No. 10-804

In the
Supreme Court of the United States

ALFORD JONES,

Petitioner,

v.

ALVIN KELLER, SECRETARY OF THE DEPARTMENT OF CORRECTION, AND MICHAEL CALLAHAN, ADMINISTRATOR OF RUTHERFORD CORRECTIONAL CENTER,

Respondents.

FAYE BROWN,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF CORRECTION, ALVIN KELLER, SECRETARY OF THE DEPARTMENT OF CORRECTION, AND KENNETH ROYSTER, SUPERINTENDENT OF RALEIGH CORRECTIONAL CENTER FOR WOMEN,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of North Carolina

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the North Carolina Supreme Court erred by holding that petitioners' due process rights were not violated where they were not entitled under state law to the application of good behavior credits toward unconditional release.

2. Whether the North Carolina Supreme Court erred by holding there was no ex post facto violation where petitioners had never earned under state law any good behavior credits toward unconditional release.

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STATEMENT

For more than five decades, the North Carolina Department of Correction (hereinafter "DOC"[1]) has acted consistently and in accordance with long-standing state statutes and regulations by never using good behavior credits to calculate unconditional release dates for prisoners sentenced to life imprisonment. Because the DOC Secretary has never exercised the absolute discretion given him by statute to apply credits to life prisoners for this purpose, even those prisoners serving life sentences that must be considered as eighty-year sentences have never been awarded and are not entitled to reduction of their unconditional release dates.

The North Carolina Supreme Court correctly found under state law that Petitioner Alford Jones[2] – who was sentenced to life imprisonment – has no state-created right to have his good behavior credits used to calculate his eligibility for unconditional release inasmuch as "[n]o regulation explicitly provides that credits are to be used to calculate an unconditional release date" for prisoners sentenced to life imprisonment. *Jones v. Keller*, 698 S.E.2d 49, 57 (N.C.

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[1] For ease of reference, respondents throughout are referred to collectively as "DOC."

[2] For clarity and to be consistent with the petition, this brief in opposition refers only to Jones. However, the argument also applies to Petitioner Faye Brown's case.

2010). As a result, the court further correctly held that there was no due process or ex post facto violation. This Court should not grant review.

1. Good Behavior Credits in North Carolina. In 1955, the North Carolina General Assembly authorized the Secretary of DOC to establish rules and regulations on "grades of prisoners, rewards and privileges applicable to the . . . classification of prisoners as an inducement to good conduct, [and] allowances of time and privileges for good behavior." N.C. Gen. Stat. § 148-13 (1955). Pursuant to the Secretary's absolute discretion, which remained unchanged from 1955 through 1979, DOC implemented policies and regulations regarding good behavior credits.[3]

None of DOC's policies regarding good behavior credits was codified prior to 1976. (Pet. App. 97a) However, DOC records show that prior to 1976 the Secretary of DOC had utilized the same policy that was later codified. (Pet. App. 98a) That codified regulation, placed in the North Carolina

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[3] Under North Carolina law, good behavior credits generally include credits for "good time," "gain time," and "meritorious time." Good time is awarded for good behavior without infractions of inmate conduct rules, gain time is awarded for work performed, and meritorious time may be awarded for exemplary behavior.

Administrative Code, provided that "[a]ll inmate[s], including . . . those with life terms" would receive "good time" credits "for acceptable behavior" and "[a]ll inmates who perform work" would be allowed "gain time." 5 N.C. Admin. Code 2B.0101, 2B.0102 (1976). (Pet. App. 177a)

The regulation did not specify the purposes for which those credits were to be used. As to prisoners with life sentences, DOC used the credits for the purposes of custody promotions, parole eligibility, and reduction of time to be served if there was a commutation by the Governor. (Pet. App. 98a, 157a) As to other prisoners, DOC also used the credits to calculate unconditional release dates. (Pet. App. 128a-130a)

In 1979, the North Carolina General Assembly created a prospective, limited right to good time credit for some prisoners who were sentenced under the "Fair Sentencing Act." *See* N.C. Gen. Stat. § 148-13 (1979). Outside of the Fair Sentencing Act, no statute speaks to the requirement that credits be given, how they are to be used, or that any credit must be used to calculate an earlier unconditional release.

