No. _____ - _____ 071043 FEB 11 2008

IN THE

Supreme Court of the United States

NEW YORK,

Petitioner,

- versus -

ANTHONY HILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under *Santobello v. New York*, 404 U.S. 257 (1971), is specific performance an appropriate remedy for the plea court's failure to inform a defendant that he will be required to serve a period of post-release supervision following his release from prison?

2. Does the "harmless error" doctrine apply to the plea court's failure to inform a defendant that he will be required to serve a period of post-release supervision?

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In The
SUPREME COURT OF THE UNITED STATES

NEW YORK,

Petitioner,

-versus-

ANTHONY HILL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

The State of New York respectfully petitions for a writ of *certiorari* to the New York Court of Appeals in *People v. Anthony Hill*, 9 N.Y.3d 189, 849 N.Y.S.2d 13 (N.Y. 2007).

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 9 N.Y.3d 189, 849 N.Y.S.2d 13 (N.Y. 2007), and is reproduced in the appendix at pages 1a-9a. The opinion of the New York Appellate Division, First Department, is reported at 39 A.D.3d 1, 830 N.Y.S.2d 33 (N.Y. App. Div. 2007), and is reproduced in the appendix at pages 10a-40a. The opinion of the trial court (New York Supreme Court, County of New York) is reproduced in the appendix at pages 41a-46a.

STATEMENT OF JURISDICTION

The New York Court of Appeals issued its opinion reversing the judgment on November 15, 2007. (App. 1a).[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Respondent Anthony Hill was charged in a 32-count indictment with raping, sodomizing, and sexually abusing his daughter. (App. 6a, 10a, 41-42a). In the midst of trial, following his daughter's direct-examination testimony, respondent pleaded guilty to one count of first-degree rape, in full satisfaction of the indictment. (App. 1a, 6a, 10a-11a, 42a). In exchange for his plea, respondent was promised a sentence of 15 years in prison. (*See* App. 1a, 6a, 11a, 42a). The court imposed a prison sentence of 15 years. (App. 1a, 6a, 11a, 42a). The court did not inform respondent that, pursuant to New York law, he was required to serve a period of

[1] Page references preceded by "App." are to petitioner's separately-bound appendix.

post-release supervision ("PRS") following his release from prison. (App. 1a, 6a, 11a, 42a).[2]

Approximately two years later, respondent filed a post-judgment motion to vacate his conviction, pursuant to section 440.10 of the New York Criminal Procedure Law. Respondent alleged that his plea was involuntary, because he had not been informed of the PRS requirement. (App. 6a, 11a, 42a-43a). While recognizing that respondent had not been informed about PRS, the trial court declined to vacate his plea. Instead, to afford respondent the benefit of his original bargain, the court resentenced respondent to 12 ½ years in

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[2] As a first-time violent felon convicted of a class B violent felony, respondent was required to serve a PRS term of at least 2 ½ years and not more than 5 years. *See* N.Y. Penal Law § 70.45(2)(f). Under the law as it stood at the time of respondent's original sentence, a 5-year PRS period applied automatically if the judge did not specify a shorter period. *See People v. Adams*, 13 A.D.3d 76, 785 N.Y.S.2d 331 (N.Y. App. Div. 2004) ("the statutory period of supervision . . . is automatically five years . . . unless the court specifies a shorter period"). More recent precedents of the Appellate Division, First Department, hold that, where the trial court has discretion to set the length of the PRS term, it must pronounce the PRS term at the sentencing hearing and enter it on the record. *See, e.g., People v. Williams*, 44 A.D.3d 335, 843 N.Y.S.2d 561 (N.Y. App. Div. 2007) (remanding for trial judge to set length of PRS term); *cf. Earley v. Murray*, 451 F.3d 71, 74-77 (2d Cir. 2006) (holding that due process required trial judge to pronounce sentence), *reh'g denied*, 462 F.3d 147 (2006), *cert. denied*, 127 S. Ct. 3014 (2007).

prison, to be followed by 2 ½ years of PRS. (App. 4a-5a, 11a, 44a-46a).

On appeal, the New York Appellate Division, First Department, affirmed respondent's conviction, by a vote of three to two. The Appellate Division held that respondent suffered no prejudice from the plea court's failure to inform him of PRS, because his ultimate sentence comported with his reasonable expectations. (App. 32a-37a). The two dissenting justices opined that, even though the trial court's remedy was "sensible," recent precedents of the New York Court of Appeals dictated that respondent's guilty plea was void from the outset. (App. 37a-40a).

