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

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In the Matter of the Application of
JOHN FERRERI, #07-A-1561,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2008-00043.09
INDEX # 2008-0106
ORI #NY016015J

BRIAN FISCHER, Commissioner,
New York State Department of
Correctional Services, and **JOHN DONELLI**,
Superintendent, Bare Hill Correctional Facility,
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 John Ferreri, verified on January 3, 2008, and stamped as filed in Franklin County Clerk's office on January 22, 2008. Petitioner, who is now an inmate at the Lyon Mt. Correctional Facility, is challenging the respondents' failure to enroll him in the DOCS Comprehensive Alcohol and Substance Abuse Treatment (CASAT) program as allegedly directed by the sentencing court pursuant to Penal Law § 60.04(6). The Court issued an Order to Show Cause on January 31, 2008, and has received and reviewed respondents' Answer and Return, including *in camera* materials, verified on March 14, 2008, as well as respondents' Letter Memorandum of March 14, 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 March 13, 2007, the petitioner was sentenced in Sullivan County Court, as a second felony offender, to an indeterminate sentence of imprisonment of 4-8 years upon his conviction of the crime of Criminal Possession of a Forged Instrument 1°. The sentencing judge made the following statement during the sentencing proceedings: "I

also place on the record and include in my sentencing the recommendation that the Department of Corrections consider Mr. Ferreri for the CASAT program, there being along history of substance abuse involvement including that which led up to the current violation for which he stands . . . convicted." The sentence and commitment order likewise referenced a "CASAT recommendation." Notwithstanding the foregoing, on the same day petitioner was sentenced the sentencing judge issued an order pursuant to Penal Law §60.04(6) directing as follows: "The New York State Department of Correctional Services shall 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). The petitioner was received into DOCS custody on March 21, 2007.

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 can not 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

[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.

> 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 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."(Emphasis added).

In the case at bar the petitioner's temporary release application (presumptive work release), was denied by the Temporary Release Committee (TRC) at the Bare Hill Correctional Facility and that denial was affirmed by the DOCS central office on October 10, 2007, based upon the nature of the crime underlying petitioner's incarceration as well as his recidivist criminal history and other factors. The comments of the central office reviewer in connection with the affirmance of the presumptive work release denial determination were as follows:

> "YOUR PRESENT OFFENSE IS CPFI 1ST, THIS IS YOUR 4TH STATE TERM. THIS OFFENSE INVOLVED THE POSSESSION OF COUNTERFEIT U.S. CURRENCY AND 10 GLASSINES ENVELOPES OF HEROIN. YOUR LEGAL HISTORY INCLUDES YO ADJ, 2 MISDEMEANORS & 4 FELONY CONVICTIONS. NOTED IS YOUR RECENT TIER II CONVICTION. YOUR POOR DISCIPLINARY RECORD COUPLED WITH YOUR INABILITY TO LIVE A CRIME FREE LIFESTYLE RENDERS YOU AN UNSUITABLE CANDIDATE FOR PRESUMPTIVE WORK RELEASE. THE INMATE MAY REAPPLY ON 06/05/2008 FOR PRESUMPTIVE WORK RELEASE."

This proceeding ensued.

The petitioner maintains that he met the only statutory eligibility requirement for enrollment in the CASAT program in that he was less than two years and six months away from parole eligibility. *See* Correction Law §§ 851(2) and 2(18)(ii). The petitioner

further maintains that the reasons cited by the central office reviewer in affirming the TAC's denial determination were all based upon administrative considerations rather than any lack of statutory eligibility. Thus, according to the petitioner, DOCS's " . . . failure to allow the Petitioner to enroll in the [CASAT] program is a failure to perform a duty enjoined upon it by law . . ."

The respondents argue that since petitioner was convicted of Criminal Possession of Forged Instrument 1°, as defined in Penal Law §170.30, he is not statutorily eligible for court-ordered CASAT placement under Penal Law §60.04 (6), which is limited in applicability to a sentence of imprisonment in DOCS custody imposed " . . .upon a person who stands convicted of a controlled substance or marijuana offense. . ." While this Court agrees that petitioner was not statutorily eligible to be the subject of a Penal Law §60.04(6) CASAT order, DOCS officials simply do not have the luxury of administratively correcting sentencing orders perceived to be illegal. *See Gill v. Greene*, 48 AD3d 1003 and *Dreher v. Goord*, 46 AD3d 1261. Accordingly, the Court finds that the respondents were obligated to comply with the sentencing court's Penal Law §60.04 (6) CASAT order, notwithstanding the apparent illegality of that order, pending judicial correction.

Turning to the merits, or lack thereof, of petitioner's case, the Court notes that its 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 <u>in an alcohol and substance abuse correctional annex</u> 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, Corrections 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 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).

Notwithstanding the foregoing, where, as here, a sentencing court has directed DOCS to enroll a defendant/inmate in the CASAT program pursuant to the provisions of Penal Law §60.04(6), the Court finds no lawful basis for DOCS to deny or delay such defendant/inmate's enrollment in CASAT Phase 1, upon his or her statutory eligibility, even if DOCS has denied such inmate's application for temporary work release or presumptive work release.

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 respondents are directed to forthwith enroll petitioner in Phase 1 of the CASAT program in accordance with the provisions of this Decision and Judgment.

Dated: May 30, 2008, at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice