STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
MICHAEL TURNER, #99-B-2747,
Petitioner,

For a Judgment Pursuant to Article 70 of the Civil Practice Law and Rules

-against-

DECISION AND JUDGMENT
RJI #16-1-2007-0051.016
INDEX #2007-0126
ORI # NY016015J

LAWRENCE SEARS, Superintendent,
Franklin Correctional Facility,
Respondent.

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This is a habeas corpus proceeding that was originated by the petition of Michael Turner, dated December 27, 2006, and stamped as filed in the Franklin County Clerk's Office on January 23, 2007. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging his continued incarceration in the custody of the New York State Department of Correctional Services. The Court issued an Order to Show Cause on January 26, 2007, and has received and reviewed respondent's Return, dated March 2, 2007. The court has also received and reviewed petitioner's Reply thereto, filed in Franklin County Clerk's Office on March 13, 2007.

On November 17, 1999, the petitioner was sentenced in Onondaga County Court to a determinate sentence of imprisonment of five years upon his conviction of the crime of Robbery 2°, a class C violent felony offense (Penal Law §70.02(1)(b)). At the time petitioner was sentenced he was apparently subject to a New Jersey parole violation warrant. The sentence and commitment order of the Onondaga County Court specified that petitioner's determinate sentence was to run concurrently with "New Jersey parole time." Although the sentencing minutes clearly reflect the Court's intention that

petitioner's determinate sentence run concurrent with his New Jersey parole time, the sentencing judge was uncertain as to the effect of such concurrency. According to the sentencing judge, "[t]he only thing I can do is say we're concurrent. I don't know what [e]ffect that has on the New Jersey law." In any event, neither the sentencing minutes nor the sentence and commitment order make any reference to a period of post-release supervision (Penal Law §70.45). On September 26, 2003, the petitioner was released from DOCS custody to post-release supervision (into the custody of New Jersey authorities as the result of petitioner's parole violation in that state). The petitioner was released from New Jersey custody on September 9, 2005, but thereafter failed to report to New York parole officials in conjunction with his still ongoing post-release supervision. The petitioner's post-release supervision was revoked following a final parole revocation hearing conducted on September 26, 2006. A delinquency date of October 9, 2005, was sustained and a 12 month delinquent time assessment imposed. The petitioner was ultimately returned to DOCS custody as a post-release supervision violator on October 12, 2006. This proceeding ensued.

Citing, *inter alia*, *Earley v. Murray*, 451 F3d 71, *rearg den* 462 F3d 147, *cert den, Behrle v. Earley*, 2007 WL 1243234, the petitioner argues that DOCS illegally imposed the five-year period of post-release supervision. The petitioner also alleges ineffective assistance of counsel in connection with his plea and sentencing in Onondaga County.

Section 70.45 was added to the Penal Law by L 1998, ch 1, §15. The legislation provided, and still provides, that "[e]ach determinate sentence also includes, as a part thereof, an additional period of post-release supervision." Penal Law §70.45(1). The originally enacted version of Penal Law §70.45(2), which is the version germane to this proceeding, provided that "[t]he period of post-release supervision for a determinate

sentence shall be five years, except that such period shall be three years whenever a determinate sentence of imprisonment is imposed pursuant to section 70.02 of this article upon a conviction for a class D or class E violent felony offense; provided, however, that when a determinate sentence is imposed pursuant to section 70.02 of this article, the court, at the time of sentence, may specify a shorter period of post-release supervision of not less than two and one-half years upon a conviction for a class B or class C violent felony offense and a shorter period of post-release supervision of not less than one and one-half years upon a conviction of a class D or a class E violent felony offense." Thus, the period of post-release supervision statutorily deemed to be part of a determinate sentence imposed pursuant to Penal Law §70.04(second violent felony offense) or Penal Law §70.06(6) (violent felony offense as a second felony offense) is precisely five years. For a defendant such as the petitioner, however, subject to a determinate sentence of imprisonment imposed upon conviction of a first class C violent felony offense, the period of post-release supervision statutorily deemed to be part of such sentence is five years, with the proviso that the sentencing judge may specify a shorter period of post-release supervision of not less than two and one-half years.

The petitioner in *Deal v. Goord*, 8 AD3d 769, *app dis* 3 NY3d 737, *recon den* 4 NY3d 795, had been convicted of a class C violent felony offense and sentenced as a second felony offender (Penal Law §70.06(6)) to a determinate sentence of imprisonment of five years. The sentencing court, however, did not advise Mr. Deal ". . . that an automatic part of his sentence was a five-year period of postrelease supervision and did not explicitly sentence petitioner to such." *Id* at 769 (citation omitted). After learning that DOCS nonetheless intended to subject him to a period of post-release supervision, Mr. Deal commenced a CPLR Article 78 proceeding seeking to prohibit DOCS from doing

so. After observing that the *Deal* petitioner did not challenge either his judgment of conviction or sentence, the Appellate Division, Third Department, quoting from *People v. Lindsey*, 302 AD2d 128, 129, *lv den* 100 NY2d 583, observed that " 'a period of postrelease supervision [was] automatically included' in his [Deal's] sentence by statute." *Id* at 769 (citations omitted). The *Deal* Court went on to hold that "[s]ince respondents are enforcing a statutorily-required part of petitioner's sentence, they have not performed any judicial function, making prohibition an unavailable remedy." *Id* at 770 (citations omitted). The *Deal* decision was issued by the Appellate Division, Third Department, in April of 2004. It should be noted that the *Deal* court did not address the distinction between determinate sentences imposed pursuant to Penal Law §70.04 or §70.06(6) and determinate sentences imposed pursuant to Penal Law §70.02. In November of 2004 the Third Department considered the case of a defendant who had been convicted, following a plea, of the crime of Assault 2°, a class D violent felony offense (Penal Law §70.02(1)(c)). *People v. Boyce*, 12 AD3d 728, *lv den* 4 NY3d 741. The *Boyce* court noted that the sentencing court did not impose a specific period of post-release supervision at the time of sentencing. Nevertheless, citing, *inter alia*, *Deal*, the Appellate Division, Third Department, found that a three-year period of post-release supervision was automatically included in Mr. Boyce's sentence.

The rationale underlying *Deal* was called into question by the June 9, 2006, decision of the United States Court of Appeals, Second Circuit, in *Earley v. Murray*, 451 F3d 71, *rearg den* 462 F3d 147, *cert den*, *Behrle v. Earley*, 2007 WL 1243234, a federal habeas corpus proceeding. Mr. Earley had been sentenced in Supreme Court, Kings County, to a six-year determinate sentence of imprisonment after pleading guilty to the crime of Attempted Burglary 2°, a class D violent felony offense (Penal Law §70.02(1)(b)

and (c)). As was the case in *Deal*, however, the sentencing court failed to mention any period of post-release supervision when it pronounced sentence and the court's written sentence and commitment order was likewise silent on this point.

In his federal habeas corpus proceeding Mr. Earley argued that his due process rights were violated when DOCS administratively added a five-year period of post-release supervision to his determinate sentence of imprisonment.[1] The Second Circuit Court of Appeals, relying on *Hill v. United States ex rel Wampler*, 298 U.S. 460, agreed with Mr. Earley. The defendant in *Wampler* had been orally sentenced to 18 months in prison and a $5,000.00 fine. In accordance with local custom known to the sentencing court, the clerk of the court added a provision directing that Mr. Wampler remain in custody until his fine was paid. "Justice Cardozo, speaking for a unanimous [*Wampler*] Court, announced a basic principal of criminal sentencing: 'The only sentence known to the law is the sentence or judgment entered upon the records of the court . . . Until corrected in a direct proceeding, it says what it was meant to say, and this is by an irributtable presumption.' *Id* at 464 . . . (internal citations omitted). The [*Wampler*] court went on to write that a 'warrant of commitment' [prepared by the clerk] departing in matter of substance from the judgment back of it is void . . .' *Id* at 465 . . ." *Earley v. Murray*, 451 F3d 71, 74. Although the *Earley* court recognized the fact that the decision whether or not to keep the *Wampler* defendant in custody pending payment of the fine lay within the discretion of the sentencing court, while state law required Mr. Earley to be sentenced to

[1]Although the *Earley* court does not state that Mr. Earley was sentenced either as a second violent felony offender pursuant to Penal Law §70.04 or a second felony offender pursuant to Penal Law §70.06(6), a first conviction of a class D violent felony offense such as Attempted Burglary 2° would at most support a three-year period of post-release supervision. The fact that a five-year period of post-release supervision was attributed to Mr. Earley's sentence by DOCS suggests that Mr. Earley was, in fact, sentenced either as a second violent felony offender or second felony offender.

a period of post-release supervision, it ultimately concluded that the *Wampler* holding was broad enough to be applicable to the post-release supervision issue before it. According to the *Earley* court, "[t]he sentence imposed by the court on Earley was six years in prison. The judgment authorized the state to incarcerate him for six years and no more. Any addition to that sentence not imposed by the judge was unlawful . . . If, as in *Wampler*, an erroneous order of commitment prepared by the clerk of the court with the court's knowledge cannot alter the sentence imposed by the court, then plainly a later addition to the sentence by an employee of the executive branch can not do it." *Id* at 75.

The post-*Earley* era has witnessed an explosion in claims by individuals, such as the petitioner, who were sentenced to determinate sentences of imprisonment that were silent with respect to the issue of post-release supervision. Insofar as it represents an interpretation of a federal constitutional question by a lower federal court, *Earley* serves as useful and persuasive, though nonbinding, authority for New York courts. *See People v. Kan*, 78 NY2d 54. It is not altogether surprising, therefore, that New York lower courts have reached varying conclusions with respect to the issue of whether or not the *Earley* court's interpretation of the due process clause of the United States Constitution should be followed when considering post-release supervision claims. At this juncture it is incumbent upon this Court to determine whether or not *Deal* is still controlling law in the Third Department. Little purpose would be served in reviewing the myriad of lower court decisions at this juncture. Rather, the limited post-*Earley* pronouncements of the Appellate Division, Third Department, must be examined against the backdrop of post-*Earley*, appellate level post-release supervision determinations of the First and Second Departments. This Court is unaware of any such determinations in the Fourth Department.

The Appellate Division, First Department, issued two post-release supervision decisions in November of 2006: *People v. Sparber*, 34 AD3d 265 and *People v. Lingle*, 34 AD3d 287. Both *Sparber* and *Lingle* were heard as direct appeals from criminal convictions with Mr. Sparber having been sentenced as a second violent felony offender to a determinate term of 15 years and Mr. Lingle having been sentenced as a second felony offender (Penal Law §70.06(6)) to a determinate term of 14 years. Thus, in both cases, Penal Law §70.45(2) provided for a period of post-release supervision of precisely five years with no sentencing court discretion available. Nevertheless, in each case, post-release supervision was not mentioned when the sentences were pronounced in open court. In *Sparber*, however, ". . . the court, acting through its court clerk, set forth the PRS provision in the commitment sheet . . ." (34 AD3d 265 at 266), while in *Lingle* ". . . the court, acting though its court clerk, set forth the PRS provision in the commitment sheet, as well as on the worksheet, both of which the court signed personally." 34 AD3d 287 at 289. In both *Sparber* and *Lingle* the Appellate Division, First Department, rejected the defendants' requests that the periods of post-release supervision be stricken on the basis that they were not part of the sentence orally imposed in open court. Noting the statutory language of Penal Law §70.45(1) the Appellate Division concluded in each case that ". . . even though the court's oral sentence was silent as to PRS, it necessarily included a five-year term thereof . . ." 34 AD3d 265 (citations omitted) and 34 AD3d 287, 289 (citations omitted). Finally, in both *Sparber* and *Lingle* the First Department found that constitutional requirements were satisfied by the court clerks' entries of post-release supervision provisions on the commitment sheets and, in *Lingle*, the worksheet. "We see no constitutional infirmity in the use of a written document to clarify an aspect of a sentence upon which the court's oral pronouncement was silent, particularly where, as

here, the relevant portion of the written document performs the ministerial function of setting forth a provision already included in the sentence by operation of law." 34 AD3d 265, 266 (citations omitted) and 234 AD3d 287, 289-290 (citations omitted).

Approximately two and a half months after deciding *Sparber* and *Lingle*, the Appellate Division, First Department had occasion to consider the post-release supervision issue, in a different context, in *People v. Hill*, 39 AD3d 1. The *Hill* defendant had been sentenced to a determinate term of 15 years upon his conviction, following a plea, of the crime of Rape 1°, a class B violent felony offense under the provisions of Penal Law §70.02(1)(a). It does not appear that post-release supervision was mentioned either orally in open court or in any commitment papers. Nevertheless, a five-year period of post-release supervision was apparently included by DOCS in its computation of the defendant's underlying sentence. The petitioner moved pursuant to Criminal Procedure Law §440.10 to vacate his conviction on the grounds that his guilty plea was involuntary since he had not been informed of the period of post-release supervision. Supreme Court modified the defendant's sentence and denied his motion to vacate the conviction. The *Hill* case was before the Appellate Division, First Department on direct appeal from the judgment of conviction and on appeal, by permission, from the order modifying the sentence and denying the motion to vacate. In the latter context the First Department had to determine whether or not the sentence originally imposed was legal. In order to do so, however, it first had to resolve the issue of whether or not that original sentence actually included a period of post-release supervision.

In its analysis the First Department distinguished situations where a determinate sentence of imprisonment is imposed on a second violent felony offender (Penal Law §70.04) or a second felony offender (Penal Law §70.06(6)) from situations, such as in

Hill, where a determinate sentence of imprisonment is imposed on a first-time violent felony offender (Penal Law §70.02). As discussed previously, in the former situations the statutory period of post-release supervision is precisely five years with no sentencing court discretion available. In the latter, however, the statutory period of post-release supervision is five years for a class B or C violent felony offense, such as in *Hill*, with the proviso that the sentencing judge may specify a shorter period of post-release supervision of not less than two and one-half years. Citing *Sparber* and *Lingle*, the *Hill* court stated that it was ". . . sensible to construe Penal Law §70.45(2) to deem a five-year period of postrelease supervision to have been imposed whenever a sentencing court fails to specify the period upon sentencing a second felony offender to a determinate sentence for a violent felony offense pursuant to Penal Law §70.04 and §70.06." *Id* at 10. With respect to first time violent felony offenders such as the defendant before it, however, the *Hill* court ultimately concluded ". . . that no period of postrelease supervision is imposed by operation of law when a sentencing court does not specify a period [of postrelease supervision] upon sentencing . . . pursuant to Penal Law §70.02." *Id* at 13. In reaching this conclusion the First Department, stated, in a footnote, as follows:

> "The statute [Penal Law §70.45(2)] cannot be construed to authorize the Department of Correctional Services to impose the appropriate period of postrelease supervision whenever a trial court fails to perform the duty the statute enjoins it to perform. No language in the statute supports such a construction, and determining the appropriate sentence within the ranges prescribed by the Legislature is quintessentially a judicial function. Indeed, a panel of the Second Circuit has held that a defendant's right to due process under the Federal Constitution was violated when the sentencing court made no mention of a period of postrelease supervision in imposing sentence and the Department of Correctional Services thereafter added a five-year period of postrelease supervision to his sentence (*Earley v. Murray*, 451 F3d 71, 74-76 [2d Cir 2006]). The court also held that even if a five-year period of postrelease supervision was mandated by Penal Law §70.45(2), under the Supreme Court's decision in *Wampler* [298 US 460] it could become part of the sentence consistent with due process only

> through a judicial sentencing proceeding. We need not determine whether we agree with this reading of *Wampler*. Rather, It is sufficient to note that a significant constitutional issue would be raised if Penal Law §70.45(2) were construed to mandate the longest of the authorized periods of postrelease supervision (five years for a class B or C violent felony offense and three years for a class D or E violent felony offense) whenever sentence is imposed pursuant to Penal Law §70.02 and the sentencing court fails to specify the period of postrelease supervision." *Id* at 11 (footnote 7) (other citations omitted).

Accordingly, the Appellate Division, First Department, determined that the sentence originally imposed on Mr. Hill did not include a period of postrelease supervision and, therefore, constituted an illegal sentence. *Id* at 13.

Commencing in February of 2007, the Appellate Division, Second Department, citing both *Earley* and *Wampler*, has repeatedly held that where a defendant is sentenced to a determinate term of incarceration and neither the sentencing minutes nor the court's order of commitment mention the imposition of any period of post-release supervision, such sentence does not include any period of post-release supervision. *See e.g*. *People v. Howell*, 2007 WL 1440942, *People v. Guerrero*, 39 AD3d 878, *People v. Benson*, 38 AD3d 563 and *People v. Smith*, 37 AD3d 499. None of the aforementioned cases specify whether the defendant was sentenced as a second violent felony offender, second felony offender with a violent felony offense conviction or, rather, as a first time felony offender. In *People v. Martinez*, 2007 WL 1502033, however, it was noted that the defendant had been sentenced as a second felony offender to a determinate term of eight years but that neither the sentencing minutes nor the court's order of commitment mentioned any period of post-release supervision. Again citing *Earley* and *Wampler*, the Appellate Division, Second Department, concluded that the sentence imposed did not include any period of post-release supervision. Thus, the Second Department followed *Earley* even

where the statutorily mandated period of post-release supervision was precisely five years with no sentencing court discretion available.

Only two post-*Earley*, post-release supervision decisions have been issued by the Appellate Division, Third Department. In *People v. Boyer*, 36 AD3d 1084, *lv den* 8 NY3d 944, the defendant pled guilty to one count of Attempted Burglary 2° and was sentenced, as a persistent violent felony offender, to an indeterminate sentence of imprisonment. On direct appeal the Appellate Division, Third Department, found Mr. Boyer should have been sentenced as a second violent felony offender, rather than a persistent violent felony offender, and remitted the matter to the Albany County Court for re-sentencing. *People v. Boyer*, 19 AD3d 804, *lv den* 5 NY3d 804. Although there was no reference to any period of post-release supervision in the sentencing minutes, the sentence and commitment order specified a five-year period of post-release supervision. The defendant contended that the difference between the sentencing minutes and the sentence and commitment order necessitated an additional remittal for re-sentencing and the People apparently conceded that under such circumstances remittal is ordinarily appropriate. *See People v. Gray*, 11 AD3d 821. According to the Appellate Division, Third Department, however, ". . . we discern no need for remittal here. Defendant, having been sentenced to a determinate prison term of seven years, was statutorily mandated to have included in such sentence a period of five years of postrelease supervision as reflected in the sentence and commitment form (*see* Penal Law §70.45(2)). We have considered defendant's remaining contentions and find them unavailing." 36 AD3d 1084 at 1085. The *Boyer* court made no reference to either *Deal* or *Earley*.

The other post-*Earley,* Third Department case addressing the post-release supervision issue is *Garner v. New York State Department of Correctional Services*, 39

AD2d 1019. *Garner*, which was decided on April 12, 2007, involved a defendant who had been sentenced as a second violent felony offender[2] to a determinate sentence of imprisonment. While not stated by the Appellate Division, Third Department, this Court presumes that neither Mr. Garner's sentencing minutes nor his sentence and commitment order contained any reference to a period of post-release supervision. In any event, Mr. Garner unsuccessfully sought to vacate the underlying determinate sentence, arguing that the sentencing court did not inform him that he would be subject to a mandatory five-year period of post-release supervision. *See* CPL §440.20(1). After that motion had been denied the petitioner commenced a CPLR Article 78 proceeding to prohibit DOCS from including the five-year period of post-release supervision in its sentence calculations. Citing *Deal*, the Third Department found that "[a]s respondents [DOCS] are only enforcing, not imposing, a part of petitioner's sentence which was automatically included by statute, they have not performed any judicial function, making prohibition an unavailable remedy." 39 AD2d 1019. The above quoted language represents the sum and substance of the Third Department's decision in *Garner*, as there is no further analysis set forth therein. This Court, however, ascribes a significance to both the brevity and timing of the Third Department's decision in *Garner*.