As for prisoners sentenced for offenses committed prior to the effective date of the Fair Sentencing Act, N.C. Gen. Stat. § 148-13(b) continued to vest in the Secretary of DOC the same absolute discretion he

previously had possessed as to good behavior credits. Indeed, N.C. Gen. Stat. § 148-13(b) in no way required the Secretary to grant good behavior credits toward an unconditional release date or even to issue regulations in that regard. *See Price v. Beck*, 571 S.E.2d 247, 250 (N.C. Ct. App.), *disc. rev. denied*, 575 S.E.2d 26 (N.C. 2002).

After the General Assembly in 1995 exempted DOC from the rule-making provisions of the North Carolina Administrative Procedure Act, DOC included good behavior credits in its definition of "Sentence Reduction Credits" that "applied to an inmate's sentence that reduce the amount of time to be served." North Carolina Department of Correction, Division of Prisons, Policies – Procedures, *Sentence Reduction Credits* § .0110 (1995). Even so, the rule did not require DOC to apply those credits for any specific purpose to prisoners with life sentences.

In 2007, DOC again amended its rule. Although the rule continues to provide that good behavior credits are sentence reduction credits, it was amended to state: "For inmates sentenced under the Fair Sentencing Act, Good Time reduces the time required to be served for unconditional release from prison." State of North Carolina Department of Correction, Division of Prisons, Policy and Procedure § .0110(a) (2007). (Pet. App. 200a-201a) This appears to be the

first and only mention of "unconditional release" in DOC regulations.

Throughout all the amendments to its regulations and rules, DOC has credited all prisoners including those with life sentences with good behavior credits. For those with life sentences, consistent with the discretion given to the DOC Secretary, those credits have been awarded for the limited purposes of reducing the time required to become eligible for custody promotion or parole eligibility or in case of sentence commutation by the Governor. (Pet. App. 131a, 140a, 146a-147a) Policies and rules also were applied to allow prisoners with life sentences to accumulate gain or merit time credits which, in addition to good time credits, would be applied only in the event of such commutation. (Pet. App. 97a-100a, 102a, 104a, 139a-140a)

In 2005, inmate Bobby Bowden filed a petition in state court alleging that he should be released from prison unconditionally because his life sentence imposed for a murder committed in 1975 was by statute an eighty-year sentence and because the application of good behavior credits to that sentence would have cut it by more than half. The North Carolina Court of Appeals ultimately agreed with

Bowden that the version of N.C. Gen. Stat. § 14-42[4] in effect for offenses committed between April 8, 1974 and June 30, 1978 required that Bowden's "life sentence is considered as an 80-year sentence for all purposes." *State v. Bowden*, 668 S.E.2d 107, 110 (N.C. Ct. App. 2008).[5]

The court in *Bowden* did not resolve the issue of whether Bowden was entitled to immediate unconditional release from prison, nor did it address whether good behavior credits would even apply to the calculation of his unconditional release date. Instead, the court remanded "for a hearing to determine how many sentence reduction credits defendant is eligible to receive and how those credits are to be applied." *Id.*

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[4] The statute provided: "Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punished by fine, by imprisonment for a term not exceeding 10 years, or by both, in the discretion of the court. A sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison." N.C. Gen. Stat. § 14-42 (1974).

[5] The North Carolina Supreme Court initially granted review of the decision of the Court of Appeals, but it subsequently found that review had been improvidently granted. *State v. Bowden*, 683 S.E.2d 208 (N.C. 2009).

