IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. __________

STEVEN PATRICK PREASE

Petitioner,

v.

HAROLD CLARKE, in his official capacity as Director of the Virginia Department of Corrections; and **PHILIP WHITE**, in his official capacity as Warden of Dillwyn Correctional Center,

Respondents.

PETITIONER'S MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

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I. INTRODUCTION

This case presents a purely legal issue regarding the applicability of recent amendments to Virginia's earned sentence credit program to people convicted of certain inchoate offenses. In 2020, Virginia's General Assembly passed House Bill 5148, 2020 Va. Acts Spec. Sess. I, chs. 50, 52; (hereinafter "H.B. 5148"), which allowed many people in the custody of the Virginia Department of Corrections (VDOC) to earn, through good behavior and proactive steps toward rehabilitation, additional sentence credits, resulting in earlier release. However, the law excluded convictions for certain enumerated offenses from eligibility for the expanded earned sentence credits. Since the law was passed, two different Attorneys General have issued conflicting opinions regarding whether convictions for *attempts* to commit any of the excluded offenses are eligible for the expanded credits, where the attempt is not specifically enumerated among the excluded offenses.

Petitioner Steven Patrick Prease should be eligible to earn expanded sentence credits because his convictions are not specifically enumerated among the convictions that are disqualified from eligibility for increased credits. The first of the two Attorney General Opinions on this issue correctly applied canons of statutory construction to reach this conclusion. In accordance with this interpretation, VDOC notified Petitioner in March 2022 that he would be awarded expanded sentence credits under H.B. 5148, resulting in a revised release date between July 1, 2022 and

August 30, 2022. However, the VDOC has chosen to adopt the conclusion of the second Attorney General Opinion on this issue, under which Mr. Prease's convictions are ineligible for increased credits. As a result, VDOC continues to incarcerate Mr. Prease, and his projected release date is now June 4, 2024.

This Court must now decide the correct interpretation of the statute. This Court should find that the General Assembly meant what it said when it drafted the language of H.B. 5148: that attempt convictions not specifically excluded from eligibility are in fact eligible for expanded sentence credits. Were Respondents to interpret and apply the statutory language correctly, Mr. Prease would be awarded enough earned sentence credits to result in his immediate release. He is therefore entitled to relief.

II. BACKGROUND

A. VIRGINIA'S EARNED SENTENCE CREDIT PROGRAM.

1. The Earned Sentence Credit Program Applies to Anyone Convicted of a Felony After 1995.

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 "the earned sentence credit program." *See* Virginia Department of Corrections Operating Procedure 830.3, effective July 1, 2022, p. 5 (hereinafter "OP 830.3").

Earned sentence credits (ESCs) are defined as:

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

Va. Code Ann. § 53.1-202.2(A). 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 Ann. § 53.1-202.3. The number of credits an individual actually earns depends on their "class level" 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.

2. 2020 House Bill 5148 Allowed Individuals to Earn ESCs at a Higher Rate.

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. *See* H.B. 5148. The law now provides that, "[f]or any offense other than those enumerated in subsection A for which sentence credits may be earned," earned sentence credits are to be awarded and calculated in accordance with a revised rate schedule that grants additional sentence credits to eligible

individuals. Va. Code Ann. § 53.1-202.3(A). The law maintains the class level system but provides that those eligible for expanded 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 (hereinafter collectively referred to as "expanded ESCs"). Va. Code Ann. § 53.1-202.3(B). These provisions took effect on July 1, 2022, and applied retroactively, so that individuals incarcerated as of the effective date would be awarded expanded ESCs for the entirety of their sentences for eligible offenses. *See* H.B. 5148, Section 4.

Subsection A of Va. Code Ann. § 53.1-202.3 enumerates the following specific offenses that are ineligible for the expanded ESCs:

1. A Class 1 felony;
2. Solicitation to commit murder under § 18.2-29 or any violation of § 18.2-32, 18.2-32.1, 18.2-32.2, or 18.2-33;
3. Any violation of § 18.2-40 or 18.2-45;
4. Any violation of subsection A of § 18.2-46.5, of subsection D of § 18.2-46.5 if the death of any person results from providing any material support, or of subsection A of § 18.2-46.6;
5. Any kidnapping or abduction felony under Article 3 (§ 18.2-47 et seq.) of Chapter 4 of Title 18.2;
6. Any malicious felonious assault or malicious bodily wounding under Article 4 (§ 18.2-51 et seq.) of Chapter 4 of Title 18.2, any violation of § 18.2-51.6 or 18.2-51.7, or any felony violation of § 18.2-57.2;
7. Any felony violation of § 18.2-60.3;
8. Any felony violation of § 16.1-253.2 or 18.2-60.4;
9. Robbery under § 18.2-58 or carjacking under § 18.2-58.1;
10. Criminal sexual assault punishable as a felony under Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2;
11. Any violation of § 18.2-90;
12. Any violation of § 18.2-289 or subsection A of § 18.2-300;

13. Any felony offense in Article 3 (§ 18.2-346 et seq.) of Chapter 8 of Title 18.2;
14. Any felony offense in Article 4 (§ 18.2-362 et seq.) of Chapter 8 of Title 18.2, except for a violation of § 18.2-362 or subsection B of § 18.2-371.1;
15. Any felony offense in Article 5 (§ 18.2-372 et seq.) of Chapter 8 of Title 18.2, except for a violation of subsection A of § 18.2-374.1:1;
16. Any violation of subsection F of § 3.2-6570, any felony violation of § 18.2-128, or any violation of § 18.2-481, 37.2-917, 37.2-918, 40.1-100.2, or 40.1-103; or
17. A second or subsequent violation of the following offenses, in any combination, when such offenses were not part of a common act, transaction, or scheme and such person has been at liberty as defined in § 53.1-151 between each conviction:
    a. Any felony violation of § 3.2-6571;
    b. Voluntary manslaughter under Article 1 (§ 18.2-30 et seq.) of Chapter 4 of Title 18.2;
    c. Any violation of § 18.2-41 or felony violation of § 18.2-42.1;
    d. Any violation of subsection B, C, or D of § 18.2-46.5 or § 18.2-46.7;
    e. Any violation of § 18.2-51 when done unlawfully but not maliciously, § 18.2-51.1 when done unlawfully but not maliciously, or § 18.2-54.1 or 18.2-54.2;
    f. Arson in violation of § 18.2-77 when the structure burned was occupied or a Class 3 felony violation of § 18.2-79;
    g. Any violation of § 18.2-89 or 18.2-92;
    h. Any violation of subsection A of § 18.2-374.1:1;
    i. Any violation of § 18.2-423, 18.2-423.01, 18.2-423.1, 18.2-423.2, or 18.2-433.2; or
    j. Any violation of subdivision E 2 of § 40.1-29.

Va. Code Ann. § 53.1-202.3(A).

The amendments to the earned sentence credit program were 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/.

B. H.B. 5148 Is the Subject of Conflicting Attorney General Opinions.

1. A December 2021 Attorney General Opinion Concluded that Convictions for Attempt Are Not Excluded from Earning Expanded ESCs.

After H.B. 5148's passage, but prior to its effective date, VDOC Director Harold Clarke sought an opinion from then-Attorney General Mark Herring, as to whether certain offenses were eligible for expanded ESCs under the new law. Relevant to this case, VDOC asked the Attorney General whether the phrase, "any felony violation," which appears in several subsections of the revised statute, includes the completed offense as well as the following offense modifiers: "Conspiracy, Attempt, Solicit, Solicit Juvenile to Commit, Accessory Before the Fact and Principal 2nd Degree." On December 21, 2021, Attorney General Herring responded in a non-binding advisory opinion in accordance with Va. Code Ann. §

2.2-505. Va. Off. Att'y Gen. Op. No. 21-068 (Dec. 21, 2021), 2021 WL 6112902 at *1 (hereinafter "Herring Opinion"), *available at* https://www.oag.state.va.us/files/Opinions/2021/21-068-Clarke-Issued.pdf.

Attorney General Herring concluded that "any felony violation" includes the substantive completed offense, as well as offenses committed in the roles of principal in the second degree and accessory before the fact, because under the Virginia Code, "every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and *punished* in all respects as if a principal in the first degree." Herring Opinion at *2; *see also*, Va. Code Ann. § 18.2-18.

On the other hand, Attorney General Herring concluded that convictions for solicitation or attempt of one of the offenses enumerated in Va. Code Ann. § 53.1-202.3(A) are *not* disqualified from earning expanded ESCs under the language "any felony violation," except for those solicitations or attempts that are themselves explicitly enumerated in Va. Code Ann. § 53.1-202.3(A). Herring Opinion at *1-2. He noted that Va. Code Ann. § 53.1-202.3(A) explicitly listed certain solicitations and attempts among the offenses that are not eligible to earn expanded ESCs. For example, "solicitation to commit murder" is listed in subparagraph (2) of § 53.1-202.3(A). Similarly, attempted criminal sexual assaults are excluded from earning expanded ESCs because Va. Code Ann. § 53.1-202.3(A)(10) excludes "criminal sexual assault punishable as a felony under Article 7 (§18.61 et seq.) of Chapter 4 of

Title 18.2," which in turn includes Va. Code Ann. § 18.2-67.5, the code section that sets out the punishment for the specific offenses of attempted rape, attempted forcible sodomy, attempted object sexual penetration, and attempted aggravated sexual battery.

Applying the statutory construction principle of *expressio unius est exlusio alterius*, Attorney General Herring concluded that, because the General Assembly included some solicitation and attempt offenses in its list of disqualifying offenses, its failure to include others must be presumed to be intentional. Herring Opinion at *2 (citing *Brown v. Commonwealth*, 284 Va. 538, 545, 733 S.E.2d 638, 641 (2012)). Therefore, Herring concluded, unless an attempt or solicitation offense is specifically listed in Va. Code Ann. § 53.1-202.3(A), it is eligible to earn to expanded ESCs.

Applying the same principle of statutory construction, Attorney General Herring turned to the specific offense of aggravated murder and inchoate offenses thereof. Attorney General Herring concluded that, while the completed offense of aggravated murder, a class 1 felony, is ineligible for expanded ESCs under Va. Code Ann. § 53.1-202.3(A)(1) (excluding all class 1 felonies), and solicitation to commit aggravated murder is excluded under Va. Code Ann. § 53.1-202.3(A)(2), there "is no direct reference to conspiracy to commit aggravated murder or

attempted aggravated murder" in Va. Code Ann. § 53.1-202.3(A), and therefore those offenses remain eligible to earn expanded ESCs. Herring Opinion at *4.

2. Attorney General Miyares Issued a Conflicting Opinion.

After the change in administration in January 2022, VDOC Director Clarke requested reconsideration of the Herring Opinion, posing the same questions to the new Attorney General, Jason Miyares. In April 2022, Attorney General Miyares issued a new opinion that conflicted with the Herring Opinion on certain issues. Va. Off. Att'y Gen. Op. No. 22-008 (Apr. 13, 2022), 2022 WL 1178995 at *1 (hereinafter "Miyares Opinion"), *available at* https://oag.state.va.us/files/Opinions/2022/22-008-Clarke-issued.pdf. Most relevant here, Attorney General Miyares concluded that the phrase "any felony violation" does include convictions for conspiracy, attempt, and solicitation of any listed offense. *Id*. at *3.[1] While he noted that Va. Code Ann. § 53.1-202.3(A) "does not explicitly state whether convictions for conspiracy, attempt, or solicitation are included in the term 'any felony violation,'" he concluded that convictions for attempts to commit any of the enumerated offenses in Va. Code Ann. § 53.1-

[1] It appears that VDOC has relied on this opinion to disqualify inchoate offenses where the target crime is enumerated in Va. Code § 53.1-202.3(A), without regard to whether it is qualified by the specific phrase, "any felony violation." Thus, for example, VDOC considers convictions for attempted robbery to be ineligible for expanded sentence credits, even though that subsection does not contain the phrase "any felony violation." Va. Code § 53.1-202.3(A)(9).

202.3(A), including aggravated murder, are not eligible to earn expanded ESCs. *Id*. He decided—without any real explanation and without citing any authority—that a contrary result would be "irrational," and thus could not have been intended by the legislature. *Id*. As discussed below, Attorney General Miyares' cursory opinion on this issue essentially re-wrote the statute. His interpretation conflicts with the plain language of the statute and simply reflects his own desired policy outcome.[2]

C. VDOC Adopted the Reasoning of the Miyares Opinion to Deny Mr. Prease Expanded ESCs.

VDOC initially proceeded to implement H.B. 5148 under the interpretation set out in the Herring Opinion. Because Mr. Prease has maintained Level 1 and 2 classification throughout his time in VDOC custody, he was eligible to earn between 15 and 7.5 days for every 30 served on his convictions. VDOC initially anticipated awarding those credits to Mr. Prease upon the July 1, 2022 effective date of H.B. 5148, and notified Mr. Prease that he would be released between July 1 and August 30, 2022. Accordingly, VDOC assisted Mr. Prease in re-entry planning and other preparations for his release.

However, after the Miyares Opinion was issued, VDOC abruptly changed its position. Mr. Prease was notified shortly before his anticipated release that he would not in fact be awarded the expanded ESCs, and his release date was revised back to

[2] In his opinion, Attorney General Miyares notes that he voted against H.B. 5148 as a member of the General Assembly. Miyares Opinion & 1 n.2.

his original release date of June 2024. Between the time he was told he was eligible for expanded credits and the time he was told that he was not, Mr. Prease did not incur any disciplinary infractions that resulted in the loss of any previously earned sentence credits. Accordingly, the only basis for VDOC's reversal in Mr. Prease's case is its interpretation of Va. Code Ann.§ 53.1-202.3.

III. ARGUMENT

This case presents an issue of statutory interpretation that has been the subject of two conflicting opinions of two different Attorneys General. While neither opinion is binding on this Court, *see, e.g.*, *Commonwealth v. Williams*, 295 Va. 90, 98, 809 S.E.2d 672, 676 (2018), basic principles of statutory construction dictate that this Court reach the same conclusion as Attorney General Herring. VDOC's current interpretation of Va. Code Ann. § 53.1-202.3(A) ignores the statute's plain language in order to achieve a desired policy outcome.

As relevant to this petition, Petitioner is serving sentences for two counts of attempted aggravated murder. The completed offense of aggravated murder is codified at Va. Code Ann. § 18.2-31 and is punished as a class 1 felony. While Va. Code Ann. § 53.1-203(A) does not include a specific reference to Va. Code Ann. §18.2-31, all class 1 felonies are excluded from earning expanded earned sentence credit under Va. Code Ann. § 53.1-203(A)(1). Petitioner understands VDOC to have disqualified him from expanded ESCs under this subsection of the statute. However,

under Va. Code Ann. § 18.2-25 (which deals with punishment for attempts to commit class 1 felonies), any attempt to commit a class 1 felony is punished as a class 2 felony. Mr. Prease was convicted under Va. Code Ann. § 18.2-25; therefore, his convictions for attempted murder are class 2 felonies. Notably, neither class 2 felonies generally, nor attempts to commit aggravated murder specifically, are among the exclusions in Va. Code Ann. § 53.1-202.3(A)(1). Thus, there is no subsection of Va. Code Ann. § 53.1-202.3(A) that would encompass Mr. Prease's convictions, even if the phrase "any felony violation" could be interpreted to include attempts.

Because Mr. Prease's offenses of conviction are not listed among the law's excluded offenses; because the application of basic canons of statutory construction prevent the exclusion of Mr. Prease's offenses from eligibility for expanded ESCs; and because Attorney General Miyares's advisory opinion misapprehends and misapplies the absurdity canon in an attempt to nullify a coherent, if disfavored, outcome, Mr. Prease must be granted expanded ESCs under Va. Code Ann. § 53.1-202.3(A) on his attempt convictions.

A. THE PLAIN LANGUAGE OF VA. CODE ANN. § 53.1-202.3(A) DOES NOT EXCLUDE PETITIONER'S INCHOATE OFFENSES FROM ELIGIBILITY FOR EXPANDED ESCS.

When statutory language is unambiguous, "courts are bound by the plain meaning of that language and may not assign a construction that amounts to holding

that the General Assembly did not mean what it actually has stated." *Williams v. Commonwealth*, 265 Va. at 271, 576 S.E.2d at 470 . Courts must "assume that the legislature chose, with care, the words it used when it enacted the relevant statute," *Alger v. Commonwealth*, 267 Va. 255, 261, 590 S.E.2d 563, 566 (2004) (internal quotations and citations omitted), and must refrain from "read[ing] into a statute language that is not there." *Commonwealth v. Williams*, 295 Va. at 101, 809 S.E.2d at 678 (internal quotations and citations omitted).

Here, it is beyond dispute that the list of excluded offenses in Va. Code Ann. § 53.1-202.3(A) does not explicitly include attempted aggravated murder. Nor does Va. Code Ann. § 53.1-202.3(A) contain any blanket provision that would exclude attempts to commit one of the enumerated offenses from eligibility for expanded ESCs. Attempts to commit Class 1 felonies are not specifically excluded from eligibility for expanded credits, nor are convictions for Class 2 felonies categorically excluded. Va. Code Ann. § 53.1-202.3(A) does not contain any reference to Chapter 3 of Title 18.2 of the Virginia Code (the chapter that governs the inchoate offenses of conspiracy and attempt). Thus, in order to conclude that attempted aggravated murder is encompassed within Va. Code Ann. § 53.1-202.3(A), VDOC apparently inferred its presence, notwithstanding its omission from the unambiguous, plain text of the statute, contrary to basic principles of statutory construction.

B. THE LEGISLATURE'S INCLUSION OF A DETAILED LIST OF EXCLUDED OFFENSES, INCLUDING SEVERAL INCHOATE OFFENSES, IN VA. CODE ANN.

§53.1-202.3(A), EVINCES AN INTENT TO EXCLUDE ONLY THOSE OFFENSES FROM ELIGIBILITY FOR EXPANDED ESCS.

It has been well established by this Court that "mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute." *Turner v. Sheldon D. Wexler, D.P.M., P.C.*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992) (finding that the statutory term "health care provider" must be interpreted to include only a "person, corporation, facility or institution," as specifically enumerated, and not a professional corporation); *Smith Mountain Lake Yacht Club, Inc. v. Ramaker*, 261 Va. 240, 246, 542 S.E.2d 392, 395 (2001) (holding that the statute governing ownership of "the beds of the bays, rivers, creeks and the shores of the sea" did not apply to "lakes," because it was not among the specifically enumerated bodies of water); *Miller & Rhoads Bldg., L.L.C. v. City of Richmond*, 292 Va. 537, 543–45, 790 S.E.2d 484, 487–88 (2016) (where statute provided that special district taxes were "subject to" four specific code sections, the "time-honored principle *expressio unius est exclusio alterius*" precluded such taxes from being subject to other unspecified code sections); *Saunders v. Commonwealth*, 48 Va.App. 196, 203, 629 S.E.2d 701, 704 (2006) ("[w]here [the legislature] includes specific language in one section but omits that language from another section, we presume that the exclusion of the language was intentional.").

This negative-implication canon of statutory construction, also known as *expressio unius est exclusio alterius*, has been stated, re-stated, and applied time

and again by this Court, and has been recognized as a fundamental principle of statutory interpretation. *See*, *e.g.*, *Miller & Rhoads Building,* 292 Va. at 544 (collecting cases and noting that "the Court's dependable application of [the negative-implication] maxim promotes consistency and avoids the possibility of an arbitrary standard of interpretation.").

Here, Va. Code Ann. § 53.1-202.3(A) states very clearly that only the enumerated offenses are not eligible for expanded ESCs. This list is detailed and includes many offenses, but it does not include Mr. Prease's offenses. Specifically, Va. Code Ann. § 53.1-202.3(A) includes 27 subsections which explicitly reference over 50 sections of the Virginia Code, many of which contain multiple offenses. The General Assembly varied the language used in each subsection—for example, "any violation" in some subsections and "any *felony* violation" in others—to demarcate the specific offenses in each referenced Code section that are to be disqualified from earning expanded ESCs. Further, the list includes not only various completed offenses, but also the following inchoate offenses:

- § 53.1-202.3(A)(2) - solicitation to commit murder under § 18.2-29;
- § 53.1-202.3(A)(4) - committing, conspiring and aiding and abetting acts of terrorism under § 18.2-46.5; and
- § 53.1-202.3(A)(6) – certain attempts included in Article 4 of Chapter 4 of Title 18.2, such as attempts to poison under § 18.2-54.1,

- § 53.1-202.3(A)(10) – certain attempts included in Article 7 of Chapter 4 of Title 18.2, such as attempted rape, attempted forcible sodomy, attempted object sexual penetration, and attempted aggravated sexual battery under § 18.2-67.5.

The presence of these specific inchoate offenses undermines any suggestion that the legislature inadvertently omitted inchoate offenses when crafting the law. The General Assembly's surgical precision in crafting the list of exempted offenses in Va. Code Ann. § 53.1-202.3(A) demonstrates what this Court is bound by the negative implication canon to presume: that the legislature was well aware of how to specify the inchoate offenses it sought to include among the offenses listed in Va. Code Ann. § 53.1-202.3(A).[3] Because the General Assembly included some

[3] This is further evident from the language of H.B. 5148's companion bill, Senate Bill 5034, 2020 Va. Acts. Spec. Sess. I, chs. 50, 52. The Senate bill, in addition to containing identical language to H.B. 5148 amending Va. Code Ann. § 53.1-202.3, also created a new code section providing for the release of terminally ill prisoners (§ 53.1-40.02), which contains a parallel list of offenses that are not eligible for consideration for release under that section. That list varies in very specific ways from the list of offenses in § 53.1-202.3(A). For example:

- Unlike § 53.1-202.3(A), § 53.1-40.02 does not exclude "solicitation to commit murder under § 18.2-29,"
- there several differences in which terrorism-related offenses are included or excluded (*Compare* § 53.1-40.02(C)(4) *with* § 53.1-202.3(A)(4)),
- § 53.1-40.02(C)(5) contains an exception for a violation of § 18.2-49.1 but § 53.1-202.3(A)(5) does not,
- § 53.1-202.3(A)(6) excludes any violation of § 18.2-51.6 but § 53.1-40.02(C)(6) does not,
- § 53.1-40.02(C)(10) contains exceptions for certain sexual assault offenses, while § 53.1-202.3(A)(10) does not, and so on.

inchoate offenses but did not include most, including Petitioner's, we are precluded from inferring or reading them into the statute.

C. To Infer the Inclusion of All Inchoate Offenses Would Render Those Specifically Included Meaningless and Superfluous.

Further, to interpret the language of the statute to disqualify all inchoate offenses from earning expanded ESCs would render the explicit references to specific inchoate offenses meaningless and superfluous. When interpreting statutes, "every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary." *Porter v. Commonwealth*, 276 Va. 203, 230, 661 S.E.2d 415, 427 (2008). No part of a statute should be read in a manner that would make a portion of it "useless, repetitious, or absurd". *Id.*; *see also Commonwealth v. Williams*, 295 Va. at 101, 809 S.E.2d at 677-8; *County of Albemarle v. Camirand*, 285 Va. 420, 425, 738 S.E.2d 904, 906-7 (2013); *Brown*, 284 Va. at 544, 733 S.E.2d at 641.

Here, reading the statute to implicitly disqualify convictions for attempts, conspiracy, or solicitation of all enumerated offenses from earning expanded ESCs, as Attorney General Miyares's opinion proposes, would make the explicit references

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These very specific differences in two similar provisions in the same bill reflect the General Assembly's careful consideration of which offenses to include in each list. *See*, *e.g.*, *Brown*, 284 Va. at 545, 733 S.E.2d at 641 (noting that "[i]t must be presumed that the legislature acted deliberately in using different language in similar statutes, and that judgment should be respected by the courts.").

to various inchoate offenses wholly superfluous. Such a reading must be avoided, leading again to the conclusion that Va. Code Ann. § 53.1-202.3(A) does not disqualify solicitations, conspiracies, and attempts of the enumerated offenses from earning expanded ESCs unless they are explicitly included therein.

D. Interpreting Va. Code Ann. § 53.1-202.3(A) to Provide Expanded ESCs to Petitioner Does Not Lead to an Absurd Result, Let Alone One That Merits Revision of the Plain Language of the Statute.

Attorney General Miyares opines in a conclusory manner that allowing people who have been convicted of attempts to commit the crimes enumerated in Va. Code Ann. § 53.1-202.3(A) to earn expanded ESCs would be an absurd and irrational result. However, in the context of statutory interpretation, an "absurd" result is one in which the statute would be internally inconsistent or 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). *See Cook v. Commonwealth*, 268 Va. 111, 116, 597 S.E.2d 84, 87 (2004) (finding that there was no "absurd result" where it was possible to carry out the law as written, though the outcome of the statute "may appear to be unwise.").

The Miyares Opinion makes no such claim of inconsistency or impossibility; instead, the Attorney General simply declares that the result does not make sense to him. But "the anti-absurdity limitation has a legal, not colloquial, meaning," *id.*, and

there is nothing internally inconsistent about the language used by the General Assembly in this section, nor is the statute incapable of operation without making the inference of the Miyares Opinion. On the contrary, VDOC fully understood and was prepared to implement the statute when it notified Mr. Prease that he would be released in July 2022. There was no confusion, and no conflict either internally or with any other provision of the Virginia Code.

The Miyares Opinion concludes that the General Assembly could not have intended to include solicitation to commit murder in the list of offenses in § 53.1-202.3(A), while excluding attempted murder or conspiracy to commit murder. Miyares Opinion, 2022 WL 1178995 at *3. However, this Court must "determine the General Assembly's intent from the words contained in the statute." *Williams v. Commonwealth*, 265 Va. at 271, 576 S.E.2d at 470 (citations omitted). The Court may not look behind the language of a statute to determine intent, or "extend the meaning of a statute" based on speculation regarding legislative intent. *In re Woodley*, 290 Va. 482, 491, 777 S.E.2d 560, 565 (Va. 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)). But that is exactly what Attorney General Miyares' interpretation of the statute does—it extends the

meaning of the statute beyond the words actually chosen by the General Assembly, simply because of disagreement with policy choices of the General Assembly.

Courts must exercise caution when examining whether the plain language of a statute creates an absurd result. *Tvardek*, 291 Va. at 279, 784 S.E.2d at 785 ("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 (2022) (quoting *Carter v. Nelms*, 204 Va. 338, 346, 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.").

Refusing to read attempts into the language of Va. Code Ann. § 53.1-202.3(A) does not render the statute unworkable or internally inconsistent. It may result in an outcome that Attorney General Miyares, some legislators, or members of the general public disagree with, but that does not render the result absurd or irrational. Nor does it mean that the intent of the legislature is not evident in the plain language of the

statute. Most importantly, it does not give the Attorney General or VDOC license to substitute their own intent for the intent of the General Assembly.

IV. MR. PREASE IS ENTITLED TO HABEAS RELIEF

Mr. Prease 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). Habeas relief is available whenever "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. Prease has been impacted by the VDOC's erroneous application of Va. Code Ann. § 53.1-202.3(A). All of his convictions should be eligible for expanded ESCs. In March 2022, VDOC notified Mr. Prease 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 a home visit and approving his home plan. However, after the issuance of the Miyares Opinion, VDOC reversed course, notifying Mr. Prease that he was not eligible for expanded ESCs and would not be released early. This clearly demonstrates that but for the VDOC's application of Va.

Code Ann. § 53.1-202.3(A) as interpreted in the Miyares Opinion, Mr. Prease would have earned enough sentence credits to be released between July 1, 2022 and August 30, 2022. For the reasons outlined in this Memorandum, Mr. Prease should be awarded the expanded earned sentence credits as provided under the 2020 amendments to § 53.1-202.3(B). Those credits will result in an immediate release. Accordingly, habeas relief is appropriate in this case and should be granted.

V. CONCLUSION

This case presents a clear and straightforward issue of statutory construction. Va. Code Ann. § 53.1-202.3(A) cannot be read to include inchoate offenses that are not explicitly enumerated. Correcting VDOC's misinterpretation of Va. Code Ann. § 53.1-202.3 will result in Petitioner earning sufficient sentence credits to be released immediately. Accordingly, he is entitled to relief, and this Court should order his immediate release.

RESPECTFULLY SUBMITTED,
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