

**Matter of Sinanovic v New York State Dept. of  
Correctional Servs.**

2010 NY Slip Op 32758(U)

September 29, 2010

Sup Ct, St. Lawrence County

Docket Number: 132149

Judge: S. Peter Feldstein

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**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of  
**BESIM SINANOVIC, #07-A-2838,**

Petitioner,

for Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules

**DECISION AND JUDGMENT  
RJI #44-1-2009-0723.54  
INDEX #132149  
ORI # NY044015J**

-against-

**NEW YORK STATE DEPARTMENT  
OF CORRECTIONAL SERVICES, and  
NEW YORK STATE DIVISION OF PAROLE,**  
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 Besim Sinanovic, verified on October 19, 2009, and filed in St. Lawrence County Clerk’s office on October 30, 2009. Petitioner, who was an inmate at the Riverview Correctional Facility but has since been released from DOCS custody to post-release supervision, is challenging the time computation associated with his underlying sentences, including the period of post-release supervision.

The Court issued an Order to Show Cause on November 4, 2009. By Letter dated December 16, 2009 chambers was advised by Deanna R. Nelson, Esq., Assistant Attorney General, that petitioner had been released from DOCS custody to parole supervision on November 1, 2009, and therefore requested that this proceeding be dismissed as moot. The Court issued a Decision and Order on January 11, 2010 denying the dismissal request and directing respondents to serve answering papers. The Court next received and reviewed respondents’ Answer, verified on February 26, 2010, and by Letter Order dated March 22, 2010 the respondents were directed to supplement the record and clarify their

Answer. In response thereto the Court has received and reviewed counsel's Affidavit, sworn to on April 7, 2010.

By Letter Order dated May 4, 2010 the litigants were advised that under the unusual facts and circumstances of this case the Court would hold final judgment in abeyance in order to facilitate settlement efforts. The Letter Order of May 4, 2010 concluded as follows: "The Court has also taken the liberty of contacting Terry Brostowin, Esq., . . . the attorney who represented petitioner at the final parole revocation hearing. Mr. Brostowin has graciously agreed to consult with the petitioner in the event petitioner desires such consultation." On June 7, 2010 chambers received responsive correspondence dated June 4, 2010, from counsel for the respondents. No additional communication from, or on behalf of, petitioner has been received.

On May 3, 2007 petitioner was sentenced in Supreme Court, Bronx County, to an indeterminate sentence of 1 to 3 years and a concurrent determinate term of 2½ years, with 2 years post-release supervision, upon his convictions of the crimes of Robbery 3° and Criminal Sale of a Controlled Substance 3°. He was received into DOCS custody on May 22, 2007 certified as entitled to 131 days of jail time credit. At that time the maximum expiration date of petitioner's multiple sentences was calculated as January 10, 2010.

Following completion of the DOCS Shock Incarceration program petitioner was released from DOCS custody to post-release supervision on February 11, 2008. At that time the remaining portion (1 year, 10 months and 29 days) of the maximum term of petitioner's merged 2007 sentences was held in abeyance (Penal Law §70.45(5)(a)) and the maximum expiration date of the 2-year period of post-release supervision was

calculated as February 11, 2010. Petitioner, however, was subsequently charged with violating the conditions of his post-release supervision and a final parole revocation hearing was conducted on May 14, 2008. At that hearing petitioner entered into an agreement whereby he pled guilty to one parole violation charge, his parole was revoked with a modified delinquency date of April 16, 2008 and a delinquent time assessment of hold to maximum expiration was imposed.

Petitioner was received back into DOCS custody on January 28, 2009 certified as entitled to 287 days of parole jail time credit. The 2 months and 5 days that petitioner spent at liberty under post-release parole supervision from his February 11, 2008 release to the April 16, 2008 delinquency date reduced the time petitioner owed on the period of post-release supervision from 2 years to 1 year, 9 months and 25 days. In addition, the 287 days of parole jail time credit were applied against the 1 year, 10 months and 29 days previously held in abeyance (Penal Law §70.45(5)(d)(iv)) thereby reducing the time held in abeyance to 1 year, 1 month and 12 days. With that time held in abeyance calculated as running from January 28, 2010 (when petitioner was received back into DOCS custody), and with the remaining portion of the period of post-release supervision (1 year, 9 months and 25 days) added in, the maximum expiration date of petitioner's merged sentences, including the remaining period of post-release supervision, was re-calculated by DOCS officials as January 5, 2012. This proceeding was commenced on October 30, 2009 when the petition was filed in the St. Lawrence County Clerk's office.

In paragraph 10 of the petition it is alleged, in relevant part, that the plea agreement at the final parole revocation hearing was entered into with the understanding "... that the petitioner would be held in custody until his maximum expiration (ME) date,

a date which would occur on February 11, 2010, as a result of the original concurrency of the sentences, his shock time credit, and his jail time credit; and the petitioner would thereafter be released from custody, with no further parole supervision or time left to serve.” On November 30, 2009, after this proceeding had been commenced, parole officials purported to amend the Parole Revocation Decision Notice issued after the May 14, 2008 final hearing. The amended notice included, in relevant part, the following analysis:

“At the time of the [final] hearing the ALJ believed and so informed the releasee that he would reach his ME date on or about 2/11/2010. In fact the releasee will not max out until on or about 1/5/2012.

Therefore, in the interest of justice and giving the releasee the benefit of his bargain, the original decision notice is being amended to revoke and restore - time served.”

Based upon the Amended Parole Revocation Decision Notice of November 30, 2009, DOCS officials promptly released petitioner back to post-release parole supervision on December 1, 2009 and effectively re-commenced the running of the period of post-release supervision retroactive to January 28, 2009, the date the petitioner was received back into DOCS custody. With the remaining period of post-release supervision (1 year, 9 months and 25 days) calculated as running from January 28, 2009, DOCS officials have determined that the maximum expiration date of petitioner’s period of post-release supervision will be reached on November 23, 2010, with 1 year, 1 month and 12 days still held in abeyance against the merged maximum term of the 2007 sentences.

This litigation highlights the potential pitfalls encountered when an ALJ presiding at a final parole revocation hearing attempts to incorporate into the plea negotiation process representations with respect to sentence calculations. Such pitfalls are

particularly dangerous where, as here, the alleged parole violator's sentence structure includes a determinate sentence with a period of post-release supervision. Although it was clearly within the power of the presiding ALJ to direct petitioner's reincarceration in DOCS custody for the balance of the remaining period of post-release supervision (Executive Law §259-i(3)(f)(x)(D)), it was the responsibility of DOCS officials, not the ALJ, to determine the precise date that petitioner's remaining period of post-release supervision would expire. It appears to the Court, moreover, that given the ALJ's imposition of a delinquent time assessment of hold to maximum expiration, DOCS officials accurately determined that the maximum expiration date of petitioner's remaining period of post-release supervision would not be reached until January 5, 2012, rather than February 11, 2010 as stated by the ALJ.

Even if the Court were to ultimately conclude that the plea agreement entered into at the final parole revocation hearing was so tainted by the ALJ's statements with respect to a February 11, 2010 maximum expiration date as to be unenforceable, petitioner would not have been entitled to unconditional release from DOCS custody on February 11, 2010. Rather, the appropriate remedy would be for the Court to vacate the plea agreement and remand the matter for a new final hearing. In the meantime, of course, petitioner was re-released from DOCS custody to post-release parole supervision pursuant to the Amended Parole Revocation Decision Notice of November 30, 2009. Since the amended notice was not issued until after this proceeding had been commenced, however, and since the amended notice did not provide petitioner with the same level of relief he sought in the petition (unconditional release as of February 11, 2010), parole officials were without

jurisdiction to act administratively by issuing the amended notice. *See Gonzalez v. Jones*, 115 AD2d 849 and *Rahman v. Coughlin* 112 AD2d 591.

Notwithstanding the foregoing, under the unusual facts and circumstances of this case, the Court finds that it would be inappropriate to vacate the plea agreement and remand this matter for a new final parole revocation hearing at this time. Petitioner has remained at liberty subject to post-release parole supervision for almost ten months (since December 1, 2009) with the tacit approval of the respondents pursuant to the Amended Parole Revocation Decision Notice for November 30, 2009. There is nothing in the record, moreover, to suggest that petitioner has been accused of violating any of the conditions of his release since December 1, 2009 and, assuming petitioner remains in compliance with release conditions, the maximum expiration date of his period of post-release supervision will be reached in less than two months, on November 23, 2010. Even though petitioner has been subject to post-release supervision for an extended period of time beyond February 11, 2010, it is clear that he directly and tangibly benefitted from the issuance of the Amended Parole Revocation Decision Notice in that it brought about his release from incarceration in DOCS custody (albeit to post-release parole supervision) on December 1, 2009, almost 2½ months prior to his anticipated unconditional release date of February 11, 2010. For all of the above reasons the Court finds it appropriate at this juncture to judicially ratify the Amended Parole Revocation Decision Notice of November 20, 2009, as well as the DOCS determinations to release petitioner from custody on December 1, 2009 and restore him to post-release supervision effective as of January 28, 2009.

Based upon all of the above, it is, therefore, the decision of this Court and it is hereby

**ADJUDGED**, that the petition is granted without costs or disbursements, but only to the extent that the issuance of the Amended Parole Revocation Decision Notice of November 30, 2009, as well as the decisions to re-release petitioner to post-release parole supervision on December 1, 2009 and to calculate such restoration effective as of January 28, 2009, are judicially ratified.

**Dated:** September 29, 2010 at  
Indian Lake, New York

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S. Peter Feldstein  
Acting Justice, Supreme Court