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

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In the Matter of the Application of
JAMMIE LONGMIRE, #02-R-2096,
Petitioner,

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules

DECISION and JUDGMENT
RJI #15-1-2006-0344.011
Index #1027-06
ORI#NY015015J

-against-

GLEN S. GOORD, Commissioner,
NYS Department of Correctional Services**,**
Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Jammie Longmire, verified on December 27, 2006, and filed in the Essex County Clerk's office on December 29, 2006. Petitioner, who is an inmate at the Adirondack Correctional Facility, is challenging the re-computation of his conditional release date from December 29, 2006, to April 23, 2008. The Court issued an Order to Show Cause on January 9, 2007, and has received and reviewed respondent's Answer and Return, verified on February 23, 2007, as well as the respondent's Letter Memorandum of February 23, 2007. The Court has also received and reviewed petitioner's Reply thereto, filed in the Essex County Clerk's office on March 16, 2007.

A DOCS inmate serving an indeterminate sentence of imprisonment, except an indeterminate sentence with a maximum term of life, may receive a good time allowance against the maximum term of his or her sentence not to exceed one-third of such maximum term. Correction Law §803(1)(a) and (b). "Such allowances may be granted for good behavior and efficient and willing performance of duties assigned or progress

and achievement in an assigned treatment program, and may be withheld, forfeited or cancelled in whole or in part for bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned." Correction Law §803(1)(a).

Correction Law §803(5) provides, in relevant part, as follows:

> "Time allowances granted prior to any release on parole or prior to any conditional release shall be forfeited and shall not be restored if the paroled or conditionally released person is returned to an institution under the jurisdiction of the state department of correctional services for a violation of parole [or] violation of the conditions of release . . . A person who is so returned may, however, subsequently receive time allowances against the remaining portion of his . . . maximum term . . . pursuant to this section and provided such remaining portion of his . . . maximum term . . . is more than one year."

On April 22, 2002, the petitioner was sentenced in Supreme Court, Rensselaer County, as a second felony offender, to an indeterminate sentence of imprisonment of 3½ to 7 years, to be executed as a sentence of parole supervision pursuant to the provisions of Criminal Procedure Law §410.91, upon his conviction of the crime of Criminal Sale of a Controlled Substance 5°. The petitioner was initially received into DOCS custody on April 29, 2002, certified as entitled to 65 days of jail time credit. After applying two years and four months of good time potentially available, the petitioner's earliest possible conditional release date was calculated as October 23, 2006. *See* Penal Law §70.40(1)(b).

Following his release to parole supervision pursuant to CPL §410.91, the petitioner was declared delinquent as of January 2, 2004, and returned to DOCS custody as a parole violator on September 14, 2004. Following a re-release to parole supervision the petitioner was declared delinquent, for a second time, as of March 28, 2006, but was restored to parole supervision on June 1, 2006. The petitioner was most recently declared delinquent as of July 13, 2006, and was again returned to DOCS custody as a

parole violator on October 18, 2006. At that time DOCS officials calculated that the petitioner owed delinquent time of 2 years 8 months and 2 days against the maximum term of his original sentence. After applying 96 days of parole jail time credit, DOCS officials re-calculated the maximum expiration date of petitioner's sentence to be March 14, 2009. The Court notes that none of the sentence computations detailed thus far appear to be in dispute.

When the petitioner was returned to DOCS custody on October 18, 2006, departmental officials, purportedly acting pursuant to the provisions of Correction Law §803(5), determined that the petitioner was only eligible to receive a good time allowance of 10 months and 21 days. That figure was apparently calculated as one-third of the 2 years, 8 months and 2 days of delinquent time owed by the petitioner against the maximum term of his underlying sentence. Subtracting 10 months and 21 days from the March 14, 2009, adjusted maximum expiration date of petitioner's sentence, DOCS officials re-calculated petitioner's earliest possible conditional release date to be April 23, 2008. It is this determination that is at issue. The petitioner argues that since he was sentenced to parole supervision pursuant to CPL §410.91, no good time allowance was granted prior to his release. Therefore, according to the petitioner, Correction Law §803(5) is not applicable to his situation and he is entitled to his original conditional release date of October 23, 2006.

No provision of the Correction Law , or any other statute for that matter, specifies the procedure to be utilized in establishing the actual good time allowance to be granted to specific DOCS inmates. Rather, Correction Law §803(3) provides, in relevant part, that "[t]he commissioner of correctional services shall promulgate rules and regulations

for the granting, withholding, forfeiture, cancellation and restoration of allowances authorized by this section . . ." The regulatory scheme developed by the New York State Department of Correctional Services provides for the review of an inmate's file by a correctional facility Time Allowance Committee (TAC) ". . . in the fourth month preceding the month of the earliest possible date he or she [the inmate] would be entitled to consideration for release if that date depends on the amount of good behavior allowance to be granted." 7 NYCRR §261.3(a). The TAC is required to consider the inmate's entire file and issue a recommendation as to the amount of good behavior allowance to be granted. 7 NYCRR §261.3(b) and 7 NYCRR §262.1(a). That recommendation is, in turn, reviewed by the facility superintendent (7 NYCRR §262.1(b)) subject to ultimate confirmation or modification by the DOCS commissioner or his designee. 7 NYCRR §262.1(c). "The time allowance specified in the final order of the commissioner or his designee shall be the good behavior allowance to be granted to the inmate." 7 NYCRR §262.1(d).

The Court first observes that although petitioner's indeterminate sentence of imprisonment was to be executed as a sentence of parole supervision pursuant to Criminal Procedure Law §410.91, the argument he advances in this proceeding would apply, with equal force, to inmates who had been released from DOCS custody to parole supervision after serving the minimum periods of their indeterminate sentences. Penal Law §70.40(1)(a). The release of such inmates, like the release of the petitioner, would not be predicated upon the granting of any good time allowances but, rather, at the discretion of the New York State Board of Parole (Penal Law §70.40(1)(a)) in accordance with Executive Law §259-i(2) and the regulations of the New York State Division of

Parole (9 NYCRR Part 8002). Thus, individuals who had been released from DOCS custody to parole supervision, whether pursuant to CPL §410.91 or not, by definition have not been granted any good time allowances. Release from DOCS custody to parole supervision, after the granting of a good time allowance, is a unique feature of conditional release pursuant to Penal Law §70.40(1)(b). When viewed from this perspective, the Court struggles to make any sense out of that portion of Correction Law §803(5) which refers to "[t]ime allowances granted prior to any release on parole . . ."[1]

Although it does not appear that the issue raised by the petitioner in this proceeding has been judicially addressed to date, the Appellate Division, Third Department, has, on several occasions, taken note of the application of Correction Law §803(5) to inmates who had been released from DOCS custody to parole supervision but subsequently returned as parole violators. *See Cannon v. Goord*, 262 AD2d 691, *lv den* 93 NY2d 891 and *McNeill v. Coughlin*, 212 AD2d 922, *app dis* 85 NY2d 1031. The *McNeill* court noted that "[p]ursuant to Correction Law §803(5), upon his [McNiell's] return to incarceration for the parole violation . . . [he] forfeited good time allowances he had previously accumulated, and was limited in his accumulation of good time to one third of the time remaining on his maximum sentence." 212 AD2d 922.

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[1]L 1997, ch 435, §43 added a new paragraph (d) to Correction Law §803(1). The 1997 enactment authorized certain DOCS inmates to receive a discretionary ". . . merit time allowance against the minimum term or period of his or her [indeterminate] sentence in the amount of one-sixth of the minimum term or period imposed by the court." While certain provisions of Correction Law §803(1)(d) have been amended since 1997, the current statute still authorizes certain DOCS inmates to receive a discretionary merit time allowance against the minimum periods of their indeterminate sentence of imprisonment in the amount of one-sixth of such minimum period. Effective August 20, 1997, therefore, certain inmates could be released from DOCS custody to parole supervision after having been granted a merit time allowance, as opposed to good time allowance, pursuant to Correction Law §803(1)(d). However, the reference in Correction Law §803(5) to "[t]ime allowances granted prior to any release on parole . . ." has been part of that statute since its enactment in 1967 (L 1967, ch 680, §147). Thus, the provisions of Correction Law §803(1)(d) cannot explain the problematic language set forth in Correction Law §803(5).

Even if this Court had been persuaded by petitioner's arguments and agreed that October 23, 2006, represented his properly calculated conditional release date, he would not necessarily have been entitled to release on that date. October 23, 2006, would merely have represented the earliest possible date that petitioner could have been conditionally released, assuming he was granted all of his potentially available good time. The actual amount of good time to be granted to the petitioner would still have to be determined by the commissioner of correctional services, or his designee, after considering the recommendations of the TAC and facility superintendent pursuant to the previously discussed departmental regulations. The absurdity of the petitioner's argument in this case is underscored by the fact that he was returned to DOCS custody, following his third parole violation, on October 18, 2006 - a mere five days prior to the date on which he claims to be entitled to conditional release from DOCS custody. Having only been back in DOCS custody for those five days, there would be no basis for the TAC to evaluate petitioner's behavior, performance of duties assigned and/or achievement in assigned treatment programs.

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: July 2 , 2007 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice