STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
FAYE B. BROWN, Petitioner, v. THE NORTH CAROLINA DEPARTMENT OF CORRECTION, ALVIN KELLER, in his capacity as Secretary of the Department of Correction, and KENNETH ROYSTER, in his capacity as Superintendent of Raleigh Correctional Center for Women, Respondents.	File No. 09CVS23746 (related to Martin County File No. 75CR3812)[1]

MEMORANDUM OPINION AND ORDER

This matter comes before this Court on Faye B. Brown's Petition for Writ of Habeas Corpus filed November 23, 2009. The Court held a hearing on this Petition on December 11, 2009. Present at the hearing were Faye B. Brown, Petitioner; Sarah Jessica Farber, Esq., Emily Coward, Esq., and Mary Pollard, Esq., counsel for Petitioner; and Tiare Smiley, Esq., and Elizabeth Parsons, Esq., counsel for Respondents. The Court has considered the record proper in this case, including the evidence presented at the hearing, the arguments and submissions of both sides, and a full review of the Martin County court file related to the Petition filed in this case, including the North Carolina Supreme Court's decision addressing Petitioner's direct appeal of her conviction for first degree murder, *see State v. Squire* et al., 292 N.C. 494 (1977), *cert. denied sub nom. Brown v. North Carolina*, 434 U.S. 998, 54 L. Ed. 2d 493 (1977).

The Court notes for the record that the North Carolina Advocates for Justice moved for Leave to File an *Amicus Curiae* Brief in this matter. The Court has considered this Motion and finds that it has merit. Accordingly, the Motion of the North Carolina Advocates for Justice for Leave to File an *Amicus Curiae* Brief in this matter is

[1] Although Petitioner's sentence was imposed in Martin County, the undersigned judge as presiding in Wake County Superior Court does have the requisite jurisdiction and appropriate venue to address the matters presented in the Petition. *See* N.C. Gen. Stat. § 17-6 ("Application for the writ shall be made in writing, signed by the applicant . . . [t]o any one of the superior court judges, either during a session or in vacation."); *see also, e.g.*, *McEachern v. McEachern*, 210 N.C. 98, 102 (1936) ("[A]ny judge, anywhere, has the power to issue the writ . . . .").

ALLOWED, and the Court will consider the Brief as it relates to the issues presented in this case.

Based on the consideration of the record proper as noted above, the Court makes the following Statement of Governing Law, Findings of Fact, and Conclusions of Law.

STATEMENT OF GOVERNING LAW

1. The relevant North Carolina sentencing regime for the purposes of this Order is best described as the "pre-Fair Sentencing" regime. Under pre-Fair Sentencing, crimes were divided up into either felonies or misdemeanors. There were no individual classes of offense as have been provided for in Fair Sentencing and Structured Sentencing.

Punishment for First Degree Murder

2. At the time that Petitioner's trial took place, first degree murder was punishable exclusively by the death penalty. *See* N.C. Gen. Stat. § 14-17 (Cum. Supp. 1975); 1973 N.C. Sess. Laws, ch. 1201, s.1;[2] *see also State v. Niccum*, 293 N.C. 276, 282-83 (1977). In reviewing North Carolina's capital sentencing regime as it existed at the time of Petitioner's trial, the United States Supreme Court ruled that the death penalty provision in N.C. Gen. Stat. § 14-17 that was in effect at the time of Petitioner's trial was unconstitutional. *See Woodson v. North Carolina*, 428 U.S. 280, 305, 49 L. Ed. 2d 944, 961-62 (1976). The General Assembly then amended N.C. Gen. Stat. § 14-17 in 1977 to provide that the punishment for first degree murder was "death or imprisonment in the State's prison for life as the court shall determine pursuant to [N.C. Gen. Stat. §] 15A-2000." *See* 1977 N.C. Sess. Laws, ch. 406, s. 1.

[2] The version of N.C. Gen. Stat. § 14-17 in effect at the time of Petitioner's trial read as follows: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death."

Meaning of "Life Imprisonment"

3. In 1973, the North Carolina General Assembly amended N.C. Gen. Stat. § 14-2, a statute dealing with sentencing in felony cases, to include the following language effective April 8, 1974:

> Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punished by a fine, by imprisonment for a term not exceeding ten 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. § 14-2 (1974); *see* 1973 N.C. Sess. Laws, ch. 1201, s. 6. The General Assembly later repealed the "80 years" provision of this statute effective June 30, 1978. *See* 1977 N.C. Sess. Laws, ch. 711, s. 15. Life imprisonment was defined as "life without parole" in 1995. *See* N.C. Gen. Stat. § 14-17 (1995); 1993 N.C. Sess. Laws, ch. 21, ss. 1, 2, 5 (Extra Sess. 1994).

Calculation of Prison Credit Earned

4. A defendant convicted of a criminal offense is entitled to receive credit against her sentence for any time she has been in jail or prison, whether before or after trial. N.C. Gen. Stat. § 15-196.1 provides in relevant part that

> [t]he minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.

N.C. Gen. Stat. § 15-196.1 (2009).

5. The General Assembly has also authorized the Department of Correction to reward prisoners with additional sentence reduction credits for different forms of good

conduct. At the time Petitioner was originally sentenced, N.C. Gen. Stat. § 148-13 provided as follows:

> The rules and regulations for the government of the State prison system may contain provisions relating to grades of prisoners, rewards and privileges applicable to the several classifications of prisoners as an inducement to good conduct, allowances of time for good behavior, the amount of cash, clothing, etc., to be awarded prisoners after their discharge or parole.

N.C. Gen. Stat. § 148-13 (Cum. Supp. 1975) (amended 1979).

6. Prior to 1976, the Department of Correction accomplished the award of sentence reduction credits through a formal internal policy. As part of the new North Carolina Administrative Code that followed the passage of the North Carolina Administrative Procedure Act, *see* N.C. Gen. Stat. § 150B-1 *et seq.*, the Department of Correction promulgated regulations related to inmate conduct that included the award of sentence reduction credits for good conduct and productive work. *See, e.g.*, 5 N.C.A.C. 2B .0100 *et seq*. These provisions became effective on February 1, 1976.

7. On or about June 30, 1977, the North Carolina Administrative Code contained provisions related to a regime for the award of "good time," "gained time,"[3] and "merit time" sentence reduction credits to inmates housed in the North Carolina Department of Correction. The relevant versions of the Administrative Code in effect at that time read as follows:

> .0101 PURPOSE
>
> This policy established a method of computing Good Time for acceptable behavior and earned Gained Time for behavior which would not normally be required of an inmate confined within any of the facilities within the Division of Prisons. All inmate[s], including [Committed Youth Offenders] and those with life terms, shall be allowed a maximum of 107 days Good Time for acceptable behavior for each year served. Good Time shall be subjected to forfeiture for misbehavior as determined by appropriate disciplinary action. Regular Good Time shall be computed on a pro rata basis and shall be equivalent of 8.94 days per 30.4 day month or 29.411% of total sentence length.

[3] While the version of these regulations in effect at the time Petitioner was sentenced to life imprisonment refers to "gained time," later versions of the regulations refer to "gain time." The Court notes that it has fully reviewed all relevant law relating to the Department of Correction's authority to award sentence reduction credits and concludes that the two terms both refer to credits for work- and study-related activities and that there is no difference between the two terms.

.0102 APPLICATION

All inmates who perform work, whether full-time or part-time or participate in specific training programs which would assist in their productive reentry into the community, shall be allowed additional Gained Time which shall be regulated as Gained Time I, II, and III. Gained Time shall not be subjected to forfeiture and will be administered as follows:

(1) Gained Time I. In addition to the 8.94 days per 30.4 day month of regular Good Time, inmates who perform short-term work assignments (requiring a minimum of 4 hours of actual work per day) or who participate in on-site academic and vocational training programs shall be eligible to receive an additional 2.09 days per month Gained Time for a total of 11.03 days per 30.4 [day] month. Such additional Gained Time shall not be subject to forfeiture for misbehavior and shall be the equivalent of 6.89% of the remaining sentence.

(2) Gained Time II. In addition to the regular Good Time of 8.94 days per 30.4 day month, all inmates who satisfactorily perform job assignments requiring a minimum of 6 hours work per day or who perform acceptably in part-time work release or study release programs shall be allowed an additional 3.81 days Gained Time for a total of 12.75 days per 30.4 day month. Such additional Gained Time shall not be subject to forfeiture for misbehavior and shall be the equivalent of 12.55% of the remaining sentence.

(3) Gained Time III. In addition to regular Good Time of 8.94 days per 30.4 day month, all inmates performing assigned job requiring a minimum of 6 hours per day with requirements for special skills or specialized responsibilities such as specialized maintenance, cook, operator, canteen operator, or hospital technician, as well as inmates participating in full-time study release or work release shall be authorized to receive an additional 5.77 days Gained Time for a total of 14.71 days per 30.4 day month. Such additional Gained Time shall not be subjected to forfeiture for misbehavior and shall be the equivalent of 18.98% of the remaining sentence.

(4) Emergency Gained Time. All inmates who perform work beyond a regular 40 hour work week during extremely inclement weather (below 20 degrees Farenheit [sic] – Chill factor), or under emergency conditions shall be compensated on the basis of 1 day emergency Gained Time for 1 day worked. The length of the day shall be determined by the nature of the work assignment to be performed under the conditions mentioned above. Such Gained Time shall be reported separately on the history card attachment (flimsy) and shall not be subjected to forfeiture for misbehavior.

> .0103 PROCEDURE
>
> . . . .
>
> (d) Meritorious Gained Time.[4] The Director of Prisons may award additional Gained Time to an inmate for exceptionally meritorious behavior. Meritorious Gained Time shall not be subject to forfeiture.
>
> . . . .

5 N.C.A.C. 2B .0101, 0102, .0103 (Feb. 1, 1976).

8. In 1979, the North Carolina General Assembly enacted the Fair Sentencing Act. *See* N.C. Gen. Stat. § 15A-1340.1 *et seq.* (1981) (repealed); 1979 N.C. Sess. Laws, ch. 760, s. 2. This act applied to offenses committed on or after July 1, 1981.[5]

9. After the Department of Correction's initial promulgation of regulations governing the award of sentencing reduction credits and the enactment of the Fair Sentencing regime, the General Assembly revised N.C. Gen. Stat. § 148-13 to address further how this system of rewards would work. The amended version of this statute provided in relevant part that:

> (b) With respect to prisoners who are serving prison or jail terms for [pre-Fair Sentencing] offenses . . . and prisoners serving a life term for a Class C felony, the Secretary of Correction may, in his discretion, issue regulations regarding deductions of time from the terms of such prisoners for good behavior, meritorious conduct, work or study, participation in rehabilitation programs, and the like.

N.C. Gen. Stat. § 148-13(b) (1982) 4 (repealed[6]); 1979 N.C. Sess Laws, ch. 760, s. 4.

10. The provision in § 148-13 as set forth in Statement of Relevant Law No. 9 was repealed effective October 1, 1994, pursuant to the implementation of Structured Sentencing, but the law repealing that provision contained a savings clause for those

[4] While there are different references to "meritorious gain time," "meritorious time," and "merit time" in the relevant regulations and exhibits in this case, the Court concludes that all of these refer to credits for "exemplary behavior" and that there is no difference between any of these terms. The Court will hereinafter refer to this type of credit as "merit time."

[5] Fair Sentencing was repealed upon the enactment of North Carolina's Structured Sentencing regime, which applies to offenses committed on or after October 1, 1994. *See* N.C. Gen. Stat. § 15A-1340.10 *et seq.*; 1993 N.C. Sess. Laws, ch. 538, s. 1.

[6] *See* 1993 N.C. Sess. Laws, ch. 538, s. 32.

sentences imposed in Fair Sentencing and pre-Fair Sentencing cases, providing that those sentences would continue to be calculated according to the relevant pre-Structured Sentencing provisions. *See* 1993 N.C. Sess. Laws, ch. 24, s. 14(b) (Extra Sess. 1994) ("This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. . . . [T[he statutes that would be applicable to those [Fair Sentencing and pre-Fair Sentencing] sentences but for the provisions of this act remain applicable to those . . . sentences.")

11. The Department of Correction amended its regulations on a number of occasions over time to change the rate at which inmates could be awarded good time, gain time, and merit time credits. *See, e.g.*, 5 N.C.A.C. 2B .0102(a) (February 1, 1982) (providing for twelve days of good time credits per month); 5 N.C.A.C. 2B .0102(a) (September 1, 1983) (providing one day good time credit for each day served with good conduct).

12. The good time, gain time, and merit time regulations promulgated by the Department of Correction as contained in the North Carolina Administrative Code were repealed effective January 1, 1994. *See* 1991 N.C. Sess. Laws, ch. 477, s. 3.

13. After the repeal of the administrative regulations in 1994, the Department of Correction began awarding sentence reduction credits pursuant to the Division of Prisons' internal "Policy and Procedure" [7] *See, e.g.*, *Department of Correction, Division of Prisons Policy and Procedure*, ch. B, s. .0100 *et seq.* ("Sentence Reduction Credits") (2007).[8] The methods for computing sentence reduction credits in the "Policy and Procedure" are similar in both form and substance to those set forth in the earlier administrative code regulations. *Compare, e.g.*, 5 N.C.A.C. 2B .0103(a)(1) (September 1, 1983) ("In addition to the Regular Good Time credits, inmates who perform short-term work assignments and/or who participate in specific training programs . . . shall receive

[7] After the repeal of the administrative regulations and the repeal of the relevant version of N.C. Gen. Stat. § 148-13 that authorized those regulations, the authority for the Department of Correction's "Policy and Procedure" as it relates to sentence reduction credits continues to come from the savings clause found in 1993 N.C. Sess. Laws ch. 24, s. 14(b) (Extra Sess. 1994) as described above in Statement of Governing Law No. 10.

[8] With the stipulation of both sides in this case, the Court takes judicial notice of the Policy and Procedure adopted by the Department of Correction.

credit at the rate of two days per month.") *with, e.g.*, *Policy and Procedure*, ch. B, s. .0112 (2007) ("Gain Time is sentence reduction credit awarded to eligible inmates [serving pre-Structured Sentencing sentences] for their participation in work and/or program activities. . . . In addition to Good Time credits, inmates who perform work assignments or participate in full time programs that are rated as Gain Time I may receive an additional two days per month, deducted from their sentence [sic]."[9]

The Bowden *Case*

14. On or about November 8, 2008, the North Carolina Court of Appeals issued its decision in *State v. Bobby E. Bowden*, ___ N.C. App. ___ (No. COA08-372) (November 8, 2008). The defendant in *Bowden* was seeking a declaration that the "life sentence" imposed in his case at a time when N.C. Gen. Stat. § 14-2 was in effect was actually a determinate term of eighty years. Having earned sentence reduction credits based on the Department of Correction's rules, Bowden contended that he was entitled to those sentence reduction credits against the eighty-year term provided for in § 14-2. In addressing his claim, the Court of Appeals concluded that

> N.C. Gen. Stat. § 14-2 (1974) treats defendant's life sentence as an 80-year sentence for all purposes. . . . We hold that N.C. Gen. Stat. § 14-2 (1974) requires that defendant's life sentence is considered as an 80-year sentence for all purposes. We reverse the trial court's order and remand for a hearing to determine how many sentence reduction credits defendant is eligible to receive and how those credits are to be applied.

Bowden, ___ N.C. App. at ___, slip op. at 7.

15. On or about April 30, 2009, the North Carolina Supreme Court allowed the State of North Carolina's petition for discretionary review of the decision of the Court of Appeals in *Bowden*. *See State v. Bowden*, 363 N.C. 258 (2009).

16. On or about October 9, 2009, the North Carolina Supreme Court declined to address the merits of the decision of the Court of Appeals in *Bowden* and issued a decision that it had improvidently allowed discretionary review in the case. *State v. Bowden*, ___ N.C. ___ (October 9, 2009) (No. 514PA08). The mandate for the Supreme

[9] Section .0109 of chapter B of the "Policy and Procedure" also provides that "[t]his policy does not establish procedures for parole eligibility." *Policy and Procedure*, ch. B, s. .0109.

Court's decision issued on or about October 29, 2009. *See* Rule 32, North Carolina Rules of Appellate Procedure (2009).

FINDINGS OF FACT

1. On or about September 2, 1975, Petitioner was arrested and charged with the murder of Guy Thomas Davis, Jr. The facts related to the murder of Mr. Davis are briefly summarized as follows. On or about September 2, 1975, the Jamesville branch of Branch Bank & Trust was robbed by a man (later identified as Joseph Seaborn) carrying a sawed-off shotgun and a woman (later identified as Petitioner) carrying a pistol. Witnesses saw the man and woman in the bank parking lot next to a brown Pontiac automobile that was being driven by a third person (later identified as Frankie Jerome Squire). Not long after the robbery, North Carolina State Highway Patrol Trooper Guy Thomas Davis, Jr., stopped a brown Pontiac automobile at an intersection in Williamston for a traffic violation. As Trooper Davis approached the automobile, an occupant of the Pontiac shot him in the throat with the shotgun. Trooper Davis died at the scene. Around forty-five minutes later, police found the brown Pontiac at the bottom of a creek bed, and then set out on a canvass of the surrounding area, which included a soybean field. Squire, Seaborn, and Brown were found hiding in the soybean field. Money identified as having been from the robbery and a pistol were found near where the three had been hiding. A later, more detailed search of the area with a metal detector resulted in the shotgun being recovered. Seaborn admitted having been involved in the robbery and having shot Trooper Davis, although he said the gun discharged by accident. Squire admitted having been the driver of the car and that he heard the gun discharge from the back seat when Trooper Davis approached the car. Brown admitted having been involved in the robbery and having heard the gun discharge when Trooper Davis approached the car.

2. On or about September 29, 1975, the grand jury of Martin County returned a true bill of indictment charging Petitioner with the First Degree Murder of Trooper Davis.

3. On or about January 5, 1976, Petitioner was convicted of first degree murder in Martin County Superior Court. Based on this conviction, Petitioner received a sentence of death. Petitioner's conviction was affirmed on appeal, but the Supreme Court vacated the death sentence pursuant to the United States Supreme Court's

decision in *Woodson v. North Carolina*, 428 U.S. 280, 49 L. Ed. 2d 944 (1976),[10] and remanded the case to Martin County Superior Court for the imposition of a sentence of life imprisonment. *See State v. Squire* et al., 292 N.C. 494 (1977), *cert. denied sub nom. Brown v. North Carolina*, 434 U.S. 998, 54 L. Ed. 2d 493 (1977).

4. On or about June 30, 1977, Petitioner was sentenced in Martin County Superior Court to a term of life imprisonment.

5. Petitioner filed a *pro se* Motion for Appropriate Relief on or about April 24, 1984, alleging (among other things) ineffective assistance of counsel. This Motion for Appropriate Relief was denied by Order of Superior Court Judge James D. Llewellyn on or about August 2, 1984.

6. The Department of Correction has historically entered sentences of life imprisonment in its prison records as "9999998" or "LIFE." The Department of Correction records prior to the *Bowden* decision contain these descriptive terms in describing Petitioner's sentence.

7. Petitioner has been given the opportunity to participate in work release and other related programs, and has been awarded good time, gain time, and merit time credits by the Department of Correction based on her conduct and her participation in the aforementioned programs.

8. The Department of Correction has never used good time, gain time, or merit time credits in the calculation of unconditional release dates for inmates who received sentences of life imprisonment, whether those sentences were pre-Fair Sentencing, Fair Sentencing, or Structured Sentencing sentences. The Department of Correction has

---

[10] The Court notes that Petitioner's life sentence, as imposed after the United States Supreme Court's decision in *Woodson* but before the enactment of the 1978 version of N.C. Gen. Stat. § 14-17, was authorized pursuant to 1973 N.C. Sess. Laws, ch. 1201, s. 7:

> In the event it is determined by the North Carolina Supreme Court or the United States Supreme Court that a sentence of death may not be constitutionally imposed for any capital offense for which the death penalty is provided by this Act, the punishment for the offense shall be life imprisonment.

1973 N.C. Sess. Laws, ch. 1201, s.7. *See also, e.g.*, *State v. Davis*, 290 N.C. 511, 547-48 (1976) (citing same).

historically applied good time credits only to parole eligibility calculations, custody determinations, and in the event the Governor commuted a sentence from life imprisonment to a specified term of years.[11] The Department of Correction has historically applied gain time and merit time credits only in the event the Governor commuted a sentence from life imprisonment to a specified term of years.

9. Because Petitioner's sentence was listed in Department of Correction records as "LIFE," the good time, gain time, and merit time credits she earned were never used by the Department of Correction in the calculation of an unconditional release date in her case.

10. After the North Carolina Supreme Court issued its decision in *Bowden*, combined records employees at the Department of Correction generated "OT-50[12] test run" release date calculations for inmates who were sentenced to terms of life imprisonment between April 8, 1974, and June 30, 1978, to determine which inmates, if any, might be eligible for unconditional release pursuant to the *Bowden* decision.

11. At some point between October 9, 2009, and October 22, 2009, staff members at the Raleigh Correctional Center for Women, where Petitioner was housed, initiated conversations with Petitioner about the possibility that she would be released from prison on October 29, 2009, based on the ruling in *Bowden*.

12. On or about October 29, 2009, the mandate on the North Carolina Supreme Court's ruling in the *Bowden* case issued.

13. Petitioner was not released from the Department of Correction on October 29, 2009.

14. On or about November 10, 2009, Secretary of Correction Alvin W. Keller, Jr., issued a memorandum with respect to the calculation of unconditional release dates for

[11] *See* N.C. Constitution, Art. III, § 5(6) ("The Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons.").

[12] "OT-50" refers to the program that the Department of Correction uses to track sentencing reduction credits and calculate unconditional release dates.

the inmates affected by the *Bowden* decision. In that memorandum, Secretary Keller directed that "for each life sentence imposed for crimes during [the April 8, 1974 – June 30, 1978,] time period the unconditional release date shall be calculated as 80 years minus applicable jail credit earned while the prisoner awaited convictions and sentencing." *See* Exhibit D, Affidavit of Alvin W. Keller, Jr.

15. Based on her date of arrest of September 2, 1975, Petitioner had as of December 7, 2009, accrued actual prison credit for time served in an amount of 12,515 days.

16. Pursuant to Secretary Keller's memorandum, the Department of Correction thereafter calculated Petitioner's unconditional release date, and applied Petitioner's credit for time actually served to her eighty-year sentence. As of the date of the entry of this Order, Petitioner's unconditional release date as posted on the "Offender Public Information" portion of the North Carolina Department of Correction website[13] is August 12, 2055.

17. As of December 7, 2009, Petitioner had accrued credits for good time, gain time, and merit time during her incarceration based on her participation in work, study, or other programs in the following amounts:

Good time:	14103 days
Gain time:	2419 days
Merit time:	484 days

Petitioner has also accrued "penalty time" during her incarceration in the amount of 110 days, but has had eighty days of that time restored.[14]

---

[13] *See* http://webapps6.doc.state.nc.us/opi/viewoffender.do?method=view&offenderID=0049355&searchLastName=brown&searchFirstName=faye&listurl=pagelistoffendersearchresults&listpage=1

[14] At the evidentiary hearing in this case, Teresa O'Brien, an employee of the combined records section in the Department of Correction, testified that, with respect to the calculation of Petitioner's accrued credit, there was a mathematical adjustment that resulted in eleven days being subtracted from the total credit attributed to Petitioner. *See* Attachment Z, Affidavit of Teresa O'Brien (noting a negative eleven day credit under "other credits"). O'Brien testified that this adjustment was prompted by a change in the Department of Correction's recordkeeping system a number of years ago. While the Court does not conclude that this eleven day negative

18. There is no evidence that Petitioner accrued any good, gain, or merit time credits prior to her being resentenced to a sentence of life imprisonment on June 30, 1977.

19. The Department of Correction did not apply any of Petitioner's good time, gain time, and merit time credits in the calculation of her unconditional release date.

20. Based on the calculations of the Department of Correction, if Petitioner's good time, gain time, and merit time credit as described in Finding of Fact No. 17 above were applied to her eighty-year sentence, Petitioner's calculated release date would be February 7, 2009.

CONCLUSIONS OF LAW

1. The Court has the requisite jurisdiction to address the matters contained in the Petition.

2. Petitioner has the burden of persuasion in a habeas proceeding in which she contends she is being illegally restrained. *See* N.C. Gen. Stat. § 17-3 ("Every person imprisoned or restrained of his liberty within this State . . . may prosecute a writ of habeas corpus . . . to inquire into the cause of such imprisonment or restraint, and, if illegal, to be delivered therefrom." *See also, e.g.*, *State v. Jones*, 113 N.C. 669, 671-72 (1893).

3. The North Carolina General Assembly has the power to define what a sentence of "life imprisonment" means. *See Bowden*, ___ N.C. App. at ___, slip op. at 7 ("[T]he Legislature merely defines the term of life imprisonment, which it has the authority to do. Our Legislature is granted the power and the authority to define crimes and set punishment for those crimes.") (citation omitted); *see also State v. Allen*, 346 N.C. 731, 737 (1997) (rejecting challenge to life imprisonment without parole statutes and concluding that "the General Assembly alone prescribes the maximum and minimum punishment which can be imposed on those convicted of crimes") (citing *State v. Perry*, 316 N.C. 87, 101 (1986)); *State v. Niccum*, 293 N.C. 276, 282-83 (1977) (noting

---

credit is meaningful given the calculation of earned time as a whole, the Court notes this additional fact for the record.

that the General Assembly "provided that 'a sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of 80 years in the State's prison.'") (quoting 1973 N.C. Sess. Laws, ch. 1201, s. 6); 1973 N.C. Sess. Laws, ch. 1201 (entitled "AN ACT TO AMEND G.S. 14-17 MURDER DEFINED AND PUNISHMENT PROVIDED FOR MURDER, RAPE, BURGLARY, AND ARSON").

4. When Petitioner's life sentence was imposed in 1977, the governing law as enacted by the North Carolina General Assembly - N.C. Gen. Stat. § 14-2 - mandated that Petitioner's "life sentence" was to be considered for all purposes a term of eighty years in the North Carolina Department of Correction. *See Bowden*, ___ N.C. App. at ___, slip op. at 7.

5. Respondents concede that sentence reduction credits would be used for all purposes, including the calculation of an unconditional release date, if Petitioner's sentence was the subject of a gubernatorial commutation to a specified term of years, or if Petitioner had originally been sentenced to a specified term of years. For the purposes of calculating an unconditional release date under North Carolina law, there is no legal basis to distinguish between a specified term of years as imposed pursuant to a gubernatorial commutation, a specified term of years as originally imposed by a court of competent jurisdiction, or a specified term of years imposed and as defined by North Carolina statute. The Court concludes as a matter of law that Petitioner's "life sentence" as defined by the North Carolina General Assembly has at all times since its imposition been a determinate sentence of eighty years in the State's prison.

6. At the time Petitioner's life sentence was imposed, the Department of Correction was obligated to calculate her sentence as an eighty-year term.

7. The Secretary of Correction has been given the authority and discretion under N.C. Gen. Stat. § 148-13 to issue regulations governing the award of good time, gain time, and merit time. The relevant version of § 148-13 in effect at the time the first set of regulations was adopted did not place any limitations on the Secretary's discretion in deciding how to award credits to inmates serving sentences for pre-Fair Sentencing crimes.

8. The Secretary of Correction did promulgate regulations as part of the Administrative Code (and later place into effect the internal "Policy and Procedure") in an exercise of his discretion pursuant to the authority set forth in N.C. Gen. Stat. § 148-13.

9. The regulations (and "Policy and Procedure") placed into effect by the Secretary of Correction pursuant to N.C. Gen. Stat. § 148-13 give the Department of Correction the discretion to award credits to inmates for good time, gain time, and merit time.

10. Based on the Department of Correction's regulations, policy, and procedure, and the conduct of Petitioner as demonstrated through the Department of Correction's records, Petitioner was in the class of inmates authorized to receive good time, gain time, and merit time credits. The Secretary of Correction appropriately awarded Petitioner with good time, gain time, and merit time credits in accordance with the Department of Correction regulations, policy, and procedure based on her conduct while incarcerated.

11. A reviewing court must give broad deference to an agency's interpretation of its own regulations. The agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation itself, and the reviewing court must defer to the agency's interpretation unless a different reading is compelled by the plain language of the regulation or other indications about the intent of the agency at the time of the promulgation of the regulation. *See, e.g.*, *Morrell v. Flaherty*, 338 N.C. 230, 237-38 (1994), *cert. denied sub nom. Morrell v. Britt*, 515 U.S. 1122, 132 L. Ed. 2d 282 (1995).

12. There is nothing in any relevant provision of the North Carolina General Statutes, the North Carolina Administrative Code, the Department of Correction's "Policy and Procedure," or North Carolina case law precedent that specifically authorizes the Secretary of Correction to apply the good time, gain time, merit time, or any other awarded credits only for certain purposes and not for others. Just as the Court of Appeals concluded in *Bowden* that "we are not permitted to interpolate or superimpose provisions or limitations which are not contained in the text of the statute[,] *Bowden*, ___ N.C. App. at ___, slip op. at 6, this Court is not permitted to interpolate or superimpose

provisions or limitations that are not contained in the text of the statutes, the Department's own regulations, policy, or procedure, or any other legal authority.

13. The Court concludes that the Department of Correction's interpretation of its regulations regarding the award of sentence reduction credits is clearly erroneous, and that a different reading is compelled by the plain language of the regulations. The Department of Correction's historical policy of awarding good time, gain time, and merit time only for the purposes of parole eligibility, custody determinations, and sentence commutation calculations is not authorized by North Carolina statute, by the regulations, policy, and procedure the Department of Correction itself placed into effect, or by any North Carolina case law precedent. While the Department of Correction does have the authority either to award or not to award sentence reduction credits, the Department of Correction does not have the discretion to award sentence reduction credits for certain purposes but to deny the use of the same sentence reduction credits for other purposes based on the regulations, policy, and procedure the Department itself put into effect. The North Carolina General Assembly could have enacted laws providing that sentence reduction credits were to be awarded only for the purposes of parole eligibility, custody determinations, and sentence commutation calculations and not for the calculation of an unconditional release date. It did not. The Department of Correction could have put into effect rules awarding sentence reduction credits only for the purposes of parole eligibility, custody determinations, and sentence commutation calculations and not for the calculation of an unconditional release date. It did not.[15]

14. Respondents contend that the decision of the North Carolina Court of Appeals in *Teasley v. Beck*, 155 N.C. App. 282 (2002), *disc. rev. denied*, 357 N.C. 169 (2003), is binding on this Court for the proposition that the Department of Correction has not exercised its discretion to promulgate regulations authorizing the award of sentence reduction credits to inmates serving "life sentences," even if those "life sentences" are defined as eighty-year terms. *See Teasley*, 155 N.C. App. at 292 ("T]he Secretary has not . . . exercised [his] authority under Section 148-13(b) to pass regulations for the application of good, gain, and meritorious time credits for those serving life sentences.") (citation omitted). The Court concludes as a matter of law that *Teasley* does not apply here. In *Teasley*, the Court of Appeals concluded that N.C. Gen. Stat. § 148-13(b) did

[15] It is not lost on the Court that the Department of Correction currently calls good time, gain time, and merit time "sentence reduction credits" in its own 2007 "Policy and Procedure."

not mandate that sentence reduction credits be applied to the inmate's Fair Sentencing Class C life sentence for the purpose of calculating parole eligibility. *See Teasley*, 155 N.C. App. at 288 ("The paramount question remains: what, if any, is the effect of the "sentence reduction credit" regulations on plaintiffs' parole eligibility dates.") This case does not deal with parole eligibility in the context of an indeterminate Fair Sentencing life sentence, but rather the calculation of Petitioner's unconditional release date based on the determinate sentence imposed on Petitioner as defined by the General Assembly.

