STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
HERBERT GANNON, JR., #97-A-4776,
Petitioner,

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

DECISION AND JUDGMENT
RJI #4-1-2008-0473.32
INDEX # 128144
ORI #NY044015J

-against-

LAWRENCE SEARS, Superintendent,
Ogdensburg Correctional Facility, and
NEW YORK STATE DEPARTMENT
OF CORRECTIONAL SERVICES,
Respondents.

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This is a habeas corpus proceeding that was originated by the petition of Herbert Gannon, Jr., verified on July 9, 2008, and stamped as filed in the St. Lawrence County Clerk's office on July 16, 2008. Petitioner, who is an inmate at the Ogdensburg Correctional Facility, challenges his continued incarceration in the custody of the New York State Department of Correctional Services. The Court issued an Order to Show Cause on July 18, 2008, and has received respondents' Return, verified on September 4, 2008. Petitioner's Reply thereto, verified on September 5, 2008, was filed in the St. Lawrence County Clerk's Office on September 9, 2008.

On June 26, 1997, the petitioner was sentenced in Supreme Court, New York County, as a second felony offender, to an indeterminate sentence of 3 to 6 years upon his conviction of the crime of Robbery 3°, apparently committed while on parole from previously imposed indeterminate sentences. He was received back into DOCS custody on July 18, 1997, certified as entitled to 54 days jail time credit. At that time it was determined petitioner still owed 6 years and 8 months against the maximum terms of his

previously imposed indeterminate sentences. That determination is not challenged in this proceeding. The 1997 sentence and commitment order did not specify whether the 1997 sentence was to run concurrently or consecutively with respect to the undischarged terms of the previously imposed indeterminate sentences. Although the Court has not been supplied with a copy of the June 26, 1997, sentencing minutes, the respondents concede in paragraph seven of their Return that ". . . the sentencing minutes for petitioner's 1997 sentence is silent regarding his prior sentences." Notwithstanding the foregoing, DOCS computed petitioner's 1997 sentence as running consecutively with respect to such undischarged terms. Accordingly, DOCS officials aggregated petitioner's sentences pursuant to Penal Law §70.30(1)(b) and calculated the interim maximum expiration date of petitioner's sentences to be January 23, 2010. With 5 months and 1 day of delinquent time lost as the result of six subsequent parole violations, petitioner's aggregate maximum expiration date was ultimately calculated as June 24, 2010.

The petitioner asserts that DOCS improperly calculated his 1997 indeterminate sentence as running consecutively, rather than concurrently, with respect to the undischarged terms of his previously imposed indeterminate sentences. [1] The Court agrees.

Penal Law §70.25(1)(a) provides, in relevant part, as follows:

> "1. Except as provided in subdivisions . . . two-a . . . of this section . . . when a person who is subject to any undischarged term of imprisonment imposed at a previous time by a court of this state is sentenced to an additional term of imprisonment, the sentence or sentences imposed by the court shall run either concurrently or consecutively with respect to . . . the undischarged

[1] The petitioner also challenges the processes associated with the revocation of his parole following a January 31, 2007, final parole revocation hearing. It appears, however, that the parole revocation issues sought to be raised by the petitioner in this proceeding were already considered in the context of a CPLR Article 78 proceeding in Albany County (Albany County Index # 9763-07). That proceeding resulted in a February 29, 2008, judgment dismissing the petition. This Court finds no basis to revisit any issues associated with the January 31, 2007, revocation of petitioner's parole in this proceeding.

> term or terms in such manner as the court directs at the time of sentence. If the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run as follows:
>
> (a) An indeterminate or determinate sentence shall run concurrently with all other terms . . .” (Emphasis added).

Penal Law §70.25(2-a) in turn provides that where, as here, an indeterminate sentence of imprisonment is imposed pursuant to Penal Law §70.06 on a second felony offender “. . . and such person is subject to an undischarged indeterminate . . . sentence of imprisonment imposed prior to the date on which the present crime was committed, the court must impose a sentence to run consecutively with respect to such undischarged sentence.”

