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

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In the Matter of the Application of
THOMAS McRAE,#09-A-2686,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2011-0347.74
INDEX # 2011-775
ORI # NY016015J

-against-

BRUCE S. YELICH, Superintendent, Bare Hill Correctional Facility, and **DR. DORA SCHRIRO**, Commissioner, NYC Department of Correction,
Respondents.

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This proceeding was originated by the Petition for Writ of Habeas Corpus of Thomas McRae, filed in the Franklin County Clerk's office on August 2, 2011. Petitioner, who is an inmate at the Bare Hill Correctional Facility, purported to challenge his continued incarceration in the custody of the New York State Department of Corrections and Community Supervision. Although the petition lacks detailed factual allegations, it is clear that petitioner asserts an entitlement to an additional 346 days of jail time credit (Penal Law §70.30(3)).

An Order to Show Cause was issued on August 11, 2011 and as a part thereof this proceeding was converted into a proceeding for judgment pursuant to Article 78 of the CPLR. The Court has received and reviewed the Answer of the State respondent (Yelich), verified on October 7, 2011 and supported by the Affirmation of Adam W. Silverman, Esq., Assistant Attorney General, dated October 7, 2011. The Court has also received and reviewed petitioner's Reply thereto, filed in the Franklin County Clerk's office on November 21, 2011. In addition, the Court has received and reviewed the Verified Answer of the city respondent (Schriro) dated December 23, 2011 and received directly in

chambers on December 30, 2011. By letter dated January 3, 2012 petitioner advised chambers that since the answering papers of the state and city respondents were so similar he did not intend to file a separate Reply to the city respondent's Verified Answer.

On August 12, 1999 petitioner was sentenced in Supreme Court, New York County, as a second felony offender, to an indeterminate sentence of 2 to 4 years upon his conviction of the crime of Criminal Possession of a Weapon 3°. The maximum expiration date of petitioner's 1999 was originally calculated as January 28, 2003.

While at liberty under parole supervision from his 1999 sentence petitioner committed new criminal offense and on March 13, 2003 he was sentenced in Supreme Court, New York County, as a second felony offender, to an indeterminate sentence of 2½ to 5 years upon his conviction of the crime of Criminal Sale of a Controlled Substance 5°. Petitioner was received back into DOCCS custody on March 21, 2003, certified as entitled to 157 days of jail time credit against his 2003 sentence. At that time the maximum expiration date of petitioner's aggregated 1999/2003 sentences was calculated as February 7, 2008. That calculation is not in dispute.

Petitioner was again conditionally released from DOCCS custody to parole supervision on April 28, 2006. On January 14, 2007, however, he committed a new criminal offense but was not arrested and taken into local custody until February 27, 2007. Although the initial steps in the parole revocation process were initiated prior to petitioner's arrest, no parole violation hearings were conducted and he reached the February 7, 2008 maximum expiration date of his aggregated 1999/2003 sentences while still in local custody pending disposition of the new criminal charges.

On May 7, 2009 petitioner was sentenced in Supreme Court, New York County, as a second violent felony offender, to a controlling determinate term of 5 years, with 5 years post-release supervision, upon his convictions of the crimes of Attempted Criminal

Possession of a Weapon 2° and Menacing 2°. He was received back into DOCCS custody on May 22, 2009 initially certified by the New York City Department of Corrections as entitled to 815 days of jail time credit, covering the entire period from his February 27, 2007 arrest to May 22, 2009. City officials, however, subsequently issued a revised Jail Time Certification reducing petitioner's jail time credit to 469 days, covering the period from February 8, 2008 (the day after the maximum expiration date of petitioner's aggregated 1999 /2003 sentences was reached) to May 22, 2009. According to the notation accompanying the revised Jail Time Certification, "[t]he period of 2/27/07 - 2/07/08 was credited to a previous imposed sentence as per NYSDOC."

After applying 469 days of jail time credit, the maximum expiration and conditional release dates of petitioner's 2008 sentence are currently calculated by DOCCS officials as February 7, 2013 and May 17, 2012, respectively. Petitioner asserts that he is entitled to an additional 346 days of jail time credit covering the period from his February 27, 2007 arrest thru the February 7, 2008 maximum expiration date of his aggregated 1999/2003 sentences. Citing *Sparago v. New York State Board of Parole*, 132 AD2d 881, *mod* 71 NY2d 943, petitioner asserts in his petition that " . . . it is well settled that when a parolee is held in local custody without any interruption of the prior . . . sentence the time applied to the [prior sentence] may be also credited to the new sentence as jail time . . ." For the reasons set forth below, however, this Court disagrees.

The calculation of jail time credit is controlled by Penal Law §70.30(3) which provides, in relevant part, as follows:

> "The term of a determinate sentence . . . imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence . . . The credit herein provided shall be calculated from the date custody under the charge commenced to the

> date the sentence commences and shall not include any time that is credited against the . . . maximum term of any previously imposed sentence . . ."

Where, as here, the criminal defendant was confined in local custody in the City of New York, jail time credit is calculated by the Commissioner of the New York City Department of Correction and certified to the New York State Department of Corrections and Community Supervision upon transfer of the inmate from local to state custody. *See* Correction Law §600-a. State DOCCS authorities are bound by the jail time certified by the city commissioner and can neither add nor subtract from the time so certified. *See Neal v. Goord*, 34 AD3d 1142, *Torres v. Bennett*, 271 AD2d 830 and *Jarrett v. Coughlin*, 136 Misc 2d 981. Where the city commissioner amends a previously issued jail time certificate, DOCCS officials are bound by the most recently issued certificate. *See Villanueva v. Goord*, 29 AD3d 1097.

According to the Appellate Division, Third Department, in *Sparago*, the crediting of time against the maximum term of a previously imposed sentence, within the meaning of the proscription against double crediting set forth in Penal Law §70.30(3), only " . . . occurs when the previously imposed sentence is duly interrupted, with jail time accruing during the period of interruption." 132 AD2d 881 at 883.[1] While the *Sparago*

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[1] In addition to its determination with respect to the jail time credit issue, the Appellate Division in *Sparago* also determined that Mr. Sparago's most recently imposed (1984) sentence had to run consecutively with respect to the undischarged term of his previously imposed (1980) sentence. It also found that Mr. Sparago's " . . .maximum release date was properly calculated by aggregating the undischarged portion of the 1980 maximum and the 1984 maximum." 132 AD2d 881 at 882. There is nothing in the Court of Appeals decision in *Sparago* (71 NY2d 943) to suggest that such court was called upon to review the determination of the Appellate Division, Third Department, with respect to the jail time credit issue. After noting that the Appellate Division had reversed Supreme Court with regard to the jail time credit issue, the Court of Appeals further noted that "[t]he Appellate Division agreed with Supreme Court on the issue now before us , however, holding that because petitioner's sentences were to run consecutively . . .they had to be aggregated . . . It [the Appellate Division] did not address which aggregation method used by respondents was proper, but implicitly held the recalculated sentence was computed using the correct method. We agree with the Appellate Division that petitioner's sentences had to be aggregated, but disagree, under these facts, as to the aggregation method which should be used." 71 NY2d 943 at 945 (citations omitted) (emphasis added). Indeed, the Court of Appeals' only specific mention of the jail time credit issue occurred after it set forth its reasoning with respect to the sentence aggregation issue, stating

rationale might arguably be applied to the facts and circumstances of this case, it is noted that the specific fact pattern in *Sparago* (which the Third Department deemed "unusual") bears little resemblance to the fact pattern in the case at bar. It is also noted that although the Appellate Division, Third Department issued its decision in *Sparago* more than 24 years ago, the relevant holding therein apparently remains uncited in any officially-reported case. More importantly, since 1987 the Appellate Division, Third Department, has issued a number of decisions seemingly at odds with the relevant rationale expressed in *Sparago*. *See Mena v. Fischer*, 84 AD3d 1611, *lv den* 17 NY3d 710, *Hot v. New York State Department of Correctional Services*, 79 AD3d 1383, *lv den* 16 NY3d 710, *Villanueva v. Goord*, 29 AD3d 1097 and *DuBois v. Goord*, 271 AD2d 874.

Hot and *Villanueva*, to be sure, involve fact patterns dissimilar to both *Sparago* and the case at bar. Each of these cases involve individuals who had already commenced serving definite or indeterminate sentences and who were subsequently sentenced to indeterminate or determinate sentences. In each case the Appellate Division, Third Department, found that jail time credit against the subsequent sentence(s) was unavailable with respect to time spent in local custody after the previously-imposed definite or indeterminate sentence had commenced. Although neither *Hot* nor *Villanueva* involved any parole delinquency issues, it is still noteworthy that, contrary to *Sparago*, the proscription against double crediting set forth in Penal Law §70.30(3) was applied notwithstanding the fact that the previously imposed sentences were not interrupted but continued to run during the periods of time for which jail time credit was sought.

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as follows: "This [aggregation] method not only effectuates the stipulation which provided petitioner's parole would not be revoked, but also credits him with the 217 days of jail time to which the Appellate Division found him entitled." *Id* at 946. It is therefore the finding of this Court (Supreme Court, Franklin County) that the *Sparago* holding with respect to the jail time credit issue, as well as the rationale underlying that holding, is that of the Appellate Division, Third Department, rather than the Court of Appeals.

Mena and *DuBois* on the other hand both involve fact patterns similar to the fact pattern in the case at bar. Each of these cases involved individuals who spent time in local custody in connection with new criminal charges with respect to acts committed while on parole from previously-imposed sentences. In each case, moreover, the previously imposed sentence(s) expired prior to the imposition of sentence(s) associated with the new criminal charges. Despite the similar fact pattern *Mena* is only of tangential interest since it involved a parole eligibility date calculation issue rather than a jail time credit issue and, therefore, the proscription against double crediting set forth in Penal Law §70.30(3) was not specifically considered. The *Mena* court, after determining that Mr. Mena's parole was not revoked by operation of law (Executive Law §259-i(3)(d)(iii)) since his previously imposed sentence expired prior to sentencing on the subsequent charges, found that he "... continued to serve his [previously-imposed] 1989 sentence after his incarceration [in local custody] in November 1993 [in connection with the new criminal charges] until that [previously-imposed] sentence expired on its own terms on December 28, 1994. Thus, the Department properly credited all prison time thereafter served to the new commitment on his 1995 sentences." *Mena v. Fischer*, 84 AD3d 1611 (emphasis added) (citing *Hot*, *Villianueva* and *DuBois*). No mention was made of any credit against Mr. Mena's subsequently-imposed 1995 sentence for the time he spent incarcerated in local custody prior to the December 28, 1994 expiration of his previously-imposed 1989 sentence.

In *DuBois* the jail time credit issue was front and center. The petitioner in *DuBois*, who was serving an indeterminate sentence of 5 to 15 years imposed in 1979, was released on parole but subsequently violated and returned to DOCS custody with an adjusted maximum expiration date of May 14, 1989. In August of 1988 Mr. DuBois was transferred to county jail pending disposition of criminal charges stemming from an incident that had occurred while he was on parole. On October 13, 1988 he was again released from DOCS

custody to parole supervision but remained in county jail in connection with the new charges. He was ultimately sentenced in connection with those charges on an unspecified date in 1989 to an indeterminate sentence of 10 to 20 years. On June 26, 1989 Mr. DuBois was received back into DOCS custody to begin serving his 1989 sentence certified as entitled to 46 days of jail time credit against such sentence covering the time period from May 14, 1989 (the adjusted maximum expiration date of his 1979 sentence) to his June 26, 1989 return to DOCS custody. Mr. Dubois contended, however, that he was entitled to jail time credit for the entire time spent in local custody from August 11, 1988 to June 26, 1989. The Appellate Division, Third Department, rejected this contention. Without specifically mentioning Penal Law §70.30(3), the *DuBois* court found as follows:

> " . . . [P]etitioner was not entitled to a credit against the 1989 sentence for time served in County Jail prior to the expiration of the 1979 sentence because that period of incarceration was credited against petitioner's 1979 sentence . . . Because petitioner continued to serve the 1979 sentence despite his October 13, 1988 release on parole, the jail time served following his parole release and prior to the maximum expiration date of the 1979 sentence may not be credited towards the 1989 sentence . . ." 271 AD2d 874 at 875-876 (citations omitted).

Based upon the decisions of the Appellate Division, Third Department in *Mena*, *Hot*, *Villanueva* and, particularly, *DuBois*, this Court is not persuaded that the *Sparago* rationale is applicable under the facts and circumstance of the case at bar. This Court finds that the proscription against double crediting set forth in Penal Law §70.30(3) is applicable notwithstanding the fact that petitioner's aggregate 1999/2003 sentence was not interrupted but continued to run while petitioner was confined in local custody from February 27, 2007 until February 7, 2008, when the maximum expiration date of such aggregate sentence was reached. Accordingly, this Court further finds that the respondent Commissioner, New York City Department of Correction, did not err in excluding that time period in the revised jail time certificate.

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: January 26, 2012 at
Indian Lake, New York

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S. Peter Feldstein
Acting Supreme Court Judge