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

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In the Matter of the Application of
CHRISTOPHER BERHAUPT, #07-A-1395,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2009-0644.130
INDEX # 2009-1692
ORI # NY016015J

BRUCE YELICH, Superintendent,
Bare Hill Correctional Facility, and
ANDREA EVANS, Chief Executive Officer,
NYS Division of Parole and Chairwoman,
NYS Board of Parole,
Respondents.

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This proceeding was originated by the Petition for Writ of Habeas Corpus of Christopher Berhaupt, verified on December 20, 2009, and filed in the Franklin County Clerk's office on December 24, 2009. Petitioner, who is an inmate at the Bare Hill 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 5, 2010 and has received and reviewed respondents' Return, dated February 12, 2010, as well as petitioner's Reply thereto, filed in the Franklin County Clerk's office on February 25, 2010.

On February 27, 2007, petitioner was sentenced in Rensselaer County Court to two indeterminate sentences of 1 to 3 years each as well as a determinate term of 2 years, with 1½ years post-release supervision, upon his convictions of the crimes of Driving While Intoxicated, Aggravated Unlicensed Operation of a Motor Vehicle and, upon a probation violation, Assault 2°. The three sentences were directed to run concurrently with each

other. Petitioner was received into DOCS custody on March 12, 2007, certified as entitled to 186 days of jail time credit.

Under the provisions of Penal Law §70.30(1)(a), the maximum terms of petitioner's concurrent indeterminate sentences and the term of his concurrent determinate sentence " . . . shall merge in and be satisfied by discharge of the term which has the longest unexpired time to run . . ." Since the 3-year maximum term of either indeterminate sentence had a longer unexpired time to run than the 2-year term of the determinate sentence, DOCS officials properly calculated the merged maximum term of petitioner's multiple concurrent sentences to be 3 years. Running those 3 years from March 12, 2007, the date petitioner was received into DOCS custody (*see* Penal Law §70.30(1)), and subtracting 186 days of jail time credit, the original merged maximum expiration date of petitioner's multiple sentences was properly calculated as September 5, 2009. The additional 1½-year period of post-release supervision, of course, would still have to be addressed.

Petitioner was initially released from DOCS custody to post-release parole supervision on May 21, 2008. Such release interrupted the running of petitioner's underlying multiple sentences with the remaining portion of the merged maximum term of such sentences "held in abeyance" until petitioner successfully completed the period of post-release supervision or was sooner returned to DOCS custody. *See* Penal Law §70.45(5)(a). As of petitioner's May 21, 2008 initial release to post-release parole supervision, DOCS officials properly determined the maximum expiration date of the 1½-year period of post-release supervision to be November 21, 2009, with 1 year, 3 months

and 14 days held in abeyance as the remaining portion of the merged maximum term of petitioner's underlying multiple, concurrent sentences.

If petitioner had not violated the conditions of post-release supervision, his period of post-release supervision would have been completed on November 21, 2009, with the 1 year, 3 months and 14 days held in abeyance against the merged maximum term of his multiple sentences "credited with and diminished by" the 1½-year period of post-release supervision. *See* Penal Law §70.45(5)(b). Thus, in the absence of a post-release supervision violation, both petitioner's period of post-release supervision as well as his underlying multiple sentences would have effectively terminated on November 21, 2009. Petitioner's post-release supervision, however, was revoked with a modified delinquency date of October 23, 2008, following a final parole revocation hearing conducted on November 19, 2008. The running of petitioner's period of post-release supervision was interrupted as of the October 23, 2008 delinquency date (*see* Penal Law §70.45(5)(d)(i)) with 5 months and 2 days (May 21, 2008 to October 23, 2008) credited against the 1 ½-year period of post-release supervision, thus leaving 1 year and 28 days remaining on such period.

Petitioner was restored to post-release supervision at the Willard Drug Treatment Campus as of November 28, 2008. He was credited with 36 days of parole jail time covering the period from the October 23, 2008 delinquency date to the November 28, 2008 restoration to post-release supervision. The 36 days of parole jail time were properly credited against the 1 year, 3 months and 14 days previously held in abeyance against the merged maximum term of petitioner's multiple sentences (*see* Penal Law

§70.45(5)(d)(iii)), effectively reducing the time held in abeyance to 1 year, 2 months and 8 days.

Petitioner completed the Willard program in April of 2009 and the running of his post-release supervision continued with community-based supervision. Petitioner's post-release supervision, however, was revoked for a second time with a modified delinquency date of June 24, 2009, following a final parole revocation hearing conducted on August 12, 2009. The Administrative Law Judge presiding at the final hearing directed that petitioner be held in DOCS custody until his maximum expiration date. The running of petitioner's period of post-release supervision was interrupted as of the June 24, 2009 delinquency date (*see* Penal Law §70.45(5)(d)(i)) with 6 months and 26 days (November 28, 2008 to June 24, 2009) credited against the remaining 1 year and 28 days of post-release supervision, thus leaving 6 months and 2 days remaining on such period.

Petitioner was returned to DOCS custody as a post-release supervision violator on September 1, 2009, credited with 49 days of parole jail time covering the period from July 15, 2009, when petitioner was taken into local custody in connection with the post-release supervision violation, to his September 1, 2009 return to DOCS custody. The 49 days of parole jail time were properly credited against the 1 year, 2 months and 8 days remaining in abeyance against the merged maximum term of petitioner's multiple sentences (*see* Penal Law §70.45(5)(d)(iv)), effectively reducing the time held in abeyance to 1 year and 19 days.

When the remaining 1 year and 19 days held in abeyance against the merged maximum term of petitioner's multiple sentences, plus the remaining 6 months and 2 days of petitioner's period of post-release supervision, were calculated as running from

petitioner's September 1, 2009, return to DOCS custody, the correct maximum expiration date of March 22, 2011, was produced.

Petitioner's argument to the contrary notwithstanding, the Court finds no basis in the record to conclude that DOCS officials improperly calculated petitioner's multiple 2007 sentences as running in consecutive, rather than concurrent, fashion. It appears that the basic flaw in petitioner's argument is related to his attempt to somehow integrate the 1½-year period of post-release supervision into the statutorily prescribed (Penal Law §70.30(1)(a)) methodology for merging the maximum terms of his indeterminate sentences with the term his concurrent determinate sentence. As alluded to previously, Penal Law §70.30(1)(a) only refers to the term of a concurrent determinate sentence, not the additional period of post-release supervision imposed by the sentencing court pursuant to Penal Law §70.45. Thus, although the 2-year term of petitioner's determinate sentence was properly merged with the concurrent 3-year maximum terms of his indeterminate sentences pursuant to Penal Law §70.30(1)(a), the interaction between the additional 1½-year period of post-release supervision and the merged 3-year maximum term of petitioner's multiple concurrent sentences was governed by the provisions of Penal Law §70.45 rather than Penal Law §70.30(1)(a).

Pursuant to the statutory scheme set forth in Penal Law §70.45, as described throughout this Decision and Judgment, the merged maximum term of petitioner's underlying sentences and his period of post-release supervision never ran at the same time despite the fact that the underlying indeterminate and determinate sentences were directed to run in concurrent, rather than consecutive, fashion. If a post-release supervision releasee, like petitioner, completes the period of post-release supervision, the

running of his/her underlying sentence(s) " . . . shall resume and only then shall the remaining portion of any maximum or aggregate maximum term previously held in abeyance be credited with and diminished by such period of post-release supervision. The person shall then be under the jurisdiction of the division of parole for the remaining portion of such maximum or aggregate maximum term." Penal Law §70.45(5)(b). See page three of this Decision and Judgment. It is therefore ultimately within the control of the post-release supervision releasee to determine, through his/her behavior while subject to post-release supervision, whether or not the underlying sentence(s) will effectively run concurrently with or consecutively to the period of post-release supervision. As far as the petitioner in this proceeding is concerned, the fact that he will effectively end up serving the merged maximum term of his underlying concurrent sentences consecutively with respect to the 1½-year period of post-release supervision is the result of his multiple post-release supervision violations, culminating in the August 12, 2009 delinquent time assessment directing that he be held to his maximum expiration date, rather than any illegal sentence calculation on the part of DOCS officials.

The Court's review of respondents' Return suggests that they construed the petition as including a challenge to the enforceability of the plea agreement reached at petitioner's final parole revocation hearing of August 12, 2009. In this regard respondents assert that such challenge cannot be maintained at this juncture pending exhaustion of administrative remedies through the administrative appeals process set forth in 9 NYCRR Part 8006. In his February 22, 2010, Reply, however, petitioner clarifies his position as follows:

> "Petitioner's reason for filing Habeas Corpus is because petitioner is illegally be [sic] held past his maximum expiration date. Petitioner also filed parole Appeal which was received by the department of Parole on October 20, 2009. Therefore, making February 20, 2010 the expired date. 9 NYCRR §8006.4(c). Petitioner not yet to receive anything from the department of Parole. Petitioner is not seeking a parole decision at this point. Petitioner is seeking immediate release from the department of Corr. Services."

Accordingly, the Court will not address the issue of the enforceability of the parole plea agreement in this proceeding.

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: March 15, 2010, at
Indian Lake, New York

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S. Peter Feldstein
Acting Supreme Court Judge