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

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In the Matter of the Application of
RONALD MILLER, #06-A-6439,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2008-0062.012
INDEX # 2008-0160
ORI #NY016015J

BRIAN FISCHER, 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 Ronald Miller, verified on January 16, 2008, and stamped as filed in the Franklin County Clerk's office on January 29, 2008. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the respondent's failure to enroll him in the DOCS Comprehensive Alcohol and Substance Abuse Treatment (CASAT) program despite the alleged order of petitioner's sentencing court directing such enrollment pursuant to Penal Law §60.04(6). The Court issued an Order to Show Cause on February 7, 2008, and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified March 21, 2008, as well as respondent's Letter Memorandum of March 21, 2008. The Court has also received and reviewed petitioner's Reply thereto, filed in the Franklin County Clerk's office on April 8, 2008.

On November 21, 2006, the petitioner was sentenced in Suffolk County Court, as a second felony offender, to a determinate term of imprisonment of 5 years (with 2 years post-release supervision) upon his conviction of the crime of Criminal Possession of a

Controlled Substance 3°. On that same date the Suffolk County Court (Hon. Ralph T. Gazzillo) issued an order pursuant to Penal Law §60.04(6) directing DOCS " . . .to enroll the defendant in the Comprehensive Alcohol and Substance Abuse Treatment Program, provided that the defendant will satisfy the statutory eligibility criteria for participation in such program."

The CASAT program was designed ". . . to prepare chemically dependant inmates for a return to the community, to reduce recidivism by providing education and counseling focused on continuing abstinence from all mood altering substances, and to encourage participation in self-help groups." 7 NYCRR §1950.1. Under DOCS regulations CASAT is a three-phase program with Phase 1 occurring in a DOCS alcohol and substance abuse treatment correctional annex. Such a facility is defined in Correction Law §2(18) as "[a] medium security correctional facility consisting of one or more residential dormitories which provide intensive alcohol and substance abuse treatment services to inmates who: (i) are otherwise eligible for temporary release, or (ii) stand convicted of a felony offense defined in article two hundred twenty or two hundred twenty-one of the penal law, and are within six months of being an eligible inmate as that term is defined in subdivision two of section eight hundred fifty-one of this chapter including such inmates who are participating in such program pursuant to subdivision six of section 60.04 of the penal law." Phase 2 of CASAT involves ". . . a transitional period in a community reintegration component, which would include transfer to a work release facility for employment and placement in appropriate community-based programs . . ." 7 NYCRR §1950.2(b). CASAT Phase 3, in turn, consists of ". . . an aftercare component in the community under parole supervision, which will provide for an orderly

community transition for participants granted release by the parole board." 7 NYCRR §1950.2(c).

Outside of the Penal Law §60.04(6) context, DOCS is vested with the sole administrative responsibility for placing inmates in the CASAT program and for the transition of inmates who have successfully completed Phase 1 of the program into Phase 2.[1] Under DOCS regulations, again outside the context of Penal Law §60.04(6), inmates cannot be placed in CASAT Phase 1 unless they have already been approved for work release or presumptive work release. 7 NYCRR §1950.3(a)(5). Thus, under the DOCS regulatory scheme, inmates who successfully complete CASAT Phase 1 can transition into CASAT Phase 2 without a further determination of work release eligibility. In theory, there should be no instances where an inmate successfully completes CASAT Phase 1 but is unable to proceed onto Phase 2 because he or she is not eligible for work release. Ultimately, an otherwise eligible inmate may only be deemed unsuitable for presumptive work release based upon his or her crime of commitment, criminal history, custodial adjustment or outstanding warrants/detainees. 7 NYCRR §1951.1(c)(4).

