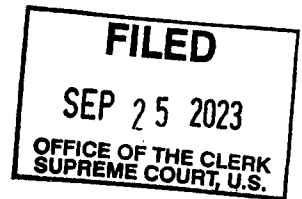


ORIGINAL

23-5849



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IN THE  
SUPREME COURT OF THE UNITED STATES

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Bryan H. Brown, Petitioner

v.

State of New Hampshire, Respondent

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ON PETITION FOR WRIT OF CERTIORARI TO  
NEW HAMPSHIRE SUPREME COURT

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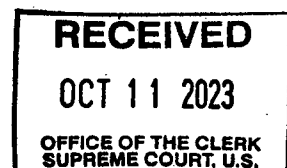
PETITION FOR WRIT OF CERTIORARI

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SUBMITTED BY

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03302-0014



## QUESTION PRESENTED

It has been long established that a State statute that provides for good time credits upon stipulated conditions confers upon prison inmates, creates a liberty interest protected by the due process clause of the fourteenth Amendment. Wolff v. McDonnell, 418 U.S. 539, 556-72 (1974). "The touchstone of due process is protection of the individual against arbitrary action of government." *Id.* at 558 (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889)); Fuentes v. Shevin, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary taking").

In 2014, New Hampshire enacted RSA 651-A:22-a, also known as the "Earned Time Credits" statute. The structure and language of the statute mandates specific credits for various programming and an inmate's entitlement to such credits upon completion of said programs. RSA 651-A:22-a, I(a)-I(f).

The question presented before this Court is based on legal precedent and is an issue of grave importance to all of New Hampshire inmates current and future irrespective of their crime and is as follows:

WHETHER THE COURT ARBITRARILY DENIED THE PETITIONER'S STATE  
CREATED RIGHT TO EARNED TIME CREDITS

## LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE  
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari be issued to review the judgment below.

OPINION[S] BELOW

For case from state court[s]:

The date on which the state (Supreme) highest court decided the case was August 23, 2023. A copy of that decision appears at Appendix "A" 2-3

The opinion of the Strafford County Superior court on the initial petition pursuant to RSA 651-A:22-a was decided on October 11, 2022. A copy of that decision appears at Appendix "A" 4.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in the case.

U.S. CONST., AMEND. V "...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"

U.S. CONST., AMEND. XIV "...nor shall any state deprive any person of life, liberty, or property, without due process of law"

## **RSA 651-A:22-a**

### **Copy Citation**

Statutes current through Chapter 211 (except RSA 6:12) of the 2023 Regular Session.

**LEXIS™ New Hampshire Revised Statutes Annotated    Title LXII Criminal  
Code (Chs. 625 — 651-F)    Chapter 651-A Parole of Prisoners (§§ 651-A:1  
— 651-A:38).**

### **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.

## SUMMARY OF THE CASE

Following his conviction, the state enacted RSA 651-A:22-a, also known as the "Earned Time Credits" statute. Using the opportunity to improve himself, the Petitioner participated in one or more of the programs offered. Upon completion of the program[] he obtained the earned time credit application with the Commissioner's recommendation. App. "A" 5. As required by the statute, the Petitioner filed a petition with his sentencing court requesting approval. RSA 651-A:22-a,II ("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 approval of the sentencing court")

Following an objection, the court summarily denied approval without conducting a hearing based on the nature and circumstances of the underlying criminal conviction. App. "A" 4. The case was appealed and accepted and briefed. In August of 2023, the court issued its opinion ignoring the issues raised on appeal, but affirming the lower court's decision under the rationale that courts have broad discretion to grant or deny approval of earned time credits.

Respectfully, the essential issue requiring resolution is whether the court arbitrarily erred in denying the Petitioner's state created right to earned time credits. The underlying conviction itself is irrelevant to the issue at hand and should not be considered as part of the argument.

Thus, this petition for Writ of Certiorari follows.

## REASON FOR GRANTING THE WRIT

### I. WHETHER THE COURT ARBITRARILY DENIED THE PETITIONER'S STATE CREATED RIGHT TO EARNED TIME CREDITS

In Meachum v. Fano, 427 U.S. 215, 225 (1967), this Court recognized that a convicted felon does not forfeit all constitutional protections by reason of conviction. He retains a variety of important rights that the courts must be alert to protect. See also Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

In Wolff, this Court speaks directly to the Due Process issue as it relates to good time credits. The Court held that prisoner's interest in good time credits has substance, and that due process requires that such a right not be "arbitrarily abrogated". *Id.* at 557. After a prisoner has earned good time credits in accordance with the statute, that rewards mandatory sentence reduction for good behavior, he possesses a liberty interest in a reduced sentence, which cannot be forfeited or revoked in the absence of minimum procedural guarantees. *Id.* at 556.

The issue in Wolff, was the deprivation of the right to good time credits, a right which was not guaranteed by the constitution, but was a creation of the state law. *Id.* There the Court held that even such a liberty interest rooted in state law was entitled to constitutional protection.

Similar, in September of 2014, New Hampshire legislature enacted RSA 651-A:22-a, also known as the earned time credits statute. The statute set forth parameters for which credits are earned and forfeited.

As recognized by the Department of Corrections, earned time credits is an incentive for inmates to use their time productively in the rehabilitative process. As enacted, the statute provides that, the Commissioner of Corrections is mandated to 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 certain programs while incarcerated, and "shall" establish procedures for each program ..., for awarding such reductions. RSA 651-A:22-a,I.

The statute further provides that, credits "shall" only be earned and available to prisoners while in the least restrictive security classifications of general population and minimum security. Moreover, the statute provides that credits 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." RSA 651-A:22-a,III.

Conceivably, the statute was designed as an Administrative tool to provide inmates with an opportunity for early release. As noted, the Commissioner of Corrections is authorized to determine an inmates eligibility for earned time credits, as part of her assigned duties in the supervising of prisoners within its facilities. RSA 21-H; see also RSA 651-A:22-a. As noted, the legislature authorizes the Commissioner of Corrections to promulgate rules and regulations respecting earned time credits for successful completion of rehabilitative programs. Id.

While the statute clearly authorizes the Commissioner of Corrections to establish the earned time credit system, it is silent as to the judicial approval for inmates such as the Petitioner who was sentenced prior to the statutes' September 2014 enactment date. Contrary to the Court's "broad discretion" decision, neither the Commissioner nor the Courts have carte blanche discretion if the inmate has satisfied the statutory prerequisite for obtaining said credits.

Legislative history of the statute indicates that judicial approval was intended to work in conformity with the Commissioner's recommendation and not a mechanism to give judges unfettered discretion. Granted, judges may have broad discretion in its sentencing authority, but is not permitted to violate the separation of powers by invading the legislature right to authorize the Commissioner of Corrections to devise and implement the earned time credit system. CF. Bell v. Wolfish, 441 U.S. 520, 562 (1979).

The fact that the statute uses the term "shall" to convey a sense of "entitlement" of said credits and curtails any sense of discretion. Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979). In Greenholtz, the Court held that the unique structure and language of the statute mandated that the Board of Parole shall order an inmate's release unless it found one of the four designated reasons for deferring parole. The mandatory language established a presumption that the prisoner would be released on parole. *Id.* at 11-12.

Based on the language of New Hampshire's statute, the Petitioner has a legitimate expectation of obtaining said credits upon completion of a qualifying program. RSA 651-A:22-a,I. Furthermore, the statute set forth explicit criteria which the denial of credits should be based, and granted the decision makers no discretion to act otherwise. Hewitt v. Helms, 459 U.S. 460, 471-72 (1983); Olim v. Wakinekona, 461 U.S. 238 (1983); Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454 (1989). Contrary to the decision below, the statute is quite clear as to the Petitioner's entitlement to said credits.

Unlike Wolff, and other cited, the deprivation of credits was not the result of a disciplinary infraction, but rather, an arbitrary denial based solely on the "nature and circumstances" of the underlying offense.

App. "A" 4. Several petitions was filed in the same state court pursuant to the statute and were denied based on the offense[s] for which the individual was convicted. The Double Jeopardy Clause of the fifth Amendment protects against multiple punishments for the same offense. Ohio v. Johnson, 467 U.S. 493, 498 (1984); United States v. Halper, 490 U.S. 435 (1989). It is without question that the deprivation or forfeiture of earned time credits is a form of punishment authorized for serious misconduct and violations of any category "A" offense listed in the department of corrections policy and procedure directives. RSA 651-A:22-a,III. Even though they may have been two separate proceedings, they had a certain relationship one to the other as demonstrated by the court's decision.

Unfortunately, the plight of individuals convicted of such offenses and their struggles in being treated fairly are often not receptive. Nevertheless, the Constitution protects all people especially those incarcerated, prohibiting the deprivation of their state created liberty rights arbitrarily or capriciously.

A majority of Circuits have confronted the issue of state created rights, and have arrived at a contrary conclusion. New Hampshire on the other hand, fails to protect or ignores the liberty interests of its less than fortunate citizens. It is undeniable that New Hampshire courts overlook or simply ignore this Court's long standing precedent and Certiorari must be granted to correct this error.

# CONCLUSION

The Constitutional inquiry, grounded in the prohibition against the deprivation of a protected liberty interest is of grave importance, and the frequency with which it will arise, it would seem only a matter of time until this Court will come to address the question presented in this case. Thus, a Writ of Certiorari should be issued to review the judgment and opinion of New Hampshire Supreme Court.

Respectfully submitted,

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