Initially, officials at DOC were uncertain as to the effect of the decision in *Bowden*. (Pet. App. 115a-120a) While considering the legal implication of the decision, preparations were made in case any inmates were ordered to be released. (Pet. App. 120a-123a)

Ultimately, DOC Secretary Alvin Keller directed – in compliance with the decision in *Bowden* – that unconditional release dates be calculated as eighty years from the date of conviction for all inmates whose crimes were committed between 1974 and 1978 when the earlier version of N.C. Gen. Stat. § 14-42 was in effect. (Pet. App. 103a, 107a-108a) Because the decision in *Bowden* did not address good behavior credits, Secretary Keller further directed that the unconditional release dates for the *Bowden* group not be reduced by use of good behavior credits. (Pet. App. 102a-103a, 135a-136a, 150a-152a) Although Secretary Keller could have exercised the statutory discretion conferred upon him by the state legislature to apply good behavior credits to the unconditional release dates, he declined to do so for inmates in the *Bowden* group because he thought it appropriate that all prisoners with life sentences should be treated similarly in this respect and because he wanted to continue North Carolina's good public policy of releasing prisoners with life sentences only under parole supervision. (Pet. App. 104a, 119a-120a, 123a-125a, 145a-146a, 152a)

2. Application of Good Behavior Credits to Jones.

In 1975, a jury found Jones guilty of first-degree murder in the "cold-blooded killing" of William B. Turner, Sr. (Pet. App. 52a, 66a) He was sentenced to life imprisonment when his original death sentence was vacated, and his life sentence has never been modified or amended by the courts. (Pet. App. 53a, 157a)

Jones's life sentence was imposed for a murder he committed during the time period when N.C. Gen. Stat. § 14-2 provided that "[a] sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years." Recognizing the eighty-year provision of N.C. Gen. Stat. § 14-42 in effect for Jones's crime, DOC utilized good time credits earned by Jones in two ways: to determine his custody classification; and to reduce the twenty years (one-fourth of eighty years) he would have to serve before being eligible for parole. (Pet. App. 158a-159a) Although Jones became eligible for custody promotion in 1982 and parole in 1986 as a result of the application of good time credits, he was not promoted to minimum custody until 1992 and the Parole Board has denied him parole on numerous occasions. (Pet. App. 159a)

In addition to applying good time as described above, DOC gave Jones opportunities to earn other good behavior credits denominated gain and merit

time. Gain and merit time earned by Jones was recorded but never applied in any way. The times were recorded in case Jones succeeded in persuading the Governor to commute his sentence. If so, good, gain, and merit time would be applied to calculate a release date. (Pet. App. 98a, 102a, 156a-158a)

Prior to 2009, no expiration or release date for Jones's life sentence had been calculated by DOC. Instead, agency records showed his release date as "life" or "99/99/99" and time remaining to be served as "99999." (Pet. App. 157a-158a, 161a) Following the decision in *Bowden*, DOC calculated Jones's unconditional release date as February 27, 2055. (Pet. App. 161a)

3. Proceedings Below. On November 18, 2009, Jones filed a petition in Superior Court claiming as follows: (i) his life sentence was the same as a sentence of eighty years because he committed the murder in 1975; (ii) by application of good behavior credits, he had completed service of eighty years even though he had been in prison for less than thirty-five years; and (iii) he was entitled to unconditional release from prison. Following a hearing in Superior Court, the court granted the petition. (Pet. App. 39a-66a)

The North Carolina Supreme Court reversed. (Pet. App. 1a-32a[6]) Three justices joined in a plurality opinion, two other justices filed a concurring opinion, and two justices dissented. (Pet. App. 1a-32a)

After concluding that DOC had the authority under state law to make and interpret its own regulations concerning the application of good behavior credits, the court considered whether Jones had been deprived of his constitutional right to due process as the result of DOC's interpretation that he is not entitled to application of the credits toward his unconditional release date. The court, recognizing that a liberty interest may be created through state regulations, held that Jones "has not been denied credits in which he has a constitutionally protected liberty interest" because he "has received the awards to which he is entitled for the purposes for which he is entitled." *Jones*, 698 S.E.2d at 55-56 (emphasis added). This is so, the court concluded, because as to prisoners with life sentences "[n]o regulation explicitly provides that credits are to be used to calculate an unconditional release date." *Id.* at 57.

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[6] On the same day, the court filed its opinion in *Brown v. N.C. Dep't of Corr.*, 697 S.E.2d 327 (N.C. 2010). The court reversed the order of the trial court "[f]or the reasons stated in *Jones v. Keller*."

The court also considered Jones's contention that an ex post facto violation had resulted from the failure to unconditionally release him because "DOC's interpretation of its regulations has retroactively increased the punishment for his offense after the offense was committed." *Id.* at 57. Recognizing that legislation retroactively altering sentence reduction credits in effect when a crime was committed can amount to an ex post facto law, the court held there was no ex post facto violation because Jones did "not allege that any legislation or regulation has altered the award of sentence reduction credits" and because DOC had not "changed its interpretation of its applicable regulations." *Id.* at 57.

The court did not reverse the trial court's order as a result of balancing any liberty interest Jones had against public safety. Only *after* finding Jones had no liberty interest at all because no state law required application of good behavior credits to unconditional release did the court even discuss whether any liberty interest would be de minimis.

In his concurring opinion, Justice Newby further explained the court's decision. He first stated that by its legislation in 1974 "the General Assembly never abolished life sentences." *Id.* at 58 (Newby, J., concurring). He further found that because the statutes and regulations governing good behavior credits "make no attempt to set forth the specific

purposes for which time credits are to be applied," DOC's interpretation that the statutes and regulations do not require application of credits to calculate unconditional release dates for life inmates was reasonable and worthy of deference. As a result, he concluded, "life inmates like Jones can claim no liberty interest in having time credits applied to calculate their unconditional release dates." *Id.* at 59.

REASONS WHY THE WRIT SHOULD BE DENIED

No statute or regulation in North Carolina has ever explicitly given prisoners with a life sentence any right to have good behavior credits applied to reduce the date on which the prisoner must be unconditionally released. To the extent that regulations have stated that credits are to be awarded to "all prisoners," those regulations are ambiguous because it is impossible for the credits to be used for the reduction of unconditional release dates for some prisoners. DOC's consistent interpretation of the regulations that good behavior credits are applied in a limited way to prisoners with a life sentence is eminently reasonable.

Without a doubt, life sentences imposed for murder and other serious offenses committed between 1974 and 1978 must be treated as eighty-year sentences for all purposes. But because there has never been a state

law requirement that prisoners with life sentences have their good behavior credits used to reduce unconditional release dates and because DOC has reasonably interpreted its own regulations, the North Carolina Supreme Court correctly held there was no due process or ex post facto violation in this case.

I. JONES'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BECAUSE HE HAD RECEIVED ALL AWARDS TO WHICH HE WAS ENTITLED UNDER STATE LAW.

A. THE DECISION BELOW WAS IN ACCORDANCE WITH THIS COURT'S DUE PROCESS JURISPRUDENCE.

Jones contends the North Carolina Supreme Court erred by holding that his due process rights were not violated because good time credits reducing his unconditional release dates were "taken away." (Pet. App. 24a) Because no statute or regulation requires application of good behavior credits to reduce the date on which a prisoner with a life sentence must be unconditionally released and because DOC's interpretation of its own regulations is reasonable and lawful, the North Carolina Supreme Court correctly concluded that under state law Jones had received all the credits to which he was due. And because Jones received all the credits to which he was due and

remains lawfully incarcerated, the court did not err by holding that his due process rights were not violated.

"[A] State may create a liberty interest protected by the Due Process Clause through its enactment of certain statutory or regulatory measures." *Hewitt v. Helms*, 459 U.S. 460, 469 (1983). Although there is no constitutional right to credit for good behavior while in prison, an inmate has a cognizable liberty interest in a shortened prison term resulting from the application of good behavior credits under state law. *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

In this case, the North Carolina Supreme Court held that Jones remains lawfully incarcerated because "he has not been denied credits in which he has a constitutionally protected liberty interest." *Jones*, 698 S.E.2d at 56. It correctly based this decision on its conclusion that under state law Jones was not entitled to have his good behavior credits applied to his unconditional release date.

