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In the
United States Court of Appeals
For the Second Circuit

AUGUST TERM, 2015

ARGUED: MARCH 28, 2016

DECIDED: SEPTEMBER 16, 2016

No. 15-2836-cv

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

v.

BRIAN FISCHER, individually and in his capacity as Commissioner of the New York State Department of Correctional Services (DOCS), ANTHONY J. ANNUCCI, individually and in his capacity as Deputy Commissioner and Counsel for the New York State Department of Corrections and Community Supervision, and TERENCE TRACY, in his individual capacity and in his capacity as Chief Counsel for the Division of Parole,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of New York.
No. 11 Civ. 03200 – Shira A. Scheindlin, *Judge.*

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Before: WALKER, RAGGI, and DRONEY, *Circuit Judges*.

In *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006) ("*Earley I*"), we held that the New York State Department of Correctional Services's ("DOCS") practice of administratively adding a term of post-release supervision ("PRS") to sentences in which PRS had not been imposed by the sentencing judge and the New York State Division of Parole's ("DOP") practice of enforcing the administratively added PRS terms violated the Constitution. Notwithstanding their awareness of our holding, defendants DOCS officials Anthony J. Annucci and Brian Fischer and DOP official Terence Tracy decided not to follow it and only did so after the New York Court of Appeals invalidated the administrative practice more than 22 months later. The plaintiffs, offenders who had been subject to PRS in violation of *Earley I*, sued the defendants for the actions they took in violation of *Earley I* and moved for summary judgment. The district court (Scheidlin, *J.*) granted the motion. The defendants appeal the grant of summary judgment and also argue that the district court erred in granting plaintiffs' motion to deem the appeal frivolous so that the district court could retain jurisdiction and proceed with a trial on damages. We AFFIRM.

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HAYLEY HOROWITZ (Matthew D. Brinckerhoff, Alanna Small, *on the brief*), Emery Celli Brinckerhoff & Abady LLP, New York, NY, *for Plaintiffs-Appellees*.

STEVEN C. WU, Deputy Solicitor General (Barbara D. Underwood, Solicitor General; Claude S. Platten, Senior Assistant Solicitor General, *on the brief*), *for* Eric T. Schneiderman, Attorney General of the State of New York, *for Defendants-Appellants*.

JOHN M. WALKER, JR., *Circuit Judge*:

In *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006) ("*Earley I*"), we held that the New York State Department of Correctional Services's ("DOCS") practice of administratively adding a term of post-release supervision ("PRS") to sentences in which PRS had not been imposed by the sentencing judge and the New York State Division of Parole's ("DOP") practice of enforcing the administratively added PRS terms violated the Constitution. Notwithstanding their awareness of our holding, defendants DOCS officials Anthony J. Annucci and Brian Fischer and DOP official Terence Tracy decided not to follow it and only did so after the New York Court of Appeals invalidated the administrative practice more than 22 months later. The plaintiffs, offenders who had been subject to PRS in violation of

1 *Earley I*, sued the defendants for the actions they took in violation of
2 *Earley I* and moved for summary judgment. The district court
3 (Scheindlin, J.) granted the motion. The defendants appeal the grant
4 of summary judgment and also argue that the district court erred in
5 granting plaintiffs' motion to deem the appeal frivolous so that the
6 district court could retain jurisdiction and proceed with a trial on
7 damages. We AFFIRM.

8 BACKGROUND

9 I. Determinate Sentencing and Post-Release Supervision 10 in New York

11 In 1998, the New York State Legislature amended the
12 sentencing scheme for violent felons to require that every
13 determinate sentence of imprisonment for a violent felony be
14 followed by a PRS term. N.Y. Penal Law § 70.45(1). The statute fixes
15 the length of PRS terms for certain crimes and provides a range of
16 permissible lengths for others, leaving the ultimate determination to
17 the sentencing judge. *Id.* § 70.45(2), (2-a). During the time period
18 relevant to this case, the Division of Parole ("DOP") and Board of
19 Parole ("BOP") established and enforced the conditions of PRS
20 terms and the Department of Correctional Services ("DOCS")
21 reincarcerated felons who violated these conditions. *Id.* § 70.45(3).¹

¹ In 2011, after the events giving rise to this lawsuit, DOCS and DOP merged to create the Department of Corrections and Community

1 Although § 70.45(1) requires sentencing courts to “state not
2 only the term of imprisonment, but also an additional period of
3 post-release supervision,” some judges did not pronounce PRS
4 terms during sentencing proceedings. As a result, certain inmates
5 entered DOCS custody with sentence and commitment orders that
6 informed DOCS employees of the term and conditions of the
7 inmate’s sentence, but failed to include PRS terms required by
8 § 70.45. Instead of bringing the failure to the attention of the
9 sentencing court, DOCS simply added the PRS term
10 administratively.

11 When DOCS first took custody of an inmate, it received the
12 inmate’s sentence and commitment order. DOCS employees
13 routinely entered information about the inmate’s sentence from this
14 document into the DOCS computer system. If a sentence and
15 commitment order did not include the PRS term that § 70.45
16 required, DOCS employees, following guidelines issued by DOCS,
17 entered for the inmate the shortest PRS term permitted by § 70.45.

18 Upon their release from prison, the inmates began to serve
19 their PRS terms under DOP supervision. Approximately 45 days
20 before an inmate left prison, DOCS employees calculated the specific

Supervision (“DOCCS”). Under the current version of § 70.45, DOCCS has the role formerly assigned to DOCS and DOP, and the Board of Parole (“BOP”) remains an independent body that sets PRS conditions.

1 dates on which that inmate's PRS would begin and end and
2 furnished these dates to DOP employees. Before beginning
3 supervision of an inmate, a DOP parole officer would meet with the
4 inmate to discuss the inmate's plans for his release and the
5 conditions of his PRS. At the same time DOP provided the inmate
6 with a document containing information about the inmate's crime
7 and sentence, including his release date and the date on which any
8 PRS would expire. DOCS and DOP were authorized to reincarcerate
9 an offender who, after a hearing, was found to have violated the
10 conditions of his release.

11 **II. Our Decision in *Earley v. Murray***

12 On June 9, 2006, we decided *Earley v. Murray*, 451 F.3d 71
13 (2d Cir.) ("*Earley I*"), *reh'g denied*, 462 F.3d 147 (2d Cir. 2006) ("*Earley*
14 *II*"), in which we addressed for the first time the constitutionality of
15 DOCS's practice of adding a PRS term to a sentence in cases where
16 § 70.45 required it but the sentencing judge had not imposed it.
17 Earley pleaded guilty to attempted burglary and was sentenced to
18 six years in prison. *Earley I*, 451 F.3d at 73. The sentencing judge
19 failed to include PRS in the sentence he pronounced in court and
20 neither the written judgment nor the written order of commitment
21 indicated that PRS was to be a part of Earley's sentence,
22 notwithstanding the requirement under § 70.45 that he serve a term
23 of PRS upon the conclusion of his term of imprisonment. *Id.* While

1 he was incarcerated, Earley became aware that DOCS had
2 administratively added a five-year PRS term to his sentence. *Id.*
3 After exhausting his state court remedies, Earley filed a habeas
4 petition in federal court arguing that DOCS's administrative
5 imposition of PRS violated his due process rights. *Id.*

6 We agreed with Earley that the Constitution forbids DOCS
7 from modifying a sentence imposed by a judge, even though § 70.45
8 required that PRS be a part of his sentence. *Id.* at 74-76. Because
9 Earley's PRS term had not been imposed by the judge, PRS was
10 never part of his sentence and the PRS term was a "nullity." *Id.* at
11 76. We remanded the case to the district court for a determination of
12 whether Earley had timely filed his habeas petition; if so, the district
13 court was "to issue a writ of habeas corpus excising the term of post-
14 release supervision from Earley's sentence and relieving him of any
15 subsequent penalty or other consequence of its imposition." *Id.* at
16 76-77. We also noted that "[o]ur ruling is not intended to preclude
17 the state from moving in the New York courts to modify Earley's
18 sentence to include the mandatory PRS term," although we left it to
19 the state courts to determine if such a motion would be timely. *Id.* at
20 77 & n.2. On August 31, 2006, we denied the defendants' motion for
21 rehearing in *Earley II*.

1 **III. The General Response to *Earley I***

2 The holding in *Earley I* was met with resistance at the state
3 level. Certain district attorneys expressed their disagreement with
4 our holding. Officials in the Office of Court Administration
5 (“OCA”), the administrative division of the New York state court
6 system, took the position that the opinion in *Earley I* was not binding
7 on state courts and issued a memorandum to judges expressing this
8 view. OCA nevertheless urged courts to pronounce PRS terms
9 going forward until the New York Court of Appeals had the
10 opportunity to weigh in.

