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

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In the Matter of the Application of
JEROME SMITH, #95-A-1886,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2012-0309.73
INDEX # 2012-650
ORI #NY016015J

-against-

BRIAN FISCHER, Commissioner,
NYS Department of Corrections and
Community Supervision, and **MICHAEL**
J. SPOSATO, Sheriff, Nassau County,
Respondents.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Jerome Smith, verified on July 3, 2012 and filed in the Franklin County Clerk's office on July 19, 2012. Petitioner, who was an inmate at the Chateauguay Correctional Facility but has since been released from DOCCS custody to parole supervision, is challenging the calculation of the maximum expiration date of his underlying sentence. More specifically, petitioner asserts an entitlement to additional jail time credit.

The Court issued an Order to Show Cause on July 26, 2012 and has received and reviewed the Answer and Return of the respondent Fischer, verified on September 14, 2012, as well as the Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General in Charge, dated September 14, 2012 and the Letter Affirmation of Richard deSimone, Esq., DOCCS Associate Counsel in Charge, Office of Sentencing Review, dated September 10, 2012, both submitted on behalf of the respondent Fischer.

The Court has also received and reviewed the Answer of the respondent Sposato, dated November 5, 2012. No Reply has been received from petitioner.

In response to its Letter Order of January 24, 2013, the Court has received and reviewed additional correspondence, with exhibits, from Glen Francis Michaels, Esq., Assistant Attorney General in Charge, dated February 1, 2013 and submitted on behalf of the respondent Fischer. In response to its Letter Order of May 30, 2013, the Court has received and reviewed additional correspondence, with exhibits, from Glen Francis Michaels, Esq., Assistant Attorney General in Charge, dated June 27, 2013 and submitted on behalf of the respondent Fischer.

On July 13, 1989 petitioner was sentenced in Supreme Court, Queens County, as a second felony offender, to an indeterminate sentence of 1½ to 3 years upon his conviction of the crime of Attempted Burglary 3°. He was received into DOCCS custody on August 29, 1989 certified as entitled to 170 days of jail time credit. At that time DOCCS officials calculated the initial maximum expiration date of petitioner's 1989 sentence as March 8, 1992. After one parole delinquency petitioner was restored to parole supervision on March 2, 1992 with an adjusted maximum expiration date of July 31, 1992. Petitioner, however, absconded from parole supervision and was declared delinquent. He remained at large until arrested and taken into local custody in connection with new criminal charges on June 20, 1993. Two days later, on June 22, 1993, a parole violation warrant was lodged.

A final parole revocation hearing was conducted at the Nassau County Jail on August 5, 1993. At the conclusion of the hearing, pursuant to a plea agreement, petitioner's parole was revoked with a modified delinquency date of May 7, 1992. The

delinquency interrupted the running of petitioner's 1989 sentence (*see* Penal Law §70.40(3)(a)) with 2 months and 24 days still owed to the July 31, 1992 adjusted maximum expiration date of such sentence. A delinquent time assessment of 2 months and 29 days (identified in the Parole Revocation Decision Notice as the "Time Remaining on Undischarged Portion of [1989] Sentence as of the sustained delinquency date") was imposed.[1]

On February 2, 1995 petitioner was sentenced in Nassau County Court, as a second felony offender, to two consecutive indeterminate sentences of 6 to 12 years each upon his convictions of the crime of Burglary 2° (2 counts). Although the consecutive 1995 sentences resulted in an aggregate minimum period of 12 years and an aggregate maximum term of 24 years, DOCCS officials reduced the aggregate sentence to 10 to 20 years pursuant to the provisions of former Penal Law §70.30(1)(c)(i). *See* L 1983, ch 199, § 1. Petitioner was received back into DOCCS custody on March 24, 1995 originally certified as entitled to 642 days of jail time credit covering the entire period from his June 20, 1993 arrest to March 24, 1995. At that time, based upon the original certification of entitlement to 642 days of jail time credit, DOCCS officials calculated the maximum expiration date of petitioner's 1995 sentence as June 16, 2013.

Following petitioner's return to DOCCS custody on March 24, 1995 he was released (and/or restored) to parole supervision on six occasions. On five of those occasions parole

[1] The Court notes the four-day discrepancy between the 2 months and 24 days owed by petitioner to the July 31, 1992 adjusted maximum expiration date of his 1989 sentence as of the May 7, 1992 delinquency date and the 2 months and 29 days identified by the Administrative Law Judge (ALJ) presiding at petitioner's final parole revocation hearing as the time remaining on the undischarged portion of the petitioner's 1989 sentence as of the May 7, 1992 delinquency date. The ALJ also characterized the delinquent time assessment as a hold to petitioner's maximum expiration date. Parole officials apparently opted to treat the delinquent time assessment as 2 months and 24 days.

delinquencies ensued. Petitioner's most recent delinquency date was September 15, 2011. Following that delinquency he was returned to DOCCS custody as a parole violator, with 53 days of parole jail time credit, on January 30, 2012. As of that date, DOCCS officials calculated the re-adjusted maximum expiration date of petitioner's 1995 sentence (already adjusted as the result of four prior delinquencies) as April 30, 2014. On April 3, 2012, however, the office of the respondent Nassau County Sheriff Sposato issued an amended jail time certificate crediting petitioner with 553 (rather than 642) days of jail time covering the time period from September 17, 1993 to March 24, 1995. Upon the issuance of the amended jail time certificate, DOCCS officials re-calculated the maximum expiration date of petitioner's 1995 sentence as July 29, 2014. Petitioner was subsequently re-released to parole supervision on August 8, 2012, after this proceeding had been commenced. He remains at liberty under parole supervision pending the July 29, 2014 maximum expiration date of his 1995 sentence. In this proceeding petitioner challenges the issuance of the amended jail time certificate which decreased his entitlement to jail time credit against the 1995 sentence from 642 to 553 days. He seeks reinstatement of the 642-day credit and the April 30, 2014 maximum expiration date.

Where, as here, a criminal defendant was confined in local custody outside the City of New York, jail time credit is calculated by the County Sheriff 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 County Sheriff 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 County Sheriff amends a

previously issued jail time certificate, DOCCS officials are bound by the most recently issued certificate. *See Villanueva v. Goord*, 29 AD3d 1097.

"DOC[C]S has a 'continuing, nondiscretionary, ministerial duty' to make accurate calculations of terms of imprisonment, a duty that requires it to correct known errors." *Patterson v. Goord*, 299 AD2d 769, 770, quoting *Cruz v. New York State Department of Correctional Services*, 288 AD2d 572, 573, *app dis* 97 NY2d 725. *See Bottom v. Goord*, 96 NY2d 870. This Court finds such duty likewise attaches to a county sheriff in carrying at his/her statutory mandate to certify to DOCCS officials the amount of jail time credit to which a criminal defendant formerly confined in local custody is entitled. Therefore, while petitioner may certainly challenge the reduction in his jail time credit on the merits, the delay in the implementation of the reduction does not render such reduction improper.

In order to understand the rationale behind the determination reducing petitioner's entitlement to jail time credit against his 1995 sentence from 642 days to 553 days it is necessary to focus upon the events associated with the expiration of his 1989 sentence. As noted previously, the running of the 1989 sentence was interrupted as of the May 7, 1992 delinquency date with petitioner still owing 2 months and 24 days to the July 31, 1992 adjusted maximum expiration date of that sentence. Under the relevant provisions of Penal Law §70.40(3)(a), the interruption of a sentence occasioned by a declaration of delinquency " . . . shall continue until the return of the person [parole violator] to an institution under the jurisdiction of the state department of corrections and community supervision." Notwithstanding the foregoing, DOCCS officials "credited" petitioner's 1989 sentence with the 2-month and 24-day time period commencing on

June 22, 1993, the date the parole violation warrant was lodged against petitioner who was then in local custody in connection with new criminal charges. Running 2 months and 24 days (the time owed by petitioner against the maximum term of his 1989 sentence) from June 22, 1993, DOCCS officials determined that petitioner completed serving his 1989 sentence on September 16, 1993 and discharged him from such sentence on that date. Since the time period from June 22, 1993 through September 16, 1993 was thus applied against the maximum term of petitioner's 1989 sentence, respondents argue that such time period could not also be credited as jail time against petitioner's subsequently-imposed 1995 sentence. The Court agrees.

Although, as noted previously, Penal Law §70.40(3)(a) provides that the interruption of a sentence occasioned by a declaration of parole delinquency continues until the parole violator is returned to an institution under DOCCS jurisdiction, the regulatory scheme associated with the parole revocation process suggests several scenarios where an adjudicated parole violator is restored to parole without first returning to DOCCS custody. In certain circumstances, for instance, the ALJ presiding at a final parole revocation hearing or the Parole Board may direct that an adjudicated parole violator be immediately restored to parole supervision without the imposition of a delinquent time assessment. *See* 9 NYCRR §8005.20(c)(4). Also, in certain circumstances where the delinquent time assessment imposed upon an adjudicated parole violator expires while such parole violator is still in local custody, he/she may be immediately re-released to parole supervision. *See* 9 NYCRR §8002.6(c) and (d)(1). In either of these scenarios parole jail time credit (Penal Law §70.40(3)(c)) would potentially be available with respect to the time spent by the adjudicated parole violator in local

custody from the date of delinquency to his/her restoration/re-release to parole supervision. In view of the above, the Court finds that to the extent Penal Law §70.40(3)(a) provides that the interruption of a sentence occasioned by a declaration of parole delinquency continues until the parole violator is returned to an institution under DOCCS jurisdiction, the statute is not applicable where the adjudicated parole violator is properly restored/re-released to parole supervision without first being returned to DOCCS custody.

The facts and circumstances in the case at bar represent a variation on the theme explored in the previous paragraph. Although the delinquent time assessment imposed upon petitioner did, in fact, expire while he was still held in local custody, re-release to parole supervision (even while remaining in local custody) was not an appropriate consideration since the expiration of the delinquent time assessment coincided with the maximum expiration date of petitioner's then underlying 1989 sentence. If, after the expiration of the delinquent time assessment, petitioner was not credited with the post-delinquency time he spent in local custody pursuant to the parole warrant (June 22, 1993 through September 16, 1993) he would have been forced to remain in local custody pending disposition of the new criminal charges with the parole warrant remaining lodged against him as a detainer, thus impeding any possibility petitioner might be released on bail, or on his own recognizance, with respect to the new criminal charges. If petitioner was subsequently acquitted of the criminal charges and therefore awarded parole jail time credit for the 2-month and 24-day time period in question (*see* Penal Law §70.40(c)(3)), such award would have been rendered illusory since the parole warrant would have already remained lodged against him in local custody as a detainer until the acquittal. *See*

Branchel v. LaClair, 29 Misc 3d 1107. Since the Court finds that the time period from June 22, 1993 through September 16, 1993 was properly credited against petitioner's 1989 sentence, it could not also be credited as jail time against his 1995 sentence. *See Jeffrey v. Ward*, 44 NY2d 812.

In reaching the above conclusion the Court notes that this is not a situation where petitioner was denied meaningful credit for time period in question. If the time period from June 22, 1993 through September 16, 1993 was credited as jail time against petitioner's 1995 sentence, it could not also have been credited against his 1989 sentence and, therefore, petitioner would have owed 2 months and 24 days to the undischarged term of his 1989 sentence at the time the 1995 sentence was imposed. Since the 1995 sentence was imposed against petitioner as a second felony offender (Penal Law §70.06)), such sentence would have been statutorily mandated to run consecutively with respect to the undischarged term of the 1989 sentence. *See* Penal Law §70.25(1) and (2-a) and *People ex rel Gill v. Greene,* 12 NY3d 1, *cert denied sub nom Gill v. Rock*, ___ US ___, 13 S Ct 86. Under such circumstances, the undischarged maximum term of petitioner's 1989 sentence (2 months and 24 days) would have been aggregated with the maximum term of petiioner's 1995 multiple sentences (20 years). Therefore, it appears that the same maximum expiration date (July 29, 2014) would be produced whether the 2 months and 24 days in question were credited against petitioner's 1989 sentence (but not as jail time against his 1995 sentence) or credited as jail time against petitioner's 1995 sentence (but not credited against his 1989 sentence). The only methodology whereby the April 30, 2014 maximum expiration date sought by petitioner would be produced is if the 2-month and 24-day time period was credited both against the 1989 sentence and as jail time

against the 1995 sentence. As noted previously, double crediting of this nature is improper.

Notwithstanding the foregoing, it is acknowledged (and the Court agrees) that petitioner is entitled to an additional two days of jail time credit against his 1995 sentence for the time spent in local custody from the date of his arrest (June 20, 1993) until the parole violation warrant was lodged on June 22, 1993.

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

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the respondent Fischer is directed to recalculate petitioner's sentence(s) with an additional two days of jail time (total of 555 days) credited against the 1995 sentence.

Dated: September 30, 2013 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice