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

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In the Matter of the Application of
TUMAR WATERS,#99-A-4945,

Petitioner,

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

DECISION AND JUDGMENT
RJI #44-1-2011-0306.15
INDEX #135952
ORI # NY044015J

-against-

JUSTIN TAYLOR, Superintendent,
Gouverneur Correctional Facility,
and **MARTIN F. HORN,** Commissioner,
NYC Department of Correction,

Respondents.

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This proceeding was originated by the Petition for a Writ of Habeas Corpus of Tumar Waters, filed in the St. Lawrence County Clerk's office on April 22, 2011. Petitioner, who is an inmate at the Gouverneur Correctional Facility, is challenging the computation of jail time credit associated with his current incarceration in DOCS custody. An Order to Show Cause was issued on May 5, 2011 and as a part thereof this proceeding was converted into a proceeding for judgment pursuant to Article 78 of the CPLR. The Court has since received and reviewed the "Motion to Dismiss Order to Show Cause" of the respondent Horn, dated June 17, 2011, as well as the Answer and Return of the respondent Taylor, dated July 8, 2011. The Court has also received and reviewed petitioner's Reply thereto (denominated "TRAVERE [sic] THE RETURN IN OPPOSITION TO THE DEFENDANTS [sic] ANSWER"), filed in the St. Lawrence County Clerk's office on July 25, 2011.

On July 27, 1995 petitioner was sentenced in Supreme Court, New York County, to an indeterminate sentence of 1 to 3 years upon his conviction of the crime of Attempted

Criminal Sale of a Controlled Substance 3°. He was received into DOCS custody on August 14, 1995 certified as entitled to 90 days of jail time credit (Penal Law §70.30(3)). At that time DOCS officials calculated the maximum expiration date of petitioner's 1995 sentence as May 13, 1998. On March 7, 1996 petitioner was released to parole supervision after completing the DOCS Shock Incarceration Program. He was apparently declared delinquent as of May 23, 1996 but was restored to parole supervision on February 8, 1997 certified as entitled to 255 days of parole jail time credit (Penal Law §70.40(3)(c)) covering the entire period of time between the delinquency and restoration. The originally-calculated May 13, 1998 maximum expiration date of petitioner's 1995 sentence therefore remained unchanged.

On December 18, 1997, while at liberty under parole supervision from his 1995 sentence, petitioner was arrested in connection with new criminal charges and taken into local custody in the City of New York. No parole delinquency was declared and when petitioner reached the maximum expiration date of his 1995 sentence on May 13, 1998 he was discharged by the Division of Parole but remained in local custody in connection with the new criminal charges.

On August 9, 1999 petitioner was sentenced in Supreme Court, New York County, as a second felony offender, to a controlling indeterminate sentence of 10 to 20 years upon his convictions of the crimes of Conspiracy 2° and Criminal Sale of a Controlled Substance 3°. Petitioner was received back into DOCS custody on September 9, 1999 originally certified as entitled to 630 days of jail time credit covering the entire period from his December 18, 1997 arrest until he was received back into DOCS custody. At that time DOCS officials calculated the maximum expiration and conditional release dates of petitioner's 1999 sentence as December 13, 2017 and April 13, 2011, respectively.

On March 7, 2011 the New York City Department of Correction issued an amended jail time certificate reducing petitioner's jail time credit to 483 days covering the period from May 13, 1998, when petitioner reached the maximum expiration date of the 1995 sentence, until he was received back into DOCS custody on September 9, 1999. The reduction of petitioner's jail time credit from 630 days to 483 days, which prompted DOCS officials to re-calculate the maximum expiration and conditional release dates of petitioner's 1999 sentence as May 10, 2018 and September 10, 2011, respectively, is the subject of this proceeding.

The calculation of jail time credit is controlled by Penal Law §70.30(3) which provides, in relevant part, as follows:

> ". . .[T]he maximum term of an indeterminate sentence imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence . . . The credit herein provided shall be calculated from the date custody under the charge commenced to the date the sentence commences and shall not include any time that is credited against the . . . maximum term of any previously imposed sentence . . ."

