THE STATE OF NEW HAMPSHIRE

SUPREME COURT

MAY SESSION

2020 TERM

No. 2021-0605

State of New Hampshire

v.

Michael Jordan

BRIEF FOR THE DEFENDANT

Rule 7 Appeal

From a Decision of the Strafford County Superior Court

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(15 Minute Oral Argument)

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TEXT OF RELEVANT AUTHORITIES

RSA 651-A:22-a. Earned Time Credits.

I. The commissioner, after reviewing a prisoner's record, shall award to a prisoner or recommend that the prisoner receive a one-time reduction in his or her minimum and maximum sentences for successful completion of each of the following programs while incarcerated, and shall establish procedures for each program, which shall be exempt from RSA 541-A, for awarding such reductions:

(a) Education Programs:

(1) High School Equivalency Certificate 90 day reduction in the prisoner's minimum sentence and 90 day reduction in the prisoner's maximum sentence.

(2) High School Diploma 120 day reduction in the prisoner's minimum sentence and 120 day reduction in the prisoner's maximum sentence.

(3) Associate's Degree 180 day reduction in the prisoner's minimum sentence and 180 day reduction in the prisoner's maximum sentence.

(4) Bachelor's Degree 180 day reduction in the prisoner's minimum sentence and 180 day reduction in the prisoner's maximum sentence.

(5) Master's Degree 180 day reduction in the prisoner's minimum sentence and 180 day reduction in the prisoner's maximum sentence.

(6) Doctorate Degree 180 day reduction in the prisoner's minimum sentence and 180 day reduction in the prisoner's maximum sentence.

(b) Vocational Programming. A prisoner who successfully completes a vocational program that is authorized and approved by the department or who successfully completes a vocational program that the commissioner deems to be valuable to the prisoner's rehabilitation, shall be entitled to a one-time reduction of 60 days in his or her minimum sentence and a one-time reduction of 60 days in his or her maximum sentence for each program under subparagraph (a) completed.

(c) Mental Health Programming. A prisoner who meaningfully participates in recommended or mandated mental health and/or substance use treatment that is authorized and approved by the department or that the commissioner deems to be valuable to the prisoner's rehabilitation, shall be entitled to a one-time reduction of 60 days in his or her minimum sentence and a one-time reduction of 60 days in his or her maximum sentence.

(d) Participation in Family Connections Center Programming. A prisoner who is a parent and who meaningfully participates in the programming offered by the Family Connections Center that the commissioner deems to be valuable to the prisoner's rehabilitation, shall be entitled to a one-time reduction of 60 days in his or her minimum sentence and a one-time reduction of 60 days in his or her maximum sentence.

(e) Correctional Industries On-the-Job Training. A prisoner who is awarded a certificate or certificate of apprenticeship in a correctional industries job that is authorized and approved by the department that the commissioner deems to be valuable to the prisoner's rehabilitation shall be entitled to a one-time reduction of 60 days in his or her minimum sentence and a one-time reduction of 60 days in his or her maximum sentence for each master's certificate earned.

(f) Other Programs. A prisoner who meaningfully participates in any program that is authorized and approved by the department that the commissioner deems to be valuable to the prisoner's rehabilitation which are not covered under subparagraphs (a) through (e) shall be entitled to a one-time reduction of 60 days in his or her minimum sentence and a one-time reduction of 60 days in his or her maximum sentence for each program completed.

II. The earned time reductions authorized in paragraph I of this section shall be available to prisoners who were incarcerated on or after the effective date of this section and who have been granted this option by the presiding justice at the time of sentencing. The earned time reductions authorized in paragraph I of this section shall be available to prisoners who were incarcerated prior to the effective date of this section upon recommendation of the commissioner and upon approval of the sentencing court in response to a petition which is timely brought by the prisoner.

III. The earned time reductions authorized in paragraph I of this section shall only be earned and available to prisoners while in the least restrictive security classifications of general population and minimum security. The earned time may 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.

IV. The earned time reductions granted under this section shall not exceed 21 months off the prisoner's minimum sentence and 21 months off the prisoner's maximum sentence.

HISTORY**:**

2014, 166:1, eff. Sept. 9, 2014. 2016, 172:1, eff. Aug. 2, 2016. 2020, 37:1, eff. Sept. 27, 2020.

QUESTION PRESENTED

1. Whether the superior court erred when it denied the Defendant's motions for earned time credit?

Issue preserved by Defendant's Motions for Earned Time Credit, Appendix at 5-44; Court's Orders, DB 29-36; and Defendant's Motion to Reconsider, Appendix at 100-111. [1]

[1] Citations to the record are as follows:

"H" refers to the transcript of the "Hearing on Motions" held in the Strafford County Superior Court on October 27, 2021.

"DB" refers to the Defendant's Brief, including the Addendum.

"Appendix" refers to the Appendix to the Defendant's Brief.

STATEMENT OF THE CASE

Between September 14, 2021 and December 3, 2021, the Defendant, Michael Jordan, filed *pro se* five "Motion[s] to Award Earned Time Credit" in the Strafford County Superior Court, the court where Jordan had been sentenced in 2014. Appendix at 5-44.[2] Each motion pertained to the successful completion of a different program authorized by RSA 651-A:22-a and sought 60 days of earned time reduction. *See id.* The State filed objections to each of the Defendant's motions. *See* Appendix at 69, 90, 92.

On September 28, 2021, the superior court (Will, J.) issued a written order granting Jordan's first motion for earned time credit, referencing and attaching the court's order in another case, *State v. Lawrence Cook* (219-1999-CR-00839). DB 29-32.

The State filed a motion to reconsider, arguing that the court had not considered victim input in reaching its decision. Appendix at 85.

The court granted the State's motion to reconsider and scheduled an evidentiary hearing. DB 33.

On October 27, 2021, the court held a hearing and heard statements from the victims and their parents. H 1-29.

Following the hearing, on November 9, 2021, the court issued a written order denying the Defendant's motion for earned time credit. DB 34-36. The Defendant moved to reconsider, which the court denied. Appendix at 100. The court subsequently denied the Defendant's other motions for earned time credit "for the reasons stated in the Court's 11/09/21 order." *See* Appendix at 30.

This appeal follows.

[2] The Defendant filed motions for earned time credit with respect to the following earned time credit programs: Correction Rehabilitative Institute Peace Program (PEP); Legal Assistant / Paralegal Certification; Behavioral Health; Hospitality and Tourism; and Introduction to Workforce. Appendix 5-44.

STATEMENT OF FACTS

On April 25, 2014, the defendant, Michael Jordan, entered guilty pleas to eight indictments charging him with Aggravated Felonious Sexual Assault ("AFSA") contrary to RSA 632-A:2. *See* 219-2013-CR-00243 & 244. Five of the charges related to assaults against C.T.; three of the charges related to assaults against A.T. Appendix at 45-68. C.T. and A.T. are sisters and were both minors at the time the assaults occurred. *See* H 7-16.

Pursuant to a negotiated resolution, the superior court (Fauver, J.) sentenced Jordan to serve two consecutive 5-20 year sentences, and a consecutive 10-20 year sentence for an aggregate stand committed sentence of 20-60 years at the New Hampshire State Prison. Appendix at 45-68. Jordan also received a suspended prison term of 10-20 years, suspended for 25 years from the release of his last stand committed sentence. *See id.*

Also in 2014, the New Hampshire Legislature enacted RSA 651-A:22-a, which grants earned time credits to inmates after completion of certain programs offered during incarceration. *See* Laws 2013, 166:1. The statute went into effect on September 9, 2014, approximately 4½ months after Jordan's sentencing. *See id.*; DB 6 (History).

After arriving at the New Hampshire State Prison in 2014, Jordan successfully completed various programming offered by the prison, each culminating in an application for an earned time credit reduction. *See* fn. 2, *infra*; Appendix at 5-44. As these requests were approved by the DOC commissioner, Jordan filed motions for earned time credit with Strafford County Superior Court, where he had been sentenced in 2014. *Id.*

Jordan filed the first of these motions or about September 14, 2021. Appendix at 5-9. Attached to Jordan's motion was a New Hampshire Department of Corrections ("DOC") Earned Time Credit Application, which specified the program he completed and the DOC Commissioner's

recommendation that 60 days be reduced from Jordan's minimum and maximum sentence. *Id.* The Application also notes Jordan's security classification and that he "has been disciplinary free since 2015 and has no gang affiliations." *Id.*

On September 15, 2021, the State filed an objection to Jordan's motion for earned time credit. Appendix at 69-70. The State acknowledged that Jordan completed a qualifying program and was eligible for the 60 day reduction. *Id.* However, the State argued that while Jordan was "entitled to make the request, it is against the wishes of the aggrieved victims and their family." *Id.*

On September 20, 2021, Jordan filed a reply to the State's objection. Appendix at 71-76. Jordan argued, among other things, that under RSA 651-A:22-a, the court's role in approving earned time credit awarded by the DOC Commissioner to inmates sentenced before its enactment is ministerial. *Id.* Additionally, Jordan offered additional facts in support of his request: that he works seven hours a day in a high security area of the prison, that he volunteers in the Secure Psychiatric Unit, that he has taken additional mental health treatment and educational courses, and that he has accepted responsibility for his crimes. Appendix at 74-75.

On September 23, 2021, the State replied to Jordan's pleading. Appendix at 77-79. The State disagreed with Jordan's reading of the statute and other arguments, and requested a hearing at which the victims could be heard. *Id*.

The Defendant filed an additional pleading on September 27, 2021. Appendix at 80-84. Among other things, Jordan argued that denying him earned time credit violated Equal Protection, because the language of the

statute made this award available to prisoners incarcerated prior to the statute's effective date. *Id.* [3]

On September 28, 2021, the superior court (Will, J.) initially granted Jordan's motion for earned time credit. DB 29. In doing so, the court attached an order issued the prior day in *State v. Lawrence Cook* (219-1999-CR-00839). DB 30-32. After trial, Cook had been convicted of AFSA[4] and received the maximum penalty. Cook had requested the court approve the DOC's award of earned time credit, and the State had objected "because of the serious nature of the defendant's crime and its lasting impact upon the victim and her family." *Id.* In granting Cook's motion, the court concluded that the mandatory language of RSA 651-A:22-a "plainly favors earned time credit awards." *Id.* Moreover, the court noted that awarding earned time credit "does not guarantee that corrections will release the defendant at the end of his minimum sentence," but that determination lies wit the Adult Parole Board after notice to the victim and law enforcement. *Id.*

On October 6, 2021, the State filed a Motion to Reconsider arguing that the court's order granting Jordan's motion "without any direct victim input," and that the victims had a right to participation and input under RSA 21-M:8-K, II(p). Appendix at 85-86.[5] Jordan filed a reply arguing that awards of earned time credits under RSA 651-A:22-a is a ministerial

[3] Jordan also responded to the State's claim in its Reply that he had antagonized the victims by challenging the no contact order in his original sentencing orders. Jordan explained that he would agree to a no contact order with the victims, but that he had only challenged this condition because it resulted in the DOC removing a visitor from his approved visitor list.

[4] *See* DB 30 and 219-1999-CR-00839.

[5] On October 13, 2021, the State also filed an objection to a second motion for earned time credit (re: legal assistant / paralegal certification) Jordan had filed on or about October 7, 2021. Appendix at 90. The State again requested victim input and noted that "there is now an inconsistency with the manner in which the Superior Court is weighing victim input in earned time credit scenarios that leads to incongruent results." *Id.*

function and did not "require" consideration of victim input. Appendix at 87.

On October 19, 2021, the court granted the State's motion to reconsider and scheduled a hearing. DB 33.

A hearing was held on October 27, 2021, at Strafford County Superior Court (Will, J.). During that hearing, the Court heard testimony from C.T., A.T., and both their parents. H 1-29.

The State argued that "there should not be any further reductions of things that didn't exist at the time, of reductions that the family never could have been consulted about." H 25. The State recognized that Mr. Jordan was "statutorily qualified" for the earned time credits for which he was petitioning, but nevertheless urged the court to deny Jordan's application, seemingly articulating its position to object in all sexual assault cases:

> I don't want Mr. Jordan to think he's being singled out, it is typical for crimes that have this kind of impact on a family, specifically sexual assault crimes.

H 23.

On November 9, 2021, the court issued a written order denying Jordan's motion for earned time credit. In reaching this decision, the court wrote:

> While the defendant has indisputably completed what the earned time credit statute would require were he eligible, the record reflects that the victims acceded, and the sentencing judge agreed, to the plea agreement in significant part on their collective understanding and intent that the defendant would serve his full minimum sentence. Not only do the sentencing orders attempt to foreclose any release prior to the minimum, they strongly suggest that, had the defendant been sentenced after enactment of the earned time credit statute, the sentencing judge would not have made credit available to the defendant.

DB 34-36.

Jordan filed a motion to reconsider, which was denied. Appendix at 100.

The court referenced its November 8, 2021 order in denying Jordan's other motions for earned time credit. *See* Appendix at 30.

SUMMARY OF ARGUMENT

Michael Jordan was sentenced to the New Hampshire State Prison in 2014, approximately 4 ½ months before the Earned Time Credits statute (RSA 651-A:22-a) went into effect. Under that statute, inmates sentenced prior to its enactment are eligible for earned time credits if they complete certain rehabilitative programs and if their conduct while incarcerated is meritorious. Jordan completed five such programs and had no disciplinary issues. He applied for earned time credit (60 days each) and the commissioner recommended the respective earned time reductions.

The lower court erred when it denied Jordan's motion and failed to approve the commissioner's recommendation. The court's decision was contrary to the legislature's intent as reflected in the statutory scheme, which looks solely to efforts at rehabilitation and behavior while in prison, and does not consider the nature of the underlying offense. The court also erred when it speculated that the sentencing judge would not have made Jordan eligible for earned time credit; the statute makes all pre-enactment prisoner eligible for earned time credit. And finally, the court violated Jordan's rights to Equal Protection under our constitutions when it denied Jordan's motion but granted a request from another similarly situated prisoner, when there were no statutory factors that distinguish these two prisoners' earned time credit requests.

For these reasons, the lower court's decision should be reversed.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR EARNED TIME CREDIT AND FAILED TO APPROVE THE COMMISSIONER'S RECOMMENDATION FOR AN EARNED TIME REDUCTION WHEN THE DEFENDANT COMPLETED THE STATUTORILY SPECIFIED PROGRAM AND HAD NO DISCIPLINARY OR SECURITY ISSUES.

In 2014, the legislature enacted RSA 651-A:22-a, which provides for "Earned Time Credits." *See* Laws 2013, 166:1. The statute authorizes a one-time reduction to a prison inmate's minimum and maximum sentences for successful completion of certain statutorily specified programs. RSA 651-A:22-a, I. Earned time credits can "only be earned and available to prisoners while in the least restrictive security classifications of general population and minimum security," and can "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." RSA 651-A:22-a, III. Additionally, the total amount of earned time credit reductions may not exceed 21 months. RSA 651-A:22-a, IV.[6]

The earned time credit statute became effective September 9, 2014. Laws 2014, 166:1, and it applies to state prison inmates sentenced both before and after that date. RSA 651-A:22-a, II. Prison inmates sentenced on or after the effective date must be "granted this option by the presiding justice at the time of sentencing." *Id.* With respect to prisoners sentenced before the effective date, the statute provides that "earned time reductions

[6] Under the statute as enacted in 2014, earned time credit reductions were not to exceed 13 months. Laws 2013, 166:1. The legislature amended the statute in 2016 and 2020, increasing the maximum reduction to 21 months and expanding the number of eligible programs and. *See* Laws 2016, 172:1; Laws 2020, 37:1.

… shall be available to prisoners who were incarcerated prior to the effective date of this section 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*.

Michael Jordan was sentenced on April 25, 2014, approximately 4 ½ months prior to the earned time credits statute's effective date. *See* Appendix at 45-68. Consistent with DOC procedures, once Jordan completed a specified program, he applied for an earned time credit reduction, and then petitioned the sentencing court to approve the commissioner's award of a 60 day reduction. Appendix at 5-44. Jordan timely filed five such motions between September and December, 2021. *Id.*

The superior court initially granted Jordan's first motion for earned time credit, noting that the construction of the statute "plainly favors earned time credit awards." DB 31. However, the court subsequently reconsidered its ruling and denied the motion after a hearing at which Jordan's victim's and their parents testified. DB 34-36.

For the following reasons, the superior court's decision was erroneous and should be reversed.

A. The lower court's decision to deny Jordan earned time reductions was contrary to the statutory scheme which looks solely to efforts at rehabilitation and behavior while in prison.

Because the legislature focused on post-conviction conduct rather than the offense conduct, the court erred when it failed to approve the commissioner's award of an earned time reduction.

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. Allain*, 171 N.H. 286, 287 (2018). The Court construes provisions of the Criminal

Code according to the fair import of their terms and to promote justice. *Id.*; *see also,* RSA 625:3. When interpreting a statute, the Court first look to the language of the statute itself, and, if possible, construe the language according to its plain and ordinary meaning. *Id.* at 288. It does not read words or phrases in isolation, but in the context of the entire statutory scheme. *Id.* When the language of a statute is plain and unambiguous, the Court does not look beyond it for further indications of legislative intent. *Id.* In matters of statutory interpretation, this Court has explained that it will construe provisions of the Criminal Code according to the fair import of their terms and to promote justice. *Id.*

RSA 651-A:22-a provides that "earned time reductions …shall be available to prisoners who were incarcerated prior to the effective date of this section 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.* The statute does not define "approval" or specify what factors the sentencing court should consider in deciding whether to approve the commissioner's recommendation.

However, the legislature did specify which types of programs would be eligible for earned time credit and used mandatory language throughout the statute regarding when earned time credit should be awarded: The commissioner, "after reviewing a prisoner's record, shall award a prisoner or recommend that the prisoner receive a one-time reduction [for completing the specified programs.]" RSA 651-A:22-a, I (emphasis added). A prisoner who completes a program "that the commissioner deems to be valuable to the prisoner's rehabilitation, shall be entitled to a one-time reduction of 60 days [in the prisoner's sentence]." *See* RSA 651-A:22-a, I(b)-(f) (using the same language in each section) (emphasis added).

Additionally, the legislature excluded certain prisoners from the opportunity to receive earned time credit, specifically prisoners not "in the least restrictive security classifications of general population [or] minimum security," as well as prisoners "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. All of these exclusions foreclose the opportunity to receive an earned time reduction as a result of conduct while in prison. None of the statutory bars look to the crime or conduct for which the prisoner was convicted or sentenced to prison, nor do they eliminate the opportunity for earned time credit reductions depending upon the degree of harm suffered by the victim.

Under the principle of *ejusdem generis* this Court should construe "approval" as requiring the sentencing court to accept the commissioner's recommendation for earned time credits, unless that court finds that the defendant's security status, disciplinary record, or other conduct *since* being incarcerated is contrary to the rehabilitative purpose of the statute. This Court has applied the principle of *ejusdem generis* in two ways: It has said that it provides that "where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same kind or class as those specifically mentioned." *State v. Proctor*, 171 N.H. 800, 806 (2019) (citations and quotations omitted). This Court has also stated that the doctrine "provides that, when specific words in a statute follow general ones, the general words are construed to embrace only objects similar in nature to those enumerated by the specific words." *Id.* Under either articulation, the general words are construed to apply only to persons or things that are similar to the specific words. *Id.*

As it applies to inmates sentenced before its effective date, RSA 651-A:22-a mandates the award of earned time credits for all prisoners completing certain programs while incarcerated. *Id.* The statute only denies eligibility and forfeits such credits to prisoners that are not in the least restrictive custody or who pose other security issues. RSA 651-A:22-a, III. But there is no evidence of a legislative intent to exclude prisoners because of the nature of the underlying offense or the criminal conduct prior to sentencing. Indeed, the legislature has taken the underlying offense and victim impact into consideration elsewhere, vesting the Adult Parole Board with the authority to consider those factors among others. *See generally*, RSA Chapter 651-A (Parole of Prisoners).

In this case, there is no dispute that Jordan had no disciplinary history for at least the past six years and was not a security threat. To the contrary, his conduct since being at the prison seems exemplary: he works seven hours a day in a high security area of the prison, he volunteers in the Secure Psychiatric Unit, and he has taken additional mental health treatment and educational courses. Appendix at 74-75. Accordingly, because the lower court looked to other factors not consistent with the statutory scheme, it erred when it denied Jordan's motion for earned time credit and did not approve the commissioner's recommendation for an earned time reduction.

B. The lower court's determination that the original sentencing judge would not have made Jordan eligible for earned time credit was speculative and contrary to the clear language of the statute.

The superior court determined that, had the earned time credits statute been in effect at the time Jordan was sentenced, the sentencing judge would not have allowed for any earned time credit:

> While the defendant has indisputably completed what the earned time credit statute would require were he eligible, the record reflects that the victims acceded, and the sentencing judge agree, to the plea agreement in significant part on their collective understanding and intent that the defendant would serve his full minimum sentence. Not only do the sentencing orders attempt to foreclose any release prior to the minimum, they strongly suggest that, had the defendant been sentenced after enactment of the earned time credit statute, the sentencing judge would not have made credit available to the defendant.

DB 35.

This conclusion can only be speculative as the earned time credit statute did not exist at the time of sentencing and the sentencing judge did not have an opportunity to consider it.

When determine the intent of the sentencing judge, this Court looks to the language of the sentencing order. *See State v. Van Winkle*, 160 N.H. 337, 341 (2010) (addressing language necessary for sentencing courts to retain jurisdiction). Judges are vested with broad discretionary powers with regard to sentencing, and a judge may generally sentence a defendant to any term authorized by statute. *See State v. Rau*, 129 N.H. 126, 129 (1987).

However, a judge may not rely on information that is product of speculation. *Cf. State v. Tufts*, 136 N.H. 517, 520 (1992) ("the sentencing judge may rely on information supplied in the presentence report, other than allegations of other crimes resolved by acquittals and prior convictions found constitutionally infirm, so long as the information is unchallenged or substantiated and not the product of speculation). And where the trial court has omitted a term, that provision cannot later be added. *State v. Fletcher*, 158 N.H. 207, 211 (2009).

In Jordan's case, the judge who ruled on Jordan's motion for earned time credits effectively read into Jordan's sentencing order terms that are not there and that the sentencing judge did not address. In doing so, he

constructively amended the sentence to remove earned time credit eligibility.

Additionally, in denying Jordan's motion, the lower court found that "[t]he victims and their parents articulated their common understanding, at the time of the plea agreement, that the defendant would serve his full minimum sentence [and] [t] sentencing judge shared this understanding." DB 35.

This logic is flawed. Awarding Jordan an earned time reduction does not guarantee he will serve anything less than his full minimum sentence; it only makes the hope of an earlier parole possible. As this Court has long recognized, there is no right to parole in New Hampshire. *See Baker v. Cunningham,* 128 N.H. 374, 380–81 (1986) ("Although any State legislature is free to provide that parole is a matter of right rather than a subject of discretion, the General Court of this State has not done so" and, "[i]n the absence of some provision grounded in State law mandating a prisoner's release upon proof of certain ascertainable facts, there is no right to parole.") Whether a state prison inmate is in fact granted parole is within the discretion of the Adult Parole Board, which has "broad discretion to deny parole" and is not limited by RSA chapter 651–A. *Knowles v. Warden,* 140 N.H. 387, 390 (1995). As the United States Supreme Court has recognized, "[t]hat the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained." *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 11 (1979) (emphasis in original).

Finally, the clear language of RSA 651-A:22-a states that "this section shall be available to prisoners who were incarcerated prior to the effective date of this section upon recommendation of the commissioner and upon approval of the sentencing court…." *Id.* (emphasis added). By doing so, the legislature essentially "checked" the earned time credit box

for all prisoners sentenced prior to the statute's effective date. Indeed, in Jordan's case, even if he were to obtain the full amount of earned time credit allowed – 21 months – the net effect would be a reduction of less than 1/10 on his minimum sentence. It is reasonable to conclude that the legislature assessed the maximum benefit available to those prisoners incarcerated before the effective date and determined to incentivize rehabilitation programs for all of them, regardless of offense, and without imposing a burden of demonstrating that the original sentencing judge would have granted the option.

Accordingly, the lower court's inference about what the sentencing judge would have done was based upon speculation, and contrary to the clear language of the statute, and thus an unsustainable exercise of discretion.

C. Granting the lower court broad discretion to consider factors outside the statutory scheme to determine which prisoners should be eligible for earned time credit and which should not, results in similar prisoners being treated differently and violates Equal Protection.

When the lower court initially granted Jordan's motion for earned time credit, it relied upon its written decision in *State v. Lawrence Cook*, 219-1999-CR-00839, which it attached to its order. Cook had been convicted of AFSA after a trial and received the maximum sentence. *See* DB 30-32.[7] As in Jordan's case, the State objected "to any earned time credit because of the serious nature of the defendant's crime and its lasting impact upon the victim and her family." *Id.* The State also argued, as it did in Jordan's case, that because the sentencing judge imposed the maximum

[7] Although the Cook order does not indicate the offense Cook was convicted of, the case summary for 219-1999-CR-00839 lists a single charge and conviction for Aggravated Felonious Sexual Assault.

sentence, "had the defendant been sentenced after the effective date of the statute, the sentencing court would not have included an option for earned time credit." *Id*. In Cook's case however, the lower court granted Cook's motion for earned time credit, noting that "the State's argument may be better suited for the Adult Parole Board at a future hearing than before this Court in the context of earned time credit." DB 32.

This same reasoning applies in Jordan's case.

"The first inquiry concerning equal protection is whether persons similarly situated are being treated differently under the statutory law...." *State v. Callaghan*, 125 N.H. 449 (1984). Equal protection principles are at issue when there exists "no rational basis that would justify such disparate treatment of defendants who, for all relevant purposes, are identically situated." *See State v. Chrisicos*, 159 N.H. 405, 411 (2009) (Broderick, C. J., dissenting); U.S. Const. amend. XIV; N.H. Const. pt. 1, art. 2 & 12.

As Cook's and Jordan's cases illustrate, looking past the statutory criteria to determine which pre-enactment prisoner is eligible for earned time credit and which prisoner is not, only presents an opportunity to reach inconsistent and disparate results. To arrive at consistent results, the court should limit itself to those factors identified in the statutory scheme: did the prisoner complete one of the recognized rehabilitative programs, and has the prisoner's conduct while incarcerated been meritorious.

Indeed, the State's universal opposition to earned time credit that in AFSA cases, *see* H 23-24, translates to a legal position all such prisoners should be denied the opportunity for earned time reductions, regardless of whether the defendant accepted responsibility, regardless of disciplinary history, and regardless of what programs the defendant completed. That view is clearly at odds with the legislature's, which does not examine the conduct that led to incarceration, does not distinguish between types of

offenders, and instead articulates a clear intent that all prisoners be incentivized to engage in rehabilitative programming while incarcerated.

While the State's default position of objecting in all similar cases may be a reasonable posture for those who represent the sexual assault victims, the sentencing court should uphold a different kind of uniformity, one which treats the same, similar offenders who have met the statutory criteria and received the commissioner's recommendation for an earned time reduction.

Accordingly, the lower court's denial of Jordan's motion for earned time credits should be reversed, and the commissioner's recommendation approved.

CONCLUSION

For the reasons set forth above, the Defendant, Michael Jordan, respectfully prays this Court reverse the decision of the Strafford County Superior Court, and remand this case with a mandate that Jordan's motions for earned time credit be granted and the commissioner's recommendations approved.

Fifteen (15) minutes of oral argument is requested.

A copy of each of each of the lower court's written decisions is attached as an addendum to this brief.

This brief contains approximately 4748 words and complies with the word limitation set forth in N.H. Sup. Ct. R. 16.

DATED: May 31, 2022.

Respectfully submitted
On behalf of the Defendant,
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By

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CERTIFICATE OF SERVICE

I, Richard E. Samdperil, hereby certify that a copy of the foregoing brief has been filed through the New Hampshire Supreme Court E-Filing system this *31st* day of May, 2022, with electronic service to Elizabeth C. Woodcock, Esquire, Office of the Attorney General.

/s/ *Richard E. Samdperil*

ADDENDUM TO BRIEF

Contents:

1. Order on Defendant's Motion for Earned Time Credits (dated September 28, 2021) (and attached referenced order in *State v. Cook*).

2. Order on State's Motion to Reconsider (dated October 18, 2021).

3. Order on Motion for Earned Time Credit after Reconsideration (dated November 9, 2021).

STATE OF NEW HAMPSHIRE

STRAFFORD, SS. SUPERIOR COURT

The State of New Hampshire

v.

Michael Jordan

Docket No. 219-2013-CR-243
219-2013-CR-244

Order On Defendant's Motion For Earned Time Credits

The defendant moves for an award of earned time credits. The State objects. For the following reasons, the defendant's motion is granted.

The motion is granted based on the reasoning in *State v. Cook*, Docket No. 219-1999-CR-839, Order dated September 27, 2021, copy attached. While the Court appreciates the State's position and the State's articulation of the victims' position, those arguments pertain to whether the defendant should be paroled, and the State and the victims will have an opportunity to provide input on that issue. The Court grants this motion based simply upon its construction RSA 651-A:22-a and applying that statute consistent with the legislature's intent. The Court is unpersuaded and the decision on this motion is not influenced by the defendant's criticisms or complaints about the State.

So Ordered.

September 28, 2021
Date

Judge Daniel E. Will

Clerk's Notice of Decision
Document Sent to Parties
on 09/30/2021

STATE OF NEW HAMPSHIRE

STRAFFORD, SS. SUPERIOR COURT

The State of New Hampshire

v.

Lawrence Cook

Docket No. 219-1999-CR-839

Order On Defendant's Motion For Earned Time Credits

The defendant moves for an award of earned time credits. The State objects. For the following reasons, the defendant's motion is granted.

RSA 651-A:22-a became effective on September 9, 2014. The statute directs that the commissioner, after reviewing a prisoner's record, "shall award" a one-time reduction in that prisoner's minimum and maximum sentences for successful completion of any of several educational, vocational, mental health, or other programs while incarcerated. Section II provides that the earned time credit "shall" be available to prisoners who were incarcerated on or after the effective date of the statute and whose sentence includes the option for earned time credits. RSA 651-A:22-a, II. For those incarcerated prior to the effective date, earned time credit "shall" be available upon recommendation of the commissioner of corrections and upon approval of the sentencing court in response to a timely filed petition. While the statute does not define "timely filed," the State does not object to the defendant's request on that basis.

The statute sets forth no particular standard to guide the sentencing court's evaluation of a motion for earned time credit, apparently leaving that determination to the court's broad discretion. The statute's plain language, however, evinces a legislative intent to incentivize prisoners to utilize their incarcerated time productively, as part of the rehabilitative goal of sentencing. *State v. Comeau*, 142 N.H. 84, 86 (1997) ("When a statute's language is plain and unambiguous, we need not look beyond the statute for further indications of legislative intent.").

Throughout, the statute employs the term "shall," mandating specific earned time credit for various programming, and even mandating a qualifying prisoner's entitlement to earned time credit. *E.g.*, RSA 651-A:22-a, I (providing that the commissioner "shall" award earned time credits for successful completion of programming); I(b) (mandating that a prisoner who completes a qualifying vocational program "shall" be entitled to an earned time credit); I(c) (mandating that a prisoner who completes a qualifying mental health and/or substance use treatment "shall" be entitled to earned time credit), among others. The statute grants the sentencing court discretion in two different ways: with respect to sentences after the effective date of the statute, the sentencing court may exercise discretion not to provide the earned time credit option as part of a sentence; and, with respect to sentences prior to the effective date, the sentencing court must approve any earned time credit request. The thrust of the statute, though, plainly favors earned time credit awards. That legislative intent animates this Court's exercise of discretion.

The defendant submits documentation from the commissioner of corrections confirming that he has completed qualifying programming worth 180 days of earned time credit, against his minimum release date of August 21, 2022. The commissioner's information further confirms that the defendant has had no disciplinary infractions since 2016, and has no gang affiliations. The commissioner's information offers nothing to support an exercise of discretion to deny the defendant's motion.

The State acknowledges the defendant's completion of qualifying programming and the amount of earned time credit it would merit. The State, however, objects to any earned time credit because of the serious nature of the defendant's crime and its lasting impact upon the victim and her family. The State observes that the sentencing court imposed the maximum sentence available, underscoring not only the seriousness of the crime, but also implying that, had the defendant been sentenced after the effective date of the statute, the sentencing court would not have included an option for earned time credit.

The defendant's request, if granted, does not guarantee that corrections will release the defendant at the end of his minimum sentence. That determination lies within the province of the Adult Parole Board, who must post advance notice of parole hearings to the public and provide specific advance notice to law enforcement, prosecutors, and victims, all who may provide their input concerning the defendant's release and any conditions attendant to that release. RSA 651-A:11. Granting the defendant's request will not result in an automatic sentence reduction, but, rather, will allow the defendant to seek parole earlier by the amount of the earned time credit. RSA 651-A:6, I(a) ("[a] prisoner *may* be released at the expiration of the minimum term of his or her sentence, minus any credits received pursuant to RSA 651-A:23 . . . .").

The State accurately characterizes the nature of the defendant's crime, but the State's argument may be better suited for the Adult Parole Board at a future hearing than before this Court in the context of earned time credit. Whether or not the defendant deserves release prior to his maximum sentence, over the course of his incarceration, the legislature's desire to incentivize the productive use of a prisoner's incarcerated time appears to have inspired the defendant, at least in part, to take advantage of beneficial programming. While there may be a situation in which similar arguments from the State defeat a defendant's request for earned time credit, the Court, in the exercise of its discretion, does not view this as such a case.

For all of these reasons, the defendant's motion is granted.

So Ordered.

September 27, 2021
Date

Judge Daniel E. Will

STATE OF NEW HAMPSHIRE

STRAFFORD, SS. SUPERIOR COURT

THE STATE OF NEW HAMPSHIRE

v.

MICHAEL JORDAN

ORDER ON STATE'S MOTION TO RECONSIDER

219-2013-CR-00243, 00244

The State's Motion to Reconsider is GRANTED.

Whether RSA 21-M:8-k can reasonably be construed as the State urges, the Court overlooked or misapprehended the broad scope of its discretion within RSA 651-A:22-a, and, within that wide latitude, the possibility that input from the victims could bear on the determination of whether and to what degree to exercise its discretion when considering an earned time credit request.

The clerk shall schedule an in person hearing on the defendant's request, which will include the opportunity for victim input.

Date: October 18, 2021

So Ordered.

Hon. Daniel E. Will

Clerk's Notice of Decision
Document Sent to Parties
on 10/19/2021

STATE OF NEW HAMPSHIRE

STRAFFORD, SS. SUPERIOR COURT

THE STATE OF NEW HAMPSHIRE

v.

MICHAEL JORDAN

Docket No. 219-2013-CR-243
219-2013-CR-244

ORDER ON MOTION FOR EARNED TIME CREDIT
AFTER RECONSIDERATION

The defendant seeks an award of earned time credit pursuant to RSA 651-A:22-a. The State objects. For the following reasons, after reconsideration of an earlier order granting earned time credit, the defendant's motion is DENIED.

By order dated October 18, 2021, the Court granted the defendant's motion for earned time credit without a hearing and over the State's objection. The State asked the Court to reconsider, arguing that RSA 21-M:8-k, II(p) requires victim input into the disposition of the defendant's motion. The Court granted reconsideration without construing RSA 21-M:8-k, II(p), concluding that it misapprehended the scope of its discretion pursuant to RSA 651-A:22-a, and overlooked the fact that victim input could bear on the exercise of that broad discretion.

A hearing at which the parties presented argument and the victims provided input occurred on October 27, 2021. The victims recounted the extensive and lasting debilitating impacts that the defendant's repeated sexual assaults during

their pre-teen and teenage years caused them. Their statements were compelling, tragic, and the product of significant determination. Each emphasized that the act of presenting at the hearing reopened wounds that each has been trying to heal for many years, but each felt strongly enough to provide her input nonetheless.

The victims and their parents articulated their common understanding, at the time of the plea agreement, that the defendant would serve his full, minimum sentence. The sentencing judge shared this understanding. In that regard, the sentencing orders in Docket 243, Charge ID# 827934C and in Docket 244, Charge ID# 797937C both read in part as follows: "Defendant shall not be eligible for work programs or supervision outside of prison grounds until such time as he is deemed eligible for parole." This is another fact that the Court overlooked when it issued the initial order granting the defendant's motion.

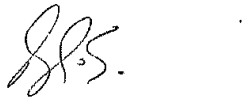
While the defendant has indisputably completed what the earned time credit statute would require were he eligible, the record reflects that the victims acceded, and the sentencing judge agreed, to the plea agreement in significant part on their collective understanding and intent that the defendant would serve his full minimum sentence. Not only do the sentencing orders attempt to foreclose any release prior to the minimum, they strongly suggest that, had the defendant been sentenced after enactment of the earned time credit statute, the sentencing judge would not have made credit available to the defendant. RSA 651-A:22-a, II (defendants sentenced after statute's enactment are eligible for earned time credit only if sentencing judge grants the option to them). The common understanding of the victims and the intent of the Court weigh heavily against an award of earned

time credit. Although the statute has incentivized the defendant to complete extensive programming as is its purpose, an award of earned time credit in this case would undermine a pillar of the original sentence.

For all of these reasons, the motion is DENIED.

Date: November 9, 2021

So Ordered.



Hon. Daniel E. Will