STATE OF NEW YORK
SUPREME COURT **COUNTY OF ST. LAWRENCE**

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In the Matter of the Application of
GYKEE MILLINER,#10-R-0293,

Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2010-0445.23
INDEX #133982
ORI # NY044015J

-against-

ANDREA EVANS, Chief Executive Officer, NYS Division of Parole and Chairwoman, NYS Board of Parole, and **BRIAN FISCHER**, Commissioner, NYS Department of Correctional Services,

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 Gykee Milliner, including his June 23, 2010 Affidavit in Support of Order to Show Cause, verified on June 23, 2010 and filed in St. Lawrence County Clerk's office on July 9, 2010. Petitioner, who is an inmate at the Riverview Correctional Facility, is challenging the time computation associated with his current incarceration in DOCS custody.

The Court issued and Order to Show Cause on July 23, 2010 and has received and reviewed respondents' Answer and Return, including confidential Exhibits B and C, verified on September 24, 2010. By Letter Order dated November 7, 2010 the respondents were directed to supplement their answering papers by addressing the issue of petitioner's entitlement to parole jail time credit for the period from May 6, 2009 to June 8, 2009. In response thereto the Court has received and reviewed respondents'

Supplement to Verified Answer and Return dated December 1, 2010. The Court has also received and reviewed petitioner's Reply, filed in the St. Lawrence County Clerk's office on December 10, 2010.

On January 19, 2006 petitioner was sentenced in Supreme Court, Bronx County, to a determinate term of 2½ years, with 3 years post-release supervision, upon his conviction of the crime of Attempted Robbery 2°. He was received into DOCS custody on February 8, 2006, certified by the New York City Department of Correction as entitled to 561 days of jail time credit (Penal Law §70.30(3) and Correction Law §600-a). At that time the maximum expiration date of petitioner's 2½-year determinate term was calculated as January 21, 2007. On September 11, 2006 petitioner was conditionally released from DOCS custody to the judicially imposed 3-year period of post-release supervision. As of the September 11, 2006 conditional release date, DOCS officials calculated that petitioner still owed 4 months and 10 days against the 2½-year term of the determinate sentence. That time period was properly held in abeyance by DOCS officials pursuant to Penal Law §70.45(5)(a).

On November 19, 2007 petitioner was arrested in connection with a new criminal offense committed on that date but was released on bail after nine days in local incarceration. Petitioner apparently remained at liberty until May 6, 2009 when he was taken into custody on a parole violation warrant and served with a Notice of Violation/Violation of Release Report. A final parole revocation hearing was conducted at Rikers Island on June 18, 2009. At that hearing an agreement was reached whereby petitioner, who was represented by counsel, pled guilty to one parole violation charge and the three remaining charges were withdrawn with prejudice. Petitioner's parole was

revoked with a modified delinquency date of March 13, 2009 and a delinquent time assessment of hold to maximum expiration was imposed.

Petitioner remained in local custody following his final parole revocation hearing and on January 11, 2010 he was re-sentenced (original sentencing date was January 8, 2010) in Supreme Court, Queens County, as a second felony drug offender previously convicted of a violent felony offense (Penal Law §70.70(4)), to a determinate term of 2½ years, with 1 year post-release supervision, upon his conviction of the crime of Criminal Possession of a Controlled Substance 5°. Petitioner was received back into DOCS custody on February 1, 2010, certified by the New York City Department of Correction as entitled to 246 days of jail time credit covering the periods from November 19, 2007 to November 27, 2007 and June 9, 2009 through January 31, 2010. No parole jail time credit (Penal Law §70.40(3)(c)) was certified by the New York State Board of Parole pursuant to Executive Law §259-c(12).

Penal Law §70.25(1)(a) provides, in relevant part, as follows:

> "1. Except as provided in subdivisions . . . two-a . . . when a person who is subject to any undischarged term of imprisonment imposed at a previous time by a court of this state is sentenced to an additional term of imprisonment, the sentence . . . imposed by the court shall run either concurrently or consecutively with respect to . . . the undischarged term . . . in such a manner as the court directs at the time of sentence. If the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run as follows:
>
> (a) an indeterminate or determinate sentence shall run concurrently with all other terms . . ." (Emphasis added).

The exception to the above-quoted general rule, as set forth in Penal Law §70.25(2-a), provides that "[w]hen an indeterminate or determinate sentence of imprisonment is imposed pursuant to . . . subdivision . . . four of section 70.70 . . . and such person is

subject to an undischarged . . . determinate sentence of imprisonment imposed prior to the date on which the present crime was committed, the court must impose a sentence to run consecutively with respect to such undischarged sentence."

Since the 2010 determinate sentence was imposed upon petitioner as a second felony drug offender previously convicted of a violent felony (Penal Law §70.70(4)), DOCS officials properly calculated such sentence as running consecutively with respect to the undischarged term (time held in abeyance) of petitioner's 2006 sentence notwithstanding the fact that the 2010 sentencing court did not so specify. *See People ex rel Gill v. Greene*, 12 NY3d 1. The only issue then to be resolved is the amount of time still owing against petitioner's 2006 determinate term at the time he was received back into DOCS custody on February 1, 2010, following the 2010 conviction/sentencing.

As noted previously, as of September 11, 2006, when petitioner was conditionally released to post-release parole supervision, DOCS officials calculated that petitioner still owed 4 months and 10 days against the 2½-year term of his 2006 determinate sentence, and that time period was properly held in abeyance by DOCS officials pursuant to Penal Law §70.45(5)(a). The relevant provisions of Penal Law §70.45(5)(d)(iv), however, provide that any time spent by a post-release supervision violator " . . . in custody from the date of delinquency until return to the department of correctional services shall first be credited to the maximum or aggregate maximum term of the sentence or sentences of imprisonment, but only to the extent authorized by subdivision three of section 70.40 of this article." Penal Law §70.40(3)(c), in turn, provides that any time spent by a post-release supervision violator " . . . in custody from the time of delinquency to the time service of the sentence resumes shall be credited against the term or maximum term of

the interrupted sentence, provided: (i) that such custody was due to an arrest or surrender based upon the delinquency . . ."

In the case at bar there is no doubt that on May 6, 2009, which is after petitioner's modified delinquency date of March 13, 2009, petitioner, who was then at liberty on bail from the charges that ultimately culminated in his 2010 sentence, was arrested and taken into local New York City custody pursuant to a parole violation warrant. It is also clear that petitioner remained in local custody until his return to DOCS custody on February 1, 2010, following imposition of the 2010 sentence, and at that time the New York City Department of Correction certified to DOCS officials that petitioner was entitled to 246 days of jail time credit (Penal Law §70.30(3)), including the period from June 9, 2009 through January 31, 2010. Although the record before this Court is not clear with respect to what transpired on June 9, 2009 to trigger the determination of city officials to recommence the running of petitioner's jail time credit, the inescapable conclusion is that during the period from May 6, 2009 through June 8, 2009, petitioner's confinement in local custody was attributable solely to the parole delinquency rather than the pending criminal charges. Accordingly, the Court finds that petitioner is entitled to parole jail time credit against the 4 months and 10 days owed to the maximum term of his 2006 determinate sentence, properly held in abeyance by DOCS officials pursuant to Penal Law §70.45(5)(a), for the period from May 6, 2009 through June 8, 2009.

Finally, the Court rejects petitioner's assertion that the plea agreement at the final parole revocation hearing of June 18, 2009, while petitioner was represented by counsel, was not knowingly and voluntarily entered into.

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 costs or disbursements, but only to the extent that the New York State Board of Parole is directed to certify, pursuant to Executive Law §259-c(12), petitioner's entitlement to parole jail time credit for the period of May 6, 2009 through June 8, 2009 and the New York State Department of Correctional Services is directed to recalculate the maximum expiration and conditional release dates of petitioner's aggregated 2006/2010 sentences upon receipt of such certification.

Dated: January 19, 2011 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court