Where, as here, the criminal defendant was confined in local custody in the City of New York, jail time credit is calculated by the Commissioner of the New York City Department of Correction and certified to the New York State Department of Correctional Services upon transfer of the inmate from local to state custody. *See* Correction Law §600-a. State DOCS authorities are bound by the jail time certified by the city commissioner and can neither add nor subtract from the time so certified. *See Neal v. Goord*, 34 AD3d 1142, *Torres v. Bennett*, 271 AD2d 830 and *Jarrett v. Coughlin*, 136 Misc 2d 981. Where the city commissioner amends a previously issued jail time certificate, DOCS officials are bound by the most recently issued certificate. *See Villanueva v. Goord*, 29 AD3d 1097.

Citing *Sparago v. New York State Board of Parole*, 132 AD2d 881, *mod* 71 NY2d 943, petitioner argues that since the running of his 1995 sentence was never interrupted by a parole delinquency, the time he spent in local custody from his December 18, 1997 arrest to the May 13, 1998 maximum expiration date of such sentence should not be considered as "credited" against the 1995 sentence within the meaning of Penal Law §70.30(3). As stated by the Appellate Division, Third Department, in *Sparago*, "[s]uch a crediting, in our view, occurs when the previously imposed sentence is duly interrupted, with jail time accruing during the period of interruption." 132 AD2d 881 at 883.[1]

While the rationale of the Appellate Division, Third Department in *Sparago* might arguably be applied to the facts and circumstances of this case, it is noted that the specific fact pattern in *Sparago* (which the Third Department deemed "unusual") bears little resemblance to the fact pattern in the case at bar. It is also noted that although the Appellate Division, Third Department issued its decision in *Sparago* more than 24 years ago, the relevant holding therein apparently remains uncited in any officially-reported

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[1] In addition to its determination with respect to the jail time credit issue, the Appellate Division in *Sparago* also determined that Mr. Sparago's most recently imposed (1984) sentence had to run consecutively with respect to the undischarged term of his previously imposed (1980) sentence. It also found that Mr. Sparago's " . . .maximum release date was properly calculated by aggregating the undischarged portion of the 1980 maximum and the 1984 maximum." 132 AD2d 881 at 882. There is nothing in the Court of Appeals decision in *Sparago* (71 NY2d 943) to suggest that such court was called upon to review the determination of the Appellate Division, Third Department, with respect to the jail time credit issue. After noting that the Appellate Division had reversed Supreme Court with regard to the jail time credit issue, the Court of Appeals further noted that "[t]he Appellate Division agreed with Supreme Court on the issue now before us , however, holding that because petitioner's sentences were to run consecutively . . .they had to be aggregated . . . It [the Appellate Division] did not address which aggregation method used by respondents was proper, but implicitly held the recalculated sentence was computed using the correct method. We agree with the Appellate Division that petitioner's sentences had to be aggregated, but disagree, under these facts, as to the aggregation method which should be used." 71 NY2d 943 at 945 (citations omitted) (emphasis added). Indeed, the Court of Appeals' only specific mention of the jail time credit issue occurred after it set forth its reasoning with respect to the sentence aggregation issue, stating as follows: "This [aggregation] method not only effectuates the stipulation which provided petitioner's parole would not be revoked, but also credits him with the 217 days of jail time to which the Appellate Division found him entitled." *Id* at 946. It is therefore the finding of this Court (Supreme Court, St. Lawrence County) that the *Sparago* holding with respect to the jail time credit issue, as well as the rationale underlying that holding, is that of the Appellate Division, Third Department, rather than the Court of Appeals.

case. More importantly, since 1987 the Appellate Division, Third Department, has issued a number of decisions seemingly at odds with the relevant rationale expressed in *Sparago*. *See Mena v. Fischer*, 84 AD3d 1611, *Hot v. New York State Department of Correctional Services*, 79 AD3d 1383, *lv den* 16 NY3d 710, *Villanueva v. Goord*, 29 AD3d 1097 and *DuBois v. Goord*, 271 AD2d 874.

Hot and *Villanueva*, to be sure, involve fact patterns dissimilar to both *Sparago* and the case at bar. Each of these cases involve individuals who had already commenced serving definite or indeterminate sentences and who were subsequently sentenced to indeterminate or determinate sentences. In each case the Appellate Division, Third Department, found that jail time credit against the subsequent sentence(s) was unavailable with respect to time spent in local custody after the previously-imposed definite or indeterminate sentence had commenced. Although neither *Hot* nor *Villanueva* involved any parole delinquency issues, it is still noteworthy that, contrary to *Sparago*, the proscription against double crediting set forth in Penal Law §70.30(3) was applied notwithstanding the fact that the previously imposed sentences were not interrupted but continued to run during the periods of time for which jail time credit was sought.

Mena and *DuBois* on the other hand both involve fact patterns similar to the fact pattern in the case at bar. Each of these cases involved individuals who spent time in local custody in connection with new criminal charges while on parole from previously-imposed sentences. In each case, moreover, the previously imposed sentence(s) expired prior to the imposition of sentence(s) in connection with the new criminal charges. Despite the similar fact pattern *Mena* is only of tangential interest since it involved a parole eligibility date calculation issue rather than a jail time credit issue and, therefore, the proscription against double crediting set forth in Penal Law §70.30(3) was not specifically considered. The *Mena* court, after determining that Mr. Mena's parole was

not revoked by operation of law (Executive Law §259-i(3)(d)(iii)) since his previously imposed sentence expired prior to sentencing on the subsequent charges, found that he "... continued to serve his [previously-imposed] 1989 sentence after his incarceration [in local custody] in November 1993 [in connection with the new criminal charges] until that [previously-imposed] sentence expired on its own terms on December 28, 1994. Thus, the Department properly credited all prison time thereafter served to the new commitment on his 1995 sentences." *Mena v. Fischer*, 84 AD3d 1611 (emphasis added) (citing *Hot*, *Villianueva* and *DuBois*). No mention was made of any credit against Mr. Mena's subsequently-imposed 1995 sentence for the time he spent incarcerated in local custody prior to the December 28, 1994 expiration of his previously-imposed 1989 sentence.

In *DuBois* the jail time credit issue was front and center. The petitioner in *DuBois*, who was serving an indeterminate sentence of 5 to 15 years imposed in 1979, was released on parole but subsequently violated and returned to DOCS custody with an adjusted maximum expiration date of May 14, 1989. In August of 1988 Mr. DuBois was transferred to county jail pending disposition of criminal charges stemming from an incident that had occurred while he was on parole. On October 13, 1988 he was again released from DOCS custody to parole supervision but remained in county jail in connection with the new charges. He was ultimately sentenced on those charges on an unspecified date in 1989 to an indeterminate sentence of 10 to 20 years. On June 26, 1989 Mr. DuBois was received back into DOCS custody to begin serving his 1989 sentence certified as entitled to 46 days of jail time credit against such sentence covering the time period from May 14, 1989 (the adjusted maximum expiration date of his 1979 sentence) to his June 26, 1989 return to DOCS custody. Mr. Dubois contended, however, that he was entitled to jail time credit for the entire time spent in local custody from August 11, 1988 to June 26, 1989. The

Appellate Division, Third Department, rejected this contention. Without specifically mentioning Penal Law §70.30(3), the *DuBois* court found as follows:

> " . . . [P]etitioner was not entitled to a credit against the 1989 sentence for time served in County Jail prior to the expiration of the 1979 sentence because that period of incarceration was credited against petitioner's 1979 sentence . . . Because petitioner continued to serve the 1979 sentence despite his October 13, 1988 release on parole, the jail time served following his parole release and prior to the maximum expiration date of the 1979 sentence may not be credited towards the 1989 sentence . . ." 271 AD2d 874 at 875-876 (citations omitted).

Based upon the decisions of the Appellate Division, Third Department in *Mena*, *Hot*, *Villanueva* and, particularly, *DuBois*, this Court is not persuaded that the *Sparago* rationale is applicable under the facts and circumstance of the case at bar. This Court finds that the proscription against double crediting set forth in Penal Law §70.30(3) is applicable notwithstanding the fact that petitioner's 1995 sentence was not interrupted but continued to run while petitioner was confined in local custody from December 18, 1997 until May 13, 1998, when the maximum expiration date of such sentence was reached. Accordingly, this Court further finds that the respondent Commissioner, New York City Department of Correction, did not err in excluding that time period in the amended jail time certificate.

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: August 16, 2011 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court