

**Matter of Torres v Fischer**

2007 NY Slip Op 33959(U)

December 10, 2007

Supreme Court, Albany County

Docket Number: 0522807/2007

Judge: George B. Ceresia

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The petitioner, an inmate at Cayuga Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review the computation of his sentence. The respondent has made a motion to dismiss on grounds of failure to join a necessary party failure and failure to state a cause of action.

On February 21, 1996 the petitioner was sentenced to 216 months of imprisonment on federal court criminal convictions obtained against the petitioner in United States District Court for the Southern District of New York. On April 3, 1996 the petitioner was sentenced to indeterminate terms of imprisonment of 7 ½ years to 15 years and 2 ½ to five years upon convictions of Robbery in the First Degree and Criminal Possession of a Weapon in the Third Degree in Bronx County, New York. The New York State sentences were directed to run concurrently with the petitioner's previously imposed federal sentence. Petitioner was received by the Department of Correctional Services on May 6, 1996. He was credited with 44 days of jail time certified by the New York City Department of Corrections.

In 1999 the petitioner commenced a CPLR Article 78 proceeding in which he sought credit for additional jail time from the New York City Department of Corrections, as well as jail time while incarcerated prior to adjudication of the federal charges. In a decision and order dated March 31, 1999 Supreme Court Justice Samuel J. Castellino dismissed the petition holding (1) that the State Department of Correctional Services was bound by the jail time certificates received from local corrections authorities and (2) that petitioner failed to demonstrate that at the time he was held in Federal facilities he was held solely as the result

of a detainer issued by New York State (citing Matter of Bentley v Demskie (250 AD2d 886 [3<sup>rd</sup> Dept., 1998] appeal dismissed, lv dismissed and denied 92 NY2d 884, cert denied 525 US 1044). The Appellate Division affirmed Justice Castellino (see Matter of Torres v Bennett, 271 AD2d 830 [3<sup>rd</sup> Dept., 2000], again citing Matter of Bentley v Demskie, supra).

On September 30, 2003 the City of New York issued a new certification of jail time credit which indicated he was entitled to a total credit of 182 days. The certificate recites that “[t]his recertification will supersede any and jail time credits previously issued to date by the New York City Department of Correction.” The certificate also noted that the petitioner had requested that his two years of Federal jail credit be applied against his New York State sentence. In a memo dated February 20, 2007 an employee of the New York State Department of Correctional Services acknowledged that the petitioner had received jail time credit for the 182 days certified by the New York City Department of Corrections.

In the instant petition, petitioner renews his request for jail time credit while incarcerated in Federal facilities. This time he cites Guido v Goord (1 NY3d 345 [2004]). In Guido the petitioner was arrested in Pinellas County, Florida on charges in that county and on outstanding arrest warrants for other charges in Sarasota County, Florida. Seven days later, and while the petitioner was being detained in the Pinellas County Jail, New York lodged a warrant against him in connection with charges in Herkimer County, New York. The petitioner was subsequently acquitted after trial of the Pinellas County charges. The petitioner, who was still in detention, was then transferred to Sarasota County, where he

remained in custody until the Sarasota charges were dismissed on April 22, 1990. On April 23, 1990, petitioner was extradited to New York to stand trial on the Herkimer charges. Herkimer County held the petitioner as a detainee through the pendency of his trial. Upon petitioner's conviction for the Herkimer County crimes, the trial court sentenced him to concurrent indeterminate terms of imprisonment of 12 1/2 to 25 years and 3 1/2 to 7 years. The petitioner then commenced a proceeding to receive jail time credit for time served in Florida. Supreme Court dismissed the petition, reasoning that petitioner was entitled to credit under Penal Law § 70.30 (3)<sup>1</sup> only if the New York warrant was the sole cause of petitioner's

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<sup>1</sup>Penal Law § 70.30 (3) recites as follows:

“The term of a definite sentence, a determinate sentence, or the maximum term of an indeterminate 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. In the case of an indeterminate sentence, if the minimum period of imprisonment has been fixed by the court or by the board of parole, the credit shall also be applied against the minimum period. 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 term or maximum term of any previously imposed sentence or period of post-release supervision to which the person is subject. Where the charge or charges culminate in more than one sentence, the credit shall be applied as follows:

- (a) If the sentences run concurrently, the credit shall be applied against each such sentence;
- (b) If the sentences run consecutively, the credit shall be applied against the aggregate term or aggregate maximum term of the sentences and against the aggregate minimum period of imprisonment.

Florida detention. The Appellate Division affirmed. The Court of Appeals granted leave and reversed. The Court of Appeals took note of a line of cases commencing with Matter of Peterson v New York State Dept. of Correctional Servs. (100 AD2d 73 [2d Dept 1984]), continuing with Matter of Keffer v Reid (100 AD2d 549 [2d Dept 1984]), Matter of Chang v Goord (295 AD2d 231[1st Dept 2002]), Matter of Bentley v Demskie (250 AD2d 886, *supra*), and Matter of Birden v Dept. of Correctional Servs. (134 AD2d 843 [4th Dept 1987]). All of them held that an inmate would not receive jail time credit unless the New York State detainer was the sole reason for Federal or foreign state detention. In construing the language of Penal Law § 70.30 (3), the Court found that “[n]otwithstanding the widespread acceptance garnered by Peterson and its offspring, those cases have established a rule that conflicts with the plain statutory language, and they should no longer be followed” (Guido v Goord, *supra*, at 349). The Court explained that under the plain language of the Penal Law § 70.30 (3) there was no distinction between inmates who are detained in New York and those who are detained by sister states or the federal government with regard to who should receive jail credit (*id.*).

To the extent that Guido is applicable here, the Court must also observe that, as noted,

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“In any case where a person has been in custody due to a charge that culminated in a dismissal or an acquittal, the amount of time that would have been credited against a sentence for such charge, had one been imposed, shall be credited against any sentence that is based on a charge for which a warrant or commitment was lodged during the pendency of such custody.”

in this instance the precise issue has already been decided (see Matter of Torres v Bennett, supra). Notably, the case of Dale Mortgage Bankers Corporation v Allington (237 AD2d 832 [3<sup>rd</sup> Dept., 1997], mot for lv to app denied 87 NY2d 804) discussed the situation where there is a subsequent change in decisional law with respect to a prior judicial determination. As the Court stated:

“On this appeal, plaintiff attempts to argue the very issue previously addressed and decided by this court on plaintiff's prior appeal in this matter . . . That issue having been conclusively resolved, plaintiff is barred from relitigating that issue under the doctrine of res judicata . . . To the extent that plaintiff seeks to avail itself of this court's subsequent decision...we need note only that “[t]he conclusive effect of a final disposition is not to be disturbed by a subsequent change in decisional law”” (Dale Mortgage Bankers Corporation v Allington, supra, at 832-833), quoting Matter of Goway v Tully, 45 NY2d 32, 36, quoting Slater v American Min. Spirits Co., 33 NY2d 443, 447).

In view of the foregoing, and under the circumstances present here, the Court finds that the petition fails to state a cause of action. The Court concludes that the motion to dismiss must be granted.

Accordingly it is

**ORDERED**, that the motion to dismiss is granted; and it is

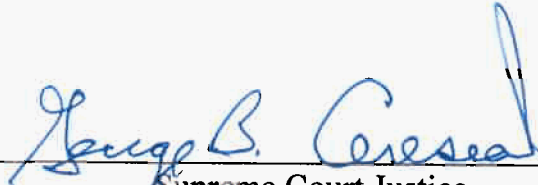
**ORDERED and ADJUDGED**, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the Respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this

Decision/Order with notice of entry.

**ENTER**

Dated: December 10, 2007  
Troy, New York

  
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Supreme Court Justice  
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated July 24, 2007, Petition, Supporting Papers and Exhibits
2. Notice of Motion dated August 24, 2007, Supporting Papers and Exhibits
3. Petitioner's Verified Reply dated September 5, 2007