WL 2271933, at *3 (E.D.N.Y. Sept. 12, 2005); People v. Adams, 13 A.D.3d 76, 76 (N.Y. App. Div. 1st Dep't 2004); Deal v. Goord, 8 A.D.3d 769, 769-70 (N.Y. App. Div. 3d Dep't 2004); People v. Bloom, 269 A.D.2d 838, 838 (N.Y. App. Div. 4th Dep't 2000).

[19] *Gastelu*, 2005 WL 2271933, at *3.

[20] In 2011, the New York State Department of Correctional Services (DOCS) and the New York State Division of Parole (Parole) were merged to form the New York State Department of Corrections and Community Supervision (DOCCS). For the sake of simplicity this note will refer to these entities both before and after the merger as DOCCS, except where explicit differentiation is necessary.

[21] *Catu*, 4 N.Y.3d at 244.

[22] *Id.* at 244-45.

[23] Scott v. Fischer, 616 F.3d 100, 106 (2d Cir. 2010).

[24] *See* Earley v. Murray, 451 F.3d 71 (2d Cir. 2006).

[25] *Id.* at 76-77.

[26] Hill v. United States *ex rel.* Wampler, 298 U.S. 460 (1936).

[27] *Id.* at 461-62.

[28] *Id.* at 464.

issue in *Wampler* was a matter of court discretion, whereas the imposition of a PRS term is a statutory mandate.[29] However, the Second Circuit interpreted the *Wampler* holding broadly.[30] The court held that Earley's sentence was unconstitutional because his term of post-release supervision was not orally pronounced at sentencing and was only administratively added later by DOCCS.[31] Specifically, the court stated "[t]he imposition of a sentence is a judicial act; only a judge can do it. The penalty administratively added by the Department of Corrections was, quite simply, never a part of the sentence."[32] Despite this finding, the court left open the possibility that a sentence could be subsequently amended, stating that "[o]ur ruling is not intended to preclude the state from moving in the New York courts to modify Earley's sentence to include the mandatory PRS term."[33] So, although the administrative imposition of PRS was found unconstitutional, the court acknowledged the validity of Jenna's Law itself and the authority of the New York State courts to take corrective action where a PRS term was administratively imposed.

After the *Earley* decision, "there was considerable confusion in New York State courts as to the applicability of the Second Circuit's decision."[34] In numerous appellate proceedings, two Departments of the New York Appellate Division continued to uphold administratively imposed PRS conditions.[35] Furthermore, state trial courts often determined that the decisions of the Appellate Division were directly controlling precedent, as opposed to the Second Circuit's holding in *Earley*.[36] This division among the New York state courts focused on the proper scope of *Earley*. For example, the First and Third Departments determined, in accord with *Earley*, that DOCCS's imposition of PRS conditions was impermissible.[37] However, by their reading, DOCCS was "only enforcing, not imposing, a part of petitioner's sentence which

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[29] *Earley*, 451 F.3d at 74.

[30] *Id.* at 75.

[31] *Id.* at 76.

[32] *Id.*

[33] *Id.*

[34] Hardy v. Fischer, No. 08 Civ. 2460(SHS), 2010 WL 4359229, at *3 (S.D.N.Y. Nov. 3, 2010).

[35] Garner v. N.Y. Dep't of Corr. Servs., 39 A.D.3d 1019, 1019 (N.Y. App. Div. 3d Dep't 2007), *rev'd*, Garner v. N.Y. Dep't of Corr. Servs., 10 N.Y.3d 358 (2008); People v. Thomas, 35 A.D.3d 192, 193-94 (N.Y. App. Div. 1st Dep't 2006).

[36] *See, e.g.*, People v. Edwards, No. 5588/2001, 2007 WL 969416, at *11 (N.Y. Sup. Ct. 2007); Quinones v. N.Y. Dep't of Corr. Servs., 14 Misc. 3d 390, 396 (N.Y. Sup. Ct. 2006).

[37] People v. Sparber, 34 A.D.3d 265, 265-66; *Garner*, 39 A.D.3d at 1019.

was automatically included by statute."[38] As such, DOCCS had "not performed any judicial function" which would fall astray of the principle of *Wampler* via *Earley*.[39] More simply stated, the First and Third Department had found that DOCCS did not add anything to the prisoner's sentences because there was nothing to add; these PRS terms were a statutory mandate that required DOCCS compliance, something quite distinguishable from the discretionary condition imposed in *Wampler*. This divide was only settled when the New York Court of Appeals finally agreed to hear two cases from the First and Third Departments in 2007.[40]

Those two cases, *Garner v. New York State Department of Correctional Services* and *People v. Sparber*, relied on New York procedural law to hold that terms of post-release supervision must be orally pronounced at sentencing in order to be valid.[41] The *Sparber* court first observed that Jenna's Law enumerated no procedural framework for imposing its mandatory PRS terms.[42] The court, however, applied New York Criminal Procedure Law Sections 380.20[43] and 380.40(1)[44] which require that courts "must pronounce sentence in every case where a conviction is entered and . . . [that] the defendant must be personally present at the time sentence is pronounced."[45] The court concluded that "[t]hese commands are unyielding."[46] In holding plaintiffs sentence invalid, the *Sparber* court explicitly determined that the sole remedy was not expungement of the PRS term, as petitioners in these cases often argued, but rather, resentencing.[47] The court in *Garner* took a more cautious approach, suggesting that officials "may," not "shall," seek resentencing.[48] Regardless, the New York Court of Appeals clarified that appropriate resentencing would allow for the required pronouncement of the PRS term and bring the sentence

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[38] *Garner*, 39 A.D.3d at 1019.

[39] *Id.*

[40] People v. Sparber, 34 A.D.3d 265 (N.Y. App. Div. 1st Dep't 2006), *lv. granted*, 2007 N.Y. Slip. Op. 98853(U) (Aug. 9, 2007); Garner v. N.Y. Dep't of Corr. Servs., 39 A.D.3d 1019 (N.Y. App. Div. 3d Dep't 2007), *lv. granted*, 2007 N.Y. Slip. Op. 8357 (Oct. 10, 2007).

[41] People v. Sparber, 10 N.Y.3d 457 (2008); Garner v. N.Y. Dep't of Corr. Servs., 10 N.Y.3d 358 (2008).

[42] *Sparber*, 10 N.Y. 3d at 469.

[43] N.Y. CRIM. PROC. LAW § 380.20 ("The court must pronounce sentence in every case where a conviction is entered.").

[44] *Id.* § 380.40(1) ("The defendant must be personally present at the time sentence is pronounced.").

[45] *Sparber*, 10 N.Y.3d at 469 (internal quotations omitted).

[46] *Id.* (citing Hogan v. Bohan, 305 N.Y. 110, 112 (1953)).

[47] *Id.* at 471 (citing People v. Sturgis, 69 N.Y. 2d 816, 818 (1987)).

[48] Garner v. N.Y. Dep't of Corr. Servs., 10 N.Y.3d 358, 363 n.4 (2008).

into accord with all substantive and procedural New York sentencing statutes. However, there were several issues that the court failed to explicate in choosing such a remedy.

B. Lingering Problems after Garner *and* Sparber*: Standing and Redress*

Garner and *Sparber* settled the debate on the legality of enforcing PRS terms that lacked judicial pronouncement, but they left unanswered two important questions. First was who had standing to challenge a potentially invalid PRS term and specifically, whether DOCCS had standing to challenge potentially invalid sentences in an effort to correct those sentences. Second was how to identify and correct invalid sentences. This was complicated by the fact that not every PRS term was invalid, as the sentencing judge in many cases did orally pronounce the term at sentencing.[49] Thankfully, at least for DOCCS, these questions were promptly answered by events in June and December of 2008.

The first issue, standing, proved to be the easier of the two issues to solve. Under New York Criminal Procedure Law after *Garner* and *Sparber*, "[a]part from the defendant, the right to appeal the propriety of a sentence is conferred exclusively upon the prosecutor."[50] DOCCS was "limited to informing the District Attorney of the county in which sentence was imposed that it appears to be erroneous."[51] This was a highly inefficient system, which often left DOCCS in the awkward position of enforcing invalid sentences until prisoners or the District Attorney brought corrective suit. The New York State legislature, recognizing the inefficiency of this system, passed two new provisions to New York Correction Law Section 601 and the New York Penal Law.[52]

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[49] *See, e.g.*, People *ex rel.* Joyner v. N.Y. Div. of Parole, No. 75045/07, 2007 WL 1345702, at *1 (N.Y. Sup. Ct. May 8, 2007).

[50] Murray v. Goord, 747 N.Y.S.2d 492, 495 (App. Div. 1st Dep't 2002), *aff'd*, 1 N.Y.3d 29 (2003) (citing N.Y. CRIM. PROC. LAW §§ 450.20(4), 450.30(2), (3) (McKinney 2004)).

[51] *Id.* (citing N.Y. CORRECT. LAW § 601-a (McKinney 2009).

[52] *See* Memorandum from Gov. David A. Paterson on Senate Bill No. 8714 (June 30, 2008), *available at* http://image.iarchives.nysed.gov/images/images/138872.pdf.; *see also* 2008 N.Y. Sess. Laws 3168 (McKinney). It stands to note that in the same bill, the New York State legislature also amended Jenna's Law to specifically require courts to orally pronounce the period of PRS at sentencing. Specifically, the court amended the language of Jenna's Law to say "*[w]hen a court imposes a* determinate sentence . . . *it shall in each case state not only the term of imprisonment, but also* an additional period of post-release supervision . . . . " 2008 N.Y. Sess. Laws 3168; *see also* Barry Kamins, *New Criminal Law and Procedure Legislation*, 81 N.Y. ST. B.A. J. 28, 28-29 (Feb. 2009).

New York Correction Law Section 601-d and New York Penal Law Section 70.85 took effect on June 30, 2008.[53] Generally speaking, Section 601-d authorizes DOCCS to directly inform the sentencing court when an inmate or parolee's PRS term may not have been orally pronounced at sentencing.[54] In practice, DOCCS did this by issuing a "601-d letter."[55] That notification then imposed certain timing requirements upon the court.[56] New York Penal Law Section 70.85 serves as an important modifier to the scope and effect of Section 601-d, providing that:

> This section shall apply only to cases in which a determinate sentence was imposed between September 1, 1998, and the effective date of this section, and was required by law to include a term of post-release supervision, but the court did not explicitly state such a term when pronouncing sentence. When such a case is again before the court pursuant to [§ 601-d] of the correction law or otherwise, for consideration of whether to resentence, the court may, notwithstanding any other provision of law but only on consent of the district attorney, re-impose the originally imposed determinate sentence of imprisonment without any term of post-release supervision, which then shall be deemed a lawful sentence.[57]

This statute modifies Section 601-d in two important ways. First, it imports a temporal limitation on the effect of Section 601-d by limiting its application to improper PRS terms imposed between the initial passage of Jenna's Law and the date these statutes were passed. Second, Section 70.85 tells us that courts can choose, on consent of the District Attorney, to resentence inmates and parolees without including a PRS term, thereby abrogating the mandate of Section 70.45.

Commentators at the time correctly noted that the legislature anticipated two scenarios that lead to this abrogation.[58] The first, which is explicitly contemplated in the statute, was when a defendant was sentenced via plea bargain and the plea agreement did not include the PRS term.[59] The New York Court of Appeals already held in *People v. Catu* that failure to notify a defendant about a portion of his sentence

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[53] *See* 2008 N.Y. Sess. Laws 3168.

[54] N.Y. CORRECT. LAW § 601-d (McKinney 2011).

[55] *See, e.g.*, People v. Guity, No. 2732-2002, 2011 WL 2315174, at *1 (N.Y. Sup. Ct. June 13, 2011); People v. Wells, 28 Misc. 3d 628, 630 (N.Y. Sup. Ct. 2010); People v. Pelsey, No. 91/2003, 2009 WL 3066662, at *2 (N.Y. Sup. Ct. Sept. 22, 2009).

[56] N. Y. CORRECT. LAW §§ 601-d(4)(a), (c), (d).

[57] N. Y. PENAL LAW § 70.85, supplemental practice cmt. (McKinney 2008).

[58] Kamins, *supra* note 52, at 29.

[59] N.Y. PENAL LAW § 70.85.

would enable the defendant to vacate that portion of the sentence.[60] The abrogation in Section 70.85 thus "avoids the necessity of a plea vacatur" in these cases.[61] The second situation commentators contemplated was when a defendant served his determinate sentence and was released from prison.[62] The concern here was that resentencing such a defendant with a term of PRS would violate the Constitution's prohibition on double jeopardy.[63] Irrespective of these issues, DOCCS now had a tool with which it could address the problem of improperly imposed PRS terms. From here, the department just had to process the tens of thousands of felons in their custody to whom the statutes may have applied.

The second issue following *Sparber* and *Garner* was how to determine which inmates and parolees were serving sentences with improper PRS terms. To address this problem, DOCCS sought a declaratory judgment in New York State Supreme Court.[64] In its complaint, DOCCS sought judicial approval of a plan to systematically correct sentences using several state agencies to review sentences and refer qualified persons for resentencing.[65] The action also sought an injunction that would allow DOCCS to maintain custody of different classes of defendants for specified periods of time.[66] DOCCS argued that this stay of release was necessary to alleviate two substantial policy concerns.[67] The primary fear was that without a clearly defined plan in the wake of *Garner* and *Sparber*, there would be a "proliferation of piecemeal, detached and inconsistent civil proceedings [that would] push the criminal justice system to the brink of chaos."[68] Furthermore, DOCCS felt it needed a clear plan to "address the potential public safety crisis inherent in releasing tens of thousands of violent felons into the community without supervision."[69]

DOCCS's request for injunctive relief focused upon a portion of the DOCCS plan that classified defendants into three groups.[70] Defendants in Subclass A were individuals who were

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[60] 4 N.Y.3d 242, 244 (2005); *see also* Kamins, *supra* note 52, at 29.

[61] Kamins, *supra* note 52, at 29.

[62] *Id.*

[63] *Id.*; *see* People v. Williams, 14 N.Y.3d 198, 214-17 (2010); *but see* People v. Lingle, 16 N.Y.3d 621, 630-31 (2011).

[64] State v. Myers, 22 Misc. 3d 809, 811 (N.Y. Sup. Ct. 2008).

[65] *Id.*

[66] *Id.* at 811-12.

[67] *Id.* at 811.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 811 n.5.

released on parole and then violated a term of their PRS and were sent back to jail.[71] Defendants in Subclass B were individuals who were still in jail serving their determinate sentence and had yet to be released.[72] Finally, defendants in Subclass C were individuals who had been released from jail either on conditioned release or to PRS who had not violated the terms of their release.[73]

On December 24, 2008, the New York State Supreme Court, Albany County, in *State v. Myers*, held that the complaint constituted "hypothetical questions resulting from" the passage of Section 601-d and that any decision "would be the equivalent of a[] request for an advisory opinion."[74] While the court declined to stamp DOCCS's proposed plan with their imprimatur or enjoin the release of defendant classes, they did not point to any deficiencies in the plan itself. In fact, this proposed plan and its inmate class system guided DOCCS actions going forward. DOCCS could systematically process the records of those still incarcerated in various state prisons, those considered to be in Subclass B, and have them resentenced as they were discovered. However, as for those inmates in Subclasses A and C, DOCCS could not learn about their potentially invalid PRS terms until they either violated the terms of their supervision or brought an action challenging their PRS.

II. QUALIFIED IMMUNITY

The broad overlying purpose of qualified immunity is to afford officials the ability to "reasonably . . . anticipate when their conduct may give rise to liability for damages."[75] In providing such predictability, qualified immunity seeks to balance citizens' constitutional rights and officials' effective performance of their duties.[76] Furthermore, the doctrine "protects public officials performing discretionary functions from personal liability in a civil suit for damages 'insofar as

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[71] *Id.*

[72] *Id.*

[73] *Id.* Under New York Penal Law § 70.45, defendants would serve six-sevenths of their determinative sentence if they exhibited good behavior. The remaining one-seventh of their determinate sentence was referred to as conditioned release. Conditioned release is served under conditions similar to PRS; however, it counts towards the determinate prison sentence as opposed to the PRS term. N.Y. PENAL LAW § 70.45, practice cmt. (McKinney 2011).

[74] *Myers*, 22 Misc. 3d at 819.

[75] Anderson v. Creighton, 483 U.S. 635, 646 (1987) (quoting Davis v. Scherer, 468 U.S. 183, 195 (1984)).

[76] *Id.*

their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[77] This means that while the doctrine looks to afford predictability and protection for officials, it will not do so at the expense of citizens' constitutional rights. In seeking to strike the appropriate balance, the Second Circuit has developed the following test: "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken."[78]

The Second Circuit's qualified immunity analysis is thus an objective analysis of whether an official violated a clearly established right.[79] Specifically, the Second Circuit has articulated that "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[80] In defining "clearly established" the Supreme Court has stated:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.[81]

On that same point, the Court has held that "existing precedent must have placed the statutory or constitutional question beyond debate."[82] In addition to articulating the pertinent standard for qualified immunity, the Supreme Court has made clear that qualified immunity is intended to afford "government officials breathing room to make reasonable but mistaken judgments," and to "protect[] all but the plainly incompetent or those who knowingly violate the law."[83] This, even more so than the standard for what is clearly established,

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[77] Lore v. City of Syracuse, 670 F.3d 127, 162 (2d Cir. 2012) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[78] *Id.* (quoting *Harlow*, 457 U.S. at 818-19).

[79] *Id.*

[80] *Id.* (quoting Saucier v. Kats, 533 U.S. 194, 202 (2001)); *see also* Wilson v. Layne, 526 U.S. 603, 615 (1999) ("[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.").

[81] *Anderson*, 483 U.S. at 640 (citations omitted).

[82] Stanton v. Sims, 134 S. Ct. 3, 5 (2013) (per curiam) (quoting Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011)).

[83] *Id.* (quoting *al-Kidd*, 131 S. Ct. at 2085).

demonstrates the Supreme Court's deference to official action in qualified immunity inquiries.

Such deference to officials may seem contrary to basic notions of the Constitution's purpose. Some might argue that any time a person's constitutional rights are violated they should have judicial recourse. As previously noted, however, the most basic policy consideration for qualified immunity is the balancing of citizens' constitutional rights with officials' effective performance of their duties.[84] It is important to understand this balance and why the Supreme Court finds value in this balance. In *Harlow v. Fitzgerald* the Court noted that:

> [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."[85]

The court in *Harlow* also noted that these social costs would be "incurred whether or not the official ultimately is vindicated of liability[,]"[86] and that this conclusion is premised on the rationale that many constitutional tort claims are "frivolous."[87]

Taken together, these considerations show the Court's awareness of the dangers of unfettered access to a constitutional tort cause of action. Similarly, constitutional law is often quite complicated, particularly to those citizens outside the legal community. In light of these considerations, the Court has determined that the line for liability should be drawn at plain incompetence. Accordingly, the Supreme Court has held that early resolution of the qualified immunity defense is an

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[84] *Anderson*, 483 U.S. at 646.

[85] Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (footnote omitted) (internal quotation marks omitted) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)); *see also* Alan K. Chen, Georgetown Univ. Law Ctr., Qualified Immunity: Unpacking the Issues, Presentation at the 27th Annual Section 1983: Civil Right Litigation Program (Apr. 16, 2009), *available at* 2009 WL 2436799, at *3.

[86] Chen, *supra* note 85, at *3; *see also* N.Y. PUB. OFF. LAW § 17(2)(a) (McKinney 2013) ("[T]he state shall provide for the defense of the employee in any civil action or proceeding in any state or federal court . . . which is brought to enforce a provision of [42 U.S.C. §§ 1981 or 1983]."); *id.* § (3)(a) ("The state shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court . . . . ").

[87] *Harlow*, 457 U.S. 827.

essential component of its proper functioning.[88] Commentators have noted "[t]he purpose of qualified immunity is to dismiss insubstantial cases at the outset of litigation."[89] Perhaps the best way to conceptualize the purpose and policy surrounding qualified immunity is to view the doctrine as "an immunity from suit rather than a mere defense to liability . . . [that] is effectively lost if a case is erroneously permitted to go to trial."[90]

The Supreme Court's most recent take on qualified immunity articulates two important principles in PRS cases. In *Stanton v. Sims*, a police officer forcibly entered private property while pursuing a fleeing suspect.[91] The Supreme Court reversed the Ninth Circuit's decision and held that the officer was entitled to qualified immunity.[92] The Court found that no clearly established law prohibited the officer's actions for two reasons. First, state court decisions in California had upheld the lawfulness of such an entry.[93] The Supreme Court found it "troubling" to impose "personal liability for damages" on a state officer under federal law "based on actions that were lawful according to courts in the jurisdiction where [the officer] acted."[94] Second, despite a Ninth Circuit ruling that one of its earlier decisions clearly established the relevant law, the Court noted that "two different District Courts in the Ninth Circuit . . . granted qualified immunity" to officers in such situations.[95] The Court found that such a finding bolstered the presumption of qualified immunity.[96]

In arriving at its conclusion, the Supreme Court definitively stated that "[w]e do not express any view on whether [the officer's] entry into [plaintiff's] yard . . . was constitutional."[97] However, the Court reasoned that such a finding was not dispositive of whether or not to grant qualified immunity, and was more concerned with whether the constitutional rule applied by the Ninth Circuit was "beyond debate."[98] Because of the conflicting state and federal cases on the issue, the Court concluded that while the officer "may have

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88 *Id.* at 817-18.
89 Chaim Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155, 1157 (2005).
90 Mitchell v. Forsyth, 472 U.S. 511, 512 (1985).
91 Stanton v. Sims, 134 S. Ct. 3, 4 (2013) (per curiam).
92 *Id.* at 7.
93 *Id.* at 5.
94 *Id.* at 7.
95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.* (quoting Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2085 (2011)).

been mistaken in believing his actions were justified . . . he was not 'plainly incompetent.'"[99] This case exemplifies the stringent standard for finding a "clearly established right." Even though the Ninth Circuit had already addressed the issue presented in *Stanton*, subsequent contradictory state and district court decisions granting qualified immunity created a situation where the right was not clearly established.

The *Stanton* decision affects qualified immunity in PRS cases in two important respects. First, it supports the position that courts should consider the New York state court decisions in the wake of *Earley* to determine whether a right was clearly established.[100] Second, the "overwhelming consensus" from the district courts following *Earley* that DOCCS officials were entitled to qualified immunity bolsters the presumption that these officials are in fact entitled to qualified immunity.[101] It makes sense to consider these factors in determining whether a right was clearly established. Qualified immunity serves to protect officials' best efforts in the face of uncertain law. Certainly, when state and district courts disagree on an issue, the law is uncertain. As an objective assessment of what a reasonable official should have known, there should be some degree of unanimity amongst the courts on a right before it is deemed clearly established. It does not make sense to hold officials who are not legal experts liable when even judges cannot agree on a matter of law.

III. WHEN WAS THE RIGHT CLEARLY ESTABLISHED?

A. Cases Leading up to Vincent v. Yelich

The next chapter in the history of PRS is the litigation brought by current and former New York State inmates who were subjected to invalid PRS terms. Prior to the Second Circuit's *Vincent* decision, district courts hearing these types of cases routinely granted DOCCS officials qualified immunity.[102]

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[99] *Id.* (quoting Malley v. Briggs, 475 U.S. 333, 341 (1986)).

[100] *See* Garner v. N.Y. Dep't of Corr. Servs., 39 A.D.3d 1019 (N.Y. App. Div. 3d Dep't 2007); People v. Thomas, 35 A.D.3d 192 (N.Y. App. Div. 1st Dep't 2006).