As already noted, *Garner* was decided on April 12, 2007. Thus, *Garner* represents not only a post-*Earley* decision, it was also issued several months after the Appellate Division, First Department, issued its decision in *People v. Hill*, 39 AD3d 1, wherein it was found that a determinate sentence imposed upon a first time violent felony offender did

[2]The information that petitioner was sentenced as a second violent felony offender is not found in the Third Department's April 12, 2007, decision. That aspect of Mr. Garner's sentencing, however, can be gleaned from the decision of the Appellate Division, First Department, in a subsequent habeas corpus proceeding. *See People ex rel Garner v. Warden, Rikers Island Correctional Facility*, 833 NYS2d 384.

not include a period of post-release supervision where neither the sentencing minutes nor the sentence and commitment order included reference to such period of post-release supervision. It is also noted that *Garner* was decided more than two months after *People v. Smith*, 37 AD3d 489, wherein the Appellate Division, Second Department first enunciated its conclusion that where neither the sentencing minutes nor commitment order mentions the imposition of a period of post-release supervision, the underlying sentence does not include any period of post-release supervision.

Garner was thus decided in the midst of a firestorm of appellate level pronouncements addressing the impact of *Earley* on the post-release supervision of inmates who had been sentenced to determinate terms of imprisonment but where post-release supervision was not mentioned by their sentencing courts or included in their sentence and commitment orders. In the face of this, the Appellate Division, Third Department, reaffirmed its pre-*Earley* holding in *Deal*. Since *Earley*, moreover, represents an approach to the post-supervision release issue that is wholly inconsistent with *Deal/Garner*, this Court, sitting in the Third Department, concludes that it cannot simply jettison *Deal/Garner* in favor of *Earley*, notwithstanding the fact that *Earley* has been embraced across the board in the Second Department and in the First Department with respect to determinate sentences imposed upon first time violent felony offenders (such as the petitioner in this proceeding). Despite reaching this conclusion, the Court is troubled by the observation that the Appellate Division, Third Department, decided *Garner* without specifically addressing the due process arguments underlying *Earley*. It is this Court's understanding, however, that the post-release supervision issue is once again before the Appellate Division, Third Department, and we await clear guidance from that tribunal.

With regard to the petitioner's assertion of ineffective assistance of counsel in connection with his plea and sentencing in Onondaga County, the Court finds no basis for habeas corpus relief. Such relief is ordinarily unavailable where the issues sought to be raised in the habeas corpus proceeding have been, or could have been, raised on direct appeal or in the context of a CPL Article 440 motion. *See People ex rel Barnes v. Allard,* 25 AD3d 893, *lv den* 6 NY3d 714, *People ex rel Robinson v. Superintendent of Clinton Correctional Facility*, 8 AD3d 794, *app dis, lv den* 3 NY3d 700, *cert den* 543 US 1124 *and People ex rel Govan v. Bennett*, 304 AD2d 996, *lv den* 100 NY2d 508. While there is nothing in the record to suggest that the ineffective assistance of counsel issue was raised on direct appeal or in the context of a CPL Article 440 motion, the court perceives no reason why such issue could not have been so raised. In addition, the Court finds nothing in the petition supporting a departure from traditional orderly procedure, such as direct appeal or CPL Article 440 motion. *See Keitt v. McMann*, 18 NY2d 257.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

Dated: June 28 , 2007 at
Indian Lake, New York

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S. Peter Feldstein
Acting Supreme Court Justice