The New York Court of Appeals reversed, by a vote of four to three. (App. 1a-9a). The majority held that when a defendant is not informed of a "direct consequence" of a guilty plea, the plea "cannot be deemed knowing, voluntary, and intelligent." (App. 2a). The court continued that the "constitutional defect lies in the plea itself and not in the resulting sentence." (App. 2a). Hence, the court concluded, "vacatur of the plea" is the only appropriate remedy, because it "returns a defendant to his or her status before the constitutional infirmity occurred." (App. 2a-3a).

The majority stated further that "harmless error analysis" does not apply to the plea court's failure to inform a defendant of a PRS term. (App. 4a). Instead, the majority ruled that the plea was void from the outset. The court explained:

> Here, at the time of his plea, defendant was not informed that a period of postrelease supervision would follow his term of incarceration. Thus, defendant did not possess the requisite information knowingly to waive his rights and must be permitted to withdraw his plea. That the trial court ultimately resentenced defendant to a total period of incarceration (12 ½ years) plus postrelease supervision (2 ½ years) equal to his originally promised sentence of incarceration does not change this conclusion.

(App. 4a-5a).[3]

In dissent, three judges argued that respondent's guilty plea need not be vacated,

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[3] In a footnote, the court observed that respondent might face "more incarceration" under the new sentence than promised, because if he violated PRS near the end of his term of supervision, he could receive "an additional six months' incarceration beyond the term of postrelease supervision." (App. 5a n. 2) (*citing* N.Y. Penal Law § 70.45(5)).

because he received the "full benefit of his bargain." (App. 8a). In fact, he received a "windfall," because he initially expected to serve 15 full years in prison. (App. 8a). Additionally, the dissent observed that the trial court had "good reason to choose the remedy of specific performance over vacatur of the plea," because the prosecution would be "severely prejudiced" if the victim, respondent's daughter, "was subjected to testifying once again at a new trial after several years have passed." (App. 8a).

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE NEW YORK COURT OF APPEALS CONFLICTS WITH THIS COURT'S LONGSTANDING DECISION IN *SANTOBELLO V. NEW YORK.*

To begin, the decision of New York Court of Appeals conflicts with the longstanding rule of *Santobello v. New York*, 404 U.S. 257 (1971).

The pertinent facts are beyond dispute. At the plea hearing, the court failed to inform respondent of the PRS requirement. The trial court attempted to cure that error by modifying respondent's sentence to comport with his reasonable expectations under the bargain. In that regard, the trial court modified respondent's sentence to 12 ½ years in prison and 2 ½ years of PRS, to comport with respondent's expectation that he would serve no more than 15 years in state custody. The New York Court of Appeals held,

however, that respondent's guilty plea was void from the outset, and thus due process required its vacatur.

As *Santobello* makes clear, the New York Court of Appeals wrongly concluded that the sole permissible remedy was vacatur of respondent's guilty plea. In *Santobello*, the prosecutor promised the defendant, in exchange for his guilty plea, that the state would make no recommendation regarding the sentence. However, a new prosecutor who was later assigned to the case violated that promise, recommending that the defendant receive the maximum sentence. *See Santobello*, 404 U.S. at 258-59. On appeal, the defendant contended that he should have been permitted to withdraw his guilty plea. *See id.* at 263. He argued that, when a promise made in exchange for a guilty plea is broken, that "undercuts the basis for the waiver of constitutional rights implicit in the plea." *See id.* at 268 (Marshall, J., dissenting).

While finding that the broken promise represented constitutional error, this Court rejected the defendant's claim that his plea must be vacated. Instead, this Court held that the state court had discretion to determine whether the circumstances warranted "only that there be specific performance of the agreement on the plea, in which case [the defendant] should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by [the defendant], *i.e.*, the opportunity to withdraw his plea of guilty." *Santobello*, 404 U.S. at 263. Hence,

this Court held that a plea induced by an unfulfilled promise is not void from the outset. Instead, the validity of the plea turns on whether the promise is ultimately performed.

