IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JOHN LOUIS FREMAN, SR.,

Plaintiff,

v. CASE NO. 2:17cv00330

VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*,

Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Plaintiff John Louis Freeman, Sr., an inmate currently within the custody of the Virginia Department of Corrections ("VDOC"),[1] has filed suit under 42 U.S.C. § 1983, claiming that, during a prior period of incarceration, he was held in custody past his anticipated release date. The procedural flaws in his pleading, however, entitle Defendants to summary dismissal. As an initial matter, the Virginia Department of Corrections is a sovereign state agency that is entitled to Eleventh Amendment immunity and cannot be sued under 42 U.S.C. § 1983. The complaint fails to state a sufficient basis for personal liability as to Defendant Clarke, and he is immune from claims filed against him in his official capacity. Moreover, this case is time-barred on its face, the referenced state court orders are void *ab initio*, and the complaint fails to allege a plausible Eighth Amendment or Due Process claim. For these reasons, and those discussed in more detail below, Defendants respectfully request that this matter be dismissed.

[1] Although Freeman has alleged that he is a former inmate, VDOC records reflect that he is currently incarcerated at Nottoway Correctional Center. Public records indicate that, on July 12, 2017, the Virginia Beach Circuit Court imposed a previously-suspended one year and six month period of incarceration on an underlying conviction for forgery of a public record. (Va. Beach Cir. Ct. docket #CR04001178-04).

STATEMENT OF FACTS

"[W]hen ruling on a defendant's motion to dismiss, a [trial] judge must accept as true all of the factual allegations contained in the complaint."[2] So viewed, the essential allegations of the complaint are as follows.

1. On March 8, 2005, the Virginia Beach Circuit Court convicted Freeman of forgery of a public record and placed him on supervised probation.[3]

2. The Norfolk Circuit Court subsequently convicted Freeman of a probation violation.[4]

3. On August 1, 2010, Freeman was charged with new traffic offenses. When he failed to appear for trial, he was charged with failure to appear ("FTA").[5]

4. On January 6, 2011, the Virginia Beach Circuit Court issued a capias for Freeman's arrest, based upon a violation of the terms and conditions of his probation.[6]

5. On October 6, 2011, Freeman was arrested in Massachusetts, for traffic offenses. The Commonwealth of Virginia agreed to extradite Freeman following resolution of his Massachusetts charges.[7]

6. Freeman was released on bond while in Massachusetts.[8]

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[2] *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citations omitted).

[3] Compl. ¶ 12.

[4] Compl. ¶ 13. This probation violation corresponds to an underlying conviction for grand larceny. Specifically, on June 15, 2004, Freeman was pled guilty to one felony count of grand larceny, and he was sentenced to three years incarceration, with the entire sentence suspended. (Norfolk Cir. Ct. docket #CR04000651). On March 26, 2007, he was found in violation of his probation, and he received a sentence of three years, with 2 years and 10 months of that sentence suspended. (Norfolk Cir. Ct. docket #CR04000651-01). There do not appear to be any subsequent probation violations associated with this conviction.

[5] Compl. ¶ 14.

[6] Compl. ¶ 15.

[7] Compl. ¶¶ 16-22.

7. On April 17, 2014, Freeman was arrested in Virginia after being stopped for traffic violations. He was held in custody on a new charge for driving on a suspended license, as well as an outstanding felony drug warrant in Norfolk[9] and the probation violation in Virginia Beach.[10]

8. Freeman was subsequently convicted of the pending misdemeanor failure to appear charge in Norfolk, the felony drug charge in Norfolk (sentencing date 7/18/14), the probation violation in Virginia Beach (sentencing date 7/31/14), and the driving on a suspended license charge from Northampton County.[11]

9. The active periods of incarceration imposed on all sentences was 30 days on the misdemeanor failure to appear, two years on the felony drug charge in Norfolk, one year on the felony probation violation in Virginia Beach, and 15 days on the driving on a suspended license charge.[12]

10. Freeman was brought into the custody of the Virginia Department of Corrections and informed that his prospective release date would be November 28, 2016.[13]

11. By March 25, 2015, Freeman was aware that his Virginia sentence was not going to be credited with the period of time he spent in custody in Massachusetts.[14]

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[8] Compl. ¶¶ 21, 22.

[9] Public records indicate that Freeman was convicted of possession of heroin on June 21, 2012, absconded while on bond, and was ultimately sentenced on July 18, 2014. (Norfolk Cir. Ct. docket #CR10000165).

[10] Compl. ¶ 24.

[11] Compl. ¶¶ 25-28.

[12] Compl. ¶¶ 25-28.

[13] Compl. ¶ 30.

[14] Compl ¶ 31.

12. Freeman filed a motion in Virginia Beach Circuit Court, which ordered that Freeman's Virginia Beach sentence be credited with time served from October 7, 2011 through March 4, 2013—a period of time exceeding the one year period of active incarceration that he had received for that sentence.[15]

13. Following issuance of the Virginia Beach order, VDOC recalculated Freeman's estimated release date.[16]

14. On April 28, 2015, VDOC informed Freeman that his sentence had been recalculated to give him partial credit for the time he spent in custody in Massachusetts. For this reason, as of April 28, 2015, Freeman was aware that his sentence still had not been credited for the entire period of time he spent in custody in Massachusetts.[17]

15. Freeman therefore filed a motion in Norfolk Circuit Court, which ordered that his Norfolk sentence, too, be credited with the period of time he spent in custody in Massachusetts.[18]

16. Freeman was released from VDOC custody on August 12, 2015.[19]

17. Combining all periods of incarceration—including the periods Freeman spent in custody in Massachusetts—Freeman was held in custody for a total of 1034 days. The total active sentence that had been imposed by the various courts totaled 1140 days.[20]

18. The present suit was filed on June 19, 2017.

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[15] Compl. ¶¶ 27, 31.

[16] Compl. ¶¶ 33, 34.

[17] Compl. ¶ 35.

[18] Compl. ¶ 35.

[19] Compl. ¶ 37.

[20] Compl. ¶¶ 29, 38.

ARGUMENT AND AUTHORITIES

I. Standard of Review: Rule 12(b)(1)

Federal district courts are courts of limited jurisdiction. "Thus, when a district court lacks subject matter jurisdiction over an action, the action must be dismissed."[21] A challenge to a court's subject matter jurisdiction can be raised at any time and is properly considered on a motion under Rule 12(b)(1) of the *Federal Rules of Civil Procedure*. The burden of proving subject matter jurisdiction in response to a Rule 12(b)(1) motion rests with the plaintiff, the party asserting jurisdiction.[22] "Because questions of standing and ripeness concern this Court's subject matter jurisdiction under the case or controversy clause of Article III, such issues are properly raised in a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1)."[23]

II. Standard of Review: Rule 12(b)(6)

"[T]he purpose of Rule 12(b)(6) is to test the legal sufficiency of the complaint."[24] Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[25] A claim is plausible if the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and if there is "more than a sheer possibility that a defendant has acted unlawfully."[26] Also, although the Court must consider all of the factual

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[21] *United States v. Jadhay*, 555 F.3d 337, 347 (4th Cir. 2009).

[22] *See Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995); *see also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

[23] *Kegler v. U.S. Dep't of Justice*, 436 F. Supp. 2d 1204 (D. Wyo. 2006).

[24] *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994).

[25] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[26] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556); *see also* Fed. R. Civ. P. (8)(a)(2); *Francis v. Giacomelli*, 588 F.3d 186 (4th Cir. 2009).

allegations of the complaint as true, the Court is not bound to accept a legal conclusion couched as a factual assertion,[27] nor should the Court accept a plaintiff's "unwarranted deductions," "rootless conclusions of law" or "sweeping legal conclusions cast in the form of factual allegations."[28]

Generally, a Rule 12(b)(6) motion to dismiss "cannot reach the merits of an affirmative defense, such as the defense that the plaintiff's claim is time-barred."[29] However, a court may determine the merits of a statute of limitations defense under Rule 12(b)(6) if "all facts necessary to the affirmative defense clearly appear[] on the face of the complaint."[30]

III. Summary of Allegations

Freeman has made the following allegations:

- **Claim One:** An Eighth Amendment claim, predicated on the allegation that Defendants "knew that Freeman's sentence was over but failed to correct the problem by releasing him"[31]
- **Claim Two:** A Fourteenth Amendment due process claim, alleging that "a state process . . . deprived Freeman of liberty without constitutionally adequate safeguards to protect against unauthorized incarceration"[32]

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[27] *Iqbal*, 556 U.S. at 663-64.

[28] *Custer v. Sweeney*, 89 F.3d 1156, 1163 (4th Cir. 1996).

[29] *Goodman v. PraxAir, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007).

[30] *Id.*; *see also United States v. Kivanc*, 714 F.3d 782, 789 (4th Cir. 2013) ("The statute of limitations is an affirmative defense that may be raised in a Rule 12(b)(6) motion to dismiss for failure to state a claim."); *Dean v. Pilgrim's Pride Corp.*, 395 F.3d 471, 474 (4th Cir. 2005).

[31] Compl. ¶ 46.

[32] Compl. ¶ 54.

- **Claim Three:** A pendent state-law claim for false imprisonment, alleging that Defendants "directly restrained the physical liberty of Freeman without adequate legal justification"[33]

Freeman seeks declaratory relief, compensatory damages, punitive damages, costs, and attorneys' fees.

IV. Because the Virginia Department of Corrections is not a "person" subject to suit under 42 U.S.C. § 1983, and because the Department is entitled to Eleventh Amendment immunity, VDOC should be dismissed as a party to this litigation.

As the United States Supreme Court has expressly held, "neither a State nor its officials acting in their official capacities are 'persons' under § 1983."[34] Because the Virginia Department of Corrections is an administrative subdivision of the Commonwealth, the agency is not subject to suit under 42 U.S.C. § 1983.[35] Accordingly, the § 1983 claims against the Virginia Department of Corrections should be dismissed for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

Moreover, because a suit against a state entity is a suit against the state itself, the Virginia Department of Corrections is entitled to Eleventh Amendment immunity. Specifically, "neither logic, the circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of the [42 U.S.C. § 1983] compels, or even warrants, a . . . conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed

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[33] Compl. ¶ 58.

[34] *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).

[35] *See, e.g., Kelly v. Maryland*, 267 Fed. App'x 209, 210 (4th Cir. 2008) (per curiam) ("It is now well settled that a state cannot be sued under § 1983."); *Dougherty v. Virginia*, No. 7:12CV00549, 2013 U.S. Dist. LEXIS 27183, at *5-6 (W.D. Va. Feb. 27, 2013) (dismissing § 1983 claim against Green Rock Correctional Center as frivolous); *Dingess v. Va. Dep't of Corr.*, No. 7:12cv00630, 2012 U.S. Dist. LEXIS 182920, at *3 (W.D. Va. Dec. 31, 2012) ("[T]he Virginia Department of Corrections . . . is not an entity subject to suit in an action for damages under § 1983.").

immunity of the several states."[36] Because state agencies and entities are entitled to Eleventh Amendment immunity for claims brought pursuant to 42 U.S.C. § 1983, this Court lacks jurisdiction to adjudicate the § 1983 claims against the Virginia Department of Corrections.[37] Accordingly, the § 1983 claims against the Virginia Department of Corrections should be dismissed on the additional basis that this state entity is entitled to Eleventh Amendment immunity. *See* Fed. R. Civ. P. 12(b)(1).[38]

Finally, to the extent that Freeman is attempting to assert a state tort claim against the Virginia Department of Corrections in federal court, the Department is entitled to sovereign and Eleventh Amendment immunity. As the Fourth Circuit has recognized, the Commonwealth of Virginia, when enacting the Virginia Tort Claims Act ("VTCA"), did not waive its Eleventh Amendment immunity.[39] Accordingly, a tort claim against a state entity may not "be brought in

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[36] *Quern v. Jordan*, 440 U.S. 332, 342 (1979).

[37] *See, e.g.*, *Madden v. Virginia*, No. 3:11cv241, 2011 U.S. Dist. LEXIS 69452, at *7-8 (E.D. Va. June 28, 2011) (granting a Rule 12(b)(1) motion to dismiss claims brought against the Commonwealth, reasoning that, because "Congress has not abrogated states' Eleventh Amendment immunity with regard to § 1983 . . . the Eleventh Amendment bars federal jurisdiction over Plaintiff's claims against the Commonwealth ," and "the Court thus lacks subject matter jurisdiction"); *see also Dingess*, 2012 U.S. Dist. LEXIS 182920, at *3 ("[T]he Virginia Department of Corrections and its constituent parts have Eleventh Amendment immunity and are not persons for purposes of § 1983.").

[38] The Fourth Circuit has noted that it is not clear "whether a dismissal on Eleventh Amendment immunity grounds is a dismissal for failure to state a claim under Rule 12(b)(6) or a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1)." *Andrews v. Daw*, 201 F.3d 521, 524 n.2 (4th Cir. 2000). It has been noted, however, that "[t]he recent trend . . . appears to treat Eleventh Amendment Immunity motions under Rule 12(b)(1)." *Haley v. Va. Dep't of Health*, No. 4:12cv00016, 2012 U.S. Dist. LEXIS 161728, at *5 n.2 (W.D. Va. Nov. 13, 2012). The underlying rationale is that, "although the Eleventh Amendment immunity is not a 'true limit' of [the] Court's subject matter jurisdiction, . . . it is more appropriate to consider [this] argument under Fed. R. Civ. P. 12(b)(1) because it ultimately challenges this Court's ability to exercise its Article III power." *Beckham v. AMTRAK*, 569 F. Supp. 2d 542, 547 (D. Md. 2008) (cited in *Haley*, 2012 U.S. Dist. LEXIS 161728, at *5 n.2).

[39] *See McConnell v. Adams*, 829 F.2d 1319, 1329 (4th Cir. 1978) ("The Virginia Tort Claims Act while generally waiving sovereign immunity for tort claims filed in state courts, does not waive

federal court in the first instance," and, "[e]ven if a district court could exercise supplemental jurisdiction over it, such an assertion of jurisdiction would violate the terms of the state's agreement to limit its sovereign immunity."[40]

Because the Commonwealth of Virginia has not waived its Eleventh Amendment immunity, to the extent Freeman is attempting to bring a tort claim of false imprisonment against the Virginia Department of Corrections, this Court lacks jurisdiction to consider that supplemental state-law claim. Accordingly, VDOC requests that Claim 3 be dismissed for lack of jurisdiction. *See* Fed. R. Civ. P. 12(b)(1).[41]

V. As to any official-capacity claims, Director Clarke is entitled to Eleventh Amendment and sovereign immunity.

To the extent that Director Clarke is being sued in his official capacity, he is entitled to dismissal for two separate, but related, reasons. First, as noted above, neither a state nor its officials acting in their official capacities are "persons" for purposes of 42 U.S.C. § 1983.[42] Therefore, to the extent that Freeman is seeking relief from Director Clarke, in his official capacity, the complaint fails to state a claim upon which relief can be granted.[43]

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the state's Eleventh Amendment immunity."); *see also Haley v. Va. Dep't of Health*, No. 4:12cv00016, 2012 U.S. Dist. LEXIS 161728, at *16 (W.D. Va. Nov. 13, 2012).

[40] *Creed v. Virginia*, 596 F. Supp. 2d 930, 938 (E.D. Va. 2009); *see also Sharp v. Virginia*, No. 3:09cv834, 2010 U.S. Dist. LEXIS 39722 (W.D. Va. Apr. 22, 2010) (remanding VTCA claim to state court, reasoning that removal jurisdiction was absent and that the court could not exercise supplemental jurisdiction over a state-law claim against the Commonwealth); *Francis v. Woody*, No. 3:09cv235, 2009 U.S. Dist. LEXIS 43599, at *32-34 (E.D. Va. May 22, 2009) (granting motion to dismiss state-law claims under the VTCA on the basis that the Eleventh Amendment precluded the court's consideration of those claims).

[41] *See supra* n. 37.

[42] *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." (citation omitted)).

[43] *Id*.

Second, Director Clarke is entitled to Eleventh Amendment immunity as to any official-capacity claims against him. In his official capacity, Director Clarke is an arm of the state, and, as with § 1983 claims against any other state agencies or other entities, he is therefore immune from suit. Defendants recognize that, under *Ex parte Young*, there is a limited exception to the doctrine of Eleventh Amendment immunity, permitting a suit against state officials to proceed in federal court if it seeks **prospective** injunctive or declaratory relief to prevent an ongoing violation of federal law.[44] But this suit does neither. Specifically, Freeman seeks backward-looking declaratory relief, compensatory damages, and punitive damages. The request for monetary damages is plainly barred by the Eleventh Amendment. And, as the Supreme Court has also held, retrospective declaratory relief is similarly unavailable in actions under 42 U.S.C. § 1983, as "[d]eterrence interests are insufficient to overcome the dictates of the Eleventh Amendment."[45] For these reasons, Director Clarke retains the cloak of Eleventh Amendment immunity, and the official-capacity claims should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction.

Finally, with respect to any pendent state law tort claims, Director Clarke, in his official capacity, is entitled to sovereign immunity. As noted previously, a tort claim against a state entity may not "be brought in federal court in the first instance," and, "[e]ven if a district court could exercise supplemental jurisdiction over it, such an assertion of jurisdiction would violate the terms of the state's agreement to limit its sovereign immunity."[46] Any state law tort claim should therefore be dismissed for lack of subject matter jurisdiction.

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[44] *Ex parte Young*, 209 U.S. 123 (1908).

[45] *Green v. Mansour*, 474 U.S. 64, 68 (1985).

[46] *Creed*, 596 F. Supp. 2d at 938; *see also Sharp*, 2010 U.S. Dist. LEXIS 39722; *Francis*, 2009 U.S. Dist. LEXIS 43599, at *32-34.

For these reasons, Defendant Clarke respectfully requests that any official-capacity claims against him be dismissed.

V. The complaint fails to plausibly allege that Defendant Clarke was personally involved in the alleged constitutional violation.

As to any personal-capacity claims against Director Clarke, the complaint fails to allege a plausible basis for liability. To state a claim under 42 U.S.C. § 1983, a plaintiff must show direct personal involvement by each particular defendant.[47] As the Supreme Court has explained, "because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."[48] For this reason, "[v]ague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss."[49] Because Freeman has not alleged sufficient facts to support a plausible claim that Director Clarke was personally involved in the alleged constitutional deprivation, the complaint fails to state a claim upon which relief can be granted.

As the Fourth Circuit has recognized, "[i]ncarceration beyond the termination of one's sentence *may* state a claim under the due process clause and the eighth amendment."[50]

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[47] *Trulock v. Freeh*, 275 F.3d 391, 402 (4th Cir. 2001) (noting that liability in a civil rights case is "personal, based upon each defendant's own constitutional violations"); *see also Garraghty v. Va. Dep't of Corr.*, 52 F.3d 1274, 1280 (4th Cir. 1995).

[48] *Iqbal*, 556 U.S. at 676.

[49] *Pena v. Garder*, 976 F.2d 469, 471 (9th Cir. 1992); *see also Calvary Christian Ctr. v. City of Fredericksburg*, 832 F. Supp. 2d 635, 642 (E.D. Va. 2011) (granting a 12(b)(6) motion to dismiss the plaintiff's RLUIPA claims, noting that "[t]alismanic assertions lacking factual support are insufficient to satisfy the pleading standard set by *Twombly* and *Iqbal*").

[50] *Golson*, 914 F.2d at *2-3 (emphasis added). Defendants note, though, that at least one federal court of appeals has held that "overconfinment" does not implicate the Eighth Amendment, because "[t]he primary purpose of [the Cruel and Unusual Punishments] clause has always been considered . . . to be directed at the method or kind of punishment imposed for the violation of criminal statutes." *Jones v. City of Jackson*, 203 F.3d 875, 880 (5th Cir. 2000) (quotations

Regardless of which constitutional provision is applied, however, personal involvement is required in order to state a claim under § 1983.[51] "[T]o recover under the due process clause, a plaintiff must establish that defendants acted with something more than mere negligence."[52] And "[t]o prevail under an eighth amendment theory, a plaintiff must demonstrate that defendants acted with deliberate indifference."[53] Of note, deliberate indifference "is a very high standard,"[54] which "make[s] it considerably more difficult for [an inmate] to prevail that on a theory of ordinary negligence."[55]

The present complaint, however, simply alleges that Director Clarke is "in charge of the VDOC, has custody and control of all persons confined under its authority, and is responsible for its day-to-day operations."[56] The complaint does not allege that Director Clarke knew about the alleged overconfinement, was involved in any deliberative process, or otherwise directly engaged in any conduct affecting the calculation of Freeman's sentence, with knowledge that Freeman was allegedly being held past his release date. Simply alleging that Director Clarke is an agency head affords an insufficient basis for a finding of personal liability. As the United States Supreme Court has explained, "while a complaint attacked by a Rule 12(b)(6) motion to

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omitted). Where an inmate is "complaining about the *fact* of his incarceration rather than its *conditions*," the Fifth Circuit concluded that this allegation failed to state a claim under the Eighth Amendment. *Id.* (emphasis added).

[51] *Brunson v. Duffy*, 14 F. Supp. 3d 287, 292 (S.D.N.Y. 2014).

[52] *Golson*, 914 F.2d at *3.

[53] *Id.*

[54] *Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999).

[55] *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 73 (2001); *see also Moore v. Tartler*, 986 F.2d 682 (3d Cir. 1993) (no deliberate indifference where parole board members investigated an alleged claim of overconfinement, and it took approximately five months to investigate that claim and ultimately release the inmate).

[56] *Id.*

dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions . . . ."[57]

Because the complaint does not plausibly allege that Director Clarke was personally involved in the alleged constitutional violation, nor does it allege a sufficient nexus for a finding of supervisory liability, the complaint fails to state a plausible claim against him.[58] The personal capacity claims against Director Clarke should, therefore, be dismissed for failure to state a claim upon which relief can be granted.

VI. The complaint is time-barred.

At its core, this complaint challenges the manner in which unnamed employees at the Virginia Department of Corrections calculated Freeman's estimated release date. Because Freeman was aware, more than two years prior to the filing of this suit, that his sentence was not being credited with the time he spent in custody in Massachusetts, this case is time-barred on its face. And even if calculated from the date Freeman alleges he should have been released from custody, the case remains barred under the applicable two-year statute of limitations.

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[57] *Twombly*, 550 U.S. at 555; *see also Bender v. Suburban Hosp., Inc.*, 159 F.3d 186, 192 (4th Cir. 1998) ("[N]otice pleading requires generosity in interpreting a plaintiff's complaint. But generosity is not fantasy.").

[58] *See, e.g.*, *Brunson*, 14 F. Supp. 3d at 293 (dismissing claims against a warden where the complaint "contains no allegations tying [the warden] to Plaintiff's prolonged incarceration," reasoning that the complaint failed to allege "how [the warden] was responsible—either personally or in a supervisory capacity—for Plaintiff's allegedly unlawful confinement"); *Beto v. Barkley*, No. 14-cv-2522, 2016 U.S. Dist. LEXIS 14781, at *26 (E.D. Pa. Feb. 8, 2016) (allegation that "[e]ach individually-named Defendant had personal knowledge that unwarranted punishment was being inflicted upon Plaintiff" deemed "insufficient to plead the requisite personal involvement under *Twombley*"); *Lozada v. Warden*, No. 10-cv-8425, 2012 U.S. Dist. LEXIS 88515, at *3 (S.D.N.Y. June 26, 2012) (dismissing overconfinement suit against a warden because "[a] prison official cannot be personally liable under § 1983 on the basis of respondeat superior or because he is atop the prison hierarchy"); *see also Harbeck v. Smith*, 814 F. Supp. 2d 608, 621 (E.D. Va. 2011) (dismissing false imprisonment claim under Rule 12(b)(6), holding that only active participants in an arrest may be held liable for false imprisonment).

When an inmate files suit under 42 U.S.C. § 1983, the governing statute of limitations is borrowed from state law.[59] For cases arising out of Virginia, federal courts borrow the two-year statute of limitations for personal injury actions, codified at Virginia Code § 8.01-243(A).[60] Accordingly, for a § 1983 action arising out of Virginia to be timely, it must be filed within two years after the cause of action accrues.

Although "the limitation period is borrowed from state law, the question of when a cause of action accrues under 42 U.S.C. § 1983 remains one of federal law."[61] "Under federal law a cause of action accrues when the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action."[62]

Here, the allegations of the complaint make clear that Freeman knew his Virginia sentence was not being credited with the time he spent in custody in Massachusetts, and that he was aware of this by March 25, 2015, at the latest. Freeman also knew, by April 28, 2015, that the Virginia Beach court order was not being applied to reduce his period of incarceration beyond the one year active sentence corresponding to that particular conviction. For this reason, Freeman's claim accrued, at the latest, on April 28, 2015—when he was indisputably aware that VDOC had not credited his active sentence with all of the Massachusetts time.[63]

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[59] *See Owens v. Okure*, 488 U.S. 235, 239 (1989); *Wilson v. Garcia*, 471 U.S. 261, 266-69 (1985); *Nasim v. Warden*, 64 F.3d 951, 955 (4th Cir. 1995).

[60] *See Shelton v. Angelone*, 148 F. Supp. 2d 670, 677 (W.D. Va. 2001); *see also Banks v. Fowlkes*, No. 1:13cv926, 2014 U.S. Dist. LEXIS 163621, at *7-8 (E.D. Va. Nov. 20, 2014).

[61] *Nasim*, 64 F.3d at 955.

[62] *Id.*

[63] This is the date that would have been applied to determine whether a habeas petition, alleging a sentence miscalculation, had been timely filed. *See Wallace v. Jarvis*, 726 F. Supp. 2d 642 (W.D. Va. 2010). Freeman should not be able to benefit from a later accrual date because he has brought this action under § 1983.

Even if this Court were to use the date that Freeman alleges he should have been released from custody as the accrual date, this case is still time-barred. Freeman alleges that he was released from custody on August 12, 2015. He also alleges that he was held 77 days past his "correct" release date. Counting backwards, then, Freeman contends that he should have been released from custody on May 28, 2015. By that date, then, his alleged injury had certainly accrued. In other words, as of May 28, 2015, Freeman possessed "sufficient facts about the harm done to him that reasonable inquiry [would have] reveal[ed] his cause of action."[64]

Freeman did not file this action until June 19, 2017. Because, under either calculation, the complaint was filed more than two years after his cause of action accrued, it is untimely. And because the relevant dates appear in the factual allegations of the complaint itself, the action is time-barred on its face, and the complaint should be dismissed for failure to state a claim upon which relief can be granted.

VII. Because Freeman was not held in custody longer than the total active sentence imposed by the courts, he has not stated a plausible claim to relief.

Freeman alleges that, in 2014, the total active sentence of incarceration to which he was sentenced equaled 1140 days. Freeman also contends that, including the Massachusetts time, he served 1034 days in custody prior to his release in 2015. Because Freeman was not incarcerated past his maximum allowable sentence, his overconfinement claims fail to state a plausible claim to relief.

Generally, "[t]he term of confinement in a local or state correctional facility for the commission of a crime shall commence and be computed from the date of the final judgment."[65]

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[64] *Id.; see also Wallace v. Kato*, 549 U.S. 384, 391 (2007) (rejecting the petitioner's argument that "the date of his release from custody must be the relevant date . . . since he is seeking damages up to that time").

[65] Va. Code § 53.1-186.

And by statute, Virginia law requires that offenders receive sentence-reducing credit for time spent awaiting trial on the charges that actually resulted in the incarceration.[66] Beyond that, however, any sentence-reducing credits are applied in the discretion of the Virginia Department of Corrections.[67] As one court has noted, "[o]nce the judiciary imposes sentence, the executive branch must execute that sentence," and, "[a]s the executive branch bears the responsibility for the proper execution of a sentence imposed on an individual, it is entirely reasonable for the personnel of that governmental branch to be the initial arbiter of the existence and scope of all credits to be applied to the sentence."[68] If an individual remains confined "beyond the proper limit of a sentence imposed," a court may issue a writ of habeas corpus, and "[i]t is solely in such separate habeas corpus proceedings that a court would have jurisdiction to determine the scope of credits to be applied to an individual's sentence."[69]

To state a cognizable constitutional claim for overconfinement under 42 U.S.C. § 1983—as opposed to a habeas petition predicated on an alleged sentence miscalculation—a plaintiff must therefore allege that he was held past his maximum allowable release date. Freeman alleges just the opposite. He specifically alleges that he served *less* time than the total active sentences imposed by the various circuit courts. This is not, then, a case where an inmate served

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[66] Va. Code § 53.1-187; *see also Wallace v. Jarvis*, 726 F. Supp. 2d 642, 646-47 (W.D. Va. 2010) (quoting Virginia statute and noting that "there is no constitutional right to credit pretrial detention on separate, dismissed or nolle prossed charges," and that, "[u]nder those circumstances, the question of credit for pretrial detention is necessarily within the province of the legislative branch").

[67] *See* Va. Code § 53.1-189; Va. Code § 53.1-202.4; *see also Commonwealth v. Bertini*, 68 Va. Cir. 255 (Fairfax Cnty Cir. Ct. July 15, 2005) (noting that "representatives of the corrections system, rather than the judiciary, [are to] determine the extent of credits to which an inmate may be entitled for time confined pre-trial"); *accord Miska v. Bartley*, No. 5:09cv00092, 2010 U.S. Dist. LEXIS 123950 at *15 (W.D. Va. Nov. 22, 2010).

[68] *Bertini*, 68 Va. Cir. at 259.

[69] *Id.*

more time than that to which he had actually been sentenced. Absent that critical nexus, the allegations of this case fail to amount to a constitutional violation.[70] An inmate is not "punished" within the meaning of the Eighth Amendment if he is not held longer than the maximum duration of his sentence.[71] And an inmate is not deprived of due process of law if he is discharged from custody prior to the expiration of his sentence.[72] As this Court has previously noted, although "the days spent in jail on a given conviction **may not accumulate** to a period of time greater than the maximum original sentence, such proposition does not establish a constitutional violation when . . . confinement days remain 'unapplied' to an active sentence yet decades of the originally imposed sentence remain suspended."[73]

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[70] *See, e.g.*, *Paternoster-Cozart v. Clarke*, No. 2:13cv539, 2014 U.S. Dist. LEXIS 105960, at *46 (E.D. Va. July 31, 2014) (noting that the Petitioner "fails to demonstrate a constitutional violation based on the manner in which his reduced sentence was calculated" where he received an active period of incarceration that was "more than a year and a half less than the time called for by his written plea agreements").

[71] *Cf. Golson v. Dep't of Corr.*, No. 90-7344, 1990 U.S. App. LEXIS 17452, at *1 (4th Cir. Oct. 2, 1990) (per curiam) ("Incarceration *beyond the termination of one's sentence* may state a claim under the due process clause and the Eighth Amendment." (emphasis added)); *Sample v. Diecks*, 885 F.2d 1099, 1108 (3d Cir. 1989) (noting that "confinement in a prison pursuant to a conviction *but beyond the term of a sentence*" implicates the Eighth Amendment (emphasis added)); *accord Moore v. Tartler*, 986 F.2d 692, 686 (3d Cir. 1993) (same); *Carenito v. Wrenn*, No. 09-cv-021, 2009 U.S. Dist. LEXIS 19813, at *5 (D.N.H. Feb. 27, 2009) (analyzing petition for constitutional violation where the inmate claimed "that he is being incarcerated past the maximum expiration date of his sentence").

[72] *See Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 422 U.S. 1, 7 (1979) ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."); *see also Sydnor v. Mahon*, No. 3:10cv780, 2012 U.S. Dist. LEXIS 23327, at *13 (E.D. Va. Feb. 23, 2012) ("[I]t is well established that Virginia inmates do not enjoy a protected liberty interest in the rate at which they earn either Earned Sentence Credits or Good Conduct Allowances."); *cf. Goode v. Commonwealth*, No. 0459-06-2, 2007 Va. App. LEXIS 118 (Ct. App. Mar. 27, 2007) (declining to apply ends of justice exception to excuse a procedural default where "the record does not demonstrate that [the petitioner] has been required to serve more time than the sentence originally imposed").

[73] *Paternoster-Cozart*, 2014 U.S. Dist. LEXIS 105960, at *54 (emphasis in original).

Because Freeman has not served more time in custody than the active sentences imposed by the Virginia state courts, he does not state a claim of federal constitutional magnitude. His complaint therefore fails to state a plausible claim to relief.

V. The Eighth Amendment claim is precluded under *Heck v. Humphrey*

In *Heck v. Humphrey*, the Supreme Court held that a civil rights action under § 1983, relating to the duration of an inmate's confinement, is barred unless the plaintiff can demonstrate that his conviction or sentence has previously been invalidated.[74] The *Heck* Court reasoned that "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983."[75] Accordingly, "a state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement **or its duration**."[76] This rule is predicated on principles of comity, as well as the general policy of avoiding "unnecessarily [] perpetuat[ing] the involvement of the federal courts in affairs of prison administration."[77]

Here, Freeman seeks monetary damages predicated the alleged invalidity of the duration of his confinement. However, he did not file a state or federal habeas proceeding attacking the

[74] 513 U.S. 477, 487 (1994).

[75] *Id.* at 481.

[76] *Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005) (emphasis added); *see also Lisenby v. SCDC Inmate Records Supervisor*, No. 5:15cv1358, 2015 U.S. Dist. LEXIS 175655, at *3 (D.S.C. Apr. 16, 2015) (noting that, generally, "a correction of a max-out or release date may be obtained only in a habeas action and not by way of a civil-rights complaint").

[77] *Procunier v. Martinez*, 416 U.S. 396, 407 (1974); *see also Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989).

duration of that confinement, and his length-of-confinement is, therefore, presumptively valid. But to find in Freeman's favor and award the relief sought, this Court would be required to find, as a factual matter, that Freeman remained in custody past his correct release date. In other words, this Court would have to invalidate the duration of Freeman's confinement. This finding is expressly precluded by the holding of *Heck* and its progeny. For this reason, Freeman's Eighth Amendment claim is barred.[78]

This case is distinguishable from the circumstances presented in *Wilson v. Johnson*, 535 F.3d 262 (4th Cir. 2008), where the Fourth Circuit recognized an equitable exception to the *Heck* rule for inmates who are no longer in custody, and lack any meaningful ability to file a habeas petition to challenge the duration of their confinement. That is, "where an inmate would be left without any access to federal court if his § 1983 claim was barred," the Fourth Circuit has held that an action for damages, based upon an alleged wrongful confinement, may proceed.[79]

Here, however, Freeman would not be left "without any access to federal court if his § 1983 claim was barred." Freeman is currently in the custody of the Virginia Department of Corrections, serving time on a Virginia Beach probation violation from the same underlying conviction that resulted in his prior term of incarceration. That is, he is in custody on a continuation of the same sentence that he has alleged was improperly calculated. Nothing prevents Freeman, logistically, from filing a habeas petition challenging the overall manner in which VDOC has calculated his Virginia Beach sentence. Because that recourse is available to

[78] *See generally Deemer v. Beard*, 557 F. App'x 162 (3d Cir. 2014) (holding that a § 1983 action for damages based on an alleged overconfiment was barred under the *Heck* favorable termination rule); *Showers v. Harlow*, No. 12-25Erie, 2012 U.S. Dist. LEXIS 174341, at *7-8 (W.D. Pa. Dec. 10, 2012) (same).

[79] *Id.* at 267.

him, he may not bring a § 1983 suit for damages unless and until he obtains a judgment that his sentence has been improperly calculated.

The appropriate mechanism for challenging a length-of-confinement is not a suit for damages under § 1983, but rather, a petition for a writ of habeas corpus. *Heck* prevents litigants, such as this Plaintiff, from circumventing the prerequisites for filing a petition for a writ of habeas corpus (for example, the shorter statute of limitations and the requirement of exhaustion of state-court remedies). An inmate should not be allowed to sidestep those procedural requirements by simply waiting until he is released from custody, and then initiating a § 1983 suit for damages.

Because nothing precluded Freeman from initiating a habeas petition when he was previously in custody, and because he is in custody and able to file a habeas petition now, he is not excused from the *Heck* favorable termination requirement. And because Freeman has not obtained a judgment that he was wrongfully detained, he cannot pursue this Eighth Amendment claim.

VIII. The due process claim fails to state a plausible claim to relief.

The Due Process clause applies when governmental action deprives a person of a legitimate liberty or property interest.[80] The first step in analyzing a procedural due process claim is to identify whether the alleged conduct affects a protected interest.[81] "Protected . . . interests 'may arise from two sources—the Due Process Clause itself and the laws of the States.'"[82] If, and only if, a protected interest has been established, is it necessary to determine

[80] *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).

[81] *See id.*; *see also Beverati v. Smith*, 120 F.3d 500, 502 (4th Cir. 1997).

[82] *Ky. Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (quoting *Hewitt v. Helms*, 459 U.S. 460, 466 (1983)).

whether a plaintiff has been deprived of that interest, and, if so, "whether the procedures attendant upon that deprivation were constitutionally sufficient."[83]

As previously discussed, an inmate has no constitutional right to release prior to the expiration of his maximum term of incarceration. For purposes of the due process analysis, then, the determinative question is whether Virginia state law creates a vested liberty interest in the manner in which an inmate's sentence is calculated. Because the methods of determining and applying sentence-reducing credit are vested in the discretion of the Virginia Department of Corrections, the statutory good conduct and earned sentencing credits scheme do not create a protected liberty interest.[84]

Moreover, even if this case implicated a protected liberty interest, Freeman has not plausibly alleged that his interest was deprived without adequate process. At its core, procedural due process requires fair notice and an opportunity to be heard.[85] Beyond those threshold requirements, though, due process is "flexible and calls for such procedural protections as the particular situation demands."[86]

Here, Freeman has not alleged that he did not receive notice as to the manner in which his sentence was being calculated. Rather, he alleges just the opposite. Freeman has not alleged that he lacked the opportunity to grieve or otherwise protest the manner in which his sentence was being calculated. Indeed, Freeman does not identify any procedural irregularities or infirmities at all, apart from his general contention that he disagreed with the manner in which he was being

[83] *Id.* at 460 (citing *Hewitt*, 459 U.S. at 472).

[84] *Sydnor v. Mahon*, No. 3:10cv780, 2012 U.S. Dist. LEXIS 23327, at *13 (E.D. Va. Feb. 23, 2012).

[85] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *see also Snider Int'l Corp. v. Town of Forest Heights*, 739 F.3d 140, 146 (4th Cir. 2014).

[86] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

awarded sentence-reducing credit. For this reason, he has not stated a plausible due process deprivation.[87]

Defendants further note that the due process claim should be barred because Freeman has not availed himself of adequate post-deprivation remedies. Specifically, where a § 1983 litigant possesses state court remedies that would enable him to mount a pre- or post-deprivation challenge, the litigant's failure to utilize those remedies "is fatal" to a procedural due process claim.[88] That is, if the litigant "has had, and continues to have, notice and an opportunity to be heard" in the state courts, "he cannot plausibly claim that [the state's] procedures are unfair when he has not tried to avail himself of them."[89]

As noted above, Freeman has available post-deprivation remedies (for example, a petition for a writ of habeas corpus) that he has not utilized. Because he has not attempted to remedy any alleged deprivation through the provided state-court remedies, he fails to state a plausible claim that his due process rights have been violated.[90]

IX. The court orders allegedly violated are void, and cannot serve as a basis for an action under § 1983.

Freeman is predicating his action upon the action of two state courts, which evidently directed the Virginia Department of Corrections to provide him with additional sentence-

[87] *See, e.g., George v. Gordinez*, No. 15-cv-01421, 2016 U.S. Dist. LEXIS 136959, at *9-10 (S.D. Ill. Oct. 3, 2016) (dismissing due process claim where "Plaintiff does not challenge the adequacy or availability of any particular procedure to request correction of his release date").

[88] *Mora v. City of Gaithersburg*, 519 F.3d 216, 230 (4th Cir. 2008).

[89] *Id.*

[90] *See, e.g., George v. Gordinez*, No. 15-cv-01421, 2016 U.S. Dist. LEXIS 136959, at *10-11 (S.D. Ill. Oct. 3, 2016) (dismissing due process claim based on an alleged overconfinement where the inmate had available post-deprivation remedies that were not utilized, including a petition for a writ of habeas corpus and a petition for a writ of mandamus); *accord Armato v. Grounds*, 766 F.3d 713, 722 (7th Cir. 2014); *Branson*, 14 F. Supp. 3d at 294; *Peterson v. Tomaselli*, 469 F. Supp. 2d 146, 166 (S.D.N.Y. 2007).

reducing credit. Because any state court order purporting to grant additional sentence-reducing credit exceeds the scope of authority granted to the Virginia circuit courts, those orders are void *ab initio*, and cannot serve as the basis for a § 1983 action for damages.