11 New York courts were inconsistent in adhering to *Earley I*'s
12 holding. The Second and Fourth Departments applied *Earley I* from
13 the outset. See *People v. Smith*, 37 A.D.3d 499, 499, 829 N.Y.S.2d 226
14 (2d App. Div. 2007); *People ex rel. Burch v. Goord*, 48 A.D.3d 1306,
15 1307, 853 N.Y.S.2d 756 (4th App. Div. 2008). The First and Third
16 Departments did not apply *Earley I*'s holding when it was first
17 decided but later did. Compare *People v. Thomas*, 35 A.D.3d 192, 826
18 N.Y.S.2d 36 (1st App. Div. 2006) (analyzing unpronounced PRS with
19 reference to *Earley I* but without applying its holding), *aff'd as*
20 *modified and remanded sub nom. People v. Sparber*, 10 N.Y.3d 457, 889
21 N.E.2d 459 (2008), and *Garner v. N.Y.S. Dep't of Corr. Servs.*, 39 A.D.3d
22 1019, 831 N.Y.S.2d 923 (3d App. Div. 2007) (analyzing
23 unpronounced PRS without reference to *Earley I*), *rev'd*, 10 N.Y.3d

1 358, 889 N.E.2d 467 (2008), *abrogated by Dreher v. Goord*, 46 A.D.3d
2 1261, 848 N.Y.S.2d 758 (2007), *with People v. Figueroa*, 45 A.D.3d 297,
3 298, 846 N.Y.S.2d 87 (1st App. Div. 2007) (applying *Earley I*'s
4 holding, though without reference to *Earley I*), *and Dreher v. Goord*, 46
5 A.D.3d 1261, 1262, 848 N.Y.S.2d 758 (3d App. Div. 2007) (applying
6 *Earley I*). *See also Scott v. Fischer*, 616 F.3d 100, 107 (2d Cir. 2010)
7 (describing how the First and Third Departments' initial failure to
8 apply *Earley I* "reflect[ed] oversight rather than defiance").

9 On April 29, 2008, the New York Court of Appeals weighed in
10 on the question whether it was permissible for DOCS to add PRS to
11 sentences after the sentencing judge had failed to pronounce a PRS
12 term in *People v. Sparber*, 10 N.Y.3d 457, 889 N.E.2d 459 (2008), and
13 *Garner v. New York State Department of Corrections Services*, 10 N.Y.3d
14 358, 889 N.E.2d 467 (2008). The Court held that New York state law
15 required the judge to pronounce the term of PRS orally at sentencing
16 if it was to be included in an inmate's sentence, but it did not
17 address whether the Constitution required sentencing judges to
18 pronounce PRS terms, as we had held in *Earley I*. *Sparber*, 889
19 N.E.2d at 469-70; *Garner*, 889 N.E.2d at 362-63.

20 **IV. The Actions of the Defendants after *Earley I***

21 The three defendants in this case were officials with DOCS
22 (Annucci and Fischer) and DOP (Tracy) who were responsible for
23 designing and implementing their departments' response to *Earley I*.

1 **A. Anthony J. Annucci**

2 Anthony J. Annucci was DOCS's counsel from September
3 1989 until October 2007, when he became executive deputy
4 commissioner and counsel, a position he filled until December 2008.

5 Annucci immediately understood *Earley I's* holding but
6 deliberately refused to change DOCS procedures to bring them into
7 compliance. In July 2006, soon after *Earley I* was decided, Annucci
8 emailed OCA's counsel to inform him of *Earley I's* holding and to
9 urge that the New York courts follow *Earley I* prospectively. He also
10 cautioned OCA that inmates would probably file individual suits to
11 relieve them from their administratively imposed PRS terms.

12 In August 2006, Annucci emailed DOCS personnel to inform
13 them that *Earley I* conflicted with New York state law and that
14 DOCS would not follow its holding. Annucci confirmed his
15 decision not to follow *Earley I* at his deposition:

16 **Q:** You've read [*Earley I*], you made decisions
17 about policy for DOCS based on that opinion, right?

18 **A:** I didn't make any decisions to change policy.

19 **Q:** Right, you made a decision to either take
20 action or not take action after *Earley*, right?

21 **A:** Correct.

22 **Q:** You made the decision to take action in
23 notifying the courts to deal with the problem
24 prospectively?

25 **A:** Correct.

26 **Q:** You made the decision not to take any action
27 retroactively until further notice, right?

28 **A:** Correct.

1 **Q:** And you made the decision to take no action
2 prospectively . . . to conform DOCS policy and conduct
3 to the holding of *Earley* as well, right?

4 . . .

5 **A:** Correct.

6 Annucci Dep. 87:11-88:7; J.A. 197.

7 **B. Brian Fischer**

8 Brian Fischer was the commissioner of DOCS from January
9 2007 to April 2011 (when DOCS merged with DOP to form DOCCS).
10 He understood *Earley* 's holding and agreed with Annucci's
11 decision not to follow its holding:

12 **Q:** But the decision to continue basically
13 enforcing that policy [of administratively adding PRS to
14 inmates' sentences] notwithstanding *Earley*, is it fair to
15 characterize that as an operational decision?

16 **A:** Yes.

17 **Q:** And that was a decision you took early on in
18 your tenure as commissioner, right, to continue that
19 policy?

20 **A:** That's correct.

21 **Q:** And when you made that decision I assume
22 you understood that what that meant was that inmates
23 would continue to get post-release supervision, be
24 subjected to it upon release, be reincarcerated for
25 violating post-release supervision going forward,
26 notwithstanding the fact that the Second Circuit Court
27 of Appeals had made it clear that that violated the
28 federal constitutional right to due process?

29 . . .

30 **A:** That was our position.

31 **Q:** That was your position?

32 **A:** We continued, correct.

1 **Q:** And that was a decision that you felt
2 comfortable making, right?

3 **A:** Yes.

4 Fischer Dep. 40:12-41:14; J.A. 224.

5 **C. Terence Tracy**

6 Terence Tracy was the chief counsel of DOP from December
7 1996 until March 2011. Like the other defendants, Tracy testified
8 that he understood what *Earley* meant for DOCS and DOP and
9 decided not to follow its holding. Tracy testified that he did not
10 review any DOP files to determine whether DOP was supervising
11 any inmates whose PRS terms had been administratively added by
12 DOCS because he believed that reviewing the files was the
13 responsibility of DOCS. Tracy Dep. 17:5-19:11; J.A. 249-50. But he
14 never conveyed this belief to anyone at DOCS or had any
15 conversations with anyone at DOCS about *Earley I*. Tracy Dep.
16 19:12-23; 24:2-10; J.A. 250-51. Even without reviewing DOP files or
17 discussing *Earley I* with DOCS employees, Tracy testified that he
18 knew that DOCS was adding PRS terms to sentences, that this had
19 implications for DOP, and that after weighing the alternatives he
20 affirmatively decided to continue DOP's former approach in
21 contravention of *Earley I*:

22 **Q:** . . . [W]hen you first read the *Earley versus*
23 *Murray* decision from the Second Circuit Court of
24 Appeals, I take it from your testimony you were aware
25 of the way DOCS was entering post-release supervision

1 terms into their system as you've testified to earlier
2 today; right?

3 A: Correct.

4 Q: And as I understand your testimony, you
5 recognize when you read *Earley* that there was a need to
6 go back and look at these sentence and commitment
7 orders to determine who amongst the inmate
8 population and the people under Department of Parole
9 had had post-release supervision entered into the
10 system even though it did not appear on their sentence
11 and commitment orders; right?

12 ...

13 A: All I know from reading that decision is that
14 this decision could have an impact upon our
15 population. Because I did know at the time that there
16 were individuals coming into state custody and then
17 coming under our jurisdiction for supervision purposes
18 who had no period of post-release supervision stated on
19 their sentence and commitment order.

20 Tracy Dep. 40:25-42:2; J.A. 253-54.

21 Q: But I am correct, am I not, that in weighing
22 these two competing interests concern for people who
23 you would be continuing to incarcerate or supervise
24 without authority and/or freeing or lifting the
25 supervision of individuals who may turn out to actually
26 have a constitutionally imposed sentence of post-
27 release[] supervision, your determination was to err on
28 the side of continuing supervision and continuing
29 incarceration until you could get those people back
30 before courts; right?

31 ...

32 A: Yes. That's the decision that the agency arrived
33 at, yes.

34 Q: Okay. And was that consistent with your own
35 view as well?

1 A: Yes, that was consistent with my own view as
2 well.

3 Tracy Dep. 69:9-70:2; J.A. 258-59.

4 In short, the three defendants decided not to comply with
5 *Earley I* although they understood the meaning of its holding and
6 that its holding applied to their departments. As a result, after our
7 decision in *Earley I*, DOCS continued to violate its holding
8 prospectively, by entering statutorily-required PRS terms when
9 sentence and commitment orders were silent, and both DOCS and
10 DOP continued to violate it retrospectively, by taking no steps to
11 cease enforcing PRS terms that had been added to sentences by
12 DOCS employees.

13 **V. The Defendants' Actions after New York State Court**
14 **Decisions on Administratively Adding PRS Terms**

15 The defendants' later responses to the subsequent state court
16 decisions holding that a judge must pronounce PRS for it to be a part
17 of an inmate's sentence contrasted starkly with their inaction
18 following *Earley I*.

19 In either February or March 2007, shortly after the Second
20 Department decided *Smith*, 37 A.D.3d 499, 829 N.Y.S.2d 226, the first
21 Appellate Division case applying the holding of *Earley I*, DOCS
22 began to review its files to identify inmates whose sentences
23 included PRS terms added by DOCS employees. The reviewers
24 began by examining the sentence and commitment orders that are

1 included in every inmate's file. These documents allowed the
2 reviewers to infer whether a judge had pronounced a PRS term at
3 sentencing. If the sentence and commitment order did not mention
4 PRS, the reviewers would attempt to examine sentencing transcripts,
5 which were missing from the majority of inmate files. The reviewers
6 created a new "PRS" data field in the DOCS computer system. This
7 field indicated whether or not the inmate's sentence and
8 commitment order contained PRS as part of the sentence. For
9 inmates who had already been released from custody, the "PRS"
10 field indicated that the inmate's file was no longer in DOCS's
11 possession.

12 In April 2007, DOCS employees completed their initial review,
13 which included over 40,000 inmate files; however, they did nothing
14 with this information. At the same time, DOCS continued to
15 administratively update the "PRS" data field for new inmates
16 entering the system. As of January 2008, DOCS employees had
17 made 49,300 entries in the "PRS" data field. Of these, 41,000
18 reflected sentence and commitment orders that included PRS terms
19 as part of the sentence, while 8,100 indicated that the sentence and
20 commitment order was silent as to PRS, leading to the conclusion
21 that DOCS had added the terms to these inmates' sentences. Of the
22 8,100, 6,300 were in DOCS custody and 1,800 had been released to
23 the supervision of DOP.

1 The New York Court of Appeals decisions in *Garner* and
2 *Sparber* on April 29, 2008—more than 22 full months after *Earley I*
3 and 19 months after we denied reconsideration in *Earley II*—
4 prompted DOP to take its first steps and DOCS to take its first
5 significant steps toward compliance with *Earley I*.

6 DOP promptly reviewed its records to determine which
7 inmates under its supervision were subject to DOCS-imposed PRS
8 terms, a process that took less than a week.

9 By the middle of May 2008, DOCS launched a “Post-Release
10 Supervision Resentencing Initiative” to obtain resentencing of
11 individuals in its custody whose sentencing judges had not
12 pronounced PRS terms required by § 70.45. In this undertaking,
13 DOCS relied on the data collected during its earlier review of inmate
14 files that identified inmates whose sentence and commitment orders
15 were silent about PRS. The initiative required an additional
16 investigative step—DOCS had to obtain the sentencing minutes for
17 all 8,100 inmates with silent sentence and commitment orders, the
18 majority of whose files lacked minutes. Thereafter, as DOCS
19 identified specific inmates who needed to be resentenced or whose
20 sentencing minutes were missing, DOCS employees emailed the
21 information to district attorneys and sent formal notifications,
22 including the sentence and commitment orders and available

1 sentencing minutes, to both the relevant sentencing courts and
2 district attorneys.

3 Finally, on June 4, 2008, DOCS and DOP filed a declaratory
4 judgment action in state court seeking judicial approval of a plan
5 that would permit state agencies, district attorneys, and state courts
6 to systematically identify and refer improperly sentenced inmates
7 back to the sentencing courts to be resentenced. The state court,
8 however, did not grant the injunctive relief sought by DOCS and
9 DOP.

10 The defendants all testified that immediately after *Earley I* and
11 *II* were decided in 2006 they could have undertaken the remedial
12 measures that they later took when prompted by *Smith, Garner* and
13 *Sparber* in the spring of 2008. Annucci Dep. 81:10-82:9; Fischer Dep.
14 60:23-61:21; Tracy Dep. 85:12-20; J.A. 195, 226, 260.

15 VI. The Legislative Response to *Earley I*

16 In June 2008, the New York legislature passed New York
17 Correction Law § 601-d, which codified a process for resentencing
18 individuals with unpronounced PRS terms. Section 601-d required
19 DOCS and DOP to notify courts if they had custody of or
20 supervision over a defendant with an administratively imposed PRS
21 term and permitted the sentencing court either to resentence the
22 defendant to a sentence that included a PRS term or, with the district
23 attorney's consent, to decline to resentence, resulting in no PRS

1 term. The latter course would not upset guilty pleas that were not
2 premised on the inclusion of a PRS term in the sentence.

3 VII. Procedural History

4 The plaintiffs are offenders who were subject to mandatory
5 PRS terms and who allege that DOCS, rather than their sentencing
6 judge, imposed these terms. Their action seeks compensatory
7 damages based upon administratively imposed PRS terms that
8 continued or were imposed after June 9, 2006, the date *Earley I* was
9 decided.

10 The defendants filed a Rule 12(b)(6) motion to dismiss on the
11 basis of qualified immunity. We affirmed the district court's denial
12 of the motion in *Betances v. Fischer*, 519 F. App'x 39, 41 (2d Cir. 2013)
13 (summary order) ("*Betances I*"). *Betances I* was decided on the same
14 day as *Vincent v. Yelich*, 718 F.3d 157, 168 (2d Cir. 2013), in which we
15 held that "*Earley I* itself clearly established that where the court has
16 not included PRS in a defendant's sentence, DOCS may not add that
17 term without violating federal law." In *Betances I*, our remand
18 directed the district court to develop the record "as to the objective
19 reasonableness of [defendants'] efforts to relieve [plaintiffs] of the
20 burdens of those unlawfully imposed [PRS] after [defendants] knew
21 it had been ruled that the imposition violated federal law." *Vincent*,
22 718 F.3d at 177.

1 to any material fact and the movant is entitled to judgment as a
2 matter of law.” *Hubbs v. Suffolk Cty. Sheriff’s Dep’t*, 788 F.3d 54, 59
3 (2d Cir. 2015) (internal citation and quotation marks omitted).

4 We deny qualified immunity to government officials on
5 summary judgment if (1) “the facts . . . taken in the light most
6 favorable to the” officials establish “a violation of a constitutional
7 right”; and (2) “the officials’ actions violated clearly established
8 statutory or constitutional rights of which a reasonable person
9 would have known.” *See Jones v. Parmley*, 465 F.3d 46, 55 (2d Cir.
10 2006) (internal quotation marks omitted).

11 **A. The Questions on Appeal**

12 The questions we must resolve in this appeal are narrow. Our
13 court has already concluded “that *Earley I* itself clearly established
14 that where the [sentencing] court has not included PRS in a
15 defendant’s sentence, DOCS may not add that term without
16 violating federal law.” *Vincent*, 718 F.3d at 168. The court also
17 deemed “clear” DOCS’s constitutional “obligation to at least attempt
18 to cease its administrative and custodial” enforcement of PRS terms
19 that had been held unlawful under *Earley I*. *Id.* at 172-73.
20 Accordingly, *Vincent* remanded for development of the record “as to
21 the objective reasonableness of [defendants’] efforts to relieve
22 [plaintiffs] of the burdens of those unlawfully imposed terms after
23 [defendants] knew it had been ruled that the imposition violated

1 federal law.” *Id.* at 177. This panel is bound by *Vincent’s* rulings as
2 to what was clearly established by *Earley I*. Therefore, the only
3 questions for us to resolve are (1) at what point in time would the
4 defendants have reasonably known that DOCS’s and DOP’s actions
5 violated federal law and (2) whether, after the defendants
6 reasonably would have known that their conduct violated federal
7 law, they made an objectively reasonable effort to comply with the
8 holding of *Earley I*.

9 **B. When Defendants Realized Their Conduct Violated**
10 **Federal Law**

11 The three defendants became aware of the implications of
12 *Earley I’s* holding at different times. Annucci understood the
13 implications of *Earley I* at least by June 20, 2006, when he emailed
14 OCA’s counsel and explained *Earley I’s* holding to him. Tracy
15 testified that he became aware of and understood *Earley I* in late
16 2006 but he could not recall the precise date. Fischer also was
17 unable to give a precise date upon which he became aware of and
18 understood *Earley I*, but this probably took place no later than
19 January 2007, soon after he became commissioner of DOCS.

20 Considering the dates in the light most favorable to the
21 defendants, we assume that Tracy understood the holding of *Earley I*
22 by December 31, 2006, and Fischer by January 31, 2007. As for
23 Annucci, although he indisputably understood *Earley I* as of June 20,

1 2006, we conclude that he could reasonably have waited to take
2 action until after August 31, 2006, the date on which we issued
3 *Earley II*, denying the motion for rehearing. We note that the district
4 court must engage in factfinding on remand to determine with more
5 specificity the dates that Tracy and Fischer understood the holding
6 of *Earley I*, but should the district court determine that either
7 defendant became aware of *Earley I* before August 31, 2006, liability
8 may not be imposed for the failure to take action before that date.

9 **C. Defendants' Efforts to Comply with *Earley I***

10 The defendants did not take objectively reasonable steps to
11 comply with *Earley I* because, even viewing the evidence in the light
12 most favorable to them, it took Annucci 19 months, Tracy 15
13 months, and Fischer 14 months to take the first meaningful steps to
14 bring their departments into compliance with *Earley I*.

15 All three confirmed that their noncompliance was not the
16 result of oversight or confusion; they understood that *Earley I*
17 required them to change their practices but affirmatively decided
18 not to do so.

19 It was only after the Second Department decided *Smith*, 37
20 A.D.3d 499, 829 N.Y.S.2d 226, the first Appellate Division case
21 applying *Earley I*, on February 6, 2007, that Annucci and Fischer took
22 any action at all. In six weeks, DOCS employees reviewed inmate
23 files to determine who had PRS terms that had been added by DOCS

1 employees rather than imposed by a judge. But while this review
2 would be essential to any remediation of retrospective violations of
3 *Earley I*, the step was insufficient on its own. DOCS employees
4 simply sat on the information they had collected. Moreover, they
5 continued to violate *Earley I* prospectively, by persisting in
6 administratively adding PRS terms to the sentences of inmates
7 whose sentence and commitment orders did not include them.

8 Throughout this period, Tracy took no steps to bring DOP into
9 compliance. He did not discuss *Earley I* with anyone at DOCS,
10 although he knew that DOCS was disregarding its holding and
11 continuing to administratively impose PRS terms.

12 Finally, prompted by the New York Court of Appeals'
13 decisions in *Garner* and *Sparber*, the defendants in late April and
14 early May 2008 took their first meaningful steps to remediate
15 DOCS's and DOP's PRS practices. It was at this point that (1) DOCS
16 launched a "Post-Release Resentencing Initiative," which notified
17 courts and district attorneys of inmates who might need to be
18 resentenced; (2) DOP reviewed its files to determine who under their
19 supervision had PRS terms added by DOCS; and (3) DOCS and DOP
20 together filed a declaratory judgment action seeking judicial
21 approval of a mass-resentencing plan. These actions were
22 reasonable steps towards bringing DOCS and DOP into compliance
23 with *Earley I*, but they had been unreasonably delayed. Between 14

1 and 19 months had elapsed from when the defendants understood
2 that *Earley I* required them to act. And all three defendants have
3 admitted that nothing prevented them from taking these same
4 actions when they first understood the requirements of *Earley I*.
5 That the defendants eventually took reasonable steps to comply with
6 *Earley I* cannot excuse their unreasonable delay in doing so.

7 The defendants' refusal to bring DOCS and DOP into
8 conformity with *Earley I* until the New York state court rulings
9 causes us to question whether, absent these later rulings, any
10 compliance would have been forthcoming. DOCS only began its
11 initial review of its files directly after the Appellate Division first
12 applied *Earley I*, and the defendants conceded that *Sparber* and
13 *Garner*, not *Earley I*, prompted the efforts they undertook in the
14 spring of 2008. While defendants appear to have chosen to ignore
15 our ruling until New York state courts directed them to change their
16 conduct, this fact does not affect our analysis. Even assuming that
17 their actions in the spring of 2008 were motivated by a belated desire
18 to comply with *Earley I*, the unexcused delay of 14 to 19 months
19 between *Earley II* and their first significant remedial efforts was
20 objectively unreasonable.

21 **D. Defendants' Counterarguments**

22 The arguments advanced by the defendants are unpersuasive.
23 Their principal arguments are that (1) their only responsibility was

1 to prepare for individual resentencings; (2) resentencing the affected
2 offenders presented significant practical difficulties; and (3) New
3 York state judges and district attorneys were resistant to *Earley I* and
4 this prevented the prompt implementation of its holding. We
5 address each in turn.

6 **1. The Scope of Defendants' Responsibilities**

7 The defendants seek to diminish the scope of their obligations
8 under *Earley I* by arguing that they reasonably believed that their
9 only responsibility was to prepare for individual resentencings
10 when requested by the defendants.

11 This argument makes no sense when applied to the subset of
12 offenders who suffered prospective PRS violations—that is, those
13 whom DOCS took into custody after we denied rehearing of *Earley I*.
14 The appropriate remedy for these offenders was not to
15 administratively add the PRS term and then prepare for
16 resentencing if and when requested. DOCS's duty was to enter the
17 sentence imposed by the judge, and that sentence only, without the
18 PRS term required by § 70.45, and then to ensure that, by the time
19 the inmate left the custody of DOCS to begin serving any PRS term,
20 the term had been pronounced by a judge.

21 The argument is more plausible, but still unsuccessful, when
22 applied to the offenders who suffered retrospective PRS violations:
23 those in the custody of DOCS when *Earley II* was decided who had

1 yet to start serving their unpronounced PRS terms; those serving
2 unpronounced PRS terms when *Earley II* was decided; and those
3 reincarcerated for violations of such terms after *Earley II*. It is true
4 that when *Earley I* was decided there was no formal remedy for
5 addressing the problem of unpronounced PRS terms. However,
6 defendants' launching of the resentencing initiative in 2008 coupled
7 with their filing of the declaratory judgment action undercuts their
8 claim that their only role was to passively wait for inmates to file
9 their individual lawsuits. When they saw fit to remediate the
10 situation they showed that they could take prompt and reasonable
11 steps to do so.

12 **2. The Practical Difficulties of Resentencing**

13 To be sure, resentencing all the violent felons with
14 unpronounced PRS terms presented practical difficulties and
15 required DOCS and DOP to devote significant resources to the
16 undertaking. There are two reasons, however, why these difficulties
17 do not persuade us that the defendants made objectively reasonable
18 efforts to comply with *Earley I*.

19 First, the defendants overstate what compliance with *Earley I*
20 would have required. *Earley I* did not require them to "conven[e]
21 resentencing hearings for thousands of violent-felony offenders . . .
22 on [their] own," Appellant's Br. 51, nor would it have required them
23 to "notify[] state courts or prosecutors of each of the eight thousand

1 individuals they had identified as potentially requiring
2 resentencing,” *id.* at 55, all at once, thereby overwhelming the court
3 system. Instead, they simply had to undertake “objective[ly]
4 reasonable[.]” efforts to comply with *Earley I*, which we have
5 previously characterized as “at least attempt[ing] to cease [their]
6 administrative and custodial operations that had been held to
7 violate federal law.” *Vincent*, 718 F.3d at 172-73, 177. Contrary to
8 what the defendants assert, therefore, making “objective[ly]
9 reasonable[.]” efforts to comply with *Earley I* was well within their
10 power and did not require them to do the impossible or even the
11 unreasonable.

12 The second answer to defendants’ argument based on the
13 logistical difficulties of resentencing is that the same supposed
14 difficulties did not prevent them from taking appropriate actions
15 after they decided to do so 14 to 19 months after we decided *Earley*
16 *II*. Each defendant testified that nothing prevented him from taking
17 these steps back in 2006, and the logistical difficulties did not
18 decrease in the interim.

19 **3. The Resistance of Other Parties to *Earley I***

20 We accept the defendants’ claim that other state actors with
21 responsibility for resentencing, such as judges and district attorneys,
22 were resistant to *Earley I*’s holding, although we note that the Second
23 and Fourth Departments of the Appellate Division applied *Earley I*

1 prospectively without resistance. *See Smith*, 37 A.D.3d 499, 499, 829
2 N.Y.S.2d 226; *Goord*, 48 A.D.3d 1306, 1307, 853 N.Y.S.2d 756.
3 However, even if all other actors in the state sentencing system were
4 entirely resistant to *Earley I*, we must still answer the question
5 whether defendants themselves undertook “objective[ly]
6 reasonable[] . . . efforts to relieve [plaintiffs] of the burdens of those
7 unlawfully imposed terms after [defendants] knew it had been ruled
8 that the imposition violated federal law.” *Vincent*, 718 F.3d at 177.
9 The efforts made, or not made, by other parties are beside the point
10 for the purposes of determining qualified immunity.²

11 As the steps taken by defendants in the wake of *Garner* and
12 *Sparber* demonstrate, they could act in compliance with *Earley I*
13 without the cooperation of state judges and district attorneys. The
14 filing of a declaratory judgment action seeking approval of a
15 resentencing plan did not require the approval or cooperation of
16 other state officials. Similarly, the decision to review their records
17 and notify state judges and district attorneys about defendants who
18 needed to be resentenced required no cooperation from others. If
19 the district attorneys and judges ultimately rejected compliance, the
20 resentencings would not have taken place, but the defendants would

² We have no occasion on this appeal to consider how, if at all, the actions of others might inform any assessment of causation for specific injuries claimed by plaintiffs against these defendants. Such matters can be pursued as warranted on remand.

1 have satisfied their obligation, which was to make an “objective[ly]
2 reasonable[.]” effort, *Vincent*, 718 F.3d at 177, to comply with *Earley I*.

3 In sum, we agree with the district court that the defendants
4 did not make an objectively reasonable effort “to relieve [plaintiffs]
5 of the burdens of those unlawfully imposed terms after [they] knew
6 it had been ruled that the imposition violated federal law.” *Id*.

7 II. Motion to Deem the Appeal Frivolous

8 The defendants attack the district court’s decision to grant
9 plaintiffs’ motion to deem the appeal frivolous so that the district
10 court could retain jurisdiction and proceed with a trial on damages
11 while the appeal was pending. This issue is moot because the
12 defendants obtained a stay of further proceedings in the district
13 court and thus there is no need to consider it.

14 We have considered the parties’ remaining arguments and
15 find them without merit.

16 CONCLUSION

17 For the reasons stated above, we AFFIRM the judgment of the
18 district court and REMAND for further proceedings consistent with
19 this opinion.