No North Carolina statute has ever required DOC to grant good behavior credits to Jones for any purpose. Except for prisoners who were sentenced under the Fair Sentencing Act – which Jones was not – the state legislature has for the entire time in which Jones has been imprisoned granted absolute discretion to the DOC Secretary to provide for regulations related to good behavior.

Similarly, no North Carolina regulation has ever explicitly required DOC to grant good behavior credits to Jones for the specific purpose of calculating his unconditional release date. It is true that, pursuant to the discretion given its Secretary, DOC has implemented regulations that have made "[a]ll inmate[s], including . . . those with life terms" eligible for good time credits and "[a]ll inmates who perform work" eligible for gain time credits. Absent any plain language showing how those credits should be applied, DOC from the first time those regulations were in effect has interpreted them as applying in a limited way to prisoners with life sentences. Specifically, DOC has always interpreted the regulations as applying to prisoners with life sentences only for the purposes of custody grade and parole eligibility. DOC has never interpreted them as enabling prisoners with life sentences to obtain early release outside the context of parole.

Jones, like other prisoners sentenced for the most serious offenses committed between 1974 and 1978, was sentenced to life imprisonment. Although North Carolina law specified that his sentence be "considered as a sentence for a term of 80 years," DOC has always treated Jones and the other prisoners sentenced to life imprisonment during that period of time the same as all other prisoners with life sentences – *i.e.*, DOC has always interpreted the regulations as applying to them

only for purposes of affecting their custody grade and parole eligibility.

The primary issue in this case is whether, as a state-law matter, DOC has lawfully interpreted its own regulations, taking into account the deference agencies are accorded when construing their own regulations. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (holding that an "agency's interpretation must be given *controlling weight* unless it is plainly erroneous or inconsistent with the regulation") (quotation marks omitted). The answer is yes – even if DOC had mistakenly thought (prior to *Bowden*) that N.C. Gen. Stat. § 14-42 treats Jones's sentence as an eighty-year sentence only for limited purposes. DOC's interpretation of its own regulations is not clearly erroneous nor inconsistent with the regulations themselves.

The regulations at issue here are ambiguous, for they apply on their face to inmates serving *indeterminate* life sentences even though credits could never reduce the amount of time served by them (apart from their impact on parole eligibility). Given that the regulations' language can be read to apply in that particular way to some prisoners with life sentences, their language can likewise be read to apply in that particular way to the 1974-1978 prisoner with life sentences.

To be sure, DOC could have treated the 1974-1978 prisoners the same way it treated other fixed-sentence prisoners; but the plain language did not mandate that route over the one DOC chose. For the *Bowden* group of life prisoners, as noted above, "[n]o regulation explicitly provides that credits are to be used to calculate an unconditional release date." *Jones*, 698 S.E.2d at 57.

Even though DOC Secretaries interpreted N.C. Gen. Stat. § 14-2 for more than thirty years in a way now found to be incorrect, the fact remains that no Secretary has ever exercised the absolute discretion given to him by statute to grant credits toward unconditional release to inmates with life sentences, including those sentenced from crimes committed between 1974 and 1978. And the DOC Secretary has declined to do so now.

It is true that some of the amendments made to DOC rules long after Jones committed murder and was sentenced for that murder provide that good behavior credits are sentence reduction credits "applied to an inmate's sentence that reduce the amount of time to be served." Those versions of the rules nevertheless do not provide that the credits must be applied to life sentences.[7]

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[7] The only mention of "unconditional release" in DOC's regulations and rules appears in the 2007 version of

Because DOC's interpretation of its own ambiguous regulations was a reasonable and lawful interpretation, the North Carolina Supreme Court correctly held, as a state-law matter, that Jones "has no State-created right to have his time credits used to calculate his eligibility for unconditional release." *Id.* at 56. The court's holding that Jones has not been denied his due process rights inevitably follows. His sentence has not expired on account of good behavior credits, and it therefore does not violate due process to continue his incarceration.

Only *after* the North Carolina Supreme Court correctly held that Jones had no liberty interest in the application of good behavior credits to an unconditional release date did the court address whether a liberty interest, "if any," would be de minimis in comparison to the State's interest. *Jones*, 698 S.E.2d at 56. It was while discussing this

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DOC's rule. The rule provides that "[f]or inmates sentenced under the Fair Sentencing Act, Good Time reduces the time required to be served for unconditional release from prison." State of North Carolina Department of Correction, Division of Prisons, Policy and Procedure § .0110 (2007). (Pet. App. 200a) Jones was not sentenced under the Fair Sentencing Act. But even for prisoners sentenced under the Fair Sentencing Act, it would be impossible for good time credits to be applied to an inmate's sentence of life imprisonment for the purpose of reducing time to be served.

balancing that the court reiterated that Jones had "no State-created right to have his time credits used to calculate his eligibility for unconditional release." *Id.* at 56. The concurring justices further made clear that the basis for the decision of the court was not the balancing of interests when they stated that "the relevant statutes and regulations do not give inmates sentenced to life imprisonment" the right to have good behavior credits applied to their unconditional release dates and that DOC has never "vested life inmates with such a right through its manner of administering those statutes and regulations." *Id*. at 59 (Newby, J., concurring). As a result, they found, "life inmates like Jones can claim no liberty interest in having time credits applied to calculate their unconditional release date." *Id*. Where the Court correctly found, based on state law, that no statute or regulation required application of good behavior credits to the calculation of Jones's unconditional release date, a finding that any liberty interest was de minimis is of no consequence.

B. THE DECISION BELOW WAS IN ACCORDANCE WITH THIS COURT'S EX POST FACTO JURISPRUDENCE.

Jones also contends the North Carolina Supreme Court erred by holding there was no ex post facto violation because DOC's interpretation of its regulations has "inflict[ed] a greater punishment, than

the law annexed to the crime, when committed." *Collins v. Youngblood*, 497 U.S. 37, 42, (1990). Because the North Carolina Supreme Court correctly concluded that under state law petitioners had never been awarded and had never earned credits toward unconditional release, it also correctly held there was no ex post facto violation in this case.

In *Lynce v. Mathis*, 519 U.S. 433 (1997), this Court considered whether a Florida statute cancelling early release credits for certain classes of offenders after those credits had been awarded – indeed, even after the inmates were released from custody – resulted in an ex post facto violation. This Court held that the statute unconstitutionally disadvantaged the prisoner "because it resulted in his rearrest and prolonged his imprisonment." *Id*. at 446-47.

This case is distinguishable from *Lynce*. In *Lynce*, the Florida legislature enacted a law providing for early release credits, the credits in fact were awarded to the prisoner, and he was released. The Florida legislature actually enacted a law cancelling credits already received by certain classes of offenders. By contrast, in the present case no statute or regulation requires prisoners such as Jones to receive good behavior credits toward unconditional release. Such credits never have been awarded to petitioners, who have not been released, and the North Carolina

General Assembly has not enacted any law cancelling credits already received by petitioners.

The North Carolina Supreme Court did not err in its conclusion that there was no ex post facto violation because DOC has not taken away from petitioners anything already awarded or earned. The undisputed facts show that DOC, pursuant to its discretionary authority, has never awarded credits toward an unconditional release date to prisoners with life sentences. Nor has DOC changed its longstanding interpretation of its regulations. Finally, DOC's interpretation of its regulations is reasonable and lawful in light of the fact that none of the regulations requires application of credits toward unconditional release of life prisoners.

II. THE DECISION OF THE NORTH CAROLINA SUPREME COURT DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS.

Jones contends the North Carolina Supreme Court's decision is in conflict with decisions of other courts. Specifically, he argues that "North Carolina is now a dramatic outlier on the question of whether States must honor sentence-reduction credits earned and awarded under previously established regimes." (Pet. App. 29a-30a) Not so. All of the conflicts alleged by Jones are based on his mistaken premise that DOC officials violated the Due Process and *Ex Post Facto*

Clauses by depriving him of credits to which he was entitled under state law. Because, as shown in Section I, *supra*, they did not, the purported conflicts evaporate.

As noted above, the North Carolina Supreme Court held that petitioners' constitutional due process rights were not violated "[b]ecause Jones has received the awards to which he is entitled." *Jones*, 698 S.E.2d at 56. Only *after* concluding that under state law no liberty interest had been created because petitioners had not been awarded and had not earned good time credits toward their unconditional release dates did the court address whether any liberty interest would be de minimis.

In most of the cases cited by petitioners in support of their contention that the decision of the North Carolina Supreme Court is an outlier, the courts found prisoners were deprived of liberty interests when credits previously awarded were rescinded or when laws were amended in such a way that credits could no longer be earned. *See, e.g., Teague v. Quarterman*, 482 F.3d 769, 778-80 (5th Cir. 2007) (rejecting concept of de minimis due process violation where inmate was "deprived of previously earned good-time credits"); *Raske v. Martinez*, 876 F.2d 1496, 1502 (11th Cir.) (finding there is no doctrine of "constitutional mistake" that would justify the application of a modified statute to limit gain time provided to a prisoner by an earlier

version of the statute), *cert. denied*, 493 U.S. 993 (1989); *Secretary v. Demby*, 890 A.2d 310, 331 (Md. 2006) (finding an ex post facto violation where credits had not been revoked but an amendment to a law had "curtailed the availability of future credits"). In this case, as the North Carolina Supreme Court found, no credits were rescinded or earned and no regulations have been changed in such a way as to deprive petitioners from any entitlement to credits toward unconditional release.

Similarly, in *Smith v. Scott*, 223 F.3d 1191 (10th Cir. 2000), a prisoner had credits deducted after being informed that he had been mistakenly awarded them. The court held there was an ex post facto violation resulting from the deduction of the credits where a 1997 amendment to a rule was a substantive change that was not foreseeable in 1992. In so holding, the court noted that although an agency's interpretation of its own rules was entitled to due deference, "[a]n agency's statement that an amendment is nothing more than a clarification cannot be accepted as conclusive because such a result would enable the [agency] to make substantive changes in the guise of clarification." *Id.* at 1195 (quotation marks omitted).

In this case, unlike in *Smith*, petitioners were never awarded and never earned any credits that have now been taken away. As argued above, DOC's interpretation of its own regulations is reasonable and

lawful where those regulations are ambiguous and where none of the regulations has ever explicitly provided for the application of credits to unconditional release.

Petitioners have failed to show that the decision of the North Carolina Supreme Court conflicts with decisions of other courts. Unlike other decisions cited by petitioners, the decision here did not involve any retroactive rescission of credits or any modification or reinterpretation of a regulation to the detriment of petitioners because no state law ever required application of good behavior credits for the purpose of shortening a life prisoner's time before unconditional release.

III. THE ISSUES RAISED ARE NOT OF NATIONWIDE IMPORTANCE.

Although Jones contends the North Carolina Supreme Court has misinterpreted and misapplied this Court's decisions, he in essence is attacking the court's determination that under state law he was not entitled to the application of his good behavior credits to calculate an unconditional release date. As demonstrated above, the court correctly held that no state law required application of credits in such a way. That decision is not one of nationwide importance for which this Court should grant review.

Jones was sentenced to life imprisonment after his death sentence for a cold-blooded murder was vacated. He has had and should continue to have opportunities to be paroled. His assertion that he should be released with no conditions less than halfway through the eighty years he is required by state statute to serve is nothing more than an attack on North Carolina law. The North Carolina Supreme Court, the ultimate authority on North Carolina law, correctly held that no statute or regulation in North Carolina required application of Jones's good behavior credits to his unconditional release date and that DOC's interpretation of its own regulations was lawful. There is no reason for this Court to review that decision.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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March 2011 *Counsel of Record