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

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In the Matter of the Application of
TASH RAHEEM HARRIS, #01-A-0459,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #15-1-2007-0350.07
INDEX #1000-07
ORI # NY015015J

LEO BISCEGLIA, Superintendent,
Adirondack Correctional Facility,
Respondent.

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This is a habeas corpus proceeding that was originated in Clinton County by the petition of Tash Raheem Harris, verified on October 9, 2007, and stamped as filed in the Clinton County Clerk's Office on October 30, 2007. Petitioner, who is an inmate at the Adirondack Correctional Facility in Essex County, 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 November 8, 2007. As part of that Order to Show Cause the Court directed that this proceeding be transferred to Essex County. The Court has since received and reviewed respondent's Return, dated December 21, 2007, as well as petitioner's Reply thereto, filed in the Essex County Clerk's office on January 7, 2008. In the meantime, on December 27, 2007, the Appellate Division, Third Department, handed down decisions in *Dreher v. Goord*, 46 AD3d 1261 and *Quinones v. New York State Department of Correctional Services*, 46 AD3d 1268. By letter order dated January 3, 2008, the Court directed the respondent to submit additional memoranda addressing the potential impacts of the two cases on this proceeding. The

Court has since received and reviewed respondent's Supplemental Letter Memorandum dated January 11, 2008.

On November 20, 2000, the petitioner was sentenced in County Court, Clinton County, to a determinate term of five years upon his conviction of the crime of Aggravated Sexual Abuse 1°. Aggravated Sexual Abuse 1° is a class B violent felony offense under the provisions of Penal Law §70.02(1)(a). Neither the sentence and commitment order nor the sentencing minutes makes reference to any period of post-release supervision (Penal Law §70.45). DOCS nevertheless computed petitioner's sentence as including a five-year post-release supervision and the petitioner was conditionally released from DOCS custody to post-release supervision on February 28, 2005. The petitioner's post-release supervision, however, was revoked following a final parole revocation hearing conducted on March 9, 2006. A delinquency date of February 7, 2006, was sustained and a 30-month delinquent time assessment imposed. The petitioner was returned to DOCS custody, as a post-release supervision violator. This proceeding ensued.

Citing *Hill v. United States ex rel Wampler*, 298 US 460, the petitioner argues that DOCS illegally imposed the five-year period of post-release supervision.

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 B 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, however, 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*, 127 S. Ct. 3014, 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 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

[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.

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. *Earley* serves as useful and persuasive, though nonbinding, authority for New York courts. *See People v. Kan*, 78 NY2d 54.

After the Second Circuit enunciated its decision in *Earley*, splits developed among the various Appellate Divisions of the Supreme Court. The Second Department fully embraced and continues to fully embrace *Earley*, repeatedly holding that where a defendant is sentenced to a determinate term of incarceration and neither the sentencing minutes nor the court's order of commitment mentions the imposition of any period of post-release supervision, such sentence does not include any period of post-release supervision. *See People v. Drummond*, __AD3d__ (2008 WL 141193), *People v. O'Shea*, 45 AD3d 701, *People v. Guare*, 45 AD3d 697, *People v. Howell*, 40 AD3d 882 and *People v. Guerrero*, 39 AD3d 878. The Second Department follows *Earley* even where the defendant had been sentenced as a second felony offender and, thus, the statutorily mandated period of post-release supervision was precisely five years with no sentencing court discretion available. *See People v. Martinez*, 40 AD3d 1012. Where the sole basis of a detainee's incarceration is the violation of the terms of post-release supervision improperly added to his/her determinate sentence, the Second Department has directed immediate release from custody in the context of a habeas corpus proceeding. *See People ex rel Gerard v. Kralik*, 44 AD3d 804.

The Appellate Division, First Department, found no constitutional defect where a non-discretionary, five-year period of post-release supervision was reflected in the

sentencing court's "worksheet and commitment sheet" even though the period of post-release supervision was not mentioned during sentencing proceedings. *People v. Collado*, 849 NYS 2d 558. Where, however, the imposition of a period of post-release supervision was not reflected in either the sentencing court's minutes or commitment order, the First Department tacitly embraced *Earley*, finding that "'. . . the sentence actually imposed by the court never included, and does not now include, any period of post-release supervision.'" *People v. Figueroa*, 45 AD3d 297, 298, *quoting People v. Noble*, 37 AD3d 622.

The Appellate Division, Fourth Department, citing *Earley*, just recently sustained a writ of habeas corpus and directed immediate release from DOCS custody where the sentencing court did not impose a period of post-release supervision and the only basis for the inmate's continued incarceration was his violation of a period of post-release supervision administratively added by DOCS officials. *People ex rel Burch v. Goord*, ___ AD3d ___ (2008 WL 450379).

In the Appellate Division, Third Department, where this Court sits, an initial post-*Earley* pronouncement concerned a defendant sentenced as a second violent felony offender where there was no reference to any period of post-release supervision in the sentencing minutes but where the sentence and commitment order specified a five-year period of post-release supervision. *People v. Boyer*, 36 AD3d 1084, *lv den* 8 NY3d 944. Under such circumstances the Third Department discerned ". . . no need for remittal . . . 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))." *Id* at 1085. The *Boyer* court made no reference to either *Deal* or *Earley*.

The next post-*Earley,* Third Department case addressing the post-release supervision issue was *Garner v. New York State Department of Correctional Services*, 39 AD2d 1019. *Garner* 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 *Garner* court made no reference to *Earley*, and this Court presumes that the due process argument underlying in *Earley* was not advanced, and therefore not considered, in *Garner*. This Court notes that although *Deal*, *Boyer* and *Garner* all involved multiple violent felony offenders, the Appellate Division, Third Department, had previously applied the *Deal* rationale (albeit pre-*Earley*) to the case of the defendant

[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*, 40 AD3d 243.

convicted as a first time violent felony offender. *See People v. Boyce*, 12 AD3d 728, *lv den* 4 NY3d 741.

The foregoing represented the judicial landscape in this department up until December 27, 2007, when the Appellate Division, Third Department, fundamentally altered that landscape by the issuance of its decisions in *Quinones v. New York State Department of Correctional Services*, 46 AD3d 1268 and *Dreher v. Goord*, 46 AD3d 1261. The defendant in *Quinones* was a first-time violent felony offender who had been sentenced to a controlling, concurrent, determinate term of imprisonment upon his conviction of the crime of Attempted Murder 2°, a class B violent felony offense. No period of post-release supervision, however, was imposed at sentencing and the written sentence and commitment order was silent with respect to post-release supervision.[3] Mr. Quinones commenced a CPLR Article 78 proceeding seeking to annul the determination of the DOCS commissioner to add a five-year period of post-release supervision. "Inferring from our case law that petitioner's sentence automatically included postrelease supervision by operation of law despite the sentencing court's omission, Supreme Court found no error in the Commissioner's determination and dismissed the petition." 46 AD3d 1268. Citing the availability of a sentencing court's discretion in setting the length of post-release supervision for first-time violent felony offenders[4], the Third Department

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[3]The appellate level decision in *Quinones* merely states that the petitioner was not "explicitly sentenced to a period of postrelease supervision." 46 AD3d 1268. The more specific sentencing information noted above is found in the Supreme Court level decision in *Quinones* reported at 14 Misc 3d 390.

[4]For reasons that are not altogether clear the *Quinones* court referenced the 2004 amendment to Penal Law §70.45(2) set forth in L 2004, ch 738, §35. Chapter 738, however, was not approved until December 14, 2004. Section 35, moreover, did not take effect until 30 days thereafter and even then only applied to crimes committed on or after such effective date. It does not appear, therefore, that the 2004 statutory amendment to Penal Law §70.45(2) was applicable to Mr. Quinones case since he was convicted on July 19, 2004. *See People v. Quinones*, 41 AD3d 868. In any event, the prior version of Penal Law §70.45(2), while specifying that the period of post-release supervision for determinate sentence "shall" be five years, included a proviso that the sentencing judge may specify a shorter period of post-release supervision of not less than two and one-half years upon a defendant convicted, like Mr. Quinones, of a first

found that "[s]ince the sentencing court here could have imposed less than a five-year period [of post-release supervision] if it had determined the issue . . . we cannot agree with respondent that imposition of a five-year period was mandatory or a purely ministerial act on the part of the Commissioner. Rather, we agree that '[t]he only cognizable sentence is the one imposed by the judge. Any alteration to that sentence, unless made by a judge in a subsequent proceeding, is of no effect.' " *Id* at 1268, *quoting People v. Duncan*, 42 AD3d 470, 471, *quoting Earley v. Murray*, 451 F3d 71, 75 (citations omitted). The Third Department went on to state that to the extent its prior decisions in *Deal* and *Garner* reached different conclusions, "they should no longer be followed." 46 AD3d 1268.

Dreher goes one step beyond *Quinones*. Mr. Dreher was sentenced as a second felony offender to a determinate term of seven years. According to the *Dreher* court "[t]he [sentencing] court did not impose any period of postrelease supervision." 46 AD3d 1261. This Court presumes that the commitment order in *Dreher* likewise included no reference to any period of post-release supervision. After DOCS calculated Mr. Dreher's sentence as including a five-year period of post-release supervision, he commenced a CPLR Article 78 proceeding seeking to preclude DOCS from imposing any period of post-release supervision. While acknowledging the language of Penal Law §70.45(1) that "[e]ach determinate sentence also includes, as a part thereof, an additional period of post-release supervision," the *Dreher* court found that ". . . sentencing remains the province of the courts. The Legislature did not authorize DOCS to impose any period of postrelease supervision." *Id* at 1261. Although noting the role of DOCS in correcting unlawful sentences pursuant to Correction Law §601-a, the *Dreher* court found that it was the

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class B violent felony offense.

responsibility of the judiciary to actually impose a correct sentence. According to the *Dreher* court, " '[t]he only cognizable sentence is the one imposed by the judge. Any alteration to that sentence, unless made by a judge in a subsequent proceeding, is of no effect.' " *Id* at 1261, *quoting Earley v. Murray*, 451 F3d 71, 75 (citation omitted). As was the case in *Quinones*, the Third Department in *Dreher* went on to note that its prior decisions in *Garner* and *Deal* should no longer be followed. Thus, in *Dreher* the Appellate Division, Third Department, applied the *Earley* rationale notwithstanding the fact that Mr. Dreher was a second felony offender and therefore subject by statute to a mandatory period of post-release supervision of precisely five years, with no discretion to impose a lesser period of post-release supervision afforded to the sentencing judge under either the pre or post 2004 versions of Penal Law §70.45(2).

This Court finds that the application of the recent Third Department holdings in *Quinones* and *Dreher* inescapably leads to the conclusions that (1) the sentence actually imposed upon the petitioner by the County Court, Clinton County, on November 20, 2000, never included, and does not now include, any period of post-release supervision; and (2) that DOCS was not authorized to include in petitioner's sentence calculations any period of post-release supervision. The respondent, for his part does not urge that the Court conclude otherwise. Rather, it is his contention that the holdings in *Quinones* and *Dreher* do not compel a finding that the petitioner in this proceeding is entitled to habeas corpus relief. In this regard the respondent relies upon a quartet of Court of Appeals cases (*People v. Catu*, 4 NY3d 242, *People v. VanDuesen*, 7 NY3d 744, *People v. Louree*, 8 NY3d 541 and *People v. Hill*, 9 NY3d 189) as standing for the proposition that the only remedy available to a plea bargaining violent felony offender for the failure of the sentencing court to advise him/her that a period of post-release supervision would be a

part of the determinate sentence ultimately imposed is to have the guilty plea vacated and the conviction reversed. According to the respondent, "[s]ince the Petitioner's only remedy is the opportunity to withdraw his plea, Respondent respectfully submits he would not be entitled to immediate release; thus habeas corpus is not an available remedy." For the reasons set forth below, however, the Court disagrees.

A *Catu* violation occurs when the sentencing court, at allocution, fails to advise a plea bargaining violent felony offender that the agreed-upon determinate sentence to be imposed includes as a part thereof an additional period of post-release supervision. *See People v. Catu*, 4 NY3d 242. "Because the defendant pleading guilty to a determinate sentence must be aware of the postrelease supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action, the failure of a court to advise of postrelease supervision requires reversal of the conviction." *Id* at 245. This Court would have little difficulty in concluding that the only relief available to an individual seeking to "remedy" a *Catu* violation is to be afforded an opportunity to withdraw his/her plea. An individual subject to a *Catu* violation, however, is under no legal compulsion to seek a remedy for the violation. Instead, such individual always has the option of simply accepting the actual sentence that is ultimately imposed. A common element in *Catu*, *VanDuesen*, *Louree* and *Hill* is that the defendants in those cases, for one reason or another, sought to be relieved of the sentences imposed after the *Catu* violations. Accordingly, for the defendants in those four cases, the only available remedy was the opportunity to withdraw their pleas. The petitioner in the case at bar, however, does not allege a *Catu* violation and does not seek to withdraw his underlying plea. Rather, he argues in effect that the sentence actually imposed on November 20, 2000 (5 year indeterminate term without any period of post-release supervision) has run

its course and yet he still remains, unlawfully, in the custody of the New York State Department of Correctional Services. Under such circumstances the Court finds that habeas corpus relief is available. *See People ex rel Burch v*. Goord, __ AD3d __ (2008 WL 450379), *People ex rel Gerard v. Kralik*, 44 AD3d 804, *People ex rel Huff v. Warden*, 18 Misc 3d 1110 (A) (2008 WL 53909) and *People ex rel White v. Warden*, 15 Misc 3d 360. In addition, the Court is not persuaded that it would appropriate to stay its judgment so as to provide the appropriate authorities with additional time to seek a re-sentencing of the petitioner.

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

ADJUDGED, that the petition is granted, without costs or disbursements, and, pursuant to CPLR §7010(a) it is directed that petitioner be immediately discharged from DOCS custody.

Dated: March 3 , 2008, at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Justice