Applying *Santobello* to the present case, the state court had two options. First, it could grant respondent the remedy he sought: vacatur of his guilty plea. Alternatively, it could grant respondent the benefit of his bargain: that he would serve a total of 15 years, and no more, in state custody. The trial court chose the second option, reducing respondent's 15-year prison sentence to 12 ½ years, to be followed by 2 ½ years of PRS. The new sentence granted respondent the benefit of his bargain. In fact, it granted him a windfall, since he would now serve the final 2 ½ years under the less restrictive custody of post-release supervision. Additionally, the trial court's remedy served the interest of justice, because the prosecution and the victim would suffer hardship from a new trial years after the crime.

Contrary to the holding of the New York Court of Appeals, the defect in the plea colloquy *could* be cured, and harmless error analysis *did* apply. The guilty plea was not void, so long as respondent ultimately received the benefit of his plea bargain.

To be sure, the state court could have decided, in its discretion, that withdrawal of the plea was the most appropriate remedy under the circumstances. But the Court of Appeals made no such finding. The

lower state courts, which considered that question, found that justice was better served by a modification of respondent's sentence. The Court of Appeals did not dispute that conclusion, holding instead that vacatur of respondent's guilty plea was the only permissible remedy. That holding was plain error.[4]

2. THE DECISION OF THE NEW YORK COURT OF APPEALS CONFLICTS WITH THE HOLDINGS OF EVERY FEDERAL CIRCUIT TO ADDRESS THE ISSUE.

Additionally, the decision of the New York Court of Appeals conflicts with the holdings of every federal appellate court to address the issue. Federal courts have found harmless the failure to inform a

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[4] In the post-conviction proceedings, respondent testified that he preferred to serve the final 2 ½ years in prison instead of under PRS. The trial court did not credit respondent's testimony, finding it "disingenuous." (App. 46a). In any event, even if the state court had credited respondent's assertion, it would not have been dispositive. A defendant is entitled to have only his *reasonable* expectations under a plea agreement fulfilled, not his subjective preferences. *See Paradiso v. United States*, 689 F.2d 28, 31 (2d Cir. 1982) ("In determining what is reasonably due a defendant the dispositive question . . . is what the parties to this plea agreement reasonably understood to be the terms of the agreement") (internal quotations omitted); *People v. Cataldo,* 39 N.Y.2d 578, 580, 384 N.Y.S.2d 763, 763-64 (1976) ("[c]ompliance with a plea bargain is to be tested against an objective reading of the bargain, and not against a defendant's subjective interpretation").

defendant about a term of supervised release (the federal analog to PRS), so long as the combined prison sentence and supervised release term do not exceed the total amount of time that the defendant knew he could spend in prison. *See, e.g.*, *United States v. Alber*, 56 F.3d 1106, 1109-10 (9th Cir. 1995) (upholding guilty plea: defendant was informed that he could receive a prison sentence of up to 25 years, and the prison and supervised release terms imposed by the court totaled only 11 years); *United States v. Good*, 25 F.3d 218, 220-21 (4th Cir. 1994) (failure to advise about supervised release is "harmless error if the combined sentence of incarceration and supervised release actually received by the defendant is less than the maximum term he was told he could receive"); *United States v. Garcia*, 983 F.2d 625, 628 (5th Cir. 1993) (failure to advise of supervised release harmless if "the sentence actually imposed cannot restrict the defendant's liberty for a period exceeding the statutory maximum as advised"); *United States v. Saenz*, 969 F.2d 294, 297 (7th Cir. 1992) (reversal not required for failure to inform defendant of supervised release unless the "term of supervised release plus the prison term . . . exceeds the maximum prison term of which the defendant was advised"); *United States v. Clay*, 925 F.2d 299, 303 (9th Cir. 1991) (if defendant "knew before pleading guilty that he could be sentenced to a term as long as the one he eventually received, then the failure to inform him of the supervised release term did not affect his substantial rights"); *see also United v. Andrades*, 169 F.3d 131, 134 (2d Cir. 1999) (holding, as a general rule, "that the error is harmless where the district court misinforms a

defendant of the applicable supervised release term and the total sentence of imprisonment and supervised release actually imposed is less than that described during the plea allocution").

Federal courts have ruled similarly in cases involving probationary sentences and special parole terms. *See Paradiso, supra*, 689 F.2d at 30-31 (upholding plea where defendant was promised an aggregate prison term of no more than 10 years and received a sentence of 8 years in prison consecutive to 2 years of probation); *Moore v. United States,* 592 F.2d 753, 756 (4th Cir. 1979) (where defendant was told that he faced 15 years in prison and was not informed of 3-year special parole term, an appropriate remedy would be reduction of prison sentence to 12 years, to be followed by 3 years of special parole); *United States v. Rodrigue*, 545 F.2d 75, 76 (8th Cir. 1976) (failure to advise defendant of special parole term harmless); *Aviles v. United States*, 405 F. Supp. 1374, 1377-83 (S.D.N.Y. 1975) (same), *aff'd*, 538 F.2d 307 (2d Cir. 1976).

In fact, applying those well settled federal precedents, a federal habeas court applied the harmless error doctrine in a case from New York, in which, like here, the defendant was not informed of PRS. *See Kazmirski v. Poole*, 2005 U.S. Dist. Lexis 36337, *4 (N.D.N.Y. 2005) (unpublished opinion) (denying habeas corpus relief where the "petitioner's sentence and post-release supervision time do not exceed the maximum sentence of which he was aware").

This is not to say that even egregious errors in a plea colloquy are always harmless. In that regard, a defendant who pleads guilty without a specific promise regarding his sentence, and who is badly misinformed about the applicable range, might not be deemed to have entered a valid plea. *See United States v. Whyte*, 3 F.3d 129 (5th Cir. 1993) (applying Fed. R. Crim. P. 11: error not harmless where, contrary to court's statement at plea hearing, defendant was subject to a mandatory term of 10 years, not 5, a possible maximum term of life, not 20 years, a supervised release term of 5 years, not 4, and a fine of $4 million, not $2 million); *United States v. Raineri*, 42 F.3d 36, 42 (1st Cir. 1994) (speculating that a defendant might suffer prejudice if misinformed about the applicable range). One might even imagine a rare defendant who could reasonably prefer imprisonment to supervised release. *See United States v. Powell,* 269 F.3d 175, 186 (3d Cir. 2001) (speculating that a defendant with a "history of addiction" might reasonably believe that "extended incarceration provides a better chance of rehabilitation" than supervised release).

But none of those concerns apply here. The plea court's error here was not egregious (in contrast to *Whyte*), and the hypothetical scenarios imagined in *Powell* and *Raineri* did not occur here. In fact, despite their hypothetical musings, *Powell* and *Raineri* rejected the defendants' claims that their guilty pleas had to be vacated, even though neither defendant was correctly informed about supervised release. *See Powell*, 269 F.3d at 185-87; *Raineri*, 42

F.3d at 41-42. As the *Powell* and *Raineri* courts acknowledged, no federal circuit has invalidated a plea under the circumstances present in the case at hand. *See Powell*, 269 F.3d at 180-81 ("Every circuit court of appeals that has considered a case involving a defendant who is misinformed as to the maximum term of supervised release, but who receives a sentence with a combined term of imprisonment and supervised release that is less than the maximum possible penalty has concluded that the misinformation constituted harmless error"); *Raineri*, 42 F.3d at 42 ("Courts have commonly held" that the failure to inform a defendant of supervised release is "harmless when the defendant receives a combined sentence of imprisonment and supervised release that is less than the maximum term of imprisonment earlier described").

Hence, the decision of the New York Court of Appeals here, that respondent's guilty plea was void from the outset and that harmless error analysis did not apply, conflicts with the holdings of every federal appellate case on point.

Notably, no alternate ground exists for the decision of the New York Court of Appeals. To be sure, the court observed in a footnote that, if respondent were to violate his PRS near the end of the supervision period, he could be returned to jail for up to six months beyond the promised 15-year sentence. (App. 5a n. 2); *see* N.Y. Penal Law § 70.45(5)(d)(iv). However, that observation was merely an aside and did not form part of the court's holding. As discussed, the court held that

respondent's guilty plea was void from the outset, regardless of the "resulting sentence." (*See* App. 2a).

Moreover, the possibility that respondent might be subject to six extra months in custody if he violates his PRS does not render his guilty plea invalid. To be sure, a defendant must be informed of all direct consequences of his guilty plea. *See Brady v. United States*, 397 U.S. 742, 755 (1970). However, consequences within a defendant's control do not qualify as "direct." Therefore, as federal courts have uniformly held, revocation of parole, probation, or other supervision -- which derives from an independent, voluntary act by the defendant -- is merely a collateral consequence of the original guilty plea. *See, e.g., Duke v. Cockrell, 292 F.3d 414, 417* (5th Cir. 2002) (possibility that defendant's probation could be revoked was collateral consequence: "the ability to abide by the probation conditions was within [defendant's] control"); *Warren v. Richland County Circuit Court*, 223 F.3d 454, 457-58 (7th Cir. 2000) (revocation of probation was collateral consequence); *Parry v. Rosemeyer*, 64 F.3d 110, 114 (3d Cir. 1995) (same: "revocation of probation is not an immediate and automatic consequence of pleading guilty"); *Sanchez v. United States*, 572 F.2d 210, 211 (9th Cir. 1977) (revocation of parole was collateral consequence).

In short, the decision of the New York Court of Appeals conflicts not only with *Santobello* but with every federal appellate decision on point. This Court should grant *certiorari* to resolve that conflict.

3. THIS CASE PRESENTS A FEDERAL QUESTION.

Finally, this case presents a federal question. This Court may review a state court decision that "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). Under those circumstances, this Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1041. Even if a state court's decision relies on its own opinions or "jurisprudence," it is "interwoven" with federal law if the cited state cases analyze federal principles. *See Pennsylvania v. Labron*, 518 U.S. 938 (1996). A state court will not be deemed to have invoked an independent and adequate state ground unless it offered a "plain statement that its references to federal law" were only for the purpose of "'guidance.'" *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (quoting *Long*, 463 U.S. at 1041).

Here, the state court decision presents a federal question, because it intertwined federal and state constitutional principles. In that regard, the New York Court of Appeals based its decision on "due process" (App. 1a, 5a) and described the error as a "constitutional" defect (App. 2a, 3a, 5a). Critically, the court did not address separate federal and state constitutional principles. In fact, near the beginning of its opinion, the Court of Appeals cited a

precedent of this Court, *McCarthy v. United States*, 394 U.S. 459, 466 (1969), alongside a reference to the New York constitution. (*See* App. 2a). That pairing signaled that New York and federal due process rules regarding plea bargaining are coextensive.

The state cases on which the Court of Appeals relied were grounded in this Court's constitutional precedents. For instance, the Court of Appeals cited *People v. Ford,* 86 N.Y.2d 397, 633 N.Y.S.2d 270 (1995), which invoked, among other precedents, *Boykin v. Alabama,* 395 U.S. 238 (1969), and *North Carolina v. Alford,* 400 U.S. 25 (1970). The court also cited *People v. Harris*, 61 N.Y.2d 9, 471 N.Y.S.2d 61 (1983), which relied on several federal cases, including *McCarthy, Boykin,* and *Barker v. Wingo*, 407 U.S. 514 (1972). Further, the court cited *People v. Gina M.M.*, 40 N.Y.2d 595, 388 N.Y.S.2d 899 (1976), which similarly relied on several federal cases, including *Boykin.*

Additionally, the Court of Appeals relied extensively on *People v. Catu*, 4 N.Y.3d 242, 792 N.Y.S.2d 887 (2005), and its progeny. (*See* App. 2a-5a). *Catu*, in turn, relied primarily on *Ford*, *supra*, *see Catu*, 4 N.Y.3d at 244-45, 792 N.Y.S.2d at 887-88, which was grounded in this Court's constitutional precedents. As noted, the Court of Appeals also cited *Ford* here.

In short, the New York Court of Appeals based its ruling, both directly and indirectly, on federal constitutional precedents. Therefore,

because the decision of the Court of Appeals intertwined federal and state law, it presents a federal question.

* * *

In sum, the decision of the New York Court of Appeals is contrary to the longstanding rule of *Santobello*. In addition, it conflicts with the holdings of every federal appellate court to address the issue. Accordingly, this Court should grant *certiorari* to resolve the split between the New York and federal courts. In fact, this case would be appropriate for summary reversal, because the decision of the New York Court of Appeals ignores settled federal constitutional precedent.[5]

[5] Notably, the New York Court of Appeals vacated a guilty plea on the same erroneous ground in another recent case. *See People v. Van Deusen*, 7 N.Y.3d 744, 745-46 (2006) (holding that guilty plea was involuntary where defendant was promised a sentence of no more than 15 years in prison and received 8 years in prison and 5 years of PRS).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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