STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of KEVIN HIGHLAND,

Petitioner,

-against-

GLENN S. GOORD, COMMISSIONER OF THE DEPARTMENT OF CORRECTIONAL SERVICES; ROBERT DENNISON, CHAIRMAN OF THE NEW YORK STATE DIVISION OF PAROLE,

Respondents,

For A Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-07-ST7578 Index No. 8750-06

Appearances: Kevin Highland
Inmate No. 98-A-7082
Petitioner, Pro Se
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 13403

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State of New York
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(Richard Lombardo,
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Marcy Correctional Facility, is currently serving the following sentences of imprisonment: (1) a term of six to twelve years upon the conviction of a charge of attempted murder second degree pursuant to a sentence and commitment dated March 12, 1999; (2) a term of six years upon the conviction of a charge of robbery first degree pursuant to a sentence and commitment dated March 12, 1999; (3) a term of fifteen years on the conviction of a charge of robbery second degree pursuant to a sentence and commitment dated September 20, 1999; and (4) a term of two to six years on conviction of a charge of criminal sale of a controlled substance third degree pursuant to a sentence and commitment dated November 19, 1998. It appears that none of the sentences expressly include a period of post release supervision. It is undisputed that the respondent Department of Correctional Services has added a five year period of post release supervision to petitioner's sentence.

Under Penal Law § 70.45 (1), "[e]ach determinate sentence also includes, as a part thereof, an additional period of post-release supervision." In this instance, Penal Law § 70.45 clearly required imposition of 5 years of post release supervision, unless at the time of sentence, the court specified a shorter period of time, not less than two and one half years (see Penal Law § 70.45 [2], L 1998, C 1, § 44, eff August 6, 1998, applicable to offenses

committed on or after September 1, 1998). In this instance, the respondent indicates that the offense of robbery first degree (for which a six year determinate sentence was imposed) was committed on October 19, 1998; while the offense of robbery second degree (for which a fifteen year determinate sentence was imposed) was committed on September 15, 1998. Thus both were committed after the effective date of the relevant amendments to Penal Law § 70.45.

A number of New York Courts, including the Court of Appeals, have stressed the mandatory nature of Post release supervision under Penal Law § 70.45. As stated in People v Catu (4 NY3d 242 [2005]):

> "Postrelease supervision is a direct consequence of a criminal conviction. In eliminating parole for all violent felony offenders in 1998, the Legislature enacted a scheme of determinate sentencing to be followed by periods of mandatory postrelease supervision (see L 1998, ch 1 [Jenna's Law]), and defined each determinate sentence to also include[], as a part thereof, an additional period of post-release supervision' (Penal Law § 70.45 [1]; see also Senate Mem in Support, 1998 McKinney's Session Laws of NY, at 1489 [describing postrelease supervision as a distinct but integral part of the determinate sentence']). Whereas the term of supervision to be imposed may vary depending on the degree of the crime and the defendant's criminal record (see Penal Law § 70.45 [2]), imposition of supervision is mandatory and thus has a definite, immediate and largely automatic effect on defendant's punishment.' "

(id. at p. 244, emphasis supplied). The Fourth Department Appellate Division has described the application of Penal Law § 70.45 in similar terms. In People v Bloom (269 A.D.2d 838, 703 N.Y.S.2d 763 [4th Dept. 2000]), where the trial Court failed to specify a period of post

release supervision at sentencing, the Court stated:

> "[t]here was no need for the court to specify a period of post-release supervision. Under Penal Law § 70.45 (2), [t]he length of the period of "post-release supervision" is five years . . . unless the court specifies a shorter period' (Donnino, Practice Commentary, McKinney's [**5] Cons Laws of NY, Book 39, Penal Law § 70.45, 1999-2000 Interim Pocket Part, at 81)"

(People v Bloom, supra, at 838; see also People v Thweatt, 300 AD2d 1100 at 1101 [4th Dept., 2002]). In People v Hollenbach (307 AD2d 776 [4th Dept., 2003]) it was stated that "[p]ost release supervision is mandatory for determinate sentences and is automatically included in the sentence. * * * [T]here is no need for the court to specify a period of postrelease supervision at sentencing" (Hollenbach, at 776, emphasis supplied, citations omitted). The Third Department Appellate Division, in a case very close to the one at bar, dismissed an inmate's CPLR Article 78 proceeding brought to prohibit the Department of Correctional Services from adding Post release supervision to his sentence where the sentencing judge had failed to mention Post release supervision (see Matter of Deal v Goord, 8 AD3d 769 [3rd Dept., 2004], appeal dismissed 3 NY3d 737, reconsideration denied 4 NY3d 795]).

In June of 2006, the Second Circuit Court of Appeals took a strikingly different position on this issue. In Earley v Murray (451 F3d 71, 75-76 [2d Cir 2006], reh denied 462 F3d 147), a state prisoner brought a habeas corpus action in Federal Court challenging imposition of post release supervision by the New York State Department of Corrections. The Court of Appeals, relying heavily upon Hill v United States ex rel. Wampler (298 US

460 [1936])[1], ruled that federal constitutional law prohibits the Department of Correctional Services from adding post release supervision to any determinate sentence if the court did not impose such a term at sentencing (Early, 451 F3d at 75). The Court reasoned that "[t]he judgment of the court establishes a defendant's sentence, and that sentence may not be increased by an administrator's amendment"; and that "[a]ny alteration to that sentence, unless made by a judge in a subsequent proceeding, is of no effect" (id.). As enunciated in the Earley decision, a term of post-release supervision can be added only by the trial court at a re-sentencing proceeding (id. at 76).

While the Court is obviously aware of the Earley case, the Court cannot not ignore the fact that the Third Department Appellate Division has twice held that the imposition of post release supervision by the Department of Correctional Services is not a judicial function (see Matter of Deal v Goord, 8 AD3d 769, supra, and Matter of Garner v New York State Department of Correctional Services, 39 AD3d 1019 [3rd Dept., 2007]).

The Court is mindful that under principles of *stare decisis* the decision in Earley, although it may be useful and persuasive, is not binding on this Court (see People v Kan, 78 NY2d 54 [1991], at 59-60), while the Deal decision (supra) is. The Court finds that the determination of the respondent to include five years of post release supervision in petitioner's sentence was not a judicial act, and was not improper or unlawful. Post release

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[1]In Wampler, a Court Clerk, pursuant to local practice, and with the court's knowledge, added a fine to defendant's sentence. The United States Supreme Court found that the Clerk did not have the power to alter the sentence imposed by the court and that the added condition was void (Wampler, 298 US at 462, 465).

supervision, by operation of law, automatically became a part of the sentence, once a determinate sentence was pronounced (see Penal Law § 70.45).

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds that the determination was not made in violation of lawful procedure; is not affected by an error of law; and is not irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed.

Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the Respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: September 20, 2007
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated March 6, 2007, Supporting Papers and Exhibits
2. Respondent's Answer dated June 18, 2007, Supporting Papers and Exhibits