

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0361

Jeremy Fiske

v.

Warden, New Hampshire State Prison

Appeal Pursuant to Rule 7 from Judgment
of the Merrimack County Superior Court

BRIEF FOR THE PETITIONER

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(15 minutes oral argument)

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QUESTION PRESENTED

1. Whether a sentencing court may preclude a future prison resident from receiving earned-time credit.

Issue preserved by Fiske's request for the option of earned-time credit, S* 16, the court's denial of that request, S 27, his petition for writ of habeas corpus, A 3, and the court's denial of that petition, AD 3.

* Citations to the record are as follows:

"AD" refers to the separate appendix containing the appealed decision;

"A" refers to the separate appendix containing documents other than the appealed decision; and

"S" refers to the transcript of sentencing in docket 218-2014-CR-1482, conducted on February 12, 2016.

STATEMENT OF THE CASE AND FACTS

In December 2015, a jury in the Rockingham County Superior Court found Jeremy Fiske guilty of eight counts of aggravated felonious sexual assault (“AFSA”) and one count of possession of child pornography. AD 3; A 8; see also State v. Fiske, 170 N.H. 279 (2017) (affirming convictions). In February 2016, the court (Delker, J.) sentenced Fiske to ten to twenty years, stand committed, on each of three AFSA convictions, to run consecutively. AD 3; A 8; S 26–28. The court provided that five years of the third sentence could be suspended upon completion of any recommended sex-offender treatment. AD 3; A 9; S 28. On the remaining convictions, the court pronounced suspended sentences, one for ten to twenty years and five for seven-and-a-half to fifteen years. AD 3–4; A 9–11; S 29–30.

During the sentencing hearing, Fiske requested that the court grant him the option of earned-time credit, pursuant to RSA 651-A:22-a. S 16. The court denied the request, stating, “I don’t think this particular case, the ordinary earned time credit programming, warrants any reduction in the sentence.” S 27.

In April 2021, Fiske filed a petition for habeas corpus in the Merrimack County Superior Court. A 3. He argued, among other things, that the court exceeded its statutory sentencing authority by denying his request to grant the

option to receive earned-time credit. A 4–7. The State objected, A 8, and Fiske filed a traverse to the State’s objection, A 16.

On July 22, 2021, the court (Delker, J.) denied the petition. AD 3. It ruled that “the decision [of] whether [to] give a defendant the option to obtain earned time credit under RSA 651-A:22-a is a discretionary judgment made at the time of sentencing.” AD 7. Fiske filed a notice of discretionary appeal, which this Court accepted.

SUMMARY OF THE ARGUMENT

RSA 651-A:22-a permits reductions to a prison resident's minimum and maximum sentences for successful completion of educational, vocational or mental health programs. Considered as a whole, RSA 651-A:22-a establishes that sentencing courts must grant future prison residents the option to receive earned-time credits. A sentencing judge has no knowledge of what behavior a prison-bound defendant will exhibit after he or she arrives at the prison, and it would be fundamentally inconsistent with the purpose of the statutory scheme to empower judges to deny future residents the opportunity to receive earned-time credit based solely on the offense for which they were sentenced. Even if this Court holds that a sentencing court is not required to grant future residents the opportunity to receive earned-time credit at the time of sentencing, it should clarify that, just like residents sentenced before the statute's effective date, those sentenced after the effective date may petition the sentencing court for approval of earned-time credit after they have completed a qualifying program and have obtained the commissioner's recommendation.

I. THE SENTENCING COURT LACKED STATUTORY AUTHORITY TO REFUSE TO AUTHORIZE EARNED-TIME CREDIT.

When interpreting a statute, this Court is “the final arbiter[] of the intent of the legislature as expressed in the words of the statute considered as a whole. State v. Gunnip, ___ N.H. ___ (Jan. 28, 2022). It “construe[s] provisions of the Criminal Code according to the fair import of their terms and to promote justice.” Id. It “look[s] first to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning.” In re Guardianship of C.R., ___ N.H. ___ (Feb. 8, 2022). It “give[s] effect to every word of a statute whenever possible and will not consider what the legislature might have said or add language that the legislature did not see fit to include.” Id. It “construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result.” Id. It “do[es] not consider words and phrases in isolation, but rather within the context of the statute as a whole, which enables [it] to better discern the legislature’s intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme.” Petition of State, ___ N.H. ___ (Feb. 4, 2022). Issues of statutory construction are reviewed de novo. Id.

The legislature enacted RSA 651-A:22-a, entitled “earned time credits,” in 2014. Laws 2014, 166:1. As

originally enacted, the statute permitted reductions to a resident's minimum and maximum sentences for successful completion of educational, vocational or mental health programs, as well as the Family Connections Center, and set a limit of thirteen months for total earned-time credits. Id. The statute provided that the credits could "only be earned and available to prisoners while in the least restrictive security classifications of general population and minimum security," and could "be forfeited for involvement or membership in a security threat group, attempted escape, escape, or commission of any category A offense listed in the department of corrections policy and procedure directives." Id.

In 2016, the legislature amended the statute to broaden the range of qualifying educational programs and raised the total limit to twenty-one months. Laws 2016, 172:1. In 2020, the legislature again broadened the range of qualifying programs and clarified that residents could receive credit for each program completed. Laws 2020, 37:1.

The original statute became effective on September 9, 2014. For those who, like Fiske, were sentenced on or after that date, it provided that earned-time credits were available to residents "who have been granted this option by the presiding justice at the time of sentencing." Laws 2014, 166:1. However, the statute also allowed for earned-time

credits for residents sentenced prior to its effective date, providing that the credits “shall be available to [such] prisoners . . . upon recommendation of the commissioner and upon approval of the sentencing court in response to a petition which is timely brought by the prisoner.” Id.

Fiske acknowledges that, read in isolation, limiting the availability of earned-time to residents “who have been granted this option by the presiding justice at the time of sentencing” may be interpreted to suggest that sentencing courts have the power to pick and choose, in advance, which residents can receive earned-time in the future, and which cannot. Courts, however, “do not consider words and phrases in isolation.” Petition of State, ___ N.H. at ___.

When the statute is considered “as a whole,” “to promote justice” “in light of the policy or purpose sought to be advanced by the statutory scheme” and to “avoid an absurd or unjust result,” it becomes clear that this interpretation is untenable. Considered as a whole, RSA 651-A:22-a establishes that sentencing courts must grant future prison residents the option to receive earned-time credits.

By enacting RSA 651-A:22-a, the legislature recognized that an individual cannot be defined by his or her worst act, and that even those who commit the most harmful acts have the capacity for rehabilitation. In enacting the earned-time-credit statute, the legislature could have chosen to exclude

those residents convicted of serious crimes, such as murder or AFSA, but it did not. Other than those serving a sentence of life without parole, the legislature did not exclude any resident from the opportunity to receive earned-time credit based solely on their underlying crime.

The legislature did choose to exclude some residents from the opportunity to receive earned-time credit, namely, those not “in the least restrictive security classifications of general population [or] minimum security,” as well as those “involve[d] . . . in a security threat group, attempted escape, escape, or commission of any category A offense listed in the department of corrections policy and procedure directives.” RSA 651-A:22-a, III. Notably, all these exclusions are the result of the resident’s conduct while in prison; none are the result of the crime for which the resident was originally sentenced to prison.

A sentencing judge has no knowledge of how a prison-bound defendant will behave after he or she arrives at the prison. Rather, the sentencing judge can only rely on the crime for which the defendant was sentenced. It would be fundamentally inconsistent with the purpose of the statutory scheme to empower judges to deny future residents the opportunity to receive earned-time credit based solely on the offense for which they were sentenced. *Cf. State v. Baker*, 164 N.H. 296, 300 (2012) (“it would be inconsistent with

legislative intent for a trial court to deny a petition to annul the record of an offense, which the legislature has determined is eligible for annulment, solely because the defendant was convicted of that offense.”). For this reason, this Court should hold that RSA 651-A:22-a requires sentencing courts to grant future residents the opportunity to receive earned-time credit.

Even if this Court holds that a sentencing court is not required to grant future residents the opportunity to receive earned-time credit at the time of sentencing, it should clarify that residents initially denied the option to receive earned-time credit may petition the court to grant that option upon the recommendation of the commissioner.

In enacting RSA 651-A:22-a, the legislature chose to make its provisions applicable to those sentenced before the effective date of the statute. RSA 651-A:22-a, II. Those residents may complete a qualifying program and obtain a commissioner’s recommendation for earned-time credit. Id. Then, with those accomplishments in hand, they may petition the sentencing court for approval of earned-time credit. Id. Thus, they can demonstrate their rehabilitation to the court before the court decides whether to approve earned-time credit. Because most of these petitions are filed years or even decades after the crime and sentencing, the court’s focus when deciding such a petition is the resident’s

accomplishments while incarcerated, not solely the crime for which they were sentenced.

It would be the very definition of arbitrariness to hold that residents sentenced after the statute's effective date are forever barred from doing what those sentenced before the effective date can do — petition the sentencing court to authorize earned-time after the resident has completed a qualifying program and can demonstrate rehabilitation. Rather, this Court should hold that, just like residents sentenced before the statute's effective date, those sentenced after the effective date may petition the sentencing court for approval of earned-time credit after they have completed a qualifying program and have obtained the commissioner's recommendation.

CONCLUSION

WHEREFORE, Jeremy Fiske respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

The appealed decision is in writing and is included in a separate appendix containing no other documents.

This brief complies with the applicable word limitation and contains 1,810 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the New Hampshire Attorney General's office through the electronic filing system's electronic service.

/s/ Thomas Barnard
Thomas Barnard

DATED: March 1, 2022