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

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In the Matter of the Application of
JOSEPH WILSON,#10-R-1024,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2010-0543.114
INDEX # 2010-1468
ORI # NY016015J

-against-

BRUCE YELICH, Superintendent,
Bare Hill Correctional Facility, and **MICHAEL J. SPOSATO**, Acting Nassau County Sheriff,
Respondents.

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This proceeding was originated by the Petition for a Writ of Habeas Corpus of Joseph Wilson, filed in the Franklin County Clerk's office on November 29, 2010. Petitioner, who is an inmate at the Bare Hill Correctional Facility, purported to challenge his continued incarceration in the custody of the New York State Department of Correctional Services. More specifically, petitioner asserted an entitlement to 717 additional days of jail time credit (Penal Law §70.30(3)). He further asserted that with the application of such additional credit the conditional release date of his 4-year determinate sentence would have been reached on September 11, 2010.

The Court issued an Order to Show Cause on December 9, 2010 and as a part thereof this proceeding was converted into a proceeding for judgment pursuant to Article 78 of the CPLR. An Amended Order to Show Cause was issued on April 12, 2011. The Court has since received an reviewed the Answer and Return of the respondent Yelich, verified on May 27, 2011, supported by the Letter Memorandum of Robert C. Glennon, Esq., Assistant Attorney General, dated May 27, 2011. The Court has also received and

reviewed the Answer of the respondent Sposato, dated May 26, 2011, supported by the Memorandum of Law of Liora M. Ben-Sorek, Esq., Deputy Nassau County Attorney, dated May 27, 2011. Finally, the Court has received and reviewed petitioner's Reply to both sets of answering papers, filed in the Franklin County Clerk's office on June 9, 2011.

On January 7, 2010 petitioner was sentenced in Supreme Court, Nassau County, as a second felony offender, to a controlling determinate term of 4 years, with 3 years post-release supervision, upon his convictions of the crimes of Criminal Sale of Controlled Substance 3° and Criminal Possession of a Controlled Substance 7°. The offenses underlying such conviction s were apparently committed in January of 2007. Petitioner was received into DOCS custody on April 8, 2010, certified by the respondent Sposato as entitled to 397 days of jail time credit (Penal Law §70.30(3)). DOCS officials currently calculate the maximum expiration and conditional release dates of petitioner's sentences as March 5, 2013 and August 7, 2012, respectively. Petitioner asserts that he is entitled to an additional 717 days of jail time credit covering the period he ". . . was under Nassau T.A.S.C. [Treatment Alternatives to Street Crime] supervision, which was court mandated pursuant to petitioner's plea agreement."

On September 6, 2007, during the pendency of the charges which culminated in his 2010 Nassau County sentences, petitioner entered into a written "PLEA AGREEMENT," presumably pursuant to Criminal Procedure Law §400.10(4) and Penal Law §65.10(2)(e). CPL §400.10(4) provides as follows: "After conviction and prior to sentencing the court may adjourn sentencing to a subsequent date and order the defendant to comply with any of the conditions contained in paragraphs (a) through (f) and paragraph (l) of subdivision two of section 65.10 of the penal law. In imposing sentence, the court shall take into

consideration the defendant's record of compliance with pre-sentence conditions ordered by the court." Penal Law §65.10(2)(e) authorizes a pre-sentence condition whereby a defendant is ordered to "[p]articipate in an alcohol or substance abuse program or an intervention program approved by the [sentencing] court after consultation with the local probation department having jurisdiction, or such other public or private agency as the [sentencing] court determines to be appropriate . . ."

Under the terms of the plea agreement referenced in the preceeding paragraph, the petitioner/defendant, who was facing five class B felony charges, one class D felony charge and one class A misdemeanor charge, ". . . will enter a plea of guilty to Criminal Sale of a Controlled Substance in the Third Degree, a class B felony, with the right to withdraw the plea if a sentence greater than six years incarceration and three years post release supervision is to be imposed, and Criminal Possession of a Controlled Substance in the Seventh Degree, a class A misdemeanor, with the right to withdraw the plea if a sentence greater than one year incarceration to run concurrently is to be imposed, and shall, as a condition of said plea, and prior to sentencing, enter a residential drug treatment program to be monitored by the Court, the Nassau County District Attorney's Office . . . and Treatment Alternatives to Street Crime . . . for a period of approximately 12 to 18 months, after which the treatment period will include an outpatient component of approximately one year, and comply with all rules and regulations and successfully complete the program . . . That upon successful completion of the program, the People will recommend a vacatur of the defendant's felony charge and join the defendant's application to dismiss the felony charge of Criminal Sale of a Controlled Substance in the Third Degree, a class B felony, in furtherance of justice . . . the defendant will then be left with the disposition of Criminal

Possession of a Controlled Substance in the Seventh Degree, a class A misdemeanor, with a sentence of time served, or conditional discharge, or probation, to be determined by the District Attorney at the conclusion of treatment . . ." This Court notes that under the provisions of paragraph 10(d) of the plea agreement the petitioner/defendant consented to the imposition of conditions "necessary for treatment, rehabilitation, and monitoring of the defendant's status in the program including, but not limited, to . . . requiring urine tests, restricting the defendant's movements, and home monitoring. The defendant specifically hereby consents at any time and for any reason to the search of the defendant's person, residence, business, car or other vessel or vehicle and to the seizure of any contraband or evidence found."

Although petitioner, specifically citing paragraph 10(d) of the plea agreement, alleges, in effect, that the 717 days he spent under Nassau T.A.S.C. supervision constituted time spent "in custody" for jail time credit purposes, the petition contains no specific allegations with respect to the nature of restrictions actually imposed upon him and the impact of such restrictions on his freedom of movement. In any event, the Court simply finds that whatever the restrictions on petitioner's freedom of movement, the plea agreement was voluntarily entered into by him with the expectation that successful completion of the program would result in the vacatur and dismissal of the remaining felony charge with no additional jail time associated with the misdemeanor conviction. While nothing in the record herein describes the circumstances surrounding petitioner's apparent failure to successfully complete the program, there is no basis, under the facts and circumstances of this case, to support an entitlement to an award of jail time credit for any time spent by petitioner, prior to the commencement of his 2010 Nassau County

Sentence, outside the actual custody of the respondent Nassau County Sheriff. *See Hawkins v. Coughlin*, 72 NY2d 158, *Titmas v. Hogue*, 21 AD3d 635 and *Poole v. Koehler*, 160 AD2d 880.

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

ADJUDGED, that the petition is dismissed.

DATED: June 20, 2011 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge