STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of JAMES WATTS,

Petitioner,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

BRIAN FISCHER (DOCCS) and ANDREA
EVANS (Div. Of Parole),

Respondents,

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-12-ST3675 Index No. 2038-12

Appearances: James Watts
Inmate No. 95-A-5937
Petitioner, Pro Se
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Wyoming Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination with regard to the calculation

of his sentence. He was initially sentenced on October 23, 1990 in Supreme Court, Queens County, to an indeterminate term of 4 3/4 years to 9 ½ years for robbery in the first degree (the "1990 sentence"). He was received by the New York State Department of Correctional Services, now known as the Department of Corrections and Community Service ("DOCCS") on March 26, 1991. At that time he was credited with 400 days of jail time from the New York City Department of Correction.[1] On August 29, 1994 the petitioner absconded from a temporary release program. Subsequent to that he was the subject of a second criminal prosecution. He was sentenced on August 7, 1995 in the Supreme Court, Kings County, as a second violent felony offender to the following: three terms of 10 years to 20 years for three counts of robbery in the first degree, a term of 7 ½ years to 15 years for criminal possession of a weapon in the second degree, and a term of 3 ½ years to 7 years for criminal possession of a weapon in the third degree (the "1995 sentence"). The Court directed that the sentence for the second count of robbery in the first degree run consecutively with the sentence of the first count of robbery in the first degree. Because the underlying crimes of the 1995 sentence were committed on September 29, 1994, they ran consecutively to the 1990 sentence (see Penal Law § 70.25 [2-a]; People ex rel. Gill v Greene, 12 NY3d 1, 4 [2009]).

By reason of an error in the calculation of his sentence in 1995, he was given a parole eligibility date of December 15, 2009, and his initial parole interview was held on November 3, 2009. He was denied parole and held for 24 months. In January 2011 DOCCS discovered

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[1]The petitioner does not dispute any credit for jail time in this proceeding.

that petitioner's sentence was incorrectly calculated, and recalculated it. As a consequence, he did not reappear before the Parole Board in November 2011. In accordance with the calculations made on January 28, 2011, petitioner is scheduled for a parole interview in August 2014.

The petitioner seeks review of the January 28, 2011 re-calculation of his sentence. He maintains that his parole board appearance scheduled for November 2011 should not have been cancelled and he should not have to wait until August 2014 for a reappearance. He contends that Penal Law § 70.30 has been misapplied, and that his 1995 sentence should have an aggregate term of 15 to 30 years not 20 to 40 years.

The respondent acknowledges that errors were made in connection with the calculation of petitioner's sentence. It is conceded that in a calculation dated August 25, 1995, DOCCS employed an incorrect maximum expiration date of petitioner's 1990 sentence (stated as November 20, 1999, when it should have been August 20, 1999). In addition, DOCCS indicates that the total possible good time was incorrectly set forth as 26 years 6 months, when it should have been 16 years 6 months.[2] DOCCS promptly discovered the errors, and recalculated petitioner's sentence on August 28, 1995. This time, however, while correcting the previous errors, it incorporated yet another error into the calculation by misstating the aggregate minimum term and aggregate maximum term of petitioner's 1995 sentence as 15 years to 30 years. At some point DOCCS discovered the error and on January 28, 2011 DOCCS recalculated petitioner's sentence using an aggregate minimum of

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[2]So as not to exceed one-third of the 49 ½ year aggregate maximum term of both the 1990 sentence and the 1995 sentence (see Correction Law § 803 [2] [b]).

petitioner's 1995 sentence of 20 years, and an aggregate maximum of petitioner's 1995 sentence of 40 years.

As respondent points out, Penal Law Former § 70.30 (1) (c), which was in effect in 1994 when the crimes underlying the 1995 sentence were committed, recites, in part, as follows:

> "(c) (i) Except as provided in subparagraph (ii) or (iii) of this paragraph, the aggregate maximum term of consecutive sentences imposed for two or more crimes, other than two or more crimes that include a class A felony, committed prior to the time the person was imprisoned under any such sentences shall, if it exceeds twenty years, be deemed to be twenty years, unless one of the sentences was imposed for a class B felony, in which case the aggregate maximum term shall, if it exceeds thirty years, be deemed to be thirty years. Where the aggregate maximum term of two or more consecutive sentences is reduced by calculation made pursuant to this paragraph, the aggregate minimum period of imprisonment, if it exceeds one-half of the aggregate maximum term as so reduced, shall be deemed to be one-half of the aggregate maximum term as so reduced.
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> (ii) *Notwithstanding subparagraph (i) of this paragraph, the aggregate maximum term of consecutive sentences imposed for the conviction of two violent felony offenses committed prior to the time the person was imprisoned under any of such sentences and one of which is a class B violent felony offense, shall, if it exceeds forty years, be deemed to be forty years.*" (see L 1983, c 199 § 1, emphasis supplied)[3]

In this instance, petitioner's 1995 sentence included convictions for the crime of robbery in the first degree, which is a class B violent felony (see Penal Law § 70.02 [1] [a]). Accordingly, Penal Law Former § 70.30 (1) (c) (ii) governed petitioner's 1995 sentence since it included conviction for three violent felony offenses committed prior to the time he was

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[3] The provision, as subsequently amended, is now found in Penal Law § 70.30 (1) (e).

imprisoned for such offenses, and which were class B violent felonies. Upon application of Penal Law Former § 70.30 (1) (c) (ii), the petitioner is not entitled to a sentence reduction, since petitioner's aggregate sentence did not exceed 40 years (see People ex rel. Walker v Yelich, 71 AD3d 1348 [3d Dept., 2010]). Thus, on its face, while it appears that respondent erred in its computation dated August 28, 1995 with respect to petitioner's 1995 sentence (by incorrectly calculating it using a 15 year aggregate minimum and a 30 year aggregate maximum), the January 28, 2011 computation of the 1995 sentence, using a 20 aggregate minimum and 40 year aggregate maximum, is correct (see Penal Law former § 70.30 [1] [c] [ii]); People ex rel. Walker v Yelich, supra).

Lastly, respondent correctly points out that the respondent "'has a continuing, nondiscretionary, ministerial duty to make accurate calculations of terms of imprisonment, a duty that requires it to correct known errors'" (Matter of Goodson v New York State Dept. of Correctional Servs., 80 AD3d 1064 [3d Dept., 2011], quoting Matter of Patterson v Goord, 299 AD2d 769, 770, 750 NYS2d 362 [2002]). Consequently, while it is unfortunate that the respondent erred in the past with respect to the calculation of petitioner's sentence, this did not relieve the respondent from its responsibility to correct its error. The petitioner's parole eligibility date was properly fixed at December 15, 2014.

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed.

Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: December 14, 2012
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated April 20, 2012, Petition, Supporting Papers and Exhibits
2. Answer dated July 16, 2012, Supporting Papers and Exhibits