Penal Law §60.04(6) provides, in relevant part, as follows:

> "When the court imposes a sentence of imprisonment which requires a commitment to the state department of correctional services upon a person who stands convicted of a controlled substance or a marijuana offense, the court may, upon motion of the defendant in its discretion, issue an order directing that the department of correctional services enroll the defendant in the comprehensive alcohol and substance abuse treatment program in an alcohol and substance abuse correctional annex as defined in subdivision eighteen of section two of the correction law, provided that the defendant will satisfy statutory eligibility criteria for participation in such

[1]DOCS obviously does not exercise administrative control over inmates moving on to CASAT Phase 3 since participants in Phase 3 must first be granted release from DOCS custody by the Parole Board.

> program. Notwithstanding the foregoing provisions of this subdivision, any defendant to be enrolled in such program pursuant to this subdivision shall be governed by the same rules and regulations promulgated by the department of correctional services, including without limitation those rules and regulations establishing requirements for completion and those rules and regulations governing discipline and removal from the program."

In the case at bar the petitioner's temporary release program application (presumptive work release), was denied by the Temporary Release Committee at the Bare Hill Correctional Facility on May 11, 2007, based upon the nature of the crime underlying petitioner's incarceration as well as his recidivist/violent criminal history. Upon administrative appeal the central office reviewer affirmed the denial of petitioner's presumptive work release application with the following comments;

> "THE INSTANT OFFENSE IS ATT CPCS 3, THIS IS YOUR 2ND STATE TERM. THIS OFFENSE INVOLVED THE POSS OF 1/8 OUNCE OR MORE OF COCAINE AND DRUG PARAPHERNALIA. YOUR LEGAL HISTORY INCLUDES PROBATION VIOLATION, YO ADJ, PRIOR CONVICTIONS FOR ATT ASSAULT 2 AND ROBBERY 1. NOTED IS YOUR ACCEPTABLE DISCIPLINARY RECORD. HOWEVER, YOUR INABILITY TO LIVE A CRIME FREE LIFESTYLE WHICH IS EVIDENCED BY YOUR NUMEROUS CONVICTIONS AND STATE TERMS RENDERS YOU AN UNSUITABLE CANDIDATE FOR PRESUMPTIVE WORK RELEASE. YOU WILL BE REVIEWED FOR CASAT PHASE 1 TREATMENT, CONSISTENT WITH THE SENTENCING JUDGE'S ORDER, AT A LATER DATE. THE INMATE MAY REAPPLY ON 5/10/2009. . ."

This proceeding ensued.

The Court's review of the statutory language leads it to conclude that the sentencing court's authority to direct DOCS to enroll a defendant in the CASAT program is limited to Phase 1 of such program. In this regard the Court notes that the relevant language of Penal Law §60.04(6) merely specifies that the sentencing court has authority to direct ". . . that the department of correctional services enroll the defendant in the

comprehensive alcohol and substance abuse treatment program in an alcohol and substance abuse correctional annex as defined in subdivision eighteen of section two of the correction law . . .” (Emphasis added). Only Phase 1 of the CASAT program takes place in an alcohol and substance abuse treatment correctional annex. *Compare* 7 NYCRR §1950.2(a) *with* 7 NYCRR §1950.2(b) and (c). In addition, Correction Law §2(18), which sets forth the definition of an alcohol and substance abuse treatment correctional annex, characterizes the period of court-ordered drug abuse treatment authorized under Penal Law §60.04(6) as “corrections based.” The Court, moreover, finds the language of Penal Law §60.04(6) –to the extent the statute provides that notwithstanding its provisions, a defendant to be enrolled in the CASAT program is to be governed by DOCS rules and regulations establishing requirements for “completion” of the program– can logically be read as requiring DOCS administrative approval for work release or presumptive work release before an inmate placed in the CASAT program pursuant to Penal Law §60.04(6) can be temporarily released from DOCS custody for CASAT Phase 2 participation. Finally, the Court notes that Corrections Law §2(18) goes on to provide, in relevant part, that “[n]otwithstanding any other provision of law, any person who has successfully completed no less than six months of intensive alcohol and substance abuse treatment services in one of the department’s eight designated alcohol and substance abuse treatment correctional annexes . . . may be transferred to a program operated by or at a residential treatment facility . . .” (Emphasis added).

Although the statutory language is frustratingly vague and does leave room for conflicting interpretation, this Court is simply not persuaded that the enactment of Penal Law §60.04(6) (L 2004, ch 738, §20) was intended to empower a sentencing court to

make a final, irrevocable determination, at sentencing, as to the suitability of a defendant/inmate for temporary release from DOCS custody to participate in community-based Phase 2 of the CASAT program at some future date, thereby divesting DOCS of its statutory authority to make such a discretionary determination at or about the time of the proposed release. (Correction Law §852(1) and 7 NYCRR Parts 1900 and 1951). To the extent petitioner argues that the sentencing court's Penal Law §60.06(4) order does not distinguish between the various phases of the CASAT program and, therefore, mandates enrollment in Phases II and III as well as Phase I, the Court rejects that argument.

The respondent, for his part, does not dispute petitioner's statutory eligibility for enrollment in Phase I of the CASAT program. Rather, he asserts that notwithstanding a Penal Law §60.04(6) order DOCS still maintains discretion as to the timing of an inmate's CASAT enrollment, even after statutory eligibility has been established. Citing an alleged significant increase in court-ordered CASAT placements, in conjunction with the finite number of CASAT beds available, as well as DOCS's penological assessment that " . . . it is best to minimize the time an inmate spends back in general population following completion of CASAT Phase I," the respondent urges the Court not to direct petitioner's " forthwith" enrollment in CASAT Phase I. The respondent seeks, in effect, an order of this Court authorizing petitioner's enrollment in CASAT Phase I between 6 and 12 months prior to his earliest possible release date. According to counsel for the respondent, the Court's issuance of a " forthwith" enrollment order would have the effect of jumping the petitioner to the head of the CASAT waiting list.

For the petitioner, who does not appear to have been sentenced as a "second felony drug offender," as defined in Penal Law §70.70(1)(b), the only statutory eligibility requirements is that he be eligible for parole or conditional release within two years and six months. *See* Correction Law §§851(2) and 2(18)(ii). DOCS has computed petitioner's merit eligibility date as November 11, 2009, and therefore acknowledges that petitioner became statutorily eligible for enrollment in the CASAT program on May 11, 2007. Notwithstanding the sentencing court's order that DOCS enroll petitioner in the CASAT program "provided that . . . [he] will satisfy the statutory eligibility criteria for such participation in such program," the respondent, as noted previously, seeks to delay petitioner's entry into CASAT Phase I for at least 18 months beyond the statutory eligibility date. According to the petitioner, " Penal Law § 60.04(6) does not speak to when a statutorily eligible inmate must be enrolled in Court-ordered CASAT." This Court, however, is not persuaded that the statue can be so loosely read and finds no lawful basis for DOCS to delay enrollment in CASAT Phase I beyond an inmate's eligibility date even if DOCS has denied such inmate's application for temporary work release or presumptive work release. To the extent the respondent urges the Court to take into account the penological considerations which led DOCS to its position, the Court finds that such argument should be addressed to the legislative, rather than judicial branch.

Notwithstanding the foregoing, the Court finds that neither logic nor the provisions of Penal Law §60.04(6) dictate that an inmate armed with a sentencing court CASAT enrollment order is entitled to leapfrog to the head of a CASAT waiting list upon attaining statutory eligibility for enrollment in the program. In short, the Court finds no

basis to distinguish between court-ordered CASAT inmates and inmates who have been administratively approved for CASAT enrollment. In the case at bar, however, the petitioner has been statutorily eligible since May 11, 2007, without being enrolled in Phase I of the CASAT program or, apparently, placed on a CASAT waiting list. It would be clearly prejudicial to petitioner to merely direct his placement on the CASAT waiting list at this late juncture.

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 cost or disbursements, but only to the extent that the respondent is directed to forthwith enroll petitioner in Phase 1 of the CASAT program in accordance with the provisions of this Decision and Judgment.

Dated: May 8 , 2008, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice