MICHAEL A. SIRAGUSA
ERIE COUNTY ATTORNEY

COUNTY OF ERIE

MARK C. POLONCARZ
COUNTY EXECUTIVE

DEPARTMENT OF LAW

MICHELLE M. PARKER
FIRST ASSISTANT COUNTY ATTORNEY

JEREMY C. TOTH
SECOND ASSISTANT COUNTY ATTORNEY

April 30, 2013

Mr. Robert M. Graber, Clerk
Erie County Legislature
92 Franklin Street. 4th Floor
Buffalo, New York 14202

Dear Mr. Graber:

In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	*Dulak, Thomas v. Timothy B. Howard, Sheriff of Erie County*
Document Received:	Order to Show Cause
Name of Claimant:	Thomas Dulak #08--B-1394 Riverview Correctional Facility P.O. Box 247 Ogdensburg, New York 13669
Claimant's attorney:	Claimant is proceeding *pro se*.

Should you have any questions, please call.

Very truly yours,

MICHAEL A. SIRAGUSA
Erie County Attorney

By: Michelle Parker
Michelle M. Parker
First Assistant County Attorney

MMP:dld

Enclosure

2013 APR 25 PM 1:22

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

IN THE MATTER OF THE APPLICATION OF
THOMAS DULAK, #08-B-1394

Petitioner,

-vs-

TIMOTHY B. HOWARD, SHERIFF OF
ERIE COUNTY,

Respondent.

ORDER TO
SHOW CAUSE

RETURN ON
PAPERS ONLY

Index No.
I-2013-1079

SUPREME COURT, ERIE COUNTY

HON. PAULA L. FEROLETO, JUSTICE PRESIDING

APPEARANCES:

Petitioner, Pro Se
THOMAS DULAK, #08-B-1394

This *ex parte* matter was referred to my attention at a Term of the Supreme Court, Erie County.

Upon the reading of the petition for relief pursuant to Article 78 of the Civil Practice Law and Rules, sworn to on March 20, 2013, with accompanying exhibits,

LET RESPONDENT SHOW CAUSE at a Special Term of the Supreme Court to be held in and for the County of Erie on **JUNE 3, 2013** before the **HON. CHRISTOPHER J. BURNS,** Justice of the Supreme Court, in Part 19 at 25 Delaware Avenue, Buffalo, New York, **WHY** the relief requested in the Petition should not be granted.

IT IS ORDERED **that the production of petitioner or appearance by or on behalf of the respondent on said return date is not required, and the matter shall be decided on all papers submitted to the Court prior to said return date;** and it is further

ORDERED that the petitioner is granted poor person status pursuant to Article 11 of the Civil Practice Law and Rules waiving the fee for the Index Number and the fee for the Request for Judicial Intervention and that in the event the petitioner should receive an unfavorable decision, said petitioner shall be permitted to file a Notice of Appeal in the Erie County Clerk's Office without having to pay the fee required by CPLR 8022(a); and it is further

ORDERED that a waiver of fees for service by publication, for stenographic transcripts, or for any other cost or fee related to this proceeding in this Court shall only be granted upon a separate application to the Court, on notice to the County Attorney of Erie County, pursuant to CPLR 1101, showing the need therefor; and it is further

ORDERED that service of a signed and executed copy of this Order to Show Cause, the petition and any supporting papers by ordinary First Class mail upon the named respondent, Timothy B. Howard, on or before **May 6, 2013** be deemed adequate. In addition, the petitioner, on or before said date, shall similarly serve the Erie County Attorney, 95 Franklin Street, Room 1634, Buffalo, New York 14202; and it is further

ORDERED that it shall be the responsibility of the party seeking an extension of time to serve papers or seeking an adjournment of this matter to make such request for an extension of time or an adjournment to Supreme Court Justice Burns, and any party receiving an adjournment shall notify the other party or parties of said adjourned date; and it is further

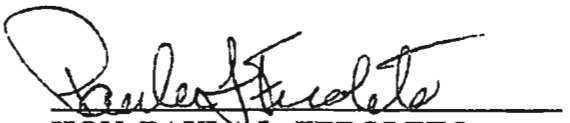
ORDERED that it is the petitioner's responsibility to:

(a) Serve a signed and executed copy of this Order to Show Cause, the petition and any supporting papers as authorized above or by personal service.

(b) Submit the original proof of service to the chambers of the **Hon. Christopher J, Burns**, 25 Delaware Avenue-Fifth Floor, Buffalo, New York 14202 at least eight (8) days prior to the return date; and it is further

ORDERED that a copy of any answer or response shall be served upon the petitioner not less than five (5) days before the return date. The original of any such answer or response is to be delivered to the chambers of Justice Burns not less than three (3) days prior to said return date.

DATED: Buffalo, New York
April 11, 2013

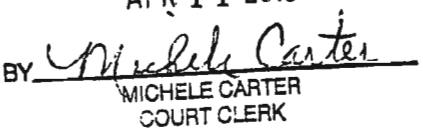


HON. PAULA L. FEROLETO
Justice of the Supreme Court

GRANTED:

GRANTED

APR 11 2013

BY 

MICHELE CARTER
COURT CLERK

ERIE COUNTY
SHERIFF

2013 APR 25 PM 1:22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF : ERIE

IN THE MATTER OF APPLICATION OF

THOMAS DULAK # 08-B-1394
Petitioner,

-against-

TIMOTHY B. HOWARD, Sheriff in and for Erie County.
Respondent.

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

AFFIDAVIT IN SUPPORT OF ORDER
INDEX NO. 2013-1079

STATE OF NEW YORK
COUNTY OF : ST. LAWRENCE)ss.:

I THOMAS DULAK, being duly sworn, deposes and says:

1. I am the petitioner in the above-entitled proceeding.

2. I make this affidavit in support of my annexed application for an Order to Show Cause to prosecute the attached petition pursuant to Article 78 of the Civil Practice Law and Rules which challenges the decision of Erie County Sheriff's Department holding of Jail Time Credit from December 13, 2007 to April 29, 2008.

3. Petitioner seeks to proceed by order to show cause rather that by Notice of Petition because this has been an on going process with the respondent and needs to be addressed as soon as practible.

4. Petitioner, being incarcerated, also cannot effect personal service of the within papers and respectfully request that timely service by mail be deemed sufficient.

5. Petitioner designates ERIE COUNTY as the place of venue.

6. No previous application for the relief requested herein has been made.

7. I have moved by the annexed affidavit for a reduction/waiver of the filing fees.

WHEREFORE, petitioner respectfully request that this Court enter an order directing Respondent to show cause why a judgment should not be made and entered pursuant to Article 78 of the Civil Practice Law and Rules At a Term of the Supreme Court of the State of New York, held in and for the County of Erie on the 15 day of April, 2013 and granting such other and further relief as this Court may deem just and proper.

Sworn to before me this
20 day of March, 2013

Kristina Monnet
Notary Public

KRISTINA MONNET
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01MO6066482
QUALIFIED IN ST. LAWRENCE COUNTY
COMMISSION EXPIRES 11/13/2013

Thomas Dulak
Signature

THOMAS DULAK
Print Name

Riverview Correctional Facility
P.O. Box 247
Ogdensburg, New York 13669

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF : ERIE

IN THE MATTER OF APPLICATION OF

THOMAS DULAK # 08-B-1398
Petitioner,

-against-

TIMOTHY B. HOWARD, Sheriff in and For Erie County
Respondent.

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

PETITION

INDEX NO. 2013-107

TO THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE COUNTY OF ERIE

The petition of THOMAS DULAK, complaining of the Respondent TIMOTHY B. HOWARD, respectfully alleges:

1. Petitioner Thomas Dulak is in inmate at Riverview Correctional Facility, P.O. Box 247, Ogdensburg, New York 13669

2. Respondent Timothy B. Howard is Sheriff of Erie County and is charged with overall supervision of his employees.

3. The petition challenges the Jail Time Credit from December,13 2007 to April 29, 2008. that he was not given credit for while being detained within the custody and care of the Sheriff's Department.

4. The within proceeding is brought pursuant to C.P.L.R. Article 78 to challenge the determination of the final response of December 24, 2010.[See Exhibit A].

BACKGROUND OF CASE

The petitioner states that he was arrested in the City of Buffalo, State of New York on March 27, 2007 and was charged with Petit Larceny pursuant to Penal Law § 155.25 of the State of New York and as a direct result of this charge the petitioner entered a plea of guilty and on April 24, 2007 the petitioner received a sentence of [thirty days] and [three years probation].

The petitioner was then arrested in the City of Buffalo on October 23, 2007 and was charged with Robbery First Degree Pursuant to Penal Law § 160.10 and as a direct result of this charge the petitioner was violated for violating his probation that he plead guilty to and received on April 24, 2007.

The petitioner asserts that while awaiting the disposition of the Robbery charge that was lodged against him on October 23, 2007 he was taken before the Court to be sentenced on the violation of probation misdemeanor charge and on the March 27, 2007 the petitioner received a [One Year Determinate Sentence] for this violation of probation.

The petitioner asserts that on April 29, 2008 he was sentenced by the Erie County Court to a determinant term of imprisonment of [ten years] imprisonment.

5. The Respondent's determination was in violation of Penal Law 70.30 (3) of the State of New York.

PENAL LAW § 70.30 (3)
READS AS FOLLOWS:

The term of a definite sentence, a determinate sentence, or the 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 culmimated in the sentence. In the case of an indeterminate sentence, if the minimum period of imprisonment has been fixed by the court or by the board of parole, the credit shall also be applied against the minimum period. The credit herein provided shall be calculated form the date of custody under the charge commenced to the date the sentence commences and shall not include any jail time credit against the term or maximum term of any previously imposed sentence or period of post-release supervision to which person is subject. Where the charge or charges culminate in more than one sentence, the credit shall be appied as follow:

Penal Law 70.30 (b)

If the sentences run consecutively, the credit shall be applied against the aggregate term of the sentences and against the aggregate minimum period of imprisonment.

6. The petitioner asserts that it is the position of the Erie County Sheriff Department that the time the petitioner spent in custody awaiting the disposition of the felony charge of Robbery First Degree does not necessarily county towards his state probation sentence i.d. [Exhibit A].

7. The petitioner states that he has not received any sentence in state prison for felony probation and was only sentenced to a one year sentence for a misdemeanor conviction. i.d. [Inmate NYS Criminal History Information].

8. The petitioner in support of the time he is seeking credit for is supported by two cases that on point on the subject matter of jail time credit, People v. Schweickert, 91 A.D.2d 1004, 457 N.Y.S.2d 869, here the court found that the One Year Definite Sentence should merge with a Determinate Sentence, Penal Law § 70.35 provides in pertinent part the service of an indeterminate term of imprisonment shall satisfy any determinate sentence of or definite sentence of imprisonment imposed on a person for an offense committed prior to the time the felony sentence was imposed. Here the petitioner asserts that he received a sentence on a Class A Misdemeanor of Petitit Larceny. Although this subject matter speaks in terms of Concurrent and Consecutive Sentences, it should also apply to Jail Time Credit.

9. The petitioner also points to People v. Delgado, 88 A.D.2d 981, 451 N.Y.S.2d 791 where this Court clearly stated that where offenses for which defendant was given a definite sentence occured prior to the time sentence were imposed, one-year definite sentence shoud not have been made to run consecutively.

10. It is the petitioners contention that Penal Law § 70.35 would imply that upon a person convicted of a crime and sentenced to a definate sentence, the sentences would merge which would imply the Jail Time Credit would be applied for all time spent in custody and be allied to the controlling determinate ten year sentence that the petitioner received.

11. Wherefore the petitioner asserts that the Respondent's decision in denying the petitioner all jail time credit is arbitrary and capricious.

12. The petitioner states that he has made no prior request for this relief in this case.

WHEREFORE, petitioner respectfully request that judgment be entered pursuant to Article 78 of the Civil Practice Law and Rules:

VACATING, the determination in withholding jail time credit from December 13, 2007 to April 29, 2008.

DIRECTING Respondent to forward a new certified Jail Time Credit Certificate to the New York State Department of Corrections setting fourth all Jail Time Credit that the petitioner is entitled to.

GRANTING such other and further relief as this Court may deem just and proper.

Dated: March 20, 2013

County of ST. Lawrence

Petitioner, pro se.

VERIFICATION

STATE OF NEW YORK
COUNTY OF : ST. LAWRENCE) ss.:

Thomas Dulak, being duly sworn, deposes and says that the deponent is the petitioner in the above-encaptioned proceeding, that he has read the foregoing petition and knows the contents thereof, that the same is true to deponent's own knowledge, except as to matters therein stated upon information and belief, which matters deponent believes to be true.

Signature

Sworn to before me this

20 day of March, 2013

Notary Public

KRISTINA MONNET
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01MO6066482
QUALIFIED IN ST. LAWRENCE COUNTY
COMMISSION EXPIRES 11/13/2013

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF : ERIE

IN THE MATTER OF

THOMAS DULAK

Petitioner,

vs.

TIMOTHY B. HOWARD

Respondent

EXHIBITS

Thomas Dulak # 08-B-1394
Riverview Correctional Fac.
P.O. Box 247
Ogdensburg, New York 13669

EXHIBIT "A"

March 21, 2007
Initial Report Of Docket Number

April 24, 2007
Convicted Upon Plea Of Guilty
-- Petit Larceny
PL 155.25 Class A Misdemeanor NCIC 2399
Sentenced to:Probation: 3 Year(s) Sentence Date:April 24, 2007
Term: 30 Day(s)

December 13, 2007
Resentenced
-- Petit Larceny
PL 155.25 Class A Misdemeanor NCIC 2399
Sentenced to: Term: 1 Year(s) Sentence Date:December 13, 2007

Interim release Status: Remanded without bail

Incarceration/Supervision Information

Probation Information

Placed on Probation:	April 24, 2007
Max Expiration Date:	April 24, 2010
Supervision Agency:	Erie County Probation
Jurisdiction Agency	Erie County Probation
Probation Officer ID :	ER172
Probation Registration Number:	3327180
Probation Case Number:	ER184057
Probation Discharge Date:	December 15, 2007
Discharge Type:	Revoked - Technical Violation

Cycle 6
*** Cycle may not be supported by fingerprints**

Arrest/Charge Information
Arrest Date: August 29, 2005 02:15 pm (14:15:00)

Fax Number	ED20586
Place of Arrest:	Town of Alden, Erie County , NY
Arrest Type:	Crime In Progress
Date of Crime:	August 29, 2005
Place of Crime:	Town of Alden, Erie County , NY
Criminal Justice Tracking No.:	57647394K
Arresting Agency:	Erie County Sheriff Department
Arresting Officer ID:	ECS253
Arrest Number:	07089519

Arrest Charges:
-- Possession Of Contraband In Prison-2nd Degree
PL 205.20 Sub 02 Class A Misdemeanor Degree 2 NCIC 5802

Court Case Information
-- **Court:** Alden Town Court **Case Number:** 05080085

September 15, 2005
Initial Report Of Docket Number
-- Possession Of Contraband In Prison-2nd Degree

EXHIBIT "B"

TIMOTHY B. HOWARD
SHERIFF

MARK N. WIPPERMAN
UNDERSHERIFF

SHERIFF OF ERIE COUNTY

ADMINISTRATIVE OFFICES
TEN DELAWARE AVENUE
BUFFALO, NEW YORK 14202-3999
(716) 858-7618
FAX: (716) 858-7680

POLICE SERVICES
ONE SHERIFF'S DRIVE
ORCHARD PARK, NEW YORK 14217
(716) 662-5554
FAX: (716) 662-8477
WEBSITE: http://www.erie.gov/sheriff

December 24, 2010

Thomas Dulak 08 B 1394
Clinton Correctional Facility
P.O. Box 2000
Dannemora, New York 12929

Dear Mr. Dulak,

I have received your second correspondence regarding your Jail Time.

As far as jail time is concerned, you are not entitled to the time you are seeking.

The time you spent in the Holding Center or ECCF does not necessarily count toward your state probation sentence such as the time you spent doing another sentence at the county for case 07m3957.

The Article you cite, 65.15, is a probation calculation and would be the jurisdiction of the Probation Department.

Please contact our office if you have any questions or need further assistance.

Sincerely,

Lt. Jacqueline Kretzmon

Lieutenant Jacqueline Kretzmon
Records and Booking

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF : ERIE

IN THE MATTER OF

THOMAS DULAK

Petitioner,

-against-

TIMOTHY B. HOWARD, Sheriff of Erie County

Respondent.

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

AFFIDAVIT IN SUPPORT
OF APPLICATION FOR FEE
REDUCTION / WAIVER
PURSUANT TO N.Y.C.P.L.R.
1101 (f)

INDEX NO. 2013-1079

I Thomas Dulak, being duly sworn, hereby declares as follows:

1. I am the petitioner in the above-entitled proceeding. I am an Inmate in New York State Correctional Facility located at Riverview Correctional Facility, P.O. Box 247, Ogdensburg, New York 13669

2. I submit this affidavit in support of my application for a reduction or waiver of the filing fees pursuant to N.Y.C.P.L.R. 1101 (f) and that an attorney be assigned to represent me.

3. I currently receive not income other that correctional facilty wages.

4. I own no property or anything of value that could be used to help pay the costs and expenses to prosecute this Article 78 Proceeding.

5. I have no savings account, checking account, or assets other thatn facility wages of $ 6.00 bi-weekly that I earn as prison wages.

6. I am unable to pay the filing fee necessary to prosecute this proceeding.

7. No other person who is able to pay the filing fee has a beneficial interest interest in the result of this proceeding.

8. The facts of my case are described in my moving papers.

9. I have made no prior request for this relief in this case.

Sworn to before me this
20 day of March, 2013

Kristina Monnet
Notary Public

Signature

KRISTINA MONNET
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01MO6066482
QUALIFIED IN ST. LAWRENCE COUNTY
COMMISSION EXPIRES 11/13/2013

AUTHORIZATION

I Thomas Dulak, inmate number 08-B-1394, request and authorize the agency holding me in custody to sent the Clerk of Court the Court certified copies of my correctional facility trust fund account statment for the past six months.

I further request and authorize the agency holding me in custody to calculate the amounts specified by CPLR 1101 (f) (2), to deduct those amounts from my inmate trust fund account and disburse those amounts as instructed by the Court. This authorization is furnised in connection with the above case and shall apply to any agency inot whose custody I may be transferred.

I understand that I may have to pay the entire amount if the Court denies my request for a fee reduction. Moreover, I understand that the fee determined by the Court will be paid in installments by automatic deductions from my correctional facility trust fund account even if my case is dismissed.

NYS DEPT OF CORRECTIONS 14:20:09
209-INMATE BALANCE SCREEN

PHONE: (315) 393 8400 EXT:
FAX: (315) 393 8400 EXT: 3299
CURRENT FACILITY: RIVERVIEW C.F.

NYSID: 09708035R
DOB: 07/22/79
FULL NAME: DULAK THOMAS
DIN: 08B1394

SPENDABLE BALANCE: 226.18

ENCUMBRANCES	
TOTAL:	0.00
COLLECTED:	0.00
OUTSTANDING:	0.00

	SPENDABLE FOR LAST SIX MONTHS	TOTAL DEPOSITS FOR LAST SIX MONTHS
OLDEST	78.00	150.66
|	75.79	10.00
|	110.10	40.00
|	33.31	20.00
\/	0.00	20.00
NEWEST	206.18	538.11

NEXT DIN:

ANOTHER LOOKUP - KEY NEXT DIN PRESS <ENTER> RETURN TO MENU PRESS <PF3>