**IN THE**
**SUPREME COURT OF VIRGINIA**

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**RECORD NO. 220665**

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**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.*

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

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## I. INTRODUCTION

Respondents move to dismiss Mr. Steven Prease's Petition for Writ of Habeas Corpus, urging this Court to expand the language of the earned sentence credit statute to achieve a desired policy outcome that runs counter to the intent of the statute. In so doing, they bypass fundamental canons of statutory construction, strain both the plain language of the statute and applicable case law, and ask this Court to divine legislative intent in accordance with Respondents' policy preferences rather than the plain and ordinary meaning of the statutory text. This Court should reject those attempts at overreach and hold the statute at issue is clear and unambiguous, and that Mr. Prease is entitled to expanded sentence credits under the law.

## II. ARGUMENT

### A. THE INTENT OF THE LEGISLATURE IN AMENDING THE EARNED SENTENCE CREDIT PROGRAM WAS TO MAKE EXPANDED CREDITS BROADLY AVAILABLE.

According to one of the bill's patrons, the intent of the 2020 amendments to Virginia's earned sentence credit program was to provide greater incentives for people convicted of crimes to "find a new path" and "to behave well while incarcerated." Jennifer Boysko, *An important Virginia criminal reform is threatened*, THE WASHINGTON POST (June 16, 2022), https://www.washingtonpost.com/opinions/2022/06/16/an-important-virginia-criminal-justice-reform-is-threatened/. The legislature recognized that such

incentives "not only make it more likely that incarcerated people will come home with skills that will ensure that they do not return to prison, but they also give those in prison the incentive to follow the rules and change for the better." *Id.* The legislative intent to expand positive incentives is evident from the text and structure of the statute itself: as amended, it establishes a default rule that individuals are eligible to earn expanded sentence credits unless their convictions are explicitly excluded. Va. Code Ann. § 53.1-202.3(B) ("[F]or *any offense other than those enumerated in subsection A* . . . earned sentence credits shall be awarded" in accordance with the new, expanded earned credit system. (emphasis added)). Notably, the amendments did not decrease anyone's ability to earn such credits, regardless of their conviction.

Respondents' arguments all rest on the premise that the legislature's actual intent was to create a two-tiered scheme of eligibility for expanded credits based on a distinction between serious, violent offenses and non-serious, non-violent offenses. Resp. Mtn. to Dismiss at 12. Respondents infer this intent without pointing to any authority or language in the statute that would support such a strict distinction.[1] And in fact, upon a close reading of the provisions of § 53.1-202.3(A), that distinction quickly falls apart.

[1] The General Assembly did not, for example, use or cite to language as in Va. Code Ann. § 19.2-316.4, which defines "nonviolent felonies" as felonies other than

Many "violent" or "serious" felonies are in fact eligible for expanded sentence credits. For example, someone with a single conviction for voluntary manslaughter – a crime in which the defendant has actually killed another human being – is eligible for increased sentence credits.[2] Va. Code Ann. § 53.1-202.3(A)(17)(b). Similarly, someone with a single conviction under Va. Code Ann. § 18.2-41 for shooting another as part of a mob with the intent to kill would be eligible for expanded sentence credits. Va. Code Ann. § 53.1-202.3(A)(17)(c). These are very serious, violent crimes that result in serious harm to the victims. And yet, there can be no dispute that the people who committed them are, in most circumstances, eligible for expanded sentence credits.

Based on their unsupported assumptions regarding legislative intent, Respondents urge the Court to read into the statute additional convictions that are not specifically enumerated, including attempted aggravated murder – a conviction that is not covered under any provision of § 53.1-202.3(A). However, this Court is bound by the unambiguous plain language of the statute and cannot assume that the

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those considered an act of violence "or any attempt" to commit one, and makes only such felonies eligible for participation in alternative supervision programs.

[2] *See Woods v. Commonwealth*, 66 Va. App. 123, 131, 782 S.E.2d 613, 617 (2016) ("Voluntary manslaughter is the unlawful killing of another, 'committed in the course of a sudden quarrel, or mutual combat, or upon a sudden provocation, and without any previous grudge, and the killing is from the sudden heat of passion growing solely out of the quarrel, or combat, or provocation.'" (quoting *Wilkins v. Commonwealth*, 176 Va. 580, 583, 11 S.E.2d 653, 654 (1940))).

legislature meant anything other than what it said. *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003).

### B. PETITIONER'S CONVICTIONS ARE NOT INCLUDED IN THE PLAIN LANGUAGE OF VA. CODE § 53.1-202.3(A).

None of the subsections in Va. Code Ann. § 53.1-202.3(A) (even if one accepts, *arguendo*, Respondents' arguments regarding the meaning of the word "any" in this context) cover Mr. Prease's convictions for attempted aggravated murder, and therefore he should be eligible to earn expanded sentence credits on those convictions. Va. Code Ann. §§ 53.1-202.3(A)(1) and (A)(2) exclude Class 1 felonies from eligibility, as well as convictions under several different murder statutes. However, those murder statutes do not include the aggravated murder statute, Va. Code Ann. § 18.2-31, which appears nowhere in § 53.1-202.3(A). Any attempt to commit an offense that is punishable as a Class 1 felony is considered a Class 2 felony. Va. Code Ann. § 18.2-25. Thus, the crime of attempted aggravated murder is a Class 2 felony that is not covered by either § 53.1-202.3(A)(1) or (A)(2), and it is therefore eligible for expanded credits under § 53.1-202.3(B).

Respondents not only fail to acknowledge that the plain language of Va. Code Ann. § 53.1-202.3(A) does not include Mr. Prease's conviction, they misstate the law to suggest it does – conflating the code section for first and second degree murder (Va. Code Ann. § 18.2-32), "any violation" of which is ineligible for enhanced credits under § 53.1-202.3(A)(2), with the code section for aggravated

murder (Va. Code Ann. § 18.2-31). Def. Mtn. to Dismiss, p. 10 ("Here, Code § 53.1-202.3(A) provides that '*any* violation of § 18.2-32,' the aggravated murder statute, is ineligible for enhanced good time credits."); *id.* at 11 ("'Any violation' of the aggravated murder statute therefore necessarily encompasses attempted aggravated murder").

### C. INCHOATE OFFENSES ARE NOT IMPLICITLY INCLUDED BY THE WORD "ANY".

This conflation then leads Respondents to focus on the meaning of the phrase "any violation" as used in § 53.1-202.3(A), and to argue that this phrase necessarily encompasses attempts and other inchoate offenses, as well as the completed crimes. Resp. Mtn. to Dismiss at 10-11.[3] This interpretation does not hold water for several reasons. First, the most reasonable, common-sense reading of these terms is evident from the subsections in which they appear. Many of those subsections list several criminal provisions, such that "any violation" is best read as "a violation of any of the following code sections." *See*, *e.g.*, §§ 53.1-202.3(A)(2) and (A)(4). In some cases, the code sections preceded by "any violation" describe many courses of conduct that would constitute the offense. *See*, *e.g.*, §§ 53.1-202.3(A)(11) and

[3] This argument is both irrelevant to Mr. Prease's case and incorrect as a matter of statutory interpretation. It is irrelevant because, again, there is no provision in Va. Code Ann. § 53.1-202.3(A), with or without the phrase "any violation" (or "any felony violation,") that includes the aggravated murder statute. As such, the Court need not reach the issue of the meaning of the term "any violation" or "any felony violation" as used in the statute, and can end its analysis here.

(A)(12). Thus, the phrase "any violation" is clearly intended to communicate that a completed offense under those code sections – whichever code section and whatever the conduct leading to the violation – is ineligible for expanded credits.

Similarly, code sections or chapters modified by the phrase "any felony violation" are those that contain both misdemeanor and felony offenses. This reflects an intent to simply differentiate between felony and misdemeanor offenses and to exclude from eligibility for expanded credits only felony offenses.[4] Respondents ask this Court to overlook the most reasonable construction of these phrases in favor of an expansive definition that basic rules of statutory construction do not support. [5]

Those rules dictate that this Court must presume that the Virginia legislature understood how to enumerate attempted violations of felony offenses as distinct from their completed offenses. *See Turner v. Commonwealth*, 295 Va. 104, 109, 809 S.E.2d 679, 681 (2018) ("We also presume that, in choosing the words of the statute,

[4] Further, some subsections do not contain any such modifiers. See, e.g., Va. Code Ann. § 53.1-202.3(A)(9), (A)(10), (A)(17)(b) and (f). Thus, even under Respondents' strained logic, convictions for attempts to commit these offenses would be eligible for expanded sentence credits, further undermining Respondents' argument that the legislature intended to exclude *all* inchoate offenses from eligibility.

[5] Respondents' argument also ignores the fact that § 53.1-202.3(B) also uses a very similar phrase – "any offense" – to establish the default rule that convictions are eligible for expanded sentence credits unless specifically excluded. Thus, to give the word "any" an expansive definition that includes inchoate offenses in this statute would cut both ways, rendering that term essentially meaningless under Respondents' interpretation.

'the General Assembly acted with full knowledge of the law in the area in which it dealt.'" (quoting *Philip Morris v. The Chesapeake Bay Found.*, 273 Va. 564, 576, 643 S.E.2d 219, 225 (2007)). And in fact, that presumption is supported by the examples of other sections of the Virginia Code, where the legislature has specifically differentiated between "violations of" and "attempts to commit violations of" criminal statutes. *See, e.g.*, Va. Code Ann. § 19.2-299 (requiring courts to direct probation officers to take certain actions where defendants are "adjudged guilty of a felony violation of . . . *or attempt to commit a felony violation of*" various code sections, including code sections containing only completed offenses) (emphasis added); Va. Code Ann. § 18.2-370.2 (defining offenses prohibiting proximity to children as "a violation *or an attempt to commit a violation of*" various code sections) (emphasis added); Va. Code Ann. § 19.2-316.4 (defining nonviolent felony as "any felony except those considered an act of violence pursuant to § 19.2-2971 or *any attempt to commit any of those crimes*") (emphasis added). Thus, the legislature plainly knows how to indicate when it intends to include attempts or other inchoate offenses within the purview of a statute, and this Court's presumption that it would do so intentionally and explicitly is entirely warranted. *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.").[6]

The negative implication canon of statutory construction also weighs against Respondents' expansive definition of the phrases "any violation" and "any felony violation." *See* Pet. Mem. Sup. at 13-17. The legislature included in Va. Code Ann. § 53.1-202.3(A)(2) a specific reference to "solicitation to commit murder under § 18.2-29." This code section describes how all convictions for criminal solicitation to commit any felony should be punished. By singling out solicitation to commit murder, the legislature made clear that convictions for solicitation of other crimes were not excluded from eligibility for expanded credits. Va. Code Ann. § 18.2-29 also appears in the same chapter as the sections that govern attempts, §§ 18.2-25 and 18.2-26. Had the legislature intended to exclude from eligibility attempted murder, or attempts generally, one might expect at least a reference to those code sections, or a provision plainly stating as much. That the legislature was clearly aware of the chapter of the Code on inchoate offenses, understood how to and did include some of its provisions in § 53.1-202.3(A), and chose not to do so for attempts generally,

[6] Likewise, if the legislature intended to exclude all violent felonies as Respondents suggest, they could have done so in any number of ways, including through language similar to that in Va. Code Ann. § 19.2-316.4, as explained above, *supra* note 2, and their failure to do so must be presumed intentional.

precludes this Court from inferring an intent to include them despite their omission from the text of § 53.1-202.3(A).[7]

### D. RESPONDENTS FAIL TO DEMONSTRATE THAT THE PETITIONER'S INTERPRETATION OF THE STATUTE CREATES AN ABSURD RESULT.

It bears re-stating that 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).

Respondents do not – and cannot – claim Va. Code Ann. § 53.1-202.3 is impossible to implement as written. Instead, they make broad assertions about the policy implications of their preferred interpretation, which are not only insufficient to justify re-writing the statute, but also are not supported by the text of the statute. Respondents make blanket statements about the types of offenses that were intended to be excluded from eligibility for expanded credits, but there are sufficient exceptions to those categories to undermine Respondents' otherwise-unsupported

[7] The legislature's inclusion in § 53.1-202.3(A) of solicitation to commit murder under § 18.2-29 also wholly undermines Respondents' reliance on a distinction between so-called "stand-alone" inchoate offenses—which Respondents define to mean code provisions that criminalize specific inchoate offenses—and inchoate offenses that are not described in any particular code section. (Resp. Mtn. to Dismiss at 16-20).

arguments. *Supra*, p. 3. It is not inherently absurd that those who attempted murder but did not actually kill another person should have the benefit of those incentives, particularly given that the intent of the law is to broadly incentivize good behavior.[8] Because the law is not internally inconsistent or impossible to implement, this Court may not reach beyond the plain language of the statute as Respondents suggest.

## III. CONCLUSION

Mr. Prease had already served the vast majority of his sentence when he was informed by VDOC that he would be released as a result of the amendments to the earned sentence credit program, as correctly interpreted by former Attorney General Herring. Respondents' abrupt change in its interpretation of the law has already extended Mr. Prease's wrongful incarceration by many months—time that he could have used to reconnect with his family and rebuild his life. Because Respondents' interpretation of Va. Code § 53.1-202.3 is erroneous as contrary to the plain language of the statute, Mr. Prease is entitled to relief, and this Court should order his immediate release.

[8] There is a broad range of conduct that may be punished as an attempt, relative to the conduct that would be required to be convicted of the completed offense. *See*, *e.g.*, *Sizemore v. Commonwealth*, 218 Va. 980, 985, 243 S.E.2d 212, 215 (1978) ("[T]he question of what constitutes an attempt is often intricate and difficult to determine, and that no general rule can be laid down which will serve as a test in all cases.").

RESPECTFULLY SUBMITTED
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CERTIFICATE

I certify that on January 18, 2023, this document was filed electronically with the Court through VACES. This brief complies with Rule 5:7(a)(7) because the portion subject to that rule does not exceed the longer of 10 pages or 1,750 words.

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