[101] Locantore v. Hunt, 775 F. Supp. 2d 680, 687 (S.D.N.Y. 2011); *see also* Henderson v. Fischer, No. 10 Civ. 2182(PAC)(HBP), 2013 WL 638930, at *4 (S.D.N.Y. Feb. 20, 2013); Ruffins v. Dep't of Corr. Servs., 907 F. Supp. 2d 290, 299 (E.D.N.Y. 2012); Pendleton v. Goord, 849 F. Supp. 2d 324, 331 (E.D.N.Y. 2012); Earley v. Annucci, Civ. No. 9:08-CV-669 (FJS/RFT), 2011 WL 7112917, at *6 (N.D.N.Y. Dec. 28, 2011), *report and recommendation adopted by* No. 9:08–CV–669 (FJS/RFT), 2012 WL 264210 (N.D.N.Y. Jan. 30 2012).

[102] *See, e.g.*, *Henderson*, 2013 WL 638930 at *4; *Ruffins*, 907 F. Supp. 2d at 299; *Pendleton*, 849 F. Supp. 2d at 331; *Earley*, 2011 WL 7112917 at *6; Vincent v. Yelich, 812 F.

Indeed, the Southern District of New York's decision in *Betances v. Fischer*, decided contemporaneously with *Vincent* in the Second Circuit, was an anomaly in concluding that DOCCS officials were not entitled to qualified immunity, as a "state court decision could not and did not place *Earley*'s holding in doubt."[103] In addition to the district courts, the Second Circuit also routinely granted DOCCS officials qualified immunity for actions taken prior to the passage of Section 601-d.[104]

The Second Circuit's decisions regarding PRS, in particular, deserve close examination. In *Scott v. Fischer*, a state prisoner brought a Section 1983 action alleging that DOCCS officials deprived her of due process by failing to remove her administratively-added PRS term either before or after she was rearrested for violating the terms of her PRS.[105] The Second Circuit examined these claims by considering whether the law was clearly established for purposes of qualified immunity both before and after *Earley*.[106]

First, the court addressed whether the right was clearly established prior to *Earley*. The court initially determined that *People v. Catu* did not clearly establish the law because the case did not address whether "administrative imposition of PRS was itself unconstitutional."[107] The court also dismissed the petitioner's claim that the right in question was defined in *Wampler*, concluding that the lack of a statutory mandate in *Wampler* rendered it factually distinguishable.[108] Nonetheless, it was acknowledged that the *Earley* court relied on

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Supp. 2d 276, 281 (W.D.N.Y. 2011); *Locantore*, 775 F. Supp. 2d at 687; *but see* Williams v. Fischer, No. 08-CV-4612 (DLI)(VVP), 2010 WL 3924688, at *6 (E.D.N.Y. Sept. 30, 2010); Santiago v. Fischer, No. 09-CV-1383 (DLI)(RML), 2009 WL 3852001, at *5-*6 (E.D.N.Y. Mar. 31, 2010). In both *Williams* and *Santiago*, defendants were arrested and incarcerated after the passage of § 601-d without judicial intervention, action clearly against the mandates of § 601-d. As such, they fall somewhat beyond the auspices of this discussion. It is important to note though that qualified immunity was never a blanket protection and hinges heavily upon the pertinent temporal facts pertaining to the sentencing of each defendant. While cases are brought in various state courts, the vast majority of cases are brought in federal courts. *See, e.g.*, Jackson v. Cuomo, No. 2008-0462, 2008 WL 2677252 (N.Y. Sup. Ct. 2008); People *ex rel.* Benton v. Warden, 20 Misc. 3d 516 (N.Y. Sup. Ct. 2008). The skew to the federal system probably in no small part results from the availability of damages and attorney's fees for claims brought pursuant to 42 U.S.C. § 1983.

[103] Bentley v. Dennison, 852 F. Supp. 2d 379, 390 (S.D.N.Y. 2012), *aff'd sub nom*. Betances v. Fischer, 519 F. App'x 39 (2d Cir. 2013).

[104] *See* Scott v. Fischer, 616 F.3d 100, 108 (2d Cir. 2010); *see also* Joyner-El-Qawi-Bey v. Russi, 439 F. App'x. 36, 37 (2d Cir. 2011); Rivers v. Fischer, 390 F. App'x. 22, 22 (2d Cir. 2010); King v. Cuomo, 465 F. App'x 42, 44-45 (2d Cir. 2010).

[105] *Scott*, 616 F.3d at 104-05.

[106] *Id.* at 106-09.

[107] *Id.* at 106.

[108] *Id.* at 107.

Wampler.[109] At this point the court made an important distinction, noting that, in *Earley*, the court granted relief because the right to not have an aspect of sentence administratively imposed was clearly defined for purposes of granting habeas corpus under the Antiterrorism and Effective Death Penalty Act (AEDPA).[110] However, a conclusion that a right was "clearly established" for purposes of relief under the AEDPA "does not require a conclusion that it was 'clearly established' in the qualified immunity context, which governs the conduct of government officials who are likely neither lawyers nor legal scholars."[111] Thus, a higher level of scrutiny applies when determining whether a right was clearly established for purposes of qualified immunity. Furthermore, "[t]here is a well-established 'general principle that, absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful.'"[112] Accordingly the court determined that:

> In the presence of a statute that requires all sentences for certain crimes to be accompanied by mandatory PRS, and New York cases that routinely upheld the administrative imposition of that PRS, we conclude that it was not clearly established for qualified immunity purposes prior to *Earley* that the administrative imposition of PRS violates the Due Process Clause.[113]

Next, the court addressed whether the right was clearly established law *after Earley*. The court began by saying "[w]hether *Earley* itself sufficed to clearly establish the unconstitutionality of administratively imposed PRS for a reasonable New York State correctional official may be open to question . . . ."[114] In *Scott*, the court then made two important findings. First, they noted that after *Earley* the fact that "two Departments of the New York Appellate division thereafter continued to find the practice constitutional" raised real concerns about whether the unconstitutionality was clearly established.[115] Further, the court stated that "[i]n circumstances of such apparent judicial confusion as to the

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[109] *Id.* at 106.

[110] *Id.*; *see* Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d)(1) (2012).

[111] *Scott*, 616 F.3d at 106.

[112] *Id.* (quoting Lemon v. Kurtzman, 411 U.S. 192, 208-09 (1973)).

[113] *Id.*

[114] *Id.*

[115] *Id.*

constitutional propriety of a statutory mandate, qualified immunity might well continue to shield state officials acting pursuant to that statute."[116] Yet, the court declined to make a firm determination on this matter and held that "[t]o resolve this appeal . . . we need not and therefore do not decide precisely when it became clearly established that the administrative imposition of PRS, even when statutorily mandated, is unconstitutional."[117] However, the court did add that even if DOCCS had authority to unilaterally revoke plaintiff's sentence, there was nothing to suggest that the Department "had such an affirmative legal duty, much less a clearly established one."[118] Furthermore, DOCCS "was not obligated affirmatively to seek resentencing for defendants with administratively-imposed PRS until 2008, when New York Correction Law Section 601-d became effective."[119] The Second Circuit ultimately held that defendants were entitled to qualified immunity for actions taken prior to *Earley*, and that the plaintiff failed to sufficiently plead facts establishing a claim for action taken after *Earley*.[120]

Three other Second Circuit cases are relevant to PRS qualified immunity.[121] In *Rivers v. Fischer*, an inmate alleged that DOCCS officials violated his constitutional rights by administratively imposing a PRS term and by failing to release him.[122] The Second Circuit held that DOCCS officials were entitled to qualified immunity on both of the plaintiff's claims.[123] Regarding the second claim in particular, the court stated that "[g]iven the ambiguity in the law" after *Earley*, "defendants . . . are entitled to qualified immunity."[124] In *Joyner-El-Qawi-Bey v. Russi*, the plaintiff claimed that DOCCS officials violated his constitutional rights by administratively

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[116] *Id.* at 107-08.

[117] *Id.* at 108.

[118] *Id.* at 109-10.

[119] *Id.* at 111; *see* N.Y. CORRECT. LAW § 601-d (McKinney 2011).

[120] *Id.* at 108-09.

[121] It should be noted that, unlike *Scott*, *Rivers*, *Joyner-El-Qawi-Bey*, and *King* are all reported in the federal appendix as opposed to the federal reporter. This is because they are slip opinions. As such, they do not bear the same precedential effect as an officially reported opinion. Second Circuit Local Rule 32.1.1 in fact states that such opinions "shall have no precedential effect." However, Federal Rule of Appellate Procedure 32.1 demands that such opinions, issued after January 1, 2007, can be cited to. Since *Rivers*, *Joyner-El-Qawi-Bey*, and *King* are directly on point in relation to *Vincent* and *Betances*, they should have been considered in those cases and should be considered in future PRS litigation before the Second Circuit.

[122] 390 F. App'x 22, 24 (2d Cir. 2010).

[123] *Id.* at 24.

[124] *Id.*

imposing PRS and continuing to enforce the PRS until his resentencing in 2009.[125] The Second Circuit affirmed the District Court's decision, which found that: "the defendants were not on notice that administratively imposing a term of supervision on [plaintiff] was unlawful when they did so no later than April 6, 2006[,]" and "defendants were justified in believing that the sole remedy for their error was a resentencing proceeding."[126] Accordingly, the court concluded that qualified immunity was appropriate.[127]

Finally, in *King v. Cuomo*, the plaintiffs brought due process and double jeopardy claims.[128] The due process claim alleged that altering the judicially imposed determinate sentence through the addition of the administratively imposed PRS term "upset [Plaintiffs'] expectations of finality[.]"[129] Regarding the double jeopardy claim, plaintiffs asserted that their PRS terms were not orally pronounced at sentencing and that the "administrative imposition of a PRS term following a judicially imposed determinate prison term constitutes 'multiple punishments for the same offense.'"[130] The *King* court affirmed the District Court's decision and stated that "because neither clearly established principles of double jeopardy nor due process prohibited defendants from administratively imposing legislatively mandated PRS terms before 2006, or from obtaining judicial resentencing of offenders already released from their determinate prison terms before 2010, the district court correctly granted dismissal."[131]

These cases answer the question of whether a right was clearly established in the wake of *Earley*. Both *Rivers* and *King* enumerate that the right was not clearly established after *Earley* because there was substantial confusion as to the state of the law. In *Joyner-El-Qawi-Bey* and *King*, the court dealt more explicitly with the state of the law both before and after *Earley*. Before *Earley*, the Second Circuit stated that there was no "notice" or clearly established law that would allow DOCCS officials to know that the imposition of PRS was unconstitutional. Additionally, the court found that, after *Earley*, these officials were "justified" in believing resentencing was the appropriate

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125 Joyner-El-Qawi-Bey v. Russi, 439 F. App'x 36, 37 (2d Cir. 2011).

126 Joyner-El-Quwi-Bey v. Russi, No. 09-CV-2047 (JG), 2010 WL 1222804, at *4 (E.D.N.Y. Mar. 23, 2010), *aff'd sub nom. Joyner-El-Qawi-Bey*, 439 F. App'x 36.

127 *Joyner-El-Qawi-Bey*, 439 F. App'x at 37.

128 465 F. App'x 42, 44 (2d Cir. 2011).

129 *Id.* at 45.

130 *Id.* at 44 (quoting United States v. Pettus, 303 F.3d 480, 487 (2d Cir. 2002)).

131 *Id.* at 45.

remedy because that was the accepted course of action by all parties involved in the process. Thus, *Scott* clarified that prior to *Earley*, there was no clearly established law prohibiting the administrative imposition of PRS. Moreover, *Rivers*, *Joyner-El-Qawi-Bey*, and *King* clarified there was no clearly established law *after Earley* prohibiting administrative imposition of PRS, and there was no clearly established law that would prevent the enforcement of a PRS term or resentencing of defendants to correct an otherwise invalid PRS term.

B. Vincent *and* Betances

When the Second Circuit decided *Vincent v. Yelich*[132] and *Betances v. Fischer*[133], it marked a stark departure from existing precedent. *Vincent* involved a combined appeal from two district court cases granting qualified immunity to DOCCS officials.[134] The combined complaints, brought under 42 U.S.C. Section 1983, alleged that defendants violated plaintiffs' due process rights as announced in *Wampler*.[135] The District Court held that "defendants were entitled to qualified immunity because the unconstitutionality of the administrative imposition of PRS was not clear prior to *Earley*."[136] In particular, the courts found that "[s]tate [court] cases decided after *Earley*[] made it unclear that administrative imposition of such conditions was unconstitutional."[137]

On appeal, plaintiffs contested defendants' entitlement to qualified immunity, arguing that *Earley* had "determined that the rights asserted by plaintiffs had been sufficiently clearly established decades earlier by *Wampler*."[138] The Second Circuit assessed this argument and the history of PRS and concluded that *Earley* "did not rule that those rights were clearly established by *Wampler* with respect to a defense of qualified immunity[.]"[139] Upon further analysis, however, the court determined that "*Earley*[] itself, decided on June 9, 2006, *did clearly establish* the unconstitutionality of the administrative imposition or enforcement of post release conditions that were not

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132 718 F.3d 157 (2d Cir. 2013).
133 519 F. App'x 39 (2d Cir. 2013).
134 *Vincent*, 718 F.3d at 160.
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.*

judicially imposed."[140] The court then reversed the judgment of the district courts and held that the DOCCS Executive Deputy Commissioner was not entitled to qualified immunity.[141]

In arriving at this conclusion, the Second Circuit focused upon two issues: (1) whether the state court decisions in the wake of *Earley* could lead to a finding that the law was not clearly established, and (2) the effect of Second Circuit precedent in denying qualified immunity to the *Vincent* defendants.[142] In determining that *Earley* clearly established the law for purposes of qualified immunity, the Second Circuit held that subsequent state court decisions contrary to *Earley* did not call the holding of that case into doubt. The court reasoned that "[s]tate and local officials are required to comply not just with state law but with federal law as well."[143] The court further concluded that subsequent state court decisions did not demonstrate *Earley* was "unclear in its holding[,]" and that "[f]ederal constitutional standards . . . define the requirements of procedural due process."[144]

The Second Circuit also determined that its precedent on qualified immunity in PRS cases was inapplicable in the *Vincent* case. While the court did not address the cases "decided by summary order," namely *King*,[145] *Rivers*,[146] and *Joyner-El-Qawi-Bey*,[147] the court did spend significant time distinguishing *Scott*. Specifically, the court articulated three reasons why *Scott* was inapplicable: (1) the *Scott* complaint did not argue that DOCCS failed to relieve the plaintiff of PRS or remove the PRS term from petitioner's record; (2) the argument that DOCCS had violated petitioner's due process rights by not taking action on the invalid PRS term was only raised in opposition to the motion to dismiss; and (3) Anthony Annucci, Acting Commissioner of DOCCS, was not a defendant in *Scott*.[148] The third rationale offered by the Second Circuit exposes a glaring peculiarity of the *Vincent* decision.

The Second Circuit in *Vincent* did not affirm the holdings of the district courts in their entirety but rather

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140 *Id.* (emphasis added).

141 *Id.*

142 *Id.* at 169.

143 *Id.* at 170.

144 *Id.* at 169 (first alteration in original) (quoting Russell v. Coughlin, 910 F.2d 75, 78 n.1 (2d Cir. 1990)); *see also* Vitek v. Jones, 445 U.S. 480, 491 (1980).

145 King v. Cuomo, 465 F. App'x 42 (2d Cir. 2011).

146 Rivers v. Fischer, 390 F. App'x 22 (2d Cir. 2010).

147 Joyner-El-Qawi-Bey v. Russi, 439 F. App'x 36 (2d Cir. 2011).

148 *Vincent*, 718 F.3d at 171-72.

affirmed them only so far as they applied to one defendant, Anthony Annucci.[149] The Second Circuit identified Annucci as DOCCS Executive Deputy and Commissioner and legal counsel.[150] The court found that, as such, he "coordinated the work of the entire [DOCCS] agency with respect to intergovernmental . . . issues."[151] Moreover, Annucci's duties in this capacity included seeking "a resolution of the PRS issues" and communicating with the courts "to have persons who should . . . have had PRS imposed as part of their sentences[] resentenced."[152] The Second Circuit determined that Annucci possessed particular knowledge of PRS litigation due to his role as DOCCS counsel and that Annucci, in light of that knowledge, may have been responsible for unacceptably slow PRS reform within DOCCS.[153]

On the same day *Vincent* was decided, the Second Circuit issued a decision in another PRS case, *Betances v. Fischer*.[154] *Betances* was an appeal from one of the few district court cases that denied qualified immunity to DOCCS officials.[155] On appeal, the Second Circuit affirmed the district court's decision.[156] *Betances* is significant because the decision utilized the reasoning the Second Circuit applied to Anthony Annucci in *Vincent* to deny qualified immunity to *all* of the named DOCCS officials.[157] However, it provided no rationale for extending that line of reasoning.[158] Recall that in *Vincent*, the court granted qualified immunity to all defendants other than Annucci on the argument that he had a special role as DOCCS counsel.[159] This case greatly expands the scope of liability under *Vincent*, which at first glance appeared to specifically level liability only against Annucci. Taken together, *Vincent* and *Betances* represent a broad rejection of qualified immunity for DOCCS officials acting pursuant to Jenna's Law. Moreover, these two cases firmly rely upon *Earley* as the point at which

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149 *Id.* at 178.

150 *Id.* at 160.

151 *Id.* at 173 (alterations in original) (citation omitted).

152 *Id.*

153 *Id.* at 173-74.

154 Betances v. Fischer, 519 F. App'x 39 (2d Cir. 2013).

155 Bentley v. Dennison, 852 F. Supp. 2d 379 (S.D.N.Y. 2012), *aff'd sub nom. Betances*, 519 F. App'x 39.

156 *Betances*, 519 F. App'x at 41.

157 *Id.*

158 *Id.*

159 Vincent v. Yelich, 718 F.3d 157, 173 (2d Cir. 2013), *cert. denied*, 2015 WL 132971 (Jan. 12, 2015).

judicial pronouncement of statutorily mandated terms of PRS became clearly established for purposes of qualified immunity.

C. Maciel v. Cate

Standing in contrast to *Vincent* is the Ninth Circuit's decision in *Maciel v. Cate*.[160] This case centered on a California statute nearly identical to Jenna's Law in the defects surrounding its implementation. California Penal Code Sections 290 and 3000 mandate that certain classes of sex offenders must register with the state after finishing their determinate sentences.[161] However, as was the case with Jenna's Law in New York, many sentencing courts did not orally announce that term of parole at sentencing.[162] As such, due process litigation of the same sort that followed Jenna's Law ensued and the Ninth Circuit engaged in a quite similar analysis to determine when it became clearly established that a judge must orally pronounce statutorily mandated PRS terms at sentencing.

In *Maciel*, the petitioner appealed the district court's denial of his petition for habeas corpus.[163] In his habeas petition, petitioner contended that California state courts failed to apply the principles of *Hill v. United States ex rel. Wampler* to his case.[164] The district court had concluded that this claim was without merit and denied the petition.[165] However, the court granted a certificate of appealability on the issue of "whether the imposition of a parole term violated *Wampler*."[166]

On appeal, petitioner asserted the issue granted under the District Court's certificate and also included a claim challenging the imposition of sex-offender registration requirements.[167] This second argument asserted that California violated petitioner's due process rights "by imposing a parole term and a sex-offender registration requirement that were not part of his criminal judgment."[168] In support of this argument, the petitioner asserted that *Earley* demonstrated that *Wampler*

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[160] Maciel v. Cate, 731 F.3d 928 (9th Cir. 2013).

[161] *Id.* at 931; CAL. PENAL CODE § 290 (West 2007); CAL PENAL CODE § 3000 (West 2014).

[162] *See, e.g.*, Maciel v. Cate, No. CV 10-7089-AG (RNB) (C.D. Cal. 2011); *In re* Douglas, 132 Cal. Rptr. 3d 582, 589 (Cal. Ct. App. 4th Dist. 2011); *In re* Maciel, No. B224912 (Cal. Ct. App. 2d Dist. 2010).

[163] *Maciel*, 731 F.3d at 930.

[164] *Id.*

[165] *Maciel*, No. CV 10-7089-AG (RNB).

[166] *Maciel*, 731 F.3d at 931.

[167] *Id.*

[168] *Id.* at 930.

was clearly established law.[169] The Ninth Circuit determined that petitioner's original claim was no longer a live controversy and dismissed that portion of the appeal.[170] The court also granted petitioner's request to expand the certificate of appealability,[171] finding that the question petitioner raised was "debatable amongst jurists of reason" and was "adequate to deserve encouragement to proceed further."[172] The Ninth Circuit further held that "[w]ith respect to [petitioner's] claim that imposition of the sex-offender registration requirement violates *Wampler*, we hold that the state court's decision was neither contrary to nor an unreasonable application of clearly established federal law."[173] The court also evaluated whether the statutory provisions in question were punitive or regulatory in nature and determined that because they were regulatory, *Wampler* was inapplicable on that ground.[174] While the court acknowledged that "[t]here are various grounds on which the California courts reasonably could have denied Maciel's *Wampler* claim", it affirmed the decision of the district court because "parole and registration requirements are imposed by law and are not subject to the sentencing court's discretion."[175]

To reach this conclusion, the court analyzed *Wampler* and questioned the Second Circuit's assumptions about extending the scope of *Wampler* in *Earley*.[176] Notably, the Ninth Circuit found it reasonable to determine that *Wampler* was inapplicable to mandatory sentencing schemes because that case "expressly applies only to discretionary sentencing terms . . . ."[177] Moreover, the court reasoned that such a finding could be supported by the conclusion that when a state statute requires imposition of a PRS term, an official does not violate due process by "carrying out that punishment."[178] In fact, in addressing the Second Circuit's conclusion, the Ninth Circuit stated "[i]f, in light of the underlying statutory scheme, the court's judgment of conviction and sentence of imprisonment *require* that the defendant be subject to additional punishment

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169 *Id.* at 934.
170 *Id.* at 931.
171 *Id.* at 932.
172 *Id.* (quoting Muth v. Fondren, 676 F.3d 815, 922-23 (9th Cir. 2012)).
173 *Id.* at 930.
174 *Id.* at 935.
175 *Id.* at 937.
176 *Id.* at 934-35.
177 *Id.* at 934.
178 *Id.* at 935.

after release, an administrator arguably has not 'amended' the judgment in any sense by carrying out that punishment."[179]

The Ninth Circuit also cast doubt on *Wampler*'s application to mandatory PRS schemes because *Wampler* "concerned illegitimate *detention*, not the collateral consequences of that detention."[180] The court thus concluded that a state court could have reasonably determined that *Wampler* was "limited [in its holding] to claims involving actual custody."[181] The Ninth Circuit has thus articulated two critical facets of *Wampler* that render it arguably inapplicable to mandatory schemes of PRS: discretionary sentencing and actual custody.

IV. *VINCENT* AND *MACIEL*—WHY *MACIEL* OFFERS A BETTER RESULT

A. Vincent—*What the Second Circuit Failed to Consider*

There are three major problems with the Second Circuit's determination in *Vincent* that *Earley* clearly established the law for purposes of qualified immunity. First, the court inexplicably dismissed the effect of state court cases in arriving at its conclusion. Second, the court failed to fully apply or consider prior cases in the Second Circuit and its district courts on the subject. Third, the court misused the doctrine of qualified immunity by applying it to certain defendants in a subjective manner. Exacerbating this final issue is that in *Betances v. Fischer*,[182] the Second Circuit extended the scope of its limited holding in *Vincent*, to apply to any DOCCS defendant.

The first two problems with *Vincent* are best viewed in light of the Supreme Court decision in *Stanton v. Sims*.[183] In *Stanton*, the Court found it "troubling" to impose liability on state officers under federal law for taking actions that were "lawful according to courts in the jurisdiction where [the officer] acted."[184] Additionally, the Court noted that although the Ninth Circuit determined one of its prior precedents clearly established the law, two district courts within the circuit granted qualified immunity in similar circumstances after that case. The Court felt that such a scenario called the clearly

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179 *Id.* (emphasis in original).
180 *Id.* at 934 (emphasis in original).
181 *Id.*
182 Betances v. Fischer, 519 F. App'x 39, 40-41 (2d Cir. 2013).
183 Stanton v. Sims, 134 S. Ct. 3 (2013).
184 *Id.* at 7.

established finding into doubt and "bolstered" a finding of qualified immunity.[185] Conversely, in *Vincent*, the Second Circuit dismissed the effect of state court decisions after *Earley* and also failed to adequately consider the fact that not only had the circuit itself granted qualified immunity to officials in PRS cases, but the district courts within the Second Circuit also routinely granted qualified immunity.[186]

The *Vincent* court determined that state court decisions following *Earley* did not make *Earley* "unclear in its holding."[187] The court further found that "federal constitutional standards . . . define the requirements of procedural due process."[188] These findings are clearly at odds with *Stanton*. The *Vincent* court's utter disregard of the state court decisions following *Earley* is enough to show error in the court's decision. However, it is also important to consider just how this omission affected the decision.

It makes sense that DOCCS officials, as state actors, would look to state courts for guidance on an issue pertaining to state sentencing. Beyond intuition, the law supports the proposition that DOCCS officials should have been able to place weight on the state court's decisions. It is a well-established principle of federalism that state courts are not bound by the decisions of federal district and circuit courts on matters of state law.[189] This rule is only abrogated where there is evidence of bad faith in the statute at issue or where the statute is unconstitutional.[190] Furthermore, federal courts generally defer to state courts on sentencing matters.[191] This rule is the result of the belief that sentencing issues are generally matters of policy and should be left for the state legislature to decide.[192] While the Second Circuit in *Earley* found that administrative imposition of PRS terms was unconstitutional, they never ruled that Jenna's Law itself was unconstitutional.[193] This means that after *Earley*, Jenna's Law was still a valid New York State statute. Furthermore, New

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185 *Id.*

186 Vincent v. Yelich, 718 F.3d 157, 178 (2d Cir. 2013).

187 *Id.* at 169.

188 *Id.* at 169 (quoting Russell v. Coughlin, 910 F.2d 75, 78 n.1 (2d Cir. 1990)) (first alteration in original); *see also* Vitek v. Jones, 445 U.S. 480, 491 (1980).

189 ASARCO, Inc. v. Kadish, 490 U.S. 605, 617 (1989); Diamond "D" Constr. Corp. v. McGowan, 282 F.3d 191, 200 (2d Cir. 2002).

190 *Diamond "D" Constr. Corp.*, 282 F.3d at 200.

191 *See* Ewing v. California, 538 U.S. 11, 24 (2003) (plurality opinion) (citations omitted).

192 *Id.* at 28.

193 Earley v. Murray, 451 F.3d 71, 74-77 (2d Cir. 2006).

York state court decisions in the wake of *Earley* upheld DOCCS action as valid on the grounds that DOCCS officials were "only enforcing, not imposing, a part of petitioner's sentence which was automatically included by statute."[194] This interpretation places DOCCS action outside of the administrative imposition prohibited by *Earley*. Decisively, *Garner* and *Sparber*, the cases that finally settled the issue, resolved the matter on New York procedural rather than constitutional grounds.[195] These cases exemplify the courts' confusion about how to define Jenna's Law and DOCCS action under the law. State and federal courts clearly held different views of the issue. As such, the state court decisions do in fact make *Earley* "unclear in its holding" despite the contrary assertion of the Second Circuit[196]

The second issue in *Vincent* was the court's failure to consider the district court cases granting qualified immunity as well as the failure to consider its own precedent in the wake of *Earley*. The *Vincent* court did not consider any of the district court cases in the wake of *Earley* that granted qualified immunity.[197] This is erroneous under *Stanton* and undoubtedly impacts the application of qualified immunity. The Supreme Court has determined that for official action to fall beyond the auspices of qualified immunity, "existing precedent must have placed the statutory or constitutional question beyond debate."[198] In *Scott*, the Second Circuit acknowledged that qualified immunity "governs the conduct of government officials who are likely neither lawyers nor legal scholars."[199] Therefore, in a situation where federal district court judges continued to grant qualified immunity on an issue, it is hard to fathom how that issue is beyond debate, or how those not versed in the law could be expected to make any sort of reasonable determination as to the state of the law.

Even if *Earley* did clearly establish the law, under *Stanton* the abundance of district court cases after *Earley* is enough to cast doubt upon the issue. This problem is exacerbated by the fact that the Second Circuit granted qualified immunity in PRS cases in *Scott* and also in *Rivers*, *King*, and *Joyner-El-Qawi-Bey*. While

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194 Garner v. N.Y. Dep't of Corr. Servs., 39 A.D.3d 1019, 1019 (N.Y. App. Div. 3d Dep't 2007).

195 People v. Sparber, 10 N.Y.3d 457, 469-70 (2008); *Garner*, 10 N.Y.3d at 360.

196 Vincent v. Yelich, 718 F.3d 157, 169 (2d Cir. 2013), *cert. denied*, 2015 WL 132971 (Jan. 12, 2015).

197 *See id.* at 169-70.

198 Stanton v. Sims, 134 S. Ct. 3, 5 (2013) (quoting Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011)).

199 Scott v. Fischer, 616 F.3d 100, 106 (2d Cir. 2010).

those last three cases are slip opinions and admittedly of debatable legal authority, it is not practical to ignore these decisions.[200] While the vaulted courtrooms of the federal circuits may not consider slip opinions as authoritative legal precedent, that distinction is lost upon a layperson. This concern is particularly acute in the PRS context because all of these lawsuits were brought against a relatively small number of people. In particular, Brian Fischer, the Commissioner of DOCCS at the relevant time, is named in nearly every single PRS case including the three Second Circuit slip opinions.[201] However, others such as Anthony Annucci and Robert Dennison, the former Commissioner of the Department of Parole, are named with near equal frequency. These individuals certainly relied upon cases in which they were personally involved to understand the state of the law, regardless of the precedential effect of those decisions. It would defy qualified immunity's practical foundation to ignore these cases.

One final issue with the *Vincent* decision is that the Second Circuit applied the objective qualified immunity test in a subjective fashion. The court asserted that Anthony Annucci, as DOCCS counsel, could not have misunderstood *Earley* or found that case ambiguous.[202] In support of this proposition, the Court cited testimony from Annucci that admittedly demonstrates his knowledge of *Earley* and his understanding of the holding.[203] These considerations are irrelevant, however, because qualified immunity is not a subjective individual defense. Rather, it is an objective defense based on an individual's official position. The ability to assert this defense is not lost based on individualized qualifications or opinions held by that person. In fact, the Supreme Court has specified, "a right must be sufficiently clear that *every reasonable official* would have understood that what he is doing violates that right."[204] The Second Circuit's subjective analysis regarding Mr. Annucci was improper and constitutes a misapplication of the law of qualified immunity. Furthermore, in *Betances v. Fischer*, the Second Circuit extended the subjective line of reasoning applied to Annucci to several other defendants. In so doing, the court determined that the defendants "ha[d] not presented any

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[200] *See* 2D CIR. R. 32.1.1; FED. R. APP. P. 32.1.

[201] *See* Joyner-El-Qawi-Bey v. Russi, 439 F. App'x 36 (2d Cir. 2011); King v. Cuomo, 465 F. App'x 42 (2d Cir. 2011); Rivers v. Fischer, 390 F. App'x 22 (2d Cir. 2010); *see also Vincent*, 718 F.3d 157; Betances v. Fischer, 519 F. App'x 39 (2d Cir. 2013).

[202] *Vincent*, 718 F.3d at 168.

[203] *Id.*

[204] Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012) (emphasis added) (internal quotation marks omitted).

basis . . . for distinguishing between the claims against Annucci and the claims against the other defendants."[205] Such an explanation leaves much to be desired and creates more questions than answers based on its reliance on arguments applicable solely to Anthony Annucci.

This analysis demonstrates why, as a matter of law, the Second Circuit's *Vincent* holding was incorrect. The Second Circuit's reasoning is incompatible with the Supreme Court's *Stanton* decision and applies the objective qualified immunity analysis in a subjective fashion. The Ninth Circuit's framework, as established in *Maciel*, is preferable for qualified immunity decisions. *Maciel* squarely dealt with how and when the judicial pronouncement of statutorily mandated PRS terms became clearly established. While *Maciel* admittedly addresses this question in a different context than *Vincent*, it directly examines the evolution of the issue through *Wampler* and *Earley*. Furthermore, *Maciel* offers valuable insight as to how an inquiry into whether a right was clearly established should be conducted. As such, *Maciel* provides the proper analysis for this question.

B. Why Maciel*'s Analysis Produced Better Results*

In the future, courts should apply the *Maciel* decision's reasoning because the result better comports with the goals of qualified immunity. *Maciel* is a more astute analysis of the law as it developed through *Wampler* and *Earley*. Particularly relevant is the *Maciel* court's examination of the discretionary term and actual custody issues in *Wampler*. The Ninth Circuit determined that because of these variances in *Wampler*, "fair minded jurists could disagree" about *Wampler*'s application in *Earley*, which plainly contradicts the *Vincent* court's decision. However, in light of what constitutes a clearly established right, *Maciel* offers a better analysis of the law and provides better results.

Before addressing the arguments in favor of *Maciel*, it is important to look at the relationship between *Maciel* and *Vincent*. *Maciel* was a habeas corpus case, not a constitutional tort claim like *Vincent*, where qualified immunity was asserted as a defense. While, the "clearly established" test is utilized in both the habeas corpus and qualified immunity contexts, it is a much more stringent test as applied to qualified immunity.[206] In the habeas corpus context, the test is whether "fair minded

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[205] *Betances*, 519 F. App'x at 41.

[206] *See* Maciel v. Cate, 731 F.3d 928, 937 (9th Cir. 2013); *Vincent*, 718 F.3d at 166.

jurists could disagree."[207] In the qualified immunity context, the test is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[208] Despite these differences the analysis for what constitutes clearly established generally follows the same analytical framework in both the habeas corpus and qualified immunity contexts.

The most important consideration in *Maciel* is the effect of a mandatory statute upon the analysis. The *Maciel* court determined "that when a state statute 'require[s] that the defendant be subject to additional punishment after release' an administrative official does not violate due process by 'carrying out that punishment,' even when no judge pronounced it."[209] This is the exact point made by the New York State courts after *Earley*. Likewise, the *Maciel* court primarily relied upon this point in determining that there was no clearly established right. This determination goes beyond the principle from *Stanton* that state court decisions should be considered in a qualified immunity analysis. *Maciel* questioned the very foundation of an official's liability under *Vincent*. The Ninth Circuit speculated that not only is the law not clearly established, but also that no violation may exist in enforcing a mandatory PRS statute. *Earley* used *Wampler* for the proposition that a sentence "may not be increased by an administrator's amendment."[210] But this has little application to the issue of DOCCS enforcement of a valid state statute.

Maciel also distinguishes *Wampler* as a case involving actual, corporeal custody.[211] It is uncertain just how this case applies to a supervision scheme that is the collateral consequence of detention.[212] Similar to the discrepancy between mandatory and discretionary, the Ninth Circuit found that this was a valid ground by which the state courts could distinguish *Wampler*.[213] This matter, while not as critical as the mandatory versus discretionary issue, further exemplifies the tentative grounds that connect *Earley* and *Wampler*, and demonstrates the confusion later courts had in applying *Earley*. Because

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[207] Harrington v. Richter, 131 S. Ct. 770, 786 (2011) (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001).

[208] Lore v. City of Syracuse, 670 F.3d 127, 162 (2d Cir. 2012).

[209] Letter from Steven C. Wu, Deputy Solicitor General, State of N.Y. Office of the Att'y General, to Catherine O'Hagan Wolfe, Clerk of Court, United States Court of Appeals for the Second Circuit (Oct. 8, 2013) (on file with author) (quoting *Maciel*, 731 F.3d at 930).

[210] Earley v. Murray, 451 F.3d 71, 75 (2d Cir. 2006).

[211] *Maciel*, 731 F.3d at 934.

[212] *Id.*

[213] *Id.*

Earley was an extension and amplification of the law, its scope and proper application were ambiguous. *Maciel* recognizes this and speaks to the reasonableness of the California state courts in distinguishing *Wampler* from their statutorily mandated PRS scheme. The Ninth Circuit's analysis is reflective of how the Second Circuit should have applied qualified immunity to DOCCS officials' actions taken in response to Jenna's Law.

Maciel's real value is that it highlights the Second Circuit's logical leap to extend *Wampler* to *Earley*. Where the law is stretched so thin, questions arise as to its applicability. This was precisely the problem after *Earley*. State and federal courts did not know how to interpret or apply the law. As such, there was a great deal of confusion on behalf of both judges and the DOCCS officials charged with continuing to enforce Jenna's Law. *Maciel*'s analysis is appropriate because it recognizes this confusion and the state of the law at the relevant times as it applied in California. *Maciel's* analysis is also favorable because it exposes the tentative ground upon which *Earley* rests. These considerations point to a finding that the law was not clearly established.

CONCLUSION

The Ninth Circuit's *Maciel* approach is appropriate because it acknowledges the tenuous connection between *Wampler* and *Earley*.[214] The Second Circuit's *Earley* decision took this connection for granted. In the context of a radical redefinition of the law, as occurred with the *Earley* decision, there will inevitably be growing pains. The Supreme Court has acknowledged the existence of these growing pains.[215] Thus, in *Stanton*, the Court determined that state court decisions and federal district court decisions granting qualified immunity should be considered in determining whether a right was clearly established.[216] This is true even when a circuit court has made a determination that the right was clearly established.[217] The Second Circuit failed to see the confusion generated by the decision in *Earley* because they did not consider the appropriate factors articulated in *Stanton* and applied in *Maciel*.

It is still unclear whether judges at sentencing must orally pronounce statutorily mandated terms of post-release supervision. Perhaps they should. *Wampler* may even be the

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[214] *Id.*
[215] Stanton v. Sims, 134 S. Ct. 3, 5-7 (2013).
[216] *Id.* at 5-7.
[217] *Id.*

answer to this question; or rather, extending the holding of *Wampler* to cover statutory mandates as well as administrative imposition may be the answer. However, *Earley* does not make that clear. *Earley* only presents the idea that it is a possibility. Yet, just as *Maciel* and the numerous New York state court opinions following *Earley* demonstrate, this possibility is easily rebutted because the case of a statutory mandate is so readily distinguishable from administrative imposition. Significantly, *Maciel* also identifies that *Earley* is an insufficient basis for remedy. Qualified immunity will not hold officials responsible when such a state of legal confusion exists. This is not to say that those affected by Jenna's Law should be left without a remedy. There are myriad remedies available to aggrieved individuals, including state Article 78 proceedings, habeas corpus petitions, and seeking of a 601-d letter.[218] These actions could result in removal of the PRS terms or resentencing, which are certainly valid remedies considering that these were all lawfully convicted, violent felons. What cannot stand is the existence of a damages suit against DOCCS officials. To find otherwise defeats the stated purposes of qualified immunity: to protect "all but the plainly incompetent or those who knowingly violate the law."[219] The decision in *Maciel* better reflects these considerations. Thus, *Maciel* offers a superior approach to defining when it became clearly established that sentencing judges must orally pronounce statutorily mandated terms of post-release supervision for purposes of qualified immunity.

Connor O'Shea[†]

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[218] *See* Earley v. Murray, 451 F.3d 71, 75 (2d Cir. 2006); Garner v. N.Y. Dep't of Corr. Servs., 10 N.Y.3d 358, 362 (2008); People v. Pelsey, No. 91/2003, 2009 WL 3066662, at *2 (N.Y. Sup. Ct. Sept. 22, 2009).

[219] *Stanton*, 134 S. Ct. at 5 (citations omitted).

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