THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0605

State of New Hampshire

v.

Michael Jordan

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE STRAFFORD COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

ISSUE PRESENTED

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

STATEMENT OF THE CASE AND FACTS

A. The Plea Agreement

The defendant pleaded guilty on April 25, 2014, to eight counts of Aggravated Felonious Sexual Assault. RSA 632-A:2; DA 45-68.[1] The plea and sentencing transcript has not been transcribed, but according to the hearing on the motion to approve earned time credits held in 2021, the original sentencing judge was somewhat reluctant to accept the plea agreement. HT 20. The judge, however, accepted the plea agreement and sentenced the defendant consistent with it. HT 20.

B. The Defendant's Earned Time Credit Motions and the State's Objections

Between September 14, 2021 and December 3, 2021, the defendant, acting *pro se*, filed five separate motions requesting earned time credit in the Stafford County Superior Court, which was the court where he had been sentenced in 2014. DA 5-44. Each motion reported his successful completion of a different program authorized by RSA 651-A:22-a and each motion requested a reduction of 60 days on his sentence. *See id.*

The State objected each time. *See* DA 69, 90, 92.

[1] References to the record are as follows: "DB" refers to the defendant's brief and page number. "DBA" refers to the addendum to the brief and page number. "DA" refers to the separate appendix filed with the defendant's brief. "HT" refers to the hearing transcript and page number. "SA" refers to the addendum filed with this brief and page number.

C. The Superior Court's Initial Order and the State's Motion to Reconsider

On September 28, 2021, the superior court (*Will*, J.) issued a written order granting the first motion for earned time credit, referencing and attaching the court's order in another case, *State v. Cook, Strafford County Superior Court* Docket No. 219-1999-CR-00839). DB 29-32. The State filed a motion to reconsider, arguing that the court had not considered the victims' viewpoint in granting the request. DA 85; *see also* RSA 21-M:8-k, II(p) (Victims have the "right to appear and be heard at any disposition and any proceeding involving the release, plea, sentencing, or parole of the accused, including the right to be notified of, to attend, and to make a written or oral impact statement at the sentence review hearings and sentence reduction hearings.").

D. The October 27, 2021 Hearing

The court granted the State's motion to reconsider and, on October 27, 2021, held a hearing during which it heard statements from the victims and their parents. H 1-29. The court told the parties that it wanted to hear "their arguments with respect to the Defendant's motions for earned time credit, including as part of the State's presentation whatever victim input is desirable from the State's perspective." HT 2.

The defendant, still representing himself, argued that the court should not consider the impact on the victims since RSA 651-A:22-a did not include "wording that includes" the impact on the victims. HT 4. The court responded that it had concluded that it had "very broad discretion" and that it would, therefore, hear from the victims. HT 4.

The defendant then stated that he agreed with the first order issued by the court that concluded that the "legislature intended for it to be incentivized for prison inmates." HT 5. The defendant pointed out that, because the statute was passed four-and-one-half months after he pleaded guilty, he had not been "given that option to include that into [his] plea agreement." HT 5.

The State responded that it was "not contesting whether each 60-unit time is eligible for a subtraction of the minimum and maximum, in theory." HT 6. It added that the defendant was "correct, this [statute] did not exist at the time that he was doing his negotiations." HT 6. But the State contended that the defendant should "see this from the flip side of things, which was it also did not exist when the [victim and] family acceded to these terms." HT 6. "[T]hey never had a chance to talk about what were the numbers that [the State] ended up at and how could those be altered." HT 6. The State noted that the reduction under RSA 651:20 had "existed for a long time. But they never had the opportunity to talk about earned time credits because they didn't exist." HT 6.

The victim A.T. told the court that the defendant had "his time in prison to further his education in miscellaneous topics that quite frankly have no relevance to his crimes and at no expense of his own." HT 7. She recounted the psychological and physical impact she suffered as a result of the defendant's abuse, noting that his daughter was her best friend and yet "[h]e also took advantage of [her] on a vacation out of the country, and used to his accessibility to [her] home as he pleased." HT 8. She told the court: "I was never safe." HT 8-9

The victim then explained that, although she was not a trusting person, she had trusted the sentencing court. HT 9. She asked:

> What about us? What about the child who was barely even a teenager when she had her mouth held against a 40-year-old man's penis while he gave a how-to on a blow job? What about the woman who to this day, struggles substantially with self-doubt and never thinking she's good enough? What about the woman who knows if she has kids some day, she will struggle every time they go to a friend's house or leave the house because of the monsters in our world?

HT 9-10. She said that she "did not have the option to earn time credit on the life sentence [that she was] serving, so why should he?" HT 10.

A second victim, C.T.,, A.T.'s sister, also addressed the court. She told the court:

> Your Honor, I have no doubt that Michael is a model inmate. It is unfortunate that he has fooled the criminal justice system already; just as he had his own family, my family, and our community. It does not surprise he volunteers his time there, he used to volunteer his time with the homeless also. He's a smart man. He owns his own business, taught classes online, and homeschooled his daughter. Let me remind you of the man Michael Jordan is.
>
> This man, who is a peer support to suicidal inmates is the same man who many days made me want to take my own life. The man that owned his own business is the same man that when I was very sick and unable to work gave me a job helping him with his business while he fondled me in his basement, despite telling me -- despite telling him he needed to stop. It's the same man that would answer his wife's calls as he had me laying on a couch with my pants off, just after he penetrated me to make sure no one was coming home soon.

HT 11-12.

She pointed out that the defendant had been "sentenced to a minimum of 20 years in prison for the crimes he committed involving [A.T.] and [her], and others that did not choose to come forward." HT 16.

The father of A.T. and C.T. also spoke. HT 16-17. He pointed out that it had been "seven short years since [they had] left this courtroom the last time… with hopes that [his family] could begin healing knowing that this animal was put away for 20 years, and not less than" 20 years. HT 17. He said that they had now returned to court and their wounds had been reopened because the defendant felt that "he deserves to have less time than he was sentenced for, after abusing [the father's] daughters." HT 17. The father was incredulous:

> Is our justice system truly this we[a]k, that it grants time off for such heinous crimes because of a printing class -- printing press class completed? Really? Does that help him, not to molest other kids when he gets out in 13 years? Because he's not going to change. He is who he is. Anything that he's doing right now to have time come off has nothing to do with why he's here. He's the person he is.

HT 18. He added that 20 years was "not nearly enough time for the crimes that [the defendant] has committed." HT 18. The family respected and had agreed to "the sentence from the Court, but not any day earlier." HT 19.

The mother of A.T. and C.T. addressed the court, as well. She told the court: "Our daughters agreed to a plea deal of 20 to 40 years in prison. The sentencing judge guaranteed these women and their family that the Defendant would not serve a single day less than those 20 years." HT 20. She said: "In fact, I remember when it took my breath away when he almost did not accept the deal as he felt strongly the Defendant should be

incarcerated for much longer than that due to the egregious crimes he had committed." HT 20.

The State then addressed the court. The State pointed out that the defendant would get some credit for his activities in the prison:

> [B]y doing these things for his self-betterment, [the defendant] increases the chances that he will get back 150 days as prorated for each year of the minimum term of his sentence. That is how the system is built. He's going to earn back those 150 days through his good works, through remaining disciplinary free, through completing these programs.

HT 24.

But the State added that "earned time credits were never on the table and were never negotiated." HT 24. The State pointed out that there was a "legitimate concern on behalf of the citizenry, who were victims of his crimes, who really want to know why we entered into a bargain at all, if it's not going to be honored." HT 24. The State urged the court to allow the defendant to "continue on through that parole process. He will, at some point, parole to that second sentence, which is when it is more likely he will be enrolling in sexual offender treatment and counseling." HT 25.

The defendant also addressed the court, taking responsibility for his actions. HT 28. He added, however, that the legislature had "afforded this [earned time credit] opportunity to those sentenced prior to the statute's effective date" and that he was "only petitioning for what the New Hampshire Legislature [said that he had] a statutory right to. Nothing more." HT 29.

E. The Court's November 9, 2021 Order

On November 9, 2021, the superior court denied the defendant's motion for earned time credit. DB 34-36. The superior court pointed out that the sentencing order had explicitly excluded potential ways in which the imposed sentence could be reduced. DBA 35. The superior court noted that the sentencing judge had written that the defendant would "not be eligible for work programs or supervision outside the prison until such time as he is eligible for parole." DBA 35. The superior court added that the victims and the sentencing court had "acceded" to the plea agreement "on their collective understanding and intent that the defendant would serve his full minimum sentence." DBA 35. The court concluded that allowing earned time credit in the defendant's case would "undermine a pillar of the original sentence." DBA 36.

The defendant moved to reconsider and the superior court denied the motion. DA 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* DA 30.

SUMMARY OF THE ARGUMENT

The superior court acted within its discretion in denying the defendant earned time credit on his pre-statute sentence. The plea agreement provided that the defendant would serve the minimum sentence and the sentencing documents made its expectation very clear. The statute contemplates exactly the kind of review exercised by the superior court in this case.

Finally, the defendant's equal protection claim, based on the superior court's order in *State v. Cook*, is without merit. The defendant in *Cook* was not "similarly situated" with the defendant in this case. For example, the defendant in *Cook* was not sentenced pursuant to a plea agreement. *See State v. Cook*, 148 N.H. 735, 737 (2002). At the time of his request for earned time credits, Lawrence Cook, the defendant, had served 21 years in prison. At the time of his request, the defendant had served seven years. Their cases are otherwise distinguishable and there is no violation of the Equal Protection Clause in the superior court's ruling. Moreover, the defendant's equal protection claims is essentially a class-of-one equal protection that is foreclosed by the United States Supreme Court's decision in *Enquist v. Oregon Dept. of Agr.*, 553 U.S. 591 (2008), due to the broad discretionary authority RSA 651-A:22-a, II vests in the superior court to approve earned time credits for prisoners sentenced before the effective date of the statute.

ARGUMENT

THE SUPERIOR COURT ACTED WITHIN ITS DISRECTION IN DENYING THE DEFENDANT ELIGIBILITY FOR EARNED TIME CREDITS.

The defendant contends that the superior court erred based on three different bases: (1) the superior court's ruling was contrary to the statutory scheme which allows a court to look solely at the defendant's rehabilitative efforts; (2) the superior court's conclusion that the sentencing court would not have permitted earned time credits was speculation; and (3) the superior court's order violates the Equal Protection Clause under New Hampshire and federal law.

These contentions fail for several reasons.

First, the defendant's contention ignores the fact that the parties negotiated – and the court accepted – a plea agreement that contemplated that the defendant would serve no less than his minimum sentence. This bargain having been struck, the superior court did not exceed its discretion in enforcing it. Notably, although he was given the opportunity to address the superior court in the 2021 hearing, the defendant never contended that serving the minimum of his sentence was not part of the negotiated plea.

This Court has held that plea agreements should be interpreted by applying basic principles of contract law. *See State v. Smith*, 173 N.H. 115, 118 (2014) (citations omitted). "At the conclusion of the sentencing proceeding, a defendant and the society which brought him to court must know in plain and certain terms what punishment has been exacted by the court." *State v. Rau*, 129 N.H. 126, 129 (1987).

At the conclusion of this sentencing the parties and the sentencing court were clear on the terms of the sentence. There was, apparently, some uncertainty that the sentencing court would accept the plea agreement as being too lenient, an act which would have been within the sentencing court's discretion. *See State v. Jeleniewski*, 147 N.H. 462, 469 (2002). Although the statute allows prisoners who were sentenced before the statute was enacted to seek sentence reductions through earned time credits, these reductions are available only with the approval of the sentencing court. RSA 651-A:22-a, II. The superior court concluded that the sentencing judge would not have made earned time credits available and, in essence, declined to amend the terms of the plea agreement to provide otherwise. *Cf. People v. Stamps*, 467 P.3d 168, 179 (Cal. 2020) (The legislature's action "did not operate to change well-settled law that a court lacks discretion to modify a plea agreement unless the parties agree to the modification.").

The statute mentions the "presiding justice" in a post-statute sentencing and provides relief to a prisoner sentenced pre-statute, provided the "sentencing court" agrees with the application, the statute does not mention the impact on fully negotiated pre-statute plea agreements. Presumably, by invoking the approval of sentencing court, the legislature intended that approval to include review of the terms of the original sentence, to include and plea agreement.

The defendant contends, however, that the superior court's decision not to apply the earned time credit provision "was contrary to the statutory scheme which looks solely to efforts at rehabilitation and behavior while in prison." DB 17.

When the question before this Court raises a question of statutory construction, this Court's review is de novo." *State v. Fogg*, 170 N.H. 234, 236 (2017) (citing *State v. Thiel*, 160 N.H. 462, 465 (2010)). "In matters of statutory interpretation, we are the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole." *Thiel*, 160 N.H. at 465. (internal quotation marks omitted). "[This Court] first look[s] to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." *Id*.

"[This Court] interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Id* (quotation omitted). Furthermore, this Court will "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. "*State v. Maxfield*, 167 N.H. 677, 679 (2015) (internal quotation marks omitted). "Finally, [this Court] interpret[s] a statute in the context of the overall statutory scheme and not in isolation." *Thiel*, 160 N.H. at 465.

The statute vests the authority for allowing earned-time credits in two places. First, for post-statute prisoners, the authority to provide credit for rehabilitative efforts is committed to the discretion of the "presiding justice at the time of sentencing." RSA 651-A:22-a, II. For pre-statute prisoners, the legislature gave that discretion to the sentencing court, *see id.*, in an apparent recognition that the presiding justice at the time of sentencing may not longer be in the service of that court.

The defendant points out that the statute repeatedly uses the word "shall". *See, e.g.* DB 18 (citing RSA 651-A: 22-a (earned time credits "shall be available"); RSA 651-A: 22-a, I (the commissioner "shall award

the prisoner"); RSA 651-A: 22-a, I(b)-(f) (a prisoner who completes a program "shall be entitled"). But these entitlements are not absolute. For pre-statute prisoners, the approval of the sentencing court is required; for post-statute prisoners, the sentencing judge must approve the reduction. If the legislature had wished to grant a blanket entitlement, it could have done so, provided that the statute complied with the separation of powers doctrine. It did not and, therefore, this Court should decline to remove the discretion that the legislature left with the sentencing courts for both pre- and post-statute prisoners.

The defendant next contends that the superior court erred because it speculated on what the sentencing justice would have done. He criticizes the superior court for "read[ing] into" the sentencing justice's order "terms that are not there." DB 21. There are several problems with this assertion.

First, to the extent that the defendant wishes to argue that the superior court erred, he has provided this Court with an incomplete record. He has not provided this Court with a copy of the original sentencing transcript.[2] *See State v. Winward*, 161 N.H. 533, 542 (2011); *see also* Sup. Ct. R. 15(3) ("If the moving party intends to argue in the supreme court that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion.").

This leaves this Court with the language in the sentencing orders which make very clear that all parties, including the sentencing judge,

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[2] It does not appear from the record that the parties asked the superior court to listen to the recording of the plea colloquy and sentencing.

expected the defendant to serve at least the minimum of his sentence. Relying on the written orders was not speculation. That reliance was based on the record as it was provided by the parties. Indeed, although the defendant cites *State v. Fletcher*, 158 N.H. 207, 211 (2009), for the proposition that "where the trial court has omitted a term, that provision cannot later be added," DB 21, he asks this Court to do exactly that: to add a term that would make the defendant eligible for early release when the sentencing judge clearly wanted to preclude that possibility.

The defendant accuses the superior court of "flawed" reasoning because, he contends, the earned time reduction "does not guarantee [that] he will serve anything less than his full minimum." DB 22. But this assertion fails to recognize two things. First, the sentencing judge did not want even the possibility of a reduction. *See* DA 52 (ordering that the defendant "shall not be *eligible*"). The defendant's argument that he may not be awarded earned time credits ignores the fact that by seeking them, he is eligible for them. *See Webster's Third New International Dictionary* at 736 (2002 ed.) (defining "eligible" as "1: fitted or qualified to be chosen: entitled to something… 2: worthy to be chosen or selected…"). It is exactly that "hope of an earlier parole," DB 22, that the sentencing judge intended to extinguish.

It also cuts against the defendant's argument that the credits are, in essence, mandatory. *See* DB 22 ("The legislature essentially 'checked" the earned time credit box for all prisoners prior to the statute's effective date."). If this is the case, the legislature would not have made the award of credits subject to the sentencing court's approval. It is the court that must "check" the box and, in the defendant's case, it has declined to do so.

Finally, the defendant contends that the superior court's ruling in *State v. Cook*, 219-1999-cr-00839, should control the outcome of this case. DB 23. Using Cook's example, he presses an Equal Protection claim under the State and United States Constitutions. DB 24. The defendant first raised the Cook case in his motion to reconsider, DA 101, and the superior court's order did not address it, so it is not clear that it is properly before this Court. *Cf. State v. Hilliard*, 2021 WL 5029405, *3 (Oct. 29, 2021) (noting that a trial court "has discretion to consider the issue and to re-open the record and allow the parties to present evidence") (citing *Smith v. Shepard*, 144 N.H. 262, 265 (1999)). The superior court dismissed the claim. *See* SA 29 ("[T]his defendant and the defendant Cook from the Court's prior order[ ] are not similarly situated for equal protection purposes"). The superior court did not make factual findings or provide legal reasoning.

But assuming, without conceding, that the argument is properly before this Court, the defendant cannot demonstrate that the superior court violated the equal protections of either the federal or state constitutions.

Under New Hampshire law, "[t]he equal protection guarantee is 'essentially a direction that all persons similarly situated should be treated alike.'" *State v. Ploof*, 162 N.H. 609, 626 (2002) (quoting *In re Sandra H.,* 150 N.H. 634, 637 (2004)). "Holding that persons who are not similarly situated need not be treated the same under the law is a shorthand way of explaining the equal protection guarantee." *Id.* at 626. Thus, the "first inquiry concerning equal protection is whether persons similarly situated are being treated differently under the statutory law." *In re Sandra H.*, 150 N.H. 634, 637 (2004).

In light of this standard, it is clear that the defendant in the *Cook* case is not "similarly situated" to the defendant in this case. This Court has repeatedly noted that differences in circumstances will not qualify the equal protection test. *See, e.g.*, *id.* at 638 (noting the difference between civil and criminal committees); *McGraw v. Exeter Region Co-op. School Dist.*, 145 N.H. 709, 712 (2001) (rejecting an equal protection challenge to voting procedures); *Gonya v. New Hampshire Ins. Dept*., 153 N.H. 521, 532-33 (2006) (rejecting an equal protection challenge to a statute). In order to satisfy the test, the defendant must prove "the existence of a classification and the differing treatment of persons so classified." *Gonya,* 153 N.H. at 532. This he has not done.

First, the defendant has not advanced the existence of a classification. He has merely argued that he is being treated differently than one other prisoner who committed similar crimes. He therefore appears to be advancing a so-called equal protection "class of one" claim, a species of equal protection claim that the United States Supreme Court has rejected in cases where state actors have been vested with broad discretion to come to subjective and individualized conclusions. *Enquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 594 (2008). Thus, in *Enquist*, the United States Supreme Court explained:

> There are some forms of state action, however, which by their nature involve discretionary decision-making based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge

> based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

Id. at 603. "Although *Engquist's* specific subject was public employment, its reasoning extends beyond its particular facts, and . . . federal courts . . . have found the case applicable beyond government staffing." *Caesars Mass. Management Co., LLC v. Crosby*, 778 F.3d 327, 336 (1st Cir. 2015) (Souter, J.); *see, e.g.*, *Engquist*, 553 U.S. at 603-04 (using traffic officers writing traffic tickets of an example and explaining that traffic tickets given out on the basis of a protected classification like race or sex would state an equal protection claim, but a general claim that one person received a traffic while another did not, "would be incompatible with the discretion inherent in the challenged action"); *Caesars Mass. Management Co., LLC*, 778 F.3d at 337 (applying *Engquist* to casino licensing); *Douglas Asphalt Co. v. Qore, Inc.,* 541 F.3d 1269, 1273–74 (11th Cir.2008) (applying *Engquist* to government contracting); *Flowers v. City of Minneapolis,* 558 F.3d 794, 799–800 (8th Cir. 2009) (applying *Engquist* to police investigations).

Thus, where the statute at issue vests broad discretion in a state actor making "[t]he possibility of mandating or deriving a baseline against which to assess a[n] [equal protection] claim" problematic, *Engquist* counsels against recognition the claim. *Caesars Mass. Management Co., LLC*, 778 F.3d at 337. While this Court has not yet had the opportunity to address whether the United States Supreme Court's holding and reasoning in *Engquist* in this regard apply under the state constitution to state equal protection claims, this Court has explained in an unpublished case that "'[i]n a class of one equal protection clam, proof of a similarly situated, but

differently treated, comparator is essential.'" *Appeal of the Mortgage Specialists, Inc.*, 2014 WL 11485821 at *3 (N.H. Oct. 10, 2014) (quoting *Snyder v. Gaudet*, 756 F.3d 30, 34 (1st Cir. 2014)). "To prevail, the petitioners 'must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves.'" *Id.* (quoting *Cordi-Allen v. Conlon*, 494 F.3d 245, 251 (1st Cir. 2007)).

Against these standards, Cook and the defendant are not similarly situated. First, Cook was sentenced after he had been convicted by a jury, not as the result of a fully negotiated plea. *See State v. Cook*, 148 N.H. 735, 737 (2002). As a result, he did not "agree" to the terms of his sentence. Indeed, his direct appeal challenged his conviction, albeit unsuccessfully, on a number of grounds. *Id.* In this case, the defendant seeks to reduce the consequences of his negotiated plea.

Second, by the time he filed for earned time credits, the defendant in *Cook* had served more than 20 years of imprisonment. SA 30-31. In contrast, in this case, the defendant had served only seven years, less than half of the minimum.

Third, at the time that the defendant in Cook requested release, he was nearly 68 years old. The defendant in this case is fifteen years younger than Lawrence Cook. Although the defendant in Cook certainly might expect to live for many years after release, *see, e.g., State v. Lopez*, 174 N.H. 201, __, 261 A.3d 314, 320 (2021), the difference in age undercuts the assertion that they are similarly situated. All of these factors and more (including demeanor at the hearing) could enter into a judge's discretionary decision regarding whether earned time credit is appropriate for a specific

prisoner and, therefore, render Cook and the defendant not similarly situated.

Indeed, the only similarities on this record are that both men were sentenced for multiple counts of sexual assault and both were sentenced to prison. These "similarities" are insufficient to support the type of equal protection claim the defendant is raising.

Additionally, because RSA 651-A:22-a, II vests broad discretion in the sentencing court to decide whether to approve earned time credits, the possibility of mandating or deriving a baseline against which to assess of claim of treating similarly situated individuals differently would be extraordinarily difficult. This circumstance alone forecloses the defendant's equal protection claim. *See Engquist*, 553 U.S. at 604-05 ("It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized."); *Caesars Mass. Management Co., LLC*, 778 F.3d at 337 ("the virtually plenary discretion that defines the state activity places this case squarely within the *Engquist* rule limiting class-of-one redress").

Because the federal constitution is no more protective than the state constitution in this area, this Court should reject the defendant's equal protection argument. *See In re Sandra H.*, 150 N.H. at 637 ("Federal equal protection offers no greater protection than our State equal protection guarantee.").

The defendant further contends that the State's position with respect to earned time credits was "at odds with the legislature's" because the State appeared to oppose earned time credits for all sex offenders. Although it is true that the prosecutor opposed credits for both Cook and the defendant,

that fact is irrelevant. First, the prosecution's consistency only proves that it was not suggesting disparate treatment for similarly charged defendants. And, second, the prosecution did not issue the ruling denying the credits. That ruling was issued by the superior court and the defendant has not shown that it treated two similarly situated defendants so differently that it violated the right to equal protection.

Finally, to the extent that the defendant suggests that the State has violated his right to equal protection by routinely opposing earned time credits for all sex offenders, the record is inadequate to support this claim. The fact that the prosecutor opposed earned time credits in two sexual assault cases is not proof that the prosecutor has done so in all cases, nor is it proof that, even if this were the case, the opposition to these credits is improper.

For these reasons, this Court should affirm the superior court.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 10-minute 3JX oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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August 26, 2022

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CERTIFICATE OF COMPLIANCE

I, Elizabeth C. Woodcock, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately _____ words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

August 26, 2022 /s/*Elizabeth C. Woodcock*

CERTIFICATE OF SERVICE

I, Elizabeth C. Woodcock, hereby certify that a copy of the State's brief shall be served on Richard E. Samdperil, Esq., counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

August 26, 2022 *s/Elizabeth C. Woodcock*

ADDENDUM TABLE OF CONTENTS

27. WHEREFORE, The defendant requests:

A. Reconsider its November 9th, 2021 order for The reasons stated above; and

B. For any other fair and just relief

Respectfully Submitted,

11-18-21

Michael Jordan 95566
P.O. Box 14
Concord, NH 03302

Certificate of Service

I hereby certify that this motion has been forwarded to opposing Counsel on the above date.

DENIED. The defendant fails to point out any point of fact or law misapprehended or overlooked. Neither does the statute entitle him to earned time credit, leaving that to the discretion of the Court, nor does the Court's discretion exclude encompass the determination to have a hearing if, in the Court's view, a hearing would assist, including input from victims and their families. The Court did not hold a hearing pursuant to the Victim's Bill of Rights, but pursuant to the exercise of its own discretion, found in RSA 651-A:22-a, II upon determining that a hearing would be helpful. As to alleged constitutional violations, each defendant's situation is unique, meaning that this defendant and the defendant Cook from the Court's prior order, are not similarly situated for equal protection purposes.

Clerk's Notice of Decision
Document Sent to Parties
on 12/03/2021

9. Honorable Daniel E. Will
November 23, 2021

STRAFFORD SUPERIOR COURT

CASE SUMMARY

CASE NO. 219-1999-CR-00839

State v. Lawrence Cook

§
§
§
§

Location: **Strafford Superior Court**
Judicial Officer: **Mohl, Bruce E**
Filed on: **10/07/1999**

CASE INFORMATION

Offense	Statute	Deg	Date	Case Type:	**Criminal**
Jurisdiction: **Rochester**					
1. Aggravated Felonious Sexual Assault ACN: 007025J992148330001	632-A:2	F	07/28/1990	Case Status:	**09/27/2021 Closed**

Arrest: 07/28/1990 ROCH - Rochester Police Department

Related Cases
219-1999-CR-00837 (Cross Reference)

PARTY INFORMATION

		Attorneys
Defendant	**COOK, LAWRENCE** *C/O NHSP # 73535* *281 N STATE ST* *PO BOX 14* *CONCORD, NH 03302* *DOB: 12/12/1953 Age: 36*	
Prosecutor	**Strafford County Attorney** *Justice & Admin Building* *259 County Farm Rd, Suite 201* *Dover, NH 03820*	**Velardi, Thomas P., ESQ** *Retained* 603-749-2808(W)

DATE	EVENTS & ORDERS OF THE COURT	INDEX
10/07/1999	Memo from Case Screen *99-S-0839: AGGRAVATED FSA CA: PKO STEPHEN JEFFCO, ESQ./LEAD 99-837 12/15/99 GUILTY VERDICT 3/1/00 SENTENCED 5/2/00 APPEAL #00-193 1/9/03: SENT. AFFIRMED SUPR CRT; Case Filing Type: Indictment; Orig. Case Type: 101*	
10/20/1999	**Arraignment** (Judicial Officer: Converted, No Judge in Sustain) *Date Sched: 10/8/1999*	
12/14/1999	**Jury Trial** (Judicial Officer: Converted, No Judge in Sustain) *Memo: VERDICT: GUILTY.* *Hearing Held*	
12/15/1999	Jury Verdict *Filed by: CT; Disp Date: 12/15/1999; Judge: MOHL; Memo: 12/13/99: JURY DRAWN 12/14/99: TRIAL BEGAN 12/15/99: VERDICT: AFSA: GUILTY.*	
12/15/1999	**Disposition** (Judicial Officer: Mohl, Bruce E) 1. Aggravated Felonious Sexual Assault Jury Verdict of Guilty	
03/01/2000	Mittimus/Return *Filed by: CT; Memo: NHSP MITTIMUS (ISSUED 3/1/00)*	
03/01/2000	**Sentence** (Judicial Officer: Mohl, Bruce E) 1. Aggravated Felonious Sexual Assault NH State Prison *Confinement* *Effective Date: 03/01/2000*	

STRAFFORD SUPERIOR COURT

CASE SUMMARY

CASE NO. 219-1999-CR-00839

Agency: State Prison - Concord
Maximum
Term: 15 Years
Mandatory Minimum
Term: 7 Years, 6 Months
Comment: Sent. to NHSP not more than 15 yrs/nor less 7 1/2 yrs. Added to Min. sentence a discip period equal to 150 days for each yr of min term of sentence to be prorated for any part of the yr; Stand Committed, Consecutive to 99-S-837/838-F. Court recom to DOC-Sexual offender program as condition of parole. Following conditions applicable whether incarcerated, suspended, deferred or imposed or no incarcer ordered at all. Failure to comply may result in imposition of any suspended or deferred sent. Def ordered to make restitution of all counseling costs plus statutory 17% admin fee through DOC. Participate in meaningful counseling, treatment and educ. programs as directed. Def ordered good behavior and comply w/terms of sentence.

03/02/2000	Sheriff's Return on Mittimus *Filed by: SD*	
05/02/2000	Notice of Appeal to Supreme Court *Filed by: ATD; Memo: see 99-S-837-F*	
01/09/2003	Supreme Court Certificate *Filed by: SPRCT; Memo: SENTENCE AFFIRMED*	
10/13/2015	Reopened *Def's Motion to Suspend Sentence (See lead file 99-CR-837 for further pleadings)* *Charges: 1*	
09/07/2021	Reopened	
09/07/2021	Motion to Award Earned Time Credits	*Index #1*
09/10/2021	Objection Filed by: Prosecutor Strafford County Attorney *State's Objection*	*Index #2*
09/27/2021	Court Order (Judicial Officer: Will, Daniel E) *Earned Time Credits; env-1961139*	*Index #3*
09/27/2021	Amended Mittimus *env-1961139/def mailed* *Charges: 1*	*Index #4*
09/27/2021	**Amended Sentence** (Judicial Officer: Will, Daniel E) 1. Aggravated Felonious Sexual Assault NH State Prison Confinement Effective Date: 03/01/2000 Agency: State Prison - Concord Maximum Term: 15 Years Mandatory Minimum Term: 7 Years, 6 Months Comment: Sent. to NHSP not more than 15 yrs/nor less 7 1/2 yrs. Added to Min. sentence a discip period equal to 150 days for each yr of min term of sentence to be prorated for any part of the yr; Stand Committed, Consecutive to 99-S-837/838-F. Court recom to DOC-Sexual offender program as condition of parole. Following conditions applicable whether incarcerated, suspended, deferred or imposed or no incarcer ordered at all. Failure to comply may result	

STRAFFORD SUPERIOR COURT

CASE SUMMARY

CASE NO. 219-1999-CR-00839

in imposition of any suspended or deferred sent. Def ordered to make restitution of all counseling costs plus statutory 17% admin fee through DOC. Participate in meaningful counseling, treatment and educ. programs as directed. Def ordered good behavior and comply w/terms of sentence. 9/27/2021 Order on Defendant's Motion for Earned Time Credits; "Granted", (Will, J.)

TARGET DATE	TIME STANDARDS