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

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In the Matter of the Application of
DEVON STURGIS,#99-B-1882,

Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2010-0106.10
INDEX #133057
ORI # NY044015J

-against-

BRIAN FISCHER, Commissioner,
NYS Department of Correctional Services,
and **NYS DIVISION OF PAROLE**,

Respondents.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Devon Sturgis, verified on February 19, 2010 and filed in St. Lawrence County Clerk's office on February 23, 2010. Petitioner, who is an inmate at the Riverview Correctional Facility, is challenging " . . . the lawfulness of a [sic] administratively imposition [sic] of a term of Post Release Supervision . . . and the imposition of delinquent time and all time held in abeyance, thus, all warrants that were for the re-taking of Devon Sturgis by the New York State Division of Parole . . . before October 23, 2007." The Court issued an Order to Show Cause on March 3, 2010 and has received and reviewed respondents' Answer, verified on April 9, 2010, as well as petitioner's Reply thereto, filed in the St. Lawrence County Clerk's office on April 20, 2010.

On July 6, 1999, petitioner was sentenced in Chemung County Court, as a second felony offender, to a 3-year determinate term and a concurrent indeterminate sentence 5 to 10 years upon his convictions of the crimes of Criminal Possession of a Weapon 3°

and Criminal Sale of Controlled Substance 3°. He was received into DOCS custody on August 30, 1999, certified as entitled to 267 days of jail time credit. At that time DOCS officials calculated the maximum expiration and parole eligibility dates of petitioner's multiple sentences to be December 2, 2008, and December 2, 2003, respectively. Although neither the sentencing minutes nor the sentence and commitment order referenced the judicial imposition any period of post-release supervision (Penal Law §70.45) in connection with the determinate term, DOCS officials administratively imposed a 5-year period of post-release supervision.

Petitioner was initially released from DOCS custody to post-release parole supervision on September 2, 2005. He was subsequently declared delinquent, however, as of February 9, 2006. Petitioner received a "revoke and restore to Willard Drug Treatment Campus program" disposition and was received back into DOCS custody, presumably to await transfer to Willard, on March 8, 2006, certified as entitled to 26 days of parole jail time credit. After attending the Willard program, petitioner was released therefrom to community-based post-release parole supervision on June 22, 2006. Petitioner was declared delinquent, for a second time, as of October 23, 2006, and on May 23, 2007, he was returned to DOCS custody as a post-release supervision violator, certified as entitled to 81 days of parole jail time credit.

By Decision and Order dated October 23, 2007, the Chemung County Court granted petitioner's CPL Article 440 motion to vacate his 1999 sentence and, upon consent of the People, modified the 1999 sentence by judicially imposing the minimum 1½-year period of post-release supervision in connection with petitioner's 3-year determinate term.

Petitioner was again released from DOCS custody to post-release parole supervision on September 3, 2008, but was declared delinquent as of September 12,

2008. His parole was subsequently revoked and it was directed that he be held to his maximum expiration date. Petitioner was received back into DOCS custody on February 10, 2009, as a post-release supervision violator, certified as entitled to 151 days of parole jail time credit. At that time DOCS officials determined the maximum expiration date of petitioner's multiple sentences and 1 ½-year period of post-release supervision to be October 11, 2010.

Petitioner commenced a habeas corpus proceeding in this Court (Index #131536) on August 13, 2009 by filing a petition in the St. Lawrence County Clerk's office. By Decision and Judgment dated November 20, 2009 the petition was dismissed. Although the Court recognized that DOCS lacked authority to calculate petitioner's 1999 determinate sentence as including any period of post-release supervision prior to the October 23, 2007 judicial modification of such sentence (*see Garner v. New York State Department of Correctional Services*, 10 NY3d 358, *People v. Sparber*, 10 NY3d 457 *and Smiley v. Department of Correctional Services*, 52 AD3d 978), it ultimately determined as follows:

> "When the petitioner . . . was first released from DOCS custody to parole supervision on September 2, 2005, he still owed 3 years and 3 months to the December 2, 2008, maximum expiration date of his multiple sentences. Thus, when petitioner was re-incarcerated on May 23, 2007, his underlying sentences, rather than the illegally-imposed period of post-release supervision, could serve as the basis for such a re-incarceration. Put another way, even if petitioner was never made subject to the administratively-imposed period of post-release supervision, his release from DOCS custody to parole supervision was still subject to revocation upon a violation of the conditions of release and he could still be lawfully re-incarcerated up to the maximum expiration date of the underlying sentences. Since petitioner was not, in fact, incarcerated beyond such maximum expiration date, and since DOCS officials have adjusted his sentence calculations to reflect the October 23, 2007, judicial imposition of a 1½-

> year period of post-release supervision, it matters little whether the prior revocation of petitioner's release from DOCS custody was termed a revocation of post-release supervision or, rather, simply a revocation of parole or conditional release. Accordingly, this Court finds that the administrative imposition of the period of post-release supervision prior to the October 23, 2007, judicial modification of petitioner's 1999 determinate sentence, while a nullity, does not serve as a basis to support petitioner's claim of entitlement to immediate release from DOCS custody."

There is nothing in any record before this Court to suggest that petitioner took an appeal from the Decision and Judgment of November 20, 2009 in Index #131536.

In this proceeding "[p]etitioner is asking the court to determine weather [sic] the time that was held in abeyance and any delinquent time that was placed on his sentence by the respondents before the amended sentence was sent down by Chemung County on October 23, 2007 was in fact lawful, thus, did respondents have the authority to hold petitioner's time in abeyance, interrupt his sentence and haold [presumably, hold] petitioner as being delinquent, thus, violate petitioner's parole when DOP [presumably, Division of Parole] did not lawfully establish jurisdiction over petitioner."

To the extent petitioner's position in this proceeding can be viewed as challenging the rationale underlying the Decision and Judgment of November 20, 2009 in Index #131536, the Court finds that petitioner is collaterally estopped from asserting such challenge. *See Hill v. Goord*, 275 AD2d 492. To the extent, however, petitioner challenges the methodology underlying DOCS's calculation of his October 11, 2010 merged maximum expiration date, the Court will consider such challenge in this proceeding.

Penal Law §70.30(5) provides, in relevant part, that "[w]hen a sentence of imprisonment that has been imposed on a person is vacated and a new sentence is

imposed on such person for the same offense . . . the new sentence shall be calculated as if it had commenced at the time the vacated sentence commenced . . ." For sentence calculation purposes only, the Court therefore finds that DOCS officials properly calculated petitioner's determinate sentence, modified on October 23, 2007 to include the 1½-year period of post-release supervision, as if it had commenced on August 30, 1999, when petitioner was originally received into DOCS custody.[1]

Under the facts and circumstances of this case, where petitioner, after his third parole revocation, was ordered to be held in DOCS custody until the maximum expiration of his period of post-release supervision (Executive Law §259-i(3)(f)(x)(D)), it ultimately makes no difference whether the 1½-year period of post-release supervision is factored in from the commencement of the 1999 merged sentence or, rather, only after the 1999 determinate sentence was modified on October 23, 2007. Under the New York statutory scheme an underlying determinate (or merged determinate/indeterminate) sentence of imprisonment and the period of post-release supervision are never calculated as running at the same time. "A period of post-release supervision shall commence upon the [inmate's] release from imprisonment to supervision by the division of parole and shall interrupt the running of the determinate sentence of imprisonment and the indeterminate sentence . . . of imprisonment, if any. The remaining portion of any maximum . . . term shall then be held in abeyance until the successful completion of the period of post-release supervision or the person's return to the custody of the department of correctional services, whichever occurs first." Penal Law §70.45(5)(a). A declaration of delinquency,

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[1] Obviously, an administratively imposed period of post-release supervision cannot, in and of itself, serve as a basis for the re-incarceration of a post-release supervision "violator." *See State v. Randy M.*, 57 AD3d 1157, *lv den* 11 NY3d 921. However, as noted in this Court's Decision and Judgement of November 20, 2009 in Index #131536, petitioner's underlying multiple sentences, rather than the illegally imposed period of post-release supervision, served as the basis for his re-incarceration prior to the October 23, 2007 Chemung County sentence modification order.

moreover, interrupts the running of the period of post-release supervision and such interruption continues until the violator is restored to post-release supervision. *See* Penal Law §70.45(5)(d)(i) and (ii). Parole jail time credit (Penal Law §70.40(3)(c)) must first be applied against the underlying sentence(s) and may only be applied against the period of post-release supervision if the time spent in custody solely pursuant to the delinquency exceeds the maximum term of the underlying sentence(s). *See* Penal Law §70.45(5)(d)(iii) and (iv).

The initially computed maximum expiration date of petitioner's merged 1999 sentences, without reference to any period of post-release supervision, was December 2, 2008. Bearing in mind that as a result of petitioner's third parole violation he was effectively ordered to be held in DOCS custody until the maximum expiration of his underlying merged sentences, including the 1½ year period of post-release supervision, and bearing in mind that such merged sentences and period of post-release supervision could never run at the same time, the maximum expiration date of the period of post-release supervision, without considering lost delinquent time, could not be reached earlier than June 2, 2010 (December 2, 2008 maximum expiration date of the merged 1999 sentences plus 1½ years post-release supervision). As a result of the 26 days of parole jail time credit and 151 days of parole jail time credit granted in connection with petitioner's first and third parole revocations, he lost no delinquent time. Petitioner's second parole revocation, however, did result in 4 months and 9 days of lost delinquent time since his second delinquency date fell on October 23, 2006 and he was returned to DOCS custody exactly 7 months later, certified as entitled to only 81 days of parole jail time credit (7 months less 81 days = 4 months and 9 days). When the 4 months and 9 days of lost delinquent time is tacked on to the earliest possible post-release supervision maximum expiration date (June 2, 2010), as described above, the final post-release

supervision maximum expiration date of October 11, 2010 is produced. Under the facts and circumstances of this case, moreover, that date is produced regardless of whether the 1½ year period of post-release supervision is calculated as if it were imposed at the time of the 1999 sentences or, rather, as of the October 23, 2007 modification of the 1999 determinate sentence.[2]

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 19, 2010, at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court

[2] For an inmate who, unlike petitioner, successfully completes his/her period of post-release supervision, it is advantageous that such completion occur with as much remaining time held in abeyance on the underlying sentence(s) as possible since Penal Law §70.45(5)(b) provides that upon completion of the period of post-release supervision the remaining portion of the sentence(s) previously held in abeyance is " . . . credited with and diminished by such period of post-release supervision."