VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

ANTOINE ANDERSON,

Petitioner

v. **Case No. _____**

HAROLD CLARKE, in his official capacity as Director of the Virginia Department of Corrections

and

KEMSY BOWLES, in his official capacity as Warden of Coffeewood Correctional Center

Respondent

MEMORANDUM IN SUPPORT OF ANTOINE ANDERSON'S PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTION

This case presents a purely legal issue of statutory construction regarding recent amendments to Virginia's earned sentence credit program. In 2020, Virginia's General Assembly passed House Bill 5148, which expanded the ability of many people in the custody of the Virginia Department of Corrections (VDOC) to earn time off of their sentences. H.B. 5148 explicitly provided that the amendments "shall apply retroactively to the entire sentence" of those who qualified. The Petitioner in this case, Antoine Anderson, was eligible to earn increased sentence credits as a result of the amendments, and his release date was moved up almost two years.

However, in June 2022, a subsequent General Assembly passed language incorporated into the state Budget, limiting the circumstances in which people with certain convictions are eligible to earn such credits. The Budget language included no similar retroactivity provision.

The Budget is an inherently-forward-looking bill that generally does not amend the Virginia Code, but instead directs the Commonwealth's appropriations during the coming two years. Nevertheless, Respondents have interpreted the Budget language regarding earned sentence credits to apply retroactively, in contravention of well-established precedent disfavoring retroactive application of statutes affecting substantive rights. This interpretation resulting in the cancellation of Mr. Anderson's earned sentence credits, and the revision of his release date from July 2022 to April 2024. Were Respondents to interpret this language correctly, Mr. Anderson would be awarded enough earned sentence credits to result in his immediate release. He is therefore entitled to habeas relief.

II. VIRGINIA'S EARNED SENTENCE CREDIT PROGRAM

Virginia has long had a system to incentivize and reward good behavior and efforts towards self-improvement among people serving sentences in state prisons. Initially called "Good Conduct Time," the system was revised in 1995 and renamed "Earned Sentence Credits", or ESCs. *See* Virginia Department of Corrections Operating Procedure 830.3, effective July 1, 2022, p. 5 (hereinafter "OP 830.3", and attached to the Petition as Exhibit B).

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

Va. Code § 53.1-202.2(A). Prior to July 1, 2022, anyone convicted of a felony offense that was committed on or after January 1, 1995, could earn a maximum of 4.5 ESCs for every 30 days served. Va Code. § 53.1-202.3. The number of credits actually earned depends on the "class level" awarded to the individual during the preceding year. OP 830.3, p. 13. A person's class

level is determined through an annual evaluation process that considers whether the person has incurred any disciplinary infractions, whether the person has achieved the goals set out in their re-entry plan, and whether the person was employed. *Id.* at p. 7.

a. H.B. 5148 (2020)

In 2020, Virginia's General Assembly amended the earned sentence credit program to provide greater incentives for incarcerated people to pursue opportunities for growth and personal improvement, and to reward those who had already done so during their incarceration. Acts of the General Assembly House Bill 5148 (November 9, 2020). Under the new law, individuals serving sentences for certain enumerated felony convictions remain eligible for a maximum of 4.5 earned sentence credits for every 30 days served, but individuals serving sentences for any other conviction are now eligible to earn as many as 15 sentence credits for every 30 days served. Va. Code § 53.1-202.3. The law maintains the Class Level system, but provides that those eligible for increased credits earn 15 days per 30 served at Level I, 7.5 days per 30 served at Level II, and 3.5 days per 30 served at Level III.

These provisions took effect on July 1, 2022. However, the General Assembly explicitly applied the law retroactively, so that those incarcerated on that date would have the benefit of these increased earned sentence credits for the totality of their sentences prior to the effective date of the law. The enactment clause to H.B. 5148 provides:

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

H.B. 5148(1)(D) (emphasis added). The delay between the enactment of the law in 2020 and the effective date in 2022 was intended to give the VDOC time to implement the new system and re-calculate the sentences of those eligible for additional sentence credits.

This law was expected to result in the release of as many as 3,200 people between July 1, 2022 and August 30, 2022. *See*, *e.g.*, Joe Dashiell, "Expansion of earned sentence credits to clear the way for release of state inmates." WDBJ7 (May 17, 2022), https://www.wdbj7.com/2022/05/17/expansion-earned-sentence-credits-clear-way-release-state-inmates/. Overall, VDOC estimated that as many as 14,000 people incarcerated as of July 1, 2022 would benefit from the law. Ned Oliver, "Thousands of Virginia prisoners could be released early under new earned sentence credit program." Virginia Mercury (October 26, 2020), https://www.virginiamercury.com/2020/10/26/thousands-of-virginia-prisoners-could-be-released-early-under-new-earned-sentence-credit-program/.

Mr. Anderson was one of the people expected to benefit from H.B. 5148. Indeed, VDOC notified Mr. Anderson that he was to be released in July 2022, and began to take all necessary steps to effectuate his release. Because Mr. Anderson has maintained Level I classification throughout his entire time in VDOC custody, he was eligible to earn 15 days for every 30 served on his convictions for attempted escape and assault and battery. The only conviction not eligible for these expanded credits was his conviction for abduction; however, he was eligible to earn 4.5 sentence credits for every 30 days served on that sentence both before and after the passage of H.B. 5148.

b. Budget Item 404(R)

On June 21, 2022, Virginia's Governor signed the Biennial Budget (H.B. 30) passed by the General Assembly, directing the Commonwealth's appropriations from July 1, 2022 until

June 30, 2024. In Budget Item 404(R), the General Assembly appropriated funds to VDOC for the implementation of the new earned sentence credit system, but qualified its administration of the credit system in the following manner:

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

Acts of the General Assembly House Bill 30 (June 22, 2022) (available at https://budget.lis.virginia.gov/get/budget/4623/HB30/). VDOC erroneously applied this language retroactively to deny increased earned sentence credits to those who had already served time, prior to July 1, 2022, on convictions that qualify for them.

As a result of VDOC's erroneous interpretation of the Budget Item, Mr. Anderson was notified that he would not in fact be awarded the increased sentence credits as provided in H.B. 5148, because he was serving concurrent sentences for convictions that were both eligible for and ineligible for the expanded credits. Instead, VDOC recalculated Mr. Anderson's sentence to award only 4.5 days per 30 served on his entire sentence. Thus, his release date was revised to April 2024 (assuming he remains at Class Level I for the remainder of his sentence).

III. BUDGET ITEM 404(R) IS NOT RETROACTIVE

VDOC has interpretated Budget Item 404(R) to apply retroactively to all time served prior to July 1, 2022. Thus, VDOC is not awarding expanded ESCs to anyone with mixed sentences, *i.e.*, people serving sentences for both convictions listed under § 53.1-202.3(A), and convictions that are not. This retroactive application of the Budget Item is clearly foreclosed by ordinary principles of statutory construction and well-established precedent.

a. Retroactive Application of Laws Affecting Substantive Rights is Disfavored

When deciding whether a statute has retroactive effect, the first question is whether the statute affects substantive rights or is merely procedural. Substantive rights "are included within that part of the law dealing with creation of duties, rights, and obligations...." *Shiflet v. Eller*, 228 Va. 115, 120, 319 S.E.2d 750, 753 (1984). Laws are procedural if they "prescribe[] methods of obtaining redress or enforcement of rights." *Id.* Statutes that are merely procedural may be applied retroactively. *See McCarthy v. Commonwealth*, 73 Va. App. 630, 647–48, 864 S.E.2d 577, 585–86 (2021) (quoting *Pennington v. Superior Iron Works*, 30 Va. App. 454, 459, 517 S.E.2d 726 (1999)). Substantive rights, however, "are included within those interests protected from retroactive application of statutes" in Virginia. *Shiflet*, 228 Va. at 120. If a law is both substantive and procedural, "courts will not give the statute retroactive effect." *McCarthy*, 73 Va. App. at 647.

b. The Legislature's Retroactive Intent Must be Explicit

Because retroactive application of laws that affect substantive rights is so clearly disfavored, the Virginia Supreme Court interprets "statutes to apply prospectively 'unless a contrary legislative intent is manifest.'" *Bailey v. Spangler*, 289 Va. 353, 358-59 (2015) (quoting *Board of Supervisors v. Windmill Meadows, LLC*, 287 Va 170, 180 (2014)). *See also Adams v. Alliant Techsystems*, 261 Va. 594, 599 (2001); *Day v. Pickett*, 18 Va. (4 Munf.) 104, 109 (1813). "Every reasonable doubt is resolved against a retroactive operation of a statute, and words of a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise defined, and the lack of such intention is evidenced by its failure to express an

intention to make the statute retroactive." *Shilling v. Commonwealth*, 4 Va. App. 500, 507, 359 S.E.2d 311 (1987) (citing 17 Michie's Jurisprudence Statutes § 73 (1979)).

