VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

ANTOINE ANDERSON,

Petitioner

v. **Case No. CL22 – 1066**

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

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

Pursuant to this Court's Order to Show Cause, Petitioner respectfully submits this Reply to Defendants' Motion to Dismiss, filed in this court on September 26, 2022. Defendants' Motion to Dismiss makes clear that this case presents a purely legal issue that turns on basic canons of statutory construction. Defendants' Motion to Dismiss also makes clear that there is no basis in fact or in law to apply Budget Item 404(R) (2022) retroactively. Accordingly, this Court should hold that Budget Item 404(R) applies only prospectively, and thus, that Mr. Anderson is entitled to expanded sentence credits for the time he has already served.

I. DEFENDANTS CONCEDE THAT THE BUDGET ITEM IS NOT EXPRESSLY RETROACTIVE.

Defendants recognize that they are asking this Court to apply Budget Item 404(R) retroactively. Def. Mot. to Dismiss, p. 9 ("The most plain and harmonious reading of [H.B. 5148] and the language in Budget Item 404(R) is that the entire amendment be retroactively and prospectively applied to an inmate's entire sentence."). But Defendants make no claim that the plain language of Budget Item 404(R) contains any express indication that it is to be applied retroactively.[1] Defendants further concede that Budget Item 404(R) "made no changes to the implementation language contained in HB5148." Def. Mot. to Dismiss, p. 5. Thus, Defendants concede that Budget Item 404(R) does not impact the retroactivity of H.B. 5148, which is indicated in the "implementation language," or enactment clauses, of H.B. 5148.

Faced with the lack of any language in the Budget Item indicating that it is to be applied retroactively, Defendants rest on the bald assertion that, "there is no need for Budget Item 404(R) to include its own additional retroactivity clause." Def. Mot. to Dismiss, p. 9. Defendants offer no support for this assertion. They do not identify anything in the language of the Budget Item or the context in which it is found that suggests it should be applied retroactively; nor could they, as the Budget Item is silent as to retroactivity, and the budget bill itself is an inherently forward-looking piece of legislation. Unsurprisingly, Defendants are unable to point to any precedent or legal authority that would support their claim that the Budget Item should be exempt from the general rule that requires an explicit statement of retroactivity, because that claim is contrary to decades, if not centuries, of precedent from Virginia's highest court. Pet.

[1] Rather, the Defendants point out that the Budget Item "only modified the application of Code § 53.1-202.3 by providing that an inmate serving a sentence which is enumerated in subsection (A) of Code § 53.1-202.3 is not eligible to earn enhanced credit on any other sentence ***they are currently serving***." *Id.* at 8 (emphasis added). Thus, Defendants implicitly acknowledge that the plain language of the Budget Item is forward looking, not backwards looking.

Mem in Support, pp. 6-7; *see also City of Charlottesville v. Payne*, 299 Va. 515, 528, 856 S.E.2d 203, 209 (2021) ("It has long been the law of the Commonwealth that retroactive application of statutes is disfavored and that statutes are to be construed to operate prospectively only unless a contrary intention is manifest and plain." (internal quotations and citations omitted)).

As a result of this long-standing rule against retroactive application of laws impacting substantive rights, the General Assembly is well-versed in how to ensure that its enactments are applied retroactively when that is the intent. *See id.* at 531 ("[T]he General Assembly knows how to make its intent manifest that a statute has retroactive application."); *Green v. Commonwealth*, 75 Va. App. 69, 873 S.E.2d 96, 103 (2022) (finding statute is not retroactive because, "the General Assembly easily could have stated that the amended statute could have been effective retroactively … but it did not."). The fact that the General Assembly did not include any such language in the Budget Item is dispositive and compels the conclusion that the Budget Item applies only prospectively.

II. THIS COURT MAY NOT INFER RETROACTIVITY.

Defendants, however, ask this Court to ignore the plain language of Budget Item 404(R) and contravene precedent to infer the General Assembly's intent that the Budget Item apply retroactively. The only argument put forth by Defendants in support of this position assumes that the General Assembly could not possibly have "intended for their [sic] to be one classification system for time spent incarcerated prior to July 1, 2022, another classification system for time spend incarcerated between July 1, 2022 and June 30, 2024, and then a third classification system for time spent incarcerated after June 30, 2024." Def. Mot. to Dismiss at 9. However, Defendants provide no cogent rationale for why such a result is legally impermissible. Instead, Defendants simply argue that it would be "absurd."

In the context of statutory construction, "the anti-absurdity limitation has a legal, not colloquial, meaning." *Tvardek v. Powhatan Vill. Homeowners Ass'n, Inc*., 291 Va. 269, 280, 784 S.E.2d 280, 286 (2016). Courts have defined an "absurd" result as one in which the statute would be internally inconsistent or the statute would be impossible to implement. *Tvardek v. Powhatan Vill. Homeowners Ass'n, Inc.*, 291 Va. 269, 280, 784 S.E.2d 280, 286 (2016) (noting that a "classic example would be a literal, but entirely dysfunctional, interpretation 'validating' an act while simultaneously 'nullifying' it.").

To accept Defendants' position, the Court would have to assume the legislature's intent based on policy considerations about how the law ought to work. Such assumptions are plainly impermissible. Long-standing precedent counsels that courts may not look outside of the statutory language to discern the intent of the General Assembly; rather, the role of the courts "is to ascertain the intent of the General Assembly as evidenced by the words used by it." *City of Charlottesville*, 299 Va. at 530, 856 S.E.2d at 211. This Court may not look behind that language to determine intent, or "extend the meaning of a statute" based on speculation regarding legislative intent. *In re Woodley*, 290 Va. 482, 490. 777 S.E.2d 560, 565 (2015). When interpreting or construing a statute, "[c]ourts are not permitted to rewrite statutes." *Boynton v. Kilgore*, 271 Va. 220, 230, 623 S.E.2d 922, 927 (2006) (quoting *Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)). Yet that is exactly what Defendants ask this Court to do in this case.

Courts must exercise caution when examining whether the plain language of a statute creates an absurd result, in order to avoid substituting its own policy judgment for that of the legislature. *Tvardek*, 291 Va. at 279 ("Our fidelity to the statutory text does not permit us to weigh policy arguments for and against legislation, holding out the possibility that we would

fashion an interpretation based upon avoiding policies that a litigant thinks to be absurd."). Even when a Court believes the legislature may have intended a different result, the Court is still bound to the plain meaning of the statute. *Appalachian Power Co. v. State Corp. Commission*, __ Va. __, 876 S.E.2d 349, 358 (quoting *Carter v. Nelms*, 204 Va. 338, 131 S.E.2d 401, 406-7 (1963)) ("Virginia tradition has always been to ask not what the legislature intended to enact, but what is the meaning of that which it did enact. We must determine the legislative intent by what the statute says and not by what we think it should have said.").

Thus, in order justify an inference of retroactivity in the Budget Item, the Court must determine that it would be impossible to implement the Budget Item as written, or that it would result in an internal inconsistency. Neither is the case here. Implementing the restrictions contained in the Budget Item only prospectively would be perfectly straightforward and easy to comprehend. This interpretation is also internally consistent, because the budget bill is an inherently temporary and forward-looking piece of legislation that does not permanently amend the Code. Had the General Assembly intended to create a permanent change to the provisions of Va. Code § 53.1-202.3, it could have passed a bill to amend that statute. It did not. Had the General Assembly intended for Budget Item 404(R) to apply retroactively, it could have said that explicitly, as it did in H.B. 5148. It did not. If the General Assembly intends for the language of Budget Item 404(R) to be permanent, it can pass such legislation in a future session, but it has not done so yet.

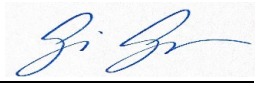
Here, there is only one reading of Budget Item 404(R) that is permissible, and that is to hold that Budget Item 404(R) applies only prospectively to time served between July 1, 2022 and June 30, 2024. "To hold otherwise 'would require this Court to add language to the statute the General Assembly has not seen fit to include, an exercise in which the Court is not free to

engage.'" *Green v. Commonwealth*, 75 Va. App. 69, 873 S.E.2d 96, 103 (2022) (quoting *Holsapple v. Commonwealth*, 266 Va. 593, 599, 587 S.E.2d 561 (2003)).

III. CONCLUSION.

In Mr. Anderson's case, the retroactive application of H.B. 5148 and the prospective application of the Budget Item would result in the award of sufficient sentence credits for time he has already served to result in his immediate release. He is thus entitled to relief in this case, and the Court should grant his petition and order his immediate release from custody.

RESPECTFULLY SUBMITTED,
ANTOINE ANDERSON



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