Based on the allegations of the complaint, Freeman obtained a modification of his final sentencing orders, requiring the Virginia Department of Corrections to give him additional pre-trial sentencing credit. But, as discussed above, "[o]nce the judiciary imposes sentence, the executive branch must execute that sentence," and, "[a]s the executive branch bears the responsibility for the proper execution of a sentence imposed on an individual, it is entirely reasonable for the personnel of that governmental branch to be the initial arbiter of the existence and scope of all credits to be applied to the sentence."[91] If an individual remains confined "beyond the proper limit of a sentence imposed," a court may issue a writ of habeas corpus, and "[i]t is solely in such separate habeas corpus proceedings that a court would have jurisdiction to determine the scope of credits to be applied to an individual's sentence."[92]

Moreover, Virginia law expressly forbids Virginia state courts from granting additional sentence-reducing credit. Specifically, under Virginia Code § 53.1-116, prisoners may only earn sentence-reducing credit in accordance with the statutes vesting that discretion in the Virginia Department of Corrections, and "[s]o much of an order of any court contrary to the provisions of [those] section[s] *shall be deemed null and void*."[93] Because "the statutory authority to grant sentence credits falls exclusively within the ambit of sections of the Virginia Code governing the administration of the state's corrections facilities," the state courts are "without jurisdiction to

[91] *Bertini*, 68 Va. Cir. at 259.

[92] *Id.*

[93] Va. Code § 53.1-116 (emphasis added).

determine the issue" of whether an inmate is entitled to additional pre-trial sentence-reducing credit.[94]

Because the state courts lacked the jurisdiction to enter the orders serving as the basis for this action, those orders are void, and Defendants cannot be liable for allegedly failing to heed them.[95]

X. The complaint does not allege a plausible tort claim for false imprisonment.

For the reasons previously discussed, the complaint does not plausibly allege that Director Clarke was directly involved in the alleged false imprisonment and, therefore, does not state a plausible claim of personal liability.[96] Moreover, Director Clarke is entitled to sovereign immunity for this state-law tort claim, which would arise out of and in the course of his state employment.[97] Regardless, even if this Court were to determine that the complaint stated a viable state-law claim, Defendants request that this Court dismiss the federal claims and decline to exercise supplemental jurisdiction over that pendent state-law claim.

CONCLUSION

The Virginia Department of Corrections is entitled to Eleventh Amendment and sovereign immunity, and should be dismissed as a party to this action. Defendant Clarke, to the extent he is sued in his official capacity, is also entitled to Eleventh Amendment and sovereign immunity. To the extent the complaint seeks to find Defendant Clarke liable in his personal

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[94] *Bertini*, 68 Va. Cir. at 257-58, 259.

[95] *See generally Rawls v. Commonwealth*, 278 Va. 213, 683 S.E.2d 544 (2009) (holding that a court order was void *ab initio* where the order issued was beyond the statutory power granted to the circuit court).

[96] *Harbeck v. Smith*, 814 F. Supp. 2d 608, 621 (E.D. Va. 2011) (dismissing false imprisonment claim under Rule 12(b)(6), holding that only active participants in an arrest may be held liable for false imprisonment).

[97] *See Messina v. Burden*, 228 Va. 301, 321 S.E.2d 657 (1984); *see also Rector & Visitors of the Univ. of Va. v. Carter*, 267 Va. 242, 245, 591 S.E.2d 76 (2004).

capacity, the complaint fails to allege a plausible basis for personal involvement, and, therefore, does not state a claim against him. Moreover, the complaint as a whole is time-barred, the Eighth Amendment claim is barred under *Heck v. Humphrey*, the due process claim fails to state a plausible deprivation and is additionally barred for failure to use existing post-deprivation remedies, and the state court orders Defendants allegedly violated are void. Moreover, because Freeman was released from custody prior to his maximum release date, he cannot sustain a federal constitutional challenge, under § 1983, to the manner in which his sentence was calculated.

For these reasons, Defendants respectfully request that this Court grant their motion to dismiss, and issue any such other relief as may be deemed appropriate and just.

Respectfully submitted,

VIRGINIA DEPARTMENT OF CORRECTIONS
and HAROLD W. CLARKE, Defendants.

By: /s/

Margaret Hoehl O'Shea, AAG, VSB #66611
Attorney for named Defendants
Office of the Attorney General
Criminal Justice & Public Safety Division
202 North 9th Street
Richmond, Virginia 23219
(804) 225-2206
(804) 786-4239 (Fax)
Email: moshea@oag.state.va.us

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 2017, I electronically filed the foregoing Memorandum in Support of Motion to Dismiss with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Maya M. Eckstein (VSB #41413)
William H. Wright, Jr. (VSB #25576)
HUNTON & WILLIAMS LLP
Riverfront Plaza – East Tower
951 E. Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8209
meckstein@hunton.com
cwright@hunton.com

Jeff Wayne Rosen (VSB #22689)
Pender & Coward PC
222 Central Park Avenue, Suite 400
Virginia Beach, VA 23462-3027
(757) 490-6253
jrosen@pendercoward.com
Counsel for Co-Defendant Kenneth W. Stolle

Leslie C. Mehta (VSB #90437)
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC.
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
(804) 523-2152
lmehta@acluva.org
Counsel for Plaintiff

And I hereby certify that I have mailed by United States Postal Service the documents to the following non-CM/ECF participants: N/A

/s/
Margaret Hoehl O'Shea, AAG, VSB #66611
Attorney for named Defendants
Criminal Justice & Public Safety Division
Office of the Attorney General
202 North 9th Street
Richmond, Virginia 23219
(804) 225-2206
(804) 786-4239 (Fax)
Email: moshea@oag.state.va.us