Any legislative intent must be evident in the language of the statute. *See Ferguson v. Ferguson*, 169 Va. 77, 87 (1937) ("It is reasonable to conclude that the failure to express an intention to make a statute retroactive evidences a lack of such intention.... It is not to be presumed that the legislature intends to work an injustice."). This principle was recently examined by the Virginia Supreme Court, which reaffirmed that, "[u]nless a contrary intent is manifest beyond reasonable question on the face of an enactment, a statute is construed to operate prospectively only." *City of Charlottesville v. Payne*, 299 Va. 515, 530, 856 S.E.2d 203, 211 (2021). Thus, the Court cannot guess or presume what the legislature may have intended when it included Budget Item 404(R) in the Budget bill. Instead, it must look only to the plain language of the provision itself to determine whether it applies retroactively.

c. Budget Item 404(R) Affects a Substantive Right and Does Not Apply Retroactively

A law affecting prisoners' ability to earn credits toward their sentence clearly implicates their substantive rights. The amount of time an individual spends in prison is a very real and tangible interest, and one's freedom from confinement is a fundamental substantive right. Thus, Budget Item 404(R), which negatively impacts that substantive interest, cannot be presumed to apply retroactively, and the legislature must have clearly, explicitly, and affirmatively expressed an intent that the provisions apply retroactively.

Nothing in in the plain language of Budget Item 404(R) manifests (or even hints at) any intent that it is to be applied retroactively. Budget Item 404(R)(2) expressly did not amend Va.

Code § 53.1-202.3[1]; rather, it merely dictates how appropriated funds are to be administered by VDOC from July 1, 2022 through June 30, 2024 (the life of the Budget). The Budget Item references only Va. Code § 53.1-202.3 and is silent as to the enactment clause of H.B. 5148, which contains the retroactivity provision. The enactment clause with the retroactivity provision does not itself appear in the language of the Code, but only in H.B. 5148 as passed by the legislature and signed by the Governor. The Budget Item contains no language overriding the enactment clause of H.B. 5148 that clearly and unambiguously directs the expanded sentence credits to be applied retroactively.

The enactment clause of H.B. 5148 demonstrates that the General Assembly is well aware of the need to specifically provide for retroactive application of a statute and is fully capable of doing so when it intends to. This renders the lack of any retroactivity provision in Budge Item 404(R) even more telling. Because there is no explicit indication that the General Assembly intended Budget Item 404(R) to apply retroactively, this Court must resolve "every reasonable doubt" against retroactive application of the Budget Item, and it must be given only prospective effect.

Such an interpretation would also be consistent with the nature of the Budget itself. The Budget bill is by its nature a prospective bill – it directs spending for the next two fiscal years. In the absence of express language indicating retroactive application of the provision, there can be no assumption or presumption from its surrounding context that Budget Item 404(R) is intended to apply retroactively.

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[1] Notably, the 2022 Budget Bill *did* amend various other sections of the Virginia Code. Thus, its full title was, "An Act for all appropriations of the Budget submitted by the Governor of Virginia in accordance with the provisions of § 2.2-1509, Code of Virginia, and to provide a portion of the revenues for the two years ending respectively on the thirtieth day of June, 2023, and the thirtieth day of June, 2024, and an Act to amend and reenact §§ 3.2-5145.5, 4.1-1100, 4.1-1101, 18.2-325, 18.2-334.6, 22.1-349.1, 58.1-322.02, 58.1-322.03, 58.1-339.8, 58.1-439.30, 58.1-611.1, and 59.1-200 of the Code of Virginia." Acts of the General Assembly House Bill 30 (June 22, 2022). Absent is any amendment to § 53.1-202.3.

There is no plausible interpretation of Budget Item 404(R) that results in its retroactive application. Instead, it must be understood to apply only prospectively; that is, people with mixed sentences who are incarcerated between July 1, 2022 and June 30, 2024 are not eligible to earn expanded sentence credits during that two-year period. Time served prior to the enactment of the Budget remains eligible for the expanded sentence credits because H.B. 5148's retroactivity provision remains untouched by the Budget Item. Under this correct interpretation of Budget Item 404(R), Mr. Anderson should be awarded expanded credits for the time he served on eligible convictions prior to July 1, 2022.

d. Statutes Must Be Read to Avoid Conflict and Constitutional Questions

Even in the event this Court were to find that the plain language of the Budget Item evinces some retroactive intent, this Court should decline to interpret the Budget Item retroactively on the basis of well-settled principles of statutory construction favoring the avoidance of conflict or constitutional concerns. Where two laws can be read to avoid conflict and to give effect to the provisions in both, courts are duty-bound to choose that interpretation. *See City of Lynchburg v. English Const. Co., Inc.*, 277 Va. 574 (2009) (citing *Sexton v. Cornett*, 271 Va. 251, 257 (2006) ("It is the duty of the courts to construe statutory enactments so as to avoid repugnance and conflict between them and, if possible, to give force and effect to each of them."); *Eastlack v. Commonwealth*, 282 Va. 120, 125–26 (2011) ("statutes concerning the same subject are to be read together, and construed, whenever possible, so as to avoid conflict between them and to permit each of them to have full operation according to their legislative purpose.").

Applying the Budget Item retroactively creates more of a conflict between it, H.B. 5148, and Va. Code § 53.1-202.3 than should actually exist. This can be avoided by giving the Budget Item only prospective effect. The Budget Item language uses the word "notwithstanding" to

signal that it is overriding the provisions of amended Code § 53.1-202.3 to a certain extent – i.e., as to people serving mixed sentences. However, the Court must narrowly construe and limit that conflict by applying the Budget Item to only the two years in which the Budget bill is operative. To do otherwise would be to infer the repeal of Va. Code § 51.3-202.3 to an extent that is not explicitly stated, and such inferences are not permitted. *See, e.g., American Cyanamid Co. v. Commonwealth of Virginia*, 187 Va. 831, 841 (1948) ("Repeal by implication is not favored and the firmly established principal of law is, that where two statutes are in apparent conflict, it is the duty of the court, if it be reasonably possible, to give to them such a construction as will give force and effect to each").

Further, courts must construe statutes "in such a manner as to avoid a constitutional question wherever this is possible." *Eaton v. Davis*, 176 Va. 330, 339, 10 S.E. 2d 893, 897 (1940). As long as Budget Item 404(R) is not applied retroactively, it creates no constitutional issues in this case. However, if this Court were to find that it did apply retroactively, it would raise serious constitutional questions under the ex post facto clause and due process, as discussed below. Thus, this Court should find that Budget Item 404(R) does not apply retroactively.

c. Applying Budget Item 404(R) Retroactively Raises Constitutional Concerns Under the Ex Post Facto Clause

The Supreme Court of the United States has examined the prohibition on ex post facto laws in the context of "good time" or "sentence credit" awards, and has held that laws that are retrospective and that "disadvantage the offender affected by" them run afoul of that prohibition. *Weaver v. Graham*, 450 U.S. 24, 29, 101 S. Ct. 960, 964, 67 L. Ed. 2d 17 (1981). The Supreme Court has concluded that statutes retroactively reducing good time credits already applied (*Lynce*

v. Mathis, 519 U.S. 433, 117 S.Ct. 891 (1997)), and statutes prospectively reducing the number of good time credits prisoners can earn (*Weaver*, *supra*), both violate the ex post facto clause.[2]

This case is most similar factually to the issue before the Supreme Court in *Lynce*. In that case, the Petitioner was released after having been awarded sentence credits related to prison overcrowding. The Florida legislature then retroactively cancelled those overcrowding credits for certain classes of inmates, and Petitioner was re-arrested to serve the time now remaining on his sentence. The Court held that because the law retroactively canceled credits that had already been awarded, the law violated the Ex Post Facto clause. The Court noted that the law was problematic because "it made ineligible for early release a class of prisoners who were previously eligible." 519 U.S. at 447.

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

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[2] Other courts have held that various changes to good time programs violate the ex post facto clause. *See, e.g.*, *Beebe v. Phelps*, 650 F.2d 774 (5th Cir. 1981) (law that required forfeiture of good time already awarded if petitioner violated parole violates ex post facto clause); *Williams v. Lee*, 33 F.3d 1010 (8th Cir. 1994) (same); *Greenfield v. Scafati*, 277 F.Supp. 644 (D.Mass.1967), aff'd mem., 390 U.S. 713, 88 S.Ct. 1409, 20 L.Ed.2d 250 (1968) (law prohibiting petitioner from earning good conduct time for the first six months after reincarceration from parole violation is ex post facto law); *Piper v. Perrin*, 560 F.Supp. 253 (D. N.H. 1984) (warden's decision to alter method by which good conduct credits were awarded violated ex post fact clause).

However, as interpreted by VDOC, the Budget Item subsequently retroactively cancelled those credits Mr. Anderson had already earned. *Lynce* stands for the proposition that once the legislature actually awards a benefit that shortens a sentence, it cannot later take it away. Applied retroactively, the Budget Item does just that – it eliminates Mr. Anderson's eligibility for sentence credits that he was previously eligible for and that were to be awarded to result in an earlier release date. Accordingly, the Court must construe the Budget Item in such a way as to avoid this Constitutional infirmity, and hold that it does not apply to credits that Mr. Anderson earned under H.B. 5148 prior to July 1, 2022.

f. Applying Budget Item 404(R) Retroactively Raises Serious Questions Under the Due Process Clause

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

Virginia's earned sentence credit program satisfies this test, as it is sets out specific criteria that, when met, result in the mandatory award of earned sentence credits. *See* Virginia Department of Corrections Operating Procedure 830.3, p. 13 (attached as Exhibit B to Petition) ("Inmates who committed their felony offense(s) on or after January 1, 1995, automatically enter the ESC system for the duration of all such felony sentences. Whether an inmate is awarded [earned sentence credits] is determined by the underlining [sic] offense and" the classification scheme set out in Va. Code § 53.1-202.3(B)).

The liberty interest created by Virginia's earned sentence credit program may not be infringed upon without due process. Under U.S. Supreme Court precedent, before a prisoner can be punished through loss of earned sentence credits, "they must be given advance written notice of the charges against them, they must be allowed to call witnesses (if prison safety so allows), and the factfinders must issue a written statement as to the evidence relied upon and the reasons for the disciplinary action." *Ewell, supra,* 11 F.3d at 487–88. (citing *Wolff v. McDonnell,* 418 U.S. 539, 563-67, 94 S.Ct. 2963, 2978-80 (1974)).

If Budget Item 404(R) applies retroactively to cause the loss of earned sentence credits – not based on the actions of any affected individual but simply based on the nature of that person's convictions, it would raise serious questions under these principles of due process, as no process whatsoever was provided to those affected by it. Again, courts must avoid these Constitutional problems if there is a way to read the statute to do so. Applying Budget Item 404(R) only prospectively relieves it of the due process problem as applied to Mr. Anderson.

IV. MR. ANDERSON IS ENTITLED TO HABEAS RELIEF

Mr. Anderson is eligible for relief from this Court, and such relief is required in this case. "*Habeas corpus* is a writ of inquiry granted to determine whether a person is illegally

detained.... In other words, a prisoner is entitled to immediate release by habeas corpus if he is presently restrained of his liberty without warrant of law." *Smyth v. Midgett*, 199 Va. 727, 730, 101 S.E.2d 575, 578 (1958). However, this Court's jurisdiction is not limited to situations in which immediate release is at issue; rather, habeas relief is available if "an order entered in the petitioner's favor will result in a court order that, on its face and standing alone, will directly impact the duration of the petitioner's confinement." *Carroll v. Johnson*, 278 Va. 683, 693, 685 S.E.2d 647, 652 (2009).

Mr. Anderson has been impacted by the VDOC's retroactive application of the Budget Item. All of his convictions are eligible for increased earned sentence credits except the abduction conviction. VDOC notified Mr. Anderson that he would be released in the first 60 days after H.B. 5148 took effect. VDOC then took affirmative steps to prepare him for release, including approving his home plan and obtaining his DMV identification. This clearly demonstrates that but for the VDOC's interpretation of the Budget Item, Mr. Anderson would have earned enough sentence credits to be released between July 1, and August 30, 2022. For the reasons outlined in this Memorandum, Mr. Anderson should be awarded the expanded earned sentence credits as provided under the 2020 amendments to Va. Code § 53.1-202.3. Those credits will result in a release date no later than August 30, 2022. Accordingly, habeas relief is appropriate in this case, and the Court should order Mr. Anderson's immediate release.

V. CONCLUSION

This case presents a clear and straightforward issue of statutory construction. Budget Item 404(R) cannot be read to apply retroactively. Ensuring the correct interpretation of Va. Code § 53.1-202.3 and Budget Item 404(R) will have a significant impact on the length of the

Petitioner's sentence. Accordingly, he is entitled to relief, and this Court should order his immediate release.

RESPECTFULLY SUBMITTED
ANTOINE ANDERSON

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