STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of SHAKIR MICHAEL,

Petitioner,

-against-

NYS DEPT. OF CORRECTIONAL SERVICES,

Respondent,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-11-ST2635 Index No. 2581-11

Appearances: Shakir Michael
Inmate No. 10-A-3564
Petitioner, Pro Se
Wyoming Correctional Facility
3203 Dunbar Road
P.O. Box 501
Attica, NY 14011

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Brian J. O'Donnell,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Wyoming Correctional Facility, commenced the instant CPLR Article 78 proceeding by reason of respondent's failure and/or refusal to establish a

merit time eligibility date for him. He maintains that he is currently incarcerated for the crime of criminal sale of a controlled substance 5th degree, a nonviolent crime, and therefore is eligible to receive merit time. He acknowledges conviction for a class B violent felony, robbery in the 1st degree, but maintains that he is not currently serving that sentence.

The respondent has served an answer containing two objections in point of law: that the petition fails to state a cause of action; and the petition is barred by the principles of res judicata and collateral estoppel.

On October 26, 1995 the petitioner was sentenced to a term of 5 ½ to 16 ½ years on a conviction of 1st degree robbery ("1995 sentence"). He was received by the New York State Department of Correctional Services ("DOCS") on November 3, 1995, and credited with 374 days of jail time. On March 23, 2006 he was conditionally released. The petitioner was declared delinquent as of October 19, 2007, and on November 20, 2007 returned to DOCS as a conditional release violator. He was credited with 32 days of parole jail time for the period between October 19 2007 and November 19, 2007. The petitioner was paroled on December 19, 2008, and declared delinquent as of May 24, 2009. On August 26, 2009 he was restored to parole supervision, and credited with 86 days of parole jail time for June 1, 2009 to August 25, 2009.

The petitioner was declared delinquent as of July 12, 2010. On the same date he was sentenced, as a second felony offender, for criminal sale of a controlled substance 3rd degree, committed on May 28, 2009. He received a 3 year determinate term and 2 year period of post-release supervision. An amended commitment was issued on August 31, 2010, which recited that the petitioner was being given the same sentence (a 3 year determinate term with

2 years post release supervision), as a second felony drug offender with a prior violent felony conviction, for the crime of criminal sale of a controlled substance 5th degree. The petitioner was received by DOCS on July 20, 2010, and credited with 194 days of jail time between January 7, 2010 and July 19, 2010. On October 14, 2010 the Albany County Sheriff's Department amended petitioner's jail time credit to 273 days for the period between October 20, 2009 and July 19, 2010. On October 25, 2010 the Albany County Sheriff's Department amended petitioner's jail time credit to 8 days of jail time for July 12, 2010 to July 19, 2010. On December 6, 2010, the Albany County Sheriff's Department amended the petitioner's jail time credit to 194 days for the period of January 7, 2010 to July 19, 2010.

Turning first to the issue of whether the 1995 sentence and 2010 sentence run concurrently or consecutively to each other, this issue was decided by Supreme Court Justice Joseph C. Teresi in Shakir Michael v Albany County Correctional Facility and the NYS Division of Parole (Sup. Ct., Albany Co., April 26, 2011, Index No. 7187-10). Judge Teresi held that the 2010 sentence runs consecutively to the 1995 sentence. The Court finds that the petitioner is barred from re-litigating the issue under principles of collateral estoppel (see Gramatan Home v Lopez, 46 NY2d 481, 485 [1979]; Kaufman v Lilly & Co., 65 NY2d 449, 455 [1985]; D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664 [1990]; Lake George Park Commission v Salvador, 245 AD2d 605, 607 [3d Dept., 1997], lv dismissed and lv denied 91 NY2d 939; New York State Higher Education Services Corporation v Adenivi, 72 AD3d 1387, 1387-1388 [3rd Dept., 2010]; Matter of Benedictine Hospital v Glessing, 47 AD3d 1184 [3rd Dept., 2008]). In addition, the Court agrees with Justice Teresi's reasoning, that because the petitioner was sentenced in 2010 as a second felony drug

offender previously convicted of a violent felony, that the 2010 sentence, by operation of law must run consecutively to the undischarged portion of his 1995 sentence (see Penal Law § 70.25 [2-a]; People ex rel. Gill v Greene, 12 NY3d 1 [2009], cert denied 130 S Ct 86 [2009]). This is so, even where the sentencing judge failed to indicate that the two sentences were to run consecutively (see People ex rel. Gill v Greene, supra).

With regard to petitioner's claim to merit time, very clearly, because he still had 9 months, 16 days time owed on his 1995 sentence[1] when sentenced in 2010, he is not entitled to merit time credit (see Correction Law 803 (d) (ii); Matter of Washington v Dennison, 42 AD3d 830 [3d Dept., 2007], lv to appeal denied 9 NY3d 813; see also People v Merejildo, 45 AD3d 429 [1st Dept., 2007]). The petitioner is entitled, however, to a limited credit time allowance as computed in the letter dated March 7, 2011of Richard de Simone, Esq., Associate Counsel in Charge, Office of Sentencing Review, former New York State Department of Correctional Services.

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed.

Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

---

[1]Which, as noted, was robbery in the first degree, a violent felony offense (see Penal Law 70.02 [1] [a]).

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: November 9, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated April 14, 2011, Petition, Supporting Papers and Exhibits
2. Answer dated August 2, 2011, Supporting Papers and Exhibits
3. Petitioner's Reply