IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 23-0172

ANTOINE ANDERSON

Petitioner-Appellant,

v.

HAROLD CLARKE, in his official capacity as Director of the Virginia Department of Corrections; and **KEMSY BOWLES**, in his official capacity as Warden of Coffeewood Correctional Center,

Respondents-Appellees.

OPENING BRIEF OF APPELLANT

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INTRODUCTION

This case presents a purely legal question regarding the interpretation of recent legislation: whether a budget provision without retroactivity language nevertheless applies retroactively to deny the benefits of amendments to Virginia's earned sentence credit program to those in the custody of the Virginia Department of Corrections (VDOC) as of July 1, 2022. Under basic principles of statutory construction in Virginia, the answer to that question must be no. This Court should reaffirm its long-standing precedent that legislation affecting substantive rights or interests may not apply retroactively absent an explicit intent by the legislature to do so.

In 2020, Virginia's General Assembly overhauled the earned sentence credit program – a system that allows incarcerated individuals to earn time off their sentence through good behavior and rehabilitation – to increase the number of available credits. Because the General Assembly explicitly applied the amendments retroactively, over a thousand people, including Mr. Anderson, expected to be released when the law went into effect in July 2022. In June 2022, the General Assembly approved the biennial budget for 2022 through 2024. The budget included a provision that would alter how the earned sentence credit program would apply in those years. However, even though the Budget Item

contained no explicit language providing for its retroactive application, VDOC[1] incorrectly interpreted the provision broadly and retroactively, snatching away early release from Mr. Anderson and hundreds of other individuals who had already finalized preparations to return home during the summer of 2022. Mr. Anderson remains incarcerated because of VDOC's incorrect application of the Budget Item and the lower court's erroneous decision to deny relief. Correcting this error will result in the award of additional sentence credits to Mr. Anderson, resulting in his immediate release. Because Mr. Anderson's physical liberty is at issue, he moved this Court to expedite its consideration of his case.

STATEMENT OF THE CASE

On August 15, 2022, Mr. Anderson petitioned the Circuit Court of Albemarle County for a writ of habeas corpus based on his continued unlawful detention by VDOC. *See* J.A. 10-11. Mr. Anderson was previously convicted in that court of four separate charges, and he began serving his sentence on those charges as a state-responsible inmate in January 2013. Mr. Anderson's cause of action forming the basis of his habeas petition accrued on July 1, 2022, when VDOC failed to properly award him retroactive earned sentence credits. After Mr.

[1] Because the Respondent-Appellees are named in their official capacities as the Director of the Department of Corrections and the Warden of Coffeewood Correctional Center, we will refer to them collectively in briefing as "VDOC" for ease of reference.

Anderson's petition was fully briefed, the Albemarle County Circuit Court held oral argument. *See* J.A. 92-133. There were no material issues of fact disputed during the hearing and no additional evidence presented. The hearing was limited to argument on a purely legal question concerning the interpretation of the earned sentence credit statute and the Budget Item that appropriated funds for the implementation of the program pursuant to the statute. The court ruled from the bench at the hearing, denying Mr. Anderson's petition, and memorialized its decision in a written order entered on December 13, 2022. J.A. 122-125; 134-138. This appeal, which was granted by this Court on April 17, 2023, follows.

ASSIGNMENTS OF ERROR

1. The circuit court erred by granting the Appellees' Motion to Dismiss and denying and dismissing Appellant's petition for writ of habeas corpus. [Preserved J.A. 125; 138.]

2. The circuit court erred in holding that Budget Item 404(R)(2) applies to the Petitioner and that therefore Petitioner is not entitled to enhanced sentence credits under Va. Code Ann. § 53.1-202.3 for time served prior to July 1, 2022. [Preserved J.A. 125; 138.]

3. The circuit court erred in implicitly holding, or, in the alternative, failing to reach the issue, that the retroactive application of Budget Item 404(R)(2) does not violate the Ex Post Facto clause of the U.S. and Virginia Constitutions. [Preserved J.A. 125; 138.]

4. The circuit court erred in implicitly holding, or in the alternative, failing to reach the issue, that the retroactive application of Budget Item 404(R)(2) does not violate the Due Process clause of the U.S. and Virginia Constitutions. [Preserved J.A. 125; 138.]

STATEMENT OF FACTS

This case arises out of recent legislative efforts to expand incentives for those serving time in state prisons to be of good behavior and to make efforts towards self-improvement. Virginia has long employed such statutory programs, although they have been modified over time. Originally called "good conduct time" or "good conduct allowance," the General Assembly modified the program in 1995 and renamed it the "earned sentence credit" program. *See* J.A. 19. Anyone serving a sentence for a felony committed on or after July 1, 1995, is eligible to participate in the earned sentence credit program. *Id.*; J.A. 63.

Earned sentence credits (or "sentence credits" or "ESCs") are defined as:

> [D]eductions from a person's term of confinement earned through adherence to rules prescribed pursuant to § 53.1-25, through program participation as required by §§ 53.1-32.1 and 53.1-202.3, and by meeting such other requirements as may be established by law or regulation. One earned sentence credit shall equal a deduction of one day from a person's term of incarceration.

Va. Code Ann. § 53.1-202.2(A); J.A. 44. Before July 1, 2022, the program provided for a maximum of 4.5 ESCs for every 30 days served. *Id.*; J.A. 63. The number of credits earned depends on the "class level" awarded to the individual during the preceding year. J.A. 27, 44-45. A person's class level is determined through an annual evaluation process that considers whether the person has incurred any disciplinary infractions, achieved the goals set out in their re-entry plan, and maintained employment. *Id.*

A. THE GENERAL ASSEMBLY EXPANDED THE EARNED SENTENCE CREDIT PROGRAM IN 2020.

In 2020, the General Assembly amended the earned sentence credit program to provide greater incentives for incarcerated people to pursue opportunities for growth and personal improvement, and to reward those who had already done so.[2] J.A. 84-86, H.B. 5148, 2020 Gen. Assemb., Spec. Sess. I (Va. 2020) (hereinafter "HB 5148"); J.A. 5-6; 45.

Under the new law, individuals serving sentences for certain felony convictions remain eligible for a maximum of 4.5 earned sentence credits for every 30 days served, but individuals serving sentences for any other conviction are now eligible to earn as many as 15 sentence credits for every 30 days served. J.A. 45, 84-86. The law maintains the class level system, but provides that those eligible for increased credits earn 15 days per 30 served at Level I, 7.5 days per 30 served at Level II, and 3.5 days per 30 served at Level III. *Id.*

[2] According to one of the bill's patrons, the intent of the 2020 amendments to Virginia's earned sentence credit program was to provide greater incentives for people convicted of crimes to "find a new path" and "to behave well while incarcerated." Jennifer Boysko, *An important Virginia criminal reform is threatened*, THE WASHINGTON POST (June 16, 2022), https://www.washingtonpost.com/opinions/2022/06/16/an-important-virginia-criminal-justice-reform-is-threatened/. The legislature recognized that such incentives "not only make it more likely that incarcerated people will come home with skills that will ensure that they do not return to prison, but they also give those in prison the incentive to follow the rules and change for the better." *Id.*

Though enacted in 2020, these provisions did not take effect until July 1, 2022. However, the General Assembly explicitly applied the law retroactively, so that those incarcerated on that date would have the full benefit of these increased earned sentence credits for the totality of their sentences prior to the effective date of the law. The enactment clause to HB 5148 provides:

> That the provisions of § 53.1-202.3 of the Code of Virginia, as amended by this act, ***shall apply retroactively to the entire sentence*** of any person who is confined in a state correctional facility and participating in the earned sentence credit system on July 1, 2022. If it is determined that, upon retroactive application of the provisions of § 53.1-202.3 of the Code of Virginia, as amended by this act, the release date of any such person passed prior to the effective date of this act, the person shall be released upon approval of an appropriate release plan and within 60 days of such determination unless otherwise mandated by court order . . . .

HB 5148(1)(D) (emphasis added).[3] The delay between the enactment of the law and its effective date was intended to give VDOC time to implement the new system and to re-calculate the sentences of those eligible for additional sentence credits. J.A. 46, 64.

This law was expected to result in the release of as many as 3,200 people between July 1, 2022 and August 30, 2022. J.A. 46; Joe Dashiell, "Expansion of earned sentence credits to clear the way for release of state inmates." WDBJ7 (May 17, 2022), https://www.wdbj7.com/2022/05/17/expansion-earned-sentence-

[3] This enactment clause is "part of the body of the act which states the precise action taken by the legislature…." *Gilmore v. Landsidle*, 252 Va. 388, 394 (1996).

credits-clear-way-release-state-inmates/. Overall, VDOC estimated that as many as 14,000 people incarcerated as of July 1, 2022 would benefit from the law. J.A. 54; Ned Oliver, "Thousands of Virginia prisoners could be released early under new earned sentence credit program." VIRGINIA MERCURY (October 26, 2020), https://www.virginiamercury.com/2020/10/26/thousands-of-virginia-prisoners-could-be-released-early-under-new-earned-sentence-credit-program/.

B. MR. ANDERSON SHOULD HAVE BENEFITED FROM HB 5148.

Antoine Anderson is currently incarcerated at Coffeewood Correctional Center in Mitchells, Virginia. J.A. 3. Mr. Anderson was arrested in Virginia on federal drug charges in March 2004, and was held at the Albemarle-Charlottesville Regional Jail pending resolution of those charges. J.A. 4. In August, 2004, Mr. Anderson was charged with the offenses of which he was ultimately convicted by the Albemarle Circuit Court, based on events that occurred in the jail. *Id.*; J.A. 13-14. He was tried on the state charges in June 2005, and was sentenced on July 22, 2005. *Id.* He was then transferred to federal custody to serve his federal sentence in April 2006. J.A. 4. He remained in the custody of the Federal Bureau of Prisons until January 18, 2013, when he was transferred to VDOC to begin serving his sentence for the convictions listed below. *Id.*; J.A. 66.

Mr. Anderson is currently serving active sentences, running consecutively, on convictions entered in the Circuit Court of Albemarle County as follows:

Case Number	Offense	Code Section	Sentence
CR04017427-00	Attempted Escape	18.2-478	One year
CR04017428-00	Abduction	18.2-48.1	Five years
CR04017429-00	Assault on Corrections Officer	18.2-57	Two years
CR04017513-00	Assault on Corrections Officer	18.2-57	Five years

J.A. 3, 13-14, 66.

During his incarceration in the Federal Bureau of Prisons, Mr. Anderson completed drug treatment programs, an anger management program, parenting classes, commercial driver training, and obtained OSHA certification and a certificate for umpiring baseball. J.A. 4-5.

In his nearly ten years of incarceration in VDOC, Mr. Anderson has an exemplary behavioral record, and has maintained Class Level I for earned sentence credit purposes throughout his entire period of incarceration. J.A. 5; 66. He has been found guilty of only two relatively minor disciplinary infractions, neither of which resulted in any loss of earned sentence credits nor a reduction in his classification level. J.A. 5.

While incarcerated at Buckingham Correctional Center for eight years, Mr. Anderson was consistently employed, including for six years as a utility worker, where he was responsible for a variety of tasks in all areas of the facility. *Id*. He was transferred to Coffeewood Correctional Center in 2020. *Id.* He is currently

working towards completing his GED and has registered to take a small engine repair class. *Id.* He recently obtained employment as a sanitation worker. *Id.* He regularly attends church services, and maintains close relationships with his daughter, father, brother, and fiancée. *Id.*

Due to his exceptional record while incarcerated, Mr. Anderson was one of the people expected to benefit from HB 5148. J.A. 7-8. Because Mr. Anderson maintained Level I classification throughout the entirety of his time in VDOC custody, he should have been retroactively awarded 15 days for every 30 served on his convictions for attempted escape and assault and battery. *Id.*; J.A. 51. The only conviction not eligible for these expanded credits under HB 5148 was his conviction for abduction; however, he was eligible to earn 4.5 sentence credits for every 30 days served on that sentence both before and after the passage of HB 5148. J.A. 66.

In March 2022, VDOC staff verbally notified Mr. Anderson that due to his eligibility for expanded sentence credits, he would be released within the 60-day period after July 1, 2022, according to the procedures set out in HB 5148. J.A. 7-8. In the subsequent months, he completed pre-release paperwork, had his home plan approved, and made plans to reunite with his family. *Id.*; J.A. 37-41.

C. BUDGET ITEM 404(R) MODIFIED THE EARNED SENTENCE CREDIT PROGRAM DURING THE LIFE OF THE BUDGET BILL.

On June 21, 2022, Virginia's Governor signed the Biennial Budget (HB 30) passed by the General Assembly, directing the Commonwealth's appropriations from July 1, 2022 until June 30, 2024. J.A. 8; 46-47; 65; 90. In Budget Item 404(R), the General Assembly appropriated funds to VDOC for the implementation of the new earned sentence credit system, but qualified its administration of the credit system in the following manner:

> Notwithstanding the provisions of § 53.1-202.3, Code of Virginia, a maximum of 4.5 sentence credits may be earned for each 30 days served on a sentence that is concurrent with or consecutive to a sentence for a conviction of an offense enumerated in subsection A of § 53.1-202.3, Code of Virginia.

Id., H.B. 30, 2022 Gen. Assemb., Reg. Sess. (Va. 2022) (available at https://budget.lis.virginia.gov/get/budget/4623/HB30/) (hereinafter "Budget Item 404(R)" or "the Budget Item").

Although this language contains no retroactivity clause, VDOC erroneously applied it retroactively – denying increased earned sentence credits to those who had served time on eligible convictions before July 1, 2022, if they also had ineligible convictions, like Mr. Anderson's abduction conviction.[4] J.A. 8-9; 47-51.

[4] For ease of reference, such individuals will be referred to herein as people who are serving "mixed sentences."

As a result of VDOC's erroneous interpretation of the Budget Item, Mr. Anderson was notified in late June 2022 – just weeks before he expected to be released – that he would not be awarded the increased sentence credits as provided in HB 5148, because he was serving sentences for convictions that were both eligible for and ineligible for the expanded credits. J.A. 9. Mr. Anderson's release date was not advanced, and his projected release date remains April 2024 (assuming he remains at Class Level I for the remainder of his sentence). *Id.*; J.A. 67. After hearing this news, Mr. Anderson fell into a depression. He could not eat, he felt as if he went numb, and he sought mental health treatment. J.A. 9.

D. THERE ARE NO MATERIAL FACTS IN DISPUTE.

None of the facts regarding Mr. Anderson's convictions, sentences, eligibility for the earned sentence credit program, class level history, or record while incarcerated were disputed below. J.A. 67; 96-97. VDOC did not dispute that were Mr. Anderson to be awarded retroactive sentence credits in accordance with HB 5148, he would have served his entire sentence as of July 1, 2022. *Id*. Thus, the Budget Item's effect on his eligibility for expanded earned sentence credits for time served prior to July 1, 2022 was the only contested issue. *See* J.A. 62 ("The only dispute is whether the language in Budget Item 404(R)(2) precludes Anderson from earning enhanced sentence credit on his sentences that are not enumerated in subsection (A)."). As described below, the circuit court erred in its analysis of and

answer to this purely legal question of statutory interpretation, and therefore erred in its ultimate ruling that Mr. Anderson is not entitled to habeas relief.

STANDARD OF REVIEW

The Assignments of Error present questions of statutory interpretation and constitutional law. Questions of statutory interpretation are questions of law that this Court reviews *de novo*. *City of Charlottesville v. Payne*, 299 Va. 515, 527 (2021) (citing *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007)). In interpreting a statute, this Court begins by determining whether the plain language of the statute is clear or has some ambiguity, and where a statute's plain language is clear, the Court is bound by that language to determine the meaning of the statute. *Id.* Constitutional questions also present questions of law that are reviewed *de novo*. *Wilkins v. Commonwealth*, 292 Va. 2, 7 (2016); *Palmer v. Atl. Coast Pipeline, LLC*, 293 Va. 573, 577 (2017).

AUTHORITIES AND ARGUMENT

In this case, the Court must interpret two acts of the General Assembly: one bill that amended a section of the Virginia Code, and one provision in the biennial budget bill, both of which took effect on July 1, 2022. The plain language of both bills is clear and unambiguous. The fundamental question is whether Budget Item 404(R) applies retroactively to prevent people serving mixed sentences from earning expanded sentence credits for time served on eligible sentences prior to

July 1, 2022. This Court's precedent clearly establishes that "retroactive application of statutes is disfavored and that 'statutes are to be construed to operate prospectively only unless a contrary intention is manifest and plain.'" *City of Charlottesville*, 299 Va. at 528 (quoting *Town of Culpeper v. Virginia Elec. & Power Co.*, 215 Va. 189, 194 (1974)). Under this precedent, the Budget Item must be given only prospective effect, because it contains no indication – much less the legislature's plain and manifest expression – of an intent that it operate retroactively.

This Court has recently reiterated that "Virginia tradition has always been to ask 'not what the legislature intended to enact, but what is the meaning of that which it did enact. We must determine the legislative intent by what the statute says and not by what we think it should have said.'" *Appalachian Power Co. v. State Corp. Commission*, __ Va. __, 876 S.E.2d 349, 358 (2022) (quoting *Carter v. Nelms*, 204 Va. 338, 346 (1963)). The circuit court's interpretation departed from the Court's longstanding guidance for statutory construction, giving undue weight to policy considerations and assumptions about what the legislature should have done. Accordingly, this Court should reverse the ruling of the Circuit Court and hold that Mr. Anderson should receive earned sentence credits under Va. Code Ann. § 53.1-202.3(B) for his time served prior to July 1, 2022.

A. THE CIRCUIT COURT ERRED IN HOLDING THAT NEITHER HB 5148 (VA. CODE ANN. § 53.1-202.3 AS AMENDED) NOR BUDGET ITEM 404(R)(2) AFFECT AN INCARCERATED INDIVIDUAL'S SUBSTANTIVE RIGHTS OR INTERESTS.

As a threshold matter, in determining whether Budget Item 404(R) may have a retroactive effect, the court below erroneously ruled that neither the Budget Item nor HB 5148 affected a substantive right or interest. J.A. 123-24, 135. This holding is contrary to well-established law. The U.S. Supreme Court held nearly fifty years ago that statutorily created good time programs generally establish a liberty interest that deserves the protections of due process. *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) ("the prisoner's interest [in the good time program] has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated."). The Fourth Circuit has recognized that the precursor to Virginia's earned sentence program[5] created a substantive liberty interest deserving of protection under the Fourteenth Amendment. *Ewell v. Murray*, 11 F.3d 482, 488 (4th Cir. 1993).

[5] The character of the current earned sentence credit program, enacted just two years after the decision in *Ewell v. Murray*, is sufficiently similar that the same analysis applies.

This Court has explained that "[s]ubstantive rights, which are not necessarily synonymous with vested rights, are included within that part of the law dealing with creation of duties, rights, and obligations…." *Shiflet v. Eller*, 228 Va. 115, 120 (1984).[6] While vested rights are undoubtedly substantive rights, not all substantive rights are necessarily vested rights. *Id.*[7]

Virginia's earned sentence credit program is statutorily created and implemented through written policy. The program imparts a valuable benefit to those who are eligible for it. *See Wolff*, 418 U.S. at 561 ("The deprivation of good time is unquestionably a matter of considerable importance."). People who are incarcerated clearly have a substantive interest in the program, even if that interest is only inchoate (i.e., the expectation of the future award of sentence credits). That

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[6] Courts apply an objective analysis that examines the overall impact of the statute in question to determine whether it is substantive or procedural. Thus, Virginia's appellate courts have held that statutes affecting substantive rights include: a statute amending the right of contribution among joint tortfeasors, *Shiflet v. Eller*, *supra*; a limitation tolling provision contained in a statutory right of action (*Riddett v. Virginia Elec. & Power Co.*, 255 Va. 23, 28 (1998)); the portion of the Condominium Act that transferred a right of action from individual property owners to the Condominium Owner's Association (*Rotonda Condo. Unit Owners Ass'n v. Rotonda Assocs.*, 238 Va. 85, 89 (1989); the repeal of a statute that resulted in elimination of a felony offense (*Gionis v. Commonwealth*, 76 Va. App. 1, 14 (2022)); and a statute prohibiting law enforcement from searching based solely on the odor of marijuana (*Goodwin v. Commonwealth*, No. 0312-22-3, 2022 WL 16823537, at *3 (Va. Ct. App. Nov. 9, 2022)).

[7] Indeed, the right at issue in *Shiflet* had not yet vested, and was later characterized by this Court as "inchoate." *Sch. Bd. of City of Norfolk v. U.S. Gypsum Co.*, 234 Va. 32, 38 (1987).

interest may also be vested (i.e., the sentence credits that have already been earned). But the interest is substantive, and changes to the nature of that interest are substantive, as opposed to procedural, whether the underlying interest is vested or not. *See*, *e.g.*, *Sch. Bd. of City of Norfolk*, 234 Va. at 38.

The General Assembly has long understood that the earned sentence credit program and its predecessors represent a substantive interest, and it has accounted for this each time it has modified these programs. In 1995, when the General Assembly replaced good conduct time with earned sentence credits (a program that awarded significantly less time towards an earlier release), it specified that only those whose offenses were committed on or after January 1, 1995, were subject to the earned sentence credit system, and those whose offenses were committed before that date would continue to receive good conduct time in accordance with the law in effect at the time of the offense. *See* H.B. 5001, 1994 Gen. Assemb., Spec. Sess. II (Va. 1994); J.A. 17. This was necessary because the new law impacted a substantive right and could not be applied retroactively without implicating constitutional concerns. Similarly, when the General Assembly passed HB 5148 in 2020 (substantially increasing the time that could be earned towards early release), it specifically provided that these provisions were to apply retroactively, because it knew the legislation affected a substantive right, and

therefore this explicit statement of retroactivity was necessary to produce the desired effect of extending the benefit of the law to cover past conduct.

Here, VDOC did not dispute that Virginia's earned sentence credit program creates a substantive interest. Rather, VDOC argued that HB 5148 did not create a vested interest for Mr. Anderson in his eligibility for expanded earned sentence credits until the law took effect on July 1, 2022. J.A. 70; 116. But the question of when HB 5148 created a vested interest in retroactive sentence credits misses the point. The issue is not whether the legislation at issue creates a new vested interest; the issue is whether that legislation changes or impacts a substantive interest that already exists.

The court below answered the wrong question, conflating the concepts of substantive rights and vested rights to hold that neither provision at issue in this case affected a substantive right or interest. J.A. 123 ("The Court finds that the budget item did not affect a substantive or vested right. House Bill 5148 did not create an entitlement or a substantive or vested right to an earned sentence credit before the effective date of July the 1st, 2022 . . . . Until this provision became effective, it is not something the Court determines to be a vested or substantive right.").[8]

[8] The circuit court also speculated that § 53.1-202.3 could have been amended up until HB 5148's effective date of July 1, 2022. J.A. 124. However, the regular session of the General Assembly concluded on March 12, 2022. H.R.J. Res. 455,

Both HB 5148 and Budget Item 404(R) modified the fundamental nature of the earned sentence credit program and thus affected a substantive right or interest: HB 5148 amended the Code to change the number of credits that may be earned and the eligibility criteria to earn those credits, and Budget Item 404(R) narrowed the eligibility criteria for the increased credits after HB 5148 took effect. For the provisions to affect a substantive right or interest, it is not necessary for either to create a new entitlement, or to result in the actual award of additional earned sentence credits to Mr. Anderson.[9] Thus, the circuit court erred in holding that neither bill affected a substantive right or interest. The circuit court's error of law on this threshold issue impacted the rest of the circuit court's analysis and its conclusion.

2022 Gen. Assemb., Reg. Sess. (Va. 2022). At the time the budget was passed by the General Assembly on June 18, 2022, there was no realistic possibility that HB 5148 would not take effect on July 1, 2022.

[9] Mr. Anderson's habeas petition was filed after the effective date of both provisions, at which time his interest in earning expanded sentence credits was no longer speculative. Thus, there can be no dispute that on July 1, 2022, and thereafter, both provisions affected a substantive interest.

B. THE CIRCUIT COURT ERRED IN HOLDING THAT BUDGET ITEM 404(R)(2) APPLIES TO PETITIONER SUCH THAT PETITIONER IS NOT ENTITLED TO ENHANCED SENTENCE CREDITS UNDER VA. CODE ANN. § 53.1-202.3 FOR TIME SERVED PRIOR TO JULY 1, 2022.

In addition to erroneously holding that Budget Item 404(R) did not affect a substantive right, the circuit court concluded that even without its own retroactivity clause, the Budget Item could apply retroactively to make Mr. Anderson ineligible for sentence credits on his time served prior to July 1, 2022 (the effective date of the Budget Item). J.A. 124. This holding is error because it ignores this Court's clear precedent establishing that "[u]nless a contrary intent is manifest beyond reasonable question on the face of an enactment, a statute is construed to operate prospectively only." *City of Charlottesville*, 299 Va. at 530.

1. VDOC Has Applied Budget Item 404(R) Retroactively.

Applying Budget Item 404(R) to make people with mixed sentences ineligible for expanded credits on time served prior to July 1, 2022 is clearly a retroactive application of the legislation. Legislation is retroactive when a "new provision attaches new legal consequences to events completed before its enactment". *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999) (quoting *Landgraf v. USI Film Prod.*, 511 U.S. 244, 270 (1994) (internal quotations omitted)). In *Martin v. Hadix*, the U.S. Supreme Court held that to apply the attorney's fees cap provisions of the newly-enacted PLRA to work performed prior to the enactment

of the statute, even though the fee awards were made after the enactment of the PLRA, would give the statute an impermissible retroactive effect. This is analogous to the present case: even though expanded sentence credits for time already served were not awarded until July 1, 2022, the conduct that earned some of those credits had already occurred. Thus, HB 5148 contained explicit retroactivity language to ensure its application as intended by the General Assembly. Applying the Budget Item's restrictions to that same conduct that occurred prior to the Budget Item's effective date, in the absence of explicit legislative intent to do so, is no different than retroactively applying the PLRA's attorney's fees cap to work performed prior to its enactment.

2. Explicit Language Showing Clear Retroactive Intent is Required for Retroactive Application of the Budget Item.

The circuit court acknowledged that Budget Item 404(R) contains no explicit language that the General Assembly intended its retroactive application. However, the circuit court reasoned that the Budget Item must be read in combination with Va. Code Ann. § 53.1-202.3, and therefore "the language that [the Budget Item] would be applied retroactively was not necessary and would have been duplicative."[10] J.A. 124.

[10] While the Budget Item does reference HB 5148 in subsection (1), it references only Va. Code Ann. § 53.1-202.3 in subsection (2), which is the provision limiting the eligibility of people serving mixed sentences. Thus, the reference in the Budget Item to "the provisions of § 53.1-202.3" does not necessarily imply any reference

Essentially, VDOC argued for, and the court below found, a previously unarticulated exception to the rule requiring an explicit statement of retroactive intent where two bills, passed at different times but effective on the same day, modify or address the same code section.[11] VDOC did not identify, nor did the circuit court's ruling cite, any authority supporting the idea that such an exception would comport with this Court's well-established rules of statutory construction. Indeed, this Court recently rejected a very similar argument in *Appalachian Power Co*. In that case, this Court also examined two separate legislative enactments, passed in the same General Assembly session and effective on the same date, that amended the same statute. One bill contained language clearly evidencing the legislature's intent that it apply retroactively, and the other did not. This Court declined to infer the retroactivity of the bill that did not contain explicit retroactivity language, noting that the presence of such language in one bill but not the other demonstrated that the bill without such language was not intended to be

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to the retroactivity provision of HB 5148, which is contained in the enactment clause and was not codified into the statute.

[11] This novel exception effectively resulted in the implied repeal of the retroactivity provision in the enactment clause of HB 5148 as to people with mixed sentences. "Repeal by implication is not favored and the firmly established principal of law is, that where two statutes are in apparent conflict, it is the duty of the court, if it be reasonably possible, to give to them such a construction as will give force and effect to each." *American Cyanamid Co. v. Commonwealth*, 187 Va. 831, 841 (1948).

applied retroactively. 876 S.E.2d at 369. This holding should apply with equal force to this case: HB 5148 contained retroactivity language but the Budget Item did not. Therefore, HB 5148 should have retroactive effect, and the Budget Item should not.

This Court's ruling on this issue in *Appalachian Power Co.* follows directly from the long line of cases governing the retroactive application of new statutory enactments. For centuries, this Court has consistently held that the retroactive application of statutes is disfavored, and that the legislature's intent for a statute to operate retroactively must be explicitly stated. *See*, *e.g.*, *Bailey v. Spangler*, 289 Va. 353, 358-59 (2015); *Adams v. Alliant Techsystems*, 261 Va. 594, 599 (2001); *Ferguson v. Ferguson*, 169 Va. 77, 87 (1937), *Day v. Pickett*, 18 Va. (4 Munf.) 104, 109 (1813).

Virginia courts have expressed this rule over and again, with very clear direction for statutory interpretation. The restatements of this rule all mandate that for a statute to apply retroactively, the intent of the legislature must be clear from the language of the statute itself. For example, the Court of Appeals has explained:

> Every reasonable doubt is resolved against a retroactive operation of a statute, and words of a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise defined, and the lack of such intention is evidenced by its failure to express an intention to make the statute retroactive.

Shilling v. Commonwealth, 4 Va. App. 500, 507 (1987) (citing 17 Michie's Jurisprudence Statutes § 73 (1979)). Similarly, in *McCarthy v. Commonwealth*, the Court of Appeals held that a law providing immunity from prosecution for a person who seeks treatment for a heroin overdose does not apply to bar prosecution of someone who overdosed prior to the effective date of the law, even though the trial occurred after the effective date. 73 Va. App. 630, 650 (2021). The court reasoned that the new law altered the range of conduct, or the class of persons, that is punishable under the law, and therefore explicit legislative intent was required to allow any retroactive application. *Id*.

In this case, there are no "clear, strong and imperative" words contained in Budget Item 404(R) that communicate an intention for that provision to operate retroactively. The language of the Budget Item is clear and unambiguous. "If language is clear and unambiguous, there is no need for construction by the court; the plain meaning and intent of the enactment will be given it." *Brown v. Lukhard*, 229 Va. 316, 321 (1985) (citing *School Board of Chesterfield County v. School Board of the City of Richmond*, 219 Va. 244, 250 (1978)). *Brown* presents a close parallel with this case. In *Brown*, the Department of Welfare interpreted a budget provision that reduced funding for a benefits program as an implicit instruction to deny benefits to a certain group of children, even though the appropriation contained no explicit language to that effect and doing so conflicted with an

existing statutory provision. This Court disagreed with the agency's interpretation and held that the trial court erred "in construing the enactments contrary to their plain meaning" *Id.* at 322. Similarly, in this case, the Budget Item contains no retroactivity provision, and VDOC does not have the authority to apply it contrary to its plain and unambiguous language.

The General Assembly knows what language to use when it intends for a bill to have a retroactive effect, and where such language is absent, courts may not infer it. *See Green v. Commonwealth*, 75 Va. App. 69, 82 (2022) ("the General Assembly easily could have stated that the amended statute could have been effective retroactively and before the normal July 1, 2021 date for newly enacted legislation to become effective, but it did not. The words 'retroactive' or 'retroactively' are nowhere to be found in the statute.").

That principle applies squarely here. Had the General Assembly intended for Budget Item 404(R) to apply retroactively, it could easily have included explicit language to that effect. Indeed, it had done just that in legislation affecting the earned sentence credit program only two years prior, in HB 5148. That it did not include the same language in Budget Item 404(R) shows that the Budget Item was not intended to operate retroactively. *See Appalachian Power Co.*, *supra*.

This Court has very recently reaffirmed this long-standing rule of statutory construction in both *Appalachian Power Co.* and *City of Charlottesville*. In *City of*

Charlottesville, *supra*, this Court considered whether a statute governing treatment of certain statues applied to statues erected prior to the enactment of the law. This Court held that it did not, because the plain language of the statute gave no intention of a retroactive intent. 299 Va. at 530. Further, because the statute contained grammar and language that was forward-looking, it was even more clear that no retroactive intent could be found in the statute. *Id.* at 529-30.

The lack of any explicit language evidencing the legislature's retroactive intent in the Budget Item should be conclusive in this case. Nonetheless, as this Court noted in *City of Charlottesville*, *supra*, we can also look to the context and language of the Budget Item as additional evidence weighing against its retroactive application. The placement of language in the budget – a bill that by its nature is entirely forward-looking – strongly suggests that it was only intended to operate prospectively. Because the provision does not amend the Virginia Code, its effect is temporary, and it operates only during the life of the budget bill itself. In other words, the provision operates beginning July 1, 2022 and will sunset on June 30, 2024. At that point, people with mixed sentences will again be able to earn expanded sentence credits on the eligible portions of their sentences (including on time served prior to July 1, 2022, even under VDOC's interpretation). The fact that Budget Item 404(R) is an impermanent modification to the earned sentence credit

program weighs heavily against any inference of an intent for it to apply retroactively.

Finally, that the Budget Item attempts to narrow the scope of the statutory amendments contained in HB 5148 may not be interpreted as an intent that it apply retroactively, as the circuit court held, and should not place the Budget Item outside the reach of this Court's long-standing precedent. The Court of Appeals explicitly rejected a similar argument in *Taylor v. Commonwealth*, holding that "the mere return to a prior statutory scheme" does not "conclusively establish[] that the legislature intended for a statutory amendment to be applied retroactively." 44 Va. App. 179, 186 (2004). Rather, the phrase "Notwithstanding the provisions of § 53.1-202.3…" in the Budget Item simply acknowledges that the Budget Item is changing the eligibility of people serving mixed sentences for expanded sentence credits, and it should have no bearing on the question of whether the Budget Item may or may not operate retroactively. This Court held as much in *Appalachian Power Co.*: "The non obstante phrase merely means that when subsection E does apply (the presumption is that it applied prospectively only) it takes precedence over any other conflicting provision of law." 876 S.E.2d at 368.

Because there is no basis under this Court's precedent to conclude that the Budget Item applies retroactively, the circuit court erred in so holding.

C. THE CIRCUIT COURT ERRED IN HOLDING THAT TO APPLY BUDGET ITEM 404(R)(2) ONLY PROSPECTIVELY WOULD CREATE A RESULT THAT IS ARBITRARY, CAPRICIOUS AND ABSURD.

The circuit court further justified its retroactive application of Budget Item 404(R) by finding that applying it only prospectively would "be very arbitrary" and "so capricious that it should fit within the definition of being absurd," because it would result in different systems of earned sentence credit eligibility during different time periods. J.A. 124-25. The circuit court's reliance on the absurdity doctrine in this case is misplaced.

In the context of statutory construction, "the anti-absurdity limitation has a legal, not colloquial, meaning." *Tvardek v. Powhatan Vill. Homeowners Ass'n, Inc*., 291 Va. 269, 280 (2016). Courts have defined an "absurd" result as one in which the statute at issue would be internally inconsistent or impossible to implement. *Id.* (noting that a "classic example would be a literal, but entirely dysfunctional, interpretation 'validating' an act while simultaneously 'nullifying' it."); *see also City of Charlottesville*, 299 Va. at 532; *Appalachian Power Co.*, 876 S.E.2d at 358 n.5.

Further, this Court has advised that courts must exercise caution when examining whether the plain language of a statute creates an absurd result, in order to avoid substituting its own policy judgment for that of the legislature: "Our fidelity to the statutory text does not permit us to weigh policy arguments for and

against legislation, holding out the possibility that we would fashion an interpretation based upon avoiding policies that a litigant thinks to be absurd." *Tvardek*, 291 Va. at 279; *see also City of Charlottesville*, 299 Va. at 532 ("The judiciary is not to substitute its own judgment in place of the General Assembly's; rather than inferring the intent of legislation, our role is to ascertain the intent of the General Assembly as evidenced by the words used by it.").

Thus, to justify disregarding the plain language of the Budget Item and making an inference of retroactivity, the circuit court in this case was required to determine that it would be impossible to implement the Budget Item as written, or that the plain language of the legislation contained an internal inconsistency. VDOC did not provide any evidence that it would be impossible to implement the Budget Item only prospectively – nor did they even make that assertion. The court below did not make any factual findings to that effect. These glaring omissions in the record compel the conclusion that implementing the restrictions contained in the Budget Item only prospectively would be both possible and internally consistent.

Further, both context and common sense support the conclusion that it would, in fact, be possible and straightforward to apply the Budget Item only prospectively. The VDOC has already implemented a complicated, multi-faceted earned sentence credit system. The General Assembly very intentionally created a

two-tiered system of eligibility for expanded sentence credits when it passed HB 5148 in 2020. Further, within that system, individuals are eligible to earn different numbers of credits depending on their classification level, which may change every year. By the time the biennial budget bill was passed and signed in June 2022, VDOC had completed its recalculation of sentences for those whose release dates were sufficiently near that, upon the award of retroactive sentence credits, they might be eligible for immediate release. *See* J.A. 64 ("VDOC's Court and Legal Unit identified inmates who … *potentially* had recalculated release dates prior to July 1, 2022 and therefore would need to be released within 60 days of the effective date of the amendment."). Thus, it is clear that VDOC is entirely capable of implementing a system that awards credits to different people at different rates, depending on the person's individualized circumstances.

The prospective application of Budget Item 404(R) would result in a system only marginally different than what VDOC had already implemented, requiring only a minor adjustment to the criteria for eligibility for enhanced sentence credits during the two year life of the budget. The fact that this would have required some additional action to implement does not render it an absurd result. Indeed, VDOC's retroactive application of Budget Item 404(R) also required additional action: prior to the enactment of Budget Item 404(R), VDOC was preparing to award retroactive expanded credits to people with mixed sentences for their eligible

convictions. However, after the enactment of the Budget Item, VDOC had to identify a sub-group of individuals who were serving mixed sentences and ensure that they would not be awarded expanded credits on any part of their sentence, including for time served both before and after July 1, 2022. Thus, there is no indication that it would have been impossible, either legally or practically, for VDOC to implement the Budget Item only prospectively.

It further bears acknowledging that applying the Budget Item retroactively will actually require VDOC to take additional action when the Budget Item expires in 2024. At that time, presumably people serving mixed sentences will once again become eligible to earn expanded credits on the time they served prior to July 1, 2022. Therefore, VDOC will have to recalculate hundreds or thousands of sentences in accordance with HB 5148, and plan for the release of many of these people without the benefit of the grace period built in to HB 5148. This is surely a more absurd result than applying the limiting eligibility criteria of the Budget Item only to time served between July 1, 2022 and June 30, 2024, resulting in no need to recalculate the number of credits earned at either end of that period. This outcome certainly weighs against the conclusion that the prospective-only application of the Budget Item creates an absurd result, or a simply a result that is more absurd than the one reached by the retroactive application of that provision.

At bottom, the VDOC's position reflects a preferred policy outcome, and not an interpretation of the law that gives effect to its unambiguous plain language. This Court has recently cautioned courts against such interpretations:

> [J]udicial review does not evaluate the propriety, wisdom, necessity and expediency of legislation. When a statutory text speaks clearly on a subject, effect must be given to it regardless of what courts think of its wisdom or policy. Courts committed to neutral principles of interpretation are not free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal. Divinations of the spirit or reason of the law and vague invocations of statutory purpose cannot take precedence over a clearly worded statutory text.

Appalachian Power Co., 876 S.E.2d at 358 (internal quotations and citations omitted, cleaned up). The Budget Item is a clearly worded piece of legislation that neither requires nor permits a court to rewrite its plain language. Accordingly, the circuit court erred in reaching beyond the plain language of Budget Item 404(R) to add a retroactivity provision, fundamentally changing the nature of the provision from that which the General Assembly actually mandated.

D. THE CIRCUIT COURT ERRED IN IMPLICITLY HOLDING THAT THE RETROACTIVE APPLICATION OF BUDGET ITEM 404(R)(2) DOES NOT VIOLATE THE EX POST FACTO OR DUE PROCESS CLAUSES OF THE U.S. AND VIRGINIA CONSTITUTIONS.

Although the circuit court did not explicitly reach the question of whether the retroactive application of Budget Item 404(R) would run afoul of the Ex Post

Facto or Due Process clauses of the U.S. and Virginia Constitutions,[12] a holding that it does not is implicit in the court's ruling. Courts must construe statutes "in such a manner as to avoid a constitutional question wherever this is possible." *Eaton v. Davis*, 176 Va. 330, 339 (1940). Construing Budget Item 404(R) to operate only prospectively eliminates any constitutional concerns that might arise. The court erred in ignoring these serious concerns arising from its interpretation of the Budget Item.

1. Applying Budget Item 404(R) Retroactively Violates the Ex Post Facto Clause.

The Supreme Court of the United States has examined the prohibition on ex post facto laws in the context of "good time" or "sentence credit" awards, holding that laws that are retrospective and that "disadvantage the offender affected by" them violate that prohibition. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). The Supreme Court has concluded that statutes retroactively reducing good time credits already applied (*Lynce v. Mathis*, 519 U.S. 433 (1997)), and statutes prospectively reducing the number of good time credits prisoners can earn (*Weaver*, *supra*), both offend the Ex Post Facto clause.

In *Lynce*, the petitioner was released after having been awarded sentence credits related to prison overcrowding. The Florida legislature then retroactively

[12] These issues were fully briefed by the parties in their filings.

canceled those overcrowding credits for certain classes of inmates, and the petitioner was re-arrested to serve the time now remaining on his sentence. The Court held that by retroactively canceling credits that had already been awarded, the law violated the Ex Post Facto clause. The Court noted that the law was problematic because "it made ineligible for early release a class of prisoners who were previously eligible." 519 U.S. at 447.

Mr. Anderson faces an analogous situation here. Upon the enactment of HB 5148, he became eligible for increased earned sentence credits. Although the actual award of expanded sentence credits to the sentences of those impacted by the bill was not to occur until July 1, 2022, the enactment of HB 5148 in 2020 created an expectation that those credits would be awarded in accordance with the law. As VDOC prepared for the effective date of the law, it made clear to Mr. Anderson that he would be awarded expanded credits on July 1, 2022 and would be released in the weeks following. VDOC then took affirmative steps to prepare for his release in July 2022, including approving his home plan, completing his medical screening, and obtaining identification for him.

However, as interpreted by VDOC, the Budget Item later retroactively canceled those credits Mr. Anderson had already earned. *Lynce* teaches that once the legislature awards a benefit that shortens a sentence, it cannot later take it away. Applied retroactively, the Budget Item does just that – it eliminates Mr.

Anderson's eligibility for sentence credits that he was previously eligible for and that were to be awarded to result in an earlier release date. Accordingly, the Court must construe the Budget Item in such a way as to avoid this constitutional infirmity and hold that it does not apply to credits that Mr. Anderson earned under HB 5148 prior to July 1, 2022.

2. Applying Budget Item 404(R) Retroactively Violates the Due Process Clause.

By the same token, the Fourth Circuit has determined that "Virginia's system of awarding good conduct credit created a liberty interest protected by the Fourteenth Amendment . . . ." *Ewell v. Murray*, 11 F.3d 482, 488 (4th Cir. 1993). Although the range of protected liberty interests is narrow for those who are lawfully incarcerated, confinement to prison does not strip a prisoner of all liberty interests. *Id.* at 487–88. A state may create a protected liberty interest for an inmate by enacting procedures that sufficiently channel the discretion exercised by prison officials. *Id*. (citing *Hewitt v. Helms*, 459 U.S. 460, 469 (1983)). To do so, the statutory or regulatory measures at issue must go beyond simple procedural guidelines by using language of "an unmistakably mandatory character requiring that certain procedures 'shall,' 'will' or 'must' be employed . . . ." *Id*. at 488; *see also Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 462 (1989) (noting that a state may create a liberty interest by "establishing

'substantive predicates' to govern official decision making . . . and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met").

Virginia's earned sentence credit program satisfies this test, as it is sets out specific criteria that, when met, result in the mandatory award of earned sentence credits. *See* J.A. 35 ("Inmates who committed their felony offense(s) on or after January 1, 1995, automatically enter the ESC system for the duration of all such felony sentences. Whether an inmate is awarded [earned sentence credits] is determined by the underlining [sic] offense and" the classification scheme set out in Va. Code Ann. § 53.1-202.3(B)).

The liberty interest created by Virginia's earned sentence credit program may not be infringed upon without due process. The Constitution ensures that before a prisoner can be punished through loss of earned sentence credits, "they must be given advance written notice of the charges against them, they must be allowed to call witnesses (if prison safety so allows), and the factfinders must issue a written statement as to the evidence relied upon and the reasons for the disciplinary action." *Ewell, supra,*11 F.3d at 487–88. (citing *Wolff,* 418 U.S. at 563-67).

If Budget Item 404(R) applies retroactively to cause the loss of earned sentence credits – not based on the actions of any affected individual but simply

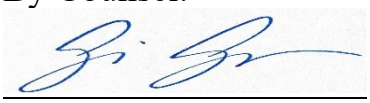
based on the nature of that person's convictions, it would raise serious questions under these principles of due process, as no process whatsoever was provided to those affected by it.

This Court must avoid these constitutional problems if there is a way to read the statute to do so. Applying Budget Item 404(R) only prospectively will avoid both Ex Post Facto and due process concerns, and therefore it is the interpretation of the statute that must control.

CONCLUSION

This case presents a clear error of law by the court below in its statutory interpretation of Budget Item 404(R). This Court should correct that error and, under its long-standing precedent, hold that Budget Item 404(R) does not have a retroactive effect, and that under the enactment clause of HB 5148, people with mixed sentences, such as Mr. Anderson, are entitled to expanded sentence credits on their eligible sentences for time served prior to July 1, 2022. As a result of such a holding, Mr. Anderson would have served his entire sentence as of July 1, 2022. Therefore, this Court should reverse the ruling of the circuit court and issue a writ of habeas corpus ordering Mr. Anderson's immediate release.

RESPECTFULLY SUBMITTED,
ANTOINE ANDERSON
By Counsel:



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CERTIFICATE OF SERVICE

In accordance with Rule 5:1B(c), I, Geri Greenspan, certify that on May 26, 2023, a copy of the foregoing Opening Brief of Appellant, as well as a copy of the Joint Appendix filed simultaneously with the Opening Brief, were served on the Office of the Attorney General of Virginia by email at service@oag.state.va.us and SolicitorGeneral@oag.state.va.us.