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

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In the Matter of the Application of
ROMIE DAYS, #06-B-2419,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2008-0170.030
INDEX # 2008-0543
ORI #NY016015J

-against-

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 Romie Days, verified on April 7, 2008, and stamped as filed in the Franklin County Clerk's office on April 10, 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, allegedly in violation of the sentencing court's Penal Law §60.04(6) order. This Court issued an Order to Show Cause on April 14, 2008, and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on May 30, 2008, as well as petitioner's Letter Memorandum of May 30, 2008. The Court has also received and reviewed petitioner's Reply thereto, filed on the Franklin County Clerk's office on June 18, 2008.

On August 30, 2006, the petitioner was sentenced in Onondaga County Court, as a second felony offender, to a determinate term of imprisonment of 5 years (with 3 years post-release supervision) upon his conviction of the crime of Attempted Criminal Possession of a Controlled Substance 3°. Also on August 30, 2006, the sentencing court

issued an order pursuant to Penal Law §60.04(6) directing " . . . the Department of Correctional Services . . . 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 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 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 TAC at the Bare Hill Correctional Facility based upon petitioner's violent and recidivist history. The TAC explanation for its denial determination was as follows:

> "MULTI-JURISDICTIONAL LEGAL HISTORY DATES BACK TO 1988. 1990 CONVICTIONS IN STATE OF GA FOR ARMED ROBBERY RESULTED IN 10 YRS. CONFINEMENT. MARCH 2005 ARREST FOR CRIM. CONTEMPT AND HARASSMENT IS WITHOUT CLEAR DISPOSITION. YOU ARE NOT SUITABLE FOR PHASE 2 WORK RELEASE PART OF THE CASAT PROGRAM.
> YOU MAY NOT REAPPLY FOR CASAT UNTIL 09/2009."

Upon administrative appeal the TAC denial determination was affirmed by the DOCS central office reviewer on January 7, 2008, based upon petitioner's instant offense as well as his recidivist criminal history. The comments of the central office reviewer in connection with the affirmance of the presumptive work release denial determination were as follows:

> "YOUR MULTI-STATE LEGAL HISTORY DATES TO 1988 AND INCLUDES MULTIPLE ARRESTS AND CONVICTIONS IN GEORGIA AND A YO ADJUDICATION IN NEW YORK. THE INSTANT OFFENSE, ATT. CPCS 3, INVOLVED THE POSSESSION OF COCAINE AND MARIJUANA. NOTED IS THE ORDER OF PROTECTION FILED ON BEHALF OF A FEMALE. ACCEPTABLE DISCIPLINARY ADJUSTMENT IS NOTED HOWEVER, YOUR CONTINUED EXTENSIVE CRIMINAL BEHAVIOR RENDERS YOU UNSUITABLE FOR PRESUMPTIVE WORK RELEASE. YOU WILL BE REVIEWED FOR CASAT PHASE I TREATMENT, CONSISTENT WITH THE SENTENCING JUDGE'S ORDER, AT A LATER DATE.
> RAP REVIEWED.

THE INMATE REAPPLY ON 09/01/2009 FOR PRESUMPTIVE WORK RELEASE."

This proceeding ensued.

In paragraph 13 of the petition it is alleged that the respondent's " . . . failure to follow the sentencing court's order to place petitioner into CASAT is a failure to preform a duty enjoined upon the respondent, and the respondent has failed and continues to fail to perform this duty." The respondent, for his part, acknowledges that the petitioner became statutorily eligible to participate in the CASAT program on September 9, 2007. Notwithstanding this acknowledgment, the petitioner takes the position, in effect, that DOCS has the discretion to delay an inmate's court-ordered CASAT (Phase I) enrollment beyond such inmate's statutory eligibility date where, as here, presumptive work release has been denied. According to the respondent, " [t]he Department [of Correctional Services] continues to believe it is best to minimize the time an inmate spends back in general population following completion of CASAT Phase I." The respondent also expresses concern that if the Court were to direct petitioner's "forthwith" enrollment into CASAT Phase I it would, in effect, jump petitioner in front of other inmates on the CASAT waiting list.

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, 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. To the extent respondent urges the Court to take into account the penological considerations which led DOC to its position with respect to the timing of a court-ordered inmate's enrollment into CASAT Phase I, the Court finds that such argument should be addressed to the legislative, rather than judicial branch.

Notwithstanding the forgoing, the Court finds neither logic nor the provisions of Penal Law §60.04(6) dictate that an inmate armed with a sentencing court's CASAT enrollment order is entitled to leapfrog to the head of any CASAT waiting list upon reaching statutory eligibility for enrollment in the program. In short, the Court finds no basis to distinguish between court-ordered CASAT inmates and inmates that have been administratively approved for CASAT enrollment. In the case at bar, however, the petitioner has been statutorily eligible since September 9, 2007, without being enrolled in Phase I of the CASAT program or, apparently, placed on any CASAT waiting list. It would be clearly prejudicial to the 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: July 30, 2008, at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice