IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 23-0514

JOSE ISAIS GARCIA VASQUEZ

Petitioner,

v.

CHADWICK DOTSON, in his official capacity as Director of the Virginia Department of Corrections; and **TONY DARDEN**, in his official capacity as Warden of Haynesville 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 how amendments to Virginia's earned sentence credit program apply to people convicted of 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 attempt, conspiracy, or solicitation to commit any of the excluded offenses are eligible for the expanded credits, where the inchoate offenses are not specifically enumerated among the excluded offenses.

In *Prease v. Clarke*, 888 S.E.2d 758 (Va. 2023), this Court considered whether people convicted of inchoate versions of the enumerated offenses were eligible for the expanded sentence credits. In its recent opinion, the Court held that only offenses specifically enumerated in subsection A of Va. Code Ann. § 53.1-202.3 were excluded from eligibility for those credits. The legislature meant what it said, the

Court reasoned, and enumerated offenses were excluded, but offenses that were not listed, including Mr. Prease's offense, were eligible.

Petitioner Jose Garcia Vasquez 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. However, even after this Court's ruling in *Prease*, the VDOC has chosen to continue to follow the second Attorney General Opinion on this issue, under which Mr. Garcia Vasquez's convictions are ineligible for increased credits. As a result, VDOC continues to incarcerate Mr. Garcia Vasquez, and his projected release date is now February 19, 2025.

This Court should now apply its ruling in *Prease* to inchoate offenses other than attempted aggravated murder. Because the General Assembly meant what it said when it drafted the language of H.B. 5148, convictions for inchoate offenses not specifically excluded from eligibility are in fact eligible for expanded sentence credits. Were Respondents to interpret and apply the statutory language correctly, Mr. Garcia Vasquez 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 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, conspiracy 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 inchoate offenses 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 inchoate 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 inchoate offense is specifically listed in Va. Code Ann. § 53.1-202.3(A), it is eligible to earn to expanded ESCs.

2. Attorney General Miyares Issued a Conflicting Opinion.

After the change in administration in January 2022, VDOC 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,'"

[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).

he concluded that convictions for attempts to commit any of the enumerated offenses in Va. Code Ann. § 53.1-202.3(A) 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. Garcia Vasquez Expanded ESCs.

Because Mr. Garcia Vasquez has maintained Level 1 classification throughout his time in VDOC custody, he should be eligible to earn 15 days for every 30 served on both of his convictions over the course of his entire sentence. He has not incurred any disciplinary offenses that have resulted in a loss of sentence credits. However, even after this Court's ruling in *Prease*, VDOC has failed to apply those credits to Mr. Garcia Vasquez, and his projected sentence date remains unchanged. The only basis for VDOC's refusal to apply enhanced sentence credits in Mr. Garcia Vasquez's case is its erroneous interpretation of Va. Code Ann.§ 53.1-202.3.

[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.

III. ARGUMENT

This case presents a legal question under a statute that this Court has already interpreted. And while neither Attorney General opinion discussed herein 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 in this case as well. 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 one count of conspiracy to commit murder and one count of criminal gang participation.[3] The completed offense of first-degree murder is codified at Va. Code Ann. § 18.2-32 and is punished as a Class 2 felony. However, under Va. Code Ann. § 18.2-22 (which sets out levels of punishment for conspiracies to commit felonies), any attempt to commit a Class 1 felony is punished as a Class 3 felony. Notably, neither Class 3 felonies generally, conspiracies generally, nor conspiracy to commit murder specifically, are among the exclusions in Va. Code Ann. § 53.1-202.3(A)(1).

Because Mr. Garcia Vasquez's offenses of conviction are not listed among the law's excluded offenses; because the application of basic canons of statutory

[3] Criminal gang participation under Va. Code Ann. § 18.2-46.2 is not listed at all in Va. Code Ann. § 53.1-202.3(A), and therefore is not at issue in this case.

construction prevent the exclusion of Mr. Garcia Vasquez'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. Garcia Vasquez must be granted expanded ESCs under Va. Code Ann. § 53.1-202.3(B).

A. This Court Should Extend the Holding in Prease to All Inchoate Offenses, Including Petitioner's.

In *Prease*, this Court was asked to settle the dispute between the two attorney general opinions on Va. Code Ann. § 53.1-202.3. However, the Court ultimately issued a relatively narrow ruling that explicitly applied only to inchoate offenses of aggravated murder. Nonetheless, the Court's reasoning in *Prease* can and should be extended to other inchoate offenses. In answering the question presented in *Prease*, the Court began with a careful reading of the statute, reiterating that when interpreting a statute, we presume "that the legislature chose, with care, the words it used when it enacted the relevant statute." *Prease*, 888 S.E.2d at 761 (*citing Tvardek v. Powhatan Vill. Homeowners Ass'n, Inc.*, 291 Va. 269, 277, 784 S.E.2d 280 (2016)). Following this principle, the Court reasoned that, "[b]y its plain language, Code § 53.1-202.3 establishes that all inmates are eligible for expanded earned sentence credits unless they were convicted of an offense that is enumerated under subsection A." *Prease*, 888 S.E.2d at 762.

Under this reasoning, the Court held that Mr. Prease was eligible for expanded sentence credits on his attempted aggravated murder conviction, because attempted aggravated murder was not specifically enumerated or encompassed either in subsection (A)(1) or (A)(2) of § 53.1-202.3. The Court concluded that there was "no basis in the governing statutes for denying Mr. Prease expanded earned sentence credits on his attempted aggravated murder convictions." *Prease*, 888 S.E.2d at 762. The same reasoning should apply here: because Va. Code Ann. § 53.1-202.3(A) does not enumerate Class 3 felonies, conspiracies generally, or conspiracy to commit murder, Mr. Garcia Vasquez should be eligible for enhanced sentence credits.

Further, the Court should now resolve the question of whether all inchoate offenses that are not specifically enumerated should be eligible for expanded sentence credits. There are countless other people currently in the custody of VDOC who are being denied expanded sentence credits solely because VDOC has refused to apply the reasoning in *Prease* to other inchoate offenses. Mr. Garcia Vasquez's case presents the opportunity for the Court to resolve this issue, clarify the law, and provide a rule that will resolve not just this case, but the many others like it that are pending before this Court and the lower courts. As argued below, the rule that naturally follows from this Court's reasoning in *Prease* is that inchoate offenses not specifically enumerated should be eligible for expanded sentence credits.

B. 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. 268, 271, 576 S.E.2d 468, 470 (2003). 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). The application of the plain-language canon, along with other fundamental canons of statutory interpretation, dictate that only the specific offenses enumerated in Va. Code Ann. § 53.1-202.3(A) should be ineligible for expanded sentence credits.

1. 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, 487–488 (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 Bldg.,* 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 ineligible for expanded ESCs. Section 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 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).[4] Because the General Assembly included some inchoate offenses but did not include most, including Petitioner's, we are precluded from inferring or reading them into the statute.

[4] 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.

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.").

2. 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 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.

3. The Phrase "Any Violation" Does Not Encompass Inchoate Offenses.

The Miyares Opinion interprets the phrase "any violation" or "any felony violation" to encompass inchoate offenses. Miyares Opinion at p. 3. However, this interpretation does not hold water. The most reasonable, common-sense reading of these terms is evident from the context of 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 (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.[5] Respondents ask

[5] 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, conspiracies, or solicitations to commit these offenses would be eligible for expanded sentence credits, further

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.[6]

4. The General Assembly Explicitly Differentiates Between Completed and Inchoate Offenses in Similar Statutes.

The General Assembly has demonstrated in other sections of the code that it is well aware of how to specify that inchoate offenses should be included or excluded from the application of a statute, and typically does so when that is what it intends. *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, '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)).

For example, Va. Code Ann. § 9.1-902, which relates to registration for sex offenses and crimes against minors, specifically notes that the offenses that require registration "include any violation of, attempted violation of, or conspiracy to violate" various code sections. *See also* Va. Code Ann. § 19.2-299 (requiring courts to direct probation officers to take certain actions where defendants are "adjudged

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undermining Respondents' argument that the legislature intended to exclude *all* inchoate offenses from eligibility.

[6] 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.

guilty of a felony violation of . . . or attempt to commit a felony violation of" various code sections, including code sections containing only completed offenses); 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); 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").

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. at 203, 629 S.E.2d at 704 ("[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."). The fact that the General Assembly used no language like the examples found elsewhere in the Code when drafting Va. Code. Ann. § 53.1-202.3(A) makes clear that inchoate offenses (other than those specifically enumerated) are not excluded from eligibility for expanded sentence credits.

C. 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 attempt, conspiracy, or solicitation 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*, 291 Va. at 280, 784 S.E.2d at 286 (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."). 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.").

In *Prease*, the Court rejected the Attorney General's public policy and absurdity arguments, finding that a reading of the statute's plain language would not

trigger a result that was internally inconsistent or impossible to implement. *Prease*, 888 S.E.2d at 763. That holding applies squarely here. The Court further declined to wade into the public policy considerations underpinning which offenses the General Assembly chose to include or not to include in the statute. *Id*. The Court should again decline to do so, and should simply interpret the statute according to its plain language.

IV. MR. GARCIA VASQUEZ IS ENTITLED TO HABEAS RELIEF

Mr. Garcia Vasquez 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. Garcia Vasquez has been impacted by the VDOC's erroneous application of Va. Code Ann. § 53.1-202.3(A). Both of his convictions should be eligible for expanded ESCs. But for the VDOC's application of Va. Code Ann. § 53.1-202.3(A) as interpreted in the Miyares Opinion, Mr. Garcia would have earned enough

sentence credits to be released around November, 2022. For the reasons outlined in this Memorandum, Mr. Garcia Vasquez should be awarded the expanded earned sentence credits as provided under the 2020 amendments to Va. Code. Ann. § 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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CERTIFICATE OF SERVICE

In accordance with Rule 5:1B(c), I, Geri Greenspan, certify that on September 26, 2023, a copy of this Amended Petition was served on the Office of the Attorney General of Virginia by email at the following addresses: service@oag.state.va.us; aferguson@oag.state.va.us; gbryant@oag.state.va.us; and lcahill@oag.state.va.us.