IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. _____

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.

PETITION FOR APPEAL

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INTRODUCTION

This petition for appeal presents the same question as numerous *pro se* habeas petitions pending before this Court and the circuit courts: 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. The Court should grant this Petition both to correct the error of the circuit court in this case and to resolve the question for the hundreds of other incarcerated persons who find themselves in the same position as the Petitioner, Antoine Anderson.

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 expand 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 incorrectly interpreted the budget 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.

This appeal presents a purely legal question regarding the interpretation of recent legislation, asking this Court to reaffirm its long-standing precedent that statutes affecting substantive rights or interests may not apply retroactively absent an explicit intent by the legislature to do so. Counsel for Petitioner respectfully request oral argument before a writ panel in lieu of filing a reply, in accordance with Rule 5:19 of the Supreme Court of Virginia. Further, because Mr. Anderson remains incarcerated and his liberty is at stake, Counsel for Petitioner also respectfully request expedited scheduling in this case.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

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* Pet. ¶¶ 24-27. 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. Anderson's petition was fully briefed, the Albemarle County Circuit Court held oral argument. *See* Transcript of November 18, 2022 Hearing. There were no material issues of fact in dispute, and both parties agreed the only issue before the court was 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. Tr. 31-34; Final Order. This appeal 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 Tr. 34; Final Order 4.]

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 § 53.1-202.3 for time served prior to July 1, 2022. [Preserved Tr. 34, Final Order 4.]

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 Tr. 34, Final Order 4.]

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 Tr. 34, Final Order 4.]

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* Pet. Ex. B, Virginia Department of Corrections Operating Procedure 830.3, effective July 1, 2022, p. 5. 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.*; Mot. to Dism. 3.

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); Pet. Mem. Supp. 2. Before July 1, 2022, the program provided for a maximum of 4.5 ESCs for every 30 days served. *Id.*; Mot. to Dism. 3. The number of credits earned depends on the "class level" awarded to the individual during the preceding year. Pet. Ex. B 13; Pet. Mem. Supp. 2-3. 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.[1]

[1] 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.*

Mot. to Dism. Ex. 2, Acts of the General Assembly House Bill 5148 (November 9, 2020) (hereinafter "HB 5148"); Pet. ¶ 11; Pet. Mem. Supp. 3.

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. Pet. Mem. Supp. 3; Mot. to Dism. Ex 2. 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.*

Though enacted in 2020, these provisions were set to take effect on 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 H.B. 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 . . . .

Pet. Mem. Supp. 3; Mot. to Dism. Ex 2 (H.B. 5148(1)(D) (emphasis added)).[2] The delay between the enactment of the law in 2020 and the effective date in 2022 was intended to give VDOC time to implement the new system and to re-calculate the sentences of those eligible for additional sentence credits. Pet. Mem. Supp. 4; Mot. to Dism. 4.

This law was expected to result in the release of as many as 3,200 people between July 1, 2022 and August 30, 2022. Pet. Mem. Supp. 4; 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-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. Pet. Mem. Supp. 4; 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/.

[2] 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, 478 S.E.2d 307, 311 (1996).

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

Antoine Anderson is currently incarcerated at Coffeewood Correctional Center in Mitchells, Virginia. Pet. ¶ 4. 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. Pet. ¶ 7. 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.*; Pet. Ex. A. 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. Pet. ¶ 7. 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.*; Mot. to Dism. 6.

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

Pet. ¶ 4; Pet. Ex. A; Mot. to Dism. 6.

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. Pet. ¶ 8.

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. Pet. ¶ 9; Mot. to Dism. 6. 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. Pet. ¶ 9.

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. Pet. ¶ 9. 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 H.B. 5148. Pet. ¶¶ 15-16. Because Mr. Anderson maintained Level I classification throughout the entirety of his 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.*; Pet. Mem. Supp. 9. The only conviction not eligible for these expanded credits under H.B. 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 H.B. 5148. Mot. to Dism. 6. The net effect of applying the enhanced sentence credits to the three eligible convictions and the unchanged sentence credits to the one ineligible conviction was to make Mr. Anderson eligible for release when the amendment took effect on July 1, 2022.

In March 2022, VDOC staff 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. Pet. ¶ 16. In the subsequent months, he completed pre-release paperwork, had his home plan approved, and made plans to reunite with his family. *Id.*; Pet. Ex. D, E.

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 (H.B. 30) passed by the General Assembly, directing the Commonwealth's appropriations from July 1, 2022 until June 30, 2024. Pet. ¶ 17; Pet. Mem. Supp. 4-5; Mot. to Dism. 5, Ex. 3. 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., Acts of the General Assembly House Bill 30 (June 22, 2022) (available at https://budget.lis.virginia.gov/get/budget/4623/HB30/) (hereinafter "Budget Item 404(R)).

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.[3] Pet. ¶ 18; Pet. Mem. Supp. 5-9.

[3] 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 H.B. 5148, because he was serving sentences for convictions that were both eligible for and ineligible for the expanded credits. Pet. ¶ 19. 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.*; Mot. to Dism. 7. 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. Pet. ¶ 21.

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. Tr. 4; Mot. to Dism. 7; Pet. Rep. 1. All parties agreed 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. Tr. 11-12. 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 disputed issue. As described below, the circuit court erred in its analysis of and answer to

this purely legal question of statutory interpretation, ultimately 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 that 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)).

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 (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.

I. THE CIRCUIT COURT ERRED IN HOLDING THAT NEITHER HB 5148 (VA. CODE § 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. Tr. 32-33; Final Order 2. 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[4] created a substantive liberty interest deserving of protection under the Fourteenth Amendment. *Ewell v. Murray*, 11 F.3d 482, 488 (4th Cir. 1993).

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,

[4] 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.

120 (1984).[5] While vested rights are undoubtedly substantive rights, not all substantive rights are necessarily vested rights. *Id.*[6]

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 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

[5] 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)).

[6] 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).

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 understands 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. This is 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. This explicit statement of retroactivity was thus necessary to produce the desired effect of extending the benefit to cover past conduct.

Here, the Respondents did not dispute that Virginia's earned sentence credit program creates a substantive interest. Rather, Respondents 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. 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 itself 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. Tr. p. 32 ("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.").

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.[7] Both HB 5148 and Budget Item 404(R) modified the fundamental nature of the earned sentence credit program and thus

[7] 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.

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. 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.

II. 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 § 53.1-202.3 FOR TIME SERVED PRIOR TO JULY 1, 2022.

Because the court below erroneously held that Budget Item 404(R) did not affect a substantive right, the 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.

Respondents conceded that applying Budget Item 404(R) such that it negates the ability of people with mixed sentences to earn expanded sentence credits for time served prior to July 1, 2022 is a retroactive application. Mot. to Dism. 9. The court below did not dispute this characterization. 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." Tr. at p. 33, lines 19-21, Tr. at p. 33, lines 12-21.

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 (2021). Essentially, the Respondents argued for, and the court below found, a previously unarticulated exception to this rule where two bills, passed at different times but effective on the same day, modify or address the same code section.[8]

Respondents did not identify any authority supporting the idea that such an exception would comport with this Court's well-established rules of statutory construction. 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);

[8] This novel exception effectively resulted in the implied repeal of the enactment clause of H.B. 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 of Virginia*, 187 Va. 831, 841 (1948).

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)).

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 General Assembly knows what language to use when it intends for a bill to have a retroactive effect. Where the General Assembly does not include an explicit instruction to apply a law retroactively, courts may not infer that instruction. *Green v. Commonwealth*, 75 Va. App. 69, 82 (2022). In *Green*, the Court of Appeals found that an amendment to an existing statute did not apply retroactively, noting that the bill did not contain any language explicitly providing

for retroactive application. The court explained that "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." *Id.*

The same is true 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.

What is more, the placement of this 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 Respondents' interpretation). The fact

that Budget Item 404(R) is an impermanent modification to the earned sentence credit program weighs heavily against any retroactive application.

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.

III. 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. Tr. 33-34. 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 would be internally inconsistent or the statute would be impossible to implement. *Id.* (noting that a "classic example would be a literal, but entirely dysfunctional, interpretation 'validating' an act while simultaneously 'nullifying' it.").

Further, a court must exercise caution when examining whether the plain language of a statute creates an absurd result 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." *Id.* at 279.

Thus, to justify disregarding the plain language of the Budget Item and making an inference of retroactivity, the circuit court was required to determine that it would be impossible to implement the Budget Item as written, or that it would result in an internal inconsistency. Respondents 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 commonsense conclusion that implementing the restrictions contained in the Budget Item only prospectively would be both possible and internally consistent.

In fact, VDOC has already implemented a complicated, multi-faceted earned sentence credit system. The General Assembly very intentionally created a two-tiered system when it passed HB 5148 in 2020. 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* Mot. to Dism. 4 ("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.").

The prospective application of Budget Item 404(R) would result in a system only marginally more complicated than what VDOC had already implemented, requiring only a minor adjustment to the criteria for eligibility for enhanced sentence credits. However, the retroactive application of Budget Item 404(R) meant that VDOC had to identify a sub-group of individuals who were serving mixed sentences, and remove them from the pool entitled to release in the 60 days following July 1, 2022 – an exercise that was surely more burdensome than simply applying the new eligibility criteria going forward. And when the Budget Item expires in 2024, VDOC will have to recalculate hundreds or thousands of sentences – including again awarding retroactive sentence credits for time served prior to July 1, 2022, in accordance with HB 5148. This is surely more absurd than applying the limiting eligibility criteria of the Budget Item 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.

At bottom, the Respondents' 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). 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.

IV. 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,[9] a holding

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

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 implicated by its interpretation of the Budget Item.

A. 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.

Consider *Lynce*. There, the petitioner was released after having been awarded sentence credits related to prison overcrowding. The Florida legislature then retroactively 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 the same situation here. Upon the enactment of H.B. 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 H.B. 5148 in 2020 created an entitlement to those credits and an expectation that they 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 H.B. 5148 prior to July 1, 2022.

B. 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* Pet. Ex. B, ("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 § 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).

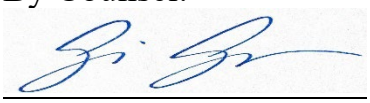
If Budget Item 404(R) applies retroactively to cause the loss of earned sentence credits – not based on the actions of any affected individual but simply based on the nature of that person's convictions, it would raise serious questions

under these principles of due process, as no process whatsoever was provided to those affected by it. Again, courts must avoid these constitutional problems if there is a way to read the statute to do so. Applying Budget Item 404(R) only prospectively relieves it of the due process problem as applied to Mr. Anderson.

CONCLUSION

This case presents a clear error 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. This holding will impact not just Mr. Anderson, but everyone else still in VDOC custody who is similarly situated. It will also resolve the numerous *pro se* cases currently pending before this and other courts that raise the same issue. And as a result of this holding, Mr. Anderson would have served his entire sentence as of July 1, 2022. Therefore, this Court should grant this appeal and ultimately issue a writ of habeas corpus ordering Mr. Anderson's immediate release.

RESPECTFULLY SUBMITTED,
ANTOINE ANDERSON
By Counsel:



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