Based upon the above-quoted statutory provisions the Appellate Division, Third Department, repeatedly held that a sentence imposed pursuant to Penal Law §70.06 on a second felony offender was statutorily mandated to run consecutively with respect to the undischarged term of a previously imposed sentence notwithstanding the sentencing court’s silence on the point. *See e.g. Batista v. Walsh,* 48 AD3d 845*, Moore v. Goord,* 34 AD3d 909, *lv den* 8 NY3d 807 and *Myles v. Smith,* 32 AD3d 1142. In *People ex rel Gill v. Greene*, 48 AD3d 1003, however, the Third Department moved in another direction. In spite of the statutory mandate that a sentencing court impose a second felony offender sentence as running consecutively with respect to the unexpired term of a previously imposed sentence, the *Gill* court ruled that DOCS had no authority to, in effect, correct a sentencing court’s error by calculating a second felony offender sentence as running consecutively where the sentencing court failed to so direct. The Third Department, moreover, re-affirmed the vitality of *Gill* in *Ettari v. Fischer*, 54 AD3d 460.

When petitioner’s multiple sentences are calculated concurrently, as they must be under constraint of *Gill* and *Ettari*, it appears that the merged maximum expiration date

of such sentences has been reached. Penal Law §70.30(1)(a) provides, in relevant part, that where an individual, such as petitioner, is serving more than one indeterminate sentence of imprisonment running concurrently, "[t]he maximum . . . terms of the indeterminate sentences . . . shall merge in and be satisfied by discharge of the term which has the longest unexpired time to run . . ." When petitioner's 1997 sentence is calculated as running concurrently with respect to the undischarged term of his previously imposed indeterminate sentences (6 years and 8 months), the maximum expiration date of petitioner's merged (concurrent) sentences would be controlled by such unexpired term since it had a longer time to run than the 6-year maximum term of the 1997 sentence, less jail time credit. With those 6 years and 8 months calculated as running from July 18, 1997, the date petitioner was received back into DOCS custody, an interim merged maximum expiration date of March 18, 2004, would seemingly be produced. With 5 months and 1 day of delinquent time lost as the result of petitioner's six parole violations tacked on to that interim date, a merged (concurrent) maximum expiration date of August 19, 2004, would seemingly be produced. Since that date has long since passed, habeas corpus relief appears warranted.

The Court is aware that certain coordinate level courts in the Third Department have issued *Gill*-related determinations that are at odds with this Decision and Judgment. While this Court has carefully considered the analyses of those courts, it remains convinced that habeas corpus relief is appropriate under the facts and circumstances herein. In *Lilley v. James*, ___ N.Y.S. 2d ___, 2008 WL 4922354, the Supreme Court, Madison County, considered a *Gill*-related habeas corpus proceeding filed by an inmate who acknowledged that even if his multiple sentences were calculated as running concurrently his maximum expiration date would not fall until May 10, 2010. The *Lilley* Court converted the habeas corpus proceeding into a CPLR Article 78 proceeding and

directed DOCS officials to commence procedures to obtain the inmate's re-sentencing pursuant to Correction Law §601-a. Although acknowledging that under *Gill* DOCS had no authority to calculate Mr. Lilley's sentences as running in consecutive fashion, the *Lilley* Court found that "[t]he [*Gill*] Court clearly did not go so far as to hold that Penal Law §70.25(1) caused the *Gill* petitioner's sentences to run concurrently as a result of the sentencing court's silence. The [*Gill*] court made no determination on that question." *Id*. It appears to this Court that under the *Lilley* analysis sentence calculations for *Gill*-related inmates are in limbo (neither consecutive nor concurrent) pending re-sentencing. Such limbo status may be of little more than academic interest where the affected inmate, like Mr. Lilley, is not entitled to immediate release from DOCS custody even if his/her multiple sentences were to be calculated as running in concurrent fashion. In the case at bar, however, the only basis for petitioner's continued incarceration is DOCS' determination to calculate his 1997 sentence as running consecutively with respect to the undischarged term of his previously imposed sentences.

In *People ex rel Moeller v. Rivera*, __ N.Y.S. 2d __, 2008 WL 4489932, the Supreme Court, Ulster County, considered the case of a *Gill*-related inmate who would have been entitled to immediate release from DOCS custody if his multiple sentences were calculated as running in concurrent fashion. Citing *People v. Sparber*, 10 NY3d 457, the *Moeller* Court nevertheless found the petitioner before it was not entitled to immediate release from DOCS custody and, therefore, that habeas corpus did not lie. According to the *Moeller* Court, "[o]rdinarily, the appropriate action for this Court to take would be to convert the present proceeding to a CPLR Article 78 proceeding challenging DOCS' administrative action in its sentencing calculation . . ." Presumably, the *Moeller* petitioner would only be entitled to re-sentencing. *Sparber*, however, was a post-release supervision case where all of the defendants before the Court of Appeals had been

sentenced to lengthy determinate terms of imprisonment. Thus, for the *Sparber* defendants, as was the case for the *Lilley* petitioner, bases existed for their continued incarcerations in DOCS custody pending re-sentencing. As noted previously, however, there is no basis for the continued incarceration of the petitioner in this proceeding other than DOCS' determination to calculate his 1997 sentence as running consecutively with respect to the undischarged term of his previously imposed sentences. This Court also notes that the Appellate Divisions in the First, Second and Fourth Departments have all sustained habeas corpus relief, post-*Sparber*, with respect to inmates whose ongoing incarcerations in DOCS custody were based solely upon violations of administratively imposed periods of post-release supervision. *See People ex rel Lewis v. Warden*, 51 AD3d 512, *People ex rel Gerard v. Kralik*, 51 AD3d 1045 and *People ex rel Foote v. Piscotti*, 51 AD3d 1407. The Appellate Division, Third Department, has yet to consider a post-*Sparber* habeas corpus proceeding.

In *Jackson v. Bradt, et al*, the Supreme Court, Chemung County (Index #2008-2664) considered the fact that the *Gill*-related habeas corpus petitioner therein had been sentenced in the Fourth Department. After noting that *Gill* ran counter to a long line of Fourth Department cases, the *Jackson* Court held that ". . . [i]t would be incongruous for this Court to conclude that the fortuity of placement in the Third Department by DOCS of a sentenced inmate is dispositive with respect to controlling law. The law to be followed, to insure the orderly and consistent resolution of matters such as these, is that of the county in which the sentences were imposed." *Id*. Although habeas corpus relief was therefore denied, the *Jackson* Court, sitting in the Third Department, cited no judicial authority in support of its determination to, in effect, apply Fourth Department, rather than Third Department, precedent to the matter before it. This Court is unaware of any such authority and also notes that in *Ettari v. Fischer*, 54 AD3d 460, the

Appellate Division, Third Department, found *Gill* dispositive in an Article 78 proceeding brought by a DOCS inmate who had been sentenced in the Second Department. *See People v. Ettari*, 31 AD3d 577.

This Court also finds it would be inappropriate to stay enforcement of this Decision and Judgment pending final resolution of the currently-pending appeal to the Court of Appeals in *Gill v. Greene*, 48 AD3d 1003. "One entitled to 'this, the greatest of all writs' (People ex rel Tweed v. Liscomb, [60 NY 559, 556]), should not be held in prison 'during the weary processes of an appeal.' " *People ex rel Sarley v. Pope*, 230 AD 649 at 651, quoting *People ex rel Sabatino v. Jennings*, 246 NY 258, 261. *See also People ex rel Morris v. Meloni*, 209 AD2d 1057.

Notwithstanding all of the above, this Court is hesitant to direct petitioner's immediate release from DOCS custody based upon its own calculation of the maximum expiration date of petitioner's merged (concurrent) sentences. The Court finds, therefore, that this Decision and Judgment should be rendered subject to prompt notification by DOCS officials that their own re-calculation of petitioner's 1997 sentence as running concurrently with respect to the undischarged term of his previously imposed sentences produces a merged (concurrent) maximum expiration date that has not yet been reached. This Decision and Judgment is also rendered without prejudice to any ability that either the People or DOCS may have to seek re-sentencing of the petitioner in the proper forum. *See Garner v. New York State Department of Correctional Services*, 10 NY3d 358.

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 unless there is another hold on petitioner, or unless DOCS officials notify the Court within 14 days of this Decision and Judgment that their own re-calculation of petitioner's 1997

sentence as running concurrently with respect to the undischarged term of his previously imposed sentences produces a merged maximum expiration date that has not yet been reached, the respondents are directed to release petitioner from DOCS custody; and it is further

ADJUDGED, that this judgment is rendered without prejudice to any ability that either the People or DOCS may have to seek re-sentencing of petitioner in the proper forum.

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

Dated: December 24, 2008, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice