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

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In the Matter of the Application of
KEITH TERRELL BUTLER, #05-A-1392,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION AND JUDGMENT
RJI #16-1-2009-0164.52
INDEX # 2009-0456
ORI #NY016015J

-against-

NEW YORK STATE DEPARTMENT
OF CORRECTIONAL SERVICES,
Respondent.

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Petitioner's "Letter/Application C.P.L. §410.91," captioned "The People of State New York vs. Keith Terrell Butler," was filed in the Franklin County Clerk's office on March 27, 2009 under the above civil index number with an index number application form captioned "Keith Terrell Butler vs. NYSDOC." Apparently based upon the application for a civil index number this matter was assigned to me as a CPLR Article 78 proceeding notwithstanding the fact that no petition, RJI form or application for poor person status was filed. By Letter Order dated May 18, 2009 the Court advised petitioner as follows:

> "Upon consideration of your "Letter/Application" it appears that you seek relief with respect to two separate issues. One claim for relief - that you be resentenced to parole supervision (Willard Drug Treatment Campus Program) pursuant to CPL § 410.91 - is clearly not cognizable within the context of a CPLR Article 78 proceeding.
>
> Your first claim for relief is a bit more problematic. Although it does appear that you are challenging the manner in which your multiple sentences have been calculated, it is not clear from the papers before me whether you are asserting that you were incorrectly sentenced by the court or, rather, that you were correctly sentenced by the court but DOCS officials improperly implemented the sentence. My confusion stems not only from the fact that your papers did not include copies of any sentencing documents, but also from the statement set forth in paragraph two of your "Letter/Application" as follow: "My time has been aggregated with my time already owed and

> that's not what you ordered. In fact my sentenced [sic] was to be ran consecutive to the time already owed and DOCS has no authority to alter my sentence . . ." To the extent you assert that the sentencing judge incorrectly directed your multiple sentences to run consecutively, such assertion is not properly the subject of a CPLR Article 78 proceeding. To the extent, however, you assert that your sentence was correctly pronounced by the sentencing court, but that DOCS officials have improperly implemented the sentencing order, a CPLR Article 78 proceeding would be appropriate.
>
> Before considering disposition of the papers assigned to me as part of a civil proceeding, rather than as part of a criminal action, you are hereby directed to clarify the nature of the first issue addressed in such papers . . ."

The Court has since received various correspondence from Mr. Butler, who is now incarcerated at the Clinton Correctional Facility and who will hereinafter be referred to as the petitioner. Although it is clear that petitioner believes that DOCS officials have miscalculated his multiple sentences, this Court remains unclear as to the precise nature of the reasoning underlying that belief. Nevertheless, the Court has been able to piece together the facts and circumstances associated with petitioner's multiple sentences and current incarceration in DOCS custody. For the reasons set forth below, the Court finds no basis to conclude that there has been any miscalculation of such sentences.

On an unspecified date petitioner was sentenced to a determinate term of 5 years with 5 years post-release supervision. On March 23, 2005 he was received into DOCS custody certified as entitled to 309 days of jail time credit. Petitioner's original maximum expiration and conditional release dates fell on May 13, 2009 and August 23, 2008, respectively.

On July 12, 2007, while in DOCS custody, petitioner committed a new criminal offense and on January 18, 2008 he was sentenced in this county, as a second felony offender, to an indeterminate sentence of 1½ to 3 years upon his conviction of the crime of Aggravated Harassment of an Employee by an Inmate (Penal Law §240.32), a class E felony. Although the 2008 sentence and commitment order contained the

"recommendation" that petitioner be enrolled into the DOCS Willard Drug Program, there is nothing in the sentence and commitment order to suggest that petitioner was sentenced to parole supervision pursuant to Criminal Procedure Law §410.91.[1] The 2008 sentence and commitment order, however, specified that its sentence was to be "served consecutively." In any event, since petitioner was sentenced in 2008 as a second felony offender (Penal Law §70.06), the sentencing court was statutorily mandated to direct that its sentence run consecutively with respect to the undischarged term of petitioner's prior sentence. *See* Penal Law §70.25(2-a).

After the 2008 sentencing DOCS officials re-calculated petitioner's maximum expiration and conditional release dates to be January 17, 2011 and February 23, 2010, respectively. As far as the re-calculated maximum expiration date is concerned, Penal Law §70.30(1)(d) provides, in relevant part, that "[i]f the defendant is serving one or more indeterminate sentences of imprisonment and one or more determinate sentences of imprisonment which run consecutively, the minimum term . . . of the indeterminate sentence . . . and the term . . . of the determinate sentence . . . are added to arrive at an aggregate maximum term of imprisonment, provided, however, (i) that in no event shall the aggregate maximum so calculated be less the term or maximum term of imprisonment of the sentence which has the longest unexpired time to run . . ." When the 1 ½ year minimum period of petitioner's 2008 sentence is added to the original May 13, 2009 maximum expiration date of his previous determinate sentence, a potential aggregate maximum expiration date of November 13, 2010 is produced. Since, however, the 3 year maximum term of petitioner's 2008 sentence, properly computed as running from its

[1] Since the crime underlying petitioner's 2008 conviction is not a "specified offense" under Criminal Procedure Law §410.91(5) and since petitioner was subject to an undischarged term of imprisonment at the time the 2008 sentence was imposed, it is doubtful that petitioner was an "eligible defendant" for purposes of a sentence of parole supervision. *See* Criminal Procedure Law §410.91(2).

imposition on January 18, 2008 without jail time credit, produces a maximum expiration date of January 17, 2011, the statutory exception set forth in the above-quoted provisions of Penal Law §70.30(1)(d)(i) is applicable. Therefore, DOCS officials correctly determined the aggregate maximum expiration date of petitioner's multiple sentences to be January 17, 2011.

As far as the conditional release date of petitioner's multiple sentences is concerned, Penal Law §70.40(1)(b) provides, in relevant part, that "[a] person who is serving one or more than one indeterminate or determinate sentence of imprisonment shall . . . be conditionally released . . . when . . . the total good behavior time allowed to him, pursuant to the provisions of the correction law, is equal to the unserved portion of his . . . aggregate maximum term; provided, however, that . . . (ii) in no event shall a person be conditionally released prior to the date on which such person is first eligible for discretionary parole release." Once again, the statutory exception to the general rule is applicable. Under the relevant provisions of Penal Law §70.40(1)(iv), "[a] person who is serving one . . . indeterminate sentence of imprisonment and one . . . determinate sentence of imprisonment which run consecutively may be paroled at any time after the expiration of the sum of the minimum . . . period of the indeterminate sentence . . . and six-sevenths of the term . . . of the determinate sentence . . ." When the 1½ year minimum period of the 2008 sentence is added on to the original August 23, 2008 conditional release date of petitioner's prior determinate sentence, which was calculated based upon six-sevenths of the 5-year determinate term, a February 23, 2010 parole eligibility date with respect to petitioner's multiple sentences is produced. Under the above-quoted statutory exception set forth in Penal Law §70.40(1)(b)(ii), the conditional release date of petitioner's multiple sentences was correctly calculated to coincide with his February 23, 2010 parole eligibility date.

Based upon all of the above, the Court finds no basis to issue an Order to Show Cause and it is further

ADJUDGED, that the "petition" currently before the Court is dismissed.

Dated: May 19, 2010, at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice