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

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In the Matter of the Application of
RAFAEL CORDERO, #12-A-4890,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2015-0505.73
INDEX # 2015-862
ORI #NY016015J

DARWIN LaCLAIR, Superintendent,
Franklin Correctional Facility,
Respondent.

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This proceeding was originated by the Petition for Writ of Habeas Corpus of Rafael Cordero, verified on November 14, 2015 and filed in Franklin County Clerk's office on November 20, 2015. 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 Corrections and Community Supervision. The Court issued an Order to Show Cause on November 25, 2015 and has received and reviewed respondent's Answer and Return, verified on January 7, 2016 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated January 7, 2015. It is noted that the Affirmation of Terrance X. Tracy, Esq., Associate Counsel, New York State Department of Corrections and Community Supervision, dated January 6, 2016, is annexed to the respondent's Answer and Return as Exhibit I thereof. The Court has also received and reviewed petitioner's Reply Affidavit, sworn to on January 18, 2016 and filed in the Franklin County Clerk's office on January 22, 2016.

On August 6, 1991 petitioner was sentenced in Supreme Court, New York County, to three concurrent indeterminate sentences of 15 years to life upon his convictions of

three counts of the crime of Criminal Sale of a Controlled Substance 1°. This Court notes that Criminal Sale of a Controlled Substance 1° is a class A-I felony defined in Article 220 of the Penal Law. When petitioner was received into DOCCS custody it was apparently determined that he would not complete serving the minimum period of his multiple 1991 sentences - and thereby become eligible for regular discretionary parole release - until 2006.

Executive Law §259-i(2)(d)(i) was amended by L 1995, ch 3, § 40, effective June 10, 1995, to permit early conditional parole for deportation only (ECPDO) for certain inmates prior to the time such inmates completed serving the minimum periods of their sentences[1]. More specifically, the amended version of Executive Law §259-i(2)(d)(i) authorized ECPDO " . . . at any time after the inmate's period of imprisonment has commenced, provided that the inmate has had a final order of deportation issued against him and provided further that the inmate is not convicted of either an A-I felony offense other than an A-I felony offense as defined in article two hundred twenty of the penal law or a violent felony offense as defined in section 70.02 of the penal law . . ."

On or about June 20, 1997 a final order was issued by the U.S. Immigration Court directing petitioner's removal from the United States to effect his deportation to the Dominican Republic. On September 17, 1997 petitioner appeared before a Parole Board for ECPDO consideration. During the course of that appearance petitioner expressed a desire for "a new opportunity to start going back into society." At that point the following colloquy occurred:

> "[Parole] COMMISSIONER GRABER: It is not our society. You'll go back to your country.

[1] Before the amendment conditional parole for deportation only was only available to inmates who had completed serving the minimum periods of their sentences.

THE INMATE:	Yes, I understand it is my country.
COMMISSIONER GRABER:	You are on a life sentence. If you return to New York without our federal government's permission, you will go back to a state sentence.
THE INMATE:	I will not return."

Petitioner was ultimately granted ECPDO pursuant to Executive Law §259-i(2)(d)(i) and (ii) and on or about December 15, 1997 he was transferred into the custody of federal immigration officials.[2] The sole condition of petitioner's release, as set forth in his ECPDO documentation (Exhibit D annexed to respondent's Return) was as follows:

> "I [petitioner] understand that I am being transferred to the custody of Immigration and Naturalization Service for the purpose of deportation only and that only the United States government can give me permission to return to the U.S. after I have been deported. In addition, I will not return to the United States prior to my Maximum Expiration Date without prior contact with the New York State Board of Parole. I will forward notice of my proposed return to the Division of Parole's Interstate Bureau . . . and will not return to the U.S. until I receive instructions from the Division of Parole telling me how and when to report to a Parole Officer. I further understand that at no time while in the custody of Immigration and Naturalization Service authorities will I attempt to escape or escape [sic]."

Federal authorities subsequently deported petitioner to the Dominican Republic. There is nothing in the record to suggest that New York State parole officials performed any supervisory function with respect to petitioner after he was transferred into the custody of federal officials on December 15, 1997.

On March 14, 2012 DOCCS officials were notified that petitioner had been arrested in New York County in connection with new felony drug charges. On October 16, 2012 he

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[2] "An inmate who has been granted [ECPDO] shall be delivered to the custody of the United States Immigration and Naturalization Service along with the [parole] board's warrant for his retaking to be executed in the event of his release from such custody other than by deportation. Executive Law §259-i(2)(d)(ii), as it provided as of December 15, 1997.

was sentenced in Supreme Court, New York County, to a determinate term of 2½ years, with 2 years post-release supervision, upon his conviction of the crime of Criminal Possession of a Controlled Substance 3°. Petitioner's 2012 conviction/sentencing stemmed from the charges underlying his March 14, 2012 arrest. He was received back into DOCCS custody on October 31, 2012. At that time petitioner was notified in accordance with the provisions of Executive Law §259-i(3)(d)(iii) that his parole had been revoked by operation of law with a final delinquency date of March 14, 2012. Since the 2012 sentencing court did not specify whether its sentence was to run concurrently or consecutively with respect to the unexpired term of the 1991 sentence, DOCCS officials calculated the sentences as running concurrently pursuant to the provisions of Penal Law §70.25(1)(a). Applying the sentence calculation methodology set forth in Penal Law §70.30(1)(a), DOCCS officials determined that petitioner was immediately eligible for parole release[3] and that the merged maximum term of petitioner's multiple (1991/2012) sentences was controlled by the life maximum term of the 1991 sentence.

In this proceeding petitioner asserts that following his December 15, 1997 release from DOCCS custody to ECPDO he remained on unrevoked parole until his rearrest, more than 14 years later, on March 14, 2012. He goes on to argue that his 1991 indeterminate sentence (15 years to life) should have been terminated after three years of unrevoked parole pursuant to Executive Law §259-j(3-a)[4], which provided, in relevant part, that "[t]he division of parole must grant termination of sentence after three years of unrevoked

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[3] Petitioner was ultimately denied discretionary parole release following parole board appearances January 23, 2013 and December 2, 2014.

[4] Executive Law §259-j(3-a), which was added by L 2004, ch 738, §37, effective February 12, 2005, was deleted by L 2011, ch 62, Part C, Subpart A, §38-g, effective March 31, 2011. The substance of the former Executive Law §259-j(3-a) was re-codified into newly-enacted Correction Law §205(4) pursuant to L 2011, ch 62, Part C, Subpart A, §32, also effective March 31, 2011.

parole to a person serving an indeterminate sentence for a class A felony offense defined in article two hundred twenty of the penal law . . ." According to petitioner, he served more than 14 years of unrevoked parole (ECPDO), from his December 15, 1997 transfer to federal immigration authorities to his March 14, 2012 arrest/delinquency date.[5]

Petitioner had not only completed more than three years of unrevoked ECPDO as of the February 12, 2005 effective date of Executive Law §259-j(3-a), he also completed more than three years of unrevoked ECPDO after the effective date of the statute. Accordingly, to the extent that the provisions of Executive Law §259-j(3-a) are properly applicable to periods of unrevoked ECPDO, petitioner would have been entitled to the benefits of the statute. *See Ciccarelli v. New York State Division of Parole*, 35 AD3d 1107. Respondent argues, however, that since petitioner was released to ECPDO he was not subject to parole supervision of the nature contemplated by Executive Law §259-j(3-a)/Correction Law §205(4). In support of this point respondent cites the 2006 decision of Supreme Court, New York County, in *Tavarez v. Dennison*, 14 Misc 3d 289, wherein Hon. Eileen Bransten held as follows:

> "Executive Law §259-j(3-a) [now Correction Law §205(4)], enacted as part of the Drug Law Reform Act, provides that the 'division of parole [now DOCCS] must grant termination of sentence after three years of unrevoked parole to a person serving an indeterminate sentence for a class A felony offense defined in article two hundred twenty of the penal law . . .' This provision was intended to 'allow parole *supervision* resources to be front-loaded to the beginning of an offender's *supervision period*, where they are most effective.' (Assembly Mem in Support, Bill Jacket, L 2004, ch 738, at 6 [emphasis added].)
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> This court is not convinced that Executive Law §259-j(3-a) applies in the context of conditional parole for deportation only (as opposed to supervised parole). Section 259-j(3-a) only requires 'termination of sentence after

[5] Although the petitioner only asserts that he served more than 13 years of unrevoked parole (ECPDO) from December 15, 1997 to March 14, 2012, the Court calculates that time period as being in excess of 14 years.

> three years of *unrevoked* parole'. (Emphasis added.) When a parolee is deported out of the country and is unsupervised, revocation of parole is not contemplated . . . There are no conditions on the parolee's freedom outside the United States and, unlike supervised parole, there is no monitoring to ensure that the parolee is law-abiding.
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> A contrary conclusion would have the absurd effect of converting Mr. Tavarez's agreement to remain out of the country for the rest of his life (absent permission of the United States Government and notice to the Division of Parole) into an agreement to leave the country for three years while unsupervised and then potentially return to the United States without any restrictions or consequences. This certainly could not have been the Legislature's intent in passing Executive Law §259-j(3-a).
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> Indeed, the motivation underlying the enactment of section 259-j(3-a) was to allow '*supervision* resources to be front-loaded to the beginning' of the '*supervision* period' (Assembly Mem in Support, Bill Jacket, L 2004, ch 738, at 6 [emphasis added]), demonstrating that the Legislature envisioned that an offender benefitting from the provision would have been subject to the Division of Parole's *supervision* for three years before the sentence could be terminated." *Id*. At 293. (Emphasis in original).

This Court perceives Justice Bransten's analysis to be persuasive and therefore finds, for the reasons set forth in *Tavarez*, that petitioner's 14 (plus) years of unrevoked but unsupervised ECPDO did not entitled him to the benefit of the mandatory sentence termination provisions of Executive Law §259-j(3-a)/Correction Law §205(4). *See Beato v. Yelich, et al* (Franklin County Index No. 2012-986, January 17, 2013). To the extent petitioner argues that the determination of the Appellate Division First Department in *People ex rel Ordonez v. Warden*, 38 AD3d 212, *aff'g* 10 Misc 3d 241, compels a contrary result, such argument is rejected. This Court (Supreme Court, Franklin County) - sitting in the Third Department - is nevertheless bound by precedents set in other departments until such time as the Third Department or the Court of Appeals rules otherwise. *See Oswald v. Oswald*, 107 AD3d 45 and *Mountain View Coach Lines, Inc. v. Storms*, 102 AD2d 663. The only substantive ruling of the Appellate Division First Department, in *Ordonez*, however, was that the benefits of Executive Law §259-j(3-a) were available to

Mr. Ordonez notwithstanding the fact that he was serving an aggregate term of 6 years to life as a result of an 1981 Robbery 2° conviction/sentencing and a consecutive 1986 Criminal Sale of a Controlled Substance 2° (a class A-II felony defined in Article 220 of the Penal Law) conviction/sentencing. According to the *Ordonez* court, " . . . section 259-j(3-a) 'does not state or imply that it is limited to situations where no concurrent non-drug-related sentence was imposed[.]'" 38 AD3d at 213 (citation omitted). Nothing in *Ordonez* even remotely suggests that the First Department, was called upon to consider whether or not the benefits of Executive Law §259-j(3-a) are available to an individual who is conditionally paroled for deportation only with his/her relevant period of "unrevoked parole" consisting, in its entirety, of unsupervised living outside the United States.

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: February 10, 2016 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice