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

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In the Matter of the Application of
TERRY ANGEL, #05-A-5577,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2010-0059.09
INDEX # 2010-166
ORI # NY016015J

DARWIN LaCLAIR, Superintendent, Franklin Correctional Facility, and **ANDREA EVANS,** Chief Executive Officer, NYS Division of Parole and Chairwoman, NYS Board of Parole,
Respondent.

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This proceeding was originated by the Petition for a Writ of Habeas Corpus of Terry Angel, verified on February 2, 2010, and filed in the Franklin County Clerk's office on February 9, 2010. 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 February 17, 2010 and has received and reviewed respondents' Return, dated April 2, 2010, as well as petitioner's Reply thereto, filed in the Franklin County Clerk's office on April 21, 2010.

On July 12, 1994, petitioner was sentenced in Supreme Court, New York County, as a second violent felony offender, to a controlling indeterminate sentence of 7½ to 15 years upon his convictions of the crimes of Assault 1° and Criminal Possession of a Weapon 3°. On October 23, 2003 he was conditionally released from DOCS custody to parole supervision. On October 13, 2004, however, petitioner was arrested in connection with new criminal charges. On October 20, 2005 he was sentenced in Supreme Court, New York County, as a second felony offender, to a indeterminate sentence of 2½ to 5

years upon his conviction of the crime of Criminal Possession of a Weapon 3°. The 2005 sentencing court did not specify whether its sentence was to run concurrently or consecutively with respect to the undischarged term of petitioner's 1994 sentences. On November 3, 2005, petitioner was received back into DOCS custody certified as entitled to 386 days of jail time credit.

Under the relevant provisions of Executive Law §259-i(3)(c)(1) a conditional releasee convicted of a new crime committed while under parole supervision is not entitled to a preliminary parole revocation hearing. In addition, under the relevant provisions of Executive Law §259-i(3)(d)(iii), ". . . when a . . . conditional releasee . . . has been convicted of a new felony committed while under such [parole] supervision and a new indeterminate . . . sentence has been imposed, the board's rules shall provide for a final declaration of delinquency. The inmate shall then be notified in writing that his release has been revoked on the basis of the new conviction . . . The inmate's next appearance before the board shall be governed by the legal requirements of said new indeterminate . . . sentence . . ." Pursuant to this statutory scheme, upon petitioner's 2005 sentencing his conditional release was properly revoked by operation of law without the necessity of a parole revocation hearing. *See People ex rel Harris v. Sullivan,* 74 NY2d 305, *Meade v. Boucaud*, 67 AD3d 1263, *Tineo v. New York State Division of Parole*, 14 AD3d 949 and *People ex rel Melendez v. Bennett*, 291 AD2d 590, *lv den* 98 NY2d 602. This Court finds, moreover, that the revocation of petitioner's conditional release by operation of law, without a parole revocation hearing, did not violate his due process rights. *See O'Quinn v. New York State Board of Parole*, 132 Misc 2d 92 *and People ex rel Conyers v. New York State Division of Parole*, 130 Misc 2d 33.

When petitioner was received back into DOCS custody on November 3, 2005, the Division of Parole issued a Notice of Final Declaration of Delinquency pursuant to Executive Law §259-i(3)(d)(iii). According to the notice, a final delinquency date of October 13, 2004, the date of the arrest underlying petitioner's 2005 conviction, was established. The notice concluded as follows:

> "By copy of this Notice of Final Declaration Delinquency we are notifying the Inmate Records Coordinator at your facility of confinement of the action by the Board [of Parole] ordering a final declaration of delinquency. We are requesting the Inmate Records Coordinator take such action as is necessary to recompute your sentence(s) in accordance with the law."

DOCS officials determined that as of the date of delinquency petitioner still owed 3 years, 7 months and 26 days against the undischarged maximum term of his 1994 sentences. DOCS officials further determined that petitioner's 2005 sentence must be calculated as running consecutively, rather than concurrently, with respect to such undischarged term. For the reasons set forth below the Court finds no statutory or constitutional infirmity associate with such determination.

Penal Law §70.25 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. . . imposed by the court shall run either concurrently or consecutively with respect to . . . the undischarged term . . . 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 . . . sentence shall run concurrently with all other terms . . .” (Emphasis added).

The relevant provisions of Penal Law §70.25(2-a) in turn provide that “[w]hen an indeterminate . . . sentence of imprisonment is imposed pursuant to section . . . 70.06 [second felony offender] . . . of this article, 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.”

Since petitioner was sentenced in 2005 as a second felony offender, he was clearly subject to the consecutive sentencing provisions of Penal Law §70.25(2-a) and the New York Court of Appeals has made it clear that DOCS officials must interpret such a sentence as running consecutively with respect to previously undischarged sentences notwithstanding the sentencing court’s silence on this point. *See People ex rel Gill v. Greene*, 12 NY3d 1, *cert den sub nom Gill v. Rock*, 130 S. Ct. 86. *See also High v. Rabsatt*, 67 AD3d 1262. According to the Court of Appeals in *Gill*, the characterization of its sentence as either concurrent or consecutive, omitted by the second sentencing court, was “ . . . provided by the statute, Penal Law §70.25(2-a), which says the sentence must be consecutive. Nothing in the statute and nothing in the Constitution requires the sentencing court to say the word ‘consecutive,’ either orally or in writing. Nothing in the statute even requires that the sentencing court be made aware that the prior sentences are undischarged.” 12 NY3d 1, 6. Thus, the rationale of the Court of Appeals in *Gill* is applicable whether or not the second sentencing judge was aware of any prior undischarged sentence(s).

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: May 10, 2010, at
Indian Lake, New York

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S. Peter Feldstein
Acting Supreme Court Judge