15. Counsel for Respondents also argued at the hearing on this matter that any ruling in favor of Petitioner could only spring from the Court's award of sentence reduction credits for the purpose of calculating Petitioner's unconditional release date. The Court is not awarding any sentence reduction credits to Petitioner in relation to her unconditional release date. The Department of Correction awarded the sentencing reduction credits to Petitioner pursuant to North Carolina statutory authority and the regulations, policy, and procedure the Department itself put into effect. The Court's role here is limited to interpreting whether the Department has acted in accordance with that statutory authority and the regulations, policy, and procedure the Department itself put into effect. The Court concludes as a matter of the law that the Department has not done so.

16. Because Petitioner earned sentence reduction credits in accordance with Department of Correction regulations, policy, and procedure, she has a "liberty interest" in those credits that is subject to constitutional protection. *See, e.g.*, *Wolff v. McDonnell*, 418 U.S. 539, 558, 41 L. Ed. 2d 935, 952 (1974).

17. Because the Department of Correction's interpretation of its own regulations, policy, and procedure improperly denied Petitioner all the benefits associated with the sentencing reduction credits she earned, the Department of Correction's policy of applying earned sentence reduction credits to Petitioner's sentence only for the purposes of calculating parole eligibility, making custody determinations, and calculating an unconditional release date in the event of a gubernatorial commutation is a violation of Petitioner's due process rights under the United States Constitution.

18. Because the Department of Correction's interpretation of its own regulations, policy, and procedure improperly denied Petitioner all the benefits associated with the

sentencing reduction credits she earned, the Department of Correction's policy of applying earned sentence reduction credits to Petitioner's sentence only for the purposes of calculating parole eligibility, making custody determinations, and calculating an unconditional release date in the event of a gubernatorial commutation is a violation of Petitioner's rights under the "Law of the Land" Clause of the North Carolina Constitution, *see* N.C. Const., Art. I, § 19.

19. Because the Department admits that other inmates serving determinate sentences have been and are still awarded sentence reduction credits that apply to their unconditional release dates, the Department of Correction's policy of applying earned sentence reduction credits to Petitioner's sentence only for the purposes of calculating parole eligibility, making custody determinations, and calculating unconditional release dates in the event of a gubernatorial commutation is a violation of Petitioner's equal protection rights under the United States Constitution.

20. Because the Department of Correction in fact awarded Petitioner sentence reduction credits in the form of good time, gain time, and merit time, Petitioner is entitled under the North Carolina General Statutes and the Department of Correction's regulations, policy, and procedure to have these credits deducted from her sentence for all purposes, including the calculation of an unconditional release date.

21. Given the application of the sentence reduction credits that Petitioner earned pursuant to the Department of Correction's regulations, policy, and procedure, and the earned prison credit for time she has served on her sentence, Petitioner's unconditional release date for the "life sentence" as defined by the North Carolina General Assembly in N.C. Gen. Stat. § 14-2 was February 7, 2009.

22. Petitioner has served the entirety of the "life sentence" imposed in her case.

23. Petitioner has carried her burden of proof showing that she is entitled to relief in this habeas petition.

CONCLUSION

Petitioner was convicted of first degree murder in connection with the cold-blooded killing of North Carolina State Highway Patrol Trooper Guy Thomas Davis, Jr., and was eventually sentenced to life imprisonment for that killing. The Court has concluded as a matter of law that Petitioner has served the entirety of that life sentence as imposed in the Superior Court of Martin County, as defined and mandated by the North Carolina General Assembly, and as credited pursuant to the North Carolina Department of Correction's own regulations, policy, and procedure. Based on the foregoing, IT IS HEREBY ORDERED that the Petition for Habeas Corpus filed by Faye B. Brown is ALLOWED. IT IS FURTHER ORDERED that Petitioner Faye B. Brown is to be released unconditionally from the North Carolina Department of Correction no later than 5 p.m. today, December 14, 2009.

This Order is entered out of session with the prior consent of all parties as noted on the record at the hearing on this matter.

This, the 14th day of December, 2009.

_____
Ripley E. Rand
Superior Court Judge