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

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In the Matter of the Application of
JERALD RANDOLPH,#07-A-5477,
Petitioner,

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

DECISION AND ORDER
RJI #16-1-2011-0429.83
INDEX # 2011-1007
ORI # NY016015J

-against-

D. E. LaCLAIR, Superintendent,
Franklin Correctional Facility,
Respondent.

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This proceeding was commenced in Bronx County by the filing of the Petition for Writ of Habeas Corpus of Jerald Randolph, sworn to on August 3, 2011. The originally filed petition named "Warden, EVELYN MIRADEL, NYC DEPT. Of CORRECTION," as sole respondent. Mr. Randolph, who was apparently in the custody of the New York City Department of Correction pending disposition of parole violation charges at the time the Petition was filed, was transferred back into state DOCCS custody at the Franklin Correctional Facility on or about August 23, 2011. By order dated September 21, 2011 the Supreme Court, Bronx County directed that venue be transferred to Franklin County. The papers originally filed in Bronx County were received in Franklin County Clerk's office on October 6, 2011. Jerald Randolph, who will hereinafter be referred to as the petitioner, remains an inmate at the Franklin Correctional Facility.

This Court issued an Order to Show Cause on October 13, 2011 and as a part thereof it was directed that D.E. LaClair, Superintendent, Franklin Correctional Facility, be substituted as respondent herein. An Amended Order to Show Cause was issued on November 1, 2011. The Amended Petition for a Writ of Habeas Corpus of Kerry Elgarten, Esq., The Legal Aid Society, Parole Revocation Defense Unit, on behalf of Jerald

Randolph, verified on December 8, 2011, was filed in the Franklin County Clerk's office on December 12, 2011. The Court next received and reviewed respondent's Return, consisting of the Affirmation of Glen Frances Michaels, Esq., Assistant Attorney General, dated January 5, 2012, as well as the Reply Affirmation of Kerry Elgarten, Esq., dated January 17, 2012 and filed in the Franklin County Clerk's office on January 20, 2012.

By Decision and Judgment dated February 9, 2012 the petition was dismissed. The Court has since received and reviewed petitioner's Notice of Motion to Re-Argue, supported by the Affirmation of Kerry Elgarten, Esq., dated March 13, 2012 and filed in the Franklin County Clerk's office on March 19, 2012. The Court has also received and reviewed the opposing Affirmation of Glen Francis Michaels, Esq., Assistant Attorney General, dated March 20, 2012 and filed in the Franklin County Clerk's office on March 21, 2012.

On February 3, 2003 petitioner was sentenced in Supreme Court, Kings County, as a probation violator, to an indeterminate sentence of 1 to 3 years upon an underlying conviction of the crime of Criminal Possession of a Controlled Substance 5°. He was received into DOCCS custody on February 12, 2003 certified as entitled to 12 days of jail time credit. The maximum expiration date of petitioner's 2003 sentence was calculated as January 29, 2006.

Following completion of the Shock Incarceration Program, petitioner was released from DOCCS custody to parole supervision on October 30, 2003. On or about October 13, 2004, however, petitioner was arrested in connection with new criminal charges and taken into local custody in New York City. Notwithstanding this arrest, no parole delinquency was declared and no parole violation proceedings were initiated. On January 29, 2006, while still in local custody, petitioner was discharged from parole upon reaching the maximum expiration date of his 2003 sentence.

On June 11, 2007 petitioner was sentenced in Supreme Court, Queens County to a controlling determinate term of 3½ years, with 2½ years post-release supervision, upon his convictions of the crimes of Robbery 2°, Robbery 3°, Criminal Possession of Stolen Property 5° and Bail Jumping 1°.[1] Reviews of the June 11, 2007 sentencing minutes and the relevant Sentence and Commitment Order reveal no reference to petitioner's 2003 sentence.

Petitioner was received back into DOCCS custody on October 4, 2007 initially credited by the New York City Department of Correction as entitled to 949 days of jail time credit covering the time periods from the October 13, 2004 arrest to August 18, 2006 and from January 3, 2007 to petitioner's return to DOCCS custody on October 4, 2007.[2] On or about November 9, 2010, however, the New York City Department of Correction issued an Amended Jail Time Certification reducing petitioner's jail time credit to 475 days covering the periods from January 30, 2006 (the day after the maximum expiration date of petitioner's 2003 sentence was reached) to August 18, 2006 and from January 3, 2007 to October 4, 2007. In amending the original Jail Time Certification, city officials noted that "[t]he period of 10/13/04 - 1/29/06 for 474 jail time days was credited to a previously imposed sentence as per NYSDOC and cannot be applicable jail time credit towards the [June 11, 2007]sentence the above is currently serving."

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[1] On August 29, 2007 petitioner was sentenced in Supreme Court, Kings County, to an additional determinate term of 1 year, with 1-year post-release supervision, upon his conviction of the crime of Criminal Sale of a Controlled Substance 5°. The criminal offense underlying the August 29, 2007 sentence was apparently committed on January 3, 2007. This sentence, which was directed to run concurrently with respect to the June 11, 2007 sentence, played no role in DOCCS calculation of petitioner's current maximum expiration date, nor does it play a role in any argument advanced by petitioner in this proceeding. Any reference in this Decision and Order to the "2007 sentence" should therefore be considered a reference to the June 11, 2007 sentence.

[2] Although the record is not clear as to the significance of the August 18, 2006 and January 3, 2007 dates, this Court presumes that petitioner was released on bail from local custody on August 18, 2006 and re-arrested on January 3, 2007 in connection with the criminal offense underlying his August 29, 2007 sentence (see footnote #1).

After petitioner's return to DOCCS custody on October 4, 2007 he was conditionally released to post-release supervision on two separate occasions. Each time, however, he was returned to DOCCS custody as a post-release supervision violator. DOCCS officials currently calculate the maximum expiration date of petitioner's June 11, 2007 sentence, including the period of post-release supervision, as September 21, 2012. Petitioner did not challenge the arithmetic computations underlying this calculation. Rather, he challenged respondent's failure to afford him additional credit against the June 11, 2007 determinate term.

Insofar as is relevant at this juncture, petitioner, citing *Sparago v. New York State Division of Parole*, 132 AD2d 881, *mod aff'd* 71 NY2d 943, petitioner argued that since the running of his 2003 sentence was never interrupted by a parole delinquency he was entitled to jail time credit (Penal Law §70.30(3)) against the 2007 sentence for the entire time spent in local custody after his October 13, 2004 arrest until the commencement of the running of the 2007 sentence on October 4, 2007, when he was received back into DOCCS custody (*see* Penal Law §70.30(1). In its Decision and Judgment of February 9, 2012 the Court rejected this argument and dismissed the petition.

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 . . ."

In its Decision and Judgment of February 9, 2012 this Court acknowledged that "[a]ccording 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." In assessing the impact of *Sparago* on the facts and circumstances of this case the Court, in its Decision and Judgment of February 9, 2012, specifically determined that the above-quoted holding in *Sparago* represented the holding of the Appellate Division, Third Department rather than the Court of Appeals. In this regard the Decision and Judgment of February 9, 2012 including the following statement in a footnote:

> "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 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."

In its Decision and Judgment of February 9, 2012 this Court went on to note that although the relevant rationale expressed by the Appellate Division, Third Department in *Sparago* might arguably be applied to the facts and circumstances of this case, more than 24 years had elapsed since *Sparago* was decided with the relevant holding therein apparently remaining un-cited in any officially-reported case. More importantly, this Court further noted that the Appellate Division, Third Department had issued a number of decisions seemingly at odds with the relevant rationale expressed in *Sparago*, most significantly *Mena v. Fischer*, 84 AD3d 1611, *lv den* 17 NY3d 710 and *DuBois v. Goord*, 271 AD2d 874.

"A motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the Court . . ." CPLR §2221(d)(2). Such a motion is directed to the sound discretion of the Court. *See Loris v. S&W Reality Corp.*, 16 AD3d 729. Petitioner's motion to reargue is premised upon the assertion that this Court, in its Decision and Judgment of February 9, 2012, " . . .substantially misapprehends the law and errs regarding the proper interpretation of the pertinent statutes and cases. The statutory framework neither compels nor justifies allocating time to the 2003 sentence. Moreover, *Matter of Sparago v. NYS Board of Parole*, 71 N.Y.2d 943 (1988) is a Court of Appeals case that controls the outcome here. Appellate Division cases cited in the Court's decision, to the extent they might be construed in such a way as to lead to a different result then that compelled by the Court of Appeals in *Sparago*, are not controlling. All courts of the State are bound by the decision of the Court of Appeals, the highest court in the State."

This Court was, and is, well aware that it is bound by decisions of the New York State Court of Appeals and that such decisions are controlling *vis a vis* decisions of the Appellate Division perceived to be contrary thereto. In *Sparago* the Appellate Division, Third Department, not only found that the proscription against double crediting set forth in Penal Law §70.30(3) was only applicable where the previously imposed sentence was duly interrupted by a parole delinquency, with jail time accruing during the period of interruption, it also found that Mr. Sparago's 1984 sentence must be calculated as running consecutively with respect to the undischarged term of his 1980 sentence. In addition, the Appellate Division, Third Department determined the sentence calculation methodology to be utilized in aggregating the time owed by Mr. Sparago against the maximum term of his previously imposed (but uninterrupted) 1980 sentence with the maximum term of his subsequently-imposed, consecutive, 1984 sentence. According to the Appellate Division, Third Department, the maximum release date of Mr. Sparago's multiple, consecutive sentences " . . .was properly calculated by aggregating the undischarged portion of the 1980 maximum and the 1984 maximum." 132 AD2d 881 at 882. As noted by this Court in a footnote (#3) to the Decision and Judgment of February 9, 2012, "[t]here 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." Rather, the Court of Appeals first addressed the issue of whether Mr. Sparago's 1984 sentence was to run consecutively or concurrently with respect to the undischarged (but uninterrupted) term of his previously-imposed 1980 sentence. After agreeing with the Appellate Division, Third Department, that the two sentences ran consecutively and, therefore, had to be aggregated, the Court of Appeals found the aggregation methodology approved by the Appellate Division to be erroneous and directed utilization of an aggregation methodology whereby Mr. Sparago " . . .would

serve the balance of the parole supervision time owed under his 1980 sentence after serving his 1984 sentence." 71 AD2d 943 at 944. In the Decision and Judgment of February 9, 2012 this Court observed that the Court of Appeals, after noting that the Appellate Division, Third Department in *Sparago* reversed the Supreme Court with regard to the jail time credit issue, 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 respondent 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 AD2d 943 at 945 (citations omitted) (emphasis added.) In the Decision and Judgment of February 9, 2012 this Court also observed that the Court of Appeals, after setting forth its reasoning with respect to the sentence aggregation issue, stated 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 (emphasis added).

Based upon the foregoing, this Court finds that it did not overlook or misapprehend any matter of law or fact when it determined, as part of the Decision and Judgment of February 9, 2012, " . . .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." Accordingly, this Court further finds that it did not overlook or misapprehend any matter of fact or law when it relied upon the post-*Sparago* determinations of the Appellate Division, Third Department (most notably *Mena v. Fischer* 84 AD3d 1611, *lv den* 17 NY3d 710 and *DuBois v. Goord*,

271 AD2d 874) in determining in the case at bar " . . .that the proscription against double crediting set forth in Penal Law §70.30(3) is applicable notwithstanding the fact that petitioner's 2003 sentence was not interrupted but continued to run while petitioner was confined in local custody from October 14, 2004 until January 29, 2006, when the maximum expiration date of such sentence was reached."

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that petitioner's Motion for Leave to Reargue is denied.

DATED: May 17, 2012 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge