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 78
of the Civil Practice Law and Rules

DECISION AND JUDGMENT
RJI #16-1-2010-0162.31
INDEX # 2010-0448
ORI #NY016015J

-against-

ANDREA EVANS, Chief Executive Officer,
NYS Division of Parole and Chairwoman, NYS
Board of Parole
Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Christopher Berhaupt, filed in the Franklin County Clerk's office on March 30, 2010. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the results and disposition of a final parole revocation hearing conducted at the Rensselaer County Jail on August 12, 2009. The Court issued an Order to Show Cause on April 9, 2010 and has received and reviewed respondent's Answer, verified on May 26, 2010, as well as petitioner's Reply thereto, filed in the Franklin County Clerk's office on June 15, 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. He was initially released from DOCS custody to post-release parole supervision on May 21, 2008 but such release was revoked with a modified delinquency date of October 23, 2008 following a final parole revocation hearing conducted on November 19, 2008. Petitioner was restored to post-release supervision at the Willard Drug Treatment Campus as of November 28, 2008, credited with 36 days of parole jail time covering the period from the October 23, 2008 delinquency date to the November 28, 2008 restoration. He 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 Petitioner's post-release supervision, however, was revoked for a second time with a modified delinquency date of June 24, 2009, following a final parole revocation hearing conducted on August 12, 2009.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 (ALJ) presiding at the final hearing directed that petitioner be held in DOCS custody until his maximum expiration date. 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 he was taken into local custody in connection with the post-release supervision violation, to his September 1, 2009 return to DOCS custody. DOCS officials calculated petitioner's maximum expiration date as falling on March 22, 2011.

The document perfecting petitioner's administrative appeal from the August 12, 2009 revocation of post-release parole supervision was received by the Division of Parole Appeals Unit on October 20, 2009. On December 24, 2009, while his administrative appeal was still pending, petitioner originated a habeas corpus proceeding in this Court under Franklin County Index Number 2009-1692. In that

habeas corpus proceeding petitioner challenged his continued incarceration in DOCS custody by asserting that state officials had improperly calculated the maximum expiration date of his multiple sentences. The respondents in petitioner's habeas corpus proceeding apparently construed the petition as including a challenge to the enforceability of the plea agreement entered into at petitioner's final parole revocation hearing on August 12, 2009. The habeas corpus respondents asserted that such challenge could not be maintained pending exhaustion of petitioner's administrative appeal. The petitioner, however, clarified his position by asserting that he did not seek a judicial ruling on enforceability of the plea agreement in the context of the habeas corpus proceeding. Accordingly, the habeas corpus Court did not address that issue. By Decision and Judgment dated March 12, 2010, however, the habeas corpus Court found that DOCS officials had properly calculated the maximum expiration date of petitioner's multiple sentences and, therefore dismissed the petition.

The Division of Parole Appeals Unit failed to issue its findings and recommendation (9 NYCRR §8006.4(a)) with respect to petitioner's administrative appeal within four months of October 20, 2009, when the administrative appeal was perfected. This proceeding ensued. *See* 9 NYCRR §8006.4(c).

Petitioner asserts that at the August 12, 2009 final parole revocation hearing he, his attorney, the ALJ and the parole revocation specialist all believed that the maximum expiration date of his multiple sentences would fall approximately eight to nine months after the final hearing, rather than on March 22, 2011, as calculated by DOCS officials. According to petitioner, if he " . . . had been correctly informed by his lawyer and the court [presumably the ALJ] of the correct language of the statute about his max. date

is a 21 months time assessment. Petitioner would have declined to plead guilty to max out to a 21 months time assessment." Petitioner now seeks a judicially-imposed 12-month delinquent time assessment or, in the alternative, that the Court direct " . . . a new final revocation parole hearing, because petitioner was ignorant of the direct consequence of pleading guilty to max out with a 21 month time assessment."

The Court initially rejects respondent's argument that this proceeding must be dismissed on *res judicata* principals. Petitioner's challenge to the integrity of the plea agreement at the August 12, 2009 final parole revocation hearing was the subject of a pending administrative appeal, and therefore not viable, during the course of the previous habeas corpus proceeding. *See Old Forge Construction Co., Inc. v. City of Syracuse*, 94 AD2d 937. In this regard the Court notes that a habeas corpus proceeding brought by a parole violator to challenge one or more aspects of the underlying revocation process is subject to dismissal where the violator fails to first exhaust administrative remedies through the administrative appeals process set forth in 9 NYCRR Part 8006. *See People ex rel DeMarta v. Sears*, 31 AD3d 918, *lv den* 7 NY3d 715 *and People ex rel Bariteau v. Donelli*, 24 AD3d 1065.

Turning to the merits, or lack thereof, of petitioner's assertions in the case at bar, the Court finds no basis in the record to conclude that petitioner's plea of guilty to one of numerous parole violation charges at the final hearing on August 12, 2009 was prompted by any representation as to the maximum expiration date of petitioner's multiple sentences. A review of the transcript of the final hearing reveals no direct references to petitioner's anticipated maximum expiration date. After placing on the record his understanding of the plea agreement whereby petitioner would pled guilty

to one parole violation charge and be held to maximum expiration as a Category I violator, counsel for the petitioner stated as follows: "I have had an opportunity to discuss that [the plea agreement] with Mr. Berhaupt. It's my understanding he's prepared to move forward today. We had discussed the possibility of lingering Department of Corrections time, he doesn't believe there is any such time. But with that understanding, he's prepared to move forward." In addition, at the close at the final hearing the ALJ stated that " . . . today's hearing is without prejudice to any due process rights regarding time. He [presumably, petitioner] indicates they [presumably DOCS] may have taken too much time from him on an earlier violation but there's no information on that violation present here today." As alluded to previously, the issues associated with the calculation of petitioner's multiple sentences and the impact upon such calculation of petitioner's multiple post-release supervision violations has been litigated in the context of the habeas corpus proceeding under Franklin County Index No. 2009-1692.

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: August 13, 2010 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice