IN THE
SUPREME COURT OF VIRGINIA

Record No. 230172

ANTOINE ANDERSON,
Petitioner-Appellant,

v.

HAROLD CLARKE and KEMSY BOWLES,
Respondents-Appellees.

BRIEF OF APPELLEES

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INTRODUCTION

Petitioner Antoine Anderson seeks immediate release from prison on his sentences for assaulting and kidnapping correctional officers. He contends that he is entitled to the benefit of 2020 legislation, House Bill 5148, that would have allowed him to earn enhanced sentence credits. H.B. 5148, Va. Gen. Assem. (Spec. Sess. I 2020). But the version of the legislation he relies upon never went into effect because the General Assembly modified it prior to its 2022 effective date. 2022 Acts ch. 2, Item 404(R)(2) (Spec. Sess. I). It is axiomatic that legislation does not take effect before its effective date. The law that actually went into effect on July 1, 2022 does not entitle Anderson to enhanced sentence credits because one of Anderson's crimes—felony abduction—is excluded from those eligible for enhanced sentenced credits.

Anderson urges this Court to reject the plain meaning of the law by applying the presumption against retroactivity. But that presumption does not apply here. Item 404(R)(2) did not affect any pre-existing legal rights. Instead, it merely prevented the pending legal changes set forth in H.B. 5148 from ever becoming more than pending. Item

404(R)(2) therefore left Anderson subject to the very same earned sentence credit regime in place when he was convicted and sentenced. In any event, there was no need for the General Assembly to include express retroactivity language in Item 404(R)(2) because it relates back to the initial unambiguously retroactive provision in H.B. 5148 as part of the same legislative scheme and became effective on the same date.

Anderson's constitutional arguments fail for similar reasons. When a legislature amends pending legislation before its effective date, the never-effective, pre-amendment provisions do not affect any rights or interests and cannot serve as a basis for habeas relief. And Anderson has not retroactively been subjected to harsher punishment than when he committed his crimes; to the contrary, his sentence remains exactly the same. This Court should affirm the circuit court's dismissal of Anderson's habeas petition.

STATEMENT OF THE CASE

Following Antoine[1] Anderson's attempted escape from prison, an Albemarle County jury convicted him of two counts of assaulting and

[1] Anderson's legal first name is "Antoine," but court records in his criminal cases below refer to him by other names, including "Antinne." See JA1 n.1. This filing follows the spelling used in Anderson's brief.

battering correctional officers, in violation of Code § 18.2-57(C); abduction of a correctional officer by a prisoner, in violation of Code § 18.2-48.1; and attempted escape, in violation of Code § 18.2-478. JA13–14; see *Anderson v. Commonwealth*, Record No. 1596-05-2, 2006 WL 3589058, at *1–2 (Va. Ct. App. Dec. 12, 2006).[2] The circuit court sentenced him to a total of thirteen years' incarceration with the Virginia Department of Corrections (VDOC) for these felony convictions, with each sentence to run consecutively. JA14. Anderson began serving this sentence on January 18, 2013, when he was transferred to VDOC custody after completing his sentence on federal drug charges. JA4.

Following the July 1, 2022 effective date of the General Assembly's revisions to the earned sentence credit program, Anderson petitioned the Albemarle County Circuit Court for a writ of habeas corpus, arguing that he was entitled to immediate release under that revised program. JA1. The circuit court granted the Commonwealth's motion to

[2] The unpublished dispositions relating to Anderson's charges, convictions, and direct appeals are cited "as informative," and copies of those not available in a publicly accessible electronic database are appended to this brief. Rule 5:1(f).

dismiss the petition after hearing argument. JA58–73, 92, 134–38. This Court then granted Anderson's appeal. JA142.

ASSIGNMENTS OF ERROR

Anderson presents four 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.

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.

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.

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.

Opening Br. 3; JA142.

STATEMENT OF FACTS

A. Anderson receives a thirteen-year sentence for abducting and assaulting correctional officers in an escape attempt

After police officers caught Anderson with large amounts of drugs for distribution in Charlottesville, Virginia, federal prosecutors charged him with, among other offenses, conspiracy to distribute 50 or more grams of cocaine base, in violation of 21 U.S.C. § 846. *United States v. Griffin et al.*, No. 3:04-cr-00030, Mem. Op. at 1–3 (W.D. Va. Nov. 8, 2004), ECF No. 108; *United States v. Anderson*, No. 3:04-cr-00030, Plea Agreement at 1–3 (W.D. Va. May 12, 2005), ECF No. 166.

While Anderson was incarcerated in the Albemarle-Charlottesville Regional Jail pending resolution of these federal charges, JA4, he abducted and assaulted two correctional officers in an attempt to escape, *Anderson v. Commonwealth*, Record No. 1596-05-2, 2006 WL 3589058, at *1 (Va. Ct. App. Dec. 12, 2006). When 72-year-old correctional officer Harold Terry entered Anderson's cell block, "an inmate surprised him from behind and restrained him in a headlock." *Id.*; *Anderson v. Commonwealth*, Record 1596-05-2, one-judge order at 1–2 (Va. Ct. App. Mar.

21, 2006). Several other inmates attacked the officer—including Anderson, who "began hitting [Terry] in the face," while another inmate began hitting Terry in the groin. *Anderson*, 2006 WL 3589058 at *1. Anderson and the other inmates then handcuffed the injured Terry, hog-tied him, and shoved him underneath a cell bed where he lost consciousness. *Anderson*, 2006 WL 3589058 at *1; *Anderson*, Mar. 21, 2006 order at 2.

Soon another correctional officer, Joseph Woodson, entered the cellblock. *Anderson*, 2006 WL 3589058 at *1. The inmates also attacked him, holding him by the neck and bringing him to the ground. *Id.* His head hit the cell bars during the struggle, and he briefly lost consciousness. *Anderson*, Mar. 21, 2006 order at 2. As Woodson lay face down on the floor, Anderson got on top of him, demanded that Woodson put up his hands, and then handcuffed Woodson while another inmate used a bedsheet to tie Woodson's feet together. *Anderson*, 2006 WL 3589058, at *1.

With Terry and Woodson restrained, the inmates tried unsuccessfully to escape through a cell window. *Id.* Anderson kept guard over Woodson in the cell for approximately an hour. *Anderson*, Mar. 21, 2006

order at 3. The hostage situation ended after other inmates eventually entered the cell and freed Woodson. *Anderson*, 2006 WL 3589058, at *1.

A jury convicted Anderson of state-law felony abduction, assault, and attempted-escape charges arising from these events. JA13. The circuit court sentenced him to a total of thirteen years' imprisonment with VDOC. JA14, 75.

In the meantime, Anderson pleaded guilty to federal charges of conspiracy to distribute and possession with intent to distribute 50 or more grams of cocaine base, in violation of 21 U.S.C. §§ 841 and 846. *United States v. Anderson*, No. 3:04-cr-00030, Plea Agreement at 1–3 (W.D. Va. May 12, 2005), ECF No. 166; *United States v. Anderson*, No. 3:04-cr-00030, Judgment at 1 (W.D. Va. Mar. 28, 2006), ECF No. 206. Anderson began serving his federal sentence in April 2006. JA4. When Anderson completed the federal sentence, he began serving his Virginia sentences on January 18, 2013. JA4, 75.

B. The General Assembly modifies the earned sentence credit program over several legislative sessions

Virginia has long allowed inmates serving certain sentences to earn credit for good behavior during their incarceration, thereby reduc-

ing the length of their sentences. Code § 53.1-202.2 *et seq.*; see generally JA19 (describing the various "good time" award systems VDOC administers). Different credit systems apply to different sentences, depending on the type, date, and severity of the offense. JA19. The system in place at the time Anderson was sentenced—called the earned sentence credit program—applies to inmates who committed felony offenses on or after January 1, 1995. JA19. When Anderson was sentenced, he was eligible to earn a maximum of 4.5 credit days for every 30 days served. Code § 53.1-202.3 (2021); see JA19.

In 2020, the General Assembly took up House Bill 5148, which proposed to alter the maximum rate at which inmates could earn sentence credits. JA84–86; H.B. 5148, Va. Gen. Assem. (Spec. Sess. I 2020), https://tinyurl.com/yvj7nfpj. H.B. 5148 amended Code § 53.1-202.3 to create a new subsection A. Subsection A lists certain offenses, largely more serious violent felonies, for which the maximum rate at which sentence credits could be earned would remain 4.5 days per 30-day period. *Id.* For offenses not enumerated in subsection A, the maximum sentence credits an inmate could earn varied, and could be as high as 15 days for every 30 days served for certain eligible inmates. *Id.*

Enactment clauses in H.B. 5148 provided that the legislation would "become effective on July 1, 2022," at which time the changes would "apply retroactively to the entire sentence" of eligible inmates. JA85. In addition, recognizing that the magnitude and complexity of the changes merited study and could require further legislative adjustment, H.B. 5148 required VDOC to "convene a work group to study the impact of the sentence credit amendments set forth in this act" and "report its findings and conclusions to the Governor and General Assembly."[3] JA85 (enactment clause 2).

The General Assembly passed H.B. 5148, and the Governor signed it on November 9, 2020. See 2020 Acts ch. 50 (Spec. Sess. I). After passage, VDOC began "conducting testing and making preliminary calculations in an effort to identify inmates" whose sentences might be affected when the bill would eventually take effect nearly twenty months later. JA76. VDOC notified the inmate population that any changes in sentence calculations were prospective and potential, and that any home plans—that is, VDOC-approved plans for post-release living and work

[3] VDOC submitted this report on June 1, 2023 as required. Earned Sentence Credit Legislation—House Bill 5148 Report, H. Doc. No. 7, 2023, https://tinyurl.com/3ffa798x.

arrangements—based on revised projected release dates were necessarily "preliminary" because "audited and finalized calculations cannot occur until on and after" the legislation's July 1, 2022 effective date. JA76–77, 82. VDOC's letter to the inmate population stated: "No legal updates can be generated that reflect Enhanced Earned Sentence Credits" as modified by H.B. 5148 "prior to 7/1/2022." JA82–83.

Meanwhile, the General Assembly continued to consider changes to the program prior to its effective date. On June 17, 2022, the General Assembly passed, and on June 22, 2022, the Governor signed into law, Item 404(R)(2), which provided that certain inmates who had committed serious offenses would not be eligible for the enhanced sentence credits set forth in H.B. 5148 on any of their sentences for any offense. See H.B. 30, Va. Gen. Assem. (2022 Spec. Sess. I), https://tinyurl.com/2s4e5kpc. Item 404(R)(2) stated that, "[n]otwithstanding the provisions of § 53.1-202.3 . . . 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." 2022 Acts ch. 2, at 460–61, Item 404(R)(2) (Spec. Sess. I), https://tinyurl.com/3venuhxj; JA90.

Thus, Item 404(R)(2) provides that H.B. 5148 will not increase the maximum sentence credits available for an inmate with a mixed sentence—that is, an inmate serving a sentence for at least one offense enumerated in subsection A of Code § 53.1-202.3, along with sentences for additional offenses that are not enumerated in subsection A. Such inmates remain eligible to earn the pre-existing maximum of 4.5 days of sentence credits for every 30 days served across all of their felony sentences covered by the earned sentence credit program. Item 404(R)(2) became effective simultaneously with H.B. 5148 on July 1, 2022.

C. The circuit court denies Anderson's habeas petition

Anderson has been earning 4.5 days of credit for every 30 days served since he became a VDOC inmate. JA75; see Code § 53.1-202.3 (2010). Applying this calculation with the assumption that Anderson would "continue to earn good time at [his] present earning level" and would not lose credit "as a result of misbehavior," VDOC in 2013 calculated Anderson's projected release date as April 9, 2024. JA36.

After H.B. 5148 and Item 404(R)(2) became effective, Anderson filed a petition for a writ of habeas corpus in Albemarle Circuit Court

against Harold Clarke, VDOC's Director, and Kemsy Bowles, the Warden of Coffeewood Correctional Center where Anderson is presently incarcerated. JA1–57. Anderson asserted that, although his felony abduction conviction is enumerated in subsection A of Code § 53.1-202.3 as ineligible for the new increased maximum rate of days of credit for every 30 days served, he was eligible for that new maximum rate on his sentences for attempted escape and assault under the revised earned sentence credit program, entitling him to release in 2022.[4] JA7–8, 37, 82. He claimed that Item 404(R)(2) did not apply to his sentence because it did not apply "retroactively" at all—that is, it did not apply to the portion of any "mixed sentence" served before July 1, 2022. JA8, 47–50. He further argued that if Item 404(R)(2) were interpreted to apply "retroactively," it would "result in Constitutional infirmities under the Ex Post Facto clause and principles of Due Process." JA10; see also JA52–54.

[4] Anderson argues that if Item 404(R)(2) does not apply, then he served his entire sentence by July 1, 2022. Opening Br. 11. Bowles and Clarke dispute this calculation but agree that if Item 404(R)(2) does not apply to Anderson's sentence, he is currently eligible for release. The exact date on which Anderson became eligible for release in 2022 is irrelevant to the questions presented in this appeal, and the Court should not address it.

The circuit court granted Clarke and Bowles's motion to dismiss. JA122–27. The circuit court held that the General Assembly's changes to the earned sentence credit program "must be read in combination, including the implementation language of HB5148," so any "additional retroactive language" in Item 404(R)(2) would have been "unnecessary" and "redundant of HB5148's implementation clause." JA135; see JA124 ("[L]anguage that [Item 404(R)(2)] would be applied retroactively was not necessary and would have been duplicative."). It held that Anderson remained eligible to earn a maximum of 4.5 days of credit for every 30 days served on all of his sentences because he was convicted of an offense—abduction of correctional officer Joseph Woodson, in violation of Code § 18.2-48.1—enumerated in subsection A of Code § 53.1-202.3. JA13, 135–36; see JA84–86, 89–90. As a result, the circuit court concluded that the rate at which Anderson may earn sentence credits has not changed since he was initially remanded to VDOC custody. JA136.

The circuit court further held that "[n]either HB5148 nor Budget Item 404(R)(2) created a vested or substantive right before their effective date of July 1, 2022." JA135. The court explained that "[u]ntil this provision became effective, it is not something the Court determines to

be a vested or substantive right, and that makes it significantly different from the other cases that were cited by Mr. Anderson as those all involved statutes [that] . . . were effective." JA123.

The circuit court further observed that H.B. 5148's provision convening a working group and requiring the submission of a report made clear that the General Assembly contemplated that the changes to the earned sentence credit program were a work in progress. Thus, nothing "guarantee[d] that even though [H.B. 5148] was to be effective on July the 1st, 2022, that, in fact, that could not have changed." JA123–24. The circuit court also noted that construing Item 404(R)(2) to apply only to "time spent 'incarcerated between July 1, 2022, and June [3]0, 2024,' as [Anderson] suggests, would be arbitrary and so capricious as to lead to an absurd result which the legislature did not intend." JA135–36 (quoting JA51).

Because Anderson's sentence and projected release date were "accurately calculated," the circuit court therefore denied and dismissed the petition. JA136. This appeal followed. JA142.

STANDARD OF REVIEW

Anderson presents issues of statutory interpretation and constitutional law, which this Court reviews de novo. *City of Charlottesville v. Regulus Books, LLC*, 301 Va. 170, 177 (2022); *Shin v. Commonwealth*, 294 Va. 517, 526 (2017).

SUMMARY OF ARGUMENT

Under the plain language of Item 404(R)(2), Anderson remains eligible for a maximum of 4.5 days of earned credit for every 30 days served because he abducted a correctional officer, an offense enumerated in subsection A of Code § 53.1-202.3. Anderson resists this plain meaning by appealing to the presumption against retroactivity. But Item 404(R)(2) does not implicate that doctrine. The presumption applies only where a law would otherwise affect "rights acquired *under existing laws*." *Landgraf v. USI Film Products*, 511 U.S. 244, 269, 277 (1994) (emphasis added). Item 404(R)(2) did not affect any rights Anderson had acquired under existing law because H.B. 5148 had not yet become effective. Rather, it preserved the status quo, preventing the pending changes anticipated in H.B. 5148 from becoming effective in the first instance as to inmates with mixed sentences. Anderson's argument that this application of Item 404(R)(2) is "retroactive" contravenes the

fundamental principle that legislation has no effect before its effective date.

Further, even if the presumption against retroactivity applied here, Item 404(R)(2) would still plainly bar enhanced sentence credits for inmates with mixed sentences. Because both H.B. 5148 and Item 404(R)(2) were enacted as part of the same legislative endeavor and became effective on the same date, they must be read together. Including additional express retroactivity language in Item 404(R)(2) would have been redundant.

Anderson's constitutional arguments fail for similar reasons. Legislation cannot affect substantive rights or interests prior to its effective date. When a legislature amends pending legislation before its effective date, the never-effective, pre-amendment provisions do not create any substantive rights or interests. When H.B. 5148 and Item 404(R)(2) became effective on July 1, 2022, nothing about Anderson's sentence changed: his eligibility for earned sentence credits remained the same on July 1 as it has been since the day he was sentenced. Because "his penalty was [not] increased from the time he committed his original unlawful acts" and indeed has not "changed at all," Item 404(R)(2) fully

complies with the Ex Post Facto Clause. *Teague v. Hines*, 232 F.3d 902, at *2 (10th Cir. 2000) (table).

Similarly, Anderson's Due Process Clause claim fails because legislation that never became effective provides Anderson no substantive rights or protected liberty interests. And he identifies no legally relevant facts that any additional process he seeks could determine. This Court should affirm.

ARGUMENT

I. Item 404(R)(2) does not implicate the presumption against retroactivity, and in any event would overcome the presumption

A. The presumption against retroactivity does not apply because Item 404(R)(2) altered only H.B. 5148, which was not effective law

Under the plain language of Item 404(R)(2), Anderson is not entitled to enhanced sentence credits. Item 404(R)(2) provides that "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." 2022 Acts ch. 2, Item 404(R)(2) (Spec. Sess. I), https://tinyurl.com/3venuhxj. Anderson's current sentences are all "consecutive to a sentence for a conviction of an

offense enumerated in subsection A." *Id.* Anderson was convicted of felony abduction of a correctional officer, and subsection A enumerates "any kidnapping or abduction felony." Code § 53.1-202.3(A)(5). And Item 404(R)(2)'s *non obstante* clause further clarifies that the 4.5 credit maximum applies "[n]otwithstanding the provisions of § 53.1-202.3." Item 404(R)(2); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 621–22 (noting that "legislatures use[] *non obstante* provisions to specify the degree to which a new statute was meant to repeal older, potentially conflicting statutes in the same field" and that "[a] *non obstante* provision in [a] new statute acknowledged that the statute might contradict prior law and instructed courts not to apply the general presumption against implied repeals." (cleaned up)); *United States v. Frank*, 8 F.4th 320, 327 (4th Cir. 2021) (observing that the legislature's "use of a 'notwithstanding' clause 'clearly signals the drafter's intention that the provisions of the "notwithstanding" section override conflicting provisions of any other section.'" (quoting *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993)); 3 Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes and Statutory Construction, § 59:8 (8th ed. 2018) [hereinafter

Sutherland] ("In general, a 'notwithstanding' clause merely excepts enumerated provisions that otherwise conflict.").

Anderson disputes none of this. Instead, he invokes the presumption against retroactivity to argue that the Court should not apply the plain meaning of Item 404(R)(2) to the portion of his sentences served prior to July 1, 2022. His invocation, however, is incorrect because Item 404(R)(2) did not change any pre-existing law; applying it to the portion of his sentence served before July 1, 2022 therefore would not constitute a retroactive application and does not implicate the presumption.

The presumption against retroactivity applies only where a statute would otherwise "have genuinely 'retroactive' effect." *Landgraf*, 511 U.S. at 277 (emphasis added) (internal quotation marks omitted) (quoting *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814)). A statute is genuinely retroactive if it "takes away or impairs vested rights acquired *under existing laws*, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Id.* at 269. In other words, "a retroactive application reaches back to affect rights and

duties accrued prior to the legislation." *Virginia Elec. & Power Co. v. State Corp. Comm'n*, 300 Va. 153, 165 (2021).

Here, the presumption is irrelevant because Item 404(R)(2) did not alter any pre-existing law and did not affect any "rights and duties" previously acquired. Instead, Item 404(R)(2) altered only pending legislation that had not become effective. Anderson contends that Item 404(R)(2) "narrowed the eligibility criteria for the increased credits *after HB 5148 took effect*." Opening Br. 18 (emphasis added). But the General Assembly expressly set the effective date for H.B. 5148 as July 1, 2022. JA85. And the General Assembly passed Item 404(R)(2) in June 2022—*before* H.B. 5148 took effect. See p. 10, *supra*. Thus, H.B. 5148 never became effective for inmates with mixed sentences, like Anderson. Instead, Item 404(R)(2) prevented H.B. 5148 from taking effect for such inmates in the first place. It maintained the pre-existing status quo of a 4.5-day credit maximum.

Anderson's argument that this application of Item 404(R)(2) is "retroactive" would require holding that H.B. 5148 granted him rights prior to its effective date. That argument is contrary to the basic meaning of an effective date. This Court has held that a "statute speaks as of

the time when it takes effect and not of the time it was passed." *County Sch. Bd. of Fairfax Cnty. v. Town of Herndon*, 194 Va. 810, 814 (1953). "Indeed, where a statute does not become operative immediately on its enactment, but the time of its going into effect is postponed until a later date . . . it ordinarily does not have *any effect* until the stated period has expired." *Id.* (emphasis added); see also 2 Sutherland, § 33:5 ("The power to enact laws includes the power to fix a future effective date. . . . A statute with a definite future commencement day has effect only from that date, no matter when it was enacted."); *State v. North Pac. Ry. Co.*, 93 P. 945, 948 (Mont. 1908) ("Legislation is not effective for any purpose until it becomes operative.").

Thus, as the U.S. Court of Appeals for the Tenth Circuit has explained, when "a law . . . was adopted, but repealed before its effective date," it has no effect and confers no rights, because the status quo remains "until the Act became effective—which it never did[.]" *Teague*, 232 F.3d 902, at *2; see also *Nichols v. Helgemoe*, 369 A.2d 614, 618 (N.H. 1977) (when "the prior enactment was amended before its effective date," it "never conferred any benefit.") (citing, *i.a.*, 2A J. Sutherland, Statutes and Statutory Construction § 33.07 (4th ed. C. Sands

1973)). Accordingly, numerous federal courts have rejected similar inmate claims that they were entitled to the benefits of new good-time credit calculations under the recently enacted federal First Step Act prior to that law's effective date. See *Washington v. Bureau of Prisons*, 2019 WL 6255786 at *2 (N.D. Ohio July 3, 2019), report and recommendation adopted, 2019 WL 6251777 (N.D. Ohio Nov. 22, 2019) (gathering cases reaching the same conclusion).

This Court has consistently applied this fundamental principle of legislative interpretation. *J.W. Woolard Mech. & Plumbing, Inc. v. Jones Dev. Corp.*, 235 Va. 333, 336 n.* (1988) ("The amendment has no effect on the present case, which turns on facts which occurred before its effective date. If it were applicable, its language would have resolved the question before us."); *Friedman v. Peoples Serv. Drug Stores, Inc.*, 208 Va. 700, 702 (1968) ("The provisions of the Uniform Commercial Code, if applicable, have no effect on the case at bar since the cause of action accrued prior to January 1, 1966, the effective date of the Act."); *Bull v. Read*, 54 Va. (13 Gratt.) 78, 89 (1855) ("[T]he legislature may provide that an act shall not take effect until some future day named or until the happening of some particular event or in some contingency

thereafter to arise or upon the performance of some specified condition. The exigencies of the government may frequently require laws of this character and to deny to the legislature the right so to frame them would be unduly to qualify and impair the powers plainly and necessarily conferred.").

Here, Item 404(R)(2) did not amend existing law; it merely modified H.B. 5148, which had not come into effect. Such a modification is no more a "retroactive" law than a legislative amendment to a pending bill. Anderson cites no case holding that the presumption against retroactivity applies in such circumstances. It does not. The application of Item 404(R)(2) to Anderson affects no "rights acquired under the former law." *Ferguson v. Ferguson*, 169 Va. 77, 85 (1937) (citation omitted). Indeed, it does not "affect[] past transactions" at all, *Gloucester Realty Corp. v. Guthrie*, 182 Va. 869, 873 (1944), because the only changes Item 404(R)(2) made were to legislation that had not yet become "existing law[]," *Landgraf*, 511 U.S. at 277; *Nichols*, 369 A.2d at 618; see *Virginia Elec. & Power Co.*, 300 Va. at 165 (2021).

Accordingly, Item 404(R)(2) should be interpreted according to its plain meaning. The circuit court correctly held that Anderson is not entitled to enhanced sentence credits.

B. Even if the presumption against retroactivity applied, Item 404(R)(2) plainly bars mixed sentences from eligibility for enhanced sentence credits

Even if the presumption against retroactivity somehow applied here, Anderson would still be ineligible for enhanced sentence credits. Generally, "statutes will not be applied retroactively absent a manifest intent to the contrary." *Virginia Elec. & Power Co.*, 300 Va. at 165. But this Court "has never required that the General Assembly use any specific form of words to indicate that a new statute or amendment to an existing statute is intended to be applied retroactively." *Board of Sup'rs of James City Cnty. v. Windmill Meadows, LLC*, 287 Va. 170, 180 (2014). Instead, the Court looks "to the *context* of the language used by the legislature to determine if it 'shows it was intended to apply retroactively and prospectively.'" *Id.* (emphasis added) (quoting *Buenson Div., Aeronca, Inc. v. McCauley*, 221 Va. 430, 433 (1980)).

Thus, the presumption against retroactivity can be overcome not only by "explicit language," but also by implication from the nature of

the legislative enactment. *Fernandez-Vargas v. Gonzalez*, 548 U.S. 30, 37 (2006) ("[I]t has become 'a rule of general application' that 'a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication.'" (quoting *United States v. St. Louis, S.F. & T.R. Co.*, 270 U.S. 1, 3 (1926)); see also *In re Pillow*, 8 B.R. 404, 407 (Bankr. D. Utah 1981) ("Congress must have intended Section 522(f) to reach pre-enactment security interests, because otherwise there would be a hiatus in the coverage of the bankruptcy laws.").

The presumption also does not change the cardinal rule that "statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogenous system, or a single and complete statutory arrangement." *Blake v. Commonwealth*, 288 Va. 375, 383 (2014) (citation omitted). "[E]very part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary." *Id.* (citation omitted).

Here, the General Assembly's intent for Item 404(R)(2) to apply to the entirety of mixed sentences is clear from the context of the legisla-

ture's amendments to the statutory scheme. The General Assembly enacted both H.B. 5148 and Item 404(R)(2) as part of a comprehensive legislative process to alter the earned sentence credit program in Code § 53.1-202.3 that would "apply retroactively to the entire sentence" of an eligible Virginia inmate. JA85. And the General Assembly provided that both H.B. 5148 and Item 404(R)(2) would become effective simultaneously "on July 1, 2022." JA85; see 2022 Acts ch. 2, at 659–60, (Spec. Sess. I), https://tinyurl.com/3venuhxj (providing that the provisions of the first enactment clause, including Item 404(R)(2), become "effective on July 1, 2022.").

Although the General Assembly passed H.B. 5148 more than a year earlier than Item 404(R)(2), it provided for an unusually long period before H.B. 5148 would become effective in order to examine further the earned sentence credit program, which included convention of a working group to study the legislation's potential effects. JA85. As a result of its further consideration during the period it provided for exactly that purpose, the General Assembly altered H.B. 5148 prior to its effective date to provide that it would not increase the sentence credits

available to inmates with mixed sentences. See pp. 10–11, *supra*. Therefore, the circuit court correctly held that H.B. 5148 and Item 404(R)(2) "must be read in combination, including the implementation language of HB5148." JA135.

Anderson argues that he is entitled to enhanced sentence credits under H.B. 5148 for every 30 days he served prior to July 1, 2022, because Item 404(R)(2) did not repeat H.B. 5148's enactment clause stating that its terms would apply "retroactively to the entire sentence" of any eligible inmate. Opening Br. 19; JA85. This argument fails. Repetition of the enactment clause was unnecessary because Item 404(R)(2)'s sole purpose was to modify the otherwise explicitly retroactive terms of H.B. 5148. Indeed, the legislative debates on Item 404(R)(2) make clear that the public understood it to be a modification of H.B. 5148 before H.B. 5148 ever took effect. See, *e.g.*, H.B. 30, Senate Floor Debate at 5:37:49 to 5:43:43, Jun. 17, 2022, Va. Gen. Assem. (2022 Spec. Sess. I), https://tinyurl.com/4krmkew2 (statement of Sen. Mark Obenshain) ("I remember while we were debating [H.B. 5148 in 2020] that there was a great deal of discussion over who would and would not be eligible for

those credits. We spent a lot of time talking about whether violent offenders—the worst of the worst—would be eligible for these earned sentence credits, and it was the consensus of this body that they should not be. . . . We spent a great deal of effort making sure that people who were convicted of those offenses were not eligible, but because of the way that this was drafted, this is a loophole that we should close. We have an obligation to do what we set out to do during that 2020 session and limit this and carefully cabin [earned sentence credit eligibility] to those who we agreed and linked arms and said should be eligible for these credits. . . . [T]his [amendment] corrects that."). The legislative context makes clear that Item 404(R)(2) was part of the same ongoing effort to revise the earned sentence credit regime that gave rise to H.B. 5148. Thus, as the circuit court correctly held, additional enactment language would have been "redundant." JA135.

This Court recently applied this reasoning to a similar ongoing legislative undertaking. In a series of amendments, the General Assembly altered the jurisdiction of the Court of Appeals of Virginia, including as to petitions for review of immunity rulings. See, *e.g.*, 2021 Acts ch. 489 (Spec. Sess. I); 2022 Acts ch. 307; 2023 Acts ch. 741. One such

amendment affecting jurisdiction over these petitions included an enactment clause addressing its application to pending cases. 2022 Acts ch. 307 (enactment clause 2). A year later, the General Assembly recodified the jurisdictional provisions governing these petitions in a new Code section—but did not include another enactment clause providing that the recodified provisions applied to pending cases. 2023 Acts ch. 741. The Court of Appeals held that "without a savings clause" like the 2022 legislation had, the recodified provisions were inapplicable to pending cases. *Commonwealth v. Muwahhid*, __ Va. App. __, 2023 WL 3956774, at *1, n.1 (June 13, 2023). It therefore "believed it no longer had jurisdiction over [a pending] case and transferred it" to this Court. *Id.* But this Court disagreed, "finding that the Court of Appeals retains jurisdiction over the petition for review," and remanded the case back to the Court of Appeals. *Commonwealth v. Muwahhid*, Record No. 230278, Order of May 30, 2023.

The same rationale should apply here. The General Assembly's alteration of the earned sentence credit program, just like its expansion of the Court of Appeals's jurisdiction, was a complex and ongoing legislative project that was not completed in a single iteration. And just as the

General Assembly did not need to repeat the enactment clause in its 2023 legislation recodifying the jurisdictional provision, it likewise did not need to repeat the enactment language in Item 404(R)(2) to apply the Item's adjustment to the same sentences potentially covered by H.B. 5148's retroactivity clause.

In short, the General Assembly need not repeat itself when the legislative context plainly demonstrates that it is continuing to adjust a legislative regime on which it has already expressed its intent regarding retroactivity. This Court should affirm the circuit court's correct holding that H.B. 5148 and Item 404(R)(2) "must be read in combination," such that additional enactment language in Item 404(R)(2) would be "unnecessary" and "redundant of HB5148's implementation clause." JA135.

Moreover, Anderson's interpretation of Item 404(R)(2) makes a hash of the General Assembly's intent. Anderson argues that the General Assembly intended for inmates with mixed sentences to obtain enhanced credits retroactively for the entirety of their sentences prior to July 1, 2022, then to be ineligible for enhanced credits solely between July 1, 2022 and June 30, 2024. Opening Br. 30. Anderson provides no

reason why the General Assembly would have intended this incoherent scheme. Indeed, legislators who passed Item 404(R)(2) did so with the understanding that they were correcting an "inadvertent[]" effect of H.B. 5148. See H.B. 30, Senate Floor Debate at 5:39:11 to 5:43:43, Jun. 17, 2022, Va. Gen. Assem. (2022 Spec. Sess. I), https://tinyurl.com/4krmkew2 (statement of Sen. Mark Obenshain) ("That bill when it was adopted I believe inadvertently provided eligibility to people who were convicted concurrently of offenses that were covered and offenses that were not covered [under subsection A]. . . . Because of the legislation that we passed and without this amendment, we are going to be releasing 43 murderers and 41 rapists who would not be eligible to be released at the beginning of next month without that legislation, and this [amendment] corrects that."). Instead, Anderson argues that the incoherence of his interpretation is solely a "policy" issue, which this Court cannot consider. Opening Br. 27–28. But Anderson's argument that the presumption against retroactivity compels this bizarre result fails, see Part I.A, *supra*, and the implausibility of his interpretation further demonstrates that it is not what the General Assembly in-

tended, see *Boynton v. Kilgore*, 271 Va. 220, 227 (2006) ("When interpreting statutes, courts ascertain and give effect to the intention of the legislature." (quotation marks and citations omitted)).

Anderson also argues that the adoption of Item 404(R)(2) in a budget bill indicates that it was not intended to alter the effect of H.B. 5148 on the portion of mixed sentences served prior to July 1, 2022. Opening Br. 25–26. But given the budget bill's timing, shortly before H.B. 5148 would have gone into effect, this fact only underscores that the General Assembly intended Item 404(R)(2) to adjust the impending revisions to the earned sentence credit program.[5] The General Assembly was not required to repeat the enactment clause from the legislation

[5] The General Assembly may, of course, choose to extend the effect of Item 404(R)(2) for a further period of years, or permanently, before its expiration date in 2024. Thus, construing Item 404(R)(2) according to its plain terms would not necessarily result in any need for VDOC to "recalculate hundreds or thousands of sentences in accordance with HB 5148," as Anderson contends. Opening Br. 30. In any event, such a result would not be "absurd," for the reasons Anderson explains at length: it would not render the law internally inconsistent, impossible to implement, or a nullity. Opening Br. 27–31; *Tvardek v. Powhatan Vill. Homeowners Ass'n, Inc.*, 291 Va. 269, 280 (2016). Rather, interpreting Item 404(R)(2) according to its plain meaning would delay the application of retroactive enhanced sentence credits to those with mixed sentences, at least until 2024 as the General Assembly continues to consider how best to apply the earned sentence credit system. Thus, precisely as Anderson

that Item 404(R)(2) plainly modified to give Item 404(R)(2) its intended effect. JA135; see *Muwahhid*, 2023 WL 3956774, at *1 n.1.

Thus, even if Item 404(R)(2) had affected existing law and required a retroactivity analysis, but see Part I.A, *supra*, it would apply retroactively by implication. See generally *Gonzalez*, 548 U.S. at 37.

II. Anderson's constitutional claims fail

Anderson's Ex Post Facto Clause and Due Process Clause claims fail for similar reasons. Item 404(R)(2) does not retroactively increase Anderson's punishment compared to when he was sentenced. And Item 404(R)(2) does not retroactively strip Anderson of any substantive or vested right, or any protected liberty interest, and therefore complies with the Due Process Clause.

A. Anderson's Ex Post Facto Clause claim fails because his earned sentence credits were never revoked, and Item 404(R)(2) does not increase his punishment

The application of Item 404(R)(2) to Anderson complies with the Ex Post Facto Clause. The U.S. Constitution provides that no "ex post facto law shall be passed," and that "[n]o State shall . . . pass any . . . ex

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complains, Item 404(R)(2) prevents these violent felons from being immediately released from prison.

post facto law." U.S. Const. art. I §§ 9, 10. This clause "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." *Weaver v. Graham*, 450 U.S. 24, 30 (1981). Thus, the legislature violates the Ex Post Facto Clause only if it passes laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts" after the crime occurred. *Collins v. Youngblood*, 497 U.S. 37, 43 (1990).[6]

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[6] Anderson states that he brings claims under the Ex Post Facto Clauses of both the U.S. and the Virginia Constitutions. Opening Br. 31. But his petition does not refer to the Virginia Constitution's Ex Post Facto Clause. See JA10; see also JA52–53 (no reference to the Virginia Constitution.) And although his opening brief mentions the provision, he fails to make any specific argument about it. See Opening Br. 32–34. Accordingly, Anderson has waived any argument under the Virginia Constitution's Ex Post Facto Clause. See *Baugh v. Commonwealth*, 68 Va. App. 437, 442 n.3 (2018) (holding the same argument waived when the appellant alleged a violation of both Ex Post Facto Clauses but included "no discussion on how this state constitutional provision was violated") (citing Rule 5A:20(e)); *Martin v. Commonwealth*, 64 Va. App. 666, 674–75 (2015) (same). In any event, any argument under the Virginia Ex Post Facto Clause would fail for the same reasons as Anderson's argument under the federal clause. See *McClain v. Commonwealth*, 189 Va. 847, 858 (1949) (interpreting Virginia Constitution's Ex Post Facto Clause consistently with federal constitutional authorities); see also, *e.g.*, *Evans v. Commonwealth*, 228 Va. 468, 476–77 (1984) (analyzing Virginia and federal constitutional ex post facto claims in a single analysis using Virginia and federal law interchangeably); *Pilcher v. Commonwealth*, 41 Va. App. 158, 167–68 (2003) (same).

Here, Item 404(R)(2) complies with the Ex Post Facto Clause for two reasons. First, Item 404(R)(2) did not change Anderson's sentence at all. Rather, it maintained the same earned sentence credit system in place when Anderson committed his crimes and was sentenced for them by preventing H.B. 5148 from going into effect for inmates, like Anderson, with mixed sentences. Second, even if the change to H.B. 5148 prior to its effective date could be considered "retroactive," it complies with the Ex Post Facto Clause because it did not increase Anderson's punishment compared to when his crimes occurred.

1. Anderson cannot base an Ex Post Facto Clause claim on provisions that never became effective

First, Anderson's ex post facto argument fails because Item 404(R)(2) does not alter his sentence at all. Rather, it merely prevented the changes set forth in H.B. 5148 from taking effect. Again, a change to a pending provision prior to its effective date is not a change to existing law. See pp. 19–24, *supra*.

Anderson contends that application of Item 404(R)(2) to his sentence violates the Ex Post Facto Clause by revoking enhanced sentence credits he had "already earned." Opening Br. 33. But Anderson had *not* "already earned" any sentence credits under H.B. 5148, because that

provision was not in effect before June 2022, when it was amended by Item 404(R)(2). See JA84–91. It is a fundamental principle of legislation that a law has no effect before its effective date. A law does not confer any substantive rights or interests before its effective date. See pp. 21–23, *supra*. Anderson never earned, and was never eligible for, earned sentence credits at a rate higher than the existing 4.5 days for every 30 days served—the same rate in place when he committed his crimes. Instead, Anderson merely had a hope or "expectation" that he would be awarded enhanced credits in the future under H.B. 5148. Opening Br. 33.

A law that never became effective cannot provide the basis of an Ex Post Facto claim. For instance, after the Oklahoma legislature repealed a sentencing law prior to its effective date, the U.S. Court of Appeals for the Tenth Circuit repeatedly held that that the repeal did not violate the Ex Post Facto Clause as to prisoners who would otherwise have been entitled to a sentence reduction. The Tenth Circuit explained that it could "find no support for the asserted right to have a law that was adopted, but repealed before its effective date, applied retroactively on collateral review. Nor can we find any support for petitioner's claim

that the Oklahoma laws which postponed and repealed the Act violated his rights under the Ex Post Facto Clause." *Teague*, 232 F.3d 902, at *2. To the contrary, the court held that "[t]he Ex Post Facto Clause does not work in this manner." *Id.*; see also *Turner v. Champion*, 198 F.3d 259, at *1 (10th Cir. 1999) (table) ("In a multitude of unpublished cases, we have found that the Act does not create any federal constitutional claim—whether ex post facto, due process, or equal protection—for those prisoners seeking resentencing under it and thus have denied habeas relief."). Similarly, the New Hampshire Supreme Court rejected an "ex post facto" claim regarding parole eligibility, where "the prior enactment was amended before its effective date, and thus never conferred any benefit." *Nichols*, 369 A.2d at 618; see also *Castillo v. State*, 954 P.2d 145, 146–47 (Okla. Crim. App. 1998) (rejecting ex post facto claim based on an "intervening change in the law" when the law upon which the petitioner relied had not become effective).

Anderson cites no case holding that the Ex Post Facto Clause gives him a right to the benefit of a provision that never went into effect. This Court should affirm.

2. Anderson's Ex Post Facto Clause claim also fails because Item 404(R)(2) does not increase his punishment beyond that at sentencing

Second, even if Item 404(R)(2) could somehow be considered "retroactive," Anderson's ex post facto claim would still fail because Item 404(R)(2) did not increase his punishment beyond that allowed at the time of his crime. Indeed, it did not alter his sentence at all.

The Ex Post Facto Clause "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." *Weaver*, 450 U.S. at 30. That prohibition is based on "the central concerns of the *Ex Post Facto* Clause: 'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.'" *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (quoting *Weaver*, 450 U.S. at 30); see *Johnson v. United States*, 529 U.S. 694, 699 (2000) (the "heart of the *Ex Post Facto* Clause . . . bars application of a law 'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed'" (quoting *Calder v. Bull*, 3 U.S. 386, 390 (1798) (opinion of Chase, J.))); see also *Evans*, 228 Va. at 476

(holding that legislative change affecting penal provisions did not violate Ex Post Facto Clause in part because "the statutory amendment was not 'more onerous' than the prior law" (quoting *Weaver*, 450 U.S. at 30)).

Thus, the clause is not implicated when a court seeks to "reimpose" the "original term" of a prisoner's sentence, because the "sentence can only violate the Ex Post Facto Clause if it increases the penalty he could have received for his crimes." *United States v. Brown*, 155 F.3d 561, at *1 (4th Cir. 1998) (table); see also *United States v. Seals*, 207 Fed. Appx. 489, 491 (5th Cir. 2006) (holding that a new sentence did not violate the clause because it "is not above and beyond the maximum penalty of his original conviction."); *Froman v. Peterson*, 74 Fed. Appx. 484, 486 (6th Cir. 2003) (holding that a requirement to participate in a Sex Offender Treatment Program to receive good time credits did not violate the clause because the requirement "would not increase [the petitioner's] punishment beyond his original sentence").

Here, even under Anderson's erroneous view that H.B. 5148 granted him rights prior to its effective date, the Ex Post Facto Clause is not implicated because Item 404(R)(2) did not increase Anderson's

punishment beyond his original lawful sentence. Instead, Item 404(R)(2) made Anderson ineligible for a potential sentence *reduction* that he could otherwise have earned under H.B. 5148. The combined effect of H.B. 5148 and Item 404(R)(2) was to leave Anderson where he started: eligible to earn a maximum of 4.5 days of sentence credit for every 30 days served. See pp. 11, 13, 20, 36–37, *supra*. He has the same projected release date as when VDOC first incarcerated him: April 9, 2024. JA36. His sentence thus never became "more severe than the punishment assigned by law when the act to be punished occurred." *Weaver*, 450 U.S. at 30. The "central concerns" of "lack of fair notice and governmental restraint" are not implicated when, as here, the legislature did not increase Anderson's punishment "beyond what was prescribed when the crime was consummated.'" *Lynce*, 519 U.S. at 441.

The cases Anderson cites do not support his ex post facto claim. In those cases, unlike here, the legislature retroactively changed the conditions that applied to the prisoners' *original* sentences, and thus worsened the original sentence after the fact. In *Weaver*, the applicable state law included a good-time credit system at the time of prisoner's sentenc-

ing. 450 U.S. at 26. A few years later, the legislature repealed this system, enacted a new and more stringent formula, applied the new formula to the prisoner, and extended his sentence. *Id.* at 26–27. The legislature thus gave him a sentence "more severe than the punishment assigned by law when the act to be punished occurred." *Id.* at 30. Anderson, by contrast, remains subject to the same sentence conditions—including the maximum rate at which he is eligible to earn sentence credits—as when he committed his crimes.

Similarly, *Lynce* involved legislative action that resulted in a prisoner having a more severe penalty than when he was originally sentenced. In that case, before the prisoner committed his crime, the state legislature implemented a system of early-release credits to prisoners under certain conditions. *Lynce*, 519 U.S. at 435. After the prisoner completed his sentence and was released from prison pursuant to that system, however, the legislature rescinded the credits policy. *Id.* at 438–39. The state then revoked the prisoner's early release under the now-repealed early-release system and returned him to prison. *Id.* at 435, 439. Just as in *Weaver*, this law violated the Ex Post Facto Clause because the prisoner was punished "beyond what was prescribed when the

crime was consummated." *Id.* at 441. Anderson's sentence, however, has not changed since the time his crime was consummated.

None of the cases Anderson cites support his argument that changing a sentencing regime enacted *after* a prisoner was sentenced violates the Ex Post Facto Clause when the original sentence is unchanged. The Ex Post Facto Clause forbids only the increase of a punishment after the commission of a crime. Because Item 404(R)(2) leaves Anderson's sentence unchanged, this Court should affirm the judgment of the circuit court.

B. Anderson's due process claim fails because he has no substantive right or protected liberty interest in a provision that never became effective

Finally, Anderson's due process claims also fail. The substantive due process doctrines he relies upon do not apply in the criminal context, which is governed by the Ex Post Facto Clause. And he has no substantive due process right to the application of a law that never became effective. Anderson has no procedural due process rights either because H.B. 5148 gave him no protected liberty interest.

1. Anderson's substantive due process claim fails

First, any substantive due process right against the retroactive application of law does not apply here. "[T]he Ex Post Facto Clause, not the Due Process Clause, establishes the relevant framework for resolving challenges to the retroactive application of new criminal rules." *Holmes v. Christie*, 14 F.4th 250, 267 (3d Cir. 2021); see *Ward v. Dixie Nat. Life Ins. Co.*, 595 F.3d 164, 176 (4th Cir. 2010) ("[T]he Ex Post Facto Clause" controls "retroactive application of penal statutes" in "the criminal context," while "in the civil context, retroactive application of statutes potentially implicates . . . the Due Process Clause."). Thus, "whatever protection against retroactive legislative acts the Due Process Clause provides, . . . this protection is no greater than the protection provided by the Ex Post Facto Clause." *Carpenter v. Commonwealth*, 51 Va. App. 84, 95 (2007). Because there is no ex post facto violation here, "these statutes' retroactive application did not violate the Due Process Clause either." *Id.*

Second, Anderson's substantive due process claim also fails because H.B. 5148 never went into effect for inmates with mixed sen-

tences, and it therefore never created any substantive rights or interests. The Due Process Clauses of the U.S. and Virginia Constitutions provide that the government cannot deprive a person of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV; Va. Const. art. I, § 11, cl. 1. Under Virginia's Due Process Clauses, the Commonwealth cannot through retroactive civil legislation retroactively divest "vested rights" or "substantive rights." *Shiflet v. Eller*, 228 Va. 115, 120 (1984); see *School Bd. of City of Norfolk v. U.S. Gypsum Co.*, 234 Va. 32, 38 (1987). Substantive rights concern the "creation of duties, rights, and obligations, as opposed to procedural or remedial law." *Shiflet*, 228 Va. at 120.[7]

Here, Anderson has no vested or substantive rights in provisions of a law that never came into effect. Again, legislation has no effect before its effective date. See pp. 21–24, *supra*. Thus, provisions of laws which are repealed before their effective date do not implicate any

[7] There is no federal due process equivalent to this Virginia retroactivity doctrine. Under federal law, retroactive civil legislation violates the Due Process Clause only if it is "arbitrary and irrational," *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), or "particularly harsh and oppressive," *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) (cleaned up). Anderson does not even identify this more stringent test, much less argue that he can satisfy it.

vested or substantive rights. See Thomas M. Cooley, A Treatise on the Constitutional Limitations 511 (Victor H. Lane ed., 7th ed. 1903) (quoted in *Virginia Elec. & Power Co.*, 300 Va. at 172 (Kelsey, J., concurring)) ("[A] right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws.").

Rejecting a highly similar argument, the Tenth Circuit explained that "[w]e can find no support for the asserted right to have a law that was adopted, but repealed before its effective date, applied retroactively on collateral review." *Teague*, 232 F.3d 902, at *2. The court went on to note that "until the Act became effective—which it never did—petitioner was convicted under, and his sentence was governed by" the law in effect at the time of his sentence. *Id.* As such, the court concluded, "we can not see how his penalty was increased from the time he committed his original unlawful acts. In fact, we can not see how it was changed at all." *Id.* (rejecting a due process claim); see also, *e.g., Parker v. Crow*, 822 Fed. Appx. 716, 717, 719 (10th Cir. 2020) ("Parker argued the Act created a vested right that . . . could not be repealed—though the legislature repealed the Act before it took effect. . . . [B]ecause the

Oklahoma legislature repealed the Act before its effective date . . . we have held that the Act did not create any federal constitutional claims for those seeking habeas relief.") (internal quotation marks omitted); *Turner*, 198 F.3d 259, at *1 (rejecting due process claim and collecting cases).

The Washington Supreme Court similarly rejected a due process claim concerning a Washington law that would have increased the salaries of certain state officials but was repealed by initiative prior to its effective date. *Yelle v. Kramer*, 520 P.2d 927, 928–29 (Wash. 1974) (en banc). Because the legislative salary increase had not yet become effective when it was revoked by the initiative, the court reasoned that "there was no reduction of salary of any state official or judge," notwithstanding that the officials received "substantially less than the increased compensation" than they had hoped for under the never effective legislation. *Id.* at 929, 935.

Anderson appears to concede that H.B. 5148 could not create any "vested" rights prior to its effective date. Opening Br 17. He argues, however, that the circuit court erred in failing separately to analyze

whether H.B. 5148 provided him a "substantive" right to enhanced sentence credits. *Id.* at 17–18. But a law does not create *any* rights, substantive or otherwise, prior to its effective date. Item 404(R)(2) therefore cannot deprive Anderson of any rights conferred by H.B. 5148 because it conferred no rights. See *Hawkins v. Freeman*, 195 F.3d 732, 749 (4th Cir. 1999). Anderson cites no authority for the proposition that H.B. 5148 could have conferred on him any substantive rights or interests prior to its effective date, much less that it actually "took effect" before then. Opening Br. 17–18. He therefore cannot demonstrate a due process violation. *Hawkins*, 195 F.3d at 749.

2. Anderson's procedural due process claim fails because he has no protected liberty interest, and his proposed process would only go towards proving facts that are conceded or irrelevant

Anderson's argument that a retroactive application of Item 404(R)(2) would violate the procedural due process protections under the U.S. and Virginia Constitutions likewise fails. Opening Br. 34–36.

Courts apply a substantially similar two-step test under both the Virginia and U.S. Constitutions based on the "almost exact similarity in language" between the two provisions. *Carter v. Gordon*, 28 Va. App. 133, 145 (1998). "To state a procedural due process violation, a plaintiff

must (1) identify a protected liberty or property interest and (2) demonstrate deprivation of that interest without due process of law." *Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015); see also *Wilkinson v. Austin*, 545 U.S. 209, 221, 224 (2005) (applying these two steps); *Klimko v. Virginia Emp. Comm'n*, 216 Va. 750, 754 (1976) ("The first inquiry [in a procedural due process challenge] is whether the interest is . . . protected by procedural due process guarantees; if so, the second is whether the procedures prescribed or applied are sufficient to satisfy the due process "fairness" standard.").

Anderson's claim fails at the outset because, for all the reasons explained above, he has no protected liberty interest in the application of H.B. 5148. See Part II.B.1, *supra*. Anderson relies heavily upon *Ewell v. Murray*, which assumed, without deciding, that Virginia's earned sentence credit program creates a liberty interest in *accrued* credits under the Fourteenth Amendment. 11 F.3d 482, 488 (4th Cir. 1993). But there is no protected liberty interest in credits that are merely "expect[ed]" rather than actually accrued, Opening Br. 33, and therefore "there can be no due process violation," *Hawkins*, 195 F.3d at 750. H.B. 5148 created no protected interests for inmates with mixed sentences because the

General Assembly altered it prior to its effective date, and it therefore never took effect. See pp. 9–11, 23–24, *supra*. Anderson has failed to demonstrate any infringement of a protected liberty interest that could give rise to a procedural due process claim.

Moreover, Anderson does not explain to what end any further process would be aimed. He appears to contend that he should have been given "written notice of the charges against [him]," the ability "to call witnesses," and "factfinders" issuing a "written statement as to the evidence relied upon and the reasons for the disciplinary action." Opening Br. 35 (quoting *Ewell*, 11 F.3d at 487–88). But Anderson was not "charged" with anything apart from his original criminal indictments, where he received all the robust process of a jury trial. There is no dispute about the offenses for which Anderson was convicted; Anderson agrees that "[t]here are no material facts in dispute." Opening Br. 8, 11. Nor was he subject to any disciplinary action, nor did he lose any credits that had ever been conferred. Instead, he argues that he was entitled to enhanced credits based on legislative language concerning eligibility for inmates with certain convictions. No additional process would shed any light at all on his eligibility for sentence credits.

Anderson thus fails to explain what the process he claims he is due would be used to show. "[D]ue process does not require the opportunity to prove a fact that is not material to the State's statutory scheme." *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4, 7–9 (2003); see also *Smith v. Commonwealth*, 286 Va. 52, 60 n.6 (2013) (holding that regardless of whether the plaintiff had protected rights, "no additional process was necessary. Classification of a crime as a 'sexually violent offense' under Code § 9.1-902 is based solely on the nature of the crime. Thus, conviction" of the offense "is the only fact relevant to the classification determination, and nothing Smith could have presented at a hearing would have changed that fact."). Anderson's procedural due process claim therefore fails.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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I further certify that this brief complies with Rule 5:26 because it does not exceed 50 pages, excluding the cover page, table of contents, table of authorities, signature blocks, and certificate.

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Rule 5:1(f)

Appendix of Unpublished Dispositions

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA, v. CHRISTOPHE GRIFFIN; ANTTINE ANDERSON; TIMOTHY BARNES FERGUSON; LORRAINE PIKE; KICHALA NASHANDA ROBINSON, *Defendants.*	CIVIL ACTION NO. 3:04-CR-00030 MEMORANDUM OPINION JUDGE NORMAN K. MOON

This matter comes before the Court on Defendants' Motions to Suppress, on which the Court held a hearing on October 9 at 10:00 a.m. For the reasons stated below, Defendants' Motions are DENIED.

I. BACKGROUND

On March 3, 2004, at about 11:15 a.m., several detectives from the Jefferson Area Drug Enforcement Task Force ("JADE") conducted a "knock and talk" at 900 Page Street in

Charlottesville, Virginia with the purpose of investigating narcotics activity in that residence. JADE had received numerous citizen complaints about drug activity at 900 Page Street, the home of Defendant Timothy Ferguson. On March 3, JADE Officer Brian O'Donnell knocked on the door at 900 Page Street, and Ferguson answered the door. After a brief exchange, O'Donnell and several other officers entered the residence. At the suppression hearing, O'Donnell testified that immediately upon entering the house, he smelled a "distinct odor of marijuana." Officer O'Donnell also testified that he heard "frantic activity" upstairs—running footsteps. Around the same time, another officer stationed in the rear of the house observed someone attempt to exit the house through an upstairs window.

The officers questioned Ferguson after they entered the house. Ferguson admitted to the officers that he occasionally smoked marijuana. O'Donnell asked Ferguson if they could search the house, and Ferguson said no. O'Donnell then told Ferguson that the officers were going to secure the house until they could obtain a search warrant. At this point, several officers went upstairs to secure the premises.

The officers encountered Defendants Anttine Anderson and Christophe Griffin in one of the upstairs bedrooms. The officers observed that Anderson and Griffin were visibly nervous. Griffin told the officers that he was nervous because he had been smoking pot and he had eaten it when he heard the officers coming. When the officers patted down Griffin, they discovered a large roll of money in his front pocket. In another upstairs bedroom, the officers encountered Defendants Kichala Robinson and Lorraine Pike. The officers also noticed a bag of what appeared to be marijuana in plain view on the floor of that room.

Several JADE officers secured all of the Defendants and the premises while Officer O'Donnell went to obtain a search warrant for 900 Page Street ("Page Street warrant"). The officers read all of the Defendants their Miranda warnings. O'Donnell obtained a warrant and the officers executed the Page Street warrant at 12:35 p.m. Upon execution of the warrant, the officers found various amounts of marijuana, cocaine base, and heroine. After the search, the officers arrested all of the Defendants and took them to JADE headquarters for questioning.

While the Defendants were at JADE headquarters, the officers placed Griffin and Anderson alone in an interview room. Griffin and Anderson placed their heads together and began whispering. Unknown to Griffin and Anderson, JADE officers were recording this conversation. The officers determined that Griffin and Anderson were discussing their drug "stash" at 336 Tenth Street North West, in Charlottesville. Based on this information, JADE officers applied for and obtained a search warrant for 336 Tenth Street ("Tenth Street warrant"). Upon execution of the warrant, the officers found 40.8 grams of cocaine base hidden in the crawl space under the 336 Tenth Street residence.

II. DISCUSSION

The Fourth Amendment prohibits both unreasonable searches and unreasonable seizures, and its protection extends to both 'houses' and 'effects.' *See United States v. Jeffers*, 342 U.S. 48, 51 (1951). When a search is conducted without a warrant or the Defendant has come forward with some evidence that the search was illegally conducted, the government bears the ultimate burden of proof in showing that the evidence was not tainted. *See id.*; *Alderman v. United States*, 394 U.S. 165, 183 (1969). The government bears the burden in this case of

showing that the evidence was not illegally seized.

Defendants move to suppress the evidence against them based on various alleged violations of the Fourth Amendment. Defendants argue that: (1) the "knock and talk" procedure was an illegal search of 900 Page Street; (2) the entry of the police into 900 Page Street was unlawful because it was without consent; (3) the police unlawfully seized the occupants and the building at 900 Page Street while they obtained a search warrant; (4) the Page Street warrant was not supported by probable case; (5) the recording of the conversation between Griffin and Anderson at JADE headquarters violated the Fourth Amendment and the federal wiretap statute; (6) the affidavit in the application for the Tenth Street warrant does not adequately describe the place to be searched; and (7) the unreasonable delay between the Defendants' arrests and the probable cause determinations before the magistrate violated the Defendants' Fourth Amendment rights. The Court will deal with each of these issues in turn.

1. "Knock and Talk" at 900 Page Street

The Fourth Circuit has recognized the "knock and talk" as a valid police investigatory technique. *See United States v. Cephas*, 254 F.3d 488, 493 (4th Cir. 2001) ("A voluntary response to an officer's knock at the front door of a dwelling does not generally implicate the Fourth Amendment, and thus an officer generally does not need probable cause or reasonable suspicion to justify knocking on the door and then making verbal inquiry"); *United States v. Taylor*, 90 F.3d 903, 909 (4th Cir. 1996) ("Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned [invasion] of the person's right of privacy, for anyone openly and peaceably . . . to

walk up the steps and knock on the front door of any man's 'castle' . . . whether the questioner be a pollster, a salesman, or an officer of the law."(quoting *Davis v. United States*, 327 F.2d 301, 303 (9th Cir. 1964))). Defendants, however, argue that police must have an "honest intent" and a "legitimate reason unconnected with the search of the premises" to conduct a "knock and talk." Defendants argue that the officers' only purpose in approaching 900 Page Street was to obtain enough evidence to justify a search. If so, Defendants argue that the "knock and talk" in question does not fall under the rule of *Cephas* and *Taylor* and violated the Fourth Amendment.

Such a standard, however, is not required for police to knock on a person's front door, in which a person has little or no reasonable expectation of privacy. *Compare Alvarez v. Montgomery County*, 147 F.3d 354, 357–58 (4th Cir. 1998) (stating that "police may approach a building, including the front entranceway to a residential dwelling, without committing a search where a person lacks a reasonable expectation of privacy in the area," but holding that police must have a "legitimate law enforcement purpose" for entering a person's backyard), *with United States v. Bradshaw*, 490 F.2d 1097, 1100 (4th Cir. 1974) (requiring that the police have a legitimate reason unconnected with the search of premises to enter Defendant's property in which he had a reasonable expectation of privacy. Defendant's property was located at the end of a little used, quarter-mile road). Under the rule of *Cephas* and *Taylor*, the police were free to approach Ferguson's front door for the purpose of questioning him. In addition, the officers had received several tips about drug activity on the premises, giving them the "honest intent" and the "legitimate law enforcement purpose" of questioning Ferguson. Therefore, the "knock and talk" did not violate the Fourth Amendment.

2. Entry to 900 Page Street

Defendants argue that the police entered 900 Page Street without consent, and therefore the entry was illegal and violated the Fourth Amendment. At the suppression hearing, Defendant Timothy Ferguson testified that he did not give the police consent to enter his home when they knocked on his door March 3, 2004. Ferguson testified that even though he did not give the police consent to enter, they pushed open the door and entered anyway. Officer O'Donnell, however, testified that Ferguson did give the officers consent to enter his home.

The Court finds that Officer O'Donnell's testimony is more credible than Ferguson's testimony. At the suppression hearing, Ferguson admitted that he had smoked "quite a bit" of marijuana and cocaine on the night of March 2 and the morning of March 3, 2004, and that he was "pretty high" when the officers arrived. Ferguson also made conflicting statements under oath about whether he consented to the entry. At his plea hearing, Ferguson signed a statement under oath stating that he had agreed to let the officers enter his residence. This statement is inconsistent with his testimony at the suppression hearing. Because Ferguson was under the influence of narcotics on March 3 and because he made conflicting statements under oath, the Court chooses to believe Officer O'Donnell's testimony. The Court finds that the officers had consent to enter the house at 900 Page Street and their entry did not violate the Fourth Amendment.

3. Seizure of 900 Page Street

Defendants next argue that the warrantless seizure of 900 Page Street was unreasonable and violated the Fourth Amendment. A "basic principle of Fourth Amendment law" is that searches and seizures inside a home without a warrant are presumptively unreasonable.

Griffin v. Wisconsin, 483 U.S. 868, 884 (1987). If a search or a seizure inside a home is conducted without a warrant, it must fall within the consent or exigent circumstances exceptions. *Id.* at 883. Exigent circumstances can exist when the police have probable cause to believe that contraband is present and they reasonably believe that the contraband may be destroyed or removed before they can obtain a search warrant. *United States v. Turner*, 650 F.2d 526, 528 (4th Cir. 1981). Some factors courts consider when determining whether exigent circumstances exist are: (1) the degree of urgency involved and the time necessary to obtain a warrant; (2) the reasonable belief that contraband is about to be removed or destroyed; (3) the possibility of danger to police guarding the site; (4) an indication that the possessors of the contraband are aware that police are watching them; and (5) the ready destructibility of the evidence. *Id.*

In this case, several of these factors point to a finding of exigent circumstances. When the officers entered 900 Page Street, they smelled burning marijuana, a type of contraband that can easily be destroyed. The officers also heard people "rushing around" upstairs and observed a man try to escape from an upstairs window. These observations indicate that the officers reasonably believed that the suspects in the house were aware of the officer's presence and were attempting to destroy the evidence when the officers arrived. Because the officers had probable cause to believe that marijuana was present in the house and also reasonably believed that the marijuana would be removed or destroyed before they obtained a warrant, the Court finds that exigent circumstances existed here.

Defendants argue that because simple possession of marijuana is a "minor" crime in Virginia, suspicion of marijuana possession alone can never justify a finding of exigent circumstances. Defendant relies on the Supreme Court case of *Welsh v. Wisconsin*, 466 U.S. 740

(1984). In *Welsh*, the Supreme Court held that exigent circumstances rarely exist in cases involving "minor" offenses. *Id.* at 753. *Welsh* held that the police were not justified by the hot pursuit doctrine to enter the home of a man without a warrant to arrest him for the offense of driving while intoxicated, classified by Wisconsin as a noncriminal, civil forfeiture for which no imprisonment is possible. *Id.* at 754.

The Court finds that possession of marijuana in Virginia, although a misdemeanor, is not a "minor" offense in the same vein as the offense in *Welsh*. Although the first offense for possession of marijuana can be punished with a program of probation, *see* Va. Code Ann. § 18.2-251 (Michie 2004), it also can be punished with a fine of $500, thirty days in jail, or both. *See* Va. Code. Ann. § 18.2-250.1 (Michie 2004). This punishment differs significantly from the offense in *Welsh,* which was noncriminal and carried no jail time. Although some jurisdictions follow a rule that exigent circumstances can never be present when the police suspect only a misdemeanor,[1] neither Virginia nor the Fourth Circuit have adopted such a rule. In fact, the Fourth Circuit has held that the odor of marijuana alone can justify a finding of exigent circumstances. *See United States v. Cephas*, 254 F.3d 488, 495 (4th Cir. 2001) (stating that the fact that the Defendant was aware that the police were on his doorstep, that marijuana is readily destructible, and that the officer reasonably believed that the marijuana would have been destroyed if he had waited for a warrant would have justified a finding of exigent circumstances); *United States v. Grisset*, 925 F.2d 776, 778 (4th Cir. 1991) (upholding the District Court's determination that the odor of

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[1] *See, e.g., State v. Guertin*, 461 A.2d 963, 970 (Conn. 1983) (limiting the exigent circumstances exception to "serious crimes," which excludes misdemeanors); *People v. Strelow*, 292 N.W.2d 517, 521–22 (Mich Ct. App. 1980) (holding that the "hot pursuit" doctrine does not apply to misdemeanor offenses).

marijuana coming from a hotel room provided police with exigent circumstances for a warrantless entry into the room). For the reasons stated above, the Court finds that the warrantless seizure of 900 Page Street was justified by exigent circumstances.

4. Page Street Warrant

Defendants argue that the Page Street warrant was not supported by probable cause. Once a search warrant has been issued, the Court will review the magistrate judge's probable cause determination with "great deference." *United States v. Blackwood*, 913 F.2d 139, 142 (4th Cir. 1990). A reviewing court may only ask "whether the magistrate had a 'substantial basis . . . for conclud[ing]' that probable cause existed." *Id.* (quoting *Illinois v. Gates,* 462 U.S. 213, 238–39 (1983)). The magistrate is required to make a "practical, commonsense decision whether, given all the circumstances in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* (quoting *Gates*, 462 U.S. at 238).

The affidavit for the Page Street warrant was filed by Officer O'Donnell, an experienced narcotics officer. The affidavit states that the officers smelled the "distinct odor of burning marijuana" at the Page Street residence and that Ferguson admitted to smoking marijuana on occasion. The affidavit also states that the officers heard "extensive movement" upstairs in the residence, which "sounded like people rushing around." The Court finds that the magistrate judge had a substantial basis for concluding that probable cause existed to issue a warrant. Based on the information in the affidavit, the magistrate judge could have found that there was a "fair probability" that contraband and evidence of drug use would be found at 900 Page Street. The

Court will uphold the magistrate judge's probable cause determination.

5. Recording of the Conversation between Griffin and Anderson

Defendants also argue that the recording of the conversation between Griffin and Anderson at JADE headquarters violated their Fourth Amendment rights and the federal wiretap statute, 18 U.S.C. § 2510 *et seq*. The key issue in determining whether a Fourth Amendment violation occurred here is whether Griffin and Anderson had a reasonable expectation of privacy that their conversation would not be overheard or recorded while they were in custody and at JADE headquarters. *See Katz v. United States*, 389 U.S. 347, 361 (1967). The Supreme Court has held that prisoners have reduced privacy expectations within the walls of a jail. *See Lanza v. New York*, 370 U.S. 139, 143 (1962). In *Lanza*, the Supreme Court upheld the admission of a conversation between a prisoner and one of the prisoner's visitors, which was recorded by prison officials without consent. *Id.*

In this case, because Anderson and Griffin were in custody and were at police headquarters, their situation is analogous to that of prisoners in a jail. Thus, the Court finds that the ruling in *Lanza* applies to the situation at hand. Defendants Anderson and Griffin did not have a reasonable expectation of privacy in their conversation that occurred at JADE headquarters. Therefore, the recording of their conversation did not violate the Fourth Amendment or the federal wiretap statute, 18 U.S.C. § 2510 *et seq*.

6. Affidavit for the Tenth Street Warrant

Defendants argue that the affidavit in the application for the Tenth Street warrant does not adequately describe the place to be searched. A warrant meets the particularity requirement if

"the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended." *United States v. Owens,* 848 F.2d 462, 463 (4th Cir. 1988) (quoting *Steele v. United States*, 267 U.S. 498, 503 (1925)). The affidavit for the Tenth Street warrant, filed by Detective R. S. Sandridge, states that the place to be searched is: "The Crawl space area and curtilage of the Cottage located at 336 10th street North West which is currently secured by Task Force detectives and Charlottesville Police Officers. This Residence is located in the city of Charlottesville Va." The language in this affidavit is specific enough to allow an officer to ascertain and identify the place to be searched. The language is not so broad that it authorizes a "fishing expedition" or a "random exploratory search or intrusion." *See Owens*, 848 F.2d at 466. Thus, the Court rejects Defendants' argument that the affidavit for the Tenth Street warrant does not adequately describe the place to be searched.

7. Delay Between the Arrest and the Probable Cause Determination

Defendant Christophe Griffin also argues that the unreasonable delay between Griffin's arrest and the probable cause determination before the magistrate judge violated Griffin's Fourth Amendment rights. Although Defendant Griffin's attorney addressed this issue in a brief filed after the suppression hearing, Defendant's attorney did not present any argument on this issue at the hearing. No facts pertaining to this issue were presented at the hearing. Consequently, the Court has no basis on which to decide this issue at this time.

For the reasons stated above, the Court does not find that any Fourth Amendment violations occurred in this case. Accordingly, Defendants' Motions to Suppress are DENIED.

It is so ORDERED.

The Clerk of the Court is directed to send certified copies of this Memorandum Opinion to all Counsel of Record.

U.S. District Judge

ENTERED: 11/8/04
Date

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Criminal No. 3:04cr00030**
	:	
ANTINNE ANDERSON	:	

PLEA AGREEMENT

I, Antinne Anderson, and my counsel, Roy Bradley, Esquire, have entered into a plea agreement with the United States of America, by counsel, pursuant to Rule 11 of the Federal Rules of Criminal Procedure. The terms and conditions of this agreement are as follows:

1. CHARGES IN THE INDICTMENT AND PUNISHMENT

I have been charged with twocounts in the Indictment filed in this case. **Count One** charges me with conspircy to distribute and possess with intent to distribute 50 grams or more of a mixture and substance containing cocaine base, otherwise known as crack cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 846 and 841. The maximum statutory penalty for this charge a fine of $4,000,000, life imprisonment, and a period of supervised release. I understand that there is a mandatory minimum period of 10 years incarceration on this charge. **Count Four** charges me with possession with intent to distribute mixtures and substances containing a detectable amount of cocaine base, heroin, and marijuana, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A). The maximum statutory penalty for this crime is a fine of $1,000,000, 20 years imprisonment, and a period of supervised release. I understand that my supervised release may be revoked if I violate its terms and conditions. If my supervised release is revoked, the original term of imprisonment may be increased. I understand that a violation of supervised release increases the possible period of incarceration.

2. CHARGES TO WHICH I AM PLEADING GUILTY

I will enter a plea of guilty to Count One of the Indictment. In addition to the penalties set forth above, I understand that fees may be imposed to pay for incarceration or supervised release and that there will be a $100 special assessment per felony count of conviction.

a. Relevant Conduct

I agree and will acknowledge at the time of the plea of guilty to the criminal charges stated above that, pursuant to Section 1B1.3 of the Sentencing Guidelines, I am accountable for more than 500 grams but less than 1.5 kilograms of cocaine base, which quantities represent the total amount

involved in my relevant criminal conduct, including amounts I distributed or possessed with intent to distribute and amounts distributed or possessed with intent to distribute by co-conspirators pursuant to jointly undertaken criminal activity that was reasonably foreseeable to me and within the scope of my conspiratorial agreement. I understand that these quantities will be among the facts used to determine the possible sentence for this offense pursuant to the Sentencing Guidelines.

b. Applicable Enhancements/Departures

The United States and the defendant agree that no provision of the United States Sentencing Guidelines other than those mentioned in this agreement should apply to the defendant's Guideline sentence. The United States agrees not to seek any enhancements of the defendant's sentence other than those mentioned in this agreement, and the defendant agrees not to seek any departure from the recommended Guideline sentence other than those mentioned in this agreement. The parties understand that the United States Probation Office is not a party to this agreement, and that a probation officer will make an independent calculation of the defendant's Guideline sentence.

My attorney, Mr. Bradley has informed me of the nature of these charges and the elements of these charges which must be proved by the United States beyond a reasonable doubt before I could be found guilty as charged.

3. WAIVER OF CERTAIN RIGHTS

I acknowledge that I have had all of my rights explained to me and I expressly recognize that I have the following constitutional rights and, that by voluntarily pleading guilty, I knowingly waive and give up these valuable constitutional rights:

a. The right to plead not guilty and persist in that plea.
b. The right to a speedy and public jury trial.
c. The right to assistance of counsel at that trial and in any subsequent appeal.
d. The right to remain silent at trial.
e. The right to testify at trial.
f. The right to confront and cross-examine government witnesses.
g. The right to present evidence and witnesses in my own behalf.
h. The right to compulsory process of the court.
i. The right to be presumed innocent.
j. The right to a unanimous guilty verdict.
k. The right to appeal a guilty verdict.

I am pleading guilty as described above because I am in fact guilty and because it is in my best interest to do so and not because of any threats or promises. There has been no representation made whatsoever by any agent or employee of the United States to me as to what the final disposition of this matter should or will be.

It is understood that the matter of sentencing is within the sole discretion of the Court, subject to the United States Sentencing Guidelines ("Sentencing Guidelines") and this Agreement. I understand that the Sentencing Guidelines apply to this charge and may create a presumption of a

mandatory period of incarceration. I have discussed sentencing issues with my attorney and realize that there is a substantial likelihood that I will be incarcerated. I understand that I will not be eligible for parole during any term of imprisonment imposed. I understand that the sentence will be determined presumptively from a variety of factors involved in the offense and related conduct, including my role in the offense and my prior criminal history.

4. DISMISSAL OF COUNTS

In exchange for my plea of guilty to Count One of the Indictment, the United States will move to dismiss Count Four of the Indictment at the time of sentencing in this matter. I stipulate that the United States had probable cause to bring all the counts in the Indictment which are being dismissed under this agreement, that these charges were not frivolous, vexatious or in bad faith, and that I am not a "prevailing party" with regard the these charges. I further waive any claim for attorney's fees and other litigation expenses arising out of the investigation or prosecution of this matter.

5. ACCEPTANCE OF RESPONSIBILITY

The United States agrees that the defendant will have "accepted responsibility" within the meaning of that term under the sentencing guidelines, if this agreement is accepted by the Court, and will urge the Court to reduce the sentencing guideline range by three levels in recognition of ~~her~~ his early decision to plead assuming that the defendant, at the time of sentencing, meets all of the requirements of USSG section 3E1.1. AA WTD

I understand that any attempt to deny that I committed the crimes to which I have agreed to plead guilty, any attempt to withdraw my guilty plea, the commission of any new crimes, or any other breach of this Agreement, including my failure to pay my mandatory special assessment, will nullify the United States agreement that I should receive credit for acceptance of responsibility.

6. PROFFER OF INFORMATION

I agree that there is a factual basis for my plea and admit that I am guilty of the offense detailed in Count One of the Indictment.

I further understand that I have a continuing obligation under this agreement to provide information to law enforcement about the criminal activity which is the subject of this plea agreement. If I supply untruthful information during any proffer, or at any other time, I may be prosecuted for perjury, for giving a false statement, or for obstruction of justice.

I understand that my attorney may be present at any debriefing or contact with any agent or attorney of the United States. However, by the signatures below, my attorney and I expressly waive the presence of counsel at such meetings and that government agents and attorneys may contact me without the prior approval of my attorney. At any time during such meetings with government

agents and attorneys I may request the presence of my attorney and the meeting will be suspended until my attorney arrives.

7. FINANCIAL STATEMENT AND CRIMINAL FORFEITURE

I understand that in this case there is a possibility that substantial fines and/or restitution may be imposed. In order to assist the United States as to any recommendation in that matter and in order to assist the United States in any necessary collection of those sums, I agree to fully and truthfully submit a complete financial statement revealing all of my assets and liabilities to the United States on a form provided by the United States.

Within 30 days of the date of this Plea Agreement I agree to provide a complete financial statement to the United States Attorney's office detailing all income, expenditures, assets, liabilities, gifts and conveyances by myself, my spouse and my dependent children and any corporation, partnership or other business entity in which I hold or have held an interest, for the period starting on January 1st of the year prior to the year I enter my guilty plea. This financial statement shall be submitted in a form acceptable to the United States Attorney's office.

From the time of the signing of this agreement, I agree not to convey any thing of value to any person without the authorization of the United States Attorney's Office. I understand that a deliberate false statement as to these matters would be a felony under federal law, in violation of Title 18, United States Code, Section 1001 and Section 401, and could constitute a breach of the agreement by me and could render this Agreement null and void, regardless of any cooperation or assistance that I may have previously provided. Any dispute as to the truthfulness of my disclosure of assets may be subjected to a polygraph examination conducted by a qualified law enforcement examiner, selected by the United States. I understand that failure of such polygraph examination, without adequate explanation, could render this agreement null and void.

I consent to the administrative forfeiture, official use and/or destruction of any illegal firearms or illegal contraband seized by any law enforcement agency from my possession or from my direct or indirect control. I will execute any documents necessary to comply with this provision of this agreement. As indicated above, I specifically agree to the forfeiture of all of the items listed in Count Eight of the Agreement, along with the Bill of Particulars filed by the United States in support of that Count.

I understand that I will be required to disclose the existence of, and location of, any assets purchased with the proceeds of my illegally activity, directly or indirectly. I agree to cooperate with law enforcement and government attorneys in the forfeiture of such assets and in the conveying of title to such assets to the United States, where I have the power to do so. I agree to assist in the forfeiture of any such assets, and conveyance of assets, which are titled to, or in the possession of, any of my family members. I understand any financial cooperation and sacrifice made by me through this course will be made known to the Court by the government at my sentencing.

I also agree to waive my constitutional rights under the Double Jeopardy clause as to any subsequent forfeiture proceedings, civil, criminal and/or administrative, arising out of the same offenses charged in the Indictment in this case.

8. WAIVER OF RIGHT TO APPEAL SENTENCING GUIDELINES ISSUES

I understand that I will have a copy of my presentence report well in advance of my sentencing hearing and that I will have an opportunity to go over it with my attorney and may file any objection to all or parts of it that I feel are not correct. I understand that I will have an opportunity at the sentencing hearing to bring witnesses, to cross-examine the government's witnesses, and to demonstrate to the Court what an appropriate sentence would be under the Guidelines. I also understand that pursuant to Booker v. United States, 2005 WL 50108 (Jan. 15, 2004), I have the right to ask the Court to sentence me outside of the range of imprisonment suggested by the Guidelines. I agree that after my full and fair sentencing hearing, I will not then appeal the Court's application of the sentencing guidelines factors to the facts of my case, or the "reasonableness" of the sentence imposed by the Court. I am knowingly and voluntarily waiving any right to appeal sentencing guidelines factors, and am voluntarily willing to rely on the Court in sentencing me. I understand that the United States expressly reserves its right to appeal any Sentencing Guidelines issues.

9. WAIVER OF RIGHT TO DIRECT APPEAL OF COURT'S DENIAL OF MOTION TO SUPPRESS EVIDENCE AND STATEMENTS

I understand that this guilty plea results in my inability to appeal the trial court's denial of my motion to suppress evidence and statements. I understand that the United States will not agree to an appeal of the Court's denial of my suppression motion by permission pursuant to Fed. R. App. P. 5 and 28 U.S.C. § 1292(b).

10. WAIVER OF RIGHT TO COLLATERALLY ATTACK THE JUDGMENT AND SENTENCE IMPOSED BY THE COURT

I further agree to waive my right to collaterally attack, pursuant to Title 28, United States Code, Section 2255, the judgment and any part of the sentence imposed upon me by the Court.

11. INFORMATION ACCESS WAIVER

I knowingly and voluntarily agree to waive all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. §552, or the Privacy Act of 1974, 5 U.S.C. §552a.

12. WAIVER OF STATUTE OF LIMITATIONS

If, for any reason, this Plea Agreement is withdrawn or otherwise not consummated by the entry of the convictions and sentences provided for under this Plea Agreement or if this Agreement is set aside by any court, I hereby waive my right to raise the defense of the statute of limitations as to any charges reinstated before the Court which were brought in the original Indictment against me but dismissed as a result of this Plea Agreement.

13. DENIAL OF FEDERAL BENEFITS

At the discretion of the court, I understand that I may also be denied any or all federal benefits, as that term is defined in 21 U.S.C. § 862(a) for up to five years if this is my first conviction of a federal or state offense consisting of the distribution of controlled substances, or (b) for up to ten years if this is my second conviction of a federal or state offense consisting of the distribution of controlled substances. If this is my third or more conviction of a federal or state offense consisting of the distribution of controlled substances, I understand that I could be permanently ineligible for all federal benefits, as that term is defined in 21 U.S.C. § 862(d).

14. SUBSTANTIAL ASSISTANCE

I understand that "substantial assistance" under Section 5K1.1 of the United States Sentencing Commission Guidelines Manual, is interpreted by the United States Attorney's Office to mean that someone is completely truthful and fully cooperative in the investigation and/or prosecution of another individual. I understand that I will be given an opportunity to make every effort to provide such assistance. I understand that at the time of the signing of this plea agreement, no one has promised me that such a "substantial assistance" motion will be made on my behalf. I understand that the determination as to whether or not my efforts constitute "substantial assistance" will be solely within the discretion of the United States Attorney's Office. I understand that the evaluation of whether I have rendered "substantial assistance" will be made taking into consideration the following factors:

a. the significance of my assistance;
b. the truthfulness, completeness and reliability of information and assistance that I offer;
c. whether any information that I offer can be corroborated by other persons or other admissible evidence;
d. the timeliness of my information and assistance;
e. any risks that I or my family may incur because of this course of cooperation; and,
f. other factors which may be unique to my case.

I understand that the decision as to whether or not "substantial assistance" has been performed will depend on my own efforts. I understand that if the United States Attorney's Office does not make

the motion, then the Court may not sentence below the Guidelines. I understand and agree that this plea agreement is not contingent in any way on the United States making a substantial assistance motion.

I understand and agree that I must provide complete and truthful information to attorneys and law enforcement officers of the government. I understand and agree that I must neither attempt to protect any person or entity through false information or omission, nor falsely implicate any person or entity. I understand that the decision as to whether or not "substantial assistance" has been performed will depend on my own efforts. I understand that truthful information alone from which no prosecutable case can be formed may not rise to the level of "substantial assistance."

I understand that I must attend all meetings, grand jury sessions, trials, or other proceedings as requested, that I must respond truthfully and completely to all questions or inquiries, and must produce documents, records, or other tangible evidence as requested. I understand and stipulate that I will not undertake any contact with any person identified by government agents as a suspect or target, or with persons I have reason to believe have committed criminal acts, unless I am specifically directed to do so by a federal law enforcement agent participating in the investigation of this case.

I understand that if I commit new crimes, use drugs, warn or aid targets, fail to be completely candid with agents of the government, or otherwise obstruct or impede an ongoing investigation in any way, then no substantial assistance motion will be made, regardless of any cooperation that was rendered.

I understand that if I successfully complete my efforts to offer full, voluntary, and truthful testimony, and that if I abide by any reasonable requests of the case agents or the United States Attorney's Office, and my efforts result in the prosecution of another person or persons, then a motion will be made at my sentencing, or at such time as my efforts have been completed, requesting that the Court depart from the Sentencing Guidelines, and sentence at a lesser level than would otherwise be found to be the applicable guidelines sentence. I understand that such a motion will not be dependant upon the United States obtaining a conviction, as long as I have provided complete and truthful information and testimony.

I understand that if there is a dispute as to the truth of a material fact, then my agreement includes having the issue subjected to polygraph examination conducted by a qualified law enforcement examiner, selected by the United States. I understand that failure of such polygraph examination, without adequate explanation, would terminate my opportunity to provide substantial assistance.

I understand that once the motion for a departure is made by the United States the sentence will be entirely up to the Court in its discretion. I also understand that the United States may recommend to the Court that I receive a substantial sentence, although one less than would otherwise apply under the Guidelines.

Defendant's Initials: AA

15. COMPLETION OF PROSECUTION

I understand that except as provided for in this plea agreement, there will be no further prosecution of me in the Western District of Virginia for any matters about which the United States has specific knowledge gained from the investigation that gave rise to the charges contained in this Indictment. I understand that this waiver is limited to my involvement in the drug conspiracy at issue in this case, and that it does not extend to my role in an attempted escape from the Charlottesville/Albemarle Regional Jail in August of 2004. I understand that this plea agreement gives me no immunity for my role my role in the attempted escape, and that I may be charged in state or federal court regardless of this guilty plea.

16. LIMITATION OF AGREEMENT

This agreement is limited to the Western Judicial District of Virginia and does not bind other federal judicial districts, nor does it bind any state or local authorities.

17. REMEDIES FOR BREACH OF PLEA AGREEMENT

I understand that if I breach any provision of this agreement, at any time, including any attempt to withdraw my guilty plea, the United States Attorney's office may, at its election, pursue any or all of the following remedies: (a) declare this plea agreement void and proceed to trial; (b) refuse to recommend that I be credited with acceptance of responsibility; (c) seek an upward departure from the guidelines range, or seek imposition of a sentence at the high end of the guidelines range; (d) terminate my opportunity to perform substantial assistance, if such opportunity has been provided, or refuse to make a substantial assistance motion, regardless of whether substantial assistance has been performed or not; (e) withdraw any substantial assistance motion made, regardless of whether substantial assistance has been performed; (f) refuse to abide by any other sentencing or other stipulations contained in this plea agreement; (g) use this plea agreement, any statement I have made during any guilty plea hearing (including my admission of guilt), any proffer session, or during my attempt to provide substantial assistance, against me in this or any other proceeding; and (h) take any other action provided for under this agreement or by statute, regulation or court rule. I knowingly waive any right I may have under the Constitution, any statute, rule or other source of law to have any statement, or evidence derived from such statement, suppressed or excluded from going into evidence. The remedies set forth above are cumulative, and not mutually exclusive.

18. EFFECTIVE REPRESENTATION

I have discussed the terms of the foregoing plea agreement and all matters pertaining to the charges against me with my attorney and am satisfied with my attorney and his advice. I understand that I have the right to make known to the Court, at any time, any dissatisfaction I may have with my attorney's representation. I agree to make known to the Court no later than at the time of sentencing any dissatisfaction or complaint I may have with my attorney's representation. I hereby waive any

claim I may have for ineffective assistance of counsel known and not raised by me with the Court at the time of sentencing.

19. GENERAL UNDERSTANDINGS

I understand that the Court is not bound by any recommendations or stipulations contained in this Agreement, and may sentence me up to the maximum provided by law.

I understand that if the sentence is more severe than I expected, I will have no right to withdraw my guilty plea.

I understand that a thorough presentence investigation will be conducted and sentencing recommendations independent of the United States Attorney's Office will be made by the presentence preparer, which the Court may adopt or take into consideration. I understand that any calculation regarding the guidelines by the United States Attorney's Office or by my attorney is speculative and is not binding upon the Court, the Probation Office or the United States Attorney's Office. No guarantee has been made by the United States Attorney's Office regarding the effect of the guidelines on my case.

I understand that the prosecution will be free to allocute or describe the nature of this offense and the evidence in this case and will in all likelihood recommend that I receive a substantial sentence.

I understand that the United States retains the right, notwithstanding any provision in this plea agreement, to inform the probation office and the Court of all relevant facts, to address the Court with respect to the nature and seriousness of the offense, to respond to any questions raised by the Court, to correct any inaccuracies or inadequacies in the presentence report and to respond to any statements made to the Court by or on behalf of the defendant.

I willingly stipulate that there is a sufficient factual basis to support each and every material factual allegation contained within the charging document to which I am pleading guilty.

I understand that this agreement does not apply to any crimes that I may commit hereafter, including perjury. I understand that if I should testify falsely in this or in a related proceeding that I may be prosecuted for perjury and that statements that I may have given authorities pursuant to this agreement may be used against me in such a proceeding.

I have not been coerced, threatened, or promised anything other than the terms of this plea agreement, described above, in exchange for my plea of guilty. I understand that my attorney will be free to argue any mitigating factors in my behalf and will be free to propose any alternatives to incarceration available under the sentencing guidelines. I understand that I will have an opportunity to personally address the Court prior to sentence being imposed.

Defendant's Initials: AA

This writing sets forth the entire understanding between the parties and constitutes the complete Plea Agreement between the United States Attorney for the Western District of Virginia and me, and no other additional terms or agreements shall be entered except and unless those other terms or agreements are in writing and signed by the parties. This Plea Agreement supersedes all prior understandings, promises, agreements, or conditions, if any, between the United States and me.

I have consulted with my attorney and fully understand all my rights with respect to the offenses charged in the Indictment. Further, I have consulted with my attorney and fully understand my rights with respect to the provisions of the Guidelines. I have read this plea agreement and carefully reviewed every part of it with my attorney. I understand this agreement and I voluntarily agree to it. Being aware of all of the possible consequences of my plea, I have independently decided to enter this plea of my own free will, and am affirming that agreement on this date and by my signature below.

Date: 5-10-05 Antinne Anderson

Defendant

I represent **Antinne Anderson**. I have fully explained to my client all rights available to my client with respect to the offenses charged in the pending indictment. Further, I have reviewed the provisions of those Guidelines that may apply in this case. I have carefully reviewed every part of this plea agreement with my client. To my knowledge, my client's decision to enter into this agreement is an informed and voluntary one and it is a decision with which I agree.

Date: 5/10/05

Counsel for Defendant

Acknowledged:

Date: 5/6/05

Assistant United States Attorney

Defendant's Initials: AA

AO 245B (Rev. 06/05 - VAW Additions 6/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT
Western District of Virginia

UNITED STATES OF AMERICA
V.
ANTTINE ANDERSON

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:04CR00030-002

USM Number: 10654-084

Edward H. Childress, Esq.
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) One

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty,

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:846	Conspiracy to distribute 50 grams or more of cocaine base	4/21/04	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ Count(s) Four ☒ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

3/23/06
Date of Imposition of Judgment

Signature of Judge

Norman K. Moon, United States District Judge
Name and Title of Judge

3/28/06
Date

DEFENDANT: ANTTINE ANDERSON
CASE NUMBER: 3:04CR00030-002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:
One Hundred Thirty-Five (135) Months

☒ The court makes the following recommendations to the Bureau of Prisons:

Defendant to be incarcerated at FCI Ft. Dix, Allenwood, PA, or as close to his family as possible.
Defendant to be placed in the Intensive Drug Treatment Program administered by the Bureau of Prisons.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before _____ on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ANTTINE ANDERSON
CASE NUMBER: 3:04CR00030-002

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

Five (5) Years

MANDATORY CONDITIONS OF SUPERVISION

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet on this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: ANTTINE ANDERSON
CASE NUMBER: 3:04CR00030-002

SPECIAL CONDITIONS OF SUPERVISION

Defendant shall pay any special assessment that is imposed by this judgment.
Defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.
Defendant shall not possess a firearm or destructive device and shall reside in a residence free of firearms and destructive devices.
Defendant shall submit to warrantless search and seizure of person and property as directed by the probation officer, to determine whether the defendant is in possession of firearms and illegal controlled substances.

DEFENDANT: ANTTINE ANDERSON
CASE NUMBER: 3:04CR00030-002

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$	$

☐ The determination of restitution is deferred until _____ . An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$0.00	$0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 13, 1996.

DEFENDANT: ANTTINE ANDERSON
CASE NUMBER: 3:04CR00030-002

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, the total criminal monetary penalties are due immediately and payable as follows:

A ☒ Lump sum payment of $ 100.00 immediately, balance payable

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, ☐ F or, ☐ G below); or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ F, or ☐ G below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ During the term of imprisonment, payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____, or _____ % of the defendant's income, whichever is greater, to commence _____ (e.g., 30 or 60 days) after the date of this judgment; AND payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ during the term of supervised release, to commence _____ (e.g., 30 or 60 days) after release from imprisonment.

G ☐ Special instructions regarding the payment of criminal monetary penalties:

Any installment schedule shall not preclude enforcement of the restitution or fine order by the United States under 18 U.S.C §§ 3613 and 3664(m).

Any installment schedule is subject to adjustment by the court at any time during the period of imprisonment or supervision, and the defendant shall notify the probation officer and the U.S. Attorney of any change in the defendant's economic circumstances that may affect the defendant's ability to pay.

All criminal monetary penalties shall be made payable to the Clerk, U.S. District Court, P.O. Box 1234, Roanoke, Virginia 24006, for disbursement.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

DEFENDANT: ANTTINE ANDERSON
CASE NUMBER: 3:04CR00030-002

DENIAL OF FEDERAL BENEFITS
(For Offenses Committed On or After November 18,1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the defendant shall be:

☒ ineligible for all federal benefits for a period of five years

☐ ineligible for the following federal benefits for a period of _____

(specify benefit(s))

OR

☐ Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 862(b)

IT IS ORDERED that the defendant shall:

☐ be ineligible for all federal benefits for a period of _____

☐ be ineligible for the following federal benefits for a period of _____

(specify benefit(s))

☐ successfully complete a drug testing and treatment program.

☐ perform community service, as specified in the probation and supervised release portion of this judgment.

☐ Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

Pursuant to 21 U.S.C. § 862(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility. The clerk is responsible for sending a copy of this page and the first page of this judgment to:

U.S. Department of Justice, Office of Justice Programs, Washington, DC 20531

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 21st *day of* March, 2006.

Antinne Anderson, Appellant,

against Record No. 1596-05-2
Circuit Court Nos. 17,427 through 17,429 and 17,513

Commonwealth of Virginia, Appellee.

From the Circuit Court of Albemarle County

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is granted in part and denied in part. An appeal is awarded to the petitioner from a judgment of the Circuit Court of Albemarle County, dated July 22, 2005, with respect to the following question:

II. Did the trial court err in refusing to instruct the jury on the law regarding the merger of abduction and assault and battery where the resolution of whether the abduction was merely incidental to the assault and battery required findings of fact which were within the province of the jury?

No bond is required. The clerk is directed to certify this action to the trial court and to all counsel of record.

Pursuant to Rule 5A:25, an appendix is required in this appeal and shall be filed by the appellant at the time of the filing of the opening brief.

The remainder of the appeal is denied for the following reasons:

Background

In the early morning hours of August 14, 2004, Harold Terry, a correctional officer at the Albemarle-Charlottesville Regional Jail, entered FD cellblock to remove bed sheets which were hanging

on the cells. As Terry was removing the sheets, an inmate named Thomas Dudley came up behind him and placed Terry in a headlock. Dudley pushed Terry, who was seventy-two years old, toward cell number six.[1] Terry resisted, and two other inmates assisted Dudley in getting Terry's arms behind him, placing him in handcuffs, and bending him over at the waist. Appellant and another inmate, Michael Carpenter, approached Terry and began hitting him in the face, as inmate Victor Becerra crawled under Terry and began hitting him in the groin. Terry was "hogtied" and pushed under a bed, where he lost consciousness.

Terry awoke to the sound of correctional officer Joseph Woodson talking to the inmates. Woodson had received a call from Terry at approximately 3:15 a.m. requesting housekeeping assistance from inmate and trustee Coburne. As Woodson escorted Coburne to meet Terry, he observed that the doors to the FD cellblock and FD cellblock day area were open, and he immediately investigated. At that point, Dudley grabbed Woodson from behind, and in the ensuing struggle, Woodson fell against the cell bars and lost consciousness briefly. Upon regaining consciousness, Woodson found Dudley on his neck and an inmate he later identified as appellant on his back. Appellant told Woodson to give him his hands, and handcuffed him.

Dudley attempted unsuccessfully to escape through a window, and Woodson heard Coburne signal an officer's approach. When Sergeant Strack and Officer Fuss appeared at the catwalk door, Carpenter and Dudley instructed them "to get back." Carpenter, along with Becerra, walked Woodson to the catwalk door with a ballpoint pen at his neck, and Strack and Fuss retreated to lock the main entrance to the F cellblocks. Meanwhile, Carpenter used Terry's keys to release the remaining forty-two inmates housed in that area.

Woodson was escorted to the picnic table in the cellblock, at which time he saw Terry under a bed with a blood-covered sheet over his head. At Woodson's suggestion, Dudley and Carpenter released Terry so he could obtain medical care, and kept Woodson as their hostage in various cells.

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[1] FD cellblock was comprised of six cells.

Appellant kept guard over Woodson in one cell for approximately an hour, and as appellant spoke to Woodson, Woodson recognized his voice. Woodson described appellant's voice as "a very distinct voice to characterize . . . [with] a distinct accent . . . ." According to Woodson, the voice belonged to the man who had been on his back and placed him in handcuffs.

Analysis

I. Appellant was convicted in a jury trial of two counts of assault and battery upon a correctional officer, abduction of a correctional officer, and attempted escape from a correctional facility as a principal in the second degree. He maintains the trial court erred when it denied his motion to strike the abduction charges because the restraint upon which the abduction charge was based was incidental to the assault against Woodson. We disagree.

In Brown v. Commonwealth, 230 Va. 310, 337 S.E.2d 711 (1985), the Supreme Court of Virginia held that a conviction for abduction is not barred on double jeopardy principles if "the acts of force and intimidation employed in the abduction were separate and apart from the restraint inherent in the commission of the rape." Id. at 314, 337 S.E.2d at 714.

We have adopted a four prong test in analyzing whether detention is "incidental to" the commission of another crime. In Hoyt v. Commonwealth, 44 Va. App. 489, 605 S.E.2d 755 (2004), we stated that

> "four factors are central to" determining whether or not an abduction or kidnapping is incidental to another crime. "Those factors are: (1) the duration of the detention or asportation; (2) whether the detention or asportation occurred during the commission of a separate offense; (3) whether the detention or asportation which occurred is inherent in the separate offense; and (4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense."

Id. at 494-95, 605 S.E.2d at 757 (citations omitted). We noted that "[this] . . . analysis states in summary fashion the factors Virginia courts have employed on a case-by-case basis in determining whether an abduction is incidental to another crime." 44 Va. App. at 495, 605 S.E.2d at 757-58 (citations omitted).

Viewing "the evidence presented at trial in the light most favorable to the Commonwealth, the prevailing party below," Johnson v. Commonwealth, 259 Va. 654, 662, 529 S.E.2d 769, 773 (2000), and applying the Hoyt analysis to facts before us, we find the trial court did not err in denying appellant's motion to strike. The Commonwealth presented sufficient evidence for a fact finder to reasonably conclude that the lengthy period Woodson was handcuffed was separate and distinct from the detention inherent in subduing Woodson when appellant was sitting on his back. See Powell v. Commonwealth, 261 Va. 512, 541, 522 S.E.2d 344, 361 (2001) (detention not incidental to rape where defendant bound victim and left her for some time after the rape was complete). Furthermore, evidence that appellant "guarded" Woodson for an extended period after Terry's release was sufficient for a jury to reasonably find that appellant detained Woodson for a period of time which was not incidental to the initial assault.

III. and IV. Appellant further argues that the evidence was insufficient to support his convictions for the assault and battery of Terry and Woodson because the victims' identification of appellant by Terry and Woodson as their respective assailants was inherently incredible.

Because appellant failed to raise these issues at trial,[2] we decline to address them for the first time on appeal. See Rule 5A:18.

V. Finally, appellant claims the evidence was insufficient to support his conviction for attempted escape from a correctional facility because it did not show that he participated in the escape attempt or shared the perpetrators' intent to escape. Appellant moved to strike the attempted escape charge on the ground that the evidence failed to show any "overt act" by him in furtherance of the escape.[3] The trial

---

[2] Appellant did not move to strike the Commonwealth's case with regard to the assault and battery charges against either Terry or Woodson. With respect to Terry, appellant conceded "he participated by punching Terry . . . [and stated] that's probably enough to get it to the jury at this point." With respect to Woodson, appellant argued, "We still have some identify [sic] issues here, Your Honor, which I think will probably have to go to the jury . . . ."

[3] As appellant did not argue at trial that the Commonwealth failed to prove his criminal intent, we decline to address that issue for the first time on appeal. See Rule 5A:18.

court denied appellant's motion, and ruled that appellant would be charged as a principal in the second degree.

When the sufficiency of the evidence is challenged on appeal, we review the evidence "in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom." Bright v. Commonwealth, 4 Va. App. 248, 250, 356 S.E.2d 443, 444 (1987). In order to prove appellant was a principal in the second degree to the attempted escape, the Commonwealth was required to show appellant assisted by some "overt act" or that he shared the criminal intent of the principals.

> "A principal in the second degree is one not the perpetrator, but present, aiding and abetting the act done, or keeping watch or guard at some convenient distance." Brown v. Commonwealth, 130 Va. 733, 736, 107 S.E. 809, 810 (1921).
>
> * * * * * * *
>
> "To constitute one [as] an aider and abettor, he must be guilty of some overt act, or he must share the criminal intent of the principal." Triplett v. Commonwealth, 141 Va. 577, 586, 127 S.E. 486, 489 (1925)[.]
>
> * * * * * * *
>
> When the alleged accomplice is actually present and performs overt acts of assistance or encouragement, he has communicated to the perpetrator his willingness to have the crime proceed and has demonstrated that he shares the criminal intent of the perpetrator. When the alleged accomplice is actually present, but performs no overt act, he is nonetheless a principal in the second degree if he has previously communicated to the perpetrator that he shares the perpetrator's criminal purpose.

Rollston v. Commonwealth, 11 Va. App. 535, 539, 399 S.E.2d 823, 825-26 (1991) (quoting Groot, Criminal Offenses and Defenses in Virginia 183 (1984)).

Appellant committed several "overt acts" which assisted with attempted escape. He assisted in overcoming two prison guards, assaulting one and placing the other in handcuffs. He also assisted by keeping watch over Woodson, presumably for the purpose of preserving a hostage situation designed to

facilitate an escape. We find such evidence was sufficient to prove beyond a reasonable doubt that appellant was a principal in the degree to the escape attempt.

This order is final unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

This Court's records reflect that Charles L. Weber, Jr., Esquire, is counsel of record for appellant in this matter.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: Marty L. P. Ring

Deputy Clerk

CERTIFICATE OF CLERK

I, Cynthia L. McCoy, Clerk of the Court of Appeals of Virginia, do hereby certify that on March 21, 2006 an appeal was awarded as described in the order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day mailed to the trial court indicated in the order and to all counsel of record.

Given under my hand this 21st day of March, 2006.

Cynthia L. McCoy, Clerk

By: Marty L.P. King

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 30th day of May, 2023.

Commonwealth of Virginia, Petitioner,

against Record No. 230278
Circuit Court No. CL21-66

Hannah Fatimah Muwahhid, Respondent.

Upon a Petition Under Code § 8.01-675.5(B)*
Justices Powell, McCullough, and Russell

On April 19, 2023, the Court of Appeals of Virginia transferred this case to this Court.

Finding that the Court of Appeals retains jurisdiction over the petition for review filed on April 22, 2022, the Court remands the case to the Court of Appeals.

A Copy,

Teste:

Muriel-Theresa Pitney, Clerk

By:

Deputy Clerk

* The provisions of former Code § 8.01-675.5(B) were recently recodified under Code § 8.01-670.2(A). *See* 2023 Va. Acts ch. 741 (effective Apr. 12, 2023).